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**EDITORIAL**

**A call to readers **

*In order to consolidate and develop its activities, the ISS/IRC launches, for the first time, a call to the readers of its Monthly Review.*

**D**ear readers,

Like every month, you are about to read ISS/IRC's information Review, which has just arrived in your inbox. For approximately 15 years, this Review has made it possible to disseminate good practices relating to the care of children deprived of their family, to maintain and develop a world-wide network of professionals interested in child protection, and to provide our programme with the visibility it requires to establish its recognition. As you well know, the creation and dissemination of the Review is possible thanks to the annual contributions of the 20

countries, which currently support the ISS/IRC. Whilst this financial support enables all these countries' professionals to receive the Review free-of-charge, it also makes it possible to distribute it for free in developing countries or countries in transition.

Thanks to this solidarity, the Review is nowadays sent to approximately 4,000 contacts worldwide, and through its redistribution, one can reasonably estimate that over 10,000 people read it every month.

Of course, we feel honoured and proud of this result, and always appreciate the

compliments and expressions of interest, which we receive from our readers.

The preparation of the Review certainly involves the implementation of financial and human resources, within the framework of the ISS/IRC programme's general management. To date, 80% of our global budget relies on the 20 state contributions; the remaining 20% are covered by specific projects. As such, the programme is financially stable, but these incomes do not make it possible to make funds available aimed at undertaking additional activities or investments, such as the improvement of the distribution's IT system or the creation of a new design for the Review, the development of services accessible via our website, the promotion and dissemination of our research, etc.

For the past three years, the ISS General Secretariat has initiated an active research process for new funding sources, either via the development of new projects or the search for donations. With regards, specifically, to the ISS/IRC, this process is challenging given that our services are only quantifiable to a limited degree in terms of results and direct beneficiaries, and that the needs, which we have identified, do not really fit the usual frameworks of donations. Thus, we have considered calling upon you and

have devised five possible means of supporting us:

- 1) **Send us an e-mail**, explaining why the Monthly Review is important to you in relation to your professional activity. Your contributions will enable us to explain more easily to our potential donors the interest and value of our work.
- 2) Help us to **develop our network**: share the Review and send us the contact details of new readers, in particular in countries of origin. The more the Review is read, the stronger it will be!
- 3) Take out a **support subscription** to express your attachment to this publication. The support subscription is set at 500 USD / Swiss Francs or 400 Euro.
- 4) Make a **donation to the ISS/IRC** in order for it to improve its services and in order to ensure its permanence.
- 5) Suggest **new means of funding**, based on your knowledge and experiences (new contributing countries, potential donors, new services, etc).

For all these possibilities, a unique address: [irc-cir@iss-ssi.org](mailto:irc-cir@iss-ssi.org).

We rely on your valuable support and thank you for giving the ISS/IRC the strength it requires.

## ACTORS

Source: Bureau Permanent de la Conférence de La Haye: [http://hcch.e-ision.nl/index\\_en.php?act=conventions.authorities&cid=69](http://hcch.e-ision.nl/index_en.php?act=conventions.authorities&cid=69)

- **Bolivia**: This country has updated the contact details of the reference persons working for the Central Authority.

## ISS/IRC NEWS

### Team changes:

- **Marie Jenny**: Following a two years mission as child protection and international adoption volunteer at the French Embassy in Mali, Marie Jenny has joined the team as Children's Rights Specialist. She has a double background on child psychology and on project management and has carried out several field missions in Benin and Mali on malnutrition.

- **Chiara Vauthey** has recently joined the ISS/IRC team as Children's Rights Specialist. She holds a Master degree in Human Rights Law. From 2005 to 2011, her professional experience has focused on child protection in emergencies. She has predominantly worked in Africa with international organizations such as the International Committee of the Red Cross, Save the Children Alliance and Unicef. Her key skills include programme planning & management and technical assistance. Italian native speaker, she is fluent in English, French and German.

### **Recommendations of the Fourth Forum on the African Charter on the Rights and Welfare of the Child related to intercountry adoptions and children with disabilities**

The Fourth Forum on the African Charter on the Rights and Welfare of the Child has been held in Addis Ababa on 18-20 March 2011. The forum constitutes a framework for strategic partnership to improve child rights in Africa and it has brought together activists from 23 African countries. Amongst the recommendations made to the African Committee of Experts on the Rights and Welfare of the Child, one deals with intercountry adoption and asks the Committee “to adopt a General Comment on art. 24 of the African Children’s Charter (ACC) giving consideration to issues relating to alternative care including intercountry adoptions in the best interest of the child within the African context”. Another recommendation “calls upon states to properly implement laws and policies passed and adopted for the rights and well being of children with disabilities”. Those recommendations underline the priority of such issues in the African region.

Source: Better Care Network,

<http://www.bettercarenetwork.org/BCN/details.asp?id=24932&themeID=1001&topicID=1010>

### **Prolongation of the suspension of intercountry adoption in Cambodia**

According to the information published by the Italian Central Authority, on May 6th 2011 the Cambodia Ministry of Foreign Affairs has decided to postpone the processing of new intercountry adoption applications to the 1<sup>st</sup> April 2012.

The reopening of intercountry adoption procedures was initially scheduled for the month of March 2011, as this was the date for the new law on intercountry adoption – adopted in December 2009 - to enter into force. This delay aims at consolidating the adjustment of procedures to the new law.

Sources: Commission italienne pour les adoptions internationales, <http://www.commissioneadozioni.it/> The Cambodia Daily, 5 Mai 2011.

### **Suspension of intercountry adoption procedures in Ivory Coast**

In the light of the current crisis facing by Ivory Coast, the ISS informs that the Committee for Family Placement (Comité de Placement Familial) of the Ministry of Family, Women and Social Affairs in Abidjan has suspended all procedures related to intercountry adoption since December 2010. As the Ivorian context remains fragile, the ISS/IRC favourably welcomes this suspension as a safeguard of children’s best interest and encourages the diffusion of this information to concerned persons.

Source: Ministère de la Famille, de la Femme et des Affaires Sociales, Direction de la protection sociale, avril 2011.

### **Ireland: New administrative procedure to control all payments made by adoptive parents in connection with the foreign adoption**

On 11<sup>th</sup> April 2011, the Adoption Authority of Ireland informed all adoptive parents who have undertaken an intercountry adoption that, with immediate effect, it will afford particular attention to all payments made to entities and/or persons in connection with the administration and finalisation of the foreign adoption. According to this new procedure for the registration of the foreign adoption, the Authority will reserve the right to seek evidence, by way of documentary proof, of the amounts of such payments. In cases where it becomes apparent that unreasonable levels of cost have been incurred, the Authority must reserve its express statutory rights to refuse to grant an entry into the statutory ‘Register of Intercountry Adoptions’. ISS/IRC welcomes this innovative approach which constitutes an excellent way to prevent and combat improper financial gains.

Source: The Adoption Authority of Ireland, <http://www.aai.gov.ie/index.php/intercountry-adoption/whats-new.html>

## An accredited body shares the experience of its representatives in countries of origin

*The Swedish body Adoptionscentrum presents the work, which it undertakes with its representatives in countries of origin and recalls the responsibility of accredited bodies in this field.*

It is a well known fact that the representatives of accredited bodies are sometimes the root causes of the ethical problems that may arise in countries of origin. Therefore, we, as bodies in receiving countries, accredited to carry out adoptions, have a great responsibility in selecting our representatives. Before we employ a person, we collect information about their background, experiences and preferably, consult specialised bodies (UNICEF, ISS, Save the Children, etc) and/or the country of origin's Central Authority.

### Selection criteria

The representatives must be professionals, with social work and childhood-related experience, etc and have a good knowledge of adoption issues. Of course, the mere merit of speaking the adoptive families' language is not sufficient. Nor is it considered a good practice to hire governmental civil servants – or former civil servants – for obvious reasons. However, representatives must possess a great deal of integrity and ethical standards. They must have no influence on the number of children matched, nor the different categories that can be matched. Even if they are offered the opportunity, they must refrain from it and be able to explain why they do so. Representatives, who do not possess such integrity or philosophy, may sometimes be the root cause of abuses and 'child laundering' situations. Either they believe these acts are justified because the children will have a better life in Europe or the USA from a material perspective, or because they receive some remuneration for every child they manage to provide to their body. This latter reason would of course be much more serious.

### Constant capacity building

We, accredited bodies, are responsible for all the actions of our representatives. We

have to constantly supervise and monitor their work and ensure that they benefit from adequate training to comply with their function satisfactorily from an ethical perspective. This training includes, among others, an understanding of the THC-93 and of other legal standards which establish the rules and regulations of intercountry adoption.

The representatives must also visit the receiving country periodically, in order to fully understand the accredited body's ethical rules and Code of Conduct, as well as to gain knowledge of the legislation and regulations, which govern adoptions in this country. Thus, Adoptionscentrum organises, twice a year, a seminar in Sweden to which it invites all its representatives. They spend a week in our offices to discuss specific and current topics as well as exchange views on experiences, difficulties and challenges. We also organise regional seminars twice a year, for example in Africa. We invite the representatives of all African countries, in which we are active in order to discuss current topics and common challenges. It is an excellent opportunity for them to exchange views on ideas and experiences. Likewise, during the trips that we regularly undertake to the country of origin, we spend a lot of time talking in depth about all issues with the representatives.

### Follow-up

We constantly ask the country of origin's Central Authority and other involved actors whether they are satisfied with the work undertaken by our representative. If the least bit of doubt arises about the representative's integrity or ethics, we immediately consult the Central Authority of the country of origin, or a NGO with experience in this issue, or another receiving country's body, for example via Euradopt. If the doubt is confirmed, there is no excuse; immediate measures must be taken and if necessary, the contract must be terminated.

## Technical aspects

A written and signed **work agreement** between the body and the representative is essential. All the representative's responsibilities, duties, rights, functions and income (amount and payment methods) may be detailed and highlighted in this agreement.

The remuneration system must be transparent and accepted by the Central Authorities in both countries. Remuneration must never be paid on a case-by-case basis – in order to prevent the representative's

temptation to look for children – but on a monthly basis.

Given that we, the accredited bodies, are the 'extended arm' of our Central Authority, it should really be the responsibility of the receiving countries' Central Authorities to periodically supervise and control that the bodies' representatives receive the required training and capacity.'

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## PRACTICE

### The concept of Habitual Residence in the 1993 Hague Convention

*The 2010 Special Commission showed that certain challenges surround the interpretation of the term "habitual residence". This brief note, prepared by Professor Duncan, Deputy Secretary General\* will discuss some of them and some possible ways such challenges might be overcome by States Parties.*

**T**he definition of the term "habitual residence" is the key to determining if an adoption is considered domestic or intercountry, and therefore if the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption* (1993 HC) is applicable. According to the 1993 HC three requirements are needed to consider an adoption intercountry (Art. 2):

- The child must be habitually resident in one Contracting State (the 'State of Origin');
- The prospective adoptive parents (PAPs) must be habitually resident in a *different* Contracting State (the 'Receiving State'); and
- The child must have been, be in the process of, or be about to be moved to the Receiving State either after his or her adoption in the State of Origin, or for the purposes of such an adoption in the Receiving State or in the State of Origin.

These provisions on the scope of the Convention are mandatory; they cannot be applied in an optional manner by States Parties. It should be noted that the nationality as such of the child or the PAPs is not relevant to determine if the adoption should be considered domestic or intercountry.

#### Habitual Residence: A Question of Definition

There is no definition of 'habitual residence' contained within the 1993 HC. Authorities are left to determine where a child and / or PAPs is / are habitually resident on a case-by-case basis. Whilst it is usually easy to determine a *child's* habitual residence, the determination of the PAPs' habitual residence can be more complicated. This is primarily due to the increase in international mobility, often for reasons of employment.

The Guide to Good Practice No 1 on the implementation and operation of the 1993 HC (GGP No 1) provides some guidance stating that "*habitual residence*" is generally treated as a *factual concept denoting the country which has become the focus of the individual's domestic and professional life. The acquisition of a particular residential status for tax purposes could be relevant, but not determinative of habitual residence...*" [emphasis added] (para. 490).

#### A change in habitual residence?

The approach set out above, whilst easy to state, may of course be more challenging to apply in reality. For example, a couple who is normally resident in the Netherlands moves as a result of a temporary work contract to Kenya. Whilst in Kenya they decide they wish to adopt a child who is habitually resident in Kenya. Would this be a domestic adoption, or

an intercountry adoption falling within the scope of the 1993 HC?

The answer will of course depend upon where the couple is determined to be 'habitually resident'. If the couple is determined to be still 'habitually resident' in the Netherlands, this is an intercountry adoption falling within the scope of the 1993 HC (see Art. 2). However, if the couple is now considered to be 'habitually resident' in Kenya, then this may be a domestic adoption, and subject to any rules applied by Kenya to domestic adoptions (including any specific residential requirements). The answer to the question of where the couple is 'habitually resident' may depend upon a number of factors: e.g., how long the couple have been and are intending to be resident in Kenya; when they intend to move back with the child to the Netherlands; how they view their time in Kenya; whether they have kept links with the Netherlands (e.g., a house, bank accounts, car(s), personal possessions)? As is stated in the GGP No 1, the intention of PAPs is a particularly important factor in relation to this issue. If the couple in this example intend to return to the Netherlands shortly after the adoption, this might suggest that the adoption should be regarded as "intercountry", i.e., that the couple should be considered to be still habitually resident in the Netherlands. By contrast, if the couple intends to return to the Netherlands many years later, the adoption may well then not be an adoption falling within the scope of the Convention.

Of course, the issues arising here not only concern persons who move *prior* to commencing the adoption process. Indeed, individuals *in the process of* adoption (whether intercountry or national adoption) could find that, for family or work reasons, they are required to move to another State. The GGP No 1 states that, "[t]he follow-up on the adoption in such cases is a matter for the authorities in the country of adoption to resolve, preferably with the co-operation of authorities in the country of destination."

It should be noted that, the 2010 Special Commission concluded: "*Where the habitual residence of the PAPs is uncertain the concerned Central Authority should provide advice on their particular situation before they proceed with an adoption application.*"

### **Where a domestic adoption should be processed as an intercountry adoption**

Another common problem is when PAPs have close connections to a State of origin, and that State, despite the fact that the PAPs have their habitual residence in another country, issues the adoption as domestic. This can happen, for example, where the PAPs are relatives of the child or nationals of the country of origin. The following is an example:

PAPs are habitually resident in France and want to adopt the husband's niece in India. In this case, the adoption is covered by the Convention and therefore the Convention procedures need to apply. It is extremely important in this situation for both States to take the same view on the nature of the adoption. If India treats it as domestic, France may not recognise the adoption, and refuse to allow the child to enter the country.

### **Confusion between habitual residence and nationality**

At the 2010 Special Commission meeting several States Parties reported cases similar to the following: a couple, both nationals of Contracting State A, are habitually resident in Contracting State B. They own an apartment in Contracting State A which they stay in during frequent visits to family and friends in Contracting State A. On a visit to Contracting State A, they visit an orphanage and decide to adopt a child. They apply for a domestic adoption in Contracting State A.

Article 2 of the 1993 HC is clear; this should be considered an intercountry adoption falling within the scope of the 1993 HC. The fact that the couple are both nationals of the Contracting State in which they wish to adopt a child (i.e., that they are both nationals of the State of Origin) should not be permitted to hide the fact that they are habitually resident in a different Contracting State. In this scenario, if Contracting State A permits the adoption to proceed as a *domestic* adoption (and thus outside 1993 HC safeguards and procedures) and the couple subsequently seeks to return to Contracting State B with the child, the child will be left in a potentially dangerous situation and in a possible 'legal limbo' (with Contracting State B determining that it should have been an intercountry adoption within the scope of the 1993 HC and hence possibly refusing to recognise the adoption).

The Permanent Bureau has been asked on a number of occasions to provide advice on cases similar to this. The advice given is always pragmatic: try to rectify the situation through co-operation and always bearing in mind that the child's best interests are paramount. Non-recognition of an adoption is seldom in the best interests of the child.

The 2010 Special Commission meeting *“emphasised that all intercountry adoptions falling within the scope of the Convention under Article 2(1), **including in-family adoptions and adoptions by nationals of the State of origin**, are subject to Convention procedures and safeguards. Where an adoption falling within the scope of the Convention has been processed in a Contracting State as a non-Convention adoption, the Central Authorities concerned are strongly recommended to co-operate in efforts to address the situation in a manner which respects Convention procedures and safeguards, and to prevent these situations from recurring.”* [emphasis added].

\* Permanent Bureau of the Hague Conference on Private International Law

All documents mentioned in this article are available on the website of the Hague Conference at < [www.hcch.net](http://www.hcch.net) > under “Intercountry Adoption Section”.

<sup>1</sup> For example, the responses of States Parties to the *Questionnaire on the Abduction, Sale of, or Traffic in Children and Some Aspects of the Practical Operation of the 1993 HC*, (Prel. Doc. No 4 of April 2010 for the attention of the Special Commission of June 2010 on the practical operation of the 1993 HC) showed this confusion. On this issue, see also the Guide to Good Practice No 1 on ‘The Implementation and Operation of the 1993 HC’ (hereinafter, GGP No 1), Chapter 8.4.

<sup>2</sup> See GGP No 1, *supra* note 1, para. 482.

<sup>3</sup> *Ibid.* para. 484

<sup>4</sup> Conclusions and Recommendations of the Special Commission on the practical operation of the 1993 HC (17-25 June 2010), para. 13.

<sup>5</sup> *Ibid.* paras 11 and 12.

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## INTERDISCIPLINARY RESOURCES

### The Council of Europe takes a stand on the respect of the rights of the child in the framework of intercountry adoption

*The Commissioner for Human Rights – an independent institution within the Council of Europe – has published a thematic document on intercountry adoption, whose author is children’s rights expert Nigel Cantwell.*

**T**he objective of this very comprehensive thematic document<sup>1</sup> is to recall issues relating to intercountry adoption and to submit advice to the Member States of the Council of Europe in order for children’s rights to be fully respected during the adoption process. The Commissioner’s latest recommendations are based on this document.

By recalling the historical development of adoption in Europe, the author first highlights the emerging culture of domestic adoption in Eastern and Central Europe (in particular in Moldova, Russia and Ukraine), whilst this protection measure is constantly decreasing in Western Europe. With regards to intercountry adoption, the author draws attention to the African continent, the new ‘breeding ground’ of adoptable children, resulting from restrictions and moratoria adopted by countries of origin.

From the legal perspective, it is worth recalling the existence of the European Convention on the Adoption of Children<sup>2</sup> (reviewed in 2008), and the 1986 UN General Assembly Declaration on Social and Legal Principles relating to the Protection and Welfare of Children<sup>3</sup>. The key role of the European Human Rights Court’s case-law in relation to article 8 of the ECHR (right to private and family life) is also emphasised. This case-law has, among others, made it possible to grant recognition to the right to know one’s origins, and to firmly rule out the right to adopt.

Some concepts appear to still be the object of controversies, such as the alleged ‘right to a family’ (which remains without a legal basis), as well as the incorrect – although generally accepted – definition of an ‘orphan’, at the origin of an overestimation of the latter’s numbers worldwide. The tricky issue of ‘special needs

children' is also being analysed. In this respect, a trend in giving priority to younger children for domestic adoption (such as in Ukraine) has been observed, as well as, in parallel, a trend in putting children with special needs forward for intercountry adoption (such as in Peru and Chile). According to the author, this new path is not without risks, in particular with regards to the way, in which these children are identified and the prospective adopters are prepared.

Faced with these numerous challenges, the author calls for caution and pleads for better procedural guarantees, in particular:

- the evaluation and matching must be undertaken by a professional and independent team;
- emergency situations are totally incompatible with intercountry adoptions;
- private adoptions or adoptions carried out by unaccredited bodies, adoptions undertaken outside the HC-1993 framework, the 'demand' being stronger than the 'offer', and the illicit and unofficial character of some 'costs' during the

procedure, enhance the risks of misuse or abuse.

Finally, the author goes into details on the issue of adoption by homosexual couples or single persons, and recalls the recent case-law of the ECHR and the Committee of Ministers' Recommendation (2010)<sup>4</sup>, according to which domestic legislation authorising adoptions by single persons must be implemented without any discrimination as to the applicant's sexual orientation.

By concluding that misuses are always endemic phenomena, the author maintains that strengthened cooperation among all intercountry adoption actors remains one of the most able solutions to ensure the effective respect for children's rights and their best interests.

<sup>1</sup>[http://www.coe.int/t/commissioner/default\\_EN.asp](http://www.coe.int/t/commissioner/default_EN.asp)

<sup>2</sup><http://conventions.coe.int/Treaty/EN/Treaties/Html/202.htm>

<sup>3</sup><http://www.un.org/documents/ga/res/41/a41r085.htm>

<sup>4</sup>[http://www.coe.int/t/cm/adoptedtexts\\_EN.asp](http://www.coe.int/t/cm/adoptedtexts_EN.asp)

#### CONFÉRENCES, SEMINAIRES, COLLOQUES, COURS À VENIR

- *United Kingdom a) Matching for black, Asian and minority ethnic children- an ongoing process?*, BAAF, London, 5<sup>th</sup> July 2011 **b) Family and friends care**, London, 14<sup>th</sup> July 2011. For more information, please refer to: [conferences@baaf.org.uk](mailto:conferences@baaf.org.uk)

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