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Deinstitutionalization, Family Reunification, and the "Best Interests of the Child": An Examination of Armenia's Child Protection Obligations Under Conventional International Law

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DEINSTITUTIONALIZATION,
FAMILY REUNIFICATION,
AND THE “BEST INTERESTS
OF THE CHILD”:
AN EXAMINATION OF
ARMENIA’S CHILD
PROTECTION OBLIGATIONS
UNDER CONVENTIONAL
INTERNATIONAL LAW

George S. Yacoubian, Jr., Ph.D., LL.M., S.J.D.*

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I. INTRODUCTION

For nearly a century, the global community has sought to afford children legal protections, abandoning widely held views that children were pecuniary assets. In the United States and globally, a nascent children's rights movement culminated in broad child welfare reform. Whether adoption, armed conflict, child labor, education, human trafficking, or deinstitutionalization, the post-war 20th century witnessed an evolution of international child protections. The prevailing standard of "best interests of the child" (BIC) has been incorporated into domestic and international law doctrine and, not surprisingly, has been operationalized in a variety of ways. In recent years, the standard has been explored in the context of residential care institutions. Some advocates of deinstitutionalization assert that children should be reunified with biological relatives under all circumstances. Absolutes, however, are legally precarious and may be practically inconsistent with the BIC standard that practitioners and policymakers are required to acquiesce. In the current essay, the history of international child protection legislation is explored, and the BIC standard is assessed in the context of Armenia's social system. I evaluate Armenia's child protection obligations and conclude that the BIC standard may not always trigger deinstitutionalization and family reunification. Implications for international human rights law and the global child protection movement are assessed.

II. OBLIGATIONS TO CHILDREN UNDER INTERNATIONAL LAW

International children's rights law confers duties on global stakeholders, who then are charged with assuring that children are safeguarded from harm and have a supportive child-rearing environment.¹ A strong international child protection system

¹ See FRED WULCZYN ET AL., ADAPTING A SYSTEMS APPROACH TO CHILD PROTECTION: KEY CONCEPTS AND CONSIDERATIONS 6 (2010), <https://www.refworld.org/docid/58260c084.html>; Karin Landgren, *The Protective Environment: Development Support for Child Protection*, 27 HUM. RTS. Q. 214, 234–36 (2005).

can address the many interconnected risks that confront children and their families. The challenge is to create and sustain a system that respects the familial institution and incorporates evidence-based practices so that all children are afforded an opportunity to excel.

The child-rearing environment is critical to shaping educational, emotional, health, and social outcomes.² It is absurd to assert that children must *always* be raised within a nuclear, biological family, as real-world problems sometimes make this difficult, if not impossible, to achieve. Aspiration cannot supplant reality. The challenge faced by decision-makers is to evaluate the efficacy of various child-rearing environments and surrogate caregivers and delineate a spectrum of alternatives³ that can be weighed against each child's specific short-term *and* long-term needs. This section introduces the international law regarding child rights generally, describes the evolution of international human rights law, and provides a comprehensive analysis of international children's rights agreements that have developed since the beginning of the twentieth century.

III. THE DEVELOPMENT OF INTERNATIONAL CHILD PROTECTION LAW

Since the early twentieth century, rights-centered systems have afforded legal protections to children.⁴ Children have two categories of rights under international law.⁵ First, children have the same fundamental rights as adults, such as security of the person and freedom from inhuman, cruel, or degrading

² Diana Basa, *The Measure of the Minor Placement, Interference with the Right of Family Life*, 5 HUM. RTS. L. ENF'T 15, 18–19 (2016); Heather Sandstorm & Sandra Huerta, *The Negative Effects of Instability on Child Development: A Research Synthesis* 4 (Urb. Inst., Discussion Paper No. 3, 2013), <https://www.urban.org/sites/default/files/publication/32706/412899-The-Negative-Effects-of-Instability-on-Child-Development-A-Research-Synthesis.PDF>.

³ Sara Dillon, *Time for a Truth-Based Policy: Humanitarian Access to Children Living without Family Care*, 27 FLA. J. INT'L L. 23, 42 (2015).

⁴ See SARA DILLON, INTERNATIONAL CHILDREN'S RIGHTS 5 (2010).

⁵ *Id.* at 10; TREVOR BUCK, INTERNATIONAL CHILD LAW 14 (2005).

treatment.⁶ Second, children enjoy special rights because of their age, including protection from sexual exploitation and the right to education.⁷

There are two distinct children's rights models: protectionism and liberation.⁸ *Protectionism* asserts that a child cannot be an official holder of rights because adults are more intellectually capable of making important decisions.⁹ Protectionists conceptualize children's rights in terms of what children require, needs that can only be safeguarded by adult decision-making.¹⁰ In contrast, the *liberation* model grants children the same rights enjoyed by adults.¹¹ Godwin argues that "[t]he legal disabilities imposed on children cannot be presumed rational on the basis of children's abilities, their best interests, or practical social necessity[.]" and that "[a] persuasive argument can be made that children represent a suspect class for equal protection purposes, and that children's fundamental rights are implicated in many of the restrictions against them."¹²

In the context of international child protection, neither tradition adequately addresses alternative child-rearing environments. Biological parents, who are the primary decision-makers of children under the protectionist model,¹³ have

⁶ See DILLON, *supra* note 4, at 9–10, for a discussion of the various human rights treaties that call on State Parties to protect the fundamental freedoms of women and children in all areas.

⁷ *Id.* at 5.

⁸ Samantha Godwin, *Against Parental Rights*, 47 COLUM. HUM. RTS. L. REV. 1, 6 (2015).

⁹ *Id.* at 7, 9–10.

¹⁰ LAURA M. PURDY, IN THEIR BEST INTEREST? THE CASE AGAINST EQUAL RIGHTS FOR CHILDREN 25–26 (1992); Joel Feinberg, *Legal Paternalism*, 1 CANADIAN J. PHIL. 105, 105 (1971).

¹¹ Amy Glaser, *The Liberation of Young People 1–3* (2018) (Ph.D. dissertation, University of North Carolina) (on file with the Carolina Digital Repository, UNC University Libraries); *see also* Samantha Godwin, *Children's Oppression, Rights, and Liberation*, 4 NW. INTERDISC. L. REV. 247, 272–73 (2011) (suggesting the method of "borrowing capacities," wherein children retain rights over certain areas of life while adults simply assist them with the completion of tasks in furtherance of those rights, similar to the way adult utilize agents).

¹² Godwin, *supra* note 8, at 301.

¹³ *Id.* at 11–12.

relinquished their obligations to an alternative caregiver, conceding an inability or unwillingness to parent. Under a liberation model, children, rejected by their chief guardian, must appreciate that decision, weigh the consequences of relinquishment, and invoke their rights. Even the contemplation of such a burden on children is nonsensical.

IV. BEST INTERESTS OF THE CHILD

Article 3 of the Convention on the Rights of the Child (CRC) expressly provides that the best interest standard should consider the rights and duties of parents, legal guardians, or other legally responsible persons.¹⁴ As such, States Parties are encouraged to take appropriate legislative and administrative steps to ensure these requirements are fulfilled.¹⁵ Under this principle, a decisionmaker has the duty to analyze the standard and give the child's interest primary consideration.¹⁶ This principle is flexible because the best interests for one child may not be so for another. The best interest standard is not about the outcome per se, but the process.¹⁷ Specifically:

A "best interests determination" (BID) describes the formal process with strict procedural safeguards designed to determine the child's best interests for particularly important decisions affecting the child. It should . . . involve decision-makers with relevant areas of expertise, and balance all relevant factors in order to assess the best option.¹⁸

¹⁴ See Convention on the Rights of the Child art. 3(2), Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

¹⁵ *Id.* art. 4.

¹⁶ *Id.* art. 3(1).

¹⁷ Thomas Hammarberg, Comm'r for Hum. Rts. Council of Eur., Lecture at the Academy for Special Education: The Principle of the Best Interests of the Child – What it Means and What it Demands from Adults 7–8 (May 30, 2008) (on file with the Council of Europe) [hereinafter Hammarberg Lecture].

¹⁸ UN REFUGEE AGENCY, UNHCR GUIDELINES ON DETERMINING THE BEST INTERESTS OF THE CHILD 8 (2008), <https://www.unhcr.org/en-us/protection/children/4566b16b2/unhcr-guidelines-determining-best-interests-child.html> [hereinafter UNHCR GUIDELINES].

While the best interest principle is the prevailing norm for enforcing the rights of the child, three issues remain. First, the Convention on the Rights of the Child speaks of best interests as “a” primary consideration, rather than “the” primary consideration.¹⁹ During the drafting process, there was debate as to which article—“a” or “the”—should be utilized.²⁰ Ultimately, it was determined that, given the comprehensiveness of Article 3, there would be other legitimate and/or competing interests.²¹ Adopting the less decisive phrase “a primary consideration” suggests that the “best interests of child” norm should be given ample weight but cannot be the only concern. Familial and community considerations, for example, might weigh into the determination.

Second, little guidance exists on how that principle should be operationalized.²² The vagaries of the practical application aside, the focus is nevertheless the “child” and not “children.”²³ The core component of the standard suggests that a BID should be made on an individual basis. If so, macro-level recommendations for child protection dilemmas are inconsistent with the principle’s core purpose.

Third, a generally accepted definition of the best interest standard is non-existent in international law. In the Guidelines on Determining the Best Interests of the Child, the term was broadly defined as the well-being of a child.²⁴ The phrase thus requires deciding what will serve a child *best*. That said, I am aware of no empirical studies that have explored the consequences of institutionalization through adulthood. Decisionmakers typically consider short-term variables in

¹⁹ CRC, *supra* note 14, art. 3.

²⁰ See Hammarberg Lecture, *supra* note 17, at 3.

²¹ *Id.*

²² See Lucinda Ferguson, *Not Merely Rights for Children but Children’s Rights: The Theory Gap and the Assumption of the Importance of Children’s Rights*, 21 INT’L J. CHILD. RTS. 177, 178 (2013).

²³ See Michael Freeman, *The Best Interests of the Child – Is the Best Interests of the Child in the Best Interests of Children*, 11 INT’L J. L. POL’Y & FAM. 360, 379 (1997), which highlights problems related to referring to “children” as opposed to “child,” such as the failure to take one’s age into account when determining best interests.

²⁴ UNHCR GUIDELINES, *supra* note 18, at 14.

custodial assessments, such as emotional deprivation, but rarely contemplate perennial advantages that accompany institutional rearing.²⁵ Living with a biological family may offer children certain protections that a residential childcare facility cannot, but education and professional growth are rarely emphasized among Armenia's poorest families. Sending a child home to impoverished biological parents may satisfy sentiment and a child's whimsical desires to live with family, but likely offers nothing in terms of long-term academic and professional achievement.

V. EVOLUTION OF INTERNATIONAL LEGAL REFORM

For more than a century, the global community has witnessed an evolution in child protection, with several themes having emerged. First, the rights extended to children—from recognition as a protected class to the spectrum of child-rearing alternatives—have expanded significantly. This elastic, rights-based system suggests that stakeholders can assume liberal interpretations of the agreements that embody the child protection arena. Given the evolution witnessed during the past century, we should extend *more* protections to children rather than less.

Second, the best interest norm has prevailed because of its simplicity. The standard is so all-inclusive that it can be adapted to a plethora of domestic and international scenarios. That said, simplicity increases the likelihood that bias and irrelevant variables may enter into the calculus or that immediate interests are given more weight than long-term considerations.

Third, while the near universal acceptance of the CRC signifies consensus on the basic rights to which children are entitled, there is little enforcement for violations of international child protection standards. The Committee on the Rights of the Child is a body of 10 independent experts that monitor implementation of the CRC by its States Parties.²⁶ Committee

²⁵ See Am. Psych. Ass'n, *Guidelines for Child Custody Evaluations in Family Law Proceedings*, 65 AM. PSYCH. 863, 866 (2010).

²⁶ See CRC, *supra* note 14, art. 43(2).

members are subject matter experts and do not represent their countries' governments or any other organization to which they belong. The States Parties are required to submit reports on the national situation of children's rights to the Committee, after which the Committee examines each report and, if necessary, offers suggestions to the submitting States.²⁷

The most recently published Committee Report covers seven sessions convened between May 2018 and March 2020.²⁸ As of March 6, 2020, the Committee had received 597 reports (202 "initial" reports and 395 "periodic" reports) pursuant to Article 44 of the Convention on the Rights of the Child.²⁹ Of these 597 reports, the Committee considered 48 (8%) under the Convention.³⁰ None of the country reports were from Armenia.³¹ While the major focus was children's rights in the justice system³² and protecting and empowering children as human rights defenders,³³ the Committee did remark that it remained "concerned about violations of the rights of children with disabilities that persist, despite its previous recommendations."³⁴ Specifically, the Committee noted that "[s]uch violations include widespread institutionalization and misinterpretations of the concept of inclusive education that leave many children with disabilities out of school or relegated to special education institutions."³⁵ While some children will always require permanent, residential care because of the nature of their disabilities, the Committee's conclusions in its 2018 report regarding stigma and a lack of resources regarding children with disabilities are not inconsistent with anecdotal reports from the residential childcare institutions in Armenia

²⁷ Cynthia Price Cohen, *Implementing the UN Convention on the Rights of the Child*, in INTERNATIONAL CHILDREN'S RIGHTS 23, 24 (2010).

²⁸ Rep. of the Comm. on the Rts. of the Child on its Seventy-Eight, Seventy-Ninth, Eightieth, Eighty-First, Eighty-Second, Eighty-Third and Extraordinary Eighty-Fourth Sessions, U.N. Doc. A/75/41 (2020).

²⁹ *Id.* at 2.

³⁰ *Id.*

³¹ *See id.* at 3–5.

³² *Id.* at 5.

³³ *Id.* at 19.

³⁴ *Id.* at 7–8.

³⁵ *Id.*

that house children with special needs.³⁶ To explore the evolution of international children's rights law since the beginning of the twentieth century, I examined 20 child protection instruments. A summary is provided in Table 1.

³⁶ See HUMAN RIGHTS WATCH, "WHEN WILL I GET TO GO HOME?" ABUSES AND DISCRIMINATION AGAINST CHILDREN IN INSTITUTIONS AND LACK OF ACCESS TO QUALITY INCLUSIVE EDUCATION IN ARMENIA 23–25 (2017), <https://www.refworld.org/docid/58af06794.html>; Rep. of the Comm. on the Rts. of the Child on its Seventy-Second, Seventy-Third, Seventy-Fourth, Seventy-Fifth, Seventh-Sixth, and Seventy-Seventh Sessions, U.N. Doc. A/73/41 (2018).

Table 1. Summary of International Child Protection Instruments³⁷

Agreement	Date	Child Protection Emphasis
Intl. Agreement for Suppression of White Slave Traffic	1904	Children designated as a protected class

³⁷ See generally International Agreement for the Suppression of the “White Slave Traffic,” Mar. 18, 1904, 1 L.N.T.S. 83; Geneva Declaration of the Rights of the Child, *adopted* Sept. 24, 1924, League of Nations O.J. Spec. Supp. 21, at 43 [hereinafter Geneva Declaration]; G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter G.A. Res. 217 (III)]; Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221; G.A. Res. 1386 (XIV), Declaration of the Rights of the Child (Nov. 20, 1959) [hereinafter G.A. Res. 1386 (XIV)]; European Social Charter, *opened for signature* Oct. 18, 1961, E.T.S. No. 35, 529 U.N.T.S. 89; American Convention on Human Rights “Pact of San José, Costa Rica,” Nov. 22, 1969, 1144 U.N.T.S. 123; Convention (No. 138) Concerning Minimum Age for Admission to Employment, *adopted* June 26, 1973, 1015 U.N.T.S. 297; International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3; G.A. Res. 41/85, 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 art. 5 (Dec. 3, 1986); CRC, *supra* note 14; African Charter on the Rights and Welfare of the Child, July 11, 1990, OAU Doc. CAB/LEG/24.9/49; Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *opened for signature* May 29, 1993, 1870 U.N.T.S. 167; Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, 2133 U.N.T.S. 161; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, *adopted* May 25, 2000, 2173 U.N.T.S. 222; Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, 2171 U.N.T.S. 227; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, *opened for signature* Nov. 15, 2000, 2237 U.N.T.S. 319; United Nations Convention on the Rights of Persons with Disabilities, *opened for signature* Dec. 13, 2006, 2515 U.N.T.S. 3; G.A. Res. 64/142, annex, Guidelines for the Alternative Care of Children (Dec. 18 2009).

Geneva Declaration of the Rights of the Child	1924	Addresses orphan status and reunification
Universal Declaration of Human Rights	1948	Normative basis for HR standards
European Convention on Human Rights	1950	Respect for the family life
Declaration of the Rights of the Child	1959	"Best interests of the child"
European Social Charter	1961	Family as a special unit in society
American Convention on Human Rights	1969	Family is the fundamental unit of society
Minimum Age Convention	1973	Abolition of child labor
ICCPR	1976	Family entitled to state protection
ICESCR	1976	Dignity of the human family
Declaration on Principles for the Welfare of Children	1986	"Best interests of the child"
Convention on the Rights of the Child	1989	Most comprehensive child-specific document

African Charter on Rights and Welfare of the Child	1990	Special provisions for African nations
Adoption Convention	1995	Standardize international adoption standards
Worst Forms of Child Labor Convention	1999	Eliminate child slavery and prostitution
Optional Protocols to the CRC	2000	Armed conflict and sex trafficking/pornography
Protocol to Prevent, Suppress and Punish Trafficking	2003	Prioritized the protection of women and children
Convention on the Rights of Persons with Disabilities	2006	“Best interests of the child”
Guidelines for the Alternative Care of Children	2010	Guidelines for the Alternative Care of Children

A. *The 1924 Geneva Declaration of the Rights of the Child*³⁸

Adopted on September 26, 1924, the Geneva Declaration established that humankind “owes to the Child the best that it has to give”³⁹ The Declaration recognized the child’s right to “normal development, both materially and spiritually” and affirmed the existence of rights specific to children.⁴⁰ The Declaration was the first instrument to address orphaned

³⁸ See Geneva Declaration, *supra* note 37.

³⁹ *Id.*

⁴⁰ *Id.*

children and the concept of reunification, stating that “[t]he child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succored”⁴¹

*B. The 1948 Universal Declaration of Human Rights (UDHR)*⁴²

Motivated by the experiences of two world wars, the UDHR articulated a comprehensive statement of inalienable human rights to which all States could agree.⁴³ The UDHR was adopted on December 10, 1948, and contains several Articles that refer specifically to children and the family.⁴⁴ Article 12 affirms that “[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation[.]”⁴⁵ while Article 16 confers the rights of marriage and procreation.⁴⁶ Article 16 articulated the first international law statement on the status of the family, averring that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”⁴⁷ This clause implies that “family” not only enjoys protected status but that society has an obligation to maintain the family unit, which is the prevailing argument in favor of deinstitutionalization and reunification.⁴⁸ Article 25(2) states that “[m]otherhood and childhood are entitled to special care and assistance[, and that a]ll children, whether born in or out of

⁴¹ *Id.*

⁴² See G.A. Res. 217 (III), *supra* note 37.

⁴³ *What is the Universal Declaration of Human Rights? – When was the Universal Declaration created?*, AUSTL. HUM. RTS. COMM’N, <https://humanrights.gov.au/our-work/what-universal-declaration-human-rights> (last visited Feb. 18, 2021).

⁴⁴ See *Documents – Universal Declaration of Human Rights*, UNITED NATIONS, <https://www.un.org/en/universal-declaration-human-rights/> (last visited Feb. 18, 2021).

⁴⁵ G.A. Res. 217 (III), *supra* note 37, art. 12.

⁴⁶ *Id.* art. 16.

⁴⁷ *Id.* art. 16(3).

⁴⁸ See *id.* art 16; Richard R. Carlson, *A Child’s Right to a Family Versus a State’s Discretion to Institutionalize the Child*, 47 GEO. J. INT’L L. 937, 949 (2016).

wedlock, shall enjoy the same social protection.”⁴⁹ Article 26 states that “[e]ducation shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.”⁵⁰ Taken collectively, the UDHR offered the first comprehensive statement on the status of, and the rights conferred to, the family and the child.

*C. The 1959 Declaration of the Rights of the Child*⁵¹

The Declaration of the Rights of the Child was built upon rights that had been set forth in the 1924 Declaration. The 1959 Declaration states that children need “special safeguards and care, including appropriate legal protection, before as well as after birth,” which reiterates the 1924 Declaration’s pledge that “mankind owes to the child the best it has to give,” and, specifically, calls upon local authorities to observe children’s rights.⁵² One of the key principles is that children enjoy “special protection” as well as “opportunities and facilities, by law and by other means,” for healthy and normal physical, mental, moral, spiritual, and social development “in conditions of freedom and dignity.”⁵³ Specifically, the Declaration was the first international agreement to articulate the best interest standard:

The child shall enjoy special protection and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially, in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.⁵⁴

Moreover, “[t]he best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents.”⁵⁵ The Declaration, a critical step in reformulating

⁴⁹ G.A. Res. 217 (III), *supra* note 37, art. 25(2).

⁵⁰ *Id.* art. 26(2).

⁵¹ G.A. Res. 1386 (XIV), *supra* note 37.

⁵² *Id.* pmb.; Geneva Declaration, *supra* note 37.

⁵³ G.A. Res. 1386 (XIV), *supra* note 37, princ. 2.

⁵⁴ *Id.*

⁵⁵ *Id.* princ. 7.

transnational norms on the rights of the child, merged two critical themes: the defense of children as an attainable objective and the promotion of universal human rights for children.

The Declaration of the Rights of the Child noted, for the first time in international law, the concept that children are afforded “family-like” protections when the family is absent and discussed the role of the State in protecting the child when the family is unable to do so.⁵⁶ Moreover, the Declaration suggested a child-rearing spectrum of alternatives. Specifically, Principle 6 states that:

The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable.⁵⁷

The Declaration affirmed that while children should be raised by their family, the more important consideration is that children are reared in a caring environment, and that, when the family is unable or unwilling to raise the children, the State has a moral and fiduciary obligation to intervene.⁵⁸

*D. The 1989 Convention on the Rights of the Child*⁵⁹

The CRC is the most comprehensive document on the rights

⁵⁶ *See id.* princ. 6.

⁵⁷ *Id.*

⁵⁸ *See id.*

⁵⁹ CRC, *supra* note 14.

of children⁶⁰ and “is primarily concerned with four aspects of children’s rights . . . participation by children in decisions affecting them; protection of children against discrimination and all forms of neglect and exploitation; prevention of harm . . . and . . . assistance to children for their basic needs.”⁶¹ A child is defined as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”⁶² Key provisions include the creation of new rights for children under international law, such as the child’s right to preserve his or her identity,⁶³ the rights of vulnerable children to special protection,⁶⁴ and indigenous children’s right to practice their culture.⁶⁵

The CRC was the first international instrument to address child protection as it relates to removal from the family unit and institutionalization. Article 3 states that “States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.”⁶⁶ The Convention not only contemplates the need for institutions but provides official guidelines to be followed when children are institutionalized, including provisions for suitable caregiving staff.⁶⁷ Article 18(2) states that “[f]or the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall

⁶⁰ SHARON DETRICK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 4 (1999).

⁶¹ *Legal Reports – Children’s Rights: International Laws, U.N. Convention on the Rights of the Child 1989*, LIBR. CONG., <https://www.loc.gov/law/help/child-rights/international-law.php> (last updated Dec. 30, 2020).

⁶² CRC, *supra* note 14, art. 1.

⁶³ *Id.* arts. 7, 8.

⁶⁴ *Id.* art. 20; *see also id.* art. 22 (providing protective measures and ensuring humanitarian assistance for children of refugee status or children seeking refugee status).

⁶⁵ *Id.* arts. 8, 30.

⁶⁶ *Id.* art. 3(3).

⁶⁷ *Id.* arts. 3(3), 18(2).

ensure the development of institutions, facilities and services for the care of children.”⁶⁸ Consistent with Hegel, Article 18(2) contemplates a reciprocal relationship (i.e., a social contract) between the biological family and the state for child-rearing.⁶⁹ Here, the CRC suggests that *institutions* are necessary and recognizes that there will be circumstances in which children will need to live outside of the family home.

Article 20(1) states that children “temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State”⁷⁰ and that “States Parties shall . . . ensure alternative care for such a child.”⁷¹ Articulating rights from a protectionist perspective, Article 20 not only recognizes the inevitable dilemma that some children cannot be raised in a family environment but suggests that child-rearing outside of the family environment may need to be permanent. Article 20(3) states that non-familial care “could include . . . foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children.”⁷² This was the first statement in international law where alternatives to biological child-rearing were contemplated.

Article 21 “[r]ecognize[s] that inter-country adoption may be considered as an alternative means of child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin[.]”⁷³ Article 21 suggests that a competent authority should not consider international adoption unless *intra*-national foster care or adoptive family alternatives are absent. While the CRC begins to address surrogate caregivers,⁷⁴ it does not offer a *preferred* hierarchy of international child-rearing alternatives.

⁶⁸ *Id.* art. 18(2).

⁶⁹ *Id.*; Joan B. Landes, *Hegel’s Conception of the Family*, 14 POLITY 5, 6 (1981).

⁷⁰ CRC, *supra* note 14, art. 20(1).

⁷¹ *Id.* art. 20(2).

⁷² *Id.* art. 20(3).

⁷³ *Id.* art. 21(b).

⁷⁴ *See id.* art. 20(3).

Lastly, Article 40(4) states that:

A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.⁷⁵

Again, the CRC touches on institutionalization, suggesting that alternatives to residential care be considered whenever possible. While Article 40 addresses confinement within an incarceration setting,⁷⁶ the use of any residential childcare setting is presumed to be the last resort.

*E. The 2010 Guidelines for the Alternative Care for Children*⁷⁷

A UN General Assembly (GA) resolution is a decision or declaration voted on by Member States, usually requiring a simple majority to pass.⁷⁸ While there is debate as to whether GA Resolutions are an authoritative source of international law,⁷⁹ they nevertheless derive their authority from the UN Charter and are intended to clarify existing Conventions, which *are* authoritative sources of international law. The most extensive instrument addressing childcare is the Guidelines for the Alternative Care of Children. The Guidelines were adopted unanimously, suggesting significant consensus among the States Parties.⁸⁰ The Guidelines “are intended to enhance the

⁷⁵ *Id.* art. 40(4).

⁷⁶ *Id.*

⁷⁷ G.A. Res. 64/142, *supra* note 37.

⁷⁸ *How Decisions are Made at the UN, Why consensus is important*, UNITED NATIONS <https://www.un.org/en/model-united-nations/how-decisions-are-made-un> (last visited Feb. 19, 2021).

⁷⁹ See Gregory J. Kerwin, *The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 1983 DUKE L. J. 876, 876 (1983).

⁸⁰ See Jennifer C. Davidson et al., *Developing Family-Based Care: Complexities in Implementing the UN Guidelines for the Alternative Care of Children*, 20 EUR. J. SOC. WORK 754, 766 (2017).

implementation of the Convention on the Rights of the Child and of relevant provisions of other international instruments regarding the protection and well-being of children who are deprived of parental care or who are at risk of being so.”⁸¹ In the Annex, the Guidelines suggest a preference for familial caregiving above other options.⁸² Specifically, the Guidelines “support efforts to keep children in, or return them to, the care of their family or, failing this, to find another appropriate and permanent solution, including adoption”⁸³ While there is no mention of residential childcare institutions in the Annex, the Guidelines suggests that when familial care is not possible or not in the child’s best interests, “the most suitable forms of alternative care [should be] identified and provided”⁸⁴

Section II of the Guidelines discusses the philosophical basis for childcare preferences.⁸⁵ Like Hegel, who emphasized the importance of the family to child-rearing, the Resolution states that “[t]he family being the fundamental group of society and the natural environment for the growth, well-being and protection of children, efforts should primarily be directed to enabling the child to remain in or return to the care of his/her parents, or when appropriate, other close family members.”⁸⁶ Here, the Guidelines discuss that the preferred caregiving environments are, first, biological parents, and second, kinship care.⁸⁷ They emphasize the preference for a biological family relative to alternative caregivers by stating that the “[r]emoval of a child from the care of the family should be seen as a measure of last resort and should, whenever possible, be temporary and for the shortest possible duration.”⁸⁸ Moreover, the selection of alternative care settings “should take full account of the desirability, in principle, of maintaining the child as close as possible to his/her habitual place of residence, in order to facilitate contact and potential reintegration with his/her family

⁸¹ G.A. Res. 64/142, *supra* note 37, ¶ 1, at 2 (footnote omitted).

⁸² *Id.* ¶ 2(a), at 2.

⁸³ *Id.*

⁸⁴ *Id.* ¶ 2(b), at 2.

⁸⁵ *See generally id.* § II, at 2–5.

⁸⁶ *Id.* ¶ 3, at 2; Landes, *supra* note 69, at 6.

⁸⁷ *See* G.A. Res. 64/142, *supra* note 37, ¶ 3, at 2.

⁸⁸ *Id.* ¶ 14, at 4.

and to minimize disruption of his/her educational, cultural and social life.”⁸⁹

The Guidelines, emphasizing the obligations of the State when the family unit begins to dissolve, state that “[t]he State should ensure that families have access to forms of support in the caregiving role.”⁹⁰ This is the first acknowledgment of State responsibility in the Guidelines. The Guidelines further emphasize the interventionist duties of the State when biological parents are unable or willing to care for the child.⁹¹ Specifically, “the State is responsible for protecting the rights of the child and ensuring appropriate alternative care, with or through competent local authorities and duly authorized civil society organizations” and “to ensure the supervision of the safety, well-being and development of any child placed in alternative care”⁹² Here, the Guidelines not only affirm the role of the State to intervene when families are unable to care for their children but they underscore the *community-level involvement* in the decision-making process.

The Guidelines unquestionably suggest a hierarchy of preferred childcare environments, beginning with biological parents and then kinship care. Residential childcare facilities are then discussed as “alternative care” options.⁹³ Following biological parents and kinship care, the Guidelines indicate that “[t]he use of residential care should be limited to cases where such a setting is specifically appropriate, necessary and constructive for the individual child concerned and in his/her best interests.”⁹⁴ The phrase “limited to” suggests that residential care should be considered only when all other options have failed to serve the child’s best interests.

Among the plethora of *institutional* options, the Guidelines offer guidance for facility preference. They state that “[w]hile recognizing that residential care facilities and family-based care

⁸⁹ *Id.* ¶ 11, at 4.

⁹⁰ *Id.* ¶ 3, at 2.

⁹¹ *See id.* ¶ 11–23, at 4–5.

⁹² *Id.* ¶ 5, at 3.

⁹³ *Id.* ¶ 21, at 5.

⁹⁴ *Id.*

complement each other in meeting the needs of children, where large residential care facilities (institutions) remain, alternatives should be developed in the context of an overall deinstitutionalization strategy, with precise goals and objectives, which will allow for their progressive elimination.”⁹⁵ Here, the Guidelines prioritize certain types of residential childcare models over others, promoting “family based care,” like SOS Children’s Villages,⁹⁶ over “large residential institutions.”⁹⁷ Most importantly, the Guidelines suggest that these “large residential care facilities” be eliminated as part of a deinstitutionalization strategy,⁹⁸ which would seem to exclude from a BID one potential setting that could serve in the child’s best caregiving interests.

Furthermore, foster care and adoption are not accentuated in the Guidelines. The first reference to foster care is as a form of alternative care that appears to fall after kinship care but before residential care in the preferred hierarchy.⁹⁹ The Guidelines define foster care as, “alternative care in the domestic environment of a family other than the children’s own family”¹⁰⁰ With respect to adoption, the Guidelines suggest that institutional care should be used as a precursor to adoption, indicating that “[f]acilities providing residential care should be small and be organized around the rights and needs of the child, in a setting as close as possible to a family or small group situation” and “to provide temporary care and to contribute actively to the child’s family reintegration or, if this is not possible, to secure his/her stable care in an alternative family setting, including through adoption”¹⁰¹ Indeed, adoption as a permanent alternative childcare solution is discouraged and should be pursued “only after efforts to determine the location of his/her parents, extended family or habitual carers have been

⁹⁵ *Id.* ¶ 23, at 5.

⁹⁶ See *Who we are* SOS CHILD. VILLAGES, <https://www.sos-childrensvillages.org/our-work> (last visited Feb. 19, 2021).

⁹⁷ See G.A. Res. 64/142, *supra* note 37, ¶ 21, at 5.

⁹⁸ *Id.* ¶ 23, at 5.

⁹⁹ *Id.* ¶¶ 29(c)(i)–(iv), at 6.

¹⁰⁰ *Id.* ¶ 29(c)(ii), at 6.

¹⁰¹ *Id.* ¶ 123, at 18.

exhausted.”¹⁰²

Taken collectively, the Guidelines import the following spectrum of childcare options: biological parents, kinship care, foster care, family-based institutional care, large residential facilities, and adoption. While the Guidelines emphasize the family—biological parents and then kinship care—as preferred caregivers, the ultimate goal in any placement determination is for the child to “live in a supportive, protective and caring environment that promotes his/her full potential”¹⁰³ and “to ensure[] the child’s safety and security, and must be grounded in the best interests and rights of the child”¹⁰⁴ Here, the Guidelines concede that the decision-making process must use the best interest standard to determine the optimal caregiving environment. It is not clear, however, how a best interest determination can reflexively assign a preference to one particular setting or caregiver over another.

VI. BEST INTERESTS OF THE CHILD

The BIC principle emerged as the standard in American adoption law in the mid-1800s.¹⁰⁵ Best interests’ determinations (BID) are formal processes conducted with the involvement of public authorities and professional decision-makers.¹⁰⁶ The objective of the BID is to reach a decision that safeguards the rights of the child and promotes well-being, safety, and development.¹⁰⁷ Decision-makers weigh and balance all relevant factors, considering all the rights of the child, the obligations of public authorities, and the service providers toward the child.¹⁰⁸ Best interests determinations are carried out when the issues at stake are expected to have significant implications on the short

¹⁰² *Id.* ¶ 152, at 21.

¹⁰³ *Id.* ¶ 4, at 2.

¹⁰⁴ *Id.* ¶ 6, at 3.

¹⁰⁵ Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. & FAM. STUD. 337, 347–48 (2008).

¹⁰⁶ UNHCR GUIDELINES, *supra* note 18, at 23, 67.

¹⁰⁷ *Id.* at 23–24.

¹⁰⁸ *See id.* at 23.

and long-term welfare of the child.¹⁰⁹

The different elements considered in an assessment and determination of the BIC may appear contradictory. Potential conflicts are solved on a case-by-case basis.¹¹⁰ The right of the child to have best interests taken as a primary consideration means that the child's interests have the highest priority. A larger weight is attached to what serves the child *best*: the possibility of harm outweighs other factors; the child's right to be brought up by her or his parents is a fundamental principle; a child's best interests can generally best be met with her or his biological family, except where there are safety concerns; the survival and development of the child are generally ensured best by remaining in or maintaining close contacts with the family and the child's social and cultural networks; matters related to health, education, and vulnerability are important factors; and continuity and stability of the child's situation are important.

The BIC standard is a modern and fundamental concept in the determination of child welfare. Discussion of the principle since the adoption of the CRC often refers to the provision in Article 3 of the Convention.¹¹¹ As a significant feature in the adjudication of custody, family relations, and juvenile justice, the principle gained more prominence after the adoption of the CRC.¹¹² Consequently, this has placed a requirement for States to take every possible effort to ensure a coordinated action and decision, directly and indirectly, affecting children that comply with the principle of the BIC.¹¹³ Advocacy on the utilization of the CRC, and the BIC principle as the basis for providing international protection to children, is more common today than it was at the beginning of the 21st century. In the context of deinstitutionalization and family reunification, the prevailing belief is that children enjoy greater short and long-term outcomes when reared within the confines of a family (preferably

¹⁰⁹ *See id.* at 67.

¹¹⁰ *See id.* at 33.

¹¹¹ *See id.* at 20.

¹¹² *See id.* at 42–44.

¹¹³ *See id.* at 17.

biological) unit.¹¹⁴

A generally accepted definition of the BIC standard is non-existent in international law. In the UNHCR Guidelines on Determining the Best Interests of the Child, the term was broadly defined as the well-being of a child.¹¹⁵ The phrase generally refers to the deliberation undertaken in deciding what will serve a child best. In this calculus, decision-makers consider several factors related to the circumstances of the child.¹¹⁶ However, the phrase as provided under the CRC denotes much wider key players than domestic judges, including executive, administrative, legislative, and any other judicial bodies.¹¹⁷ At its best implementation and application, a collaborative process will assure that a child's best interests are maintained.

Article 3 of the CRC expressly provides that the deliberation of the BIC should consider the rights and duties of parents, legal guardians, or other legally responsible persons.¹¹⁸ As such, state parties are encouraged to take appropriate legislative and administrative measures to ensure that these requirements are fulfilled.¹¹⁹ Under this principle, a decision-maker has the duty to analyze the BIC or to give a child's interest a primary consideration above other interests when deciding on any child-related issue.¹²⁰ Generally, the BIC principle is flexible because what is considered "best interests" for one child may not be so for another.

The consideration of a child's best interests shall also involve their rights recognized nationally or internationally where applicable.¹²¹ A child's best interests might differ from one situation to another, and a group of children's interests may vary from one group to another. Furthermore, culture and religion may have some influence on what constitutes the

¹¹⁴ *Id.* at 71–72.

¹¹⁵ *Id.* at 14.

¹¹⁶ *Id.* at 14–15.

¹¹⁷ *Id.* at 15; see CRC, *supra* note 14, art. 3(1).

¹¹⁸ CRC, *supra* note 14, art. 3(2).

¹¹⁹ *See id.*

¹²⁰ *Id.*

¹²¹ UCHRC GUIDELINES, *supra* note 18, at 15.

interests of a child.¹²² A decision concerning custody rights between parents and international adoption, for instance, may depend on different sets of factors.¹²³ As a standard of international law, the concept is a form of protection beyond the traditional precept, and it can further evolve as the result of State practice in implementing and applying the principle in a respective jurisdiction.

The best interests rule is not about the outcome *per se*, but the process of determination (i.e., the BID).¹²⁴ According to the UNHCR, a BID “describes the formal process designed to determine the child’s best interests for particularly important decisions affecting the child, that require stricter procedural safeguards . . . [and] involves decision-makers with relevant areas of expertise, and balances all relevant factors in order to assess the best option.”¹²⁵ The interests of the child are to be assessed and weighed as part of a process in applying a rule or procedure.¹²⁶ This principle does not command that a decisionmaker decide everything in complete agreement with a child’s best interests.¹²⁷ If a decision is to cause greater impact on children, greater emphasis on the requirement of making the BIC as a primary consideration should be made.

A. *Institutional Care*

Research interest in the developmental consequences of extreme deprivation in infancy began in the 1930s and 1940s.¹²⁸ Early studies documented the adverse effects that long-term institutional care had on young children’s emotional, social, and

¹²² CRC, *supra* note 14, arts. 14, 30.

¹²³ *See id.* art. 21.

¹²⁴ *See generally* UCHRC GUIDELINES, *supra* note 18, at 47–79 (outlining the crucial parts of the BID procedure, such as setting up the BID, collecting information, balancing competing rights in making a decision, informing the child and follow-up measures, keeping records, and reopening a BID decision).

¹²⁵ *Id.* at 23.

¹²⁶ *Id.* at 67.

¹²⁷ John Tobin, *Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children?*, 33 MELB. UNIV. L. REV. 579, 588 (2009).

¹²⁸ René A. Spitz, *Hospitalism: An Inquiry into the Genesis of Psychiatric Conditions in Early Childhood*, 1 PSYCHOANALYTIC STUDY CHILD 53, 54 (1945).

cognitive development,¹²⁹ with researchers claiming that children were compromised because of early institutionalization.¹³⁰ While methodological limitations with these studies precluded generalization, more recent social science literature suggests that “[c]hildren exposed to institutional care do not receive the type of nurturing and stimulating environment needed for normal growth and healthy psychological development” compared to non-institutionalized counterparts.¹³¹ In sum, orphanage care is an unsatisfactory option for young children who cannot remain with their own families. Empirical findings suggest a wide array of negative outcomes.¹³² Youth living in group homes or institutions “t[ake] more risks, ha[ve] more threats to achievement, and ha[ve] poorer peer influences” than their non-institutionalized counterparts.¹³³ “Compared with a primary placement in foster homes, group care for young children results in less stability, lower rates of adoption, and a greater likelihood of remaining in care.”¹³⁴ Residential caregivers make far greater use of inappropriate and ineffective techniques of control than special foster parents, while children’s homes are less child-oriented than the special foster homes.¹³⁵ Being reared in an institution generally increased the risk of pervasive social dysfunction in adult life,¹³⁶ while “children who had spent at least the first 2

¹²⁹ William Goldfarb, *Effects of Psychological Deprivation in Infancy and Subsequent Stimulation*, 102 AM. J. PSYCHIATRY 18, 32 (1945).

¹³⁰ See Marinus H. van IJzendoorn et al., *Children in Institutional Care: Delayed Development and Resilience*, MONOGRAPHS SOC’Y RSCH. CHILD DEV., Dec. 21, 2011, at 8, 12, for a discussion on the types of impairments and dysfunctions of children who have experienced early institutionalization.

¹³¹ *Id.* at 8.

¹³² *E.g.*, Mary Dozier et al., *Institutional Care for Young Children: Review of Literature and Policy Implications*, 6 SOC. ISSUES & POL’Y REV 1, 1 (2012); Sandra J. Altshuler & John Poertner, *The Child Health and Illness Profile-Adolescent Edition: Assessing Well-being in Group Homes and Institutions*, CHILD WELFARE J., May–June 2002, at 495, 495.

¹³³ Altshuler & Poertner, *supra* note 132, at 495.

¹³⁴ Jill Duerr Berrick et al., *Group Care and Young Children*, 71 SOC. SERV. REV. 257, 257 (1997).

¹³⁵ See Matthew Colton, *Careers of Children: A Comparative Study of the Practices of Residential and Foster Careers*, 6 CHILD. & SOC’Y 25, 25 (1992), for a comparison of special foster practices and residential caregiving practices.

¹³⁶ See Mark Zoccolillo et al., *The Outcome of Childhood Conduct Disorder: Implications for Defining Adult Personality Disorder and Conduct*

years of their life in residential care were likely at age 16 to have more social and emotional problems . . . and more disruptions in their lives” than other children.¹³⁷

The current analysis of childcare in Armenia begins with the widely held assumption that, *all things being equal*, children raised within a non-institutionalized setting have better long-term outcomes than children reared in residential care facilities, including group homes, orphanages, or special boarding schools. The challenge, however, is empirically and philosophically disentangling the variables that must be assessed in a BID. Proponents of deinstitutionalization and family reunification¹³⁸ incorrectly assume that all children should be reared by, or reunified with, families, under all circumstances. Not only is this generalization without empirical support, but it effectively compromises the case-specific analysis that the BID embodies. If the BID requires a careful analysis of all childcare environments and alternatives, there should be no assumptions made about setting prior to undertaking the analysis. Instead, a careful examination of all relevant variables and alternatives must be assessed prior to making any child-specific recommendation. To better analyze the impact of the BIC principle internationally, the child protection and residential care system in Armenia is explored below.

VII. CHILD PROTECTION IN ARMENIA

In Armenia, there are two primary types of state/government-funded residential institutions: orphanages and special boarding schools.¹³⁹ As a practical matter, the

Disorder, 22 PSYCH. MED. 971, 971 (1992), for a study conducted on young adults in areas of work, romantic and social relationships, and criminality who have spent a majority of their childhood in group homes.

¹³⁷ Jill Hodges & Barbara Tizard, *IQ and Behavioural Adjustment of Ex-Institutional Adolescents*, 30 J. CHILD PSYCH. PSYCHIATRY 53, 69 (1989).

¹³⁸ See, for example, HUMAN RIGHTS WATCH, *supra* note 36, at 2, 10, which makes recommendations to the Armenian Government in favor of deinstitutionalization and family reunification.

¹³⁹ *See id.* at 14. It is important to distinguish between state and private institutions in Armenia. Human Rights Watch only examined state institutions, a significant flaw in their methodology given the variety of private residential childcare institutions that exist in Armenia. ZULFIYA CHARYEVA ET

distinctions between them are marginal. Children are ultimately received into a residential care institution (RCI) because they have no living family (i.e., are natural orphans) or their biological family is unwilling or unable to care for them (i.e., are social orphans).¹⁴⁰ The former are wards of the state and, barring foster care or adoption, must be institutionalized until at least the age of 18.¹⁴¹ Parents of social orphans retain legal rights over their children but have temporarily ceded those rights to the RCI.¹⁴²

As a practical matter, children under the age of 18 taken into one of these institutions typically reside there perpetually.¹⁴³ In rare circumstances, children return home for weekend visits.¹⁴⁴ These furloughs aside, the RCI is the primary residence for these institutionalized children unless family reunification, foster care, or adoption (domestic or international) is facilitated. “A high majority of institutionalized children are social orphans, with family problems that include poverty, domestic violence, neglect, alcohol and drug issues, and/or the risk of prostitution and human trafficking.”¹⁴⁵ It is important to

AL., ASSESSING ALTERNATIVE CARE FOR CHILDREN IN Armenia 38 (2018), <https://www.data4impactproject.org/wp-content/uploads/2020/09/tr-18-268-1.pdf> [hereinafter ASSESSING ALT. CARE FOR CHILD. IN ARM.].

¹⁴⁰ *Society for Orphaned Armenia Relief to Celebrate its Fifth Anniversary in October*, ARMENIAN MIRROR-SPECTATOR (Sept. 27, 2010), <https://mirrorspectator.com/2010/09/27/society-for-orphaned-armenian-relief-to-celebrate-its-fifth-anniversary-in-october/#:~:text=There%20are%20two%20types%20of,unwilling%20to%20care%20for%20them>.

¹⁴¹ See HUMAN RIGHTS WATCH, *supra* note 36, at 37–38, 40, which discusses that, under Armenian law, once children turn 18, they are determined to have the legal capacity to determine where they want to live and, excluding individuals with disabilities, orphanages subsequently no longer have rights or responsibilities to them.

¹⁴² See Nanore Barsoumian, *Ending the Era of Orphanages in Armenia*, ARMENIAN WEEKLY (Aug. 15, 2012, 9:09 AM), <https://armenianweekly.com/2012/08/15/ending-the-era-of-orphanages-in-armenia/#:~:text=Around%205%2C000%20children%20in%20Armenia,at%20least%20one%20living%20parent>.

¹⁴³ HUMAN RIGHTS WATCH, *supra* note 36, at 14.

¹⁴⁴ *Id.*

¹⁴⁵ GEORGE S. YACUBIAN, JR., SOAR’S 2020 HUMAN RIGHTS PROGRAM: A FINAL REPORT 5 (2020), https://www.soar-us.org/wp-content/uploads/PDFS/Fund_Reports/Human-Rights-Program-2020-Final-

note that there are strategically located “day care centers” throughout Armenia,¹⁴⁶ which are non-residential facilities that provide social services to families to prevent institutionalization, facilitate reunification, and prevent re-institutionalization.¹⁴⁷ In Armenia, institutionalization is the last resort and is triggered only when a child’s health and safety within the family setting are compromised.¹⁴⁸

There are four categories of children in Armenia’s state RCIs: healthy children under the age of six; children with special needs under the age of six; healthy children between the ages of six and 18; and special needs children between the ages of six and 18.¹⁴⁹ Generally, unless an institutionalized child is 100% healthy in Armenia, s/he is classified as special needs. There are approximately 1,600 children housed in Armenia’s state and private RCIs.¹⁵⁰

Armenia is undertaking a program to deinstitutionalize various RCIs, either closing them permanently or transforming them into community-focused day centers.¹⁵¹ The progress made to date, however, has raised concerns from human rights organizations that the government of Armenia is not in compliance with its Conventional obligations and that the current RCI system is discriminatory.¹⁵² I respectfully disagree and maintain that the Armenian government is in full compliance with its child-focused Treaty obligations.

In February 2017, the Human Rights Watch (HRW) detailed findings from its own primary research that was

Report-1.pdf.

¹⁴⁶ See ASSESSING ALT. CARE FOR CHILD. IN ARM., *supra* note 139, at 26 n.6.

¹⁴⁷ See *id.* at 27–28, for further discussion regarding the ways in which daycare centers support families and children, such as the provision of daily food, homework help, development in sports, music, and art, parenting skills training, and psychological support.

¹⁴⁸ See HUMAN RIGHTS WATCH, *supra* note 36, at 17–18.

¹⁴⁹ YACoubIAN, *supra* note 145, at 6–7.

¹⁵⁰ *Id.* at 5.

¹⁵¹ HUMAN RIGHTS WATCH, *supra* note 36, at 87.

¹⁵² See *id.* at 2, 47.

conducted with 173 research subjects.¹⁵³ Their methodology is flawed on several levels. It is not clear from the report when the data was collected or what the study's response rate was. Equally problematic is the unit of analysis. According to the report, 173 "people" were interviewed, which included 47 children, 63 "families," and the remainder, we assume, was institutional staff.¹⁵⁴ However, it is not wholly clear who the "family" respondents were.

The abandonment of these fundamental research principles aside, the greater concern is the use of case studies as the basis for wholesale policy recommendations. "Case studies are in-depth investigations of a single person, group, event or community."¹⁵⁵ The HRW research was conducted with one aim in mind: identifying subjects whose responses and representations would highlight the perceived failings of institutionalization and RCI life in Armenia. This "ends-based" approach is enigmatic. How the sample of subjects responded across the various constructs is unknown. While one research subject, for example, may have reported "the lack of community resources" as an underlying reason for institutionalization, we have no way to know how that respondent assessed the care provided in the RCI post-institutionalization. The qualitative research approach excerpted responses from those who agreed to be interviewed, with the "findings," and thus the policy recommendations, having been predetermined.

A more enlightening and methodologically rigorous approach would have explored a variety of constructs quantitatively. Such a design would involve creating and implementing a survey, identifying research subjects (i.e., children, relatives, and staff) for possible inclusion, monitoring response rates, and presenting generalizable results.

¹⁵³ *Id.* at 12.

¹⁵⁴ See *id.*, which indicates that the families interviewed were "of children living in orphanages, living in or attending special schools, or attending mainstream schools" with no further specifications.

¹⁵⁵ Saul McLeod, *Case Study Method*, SIMPLYPSYCH. (Aug. 3, 2019), [https://www.simplypsychology.org/case-study.html#:~:text=Case%20studies%20are%20in%2Ddepth,\(e.g.%20observations%20%26%20interviews\).&text=In%20psychology%2C%20case%20studies%20are,study%20of%20a%20particular%20individual](https://www.simplypsychology.org/case-study.html#:~:text=Case%20studies%20are%20in%2Ddepth,(e.g.%20observations%20%26%20interviews).&text=In%20psychology%2C%20case%20studies%20are,study%20of%20a%20particular%20individual).

Stakeholders would ultimately know, for example, what proportion of respondents reported poor, adequate, or excellent care within their RCI or what proportion identified poverty as the primary reason for the initial institutionalization. Qualitative research designs may offer some advantages, typically in a previously unexplored research area but only as a precursor to quantitative research. The government of Armenia will be in a precarious situation if its child-care protection policies are based on case study research.

The Armenian government has proposed the following “hierarchy of placement alternatives” for children considered at risk for institutionalization. To the extent possible, reunification with a biological parent or parents is preferred.¹⁵⁶ That is, if a child can remain with at least one of his biological parents, s/he should. If a biological parent is unavailable or unwilling to rear his/her child, the child should be placed with extended biological family.¹⁵⁷ This “kinship care” approach refers to care of children by relatives or close family friends.¹⁵⁸ If kinship care opportunities are unavailable, the Armenian government would then consider a foster family.¹⁵⁹ Foster care in Armenia, however, is a relatively new phenomenon and may expose the children to a variety of dangers that almost certainly do not exist in an RCI.¹⁶⁰ Adoption of an Armenian child, either domestically or internationally, can *only* result after biological parents have relinquished their rights to the child permanently.¹⁶¹ Because of the stigma attached to raising someone else’s child in Armenia, *intranational* adoption is rare,

¹⁵⁶ HUMAN RIGHTS WATCH, *supra* note 36 at 19, 87–88; ASSESSING ALT. CARE FOR CHILD. IN ARM., *supra* note 139, at 19.

¹⁵⁷ ASSESSING ALT. CARE FOR CHILD. IN ARM., *supra* note 139, at 45.

¹⁵⁸ *Id.*

¹⁵⁹ *E.g.*, SAVE THE CHILDREN, DEVELOPMENT PERSPECTIVES OF FOSTER CARE IN ARMENIA: RESEARCH ANALYSIS RESULTS 4 (2013), https://resourcecentre.savethechildren.net/node/7961/pdf/armenia_foster_care_study_final1.pdf.

¹⁶⁰ See *id.* at 17, for examples of certain dangers that can and do occur to children in the Armenian foster care system.

¹⁶¹ HUMAN RIGHTS WATCH, *supra* note 36, at 92. To be eligible for adoption, a child’s biological parents must permanently relinquish their parental rights. *Id.*

¹⁶² while international adoption could separate a child from his/her nationality and birth culture permanently. The next alternative to foster care and adoption that the Armenian government is *considering* is the creation of children's villages or group homes,¹⁶³ where a smaller number (i.e., no more than eight) children are housed together in a "family-like" setting.¹⁶⁴ The last alternative is the RCI.

These placement alternatives, however, should not be considered hierarchically. A plethora of variables must be weighed when deciding where a child should be raised.¹⁶⁵ While the BID requires that the biological family be given primary preference, the primary consideration should be where the child will have his/her basic human needs met.¹⁶⁶ Moreover, the hierarchy assumes that all RCIs are identical, offering the same quality of "institutionalized" care. This is a misguided assumption, particularly in Armenia, where there is such diversity among the state and private RCIs that house orphaned children.¹⁶⁷

¹⁶² See YACOUBIAN, *supra* note 145, at 10.

¹⁶³ To date, no government-funded "group homes" have been opened in Armenia even though plans have been made to facilitate this change. Gayane Abrahamyan, *Armenian Orphans*, BEARR TRUST, <https://barr.org/regional-news/armenian-orphans/> (last visited Feb. 3, 2021); see also ASSESSING ALT. CARE FOR CHILD. IN ARM., *supra* note 139, at 38 (indicating such group homes are funded only through private organizations).

¹⁶⁴ See *Small group homes, are not just a place to live, they give children a sense of love and belonging*, UNICEF (Aug. 8, 2018), <https://www.unicef.org/northmacedonia/stories/small-group-homes-are-not-just-place-live-they-give-children-sense-love-and-belonging>.

¹⁶⁵ See, for example, ASSESSING ALT. CARE FOR CHILD. IN ARM., *supra* note 139, at 23, which notes that the availability of care options and their locations play a role in the determination of placements; and UNHCR GUIDELINES, *supra* note 18, at 67–76, which highlights the various competing rights in making best interest decisions regarding placements, such as the full range of the child's rights, the views of the child, the views of family members and others close to the child, safety as a priority, the importance of the family and of close relationships, nurturing the development needs of the child, and balancing the interests of the child with rights of others.

¹⁶⁶ See CRC, *supra* note 14, art. 9(1); UNHCR GUIDELINES, *supra* note 18, at 67.

¹⁶⁷ See ASSESSING ALT. CARE FOR CHILD. IN ARM., *supra* note 139, at 5, 11, 25, 32, 37, 41, for a discussion on the various disparities amongst state and

Private residential orphanages include, for example, the Our Lady of Armenia (OLA) Center in Gyumri, which houses approximately 25 children (primarily girls) between the ages of six and 18.¹⁶⁸ With supervision provided by the Armenian Sisters of the Immaculate Conception, an order of Catholic nuns established in the 19th century,¹⁶⁹ many would argue that the nurturing far exceeds any love and support the children could receive in their family homes. The Sisters also manage a transitional Center, which offers the opportunity for older girls who have aged out of the traditional orphanage to work and/or continue their education without being abandoned to the streets, and a day center, which works with families and children to prevent institutionalization.¹⁷⁰ The OLA model offers an alternative to a family setting where children's health and safety have been compromised.¹⁷¹

Additional private RCIs in Armenia include Mer Hoos (MH)¹⁷² and SOS Children's Villages.¹⁷³ MH, translated as "Our Hope," houses approximately 16 girls between the ages of eight and 18 and provides "a comfortable and safe home, a family environment, psychological support, family reunification services, and education support, including training in languages, social skills, community relations, arts, religion, health and life skills, and job skills."¹⁷⁴ The MH model focuses on quality, not quantity, creating a family unit within the RCI

private RCIs with regard to quality and type of services provided, general oversight and operations, specialized services to support children with disabilities, financing, leadership and governance, and informational systems.

¹⁶⁸ SOC'Y FOR ORPHANED ARMENIAN RELIEF (SOAR), 2020 ANNUAL REPORT 16 (2019), https://www.soar-us.org/wp-content/uploads/PDFS/Annual_reports/SOAR-Annual-2020.pdf; YACOUBIAN, *supra* note 145 at 16.

¹⁶⁹ See SOC'Y FOR ORPHANED ARMENIAN RELIEF (SOAR), *supra* note 168 at 9.

¹⁷⁰ *Id.* at 11.

¹⁷¹ See *About our Lady of Armenia*, OUR LADY ARMENIA, <https://olarmenia.org/> (last visited Feb. 21, 2021).

¹⁷² See *About us*, MER-HOOYS HOUSE OF HOPE, <https://www.mer-hoos.org/about/> (last visited Feb. 21, 2021).

¹⁷³ See *What we do*, SOS CHILD. VILLAGES, <https://www.sos-childrensvillages.org/our-work> (last visited Feb. 21, 2021).

¹⁷⁴ MER-HOOYS HOUSE OF HOPE, <https://www.mer-hoos.org/> (last visited Feb. 21, 2021).

and facilitating relationships between and among children who see themselves as sisters, not strangers. SOS Children's Villages offers alternative care services and family strengthening community services, as well as a wide range of educational projects and the improvement of child protection through implementation of national programs.¹⁷⁵ The SOS model is based on family-style homes in a village setting, with a house mother (or couple)¹⁷⁶ living with no more than six children in a family-focused dwelling.¹⁷⁷ The adults and children live, eat, and interact as a family, offering support, love, respect, and a sense of responsibility to each other.¹⁷⁸ Unlike the traditional RCI, the SOS model offers a lower and thus more emotionally effective parent to child ratio,¹⁷⁹ often mirroring the large family units into which these children had been born.

Even among the state RCIs, the diversity among facilities mitigates the need for deinstitutionalization. Mari Izmirlyan and Kharberd Orphanages, for example, house special needs children between the ages of six to 18.¹⁸⁰ The disabilities may be developmental, emotional, and/or physical,¹⁸¹ but these RCIs are equipped to accommodate these needs. Because of charitable assistance from organizations like the Society for Orphaned

¹⁷⁵ *About Us, SOS Children's Villages Armenia*, ARMENIAN SOS SOC'Y, <https://www.sos-kd.am/en/who-we-are/about-us.html> (last visited Jan. 29, 2021).

¹⁷⁶ *Children's Villages, SOS Children's Village Kotayk*, ARMENIAN SOS SOC'Y, <https://www.sos-kd.am/en/programs/KotaykSOS.html> (last visited Feb. 21, 2021).

¹⁷⁷ *E.g., The SOS Children's Villages Illinois Difference*, SOS CHILD. VILLAGES ILL., <https://www.sosillinois.org/about-us/sos-difference/> (last visited Feb. 21, 2021).

¹⁷⁸ *See What we do – Strengthen Families*, SOS CHILD. VILLAGES INT'L, <https://www.sos-childrensvillages.org/our-work/quality-care/strengthen-families> (last visited Feb. 22, 2021).

¹⁷⁹ ROBERT PORTER ET AL., *FUNCTION, QUALITY AND OUTCOMES OF RESIDENTIAL CARE: RAPID EVIDENCE REVIEW – EXECUTIVE SUMMARY 4* (2020), <https://www.sos-childrensvillages.org/getmedia/cfff23e5-814f-494f-97d7-652e48cafbc6/CELCIS-and-SOS-Evidence-review-residential-care-Executive-Summary.pdf>.

¹⁸⁰ WIEGNER & YACUBIAN, *SOAR 2015 ANNUAL REPORT 8* (2015), https://www.soar-us.org/wp-content/uploads/PDFS/Annual_reports/2015-SOAR-AnnualReport-Final.pdf [hereinafter SOAR 2015 ANN. REP.].

¹⁸¹ HUMAN RIGHTS WATCH, *supra* note 36, at 22.

Armenian Relief (SOAR), Mari Izmirlyan Orphanage has a physical therapy (PT) suite, an aqua therapy suite, and modern PT equipment.¹⁸² A newly installed elevator allows for children with physical disabilities to enjoy the exterior garden and play area, despite residing on the second floor of the orphanage.¹⁸³ For Kharberd, SOAR has funded a hippotherapy arena, renovated dental and medical suites, and constructed a pottery studio,¹⁸⁴ all of which contribute to the physical development of the children. Both facilities receive assistance through SOAR's Sponsorship Program, where funds are earmarked for the exclusive use of the sponsored child and through which many medical and educational needs are satisfied.¹⁸⁵

Not only do many of the children at Mari Izmirlyan and Kharberd Orphanages *need* full-time residential care, but those children whose disabilities might not be hindered by reunification would then be without the amenities currently offered within the residential setting. Their disabilities would have to be addressed by the family if reunification was facilitated. The dilemma is that the family, even if interested in rearing the children, was ill-equipped to manage the disabilities initially, which triggered institutionalization. Any mandate that reflexively opts against an RCI will thus almost certainly deprive the children of tangible advantages that a fully equipped and well-staffed institution provides and may deny the children the nurturing and emotional support that families may not be capable of, or interested in, providing.

VIII. DISCUSSION

The global community is dedicated to child protection and developing strategies to fulfill the legal obligations required under conventional international law. Because of the prevalence of RCIs in Armenia, questions have been raised about whether

¹⁸² See SOAR 2015 ANN. REP., *supra* note 180, at 14, 18.

¹⁸³ See SOC'Y FOR ORPHANED ARMENIAN RELIEF, 2017 ANNUAL REPORT 15, 20 (2017), https://www.soar-us.org/wp-content/uploads/PDFS/Annual_reports/SOAR-Annual-2017_final.pdf [hereinafter SOAR 2017 ANN. REP.].

¹⁸⁴ SOAR 2015 ANN. REP., *supra* note 180, at 16–18.

¹⁸⁵ See SOAR 2017 ANN. REP., *supra* note 183, at 13–14, for an allocation of funds.

the government is fully compliant with generally accepted principles of childcare protection. The BIC standard, which permeates multiple global Conventions, is without a formal definition. As such, a clear and precise understanding of the BIC concept remains elusive, to the point that it is subject to competing interpretations. When the “best interests” of children are addressed, human rights advocates, researchers, government officials, and policymakers should be primarily concerned with identifying and fulfilling essential needs, helping children grow physically, intellectually, and socially, and developing their capabilities to the maximum extent possible.

The most pressing issue in childcare protection is where and under whose supervision a child should be raised. This question is addressed in the context of domestic child custody determinations, where parents are pitted against one another to determine physical custody of biological children. Internationally, biological parents and extended family are often unable or unwilling to rear their own children and thus must rely on social systems for assistance.

I would argue that a BID should first articulate and then follow a covenant of parental and social institutional responsibilities to children’s essential needs. Primary among these responsibilities is to ensure that children are loved, respected, educated, and shielded from conflict, abuse, and violence. This covenant would consist of general humanitarian principles and those international Conventions to which Armenia is a signatory State. The starting point of such a covenant is the enumeration of the essential needs of children. Physical needs, like attention, food, warmth, sleep, health, rest, exercise, education, and fresh air, are perhaps the easiest to identify. Psychological, social, moral, and spiritual needs are slightly more ambiguous, yet no less essential.

That children require such an extensive array of “needs” overwhelmingly suggests that a BID not preclude the possibility of an RCI. By definition, a case-by-case analysis requires stakeholders to evaluate *all available alternatives* before determining what residential setting is truly in a child’s best interests. Policymakers in Armenia would be ill-advised to

dismiss all potential options, including the RCI, simply because of an artificial hierarchy that fails to distinguish between types of residential facilities. Indeed, failing to examine the plethora of residential options would contravene international law and the BIC standard Armenia's government is required to apply.