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EDITORIAL

Bringing moratoriums in line with international standards

Given the frequency of moratoriums in intercountry adoption procedures, and irrespective of the context of why and how one is instigated, international law demands that certain minimum standards are evoked to ensure the best protection of children in their application.

Moratoriums are suspensions of intercountry procedures and in the majority of cases instigated by a country of origin. Moratoriums are rarely a simple matter, because they originate from diverse motives, vary in form and can have acute consequences on the parties involved in the intercountry adoption process, especially for those linked with 'pipeline' cases. Given the frequency of such decisions, one has to keep in mind the context of international law and the need for the latter to be respected.

Diverse motivations for instigating moratoriums

Moratoriums can be initiated for a variety of reasons including the need to overhaul the child protection framework, as a response to pressure from receiving countries as well as to address widespread abuses and corruption etc. Such justifications can polarise actors involved in intercountry adoptions, with one group viewing moratoriums as a knee jerk reaction being the unnecessary prolongation of finding a solution for the permanent placement of children, whilst others considering them to be a necessary step to combat a precarious situation. A delicate balance between competing interests must be found, keeping that of the child's as the priority.

Over the last years, some countries of origin have made a wide use of moratoriums, resulting in a "stop and go" situation, which is

Quai du Seujet, 32 ▪ 1201 Geneva ▪ Switzerland
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particularly difficult to handle. They have resulted in endless pending cases, with unnecessary suffering for both children and prospective adoptive parents. These experiences have shown that moratoriums should not only be based on political arguments, but they are temporary measures that can be used for solving a specific problem. Moratoriums should not be relied upon in the long term as other measures such as changes in national law are better suited for the definitive prohibition of intercountry adoptions.

Diverse forms of moratoriums

Once a country decides that a moratorium is necessary, it then must determine its form. Some countries will opt for making an official statement (eg: Belarus, Romania, Guatemala, Cambodia, Nepal, Liberia, Moldova etc) and others, particularly those in the Latin American region (eg: Argentina, Paraguay and Venezuela etc) have implemented 'defacto' moratoriums where an official statement is not made, but in practice intercountry adoptions are limited and has the same effect of suspending adoptions.

Countries must also choose who the moratorium will apply to, that is whether it will apply equally to all countries and/or all children. For example in 2009, Peru decided that it would no longer accept dossiers from countries that are not party to THC-93 and the Philippines instigated a moratorium for all children under 2 years.

Whatever form is adopted as per the prerogative of each country, international standards simply demands that concerned countries keep communication lines open. The country implementing the moratorium should co-operate fully with relevant receiving countries by communicating clearly and regularly its position. This can include the length and scope of the moratorium, timeline of expected activities and treatment of pipeline cases etc.

The 'pipeline cases'

When a moratorium is declared, the particular question arises of how to deal with 'pipeline' cases where the intercountry adoption process is underway but not yet finalised. International standards stipulate that the country clearly identify the particular circumstances of each child and the progress of their adoption dossier as a first priority. As a result of this assessment, two categories of children can be identified.

For children in the first group, where a matching has occurred and the prospective adoptive parent has agreed to the proposal, the Government should in principle, continue to finalise the adoption procedure after the following criteria are met. Firstly it has been determined that the prospective adoptive parents are eligible and that the child is or will be authorised to enter and reside permanently in that State. Secondly, it is agreed by the concerned country and relevant receiving country that the adoption can proceed. Any unnecessary delay in the child's placement is likely to be contrary to his interests, assuming all the required safeguards are in place (see Review 1/2010).

To facilitate the international principle of open communication, the country could establish an 'email contact' where concerned families can receive information about their particular case. To avoid being overburdened by emails, this 'contact' perhaps, should only be accessible by central authorities or accredited bodies acting on behalf of concerned prospective adoptive families. To help facilitate such a decision, it should be made clear that this contact will only respond to emails from central authorities or accredited bodies with questions about a specific case.

For children in the second group where a matching has not occurred, in principle, intercountry adoption should not be processed. Exceptions for duly justified reasons could be envisaged depending on the urgency and necessity of finalising the adoption given considerations, including, inter alia:

- quality and number of proofs that domestic solutions for the child have been clearly exhausted (eg: potential of finding domestic solutions)
- time the child has been waiting for a permanent family solution
- likely time the child may potentially have to wait for a permanent family solution
- psycho-social needs of the child
- health conditions of the child
- age of the child (eg: if the child is of a school age etc)
- possible bonding of the child with prospective adoptive parents

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- other special needs of the child (eg: to be placed with other siblings etc)
- characteristics of the prospective adoptive parents (eg: family related adoptions or families temporarily living in the country)

The above list of issues shows that a strict black and white approach to moratoriums will not always lead to a respect of international standards. It is therefore of utmost importance that the above-mentioned questions are seriously taken into consideration by the authorities in charge before a moratorium decision is taken.

International law demands a clear and flexible approach in the application of moratoriums

A flexible but consistent approach must be adopted for pipeline cases and necessary safeguards must be in place before such cases can be processed. For all other cases, intercountry adoptions should not be processed and the country of origin's prerogative should be respected. It may be also prudent for the prospective adoptive parents who fall in the latter category to be redirected to another country of origin to avoid an uncertain time of waiting for them. This could also minimise pressure on the country, so that it does not have to deal with old files as well as new files should it decide to re-open intercountry adoptions. Such an approach is altogether consistent with international law, so long as the best interests of each individual child are kept as the priority.

Sources: Guide to Good Practice, Hague Conference and UNICEF Guidance Note on Intercountry Adoptions in CEE/CIS

ACTORS IN MATTERS OF ADOPTION

Source: Permanent Bureau of the Hague Conference: http://hcch.e-vision.nl/index_en.php?act=conventions.authorities&cid=69.

- **Kazakhstan:** The Hague Convention was ratified by both Chambers of the Parliament and endorsed by the President on 13 March 2010. Based on the implementation decree it would enter in force within 3 months from the date of signature i.e. from 13 June 2010
- **Sweden:** This country has updated the details of its adoption accredited bodies.

BRIEF

Geneva: Human Rights Council adopts resolution for the drafting of a communications procedure for the UN Convention on the Rights of the Child (UNCRC)

The Human Rights Council (HRC) in its March session examined the first report of the Open-ended Working Group (established by HRC resolution 11/1 in 2009) to explore the possibility of elaborating an optional protocol to the UNCRC to provide a communications procedure complementary to the reporting procedure under the Convention. This new resolution (A/HRC/13/L.5) requests the chairperson of the working group to 'prepare a proposal for a draft optional protocol', which will be the first official draft. Recalling that the aim of this optional protocol will be another means of communicating breaches to the Committee on the Rights of the Child, when national remedies have been exhausted. To date the UNCRC is the only Convention without a communication mechanism.

Source: http://ap.ohchr.org/documents/sdpage_e.aspx?b=10&se=104&t=4

Thailand: Temporary suspension of new intercounty adoption (ICA) files starting in February 2010

The Thai Central Adoption Authority has made a decision to not accept any new files due to a significant backlog of applications and less children being in need of an ICA. Applications for children with 'significant' special needs may continue to be accepted.

Source: http://www.ag.gov.au/www/agd/agd.nsf/Page/Intercountry_AdoptionWhats_New#thailandfurther

Quai du Seujet, 32 ▪ 1201 Geneva ▪ Switzerland
Tel : +41 (0)22 906 77 00 ▪ Fax: +41 (0)22 906 77 01 ▪ E-mail : irc-cir@iss-ssi.org ▪ www.iss-ssi.org

Legal framework for the consultation and consent of child in adoption: Part 1

This article examines the legal aspects of consulting a child in adoption and is based on a paper presented by ISS at a conference on the challenges in adoption procedures in Europe: ensuring the best interests of the child, co-hosted by Council of Europe and European Commission Conference. It is the first of a series of three articles dealing with this topic.

International law requires that the child be consulted in decisions that affect him/her. There are very few decisions, of more importance to a child than where s/he should live, with whom and when a filiation tie should be permanently made. International law does not give children the sovereign decision making authority but rather it reinforces the notion that they should be given the opportunity to participate in important decisions such as when an adoption order should be made. This short article examines the international legal framework addressing the topic and deals with how the latter is translated into various national legislatives contexts. Two complimentary articles exploring the practical implementation of these laws will be forthcoming.

International legal framework

The right of the child to be consulted is a well established principle in article 12 UNCRC and regarded as one of the four pillars of the Convention. In May 2009 the Committee on the Rights of the Child (Committee) adopted General Comment 12 which aims to strengthen the understanding of article 12 (see Review 7/09). The Committee recommends that the child be consulted in the placement decision and more precisely, when adoption is chosen that 'all States parties inform the child, if possible, about the effects of adoption, kafalah or other placement, and to ensure by legislation that the views of the child are heard.'

This participation right in alternative care decisions is also embedded in the Guidelines for the Alternative Care of Children (see Review 1/09). For example, children should be provided with all the necessary information about the alternative care options to make an informed decision (par 63) and may request that other important persons in the child's life be consulted (par 64). Moreover, in the context of intercountry adoptions, article 4(d)(2)THC-93 makes it a requirement that 'consideration has been given to the child's wishes and opinions'.

Based on the above examination, the international requirements can be summarised into two levels. Firstly the child should be consulted about his/her placement options which can include kinship care, foster care etc of which adoption is only one option. Secondly, once adoption is chosen as the placement option that it is in the best interests, prima facie, the child's consent or otherwise should be obtained having had the effects of the adoption explained to him/her.

National legislative frameworks

The above international standards are translated diversely and flexibly into various national legislative frameworks. Disappointingly, the first aspect requiring that children are consulted about their placement options is not systematically included in all child protection frameworks. Norway provides a good example of how this situation can be rectified. Its Children's Act requires that 'when the child reaches the age of 7, it shall be allowed to voice its view before any decisions are made about the child's personal situation', which would include where and with whom the child will live.

As for the second aspect, having an obligation to have the child's consent before an adoption is made, it is reassuring to find that all the countries in the European region had a reference. Most countries have a minimum age for when the child's consent is compulsory, ranging from 10 to 15 years, although 15 is rather high. Whilst a minimum age is beneficial, ISS/IRC believes it is important that the laws incorporate a certain flexibility to include the consent of younger children aligned with their evolving capacities. In this regard, other countries do not specify a minimum age but have an obligation to

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include the child's consent based on the maturity of the child (eg: Greece).

In addition to having a minimum age, distinct safeguards can be found in some existing laws, thus give fuller meaning to the right of the child to be consulted in the adoption procedure, a few of which are mentioned below:

- Before consent is given, relevant professionals must explain the effects of adoption and provide Guidance (eg: Iceland)
- Consent must be given personally (eg: Italy)
- Requirement that consent is verified by a tribunal or Government body (eg: Latvia). This ensures that an independent and ideally professional assessment of the child's consent has been made
- Consent must be provided without the presence of the prospective adoptive parents. This ensures that the child is able to freely provide his/her consent without the pressure of potentially hurting the feelings of PAPs (eg: Belarus)

It is important to note that in some countries consent can be dispensed with if the child has been living with the family (eg: Armenia, Azerbaijan, Moldova etc). Whilst this provision would allow for the expedition of adoption procedures, it is vital that children are nevertheless consulted about the permanency of the placement. Unfortunately one can not automatically assume that each and every foster care placement is suitable for a permanent adoption plan. This view is supported by the UN Committee on the Rights of the Child in its General Comment 12 who identify this situation as being important to obtain the consent of the child.

Whilst it is essential to have an adequate legislative framework protecting the right of the child to be consulted, the implementation of these laws is just as crucial as discussed in subsequent articles in upcoming Reviews.

PRACTICE

Access to one's origins from a psychological point of view

Following his paper presented at Joint Council of Europe and European Commission Conference Challenges in adoption procedures in Europe in November 2009, Professor, Dr Philip D. Jaffé agreed to prepare an article on 'accessing one's origins.

Erikson (1959) famously wrote that identity represents «a feeling of being at home in one's body, a sense of knowing where one is going, and an inner assuredness of anticipated recognition from those who count» (p. 165). Identity formation is a core developmental task for all children as they explore the boundaries of their physical self almost at birth, as they enter into a relational frame, essentially with their birthmother. Identity is a crucial component of emotional security.

Who am I – from an adopted child's perspective.

An adopted child can only answer the question «who am I?» with some degree of investigation. Getting answers is more of a quest than simply retrieving information from willing sources. Professionals know that, outside of open adoption, the identity seeking adoptee must still deal with secrecy and lack of information. So, the human need to construct one's identity, to feel at home in one's body, pushes most adoptees to embark on a restless search for answers about origins. They encounter many dead ends, starting with adoptive parents who may not want to share information or for whom it is hurtful that their child searches for his or her origins because it implies a form of rejection of the new family. It is therefore vital for adoption staff to prepare adoptive parents during the pre-adoption stage so that they may anticipate their child's search for his or her origins.

As the adopted child's keeps questioning and his or her search intensifies, a curious process gets under way, intertwining the acknowledgement of loss, mourning and the active production of fantasy to make up for the loss and to compensate for unpleasant

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emotions. That is because loss is a central experiential element that adoptees must mentally metabolize and accept, not only the loss of their genealogical continuity and the physical proximity of their birthparents, but also the sense of unquestioned belongingness they had enjoyed until then in adoptive families, as well as, in the case of transracial adoption, the loss of cultural continuity. And after an often frustrating quest, adoptees discover that they must contend with the reality that the shape and the extent of the loss is itself unknown.

Dealing with the unknown

The human mind does not accept blank zones readily and, like other groups dealing with lack of information and secrecy, adoptees fill the blanks and generate fantasies about who they are and where they come from. Psychoanalysis was proficient in describing these fantasies, albeit simplistically… having a twin leading a different life somewhere, having been bought, stolen, kidnapped, abused, neglected, etc. Searching for one's origins could be described as the understanding of the trauma that has defined one's past. One is what one has lost would be a fair way of summarizing. Once the mind is able to wrap itself around this terrible childhood experience, the adoptee could turn with some hope to his or her future life.

While loss and trauma are unavoidable ingredients of practically all adoptions, the psychological field has evolved into a much more elaborate understanding of the sense of personal identity and of its components, this understanding taking into account the notion of *personal narrative*. We are all constantly updating our personal narrative about who we are and how we relate to others, and so on. This constant flow of information that we are processing and archiving is part of our sense of agency, the feeling that we have some mastery over our environment, of ourselves in context.

Constructing one's personal narrative

One's personal narrative is highly subjective, even fictitious, in that facts are undocumented, information is distorted and personalized. Homans (2006) suggests that, in some ways, adoptees and non adoptees are alike: in our personal narrative, all origins are inventions, neither recoverable nor verifiable. However, it is obvious that some origins have a truer ring and the more so when origins are known. But, even when origins are not known, the line separating truth from fiction is often blurred. Indeed, a common experience among adoptees is to juggle with two origins, and the one that is obscured from reality is the one that generates the adoptees' greatest creative process.

Sants (1964) wrote insightfully that not knowing one's origins could have a bewildering effect, induce a great state of confusion, and have a negative effect on the adoptee's personal growth. Historically, genealogical bewilderment really reflects the adoption practices in the dark days of secrecy aimed at constructing a family fiction that erased the very notion of adoption. Fortunately adoption practices have evolved over the past few decades and it is now clear that adoptees must be provided with the factual elements that make up their history and can fuel their personal narrative. We now know that the adoptee's compulsion to search for origins becomes a compulsion to create them (Homans (2006). Literal and factual information are pieces of a puzzle, they help map out what is not known, they help in constructing a childhood, and they support the creative narrative that adoptees must implement to hold on to a stable sense of self for the rest of their lives. After all, it is undeniable that adoption represents a psychological fiction despite any attempt to create a judicial reality.

Essential to preserve access to information

In conclusion, given that retrieving some pieces, any pieces, of one's literal origin helps us all, but above all adoptees, generate a satisfactory personal narrative, it is essential that, based on the child's best interest doctrine and from a children's rights perspective, we must strenuously support administrative and legal best practices that preserve and provide access to information regarding personal origins, and facilitated the creative journeys adoptive families and adoptees undertake if they so chose to search for their origins.

Notes: Erikson, E. H. (1959). Identity and the life cycle: Selected papers. *Psychological Issues*. 1, 1-171, Homans, M. (2006) Adoption narratives, trauma, and origins. *Narrative*. FindArticles.com. 27 Nov, 2009.

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http://findarticles.com/p/articles/mi_hb1455/is_1_14/ai_n29360375/ and Sants, H.J. (1964). Genealogical bewilderment in children with substitute parents. *British Medical Journal*, 37, 133-141.

The author is the Director, Institut universitaire Kurt Bösch, Sion, Switzerland / www.iukb / philip.jaffe@iukb.ch

READER'S FORUM

Ratification of the THC-93 and implementation of regulations in India has not always had beneficial results

Arun Dohle, author of the article 'Inside Story of an Adoption Scandal' published in the Cumberland Law Review Vol 39:1, 2008 has kindly provided the ISS/IRC a brief summary of this text where he identifies existing concerns about the Indian intercountry adoption, even after ratification of THC-93.

The ISS/IRC has decided to publish this summary by Arun Dohle to highlight that the ratification of THC-93 by a country of origin does not automatically lead to a 'green light' that there are sufficient safeguards in place to undertake intercountry adoptions. In any country, ratification of THC-93 is just a first step to a much needed overhaul of the child protection framework and alternative care system.

This article shows how, in the case of India, in certain situations persons have profited from the ratification of THC-93 and legal procedures to the detriment of the rights of children. The ISS/IRC strongly recommends that authorities processing adoptions in all countries make genuine efforts to ensure that children are really in need intercountry adoption plans rather than blindly rubber stamping the paperwork that the legal formalities have been met.

Summary of 'Inside Story of an Adoption Scandal' by Arun Dohle

Within thirty years of its inception, Intercountry adoption from India has been ridden with murky scandals of child kidnapping, falsifying paperwork, outright trading and tragic stories spelled out broadly in the media. It was widely believed among adoption experts worldwide, that ratifying the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption (1993) would help reduce malpractice in adoptions. But does regulating help in weeding out malpractices? Or does the regulating of intercountry adoptions, because of the strong demand for children, lead to a legalised market for children without much effective control?

Preet Mandir

The children's home Preet Mandir facilitated 358 adoptions to the US and Europe between 2004 and 2006. Many of the children were not orphans, but had been placed into care by relatives. Agreement for adoption was often faked or given without full understanding that children would be adopted abroad and all legal bonds permanently severed. In the article some cases are analysed in detail.

It is crucial to realise that the adoption papers created in the very beginning of the process, form the basis for every later step in the process. At no point does any authority crosscheck whether the papers and their content reflect the truth. At no stage does anyone question if sufficient efforts were made to re-integrate these children with their parents, or with the extended family or others in the community.

Until the 2006 CARA Guidelines became effective, taking donations was allowed. Thus, since Preet Mandir labelled the amounts (6.000 – 12.000 dollars) charged from adoptive parents as "donations", they operated prima facie within the legal framework. The 2006 CARA Guidelines, however, stipulate that an agency may charge a flat fee of 3.500 $ and no donation is allowed. Preet Mandir violated this rule. But since that was proven only in two cases, this does not seem to worry the authorities much. Not in India, nor in the receiving countries.

Is Preet Mandir involved in child laundering? In a strict legal sense the answer must be negative; Preet Mandir obtained

children "legally". The children were not stolen or kidnapped, but legally relinquished by their parents or freed for adoption by the Child Welfare Committees, and from then onwards, Preet Mandir just followed the legal steps. Steps that all are leading straight to the same destination: intercountry adoption.

A legalised Child Market

Regulating intercountry adoption and thus defining exact procedures on how to relinquish children, how to declare children as abandoned, putting deadlines on decision making means that these procedures are validated as good as blindly by the courts and thus accepted by the central authority. This creates a watertight system where parents are left powerless and without support.

In the receiving countries, the Indian regulation leads to a mystification of what really happens in India. Their impression is that since adoptions are well regulated with checks and balances in place, children are indeed "orphans" and that the best solution for them is to be adopted by foreigners. Media exposure may shake this confidence short term, but after expert reports confirm the legality of procedures, the confidence quickly returns.

The rules developed under the guise of the Hague Convention do not prevent abuses, but instead prevent them from being seen. They mystify and hide the inherent injustice behind a legalised smokescreen. The results are demand-driven 'legal orphans', who according to paperwork could not be cared for in their own country. The reality is that India could easily care for the 700 to 1,000 children sent abroad yearly. This is a matter of political choice.

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- The texts must be sent in English, French or Spanish to: irc-cir@iss-ssi.org.
- The texts must not exceed 1000 words.
- The ISS/IRC reserves the right to select the texts it publishes in this section.

FORTHCOMING CONFERENCES, SEMINARS, SYMPOSIA AND COURSES

- **Brazil:** 1er Congrès franco-brésilien sur psychanalyse, filiation et société (First Congress Franco-Brasilian about pyschoanalysis, filiation and society focusing on adoption), UNICAP, Recife-PE, 17-25 August. For more information: www.unicap.br/congresso_adocao
- **Canada:** Seminar for Extended Family and Friends of the Adoptive Family, Adoption Education, Toronto, 5 June 2010. For more information www.adoptioneducation.ca
- **Netherlands:** Third International Conference on Adoption Research (ICAR3), 11-15 July 2010. For more information http://icar3.eu/
- **United Kingdom***: a) International Foster Care Organisation European Regional Training Seminar*, IFCO, England, 4-7 July 2010. For more information see http://www.ifco.info/?q=node/302 and b) 2nd Annual Fostering Services Conference, BAAF, Central London, 17th June and Facing up to Facebook: The impact of social networking on adoption and fostering, BAAF, Central London, 24th June For more information www.baaf.org

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Quai du Seujet, 32 ▪ 1201 Geneva ▪ Switzerland
Tel : +41 (0)22 906 77 00 ▪ Fax: +41 (0)22 906 77 01 ▪ E-mail : irc-cir@iss-ssi.org ▪ www.iss-ssi.org