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# The Best Interests of the Child in Intercountry Adoption

Nigel Cantwell

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# Acknowledgements

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# About the Author

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Nigel Cantwell has been working on issues related to the protection of children's rights in intercountry adoption for over 25 years. As founder of Defence for Children International (DCI) and coordinator of the group of non-governmental organizations that helped to shape the Convention on the Rights of the Child during the 1980s, he began taking a special interest in rights violations in the context of children's adoption abroad.

He represented DCI at the meetings to draw up the 1993 Hague Convention, and has been UNICEF's delegate to all sessions of the Special Commission responsible for reviewing the practical operation of that treaty, as well as to expert meetings on specific aspects of the issue organized by the Permanent Bureau of the Hague Conference. UNICEF designated him as lead consultant on the drafting of the Guidelines for the Alternative Care of Children that were approved by the United Nations General Assembly in 2009.

With a colleague from International Social Service (ISS) and the active support of UNICEF, in February 1991 he undertook the first mission to Romania designed to assist the authorities in responding to abuses of the intercountry adoption process, and he continued to advise UNICEF-Romania on policy in this sphere for the following 15 years. He has undertaken many field assessments of adoption systems for or in cooperation with UNICEF and ISS, notably in Ghana, Guatemala, Haiti, Moldova, Kazakhstan, Kyrgyzstan, Sierra Leone and Viet Nam, and with ISS for the Organisation for Economic Co-operation and Development (OECD) in Ukraine.

As a consultant to the Innocenti Research Centre, he authored the very first UNICEF publication on intercountry adoption – Innocenti Digest No. 5, issued in 1999 – and from 1998 to 2003 he headed up the Implementation of International Standards Unit at the Centre. Among his other writings on this topic is the Issue Paper on 'Adoption and children: a human rights perspective', published by the Council of Europe's Commissioner for Human Rights in 2011.

Since 2003, as an independent consultant on child protection policies, he has continued to work closely with UNICEF in the overall field of the rights of children without parental care, as well as on juvenile justice issues.

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# Acronyms and Abbreviations

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BID	Best Interests Determination
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CHR	UN Commission on Human Rights
CEE and CIS	Central and Eastern Europe and the Commonwealth of Independent States
CoE	Council of Europe
CPED	International Convention for the Protection of All Persons from Enforced Disappearance
CRC	Convention on the Rights of the Child
CRIA	Child Rights Impact Assessment
CRPD	Convention on the Rights of Persons with Disabilities
ICAB	Inter-Country Adoption Board (Philippines)
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
JCICS	Joint Council on International Children's Services (USA)
USAID	US Agency for International Development

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# Foreword

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The ‘best interests of the child’ is a ringing phrase that is widely seen as emotionally capturing the intent of the Convention on the Rights of the Child (CRC), putting into a mere five words the combined purpose of all of its articles. Perhaps because of this emotional power, it is not often asked why the principle is enshrined in the CRC in the first place, and nor are the wide-ranging and sometimes unexpected ramifications of its inclusion in this human rights treaty often considered.

This is the fascinating point of departure for Nigel Cantwell’s study on the application of the best interests principle in intercountry adoption. His approach is to tackle upfront a two-fold fundamental problem with this principle: the fact that it still carries the legacy of its pre-human rights form – a notion with no clear limits yet still the benchmark for making decisions about children, used to justify bad practices as well as good; and the fact that, although international human rights law now places best interests within the boundaries of all the other rights of the CRC, the way the principle is to be operationalized has remained necessarily undefined.

If the best interests principle thus poses major challenges in itself, these are magnified considerably when we look at its application as the determining factor in the practice of intercountry adoption, which has been one of the most hotly debated measures in the sphere of child protection.

UNICEF’s Office of Research Innocenti, through its *Insight* series and other publications and initiatives, has a long history of taking up challenges such as these. The *Insight* series offers experts the space to put forward critical but constructive analysis of conventional wisdom on ‘sensitive’ issues, ranging from poverty in the industrialized countries to the realities of the ‘transition’ in Central and Eastern Europe, juvenile justice and traditional practices harmful to children’s health. Indeed, Nigel Cantwell has already authored a well-received *Innocenti Insight* study, ‘Starting from Zero: The promotion and protection of children’s rights in post-genocide Rwanda’, published in 1997, which also addressed some controversial areas of child protection.

While the present study is aimed at helping to determine what role the best interests principle should play in intercountry adoption and the overall conditions required for it to do so in keeping with the rights of the child, the discussion clearly has far wider relevance. The order of wording in the title is deliberate: the emphasis is on unravelling the best interests of the child, taking its application to intercountry adoption as the practical example in this case. But it goes to the heart of the use of the principle in all areas in which best interests need to be assessed within a human rights framework in order to arrive at appropriate solutions for children.

Our intent in publishing this study, while first seeking to contribute to improving practice in intercountry adoption, also reflects this broader perspective. We hope it will provoke discussion among a wide readership.

Gordon Alexander  
Director, Office of Research



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# Executive Summary

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This study responds, in particular, to one key question: *what is it that enables a policy, process, decision or practice to be qualified as either respectful or in violation of the best interests of the child in intercountry adoption?*

There is universal agreement, embedded in international human rights law, that the best interests of the child should be a primary consideration in any decisions made about a child's future. In the case of adoption, which represents one of the most far-reaching and definitive decisions that could be made about the future of any child – the selection of their parents – international law qualifies the best interests of the child as the paramount consideration. The implications of this obligation are all the greater in the context of the intercountry form of adoption, since this involves in addition the removal of a child to a new country and, usually, a new culture.

However, there is no universal agreement on who is ultimately responsible for determining what is in a child's 'best interests', nor on what basis the decision should be made.

With specific reference to intercountry adoption, this study sets out to demonstrate the dangers for children's rights that are inherent in the lack of such consensus, and to contribute concrete proposals for addressing the problem in its various facets. It focuses on the precise role that the best interests principle should play in intercountry adoption to ensure that the human rights of children are upheld at every stage.

It seeks to move debate beyond so-called 'pro' and 'anti' stances towards intercountry adoption, and therefore does not assess the overall merits of this measure to fulfil the best interests of the child. Most conflicts of opinion about intercountry adoption in fact revolve around the conditions to be met if the 'best interests of the child' are to point to intercountry adoption as a positive solution for a child. This matters not only for decisions about individual children and the way in which the adoption process is carried out, but also for the place given to, or restrictions placed on, intercountry adoption in national child protection policies. The study therefore calls for the systematic and rigorous appraisal of best interests in the sphere of intercountry adoption both at policy level and for each child concerned.

In addition, the study aims to clarify important issues and propose ways forward that would enable intercountry adoption to better fulfil its role as an exceptional protective measure when a child's general adoptability has been shown to be legally possible, warranted and desirable. In other words, intercountry adoption is one possible component of wider child care and protection provision, to be used only when no suitable alternatives exist or can be created in that child's own country.

The scene is set in Chapter 1, which gives examples of the 'chequered history' of policy and programmes justified by invoking the notion of children's best interests, with special reference to the removal of children from parental care and their transfer abroad. This notion originated well before the codification of human rights, and served as the key basis for decision-making. With the advent of internationally agreed human rights, the 'best interests' approach was deemed redundant for adults, but not for children. Quite the contrary: in their special case the notion was turned into a principle, notably through the right to have best interests taken into account as contained in the Convention on the Rights of the Child (CRC). At the same time, implicitly, its ascribed role changed from being the benchmark in itself to becoming one means of achieving the benchmarks set by all the other rights in the treaty. However, the legacy of the paternalistic and often simplistic approach originally behind the notion is still very much alive and can lead to serious violations of the rights of the child today.

Chapter 2 looks at how the best interests principle came to be such a wide-ranging and significant element of human rights law relating to children. It reviews how the scope of its application evolved and expanded from the limited reference in the 1959 Declaration on the Rights of the Child through to the broad role it is assigned

in the final version of the CRC, and the designation of 'best interests' as a General Principle of that treaty by the Committee on the Rights of the Child. The rationale and repercussions of the deliberate flexibility of the concept are analysed, as is its relationship with children's other rights, especially the 'right to be heard'.

There follows an examination of the reasons behind the enhanced status afforded to best interests as 'the paramount consideration' uniquely as concerns adoption. This stemmed in good part from changing attitudes towards intercountry adoption during the 10-year drafting process of the CRC, as a result of an increasing preoccupation over the way it was being carried out. The chapter ends by emphasizing that the best interests of the child are relevant not only to decisions on individual children, but also to laws, policies and procedures affecting children as a group.

Against this background, Chapter 3 uses a best interests lens to review how intercountry adoption has evolved from a humanitarian response into a child protection measure since it began in the aftermath of the Second World War, assessing the extent to which the best interests of the child have shaped this development.

Initially carried out under conditions tantamount to a legal void, intercountry adoption first became the explicit subject of international treaties in the 1960s. Quickly, however, these texts became obsolete because of the rapid demand-led expansion of the practice and the new problems this raised. By the mid-1980s, the need for more comprehensive regulation to protect children's best interests and basic rights was recognized, leading to the decision to draft what became the 1993 Hague Convention. The steady rise in intercountry adoption numbers continued until 2004, but has since declined equally steadily. On the one hand increasing ratification of the 1993 Hague Convention has invariably led to stricter procedures; but on the other, new non-Hague countries of origin have been sought where best interests safeguards are generally less effective.

The chapter also deals with a number of key issues that have arisen in light of experience over the six decades during which intercountry adoption has been practised to date. Among these is the debate on how the 'subsidiarity rule' – established under the CRC and the 1993 Hague Convention, and stipulating that intercountry adoption can only take place if no 'suitable' care option can be found in the child's own country – should be implemented with the best interests of the child in mind. A similar debate is ongoing about the ramifications for the best interests of the child of imposing severe limitations or moratoria on intercountry adoptions. In addition, the fragile nature of respect for international standards in emergency situations was highlighted by the post-earthquake evacuation of children from Haiti for adoption abroad, again raising serious concerns about the level of importance given to the best interests and human rights of the children involved.

This historical perspective demonstrates clearly that what has been missing is a globally accepted and well-defined basis for determining the best interests of the child in relation to intercountry adoption, and Chapter 4 addresses this question on three levels.

First, it considers elements to be taken into account when evaluating policies and laws relevant to intercountry adoption against a best interests criterion. Here, special reference is made to the child rights impact assessment advocated by the Committee on the Rights of the Child, which can be used by legislators, government officials and monitoring bodies alike.

Second, it draws on pertinent sources to propose a detailed checklist of issues to be considered when determining the best interests of each child for whom adoption abroad may be envisaged. Emphasis is placed on the need for the determination process to be carried out systematically for every child in that situation. Further, it should be conducted by qualified and specially trained professionals, ideally in a multidisciplinary team, and the final decision should not be in the hands of one individual alone.

Finally, this chapter discusses the implications of the procedure required by the 1993 Hague Convention – from determining adoptability to ensuring post-adoption support – for preserving the best interests of the child throughout the intercountry adoption process.

Such systematic assessments are clearly vital if the best interests of the child are to be truly ‘the paramount consideration’ in intercountry adoption, but they require substantial investment and an ‘enabling environment’ in order to function adequately. Chapter 5 points to a range of elements in the current environment that, far from being ‘enabling’, are actively or passively hostile to the required attention to best interests. These relate not only to prevailing conditions in countries of origin – such as limited domestic care options, laws that strongly influence the reasons given for pronouncing adoptability, and resource constraints – but also to the approach taken by receiving countries, including the pressure they exert, and the conditions they accept, in order to secure children for adoption. Without tackling these issues as well, the best interests of the child can only remain a secondary feature of decision-making on the intercountry adoption of many children in the years to come.

As concluding Chapter 6 indicates, differing perceptions of the best interests of the child in a human rights framework are the essential cause of conflicting opinions as to when recourse to intercountry adoption is warranted. At the same time, attempts to develop globally accepted bases on which those best interests can be determined will have to confront a number of paradoxes and dilemmas that the study brings to light, and which are briefly recalled at this point in order to signpost the way forward.

# 1

## Best Interests, Human Rights and Intercountry Adoption

### Key points

- ↘ While there is general agreement that the best interests of the child should be the paramount consideration in intercountry adoption, there is no consensus on who decides what is in a child's best interests or on what basis that decision should be made.
- ↘ The notion of best interests pre-dates the international codification of human rights, and many decisions justified by best interests considerations alone have had very damaging consequences for children.
- ↘ It is essential, therefore, to define clearly the role of the best interests of children in intercountry adoption as a principle within a human rights framework, to avoid 'hit-and-miss' decisions that determine children's entire future.



There is general agreement that measures to protect and ensure the healthy development of children – whether initiated by parents, caregivers, third parties or the state – must be guided by the best interests of those children.

It may seem obvious, therefore, that adoptions should only take place when they are in the best interests of the children concerned. Indeed, authorizing an adoption – in essence choosing a child’s parents – is one of the most drastic and definitive decisions that could be made about a child’s future. Not only might it seem evident that this ‘best interests’ condition should be fulfilled, but there is also now an absolute obligation, anchored firmly in international human rights law, for the best interests of the child to be the ‘paramount consideration’ – the decisive factor – where adoption is concerned. And this is reflected in the legislation of most countries that permit adoption.

### 1.1. What is contentious about the best interests principle?

Despite clear consensus on the need to uphold the principle of the best interests of the child, there is a persistent lack of consensus on how, precisely, those best interests are to be decided. International standards themselves do not specify any criteria at all on how and by whom these interests should be determined, or on who should be responsible for making the final decision. As a result, perceptions of what constitutes the best interests of the child have varied widely over the decades, and still do. It was fully 23 years after the Convention on the Rights of the Child (CRC) came into force in 1990 that the Committee on the Rights of the Child tried to fill this gap through General Comment No. 14,<sup>1</sup> issued in 2013, which sets out how the best interests of the child should be taken into account in implementing the Convention.<sup>2</sup>

### Perceptions of what constitutes the best interests of the child have varied widely over the decades.

But the impact of a long and entrenched history of confusion and disagreement on this

principle is unlikely to be overcome solely as a result of this move, welcome though it may be.

If this lack of consensus has worrying implications for crucial decision-making on adoptions in general, its significance is all the greater when it comes to intercountry adoption in particular. First, the joint decision-making required usually involves actors from very different socio-cultural realities that will have shaped their respective outlooks on what the application of best interests might entail. Second, there are many additional and complex factors to be considered when contemplating moving a child definitively – not just to a new family, but also to an entirely new country and culture.

Yet there are frequent warnings about a worrying lack of respect for best interests in intercountry adoption, despite the notable absence of any common understanding on what, precisely, the principle means in practice.

A 2012 situation analysis by the African Child Policy Forum, for example, expressed concern that:

...despite the fact that the continent’s laws, policies and practices are generally **ill-equipped to uphold the best interests of children**, Africa is becoming the new frontier for intercountry adoption. With globalisation, there are also indications that illicit activities that **violate children’s best interests** on the African continent are on the rise, encouraged by a shortage of adoptable children in other parts of the world, the shifting focus of intercountry adoption to Africa, increasing poverty in Africa, and accompanying weak institutional law enforcement capacity of African State institutions.<sup>3</sup>

The Parliamentary Assembly of the Council of Europe, having already felt it necessary in 2000 “to alert European public opinion to the fact that, sadly, international adoption may prove to be a practice that disregards children’s rights and that **does not necessarily serve their best interests**”,<sup>4</sup> returned to the theme in 2012, preoccupied by “persisting reports of cases of intercountry adoption where **the best interest of children has evidently not been**

<sup>1</sup> Committee on the Rights of the Child (2013). General Comment No. 14, The right of the child to have his or her best interests taken as a primary consideration (CRC/C/GC/14).

<sup>2</sup> More details on the recommendations of this General Comment are given at various points of this study, including in particular in sections 4.2 and 4.3.1 below.

<sup>3</sup> African Child Policy Forum (2012a). *Africa: The new frontier for intercountry adoption*. Addis Ababa: The African Child Policy Forum. p. v (our emphasis).

<sup>4</sup> Council of Europe (2000). ‘International adoption: Respecting children’s rights’, Recommendation 1443 (our emphasis).

the paramount consideration or where their human rights have been severely violated".<sup>5</sup>

In the absence of any formal consensus on the subject, we need to clarify the basis on which such statements might be valid. This means answering the following crucial question: *What is it that enables a policy, process, decision or practice to be qualified as either respectful or in violation of the best interests of the child in the particular case of intercountry adoption?*

### 1.2. The chequered legacy of invoking best interests

The notion of best interests (and similar approaches) pre-dates the development of internationally accepted human rights. It has invariably been used as the basis for decisions about people deemed incapable of making rational decisions for themselves, as well as for actions intended to help them protect themselves or improve their lives. Persons with disabilities and children have been the main, though by no means the only, groups dealt with in this way.

### The notion of best interests pre-dates the development of internationally accepted human rights.

Decisions ostensibly inspired by notions of best interests have, in essence, reflected prevailing attitudes towards both groups of people in question and the desirability of particular protective actions. In relation to children, such decisions could be – and certainly were – unfettered by human rights considerations until the codification of their rights (including their right to be involved in the decisions affecting them) in the CRC.<sup>6</sup> Until that point, decisions about children tended to be driven by unilateral individual initiatives or contemporary views on desirable and appropriate solutions.

Although attitudes and knowledge develop and change over time, and differ from place to place, some of the outcomes of decisions

based on best interests notions are still seen as positive today. For example, while a certain view of best interests underpinned the now widely discredited institutional care for children separated from their families, it was the concept of best interests, rather than a human rights approach, that spurred efforts in some industrialized countries to begin to phase out large residential facilities and replace them with foster care and similar arrangements as far back as the 1890s.<sup>7</sup> Analyses of past policies and practices that are now condemned have often been acknowledged to have at least some good intentions behind them, even if combined with other less honourable motives. The degree of 'flexibility' afforded by the concept of best interests is still looked on positively, as it allows the adjustment of the desired outcome to respond to advances in knowledge, evolving attitudes and diverse socio-cultural contexts.<sup>8</sup>

Nonetheless, when decisions based on best interests are grounded predominantly in contemporary thinking among decision-makers, with few boundaries set by other considerations, the results become somewhat 'hit-and-miss'. This is unacceptable in the case of any child, and particularly those who might be adopted to another country; vulnerable children simply should not be part of an 'experiment' that will determine their future prospects.

However many examples there may be of initiatives that had a positive outcome in the end, reliance on notions of best interests or similar terms to justify a particular action has a clear legacy of misuse, abuse and failure. The negatives include outcomes that are now condemned from a human rights standpoint. Nowhere has this been more apparent, perhaps, than in policies and initiatives involving the large-scale removal of children from their parent(s) for placement in various forms of 'alternative care', whether in-country or in a foreign land, so that they might have 'a better life'.

In addressing the subject, therefore, it is useful to recall examples of what are now invariably termed 'abuses' but that were, in the not-so-distant past, promoted as being in the best interests of the children concerned.

<sup>5</sup> Council of Europe (2012). 'Intercountry adoption: Ensuring that the best interests of the child are upheld', Resolution 1909, para. 4 (our emphasis).

<sup>6</sup> The same could be said in relation to persons with disabilities until the advent of the Convention on the Rights of Persons with Disabilities.

<sup>7</sup> See, for example, 'The history of Barnardo's' at [http://www.barnardos.org.uk/barnardo\\_s\\_history.pdf](http://www.barnardos.org.uk/barnardo_s_history.pdf)

<sup>8</sup> For a review of arguments in favour of the flexibility of the concept, see section 2.3.3.1 below.

### 1.2.1. Best interests used to justify the removal of children from parental care

One obvious example of an action once seen as positive and now seen, quite rightly, as disastrous lies in the account of ‘forced adoption’ produced by an Australian Senate committee in February 2012,<sup>9</sup> which led to the national apology for the practice by the country’s then prime minister, Julia Gillard, one year later.<sup>10</sup>

An estimated 150,000 babies born to unwed mothers in Australia were the victims of forced adoptions between the late 1940s and the early 1980s – the result of a government policy sanctioned by churches and charities.<sup>11</sup>

The Senate report sets out the way in which the best interests of the child were invoked to justify the practice, which was grounded in “the belief that if children were born to people of ‘low moral standard’ or poverty, they should be adopted by infertile couples of better social standing so as to ensure the best interest of the child were [*sic*] being looked after” (para. 2.21). One adoptee is quoted as saying, “My true mother was told to give me away because it was in the best interests of the child” (para. 4.7).

That principle also underpinned the so-called ‘clean break’ approach: removing children early and abruptly from their mothers’ care – often immediately after birth, to prevent bonding. Here, best interests presumed that “the interests of the child of an unmarried mother was [*sic*] well-served by adoption by a married couple” (para. 7.32). A major Australian charity, The Benevolent Society, is quoted in the report as agreeing that adoption practices “which were seen at the time to be in the best interests of a child, are now acknowledged as cruel and damaging to both the mother and her child/ren”.<sup>12</sup>

In her official apology address, Gillard noted that the practice of forced adoption “had its beginnings in a wrongful belief that women could be separated from their babies and it would all be for the best” and she criticized “the bullying arrogance of a society that presumed to know what was best”.<sup>13</sup>

Tellingly, the wording of the National Apology adopted by the Senate and House of Representatives makes no mention at all of best interests as a basis for future policy in this sphere, placing the emphasis rather on the protection of rights:

We resolve, as a nation, to do all in our power to make sure these practices are never repeated. In facing future challenges, we will remember the lessons of family separation. Our focus will be on protecting the fundamental rights of children and on the importance of the child’s right to know and be cared for by his or her parents.<sup>14</sup>

Haskins and Jacobs also give examples of the best interests leitmotif behind the removal of indigenous children from parental care in both Australia and the USA:

In each case, government authorities forcibly removed children from their families for the stated purposes of educating them or improving their lives...

As a central component of the assimilation agenda in the United States and of absorption plans in Australia, child removal became a systematic government policy toward indigenous peoples in both countries in the nineteenth and twentieth centuries. Using the rhetoric of protecting and saving indigenous children, reformers and government officials touted child removal as a means to “uplift” and “civilize” indigenous children...

After World War II, the [US] government revived assimilation policy under a new name – termination and relocation. Although many boarding schools remained in operation, Indian child removal now more often manifested itself in the form of social workers who removed Indian children from families they deemed unfit, to be raised in white foster homes.

<sup>9</sup> Australian Senate, Community Affairs References Committee (2012). ‘Commonwealth contribution to former forced adoption policies and practices’. Commonwealth of Australia: Canberra.

<sup>10</sup> National Apology for Forced Adoptions, delivered by Australian Prime Minister Julia Gillard, Parliament House, Canberra, 21 March 2013, available at: <http://resources.news.com.au/les/2013/03/21/1226602/365475-aus-file-forced-adoptions-apology.pdf>

<sup>11</sup> Australian Senate, Community Affairs References Committee (2012).

<sup>12</sup> *ibid.*, para. 9.32.

<sup>13</sup> National Apology (2013).

<sup>14</sup> *ibid.*

Child removal [in Australia] was aimed ostensibly at making Aboriginal children into “decent and useful members of the community” and couched in the language of benevolent welfare policy. Thus, the New South Wales (NSW) Aborigines Protection Board had the power to secure custody and control of any Aboriginal child “if it is satisfied that such a course is in the interest of the moral or physical welfare of such child”.<sup>15</sup>

A similar approach was used in Switzerland, where children from the Jenisch travelling population were routinely removed from their families from the late 1920s until the early 1970s – a measure seen as being for their own good:

In 1926, together with a number of charitable associations and with the support of the Confederation, the Œuvre des enfants de la grand-route [Action for travelling children] ... began the systematic removal of children from Jenisch families (approx. 800), placing them with foster families, in psychiatric hospitals or even in prisons, to turn them into a ‘settled’ population. It was only in 1973 that, with the help of the media, the persons affected were able to bring this practice to a halt.<sup>16</sup>

With such a prevailing mindset, it was only logical that the forced migration of children ‘in their best interests’ would also be envisaged.

### 1.2.2. Best interests used to justify the forced migration of children to other countries

The United Kingdom was the source of some of the worst examples of the long-term forced migration of children to other countries. According to the report of a Parliamentary Committee set up to examine the practice in depth, an estimated 150,000 children were subjected to this practice in the nineteenth and twentieth centuries, two-thirds of whom were sent to Canada and the remainder to Australia, New Zealand and other British dominions or colonies.<sup>17</sup> While child migration to

Canada was not resumed after the Second World War, between 7,000 and 10,000 children were sent to Australia and 549 to New Zealand from 1947 to 1967.<sup>18</sup> The Committee’s report notes that the best interests principle was not the only motive for such forced migration, but may well have been invoked to mask other, far less palatable, intentions:

The motivation underlying child migration policy was mixed. On the one hand, there was a genuine philanthropic desire to rescue children from destitution and neglect in Britain and send them to a better life in the Colonies. This went hand in hand with a wish to protect children from ‘moral danger’ arising from their home circumstances – for instance, if their mothers were prostitutes... Child migration was also seen to be of economic benefit both to Britain (because it relieved the burden on public finances of looking after these children) and to the receiving countries (because child migrants were seen as being potential members of a healthy and well-trained workforce). Evidence shows that they were actually used as cheap labour. (paras 15–16)

However mixed the arguments in favour of the practice may have been, the report finds that:

It was the charitable and religious organisations who maintained the child migration policy, often apparently motivated by the need to keep the institutions overseas financially viable. (para. 20)

Tellingly, after qualifying such forms of cross-border displacement of children as “a bad and, in human terms, costly mistake” (para. 98), the report draws parallels between the past practice of forced migration and today’s intercountry adoption:

Potential future difficulties related to inter-country adoptions which may mirror some of the current

<sup>15</sup> Haskins, V. and M.D. Jacobs (2002). ‘Stolen Generations and Vanishing Indians: The removal of indigenous children as a weapon of war in the United States and Australia, 1870–1940’, in J. Marten, ed. *Children and War: A historical anthology*. New York: New York University Press, pp. 227–29.

<sup>16</sup> ‘Dictionnaire historique de la Suisse’, available at: <http://www.hls-dhs-dss.ch/textes/f/F8247.php> (our translation).

<sup>17</sup> UK Parliament Select Committee on Health (1998). Third Report, 23 July 1998, para. 11. <http://www.publications.parliament.uk/pa/cm/cm199798/cmselect/cmhealth/755/75502.htm>

<sup>18</sup> *ibid.*, para. 13.



concerns of former child migrants about their identity and past were brought to our attention in both New Zealand and Australia... Removing children from their country of birth should not be seen as an alternative to appropriate child care or occur because insufficient aid or assistance is available. (para.101)

Indeed, very similar concerns are still raised to this day about the validity of the reasons given for placing some children – in particular – for intercountry adoption.

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### 1.3. The best interests principle gives way to human rights – except for children

With the development of human rights instruments, and particularly since the 1970s, invoking ‘best interests’ as regards adults has become something of an anathema. The very fact of having human rights has been viewed as negating the need and justification for using best interests as a basis for decision-making. Arguments based on the concept are even deemed, in the worst cases, to threaten the promotion and protection of human rights (see, for example, the introduction to 2.1 below).

It is noteworthy, therefore, that the notion of best interests has been retained within international human rights law solely in relation to children. The principle is enshrined in the CRC itself, but also in the small number of more general instruments that refer to certain children’s issues. This is certainly, in part, a legacy of the charitable approach to children’s issues that prevailed in the nineteenth and twentieth centuries – a legacy that continues to make itself felt in any and all decisions concerning children. This legacy is complicated by the real dilemma that the capacity of children to exercise their rights on their own behalf depends upon their evolving capacities. Many children adopted abroad are very young, and adults are called upon to make decisions on their behalf. The question thus becomes: to what extent, and when, must those decisions rely on a best interests approach rather than simply being ‘rights based’?

That said, the CRC, in particular, sets boundaries to the kinds of measures that may be envisaged in the name of best interests. Having them taken into account is now a fully fledged right within the CRC itself, and its implementation is, therefore, totally inter-dependent with all the other rights contained in the Convention. These protections have been reinforced substantially in relation to intercountry adoption, through specific procedural requirements set out in the 1993 Hague Convention. Taken in combination, these provisions might be expected to consign the chequered history of applying a best interests approach to the past.

However, the dangers of the paternalistic and often simplistic approach that spawned the principle of best interests still contribute to attempted or actual violations of the rights of the child today. With the concept deliberately, and to some extent understandably, being left undefined to take account of diverse individual situations and different socio-cultural perceptions, the vague nature of the obligations implied by best interests is a breeding ground for misconception and manipulation.

Such vagaries are a special concern in intercountry adoption, given that the assessment of best interests is, supposedly, the paramount consideration. They are also a wider concern in the overall promotion and protection of all child rights, with best interests now designated as one of four General Principles of the CRC by the Committee that monitors the treaty’s implementation by states parties, alongside non-discrimination, the right to life, survival and development, and respect for the views of the child.

The way the best interests principle is to be approached and used today – essentially to ensure the best possible protection of rights – stands in stark contrast to its origins, when it was designed to fill in or compensate for the absence of rights.

The way the best interests principle is to be approached and used today – essentially to ensure the best possible protection of rights – stands in stark contrast to its origins.

Therefore, instead of being the sole basis for defining what action to take, best interests now have – or should have – a far more limited role within human rights constraints. This means that determining best interests needs to be a thorough and well-prescribed process directed, in particular, towards identifying which of two or more rights-based solutions is most likely to enable children to realize their rights, bearing in mind that the other people affected by those solutions also have their own human rights.

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#### 1.4. The purpose of this study

This study focuses on the role of best interests in the specific context of intercountry adoption. It does not seek to assess whether intercountry adoption itself is a measure that fulfils the best interests of the child.

It is grounded in the belief that, while the best interests principle can be shown to have a clear role to play in intercountry adoption, it no longer sets the benchmark itself. It is now one of several ways to attain the optimal achievement of benchmarks established elsewhere, notably in the rights set out in the CRC and the safeguards and procedures foreseen by the 1993 Hague Convention. On the one hand, part of the initial role of ‘best interests’ in guiding responses and outcomes may have been subsumed into a human rights framework; on the other, its more limited role within that framework needs to be fully understood and respected.

There is a clear dilemma here. If best interests are not part of the overall approach to human rights, how, when and why might they be seen as applicable to,

and decisive in terms of, the human rights held by children alone? What initiatives, decisions and actions about children would require a best interests basis rather than simple reliance on respecting and furthering the human rights of the children concerned? And which criteria should we use to fulfil that requirement? This study aims to respond, in a dispassionate manner, to these questions.

First, this study outlines how and why the principle of best interests now applies only to children in an era of broader human rights, and examines the extent to which developments in intercountry adoption, in particular, have been guided by that principle as ‘the paramount consideration’.

Second, the study sets out to demonstrate the need for consensus on, and rigorous appraisal of, best interests within a human rights framework, and particularly in the sphere of intercountry adoption, where decisions made on behalf of children are meant to be final. It proposes concrete responses to build consensus on policy development, on safeguards at all stages of the adoption process, and on determining whether or not intercountry adoption should be pursued for any given child. It also sets out some minimum conditions to ensure that a decision based on best interests can indeed take place and have real effect.

Determining best interests needs to be a thorough and well-prescribed process.

This study contributes to ongoing debates by clarifying important issues and proposing ways forward that would better enable intercountry adoption to fulfil its prime and historic role: as an exceptional protective measure offered to a child for whom adoption is legally possible, warranted and desirable; and when no suitable alternatives exist, or can be created, in that child’s own country.

# 2

## The Role and Purpose of the Best Interests Concept in a Human Rights Context

### Key points

- The principle of best interests applies only to children, both in international human rights instruments and in private international law.
- It is, at one and the same time, a deliberately vague concept in the CRC, and a guiding principle of that Convention.
- A two-fold challenge emerges: how to determine the best interests of the individual child in intercountry adoption, and how to assess the impact of national laws, policies and procedures on intercountry adoption from the standpoint of children's collective rights.



While there is nothing new about the notion of best interests – sometimes formulated as, for example, “it’s for your own good” and “we have your interests at heart” – references to it in international law are not only recent, but also rare and confined to issues concerning children.

There is no mention, therefore, of best interests in humanitarian law (the four Geneva Conventions of 1949 and their Additional Protocols of 1977) or in international refugee law. Where it appears in international human rights law, it applies only to children or ‘juveniles’ (see section 2.1 below). Reliance on the concept is also extremely limited in private international law (see section 2.2 below).

Against that background, this chapter looks at how best interests came to be a cornerstone of the CRC in general, and the determining factor in adoption decisions in particular, and examines the implications of this for broaching the best interests principle from a human rights standpoint.

### 2.1. Best interests in human rights instruments

The CRC is one of the nine current treaties known as core international human rights instruments.<sup>19</sup> It is interesting to note, however, that best interests is not a concept that is widely used in human rights hard law: in those rare cases where it figures in core instruments other than the CRC, it also relates solely and specifically to children.

Of the five core treaties that pre-date the CRC, only two refer to the “interest(s)” – though not the “best interests” – of children: the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Interestingly, in each instance, this criterion is accorded a determining status (our emphasis):

- ICCPR (1966) Art. 14.1: [A]ny judgement rendered in a criminal case or in a suit at law shall be made public **except where the interest of juvenile persons otherwise requires** or the

proceedings concern matrimonial disputes or the guardianship of children.

- CEDAW (1979) 5(b): To ensure ... the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that **the interest of the children is the primordial consideration** in all cases.

- CEDAW 16. 1: States Parties ... shall ensure, on a basis of equality of men and women: ... (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases **the interests of the children shall be paramount**.

Of the three post-CRC core treaties, only the 2006 Convention on the Rights of Persons with Disabilities (CRPD) mentions “best interests”, again solely in relation to children:

- CRPD 7.2: In all actions concerning children with disabilities, **the best interests of the child shall be a primary consideration**.

In this case, the wording is a faithful echo of the CRC, where best interests are clearly an important, but not definitive, consideration in decision-making.

Persons with disabilities are, like children, a group that has been particularly subjected to a charitable approach, rather than one grounded in human rights. So it is interesting to note the clear criticisms made in a 2012 UN study on disability about reliance on best interests criteria, which are seen as running counter to the fulfilment of rights obligations: “In many societies, persons with disabilities are still regarded as recipients of charity or objects of others’ decisions instead of holders of rights” (para 14). As a result, “international human rights standards ... prohibit forced and coerced treatment of people suffering from intellectual disabilities, **regardless of arguments of their ‘best interests’**” (para 29). Despite this, “a striking number of States have laws that authorize forced

<sup>19</sup> The nine core international human rights instruments are, in date order: International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 21 Dec 1965; International Covenant on Civil and Political Rights (ICCPR) 16 Dec 1966; International Covenant on Economic, Social and Cultural Rights (ICESCR) 16 Dec 1966; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 18 Dec 1979; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 10 Dec 1984; Convention on the Rights of the Child (CRC) 20 Nov 1989; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) 18 Dec 1990; Convention on the Rights of Persons with Disabilities (CRPD) 13 Dec 2006; and International Convention for the Protection of All Persons from Enforced Disappearance (CPED) 20 Dec 2006.

or involuntary treatment of persons with psychosocial disabilities **when in their 'best interests'**. In more than half of the countries that submitted data, psychiatric treatment is imposed on persons with disabilities within legal safeguards if demonstrably 'justified', 'reasonable', 'necessary' and 'proportionate'" (para 30).<sup>20</sup>

Indeed, the Committee on the Rights of the Child itself fully recognizes that:

... the concept of the child's best interests has been abused by Governments and other State authorities to justify racist policies, for example; by parents to defend their own interests in custody disputes; by professionals who could not be bothered, and who dismiss the assessment of the child's best interests as irrelevant or unimportant.<sup>21</sup>

When reviewing states parties' reports in particular, the Committee has had to confront arguments based on an ill-founded perception of best interests:

When the Committee on the Rights of the Child has raised eliminating corporal punishment with certain States during the examination of their reports, governmental representatives have sometimes suggested that some level of 'reasonable' or 'moderate' corporal punishment can be justified as in the 'best interests' of the child. ... But interpretation of a child's best interests must be consistent with the whole Convention, including the obligation to protect children from all forms of violence and the requirement to give due weight to the child's views; it cannot be used to justify practices, including corporal punishment and other forms of cruel or degrading punishment, which conflict with the child's human dignity and right to physical integrity.<sup>22</sup>

What these documents demonstrate is that best interests continue to be used in a paternalistic manner that should have become obsolete with the advent of the human rights narrative, or that may even be incompatible with those rights from many standpoints. Obviously, this makes

it all the more vital to ensure the proper use of a precise best interests concept in the context of the human rights of children.

A further indication of the perceived marginal role of best interests in the overall human rights framework lies in General Comment No. 17 on the Rights of the Child, adopted by the Committee on Civil and Political Rights in April 1989<sup>23</sup> – in other words, just after the text of the CRC had been finalized but before its formal acceptance by the UN General Assembly. While this commentary is linked ostensibly to the one short article in the ICCPR devoted specifically to children (Art. 24, covering the rights to protective measures, birth registration, and to a name and nationality), the Committee took the opportunity to expand considerably on 'protection' questions in particular. General Comment No. 17 refers, therefore, to a wide range of issues, from children deprived of parental care to juvenile justice, labour and abduction, sale and trafficking. Apart from an allusion to ICCPR Article 14.1, however, not once does the document refer to the best interests of the child as having a bearing on decision-making on any of these matters.

## 2.2. Best interests in private international law

Private international law does not set human rights standards directly. However, it builds on those standards by establishing requirements for their respect through the procedures it puts in place in certain fields that it covers. In doing so, private international law not only reflects human rights law, but also complements the standards it sets by giving a practical dimension to implementation. This is clearly a key factor when applying the best interests of the child principle in intercountry adoption.

As is the case for human rights law, the term 'best interests' is rarely used in private international law and, once again, only in relation to children.

For example, the 1993 (Hague) Convention on Intercountry Adoption (see Chapter 3) is premised on:

<sup>20</sup> UN General Assembly, Human Rights Council (2012). 'Thematic study on the issue of violence against women and girls and disability, Report of the Office of the United Nations High Commissioner for Human Rights'. New York: United Nations General Assembly (our emphasis).

<sup>21</sup> Committee on the Rights of the Child (2013), para. 34.

<sup>22</sup> Committee on the Rights of the Child (2006). General Comment No. 8 on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (CRC/C/GC/8), para. 26.

<sup>23</sup> Office of the High Commissioner for Human Rights (1989). General Comment No. 17 on the rights of the child (Art. 24).

...the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights.<sup>24</sup>

And the treaty's very first objective is indeed "to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law".<sup>25</sup>

Another child-focused Hague Convention – the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children<sup>26</sup> – was, like the Convention on Intercountry Adoption, drafted after the entry into force of the CRC. Not surprisingly, it also reflects the CRC by stating in its preamble that "the best interests of the child are to be a primary consideration". 'Best interests' also figure in a number of its operative provisions, either as a determining factor (Arts. 8.4, 10.1.b) or as a factor to be taken into account in decision-making (Arts. 22, 23.2.d and 33).

Of special note in the context of this study, however, are the references to best interests in Articles 8.1 and 9.1 of this Convention. These provisions deal with the question of which state – the country of a child's habitual residence or, for example, the country where the child is physically present – is "better placed in the particular case to assess the best interests of the child" (our emphasis). This matters because it may be the only example in an international treaty, other than the 1993 Hague Convention,<sup>27</sup> where an explicit link is made between 'best interests' and the need for an assessment (or determination) process to be established and carried out by the state.

The preamble of the 1980 (Hague) Convention on the Civil Aspects of International Child Abduction,<sup>28</sup> developed well before the CRC, underlines the fact that "the interests of children are of paramount importance in matters relating to their custody". That said, the operative articles make no further mention of the concept. This Convention uses a more concrete formulation than

'best interests' to allow derogation from the treaty's basic principle that abducted children should be returned as quickly as possible to their country of habitual residence. Here, the competent authority is under no obligation to return a child if:

...there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.<sup>29</sup>

In contrast, the 2000 (Hague) Convention on the International Protection of Adults, although it applies to those who, "by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests" (Art. 1.1), contains no reference to decisions being made on the basis of the 'best interests' of those concerned.<sup>30</sup> Certainly, the preamble affirms that "the interests of the adult and respect for his or her dignity and autonomy are to be a primary consideration, but, in operative terms, the 'interests' in this context are seen specifically and concretely as "the protection of the person or the property of the adult" (Art. 8.1).

It is of note that the implications of ensuring 'best interests' are left relatively vague compared with other private international law instruments as far as intercountry adoption is concerned – although it is arguable that the substantive provisions of the 1993 Hague Convention indicate, albeit implicitly, how 'best interests' should be interpreted (see section 4.4).

### 2.3. The best interests of the child in the Convention on the Rights of the Child

It is particularly challenging to respond appropriately to the best interests of the child requirements in the human rights context of the CRC. There is no global precedent or jurisprudence based on the provisions or application of human rights law as a function of the best interests of a child, or for that matter, an adult. Hence the need to look more closely at why and how the concept was incorporated into the CRC.

<sup>24</sup> Hague Conference on Private International Law (1993). Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, preamble.

<sup>25</sup> *ibid.*, Art. 1(a).

<sup>26</sup> Hague Conference on Private International Law (1996). Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

<sup>27</sup> Article 4 of the 1993 Hague Convention requires that "the competent authorities of the State of origin have determined ... that an intercountry adoption is in the child's best interests".

<sup>28</sup> Hague Conference on Private International Law (1980). Convention on the Civil Aspects of International Child Abduction.

<sup>29</sup> *ibid.*, Art. 13 (b).

<sup>30</sup> Hague Conference on Private International Law (2000). Convention on the International Protection of Adults.

### 2.3.1. Why best interests figure in the CRC

The first draft for a convention on the rights of the child was submitted to the UN Commission on Human Rights (CHR) by Poland in 1978 and was based almost entirely on the non-binding Declaration on the Rights of the Child adopted by the UN General Assembly in 1959, which included two principles dealing with the best interests of the child:

- Principle 2: The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, **the best interests of the child shall be the paramount consideration.**
- Principle 7: **The best interests of the child shall be the guiding principle** of those responsible for his education and guidance; that responsibility lies in the first place with his parents. (our emphasis)

While the CHR rejected the proposed text as a whole and asked Poland for a revised version, it was clear from the start that the concept of best interests would figure, in some way, in any final text.

However, where state responsibilities (as opposed to those of parents) were set out, the scope of the best interests of the child as formulated in the 1959 Declaration had been limited to legislation alone. The revised draft of the CRC submitted by Poland in 1979 – which contains the foundation of CRC Article 3.1 as we know it – suddenly reinforced and widened the scope of the best interests concept and its potential impact to an unprecedented degree:

In all actions concerning children, whether undertaken by their parents, guardians, social or state institutions, and in particular by courts of law and administrative authorities, **the best interest [sic] of the child shall be the paramount consideration.** (draft Art. 3.1; our emphasis)

Three aspects of this proposed new text are noteworthy:

- Those responsible for protecting and ensuring the best interests of children – the authorities on the one hand and the parents on the other – were now covered in a single provision instead of separately as in the 1959 Declaration.
- The “enactment of laws” for the special protection and overall development of children no longer figured in the text, and was replaced by a list of protagonists which, somewhat paradoxically, made no mention of legislators at all.
- Best interest(s) remained the “paramount consideration” in all instances.

This text was adopted provisionally in 1980 by the Working Group charged with drawing up the final version of the CRC. Interestingly, while all three aspects listed above were modified, the Working Group never debated either the principle or the potential ramifications of the sudden expansion of best interests or how it would fit within the human rights logic.

This almost unquestioning acceptance of such a sweeping application of best interests in relation to children’s rights has never been critically analysed since. Yet it has had, and still does have, a key and clear influence on how the implementation of the human rights of children is perceived today.

### 2.3.2. Provisions on the best interests of the child in the CRC

#### 2.3.2.1. Drafting the fundamental provision on the best interests of the child (Article 3.1)

Almost all decisions on how Article 3.1 of the CRC – the generic provision on best interests – would be formulated were made in 1981.

Some members of the Working Group questioned the wisdom of positioning the formal obligations on parents and guardians on the same plane as those of courts of law and administrative authorities. They prevailed, and parents’ duty to have the best interests of the child as “their basic concern” is now a separate issue in CRC Article 18.1.

As a result of another suggestion by the United States, the Working Group agreed to a major change: the general status of the best interests of the child was no longer to be viewed as “the paramount consideration” but as “a primary consideration” in decision-making by “public or private social welfare institutions, courts of law or administrative authorities”.<sup>31</sup>

This move – and indeed the draft text of Article 3.1 as a whole – was not picked up again until the last stages of the drafting process, in the context of a technical review in late 1988 to ensure that the entire draft Convention was consistent in itself and with existing human rights treaties. The review invited further discussion on whether the best interests of the child should be ‘the’ or only ‘a’ primary consideration.

Some Working Group members wanted to revert to the original higher status given to the concept of best interests in the future CRC, to bring it into line with CEDAW Article 5(b), which refers to best interests as “the primordial consideration”. However, it was pointed out that where ‘the’ rather than ‘a’ had been used, the issues at stake are far more specific (e.g. adoption) than the wide-ranging issues to be covered by CRC Article 3.1. It was also noted that the interests of other parties (including justice and society as a whole) might be of equal importance, at the very least, in certain circumstances. Given the many reservations expressed, it was finally decided that the best interests of the child should remain as “a primary consideration”.

### The concept of the best interests of the child applies not only to individual children but also to children as a group.

There was also agreement on a proposal contained in the technical review to bring back reference to ‘legislative bodies’ in the list of actors covered by this provision. This also has major ramifications for interpretation, demonstrating beyond doubt that the concept of the best interests of the child applies not only to individual children but also to children as a group (see section 2.4.3).

#### 2.3.2.2. Other CRC provisions referring to the best interests of the child

There is only one place in the CRC where the principle of best interests becomes, automatically and explicitly, the decisive factor for assessing the desirability of any given course of action foreseen under the treaty: its status as “the paramount consideration” in decisions about a child’s adoption in Article 21.

This singular recourse to best interests as the ultimate determinant of a decision to proceed with a measure that, in principle, should not undermine the fulfilment of any other right(s), is telling. We review the reasons for its inclusion in these terms in section 2.4 and examine its implications in more depth in Chapter 4.

Elsewhere in the CRC, as well as being cited as the “basic concern” of primary caregivers (Article 18.1), the status of best interest as “a primary consideration” in decision-making on “all actions concerning children” is up-graded for a small number of specific situations. In all but one of these, the best interests of the child become the determining criterion to justify any case-by-case derogation from an otherwise established right:

- removing children from parental care (Arts. 9.1, 20.1)
- denying contact between the child and his or her parents (Art. 9.3)
- envisaging deprivation of liberty with adults (Art. 37.c) and
- prohibiting parents from being present during judicial proceedings (Art. 40.2.b.iii).

#### 2.3.3. Issues raised by the inclusion of the best interests of the child in the CRC

As we have seen, in human rights law – as well as in humanitarian law, refugee law and private international law – the concept of best interests, when used at all, applies solely to children. It is all the more important, therefore, to look closely at the

<sup>31</sup> Detrick, S. ed. (1992). *The United Nations Convention on the Rights of the Child: A guide to the ‘travaux préparatoires’*. Leiden: Martinus Nijhoff Publishers, p. 133.



way it is broached and the implications of its specific inclusion in the CRC in such a context.

2.3.3.1. *A deliberately undefined concept...*

During the drafting of the CRC, there was implicit consensus that the notion of best interests should be left undefined, so that its interpretation could take account of context and circumstances.

Only Venezuela voiced serious concerns about this lack of clarity during final discussions on the text, fearing that the concept of best interests would be interpreted subjectively. It was particularly concerned at the lack of any wording to clarify that best interests included all aspects of a child’s development, spanning – as in the 1959 Declaration – the broad range of “physical, mental, moral, spiritual and social” considerations.<sup>32</sup>

There was scant support for this stance, however, as it was presented during the final stages of drafting. Venezuela did not insist on a further review and joined consensus on the text as proposed. However, the fears expressed about the scope of best interests – and the criteria to be applied in a potentially subjective decision about those interests – remain valid.

There is general agreement on the need for flexibility in determining best interests. Clearly, no single pre-determined outcome is in the best interests of each and every child, no ‘path’ is automatically preferable, and socio-cultural realities and perceptions differ. Zermatten, therefore, defends the best interests of the child principle as broad, flexible and adaptable to cultural and socio-economic variance across different legal systems,<sup>33</sup> and Van Bueren comments that this elasticity is essential in the case-by-case approach required by the best interests standard.<sup>34</sup>

There is general agreement on the need for flexibility in determining best interests.

Alston has also emphasized the deliberate ‘flexibility’ of the CRC drafters to allow for the principle’s broad application by professionals. He underlines how the cultural setting can influence the interpretation of child rights and the role of the best interests principle in mediating between rights and cultural frameworks, with human rights taking priority where there is insoluble conflict between the two.<sup>35</sup> The CRC Committee also points out that the “flexibility of the concept of the child’s best interests allows it to be responsive to the situation of individual children, as well as to “evolve knowledge about child development”.<sup>36</sup>

At the same time, the range of considerations to be taken into account, the criteria to be applied in respecting the best interests criterion itself and the precise responsibilities for assessing and determining the best interests of the child are still somewhat of a legal and conceptual wilderness in practice. In the early 1990s, Mr Justice Brennan of the Supreme Court of Australia commented that:

The best interest approach depends on the values systems of the decision-maker. Absent any rule or guideline, that approach simply creates an unexaminable discretion in the repository of the power.<sup>37</sup>

Twenty years later, his concerns remain largely unanswered. In such circumstances, efforts to ensure and verify compliance of resulting decisions with the substance of the best interests principle itself are clearly and severely compromised.

2.3.3.2. *...but a General Principle of the CRC*

Despite this juridical, substantive and procedural void, the Committee on the Rights of the Child decided from the start that best interests should be one of the four over-arching implementation issues, alongside non-discrimination, the right to life, survival and development, and the right to be heard, all of which needed to be addressed by states parties in their initial reports to the Committee.<sup>38</sup>

As a result of that decision, which was extended to cover states parties’ periodic

<sup>32</sup> *ibid.*, p. 137.

<sup>33</sup> Zermatten, J. (2010). *The Best Interests of the Child: Literal analysis, function and implementation*. Sion: Institut International des Droits de l’enfant, p. 16.

<sup>34</sup> Van Bueren, G. (2007). ‘Pushing and pulling in different directions: The best interests of the child and the margin of appreciation of states’, in *Child Rights in Europe: Convergence and divergence in judicial protection*, p. 32.

<sup>35</sup> Alston, P. (1994). ‘The Best Interests of the Child: Towards a reconciliation of culture and human rights’, in P. Alston, *The Best Interests of the Child: Reconciling culture and human rights*, Florence: UNICEF Innocenti Research Centre, pp. 1-25.

<sup>36</sup> Committee on the Rights of the Child (2013), para. 34.

<sup>37</sup> *Secretary of the Department of Health and Community Services v. J.W.B. and S.M.B. (Marion’s Case)* [1992] HCA 15; (1992) 175 CLR 218, para. 14.

<sup>38</sup> Committee on the Rights of the Child (1991). *General Guidelines, CRC/C/5*, 30 October 1991.

reports, the best interests of the child and the three other over-arching implementation issues were designated by the Committee as the four General Principles of the CRC for interpreting and implementing all the rights of the child. The Committee now describes the provision on best interests as “express[ing] one of the fundamental values of the Convention”.<sup>39</sup> No other treaty body to date has attempted to distinguish between the provisions of an international instrument in this way.

Whatever the justification and merits of elevating certain rights to this special status, the move is not without its dangers from a human rights perspective. These dangers are singularly acute when considering best interests, as this is not a familiar human rights concept. And in the case of intercountry adoption, where the best interests of the child are to be the sole determining factor, the risks are even greater.

The 1993 Vienna Declaration states – and the Committee itself has logically reaffirmed – that all human rights “are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally ... on the same footing, and with the same emphasis.”<sup>40</sup> In essence, the concept of the best interests of the child in this context means that all children have the right to have their best interests determined as a way of ensuring that all their other human rights are respected. Indeed, the CRC Committee stresses that the role of best interests as a guarantor of child rights is reflected in its own approach:

[The Committee] recalls that there is no hierarchy of rights in the Convention; all the rights provided for therein are in the ‘child’s best interests’ and no right could be compromised by a negative interpretation of the child’s best interests.<sup>41</sup>

[T]he ultimate purpose of the child’s best interests should be to ensure the full and effective enjoyment of the rights recognized in the Convention and the holistic development of the child. Consequently, elements that

are contrary to the rights enshrined in the Convention or that would have an effect contrary to the rights under the Convention cannot be considered as valid in assessing what is best for a child or children.<sup>42</sup>

In some quarters, nonetheless, the General Principle designation of the best interests of the child still generates a perception that it can and should be seen as a ‘super-right’ representing some kind of higher standard that can be invoked at will to trump children’s other rights.<sup>43</sup> As a careful examination of the Committee’s statements shows, this is not the intention. If the best interests of the child are to play a rights-compliant role in decisions on intercountry adoption and certain other spheres in particular, it is vital to combat that perception.

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### 2.4. Compliance of best interests with human rights provisions

Whatever the challenges it poses, the inclusion of best interests in the Convention has had the undeniable merit of positioning discussion of that notion in a human rights framework at last.

The acceptance of CRC Article 3.1 within that framework implies that its general interpretation and application cannot conflict with, and are even compatible with, other rights established in the CRC itself and those in all other binding international human rights instruments. Therefore, in its General Comment No. 8, the Committee on the Rights of the Child states that “the interpretation of a child’s best interests must be consistent with the whole Convention”.<sup>44</sup>

The best interests of the child can be invoked, but only in explicit and well-defined instances and on a case-by-case basis, to justify derogation from a very limited number of rights, establishing a kind of ‘right not to benefit from a right’ (see 2.3.2.2 above). In such cases, this does not make it a ‘super-right’, but simply a way of preserving the positive intention behind the right in question: it should not be applied if the outcome

<sup>39</sup> Committee on the Rights of the Child (2013), para 1.

<sup>40</sup> World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, para. 5.

<sup>41</sup> Committee on the Rights of the Child (2013), para. 4.

<sup>42</sup> *ibid.*, para. 51.

<sup>43</sup> One very clear example of this is the expedited adoption of children from Haiti (see section 3.7 below) where, despite the lack of any assessment, ‘best interests’ were invoked to justify derogation from procedures designed to protect the rights of the children concerned.

<sup>44</sup> Committee on the Rights of the Child (2006a), para. 26.

for the child can be demonstrated as very likely to be harmful. The key, and far more common, purpose of the best interests of the child principle, however, is to guide decisions where a choice must be made across a range of options that comply with the rights of the child.

It is here, where the best interests of the child is the primary or even paramount consideration for implementing one or more rights, rather than for derogating from a specific one, that its compatibility with the overall rights framework is particularly at risk in practice. Here, the function of the 'best interests right' in relation to others is far more vague.

This risk is evident where the best interests of the child inform decisions that must balance or prioritize different rights. Such situations are frequent, and particularly so in relation to child protection and alternative care. The inevitable consequence is that the enjoyment of one or more rights will be restricted to some degree, or may even be denied completely in extreme cases. We are then looking at the equivalent of a child's 'right to have the relative importance of all my other rights decided for me'. This is a vivid demonstration of both the dilemma and the crucial nature of decision-making on the basis of best interests in the context of human rights.

#### 2.4.1. Linkages between the best interests of the child and a child's right to be heard

The question of the compatibility and interdependence of decisions based on best interests with other rights is illustrated by their connection with CRC Article 12 on the right to be heard.

The United States' proposal that became the basic text for CRC Article 3.1 (see section 2.3.2.1 above) originally had a second paragraph devoted to the right to be heard:

In all judicial and administrative proceedings affecting a child that has reached the age of reason, an opportunity for the views of the child to be heard... shall be provided,

and those views shall be taken into consideration by the competent authorities.<sup>45</sup>

### One of the key elements in a best interests determination (BID) must be the child's own opinion.

The subject of this paragraph was finally dealt with in CRC Article 12, together with the right of the child "who is capable of forming his own views ... to express his opinion in matters concerning his own person", which was contained in the revised Polish proposal of 1979. The United States' proposal, however, made an implicit linkage between the best interests of the child and the right of the child to be heard in dealings with courts of law and administrative authorities. This matters when interpreting the two concepts. Even if there is no explicit connection between them in the final text of the CRC, Zermatten describes Articles 3 and 12 as a "duo", to sit side by side.<sup>46</sup> The CRC Committee goes further, noting the "inextricable links" between the two articles and their complementary roles:

...the first aims to realize the child's best interests and the second provides the methodology for hearing the views of the child or children and their inclusion in any matters affecting the child, including the assessment of his or her best interests. Article 3, paragraph 1, cannot be correctly applied if the requirements of article 12 are not met.<sup>47</sup>

In light of this, one of the key elements in a best interests determination (BID) must be the child's own opinion. Archard maintains that what children say about their interests is valuable evidence on what is, in fact, in their best interests.<sup>48</sup> Eekelaar talks about the importance of "dynamic self-determinism" in enabling children to influence decisions; in determining their best interests, the subjectivity they bring as to how they experience a situation enriches any analysis of the objective elements.<sup>49</sup> As demonstrated by specialists such as

<sup>45</sup> Detrick (1992), p. 133.

<sup>46</sup> Zermatten (2010), p. 21.

<sup>47</sup> Committee on the Rights of the Child (2013), para. 43.

<sup>48</sup> Archard, D. (2004). *Children: Rights and childhood*, London/New York: Routledge, p. 68.

<sup>49</sup> Eekelaar, J. (1994). 'The interests of the child and the child's wishes: The role of dynamic self-determinism', *International Journal of Law, Policy and the Family*, 8(1): 47-48.

Lansdown, even very young children have non-verbal ways to make their views known, if sufficient efforts are made to facilitate this by skilled professionals under appropriate conditions.<sup>50</sup>

Thomas and O’Kane have elaborated on the difficulty of having no clear guidance or legislation on the weight to attribute to children’s views, or on how their views and feelings should be balanced in best interests decisions. Drawing on research by Schofield et al., they argue that determining the child’s competence is critical, but it should be assessed on the basis of a specific decision. The emotional contexts in which children make decisions, which are influenced by their wishes and feelings, should also be taken into account when seeking their views.<sup>51</sup>

That said, as Archard and Skivenes argue, children cannot be expected to display competencies that even adults are unlikely to possess in a highly emotional situation (such as the choice of a family or parent). They emphasize, too, the complexity of balancing the views of children with their best interests, as this raises some tensions. Ensuring what is best for children – and therefore their welfare – is essentially ‘paternalistic’, yet asking children for their views might not tally with what is considered to be in their best interests. Archard and Skivenes define three key steps to determine the best interests: judgement, hearing the child’s opinion and balancing the child’s views and best interests.<sup>52</sup>

A related issue is the standpoint from which the assessment is made. Should young children’s best interests be determined according to their current needs? Or is it necessary to consider what they might choose if they were older and capable of making an informed choice? Some commentators, such as Brems, maintain that we should consider children’s current interests as children.<sup>53</sup> Others believe that “we must choose for others as we have reason to believe they would choose for themselves if they were at the age of reason and deciding rationally”.<sup>54</sup> Zermatten has noted the need for “a more objective form of knowledge about this concept” if we are to avoid the “risk that very different

decisions can easily, yet inaccurately, be justified as being in the interest of the child” depending on the subjective views of the decision-maker.<sup>55</sup> The CRC Committee emphasizes the child’s evolving capacities over time:

In the best-interests assessment, one has to consider that the capacities of the child will evolve. Decision-makers should therefore consider measures that can be revised or adjusted accordingly, instead of making definitive and irreversible decisions. To do this, they should not only assess the physical, emotional, educational and other needs at the specific moment of the decision, but should also consider the possible scenarios of the child’s development, and analyse them in the short and long term. In this context, decisions should assess continuity and stability of the child’s present and future situation.<sup>56</sup>

These questions are particularly pertinent to alternative care and adoption, but at least two aspects of them pose clear problems, especially in relation to intercountry adoption.

First, the children most often placed for intercountry adoption are likely to be very young, and any expectation that they will fully understand what is happening to them or be able to share an informed opinion about it is, at best, unrealistic, even with the involvement of highly skilled practitioners. The age at which a child must be consulted about, or give their consent to, intercountry adoption – to the extent that it is set – varies from country to country, but is rarely under 10.<sup>57</sup> There is no research, however, about the extent to which children of any particular age are able to really grasp the various implications of adoption, and particularly of being adopted abroad. As a result, the principle that the child’s opinion should inform the process around a determination of best interests may be very hard to apply in intercountry adoption.

Second, it is obvious that the general advice given by the CRC Committee (see above) to avoid “definitive and irreversible decisions” on best interests cannot apply in relation to any adoption, be it domestic or

<sup>50</sup> Lansdown, G. (2005). ‘Can you hear me?: The right of young children to participate in decisions affecting them’. The Hague: Bernard van Leer Foundation.

<sup>51</sup> Thomas, N. and C. O’Kane (1998). ‘When children’s wishes and feelings clash with their “best interests”’, *International Journal of Children’s Rights*, 6(2): 137–54.

<sup>52</sup> Archard, D. and M. Skivenes (2009). ‘Balancing a child’s best interests and a child’s views’, *International Journal of Children’s Rights*, 17(1): 1–21.

<sup>53</sup> Brems, E. (2002). ‘Children’s rights and universality’, in J.C.M. Willems, ed. *Developmental and Autonomy Rights of Children: Empowering children, caregivers and communities*. Antwerp: Intersentia, pp. 21–45.

<sup>54</sup> Rawls, J. (1972). *A Theory of Justice*. Oxford: Clarendon Press, p. 209.

<sup>55</sup> Zermatten (2010), p. 27.

<sup>56</sup> Committee on the Rights of the Child (2013), para. 84.

<sup>57</sup> United Nations Population Division (2009). *Adoption, Trends and Policies*, Department of Economic and Social Affairs, pp. 43–44.

intercountry. That said, the very fact that the Committee advises this, on a general level, is highly significant. It indicates the inherent difficulty in reaching a permanent decision for a child on the basis of a one-off BID exercise – a decision that will remain ‘correct’ over the long term. Again, this underscores both the crucial importance and the potential weaknesses of any BID process that will be the foundation of an irrevocable decision about the intercountry adoption of a child. And again, it highlights the need to prioritize the protection of the human rights of the children concerned.

#### 2.4.2 Why the CRC enhances the status of the best interests of the child in relation to adoption

The emphasis given to the best interests of the child in determining whether or not an adoption should go ahead only emerged during the drafting of the Convention. This was the result of growing recognition, particularly during the 1980s, of serious problems that needed to be tackled within the adoption sphere, particularly in relation to intercountry adoption.

The 1959 Declaration on the Rights of the Child made no reference to adoption, or indeed to any specific measure for children without parental care. Similarly, Poland’s initial draft text for a convention on the rights of the child (1978), grounded as it was in the 1959 Declaration, contained no mention at all of adoption.

This was remedied in Article 11.3 of the 1979 revised draft, which required states to “undertake measures so as to facilitate adoption of children”. This was adopted as a basic working text by the 1980 Working Group.<sup>58</sup> At that time, it should be recalled, the draft text still referred to the best interests of the child as “the paramount consideration” in relation to all decisions concerning children (see section 2.3.1 above).

By the time the draft provision on adoption came up for in-depth examination at the 1982 session of the Working Group, however, this general reference to the best interests of the child had been down-graded to “a primary consideration”

(see section 2.3.2.1 above). After extensive debate on how the CRC should broach the adoption question as a whole,<sup>59</sup> the Working Group decided to supplement the idea of ‘facilitating’ – but facilitating the process, rather than adoption itself – by an explicit reference to best interests (and, interestingly, in relation to intercountry adoption alone). Therefore, the provisional draft text of what is now Article 21 of the CRC, approved in 1982, contained two paragraphs, opening as follows:

1. The States Parties ... shall undertake measures, where appropriate, to facilitate the process of adoption of the child.
2. The States Parties ... shall take all appropriate measures to secure the best interests of the child who is the subject of intercountry adoption.<sup>60</sup>

This draft text was not reviewed again until the final session of the Working Group in 1989. During the 1980s, however, there were significant developments in response to growing concerns about how and why more and more intercountry adoptions were being carried out.

At the very start of that decade, the Council of Europe (CoE) had issued a document where it was stated that “over the past decade pressure by numerous European couples wishing to adopt has reduced the attention that is paid to the child’s interests”.<sup>61</sup>

At the United Nations, a report requested by the Sub-Commission of the CHR, submitted in 1982, noted that “growing concern is being expressed at the ... practice of the sale of children for adoption”,<sup>62</sup> and the Sub-Commission resolved that “a report on the causes and implications of the sale of children, including commercially-motivated (and especially transnational) adoptions, should be prepared”.<sup>63</sup> That same year the Economic and Social Council appointed a Special Rapporteur on traffic in persons; his 1983 report noted that “international traffic in young children for adoption ... should be given separate treatment in a specific study”.<sup>64</sup>

Calls throughout the decade for the appointment of a Special Rapporteur on

<sup>58</sup> UN Doc. E/CN.4/1349, p. 4, cited in Detrick (1992), p. 305.

<sup>59</sup> Detrick (1992), pp. 306–311.

<sup>60</sup> UN Commission on Human Rights (1982). Economic and Social Council, UN Doc. E/1982/12/Add.1.

<sup>61</sup> Council of Europe (1980). ‘The role of governmental and non-governmental organisations in supervising the placement in Europe of children from the Third World’, Social Affairs, Doc. COE.G.6/80, p. 35.

<sup>62</sup> Whittaker, B. (1982). Updating of the Report on Slavery Submitted to the Commission in 1966, UN Doc. E/CN.4 Sub.2/1982/20.

<sup>63</sup> UN Commission on Human Rights (1982). Resolution 1982/15, para. 14.

<sup>64</sup> Report of Jean Fernand-Laurent, Special Rapporteur on the suppression of the traffic in persons and the exploitation of the prostitution of others, E/1983/7.

the Sale of Children resulted in such an appointment, finally approved by the CHR, in 1990. The mandate of the Special Rapporteur included efforts to address “the problem of the adoption of children for commercial purposes”,<sup>65</sup> a confusing term that was intended to emphasize financial gain, in particular.

In 1986, the United Nations General Assembly approved a text that had been in the pipeline for eight years: the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally.<sup>66</sup> It was certainly a sign of the times that the terms ‘protection’ and ‘welfare of children’ were mentioned in this context: they were inserted towards the end, not having figured in the original working title of the 1970s.<sup>67</sup> Of special note here is the status that the 1986 Declaration affords to the best interests of the child in relation to both adoption and foster care: it is reinstated as “the paramount consideration”.<sup>68</sup>

Finally, in 1988, states members of the Hague Conference on Private International Law agreed that a new convention on “international co-operation in respect of intercountry adoption” was necessary because “international adoption was posing at present very serious problems of a kind or degree different from those existing when the Hague Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions was drawn up”.<sup>69</sup>

In a preparatory document for the drafting process, the Permanent Bureau of the Hague Conference observed that the future treaty should meet the

...need for a system of supervision in order to ensure that [legally binding] standards are observed (what can be done to prevent intercountry adoptions from occurring which are **not in the interest of the child**; how can children be protected from being adopted through fraud, duress or for monetary reward...);<sup>70</sup>

Significantly, and reflecting what had happened in deciding on the lengthy title

of the 1986 Declaration, between 1988 and 1989 the term “protection of children” was inserted after “international co-operation” in the draft title of the future Hague Convention. The Diplomatic Conference that approved the final text in 1993 was to go even further, with the symbolic placement of “protection of children” before the reference to cooperation, “in order to stress its importance as the main subject-matter of the Convention”.<sup>71</sup>

Adoption can only be undertaken as a uniquely child-centred practice and only if it is in accordance with all of the other rights of the child concerned.

In short, the prevailing mindset reversed completely in the late 1970s and the 1980s from a climate where adoption should be ‘facilitated’ to one where the overriding concern was the protection of children’s interests and rights in adoption. Not surprisingly, the definitive text in the CRC, applying to both domestic and intercountry adoptions, reflects this shift and takes an uncompromising line from the start (Art. 21):

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

This requirement to “ensure” is one of the strongest in human rights law, being part of the state’s obligation to take active measures to fulfil a right, rather than merely respect it (refrain from interfering with the enjoyment of the right) or protect it (prevent violations of the right by any party, including the state itself and its agents). And the best interests of the child become the determining criterion for adoption decisions, a clear reflection of consensus: adoption can only be undertaken as a uniquely child-centred practice and only if it is in accordance with all of the other rights of the child concerned.

<sup>65</sup> UN Commission on Human Rights (1990). Human Rights Council Resolution 1990/68.

<sup>66</sup> United Nations (1986). ‘Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally’, UN Doc. A/Res. 41/85, 3 December 1986.

<sup>67</sup> UN Economic and Social Council (1979). ‘Draft Declaration on social and legal principles relating to adoption and foster placement of children nationally and internationally’, Report by the Secretary-General, United Nations, E/CN.5/574, 22 January 1979.

<sup>68</sup> United Nations (1986). ‘Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children’, Art. 5.

<sup>69</sup> Hague Conference on Private International Law (1994a). ‘Explanatory report on the Convention on protection of children and co-operation in respect of intercountry adoption’. Caracas, paras. 1–2.

<sup>70</sup> Hague Conference on Private International Law (1989). ‘Memorandum concerning the preparation of a new Convention on international co-operation and protection of children in respect of intercountry adoption’, Permanent Bureau, The Hague, pp. 1–2 (our emphasis).

<sup>71</sup> Hague Conference on Private International Law (1994), para. 31.

### 2.4.3 Application of the best interests principle to children as a group

Because we talk about the best interests of the child, discussion on the application of the principle has often focused on decision-making in relation to the future of one individual child. However, apart from parents and others responsible for the child’s education and guidance, the original reference to the best interests of the child in the 1959 Declaration (and Poland’s initial proposed text for a convention) concerned only its paramount importance in the “enactment of laws”, clearly grounded in the best interests of children collectively, rather than individually. The final text of CRC Article 3.1 reflects this by mentioning “legislative bodies”, but all other relevant actors are also bound to give “a primary consideration” to the best interests of the child, developing overall approaches and policies, as well as determining best interests case by case.

While the notion of the best interests of the child has, therefore, clear ramifications for policy and law affecting children as a group, there has been debate about how the term “all actions concerning children” should be interpreted. Does it designate actors and initiatives that target children specifically, or does it cover any initiative or decision that may affect children in some way? While an impact assessment of any policy or measure that may affect the rights of children is desirable, this does not mean that the best interests of the child should be the primary consideration in cases where children are affected only marginally.

Zermatten highlights the fact that the Committee on the Rights of the Child has long taken a broad and firm view on these questions:

Ensuring that the best interests of the child are a primary consideration in all actions concerning children (art. 3 (1)), and that all the provisions of the Convention are respected in legislation and policy development and delivery at all levels of Government demands a continuous

process of child impact assessment (predicting the impact of any proposed law, policy or budgetary allocation which affects children and the enjoyment of their rights) and child impact evaluation (evaluating the actual impact of implementation).<sup>72</sup>

In the context of its consideration of the situation of young children, the Committee has established a principle that would apply to those of all ages from a collective standpoint:

*Best interests of young children as a group or constituency.* All law and policy development, administrative and judicial decision-making and service provision that affect children must take account of the best interests principle. This includes actions directly affecting children (e.g., related to health services, care systems, or schools), as well as actions that indirectly impact on young children (e.g., related to the environment, housing or transport).<sup>73</sup>

Taking a complementary angle that builds on the requirement for an impact assessment, the Committee has used its review of the situation of indigenous children to make another point that has wider application, setting out the link between collective rights and best interests explicitly:

The principle of the best interests of the child requires States to undertake active measures throughout their legislative, administrative and judicial systems that would systematically apply the principle by considering the implication of their decisions and actions on children’s rights and interests. In order to effectively guarantee the rights of indigenous children such measures would include training and awareness-raising among relevant professional categories of the importance of **considering collective cultural rights in conjunction with the determination of the best interests of the child.**<sup>74</sup>

<sup>72</sup> Committee on the Rights of the Child (2003). General Comment No. 5, General Measures of Implementation for the Convention on the Rights of the Child (CRC/GC/2003/5), para. 45.

<sup>73</sup> Committee on the Rights of the Child (2005). General Comment No. 7 on implementing child rights in early childhood (CRC/C/GC/7/Rev.1), para. 13(b).

<sup>74</sup> Committee on the Rights of the Child (2009a). General Comment No. 11, Indigenous children and their rights under the Convention (CRC/C/GC/11), para. 33 (our emphasis).

It is clear that all legislation, policy and measures relating to intercountry adoption – and indeed to the wider context in which it may take place, such as family support and strengthening alternative care provision – must be reviewed from the standpoint of compliance with the best interests of children. The implications of this are examined in depth in Chapter 4.

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### 2.5. A two-fold challenge

This chapter has demonstrated that the concept of best interests is almost unknown in international human rights law other than in the CRC, and in the very rare cases where it is mentioned in other treaties it refers solely to children. The same applies to private international law, where reference to best interests is limited, for the most part, to decisions on intercountry adoption. In addition, the notion of best interests is nowhere to be seen in either humanitarian law (the Geneva Conventions) or refugee law. As a result, there is no international jurisprudence or precedent on the interpretation of the concept in general or its implications in practice when it comes to human rights.

The reasons for the inclusion of the best interests of the child in the CRC date back to an era before the formal recognition of the human rights of children. But there has never been any global agreement on best interests criteria, on clear and exclusive responsibilities, or on what best interests might imply in a human rights context. Indeed, the concept of best interests continues to be invoked in attempts to side-line or negate agreed human rights, including those of children.

The best interests of the child remains a deliberately undefined concept. Yet it is a General Principle of the CRC – an integral part of children’s human rights. This presents a major challenge for implementation, particularly when the best interests principle is to be ‘the paramount consideration’ in decisions about intercountry adoption, and where those decisions may have to balance or prioritize a range of inalienable human rights. At the

same time, disregard for the best interests of the child has been cited as a major reason for the development of protective international standards governing the practice of intercountry adoption.

The best interests of the child remains a deliberately undefined concept. Yet it is a General Principle of the CRC.

There is a clear two-fold challenge: first, how to determine the best interests of the individual child who is, or may be, placed for intercountry adoption; second, how to assess the impact of national laws, policies and procedures related to intercountry adoption from the standpoint of children’s collective rights.



# 3

## The Changing Role and Purpose of Intercountry Adoption



### Key points

- ↘ Intercountry adoption is a relatively new phenomenon, emerging only in the aftermath of the Second World War as a 'humanitarian' response and expanding dramatically in the 1970s, with few international safeguards in place until the advent of the 1993 Hague Convention.
- ↘ It is intended as a protection measure when in-country care for a child who cannot remain with his or her family is not available, but its escalation has been so rapid and often uncontrolled that countries of origin have been hard pressed to ensure that the best interests of the children concerned are being upheld.
- ↘ As increasing numbers of countries of origin have become parties to the 1993 Hague Convention and have implemented its provisions designed to protect children's best interests and human rights, adoptions from these countries have invariably declined. This has led receiving countries to seek children for adoption from countries that are not bound by the standards set in that treaty.

Every society has its own traditional mechanisms to look after children who cannot be cared for by their parents – measures that often involve extended family or friends.<sup>75</sup> With the exception of most Islamic societies, local mechanisms the world over include some form of ‘de facto adoption’, an informal process that is sanctioned by society. Full and formal adoption as a protective measure for a child, however, is a relatively recent development in human history, dating back to the mid-nineteenth century at the earliest, while intercountry adoption emerged only in the aftermath of the Second World War.

Full and formal adoption as a protective measure for a child is a relatively recent development in human history.

### 3.1. Key phases in the development of intercountry adoption

Formal, legalized and full adoption – the kind that characterizes its intercountry form – involves cutting ties with a child’s original family and “complete or almost complete integration in the new family”.<sup>76</sup> It is a relatively recent construct, with its genesis in the United States, where a number of states enacted laws on adoption from the mid-nineteenth century.<sup>77</sup> It took decades to spread to Canada, Australasia and Europe, where in 1926 the United Kingdom became the first European country to legislate on this full form of adoption. Similar initiatives by other European nations followed over the next 50 years: France introduced its ‘*légitimation adoptive*’ in 1939, for example, while Ireland, the Netherlands and Sweden enacted laws on full adoption in the 1950s, Poland in 1964, and the former West Germany only in 1977.<sup>78</sup> There was, however, a certain stigma attached to adoption in Europe in the mid-twentieth century: it tended to be shrouded in secrecy, and indeed this remains the case today in many Central and Eastern European countries, as well

as in other parts of the world, such as the Republic of Korea.

#### 3.1.1. The development of intercountry adoption from the perspective of the best interests of the child

##### 3.1.1.1. *The first decades of intercountry adoption: a humanitarian response to war*

Intercountry adoption emerged in the aftermath of the Second World War as a humanitarian response – in the first instance, largely by families in the United States – to war orphans in a number of European countries and Japan. Its evolution over the past 60 years has been neither linear nor predictable, and its development, over time and from country to country, reflects a complex and changing interaction of factors. But, from the standpoint of the best interests of the child, some key events and trends are worth highlighting.

The initial trans-Atlantic movement of children for adoption was supplemented and then overtaken by cross-border adoptions within Europe itself. In the mid-1950s, the focus in the USA moved to children affected by the Korean War, and particularly to stigmatized ‘Amerasian’ children fathered by US troops. This development spawned the first specialist private agencies that aimed to place children with foreign families<sup>79</sup> – agencies that were to become major fixtures in intercountry adoption.

These agencies – and individuals who organized their own independent adoptions – arranged adoptions in what was essentially a normative and procedural void. Not surprisingly, legislation at that time did not envisage this sudden extension of adoptions across borders: in the United States, for example, regulation of international adoption was only achieved in 1961 through the Immigration and Nationality Act. Ad hoc procedures were put in place in the 1950s to ensure some measure of legality in the receiving country, but oversight of the process itself was patchy at best. In addition, the humanitarian nature of intercountry adoption was never questioned. As a result, it was seen by definition as a desirable outcome for the children concerned. Indeed,

<sup>75</sup> Van Loon, J.H.A. (1993). ‘International co-operation and protection of children with regard to intercountry adoption’, in *Collected Courses of the Hague Academy of International Law*, vol. 244. Leiden: Martinus Nijhoff Publishers, p. 207.

<sup>76</sup> Weinstein, E.A. (1968). ‘Adoption’, in *International Encyclopedia of the Social Sciences*. New York: Macmillan.

<sup>77</sup> Van Loon (1993), p. 213.

<sup>78</sup> Council of Europe (2011). ‘Adoption and children: A human rights perspective’. Strasbourg: Commissioner for Human Rights.

<sup>79</sup> Van Loon (1993), p. 229.

the paucity of data and more general information from that period reflects the lack of attention given to this new phenomenon.

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3.1.1.2. *The 1960s: first attempts to impose international standards*

International efforts to address the issues raised by intercountry adoption in the 1960s focused on harmonizing laws, determining jurisdiction and ensuring that all parties recognized the adoption decisions that were made – in other words, the stuff of private international law. At the international level, these efforts shaped the first Hague Convention on intercountry adoption in 1965.<sup>80</sup> This treaty stipulated that the authorities “shall not grant an adoption unless it will be in the interest of the child” (Art. 6). A similar requirement was made in a European Convention approved two years later for Member States of the Council of Europe (though also open, in theory, to other countries).<sup>81</sup>

In addition to these single references to the best interests of the child and a listing of basic procedures to be followed in the adoption process, the first Hague Convention of 1965 and the European Convention of 1967 reflected two significant developments in adoption practice that have, for different reasons, become vital factors in the best interests debate: the involvement of private bodies and the professionalization of the process.

When setting out the need to determine the situation of the child, his or her family and prospective adopters, Article 6 of the now-defunct 1965 Hague Convention stated that “this enquiry shall be carried out in co-operation with public or private organisations qualified in the field of inter-

country adoptions and the help of social workers having special training or having particular experience concerning the problems of adoption”.

The 1967 European Convention went into more detail:

- Article 9.3: “These enquiries shall be entrusted to a person or body recognised for that purpose by law or by a judicial or administrative body. They shall, as far as practicable, be made by social workers who are qualified in this field as a result of either their training or their experience.”
- Article 18: “The public authorities shall ensure the promotion and proper functioning of public or private agencies to which those who wish to adopt a child or to cause a child to be adopted may go for help and advice.”
- Article 19: “The social and legal aspects of adoption shall be included in the curriculum for the training of social workers.”

The 1967 European Convention alone recognized the potential influence of financial considerations in adoption arrangements, with Article 15 stipulating that:

Provision shall be made to prohibit any improper financial advantage arising from a child being given up for adoption.

However, neither of these treaties would be able to deal with the ways in which intercountry adoption expanded in the 1970s or the new problems this raised. Both were too restricted in scope and both suffered relatively poor ratification rates. Their limited impact made them obsolete within a few years, and as a result they ceased to be operative.

3.1.1.3. *The 1970s: growing ‘demand’ for a dwindling ‘supply’ of children*

By the start of the 1970s, the adoption picture had started to change radically, with a sharp decline in the numbers of

<sup>80</sup> Hague Conference on Private International Law (1965). Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption.

<sup>81</sup> Council of Europe (1967). European Convention on the Adoption of Children, (ETS-058), Art 8.1.

children in the industrialized countries in need of adoption. Van Loon summarizes the prevailing situation as follows:

As long as only the existence of children deprived of their families had a structural character, the problem of intercountry adoption could be phrased ... as: how to find a family for this child? The question became ambiguous when, as a result of declining fertility, birth control and changing attitudes, the impetus and motivation for intercountry adoption arising from the industrialised countries also acquired a structural character. At this point a structural 'supply' of children 'available' for adoption abroad in economically developing countries met with a structural 'demand' for such children in economically advanced countries. The language of economics made its appearance and intercountry adoption became a more complex and controversial social phenomenon.<sup>82</sup>

In other words, the original 'humanitarian' motives were being overtaken by a more general desire simply to adopt children from abroad. This would create pressures to secure children by means that might not respect their best interests in full.

Although the number of children adopted from Latin America (especially Colombia) began to grow in the 1970s, the focus was still largely on Asian countries of origin. These included Viet Nam, from where over 1,400 adoptions took place to the United States alone between 1970 and 1974. And it was Operation Baby Lift from Viet Nam in 1975 that sparked the first real debate on the ethics of how intercountry adoption was being organized – and, therefore, on the extent to which children's best interests were being respected.

According to the US Agency for International Development (USAID) at the time, a total of 2,547 Vietnamese children were airlifted out of what was then South Vietnam under the Baby Lift programme, with 80 per cent destined for adoption in the United States. USAID defended the evacuation in the following terms:

Prospective adopting U.S. parents were concerned that Vietnamese orphans already selected for adoption, who might be physically endangered by active hostilities, would not be able to leave Vietnam expeditiously if normal, lengthy Vietnamese exit procedures and U.S. immigration procedures were followed. ... The movement of the children was accelerated due to the growing crisis in Vietnam. But, with negligible exceptions, the children met the criteria for intercountry adoption and virtually all of them were in some stage of processing when the decision was taken to speed up the movement.<sup>83</sup>

Others were less convinced. As a report from the Public Broadcasting Service put it:

The hasty evacuation in the final days of the war led to a public debate over whether these actions had been in the best interest of the children and whether the children would have been better served by remaining in Vietnam. ... The greatest point of controversy ... had to do with the circumstances that led to the relinquishment of the "Baby Lift" children and whether these children were technically orphans who qualified for adoption. Lost or inaccurate records were the norm and, in several cases, birth parents or other relatives who later arrived in the U.S. demanded custody of children who had previously been adopted by American families.<sup>84</sup>

This debate crystallized the complexity and controversial nature of intercountry adoption at that time. And it was to return, from a different angle but with particular force, 15 years later, when the plight of Romania's institutionalized children was suddenly revealed to the world. By then, the decision had already been made – in 1987 – to draft a new Hague Convention, given the growing preoccupation with intercountry adoption. But negotiations on the text were yet to start.

### 3.1.1.4. *The 1990s: countries close their doors as the search for 'adoptable' children escalates*

There were many concerns when agencies and individuals flocked to Romania in

<sup>82</sup> Van Loon (1993), p. 230.

<sup>83</sup> See report on the 1975 'Operation Babylift', at: <http://darkwing.uoregon.edu/~adoption/archive/AIDOBRR.htm>

<sup>84</sup> Public Broadcasting Service (2000). 'Adoption History: Overview of International Adoption'. <http://www.pbs.org/pov/archive/firstpersonplural/historical/intadoptions.html>

early 1990 to adopt children, but two are of particular importance. First, the structures, procedures and laws in place at the time in Romania were totally inadequate to ensure respect for the best interests and rights of children adopted by foreigners – a weakness that was exacerbated many times over by the sudden, massive and insistent surge in applications that occurred. Second, it soon became clear that the children in institutions who might be seen as ‘adoptable’ accounted for only a very small proportion of the total: the overwhelming majority were not ‘orphans’ or abandoned, and were not babies – most were aged 7 or older and/or had special needs, including severe disability or trauma. Because of this, financially vulnerable families began to be approached directly with ‘offers’ to adopt their babies or healthy young children. Within the space of just one year, such arrangements were reported to account for at least half of all intercountry adoptions from Romania.<sup>85</sup>

From then on, throughout the 1990s a rapidly increasing number of countries in the Central and Eastern European region became countries of origin for intercountry adoption. This was, in part, a response to the year-long moratorium on intercountry adoption imposed by Romania in mid-1991, which led prospective adopters and their agencies to search for alternatives. While no other country had to confront a wave of applications on the scale of that seen in Romania, almost all countries in the region were similarly unprepared, legally and practically, to deal with the demand. As a result, and ironically, most of the countries concerned have since at some point imposed a moratorium on intercountry adoption in order to establish reforms and regain control of the situation.<sup>86</sup> The best interests implications of these moratoria have become yet another subject of debate (see section 3.4.1 below).

In the midst of these developments, the landmark Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (or 1993 Hague Convention) entered into force on 1 May 1995, but only in the initial three ratifying states. It would take several years more for

the number of states parties to reach a level at which the treaty would have a real impact and its provisions would become widely accepted as constituting the benchmark for good practice in intercountry adoption.

### Restrictions put in place by Hague Convention countries of origin have led to attempts to identify potential ‘substitute’ countries, in particular, outside the Hague framework.

#### 3.1.1.5. Stronger controls halt the growth of intercountry adoption, but the focus shifts

The first decade of the twenty-first century was characterized by four phenomena of special note:

- First, the constant growth in intercountry adoption worldwide that characterized the 1990s and the first years of the twenty-first century – peaking at well over 40,000 in 2004 – was reversed. By 2012, that number had been more than halved. This rapid fall – whether or not it continues – has raised questions about the real importance given to the best interests of, in particular, some of the children adopted abroad when numbers were steadily rising, given the subsequent drastic decline in the number of children deemed to require intercountry adoption.
- Second, as more countries have committed to the 1993 Hague Convention, they have introduced stricter procedures on the adoption of children abroad. In quantitative terms, the most significant developments relating to countries of origin have been the two-thirds fall in adoptions from China, due in part to its ratification of the Convention in 2006, and Guatemala’s confirmation of its ratification in 2008, with a moratorium on new applications. Among receiving countries, the

<sup>85</sup> Defence for Children International (1991). ‘Romania: Is the adoption jungle a thing of the past?’, *International Children’s Rights Monitor*, Vol 8, pp. 29-30.

<sup>86</sup> UNICEF (2009a). *UNICEF Guidance Note on Intercountry Adoption in the CEE/CIS Region*. Geneva: UNICEF Regional Office for Central and Eastern Europe and the Commonwealth of Independent States.

ratification in late 2007 by the United States, which has been the destination country for about half of all intercountry adoptions in the past, was particularly significant in its effects.

- Third, restrictions put in place by Hague Convention countries of origin have led to attempts to identify potential ‘substitute’ countries, in particular, outside the Hague framework. In many cases, this has implied sub-Saharan African nations whose children had previously constituted only a small proportion of all intercountry adoptions. Thus adoption of African children to the United States rose from just 1 per cent of the total in 1999 to 30 per cent in 2012; to Italy from 4 per cent to 16 per cent; and to France from 17 per cent to 45 per cent over the same period.<sup>87</sup> Disturbingly, not one of the ‘top five’ African countries whose children were adopted to France, Italy, Sweden and the United States in 2011 was a Hague country.<sup>88</sup> As was the case for Central and Eastern Europe in the 1990s, in such circumstances capacity to ensure that the best interests of the child (and other rights) are respected is likely to be limited.

- Fourth, a growing number of countries of origin are emphasizing their priority, or even sole reliance, on intercountry adoption to find families for children with special needs. This is in good part the result of efforts to demonstrate respect for the subsidiarity principle (or at least the philosophy behind it). In line with this, many people have been working to put in place suitable care arrangements in their own countries for an increasing number of children. Again, however, the best interests ramifications of this approach require examination, both because of fears that prospective adopters in receiving countries will agree to care for children with characteristics or requirements that, in practice, prove to be beyond their capacity, and because there are many children

with special needs in those very same countries for whom adoptive families cannot be found.

The combined and interrelated ramifications of these developments have created, within the space of no more than a decade, an ‘adoption landscape’ for which no one was prepared. As a result, there have been wild variations in the reactions to it and attempts to cope with it, both in substance and intent.

If the best interests of the child are to remain the central tenet of adoption, it is all the more important to ensure that they are determined in a clear and accepted manner, at the very least.

In this kind of climate, if the best interests of the child are to remain the central tenet of adoption, it is all the more important to ensure that they are determined in a clear and accepted manner, at the very least.

### 3.2. The viewpoint and main thrusts of international standards

The international standards in force today no longer view adoption as a ‘humanitarian’ act as such, but as one in a range of possible child protection measures that may be taken when it is deemed that, for whatever reason, the parents will never again be in a position to look after their child.

It is important to distinguish between adoption and other protective measures that involve what is known as ‘alternative care’. That distinction is sometimes made inadequately. The CRC itself contributes to the confusion by listing adoption under ‘alternative care’ in its Article 20 (see below).

Of course, both adoption and alternative care are components of the wider child protection system, but when a child is adopted he or she is in (new) parental care and, as a result, many of the safeguards that apply to alternative care settings – including

<sup>87</sup> Based on statistics published by the Central Authorities of the countries concerned.

<sup>88</sup> African Child Policy Forum (2012a), p. 10. The ‘top five’ countries were Ethiopia, DRC, Uganda, Nigeria and Ghana.

foster and residential care – do not apply to adoption, such as the formulation of a care plan and periodic reviews of the placement. Generally speaking, therefore, adoption is one possible outcome of alternative care rather than a component of that care. This is why the UN Guidelines for the Alternative Care of Children clearly state that adoption placements, once finalized, fall outside their scope.<sup>89</sup>

Similarly, it is important to highlight the way in which references to adoption are formulated in the CRC: no state is obliged to foresee the adoption of children. So, under CRC Article 20.2 and 20.3: “States Parties shall in accordance with their national laws ensure alternative care [that] could include, *inter alia*, foster placement, *kafala* of Islamic law, adoption.”

This double insistence on what is possible (“could include, *inter alia*”) rather than what is required, coupled with the condition that the measure should be in compliance with “national laws”, is supplemented by the restriction on the application of Article 21, which applies only to “States Parties that recognise and/or permit the system of adoption”.

In general, these formulations are seen as a response to the situation of states governed by Islamic law, which do not, as a rule, “recognise and/or permit” adoption (several such states nonetheless felt it necessary to go further, declaring on their signature or ratification of the CRC that they did not consider themselves bound by Article 21). In fact, the formulations also imply that any state may choose not to implement adoption, at any time and for any reason that is consistent with safeguarding children’s best interests and other rights.

This is particularly important in relation to the intercountry form of adoption. International standards reinforce the non-prescriptive nature of the measure. According to CRC Article 21(b), the states parties concerned “[r]ecognise that intercountry adoption may be considered as an alternative means of child’s care”.

Similarly, in the preamble to the 1993 Hague Convention, states recognize that “intercountry adoption may offer the advantage of a permanent family”. Use of the terms “may be” in the CRC (rather than, for example, “shall be”), and “may offer” in the Hague Convention (rather than “offers”), demonstrates deliberate restraint on the part of the drafters. It signals both that intercountry adoption is to be seen only as a potential response to certain children without parental care, and that compliance with these treaties does not depend on carrying out such adoptions, either as a receiving country or as a country of origin.

As a result, assessing compliance at both policy and individual level revolves around whether or not the best interests of the child are shown to be “the paramount consideration” (CRC Art. 21) and whether “intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law” (1993 Hague Convention Art. 1(a)).

The following sections review the implications of the predominant role of the best interests of the child in relation to intercountry adoption from four key standpoints:

- the subsidiarity of intercountry adoption to suitable in-country care (section 3.3)
- prohibition or severe limitation of intercountry adoption (section 3.4)
- intercountry adoption procedures with non-Hague countries (section 3.5)
- the best interests of the child in emergency situations (section 3.7).

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### 3.3. The subsidiarity of intercountry adoption to suitable in-country care

International standards require that intercountry adoption can only be considered when the parents or family are unable to care for the child and where there are no appropriate in-country care

<sup>89</sup> See UN General Assembly (2010). Guidelines for the Alternative Care of Children: resolution, adopted by the General Assembly, 24 February 2010, A/RES/64/142, in particular para. 30(b).

options available. In the words of the CRC (Article 21(b)), this translates as "...if the child cannot be placed in a foster or adoptive family or cannot in any suitable manner be cared for in the child's country of origin". Similarly, according to the 1993 Hague Convention (Art. 4(b)), the competent authorities of the state of origin may only decide that intercountry adoption corresponds to a child's best interests "...after possibilities for placement of the child within the State of origin have been given due consideration".

This subsidiarity rule has provoked debate about its implications for the best interests of the child. Some middle ground in that debate is expressed in the Hague's Guide to Good Practice:

The principle of subsidiarity should be interpreted in the light of the principle of the best interests of the child. For example:

- It is true that maintaining a child in his or her family of origin is important, but it is not more important than protecting a child from harm or abuse.
- Permanent care by an extended family member may be preferable, but not if the carers are wrongly motivated, unsuitable, or unable to meet the needs (including the medical needs) of the particular child.
- National adoption or other permanent family care is generally preferable, but if there is a lack of suitable national adoptive families or carers, it is, as a general rule, not preferable to keep children waiting in institutions when the possibility exists of a suitable permanent family placement abroad. [Institutionalization as an option for permanent care, while appropriate in special circumstances, is not as a general rule in the best interests of the child.]
- Finding a home for a child in the country of origin is a positive step, but a temporary home in the country of origin in most cases is not preferable to a permanent home elsewhere.<sup>90</sup>

This raises two key issues: the potential role of informal arrangements to care for children, and what determines whether an in-country care option is 'suitable'.

### 3.3.1. The role of informal and traditional care mechanisms

Some maintain that informal care arrangements cannot, by their very nature, guarantee permanency for a child, and that the best interests of the child cannot therefore be served by positioning intercountry adoption as subsidiary to such arrangements. In the context of this study, this approach has to be examined in the light of international standards, particularly on the roles of informal caregivers within and beyond the family in looking after children who are without parental care.

There is little more than implicit acknowledgement in the CRC of the vital role played by informal forms of alternative care and traditional coping mechanisms for children who cannot live with their parents. The 1988 Technical Review of the first full draft of that treaty noted:

The draft Convention as a whole may not adequately recognize the role of the extended family and community when parental care is not available. Because cultures, traditions and customs in many countries and areas provide for such a role, the Working Group [drafting the Convention] may wish to broaden Article [5] accordingly.<sup>91</sup>

As a result, the focus of CRC Article 5 was broadened to require respect for the "responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom". However, the article itself is limited in scope: the responsibilities, rights and duties in question relate only to giving "appropriate direction and guidance" to children in exercising their rights. It makes no reference to situations where children are without parental care.

<sup>90</sup> Hague Conference on International Private Law (2008). *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice, Guide No. 1*. Bristol: Family Law, Chapter 2.1.1., para. 51.

<sup>91</sup> UN Secretariat (1989). 'Additional Comments and Clarifications', UN Doc. E/CN.4/1989/WG.1/CRP.1/Add.1, para. 13.



Some commentators claim that the spirit of this provision, together with its position near the beginning of the treaty, means that it should be seen as a baseline, or ‘umbrella’, for considering the role of the extended family and community throughout the CRC. Others argue that there was no indication of such an aim during the drafting of the CRC, and that there would be inconsistencies in trying to apply this wider vision of that role systematically to the Convention as a whole.<sup>92</sup>

Whether or not the inclusion of “extended family or community” in CRC Article 5 resolved the issue raised in the 1988 Technical Review, there is general agreement that the interpretation of the term ‘family’ must be wide and culturally sensitive. This is particularly important when reviewing the implications of CRC Article 20.3 for decisions on the need for formal alternative care measures and adoption. Here, the question at hand is not the restricted concept of ‘parental care’, but, as spelt out in CRC Article 20.1, the situation of a child “deprived of his or her family environment or in whose own best interests cannot be allowed to remain in that environment”. Both the CRC Committee and the Human Rights Committee have underlined the fact that there can be no one globally applicable definition: ‘family’ may include, for example, those of a nuclear or extended nature, unmarried or re-constructed families, and those with a single parent.<sup>93</sup> Alternative formal care provision is, therefore, to be envisaged only when that broad “family environment” is not available or is deemed unsuitable in the light of the child’s best interests.

This wide-ranging view is reflected in other CRC provisions relevant to child care. The child’s right to benefit from social security, for example, depends in part on the resources and circumstances of the “persons having responsibility for the maintenance of the child” (CRC Art. 26), and the primary responsibility for ensuring that the child has an adequate standard of living falls to “parent(s) or others responsible for the child” (CRC Art. 27). But neither case mentions ‘legal’ responsibility, so the terms used could include informal carers, as well as those who are not related to the child.

Concerns about the lack of recognition given to informal care arrangements were addressed more explicitly during the drafting of the Guidelines for the Alternative Care of Children. As a result, it contains specific provisions that “apply to informal care settings, having due regard for both the important role played by the extended family and community and the obligations of States [under the CRC] for all children not in the care of their parents or legal and customary caregivers”.<sup>94</sup> The Guidelines include the need to “respect and promote” care arrangements based on “cultural and religious practices” (para. 75) and to take adequate measures to support the optimal provision of informal care (para. 76).

Behind those concerns was the preoccupation that positive but informal arrangements by extended families and communities would be disrupted if carers found it difficult, in material terms, to provide for children and/or on the grounds that only a formal arrangement can ensure that the best interests of the child will be upheld in the long term. This ‘guarantee of permanency’ argument is often used by those who advocate greater recourse to intercountry adoption. On that basis, some contend that intercountry adoption should be subsidiary only to formal domestic adoption, and not to informal arrangements or even formal foster-care.<sup>95</sup> However, as noted by Hodgkin and Newell, “[i]t is clear that children’s psychological need for permanency and individual attachments can be met without the formality of adoption”.<sup>96</sup>

One state, Canada, recognized the need to pre-empt that approach formally when ratifying the CRC, at least in the adoption of its own children. A reservation to CRC Article 21 states:

With a view to ensuring full respect for the purposes and intent of article 20 (3) and article 30 of the Convention, the Government of Canada reserves the right not to apply the provisions of article 21 to the extent that they may be inconsistent with customary forms of care among aboriginal peoples in Canada.<sup>97</sup>

<sup>92</sup> See, for example, discussion on this point in Cantwell and Holzscheiter (2008). ‘Article 20: Children deprived of their family environment’, in Alen, A., J. Vande Lanotte, E. Verhellen, F. Ang, E. Berghmans and M. Verheyde, eds. *A Commentary on the United Nations Convention on the Rights of the Child*. Leiden: Martinus Nijhoff Publishers, pp. 33–35.

<sup>93</sup> Committee on the Rights of the Child (2006). Day of General Discussion, UN Doc.CRC/C/153, para. 6; UN Human Rights Committee (1990). General Comment No. 19, para. 28.

<sup>94</sup> UN General Assembly, Human Rights Council (2010), para. 27.

<sup>95</sup> See, for example, Barcholet, E. (2007). ‘International adoption: Thoughts on the human rights issues’, *Buffalo Human Rights Law Review*, 13: 151–203, pp. 154–55.

<sup>96</sup> Hodgkin, R. and P. Newell (2007). *Implementation Handbook for the Convention on the Rights of the Child*. New York: United Nations Children’s Fund, p. 294.

<sup>97</sup> [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en)

This is not always the approach that receiving countries take to intercountry adoption. Despite the existence of, in particular, such informal “customary forms of care” in many actual or potential countries of origin, there seems to be a willingness in some quarters to overlook these and enable adoption abroad, rather than supporting such informal mechanisms in the best interests of the child.

Bearing in mind the overall thrust of the relevant international standards, it is reasonable to question the validity of such a dismissive approach towards informal care arrangements. Reliance on such arrangements “to the extent that they can be shown to be consistent with the rights and best interests of the children” is indisputably the path to be followed.<sup>98</sup>

### 3.3.2. Determining what is a ‘suitable’ care placement

In the absence of appropriate informal solutions, children may need formal alternative care. In that case, the suitability of each placement option for the child in question has to be determined and, according to international standards, the option chosen must correspond to the child’s best interests. If it is not regarded as ‘suitable’, adoption abroad may be envisaged.

There is widespread agreement that, to be deemed suitable, a formal care setting must meet two criteria: first, it must conform to general human rights obligations on the welfare, development and protection of those children for whom it takes responsibility; second, the form of care it offers must correspond to the specific characteristics, needs and circumstances of each individual child.<sup>99</sup>

The Guidelines for the Alternative Care of Children stress that all forms of care, whether family-based or residential, should be viewed as potentially suitable. This approach underlies the requirement to have a range of options in place, the components of which can be evaluated according to their capacity to respond effectively to the situation of the individual child. Here, the Guidelines echo the CRC’s implicit call to look first for a viable family-

based solution – a call made explicit by the CRC Committee in its recommendations to states parties – and they recognize the role to be played by residential care when it is “specifically appropriate, necessary and constructive for the individual child concerned and in his/her best interests”.<sup>100</sup> In other words, it is clear that ‘suitable care’ can be provided in a residential setting if the family-based alternatives on offer could not meet a child’s needs, particularly those of a psychosocial nature: some children need specialized treatment, for example, and others have had such a negative experience of family life that – for some time at least – they cannot cope with family-based living.

Much of the debate around suitability has been about residential care placements. This issue has been clouded by the reference in CRC Article 20 to “suitable institutions”, rather than suitable residential facilities, as the only explicitly mentioned alternative to family-based alternative care. This CRC terminology is, for the most part, a reflection of the influence of the Soviet Union and allied states during the drafting process in the 1980s, and there are still many examples of the amalgam between institutional and residential care.

The Guidelines for the Alternative Care of Children do help to clarify the distinction between the two, however. The single reference to “institutions” equates them with “large residential care facilities” (para. 23) which are to be subjected to a strategy of “progressive elimination”. The thinking here is that, while suitable care can be provided in certain residential facilities, it is unlikely to be assured in ‘institutions’.

Determining the suitability of a care arrangement also hinges on respect for the child’s right to a periodic review of his/her placement for treatment or care, to determine whether or not it is still needed and is still the most appropriate form of care. Formal alternative care should be designed to ensure what the Guidelines term “permanency”,<sup>101</sup> wherever possible through reintegration with the family or, when necessary, in a substitute family-based setting. The child’s need for stability, security and support, set out implicitly in the “permanency” objective, can be foreseen

<sup>98</sup> UN General Assembly, Human Rights Council (2010), para. 75.

<sup>99</sup> See Cantwell, N. et al. (2012). *Moving Forward: Implementing the ‘Guidelines for the Alternative Care of Children’*. Glasgow: Centre for Excellence for Looked After Children in Scotland, pp. 22–23 and 66–74.

<sup>100</sup> UN General Assembly, Human Rights Council (2010), para. 21.

<sup>101</sup> *ibid.* paras. 60–63.

in various ways for individual situations. Beyond a ‘simple’ choice between return to parental care or adoption, there are other responses that can meet those requirements, such as kinship care, long-term foster care or – especially if the child particularly wants it – a residential facility such as a small group home.

Taking these and other factors – including the “desirability of continuity in a child’s upbringing” (CRC Art. 20.3) – into account, the suitability of any in-country care arrangement depends on a professional assessment in each case, based on established and wide-ranging criteria. Without that, it is difficult to see how respect for the subsidiarity principle can be achieved before an intercountry adoption goes ahead in the best interests of the child.

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### 3.4. Prohibition or severe limitation of intercountry adoption

As we have seen (section 2.2), there is no obligation on a state party to the CRC to carry out any adoptions, domestic or intercountry. It is the state concerned that, in the first instance at least, determines whether or not in-country care for the child can be provided in a suitable manner, and whether or not adoption abroad could indeed meet the child’s best interests as a general rule or in individual cases.

Similarly, contracting states to the 1993 Hague Convention are not obliged to carry out intercountry adoptions, but if and when they choose to do so any such adoption (between contracting states, at least) must be carried out in line with the Convention.<sup>102</sup>

Indeed, many states parties to the CRC (often also Hague contracting states) prohibit or severely restrict the intercountry adoption of their children, while recognizing and permitting domestic adoptions including those by foreigners who are habitually resident in the child’s country of origin.

Typically, it is the countries known as ‘countries of origin’ that are subjected to

scrutiny when they impose severe restrictions on the adoption of their children abroad.

This obscures the fact that many receiving countries take exactly the same line – a line that is tantamount to prohibiting intercountry adoption. While exceptions can usually be made in the case of relative (intra-familial) adoptions, Canada, Denmark, Italy, Malta, the Netherlands, Spain and Sweden are among those countries that require foreign adopters to be ‘permanent’ or ‘legal’ residents, and Switzerland requires them to be ‘habitually resident’ in the country. Greece has similar restrictions, save in the case of children with health problems who are living in institutions. To adopt an Australian child, at least one of the adopters must be Australian or a permanent resident; Iceland requires them to be residents or to have “special connections” with the country, while Japan demands that they be resident throughout the adoption process, which can take up to 18 months.<sup>103</sup>

These stringent restrictions rarely provoke comment. It is apparently assumed that in devising their policies those countries are justified in deciding that, as a general principle, the best interests of their children will not be served by non-relative adoption abroad. The CRC Committee, for example, has never commented on the validity of restrictive approaches by receiving countries from a rights or best interests angle, even when there are many legally adoptable children who are living in permanent alternative care settings and who will struggle to find a domestic adoptive family.<sup>104</sup>

This assumption, however, is rarely applied when those considered to be ‘countries of origin’ impose similar restrictions in the long term or declare a moratorium on intercountry adoption. When evaluating the importance given to best interests as ‘the paramount consideration’ to be applied to intercountry adoption, it is highly instructive to examine how the CRC Committee has reacted to the limitations established by countries of origin.

The case of **Romania** is illuminating. In 2000, Romania determined that it could

<sup>102</sup> See, for example, Hague Conference on Private International Law (2008), Chapters 8.2.1., 8.2.2. and 8.2.3.

<sup>103</sup> All information from the US Department of State website: <http://adoption.state.gov/>

<sup>104</sup> According to the Adoption Council of Canada, for example, there are approximately 30,000 children in the country who are “legally free or eligible” for adoption. See <http://www.adoption.ca/myths-and-realities>

not safeguard the rights of its children who were adopted abroad, and that adoption could not, therefore, be seen as being in the best interests of the children concerned. Consequently, Romania suspended all intercountry adoptions and banned the practice by law in 2005, with the exception of adoption by close relatives, particularly grandparents.<sup>105</sup>

Having reviewed the state party's subsequent report in 2009, the CRC Committee noted in its Concluding Observations that it considered that the prevailing restrictions on intercountry adoption fell short of the requirements of CRC Article 21:

53. The Committee notes that intercountry adoptions have been limited to cases where a family relationship exists between the child and prospective parents...

55. The Committee recommends that the State party, taking into account the new adoption laws and guarantees of legal procedures for inter-country adoption in conformity with the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, withdraw the existing moratorium [*sic*] as a barrier to the full implementation of article 21 of the Convention.<sup>106</sup>

This was the very first time that the CRC Committee had ever equated the prohibition or limitation of intercountry adoption with the violation of – or lack of full compliance with – the CRC. It is also, so far, the only time the Committee has taken such a stance.

One year later, in 2010, the Committee issued Concluding Observations on three countries with highly restrictive laws on intercountry adoption – Argentina, Paraguay and Tajikistan – that are worth reviewing.

In **Argentina**, applicants to adopt a child must be Argentine nationals or have been permanent residents of the country for at least five years immediately before their application. This means that there are no intercountry adoptions from Argentina,

and it explains why the country is not a party to the Hague Convention. The only comment by the Committee, however, concerned Argentina's reservation on this issue when ratifying the CRC:

The Argentine Republic enters a reservation to subparagraphs (b), (c), (d) and (e) of article 21 of the Convention on the Rights of the Child and declares that those sub-paragraphs shall not apply in areas within its jurisdiction because, in its view, before they can be applied a strict mechanism must exist for the legal protection of children in matters of intercountry adoption, in order to prevent trafficking in and the sale of children.<sup>107</sup>

Commenting on this reservation and the reference to it in Argentina's state party report, the Committee,

...while appreciating that the State party wishes to adopt "a rigorous arrangement ... for the legal protection of children in order to prevent the phenomenon of the sale of children and child trafficking"<sup>108</sup> remains concerned that the system has not yet been fully addressed.<sup>109</sup>

In the light of the long waiting lists for adoptions, the Committee urges the State party to establish a strong legal protection system against sale and trafficking of children in line with the Optional Protocol on the sale of children, child prostitution and child pornography in order to, inter alia, establish a secure system of adoption that **respects the best interests of the child** and with a view to eventually withdrawing its reservation.<sup>110</sup>

In other words, the Committee agreed that the blanket ban on intercountry adoption was justified since the system in place could not guarantee that the best interests of the children concerned would be upheld.

In **Paraguay**, the current Paraguayan law states that prospective adoptive parents of Paraguayan children must reside in Paraguay, and intercountry adoption is,

<sup>105</sup> Romania later enacted a new law on adoption that came into effect on 7 April 2012, extending the categories of potential adopters to include relatives of the fourth degree of kinship, the spouse of the child's natural parent and, significantly, Romanian citizens who are habitually resident abroad.

<sup>106</sup> Committee on the Rights of the Child (2009). Concluding Observations of the Committee on the Rights of the Child: Romania' (CRC/C/ROM/CO/4).

<sup>107</sup> See UN Treaty Collection, Declarations and Reservations: [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en)

<sup>108</sup> Committee on the Rights of the Child (2009c). 'Concluding Observations of the Committee on the Rights of the Child: Argentina' (CRC/C/ARG/3-4), para. 38.

<sup>109</sup> Committee on the Rights of the Child (2010a). 'Concluding Observations of the Committee on the Rights of the Child: Argentina' (CRC/C/ARG/CO/3-4), para 9.

<sup>110</sup> *ibid.*, para. 10 (our emphasis).

therefore, prohibited. In this case, the Committee actually expressed support for the restrictive approach:

The Committee welcomes Act No. 1169, adopted by the State party in 1997, and the various initiatives that it has undertaken regarding adoption processes, with the effect of restricting international adoption in response to widespread trafficking and sale of children.<sup>111</sup>

Here, as in the case of Argentina, the Committee appears to agree that the blanket ban is warranted. This stance also corresponds with that taken earlier, in 2004, by the UN Human Rights Council's Special Rapporteur on the sale of children, child prostitution and child pornography, who noted in relation to Paraguay: "Between 1990 and 1995, approximately 3,000 babies left the country as a result of inter-country adoptions that were riddled with irregularities."

He endorsed the enactment of legislation suspending intercountry adoptions, thereby "putting an end to trafficking in babies for intercountry adoptions".<sup>112</sup>

In **Tajikistan**, a 2006 amendment to the Family Code prohibits the adoption of Tajik children by non-Tajik citizens, although couples where only one spouse is a Tajik citizen may still be allowed to adopt. Here, the CRC Committee's response is somewhat unclear. First it expresses support for this stance:

The Committee welcomes the initiatives undertaken by the State party regarding adoption, such as restrictions to intercountry adoptions in response to the lack of sufficient monitoring of such adoptions. The Committee also welcomes the State party's commitment indicated during the dialogue to amend its legislation on adoption to ensure that it includes the **principle of the best interests of the child**.<sup>113</sup>

The Committee goes on, however, to recommend that Tajikistan:

(a) Accede to the Hague Convention of 1993 related to the protection of children and cooperation on intercountry adoptions.

(b) Introduce a new legislation on adoption in compliance with article 21 of the Convention and the procedures established under the Hague Convention (1993).

(c) Establish screening and monitoring mechanisms to determine the suitability of prospective adoptive parents and **ensure the best interests of the child to be adopted**.<sup>114</sup>

There is no indication what "compliance" might require, unless, by implication, it means opening up intercountry adoption, even though the obligations under Article 21 apply only to countries that "recognise and/or permit" that measure.

It will be interesting to see how the Committee reacts to similar prohibitions and restrictions in the future. At the time of writing, the countries concerned will include Mali, a state party to the 1993 Hague Convention. A circular dated 5 December 2012 issued by its Ministry of Justice invites magistrates to apply Article 540 of the new Personal and Family Code, whereby intercountry adoption is permissible only if the adopters are Malian citizens.<sup>115</sup> If the current tendency of greater restrictions being imposed by countries of origin continues, the importance of measuring such initiatives against the best interests of the child will be thrown into even sharper relief.

### 3.4.1. Moratoria

A suspension or moratorium on intercountry adoption is designed as a temporary measure to respond to an actual or potential risk of a general and severe violation of the rights of children who enter the process. Moratoria may be declared by countries of origin or by receiving countries, in varying contexts and with different scope and effects. The aim is to use the suspension period to secure conditions under which adoptions can resume, with the necessary safeguards in place to protect children's rights in line with their best interests.

<sup>111</sup> Committee on the Rights of the Child (2010b). 'Concluding Observations of the Committee on the Rights of the Child: Paraguay' (CRC/C/PRY/CO/3), para. 44.

<sup>112</sup> United Nations Economic and Social Council (2004). 'Report submitted by the Special Rapporteur on the sale of children, child prostitution and child pornography' (E/CN.4/2005/78/Add.1). New York: United Nations, paras. 44–45. Also see para. 46.

<sup>113</sup> Committee on the Rights of the Child (2010c). 'Concluding Observations of the Committee on the Rights of the Child: Tajikistan' (CRC/C/TJK/CO/2), para. 46 (our emphasis).

<sup>114</sup> *ibid.*, para. 47 (our emphasis).

<sup>115</sup> <http://www.diplomatie.gouv.fr/fr/adopter-a-l-etranger/comment-adopter-a-l-etranger/les-fiches-pays-de-l-adoption/fiches-pays-adoption/article/adopter-au-mali>

Moratoria are not unusual. Most of the 22 countries in Central and Eastern Europe and the Commonwealth of Independent States (CEE/CIS) have invoked the measure at least once since the early 1990s,<sup>116</sup> as have many other countries of origin, particularly in Africa and Asia. At the same time, the justification for and the aims of moratoria are contested in certain quarters – particularly in receiving countries – as running counter to the rights and best interests of those children who are, as a result, deprived of the opportunity of adoption abroad. In a 2010 statement, for example, the US Joint Council on International Children’s Services (JCICS) stated:

The history of suspensions clearly demonstrates that an ethical and fully functional intercountry adoption process is not the true goal of those calling for suspension. Of eight countries where the chosen route of reform included the suspension of intercountry adoption, not one country has effectively reconstituted intercountry adoption as an option for children in need. Suspension without a goal of achieving a full spectrum of permanency services, including intercountry adoption is **not in the best interest of children** and only replaces one abuse with abuse of another form.<sup>117</sup>

The eight countries cited by JCICS as having imposed moratoria were Romania (June 2001), Cambodia (December 2001), Georgia (August 2003), Azerbaijan (May 2004), Belarus (October 2004), Guatemala (December 2007), Viet Nam (September 2008) and Kyrgyzstan (September 2008), all of which “continue[d] to this day” (i.e. February 2010). All of these countries were, or have since become, parties to the 1993 Hague Convention.

The nature and outcomes of these moratoria were very different. Romania’s initial decision to suspend intercountry adoptions was transformed into a virtually outright prohibition in 2005, while the 2008 suspension of adoptions from Viet Nam was at the initiative of three receiving countries (Ireland,

Sweden and the United States) and applied only to them: all three indicated their wish to resume once the necessary conditions were in place. Furthermore, the JCICS list of countries was selective: many others suspended intercountry adoptions in the 2000s but later reinstated the measure, including Moldova, Ukraine and Sierra Leone.

The JCICS stance does, however, highlight important issues that need to be addressed if the best interests of the child are to be ensured through moratoria. For example, they are bound to affect children for whom intercountry adoption could be a valid response; but if the system in place cannot safeguard their rights and best interests, the risk involved in continuing adoptions under such a system is too high. The time it takes – often years – to establish a system capable of safeguarding children can reflect the depth and extent of reform that is needed, demonstrating just how unacceptable the framework for intercountry adoption has been. This is certainly the case for countries such as Cambodia, Guatemala and Nepal: even after years of effort, including technical assistance, few receiving countries felt that conditions were good enough to lift the moratoria.

That said, it is also clear that a moratorium to protect the best interests of children must only be imposed with good cause and in a manner that takes full account of the situation of children already going through the intercountry adoption process (see 3.4.1.3 below).

### 3.4.1.1. *Why do countries of origin impose moratoria?*

Moratoria declared by countries of origin are usually general in nature (affecting adoptions to all receiving countries) and may be motivated by a number of factors:

- *Evidence that the adoption system and procedures in place have failed to prevent serious and widespread violations of children’s rights.* This may be on the basis of the country of origin’s spontaneous concerns or at the suggestion of – and sometimes under pressure from – international bodies

<sup>116</sup> UNICEF (2009a), p. 8.

<sup>117</sup> Joint Council on International Children’s Services (2010). ‘A Statement on the True Character of Reform Efforts’ (our emphasis).

and/or receiving countries concerned about systemic problems. This is why, for example, Sierra Leone’s Ministry of Social Welfare, Gender and Children’s Affairs imposed a suspension on intercountry adoptions on 21 May 2009 – a suspension that was lifted on 13 April 2012 after more effective measures were put in place.

- *Concerns that systems may lack the resources to cope with the level of intercountry adoption while protecting the rights of the children involved.* There have been many examples of this since the ‘free-for-all’ that hit Romania in 1991, and Ghana is one of the countries that reacted to high demand in this way more recently (in 2013).

- *The need for thorough legislative reform and establishment of procedures and structures with a view to becoming a state party to the 1993 Hague Convention or to implementing that treaty.* Carrying out such fundamental changes while continuing to process new applications compromises the efficacy and speed of the reform process. Rwanda, for example, applied a moratorium in August 2010, so that it could put in place the necessary infrastructure to protect the best interests of its children and combat their potential abduction, sale and trafficking, enabling it to accede to the Hague Convention in 2012.<sup>118</sup>

- *Fears that proven malpractice elsewhere may compromise adoptions from the country.* One example was the moratorium imposed by Congo-Brazzaville in 2007 and 2008 to avoid problems like the *Arche de Noé* episode in neighbouring Chad, when an illegal attempt was made to remove 103 children for adoption in France.

- *Fears of malpractice in the wake of disaster or emergency situations.* Examples include the moratorium imposed by Sri Lanka following the December 2004 tsunami (see also section 3.7 below).

- *Temporary refusal to accept new applications from prospective adopters*

*because of a significant backlog and the relatively few children in need of intercountry adoption.* In some cases, this may apply only to applications to adopt children in particular age-groups. For example, on 1 May 2009, the Central Authority of the Philippines, the Inter-Country Adoption Board (ICAB), announced a moratorium on accepting new applications from those wishing to adopt a child under the age of 25 months with or without medical or developmental concerns. It stated that this was “due to the large number of unmatched approved adoption applications for prospective adoptive parents wanting to adopt children” in this age group and the relatively small number of such young children in need of inter-country adoption.<sup>119</sup>

The ICAB indicated that it would lift the moratorium once it had processed at least 50 per cent of its current cases – and it did so, subject to a quota system, in September 2012. In many such instances, exceptions are made for one or more categories of hard-to-place children (those with a disability or serious illness, sibling groups and/or older children).

Suspensions by countries of origin sometimes target specific receiving countries. This has been the case for Ukraine, for example, which in September 2005 halted – but later reinstated – adoption procedures for Canada, France, Germany, Italy, Spain and the United States on the grounds that many adoptive parents there had failed to comply with post-adoption reporting requirements.<sup>120</sup>

#### 3.4.1.2. *Why do receiving countries impose moratoria?*

In stark contrast, moratoria declared by receiving countries always target individual countries of origin whose intercountry adoption practices are deemed to fall below acceptable standards for safeguarding the child’s rights and best interests. Justifying its suspension of adoptions from Ethiopia in June 2012, Australia noted that “the changing and complex Ethiopian adoption environment meant that the Australian Government could no longer be confident

<sup>118</sup> Hague Convention on Private International Law (2012a). ‘Francophone workshop on The Hague Convention of 29 May 1993 on protection of children and co-operation in respect of intercountry adoption: Conclusions and recommendations’. Dakar.

<sup>119</sup> See: <http://www.psbj.org/document.doc?id=399> and <http://www.icab.gov.ph/>

<sup>120</sup> Organization for Security and Cooperation in Europe (2006). ‘Assessment of the adoption system in Ukraine’. OSCE: Kyiv, p. 96.

that the program would continue to operate in a way that protected the best interests of Ethiopian children.”<sup>121</sup> The government pointed to “ongoing challenges in identifying orphanages in which Australia could have trust and confidence” and the “growing numbers of non-government adoption agencies operating in Ethiopia [leading] to increased competition for referral of children to intercountry adoption programs”, which “is not always conducive to ethical adoption practices”.<sup>122</sup>

Such decisions are generally made unilaterally, rather than as a concerted move, although they may snowball more or less quickly. The United States, for example, was the first country (in 2001) to prohibit adoptions from Cambodia, and it was followed over the next four or five years by most receiving countries – the notable exception being Italy, which has maintained its programme. In contrast, the European receiving countries were the first to ban adoptions from Guatemala during that same period, while the United States was practically the only country processing adoptions from Guatemala in the years up to the 2008 moratorium. In the case of Viet Nam, three countries (Ireland, Sweden and the United States) decided that conditions did not enable them to renew their agreements with the authorities in 2008–2009, but other countries to which Vietnamese children were being adopted (notably Denmark, France and Italy) decided that such a move was unnecessary.

A rare example of coordinated action to date is adoption from Nepal. In 2010, all of the 13 main receiving countries suspended the adoption of any children declared as ‘abandoned’. This had been the officially recorded status of the vast majority of intercountry adoptees from Nepal, but it was clear that it did not reflect the reality in many cases.

The best interests implications of such disparate policies are considerable. The biggest and most obvious question revolves around the fact that, if the best interests of the child are to be the paramount consideration in adoptions, why do the competent authorities of receiving countries have such divergent

views on whether or not those best interests are being safeguarded adequately at any given point in time?

### 3.4.1.3. *Preserving the best interests of children through a moratorium*

Moratoria declared by receiving countries invariably take the form of official statements that no more applications will be accepted in relation to the country of origin in question, while allowing for the completion of cases already under way (‘transition’ cases that have already reached a specified stage in the process). These moratoria are often combined with an offer to provide technical assistance, so that the country of origin can meet the standards required (and, where appropriate, accede to the Hague Convention), allowing intercountry adoptions to resume.

Experience shows that countries of origin are more likely than receiving countries to declare an immediate or almost immediate suspension. The aim is, at least in part, to pre-empt a flood of applications before a moratorium comes into force.

As noted above, one justification for suspending adoptions lies in the need to create the most conducive context for the successful preparation and establishment of fundamental reforms. In most cases, the spur for reform is the evidence of serious and widespread systemic problems that constitute or result in procedures or activities that are not in keeping with international standards – and therefore violate the best interests and rights of the child.

The key word here is ‘systemic’. In other words, the problems and actions to be addressed by a moratorium are not those attributable to individuals or agencies acting in isolation that infringe the law or abuse what is otherwise a valid system. Clearly, such cases are to be dealt with by law enforcement and judicial bodies. Systemic problems involve practices that do not comply with international standards but are nonetheless required or tolerated, or that are simply not addressed adequately, if at all, by the legislation, system and/or procedures in place. Consequently,

<sup>121</sup> Australian Government, Attorney-General’s Department (2012). ‘Closure of the Ethiopia–Australia Intercountry Adoption Program’, 28 June.

<sup>122</sup> *ibid.*



they are 'accepted' and their incidence is generalized. Examples include:

- lack of effective procedures to verify the alleged 'abandonment' of a child
- lack of guarantees to ensure that consent for adoption is fully informed, freely given and involves no recompense
- a legal requirement for every adoption agency to provide 'humanitarian' financial contributions, often based on the number of adoptions carried out, to secure authorization to operate (a clear incentive for the country of origin to maximize the number of children made available)
- regulations that require or allow adoption agencies to identify specific residential facilities ('orphanages') with which they will 'cooperate' directly (which can create an unwarranted channel for intercountry adoption)
- little or no oversight of residential facilities set up and/or financed by agencies with an interest in intercountry adoption
- tolerance of 'independent' or 'non-agency' adoptions (by some non-Hague signatory countries of origin, as well as certain receiving countries in their relations with non-Hague signatory states)
- lack of professional procedures to match children with prospective parents
- no provision to authorize or monitor individual 'facilitators' working with agencies or prospective adopters in the country of origin.

Such systemic failures, which seriously jeopardize the protection of children's rights and best interests, have underpinned most major suspensions in recent years, including those put in place in Cambodia, Guatemala, Liberia, Nepal and Viet Nam.

If, on balance, the suspension of adoptions is deemed necessary to prevent rights violations, it must be planned and carried out in a manner that respects the best

interests of the children who are affected – actually and potentially.

**'Transition' cases have been left in an administrative and legal limbo that creates uncertainty and anxiety in the children concerned.**

There have, to date, been many instances where lack of clarity and expediency in following through the initial decision has jeopardized those best interests severely. In particular, there has often been a failure to foresee from the start the criteria to determine which pending adoption cases should proceed and how this should be done. As a result, these so-called 'transition' cases have been left in an administrative and legal limbo that creates uncertainty and anxiety in the children concerned and cannot, therefore, be in their best interests – even more so when that limbo lasts for several years. This has happened, for example, in Guatemala where, at the time of the vital moratorium in January 2008, there were over 3,000 transition cases, of which 714 had still not been resolved three years later, and 73 were still pending in mid-2013.<sup>123</sup>

At the same time, it has to be recognized that where many hundreds of children can be said to be in the intercountry adoption process at one stage or other – as in Guatemala – it is difficult to deal appropriately with their individual cases. While the quickest possible resolution is desirable in principle, it is important not to overlook the probability that many (or even most) of the children involved will have been the subject of illegal or unethical practices that led to their being declared adoptable abroad. Inevitably, each case requires very thorough and time-consuming review.

To reduce the negative impact of this apparent best interests conflict between ensuring stability for the child and the case review time-lag, some issues must be addressed before adoptions are suspended:

<sup>123</sup> See [http://www.unicef.org/infobycountry/guatemala\\_68509.html](http://www.unicef.org/infobycountry/guatemala_68509.html)

- A clear announcement should be made of both the reason(s) for and the goal(s) of the initiative.
- The specific issues to be tackled and the responsibilities and processes required for carrying out the reforms need to be identified and made public.
- Where appropriate, details of the expected technical assistance inputs should be published and their delivery programmed.
- A timescale should be established for undertaking each key reform, which should be made public, and a target date given for completion of the whole exercise.
- If the moratorium is declared by a country of origin, there should be a designated government contact point to provide updated information to the Central Authorities of the receiving countries concerned.
- The country of origin and relevant receiving countries should agree on the exact criteria to determine which adoption cases under way at the time of the suspension are to go forward, in each child's best interests, for review and potential completion (transition cases), for example, from the moment that bonding between the child and identified prospective adopters has been initiated.
- Detailed provisions should be in place to examine and decide on such transition cases, again on the basis of consultation between the country of origin and the receiving countries concerned.

### 3.5. The best interests of the child in adoptions from non-Hague countries

Although an ever-growing number of states of origin have become parties to the 1993 Hague Convention, adoptions from non-Hague signatory countries appear to account for a gradually declining yet still substantial proportion of the annual total

– at least half at the present time. Receiving countries do not, in general, provide up-front information on the proportions involved, but a 2011 Council of Europe document noted that:

... five of the seven countries of origin from which more than 100 children were adopted in Spain in 2008 had not ratified the [1993 Hague Convention]. A similar degree of reliance on non-Hague countries of origin is seen elsewhere: 78 per cent of adoptions to the Flanders region of Belgium (in 2008) were processed outside the Hague framework, as were 72 per cent to France. The corresponding figure for Italy was lower, however, at 54%, and adoption from non-Hague countries is now less than half of total ICAs to Switzerland.<sup>124</sup>

The 2012 figure for Italy – a receiving country that excels in providing detailed statistics – was, at 51 per cent, similar to the figure for 2008.<sup>125</sup> Data for the 2012 financial year from the United States show that adoptions from seven of the 'top 10' countries of origin took place outside the Hague framework.<sup>126</sup> Clearly, the protection of the best interests of the child in adoptions from non-Hague countries will be a very important issue for a long time to come.

Why is the balance between Hague and non-Hague adoptions changing so slowly, despite increased ratification of the treaty? There is one key reason: once a country of origin becomes a party to the Hague convention, it usually applies the subsidiarity rule and other safeguards more strictly than before. This is often combined, logically, with a policy to enhance domestic responses to children needing alternative care or adoption. As a result, there is almost always a fall – sometimes very substantial – in the numbers of children deemed to require adoption abroad, especially among the youngest. One striking example is Madagascar: in 2004, the year in which it ratified the Hague Convention, intercountry adoptions peaked at over 300, but by 2012 the figure had fallen to less than 50.<sup>127</sup>

Faced with this phenomenon, authorities, agencies and individuals in receiving countries have sought new or enhanced

<sup>124</sup> Council of Europe (2011).

<sup>125</sup> See [http://www.commissioneadozioni.it/media/138484/dp2\\_2012.pdf](http://www.commissioneadozioni.it/media/138484/dp2_2012.pdf)

<sup>126</sup> China, a Hague country, was first, followed by Ethiopia, Nigeria, Russia and Ukraine which are not. [http://adoption.state.gov/content/pdf/fy2012\\_annual\\_report.pdf](http://adoption.state.gov/content/pdf/fy2012_annual_report.pdf)

<sup>127</sup> Australian Intercountry Adoption Network, (n.d.). International Adoption Statistics, available at: <http://www.aican.org/statistics.php?region=0&type=birth>

partnerships with non-Hague countries of origin where more children may be 'available' because subsidiarity and other protective considerations are applied less strictly. Sub-Saharan African countries, in particular, have increasingly become the target for such initiatives in recent years, given their relatively low ratification rate to date.<sup>128</sup> While adoptions from China plummeted from over 14,000 at their peak in 2005 to hardly more than 4,000 in 2012, those from Ethiopia climbed from just over 1,500 in 2005 to a high of more than 4,200 by 2009.<sup>129</sup> On a smaller but still illustrative scale, intercountry adoption from the Democratic Republic of Congo was virtually unknown until 2005, but then rapidly expanded, reaching at least 460 by 2012.<sup>130</sup> In Nigeria and Uganda there have also been increases from single figures in the first years of the century to over 200 each in 2012.<sup>131</sup> None of these is a Hague country, and all have been approached by actors from receiving countries to 'compensate' for the fall in adoption numbers from contracting states of origin.

From the standpoint of the best interests of the child, the implications are considerable and alarming.

First, they involve a deliberate shift away from countries where those best interests should be better protected under the 1993 Hague Convention to countries where the kind of guarantees afforded by the treaty may well be absent and where experience and adequate resources are lacking. Second, the year-on-year increase in the volume of adoptions from a non-Hague country may be so rapid that it defies any real attempt to ensure case-by-case verification of the child's circumstances by the competent authorities. Third, as already noted, it often leads to a moratorium that, although justified on protection grounds, demonstrates by its very existence that the best interests of children had indeed been widely and substantially jeopardized before the moratorium was in place.

A vast array of fundamental Hague standards and procedures designed to protect the rights and best interests of

children could be endangered by an adoption from a non-Hague country.

Above all, many – though gradually fewer – receiving countries continue to allow their citizens to undertake 'private' (direct contact with birth parents) or, more frequently, 'independent' adoptions in non-Hague countries (where the prospective adopters act without the support and supervision of the central authority or an accredited agency). In France, for example, such 'adoptions individuelles' accounted for no less than 32 per cent of the total in 2012.<sup>132</sup> Given that the risks of malpractice had been shown so clearly to be far higher in such instances,<sup>133</sup> the drafters set out to ensure that adoptions by these means fall outside the framework of the 1993 Hague Convention. Even so, the 2010 Special Commission felt it necessary to recall the unacceptability of such adoptions as part of Hague-compliant practice, and in very clear terms:

Adoptions which are arranged directly between birth parents and adoptive parents (i.e., private adoptions) are not compatible with the Convention.

Independent adoptions, in which the adoptive parent is approved to adopt in the receiving State and, in the State of origin, locates a child without the intervention of a Central Authority or accredited body in the State of origin, are also not compatible with the Convention.<sup>134</sup>

Linked with this is the ability of adoption agencies or other third parties that are not accredited by the receiving country to operate in a non-Hague country. Some receiving countries, including Italy and Sweden, prohibit any non-accredited agency from processing any adoption from any country. In contrast, US agencies that are not accredited under the US system can still deal with intercountry adoptions from non-Hague countries, such as Ethiopia, as long as they are 'approved' to work there by the government of that country.<sup>135</sup>

Other dangerous gaps and derogations from the 1993 Hague Convention that are likely

<sup>128</sup> By 2013, just one-third of African countries practising intercountry adoption had become contracting states to the 1993 Hague Convention.

<sup>129</sup> Australian Intercountry Adoption Network, (n.d.). International Adoption Statistics, available at: <http://www.aican.org/statistics.php?>

<sup>130</sup> Statistics for 2012 from just three receiving countries: France 84, Italy 138, United States 240. See <http://www.aican.org/statistics.php?region=0&type=birth>

<sup>131</sup> Figures available for 2012 to date: Nigeria at least 208 (United States 197, Italy 11); Uganda at least 238 (all United States).

<sup>132</sup> [http://www.diplomatie.gouv.fr/fr/IMG/pdf/Rapport\\_statistique\\_2012\\_cle8c651d.pdf](http://www.diplomatie.gouv.fr/fr/IMG/pdf/Rapport_statistique_2012_cle8c651d.pdf) p. 16.

<sup>133</sup> Defence for Children International/International Social Service/Terre des Hommes (1991). 'Preliminary findings of a joint investigation into independent intercountry adoptions', Geneva: DCI.

<sup>134</sup> Hague Conference on International Private Law (2010). 'Conclusions and recommendations and report of the Special Commission on the practical operation of the 1993 Hague Intercountry Adoption Convention', paras. 22–23.

<sup>135</sup> Rotabi, K. (2010). 'From Guatemala to Ethiopia: Shifts in intercountry adoption leave Ethiopia vulnerable for child sales and other unethical practices', unpublished report received from author via email 12 February 2010.

in adoptions from non-Hague countries are set out in the discussion on bilateral agreements below. They are also listed as explicit or implicit problems to be tackled as part of measures required to promote the appropriate 'environment' in which the best interests of the child can be a positive feature of decision-making on intercountry adoption questions (see Chapter 5).

All this said, it is difficult to determine the extent to which adoptions from non-Hague countries may cause more problems than those carried out according to the Convention. For example, United States official data seem to use different criteria for Hague as opposed to non-Hague countries when broaching the question:

In [Fiscal Year] 2012, adoption service providers (ASPs) reported no disrupted placements in Convention adoptions, i.e., cases in which there was an interruption of a placement for adoption during the post-placement (but pre-adoption) period. ...In addition, information received from the Department of Health and Human Services... indicated 71 cases of disruptions and dissolutions involving 76 children who were adopted from other countries and entered state custody as a result.<sup>136</sup>

Other receiving countries provide no upfront information at all on this question, which is of major significance from a best interests perspective.

### 3.6. Bilateral agreements

To facilitate cooperation, and "with a view to improving the application of the [1993 Hague] Convention in their mutual relations",<sup>137</sup> contracting states may enter into agreements with one another, as foreseen by Article 39(2). Under a so-called 'bilateral agreement', the country of origin and the receiving country try to create better safeguards for children's rights in specific procedures,<sup>138</sup> as their most common purpose is to streamline the adoption process.<sup>139</sup> At the same time every provision

of the Convention must be scrupulously respected in such agreements.

But states parties to the 1993 Hague Convention are also free to sign bilateral agreements with countries that have not ratified the Convention, and there are many examples of this. Some see this as a valid way to 'officialize' – and thereby legitimize – intercountry adoptions outside the Hague framework. At the same time, concerns have been voiced by many about these bilateral agreements with non-Hague States.

One concern is that concluding such an agreement might undermine any motivation for the non-Hague state to ratify the treaty.<sup>140</sup> The report of the Special Commission in 2001 noted: "Some concern was expressed about agreements which seemed to supplant rather than to supplement the Convention."<sup>141</sup>

Another concern is that this kind of agreement would be tailored to fit, in particular, the non-Hague system in the country of origin and would not therefore ensure the appropriate safeguards foreseen by the Convention. This is compounded by a fear that such agreements will not be comprehensive or detailed enough to cover all requirements for adoption procedures and mechanisms that meet the required standards.

All three of these concerns proved well founded in the case of agreements between Viet Nam and individual receiving countries in 2004 and 2005. As a result, Sweden decided not to renew its 2004 accord with Viet Nam, noting that, at the time of signature,

...pledges were made that the country would accede to the 1993 Hague Convention. ... Since then, Viet Nam has postponed accession several times and has still [as at October 2008] not specified a definite date on which the country intends to accede.<sup>142</sup>

A review of the content of agreements with Viet Nam found that some – with France, Switzerland and the USA – were

<sup>136</sup> US Department of State (2012). 'FY 2012 Annual Report on Intercountry Adoption', Office of Children's Issues.

<sup>137</sup> Hague Convention on Private International Law (1993), Art. 39(2).

<sup>138</sup> Convention on the Rights of the Child, Art. 21, as referenced in Mezmur, B.D. (2008). 'From Angelina (to Madonna) to Zoe's Ark: What are the "A-Z" Lessons for Intercountry Adoptions in Africa?', *International Journal of Law, Policy and the Family*, 23(2): 145–73.

<sup>139</sup> United Nations, Department of Economic and Social Affairs, Population Division (2009).

<sup>140</sup> *ibid.*, p. 60.

<sup>141</sup> Hague Convention on Private International Law (2001). 'Report and Conclusions of the Special Commission on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption', para. 105.

<sup>142</sup> Swedish Ministry of Health and Social Affairs, Press Release, 23 October 2008.

grounded explicitly in a “humanitarian objective for adoption”, when they “should have reflected the fact that adoption is one of a series of child protection measures, not a humanitarian or charitable act”.<sup>143</sup> Moreover, that humanitarian approach underpinned another major concern raised by the agreements: the (non-Hague) requirement that “accredited adoption bodies support humanitarian projects linked to adoption” with, in addition, no concrete references to amounts, procedures for transfer or oversight and accountability.<sup>144</sup>

The agreements also clearly failed to address crucial questions at the heart of the 1993 Hague Convention:

The issue of fees, as per article 32 [of the Convention] is ... not adequately addressed in any of the bilateral agreements to which we had access. Moreover, the bilateral agreements do not cover the issue of accreditation of agencies.<sup>145</sup>

Some of the agreements (for example, in Switzerland and the United States) omitted any mention of obtaining the child’s consent; all failed to cover the issue of matching and (with the exception of Denmark) the prohibition on any contact between prospective adopters and the child before that stage (Hague Art. 29). The agreements were also “vague or inadequate” about the implementation of the subsidiarity principle.<sup>146</sup>

There is, regrettably, good reason to believe that many future bilateral agreements between Hague receiving countries and non-Hague countries of origin will be characterized by similar deficiencies, and will continue to put the rights and best interests of the child at risk. Receiving countries, unconstrained by formal obligations other than the general conditions set out in CRC Article 21, seem prepared to accept far lower standards in their ‘felt-need’ to access children in non-Hague States now that so many of their Hague-compliant partners are showing greater resolve to find preventive and reactive solutions within their own borders.

Clearly, however, there are strong arguments for requiring that states parties uphold minimum Hague standards in all their intercountry adoption relationships, beyond the fact that this is recommended by the Special Commission. As noted in a recent report,<sup>147</sup> if the best interests of every child are to be at the centre of the intercountry adoption process, receiving countries that have ratified the 1993 Hague Convention have an ethical responsibility to grant children from non-Hague countries the same legal guarantees and protection offered to children from Hague States. In particular, Hague States are obliged to restrict or even prohibit private or independent adoptions. Worotyneć puts it more strongly – citing Canada, but her question applies to all receiving countries – when she asks:

Should Canada not expect, at minimum, such an explicit endorsement of relevant standards from the sending countries as it sets for itself? Should Canada enter into agreements with countries that do not share this commitment, in particular when lives – children’s lives – are at stake?<sup>148</sup>

Such concerns, which have been borne out over recent years, demonstrate just how fragile respect for the best interests of the child in intercountry adoption may be in practice.

### 3.7. Policy and practice in emergency situations

Such concerns are highlighted all the more in emergency situations – such as a natural disaster or armed conflict – when the balance of power shifts even further towards the receiving countries and the opportunities to manipulate the best interests requirement appear almost limitless. The CRC and the 1993 Hague Convention do not contain any derogation clauses permitting modifications to their applicability in emergencies or their aftermath. In other words, states parties to either of these treaties are bound to abide by all their provisions, whatever the circumstances.

<sup>143</sup> International Social Service (2009). *Adoption from Viet Nam: Findings and recommendations of an assessment*. Geneva: ISS, p. 39.

<sup>144</sup> *ibid.*

<sup>145</sup> *ibid.*

<sup>146</sup> *ibid.*, pp. 39-40.

<sup>147</sup> Lammerant, I. and M. Hofstetter (2008). ‘Adoption at what cost? For an ethical responsibility of receiving countries in intercountry adoption’. Lausanne: Terres des Hommes International Federation.

<sup>148</sup> Worotyneć, Z.S. (2006). ‘Child, interrupted: International adoption in the context of Canadian policy on immigration, multiculturalism, citizenship and child rights’, *CERIS Working Paper, No. 46*. Toronto: Joint Centre of Excellence for Research on Immigration and Settlement, p. 12.

That said, an emergency makes it extremely difficult to ensure that international standards on child protection are respected – at precisely the moment when they are most needed. The state is often overwhelmed by the sheer scale of an emergency and its consequences, and may lose authority over the affected area. The emergency response from outside the country may not be well coordinated, with an influx of many organizations and individuals that lack any experience or child protection training. At the same time, the response can be so massive and well-resourced that it constitutes an alternative authority accountable to no one. Social values and cohesion may break down, particularly in situations of armed conflict, and in any kind of emergency traditional coping mechanisms can be stretched beyond their limits, given the sudden increase in the number of children who need them.

**An emergency makes it extremely difficult to ensure that international standards on child protection are respected – at precisely the moment when they are most needed.**

The dangers associated with such situations have been summed up by UN Special Rapporteur Najat Maalla M'jid:

In every humanitarian crisis, States, international aid agencies and civil society organizations seek to protect children by 'rescuing' them from affected areas. Child survivors are frequently mistakenly labelled as orphans and removed from their families and communities to be transferred to orphanages or adopted into new families. This 'misguided kindness' may significantly increase the short- and long-term harm caused to children and families who are suffering from the impact of a natural disaster. Experience has shown that girls and boys are usually safer, better

cared for and tend to recover more quickly in a family environment within their own communities. ... The number of children who are orphaned in a natural disaster is usually overestimated, and the ability of the community to care for its children is often underestimated.<sup>149</sup>

It is now a well-accepted principle that adoption (domestic or intercountry) is not an appropriate response for unaccompanied children or those who have become separated from their parents during or after an emergency until efforts to trace and reunite them with their family have been exhausted.<sup>150</sup> It is conventional wisdom that such efforts should be allowed to run, if circumstances so require, for two years at least before permanent alternatives are considered. Meanwhile, the focus must be on preventing the separation of parents and children and bolstering alternative care arrangements within the community.<sup>151</sup>

At a policy level, therefore, suspension of intercountry adoption in an emergency creates relatively little controversy. On each occasion, the need for such a suspension is relayed, often forcefully, in statements by UNICEF, the Permanent Bureau of the Hague Conference, Save the Children and International Social Service, for example. Increasingly, governments and central authorities have also made it clear that no applications to adopt children in the post-emergency phase will be accepted.

However, experience in Haiti following the January 2010 earthquake demonstrates the limits of this apparent consensus in practice. There was general agreement that, in principle, the best interests of children whose adoption had already been cleared by the court would be best served by allowing the adoption to proceed. In fact, most children who were evacuated for adoption over the following days and weeks – at the instigation of the receiving countries and with 'permission' from the Haitian Authorities – had not completed the adoption process before the earthquake. For some, their adoptability status had not even been confirmed, let alone their

<sup>149</sup> UN General Assembly, Human Rights Council (2011). 'Report of the Special Rapporteur on the sale of children, child prostitution and child pornography' (UN Doc A/HRC/19/63), paras. 62–63.

<sup>150</sup> See, for example, UN General Assembly, Human Rights Council (2010), para. 166; Hague Conference on Private International Law (1994b). 'Hague recommendation on refugee children'. The Hague: HCCH Permanent Bureau.

<sup>151</sup> UN General Assembly, Human Rights Council (2010), paras. 155–159.

match with prospective adopters.<sup>152</sup> Najat Maalla M'jid expressed her concern that:

... many receiving countries bowed to internal pressure and 'expedited' the displacement of children (between the ages of 3 months and 18 years) for adoption in their own countries, based on ad hoc criteria. It has also been noted that the rapid removal of Haitian children without a court order was unwarranted ...<sup>153</sup>

For most children concerned, therefore, no assessment or determination of their best interests had taken place at all. It seems to have been simply assumed, as in pre-CRC days, that the children would be 'better off' outside their country, and the quicker the better. Adoption abroad was the justification for the evacuations of children, but these could not be justified as an urgent measure. In addition, the evacuations themselves were often carried out with scant regard for established international practice – and were certainly not designed to be a temporary measure that would last only until the situation stabilized, as good practice would dictate (see below). This led to the Haiti post-earthquake adoption programme being qualified as "forced migration" in the 2012 edition of the annual *World Disasters Report* (WDR):

The UNHCR [United Nations High Commissioner for Refugees] has 'Three Rules' for evacuation: "first, to protect and assist in the place where the child and his or her family are physically located; second, if evacuation cannot be avoided, a child must be moved with a primary care-giver; and third, never evacuate unless a plan has been made that will protect children's rights and well-being" ... Objectively, there was no justification for removing these children from the country [Haiti] on an urgent basis. 'Expedited adoptions' translated in practice into circumventing vital protection procedures regarding adoption, evacuation, verification of consent and family situation, and examination

of possibilities for in-country care. In other words, after the trauma of the earthquake, these children were subjected to the second trauma of unnecessary and rapidly-implemented 'forced migration' without family or known caregivers and to a totally unfamiliar place.<sup>154</sup>

In fact, whatever the adoption status (or lack of it) of the children concerned, rapid evacuation was wholly unnecessary. The Guidelines for the Alternative Care of Children require that special attention be paid, in emergency situations, to preventing the cross-border displacement of children from their country of habitual residence "except temporarily for compelling health, medical or safety reasons", and in that case as close as possible to their home, accompanied by a parent or caregiver known to the child, and with a clear return plan.<sup>155</sup> Equally, urgent and wholesale removal of the kind that took place from Haiti would not have been countenanced on the basis of a valid best interests assessment, even for those children who had completed the adoption process:

Expedited transfer may be in the best interests of a child with a pre-existing adoption judgement, but it should be decided on a case-by-case basis and should never take place before the child can first recover from initial trauma in a familiar environment, verifications can be carried out and appropriate preparations made in a calm manner. There should be sufficient time to enable the adoptive parents to join the child in his/her country of origin and to accompany the child to the receiving country.<sup>156</sup>

Far from proceeding with a best interests assessment for each child, the competent authorities of receiving countries pressured Haiti to accept a so-called 'procedure' to authorize intercountry adoptions that totally circumvented essential protective processes stipulated as indispensable under the 1993 Hague Convention.<sup>157</sup>

Although receiving countries had no formal obligation to respect that treaty in their

<sup>152</sup> For an exhaustive account of intercountry adoption initiatives in the six months following the Haiti earthquake, see International Social Service (2010). *Haiti: 'Expediting' intercountry adoptions in the aftermath of a natural disaster ... preventing future harm*. Geneva: ISS.

<sup>153</sup> Human Rights Council (2011).

<sup>154</sup> International Federation of Red Cross and Red Crescent Societies (2012). "'Expedited adoptions': Forced migration by another name", in *World Disasters Report 2012*. Geneva: IFRC, pp. 68–70.

<sup>155</sup> UN General Assembly (2010), paras. 154(e) and 160.

<sup>156</sup> International Federation of Red Cross and Red Crescent Societies (2012).

<sup>157</sup> *ibid.*

relations with Haiti, which was not a state party, it has long been agreed, in the context of the Special Commission that examines the Convention's implementation periodically, that "States Parties, as far as practicable, apply the standards and safeguards of the Convention to the arrangements for intercountry adoption which they make in respect of non-Contracting States".<sup>158</sup>

It was only because Haiti was not a Hague country, and the receiving countries concerned decided to ignore this recommendation, that most intercountry adoptions dating from that period could be 'recognized' in those receiving countries. This would have been patently impossible had the country of origin also been a state party to the 1993 Hague Convention: the procedures laid down by that treaty to protect the best interests of the child were ignored, comprehensively and deliberately, and any resulting 'adoption' could not have been recognized.

From a broader standpoint, the disproportionate level of attention, effort and means devoted to these rapid evacuations had an undoubted impact on the best interests of all children, not just those evacuated, by diverting significant resources of all kinds from wider protection and relief operations. Yet, as the *World Disasters Report 2012* notes, "absolute priority must be given to providing assistance in situ and promoting continuity of care."<sup>159</sup>

There are many lessons to be drawn from the post-earthquake response to Haiti in 2010, but one stands out in relation to intercountry adoption: the absolute necessity to adhere to a process to determine best interests that respects the overall rights of the child before any final decisions are made about that child's adoption abroad. That process must be every bit as rigorous as a process used under normal conditions or, for example, the process to inform decision-making on the most appropriate measures to take for a separated or unaccompanied child. While this implies ensuring best possible protection and services pending the assessment and determination, it clearly precludes any derogation whatsoever from the obligation to carry it out.

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### 3.8. If best interests are a requirement, so is their objective determination

This chapter has demonstrated the incoherence and the pitfalls of all kinds that are seen in practice in the significance and implementation of the requirement to make the best interests of the child the paramount consideration in decisions about intercountry adoption.

Experience to date shows that the best interests principle is, to all intents and purposes, such a vague concept that it is easily ignored or misconstrued.

Experience to date shows that the best interests principle is, to all intents and purposes, such a vague concept that it is easily ignored or misconstrued.

If it is to promote and protect the human rights of children who may be or are involved in the intercountry adoption process, the determination of best interests must be based on accepted criteria and assessed by qualified persons or bodies, with responsibility for a final decision in the hands of a clearly-designated authority.

The following chapter proposes both the frame and substance for those vital assessment and decision-making processes for general policy, adoption procedures and the future of any given child. The results of such evaluations should be demanded systematically before any child is adopted abroad 'in their best interests'.

<sup>158</sup> Hague Conference on Private International Law (2000b). 'Report and conclusions of the Special Commission on the practical operation of the Hague Convention of 29 May 1993 on protection of children and co-operation in respect of intercountry adoption', para. 56.

<sup>159</sup> International Federation of Red Cross and Red Crescent Societies (2012), pp. 68-70.



# 4

## Determining Children's Best Interests in Intercountry Adoption



### Key points

- Many factors must be taken into account to ensure that national policies on intercountry adoption correspond to children's best interests, and the extent to which they do needs to be open to examination, so that this principle lies at the heart of the approach to the practice.
- Many considerations also need to be reviewed when determining whether or not the best interests of an individual child would be met by intercountry adoption – Table 1 provides a checklist of these.
- Once it is established that the intercountry adoption of a child should be envisaged, his or her best interests must be preserved at each and every stage of the adoption process, which comprises many phases, from the initial decision that a child is 'adoptable', right through to follow-up support measures with children and their adoptive families.

The considerations set out in the preceding chapters have highlighted the pitfalls to be avoided when defining the role of a best interests approach, within a rights-compliant framework, for children in the intercountry adoption process. They have also illustrated the lack of consensus about both the concept and the resulting variations in the impact, in practice, of best interests as ‘the paramount consideration’. Without agreement on clear criteria against which the respect for best interests in intercountry adoption can be evaluated, it is difficult to apply the principle in the coherent, consistent and widely accepted manner that the term ‘paramount’ requires. This chapter aims to provide a concrete response to that concern by proposing a basis for such evaluations.

First, it reviews the factors that should be taken into account to ensure that national policies on intercountry adoption correspond to children’s best interests.

Second, it identifies the elements that should form part of a thorough and comprehensive assessment of the best interests of each individual child for whom intercountry adoption might be envisaged (Table 1).

Finally, it considers the conditions required, once it has been determined that intercountry adoption is indeed in a child’s best interests, to achieve the optimal ongoing protection of that child’s best interests at each stage of the intercountry adoption process itself.

### 4.1. Factors that influence policies on intercountry adoption

States’ policies on the intercountry adoption of their children vary. This is true regardless of whether the country in question is generally seen as a receiving country or a country of origin.<sup>160</sup> Policies range from total prohibition to full acceptance (and even virtual *laissez-faire*), and may change either temporarily or permanently over time. The foundations of the approach taken always lie in a combination of numerous

socio-cultural, political and sometimes financial factors. In practice, these factors have not always reflected the paramount consideration of the best interests of the child.

#### 4.1.1. Socio-cultural factors

Because the best interests of the child are to be assessed within the societal context in question – seen as a desirable element of the ‘flexibility’ of the concept<sup>161</sup> – the impact of purely socio-cultural factors on policy tends to be the least contested argument for limiting intercountry adoption. As well as the clear-cut prohibition of the practice in many countries that apply Islamic law, where adoption cannot be countenanced on religious and cultural grounds, several other states are hesitant or highly restrictive because the legalized, complete and definitive rupture of family ties is not a familiar or acceptable practice in society at large. No ‘best interests’ argument for allowing intercountry adoptions seems to apply in such circumstances.

#### 4.1.2. Political factors

Political factors, in contrast, are often the subject of controversy from a best interests standpoint. The most commonly contested are decisions to ban or restrict intercountry adoptions that are, or are perceived to be, rooted more in ‘national pride’ or even political posturing than in considerations of child welfare. There are several facets to this approach.

An argument often advanced is that children are a national resource whose numbers should not be depleted through adoption abroad. In studying adoption practice in India, for example, Lind and Johansson document adoption professionals’ belief that adoptable Indian children should be ‘reserved’ for Indian couples, on the grounds that children are “an asset belonging to their nation of origin”.<sup>162</sup>

Often, this goes hand in hand with a country’s understandable reluctance to be perceived or labelled as being unable to cope with problems related to the care of their vulnerable children, and the knowledge that in-country solutions could be enhanced and made available with a little additional

<sup>160</sup> Thus, for example, significant numbers of children have been adopted abroad every year from the United States (99 recorded at Federal level in FY 2012), leading many to wonder, moreover, if the United States is itself applying the ‘subsidiarity principle’ in a systematic manner. In contrast, many other ‘receiving countries’ to all intents and purposes ban the intercountry adoption of their children.

<sup>161</sup> Zermatten (2010); see also Committee on the Rights of the Child (2013).

<sup>162</sup> Lind, J. and S. Johansson (2009). ‘Preservation of the child’s background in in- and intercountry adoption’, *International Journal of Children’s Rights*, 17(2): 235–60.

investment. For example, the participants at a May 2012 pan-African conference on intercountry adoption noted that "African societies have for centuries been able to care for their children, including those left without parental care, based on collective values and wisdom",<sup>163</sup> and that despite present realities such as HIV/AIDS and conflict, "with a modest degree of economic and social support, African families and communities could provide for children without parental care".<sup>164</sup>

They called, therefore, for "a reversal of the current trend of resorting to intercountry adoption as an easy and convenient option for alternative care in Africa, and for giving absolute priority to enabling all children in Africa to remain with their families and their communities".<sup>165</sup>

Very often this kind of stance is mixed with concerns over how the adoption process is carried out and the end results for the adoptees. That same conference declaration, for example, observed that there are:

...reports, in some instances, of intercountry adoption resulting in abuse of children in the receiving countries; ... that sometimes children are being procured for adoption abroad through manipulation, falsification and other illicit means of securing financial gains; [and] that in some instances there are both internal and external pressures put on families and governments to make their children available for intercountry adoption.<sup>166</sup>

In sum, the basic issues that often underpin political arguments are linked to states' concerns that they are unable to exercise proper control over the intercountry adoption process and there are inadequate resources for the development of in-country services that would enable more stringent respect for the 'subsidiarity rule'; states often lack confidence in the outcomes under such conditions.

Finally, it can be noted that, whether a country decides to allow, restrict or prohibit intercountry adoption, there is no record of any country ever having formally requested the adoption of its children

abroad as part of its assistance needs. This, too, needs to be taken into account when considering the best interests component of policy development on the question.

#### 4.1.3. Financial factors

There is no doubt that economic considerations have, on occasion, underpinned state policy towards intercountry adoption, at least during a certain period.

The most notorious example of this was probably Guatemala. At their peak in 2007, adoptions from Guatemala to the United States numbered 4,726.<sup>167</sup> In the blunt words of one commentator, "a national industry has developed around adoption, with specialty lawyers offering their services, and hotels catering to the thousands of American couples who visit for the sole purpose of finding a child".<sup>168</sup>

It was estimated, entirely realistically, that Guatemala's intercountry adoption at that time had become a \$100 million per year industry – in the same author's equally uncompromising terms, "making orphans the country's second-most lucrative export after bananas". The leverage and lobbying force of those involved kept that status quo in place – including by preventing domestic recognition of Guatemala's adherence to the 1993 Hague Convention in 2002 – until it became obvious that US ratification of the treaty in 2008 would put an end to the current system.

### Other countries have also gained financially by making their children available for adoption abroad.

Other countries have also gained financially by making their children available for adoption abroad. Under the short-lived 'points' system set in place in Romania in 1997, for example, domestic social protection foundations were set up to which adoption agencies were invited to contribute: "[these] agencies could earn points (by investing in social services) and with enough points they would be given a child for international adoptions".<sup>169</sup>

<sup>163</sup> African Child Policy Forum (2012). 'Final Communiqué of the Fifth International Policy Conference on the African Child', Addis Ababa, 29-30 May 2012, p. 1.

<sup>164</sup> *ibid.*

<sup>165</sup> *ibid.*

<sup>166</sup> *ibid.*

<sup>167</sup> [http://adoption.state.gov/about\\_us/statistics.php](http://adoption.state.gov/about_us/statistics.php)

<sup>168</sup> Martinez, H. and R. Goldman (2008). 'US adoptions fueled by Guatemalan kidnappings', ABC News, 13 May.

<sup>169</sup> Wolfe Murray, R. (2005). 'Child Welfare Reforms Threatened by International Adoption Lobby', [http://www.childrights.ro/media\\_article\\_cotidianul.htm](http://www.childrights.ro/media_article_cotidianul.htm)

Similarly, countries such as Nepal and Viet Nam have required prospective adopters and agencies to make 'humanitarian aid contributions' as a condition for, respectively, operating and adopting. One former head of a European central authority stated that, more generally, "it is an open secret that foreign Authorities solicit humanitarian aid contributions from agencies that work on adoptions".<sup>170</sup>

The official line is, invariably, that financial support to the child protection system is necessary and that contributions do not influence either adoption policy itself or the number of children declared adoptable abroad. Such explanations, however, have not deterred the Hague Special Commission from making its concerns very clear – an implicit recognition of the widespread and significant nature of the problem. As far back as 2000, while encouraging receiving countries "to support efforts in States of origin to improve national child protection services, including programmes for the prevention of abandonment", the Special Commission stipulated that "this support should not be offered or sought in a manner which compromises the integrity of the intercountry adoption process, or creates a dependency on income deriving from intercountry adoption".<sup>171</sup> It made a more far-reaching recommendation in 2010, when it "emphasised the need to establish, in all cases, a clear separation of intercountry adoption from contributions, donations and development aid".<sup>172</sup>

In sum, there are legitimate fears – and documented indications – that policies on intercountry adoption have often been influenced unduly by financial factors that have no connection whatsoever with the best interests of the children concerned.

### 4.2. Putting the best interests of children at the heart of intercountry adoption policy

In the context of its observations on the question of the best interests of the child, the CRC Committee has highlighted the need for all policies and measures regarding

children to be subject to a systematic Child Rights Impact Assessment (CRIA), noting that:

...the adoption of all measures of implementation should ... follow a procedure that ensures that the child's best interests are a primary consideration. The child-rights impact assessment (CRIA) can predict the impact of any proposed policy, legislation, regulation, budget or other administrative decision which affect children and the enjoyment of their rights and should complement ongoing monitoring and evaluation of the impact of measures on children's rights. CRIA[s] need to be built into Government processes at all levels and as early as possible in the development of policy and other general measures in order to ensure good governance for children's rights.<sup>173</sup>

The proposed CRIA is, therefore, conceived as the policy-level equivalent of what we call 'best interests determination' for individual children (see section 4.3 below).

As far as the specific focus of the present study is concerned, this means that any policy decision (and its legislative ramifications) about the conditions under which intercountry adoption may take place, if at all, must be backed by a thorough evaluation of the consequences this will have for the best interests of the country's children – both those who might be adopted abroad and those who will not. This is clearly all the more true given the 'paramount' status of their best interests in relation to policies about adoption abroad.

Logically, the outcome of such an assessment is likely to differ widely from one country to another, and as a result may justify policies that are just as disparate as those in existence today. Some countries may decide that the services and structures in place are adequate to cater for their children, negating the need to envisage intercountry adoption (except, perhaps, in exceptional cases, such as intra-familial). Others may decide that current conditions

<sup>170</sup> Melita Cavallo, ex-President of the Italian Central Authority (CAI) during her presentation entitled 'Humanitarian aid and children placed outside their family of origin and not proposed for adoption', at the colloquium "Intercountry Adoption Today", Agence Française de l'Adoption, Paris, 7-8 November 2007 (our translation).

<sup>171</sup> Hague Conference on Private International Law (2000b), para. 47.

<sup>172</sup> Hague Conference on Private International Law (2010), para. 14.

<sup>173</sup> Committee on the Rights of the Child (2013), para. 99.

do not enable them to ensure 'suitable care' for all children, and therefore foresee inter-country adoption in certain cases.

In the light of a CRIA, however, these policies – be they prohibitive, restrictive or 'open' – would be subject to scrutiny on objective grounds. First, the validity of the findings of the CRIA can be examined, and they can then be compared with the policy from a best interests and rights-based standpoint. Importantly, this standpoint would have to take account of a range of issues, including, for example:

- the extent to which maximum levels of available resources are being devoted to family support and in-country alternative care (CRC Art. 4)
- whether or not international cooperation is needed here and, if so, if it has been requested (CRC Art. 4)
- the extent to which national and, where applicable, externally supported measures on the prevention of family separation and the provision of alternative care conform with the Guidelines for the Alternative Care of Children.

The answers to such questions enable a robust review of the justification for any country's basic approach to intercountry adoption as a response to children deprived of parental care. Other factors also need to be considered, however, when considering whether a given policy is warranted.

First and foremost, and particularly for countries of origin, is whether they can have confidence in the contention that the overall rights of some of their children will be better realized through adoption abroad. This includes their level of trust in all aspects of the adoption process itself, as well as in post-adoptive arrangements and attitudes towards foreign adoptees in the receiving country. Such concerns manifest themselves most often temporarily (in the form of moratoria, for example) but also explain the longer-term prohibition on intercountry adoption put in place to date by a limited number of countries (see section 3.4 above), such as Argentina.

#### 4.2.1. Culture and ethnicity

It is also important to consider the issue of removing children from their culture of origin. In this context, the principle of subsidiarity suggests that it is generally in children's best interests to remain in their own community, but in individual cases it may be concluded that the overall rights of the child concerned would be better protected elsewhere. It is essential, therefore, to weigh up the complex elements at play in developing a general policy on this question. A balance should also be struck between supporting efforts to improve living conditions and children's life chances in their home communities and promoting forms of alternative care that may be more appropriate to the specific cultural context.<sup>174</sup>

The debate around what is known as 'transracial adoption'<sup>175</sup> is also relevant to a discussion of the best interests of the child and removal from their country of origin.<sup>176</sup> For decades, researchers and practitioners have voiced opinions for or against such adoption, first dismissing the idea that it affects the formation of one's identity, only to argue in longitudinal studies that it does indeed complicate identity development.<sup>177</sup>

No true consensus has been reached, but it is now clear that racial and ethnic background is an important factor to bear in mind in adoption. Much of this discussion has taken place in the context of domestic adoption and has influenced the approach to both domestic and intercountry adoption taken by countries such as the United States and the United Kingdom.<sup>178</sup> The so-called transracial aspect becomes even more complex in intercountry adoption, of course, as here it is intertwined with removal from the culture of origin. From an overall policy perspective, and similarly in relation to the more general question of a child's removal from the country of origin, there seems to be no justification on best interests grounds for a blanket prohibition, rather than leaving it to case-by-case assessment to come to a decision.

<sup>174</sup> Snow, R. and K. Covell (2006). 'Adoption and the Best Interests of the Child: The dilemma of cultural interpretations', *The International Journal of Children's Rights*, vol. 14, no. 2, pp. 109-117.

<sup>175</sup> The term 'transracial adoption' is widely used, justifiably or not, to describe an adoption between a child and parents with different skin colours, and is thus more specific than 'trans-ethnic' or 'trans-cultural'.

<sup>176</sup> It is beyond the scope of this report to analyse the impact on identity of transnational and transracial adoption. Much of the literature is based on the US context but the results have global relevance. For a summary of seminal work on this issue, see Evan B. Donaldson Adoption Institute (2009). It is beyond the scope of this report to analyse the impact on identity of transnational and transracial adoption. Much of the literature is based on the US context, but the results have global relevance. For a summary of seminal work on this issue, see Evan B. Donaldson Adoption Institute (2009). Other sources: Simon, R.J., and A. Alstein (2000); Huh, N.S. and W.J. Reid (2000); Lee, R.M. (2003); Baden A.L. and R.J. Steward (2000).

<sup>177</sup> Evan B. Donaldson Adoption Institute (2009).

<sup>178</sup> Evan B. Donaldson Adoption Institute (2008); Hayes, P. (1995).

### 4.2.2. Access to information for adoptees

The fact that full adoption – the invariable outcome of an intercountry measure – involves the complete severing of a child’s ties with their birth family is also an issue worthy of debate from the policy-development angle of the best interests of the child. To begin with, such an extreme consequence of relinquishing a child’s care to others is not only unknown but unthinkable in many societies. It provokes both resistance to the measure and, in many cases, confusion over the effects of giving consent to adoption. In addition, it can have implications for the child’s later ability to access information about birth family members,<sup>179</sup> including their health history, which may be vital to prevent or identify an adoptee’s medical conditions.

It is surely necessary to balance the best interests of the child with the rights of the family of origin,<sup>180</sup> and information provided may, in some circumstances, be of a ‘non-identifying’ (i.e. anonymous) nature. But access to at least a minimum of information about one’s origins is essential to identity formation, and is, indeed, linked to the child’s right to an identity.

### Access to at least a minimum of information about one’s origins is essential to identity formation.

Overall, the tendency has been towards greater openness in domestic adoption,<sup>181</sup> with evidence showing that this has a number of benefits (prevention of identity confusion, easing of maternal grief,<sup>182</sup> and encouragement of empathy in adoptive parents).<sup>183</sup> Informally, this approach is being taken up increasingly by the adoptive parents of foreign children.

Such openness in adoption – ensuring the greatest possible access to information and in some cases maintaining a degree of contact with the birth parents – should not be confused with ‘open adoptions’, which are grounded in the adopted

child’s ongoing relationship with the birth parents, including meeting them in person. Under some jurisdictions, an ‘open’ adoption can end with the child returning to the care of the birth parents. Such an arrangement, which is not without its own risks for all involved, might pose special problems in intercountry adoption. Nonetheless in New Zealand, for example, the principle of openness in adoption is broached in both domestic and intercountry adoption, with each party in the adoption ‘triad’ – the child, the family of origin and the adoptive parent – being encouraged to understand that ‘open’ adoption can help an adoptee to preserve their identity and maintain contact with the family, and therefore promote their best interests.<sup>184</sup> Open adoption has also been used in the context of intercountry adoption in the Marshall Islands – a result of cultural norms that have shaped domestic adoption policy and the fostering of these traditions in intercountry adoption through the positive advocacy of adoption agencies.<sup>185</sup>

In sum, applying the principle that the best interests of the child are the paramount consideration, policy that allows adoption arrangements based on some degree of openness (if all concerned are in agreement) might enable the most appropriate terms of adoption to be determined on a case-by-case basis.

### 4.3. Determining the best interests of individual children

As this study has sought to show, applying the principle of best interests within a human rights framework requires consensus on the issues to be considered and systematic recourse to an agreed determination process. Decision-making on whether or not the best interests of any given child will be served by adoption abroad cannot be made in a hurry, but must be timely, on the basis of subjective and selective criteria. It requires a thorough review of the child’s overall situation and needs, and of the likely impact of the measure on virtually all the rights of the child.

<sup>179</sup> Berry, M. (1993). ‘Risks and benefits of open adoption’, *Adoption*, 3(1): 125–38; International Social Service (2006a). ‘Post adoption: The search for origins (part 1)’ (Editorial), *Monthly Review*, 4.

<sup>180</sup> EurAdopt, Nordic Adoption Council (2005). ‘Origin and Personal History of Adoptees: Principles for search, knowledge and reunion’, Working document for the Special Commission on the practical operation of the 1993 Hague Intercountry Adoption Convention.

<sup>181</sup> *ibid.*

<sup>182</sup> Berry, M. (1993).

<sup>183</sup> Grotevant, H.D. (2000). ‘Openness in Adoption: Research with the adoption kinship network’, *Adoption Quarterly*, vol. 4, no. 1, pp. 45–65.

<sup>184</sup> International Social Service (2006). International Social Service (2006b). ‘What are the alternatives to full adoption?’ (Editorial), *Monthly Review*, 7–8.

<sup>185</sup> Roby, J., J. Wyatt and G. Pettys (2005). ‘Openness in international adoptions: A study of US parents who adopted children from the Marshall Islands’, *Adoption Quarterly*, 8(3): 47–71.

This section develops a basic checklist of issues that should be covered by such a formalized best interests determination (BID) process.

One inspiration for this exercise is the UNHCR Guidelines on Determining the Best Interests of the Child issued in 2008, the very first attempt at international level to codify the issues for practical use. In all situations covered by these Guidelines, the parents of the child concerned are absent or otherwise unable to exercise their basic parental responsibilities. While they were developed to guide decision-making on unaccompanied and separated children outside their country of origin, they can be applied to situations where competent authorities are called on to decide the future of a child and are faced with several possible options. These UNHCR Guidelines describe BID as follows:

...the formal process with strict procedural safeguards designed to determine the child's best interests for particularly important decisions affecting the child. It should facilitate adequate child participation without discrimination, involve decision-makers with relevant areas of expertise, and balance all relevant factors in order to assess the best option.<sup>186</sup>

Clearly, envisaging the adoption of a child abroad is a prime example of a "particularly important decision".

There are currently three additional resources that can be used to conceptualize a BID process related to the intercountry adoption of a child. These are, in chronological order:

- the 2008 Guide to Good Practice No. 1 for implementing the 1993 Hague Convention,<sup>187</sup> which deals with questions relating to safeguards for the child's best interests when intercountry adoption is being considered
- the handbook for implementing Guidelines for the Alternative Care of Children,<sup>188</sup> published in early 2013, which contains a checklist of issues to be covered when determining

children's best interests in the context of alternative care provision in general – drawing much from the UNHCR Guidelines

- the CRC Committee's General Comment No. 14,<sup>189</sup> made publicly available in May 2013, which indicates the different spheres that the Committee says should be taken into account when coming to a decision on the best interests of a child, whatever the question at hand.

Some key contributions from these texts are set out in the following sub-section.

#### 4.3.1. The development of a best interest determination process for intercountry adoption

In many countries, the best interests of the child principle is used most often by courts ruling in custody disputes, but the way it is used in this narrow context can be applied more broadly. For example, when considering what is in the best interests of a child in a custody case under English law, the judge must take into account a range of factors on a so-called 'welfare checklist':<sup>190</sup>

- the ascertainable wishes and feelings of the child concerned (in light of his or her age and understanding)
- the child's physical, emotional and educational needs
- the likely effect of any change in his or her circumstances
- the child's age, sex, background and any other relevant characteristics
- any harm that the child has suffered or is at risk of suffering
- how capable each of the child's parents, and any other person considered relevant to the question by the court, is of meeting the child's needs.

The checklist approach is useful in applying the principle according to a child's particular needs at a particular time.

<sup>186</sup> UN High Commissioner for Refugees (2008). *UNHCR Guidelines on Determining the Best Interests of the Child*. Geneva: UNHCR.

<sup>187</sup> Hague Conference on Private International Law (2008).

<sup>188</sup> Cantwell et al. (2012), p.25.

<sup>189</sup> Committee on the Rights of the Child (2013).

<sup>190</sup> United Kingdom, Children Act 1989, s,1(3). <http://www.legislation.gov.uk/ukpga/1989/41/contents>

To determine how the best interests principle is to be applied practically in relation to intercountry adoption, it is useful to draw an analogy with the UNHCR's BID process. UNHCR uses this process to:

- identify durable solutions for unaccompanied and separated refugee children
- decide on temporary care arrangements for unaccompanied and separated children in exceptional situations
- decide on the possible separation of a child from his or her parents against his or her will in cases where the child is exposed to or likely to be exposed to severe abuse or neglect.<sup>191</sup>

The UNHCR Guidelines point out that the BID process should not delay family reunification, unless there are reasonable grounds to believe that reunification is likely to expose the child to abuse.<sup>192</sup>

The Guidelines aim to give practitioners in the field a framework to help apply the best interests principle in any of the three scenarios above. Being a formal process, BID must be carried out only by authorized persons, who are normally specialists in child protection, community services or child welfare. BID results are presented to a multidisciplinary panel that considers each child's situation assessment on a case-by-case basis.<sup>193</sup>

According to the UNHCR Guidelines, the process of gathering information for BID must include:

- verification of existing and documented information about the child
- several interviews with the child and, if appropriate, observations of the child
- interviews with persons within the child's network, including caregivers, family (siblings and extended), friends, neighbours, guardian, teachers etc.
- background information on the conditions in each geographical

location that is to be considered as a potential place of residence for the child

- the view of experts, where appropriate or necessary.

Relevant elements for BID from the Hague Guide to Good Practice are examined in more detail in section 4.4 below, within the framework of wide-ranging safeguards for children throughout the entire adoption process. These include in particular:

- establishing the child's legal and psychosocial adoptability
- ensuring the child's consent to adoption
- preparing a comprehensive report on the child.

From the best interests angle – and leaving aside to some extent legal considerations as such – it is clear that the essentials of the BID process are the psychosocial adoptability of the child and an overall assessment of his or her situation (the comprehensive report).

For its part, the Handbook on the Guidelines for the Alternative Care of Children notes that, for children for whom alternative care is, or may be, a reality, BID should be grounded in an assessment undertaken by qualified professionals, and should cover the following issues as a minimum:

1. the child's own freely expressed opinions and wishes (on the basis of the fullest possible information), taking into account the child's maturity and ability to evaluate the possible consequences of each option presented
2. the situation, attitudes, capacities, opinions and wishes of the child's family members (parents, siblings, adult relatives, close 'others'), and the nature of their emotional relationship with the child
3. the level of stability and security provided by the child's day-to-day living environment (whether with parents, in kinship or other informal care, or in a formal care setting):

<sup>191</sup> UN High Commissioner for Refugees (2008),

<sup>192</sup> *ibid.*

<sup>193</sup> *ibid.*



- a) currently (immediate risk assessment)
- b) previously in that same environment (overall risk assessment)
- c) potentially in that same environment (e.g. with any necessary support and/or supervision)
- d) potentially in any of the other care settings that could be considered.

4. where relevant, the likely effects of separation and the potential for family reintegration

5. the child's special developmental needs:

- a) related to a physical or mental disability
- b) related to other particular characteristics or circumstances

6. other issues as appropriate, such as:

- a) the child's ethnic, religious, cultural and/or linguistic background, so that efforts can be made, as far as possible, to ensure continuity in upbringing and, in principle, maintenance of links with the child's community
- b) preparation for transition to independent living

7. a review of the suitability of each possible care option for meeting the child's needs, in light of all the above considerations.<sup>194</sup>

The CRC Committee lists the following elements to be taken into account, in general, when assessing and determining the child's best interests, with the important proviso that not all of them may be relevant or of equal importance in every situation in which such an assessment is required:

- a) the child's views
- b) the child's identity, to include characteristics such as sex, sexual orientation, national origin, religion and beliefs, cultural identity and the personality of the child. As regards the choice of a foster home, for example, the decision-maker will have to take into consideration the continuity in a child's upbringing and the child's ethnic, linguistic and cultural background (CRC Art. 20.3) when assessing and determining the child's best interests. The same will apply to cases of adoption, separation or divorce

c) preservation of the family environment and maintaining the child's relations

d) care, protection and safety of the child, where the objective of 'protection and care' is not stated in limited or negative terms (such as 'to protect the child from harm'), but rather in relation to the comprehensive ideal of ensuring the child's overall 'well-being' and development. Applying a best interests approach to the decisions means assessing the safety and integrity of the child at the time of adopting the measure, while also assessing the potential consequences for the child's safety of the decision to be made

e) a situation of vulnerability such as: disability, belonging to a minority, being a refugee or asylum seeker, victim of abuse, living in a street situation, etc.

f) the child's right to health

g) the child's right to education.<sup>195</sup>

Combined, these sources provide a good insight into the scope and thrusts of the formal assessment process that would be needed for case-by-case determination of the best interests of the child in intercountry adoption. Taking inspiration from them, a basic outline for a BID process related to children for whom intercountry adoption is envisaged is proposed in Table 1.

<sup>194</sup> Cantwell et al. (2012), p.25.

<sup>195</sup> Committee on the Rights of the Child (2013), paras. 52ff.

Table 1: Proposed checklist for a best interests assessment and determination process on intercountry adoption

	Key issues to be covered	Considerations	Outcome
1	The child's freely expressed opinions and wishes about a range of possible and realistic outcomes, including adoption abroad, taking into account the child's ability to understand the nature and evaluate the full ramifications of each option presented.	Fullest possible information needs to be provided to the child on the nature and implications of each potential option, taking account of the child's maturity. Consider not only verbal but also non-verbal responses (e.g. drawings) and expert observation of behaviour, including body language.	An insight into the child's feelings about cutting ties with parents, siblings and the wider family and community, and into his or her attitudes that might need to be taken into account and/or affect the success of any given option, including, but not limited to, adoption abroad.
2	The situation, attitudes, capacities, opinions and wishes of the child's family members (parents, siblings, adult relatives), other caregivers and any other key persons in the child's life, and the nature and quality of their emotional relationship with the child.	Ideally, meet close family as a group and also observe their interaction with the child. If possible and appropriate, meet the mother and father individually as well. Emphasize the perceptions of siblings, according to whether they may or may not also be the subject of a potential change in their care setting. Check their understanding of the ramifications of each future care option.	An understanding of the real reasons behind the willingness of the parents and wider family to part with the child, and thereby gauge the potential to prevent that separation.
3	The level of stability and security provided by the child's day-to-day living environment (whether with parents, in kinship or other informal care, or in a formal care setting): a) currently (immediate risk assessment) b) previously in that environment (overall risk assessment) c) potentially in that environment (e.g. with any necessary support and/or supervision) d) potentially in any other in-country care setting that could realistically be considered e) potentially with adoptive parents abroad.	This requires discussion with family, professionals and others who have been involved in or are familiar with the care of the child, as well as on-site visits. Clearly, the child's own perceptions and experiences are also critical on this question.	An informed evaluation of the degree to which the child could find necessary levels of security and support in his or her current care setting or in others available in the community or country.
4	As appropriate, the potential to keep or reintegrate the child with the parent(s) or within the wider family, including consideration of the current or future availability of any family strengthening and/or support measures this would require.	This involves setting the findings under Issues 1 to 3 against the possibility of reintegration with the parents or within the family.	An assessment of the nature, extent and reasonable prognosis of necessary family support, and a determination of whether and how such support can be provided through current services or mobilized in the near future, including through outside assistance.

Table 1, continued

	Key issues to be covered	Considerations	Outcome
5	Requirements and possibilities to realize the child’s right to education.	This evaluation needs to take account of the context, notably of opportunities available to the child’s peers in his or her community.	A determination of which care option(s) are likely to offer the educational opportunities corresponding to this right, domestically or abroad.
6	The child’s physical and mental health, compared with the overall health and health-care implications of each possible care setting.	This requires a professional evaluation of the child’s health needs, bearing in mind his or her right to enjoy the highest attainable standard of health and access to services. Again, this should be a contextualized evaluation. It also requires assessment of the potential health consequences of removal to, and living in, a new care setting.	A determination of which care option(s) are likely to ensure the realization of the child’s right to physical and mental health and/or which options might jeopardize that right, by their nature or by their consequences, domestically or abroad.
7	Any special developmental needs of the child related to: a) a physical or mental disability b) other particular characteristics or circumstances that create vulnerability.	This requires a professional evaluation of any special needs, including behavioural problems or vulnerabilities resulting from the child’s previous or current experience (e.g. separated from parents, victim of abuse, living or working on the streets).	A set of conditions that should be met by any future care setting or arrangement to cater appropriately to the particular needs of the child.
8	The child’s potential to adjust to new care arrangements and settings.	A psychosocial evaluation is needed to establish the child’s propensity to adapt to new circumstances.	The elimination of any arrangements and settings to which the child is unlikely to adjust.
9	Other issues as appropriate, such as: a) how each option would provide continuity with the child’s ethnic, religious, cultural and/or linguistic background b) preparation for transition to adulthood and independent living.	This involves identifying the kinds of arrangements and settings, and the conditions required within them to take appropriate account of the child’s origins or of any other factor specific to that child’s needs or situation (e.g. demonstrable sensitivity on the part of foreign adopters).	The selection of the arrangements, settings and other conditions that best preserve key elements of the child’s identity. For an older child, the establishment of the potential for a successful transition into adulthood.
10	Best interests determination (BID) phase; a review of the suitability and advantages and disadvantages of each possible care option for meeting the child’s overall needs and respecting his or her rights, in light of all the considerations listed above.	All of the findings of the assessment should be collated and examined by an interdisciplinary team, and their discussion should lead to a preliminary recommendation on which option(s) complies with the child’s best interests.	A determination of whether or not the best interests of the child lie in intercountry adoption compared with any other option overall, and in specific relation to their rights. If so, an agreement on the conditions. If not, an agreement on the other avenues to be pursued.

For the protection of children's best interests in intercountry adoption to be approached in the way foreseen by the CRC Committee, a formal assessment process should reflect the procedures set out in the UNHCR BID model, and be carried out by qualified professionals acting where possible as a multi-disciplinary team.<sup>196</sup>

It is, of course, very unlikely that such an assessment will identify any one solution as positive on all counts. There must, therefore, be flexibility in determining, for each specific child and according to the specific context, the factors that need to be prioritized in reaching a final decision – hence, again, the importance of professional input. As the CRC Committee notes:

Not all the elements will be relevant to every case, and different elements can be used in different ways in different cases. The content of each element will necessarily vary from child to child and from case to case, depending on the type of decision and the concrete circumstances, as will the importance of each element in the overall assessment.

The elements in the best-interests assessment may be in conflict when considering a specific case and its circumstances. For example, preservation of the family environment may conflict with the need to protect the child from the risk of violence or abuse by parents. In such situations, the elements will have to be weighed against each other in order to find the solution that is in the best interests of the child or children.<sup>197</sup>

However, a systematic BID process does provide a formal framework within which those priorities and conflicts can be reviewed, with clear arguments being put forward to justify the selected option. In the sphere of alternative care in general, and intercountry adoption in particular, this would be a very significant step forward in ensuring that, when intercountry adoption is the final decision, it is clearly in the best interests of the child concerned.

### 4.4. Preserving the best interests of the child during the intercountry adoption process

The 1993 Hague Convention stipulates the procedural requirements for each intercountry adoption, and the Guide to Good Practice No. 1 sets out clear guidance on how to implement the best interests of the child principle throughout the process.<sup>198</sup> This section does not provide detailed, step-by-step guidance on each phase – that is the purpose of the Guide itself – but highlights key stages when analysing how the best interests principle is to be implemented: from the initial determination of a child's adoptability and the desirability of inter-country adoption to the finalization of that adoption and the appropriate follow-up.

The discussion once again demonstrates that implementing the best interests principle in an intercountry adoption usually means little more than protecting the rights of the child, including, among others, the rights to an identity, to be raised by his or her parents wherever possible, and to be protected from all forms of exploitation.

### Implementing the best interests principle in an intercountry adoption usually means little more than protecting the rights of the child.

#### 4.4.1. Determination of 'adoptability'

Determining adoptability is the stage at which a child may be diverted from alternative care and other placement options because he or she cannot be reintegrated into the family of origin and a formal determination has been made that an adoptive family would, in principle, best meet his or her needs. It is a complex but fundamental process, with two major facets that are often referred to as 'legal' and 'psychosocial' adoptability.<sup>199</sup>

<sup>196</sup> *ibid.*, para. 94.

<sup>197</sup> *ibid.*, paras. 80-81.

<sup>198</sup> Hague Conference on Private International Law (2008).

<sup>199</sup> International Social Service (2006c). 'The determination of the adoptability of the child', Fact Sheet No. 20. Geneva: ISS/IRC.

4.4.1.1. *Legal adoptability*

Legal adoptability is determined simply on the basis of the child's potential legal status as adoptable, in view of the parents' death or abandonment or their appropriate consent to relinquish the child.<sup>200</sup> Legal adoptability is therefore a necessary condition, but it is not enough on its own to underpin an adoption decision. The suitability of adoption must also be examined for each child, even if that child is deemed 'adoptable' from a legal standpoint.

Establishing that a child is legally eligible for adoption is a task that should be entrusted to a designated competent authority, such as the judicial system. Resulting declarations of adoptability do not, in themselves, distinguish between possible domestic or intercountry adoption placements – that decision is based on other criteria and comes at a later stage.

Declarations of adoptability do not, in themselves, distinguish between possible domestic or intercountry adoption placements.

The CRC (Art. 21) and the 1993 Hague Convention (Art. 4) indicate that all necessary consents must be fully informed, freely given and, importantly, must not be induced by any compensation or promise of compensation – requirements that are reflected in the legislation of most countries of origin. Again, the consent referred to is, in principle, general: it is consent for adoption, not for either domestic or intercountry adoption alone.

Obtaining consent must be handled sensitively: a whole range of personal reasons can cause significant distress to the birth parent(s), such as fear of punishment for leaving a child, and embarrassment if the mother's pregnancy was kept a secret or occurred out of wedlock. Securing parental consent is also a process subject to abuse and corruption.<sup>201</sup> An adult may claim to be the birth parent, for example, but other evidence is needed to verify that claim in the absence of genetic testing.

Inducements for parents to give consent can occur at this stage, as seen in Romania in the 1990s and, more recently, in Guatemala.<sup>202</sup> Great care must be taken to ensure that parents understand what it really means to give consent, particularly the permanent severance of ties between the parents and child – a totally alien concept in many societies. Decision-making on adoptability must also be timely; while it is not a decision to be made in haste, a lack of expedition can work against the child's best interests. In addition, disclosing information to adoptive parents about children who have not been declared as adoptable is contrary to the terms of the 1993 Hague Convention and may lead to further abuses of procedure.<sup>203</sup>

An effective birth registration system is fundamental in determining legal adoptability, but the process should also account for children whose birth documents have been lost, destroyed, stolen or were never issued, so that they have the same opportunities, regardless of their documentation (or lack of it). Many children in post-earthquake Haiti in January 2010, for example, did not hold birth certificates,<sup>204</sup> and in 2007 an estimated 51 million births worldwide went unregistered.<sup>205</sup> Where children have no birth registration documents, steps must be taken to resolve the issue in a timely manner, so that they are not left in a 'legal limbo' that compromises their best interests and could hamper efforts to plan their long-term stability.<sup>206</sup>

4.4.1.2. *Psychosocial adoptability*

Psychosocial adoptability is evaluated after legal adoptability has been established, on the basis of a child's potential capacity to create ties with a new family and be integrated into a new family environment. The concept is sometimes broken down into its social, psychological and medical components.<sup>207</sup> Social adoptability is based on an assessment of the child's situation, in particular the family of origin and its ability to provide a suitable environment for the child's full development. The term psychological adoptability refers to the emotional and psychological needs that a child might have and that may not be

200 Lammerant, I. (2003). 'Les Fondements Ethiques et Juridiques de l'Adoption des Enfants Délaissés', Contribution to the colloquium 'Devenir adoptable, être adoptable', Paris, 14 November, p. 5; International Social Service (1999). 'The rights of the child in internal and intercountry adoption: Ethics and principles – Guidelines for practice'. Geneva: ISS.

201 Bunkers, K.M., V. Groza and D.P. Lauer (2009). 'International adoption and child protection in Guatemala: A case of the tail wagging the dog', *International Social Work*, 52: 649–60; Baldauf, S., et al. (2010). 'International adoption: A big fix brings dramatic decline', *Christian Science Monitor*, 14 March.

202 Roby, J.L. and J. Ife (2009). 'Human rights, politics and intercountry adoption: An examination of two sending countries', *International Social Work*, 52(5): 661–71; Bunkers et al. (2009).

203 Hague Conference on Private International Law (2008).

204 Baldauf, S. et al. (2010).

205 UNICEF (2009). 'Progress for Children: A report card on child protection', No. 8, p. 5.

206 Groza, V. and Nedelcu, C. (2006). 'Romanian Adoption', in K. Stolley and V. Bullough (eds.), pp.523-527.

207 International Social Service (2006). 'The Determination of the Adoptability of the Child'.

addressed properly through adoption. The establishment of medical adoptability is important to identify the best care arrangement for an individual child, particularly one with special needs.

Clearly psychosocial adoptability matters when considering possible adoption abroad. But additional elements must be taken into account to determine 'intercountry adoptability'. These include ensuring that all realistic efforts have been made to consider the suitability of domestic adoption or other stable in-country options, and assessing the child's potential to adjust to a different cultural and linguistic environment. Consideration may also need to be given to the socio-political situation of the country of origin, particularly any allegations of corruption and child trafficking in the context of armed conflicts or natural disasters (see section 3.7 above).<sup>208</sup>

Psychosocial adoptability is, therefore, a key consideration from a best interests standpoint. A child may be legally adoptable but his or her situation, characteristics and needs may indicate that adoption is not, in fact, an appropriate response or that his or her best interests can only be met in a domestic family setting. The BID process aims to elucidate such elements, and the findings are to figure in the overall report on the child (see section 4.4.3. below).

#### 4.4.1.3. *The adoptability of children with disabilities and other 'special needs'*

The question of psychosocial adoptability is of particular significance in the adoption of children with disabilities and other special needs, who usually account for the vast majority of children who are legally adoptable but remain unadopted.

In adoption, children with 'special needs' are in general those with physical, emotional or mental disabilities, as well as other 'hard-to-place' children: those with serious medical conditions, older children or sibling groups.<sup>209</sup> There is no universally recognized definition of 'special needs', however, and the terminology used varies from country to country. In some countries, even minor problems such as a hare-lip or cleft palate are considered 'disabilities'. The

term 'older' may be applied to children as young as 5 or as old as 10, while a 'sibling group' may amount to just two children.

In addition, some countries specify that the term 'special needs' includes children who have traumatic histories with their biological families or those who have spent a long time in an institutional setting, both of which carry known and unknown risks for the future.

It is often impossible to secure appropriate adoption or other family-based care for abandoned or relinquished children with special needs in their country of origin, whether industrialized or developing. If no suitable care arrangements can be identified domestically, it may be deemed in those children's best interests, therefore, to be adopted by families in other countries that are better placed to cater to their particular requirements.

At the same time, and especially given the increasing reliance by countries of origin on the potential adoption of these children abroad, there is concern about whether many of these children can adjust to a new environment, and particularly about whether foreign adopters have the information, preparation and support to cope with the special needs of the children they adopt. A recommendation from the Council of Europe's former Commissioner for Human Rights, Thomas Hammarberg, pinpointed this latter problem, urging European States to "ensure that children with special needs will be appropriately protected and cared for by prospective [adoptive] parents".<sup>210</sup>

Some central authorities have taken proactive measures to increase public awareness of, and sensitivity to, the topic of children with special needs, to boost the chances of their adoption, domestically or abroad. Peru's central authority, for example, developed an awareness-raising programme in 2003 to recruit domestic adoptive families for children who have health problems or disabilities, children above 5 years of age and sibling groups.<sup>211</sup> The campaign was later extended to the embassies of countries with a history of intercountry adoption from Peru.

<sup>208</sup> *ibid.*

<sup>209</sup> Vité, S. and Boéchat, H. (2008). 'Article 21: Adoption' in Alen, J. et al. (2008).

<sup>210</sup> Council of Europe (2011), General Recommendation No. 3.

<sup>211</sup> Ministerio de Mujer y Desarrollo Social de Peru (n.d.). 'Adopciones prioritarias: Los ángeles que aguardan, Lima.

### 4.4.2. The child's consent

According to both the CRC (Art. 12) – which is linked to the best interests determination – and the 1993 Hague Convention (Art. 4.d), children who have the maturity and capacity to present their opinion on the determination of adoptability should be given the chance to do so. However, most children adopted abroad are babies or infants aged 4 years or less,<sup>212</sup> who cannot be expected to comprehend the implications of their adoption, let alone to another country.

How such child participation is implemented varies, but it is clear that the child must be enabled to express opinions in a context that is free from all types of constraints and from any fear of potential repercussions, with a guarantee that those opinions will be taken into account in any final decision.<sup>213</sup>

Guides to Good Practice Nos. 1 and 2 underline the importance of having qualified and ethical personnel mandated to oversee the consent procedure. Professionals who work with children on placement decisions must understand and appreciate the child's history, and have a good knowledge of child development, family systems assessment, the impact of trauma on children and the effects of grief and loss.<sup>214</sup>

A recent United Nations report found that the legislation of most states set the minimum age of consent for adoption at 10 years of age; in 26 states it was 12 years of age and in 10 states it was 14 years of age. At the other end of the scale are Liechtenstein (5 years old) and Mongolia and Sao Tome and Principe (7 years old).<sup>215</sup> In 16 countries, the central authority is required to assess the child's maturity or capacity to understand before asking for the child's consent. Some countries recognize the right of children to participate in adoption procedures without specifying any age; instead the child must simply be able to understand the concept of adoption. This is the case in Cyprus<sup>216</sup> and the Czech Republic.<sup>217</sup>

Where the child's free consent is required by law and obtained freely, refusal to give that consent should always be respected in practice. Where the law demands only that the child's views and wishes on adoption are taken into consideration, a judge might well determine that these are not in the best interests of the child. Varying approaches are taken on this issue.<sup>218</sup> In Brazil, children aged 12 years or older can express their feelings about an adoption, but the law does not specify exactly what 'expressing their feelings' might mean in practice. Madagascar states that every child who has reasonable judgement must be informed of the implications of adoption.<sup>219</sup> An adoption cannot be granted in South Africa if the child is aged 10 years or older and has not given consent. Even if a child is under the age of 10 that child's views must be taken into account if he or she demonstrates the maturity or capacity to give consent.<sup>220</sup>

### 4.4.3. Preparing the report on the child

Once eligibility for adoption is confirmed, a key step in preserving the child's best interests is the preparation of an accurate and comprehensive report about the child and his or her background, using such sources as case notes, legal records and medical, developmental, educational, psychological and social evaluations.<sup>221</sup> Drawn up correctly, this report should be one of the main bases for a BID (see section 4.3 above). It should be prepared by a multidisciplinary team of experienced and qualified professionals, and should be independent of any pending application by adoptive parents. Its preparation should allow sufficient time for accurate elaboration, but should be carried out expeditiously.<sup>222</sup>

Priority for the assessment of children who are not with their birth parents should go first to children in institutions, children with siblings and children with mental or physical disabilities whose needs cannot be met in their country of origin. It is vital that no significant information is left out, as this could hamper matching between the child and prospective adoptive parents, which would be detrimental to the child's best interests.<sup>223</sup>

<sup>212</sup> For example, the figure for France in 2012 was 68%, and 71% for the USA in 2011.

<sup>213</sup> Webb, N.B. (2003). *Social Work Practice with Children*.

<sup>214</sup> Hague Conference on Private International Law (2008).

<sup>215</sup> United Nations, Department of Economic and Social Affairs, Population Division (2009), pp. 43-44.

<sup>216</sup> Article 4, Cypriot Adoption Law 19(1) of 1995 States: "For the making of an adoption order, it shall be required – c) the consent of the person to be adopted, if his age or spiritual capability permits that".

<sup>217</sup> Czech Family Code Act No. 94/1963, Art. 67 states: "(1) the adoption requires consent of the legal representative of the child. If the child is able to consider the consequences of the adoption, also his or her consent is necessary except for cases when it would frustrate the purpose of adoption."

<sup>218</sup> Zermatten (2010), p. 21.

<sup>219</sup> Madagascar Adoption Law No. 2005-014. www.madagascar-diplomatie.net/article.php?article\_id=350

<sup>220</sup> Republic of South Africa, Children's Amendment Act 2007, Government Gazette, No. 30884, 18 March 2008, para. 233.1.

<sup>221</sup> Vité, S. and Boéchat, H. (2008); Romaine, M., Turley, T. and Tuckey, N. (2007).

<sup>222</sup> Hague Conference on Private International Law (2008).

<sup>223</sup> *ibid*.

In Hague contracting states, the central authority is responsible for developing policies, procedures and protocols for the type and frequency of assessment for each child who is not with his or her birth family and who may be eligible for adoption. Investigations should begin when the child enters the care system.<sup>224</sup>

The report should provide invaluable information not only for the adoption process but also for the children concerned, should they wish to find out about their past later in life.<sup>225</sup>

### 4.4.4. Assessment of prospective adoptive parents

An assessment of prospective adoptive parents is carried out in the receiving country to establish their overall fitness to adopt, and to determine the characteristics of the children for whom they would be suitable parents. A thorough and impartial assessment is, therefore, an essential component of efforts to ensure that an adoption is likely to meet the best interests of the child. As a result, it must cover legal, medical, social and psychological dimensions, as well as more material questions, and should be conducted by a multidisciplinary team of professionals.

A key step in determining parents' eligibility for adoption is the home study, which must be completed by a licensed assessor, such as an experienced and qualified social worker. While similar tools may be used to assess potential adoptive parents for domestic and intercountry adoption, issues specific to intercountry adoption must also be addressed, such as ability to travel, views about how to broach the child's country of origin and culture within the family, and thoughts about language issues.<sup>226</sup>

Particular attention needs to be paid to the prospective adopter's propensity to care for children with disabilities, behavioural problems and/or those who have spent long periods in an institutional setting. Clearly, a full and honest evaluation of such capacities is vital to prevent serious difficulties or breakdowns in an adoptive relationship and is, therefore, crucial for

safeguarding the best interests of the child. This aspect is taking on increasing importance as countries of origin seek more opportunities for adoption abroad of children with special needs (see section 4.4.1.3. above).

In addition to basic assessment, some receiving countries use the 'preparation of prospective adopters' as a form of self-assessment process (see section 4.4.6. below).

## Children must benefit from systematic and developmentally appropriate preparation for adoption.

Each receiving country sets out its eligibility requirements for prospective adoptive parents, but additional or more stringent requirements may also be applied by the country of origin. China, for example, requires a married couple with any history of divorce to have been married to each other for five years before applying to adopt.<sup>227</sup> In many countries, being married is an essential requirement for intercountry adoption. Interestingly, however, more than 100 countries allow single people to adopt through both domestic and intercountry adoptions.<sup>228</sup> In contrast, virtually all countries of origin forbid adoption by homosexual parents at present.<sup>229</sup> To the extent that their objections stem from fears over the potential developmental and psychological impact on the adopted child, the findings of emerging research initiatives on this relatively new issue should clarify matters from the standpoint of the child's best interests.<sup>230</sup>

### 4.4.5. Preparation of the child

A best interests approach dictates that children must benefit from systematic and developmentally appropriate preparation for adoption. The country of origin is responsible for ensuring that professional staff are assigned this specific task. The issues for discussion vary according to the age of the child, but may include explaining

<sup>224</sup> *ibid.*, p. 84.

<sup>225</sup> *ibid.*

<sup>226</sup> The 2010 Special Commission "emphasised the need for country specific preparation and for prospective adoptive parents to have some knowledge of the culture and his or her language of the child in order to communicate with the child from the matching stage". Hague Conference on International Private Law (2010), p. 2.

<sup>227</sup> US Department of State, Office of Children's Issues, Intercountry Adoption website. <http://adoption.State.gov/country/china.html#who1>

<sup>228</sup> United Nations, Department of Economic and Social Affairs, Population Division (2009), pp. 38-39.

<sup>229</sup> Information provided by the Permanent Bureau of the Hague Conference on Private International Law on 14 January 2011.

<sup>230</sup> The necessary potential contribution of further research is expressed, for example, in European Parliament Directorate-General (2009). 'International Adoption in the European Union', pp. 110-112.



to children what they may gain by having a parent, helping them to understand their past, involving them in the decision-making process in line with their evolving capacities, and providing them with facts about adoption and the process.<sup>231</sup>

### Allowing children to be involved in the planning may help them to explore feelings of loss, anger and confusion and support their empowerment.

Information can be provided in several stages, and allowing children to be involved in the planning may help them to explore feelings of loss, anger and confusion and support their empowerment.<sup>232</sup> Such discussion can also help children with close ties to their families, or other children and personnel in residential settings to understand – and mourn – the changes that adoption brings.<sup>233</sup>

A useful tool to help the child is a 'lifebook' which provides a detailed outline of the child's life before adoption. Prospective adoptive parents who plan to adopt internationally are encouraged to collaborate in the lifebook's preparation.<sup>234</sup>

#### 4.4.6. Preparation of the prospective adoptive parents

Being placed in a family well prepared for adoption is in the child's best interests, as it will ensure a better 'fit', as well as better day-to-day care and responses to the child's needs.<sup>235</sup> An accredited adoption body in the receiving country is responsible for helping to prepare prospective adoptive parents, although countries of origin may also develop preparatory training programmes which adoptive parents are obliged to attend. Training activities may be planned and delivered by social workers or psychologists;<sup>236</sup> when preparation entails a medical focus, physicians and nurses will also be involved as presenters.<sup>237</sup> A recent study found that many of

Europe's receiving countries (Belgium, Denmark, Ireland, Luxembourg, Malta, the Netherlands, Slovenia and Sweden) implement compulsory training programmes for adoptive parents. The issues covered in the training span the adoption triad, as well as the attachment and the background of adoptive children.<sup>238</sup> Sweden's central authority has published a manual detailing the contents of the training sessions it runs for adoptive parents.<sup>239</sup> This manual is a key component of the compulsory training programme that Swedish adoptive parents must follow once the home study and assessment phase has been completed.

The preparation phase can also give applicants a chance to reconsider their wish to adopt once they have all the information, enabling them to withdraw from the process without negative consequences for their self-esteem.

Taking inspiration from elements in the Hague Guides to Good Practice, all adoptive families should receive training in the following core areas:

- the legal and social process of adoption in the country of origin and the receiving country
- issues of abandonment, separation, grief, loss and mourning; understanding that the psychological consequences for the child might occur only later, when parents think such issues have been resolved
- the adoptive family life cycle and unique issues in adoptive family formation
- unique issues of identity, which vary according to the age and developmental stage of the adopted child
- culture and ethnicity
- attachment in adoption, including methods to promote attachment at an early stage
- outcomes and risks in intercountry adoptions, focusing on the health, development, behavioural and educational needs that may be experienced by children from institutions

<sup>231</sup> Chestang, L.W. and Heymann, I (1976); Hanna, M.D. (2008).

<sup>232</sup> Henry, D.L. (2005). 'The 3–5–7 Model: Preparing children for permanency', *Children and Youth Services Review*, 27(2): 197–212.

<sup>233</sup> Hague Conference on Private International Law (2008).

<sup>234</sup> European Parliament Directorate-General (2009), p. 137.

<sup>235</sup> Roby, J. L. (2007).

<sup>236</sup> Farber, M.L.Z., Timberlake, E., Mudd, H. P. and Cullen, L. (2003).

<sup>237</sup> Bledsoe, J.M. and Johnston, B.D. (2004).

<sup>238</sup> European Parliament Directorate-General (2009), p. 136.

<sup>239</sup> Swedish National Board of Health and Welfare (2007). 'Special Parents for Special Children', Edita Vastra Aros.

- dealing with unresolved infertility issues (if applicable)
- resources for a single adoptive parent (if applicable)
- the short- and long-term effects of neglect, abuse and trauma experienced by the child before adoption, to help prepare adoptive parents to meet any challenges.

### 4.4.7. The matching process

Matching is the process of assessing which prospective adopters would best meet the needs of a child for whom adoption is envisaged. In keeping with the paramountcy principle, the best interests of the child are the most important consideration and the matching process is to be child-centred: finding the most appropriate family for the child rather than the most 'suitable' child for the family.<sup>240</sup>

Preliminary matching is based on the assessment reports of the child concerned and of prospective adopters, which underscores the importance of ensuring that these reports are accurate and complete. A match based on false or missing information could cause major problems for the child, the family or both.<sup>241</sup>

Matching should be a "balancing act between acceptance of the limitations in ... applicants' ability to love every child and a requirement for them to be able to do just that, but also between the ambition to achieve as much likeness between the adoptive parents and their child as possible and the ambition to accommodate applicants' preferences."<sup>242</sup> Applicants' preferences should be accommodated only when these are also in the child's best interests.

It is poor practice to make 'blind' matches, in which prospective adoptive parents are unaware of the identity of the matched child until they arrive in the country of origin, or are offered a child only upon arrival, with too little time to decide whether or not to proceed with the adoption.<sup>243</sup> Administrative decisions that result in blind matching – in contrast to the professional decisions made by specialists – are rarely based on a real assessment of the best interests of the child.

While the child's ethnic identity should be considered in every case, and matching should take this into account, this does not imply the need for placement in a family of the same ethnic background. But it does entail a full assessment of prospective parents, coupled with preparatory and post-adoption services to support them in this task.<sup>244</sup> Evidence also indicates that positive ethnic identity development is aided by travel to the child's country of origin, role models who share the child's race or ethnicity, enrolment in a racially diverse school and, above all, contact with birth relatives.<sup>245</sup>

To accomplish a positive, child-centred match, the process should be conducted in the country of origin by a multidisciplinary team of professionals familiar with the child; it should not be left to any one individual.<sup>246</sup> Slovakia's central authority, for example, has created a commission of specialists (comprising a psychologist, social worker and legal expert) who select the most suitable family for an individual child from a list of prospective candidates.<sup>247</sup> The matching process should be confidential and only the final outcome should be shared.

No uniform guideline exists on the age of prospective adoptive parents, but there are two general approaches.<sup>248</sup> The first addresses age limits for the prospective adoptive parent(s): many countries have a minimum age and some also stipulate a maximum age. Prospective adoptive parents in India, for example, should be at least 30 and no more than 55 years old. The second approach uses the age difference between the child and prospective adoptive parent(s). The minimum age difference in some countries is 15 years; in others it is as high as 21 years. A combination of these two approaches is often used; for example, in Luxembourg, adoptive parents must have reached the age of majority and be at least 15 years older than the child.

Matching decisions must be based on a clear policy that prohibits preferential treatment of specific families referred by a particular agency or individual. Again, the best interests of the child principle is central to this process. To avoid a certain adoptive family being favoured, Article 29 of the 1993 Hague

<sup>240</sup> International Social Service and International Resource Centre for the Protection of Children in Adoption (2004). 'The Rights of the Child in Internal and Intercountry Adoption. Ethics and Principles; Guidelines and Practice'.

<sup>241</sup> Lammerant and Hofstetter (2008).

<sup>242</sup> Lind and Johansson (2009), p. 250.

<sup>243</sup> Hague Conference on Private International Law (2008), p. 87, para. 357.

<sup>244</sup> Evan B. Donaldson Adoption Institute (2009).

<sup>245</sup> *ibid.*

<sup>246</sup> Hague Conference on Private International Law (2008), p. 29, para. 49.

<sup>247</sup> European Parliament Directorate-General (2009), p. 137.

<sup>248</sup> United Nations, Department of Economic and Social Affairs, Population Division (2009), pp. 36-38.

Convention specifies that prior contact between the prospective adoptive parents and the birth parents or guardians must be avoided, unless the adoption takes place within the family or complies with conditions set by the competent authority.<sup>249</sup> Similarly, there should be no contact between adoptive parents and the authorities of the country of origin, except in specific circumstances, such as certain cases where the child involved has special needs.<sup>250</sup>

Matching decisions are in no way to be seen as final. They should lead to a phase during which the child and the prospective adopters are given the opportunity to bond. The adoption should only proceed if this subsequent bonding process is positive. This is another reason why the removal of children from an emergency situation to the care of potential adopters who have not been through the bonding process with them is particularly risky and unlikely to be in the best interests of the child.

#### 4.4.8. Bonding

The initial meeting between prospective adopters and the child with whom they have been matched is the first step in the bonding process. It should take place in the country of origin, and a professional should facilitate and supervise the meeting. The bonding process is, in essence, the practical test of the matching decision. If its results are positive, the adoption will proceed – which occurs in most cases where the preliminary matching has been carried out in a professional way. At the same time, if serious bonding problems arise, the adoption process can be halted early enough to avoid traumatic consequences for the child.

**If serious bonding problems arise, the adoption process can be halted early enough to avoid traumatic consequences for the child.**

Colombia offers a positive example of how to facilitate a first meeting. Adoptive parents must stay in the country with the child for at

least two weeks before an adoption decree is pronounced. Psychologists or social workers assist during the bonding period, helping to build the relationship between the child and the adoptive family. After the first meeting, both sides are observed by a psychologist in their daily interactions – including play, negotiation and expression of affection. Observations span three days in the case of children up to 6 months of age, rising to a maximum of five days for children older than 1 year, with the caveat that any challenges encountered will further prolong the process.<sup>251</sup>

It is clear that adherence to the best interests principle will be enhanced if the reactions of the prospective adopters are garnered in a setting where they can express themselves freely, and without feeling pressured to proceed with the adoption if they have serious doubts. Depending on the age and capacities of the child, his or her views should also be solicited in a child-friendly context immediately after the first meeting and after subsequent meetings, if necessary. If any problems are observed or reported, the professional staff must devise plans for how to proceed. It may be enough to work with the child to aid his or her adjustment or with the prospective adopters to ease the transition. However, the adoption may need to be delayed or abandoned depending on the views of the prospective adopters and the child about the meetings.

It follows that the practice of 'escorting', where a staff member or volunteer 'delivers' the child to the receiving country, is not in the child's best interests,<sup>252</sup> particularly if there has been no bonding process beforehand in the country of origin. In any case, 'escorting' could well add to the child's anxiety. It also denies adopting parents the valuable insights gained by being with the child in his or her current surroundings and through informal conversations with caregivers. Information that is not usually recorded in official records can be elicited in this way, such as dietary preferences and how best to calm the child.<sup>253</sup>

<sup>249</sup> Hague Convention on Private International Law (1993).

<sup>250</sup> Hague Conference on Private International Law (2008), p. 87.

<sup>251</sup> Instituto Colombiano de Bienestar Familiar (2007). 'Lineamientos de Adopción', Bogota.

<sup>252</sup> Groza, V. and C. Proctor (2007). 'Escorting children in inter-country adoption', in J. Pati, ed. *Adoption: Global perspectives and ethical issues*. New Delhi, Concept Publishers, pp. 177–88.

<sup>253</sup> Hague Conference on Private International Law (2008).

### 4.4.9. Entrustment of the child and finalization of adoption

Entrustment refers to the placement of the child in the care of adoptive parents. Adoption under the 1993 Hague Convention has an important safeguard in Article 17(c), which provides that the best interests of the child should be respected before this entrustment takes place. This is to be ensured by an agreement based on the acceptance of the matching by the adoptive parents, confirmed by the country of origin, the approval of that decision by the authority in the receiving country (if required), the establishment of the eligibility and suitability of prospective adoptive parents to adopt, and the granting of permission for the child to live permanently in the receiving country.<sup>254</sup>

Normally, entrustment should occur before the child is transferred to the new country of residence.<sup>255</sup> And, as mentioned in the previous section, it is good practice, and in the best interests of the child, for adoptive parents to travel to the country of origin to spend time with the child before accompanying him or her to the new home.

Most countries require adoptive parents to travel to the child's country only once, during which visit the entrustment, probationary period and final decision will all take place. However, some countries require prospective adopters to travel to the child's country twice: first to accept the matching and to bond with the child during a 'probationary period', and second for the decision on adoption. This option confronts the child (and family) with disruption and a period of separation, which may be extremely detrimental, particularly if the gap between the trips is very long.<sup>256</sup>

A few countries stipulate a longer probationary period – as is commonplace in domestic adoption – which must take place in the receiving country. In that case, the child usually meets the prospective adopters in the country of origin and then travels to the receiving country to spend an extended period with the selected family before the adoption is finalized (whether in the receiving country or country of origin). They include Panama,

the Philippines and Thailand, which requires a six-month probationary period in the receiving country.<sup>257</sup> Should bonding not be successful during that period, the consequences for the child may be more traumatic and difficult to resolve because he or she is already in a foreign country. How such an arrangement ties in with the child's best interests is therefore questionable.

### 4.4.10. Post-adoption issues

Ensuring the best interests of the child during the post-adoption phase demands a focus on support services for the child and adoptive family, post-placement reports, responses in cases of irredeemable breakdown in the adoptive relationship, and the search for origins. Post-adoption support services must be wide-ranging and sufficient to address the multiple and intertwined needs of adoptees and their adoptive families<sup>258</sup> across the child and family life cycle.<sup>259</sup> These services are to be provided by receiving countries, and may be formal (e.g., case management, services offered by a licensed mental health professional or agency) or informal (e.g., parent support groups).<sup>260</sup>

## Good post-adoption support includes an element of community education.

Formal services should include regular face-to-face contact between the adoptive family and professionals for several months after the child's arrival, to assess how he or she is faring and how the family is adjusting. Offering comprehensive post-adoption support services requires professionals who can deal with medical, developmental, educational and behavioural issues. Social-work case management may also be needed to assist families with early intervention programmes to prevent problems from arising or progressing. It is good practice to evaluate all families and children immediately after placement to ascertain any needs and to develop a system of periodic check-ins or opportunities for families to seek more help.

<sup>254</sup> Hague Convention on Private International Law (1993), Art. 17.

<sup>255</sup> Hague Conference on Private International Law (2008), p. 119, para. 545.

<sup>256</sup> International Social Service (2007). 'The Conformation of Matching, the Meeting and the Probationary Period', Fact Sheet No. 43.

<sup>257</sup> Hague Conference on Private International Law (2008), p. 118, para. 543.

<sup>258</sup> ChildONEurope Secretariat (2007). 'Guidelines on post-adoption services'. Florence: Istituto degli Innocenti.

<sup>259</sup> Rosenberg, E. (1992). *The Adoption Lifecycle: The children and their families through the years*. New York: Free Press.

<sup>260</sup> Palacios, J. (2009) in G.M. Wrobel and E. Neil, pp. 71–94; Dhami, M.K., D.R. Mandel and K. Sothmann (2007).

More widely, good post-adoption support includes an element of community education or the encouragement of community support. Parents might require targeted, specialist support to address identity and transracial issues and to help adopted children preserve links with their cultural traditions.

Each country of origin determines its time frame and requirements for post-placement reporting: these range widely, from no more than one year following placement to the time the child reaches adulthood. The Philippines, for example, requires post-placement reports two, four and six months after the adopted child arrives in the receiving country, while Ukraine demands annual reports for the first three years and then once every three years until the child reaches the age of 18.<sup>261</sup> The 2005 Hague Special Commission, while recommending that receiving countries encourage adopters to comply with post-adoption reporting requirements, also proposed that countries of origin “limit the period in which they require post-adoption reporting in recognition of the mutual confidence which provides the framework for co-operation under the Convention.”<sup>262</sup>

In general, it is considered good practice to require regular reporting over no more than three years.<sup>263</sup> In addition, post-adoption reporting has proved to be of little value, in reality, from the standpoint of the best interests and protection of the individual child, as almost no reports submitted contain information that has provoked concern.

In cases where the adoption breaks down (i.e. legal rights to the adopted child are relinquished by the adoptive parents) the receiving country and country of origin must collaborate to prepare a permanency plan or alternative placement that is in the best interests of the child. Ultimate responsibility for planning the child’s future lies with the receiving country’s competent authorities, and only in extreme circumstances should a child return to his or her country of origin.<sup>264</sup> However, the breakdown of intercountry adoptions often

goes unreported, so data are scarce on whether the best interests of the child are upheld effectively in such circumstances.

## A key issue is whether to allow adoptees access to information on their rights.

Adoption-related issues may surface throughout the adopted child’s lifetime.<sup>265</sup> A key issue is whether to allow adoptees access to information on their origins. The overwhelming tendency among professionals is to recognize the psychological need for adoptees to have access at least to non-identifying information about their origins, to consolidate their identity. This is not universally accepted, however, and access to such information is not formalized explicitly as a right by the CRC.<sup>266, 267</sup>

Each Hague contracting state must preserve documents that relate to the adopted child’s family and medical history (Art. 30(1)) with a view to the child having access to this information at some point if he or she so desires. This is clearly considered to be in the best interests of the child. At the same time, ensuring such access is not an absolute obligation, and is applicable only “in so far as [this] is permitted by the law of that State.” (Art. 30(2)). Indeed, practices around the world vary: some countries prohibit the search for origins outright; others have a coherent policy on the preservation and sharing of information at different stages, or envision supervised country visits.<sup>268</sup> Services that handle adoptees’ requests for the search for origins should be staffed by trained professionals with extensive knowledge of intercountry adoption issues in both the country for origin and the receiving country.<sup>269</sup>

<sup>261</sup> US Department of State (2008). Intercountry Adoption, ‘Ukraine Country Information’.

<sup>262</sup> Hague Conference on Private International Law (2005), para. 18.

<sup>263</sup> International Social Service (2007). ‘Intercountry Adoption: Post-adoption follow-up’, Fact Sheet No. 46.

<sup>264</sup> Hague Conference on Private International Law (2008), p. 129, para. 604.

<sup>265</sup> Rosenberg, E. (1992).

<sup>266</sup> International Social Service (2007a).

<sup>267</sup> Brodzinsky, D., L.M. Singer and A.M. Braff (1986), in P.D. Ashmore and D.M. Brodzinsky, eds.

<sup>268</sup> International Social Service (2007b).

<sup>269</sup> Roby, J. (2002).

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#### 4.5. What is the real importance given to the best interests of the child in intercountry adoption?

Whether it be from the standpoint of overall policy or the situation of a specific child, this chapter has outlined the wide range of factors that need to be reviewed in each case if the best interests of the child and of children are to be the 'paramount consideration' in decision-making. In so doing, it has shown, either explicitly or implicitly, that this is frequently not the case in reality, and that the full practical implications of subscribing to the 'best interests principle' have, undeniably, been barely acknowledged in many quarters so far.

But it is not only the insufficient attention given to proper assessment – of laws, policies, procedures and the circumstances of individual children – that has failed to place best interests systematically at the heart of decisions around the intercountry adoption of children. The 'environment' in which intercountry adoptions are carried out is also of great importance – the extent to which circumstances and actions tend to favour the thorough determination of best interests or, on the contrary, to jeopardize or even run counter to that requirement.

The 'environment' in which intercountry adoptions are carried out is also of great importance.

The next chapter therefore examines some key elements in that 'environment' that also need to be addressed – by countries of origin and receiving countries alike – as a pre-condition for intercountry adoption to be undertaken in a manner consistent with the 'best interests principle' and the human rights of children.

# 5

## Ensuring the Right Conditions for a Best Interests Determination in Intercountry Adoption

### Key points

- Robust foundations must be in place to ensure that the best interests of the child are truly paramount in intercountry adoption, as required by relevant human rights instruments, but the 'environment' is by no means always favourable to their proper functioning.
- The challenges to countries of origin include scarce human and other resources, the lack of domestic options, an unquestioning attitude in cases of 'abandonment' and/or 'relinquishment', and the continued influence of a largely unregulated private residential care sector.
- However, receiving countries also need to put their own houses in order, ensuring that they in no way pressurize or incentivize countries of origin to allow more children to be adopted by their citizens. They must also achieve consensus among themselves on the minimum criteria to be met for the intercountry adoption process to be considered acceptable from the standpoint of the best interests of the child.



The previous chapters have set out the specific roles that best interests can play, validly, in a human rights context and how those roles can be considered for policy development on intercountry adoption, safeguards throughout the adoption process, and determining whether or not intercountry adoption should be pursued for any given child.

The operationalization of these roles at each of those levels will be well-nigh impossible, however, unless a number of basic conditions are met to create an 'enabling environment' for this to happen. The current environment is surprisingly hostile to the proper consideration of children's best interests in relation to their wider rights. This chapter pinpoints key issues to be addressed if that enabling environment is to be secured – an environment where best interests assessment and determination are the true foundation for decisions about the adoption of children abroad, as international standards prescribe.

There are three basic issues: policy approaches; conditions in the country of origin; and actions to be taken primarily by receiving countries.

### 5.1. Policy approaches

Chapter 4 examined important factors that determine overall policy on intercountry adoption and their impact on the extent to which the best interests of the child are a genuine consideration. There are at least two other policy questions that need to be raised to preclude the intrusion of any unwarranted elements into a best interests assessment: the response to poverty and the relationship between children and families.

#### 5.1.1. The 'family poverty' argument

As shown in Chapter 1 of this study, material poverty has long been used to justify the removal of children from parental care, or to accept their relinquishment unquestioningly. And it is still often seen as a valid reason, on its own, for intercountry adoption. For example:

Intercountry adoption in Ireland, while being an arduous process for prospective adopters, is in some ways more accessible than domestic adoption. This is because **a child is generally available for adoption in an intercountry context, such is the extent of deprivation in many countries**, whereas in Ireland the numbers of children that are placed for adoption are very low.<sup>270</sup>

In contrast, Smolin argues that not only is there "a palpable cruelty to taking away the children of the poor", but also:

Such an act exploits the vulnerability of those deprived of their basic human right to an adequate standard of living, and uses this deprivation of rights as justification for a further deprivation of rights: the rights of parents to retain the care and custody of their children.<sup>271</sup>

Along the same lines, Fuentes et al. state:

It is essential to put an end to the reasoning that poverty alone is sufficient for relinquishment, abandonment and finally, for an adoption. In too many cases, relinquishment and abandonment wrongly turn into adoption, with or without the proper consent of birth parents.<sup>272</sup>

Such calls have found a forceful echo at international level. The CRC Committee, having reviewed Nepal's State Party Report in 2005, for example, recommended the country to:

...abolish the provisions in the Conditions and Procedures made to provide Nepalese Children to Foreign Nationals for Adoption (2000), that states that poverty of the parents of a child can be a legal ground for adoption.<sup>273</sup>

In that vein, and more proactively, Guatemala's 2007 law on adoption stipulates that "the situation of poverty or extreme poverty does not constitute sufficient motive for placing a boy, girl or adolescent for adoption".<sup>274</sup>

<sup>270</sup> Law Reform Commission, Ireland (2008). Law Reform Commission, Ireland (2008). Aspects of Intercountry Adoption Law. Dublin: Law Reform Commission (our emphasis).

<sup>271</sup> Smolin, D (2007).

<sup>272</sup> Fuentes, F, Boéchat, H. and Northcott F. (2012). 'Investigating the Grey Zones of Intercountry Adoption', International Social Service, Geneva, p. 20.

<sup>273</sup> Committee on the Rights of the Child (2005b). 'Concluding Observations: Nepal' (CRC/C/15/Add.261), para. 54(c).

<sup>274</sup> Government of Guatemala (2008). Adoption Law (Ortega's Law), entry into force 1 January 2008, Art. 6.



For their part, the 2009 Guidelines for the Alternative Care of Children set out the principle in question for the first time in an international instrument:

Financial and material poverty, or conditions directly and uniquely imputable to such poverty, should never be the only justification for the removal of a child from parental care, for receiving a child into alternative care, or for preventing his/her reintegration, but should be seen as a signal for the need to provide appropriate support to the family.<sup>275</sup>

In other words, material poverty should not be seen as a key element in determining whether or not intercountry adoption is in the best interests of a child. Consequently, it is not included explicitly in the factors proposed for the BID process in Chapter 4, though it would normally inform the evaluation of the level of stability and security provided by the child's day-to-day living environment.<sup>276</sup> Allowing it to remain as a major consideration in adoption decisions will inevitably and significantly falsify the BID process.

### 5.1.2. The 'right to a family' argument

The key international standard – the CRC – is clear about the desirability of having children grow up in a family environment, for “the full and harmonious development of his or her personality” and “in an atmosphere of happiness, love and understanding”.<sup>277</sup> Such statements have been portrayed in some quarters – including many concerned with intercountry adoption – as conferring a ‘right to a family’ on every child. While seeking, first and foremost, family-based solutions for children who cannot live with their parents is a fully accepted policy orientation and objective,<sup>278</sup> it is wrong to view this as stemming from a ‘right’.

Among a number of commentators, Van Bueren has been particularly forthright on this issue:

Although children have a right under a variety of treaties to respect for family life, and to protection against unlawful interference with the family, children,

as with adults, understandably, **do not have a right to a family *per se* under international law.**<sup>279</sup>

She goes on:

...Although a child has a right to respect for his or her existing family life, **a child does not have a right *per se* to a family life.** The consequence of this is that **children do not in international human rights law have a right to be adopted.**<sup>280</sup>

Therefore, under the CRC, children's rights in relation to the family concern only their family: the child's right, as far as possible, to know and be cared for by his or her parents (CRC Art. 7.1); the right to preserve his or her identity, including family relations (CRC Art. 8.1); and the right not to be subjected to arbitrary or unlawful interference with his or her family (CRC Art. 16.1). ‘Their family’ naturally includes an adoptive family, but only after the adoption has taken place.

While the CRC also sets out conditions (e.g. in Art. 9) under which children's ties with their parents may be justifiably suspended, partially or wholly, or even annulled for good, nowhere does it stipulate a child's right to then live in a substitute family environment.

Clearly, the requirement is that the child's right to his or her own family should be the basis of policy when approaching a BID process, save in exceptional circumstances. This is even more important in intercountry adoption because, as discussed in section 5.2.3 below, most children adopted abroad are neither orphans nor have they been removed from parental care ‘in their best interests’.<sup>281</sup>

## 5.2. Conditions in the country of origin

The realities of most countries of origin, as they stand, are not conducive to ensuring that a BID process can take place under ideal – or even acceptable – conditions. This section reviews four of the most troubling systemic problems: those that relate to operational issues more than to isolated instances of illegal activity.

<sup>275</sup> UN General Assembly (2010), para. 15.

<sup>276</sup> See 4.3.1 above, Table 1 ‘Proposed checklist for a best interests assessment and determination process on intercountry adoption’, key issue 3.

<sup>277</sup> United Nations (1989). Convention on the Rights of the Child, Preamble.

<sup>278</sup> *ibid.* Art. 20.3 implicitly suggests this, for example.

<sup>279</sup> Van Bueren, G. (1998), p. 93 (our emphasis).

<sup>280</sup> *ibid.*, p. 95, (our emphasis).

<sup>281</sup> Cf. United Nations (1989), Arts 9.1. and 20.1.

### 5.2.1. Limited domestic options

To maximize the usefulness of the BID process, there needs to be in place a whole spectrum of preventive and protective responses that can be considered before deciding that intercountry adoption may be in the child's best interests.

The Guidelines for the Alternative Care of Children emphasize the need for countries to "implement effective measures to prevent child abandonment, relinquishment and separation of the child from his/her family"<sup>282</sup> and list a variety of potential family support and strengthening programmes.<sup>283</sup> The provision of such services stretches the available resources in many countries, but this can be eased in various ways. These include the judicious implementation of social protection schemes to reduce family poverty, assisting the community to provide day care, and enlisting the conciliation and counselling skills of community leaders and elders. In some contexts, it may be appropriate to mobilize international development cooperation in such efforts, including 'South-South' cooperation (e.g. to kick-start community day-care initiatives based on successful experiences elsewhere). Combined with an enhanced recognition of traditional informal care options (see section 3.3.1), affordable schemes can be developed to avoid recourse to formal care placements or adoption.

The Guidelines also point to the need for a "range of alternative care options ... for emergency, short-term and long-term care"<sup>284</sup> that come into play when efforts to prevent short or long-term family separation fail. This range spans foster care and other family-based arrangements, as well as suitable forms of residential care. The availability and quality of such care options determines whether or not the subsidiarity of intercountry adoption to domestic solutions can be adhered to in practice. Too often, the reality in countries of origin is that no such range exists, with residential facilities offering almost the only form of care provision (see section 5.2.2 below). Development assistance programmes should also be mobilized to support the establishment of such a viable range of options, in line with the Guidelines

on type and quality. As noted in Chapter 3, many countries of origin have been inspired to develop in-country alternative care options on becoming a state party to the 1993 Hague Convention. In particular, countries as diverse as China, Guatemala, Kenya and Moldova have developed family-based responses. These include the promotion of domestic adoption for children who will never again be able to benefit from parental or kinship care. An effective step towards such an approach can be simply removing financial hurdles, such as administrative charges and travel costs, which may be prohibitive for nationals who are otherwise willing and fit to adopt.

Many countries of origin have been inspired to develop in-country alternative care options on becoming a state party to the 1993 Hague Convention.

While the impact of such initiatives can only be progressive, their importance is particularly critical in ensuring a meaningful BID process for intercountry adoption.

### 5.2.2. Private residential care provision

Formal alternative care provision in most countries of origin consists mainly of privately run residential facilities, with the exception of countries in Central and Eastern Europe and the Commonwealth of Independent States. It is not unusual for such facilities to be involved directly in intercountry adoptions – indeed, some are established or financed by adoption agencies themselves or are supported through donations from prospective adopters. Frequently, such residential care facilities are not registered or authorized as being fit to care for children either professionally or ethically, let alone subject to inspection and supervision, as demanded by the Guidelines.<sup>285</sup>

This essentially unregulated and growing sector<sup>286</sup> jeopardizes any attempts to carry out a fully fledged BID process. Above all, it is at the heart of the active recruitment of children into alternative care, whether or

<sup>282</sup> United Nations General Assembly (2010), para. 34.

<sup>283</sup> *ibid.*

<sup>284</sup> *ibid.*, para. 54.

<sup>285</sup> *ibid.*, para. 55.

<sup>286</sup> For example, according to Save the Children, the number of residential facilities for children in Ghana increased from ten in 1996 to more than 140 in 2009, and by a factor of 11 in Liberia over the same period. See Save the Children (2009). *Keeping Children out of Harmful Institutions*. London: Save the Children UK.

not this is necessary for those concerned. Parts of this sector also try to ensure, by any means necessary, that as many children as possible can be presented as 'adoptable', in response to demand from abroad. In recent years, scandals over such child procurement have erupted in many countries of origin, including Cambodia, Ethiopia and Haiti. The fact is that the best interests of the child are not on the agenda of such residential facilities.

The problems to be overcome if BID is to become a reality in such circumstances are clear. Private provision is destined to remain the core feature of alternative care systems in those countries of origin for the foreseeable future. It exists primarily because the state in those countries is unable or unwilling to devote resources to care provision (and to the prevention of recourse to alternative care) and because outside funding can be accessed with ease. In most such countries, therefore, it is unlikely that state resources will be made available on the scale required to ensure meaningful oversight and the conditions that would make the BID process a realistic proposition.

Possible responses to this, while not resolving the situation fully, may at least improve it. They include: increased international cooperation to enable countries of origin to assess, authorize and inspect care providers systematically and on the basis of comprehensive criteria; prohibiting the establishment or funding of residential facilities by agencies engaged in intercountry adoption and their clients; and sensitizing foreign donors to the paradox of funding the kind of facilities that would be discouraged or outlawed in their own countries – in essence promoting the very type of care provision that leads to the concerns they express about the number of children in institutional care.

### 5.2.3. Reasons given for pronouncing 'adoptability'

The vast majority of children who are adopted abroad are neither orphans, in the sense that both parents have died, nor have they been removed from parental care because of serious abuse or deliberate neglect. It is now a well-established fact

that most children in 'orphanages' still have one or both parents. Save the Children records that at least four out of every five children in institutional care worldwide have one or both parents alive, with that proportion often being even higher in individual countries or regions: 90 per cent in Ghana and even 98 per cent in Central and Eastern European countries of origin, for example.<sup>287</sup>

**It is now a well-established fact that most children in 'orphanages' still have one or both parents.**

This reality has generated the highly dubious term 'social orphans' to describe the status of these children, in an attempt to legitimize a view of them as being in a similar situation to that of genuine orphans. Given that the likelihood of a child being orphaned increases with age, most true orphans are older and therefore more difficult to place with adoptive families, particularly in the case of sibling groups.

In most African and Asian countries of origin, and some countries elsewhere, it is rare for parents to be formally deprived of their parental responsibilities as a result of maltreatment of their child, in part because the social work and legal systems are insufficiently developed to undertake such interventions. As a result, very few children in such countries become legally adoptable for this reason.

It follows that most of the children adopted abroad are declared to be either 'abandoned' – with their parents recorded as unknown – or 'relinquished' by their parents who have, at least in principle, given their free and informed consent to their child's adoption. Clearly, it is extremely difficult to verify whether or not a child has truly been 'abandoned' anonymously: all kinds of ploys have been used to make it almost impossible to trace parents. Relinquishment is also subject to much abuse, with forgery, coercion and misleading information all playing a part in many signed consent forms.

<sup>287</sup> *ibid.*

But what is particularly significant from the best interests angle is the way that national legislation influences whether abandonment or relinquishment is used to justify a child's adoptability – in other words, an opportunistic approach can often determine the registered status of children and, therefore, their future.

Before Guatemala's ratification of the 1993 Hague Convention became effective, very few 'abandoned' children were adopted abroad from that country, because abandonment had to be declared by a court and the process was unusually long. Almost all intercountry adoption cases were processed directly and solely by lawyers, and few of the latter would handle cases of abandonment "due to the lengthy and unwieldy process of having a child declared legally abandoned."<sup>288</sup> Because a signed consent form was, initially, enough for a child to be declared 'relinquished for adoption', this was invariably the chosen (extra-judicial) path taken by lawyers and prospective adopters.

In stark contrast, most children adopted abroad from Nepal had been registered as 'abandoned', essentially because it was difficult to prove otherwise. In 2010, however, the US government and others determined that "the documentation presented for children reported abandoned in Nepal is unreliable",<sup>289</sup> and all receiving countries have since refused to process the intercountry adoption of children reported as 'abandoned' from that country – leading inevitably to a sharp reduction in the number of adoptees, as that 'abandonment' had, invariably, been fabricated.<sup>290</sup>

Only one conclusion is possible if a BID process is to be achieved: receiving countries must examine very carefully not only the procedures and realities that underpin the justifications provided for 'adoptability' in each country of origin, but also the tenor and implications of the legislation in force, which may determine how children are channelled most easily into intercountry adoption. This is especially vital in relation to non-Hague countries of origin.

### 5.2.4. Lack of human and other resources to undertake a best interests determination

It is clear that a BID assessment on each child for whom intercountry adoption is envisaged needs considerable and timely investment. It is also obvious that, when annual intercountry adoptions from an economically disadvantaged country are no longer an 'exceptional measure' but a daily occurrence for possibly up to 10 children or more,<sup>291</sup> any such country would struggle to provide qualified staff to assess each child's situation and determine his or her real need to be cared for permanently in a family elsewhere.

This is all the more important when adoptions from a given country have escalated within a few years, and the country in question is not bound by Hague requirements. Adoptions abroad from the Democratic Republic of Congo, for example, rose from just one each month in 2004 to well over one per day by 2012 (at least 460 to France, Italy and the United States combined during that year), completely outpacing any developments in allocated resources.

As a result, it is untenable for countries of origin or receiving countries to affirm that intercountry adoptions under such conditions have been approved and undertaken with the best interests of the child as 'the paramount consideration'.

There seem to be three main ways to confront this kind of situation, though none is by any means entirely satisfactory.

First and most obviously, the country of origin may limit the number of intercountry adoptions to a level that the system can cope with. Madagascar, for example, uses this approach preventively, but the remedy has been more usually applied only once the system is overwhelmed. This may result in a 'stop-go' approach which generates problems of its own.

Second, attempts can be made to increase resources to undertake BID and other tasks related to intercountry adoption, with receiving countries offering training and other assistance, for example. However, this prioritizes intercountry adoption

<sup>288</sup> Bunkers, K.M. (2005). 'Fostering children prior to adoption: The case of Guatemala', *Early Childhood Matters*, 105: 42–44.

<sup>289</sup> US Citizenship and Immigration Services and Department of State, news release, 6 August 2010.

<sup>290</sup> For example, for France, from 19 in 2010 to 0 in 2012; for the US, from 30 in 2010, then 63 (mainly pending from before) in 2011, down to 3 in 2012.

<sup>291</sup> For example, 4,397 children from Ethiopia were adopted abroad in 2010, an average of 12 per day.

assessments over other welfare initiatives and can create an undesirable imbalance in the use of scarce human resources, such as social workers and members of the medical professions.

Third, receiving countries could be more proactive in the BID process to compensate for the lack of local resources, but this would be a highly debatable move for many reasons, including: the jurisdictional and legal status of such interventions; the need for in-depth knowledge of culture and mores; and the perceived or actual conflict of interests involved. Indeed, few receiving countries carry out case-by-case investigations, even where there are serious concerns, because of the restricted mandates and resources of their representations in the countries concerned, and the logistical problems often involved.

The dilemma is clear. On the one hand, putting a fully-fledged BID process in place could divert resources in the country of origin from more fundamental welfare issues. On the other hand, without such a process, there is no guarantee that the subsidiarity principle will be respected and that the best interests of the child will be upheld.

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### 5.3. Actions taken by receiving countries

While it is natural that countries of origin, according to international standards, must be the sole decision-makers as to when intercountry adoption is in the best interests of their children, this does not absolve receiving countries of all responsibility. In general, and in theory at least, receiving countries accept this. What they are more reluctant to accept is the fact that countries of origin have been put in that position because this is what potential or actual receiving countries have obliged them to do. Intercountry adoption happens at the initiative of receiving countries, not as a result of requests from countries of origin. Receiving countries act, and countries of origin can then only

react as best they can and despite all the odds noted in the preceding sections of this study. In the following sub-section we recall the major concerns that must be tackled by receiving countries in particular to create a BID-friendly environment.

### Intercountry adoption happens at the initiative of receiving countries, not as a result of requests from countries of origin.

#### 5.3.1. Financial incentives to maximize intercountry adoptions

Over and above illegal payments made to secure children for adoption and/or to expedite the adoption process, policies and laws in some countries create systems that involve financial obligations. These, perversely, constitute officially sanctioned incentives to carry out the maximum number of intercountry adoptions.

While these systems vary in nature, they revolve around the idea that agencies and/or prospective adopters are required to make a 'contribution' or are encouraged to make a 'donation' to an authority (central, regional or local) or to a specific residential child care facility for adoptions to be processed. It is immaterial whether the contribution or 'gift' is made before, during or after the adoption process: the knowledge that it is coming at some point incites those involved to procure and 'process' children to that end. Meanwhile, the firm expectation on the part of the contributor or donor that an 'adoptable' child will be allocated creates a similar climate of pressure to make a child available.

The problem can be particularly severe when agencies work closely with specific residential facilities and where, as is often the case, the transfers are made in cash with no accountability. Contributions or donations per child adopted may be the subject of bargaining and each facility concerned benefits by providing the highest number of children possible.<sup>292</sup>

<sup>292</sup> See, for example, US Embassy Hanoi (2008). 'Warning Concerning Adoptions in Vietnam'.

Such is the level of overall concern about the unequal influences of money and the best interests of the child in adoptions that the Permanent Bureau of the Hague Conference is developing a Note on the Financial Aspects of Intercountry Adoption, based on the conclusions of an Expert Group set up specifically to examine the question.<sup>293</sup> This covers all the questions outlined above and a wide range of associated issues.

One important requirement that transpires is the fundamental need to ensure that expenditure related to an adoption must be limited to the costs of services directly involved and nothing more. Any financial support to an authority or facility for general child protection, for example, should be kept completely separate from intercountry adoption, and should never be demanded of, or accepted from, bodies or individuals involved in an adoption.

Competent authorities in receiving countries must systematically refuse any proposed arrangement with a country of origin that does not respect this separation, and must also ensure that all actors comply with this rule in practice. Unless and until this incentive to maximize the number of children for adoption abroad is removed, there is no realistic possibility of ensuring that a BID process can take place under proper conditions or, therefore, that children are adopted to the receiving country 'in their best interests'.

### 5.3.2. Independent adoptions

Intercountry adoptions carried out privately or independently – without going through an accredited agency or being under the direct and effective supervision of a central authority – are not covered by or compliant with the 1993 Hague Convention. Any possibility of such independent adoptions was excluded deliberately from the Hague Convention because they had been shown to involve a particularly high risk of malpractice from a variety of standpoints.

Independent adoptions were excluded deliberately from the Hague Convention because they had been shown to involve a particularly high risk of malpractice.

The Hague Special Commission has called for a total "prohibition on private and independent adoptions"<sup>294</sup> and the Council of Europe's former Commissioner for Human Rights has recommended specifically that states "ensure that intercountry adoption is carried out only through accredited and authorised agencies and explicitly ban non-regulated and private adoptions from any country of origin".<sup>295</sup>

There is no question that these recommendations must be acted upon by all receiving countries if they are serious about the best interests of the child being the paramount consideration in intercountry adoption.

Independent adopters may use the services of individuals who are not registered, authorized or monitored in the chosen country of origin. They have no way of verifying the legality of the various steps undertaken, and they are likely to play an inappropriate role in determining which child they seek to adopt, 'selecting' a child rather than being 'matched' with a child. The activities of individuals in the country of origin are far more difficult to monitor than those of a single accredited agency representing many prospective adopters. If such adopters return home with a child, it is likely that the adoption will be recognized or that the child will be granted permission to remain, whatever has happened in the country of origin, since the 'best interests of the child' at that late stage usually dictate that the child will not be returned to that country. In addition, independent adopters may have no access to specialized post-adoption assistance.

In sum, the existence of independent adoptions has no justification from a children's rights standpoint. By their very nature, they severely compromise any

<sup>293</sup> The original discussion paper on this question was presented to the Expert Group in 2012. See Hague Conference on Private International Law (2012b). 'Discussion paper on the financial aspects of intercountry adoption'. The Hague: HCCH Permanent Bureau. The 'Note' is scheduled for publication in 2014.

<sup>294</sup> Hague Conference on International Private Law (2010), 1.g.

<sup>295</sup> Council of Europe (2011).

attempt to ensure the systematic determination of children's best interests.

### 5.3.3. Accreditation of agencies and competition

Agency involvement in intercountry adoptions is not any guarantee that procedures and standards will be respected. Good Practice Guide No. 2 issued by the Hague Conference<sup>296</sup> is a response to the clear need for stricter accreditation and authorization of agencies, according to wide-ranging criteria and with special attention to the ethics, professional quality and scope of the services they provide.

## Agency involvement in intercountry adoptions is not any guarantee that procedures and standards will be respected.

It is also important to ensure that the number of accredited agencies is not greater than is required to process adoptions to the receiving country concerned and that the number authorized to operate in a given country of origin corresponds to a realistic assessment of needs. Although authorization is the prerogative of the country of origin concerned, receiving countries can make sure that countries of origin understand the consequences of authorizing too many agencies, and can also take their own action to limit that number. For example, in countries where more than 50 agencies have permission to process adoptions, such as Ethiopia, Haiti and Viet Nam, a highly competitive climate is inevitably created, which can spawn child procurement and, therefore, negate any efforts to assess the best interests of the children in question.

### 5.3.4. Pressure from receiving countries

Receiving countries can and do exert pressure on countries of origin in various ways to launch or develop intercountry adoption programmes. These include: diplomatic missions to encourage 'cooperation' on the issue; making the establishment or enhancement of

intercountry adoption a condition of assistance programmes; and transmitting, or permitting the transmission of, applications from prospective adopters that outnumber the requirements for intercountry adoption from the country of origin concerned, creating an intimidating backlog of files to be handled.

Under the 1993 Hague Convention, it is not the role of central authorities to encourage other countries to undertake intercountry adoptions in any way. When such encouragement is expressed and is directed towards countries that are not parties to that Convention – and where a proper BID process is unlikely – it is all the more reprehensible on best interests grounds.

### 5.3.5. Relations with non-Hague countries

Every country that allows adoptions but has not yet acceded to the 1993 Hague Convention is urged to do so by the UN Committee on the Rights of the Child in its Concluding Observations on state party reports.

Clearly, ratifying the Hague Convention will not, of itself, eliminate overnight the problems outlined in this study. However, it is valid to question the reasons why some countries of origin have not felt it necessary or desirable to accede to the treaty; it is unlikely that these include the protection of the best interests of the children concerned.

## Ratifying the Hague Convention will not, of itself, eliminate overnight the problems outlined in this study.

Ideally, receiving countries should not consider putting in place adoption programmes from countries that are not Hague compliant, and where the basis for a BID process is, at best, shaky. At the very least, they should apply Hague principles rigorously in all cases and should examine very closely the motives of a country that remains outside the Hague framework, together with the impact this may have on a BID.

<sup>296</sup> Hague Conference on Private International Law (2012c).

Adherence to Hague principles, including BID, should be specified in any bilateral agreement drawn up with a non-contracting state. At the same time, no such agreement should supplant the Hague Convention itself, nor should it reduce motivation to proceed with accession to the treaty or provide an excuse not to do so.

### 5.3.6. Responses in post-disaster situations

The urgent cross-border displacement of children is warranted only when their lives are clearly at risk, and when internationally agreed principles governing this measure are respected. This includes children whose final adoption order had already been legally granted before the emergency. The best interests of all children are served, in the first instance, by ensuring appropriate responsive support in a human and physical environment that is familiar to them.

Children whose intercountry adoption has been formally and legally approved for specified adopters should be united with them under conditions that resemble as far as possible those that would have applied under normal circumstances. These include travel by the adopters to the country of origin to accompany the child to the receiving country – although the issuance of travel documents may be expedited if conditions so permit.

Affected children who are at an advanced stage in the intercountry adoption process, and particularly those who have bonded with specific prospective adopters, should be enabled to complete the adoption process in as expeditious a manner as possible, but still fully respecting international standards and safeguards.

The situation of affected children who are at the ‘matching’ stage or earlier should be reassessed once the immediate consequences of the disaster have been eased and the procedures that were already foreseen can be assured. This may involve a (further) best interests assessment to take account of the new, post-disaster, reality. Under no circumstances should these children be evacuated for adoption.

In post-disaster situations, receiving countries bear two major and special responsibilities, both of which are grounded clearly

and strongly in the 1993 Hague Convention and the best interests requirement.

First, they must never take advantage of the temporary absence or fragility of the competent national authorities to seek, implement, condone or allow measures that circumvent international standards to evacuate or otherwise remove children from their country of origin with a view to their adoption.

Second, they must ensure that prospective adopters are fully prepared and able to care for children who have experienced the trauma of a disaster, including those adopters who have already bonded with a child before the event.

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## 5.4. Creating consensus over best interests in intercountry adoption

One of the advantages of ensuring the proper and systematic determination of the best interests of the child within the human rights framework at both policy and case-by-case levels is that this would bring about a less disparate view among receiving countries, in particular, of what is acceptable practice.

The disturbing lack of a common approach towards problematic situations in countries of origin often results in some receiving countries halting intercountry adoptions unilaterally, while others continue, flying in the face of official pronouncements that the best interests of the child are the paramount consideration. This conflict in approaches is the result of competing factors that are seen differently by each country, with the rights-based best interests of the child sometimes side-lined in favour of political or other considerations. This sends a disturbing message to countries of origin: that it is not necessarily the best interests of their children that motivate their adoption abroad.

Putting an agreed and fully-fledged BID process at the very heart of intercountry adoption could not eliminate diverse approaches entirely, but it would surely reduce the breadth of the divergences and the frequency of discord, and thus their negative ramifications for children.



# 6

## By Way of Conclusion: Paradoxes and Dilemmas

Discussion of intercountry adoption issues today is too often a conflict, and often fruitless. This is in good part because the differing views expressed are widely, simplistically and wrongly ascribed to 'pro' and 'anti' stances on the practice itself.<sup>297</sup> In fact, most conflicts of opinion do not stem from diametrically-opposed standpoints on whether intercountry adoption is an acceptable or desirable measure in itself.

The differing views expressed are widely, simplistically and wrongly ascribed to 'pro' and 'anti' stances on the practice itself.

Digging a little deeper, the underlying and sometimes profound discord revolves around what is implied by the term 'best interests of the child', and therefore under what conditions best interests point to intercountry adoption as a positive solution. This is relevant not only to decisions about individual children, but also to the place given to, or restrictions placed on, intercountry adoption in a country's overall child protection policy, and the appropriateness of the way in which the adoption process is carried out.

As is clear from this study, however, an examination of how to respond to those diverging views, by developing objective ways to determine 'best interests', reveals a whole series of paradoxes and dilemmas:

- The concept of the 'best interests of the child' comes from an era before children were granted human rights, and was seen as a criterion for protective action in the absence of such rights. Today, however, it is seen as a key principle underlying all those rights.
- 'Best interests' as a concept is unknown in international human rights law, save in relation to children, but little has been done until recently to identify how, in practical terms, it should underpin or contribute to the fulfilment of the human rights of children.
- While the process of determining, and the outcomes of applying, best interests are left deliberately vague in international texts – in recognition of diverse socio-cultural realities and individual situations – intercountry adoption involves actors from very different socio-cultural contexts who have to agree, in principle, on one outcome based on those best interests.
- Despite all of the above, the best interests of the child – vague as they are – are to be the decisive factor in determining whether or not a child should be adopted abroad.
- The proper determination and protection of those best interests demands timely intervention and considerable qualified human investment. However, for many countries of origin, building the human resources for this task would involve diverting professionals

<sup>297</sup> See, for example, Bartholet, E. (2007), *op. cit.*, pp. 151-203 (referring *passim* to "opponents of international adoption").

whose efforts could and should be directed to strengthening families and, where necessary, securing suitable alternative care and adoption possibilities within their country.

- Receiving countries that, by ratifying the 1993 Hague Convention and – bar one – the CRC, have committed to ensure that the best interests of the child are the paramount consideration for intercountry adoption still tend to seek out (non-Hague) countries of origin that are not bound by the procedures designed to enable that best interests obligation to be fulfilled.
- Countries of origin maintain systems, and receiving countries agree to conditions, comprising elements that inevitably relegate the best interests of the child to second place, only adding to the problems of determining those best interests even within a supportive framework.
- Perhaps the most striking paradox of all is the fact that most of the ‘best interests’ dilemmas now faced by countries of origin stem simply from their acceptance of overtures made by receiving countries, and not from any deliberate or active effort on their part to secure the adoption of their children abroad.

While this study cannot resolve such paradoxes and dilemmas, it has set out to pinpoint and confront them, and to propose a number of responses to maximize compliance with the best interests principle in a human rights context in the case of intercountry adoption.

Unless we tackle these issues, it will be just as difficult for those who deplore violations of the best interests of the child to find global support for their claims as it is for those who declare that those best interests are being upheld.

We may not be certain or in agreement today about what applying the best interests principle really means for decisions on intercountry adoption. But we are duty bound to move as swiftly as possible along the road to clarity and consensus.

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