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As a reminder, this Review is directed, uppermost, at professionals in the field of adoption and child protection worldwide. It is not aimed at being directly shared with prospective or current adoptive parents, as its content and editorial line often raise a sensitive issue, which sometimes requires adequate support for their understanding.

TABLE OF CONTENTS

Editorial

p. 1 [Are the best interests of the child always best?](#)

Actors

p. 2 [Australia, Canada](#)

Brief news

p. 2 [Lesotho, Russia, United Nations](#)

Practice

p. 3 [Canada's Touchstones of Hope: Engaging Aboriginal Communities](#)

p. 5 [Protecting children against harmful traditional practices](#)

Interdisciplinary resources

p. 6 [Finding Fernanda: An accessible and insightful examination of what can go amiss in intercountry adoptions – a helpful reminder to us all](#)

Special series: The rights of children in alternative care at the United Nations

p. 7 [Protecting children from violence within the family and in alternative care settings through the Convention Against Torture](#)

Forthcoming conferences, seminars, and courses

p. 8 [France, United Kingdom](#)

EDITORIAL

Are the best interests of the child always best?

This Monthly Review covers multiple articles that show, to some degree, how the best interest principle can be misunderstood and misconstrued, resulting in grave consequences for the children in question.

The best interest of the child is one of the four pillars of the Convention on the Rights of the Child (CRC). Without doubt, the principle has become part and parcel of child protection jargon, so that hardly one meeting, event or publication can go by without it being mentioned. Yet, as this Editorial briefly shows, how the term is interpreted and is applied has not always been the best for each child – particularly in alternative care matters.

What do international standards actually say?

Article 3.1 of the CRC states that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” The child’s best interests must be considered but not as the overriding rule as argued by some.

In only two matters are the best interests of the child to be *the* paramount consideration, being

when considering separating a child from his parents (article 9 of the CRC) and in adoption cases (article 21 of the CRC).

With specific regards to matters where children are deprived of their family, the best interest principle is scattered throughout the Guidelines for the Alternative Care of Children, highlighting its due importance.

What does this mean in practice?

Whilst there is relative unanimity on the importance of the principle, its implementation has been less straightforward. History has shown the manipulation of the principle to the detriment of children's global rights depending on who determines the best interest and their motivation.

In the recent past, Governments have made decisions to separate aboriginal children from their families of origin in countries in what they thought was the best for these children. Often this has resulted in the unnecessary break-up of families and much heartache. Indigenous groups have since been demanding the right to become the decision-makers within their communities and to identify solutions for their children – *prima facie* a reasonable request (see article p. 3).

Yet, having communities as the sole decision-makers can also be problematic. This can be seen with the prevalence of harmful traditional practices, such as child brides and exchange of children in lieu of debts in certain countries (see article p. 5). Such practices are a form of violence against children and can lead to their

unnecessary separation from their families (see article p. 7).

But even when there are joint decision-makers – such as the Government with the community determining the best interests – if the overall child protection system is weak, and there is widespread corruption, the rights of children may still be overlooked. Regrettably, this has occurred in many intercountry adoption cases, where the system has functioned for the interests of third parties and not for children (see article p. 6).

One can therefore conclude that it is not simply about who makes the decision, but how the best interests are determined. A helpful tool for this end was developed by the UNHCR in its model Guidelines on determining the best interests of the child (see *Monthly Review* 10/2008).

Importance of including the child

Optimally based on the UNHCR Guidelines, to truly achieve the best interest of the child, multiple decision-makers should be involved in an open process. The child – who has the right to participate in decisions that affect his future – must be consulted.

As this editorial has shown, the best interest principle can be easily misinterpreted. Thus, it is with great interest that the ISS/IRC looks forward to the finalisation of the General Comment on the issue as it is currently being drafted by the CRC Committee.

The ISS/IRC team
January 2013

ACTORS

Source: Hague Conference on Private International Law: http://www.hcch.net/index_en.php?act=conventions.status&cid=69.

- **Australia:** This country has updated the contact details of its Central and competent authorities.
- **Canada:** This country has updated the contact details of its Central Authority as well as those of the accredited adoption bodies of the Province of British Columbia.

BRIEF NEWS

Lesotho: Entry into force of the HC-1993

The HC-1993 came into force in Lesotho on 1 December 2012. This country's government has, however, stated that it would not accept new adoption applications from receiving countries until 1 March 2013, according to information provided by the American Central Authority. Indeed, the country needs time to establish the procedures that would allow for a full implementation of the HC-1993. The ISS/IRC welcomes this important step forward for the rights of children and reiterates the need to provide time to the country in order for it to modify its legal and practical adoption system.

Sources: US Department of State, http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=alerts&alert_notice_file=lesotho_1; Permanent Bureau of the Hague Conference, http://www.hcch.net/index_en.php?act=conventions.status&cid=69.

Russia: Enactment of a new law prohibiting the intercountry adoption of Russian children by US citizens

According to information provided by the U.S. Department of State, Russian President Vladimir Putin signed a federal law, known as *Dima Yakovlev*, on 28 December 2012; in accordance with this law, the adoption of Russian children by US citizens is now prohibited. The issue of the processing of ongoing adoptions between both countries remains to be solved. To date, it is difficult to gain clear information on this issue. According to the media, it appears that Dmitri Peskov, the spokesperson of Russian President Vladimir Putin, has recently declared that, in those cases in which a judicial adoption decision has been issued, the children will leave for the United States. Whatever decisions are made by a country, the ISS/IRC reiterates that it is fundamental for the rights and needs of children to remain the primary consideration.

Sources: U.S. Department of State, http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=alerts&alert_notice_file=russia_8; Romandie, http://www.romandie.com/news/n/Les_enfants_russes_dont_un_juge_a_deja_approuve_l_adoption_partiront_aux_Etats_Unis_25110120131355.asp.

United Nations: Annual resolution of the United Nations General Assembly on the rights of the child

The Committee in charge of human rights issues at the United Nations General Assembly has published its annual resolution on the rights of the child. In this resolution, it encourages all States Parties to multiply their efforts to protect children, in particular in relation to birth registration, family relations, adoption and other forms of alternative care. Thus, it encourages States to consider the Guidelines for the Alternative Care of Children in their policies and practices. In addition, the Committee reiterates that all children with disabilities should enjoy their rights and freedoms on an equal basis with other children. Finally, a considerable part of this resolution focuses on indigenous children and the obligations of States to protect them against all forms of discrimination – in particular in the field of health and education – and to strengthen their participation.

Source: United Nations Resolution on the promotion and protection of the rights of the child, http://srsq.violenceagainstchildren.org/sites/default/files/documents/docs/A_C.3_67_L.23_Rev.1_Resolution_on_the_Promotion_and_protection_of_the_rights_of_children_2012.pdf.

PRACTICE

Canada's Touchstones of Hope: Engaging Aboriginal Communities

The ISS/IRC has the pleasure of presenting the initial outcomes reported in the Touchstones of Hope: Participatory Action Research to Explore Experiences of First Nation Communities in Northern British Columbia – Evaluation Report, 2012.

The disproportionate number of Aboriginal children in child welfare care is grounded in the history of colonial policies and legislation imposed on Aboriginal Peoples in Canada, and this is reflected in the widespread removal of Aboriginal children from their homes and communities into residential schools and, later, into non-Aboriginal foster homes (Sinha, Trocmé, Fallon, MacLaurin, Fast, Thomas Prokop, *et al.*, 2011). The Canadian government's policies also foster systemic poverty in many Aboriginal communities, contributing to the poor housing conditions that boost the number of Aboriginal children in care due to a lack of basic necessities.

In 2008, Aboriginal children in British Columbia were six times more likely to be taken into child welfare care than non-Aboriginal children (Auditor General, 2008). As of September 2009, an estimated 8,677 Aboriginal children in British Columbia were in care, representing 53% of the province's total number of children in Care (Ministry of Children and Family Development (MCFD), 2010).

Touchstones of Hope and reconciliation in child welfare in Canada

Aboriginal communities across Canada are diligently working to overcome assimilative government policies that have frequently disrupted self-governance and traditional systems of care.

The Touchstones of Hope (ToH) are guiding principles: Culture and Language, Holistic Approach, Self-Determination, Structural Interventions and Non-Discrimination, which are conceptualized by Aboriginal communities so that their realities are reflected. These principles guide a reconciliation process in child welfare services. The overall goal of the reconciliation movement is to re-model child welfare systems so that they promote Aboriginal cultures and values in order to ensure their success.

Northern British Columbia Touchstones of Hope

Following a two-day information session demonstrating to child welfare leaders how they could develop five-to-ten-year plans guided by positive visions for safe and healthy children, six designated First Nation child welfare agencies in Northern British Columbia participated by each hosting a community planning session, examining central themes and prioritising next steps for an action plan of reconciliation in child welfare based on the ToH discussed above.

Since early 2010, agencies, communities and the MCFD have been implementing these plans, which are specific to each community. This was followed by various assessment and monitoring actions, which are detailed in the evaluation report*.

Initial results

Participants noted that Aboriginal communities know what is best for Aboriginal children; programs and policies need to be revised or developed in order to include Aboriginal values in service delivery. In particular, the participants noted that poverty and an inadequate access to resources are the reality for many Aboriginal children and youth, in stark contrast to deeply-rooted traditional systems of care. Prevention and supporting children before and during a crisis, in addition to post-crisis services, were identified as holistic approaches needed. Self-determination is rooted in the participants' ability to develop and practice child welfare in their own language and culture, with a holistic approach.

Participants noted the following improvements:

- increased knowledge and skills;

- ToH principles applied in child welfare practice;
- increased collaboration between workers;
- increased understanding of reasons for child welfare involvement; and
- increased family engagement and planning.

Challenges

One of the biggest challenges identified was getting all the players and stakeholders to make change and then follow through. Continued communication, support, respect for culture and communities working together were identified as key ingredients to achieving the community's dream. Hope for the future and having a positive attitude were also viewed as contributors to achieving community dreams. Some participants wondered how the next steps would be implemented and if there would be tangible benefits for the future. Funding, as well as community and individual healing, were also identified among other challenges, as time, commitment and efforts are needed to change ways of thinking.

This participatory action research indicates that the ToH community sessions are a collaborative, effective and engaging way of bringing people together to create a better future for Aboriginal children and their families. The participants stressed that the child welfare reconciliation movement needs to be fostered and nurtured so that Aboriginal communities can continue to work towards reconciliation, health and community well-being.

Ashley Quinn,
Advocate for children's rights,
Doctoral candidate at Factor-Inwentash Faculty of
Social Work, University of Toronto

Note: Information was taken from the *ToH-Evaluation Report* found at:
<http://www.fncaingsociety.com/sites/default/files/docs/UofT-Touchstones-Evaluation-2012.pdf>.

Protecting children against harmful traditional practices

In 2012, two reports were published by the Council on Violence against Children and by PLAN and the Special Representative of the UN Secretary-General on Violence against Children. Both deal with harmful practices against children based on tradition, religion, culture or superstition.

Every year, thousands of children are victims of harmful practices committed by family members, religious communities or by those close to them. These harmful practices based on culture, religion or superstition are entirely legitimised by those close to the child. The majority of identified harmful practices entail serious violations of the rights of the child.

The practices

According to UNICEF, amongst these practices, child marriage and forced marriage affect 46% of young women in South Asia, 38% in Sub-Saharan Africa and 29% in Latin America. Excision exists in 28 African countries. Infanticide due to the preference of a son, and the mistreatment of girls, is still widely practiced in Africa, Latin America and the Middle East. In certain countries, it is common for honour crimes, as well as stoning, to be committed against young women by parents, who believe that the victim brought dishonour to the family. Other practices include using children to beg or as child workers until a debt is repaid. The sexual and domestic slavery of children also exists in numerous countries.

Article 24(3) of the CRC explicitly states that 'Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children'. In all cases, the best interests of the child according to the CRC imply the protection of the child against all forms of violence.

The practices from the perspective of the Guidelines

The Guidelines for the Alternative Care of Children aim to avoid the separation of children and parents. In cases where the child's family is not able to assure the well-being of the child, the State is obliged to protect the child and to provide

a more appropriate means of care suited as an alternative. Paragraph 6 of the Guidelines relevantly states that the best interests of the child must comply with the principle of non-discrimination and gender equality. Paragraph 7 outlines that the States must develop and establish policies for the social aid and the protection of the child. Paragraph 75 of the guidelines states more specifically that 'cultural and religious practices regarding the provision of alternative care, including those related to gender perspectives, should be respected and promoted to the extent that they can be shown to be consistent with the rights and best interests of the children. The process of considering whether such

« I was 12 years old when I got married. I was a child. They oppressed me by marrying me. All that I'm good for is to be a mother and a home maker.... I'm illiterate. They didn't teach us anything. If they did, at least I would have benefitted from something. I didn't know anything about marriage, how to be a mother...I wasn't thinking about anything. I get upset at myself. I get upset at my father. I get upset from my husband. I have constant headaches and I don't feel like even speaking. I feel like someone is choking me. There's so much heaviness on my chest»

Fathiya L., Yemen

HRW 2010, Yemen, « *How come you allow little girls to get married?* »

practices should be promoted should be carried out in a broadly participatory way, involving the cultural and religious leaders concerned, professionals and those caring for children without parental care, parents and other relevant stakeholders, as well as the children themselves'.

In terms of traditional practices, it is a sensitive question to ask who

should determine the best interests of the child. Many harmful traditional practices, such as, for example, child marriage and domestic slavery, permanently separate the child from his family, leaving him without any protection. In the majority of cases, the aforementioned provisions are not respected and nor are the best interests of the child.

Conclusion

The reports conclude by insisting on the following points. It is urgent for UN agencies to provide a legal framework forbidding these practices. There is also a need to have systematic and rigorous revisions of harmful practices at national level in collaboration with governments. In particular, governments must undertake legislative

reforms to eliminate these practices, inform their population on the consequences of these practices as well as establish campaigns until these practices are eliminated and raise awareness within the educational framework. The role of local NGOs is vital as is that of doctors, who must actively work to eliminate these practices.

Sources:
Violating children's rights: Harmful practices based on tradition, culture, religion or superstition, a report by the International NGO Council on Violence against Children, October 2012, http://www.crin.org/docs/InCo_Report_15Oct.pdf.
Protecting children from harmful practices in plural legal systems, with a special emphasis on Africa, PLAN and Special Representative of the UN Secretary-General on Violence against Children, New York 2012, http://srsq.violenceagainstchildren.org/sites/default/files/publications_final/SRSG_Plan_harmful_practices_report_final.pdf.

INTERDISCIPLINARY RESOURCES

Finding Fernanda: An accessible and insightful examination of what can go amiss in intercountry adoptions – a helpful reminder to us all

This article presents a short book review of Finding Fernanda, written by Erin Siegel, an investigative journalist. Finding Fernanda looks at how both a biological mother and prospective adoptive mother were taken advantage of in an adoption system gone horribly wrong, especially for the child.

F*inding Fernanda* is about a biological mother looking for her kidnapped child and an adoptive mother in the U.S.A. looking to adopt the stolen child in Guatemala. It is enthralling reading and is especially accessible for anyone not familiar with intercountry adoption and its risks.

Independent book review

International child protection consultant and adoption expert Nigel Cantwell provides an objective review of the book in *Amazon* in the following terms:

'Finding Fernanda is a courageously well-researched, and probably unique to date, description of the "two sides" of what has too often gone wrong in intercountry adoptions.

While this fascinating and chilling book successfully sets out to provide an in-depth examination of a single such case, it implicitly demonstrates two wider and vital issues.

First, the violation of children's rights in intercountry adoption is essentially a systemic problem - in other words, individuals involved tend first and foremost to take advantage of the weaknesses of the law and procedures in place rather than wholesaledly contravene them. So the answer is not simply better law enforcement, but

necessarily changing the framework in which these adoptions are undertaken.

Second, the fundamental issue is not the totally false one of supposedly being "for" or "against" intercountry adoption, as some still try simplistically to portray it. The issue at stake is rather: are the right children being declared adoptable abroad for the right reasons, and does the consequent process uphold and protect those children's human rights?

Finding Fernanda provides an accessible and totally credible insight for all concerned into the good, bad and truly ugly - not of intercountry adoption as such, in fact, but of the way its original purpose is now so frequently transgressed and manipulated by too many, for different reasons, in countries of origin and receiving countries alike'.

An excellent tool for professionals

This book gives a very good introduction to 'newcomers' in the intercountry adoption field and provides stark reminders to experts working in the field for a number of years. We must ask questions. We cannot look the other way, when we are receiving conflicting and sometimes suspicious information.

Note: Finding Fernanda, <http://findingfernanda.com/>.

Protecting children from violence within the family and in alternative care settings through the Convention Against Torture

This second article in the series firstly examines cross-cutting issues covered by the Guidelines for the Alternative Care of Children and the Convention Against Torture. Secondly, it focuses on how these international standards provide safeguards to protect children against violence.

Children may regrettably be subject to violence, abuse and exploitation within the family and in alternative care settings. This article highlights examples of such violence as well as identifies safeguards in the Convention Against Torture (CAT), supplemented in more detail by the Guidelines for the Alternative Care of Children (Guidelines). It is based on a presentation* to the CAT Committee by ISS and SOS-Children's Villages International.

Preventing violence within the family as being a reason for the child's separation

Enhanced resort to alternative care for children stems from the parents' felt-inability to cope – and lack of available support of all kinds to do so – and, in many societies, violence within the family home. Such violence can therefore be a factor leading to the child's abandonment, relinquishment or their removal – as has been found in countries such as Peru. The safety of children is especially jeopardised when prevention mechanisms are lacking. In Norway, the 'Child Welfare Services in some areas of the country do not have the resources or the competencies to identify and support children who are exposed to violence and [...] the existing helpline is not well enough known to children.'

Harmful traditional practices can also lead to the child's abandonment or relinquishment. For instance, in Togo, parents may relinquish their children in exchange for a bride price or in lieu of

debts, where the laws allow the discriminatory practices of levirate, repudiation and polygamy.

A range of options lacking for children facing violence

Once alternative care becomes necessary, there are often limited options available. Hence, children may be forced to live on the streets or in inappropriate settings, becoming subject to exploitation. The CRC Committee noted with

regret the large number of child sex tourists and of children involved in prostitution in Mexico.

When alternative care is provided, children are particularly vulnerable. In informal settings, such as the extended family, children may be employed as household aids to their detriment. As in other countries, in Togo, 'children, especially girls as young as nine years, working as domestics, work very long hours, without days of rest, no or very little remuneration, and are regularly subjected to verbal, physical and sexual violence.'

Some protection for children against violence in the Guidelines

Para. 9b: 'To provide appropriate care and protection for vulnerable children, such as child victims of abuse and exploitation [...]'

Para. 13: 'Children must [...] benefit from effective protection from abuse, neglect and all forms of exploitation [...]'

Para. 32: 'States should pursue policies that ensure support for families in meeting their responsibilities [...] by promoting measures to combat poverty, discrimination, marginalisation, stigmatisation, violence, child maltreatment and sexual abuse, and substance abuse.'

Para. 46: 'Specific training should be provided to teachers and others working with children in order to help them to identify situations of abuse, neglect, exploitation or risk of abandonment and to refer such situations to competent bodies.'

Para. 93: 'All alternative care settings should provide adequate protection to children from abduction, trafficking, sale and all other forms of exploitation [...]'

See also e.g. § 96, 97 and 99.

Violence in formal care settings

In Senegal, Human Rights Watch found that at least 50,000 children (*talibés*) – mostly boys under twelve years old – attending residential Quranic schools were forced by the teachers in their position as guardians (*marabouts*) to beg on the streets. If the quota was not forthcoming, they experienced severe punishment.

The long-term impact of institutionalisation is well documented including 'severe developmental

delays, disability, irreversible psychological damage, and increased rates of suicide [...]. Among those children living in institutions, babies and infants under three are particularly vulnerable as this is the greatest developmental phase. In 2010, there were approximately 31,000 infants living in institutions in the CEE/CIS.

Violence in other situations

Similarly, children outside of their country of habitual residence are at heightened risk of exploitation and are regularly housed in inappropriate settings. In 2011, it was found that Mexico had a 'large number of unaccompanied children entering the State party from neighbouring countries, at risk of trafficking for purposes of sexual or labour exploitation.'

Children in emergency situations are likewise prone to being subjugated. During wars, children may be abused by competing factions but also by aid workers and peacekeeping troops. In the aftermath of natural disasters, children may become temporarily separated and become easy prey. For example, two weeks after the earthquake in Haiti, UNICEF reported that since the earthquake about 15 children had gone missing from makeshift hospitals.

International conventions provide protection for children against violence in alternative care

The CRC as well as other key international conventions, including the CAT, have provisions to address the above situation. The CAT affords children with protection, firstly through the broad scope of what torture includes (article 1), the protection against care-givers as appointed by the State (articles 10 and 16) as well as safeguards against violence within residential settings (article 11). Supplementary protection is provided by the Guidelines (see box above). We trust that advocates on the ground can use these provisions to lobby for a better protection against violence within the family and in alternative care settings.

Notes:

* Briefing Note: http://iss-ssi.org/2009/assets/files/guidelines/ANG/2012-10-31_CAT_Introduction%20to%20Guidelines_October%202012.pdf.

** Please note that all the references for the country examples are included in the above briefing note.

FORTHCOMING CONFERENCES, SEMINARS AND COURSES

- **France:** **a)** *L'accueil familial des enfants à temps complet. Rôle et dynamique du placement familial* [Full-time foster care of children – The role and dynamics of foster care], COPES, Paris, 27 March 2013 (beginning of the training); **b)** *Pour qu'une séparation brutale ne soit pas une rupture* [For a sudden separation not to become a breakdown], COPES, Paris, 20 March 2013 (beginning of the training); **c)** *L'enfant handicapé et ses parents* [The disabled child and his parents], COPES, Paris, 20 March 2013 (beginning of the training). For further information: <http://www.copes.fr/Annexes/Formations>.
- **United Kingdom:** *Siblings – Together or Apart*, BAAF, Whitefield, Manchester, 5 March 2013. For further information: <http://www.baaf.org.uk/training/allevents/2013-03-05t000000>.



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