

**INTERNATIONAL SOCIAL SERVICE
&
UNICEF**

**IMPROVING PROTECTION FOR
CHILDREN WITHOUT PARENTAL CARE**

A Call for International Standards

A JOINT WORKING PAPER

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Millions of children throughout the world are currently in, or in need of, out-of-home care because their parents are unavailable or unable to care for them:

- In the USA there are 600,000 children in the foster-care system alone (CWLA)
- Some 1.5 million children are reported to be in out-of-home care in Central and Eastern Europe and the CIS, including 900,000 in residential facilities (UNICEF)
- In Asia, Africa, Latin America and the Caribbean, 13.4 million children have lost one or both parents to AIDS (UNAIDS)
- Every year thousands of unaccompanied minors arrive as potential immigrants or asylum seekers in the industrialised countries: in 2001, they numbered over 17,000 (UNHCR)

Concern over the situation of children who cannot be looked after by their parents – and the provision of alternative care – is nothing new. In some settings, children in need of care are provided with little or none, as exemplified by children living on the street. States may also have difficulty in identifying or reaching some groups of children, including those associated with armed conflict or in situations of exploitative labour. More often, perhaps, foster and/or residential care is provided, but in ways which can violate children's rights. Common concerns relate both to policies and practice in care settings and include physical, sexual and psychological abuse, lack of efforts towards family reunification and/or permanency, deprivation of liberty and overuse of residential care, among others.

The CRC provides an overall framework in which to raise these problems, but neither it nor other internationally-agreed texts set out comprehensive and detailed guidelines and rules that could clarify good practice, prevent abuses, and establish responsibilities and accountability.

In calling for the development of such standards, this paper reviews the complex reality of care provision for children who are not looked after by their parents and seeks to identify the main problems and issues that need to be broached in an internationally-accepted instrument.

Terminology used in this document

- **Children without parental care** is the term used in this paper to cover all children not living with their parents, for whatever reason and in whatever circumstances.
- **Out-of-home care** is the term used to describe the whole range of responses to children without parental care, excluding adoption (which is fully equivalent to parental care).
- **Residential care** is the generic term used for any living situation that is not family-based, and **residential facilities** refers to the physical environment in which that care is provided. The range of size, type and purpose of residential facilities, and the confusingly different names they are given from one country to another, means that more specific references to given kinds of facilities are avoided wherever possible (except, notably, in texts quoted from other sources).

A. OUT-OF-HOME CARE: WHY AND WHERE?

1. Why are children in need of out-of-home care?

Children may be in, or in need of, out-of-home care for a **wide range of reasons**, including:

- ❑ The death of both parents,
- ❑ Unintentional separation from parents who cannot be immediately traced, usually in the context of armed conflict or natural disaster,
- ❑ Relinquishment or abandonment by parents, for economic or other reasons,
- ❑ Temporary or permanent incapacity of the parents (e.g. due to imprisonment, illness...),
- ❑ Voluntary placement by parents (including respite care and boarding for education),
- ❑ Medical treatment and other specialised care (e.g. disability, recovery),
- ❑ An administrative decision (by a welfare or protection body) or a court ruling that removal from parental care is in the child's best interests (place of safety),
- ❑ An administrative or judicial decision on a care placement pursuant to criminal activity or a status offence (e.g. vagrancy),
- ❑ Arrival in a country as a "separated child" seeking asylum or immigration, or as a victim of trafficking,
- ❑ The child's own initiative to leave home.

2. Where does out-of-home care take place?

To some extent reflecting the diversity of reasons why out-of-home care may be required, there is a similar **diversity of care situations**. First, it is important to acknowledge that in certain situations care may not be provided at all. In some cases countries may not fully recognise or act upon their obligation to provide care, nor have non-state bodies stepped in to fill the gap. In such situations children may be living on the street, often with other non-related children, or in unsupported child-headed households. In other cases, children in need of care may not be reachable by either government or other non-state actors (e.g. children associated with fighting forces).

Out-of-home care does not come down simply to a choice between fostering and placement in a residential facility. Countries – and in many cases communities – have developed their own priority responses to care for children who are not with their parents for any given reason. The main forms such care takes are:

- ❑ **Informal care by family members or others**
The informal placement of children by their parents – or the spontaneous offer by others to care for children without parents – is by far the most prevalent form of alternative care in many societies, and within given communities of societies where it is otherwise not the norm. The caregiver may be a grandparent or other relative (informal kinship care) or a friend or acquaintance (informal foster care or "private fostering").
- ❑ **Formal foster care by family members or others**
The formalised version of family-based care, which again may concern relatives (under "kinship foster care" or "formal kinship care") as well as non-related carers, is a far less widespread practice than its informal counterpart. It involves shorter- or longer-term placements resulting from decisions of the courts or an administrative authority (such as a child welfare or social service agency), and has been developed more especially in the industrialised countries and promoted by the latter elsewhere.

❑ **Residential facilities**

These are living facilities for groups of children staffed by remunerated care givers. They range from small, community based group homes housing 10 or fewer children to much larger facilities. They may be designed to provide anything from general care to specialised support, treatment and therapy, such as for children with disabilities or who are recovering from trauma or exploitation. Also included under this heading, for example, are facilities for separated immigrant children and residential establishments with an educational focus, such as boarding schools.

❑ **Safe houses and other “protective” environments**

These facilities are designed to provide a secure – often “closed” – care environment for children deemed more specifically to require protection from outsiders, such as victims of trafficking or separated children who risk being drawn into exploitation or criminal activity.

❑ **Transit centres**

These facilities provide residential care to children in emergency situations when they have become separated from their parents or customary caregivers. Such centres are usually intended to be temporary in nature, to be used while a child’s family is being traced and pending reunification.

❑ **Child-headed households**

There are many examples of situations where children have spontaneously created their own “households” on the death of their parents. Such households tend to be composed of children from one family, where the eldest takes on responsibility for the welfare of his or her siblings, but other forms – a mix of family and non-family children, or even a group of unrelated children – are not unknown. Typically, these households are formed in response to a specific emergency situation, such as armed conflict or the HIV/AIDS pandemic, but they may also be set up for other reasons.

❑ **Placements abroad**

Children may be placed abroad on a short- or long-term basis for many of the reasons, and in many of the care situations, described above: in all types of informal care, in the context of formal foster care or *kafala*, and in various kinds of residential facilities. In addition, children who have moved outside their country of origin or habitual residence may be placed in informal or formal care including various kinds of residential facility such as group homes, safe houses and closed “protective” facilities, in the country where they find themselves.

The **legal responsibility of the care provider** may vary considerably, not only among, but also within, each of these forms of care. In some cases parents will retain full responsibility. In others parental responsibility will be shared or delegated, e.g. to a court-appointed or approved guardian. In countries with a legal system based on Islamic Law, the practice of *kafala*, where a child is taken in by family members or others under a care arrangement that is generally envisaged as permanent, responsibilities are not unlike those under adoption.

It is also worth noting that, **according to the situation and the country or community concerned**, almost all of the above options may be viewed in practice either as essentially temporary (pending return to parental care or identification of a more suitable long-term care option) or, on the contrary, intended to last throughout childhood. The degree of reliance on one or more of these options can change, moreover – and sometimes radically – over time in response to a variety of factors such as: externally-induced needs (epidemics, wars, natural disasters...); socio-demographic developments (urban migration, cross-border movement, family breakdown rates...); economic conditions; prevailing ideologies, politically-motivated decisions and research-based policies.

B. PROVIDING APPROPRIATE OUT-OF-HOME CARE: PROBLEMS AND ISSUES

Ensuring the conception and functioning of a system catering to the welfare and protection of children who need out-of-home care for such a variety of reasons, and with such a range of possible options, is a complex task. Problems arise – and children’s rights violations ensue – at various levels: policy, decision-making, resourcing, training, practice and monitoring.

This section reviews the major areas of concern regarding provision of out-of-home care that have been documented recently.

1. Unwarranted recourse to out-of-home care

To begin with, many placements of children in out-of-home care could easily be avoided if the major emphasis were to be placed on providing support and services to enable parents to care for their children themselves.. In some situations, mothers or parents “spontaneously” place their children – or are even encouraged to do so – in a residential facility purely because of their financial circumstances or because, for example, of the mother’s single or unwed status. This is reportedly the case for a large proportion of children in Children’s Homes in India, for example.¹ In such instances, the very existence of residential facilities can act as a stimulus to relinquishment or abandonment, whereas maintaining the child with his or her parents could often be achieved at less cost. Equally, parents in material difficulty may feel pressured to relinquish their children in case they are charged with neglect.

Decisions to remove children from parental care are frequently made without any serious prior attempts to support the parents in their primary role. One source claims that “wrongful removal drives everything else. [It] overburdens the system, causing agencies to overcrowd foster homes and lower standards.”² Children are being removed from parental care on the sole grounds of poverty or its direct ramifications, even in industrialised countries. An “aggressive” approach to removal may be founded more in the initiator’s fear of disciplinary action or prosecution should a child be abused while remaining with the family than in a conviction that abuse will take place³ or that removal would be necessary if effective family support were to be available.

2. Inappropriate decisions regarding type of care

Foster-care and residential placements may be ordered without full consideration of the range of options available (and their specific advantages and disadvantages) and/or without due regard to the needs and circumstances of the individual child. In addition, the original placement may not be subjected to regular review as to its continuing appropriateness and justification. Thus, children may be retained in a foster-care system that cannot cope, experiencing a vicious circle of increasingly disturbing placement breakdowns. Equally, an initial assessment or diagnosis resulting in a placement in a specific residential facility may never be reviewed, so the child remains in that facility even though it no longer corresponds to his or her needs. The circumstances of the parents may have changed, but this may not lead to consideration of the child’s return to their care.

¹ UNICEF India, 16 March 2004.

² Richard Wexler, Executive Director of the National Coalition for Child Protection Reform, News Release, 1 May 2002.

³ In the UK, this is reflected in the concern is that “a severe shortage of people willing to foster children is putting some of the most vulnerable youngsters in Britain at risk ... The shortage has led to fears that social workers are being forced to gamble with children’s safety by leaving them in homes where they are at risk because there was no foster placement available” (“Fostering in crisis as children are left at risk in unsafe homes”, The Guardian, 2 June 2001).

3. Over-burdened foster-care systems

In the industrialised countries at least, the apparently acute shortage of foster carers is clearly a subject of wide concern – and debate. “The nation’s foster care system is unquestionably broken”, says one US source⁴, but “We can’t recruit our way out of the foster care crisis,” notes a US organisation working for family preservation, questioning the likely returns on investing in “another tired recruiting campaign for foster parents.”⁵ A government-backed recruiting drive in Britain in 2000 indeed reportedly resulted in just 1,000 applications compared with a target of 7,000.⁶ The shortage is all the more acute when reliance on the formal foster-care system becomes exaggerated, as a result of the increasing removal of children from parental care on protection grounds and sometimes simultaneous moves towards de-institutionalisation. One result can be the recruitment of insufficiently prepared and supported foster carers, another the over-burdening of existing foster carers. Many would espouse the view that over-reliance on foster care happens “at the expense of other services that might keep families safely together, allow children to return safely home, or move children swiftly and safely from foster care to adoptive families or permanent legal guardians.”⁷ Countries considering the establishment or development of formal foster care clearly need to be made aware of the dangers of pinning their hopes entirely on this system.

4. Lack of protection in informal care

There is a considerable *a priori* advantage for a child to be looked after by family members or others familiar to him or her, often in the original community, and this is of course the prevalent form of out-of-home care in Africa and Asia. But in the USA too, reportedly more than 1.3 million children are in formal or informal kinship care in the Black community nation-wide, and this form of care is said to have remained “stable and successful” for more than a century.⁸ An informal arrangement is said to be preferred by many carers who resent the intrusions and constraints otherwise imposed by child welfare agencies: “Presently, child welfare policies are not meeting the needs of kin caregivers.”⁹

Equally, however, kinship or friendship is no guarantee of welfare, protection and ability to cope,¹⁰ and almost by definition an “informal” arrangement means that it likely falls outside the purview of the official child care system.¹¹ As the British Association for Adoption and Fostering (BAAF) has noted, for example:

*“Around 10,000 children in the UK are being cared for in private foster care arrangements. Most of these children are under the age of five and worryingly, the majority of these private arrangements are unknown to local social services departments, leaving children vulnerable to abuse or neglect.”*¹²

⁴ Bill Frenzel, Chairman of the Pew Commission on Children in Foster Care, Press Release, 18 May 2004.

⁵ Richard Wexler, Executive Director of the National Coalition for Child Protection Reform, News Release, 1 May 2002.

⁶ “Fostering in crisis as children are left at risk in unsafe homes”, The Guardian, 2 June 2001.

⁷ Pew Commission on Children in Foster Care, Press Release, 18 May 2004.

⁸ Rankin, Sonia Gipson, “Why they won’t take the money: Black grandparents and the success of informal kinship care”. 10 Elder L.J. 153-185 (2002).

⁹ *Ibid.*

¹⁰ Similarly, in the case of intercountry adoptions, while it was agreed in discussions during the drafting that *prima facie* preference should be given to potential adopters who are family members, the 1993 Hague Convention on Intercountry Adoption provides for no dispensation whatsoever from the normal vetting process in their respect. Arguably, informal care or foster care organised within the family should be subject at the very least to that same level of safeguards, given the little, if any, outside supervision of the child’s welfare under those systems and the fact that responsibilities of the carers are vaguer and less formal than in adoption.

¹¹ South Africa, for example, has opted to incorporate the rights and responsibilities of relatives caring for a child on an informal basis in the Children’s Bill, rather than establishing any special procedure or investigation (South African Law Reform Commission, Discussion Paper 103, 2002). Conversely, Malta requires those contemplating kinship or private foster care “to give notice to the social services of an intended placement. This offers ... the opportunity to investigate the suitability of the foster home”. Foster Care Service, APPOGG, Malta, www.appogg.gov.mt/services/foster_en.htm.

¹² BAAF Press Release 28 January 2003.

The UK Government is not considering registration, however: new legislation will just require local authorities to promote awareness of the need for intended private fostering to be notified to them, and urge that such arrangements be vetted before the child is placed.¹³ In Australia, where kinship care is “a longstanding substitute care principle and a longstanding practice for indigenous communities”, one State authority notes that it is “responsible for arranging or approving the great majority of kinship placements”.¹⁴ But in most societies where informal or private fostering is in practice the prevalent form of substitute care, it may be unrealistic to envisage any major level of State intervention in this sphere.

Concerns over exploitation of the children (as domestic workers, for example), sexual abuse and unfavourable treatment or neglect in comparison to the caregivers’ biological children are frequently reported. Although “available research suggests that most children are at least as safe in kinship care as they are in non-relative foster-care”¹⁵, this means that a minority are not, and “some relatives may be abusive or neglectful toward the children because they come from the same ‘troubled’ family”.¹⁶ In addition, there are “grey areas”: children sent to live with family relations in many African countries, the *restavek* in Haiti, and other situations where the parent(s) “place” their child with third parties, whether family members or not, or where the child is quite simply taken in by such families.

To ensure protection, child welfare agencies need to be aware of who has effective responsibility for a child, including a child who is looked after informally by other persons, and to be assured of the fitness of those persons to cope.

5. Recourse to residential care

Because other options have not been developed, unnecessary over-use of residential placements is a common feature of out-of-home care throughout the world. Thus, for example:

“The average occupancy of Zimbabwean orphanages is 106% overall, and 128% in government institutions. Their experience is that one can never build enough orphanages to meet demand – those which are built are always full because they attract children, although usually for the wrong reasons.... Research shows that the majority of children in institutions do not need to be there – only 25% have no known relatives. 45% have at least a mother alive. Most children could be reintegrated into their families with good social work.”¹⁷

Undue recourse to residential care is also a major preoccupation of the Committee on the Rights of the Child. The following response (to the situation in Latvia) is a typical example of its comments after reviewing CRC States Parties’ reports:

“The Committee expresses its concern at the high number of children living in institutions, due mainly to the fact that children living in vulnerable families or with a very low income cannot be supported because of the lack of alternative care and of social assistance.”¹⁸

Despite increasing efforts aimed at de-institutionalisation, foreign aid from whatever source is not necessarily directed at the development of alternative services. Private initiatives are particularly prone to proposing and promoting residential solutions.

¹³ “Law on private fostering to be tightened”, The Guardian, 13 January 2004.

¹⁴ Children Out of Home, Analysis of Substitute Care Data, 1991/92 to 1995/96, Department of Community Services, NSW, Australia.

¹⁵ National Resource Center for Foster Care and Permanency Planning, Hunter College School of Social Work, CUNY, citing Illinois Department of Children and Family Services, 1995.

¹⁶ National Resource Center for Foster Care and Permanency Planning, Hunter College School of Social Work, CUNY, Tools for Permanency, Tool # 4: Kinship Care, at www.hunter.cuny.edu/socwork/nrcfcpp.

¹⁷ Meeting on African Children Without Family Care, Windhoek, 30 November 2002, Final Report.

¹⁸ Concluding Observations of the Committee on the Rights of the Child: Latvia. CRC/C/15/Add.142, 21 February 2001.

6. Conditions in residential care

The relatively high cost of providing suitable residential care is well-known. A World Bank report on Tanzania noted that “the annual cost for one child in residential care... was more than US\$ 1,000, almost six times the cost of supporting a child in a foster home.”¹⁹ Similarly, the average weekly cost of foster care for a child in England is officially calculated to be just 16% of that of residential care.²⁰ Not surprisingly, resources available – or made available – for residential care often fall far short of the required mark.

The following example concerns the CEE/CIS/Baltic Region:

“The financial difficulties of the 1990s have left many institutions in bad condition. Outright falls in expenditure have led to major problems in safeguarding supplies of nutritious foods, adequate heating, lighting, clothing, shoes and bed linen. Crumbling infrastructure is neglected.... In Armenia, 80 per cent [of institutions surveyed] had problems with food, clothing, shelter and medical services. In Tajikistan, the expenditure on homes for children with disabilities dropped throughout the 1990s... In Latvia, direct expenses per child fell by 10 per cent [between 1997 and 1999] although food and medicines were protected.”²¹

Indeed, the many investigations undertaken world-wide have variously documented poor (sometimes inhuman) physical conditions, inadequate (sometimes life-threatening) nutrition, hygiene and health care, insufficient, unqualified and poorly-remunerated staff, abuse and exploitation, harsh discipline, no review of the appropriateness of the placement, little or no contact with the family or others, and no preparation for life outside.

7. Private residential facilities

Residential care services of all kinds are increasingly being passed to the private sector. However, whether run by for-profit organisations or by voluntary associations, private residential facilities are frequently able to operate with little supervision by the authorities. In Namibia, disturbingly, “it is not known how many children are in unregistered institutions, and no study has been conducted to find out why these private institutions are mushrooming. However, it is suspected that profit is the motive.”²² In India, “several NGOs run small facilities for children ‘picked up’ from railway stations, street children, etc. Some of these facilities are not registered for providing out-of-home care services but they do it anyway. NGOs receiving funds from foreign donors often do not have themselves registered.”²³ Similarly, in Cambodia, there is “an unknown number of privately run children’s centres, some of which are registered with the Ministry. These services admit orphans and abandoned children, child victims of abuse and neglect, exploited children and children at risk in general, including children of very poor families.”²⁴ This is a special problem in countries or situations where State budgetary provision for alternative care is weak or non-existent. In such circumstances, it has often proved easy for foreign entities to negotiate almost unlimited rights when seeking to establish or take over residential child care facilities, including determination of in-house child care policy and the education syllabus, and even the requirement that a State

¹⁹ Confronting AIDS: Public Priorities in a Global Epidemic, World Bank, OUP, New York, 1997.

²⁰ Social Services Performance Assessment Framework Indicators 2002-2003, Department of Health.

²¹ “A Decade of Transition”, Regional Monitoring Report No. 8, UNICEF Innocenti Research Centre, Florence 2001.

²² Meeting on African Children Without Family Care, *supra* footnote 16.

²³ UNICEF India, 16 March 2004.

²⁴ Family and Community-Based Responses: A Case Study of Fostering and Kinship Care, Child Welfare Department, Directorate of Social Affairs and Youth Rehabilitation, Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation, Phnom Penh, 2003.

inspection of the facility can only be carried out with 24 hours notice.²⁵ In extreme circumstances, private facilities may operate in apparent active defiance of government policy²⁶.

But effective licensing and monitoring procedures are also frequently found to be woefully inadequate under non-exceptional conditions in industrialised countries, with the situation coming to light only after a serious incident or special investigation. Thus: “One Group Home was in despicable condition” and “provided a totally unhealthy and unsafe environment”; “Group Home owners determine the quantity and qualifications of their staff. 24-hour staffing is required” but “one Group Home was cited 4 times in 1997 for having no staff on the premises” and in another, “8 juvenile females were being supervised by 3 male staff members. There was no female staff present.”²⁷

8. Inadequate permanency planning

Permanency planning should be an integral part of the individualised care plan that needs to be drawn up for each child before or shortly after out-of-home care commences, and reviewed regularly as the placement evolves. In the majority of cases, it is designed to achieve reunification with parents or, failing that, to secure an alternative stable family-based care solution for each child. It is therefore a vital element in ensuring that, once out-of-home care measures have been decided, they do not continue to be used unnecessarily or inappropriately. Permanency planning also reduces the risk of the insecurity and uncertainty that can destroy children’s lives when their future is unclear.

Although “[a]ll too often, social service systems have inadequate permanency planning”²⁸, acceptance of its desirability is progressing. To be successful, however, it needs to be founded on given criteria and carried out by qualified staff, in full consultation with the parents and the child, and of course the options to be considered (including, above all, safe return home) need to be viable propositions. Such is not always the case.

In many countries, there is no system in place at all to ensure such planning. Children in out-of-home care of whatever kind are likely to remain there come what may (as noted, for example, under “5. Recourse to Residential Care” above). Inadequacy or absence of permanency planning can thus have major negative effects for individual children, but also impacts significantly on the use of the limited resources and facilities available.

9. Children and parents with no voice

Very often, no mechanisms or processes are foreseen to enable the child and the family to participate systematically and effectively in decision-making about appropriate care options and the longer-term goal of a placement: children’s involvement in decision-making about their care options can be at best haphazard, at worst unknown.

Research in New Zealand²⁹, for example, has shown that “children in care are often ignorant of the reasons why they are in care and do not understand the decision-making processes which resulted in their being taken into care. Many children are excluded from Family Group Conferences or

²⁵ This restriction was included, for example, in the contract negotiated by an evangelical organisation which took over a State facility in a Central European country in the early days of “transition”.

²⁶ As was the case in Rwanda after the genocide, for instance. See Cantwell, N: Starting from Zero: Children’s Rights in Post-Genocide Rwanda, UNICEF International Child Development Centre, Florence 1997.

²⁷ Report No. 0108, “Group Homes”, Contra Costa County Grand Jury, California, USA, 2001.

²⁸ U.S. Department of Justice, OJJDP Fact Sheet 4/97, July 1997.

²⁹ Smith AB, Gollop MM & Taylor NJ, “Children in foster and kinship care”. In AB Smith, NJ Taylor & MM Gollop (Eds.) Children’s voices: research, policy and practice. Auckland: Pearson Education, 2000.

Review meetings, hence denying their participation rights. More social work resources are needed to ensure that children [...] have a part in those decisions where appropriate.”

Indeed, when children are consulted on their preferred out-of-home care options, the results do not always tally with the general “conventional wisdom” of policy- and decision-makers. Some, for example, express a preference for a residential environment such as a group home as opposed to foster care. Some do not want adoption to figure in their permanency plan.

Ensuring that children and their parents are consulted prior to and at all stages during out-of-home placements is fundamental to the protection of their rights and to the potential success of these placements.

10. Preparing for de-institutionalisation

The considerable literature on out-of-home care is to all intents and purposes unanimous in pointing to the drawbacks of “institutionalisation”. Whatever the benefits of family-based out-of-home care for most children, however, it is invariably recognised that some children will need to be cared for in a residential setting.³⁰ The UK’s Department of Health, for example, states that “for a minority of children residential care will continue to offer the best solution”³¹.

Clearly, policy and practice that enables care to be provided as far as possible in families or family-like settings rather than residential facilities is a very positive move. But de-institutionalisation is a complex process that cannot be summed up as “closing institutions”. Case studies on the experience of de-institutionalisation in Italy and Spain and on initiatives to launch the process in Argentina, Chile and Uruguay³² highlight the preconditions and various facets of carrying through such an exercise successfully. These include, for example, ensuring that the social, professional and political climate is positive as well as enacting appropriate legislation. More obviously, de-institutionalisation pre-supposes the creation or development of appropriate and operational alternatives. Family-based care options may be quickly perceived as being overwhelmed: as a social worker in the UK noted, “they are closing residential homes but we don’t have the care on the ground to cover”.³³ Negative reactions such as this from professionals have ramifications that do not bode well for effective child protection.

As noted previously, far too many children are in residential care not because they need it but because suitable alternatives do not exist or are not promoted or exploited. But paradoxically a de-institutionalisation policy has first and foremost to recognise that forms of residential care will continue to be an essential component of out-of-home care. If it does not, it risks not only stigmatising further the children who, at least at certain moments in their lives, may need to be in that kind of structured or specialised environment – as well as the staff who work these facilities – but also going against the wishes of some children who would choose it rather than foster care.

Standards for policy and practice should therefore reflect the need to determine the strengths and weaknesses of the different care options in relation to the specific situation of each child. This will mean that residential care is used for positive reasons and with adequate safeguards, and not simply because there is a lack of alternatives or of an individualised decision-making process regarding the most suitable form of care.

³⁰ David Tolfree, for example, renowned in particular for *Roofs and Roots: the care of separated children in the developing world* (Arena, 1995) pointing out the shortcomings and risks associated with residential care, notes that “placement in a family setting is almost always preferable to institutional care” but identifies a number of instances where “group living may be considered an appropriate approach”, including children demobilised from armed forces and those needing to recover from a breakdown in a foster home placement. (Community-based care for children, Save the Children Sweden, 2003).

³¹ Social Services Performance Assessment Framework Indicators 2002-2003, www.publications.doh.gov.uk/paf/.

³² Children in Institutions: the Beginning of the End?, Innocenti Insight No. 8, UNICEF Innocenti Research Centre, Florence 2003.

11. Substitute care in emergencies

Provision of appropriate care in emergency situations was already a major concern of the Machel Study³⁴ and remains no less important today. That Study dealt in the following terms with the need for preventing children's rights violations arising from, *inter alia*:

- unwarranted or ill-prepared displacement abroad: "Evacuations are sometimes essential", in which case "whole families should move together, and if this is not possible, children should at least move with their primary caregivers and siblings"; "Difficulties often arise when the foster family, thinking the child will have better opportunities in the host country, does not want to allow the child in their care to return to the original family";
- unsuitable residential programmes: "There is always the risk that temporary centres may become permanent. The creation of centres may also in itself generate higher numbers of unaccompanied children. [In the Great Lakes Region] many centres had been created as a way of profiting from humanitarian aid."
- certain manifestations of informal foster care: "These arrangements need careful supervision... children may be at risk of exploitation. The situation of a child in a foster family should therefore always be closely monitored through a community-based system";
- the precariousness of child-headed households: "Their need for legal and social protection is especially acute. [They] are particularly vulnerable to exploitative labour and prostitution. Dilemmas have arisen in designing appropriate policy and programme responses". The Study recommended that urgent attention be given to developing policy and programme guidelines for the protection and care of these children.

NB: These issues have been alluded to in the context of this paper, and are to be dealt with in more detail in a supplementary report focusing on care in emergency situations.

The situation of children "evacuated" from conflict situations – such as Bosnia and Rwanda in the Nineties – to be cared for in other countries has aroused a wide range of serious concerns on various occasions. Lack of prior research on the family situation, inadequate efforts to ensure appropriate documentation, the absence of consent from families and of information enabling the latter to remain in contact with the children, and removal to unnecessarily far-flung destinations are among the problems documented. In many cases it appears that traces of the children have definitively been lost, and there are clearly no guarantees whatsoever as to their safety and well-being, let alone their return and reunification with their family.

This is a sphere where international standards exist. Additional Protocol I of the 1949 Geneva Conventions prohibits the evacuation of children to a foreign country, except for a temporary evacuation because of compelling reasons of health or medical treatment of the children or, unless they are in occupied territory, should their safety so require. The international community's policy on evacuation mirrors the findings of evaluations of past evacuations – that they are often more harmful than helpful to the children involved – and sets out a list of pre-conditions to be met before such initiatives are taken.³⁵ Their inclusion in a wider set of standards would nonetheless both be appropriate and serve to reinforce efforts to ensure respect for them.

³³ "Fostering in crisis as children are left at risk in unsafe homes", The Guardian, 2 June 2001.

³⁴ The Impact of Armed Conflict on Children: report of the Expert of the Secretary General, Ms Graça Machel, UN Doc A/51/306, 26 August 1996.

³⁵ Inter-agency Guiding Principles on Unaccompanied and Separated Children, ICRC, January 2004.

12. Care provision for children affected by HIV/AIDS

Policy, criteria and programming need to be developed and enhanced in order to ensure feasible and desirable care options for children orphaned or otherwise affected by HIV/AIDS, especially in families and communities that have been pushed to breaking point in their traditional role of care providers.

Relatives caring for children affected by HIV/AIDS in sub-Saharan Africa cannot even access minimum resources, let alone be registered, supported and supervised: “Extended families take in the overwhelming majority of orphans who lose both parents. But in many cases, orphaned siblings are sent to different households and experience a second profound loss through this separation. Many foster families are poor and have to stretch already inadequate resources to provide for both the orphans and their own children. In addition, some step or foster parents treat orphans harshly.”³⁶

On a lesser scale, the problem presents itself in industrialised countries too. Efforts have been made, for example, to ensure permanency planning “to assist [HIV-affected] parents in making legal arrangements for the future care of their children.”³⁷

NB: Certain realities and implications regarding children affected by HIV/AIDS have been referred to in this paper, but the special situation of these children is to be examined in more detail in a supplementary report focusing on this question.

13. Lack of support to child-headed households

Child-headed households are especially vulnerable to marginalisation, insecurity and exploitation. At the same time, they are numerically a major and growing care option. Thus, in February 1997, for example, the Rwandan Ministry of Labour and Social Affairs put the number of such households – at that time set up largely as a direct result of the genocide – at 85,000,³⁸ whereas one estimate for 2001 suggests a three-fold increase in those four years: up to 227,500, or fully 13% of all the households in the country.³⁹ It is indeed recognised that in some countries child-headed households “will become a familiar phenomenon owing to the increase of HIV/AIDS infected adults” and “the fact that the formal placement options for children in need of care and protection are inadequate to cater for the massive number of children orphaned by AIDS.”⁴⁰

Not unexpectedly, the acceptability of such arrangements from a children’s rights standpoint – and in particular the rights of the “responsible” child and the protection of girls – is the subject of debate. At the same time, there are increasing instances of this solution being promoted and supported as a form of alternative care, and it can correspond to the “least undesirable” care option in the eyes of the children themselves. As an official South African consultation has concluded, there appears to be general agreement that child-headed households “have the advantage of keeping siblings together and allow for the continuity of their relationship with the community”⁴¹ in situations where, for whatever reason, more appropriate formal placement options are not available. In this case, however, there is surely a need for their legal recognition “as a placement option for orphaned children in need of care”⁴² and consequently for provision to be made to ensure adequate supervision and support by persons or entities selected or approved by an official body and directly or indirectly accountable to that body.

³⁶ Children on the Brink, USAID, UNICEF, UNAIDS, 2002.

³⁷ Family Ties Project, Washington DC, www.familytiesproject.org accessed 1 June 2004.

³⁸ Cantwell, supra footnote 24.

³⁹ “Research into the living conditions of children who are heads of household in Rwanda”, Agency for Cooperation and Research in Development (ACORD), London, March 2001.

⁴⁰ South African Law Commission, Discussion Paper 103, 2002.

⁴¹ *Ibid.*

⁴² *Ibid.*

14. Cross-border care placements

The placement of children abroad, whether for short-term respite care and care during and after medical treatment, or for longer-term fostering, *kafala* or other reasons is, overall, a reportedly growing but notoriously unregulated and under-documented practice. Cross-border movement increases both the likelihood of problems arising and the difficulty of responding appropriately when they occur.

A recent study⁴³ sheds some light on one aspect – respite holidays of a few weeks – as regards Europe at least. Notably since the Chernobyl disaster, voluntary associations in almost all EU countries have been organising so-called “therapeutic holidays” for children from countries “experiencing very serious economic conditions”, and particularly those of Eastern Europe. Children from Russia and Kazakhstan have also been brought “on holiday” to summer camps in the USA, with a view to identifying potential adoptive parents there.⁴⁴

Numerous risks are associated with temporary care abroad, although evidence regarding the extent to which these in fact materialise has so far tended to be anecdotal. A basic risk factor is clearly the frequent lack of accepted criteria for assessing the fitness, and ensuring the adequate preparation, of families to host children under these singular conditions, with too much reliance on “self-selection” and “goodwill”. Instances of violence and rejection on the part of host families have been reported, sometimes meaning that the child is subjected to the negative experience of being transferred to another family’s care. Cases of aggressive non-adjustment and absconding by the children have also been recorded.

A glaring knowledge gap stems from the absence of assessments of the impact of these “holidays” on children after their return. In similar situations (“respite care” abroad for children in conflict situations, for example) in the past, serious concerns have been raised, for example, about children’s problems in readjusting to their habitual environment – whether family or institution – following their experience abroad.

Concerns are raised in several countries too over the potential risks for children moved abroad under kinship and *kafala* arrangements. Such moves are often carried out privately, without reference to child welfare authorities, and the children involved therefore do not benefit from procedures to ensure their welfare and protection, either in the country of origin or in the host country.

N.B.: The question of the evacuation of children abroad is dealt with under “11. Substitute care in emergencies” above.

15. Care for separated children abroad

Increasing numbers of “separated children” – without their parents or their legal or customary primary caregiver – are moving across frontiers as asylum seekers, migrants and victims of trafficking. Expressions of concern over the treatment and care they receive in the country of destination – as well as in their country of origin in those cases where they are subsequently repatriated – have also been growing.

Although there are clear legal and other distinctions between the situations of asylum-seekers and immigrants – and then subsequent distinctions between those in situations of legality, illegality or victims of trafficking – in practice the differences are blurred. Restrictive immigration laws lead many of those looking for admission to a country to resort to seeking asylum, and the conditions of their arrival are not always clear. In addition, most of the major child care issues are common to all. This means that an essentially generic approach to the out-of-home care issues involved can be taken.

Practice in this sphere varies considerably, but in many countries is conditioned by a continuing and widespread failure to recognise that these children are not criminals but, on the contrary, in most cases

⁴³ REMATCH Project (Risk Evaluation of Models of Assistance through Temporary Children’s Holidays): *Indagine sulle forme di accoglienza temporanea di minori e in particolare sul c.d. soggiorno a scopo terapeutico. Documento di sintesi.* CENSIS, Camino, EPE, Altea España, Rome, 10 November 2003.

⁴⁴ www.kidsave.org/sum_acc.htm, accessed 16 February 2004.

victims. In other words, they are not to be considered first and foremost as undocumented aliens to be moved out of the destination country, but as children needing protection in that country. There is a general preoccupation that “care” of these children consequently too often involves unwarranted deprivation of liberty (see below), and that even in “open” facilities, conditions are often inappropriate. Frequently lacking is permanency planning by the destination country in consultation with the family and authorities in the country of origin. These children frequently lack the guarantees and legal representation available to other children in the country concerned. Special concern has been voiced over their treatment in “transit zones” at airports when they arrive in the destination country.

16. Care involving deprivation of liberty

Many residential care situations, avowedly or not, involve deprivation of liberty in the sense of the UN Rules definition.⁴⁵ Child offenders under the minimum age of criminal responsibility, as well as non-offenders, can often be placed in residential facilities as a “welfare” or “educational” measure decided by an administrative body, either for a specified period or, in some cases, quite simply until they reach the age of majority. Conditions may differ little from those of a correctional or penal facility, and there is no attempt to secure conditions that would enable their early departure from the “care system”.

As noted above, children needing care in a country other than their own are also particularly concerned by this question. Until recently, for example, illegal child immigrants in the Czech Republic were being held in “prison-like detention centres” pending expulsion.⁴⁶ There has been long-standing concern over the principle and conditions of detention of migrant children – mainly from China, Mexico and Central America – in the USA,⁴⁷ where legislation currently pending approval would require federal authorities to recognise their difficult circumstances, and take them into consideration when making decisions regarding the child’s care and placement.⁴⁸ Similar preoccupations have been expressed in a wide range of other countries including Australia⁴⁹ and Spain.⁵⁰

Some degree of deprivation of liberty is often defended on the grounds of ensuring protection, particularly for children on arrival in a new country. It is true that the authorities of several host countries are concerned that a significant proportion (sometimes a majority⁵¹) of unaccompanied minors are said to abscond and/or “disappear” into exploitative networks or other vulnerable situations very soon after arrival, even when placed in relatively secure facilities. The issue should revolve in good part around the desire or felt-need of the children themselves to be “protected”, and from whom or what. In the debate surrounding the proposed closure, in Autumn 2003, of a “safe house” for unaccompanied girls arriving in Britain, the authorities maintained that vulnerable girls would be adequately looked after by trained foster carers. Fears were expressed, however, that the high levels of monitoring and security provided by the safe house would not be possible in foster care.⁵² This exemplifies the difficulties in ascertaining the most appropriate form of protective care to be foreseen. Those difficulties do not, however, justify derogation from the rights of children concerning conditions of care and the use of measures constituting deprivation of liberty.

⁴⁵ UN Rules for the Protection of Juveniles Deprived of their Liberty, 1990: see Section “C” below for definition.

⁴⁶ Cited by Maud de Boer-Buquicchio, Deputy Secretary General, Council of Europe, during her 6th Kilbrandon Lecture, “Justice For Europe’s Children”, Glasgow, 1 December 2003.

⁴⁷ See, for example, “The detention of refugee children in the US”, International Children’s Rights Monitor Vol. 3, No. 2, Defence for Children International, Geneva, 1986.

⁴⁸ “Why Am I Here? Children in Immigration Detention”, Amnesty International-USA, June 2003.

⁴⁹ National Inquiry into Children in Immigration Detention, 2002-2003.

⁵⁰ Following an order by the *Fiscal General* on 23 October 2003 concerning responses to the “illegal entry of immigrant minors”.

⁵¹ For France, see for example Plantet, Joël: “Que faire des enfants de la rue?” in *Lien Social* 634, Sept. 2002.

⁵² UNICEF UK: “West Sussex refuge for trafficking victims to shut”, 3 August 2003.

C. HOW CURRENT INTERNATIONAL STANDARDS DEAL WITH OUT-OF-HOME CARE

The complex array and combination of reasons for out-of-home care, the forms it takes, the issues it raises and the responsibilities that it implies, create major problems for ensuring the protection of children without parental care. Existing international texts – the Convention on the Rights of the Child first among them – deal broadly with the issue. They help to define the approach to be adopted in ensuring the protection of children in out-of-home care and, in some cases, also provide inspiration regarding issues that need to be covered and processes that could usefully be considered:

- **Convention on the Rights of the Child:** While all of the rights it contains are of course applicable to children without parental care as they are to any other child, several are of explicit and direct relevance to out-of-home care, including those covering:
 - Primacy of efforts to enable the child to be maintained in, or to return to, the care of his or her parents (5, 10, 18, 27)
 - Conditions of removal from parental care (9)
 - The obligation to provide suitable alternative care (20, 39)
 - Inferred subsidiarity of “institutional” care (20)
 - Conditions of care (3, 37)
 - Periodic review of placements (25)
- The **1986 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:** this document stipulates priority to parental care, subsidiarity of institutions as an out-of-home care option, and general conditions under which foster care should take place.
- The **1993 Hague Convention on Inter-country Adoption:** the treaty reaffirms first priority to maintaining the child in, or returning him or her to, parental care; preference for in-country *family-based* solutions for children who cannot live with their biological parents, but no automatic application of this rule to in-country *residential* care. The provisions of this Convention also provide useful insights into the processes and requirements for determining appropriate out-of-home placement.
- The **1990 UN Rules for the Protection of Juveniles Deprived of their Liberty (JDLS):** the Rules cover any “placement [...] in a private or public custodial setting, from which [the] person is not permitted to leave at will, by order of any judicial, administrative or other public authority.” This definition of “deprivation of liberty” clearly includes many alternative care situations. At the same time, consultation of these Rules shows that, although they can certainly apply more widely, they were clearly developed to deal more especially with juveniles who are suspected, charged with or convicted of having committed an offence. Thus, while several elements therein good indications of issues to be considered when establishing standards for care, and certainly need to be taken into account in that regard, the Rules by no means cover all the spheres regarding deprivation of liberty motivated – justifiably or not – by care and protection concerns and/or specialised treatment.
- The **1985 “Beijing” Rules on the Administration of Juvenile Justice**, by analogy, these Rules provide part of a checklist of issues to be covered in terms of the decision-making process regarding the need for out-of-home care and the type of care to be offered.
- The **1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children:** this treaty covers situations where children need alternative care because of being outside their country of habitual residence. It allows for “the placement of the child in a foster family or in institutional care, or the provision of care by *kafala* or an analogous institution” and “the supervision by a public authority of the care of a child by any person having charge of the child”. Importantly, its Chapter on co-operation provides a mechanism and framework for ensuring protection where two States are involved.

Finally, mention can be made of other relevant international texts on specific circumstances where children can require out-of-home care, including in particular the **UNHCR Guidelines on Refugee Children** and the **Inter-Agency Guiding Principles on Unaccompanied and Separated Children**.

D. THE NEED FOR DEDICATED INTERNATIONAL STANDARDS ON THE PROTECTION OF CHILDREN WITHOUT PARENTAL CARE

The preceding section shows that today's international standards can provide, overall, a sound rights-based backdrop for the much-needed improvement of protection of children without parental care. However, in the light of the wide range of issues and problems documented in this paper, it also shows that these standards are far from sufficient in both their scope and detail. On those out-of-home care issues that they cover, they point to the direction to be taken but rarely indicate how the goals are to be achieved. In general they do not provide adequate benchmarks for the development and monitoring of policies and practice, and even less for identifying and reacting against abuses and malpractice. And on many crucial problems among those highlighted in this document – protection of children in informal care, child-headed households and private residential facilities, for example – they are quite simply silent.

The following are among the spheres where, as this document has demonstrated, internationally agreed guidelines and/or minimum standards do not exist and are urgently required as a basis and stimulus for improved protection:

- Services to be provided for maintaining children in safety with their parents
- Conditions to be met when children are to be removed from parental care
- Provision of a range of care options to meet individual children's needs
- Qualifications and accountability of those who decide among out-of-home care options
- Criteria for deciding among out-of-home care options
- Processes and mechanisms enabling the children (and, where applicable, their parents) concerned to have a real say in the care option chosen, and to be consulted regularly throughout the period in which out-of-home care is provided
- Permanency planning
- Protection in informal care situations
- Selection, training, monitoring and support for foster carers
- Selection, qualifications, training and monitoring for residential care staff
- Recourse to, and conditions in, residential care
- Conditions in care situations that constitute deprivation of liberty
- Criteria for the accreditation of private care providers, and on-going assessment and review of the accreditation
- Responses to child-headed households
- Oversight of care arrangements proposed abroad

The development of international guidelines and rules as to **how** these problems are to be broached would be a major and necessary contribution to appropriate policy development, good practice, on-going assessment of initiatives taken, and implementation of children's rights. For, undoubtedly, these problems are greatly compounded in the absence of comprehensive, coherent and detailed international standards to serve as a guide and measuring-rod for those responsible for decision-making, care provision and oversight of out-of-home care.

Drawing up such standards to supplement the CRC would in no way set a precedent. The most obvious – and indeed related – example lies in the above-mentioned two sets of UN Rules developed in the sphere of juvenile justice, one of which was adopted during the drafting of the CRC, the other in the year in which the CRC came into force. These texts are constantly referred to, not only as defining clearly the standards to be met, but also as indicating precise ways in which compliance with those standards is to be achieved. The 1993 Hague Convention on Intercountry Adoption, an international private law treaty, serves a similar crucial role in its specific sphere of application, setting out detailed procedures to be followed and criteria to be met, in order to facilitate implementation of the relevant CRC provisions.

Noteworthy too is the oft-repeated concern of the UN Committee on the Rights of the Child regarding the lack of national standards on out-of-home care, the development of which would undoubtedly be stimulated and facilitated by a text previously agreed at the international level.

As a logical consequence of the above, it is implicit and vital that international standards be rights-based, elaborated within the United Nations, and adopted by its General Assembly. Only this process – with the fullest possible involvement of intergovernmental bodies and recognised NGOs – and this level of approval would ensure the necessary credibility, global acceptability and generic applicability essential to the status and impact of such guidelines and rules.

There is frequent – and sometimes understandable – hesitancy to embark on the formulation of additional international standards. The numbers of children involved and the problems identified, together with the inadequacies of current texts to confront them, surely mean, however, that any such reluctance must not be allowed to hold sway regarding the protection of children in out-of-home care.

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