Family Environment and Alternative Care

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INTRODUCTION

Family environment and alternative care is one of the clusters of articles recommended by the CRC Committee in its reporting guidelines. According to the Committee the following articles are of direct relevance for this topic: art. 5 and 18, para 1 and 2 (rights and responsibilities of parents), art. 9 – 11 (separation from parents, reunification, illegal transfer), art. 19 (protection from all forms of violence in caring setting, such as family. Foster care and institutional care), art. 20 and 21 (alternative care and adoption), art. 25 (review of placements) and art. 27, para. 4 (payment of child allowances by parent). But for the family environment of the child other articles are also important, in particular art. 7 (the rights of the child to know and to be cared for by her/his parents), art. 8 (the right to preserve her/his identity which includes family relations) and art. 16 (no child shall be subjected to arbitrary or unlawful interferences in her/his family or home).

In addition and throughout the implementation of these articles the General Principles of the CRC, in particular art. 2 (non-discrimination), art. 3 (the best interest of the child) and art. 12 (the right to express views and be heard).

In the training of professionals working with or for children attention should be given to the various aspects of this topic. But the degree of details in the presentation of these aspects may vary depending on the role of the professionals who participate to the training.

- For example: in the training of judges special attention could be given to the decision making processes in cases of custody and visitation when the parents of the child are separating (divorce) or in cases of child protection (placement of a child and/or termination of parental rights).
- Prosecutors and the police can be involved in efforts to protect the child from violence in the family or in an institution, but also in addressing cases of illicit transfer.

This chapter provides information on the content and implementation of the relevant articles regarding family environment and alternative care. Where appropriate some attention will be given to the role of the different professionals: judges, prosecutors and police.. The next paragraphs will deal first with some general observations and principles, followed by paragraphs on some family law issues, in particular of relevance for judges, on Protection from violence in the family and other care settings (art. 19 CRC) and on Children without parental care/ institutional care (alternative care).

General Observations and General Principles: In all actions regarding the protection of the family environment of the child and her/his right to alternative care when necessary professionals should fully respect the primary responsibility of parents for the upbringing and development of their children. In addition all actions should fully respect and be guided by the General Principles of the CRC.

The Rights and Responsibilities of Parents: Parents (or legal guardians) have the primary responsibility for the upbringing and development of the child and the best interest of the child will be their basic concern. The State shall render appropriate assistance to parents (or legal guardians) in the performance of their child rearing responsibilities, not only in case parents fail to meet their
responsibilities. It is a general obligation for the purpose of guaranteeing and promoting the rights of the child. And for that purpose the State shall ensure the development of institutions, facilities and services for the care of children (art. 18, para. 1 and 2 CRC). This obligation implies that interference in the family via child protection measures should be a measure of last resort. The first option should be the use of existing child care services and facilities and only if these services are insufficient to address the problems in the upbringing of the child a child protection measure can be imposed on the parents via the court or via another authorised authority.

According to art. 5 CRC parents (or others legally responsible for the child) have the responsibility, the right and the duty to provide appropriate directions and guidance in the exercise by the child of the rights recognized in the CRC. This should be done in a manner consistent with the child’s evolving capacities.

This provision recognizes the autonomy of parents in the upbringing of the child but at the same time requires that parents should support the child in the exercise of her/his rights in such a way that the child will be given, depending on age and maturity, the opportunity to make her/his own decisions. This concept of “evolving capacities” has been elaborated by the Committee in its General Comment no. 12 (2003) on Adolescent health and development in the context of the Convention on the Rights of the Child.

- For example the States are recommended to ensure that specific legal provisions are guaranteed, including the setting of a minimum age for sexual consent, for marriage and for the possibility of medical treatment without parental consent.
- Adolescents who are mature enough to receive counselling without the presence of a parent are entitled to privacy and may request confidential services and treatment,
- In conclusion: if professionals have to deal with a conflict between a child and her/his parents, for example regarding medical treatment or the choice of education, should take into account the age and maturity of the child and may support the choice/decision of the child.

**General Principles:** Throughout the practice, including decisions made by competent authorities, in the field Family environment and Child Protection, the General Principles of the CRC (art. 2, 3 and 12) should be applied. Some brief remarks:

**Non-discrimination (Art. 2):** This is a very fundamental right of every child within the jurisdiction of a State Party to the CRC. The CRC Committee therefore recommended inter alia to include the prohibition of non-discrimination in the Constitution, while ensuring that all the prohibited reasons for discrimination mentioned in art. 2 are included, e.g. the one referring to disability (a prohibit reason for discrimination not explicitly mentioned in other human rights treaty, except for the very recent one on the Protection of Persons with Disabilities).

The CRC Committee has drawn the attention to various forms of discrimination which may occur. For instance the discrimination of children born out of wedlock, children with disabilities, girls, children belonging to minorities or to migrants families and refugee or asylum seeking children and their families. Further examples could be given related to e.g. the right to know your parents and the right of equal access to services, including child protection.

**The Best Interest of the Child (art.3):** In all actions concerning children the best interest of the child shall be a primary consideration. The rule is simple but its implementation faces many problems. What is in a concrete case of e.g. a decision on custody after divorce of the parents or in child protection decision the best interest of the child? There is not one simple answer to this question. Much depends on the circumstances of the case and many factors may play a role. In any kind of case one and most likely more of the following factors should be taken into account: continuity and stability in and adequate care of the child by at least one adult person (preferably one of the parents), respect for the child and interest in and taking seriously the living conditions of the child and her/his needs, a caring situation that allows the child room for initiatives and challenges, adequate exemplary attitudes of caring adults, contact with peers and broad educational opportunities. This principle plays a key role in the decision making by juvenile courts, but should also a primary consideration in actions taken by the prosecutor or the police for the protection of a child. Participants to the training can be invited to present and discuss decisions/ cases in which the best interest of the child pose problems/ dilemma’s.

**The Right to Be Heard (art.12):** In the presentation and discussion of this General Principle the main elements of General Comment no. 12 of the CRC Committee should be presented. Attention should be given, for example, to the rule that the right of the child to express views and to be
heard is depending on the capability of the child to form his or her own views. States have an obligation to assess this capability and should assume that the child has the capability to form her or his own opinions; it is not the child who must prove her or his capability. The Committee discourages States to introduce age limits which would restrict the child’s right to be heard. The right to express the views freely means that the child should not be subjected to undue pressure or influence. The child should express her or his own views not the views of others.

The rule that due weight must be given to the views of the child in accordance with age and maturity means that simply listening to the child is not enough. The views of the child must be given serious consideration and in that regard the Committee encourages States to introduce legislative measures requiring decision makers in judicial or administrative procedures to explain the extent of the consideration given to the views of the child and the consequences for the child. The environment in which the child is heard must be child friendly and may require special design of court rooms and separate waiting rooms. More and other information can be given form this General Comment. The trainers should also use as a source of information The Handbook to General Comment No. 12: the Right of the Child to be Heard, prepared by Gerison Lansdown on behalf of Save the Children and UNICEF (New York 2011).

The presentation of this information should be followed by a discussion of the practice in Kazakhstan. Section 54 of the Law on Marriage and the Family (17 Dec. 1998, nr. 321-1) contains the right of the child to express her/his opinion in the course of any judicial or administrative proceedings, stipulating that the opinion of the child over the age of ten must be taken into account, except in cases in which this would contradict the child’s best interest.

**Family Law Issues:** During the training different family law issues can be presented with reference to the relevant provisions of the CRC. Some examples of these issues are given with the note that the focus is on legal procedures in juvenile/family courts. But at the same time some basic information on these issues is also relevant for police officers and prosecutors who may, for example, encounter issues of paternity or conflicts between divorcing parents.

**The Right to Know Your Parents, as Far as Possible (Art.7):** This right sounds rather straightforward but has raised a lot of questions. First: what is meant by “parents”? Based on the views of the CRC Committee (expressed in numerous concluding observations) we may assume that the provisions apply to biological parents, the mother who gave birth to the child and the biological father. But modern medicine makes it possible that a child is conceived via artificial insemination or via in vitro fertilisation (IVF). In the process of IVF the child can be conceived with the egg of a donor mother and the sperm of a male donor. The embryo will be implanted in the woman who gives birth to the child. If that woman is married at the time of birth of the child her husband will be legally considered as the father while the woman is considered as the legal mother. But they are not the biological parents. Does art. 7 mean that the child has the right to know the egg and sperm donor because they are her or his biological parents? What does “as far as possible” mean in this regard? It may be very important for the child to know her or his genetic origin, for example in case of a disease that can not be explained as inherited via his parents but may be caused by one of his genetic parents. But should the child has the right to know the identity of the genetic parents or only the medical records? In some countries the practice of anonymous birth exists (the child is registered under “X”). The CRC Committee is of the opinion that such practice should be abolished. The same may apply to the practice of abandonment of a child immediate after birth in a hospital without registration of the name of the mother. Such practices make it de facto impossible for the child to know her or his biological parents.

Finally there seems to be an international consensus that an adopted child should have the right to know and to be informed about her or his biological parents. The practice of “secret adoption”, that is an adoption in which the identity of the biological parents are kept secret, should be abolished, perhaps with some exceptions if revealing that information may endanger the life of these parents.

**Divorce of Parents:** The CRC does not explicitly address this issue (the term “divorce of parents” does not appear in the convention). But the divorce/ separation of their parents will have considerable and sometimes devastating impact on the children. During the training attention could be given to the various social and other adverse consequences for children of the divorce of their parents. In most countries the divorce of parents requires the involvement of the (family/juvenile) court, because decisions have to be made regarding the custody over the children, the arrangement of regular contact between the
children and the parent not in charge of their daily upbringing and the payment of maintenance as a contribution for the child’s upbringing (see art. 27, para. 4 CRC)

**Question:** Should the parents continue to have joint custody?

A positive answer to this question can be based on art. 18 CRC requiring States Parties to ensure the recognition of the principle that both parents have common responsibilities; further support can be found in art. 8 ECHR containing the right to respect for family life + related jurisprudence.

Parents can decide to share their daily responsibility for the upbringing of the child via a so called co-parenting arrangement. For example the children live alternately with one of the parents for example: two weeks with the mother and then two weeks with the father. Such an arrangement is left to the parents; courts should not impose it. The continuation of the joint custody does not mean that such co-parenting arrangement is necessary. In practice it is often the mother who is in charge of the daily upbringing of the child.

The other possibility is sole custody for one of the parents. Sole custody for one of the parents may be necessary because the good communications between the parents required for continuation of joint custody is lacking e.g. because the ex-spouses separated with a lot of negative feelings towards each other. But the decision to give sole custody to one of the parents brings us to the

**Question:** What is in the best interest of the child? Sole custody for the mother or the father? See for factors in this regard above under best interest.

The divorced parents have to make a an arrangement of the contacts between the child and the parent who is not the in charge of the daily care of the child. If they cannot agree on such arrangement they can ask the judge to decide on the matter of visitation. Relevant in this regard is the rule of art. 9 para. 3 CRC: the child has the right to maintain personal relations and direct contact with this parent on a regular basis, except if it is contrary to the child’s best interest.

**Question:** When is that the case? In all the procedures related to custody and contacts (visitation rights) the child must be heard and parents should be involved. In these procedures the judge often has to deal with conflicting views/opinions of the parents and the growing practice is to undertake reconciliation efforts via mediation. This practice could be discussed with examples from Kazakhstan and other countries.

**Finally:** maintenance of the child should be discussed with reference to art. 27, para. 4 CRC stating that the government shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons, having financial responsibility for the child. The CRC does not provide rules for the determination of the amount of maintenance that a parent should pay. This could be a matter for further discussion about the relevant factors in this regard. The other is the enforcement of maintenance orders made by the court both within the country and in international/ cross borderer cases. Guidance for the latter can be found in a rather new Convention of the Hague Conference on International Private Law (the 2007 Child Support Convention and the 2007 Protocol on the Law applicable to maintenance obligations).

**Child Protection:** Art 18 and 27 imply that the first option to consider when the child needs protection is organizing support for the parents in order to help them to continue with the care for their children. Separation of the child from parents has to be a last resort is the message of these articles and that poverty cannot be a justification for such separation.

In most countries the law (for example: family code or children’s act) contain provisions which allow the court (juvenile or family court) to take measures for the protection of the child when their development is seriously threatened for example because they are the victim of abuse or and/or neglect. These measures can be supervision order, the placement of the child in alternative care (foster care or institutional care) and ultimately the termination of parental rights. Decisions of the court have to be based on a thorough assessment of the needs of the child and must fully respect and implement the General principles of the CRC (see para. 2 above). The trainers should also use as a source of further information the UN Guidelines for the Alternative Care of Children (UN General Assembly Resolution 64/142, 27 February 2010). It contains detailed information on, for example, the measures to prevent the need for alternative care, a description of the various forms of alternative care and rules for the determination of the most appropriate form of care.
In this context attention could be given to termination of parental rights in Kazakhstan (see section 68 of the Law on Marriage and the Family) and discuss whether the practice is in compliance with the rights of the child (e.g. art. 3, art. 12 and art. 9 CRC). The state prosecutor can participate in the investigation of cases of termination of parental rights. I assume that a request for termination has to be submitted to and decide by a court.

Protection from Violence in the Family and Other Settings: Violence against children is as old as history of humankind. It is a common practice across cultures and nations and occurs in homes, schools, community, workplaces, state care and detention institutions. Perpetrators include parents and family members, as well as teachers, caretakers, law enforcement officers, sports coaches and others. Sadly, perpetrators are other children as well. It affects children from rich and poor countries, but some children are more vulnerable than others, in particular those who belong to any kind of marginalized group in a society [1]. Violence threatens the survival, well-being and future prospects of children. The physical, emotional and psychological scars of violence can have severe implications for a child’s development, health and ability to learn.

Violence against children goes beyond the purely physical. Violence perpetuates poverty, illiteracy and early mortality. The physical, emotional and psychological scars of violence rob children of their chance to fulfill their potential [2].

Violence against children can never be justified. Inflicting violence on a child, in whatever form, teaches that child that violence is acceptable and so perpetuates the cycle of violence. Children can make a valuable contribution to helping understand the violence they face and the damage it does to them. Much violence against children is hidden due to fear of children or their parents, especially if violence is perpetrated by a spouse or other family member, a more powerful member of society such as an employer, a police officer, or a community leader, the stigma frequently attached to reporting violence, societal acceptance of violence, lack of safe or trusted ways for children or adults to report violence.

Violence Against Children and the CRC: The Convention on the Rights of the Child deals with the problem of violence against children from the point of view of prevention and rehabilitation. The intention is to protect economic and social sensitivity of children in a manner which would ensure that they live free of fear from emotional and physical harm. When abuse takes place in spite of preventive measures, the States must undertake appropriate measures for physical and psychological rehabilitation and reintegration of children. General agreement of States to act against abuse and neglect is demonstrated also by the fact that not a single reservation was registered regarding relevant provisions in the Convention on the Rights of the Child.

Obligations of state parties are stipulated in article 19 of the Convention. They are more comprehensive than those related to torture in other international human rights conventions. Article 19 obliges states to take all appropriate measures to protect the child from different forms of violence. Such a formulation includes and lists all forms of abuse and neglect not only by parents but also other persons that are taking care of children. Further on in paragraph 2, article 19 emphasizes that “listed protective measures should include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore and , as appropriate, for judicial involvement.”

Article 39 of the Convention on the Rights of the Child is on rehabilitation of the child. State parties have an obligation to take “all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.” Here again, the text lists all instances in which State should ensure the rehabilitation of the child. Torture or other forms of cruel degrading or inhuman treatment or punishment are mentioned separately from abuse, exploitation or neglect so that the child can be protected from acts of authorities within or outside of administrative proceedings, investigations or court proceedings.

Violence Against Children and the Committee: The Committee on the Rights of the Child has, from its first session, been active on the issue of violence against children. In belief that there is “a need to increase further the attention given to violations of the right of children to be protected from all forms of torture, mistreatment and abuse,” at its twenty-third session, in January 2000, the
Committee decided to devote two annual days of general discussion to the theme of violence against children [3]. The first was the State violence against Children (in September 2000) and the second Violence against Children within the Family and in Schools (September 2001). The Committee hosted at the two occasions interesting discussions and issued two sets of recommendations. Finally, February 2011, the Committee adopted General Comment No. 13 on Article 19: The right of the child to freedom from all forms of violence. For the purposes of the general comment, the Committee defines “violence” as “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse” as listed in paragraph 1 of Article 19. The Committee further states that “The term ‘violence’ has been chosen here to represent all forms of harm to children as listed in paragraph 1 of Article 19, in conformity with the terminology used in the 2006 UN Study on Violence against Children, although the other terms used to describe types of harm (injury, abuse, neglect or negligent treatment, maltreatment and exploitation) carry equal weight [4]. As in common parlance the term ‘violence’ is often understood to mean only ‘physical’ harm and/or ‘intentional’ harm. However, the Committee emphasises most strongly that the choice of the term ‘violence’ in the present general comment must not be used in any way to minimise the impact of and need to address, non-physical and/or non-intentional forms of harm (such as neglect and psychological maltreatment inter alia).”

Although most of the Committee’s GCs have some reference to violence against children, the Committee’s GC General Comment No. 8, “The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment”, is very important since it is on one form of violence [5]. It starts with a strong message to States that, “addressing the widespread acceptance or tolerance of corporal punishment of children and eliminating it, in the family, schools and other settings, is not only an obligation” but also “a key strategy for reducing and preventing all forms of violence in societies”. The CG offers a definition of corporal punishment as “any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light.” [6]. The Committee often receives common arguments by governments against prohibition of all corporal punishment. Many States’ representatives have publicly stated their belief that a certain degree of “reasonable” or “moderate” corporal punishment is in the “best interests” of the child. The GC No. 8 stresses that no excuse based on stereotypes and misperceptions can be “used to justify practices, including corporal punishment and other forms of cruel or degrading punishment, which conflict with the child’s human dignity and right to physical integrity”. The GC offers list of measures and mechanisms required to eliminate corporal punishment and other cruel or degrading forms of punishment.

UN Study on Violence against Children: The UN General Assembly called for a study on violence against children in 2001 (res. 56/138) acting on the recommendation of the Committee on the Rights of the Child. The Study is based on the knowledge, research and collection of data. Key findings and messages of the Study are that violence against children is not inevitable and that it can and must be prevented. The best way to deal with violence against children is to stop it before it happens by investing in prevention programmes. States and all sectors of society must fulfill their responsibilities to protect children and hold accountable all those who put them at risk.

The Study identified risks and factors which generate violence. Although violence happens in every corner of the world, economic development, status, age, sex and gender, social and cultural patterns of conduct are among risk factors. The rate of homicide of children is estimated at twice as high in low-income countries than high-income countries. The highest child homicide rates occur in adolescents, especially boys, aged 15 to 17 years and among children 1 to 4 years old young children are at greatest risk of physical violence, while sexual violence predominantly affects those who have reached puberty or adolescence. Boys are at greater risk of physical violence than girls, while girls face greater risk of sexual violence, neglect and forced prostitution. Children with disabilities, those from ethnic minorities and other marginalized groups, “street children” and those in conflict with the law and refugee and other displaced children are especially vulnerable to violence [7]. The Study has developed “overarching” and “setting-specific recommendations”. They were presented to the UN GA [8].

Alternative Care for Children Without Parental Care General Introduction: When a child is separated from family, on a permanent or temporary basis and for no matter what reasons, it is necessary to provide special protection. The protection measures that will be implemented depend first and foremost on each and every situation of the child. The Convention on the Rights of
the Child in its article 20 establishes an obligation for states to provide special assistance to children deprived of family environment and ensure alternative care in their national legislations. The article lists four types of alternative care but leaves room for other solutions that are not explicitly enumerated: foster placement, kafalah of Islamic law, adoption and placement in suitable institutions for the care of children. It is very important to note that “during the consideration of solutions” for alternative care for children states should pay “due regard” to the need for “the continuity in a child’s upbringing”, as well as to “the ethnic, religious, cultural and linguistic background”. Unlike in the article 9 of the CRC on separation from parents, this provision refers to family. It is an important distinction, which reaffirms the belief that solutions should always be firstly sought within wider family.

But if separation from the parents is necessary in the best interest of the child or if the child is deprived of family environment for other reasons alternative must be provided. Art. 20 indicates that this alternative care should be as much as possible a family environment (foster care, Kafalah or adoption) and only if necessary placement in a suitable institution for the care of children.

Given this order we will in this paragraph first pay briefly present some information on relevant international provisions and standards of family-based alternative care, with special attention to adoption. This will be followed by information on alternative care in institutions (children’s homes, orphanages, educational institutions etc.).

In addition to the CRC itself important documents relevant to alternative care for children are:

- the 1986 UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption;
- the Report and Recommendations of the CRC Committee on the Day of general Discussion 2005 on Children without Parental Care; included in the Report on the 40th session of the Committee September 2005 (UN Doc. CRC/C/153)
- the UN Guidelines for the Alternative care of Children (UN General Assembly Resolution 64/142, 24 February 2010);
- various General Comments (GC) of the CRC Committee in which attention is given to issues of alternative care of children, such as GC No. 3 (2003) on HIV/AIDS an the rights of the child, para. 28 – 32; GC No. 6 (2005) on Treatment of unaccompanied and separated children outside their country of origin, para. 91 (on adoption); GC No. 7 (2005) on Implementing child rights in early childhood, para 36 under (b); GC No.9 (2006) on The rights of children with disabilities, para. 41 – 50.

**Family-based Alternative Care**

**Some General Observations:** Alternative family-based of children without parental care is practices in many different ways.

Informal care is any private arrangement provided in a family environment, whereby the child is looked after by relative or friends or by others in their individual capacity. It is an arrangement that takes place without an order/decision of an administrative or judicial body or a duly accredited body. It is a form of alternative care that usually lacks oversight and regular review and may put the child at risk of abuse or exploitation.

Formal alternative care is all care provided in a family environment as the result of a decisions of an administrative or judicial authority (court) and all care in a residential environment, whether or not ordered by a competent body. In other words: residential alternative care is not informal.

Foster care is the alternative in the environment of a family other than the supervised. Children are placed in foster care by a competent authority (administrative or judicial); see UN Guidelines 2010, para 29. Informal care, in particular kinship care in the extended family, is widely practiced in the (so-called) developing part of the world. Foster care is a well established form of alternative care in the developed part of the world and in other parts it is sometimes slowly developing and implemented.

Child-headed households are de facto and informal forms of alternative care, which can be found particularly in Africa. Millions of children in Africa lost their parents due to HIV/AIDS, natural or other disasters (e.g. armed conflicts). The traditional alternative care in the extended family is less and less available due to the same problems. The desire of children to stay together, when possible, in the parental home (in stead of being separated and placed in institutions) resulted in the practice that the oldest child became the head of that household. The UN Guidelines draw the attention to the particular vulnerable situation of this form of alternative care and States should ensure that a legal guardian (or other responsible adult) is appointed. These child-headed households should benefit from mandatory protection against all forms of abuse or exploitation and from supervision and support.
by the local community; special attention should be given to the children’s health, education and inheritance rights (UN Guidelines, para. 37).

*Kafalah* is a well established form of alternative care under the Sharia law in the Islamic world. The child is cared for by members of her/his extended family but does not loose her/his identity as a member of her/his biological family and continues to have the name of that family. The Sharia law prohibits that the “new” father names the child after him. In short: it is not an adoption, because that is prohibited under the Sharia law, but can be seen as a form of kinship care.

Adoption is the only form of alternative care which is elaborated in a separate article of the CRC (art. 21) and deserves special attention.

**Finally:** for all placements of children in alternative care art. 25 CRC contains an important provision: every child placed for the purpose of care, protection or treatment has the right to a periodic review of the treatment provided and all other circumstances relevant to her/his placement. This rule applies to all placement of a child in alternative care, whether it is family based care or institutional care. This periodic review has to be carried out preferably by independent persons or bodies, for instance an independent inspectorate. The review is a very important tool not only to asses the need for and legitimacy of continuation of the placement but also as a tool to protect the child from abuse of exploitation in the alternative care setting.

**Adoption:** Article 21CRC provides specific rule for adoption which should be applied but only by States Parties that recognize and/or permit the system of adoption. This limitation is recognition of the fact that in countries which apply the Sharia law adoption is prohibited.

A distinction is made between national or domestic and inter-country adoption. For both forms of adoption the best interest of the child shall be the paramount consideration. This is in line with article 5 of the 1986 UN Declaration and stronger than article 3 CRC requiring that the best interest of the child shall be a primary consideration. It means that the interest of the child is the decisive factor. Adoptive parents have undoubtedly an interest in adopting the child but this interest can not be given more weight than the interest of the child.

Key rules for both forms of adoption are according to article 21 under (a) CRC:

- adoption has to be authorized by a competent authority (court or other authority);
- this authority has to determine whether the adoption is permissible under the applicable law and procedures and on the basis of all relevant and reliable information and in light of the child’s status(and relation) with her/ his parents, relatives and legal guardian. From the CRC it is not clear what is exactly meant by “the child’s status concerning parents etc”. Interpretation of this phrase may depend on national law. But it may mean for instance that the child is free for adoption (not under the legal authority of the parents or guardian) and/or that the child’s parents lack the capacity to care for the child, simply because they died or because they suffer from drug addiction or other serious (psychiatric) problems;
- the consent should be obtained from the persons whose consent is required under the national law, unless that is de facto impossible. In most countries at least parents have to give their consent and in case that is de facto not possible consent of the legal guardian or qualified relative may be necessary.

In addition it is by now an international standard that the adopted child has the right to know her or his background, including information about her or his biological parents and (extended) family as much as possible (art. 7 CRC and the 1986 UN Declaration). For inter-country adoptions art. 30 of the Hague Convention (see hereafter) requires that the competent authorities of the State must preserve information concerning the child’s origin, in particular, information about the identity of her or his parents. These authorities shall ensure that the child or her or his legal representative has access to this information. It is left to national legislation to determine the level of information; for instance: only the names but not the current address(es) of the biological parent(s) or other information that would allow for direct contact. Such contact, if desired by the child, should only take place under appropriate guidance and only after the biological parent(s) agrees with it.

**Inter-Country Adoption:** The rest of article 21 CRC is devoted to inter-country adoption reflecting the need to set special rules in order to ensure that it is in the best interest of the child and free from improper practices or exploitation.
The following special rules are set:

- only if the child cannot be placed in a foster or adoptive family or cannot in any other suitable manner be cared for in her or his country of origin inter-country adoption can be considered as alternative care for the child (a similar provision was already included in art. 17 of the 1986 UN Declaration). The question is raised and sometimes subject to heated discussions whether inter-country adoption should be a measure of last resort, meaning that all national means of alternative care including institutional care have to be exhausted. For instance, a child is placed shortly after birth in a suitable institution and will stay there for an indefinite period of time (perhaps even the rest of her childhood).

Some experts argue that such an alternative care is not in the best interest of the child and that inter-country adoption should be made possible for such child.

- the authorities must ensure that the child subject to inter-country adoption should enjoy the safeguards and standards equivalent to those applicable in the case of national adoption.

- all appropriate measures must be taken to ensure that, in inter-country adoption, the placement of the child does not result in improper financial gain for those involved in it. Article 32 of the Hague Convention (see hereafter) confirms this standard and states that only costs and expenses, including reasonable professional fees of persons involved in the adoption may be charged or paid. The directors, administrators and employees of bodies involved in an adoption shall not receive remuneration which is unreasonably high in relation to the services rendered.

- States parties must promote the objectives of article 21 by concluding bilateral or multilateral agreements in order to ensure that placement of a child in an other country for the purpose of adoption is carried out by competent authorities. The most important multilateral agreement is the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption. This Convention has been ratified by the Republic of Kazakhstan and it is in the process of implementing it. Therefore some brief information about this Convention.

The objectives of this Convention are (art. 1):

- to establish safeguards to ensure that inter-country adoptions take place in the best interests of the child and with respect for her or his fundamental rights as recognized in international law;

- to establish a system of co-operation amongst the Contracting States to ensure that those safeguards are respected and prevent thereby the abduction, the sale of, or traffic in children;

- to secure the recognition in Contracting States of adoptions made in accordance with the Convention.

The Convention covers only adoptions which create a permanent parent-child relationship (art. 2).

Article 4 and 5 contain a detailed description of the requirements for inter-country adoption to be met by the authorities of the country of origin of the child (art. 4) and by those of the country where the child will placed for adoption, (the receiving state) (art. 5). For instance:

- authorities of the country of origin have to establish that the child is adoptable after due consideration have been given to the possibilities of placement of the child in the country of origin; they have to ensure that all the required consent, in accordance with the national law, is given by persons (in particular parents) institutions or authorities; the consent of the mother, when required, can only be given after birth of the child; the child should be informed, depending on age and maturity, about the effects of adoption and about her/his consent which should be given, when required, freely (that is not induced by payment or compensation of any kind) and in writing; the wishes and opinions of the child should be taken into account.

- authorities of the receiving country must determine that the prospective adoptive parents are eligible and suited to adopt and that they have been informed and counselled as necessary; they also must have determined that the child is or will be authorised to enter the receiving country and reside there permanently.

In order to establish a system of effective co-operation each Contracting State has to designate a Central Authority (CA); detailed rules can be found in art. 6 – 13 of the Convention. The duties of this CA are among others:
to co-operate with each other and promote cooperation between competent bodies in their State and take all appropriate measures to prevent improper financial or other gain in connection with an adoption;

- to collect preserve and exchange information about the situation of the child and the prospective adoptive parents; to facilitate and expeditate proceedings for obtaining an adoption; to promote development of adoption counselling and post-adoption services;

- to set up a system of accreditation of organisations involved in inter-country adoption ensuring that they operate in a competent manner and are subject to supervision by competent authorities. Only if an organisation has been accredited by both the CA in the country of origin of the child and the CA in the receiving country it may be involved in cases of inter-country adoption between these States.

Article 14 – 22 provide detailed rule regarding the procedural requirements in inter-country adoption, among others about the report to be prepared by the CA in the receiving county on the prospective adoptive parents and by the CA in the country of origin about adoptability of the child her/his background, family and medical history. A key provision in this regard is that an inter-country adoption can only proceed if the Central Authorities of both the country of origin of the child and the receiving country agree (art.17).

Article 23 – 27 deal with the recognition and effects of adoption. The key rule is that inter-country adoptions made in accordance with the rules of the Convention shall be recognised in all Contracting States (art.23) although it is possible that a Contracting State refuse the recognition of an adoption but only if it is manifestly contrary to its public policy (art. 24).

Article 28 – 42 contain general provisions. Some of them have been mentioned before, e.g. the rule that information about the child’s background, family and medical records have to be preserved (art. 30) and the rule regarding improper gain (art. 32).

Finally some remarks regarding the situation in Kazakhstan regarding adoption:

- According to the draft report on Gate-Keeping Guardianship Authority and the Commission of Minors (Andy Bilson) many mothers leave their child in the hospital and sign papers for adoption. In 2007 3,822 adoption took place in Kazakhstan (414 per 100,000 children aged 0 – 3 years). In 2008 more than 60% of the children leaving infant homes were adopted. In other words domestic adoption is an important form of alternative care in Kazakhstan.

- Further discussion could take place about the question whether the rules and practice meet the standards of the CRC with reference to the elaborated set of rules for adoption in Chapter 12 of the Law on Marriage and the Family (art. 76 – 99).

- For instance and with reference to inter-country adoption as a last resort: if the only national option is the placement of such child in an institution should then inter-country adoption of the child be an option?

**Children Placed in Residential Care Institutions:**

**Weaknesses and Threats:** Institutional placement, or residential care is, experience proved, worst solution for the child without parental care [9]. No matter how good conditions are, the child is most likely raised with no special relationship with one person who would take care of, love and raise him/her. For that reason the Convention on the Rights of the Child envisages placement in institutional care as a last resort measure, only “if necessary”. Placement in an institution should be a temporary solution, until an appropriate family arrangement is made. With regard to institutionalization of children, there is a general request to the States parties to refrain, whenever possible, from such form of placement. The request in particular applies to children under the age of 3, who should always be in a family type alternative care. The goal of every social care policy should be a deinstitutionalization and reform of existing institutions into individualized and small-group care types [10].

Like in all areas of the rights of the child, States should have all general measures of implementation in place. Majority of children are not in need of alternative care. The same applies to Kazakhstan. Majority of the children placed in a residential care institution in Kazakhstan have at least one parent or close member of family. The basic elements of a framework of care provision are legislative and administrative measures but also financial support to care system. Placement of children in institutional care is still a wide spread practice in Kazakhstan. The key actors in that regard are the Guardianship Authority and the Commission of Minors with the Pedagogical, Medical, Psychological Committee in an advisory role (see draft initial report on Child protection System in Kazakhstan; Essex University).
Most of the Committee’s GCs have reference to some aspect of placement or treatment of children without family care with the strongest accent is on children placed in institutional care. Apart from absence of a strong, individual relationship between the child and a caring adult, the child’s vulnerability and exposure to violence is of greatest concern. For example, in its latest GC 13 on the right of the child to freedom from all forms of violence, interpreting article 19 (para 1) of the CRC, the Committee provides a broad list of caregivers and the respective danger of violence stating that “There are different ways to guarantee the rights of these children, preferably in family-like care arrangements, which have to be carefully examined with respect to the risk of these children being exposed to violence.” Children are at risk of being exposed to violence in many settings where professionals and State actors have often misused their power over children, such as schools, residential homes, police stations or justice institutions. Therefore the Committee notes that “the States Parties are under strict obligation to undertake “all appropriate measures” to prevent, process perpetrators as well as rehabilitate and reintegrate the child victim of violence. Such measures include legislative, administrative, social and educational measures: “Initial and in-service general and role-specific training (including inter-sectoral where necessary) on a child rights approach to Article 19 and its application in practice, for all professionals and non-professionals working with and for, children (including … lawyers, judges, police, probation and prison officers, … residential caregivers, civil servants and public officials, …);”

The Committee expresses in the CG 3 on HIV/AIDS and Rights of the Child concern about institutional placement and treatment. and to orphaned children and states that “orphans are best protected in the care of relatives or family members, … the extended family, … family-type alternative care (e.g. foster care).” The Committee reaffirms its earlier opinion that “institutionalized care may have detrimental effects on child development” and that “strict measures are needed to ensure that such institutions meet specific standards of care and comply with legal protection safeguards.” [11].

The GC 4 on Adolescent Health, mentions violence against adolescents in institutions and expressing concern with adolescent with a mental disorder notes that “where hospitalization or placement in a psychiatric institution is necessary, this decision should be made in accordance with the principle of the best interests of the child” and “the patient should be given the maximum possible opportunity to enjoy all his or her rights as recognized under the Convention, including the rights to education and to have access to recreational activities.”(para 29) [12].

Upon the proposal of the Committee, the UN General Assembly adopted the Guidelines for the Alternative Care of Children on the occasion of the 20th anniversary of the CRC on 20 November 2009. The Guidelines are intended to enhance the implementation of the CRC and other relevant provisions of international and regional human rights law, in matters of protection and well-being of children who are in need of alternative care, or who are at risk of so being. Its focus is to ensure that children are not placed in alternative care unnecessarily and that out-of-home care is provided in the best interests of the child [13]. This UN document crowns the efforts made by all stakeholders to define issues pertaining to alternative care for children.

The Guidelines offer an extensive list of types of alternative care in relation to the environment where it is provided, such as kinship care, foster care and other forms of family-based care, residential care and supervised independent living arrangements for children [14].

There are several general guiding principles for alternative care [15]. First principles reaffirm the right to family life and introduction of measures to prevent separation. In order to provide separation, legislation should be in place to, at least, forbid placement of children younger than 3 in any type of residential care and discourage placement of all children. Further policy measures should follow, such as support for families to keep their children at home. This is especially important with regards to children with disabilities.

In case of family violence, the laws and policies should aim at removal (temporary or permanent) of a violent parent, rather than placement of the child in a residential care institution. The police should at first call remove the violent parent and prosecution and courts should follow in respecting such principle.

Further principles apply to children who already are in alternative care. The child should remain as close as possible to the habitual place of residence, sibling should not be separated, the solutions should be permanent and children should be treated with respect and dignity, in a safe environment. All placement decisions should be reviewed regularly, which is given a special attention in article 25 of the CRC. No matter whether the child is
placed in a public or private institution, a family arrangement or within informal care, it is State’s responsibility to regularly oversee the conditions of alternative care. Although the provision of the article 25 of the CRC requires States parties to “recognize the right of a child who has been placed by the competent authorities”, years of application of this provision opened doors for enhancement of the obligations to placements that are spontaneous in nature. Periodic review of placement surely includes regular inspections, as well as licensing of care providers. Further general principles include a right of the child without parental or family care to legal guardian or appropriate assistance, prohibition of lucrative nature of care provision, respect for the culture, language, religion and beliefs of the child and access to education, health and other basic services. Gradual deinstitutionalization is also one of the general principles of the administration of alternative care.

Determination of the most appropriate care for the child is crucial [16]. The decision-making process should “take place through a judicial, administrative or other adequate and recognized procedure, with legal safeguards, including, where appropriate, legal representation on behalf of children in any legal proceedings.” The Guidelines add that such process should be based on “rigorous assessment, planning and review, through established structures and mechanisms and should be carried out on a case-by-case basis, by suitably qualified professionals in a multidisciplinary team, wherever possible.” All situation in which the child is, for different reasons, apprehended by the police and taken to an institutions should be carefully reviewed from the legal and psychological point of view. Sometimes the police has no other institutional option but to take the child who lives or works in the streets directly into a residential care institution. Such act should be of strictly temporary nature and foster homes and open type shelters must be established in order to provide safety for such children.

There are also “social” orphans residing in institutions and this is the case in Kazakhstan (Hamilton report). The courts should avoid approval of such placements. The courts should also refrain from parental decisions to place the child in an institution due to the lack of parental skill to deal with “difficult” child. Instead, counseling services for parents should be established, based on laws and financially supported by the Government (local authorities).

The important principle is that consultation with the child should be a practice in all stages of the proceedings and in order to achieve the best result; “States should make every effort to provide adequate resources and channels for the training and recognition of the professionals responsible for determining the best form of care so as to facilitate compliance with these provisions.” This is all easier said than done, in particular in States with limited financial, organizational and human resources. Therefore, international cooperation in administration of social care systems is equally important as with some other rights of the child.

There are certain rules that apply to provision of alternative care [17]. The Guidelines reaffirm the general obligation rule: “It is a responsibility of the State or appropriate level of government to ensure the development and implementation of coordinated policies regarding formal and informal care for all children who are without parental care.” However, the States should formulate and implement their policies in cooperation with other sectors of society as well as with individuals. This is necessary because of the quality of service. Other rules are similar to those listed under the system of the administration of juvenile justice, such as contact with families, access to appropriate information, appropriate education and nourishment, information on healthy lifestyles, provision of rights to participate in religious services, respect for the privacy and others. There is a special requirement that children placed in alternative care should be protected from violence.

Another concern in relation to alternative care is what happens after. National laws determine the age until which the State will care of the child without parents or families. When the child leaves his or her parent’s home, the relation stays and supports continues to some extent. However, if the child is under formal or even informal care, the service may formally stop at a birthday, rather than in a gradual transition to independent life. Although many beneficiaries of state alternative care may not be children in legal terms, they are most of the time young adults. There are many risks for children who are in the transition process, in particular with regard to all forms of exploitation. Therefore counseling and support should be introduced in consideration of the child’s “gender, age, maturity and particular circumstances.” This especially applies to children with special needs [18].
REFERENCES

1. Information on violence collected throughout the World within the last 20 years is staggering. WHO estimated that almost 53,000 children died worldwide in 2002 as a result of homicide. Studies suggest that up to 80 to 98 per cent of children suffer physical punishment in their homes, with a third or more experiencing severe physical punishment resulting from the use of implements. The Global School-based Health Survey found that between 20 and 65 per cent of school-aged children reported having been verbally or physically bullied during 30 days preceding the survey. WHO estimates that 150 million girls and 73 million boys under 18 experienced forced sexual intercourse or other forms of sexual violence during 2002. According to a WHO estimate, between 100 and 140 million girls and women in the world have undergone some form of female genital mutilation. ILO estimates indicate that, in 2004, 218 million children were involved in child labour, of which 126 million were in hazardous work.


3. The book may be consulted and downloaded from: http://www.violencestudy.org


5. Translations of the Convention into other languages do not necessarily include exact equivalents of the English term 'violence'.

6. General Comment No. 8, The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para.2; and 37, inter alia), CRC/C/GC/8, 2006.

7. Most punishment "involves hitting ("smacking", "slapping", "spanking") children, with the hand or with an implement - a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices). In the view of the Committee, corporal punishment is invariably degrading. In addition, there are other non-physical forms of punishment that are also cruel and degrading and thus incompatible with the Convention. These include, for example, punishment which belittles, humilates, denigrates, scapegoats, threatens, scares or ridicules the child." (para. 11)


9. The 12 overarching recommendatios are:
   - Strengthen national and local commitment and action (national strategy or plan)
   - Prohibit all violence against children
   - Prioritize prevention
   - Promote non-violent values and awareness-raising
   - Enhance the capacity of all who work with and for children
   - Provide recovery and social reintegration services
   - Ensure participation of children
   - Create accessible and child-friendly reporting systems and services
   - Ensure accountability and end impunity
   - Address the gender dimension of violence against children
   - Develop and implement systematic national data collection and research
   - Strengthen international commitment

10. European Commission and others: Mapping the number and characteristics of children under three in institutions across Europe at risk of harm, University of Birmingham, Birmingham, UK, 2005, p. 5


14. For more information, please see GCs 6,7,8,9,10,11 and 12.


16. Guidelines for the Alternative Care of Children, para. 29

17. Guidelines for the Alternative Care of Children, paras. 3-10.

18. Guidelines for the Alternative Care of Children, paras. 57-68.

19. Guidelines for the Alternative Care of Children, paras. 69-104.