

# PRINCIPLE OF SUBSIDIARITY

ISS/IRC comparative working paper 1:

Spotlight on solutions



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# Abbreviations

<b>AAB</b>	Adoption accredited body
<b>CA</b>	Central Authority
<b>CAA</b>	Central Adoption Authority
<b>CRC</b>	United Nations Convention of 20 November 1989 on the rights of the child
<b>CO</b>	Country of origin
<b>ICA</b>	Intercountry adoption
<b>ISS</b>	International Social Service
<b>ISS/IRC</b>	International Social Service/International Reference Centre for the Rights of Children Deprived of their Family
<b>PAP</b>	Prospective adoptive parent
<b>RC</b>	Receiving country
<b>1993 Hague Convention</b>	The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption
<b>UN Guidelines</b>	United Nations 2009 Guidelines for the Alternative Care of Children
<b>UNICEF</b>	United Nations Children's Emergency Fund



## Introduction<sup>1</sup>

The principle of subsidiarity is one of the key principles for undertaking intercountry adoptions (ICAs) clearly stipulated within international law, notably the UN Convention on the Rights of the Child (CRC) and the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993 Hague Convention). The principle of subsidiarity has a two tier approach summarised as follows:

**1) Domestic adoption is subsidiary to keeping or returning the child to his or her family of origin and that there should be a priority given to preventing abandonment.** For this first aspect, the *2015 ISS Manifesto for Ethical Intercountry Adoptions* notes the first level of the principle of subsidiarity requires that priority be given to keeping the child in his or her environment of origin. In practice, this involves the implementation of a system based on the development

*of domestic family-type solutions for children separated from the family, making it possible to decrease the need for intercountry adoption. Specifically, such a system should set out family support programs so that they can raise their children, family reintegration programs for situations involving temporary separation, and alternative family placement in cases of permanent separation.'*

<sup>1</sup> This paper is a revised version of the presentation to the European Central Adoption Authorities in Oslo in 2009 written by Mia Damback.

**2) ICA is subsidiary to domestic adoption.**

*The 2015 ISS Manifesto for Ethical Intercountry Adoptions “focuses on the subsidiarity of intercountry adoption with regard to family-type domestic protection measures. Consequently, intercountry adoption should only take place after a long term family solution has been actively sought in the child’s country of origin, particularly with domestic PAPs.”*

Whilst the two tier approach is clearly present in international law, it is vital that the overriding principle of all adoptions be, the best interests of the child.<sup>2</sup> Therefore there may be situations where it is in the best interests of the child to be adopted into another country (e.g. close relatives living abroad) despite the existence of domestic solutions.

Having the best interest principle and taking into account the individual needs of each child, this paper endeavours to promote the two tier approach of the principle of subsidiarity by examining the drafting spirit behind international standards ([Section 1](#)), providing examples of legislation and jurisprudence ([Section 2](#)) and identifying promising practices ([Section 3](#)) that reflect the principle.

It is essential that the laws, policies and practices directed at complying with the principle of subsidiarity are genuine, effective and do not merely give lip service to the principle. For example, poverty should never be the sole reason as to why a child is in need of an ICA, which is often mentioned in cases of relinquishment. In this situation, it is difficult to uphold the principle of subsidiarity as adequate prevention policies and support for parents in their caregiving role are not in place. Likewise, if there is a law that states that the child must be on an adoption register for 60 days before ICA is considered, it is essential that activities are actually undertaken during this time to look for a solution within the country and documented, as opposed to simply waiting for the time period to lapse. Therefore, where relevant this paper also explores issues to consider as to whether the principle of subsidiarity is truly respected in practice.

<sup>2</sup> Note the complexities in applying the best interests of the child in adoption in Cantwell N. (2014). The best interests of the child in intercountry adoption. Florence, Italy. UNICEF [https://www.unicef-irc.org/publications/pdf/unicef%20best%20interest%20document\\_web\\_re-supply.pdf](https://www.unicef-irc.org/publications/pdf/unicef%20best%20interest%20document_web_re-supply.pdf)

### **Illustration: principle of subsidiarity**

ICAs 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, one simple way to easily understand the hidden meaning behind the principle of subsidiarity is to 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, imagine you have two children and 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 grandparents, or uncles or aunts for example".

The expert: "That's right. And what if the family cannot 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 ICA should only be considered after all the options that you elaborated upon before are not possible. That is the principle of subsidiarity".

(Developed by Aaron Greenburg, see ISS/IRC Monthly Review 3-4/2009)





## 1. Historical drafting of the principle of subsidiarity in international law<sup>3</sup>

The principle of subsidiarity is embedded in the CRC ([Section 1.1](#)) and the 1993 Hague Convention ([Section 1.2](#)). These two international standards set the benchmark for necessity to comply with this principle prior to undertaking an intercountry adoption. More recently the spirit of the principle of subsidiarity is reflected in the UN Guidelines for the Alternative Care of Children (See [section 3.1](#)). Although this text does not deal specifically with adoptions, through several of its provisions (e.g. paragraphs 9, 10, 34b, 38, 117, 132), there is a clear priority to provide support for families caring for children. This includes financial support, day care and respite care, education, health, community support and rehabilitation services in order to enable the children to remain in their families as a priority and achieve sustainable reintegration if they have been separated.

<sup>3</sup> Office of the United Nations High Commissioner for Human Rights. (2007) Legislative history on the Convention on the Rights of the Child (vol 2). Geneva, Switzerland. OHCHR at <https://www.ohchr.org/Documents/Publications/LegislativeHistorycrc2en.pdf> and Van Loon JHA. (1993) International Co-operation and Protection of Children with regard to Intercountry Adoption. Dordrecht, Netherlands. Martinis Neuhoff Publishers.

## 1.1 UN Convention on the Rights of the Child 1989

As mentioned earlier there are two aspects of the principle of subsidiarity in the CRC. Firstly, domestic adoption is subsidiary to keeping or returning the child to his or her family of origin as well as the priority given to preventing abandonment and secondly, ICA is subsidiary to domestic adoption.

The first aspect of the principle of subsidiarity is clearly found in the first Polish draft (1979) – used as the basis for the CRC – so that a priority was placed on ensuring that “a child, wherever possible, should grow up in the care and under the responsibility of his parents” (former Art. VI). This idea is reformulated in the preamble of the Convention which states “*convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community*”.

Whilst the issue of adoption was included in the first revised Polish draft (1979) of the CRC, the second aspect of the principle of subsidiarity was not mentioned in the text.<sup>4</sup> The second aspect of ICA being subsidiary to domestic adoption was not mentioned by any State or NGO proposal to the Working Groups for the CRC in 1981, 1982, 1983 and 1985. In 1986, the General Assembly 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).<sup>5</sup> Interestingly Art. 17 of UN Declaration 1986 referred to the second aspect of 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 CRC in 1988, UNICEF suggested that the draft CRC article on adoption should take into account the UN Declaration 1986 and in particular the principle of subsidiarity.

Accordingly, proposals to include the principle of subsidiarity in the CRC 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*” (current wording of Art. 21(b) CRC). To reinforce this principle, Brazil and Canada suggested that an additional clause be included about the need for continuity in the child’s upbringing which now is Art. 20(c) CRC.

4 In the first Polish draft of the Convention (1978), the issue of adoption was not mentioned and it was Barbados and Colombia who first suggested that it be included.

5 see <http://www.un.org/documents/ga/res/41/a41r085.htm>



## 1.2 The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption

Preparatory work for the 1993 Hague Convention 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 Art. 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 ICA. In this context the preamble of the 1993 Hague Convention was drafted to highlight the **benefits of a permanent solution** for the child, firstly in the child's country of origin (CO) and then outside which was elaborated in Art. 4(b) 1993 Hague Convention 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 been given due consideration, that an intercountry adoption is in the child's best interests*".

**As a result of the slightly different views in the CRC and 1993 Hague Convention, debates have arisen that have led to polarised views about the role of ICA:**

## 1.3 Current debate 1 – is the principle of subsidiarity as set out in the 1993 Hague Convention in conflict with the CRC?

It has been argued that the CRC emphasises that ICAs should be the last resort and that the 1993 Hague Convention has a broader view, emphasising the importance of the solution being permanent. Arguably, a more child rights-based approach would not favour such a categorical last resort discourse. Effectively implementing the principle of subsidiarity is not solely about ensuring on paper that all national laws and policies are respected prior to ICA being considered. A last resort approach more importantly discourages an individualised approach for each child and identifying the measure of best resort for him or her. Rigid approaches steer away from challenging realities, for example, what real efforts were made to search for the family of origin in cases of abandonment, what support was provided to the parents to enable them to care for the child, systemic failures in a child protection system, etc.

ICA may be considered when there is evidence that a child cannot be cared for “suitably” in his or her CO. ICA may be one child protection measure among many to be offered to the child. Determining suitability in principle starts from examining care with the family of origin to options that are family-based and should continue if necessary, until the most adequate solution is found for the child. This examination process will require a very thorough comparison of benefits and

disadvantages in particular where the only two realistic options are offered uniquely in large residential care facilities and ICA. Such an examination must include for instance, a detailed evaluation of the prospective adoptive parents’ (PAPs) capacity to care for the child’s unique needs, including evidence of their adequate preparation and support. A comprehensive evaluation should also include the quality of care received in the institution, for example ratio of staff to children and relationships with other children. This approach will also ensure that the child is able to effectively participate in the decision making. Moreover, ICA may be considered and given priority over national solutions, as may be the case in intra-familial adoptions where the child has a pre-existing relationship and/or when the child has an urgent medical need, when deemed in the best interests of the child.

**Due regard to the principle of subsidiarity in practice will depend on each child’s individual needs, with his or her best interests being the paramount consideration. Discussions should move away from last resort towards finding the solution that is in the best interests for each individual child.<sup>6</sup>**

<sup>6</sup> CRC Committee General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CR%2FC%2F%2F14&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CR%2FC%2F%2F14&Lang=en), UNHCR. (2008) Guidelines on Determining the Best Interests of the Child. Geneva, Switzerland. UNHCR <http://www.unhcr.org/4566b16b2.pdf> (note that these Guidelines are currently being updated and should be published late 2018/2019), Cantwell N. (2014). The best interests of the child in intercountry adoption. Florence, Italy. UNICEF [https://www.unicef-irc.org/publications/pdf/unicef%20best%20interest%20document\\_web\\_re-supply.pdf](https://www.unicef-irc.org/publications/pdf/unicef%20best%20interest%20document_web_re-supply.pdf)



## 1.4 Current debate 2 – is the principle of subsidiarity likewise applicable to receiving countries?

The classical way of interpreting the principle of subsidiarity is to rely upon the black letter law of the CRC and 1993 Hague Convention. Both Conventions describe the principle of subsidiarity as the country's obligation to exhaust national solutions and promote continuity in the child's upbringing before undertaking an ICA. The minutes from the drafting sessions show that State Parties, UNICEF and NGOs placed the obligations of the principle of subsidiarity primarily on country of origins (COs) and they did not turn their mind to receiving countries (RCs).

This omission does not mean that the principle of subsidiarity must only be respected by COs as international laws apply to all countries, whether they are sending or

receiving children. The UN Committee on the Rights of the Child (CRC Committee) 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 the Guide to Good Practice by the Hague Conference point out that institutional care is less favourable than ICA. Additionally, in its Concluding Observations to Russia in 2005, the Committee held that the "*State Party... develop and implement measures to promote domestic adoption*". Further guidance can be found from Vité and Boéchat (2008), who suggest that one aspect of the principle of subsidiarity lies

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with the need for continuity in the child's upbringing (Art. 20 (3)) which is consistent with the intent of original drafters.<sup>7</sup>

A clear illustration of the principle of subsidiarity is seen in the CRC Committee recommendation to the USA – a CO and RC – in 2008:

31. In order to strengthen the safeguards against sale of children for adoption purposes, the Committee recommends that the State party:

(f) Effectively apply the principle of subsidiarity as enshrined in Section 303 (a)(1)(B) of the Intercountry Adoption Act of 2000, in order to ensure that American children are primarily adopted in the United States.

Source: <http://www2.ohchr.org/english/bodies/crc/docs/co/CRC.C.OPSC.USA.CO.1.pdf>

**Given that the principles in the CRC and 1993 Hague Convention apply to all countries without distinction if it is a CO or RC, the obligations to develop “domestic suitable solutions including adoptions”, promoting permanency and have regard to continuity in the child's upbringing, are applicable to both COs and RCs.<sup>8</sup>**

7 Vité S. and Boéchat H. (2008). Article 21: Adoption”, part of series A commentary on CRC. Netherlands. Martinus Nijhoff Publishers at <https://brill.com/view/title/11637>

8 See ISS Monthly Review (3/4 2009) dedicated to the principle of subsidiarity and ISS Monthly Review (4/2016) [http://www.iss-ssi.org/images/editorial-monthly-review/Editorials\\_fra/2016/Edito\\_2016Avril\\_2016.pdf](http://www.iss-ssi.org/images/editorial-monthly-review/Editorials_fra/2016/Edito_2016Avril_2016.pdf)



## 2. National legal frameworks directed at respecting the principle of subsidiarity

The principle of subsidiarity should be clearly set out in the domestic laws, policies and practices of any country that is considering international child protection measures such as adoption or those covered under the 1996 Hague Convention such as kafalah. There is much leeway in how countries integrate the principle such as, giving priority to national adoptions, fixing time frames and use of last resort language. Unfortunately, in multiple countries, including but not limited to Angola, Commonwealth of Dominica, Lebanon, Mozambique, Senegal and Swaziland the domestic laws do not elucidate this principle. Legislative bodies should rectify this as soon as possible, which must be a priority for countries who engage in ICAs.



## 2.1 Legislative examples

Below are a few national examples, although many other illustrations exist.<sup>9</sup>

### **Australia**

As predominantly a RC, there are nevertheless also protections for Australian children being adopted into other countries. Art. 40 [NSW Adoption Act 2000](#) states that “(1)(b) A child who is resident or domiciled in the State is not to be adopted in a place outside Australia unless the Director-General has (b) determined that a suitable family to adopt or otherwise care for the child cannot be found in Australia among other conditions”.

### **Benin**

Intercountry adoption is only allowed if the child’s protection cannot be ensured at domestic level according to the Art. 101 Children’s Code.

### **Bolivia**

Domestic adoption will be given priority over intercountry adoption as outlined in the Regulation for the implementation of Art. 98 Law n° 548 Children’s Code of 2014 (Código de la Niñez y Adolescencia, Law N° 548 of 2014, Art. 98).

### **China**

According to Art. 18 Adoption Law, when an abandoned child is found, the public security office shall first try to locate his or her biological parents. Provincial departments of civil affairs will post announcements on the local provincial-level newspaper to look for the biological parents of the abandoned child. If neither the biological parents nor other guardians come to claim the child after 60 days of publication, the child is considered to have been abandoned and may then

<sup>9</sup> The ISS/IRC centralises as many national legislative and policy practices across the world, ideally in English, French and Spanish with over 110 country situations.



be placed for adoption. The provincial department of civil affairs of the province where the child resides is responsible for deciding whether an ICA is in his or her best interests. Provincial departments of civil affairs must ensure that there is no possible domestic adoption option for the child. This decision is made before the report of the child is filed with the CCCWA for ICA. Where a spouse places a child for adoption after the death of the other spouse, the parents of the deceased shall have priority in caring for the child.

### **Colombia**

As stated in Art. 71 Code on Children and Adolescents (Code), priority will be given to Colombian families, who reside in Colombia or abroad. Indeed, the ICBF and the authorised institutions will give priority, in equality of conditions, to requests submitted by Colombian citizens, whenever they meet the requirements provided for in the Code. In practice, clear mechanisms are needed to ensure this equality of conditions and that priority is given to domestic adoption.

### **Democratic Republic of the Congo**

Before a child is available for an ICA, there must be proof that alternative solutions for the child in his or her country of origin have been duly explored and an ICA is in the child's best interests as stated in Art. 18 Child Protection Law 10 January 2009.

### **Estonia**

Adoption from Estonia to a foreign state may occur primarily if it is not possible to care for the child to the necessary extent in the Republic of Estonia as per Art. 165 Family Law Act.

### **Federation of Bosnia and Herzegovina (FBiH)**

In accordance with Art. 95 of the Family Law of FBiH, an adoptive parent may be a foreign citizen, if this is in the child's best interests and if the child cannot be adopted in FBiH. This may only take place upon prior approval issued by the official body of the FBiH responsible for social protection issues. The delegation of Bosnia and Herzegovina at the Committee's examination of the State report stated that "under the Family Law, foreign citizens were permitted to adopt a child from Bosnia and Herzegovina when no citizen of Bosnia and Herzegovina wished to adopt the child; when the child could not be placed in a foster family; when all other types of care had been exhausted; when a team of experts had decided that the adoption would be in the best interests of the child; and when the adoption was authorised by a competent authority".

The State Party's report to the Committee on the Rights of the Child also states that, throughout the war, and especially in the post-war period, many foreign nationals, international organisations, and even foreign States have been approaching the local authorities with questions about the possibility of adopting children who are FBiH citizens. However, since the number of children who meet the requirements for adoption prescribed by the law is less than the number of requests received from citizens of FBiH, the requests of FBiH citizens are accommodated first.

### **Indonesia**

An intercountry adoption shall only be permitted as a last recourse as per Art. 39(4) of the Child Protection Law.

### **Kazakhstan**

According to Art. 12.2 of the Law on Marriage and Family 1998, ICA is allowed only if no national solution is found for the child. The preference lies first with Kazakh citizens who live in the country and after to citizens from Kazakhstan who live abroad.

### **Madagascar**

Intercountry adoption is only allowed if, after having duly examined the possibilities of a domestic placement or domestic adoption, it is in the best interests of the child as stated by Art. 32 Adoption Law.

### **Philippines**

Intercountry adoption is applicable when all possibilities for adoption of the child under the Domestic Adoption Act have been exhausted and when it is in the best interests of the child as per Art. III, Section 7 Intercountry Adoption Law.

### **Russia**

Adoption of a child shall be a priority form of placement for children who have remained without parental care. The adoption of children by foreign citizens shall be admitted only in cases in which it is impossible to give these children for upbringing into families of citizens of Russia, who permanently reside on the territory of Russia, or for adoption to the children's relatives, regardless of the citizenship and the place of residence of these relatives according to Arts. 124.1 and 124.4 Family Code.

### **Serbia**

A foreign national can adopt a child under the following conditions when an adopter cannot be found amongst domestic nationals after being placed on the united personal adoption registry for at least one year and when the Minister for family welfare consents with the adoption. An exception to this one year period exists if the adoption is in the best interest of the child as outlined in Art. 103, (1), (2), (3) Family Act.

### **USA**

According to Section 303 Intercountry Adoption Act 2000 and 22 CFR Part 96.53/4, a child can only be considered for an intercountry adoption after the accredited agency or approved person or the prospective adoptive parent(s) acting on their own behalf have among other things, ensured that a background study of the child has been complete and made reasonable efforts to make a diligent search for PAPs to adopt the child in the USA and that despite such efforts placement of the child in the USA is not possible in a timely manner. This should include evidence for example of dissemination of information on the child and his availability for adoption through print, media, and internet resources to potential prospective adoptive parent(s) in the USA, listing information about the child on a national or State adoption exchange or registry for at least sixty days after the birth of the child. However, it should be noted that exceptions to the above requirements exist for relatives or in the case in which the birth parent(s) have identified specific PAPs or in other special circumstances accepted by the State court with jurisdiction over the case. For such exceptions, it is important that inter-disciplinary matching is carried out to ensure that adoption is truly in the best interests of the individual child.



## 2.2 National case law examples

The following provides two examples of national jurisprudence where the principle of subsidiarity has been encouraged. It should be noted that the principle has likewise been promoted in regional jurisprudence such as the European Court of Human Rights (See [Section 3.2](#)):

### India

In its landmark judgement *Laxmi Kant Pandey vs Union of India 1984*,<sup>10</sup> the Supreme Court of India determined that preference is to be given for finding homes within India for every orphaned child prior to ICA 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 ICA. 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 ICAs by implicitly evoking the principle of subsidiarity almost a decade before it was embedded in the CRC and the 1993 Hague Convention.

### Indonesia

The Supreme Court, through its Circular No. 6 of 1993 and No. 4 of 1989, emphasised that ICA shall be *ultimum remidium* or the last resort after all efforts to find adoptive parents from among Indonesians were exhausted, and the adoption requires court's decision.<sup>11</sup>

<sup>10</sup> see [https://www.eschr-net.org/sites/default/files/caselaw/lakshmi\\_kant\\_pandey\\_vs\\_union\\_of\\_india\\_on\\_6\\_february\\_1984.pdf](https://www.eschr-net.org/sites/default/files/caselaw/lakshmi_kant_pandey_vs_union_of_india_on_6_february_1984.pdf).

<sup>11</sup> see <http://www.unhchr.ch/html/menu2/6/crc/doc/info/al-indonesia-2.pdf> at p. 39



## 2.3 Context and consequences of the implementation of the principle of subsidiarity

It is important to note the context in which many of these adoption laws were drafted ([Section 2.1](#)). As we are aware, ICAs evolved where many countries, especially COs, did not include the principle of subsidiarity as part of their child protection framework. With the introduction of the CRC and the 1993 Hague Convention and the Guidelines for the Alternative Care of Children ([Section 3.1](#)), countries gradually included the principle in its laws, policies and practices. As a consequence, countries improved the child protection frameworks, embarked upon alternative care reforms ([Section 3.1](#)) and promoted domestic adoptions (i.e. respected the principle of subsidiarity). One logical result of these efforts was a reduction in ICAs. This has been observed

in countries such as Brazil, Chile, Colombia, India and Peru. In particular, national adoptions have proportionately increased and ICAs decreased.

Therefore, **as countries, both receiving and those of origin, make genuine and effective efforts to better respect the principle of subsidiarity, it is not surprising to see that there are less children needing ICA.** Efforts should be made to ensure that children can remain with their own biological families, when it is in their best interests. Cases of children under six months or even children under one being adopted out of the CO should be an exception rather than the norm. One would expect if domestic PAPs exist, they would be given the priority to

adopt such children. One indicator that the principle is not being complied with is the “large number of healthy babies” having ICA plans in certain COs or certain RCs adopting only healthy babies.

A further question arises with respect to the disproportionate number of children from minority groups (e.g. Roma and Indigenous groups) that are often declared adoptable. How can the principle of subsidiarity be respected where there is discrimination in the country of origin and very little suitable care options? How can we avoid forced adoptions and at the same time, ensure that quality care for children is provided?

The aim is not of course, to recommend an abolition of ICA or to develop a permanently overprotective system of COs, where children remain in institutions in need of care well into adulthood. For example, whilst only a handful of ICAs are undertaken in some countries, this does not necessarily mean that the principle of subsidiarity is being respected, let alone the best interest principle. There may be limited policies to help families care for their children and alternative options

for children deprived of their family such as kinship care and foster care, which may not be well developed leaving institutional care as the only option. In such countries, an assessment of adoptable children especially those with special needs living in institutions could be undertaken. Perhaps ICA would be an appropriate solution according to their national laws.

In parallel, robust efforts must be made to ensure that children are not drawn unnecessarily into ICA. It is problematic that many institutions with so-called adoptable children are being financed externally by RCs. It is likewise questionable the use of donations linked to adoptions. One can only ask if there would be as many children in institutions if such financial incentives did not exist.

**Whilst there may be a need for a temporary suspension of ICAs as countries improve their laws, policies and practices, a balance must be found to ensure that children are not left in limbo or nor required to live in large scale residential care facilities for an indefinite period.**



### 3. Showcasing a few promising practices

The following section examines how the theoretical framework ([Section 1](#)) and national laws ([Section 2](#)) of the principle of subsidiarity can be implemented by showcasing a few promising practices ([Section 3](#)). This can be done broadly by applying the [UN Guidelines for the Alternative Care of Children](#) ([Section 3.1](#)), prevention of family separation ([Section 3.2](#)), promotion of family reintegration ([Section 3.3](#)), advocating for continuity in the child's upbringing ([Section 3.4](#)), promotion of domestic adoptions ([Section 3.5](#)) and facilitating cooperation ([Section 3.6](#)). It is accepted that other promising practices exist and that the selection provided is by no means an exhaustive list.

## 3.1 UN Guidelines for the Alternative Care of Children

The UN Guidelines for the Alternative Care of Children (UN Guidelines) elaborate rights in the CRC which itself favours permanent solutions (Arts. 20 and 21), such as family and community-based care as opposed to long term care in large residential care institutions. The UN Guidelines address the importance of preventing the need for care and explores how to provide suitable care, when this becomes nevertheless necessary. The UN Guidelines cover the different types of domestic solutions that can be developed, which is the first tier of the principle of subsidiarity (see introduction). The UN Guidelines do not apply directly to adoptions as this is not “alternative care”. Adoption is a permanent family measure where a filiation tie is created and therefore once a child is adopted, family laws will apply. Nevertheless, the principles within the UN Guidelines encompass the first level of the principle of subsidiarity (see Introduction) apply to children who will eventually be adopted given that there is usually a time lag between being declared ‘adoptable’ and being adopted. Children in this period will benefit from the guidelines’ protections.

Broadly speaking, countries will do well to take active approaches to implement the UN Guidelines, where a number of resources have been developed, such as:

- Moving Forward handbook (with multiple promising practices) (<http://www.alternativecareguidelines.org>)
- Massive Open Online Course on UN Guidelines ([www.alternativecaremooc.com](http://www.alternativecaremooc.com))
- ISS website advocacy section (<http://www.iss-ssi.org/index.php/en/advocacy>)



## 3.2 Prevention of family separation – Part IV UN Guidelines

In order to respect the principle of subsidiarity, priority should be placed on ensuring that children are able to live with their families of origin and parents should be supported in their caregiving role. This would include access to both basic services and targeted services, as primary and secondary levels of prevention as outlined in *Moving Forward* (see [Section 3.1](#)). In general, financial and human resources should be invested so that there is, *inter alia*:

- access to free birth registration;
- access to quality education and health services;
- psychosocial support services and/or financial support for mothers and fathers or families in difficulty;
- social dialogue with the extended family, such as grandparents, uncles and aunts, so that they help in preventing abandonment;
- training on parenthood with awareness raising about importance of the father's role;
- awareness of the needs and rights of the child;
- conscious and responsible sex education and family planning;
- promotion and upholding of women's rights;
- fair incomes, access to employment;
- a reduction of world economic imbalances; etc.

It is likewise important to ensure that practices directed at preventing family separation



must be accessible in terms of information, costs and location. For example, it makes little sense to offer family assistance to a single mother of four children living in a regional area that can only be accessed at

a city office, requiring a personal interview. Innovative ways should be explored to improve accessibility such as having rotation of service providers moving to difficult to reach areas.

### **Promising practice: CRC Committee recommendation to France in 2009<sup>12</sup>**

The CRC Committee places great emphasis on the need to prevent the separation of the child from his or her parents, especially where challenging financial circumstances are a driving force leading to this situation.

65. The Committee also expresses concern at the State party's new draft law on adoption, which enables national adoption of children in situation of parental neglect, provided that a declaration of family abandonment has been obtained by the social services. The Committee is particularly concerned that this bill, once enacted, may entail the risk of definitely separating these children, especially those from low income families and families living in poverty, from their family environment.

66. The Committee recommends that this draft law on adoption takes seriously into account the right of the child not to be separated from his or her family (Art. 9), as well as the four general principles of the Convention (Arts. 2, 3, 6 and 12). It should further fully comply with the provisions of Art. 21 of the Convention.

### **Promising practice: European Court of Human Rights recommendation to Czech Republic in 2006<sup>13</sup>**

In the Czech Republic the placement of children in institutions is mainly due to socio-economic reasons rather than to a consideration of a genuine risk for the child if he or she remains in his or her biological family and over 18 per cent of these children have a disability. This situation was condemned by the European Court of Human Rights in the case of *Wallová and Walla v. Czech Republic*. In the context of the Court's consideration of the administrative and judicial authorities' grounds for the removal of children from their parents – i.e. the lack of resources, of accommodation, of employment stability – it has stated that these were not sufficient to justify such a serious interference in their family life, nor the placement of the children in public institutions. Furthermore, it was not obvious from the facts of the case that the child protection authorities had genuinely made important efforts to support the parents in remedying their difficulties, and in trying to get their children back as soon as possible.

<sup>12</sup> <http://www2.ohchr.org/english/bodies/crc/docs/co/CRC-C-FRA-CO-4.pdf>

<sup>13</sup> *Wallová and Walla v. Czech Republic*, Application N° 23848/04, European Court of Human Rights at <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-1820815-1910281&filename=003-1820815-1910281.pdf>.

### **Promising practice: Rwandan policies to continue support to families at risk in 2018**

Over a decade ago, the government of Rwanda developed a National Policy for Orphans and Other Vulnerable Children<sup>14</sup> where it committed to implement policies and programmes to ensure that children in difficult circumstances are integrated in a socially, economically sustainable community.

In 2018, the Rwandan government continues to offer support to families in difficulties to ensure that there is food, accommodation, health support, clothing and education of children. Specifically, key priorities for the Social Protection Strategy include “increasing the coverage of social protection programmes targeting the extremely poor and vulnerable; addressing child poverty and vulnerability in the poorest households; building a sustainable, efficient, effective and harmonised social protection sector; mitigating the impacts of climate change; and measuring and communicating social protection results and impact.”<sup>15</sup>

14 National Policy for Orphans and other Vulnerable Children in Rwanda, [https://www.unicef.org/rwanda/RWA\\_resources\\_ovcrwanda.pdf](https://www.unicef.org/rwanda/RWA_resources_ovcrwanda.pdf)

15 UNICEF. (2018) Situation Analysis of Children in Rwanda in 2017, Rwanda, UNICEF at [https://www.unicef.org/rwanda/RWA\\_resources\\_sitanmain.jpg.pdf](https://www.unicef.org/rwanda/RWA_resources_sitanmain.jpg.pdf) at 56



### 3.3 Promotion of family reintegration – Para 48 to 51 of the UN Guidelines

The promotion of family reintegration ranges from programmes created to strengthen and reunify families by limiting the removal of children from their homes, expediting children's return home from an alternative care placement and providing the essential resources to support families of origin to prevent unnecessary separation. When assessing such programmes of family reintegration, it is essential that children are not only reunited with their families, but that the family is supported with the means to ensure that the child can remain in a supportive and loving environment on a long term basis. The aim is to establish a quality sustainable solution with adequate follow up support.

Regrettably, some programmes focus only on short term solutions and do not adequately implement sustainable solutions.

In other cases, rural areas suffer from a lack of services and therefore parents can send their children to larger cities to receive an education. In such situations, there are often inadequate procedures in place to ensure that the ties with their biological family are maintained. For example, workers in residential care facilities often do not have the capacity to encourage maintenance of relationships. In this situation, there are risks that children can be adopted, despite them having families who have not provided their full and informed consent (e.g. Zoe's ark in Chad, RUC community in Viet Nam).

As one tool to support workers and provide additional direction, Guidelines on Children's Reintegration<sup>16</sup> on behalf of 14 agencies were developed in 2016 setting out guiding principles, along with assessments and plan development models.

<sup>16</sup> Delap E. and Wedge J. (2016) Guidelines on children's reintegration. Inter-agency group on children's reintegration at <https://bettercarenetwork.org/sites/default/files/Guidelines%20on%20Children%27s%20Reintegration%20DIGITAL%20.pdf>

**Promising practice:  
Cambodia – 30% re-integration strategy in 2016<sup>17</sup>**

A national mapping report in Cambodia in 2016 found that there were 639 residential care facilities operating in Cambodia. Based on self-reported data from institution staff, these facilities can be categorised into five types: residential care institutions (406), transit homes and temporary emergency accommodation (25), group homes (71), pagodas and other faith-based care in religious buildings (65) and boarding schools (72). The total of children living in all the 639 facilities is 26,187 (48 per cent female). An additional 9,187 young people between the ages of 18 and 24 (36 per cent female) were reported to be living in the 639 facilities. A total of 16,579 children (47 per cent female) were reported to be living in the 406 residential care institutions. Based on 2015 population figures, this means that nearly 1 in every 350 Cambodian children lives in a residential care institution. In response, MoSVY has agreed on an aspiring target to reintegrate 30 per cent of the children in residential care in five priority provinces by 2018. Several NGOs are actively providing reintegration services, although work must continue to ensure that children are prepared, and families are adequately supported by the State.

**Promising practice: Slovak Republic – systematic assessment of situation and assistance to biological family, established in 2005<sup>18</sup>**

The Slovak Republic has adopted a Family Law that offers a number of alternative care options for minors when the parents do not have the custody of the child, or are incapable of assuming it. The alternative protection, which may only be decided by judicial process, can take the form of a placement with an individual other than the biological parent (“placement with a third party”), in a foster family or in an institution. The Law stipulates that the best interests of the child must always take precedence over court orders in the matter, and that a placement with a third party or in a foster family is preferable to a placement in an institution. In order to implement this last principle, the placement in a foster family is actively encouraged thanks to a system of financial incentives. Furthermore, during the provisional placement in a home, the application of decisions and measures taken to improve the child’s family environment is systematically assessed. The Government also provides financial measures such as travel allowances aimed at making it possible for parents to visit their child in a foster home, food allowances when the child stays in his or her home for weekends, holidays, etc.

<sup>17</sup> Based on joint evaluation mission in Cambodia by HCCH and ISS in 2016 to develop a capacity development.

<sup>18</sup> Slovak Family Law Act No. 305/2005



### 3.4 Advocating for the continuity in the child's upbringing – Para 57, 60, 74 of the UN Guidelines

As noted earlier (sections 1.2 and 1.4), the necessity for continuity in the child's upbringing is one of the justifications for the principle of subsidiarity. The CRC specifically notes that when considering alternative solutions for a child permanently deprived of their family, "*due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background*" (Art. 20(3)).

In adoptions, compliance with this article would be almost impossible without background information about the child before his or her adoption. Therefore, information should be gathered about the child's ethnic group, religious (e.g. local beliefs), cultural (e.g. local festivals, eating habits and clothing customs) and their linguistic background (e.g. forms of communication that child is accustomed).

### **Promising practice: Australia's legislative provisions on continuity on the child's upbringing in 2000**

The NSW Government has ensured that its NSW Adoption Act 2000 is consistent with Art. 20(c) CRC, by stating that regard must be made to cultural heritage of the child.

#### Section 32

(1) In placing a child (other than an Aboriginal or Torres Strait Islander child) for adoption, the decision maker must take into account the culture, any disability, language and religion of the child and the principle that the child's given name, identity, language and cultural and religious ties should, as far as possible, be preserved.

(2) Without limiting matters that may be taken into account, the decision maker must take into account whether a prospective adoptive parent of a different cultural heritage to that of the child has demonstrated the following:

- (a) the capacity to assist the child to develop a healthy and positive cultural identity,
- (b) knowledge of or a willingness to learn about, and teach the child about, the child's cultural heritage,
- (c) a willingness to foster links with that heritage in the child's upbringing,
- (d) the capacity to help the child if the child encounters racism or discrimination in school or the wider community.

In practice this section is complied with as cultural issues are addressed by the Contracted Adoption Assessor (CAA) when they assess a family's suitability to adopt as per the reporting guidelines.

### **Promising practice: South Africa priorities investment in poor communities in legislation in 2005<sup>19</sup>**

The Children's Act 38/2005 introduced shifts in the emphasis of social welfare services as a charity to a State obligation that children have a constitutional right to (Art. 4 CRC). There is a priority on spending in poor communities, children with disabilities as well as support programmes for child headed households, new programmes of cluster foster home care. This new innovation referred to as "cluster foster care" which provides for the reception of children in foster care and is managed by non-profit organisations. Cluster foster care uses foster care grants to set up a family oriented environment where a maximum of six children stay in a house in the community with a house mother/s. Children receive individual attention, intensive therapy, individual development plans that are comprehensive, supervision and reunification services. The value of a cluster scheme is that children can be kept within their community and this encourages the retention of cultural and religious values in a cost effective manner. Additionally, legislative provisions complement policies such as the Policy Framework for Orphans and Vulnerable Children including the Constitution (sec 28), Child Care Act 74/1983 and the new Children's Act 38/2005. The Social Assistance Act of 1998 provides a regulatory framework for social assistance grants including grants for child support, foster care and care dependency. In October 2008 there were 8 million children benefitting from the child support grant.

<sup>19</sup> Foster care campaign 2008 & Media briefing: orphans/vulnerable children in South Africa 27 Oct 2008 <https://www.slideserve.com/bendek/media-briefing-on-orphans-and-vulnerable-children-in-south-africa-presentation-by-director-child-protection-ms-m-ngcobo-mbere-27-october-2008>, Jamieson L. and Proudlock P. (2007) Progress Update 29 June 2007. Capetown, South Africa. Children's Institute, University of Capetown and South African Government Information Website.



## 3.5 Promotion of domestic adoptions

There are a number of ways to encourage domestic adoption as the second tier of the principle of subsidiarity as outlined in the introduction. Practically, this can be facilitated through the creation of a centralised adoption registry (Section 3.5.1), raising awareness of needs of children within the country (Section 3.5.2), support provided to families to adopt children (Section 3.5.3) and preparation of domestic PAPs (Section 3.5.4).

### 3.5.1 Centralised adoption registry to facilitate matching of regions children/prospective adoptive parents

It is essential to establish a national registry of children for whom adoption plans are made which includes the details of all domestic and foreign PAPs. A national registry will facilitate the matching process by helping to avoid situations where the number of PAPs in a particular province exceeds

the number of children needing adoption there. Having a national-level register of PAPs would therefore enable the competent authorities to better respond to domestic applicants in other regions where there is a greater demand. A register can clearly help promote domestic adoptions and only after no domestic PAPs are available should the children be registered as having an ICA plan.

Access to this registry should be limited to the professionals within the Central Authority (CA) in charge of matching in order to avoid the problem of PAPs as well as adoption accredited bodies (AABs) selecting the child who best corresponds to their wishes. Such a register should give the CA the necessary information to evaluate the number of AABs that should be authorised in any country, thus avoiding any competition among them.



### **Promising practice: Brazil and its four levels of subsidiarity with regional matching**

In Brazil, there are four levels of subsidiarity. Law 13-105 provides that the keeping or the reintegration of a child or adolescent in his/her family will be the first option. Adoption is an irrevocable and exceptional measure, which should only take place when all other means to keep the child or the adolescent in their natural or extended family have been exhausted (Law No. 12.010 of 2009, Art. 25). Following this, adoption of children within their residing state is encouraged, followed by attempts within Brazil (inter-states), followed by efforts with Brazilian couples living abroad and finally with foreign families

In practice the State Central Authorities (CEJAI) are responsible for keeping in each state county or jurisdiction a registry of adoptable children/adolescents and of persons or couples authorised to adopt. They are also responsible for maintaining and properly recording the entries into the registry, with subsequent notification to the Federal Brazilian Central Authority (registry at national level). The States and Federal Central Authorities have full access to records and are responsible for the exchange of information and mutual cooperation in order to improve the system.

The Office of the Public Prosecutor gives its agreement for the registration of children/adolescents/PAPs and is responsible for supervising/controlling the proper recording onto the registry and the notification to the PAPs. For further information on those situations, in which no registration is granted, see Art. 29 of the Statute on the Child and the Adolescent.

### **Promising practice: Belarus, South Africa and Ukraine have a minimum period to be registered prior ICA being considered**

In addition to having a register, it is helpful to have a minimum period for which a child is included before being considered for an ICA. This minimum period provides local authorities a time limit to find a domestic family and ensures that the child is not waiting for an indefinite period. The time limit can vary depending on the needs of each country and relaxed in certain cases. For example, in South Africa the child must be on the register 60 days<sup>20</sup>, twelve months in Belarus<sup>21</sup> and Ukraine<sup>22</sup>.

Even if these registries with time limits are set up, it is important to ensure that genuine and effective activities are undertaken during the waiting periods, to find domestic solutions. The point of having a waiting period becomes redundant if there are no resources for finding a domestic solution for this child. It should likewise be noted that perhaps a waiting period of one year can be considered too long especially for children with specific special needs.

<sup>20</sup> Sections 261 and 262 of the Children's Act 2005

<sup>21</sup> Art. 233, Chapter 12 Marriage and Family Code, Paragraphs 10-12, Regulation on international adoption and establishment of international trusteeship, custody of children approved by the Council of Ministers on January 31, 2007 № 122

<sup>22</sup> Arts. 213, 283 Family Code and 24-7 Law on Child Protection

### **Promising practice: Venezuela – compulsory record of efforts to find local solution of child**

Children and adolescents who have their habitual residence in Venezuela may only be considered eligible for ICA when the competent bodies have carefully examined all the possibilities for their adoption in Venezuela and have concluded that ICA is in the best interests of the child to be adopted. Evidence of the actions taken in compliance with this article will be included in the respective file (Art. 445 Law for the Protection of the Child and the Adolescent). This practice is beneficial as there is a record of the efforts made to find a solution for the child which is included in his or her file and can be used at a later stage to explain to the child why he or she did not remain in Venezuela.

### **3.5.2 Raise awareness of children's needs**

There are various ways to raise awareness about the needs of children to those living in the CO. This can include over the internet such as Adopts kids or through various television programmes such as “find me a family in the UK”<sup>23</sup> – although it must be said that questions about the child’s privacy and ethical questions about these means do arise.

However, children’s needs can become more familiar to the public through campaigns initiated by the Government for example in Guatemala and those spearheaded by civil society such as in Uganda (see promising practice).

It should be said that efforts to raise awareness in practice can be artificial and pay lip service to the principle of subsidiarity. For example, it has been observed that the legal requirements for finding the origins of a child may require the publication of the child’s details in a government gazette. This type of publication would hardly ever be read by the population, let alone the families with difficult backgrounds. Other Governments require the publication of the child’s name on three occasions on television. Yet in some cases, this would not usually be during prime time segments let alone accessible to families living in poverty. Awareness raising efforts must be done in a manner that is compatible with the lifestyles of the country population and effective in the national context.

### **Promising practice: Uganda – Nationals adopt campaign**

Many States have managed to increase the number of domestic adoptions by clearly explaining the meaning of adoption to the general public and making domestic adoption free of charge. An advocacy strategy to promote adoption should include clear objectives and goals, target groups, and planned activities. Advocacy should be done at both the local and national level, as well as regional level. Uganda’s Adopt Campaign (<http://ugandansadopt.ug/>) has been launched in the last few years with active use of social media.

<sup>23</sup> For example, see episode one [https://www.youtube.com/watch?v=t9652R\\_JPRw](https://www.youtube.com/watch?v=t9652R_JPRw)

### 3.5.3 Support provided to families in country of origin to adopt children

There are a number of ways national PAPs can be supported to have the capacity to become adoptive parents – such as through better employment conditions and financial aid.

#### **Promising practice: Leave for both domestic and intercountry adoptions<sup>24</sup>**

A number of countries provide clear support to adoptive parents. Parental leave for adoption is one of the means that allows one of the parents (or both of them) to stay with the adopted child to get this process up and running. Such leave reflects the spirit of Arts. 4 and 18 CRC and 9c 1993 Hague Convention, which oblige States to assist parents in raising their children and ensuring their well-being, and in the more specific case of adoption to support them efficiently after the child's arrival in the family.

Whether it is in terms of duration, financial compensation, the conditions granted, maintaining certain rights (paid leave, pension contributions, etc) or the number and age of the children, the systems of parental leave for adoption are more or less generous depending upon the RC and even within the country in the case of federal States. In most cases, leave is granted to salaried workers, but its scope can vary according to seniority; the allocations can differ considerably from one State to another, and often a ceiling on income is set. Its duration oscillates between approximately one year or even more, generously remunerated in countries like Canada (Quebec), Norway and Sweden, and three months or even less, sometimes unpaid or scarcely so in countries such as the Netherlands, the United States, etc.

#### **Promising practice: USA – financial incentives to adopt children with special needs, adoption tax benefits, etc.**

The latest legislative reform as signed by the president on 7 October 2008 known as the “H.R. 6893 Fostering Connections to Success and Increasing Adoptions Act of 2008” is welcomed as a promising practice for encouraging more domestic adoptions. The Act, amongst other various innovative mechanisms, makes provisions for kinship guardian assistance for adoption, promotes adoptions of children with special needs, adoption tax benefits and family connection grants.

### 3.5.4 Prepare PAPs to consider domestic adoptions and provide follow up support

To encourage effectively domestic adoptions, domestic PAPs should be adequately prepared.

#### **Promising practice: Guatemala – preparation of domestic PAPs**

Reforms are being undertaken so that when ICAs are reintroduced, it will be according to a new regime and they will be truly subsidiary. In the promotion of domestic adoption, a strong focus is now on “recruiting” Guatemalan adoptive families, through a series of TV and radio spots and a special 1-hour TV programme that was broadcast (the programme reflects quite well the old system vs. the new system, plus support to biological mothers, and focus on domestic adoptions), as well as information meetings for PAPs increasingly throughout the country.

The CA in Guatemala has developed a training kit to support and prepare PAPs. The activities themselves range from the very objective list of requirements to a poem on parentage used for reflection. Based on the internal professional guidelines, the preparation workshops include among other things:

- information on the reality of adoption in Guatemala, including the profile and the situation of adoptable children and their potential backgrounds (particularly abandonment), including historically;
- explanation of the adoption process, in particular the matching (not a choice of the applicants, but intervention of a multidisciplinary team) and how this differs from the previous system;
- explanation of the requirements and the assessment process (including its aim and the opportunities for support);
- counselling with regards to the priority of adoption, i.e. the right of a child to a family and not the opposite;
- the responsibility of responding to the best interests and the needs of the particular child;
- information on the principle of subsidiarity (subsidiarity to reintegration into their families and priority to domestic adoption aimed at continuity in the child’s life);
- awareness-raising as to the realities and issues relating to the building of an adoptive filiation and parenthood;
- reflection on the absence of biological children and the causes, and the relevant mourning process.



## 3.6 Co-operation between countries

One key to the successful implementation of the principle of subsidiarity is cooperation between COs and RCs. Art. 17 of the 1993 Hague Convention gives Central Authorities an opportunity to confirm at an early stage whether the principle of subsidiarity has been complied or not before proceeding further with an adoption. RCs should at this stage ask for proofs that efforts have been made to uphold the UN Guidelines ([Section 3.1](#)), prevent family separation ([Section 3.2](#)), promote family reintegration ([Section 3.3](#)), ensure continuity in the child's upbringing ([Section 3.4](#)) and promote of domestic adoptions ([Section 3.5](#)) prior to ICA being considered.

Another means of encouraging cooperation is through the ongoing support of RCs to the ISS/IRC, which allows the organisation to promote the principle of subsidiarity through publications such as this, but also through the UN treaty bodies<sup>25</sup>. In addition, the ISS/IRC is regularly provided additional support by UNICEF and RCs to provide technical assistance to CO. In 2017 and 2018, as one example the ISS/IRC has undertaken training in Ghana, Guinea Conakry and Haiti to train central authorities, social workers and judges on preparing children's dossiers, declaration of adoptability, matching, etc – including the principle of subsidiarity supported by the French, Flemish and Wallonia (Belgium) CAs.

<sup>25</sup> <http://www.iss-ssi.org/index.php/en/advocacy/#8-1-treaty-body-mainstreaming>

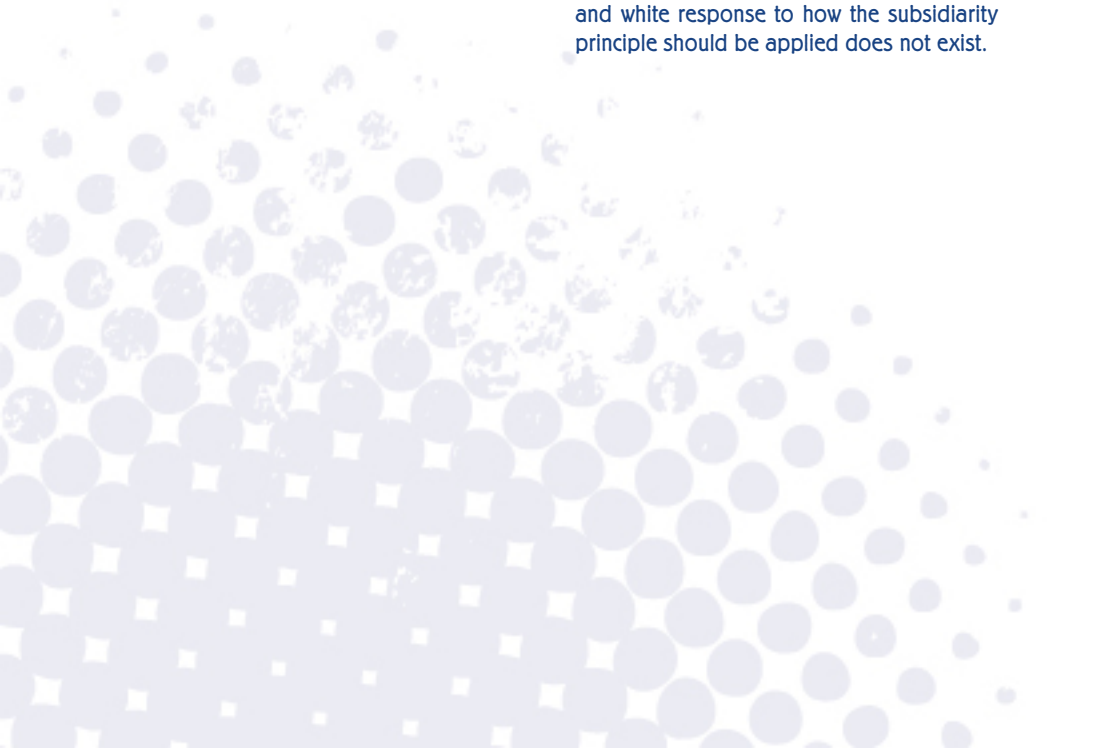
## Conclusion

Whilst many countries have a clear legislative framework articulating the principle of subsidiarity, unfortunately the principle is not set out in any law or policy of a number of others. Countries who find themselves in this situation should rectify this omission as soon as possible especially if they choose to undertake ICA.

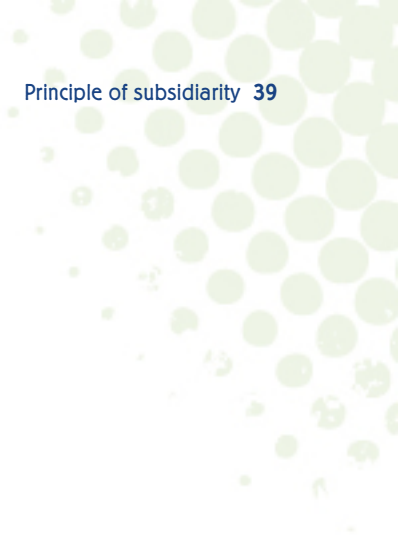
The aim of this paper was to provide a small palette of promising practices aiming to respect the principle of subsidiarity from COs and RCs. There are of course many other practices. As a priority, there is a clear need to implement prevention policies and strengthen the support to biological families with a view to successful reintegration, key principles stipulated in the UN Guidelines (part IV).

It is also important to ensure that domestic solutions in principle are truly exhausted and this can only be done by strengthening the national alternative care system as well as promoting domestic adoptions. Domestic adoptions can be promoted by implementing a national registry to facilitate matching, raising awareness of the needs of children with adoption plans, as well as preparing and providing support to domestic PAPs. It is also essential that COs and RCs work in a spirit of co-operation to ensure that the principle is respected.

Finally, it is essential genuine efforts are made to respect the principle of subsidiarity. There must be documented efforts to ensure that the principle is respected and notably that the best interests of the child remain the paramount consideration ensuring individualised treatment. An automatic black and white response to how the subsidiarity principle should be applied does not exist.



# Notes



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