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SPECIAL EDITION ON THE PRINCIPLE OF SUBSIDIARITY

TABLE OF CONTENTS

EDITORIAL

What scope should be granted to the principle of subsidiarity?

The principle of subsidiarity, fundamental to adoption mainly conceived and understood as an obligation of countries of origin raises complex issues as intercountry adoption develops.

The contemporary context of intercountry adoption is a place of many constraints and not limited in paradoxes. In order to introduce the topic of this special issue which is dedicated to the principle of subsidiarity, let us take the example that led us to initiate this reflection: if a receiving country which carries out several thousands of intercountry adoptions each year, is also a country of origin for part of 'its' children, does this country respect the principle of subsidiarity? In other words, should a Western country's children without permanent family care benefit, as a priority, from a domestic adoption before this

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

country's potential adopters look abroad? Could one go as far as imagining that the latter may be 'obliged' to consider a domestic adoption, with a view to responding, as a priority, to children's needs?

Of course, and as usual, it is not possible to offer standard responses to these questions. However, given the 'global village' era, the contexts of adoption are so diverse that it becomes necessary to think about our views about adoption and its underlining principles.

A view of the world?

As evidenced by the historical analysis of the instruments (United Nations Convention on the Rights of the Child – CRC -, Hague Convention on Intercountry Adopton (see page 4), the regulation of intercountry adoption has been based on a relatively simple model, which brings together 'poor countries of origin' and 'rich receiving countries'. Even though this assumption may be well understood given the initial developments in intercountry adoption, the evolution of societies, the ease of international displacements and the access to information slowly has blurred this dual view. The practical cases outlined on page 5 intend to illustrate this evolution, and fuel reflection, which may be applicable to an increasing number of cases in a not-so-distant future.

From the child's perspective

If one approaches this reflection from the child's position, it is clear that the principle of subsidiarity imposes on countries of origin, the need to search for domestic care solutions first, prior to considering an intercountry adoption. This obligation is imposed on States and responds to the protection needs of the children. A receiving country should therefore also assume this same obligation, and ensure that the children who are adopted at home by other countries have not found parents likely to adopt them. This would entail, among other consequences, that the State take the necessary measures to promote domestic adoption, depending on the profile of children deprived of a family, to support the adoption of children with special needs, to develop the mechanisms, which would allow a comprehensive picture of the number and profile of adoptable children compared with the number of adoption applicants, etc. In short, to do what is requested from countries of origin...

In this context, let us remember that article 21.b of the CRC provides that the States Parties '*recognise that intercountry adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin*'. However, this instrument is indeed applicable to all signatory States, without distinguishing between countries of origin and receiving countries. This issue is particularly important in the case of adoption of children with special needs, for whom efforts must still be undertaken with a view to promoting their domestic adoption.

From the perspective of the adoption applicants

Given that the implementation of the principle of subsidiarity is imposed on States by virtue of the legal nature of the instruments which enshrine it, it is difficult to foresee that it may be imposed directly on adoption applicants. However, the obligation to promote domestic adoption should further encourage the latter to consider the adoption of a child from their country prior to looking abroad.

One may also note that, even though in some 'traditional' countries of origin, this may lead to a considerable development of domestic adoption, the initiative has sometimes experienced such a success that domestic applicants are now put on waiting lists, given the lack of children. It is therefore not impossible that the nationals of these same countries may one day contact Western countries in order to adopt...

An odd brain-teaser

The creation of this special issue has opened a field of complex reflection and resulted in sessions of particularly stimulating intellectual exercise among our editorial team. We hope that our readers will appreciate our legal and philosophical circumvolutions and we look forward to your remarks and comments, which we will be happy to share.

The ISS/IRC team

32, Quai du Seujet - 1201 Genève - Suisse - Tél.: +41 22 906 77 00 - Fax : +41 22 906 77 01
Courriel: irc-cir@iss-ssi.org - Site Internet : www.iss-ssi.org

ISS/IRC NEWS

- **About the team:** The ISS/IRC warmly welcomes our new intern, Caroline Benetti, a recent graduate with a Masters in International European and Comparative Law, who will be with us for 6 months.
- **Internet site:** The ISS internet site in English is now on line. You will find numerous helpful documents which we hope are presented in a format that is more clear, helpful and practicable. The documents specifically linked the ISS/IRC can be found under the tab 'what we do' and section IRC. The French and Spanish versions of the website will be available soon. We apologise that these versions are temporary unavailable. If you need a document during the intervening period, you can contact us at irc-cir@iss-ssi.org so that we can send the document directly.

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.

- **Australia, UK, Dominican Republic Andorra, Costa Rica, Mexico, Poland, Switzerland and Spain:** These countries have updated the details of their central authorities and in some cases the contact persons (the Commonwealth Central Authority in the case of Australia).
- **Austria**: This country has modified its accredited bodies.
- **Georgia:** This country has changed its Central Authority.
- **Liechtenstein:** This country has accessed the THC-1993 and has designated its Central Authority.

IN BRIEF

The Republic of Togo: Intercountry adoptions are permitted

The Republic of Togo has promulgated the Law No: 2008-014 of November 2008 for the approval of the THC-93. Togo has not yet deposited the accession instrument with the Government of the Netherlands, who act as the depository of for Convention which means that Togo is not yet a party to the Convention. Togo has also announced that they will resume both national and intercountry adoptions. The National Committee for Adoptions will supervise the procedures and has introduced new conditions for prospective adoptive parents.

Source: US Department of State http://adoption.state.gov/news/togo.html and http://www.diplomatie.gouv.fr/fr/actions-france_830/adoption-internationale_2605/pays-origine_3233/fiches-pays_3895/togo_9635.html

The Kingdom of Lesotho: Suspensions lifted for intercountry adoptions

The Government of Lesotho has just lifted the suspension for intercountry adoptions for 4 countries: USA, Sweden, the Netherlands and Canada. For the moment, there is one adoption agency approved for each of these countries. The Department of Social Welfare of Lesotho is also in the process of establishing a Committee for Adoptions who will supervise these agencies and ensure that the laws and practices of the country are respected.

Source: US Department of State http://adoption.state.gov/news/lesotho.html

France: New Official Website for information about adopting a child

The French Government has announced the opening of the government website www.adoption.gouv.fr to the public from the 1 April. The website is targeted at improving access to information for families.

Source: http://www.diplomatie.gouv.fr/fr/espaces_dedies.php3?id_rubrique=2605

Moldova: Moratorium on adoption dossiers

The Moldovan Government has announced that new adoption dossiers have been suspended. Dossiers that have already been registered are blocked. The processing of adoptions will only commence when the new Adoption law has been adopted which could take another 6 months.

Source:http://www.bj.admin.ch/bj/de/home/themen/gesellschaft/internationale_adoption/herkunftslaender/moldawien.html

32, Quai du Seujet - 1201 Genève - Suisse - Tél.: +41 22 906 77 00 - Fax : +41 22 906 77 01
Courriel: irc-cir@iss-ssi.org - Site Internet : www.iss-ssi.org

Historical drafting of 'the principle of subsidiarity' in the Conventions

This article examines how the principle of subsidiarity was integrated in the following Conventions

The UN Convention on the Rights of the Child 1989 (UNCRC)

The principle of subsidiarity was not mentioned in the first revised Polish draft (1979) of the UNCRC 1989, nor by any State or NGO proposal to the Working Groups for the UNCRC in 1981, 1982, 1983 and 1985. In 1986, the GA adopted the UN 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 Declaration 1986). Interestingly article 17 of UN Declaration 1986 referred to the principle of subsidiarity stating 'if a child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the country of origin, intercountry adoption may be considered as an alternative means of providing the child with a family'. At the technical review of the UNCRC in 1988, UNICEF suggested that the draft UNCRC article on adoptions should take into account the UN Declaration1986 and in particular the principle of subsidiarity.

Accordingly, proposals to include the principle of subsidiarity in the UNCRC from the Netherlands and from a Latin American meeting were made at the second reading in 1988-1989. The text was accepted by the drafting group as 'inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin' (the current wording of Article 21(b) UNCRC 1989). To reinforce this principle Canada and Brazil suggested that an additional clause be included about the need for continuity in the child's upbringing etc which now is Article 20 (c) UNCRC 1989.

Indian Supreme Court decision leads the way

In its landmark judgement Laxmikant Pandey vs Union of India 1984, the Supreme Court of India determined that preference is to be given for finding homes within India for every orphaned child prior to intercountry adoption being an available option. This case was initiated by Laxmikant Pandey, a Supreme Court lawyer who wanted to alert the judiciary of reported fraudulent practices and illegalities involving intercountry adoptions. The lawyer petitioned the Government to undertake investigations and develop appropriate standards for when it would be appropriate for Indian children to be adopted by foreigners. This decision reflects a revolutionary approach to intercountry adoptions by implicitly evoking the principle of subsidiarity almost a decade before it was embedded in the UNCRC and THC-93.

Source: To see the further case details, see http://csa.org.in/SC1984Feb06.htm

The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (THC-93)

Preparatory work for THC-93 started in June 1990 at the Special Commission where discussions about the principle of subsidiarity resurfaced. The conclusions of the first meeting tentatively defined one of the general policy objectives as being '…the child's interests are in general best served if the child is raised by his or her parents or, alternatively, by a foster or adoptive family in the child's own country; inter-country adoption is to be seen as a solution of a subsidiary nature for ensuring the welfare of the child...' During the Special Commissions in 1990, 1991 and 1992, the main aspect of subsidiarity that was treated was whether Article 21(b) could but should not necessarily be interpreted as meaning non permanent national solutions for child care such as foster care or placement in an institution are to be preferred over intercountry adoption. In this context the preamble of the THC-93 was drafted to highlight the benefits of a permanent solution for the child, firstly in the child's country of origin and then outside which was elaborated in article 4(b) THC-93 which states 'an adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin have determined, after possibilities for placement of the child within the State of origin have

32, Quai du Seujet - 1201 Genève - Suisse - Tél.: +41 22 906 77 00 - Fax : +41 22 906 77 01
Courriel: irc-cir@iss-ssi.org - Site Internet : www.iss-ssi.org

been given due consideration, that an intercountry adoption is in the child's best interests.'

Historical interpretations

The classical way of interpreting the principle of subsidiarity is to rely upon the black letter law of the UNCRC and THC-93. Both conventions describe the principle of subsidiarity as the State's obligation to exhaust national solutions and promote continuity in the child's upbringing before undertaking an intercountry adoption (ICA). The minutes from the drafting sessions show that State Parties, UNICEF and NGOs placed the obligations of the principle of subsidiarity primarily on countries of origin and they did not turn their mind to receiving countries.

In order to apply the principle of subsidiarity to the various contexts, it is important to examine the principle's theoretical foundations. The UN Committee on the Rights of the Child have interpreted the principle of subsidiarity to mean 'intercountry adoption should be considered, in light of Article 21, namely as a measure of last resort' in its concluding observations to Mexico in 1994, although more recently UNICEF and the Guide to Good Practice by the Hague Conference point out that institutional care is less favourable than ICA. Additionally, the Committee held that 'State Parties should also consider implementing measures to promote domestic suitable solutions including adoptions' in its concluding observations to Russia in 2005. Further guidance can be found from Vité and Boéchat (2008) who suggest that one aspect of the principle of subsidiarity lies in Art 21(c) and the need for continuity in the child's upbringing Art 20 (3).

Therefore, and according to the Conventions, both countries of origin and receiving countries equally have obligations to promote permanency plans for children, that includes prevention, family re-integration and adoptions as well as develop domestic adoptions as a priority over ICA.

Source: Legislative history on the Convention on the Rights of the Child (vol 2), J.H:A Van Loon, *International Co-operation and Protection of Children with regard to Intercountry Adoption* (Martinus Nijhoff Publishers , Dordrecht, 1993) and UN 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 adopted by General Assembly resolution 41/85 of 3 Dec 1986 http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/495/93/IMG/NR049593.pdf?OpenElement and S. Vité and H. Boéchat, "Article 21: Adoption", series *A commentary on UNCRC (*2008)http://www.brill.nl/default.aspx?partid=210&pid=22373

The principle of subsidiarity 'for the dummy'

International adoptions still suffer from persistent prejudices and it is not always easy to explain its real meaning to those around us or the general public. Therefore we thought that it would be useful to take up an argument that is extremely simple, which allows one to easily understand hidden meaning behind the principle of subsidiarity. Imagine the following dialogue:

The novice: *« But why is it so complicated to adopt a child when it seems that the world is overwhelmed with children in need?»*
The expert: *« It is important to firstly ask whether the children are adoptable, that is ensure that the possibility of relying upon alternative care measures in their country do not exist. To illustrate this point, imagine you have two children and that you die in a car accident? What would you want for your children? »*
The novice: *« It would be normal that they stayed with their mother ».*
The expert: *« Of course. And if the mother also died during the accident? »*
The novice: *« In that case, I would like the children to be placed in the care of our family: the grand parents, or uncles or aunties for example. »*
The expert*: « That's right. And what if the family can not look after the children, either because they do not exist or do not have sufficient resources? »*
The novice: *« In that case, I would like my children to grow up in their country, in a framework more or less familiar, where they can pursue their schooling in their mother tongue etc. ».*
The expert: *« And now you see, it is the same thing for all the parents in the world that international adoption should only be considered after all the options that you elaborated upon before are not possible. That is the principle of subsidiarity.».*

32, Quai du Seujet - 1201 Genève - Suisse - Tél.: +41 22 906 77 00 - Fax : +41 22 906 77 01
Courriel: irc-cir@iss-ssi.org - Site Internet : www.iss-ssi.org

The principle of subsidiarity: a fluid or fixed concept?

Whilst there is a common agreement about the application of the principle of subsidiarity in countries of origin, its application to receiving countries has received less attention.

The ISS/IRC has developed the following exercise in order to better understand the boundaries of the principle of subsidiarity. Four different scenarios were invented using the names of real countries to avoid the exercise being too abstract. These countries were chosen because together, their intercountry adoption practices when examined objectively are representative of existing realities within numerous countries. Of course, there is no intention to either promote or denounce the practices of the countries mentioned and the figures stated are fictional.

The aim of the exercise is to show that the application of the principle of subsidiarity is not always unilateral. The boundaries of the principle of subsidiarity remain flexible depending on inter alia, the particular situation of each child, characteristics of the prospective adoptive parents and the realities within each country.

We would be very interested in receiving the answers and opinions of our readers!

Clear cut answers to the following scenarios?

Case 1
A Filipino citizen would like to undertake an adoption in Switzerland who on average process 20 domestic adoptions per year. Should this citizen be required to adopt a child from the Philippines instead of undertaking an adoption in another country? Would the answer change, if the citizen undertakes an adoption in Germany who on average process 500 domestic adoptions per year, or in the USA, where 30000 domestic adoptions are processed every year?

Case 2
An Indian citizen, Professor at New Dehli University specialising in autism and adolescent development, would like to undertake an adoption in France and proposes to adopt an autistic child. Should this citizen be required to adopt a child from India instead of undertaking an adoption in another country?

Case 3
A married Ghanaian couple lives in Accra after having spent 8 years in the USA. They intend to adopt a toddler African American from the USA. Should this citizen be required to adopt a child from Ghana instead of undertaking an adoption in another country?

Case 4
A homosexual couple from Belgium would like to undertake an adoption in the USA. Should they be required to adopt a child from Belgium instead of undertaking an adoption in another country? If the adoption is finalised in the USA, can Belgium refuse to recognise it, as it may not respect the principle of subsidiarity?

Extract from the expert view provided by the Hague Conference

The following extract was taken from an expert view prepared by the Hague Conference in response to questions raised by the ISS/IRC relating to the application of the principle of subsidiarity on prospective adoptive parents.

We do not agree with the view that "intercountry adoption should be considered as a measure of last resort". The 1993 Hague Convention expresses the principle of subsidiarity in a slightly different manner to that in the UN Convention on the Rights of the Child at Article 21b, but there is no inconsistency. The Hague Convention in Article 4b requires the State of origin to determine "after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests".

As we state in our Guide to Good Practice, at paragraph 50, the Convention "does not require that all possibilities be exhausted. This would be unrealistic; it would place an unnecessary burden on authorities; and it may delay indefinitely the possibility of finding a permanent home abroad for a child." Furthermore, the principle of subsidiarity should be interpreted in the light of the principle of the best interests of the child. The latter principle is the overriding principle, not subsidiarity. This approach is also supported by the UNICEF Statement of 2007 in which it

32, Quai du Seujet - 1201 Genève - Suisse - Tél.: +41 22 906 77 00 - Fax : +41 22 906 77 01
Courriel: irc-cir@iss-ssi.org - Site Internet : www.iss-ssi.org

is said that institutionalisation should be the last resort for a child without a family. See also paragraph 53 of the Guide.

Obligation on PAPS to exhaust their domestic options

We would certainly agree that all States should encourage their nationals to adopt children within their own country – this is subsidiarity in action. We would also agree that Receiving countries could give more attention to this matter, and that as part of the preparation for adoption, PAPs be informed about and encouraged to consider domestic adoption. However, we are not sure how realistic it is to place an obligation on PAPS to exhaust their domestic options before being permitted to carry out intercountry adoptions. […] Assuming that all adoptable babies and very small children are quickly adopted, it cannot be assumed that all PAPs have the capability to adopt those remaining adoptable children. There must be a thorough and professional evaluation of the PAPs' capacity and capability to adopt particular categories of children. Would all PAPs have to be evaluated for categories of children they do not really want to adopt? Furthermore, there are many good reasons not to add to the delays already occurring in the normal and ethical intercountry adoption application process.

Conclusion

The Hague Convention, as an instrument to protect the interests of children who are the subject of intercountry adoption, imposes obligations concerning the principle of subsidiarity on States of origin only (including Receiving States which are also acting as States of origin). The obligation that PAPs be required to exhaust all domestic solutions to adopt, before being permitted to adopt intercountry, is a question of domestic adoption law and procedure (and this requirement can only be imposed by the State). Therefore we cannot agree with the conclusion that the principle of subsidiarity, as stated in the Hague convention and the UNCRC, could be read as imposing this obligation on national PAPs.

We do however agree that a requirement to promote domestic adoptions, stated in appropriate language, could be an aspect of good practice, to be encouraged in Receiving States. We agree that this is a principle that should apply equally to Receiving States and States of origin, but a legal basis for this view cannot be found in the two conventions themselves.

PRACTICE

The principle of subsidiarity in receiving countries: does it mean a fundamental change in approach?

The situation of children taken into care in receiving countries raises the question of the implementation of the principle of subsidiarity in industrialised countries. Several states are aware of the difficulties attached to this important issue and have taken initiatives to remedy it.

The larger receiving countries active in inter-country adoption all face the same reality: they carry out a much greater number of intercountry adoptions than domestic adoptions. If it's true that cases of child abandonment and desertion have been considerably reduced, particularly thanks to birth control, there are nonetheless a significant number of children who are still taken into care by the State in the guise of different forms of protection or alternative provisions of care. Given the great variety of individual cases, both at the social and legal level, there is a prohibition on any shortcuts between abandonment and adoption. Nonetheless we note that more and more countries are asking themselves about the relevance of carrying out a great number of inter-country adoptions while the responses brought to children living on their territory are remain inadequate. In these cases and beginning with the belief that the principle of subsidiarity applies equally to receiving countries (see page 2, 5 and 6), what measures could be envisaged?

32, Quai du Seujet - 1201 Genève - Suisse - Tél.: +41 22 906 77 00 - Fax : +41 22 906 77 01
Courriel: irc-cir@iss-ssi.org - Site Internet : www.iss-ssi.org

A blurred situation

First of all we have to underline that it's difficult to know precisely how many children are taken into care by each State, why they are there and what is their « social and legal profile». On the one hand, the statistics vary considerably from one country to another since the different categories of the population differ (age, types of measures pronounced, the state of their health etc.). On the other hand, the definitions have not been harmonised and sometimes lack precision. In this context, it can be quite complex to interpret the available figures, especially to determine with any precision which children are taken into care or would be adoptable. In France for example, according to the 2008 report of the national Observatory for children in danger, 128,824 children were « placed in child protection» at the end of 2006, of whom 21,774 were placed directly by the judge of the minors court [1]. How many of them have really been forsaken by their parents and could be pronounced adoptable? The debates that currently take place in France on this subject clearly show how delicate it is to draw a parallel between abandonment and adoption. These questions also arise in Spain, for example, where 30,000 children were « under the protection of the State » in 2006[2].

The Netherlands: a new approach that respects the principle of subsidiarity

The Dutch Government announced in April 2009 that it will place stricter requirements on adoptions from the USA. For the Netherlands, the USA was the third largest country of origin (after China and Haiti) with 56 children being adopted out of 676 intercounty adoptions in 2008.

The Dutch adoption regulations recognise that it is preferable for a child to be adopted from within his own area or country, in other words, the principle of subsidiarity. However the Government stated that 'investigations have shown that small children can easily find homes with American families […] There appears to be no necessity to place these children outside the United States.'

The Dutch Government said that the stricter requirements for adoption from the USA would not be applied to American children of five years or older, those in foster care, or those who are difficult to place because of health problems or other special reasons. These categories of children are known to have much longer waiting lists.

Source: http://www.google.com/hostednews/afp/article/ALeqM5q2-M-kYml7bNRXjXMDIUQEHCe0cg

The need for more precise statistics

These examples shed light on the need to have thorough and detailed statistics available so as to carry out a precise assessment of the profiles of children taken into care, their number and their needs. On this basis, the country can adapt its public policies in the field of child protection and address its possible weaknesses. For example the United States, know that in 2006, 129,000 out of 510,000 children placed in foster homes had been waiting to be adopted for about 39 months. That same year some 50,000 domestic adoptions were completed[3]. In order to respond to this situation and to promote domestic adoption the USA adopted in 2008 the Fostering Connections to Success and Increasing Adoptions Act[4] thus establishing innovative mechanisms such as assistance to members of the child's extended family, financial support for adoptive families and the promotion of child adoption for those with special needs. In the same way of thinking, Spain has recently set up a committee to analyse and foster domestic adoption. The clarification of data on children under State protection figures among the first tasks of this Committee.

The need to diversify the choices of care provision in the receiving countries

Setting up a full system of gathering information must then make it possible to initiate reflection about possible political and legislative reforms for adapting the system to the needs of children. Quebec has already taken this step thanks to its child protection law adopted in 2006. The latter introduces the notion of « a stable and lifelong plan» for every child and introduces a maximum time span for determining it and setting it in motion, according to the age of the children (12 months if the child is less than two years old, 18 months if the child between two and five years of age and 24 month so if he is six or more years old). Furthermore, this law offers a varied array of transitory or permanent child care options.

32, Quai du Seujet - 1201 Genève - Suisse - Tél.: +41 22 906 77 00 - Fax : +41 22 906 77 01
Courriel: irc-cir@iss-ssi.org - Site Internet : www.iss-ssi.org

As for the UK it has developed an extensive foster care system as a temporary and permanent solution to cater for the needs of children deprived of their family including those with special needs since the 1970's. Accordingly, the country has instigated numerous efforts to diversify the range of alternative family care solutions, notably to professionalise foster carers and develop their training. Moreover the UK considers adoptions as one of its solutions. At the moment, approximately 3 000 children taken into care are adopted at the national level each year. Intercountry adoptions are not common (between 300 and 400 per year) and expensive (approximately 5000 up to 5,000 £ for the social report only).

The need for a change of mindsets

Furthermore, alongside these steps, efforts should be made in every country to change mindsets. It is still too frequent that adoptable children do not find an adoptive family in their own country because of their special needs or their ethnic origin. Thus, numerous Afro-American children are adopted abroad when American applicants adopt more and more children coming from African countries such as Ethiopia, Uganda and Nigeria. In Europe, there are mentally disabled children adopted by nationals of neighbouring countries of origin. An in-depth study must be undertaken so that the plan of adoptive applicants responds properly to their domestic reality.

Only the combination of these steps will make it possible to respond adequately to the needs of children taken into care in receiving countries However, as for countries of origin, this process is slow and gradual. As pointed out in the editorial in this bulletin, these thoughts clearly illustrate that it is time for the professionals to review the prejudices that still too often surround adoption, and to carry out in western countries what we demand in countries of origin.

(1)Fourth annual report to parliament and to the Government of the National Observatory for children in danger - the State of affairs of the setting up of compiling cells, treatment and assessment of disturbing information. New estimate of the number of children benefiting from a measure, December 2008: www.oned.gouv.fr/docs/production-interne/rapports/rapport_oned2008_020209.pdf

(2) Adoptantis n° 65, janvier 2009

(3) Statistiques 2006 www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report14.pdf,

(4) Fostering Connections and Increasing Adoptions Act www.govtrack.us/congress/bill.xpd?bill=h110-6893

32, Quai du Seujet - 1201 Genève - Suisse - Tél.: +41 22 906 77 00 - Fax : +41 22 906 77 01
Courriel: irc-cir@iss-ssi.org - Site Internet : www.iss-ssi.org

Originally this article included photos representative of the different members of the adoptive family in Tanzania and their home with a view of helping readers visualise the reality and cultural changes. Unfortunately for technical reasons, it is impossible to reproduce these photos here.

Intercountry adoption exercise for the preparation of prospective adoptive parents by Johanne Lemieux: Tanzania or an inversed adoption

This exercice was invented by Mme Johanne Lemieux, french-canadian social worker and creator of the psychosocial approch «Adopteparentalité » .Copyright from the book L'enfant adopté dans le monde en 15 chapitres et demi, éditions Hotpital Ste-Justine.Montréal.2003

Your name is Julie or Simon and you are 18 months old. The Director for the Protection for Children in Quebec has declared you to be adoptable, because your biological mother does not have the necessary capacity to take care of your health, security nor your development. The social workers in Quebec have looked for an adoptive family for you in Canada for 6 months without success. A Tanzanian family would like to adopt you. You take the airplane with a government escort and arrive at the airport in Dar-Es-Salem in Tanzania 20 hours later.

Here is your new family.

This is your father. He is wearing colourful jewellery around his neck and on his ears. He is wearing a simple cloth dress.

These are your two mothers and your new brothers and sisters.

This is your new house in the Savannah desert which is constructed with hay and dry wood.

- When the escort introduces you to your new father and two mothers, what do you think of them?

- The escort who speaks French needs to depart with same plane and leaves you with your new family. What are your emotions?

32, Quai du Seujet - 1201 Genève - Suisse - Tél.: +41 22 906 77 00 - Fax : +41 22 906 77 01
Courriel: irc-cir@iss-ssi.org - Site Internet : www.iss-ssi.org

- At the airport there is a loud crowd composed of the whole Maasai tribe who sing, dance and play numerous musical instruments to welcome you. Are you touched and pleased with their efforts?

- At the airport, numerous unknown persons: elderly, children and other adults approach you. They touch you, they speak to you, they kiss you all over your face and some cry, with others hugging you tightly. How do you feel? What is the reaction of your body? Do you want to laugh? To cry? To hit them? To save yourself? To sleep? To vomit?

- Your new mothers and father speak to you in the Maasai language. How do you know if they are being kind to you? How do you understand what they want you to do?

- The same night, they serve you a typical dish from Maasai. Intestines with some soup made up of beans with a bowl of hot cow blood to drink. What is your reaction?

- The first night, they make you sleep in their house on a mat on the floor. There are unfamiliar sounds that come from the Savannah Desert. It is really hot and dark. How do you sleep?

- The next morning, one of your mothers throws out all your clothing, by way of t-shirts and jeans. She dresses you in a woollen dress named rubkea. She shaves your head and places some jewellery on your head like your brothers and sisters. Are you thankful? Do you find yourself beautiful?

- A few days later, someone speaks French and asks you if you are finally happy to have found a new family?

- 20 years later, where are you? What are you doing? Who are you?

CONCLUSION

Conclusions after considering the principle of subsidiarity

Despite subsidiarity being a key principle in the UNCRC 1989 and THC-93, its legal implications and boundaries remain unclear, especially for receiving countries.

Almost two decades after the implementation of the Conventions, the nature of ICA has evolved. The financial status and capacity of citizens of traditional countries of origin have changed so that they are now able to adopt children from their own countries. In the same time, citizens from traditional receiving countries are adopting in other countries despite children in their own countries waiting to be adopted.

Given such realities and the above exercise (see page 5), the principle of subsidiarity is clearly a fluid concept and should be interpreted according to the context of each individual child and country. Whether States will respect or contravene the principle of subsidiarity depends on issues such as, inter alia, whether the prospective adoptive parents are undertaking an ICA from a country where there is a waiting list for adoptions of children with special needs or to a country where domestic adoptions are not given priority over intercountry.

General principles and exceptions

32, Quai du Seujet - 1201 Genève - Suisse - Tél.: +41 22 906 77 00 - Fax : +41 22 906 77 01
Courriel: irc-cir@iss-ssi.org - Site Internet : www.iss-ssi.org

The ISS/IRC believes that the *general principles* are first to ensure that the principle of subsidiarity applies equally to all countries. Secondly, it is essential to ensure that all domestic solutions for the child have been exhausted and one way this can be done is for States to encourage their nationals to adopt children within their own country as a priority, including those with special needs. For Federal countries, this would mean the promotion of interstate adoption. By doing this in addition to implementing prevention and reintegration measures, States will have ensured that all domestic solutions have been exhausted and there is continuity in the child's upbringing before ICA is an available option for the child. Of course, this general principle would be applied only where the authorities declare there is a suitable match with the PAP and national children.

As for imposing an obligation on PAPs to exhaust national possibilities before turning to intercountry adoption, it clearly appears that the current international legal framework (CRC and THC-93) is not going that far. However, the decision just taken by the Netherlands to limit adoptions from the USA is clearly a first attempt in limiting the choices of PAPs. But as the latter decision is based on the implementation of the subsidiarity principle in a country of origin, could we imagine a similar step for other countries?

In addition, in practice, there may be *exceptions* to these general principles depending on the specific needs of the child and their best interests..There may be cases where an international permanent solution is in the best interests of the child and not a domestic permanent solution (eg: prospective adoptive parents have medical expertise, child has biological family living overseas or ICA may be better than long term residential care).

In order for States to meet their obligations for the principle of subsidiarity, the general principles as mentioned above should be followed. However, a flexible approach is needed that allows States to comply fully with their obligations of treating each child as an individual and have regard to their best interests.

FORTHCOMING CONFERENCES, SEMINARS, SYMPOSIA AND COURSES

- **Brazil**: *14º Encontro Nacional das Associações e Grupos de Apoio à Adopção e 1º Encontro Latino Americano* (14th National Meeting and 1st Latino American Meeting for Adoption Support), 22-25 May, San Paolo. For more information and contacts: www.angaad.org.br.
- **France:** *rencontre nationale entre parents adoptifs et autres (National meeting for adoptive parents and others)*, PETALES, 6 June 2009, Paris. See www.petalesfrance.fr and *Adoption: Evaluer et accompagner. Aspects psychologiques* (Adoption: Assessment and Accompaniment. Psychological Aspects, COPES, 18 and 19 June and 17 and 18 September. See www.lecopes.org
- **Germany:** Specialist Discussion on Adoption Family international frankfurt e.V., Frankfurt, 17 June 2009. For more information see www.fif-ev.de/news/special-discussion-on-adoption-on-june-17-2009.-please-register-now
- **United Kingdom**: *The journey to recovery: Safeguarding children living with trauma and family violence-Assessment, Analysis and Intervention*, BAAF, 21 and 22 May 2009, London. For more information see http://www.baaf.org.uk/res/training/dates/index.shtml and Adoption and Attachment 2 year course, University of Greenwich, 14 October 2009, contact joanne@familyfutures.co.uk
- **USA:** *Adoption Exchange Association Conference: Flourishing in downturn*, 27-30 May, Chicago. See www.adoptea.org/Conference_2009/SaveDate.html

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Courriel: irc-cir@iss-ssi.org - Site Internet : www.iss-ssi.org