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EDITORIAL

Responding to inherent risks linked to ‘expatriate adoptions’

Our globalised world has increasingly facilitated transnational mobility and free movement of workers. By 2017, global numbers are estimated to reach 56.8 million expatriates¹. Expatriates are generally individuals living in a country other than their country of citizenship for various reasons (work, volunteering, education, etc.), often for a limited amount of time. Such work expatriations can create opportunities and challenges related to the private family sphere, including adoption issues. The ISS/IRC does not question the validity of every ‘expatriate adoption’, yet invites all actors to prevent and address the inherent risks linked to such adoptions when they arise.

What situations fall under ‘expatriate adoptions’?

The term ‘expatriate adoptions’ (EAs) can cover a variety of situations that occur in a given country with a transnational element due to the expatriate status of the prospective adoptive parents². When identifying competent authorities and the applicable law in EAs, the determining factor is usually the habitual residence (see p. 6) and less frequently it can be the citizenship, of the expatriates as well as of the child, etc³.

- **Domestic expatriate adoptions (DEAs):** These are scenarios where prospective adoptive parents have their habitual residence in their country of expatriation, which is also the country of habitual residence of the child. Such cases should be handled according to the domestic adoption legislation of the country of expatriation. However, States are encouraged to incorporate international standards, such as the UNCRC, the 1993 Hague Convention and others, into their domestic legislation.

- **Intercountry expatriate adoptions (IEAs):** These are scenarios where the prospective adoptive parents’ country of habitual residence differs from their current country of expatriation. The child may be from: the country of expatriation or a third country. In

addition to the UNCRC provisions, these IEAs fall within the scope of Article 2 of the 1993 Hague Convention. Even for non-Contracting countries, these international standards should always be considered to prevent the abduction, sale or trafficking in children.

Yet, in practice, as raised during 2010 and 2015 Special Commissions⁵, and according to alarming information provided to the ISS/IRC, some DEAs and IEAs are occurring outside the protective framework of international and national standards.

Inherent risks regarding the legal framework

Operating outside of the above-mentioned protections can occur because the existing laws are not compliant with

international standards or may be applied incorrectly. For example, an adoption is erroneously or voluntarily considered as a domestic one, when it should be intercountry according to the 1993 Hague

Consistent criteria for the determination of habitual residence of prospective adoptive parents⁴:

- *the length of time living in the State (appropriate immigration status or residence permit);*
- *reason(s) for moving to and living in the State;*
- *intention(s) concerning their residence (e.g. how long they expect to remain living there);*
- *centre of their professional activities and personal and social ties to the State (e.g. degree of integration);*
- *any ties with the State (e.g. business interests and personal property) and with any other relevant States.*

Potential criteria for the determination of habitual residence of the child:

- *the State where the child was born;*
- *the State of habitual residence of the child’s parent(s);*
- *their level of integration and ties with significant persons.*

Convention. Likewise, in DEAs, challenges arise when the country of expatriation is based on, or influenced by, *Sharia* Law⁶, or when the country does not have specific adoption legislation let alone tradition. Even when adoption legislation exists, in some cases, it is neither robust enough to ensure that the best interests of the child are the primary consideration (*e.g.* appropriate consents, evaluation of the child's adoptability and of the prospective adopters' suitability, proper matching, etc.), nor is its implementation in practice adequately monitored (*e.g.* preventing private adoptions, illicit practices, undue compensation, etc.).

Such concerns can equally be observed in IEA cases, where the child originates from countries with well documented risks concerning intercountry adoption, where some receiving States have even imposed moratoriums. Despite the apparent risks, EAs might questionably be tolerated or legitimised by countries involved due to the adoptive parents' privileged immigration status (*e.g.* international organisations, NGOs, consular staff, expatriate volunteers working in residential care institutions⁷, etc.).

To address these risks, recently raised by the Special Rapporteur on the sale of children, child prostitution and child pornography⁸, and to avoid the deliberate or unconscious circumvention of existing domestic and intercountry adoption processes – often considered lengthy, costly and without a guaranteed success – prospective adoptive parents should inform themselves about the current adoption situation in the country, in which they want to adopt, prior to starting the procedure (see pp. 6 and 10). To support them, both prospective adopters and professionals in direct contact with expatriates (Embassies, migration authorities, accredited adoption bodies, etc.) should be adequately equipped with information, tools and resources – an element, which the ISS/IRC is currently working on.

Inherent risks regarding authorities' responsibilities

All involved countries (the child's country of origin, the country of expatriation, the country of habitual residence, etc.) are equally liable to protect their children and to assume responsibility of their nationals' actions. However, EAs raise legitimate questions about whether State control is being exercised early enough or with sufficient oversight. We observe, indeed, that most EAs are unregulated: either they escape completely the States' control, or show very little State involvement, especially in terms of evaluation, preparation, matching and follow-up (independent/private adoptions)⁹.

The starting point should be to determine the nature of the adoption (domestic or intercountry) according to the habitual residence of both, of the prospective adoptive parents and of the child. Consequently, competent authorities will be identified. However, the criteria of habitual residence being based on the interpretation of each State, conflicts may arise at this stage. In practice, when there is, for instance, no agreement on the habitual residence, regrettably some States continue to process the adoption ignoring the other State as the child is now with the expatriates – a pragmatic, yet highly risky, approach. In other cases, all States involved decline responsibility leaving the prospective adoptive parents in limbo with the risk of the latter going through irregular channels.

To ensure that adequate safeguards are in place prior to processing any adoption, States should cooperate, inspiring themselves of the guidance provided at international level regarding the determination of habitual residence (see attached box) and keeping in mind the best interests of the child.

Expatriate adoptions: Are they in the best interests of the child?

When considering and assessing an EA, the crucial question remains: is this adoption in the best interests of the child? For a child declared adoptable, expatriate prospective adopters can potentially provide a suitable family environment, provided that they have gone through a formal assessment and adequate preparation process. The strong ties that the prospective adopters have developed with the child's country of origin can be a favorable element to better understand the child's origins. However, the expatriates' status can also have a harmful impact on the child's life: the changing nature of their residency leading to the child's emotional instability, problems related to the nationality and statelessness, as well as practical challenges with accessing the child's origins. Additionally, for many EAs, prospective adopters receive little, and sometimes no, education to equip them to raise an adopted child. In case they should move to another country with the adopted child, there is limited support and no monitoring by the competent authorities, who have never been involved in the process. These adoptions are then more exposed to breakdowns.

Furthermore, it is of most concern when the assessment of the best interests of the child is not undertaken by both States before the adoption is approved, but only after the adoption has been approved and the adoptive parents ask for its recognition in their State and for the nationality. Often, the concerned State may – at this point – tend to refer only to the immediate/short-term wellbeing of the child and recognise the adoption. Similarly, States frequently invoke their limited sphere of action and abdicate their responsibilities to duly assess and/or prohibit such complex transnational situations. As stated in the Hague Conference on Private International Law's Guide to Good Practice No. 1, it is comprehensible that the country, in which the adoptive family will finally be living, is faced with a delicate decision: *'on the one hand, if recognition is refused, the children may be left in limbo, but on the other hand such practices should not be encouraged'*¹⁰.

Regardless of the diversity of EAs (domestic vs intercountry, relative vs non-relative, temporality of the expatriation, etc.), adoptions should only be processed when they are in the child's best interests, and when international standards have been adequately respected, which includes long-term future considerations about how the child might view his or her adoption. A part from the responses developed in certain countries and presented in this issue of the Monthly Review, the ISS/IRC would like to encourage professionals to share initiatives developed in their country to better frame these adoptions.

The ISS/IRC team
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References:

¹ Finaccord (2014). *Global Expatriates: Size, Segmentation and Forecast for the Worldwide Market*; available at: http://finaccord.com/uk/report_global-expatriates_size-segmentation-and-forecast-for-the-worldwide-market.htm.

² Other adoption constellations that may raise difficulties and require strengthened cooperation include, for example, an prospective adopters' adoption application for a child resident of their country while he or she was born from expatriated biological parents.

³ Hague Conference on Private International Law (2008). *The Implementation and Operation of the 1993 Intercountry Adoption Convention: Guide to Good Practice No. 1*. Bristol, United Kingdom: Family Law – A publishing imprint of Jordan Publishing Limited, https://assets.hcch.net/upload/adoguide_e.pdf, Chapters 8.4 and 8.7.2; and Hague Conference on Private International Law (1994). *Explanatory Report on the 1993 Hague Intercountry Adoption Convention*, <https://assets.hcch.net/upload/exp133e.pdf>, pp. 49 ff.

⁴ Extracts from Hague Conference on Private International Law. Preliminary Document No. 4 (April 2015), drawn up by the Permanent Bureau. Globalisation and international mobility: Habitual residence and the scope of the 1993 Convention, available at: <https://assets.hcch.net/docs/d10d006d-0f68-4246-94a4-9f1d1b9e88b1.pdf>.

⁵ Hague Conference on Private International Law. Conclusions and Recommendations and Report of the Special Commission on the Practical Operation of the 1993 Hague Intercountry Adoption Convention (17-25 June 2010), No. 13. See also: Hague Conference on Private International Law. Conclusions and Recommendations adopted by the Fourth Meeting of the Special Commission on the practical operation of the 1993 Hague Intercountry Adoption Convention; available at: <https://assets.hcch.net/docs/858dd0aa-125b-4063-95f9-4e9b4afd3719.pdf>, No. 25.

⁶ In such countries, adoption remains often a foreign concept or/and is even prohibited (Algeria, Morocco, etc.).

⁷ Expatriates working in residential care institutions, can even create volunteer tourism: they might form an attachment with a child and then seek to adopt him or her. See Better Volunteering, Better Care, <http://www.bettercarenetwork.org/bcn-in-action/better-volunteering-better-care>.

⁸ *'Prospective adoptive parents have, for example, resided temporarily in countries of origin long enough to be able to conclude a domestic adoption and then brought the adopted child back to their country, thus bypassing the intercountry adoption process'*. See: Special Rapporteur on the sale of children, child prostitution and child pornography, Annual Report, A/HRC/34/55, 22 December 2016, available at: <http://www.ohchr.org/EN/Issues/Children/Pages/AnnualReports.aspx>, Para. 49.

⁹ See ISS/IRC Monthly Review, No. 203, July 2016.

¹⁰ *Supra* 3 Hague Conference on Private International Law (2008), pp. 106 ff.



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