THE RIGHT OF THE CHILD TO FAMILY IN INTERNATIONAL AND COMPARATIVE PERSPECTIVE (THE EXAMPLE OF RUSSIAN FEDERATION).

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Abstract.

In spite of an interest to the topic of the child's right to family demonstrated by the international community in the recent years there is no common definition of the right of the child to family: its content, corresponding obligations of the state and the guarantees it encompasses. Certain provisions of international law allow formulating these concepts and clarifying their meaning which is done in the present paper. It also addresses the regulation of the child's right to family in Russia as a model of the post-socialist country in transition to market economy in light of international standards and identifies the directions the legislation and policies of this country should develop in order to provide full realization of this right.

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Introduction.

In the recent decade different research materials and program documents of international organizations working in the sphere of children's rights protection more and more frequently make references to the right of the child to family. This concept is usually applied in the context of the rights of children without parental care and in the present time attracts a broad attention of both international governmental organizations and civil society (this interest is demonstrated, *inter alia,* by the process of elaborating the most comprehensive international document on children without parental care and their right to family environment: the draft UN Guidelines on the alternative care of children). Such tendencies could not help affecting the public opinion and policies of the post-socialist countries, in particular, members of the former USSR which are gradually undertaking transformation of their traditional childcare patterns to models more appropriate for realization of the child's right to family in accordance with international standards and recommendations. These processes are most vividly demonstrated by the example of Russian Federation where the situation with abandoned children and family separations remains critical since the early 1990-s.

In spite of the interest to this topic of international and Russian community there can hardly be found any definition of the right of the child to family: its content, corresponding obligations of the state and the guarantees it encompasses. There is no right to family as such in international human rights documents. But there are a lot of provisions of international law, both binding and not, which refer to family and can be understood as human rights. As the present paper attempts to demonstrate, these provisions constitute a complex institution of the general right to family; and another, similar but more extensive set of provisions – the right of the child to family.

Among the researches and experts in children's rights the child's right to family is usually understood as the right to be provided with family type of substitute care when the child's parents do not comply with their parental duties (for example, this kind of approach is undertaken by Geraldine Van Bueren in her extensive research on international children's rights[1]), or even more narrowly, as the right to be fostered or adopted when being deprived of parental care[2]. A similar narrow approach is common for Russian child protection specialists[3]. Within the topic of the child's right to family some experts may also consider preventive measures to avoid child's separation with his/her biological parents.[4] However, no separate comprehensive analysis of the content and elements of this right has yet been undertaken. The lack of clarity in this issue deprives all references to the child's right to family of its legal meaning.

So, the purposes of the present paper are to define what guarantees and respective state's obligations can be understood as the right to family and the right of the child to family; to elaborate further what international standards constitute the right to family in respect of children without parental care for whom this right is especially crucial; and to trace the realization of the right of the child to family in Russia as a model of the post-socialist country in transition in light of international framework for this right. I will also formulate the recommendations for the development of Russian legislation and policies in order to ensure their compliance with international regulation of the child's right to family.

In the first chapter I will address the regulation of the right of the child to family on international level. I will, first, identify an approach to family in international jurisprudence and try to single out the elements of the general right to family as provided by international

[1] See: Geraldine Van Bueren, *The International Law on the Rights of the Child*, Martinus Nijhoff Publishers, 1994.
[2] See: Nayak, Nina P. The Child's Right to Grow Up in a Family: Guidelines for Practice on National and Intercountry Adoption and Foster Care. Bangalore, India. 1997.
[3] See, e.g.: Право ребёнка на семью и семейное окружение: Сборник статей. М., 2002. С. 5./*The Child's Right to Family and Family Environment:* Collection of Articles. Moscow, 2002. Available at: http://www.npf.ru/childrens-rights-family/ru/ (last visited: 3 September 2007).
[4] See, e.g.: SOS Kinderdorf-International. *A Child's Right to Family: Family-Based Child Care*. Position Paper, 2005.

human rights law. Then, I will try to define the content and components of the right of the child to family. Finally, I will identify the standards for providing the right to family for children without parental care in respect of each form of their protection stipulated by international law.

In the second chapter I will examine the regulation and realization of the child's right to family in post-soviet country on the example of Russia. First, I will address the historical background for the state regulation of this right; then, touch upon its contemporary legislative consolidation and the practical situation with it. In the second and third subchapters I will assess the basic steps of guaranteeing the child's right to family, from preventing family separation to ensuring the child's well-being in different forms of substitute care, looking at their legislative regulation and practice in various regions of Russia. At the same time, I will identify the basic shortcomings of Russian childcare system preventing it from compliance with international standards and formulate recommendations in this direction.

The first chapter will be primarily based on the analysis of international normative documents, both binding and not, and research materials by experts and practitioners in the sphere of child rights. For the second chapter I will use, apart from the legislation of Russia, literature on child protection and official statistical data, also opinions and commentaries of the child protection specialists of the Ivanovo region (the head of the Commissions on Minors' Affairs, the head of the Ivanovo guardianship agency, social protection workers, Children's Rights Ombudsman etc.), reports of the Ivanovo child protection services and also personal experience of work in the Ivanovo regional Children's Rights Ombudsman's office. I will also use the materials prepared by other non-governmental organizations of Russia, such ad an alternative NGO report to the UN Committee on the Rights of the Child, and drafts of legislation which were not ultimately adopted.

Chapter I. International Regulation of the Right of the Child to Family.

1. The Family and the Child's Right to Family in International Law: Background, Content and Possible Interpretations.

A. The Concept of Family and Right to Family in the Contemporary International Jurisprudence.

There is no right to family as such among the fundamental human rights recognized by the contemporary legal doctrine. However, numerous provisions of international documents concerning family leave no doubt about the existence of a complex institution protected by human rights law which can be considered as the right to family. In the present section I will briefly examine the understanding of family in international jurisprudence and the scope of the right to family as can be derived from the basic human right instruments.

The Universal Declaration of Human Rights in its article 16 (3) and the International Covenant on Civil and Political Rights in article 23 define family as "the natural and fundamental group unit of society"[5]. This abstract provision hardly allows to make any conclusions either about the definition of family as subject to international legal order or about the scope of its regulation. The only starting point in the concept of family, thus, may be its indication as a "group unit", i.e., a certain community of people. Historically family was recognized and supported by the state ideology in almost every country as a procreative unit. That is, traditional family represents a unit of man and woman with children. However, the concept of family is certainly broader in almost all jurisdictions: a few relatives living together or a married couple without children were always too

[5] See: *The Universal Declaration of Human Rights*, 10 December 1948. Adopted and proclaimed by the United Nations General Assembly resolution 217 A (III). Available at: http://www.un.org/Overview/rights.html (last visited: 11 September 2007); *International Covenant on Civil and Political Rights*, 16 December 1966. Adopted and opened for signature, ratification and accession by the United Nations General Assembly resolution 2200A (XXI). Available at: http://www.ohchr.org/english/law/ccpr.htm (last visited: 11 September 2007).

recognized as a family for the purposes of family law. Nowadays the term of family has become all the more broad and unclear: it sometimes encompasses also homosexual couples, unmarried couples etc. Besides, the conception of family and its legal recognition varies significantly depending on a culture: a single woman with one child is a typical family unit for Europe and, for example, Russia; a polygamous family is legal in most countries of the Muslim world; and, for instance, in rural areas of Africa the concept of family presumes a significant number of people linked together by both close and quite remote kinship (extended family). Thus, international law not accidentally fails to provide for a single definition of family, and it may seem that it leaves an interpretation of this concept at a full discretion of domestic jurisdictions.

However, in some situations an understanding of family in international legal order may run counter to its legal definition in national legislation. For example, the European Court of Human Rights (ECtHR) in the case of Marckx v. Belgium found a violation of the right to family life in a situation where an illegitimate child was not recognized by the state as a child of his/her mother, i.e., they were not legally recognized as a family in national law[6]. A similar situation may also arise in defining a range of persons with childcare responsibilities in the context of international instruments on child rights. For example, numerous provisions of the UN Convention on the Rights of the Child (hereinafter the CRC) refer to parents of the child endowing them with certain rights and duties towards him or her[7] which may run counter to national laws, for instance, failing to recognize such rights and obligations in respect of an unmarried spouse. Also, a broader interpretation of family than a national one may be required in the framework of art. 9(4) of the CRC which provides an obligation of the state to inform a child's family member about his/her parents'

[6] See: Marckx v. Belgium. ECtHR, [1979]. 2 EHRR 330.
[7] See: *Convention on the Rights of the Child*, 20 November 1989. Adopted and opened for signature, ratification and accession by the United Nations General Assembly resolution 44/25. Available at: http://www.unhchr.ch/html/menu3/b/k2crc.htm last visited: 11 September 2007).

whereabouts: a national legislation may not provide such a duty or provide it in respect of only a limited range of persons. The list of such possible inconsistencies may be continued.

So, it may seem from the examples mentioned above that the international law's approach to the concept of family may be broader than a national one but can hardly be narrower. This is specifically confirmed, *inter alia*, by the UN Human Rights Committee which stresses that the concept of family should be given the broadest possible interpretation[8]. It can be stated consequently that since no uniformity can be achieved in understanding of family in international law, there is no need to formulate a universal concept of it; rather, every particular issue of legal regulation requires its own approach to the conception of family with the most possible flexibility and based on general framework of fundamental human rights. For example, when an object of regulation is the support of family by the state, the primary understanding of family would probably be as of the procreative unit (at least potentially). When it comes to the child's right to family, the UN Committee on the Rights of the Child gives the following explanation: "When considering the family environment, the Convention reflects different family structures arising from various cultural patterns and emerging familial relationships. In this regard, the Convention refers to various forms of families, such as the extended family, and is applicable in a variety of families such as the nuclear family, re-constructed family, joint family, single-parent family, common-law family and adoptive family"[9]. Apparently, this means that the concrete conception of family applicable to the case should be defined according to the domestic jurisdiction but may be construed more broadly according to the best interests of the child stipulated by art. 3 of the CRC.

[8] See: Geraldine Van Bueren, *The International Law on the Rights of the Child*, Martinus Nijhoff Publishers, 1994. P. 69.

[9] Committee on the Rights of the Child, *Report on Children Without Parental Care*. Fortieth Session, General day of discussion/ CRC/C/153, 17 March 2006. Available at: http://64.233.183.104/search?q=cache:O4wd59yl19MJ:www.ohchr.org/english/bodies/crc/docs/discussion/recommendations2005.doc+CRC+report+fortieth+session+on+Children+Without+Parental+Care&hl=ru&ct=clnk&cd=1&gl=ru (last visited: 11 September 2007)

So, having defined an approach to family in contemporary international law, the concept of the *right* to family becomes all the more vague. As it has been mentioned above, no provision of any international instrument contains this right as such. However, references to family in international human rights law are quite frequent: they may appear in different contexts and touch upon different areas of regulation. In the present paper, thus, I will understand the "right to family" as a complex legal institution consisting of a number of rights which are linked to family and may be related to the conception of *human rights*.

This institution, due to the specificity of its subject, is worth tracing a separate history in human rights jurisprudence. A crucial role of family as of the main procreative unit as well as of the economic "cell" of the society was traditionally highly estimated in all countries, at least in public ideology if not in the state policies. However, the concept of family in the context of *right*, assuming a number of state's obligations towards this specific entity, is a rather recent approach. The very word "family" was not mentioned at all in such first human rights documents as the French Declaration of the Rights of Man (1789)[10], Bill of Rights of the American Constitution (1791)[11] etc.; and, interestingly, even in the French Declaration of the Rights of Women and Female Citizen (1791) by Olympe de Gouges[12], although family was traditionally regarded as the sphere of female self-determination. The explanation to this can lie in the traditional dichotomy of public and private spheres typical to the original human rights jurisprudence, which will be discussed below, as well as in the lack of recognition of the collective entities as the possessors of rights in traditional human rights doctrine: the latter interpretation commonly understood as the doctrine of collective rights has been accepted relatively recently and is usually referred

[10] See: "Declaration of the Rights of Man and of the Citizen" in *The Constitution and Other Select Documents Illustrative of the History of France, 1789-1907, ed. by* Frank Maloy Anderson. New York: Russell and Russell, 1908. P. 59-61.

[11] See: *Constitution of the United States of America*. Adopted by convention of States, September 17, 1787. Available at: http://www.law.emory.edu/law-library/research/ready-reference/us-federal-law-and-documents/historical-documents-constitution-of-the-united-states.html (last visited: 11 September 2007).

[12] See: Olympe de Gouges, *Declaration of the Rights of Women and Female Citizen*. Available at: http://www.pinn.net/~sunshine/book-sum/gouges.html (last visited: 11 September 2007).

to as the rights of the third generation. It would be logical to trace an analogy between the family as a collective unit endowed with human rights as a unified, single entity separate from its members and other collective units, such as, for example, minorities – the classical instance of the third-generation rights possessors, as opposed to the traditional understanding of human rights as belonging only to an individual. Therefore, it would be fair to equate the right to family in its certain aspects (e.g. family support from the state) with other third-generation rights. At the same time, several components of the right to family should be regarded rather as rights of individual family-members (e.g., right to family reunification), and from this point be equated with the special rights of certain categories (such as women, children, disabled people), which was also an achievement of the later human rights doctrine. The right to family in the context of international law, thus, seems to appear in and be connected with the latest trends in human rights jurisprudence, namely the recognition of special rights of certain categories and of the collective entities which occurred during the XX-th century, especially its second part.

B. International Regulation of the Right to Family: Legal Framework and Content.

Attempts to regulate certain family issues on the international level were made already at the end of the XIX-th century, within the first Hague Conference on Private International Law held in 1893[13]. A few conventions subsequently (in 1902) adopted by this Conference defined the rules on applicability of the law regulating some aspects of family with an international element: such as marriage, divorce and guardianship of children[14]. These instruments, however, did not contain any substantive provisions on family law since their objective was only to define an applicable jurisdiction in family matters with an

[13] See: http://www.hcch.net/index_en.php (last visited: 20 August 2007).
[14] See: The Hague Conventions of 12 June 1902 relating to the settlement of the conflict of the laws concerning marriage and relating to the settlement of guardianship of minors. Available at: http://www.hcch.net/index_en.php (last visited: 20 August 2007).

international component. It was therefore hardly possible to speak about any human rights connotations in respect of family during this period.

The first reference to family in fundamental international human rights law was made in the UN Universal Declaration of Human Rights (1948) (UDHR), and since then international regulation of family acquired a broad consolidation: the family is mentioned in different contexts practically in all major human rights instruments (besides UDHR, also in International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights[15] (ICESCR), European Convention for the Protection of Human Rights and Fundamental Freedoms[16] (ECHR) and others). Analyzing the content of these basic human rights documents three major separate tendencies in recognizing and regulating of the right to family can be traced. The first one is freedom of founding a family and equality in family relations; the second one is family privacy and state's non-interference to family life and the third one is the protection of family by the state. The first one can be derived, *inter alia*, from art. 16(1,2) of the UDHR, art. 23 (2,3,4) of the ICCPR, art. 12 of the ECHR; the second one can be traced in art. 17 of the ICCPR, art. 8 of the ECHR; the third one is reflected in art. 16 (3) of the UDHR, art. 23 (1) of the ICCPR, art. 10 of the ICESCR and art. 16 of the European Social Charter of 1996[17] (ESC).

All these provisions reflect the evolution of an approach to correlation between the state and family or, in other words, of an extent of possible legal regulation of family, and somehow represent an inherent contradiction in this regulation. Family is a group of free autonomous individuals each of whom may need protection of the state and, at the same time, a unit or association subjected to a special legal order and usually containing an

[15] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966. Adopted and opened for signature, ratification and accession by the United Nations General Assembly resolution 2200A (XXI) Available at: http://www.unhchr.ch/html/menu3/b/a_cescr.htm. (last visited: 11 September 2007).
[16] *The European Convention on Human Rights*. Adopted by the Council of Europe on 4 November 1950. Available at: http://www.hri.org/docs/ECHR50.html (last visited: 11 September 2007).
[17] The European Social Charter (revised). Adopted by the Council of Europe on 3 May 1996. ETS #163. Available at: http://conventions.coe.int/treaty/en/treaties/html/163.htm ETS #163 (last visited: 11 September 2007).

unavoidable imbalance of power (at least of parents over children). Till the second half of the XX-th century, within the spirit of liberal, individualistic interpretation of human rights, the family and the state were regarded as totally separate, even opposite spheres: the emphasis in legislative regulation of family, if there was any, was made on family privacy and non-interference by the state.[18] This certainly does not mean that family relations were not at all an object of state regulation: rules on property of family members, inheritance rules always existed in all jurisdictions. What was basically not in focus of pre-World War II jurisprudence were the human rights connotations in respect of personal relations of family members. Such an interpretation sometimes took quite absurd forms: thus, in Mary Ellen case decided in 1874 by one of the American courts the legal defense of a girl who had been ill-treated by parents had to be based on a claim that she belonged to animal species, since a cruelty to animals was outlawed and the one of parents to their children – was not[19]. As it is widely stated in feminist sociological and legal literature, such a doctrine of state's non-interference and strict separation of "private" and "public", which still has a strong effect on modern legal practice, could easily serve to support unlimited male dominance and subordination of women and children[20], thus leaving no room for their rights' protection. It is, however, undisputable that family privacy is one of the crucial elements of family rights. Balancing these contradicting approaches has a particular meaning for the protection of children *from* the family or *within* the family which will be discussed in the second section of this subchapter.

Contemporary doctrine of human rights, generally implying principles of not only state's non-intervention, but also positive action of the state to protect its citizens, places a different emphasis on regulation of family. It presupposes, as it has already been

[18] See, for example: M. A. Fineman, "What Place for Family Privacy?" in *Privacy and the Law: a Symposium Privacy and the Family*, George Washington Law review June-August, 1999; F. E. Olsen, *The Family and the Market: a Study of Ideology and Legal Reform*, Harvard Law Review, vol. 96, #7, May 1983.
[19] See: Geraldine Van Bueren, *supra*. P. xxi.
[20] See, for example: Catherine A. MacKinnon, *Disputing Male Sovereignty: on United States v. Morrison,* Harvard Law Review, November 2000; F. E. Olsen, *The Family and the Market: a Study of Ideology and Legal Reform, supra.*

mentioned, freedom of marriage and equality of spouses and the obligation of the state to protect a family. The latter provision – an achievement of the modern doctrine of the welfare state - covers a rather broad list of state's obligations varying significantly in different national jurisdictions, as well as other economic and social rights characterized by a high degree of state's discretion. This "social" or "welfare" part of the right to family in international law may include the following elements: 1) protection of mothers before and after the childbirth (art. 10 of the ICESCR) – this can imply both financial maintenance of the woman while she is not able to work and the right to health care of mother and child; 2) financial assistance to families with children (art. 10 of the ICESCR in particular sets up the state's obligation of the family's special protection while it is responsible for the care and education of dependent children); 3) providing housing and other material benefits to families, especially for young and newly married ones (art. 16 of the European Social Charter); 4) labor benefits for parents; 5) tax benefits for parents of minor children and other measures of support and 6) the state protection of children. The latter element, probably the broadest and the most controversial one, is in focus of the present paper.

Apart from these basic components or interpretations of the right to family, I think, contemporary human rights jurisprudence formulated one more very important element which can be defined as the right of family members to communicate with each other and to live together. This right follows from a broad range of international documents and the case-law of international courts and includes, on my opinion, the right to family unification/reunification, provided, *inter alia*, by the International Convention on the Protection of the Rights of All Migrant Workers[21]; the UN Refugee Convention[22]; in

[21] *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 18 December 1990. Adopted by the UN General Assembly resolution 45/158. Available at: http://www.ohchr.org/english/law/cmw.htm (last visited: 22 August 2007).

[22] *Convention Relating to the Status of Refugees*, 14 December 1950. Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V). Available at: http://www.unhchr.ch/html/menu3/b/o_c_ref.htm (last visited: 22 August 2007).

regional context, of the EU Council Directive on the Right to Family Reunification[23] etc; and a series of rights connected with child-parental relations, such as the rights of children to live and be brought up by parents and to maintain contacts with their family members, provided primarily by the Convention on the Rights of the Child (hereinafter the CRC) as well as by other international instruments concerning children's rights, and following also from the ECtHR case-law[24]. Though sometimes this right is construed by the ECtHR within the framework of the right to family privacy (i.e. non-interference to family affairs)[25], it has been so much elaborated in various legal instruments and its content so much shifted towards a positive model of protection by the state, that it now seems to go beyond the right to privacy and to get a somewhat independent meaning.

We may also mention the right to family planning as one of the aspects of the right to family. It basically implies the right to determine the number of children and may be traced in some soft-law instruments, such as, e.g., the World Population Plan of action, adopted by the 1974 World Population Conference[26], several articles of the UN Convention on the Elimination of All Forms of Discrimination Against Women[27] etc.

Thus the right to family in contemporary international human rights law encompasses a few elements reflecting the development of the legal approach to family-state relationship. Tentatively it implies five basic aspects: 1) family privacy and state's non-intervention – a principle rooted deeply in the traditional separation of public and private sphere of Western jurisprudence of the New Age; 2) freedom of marriage, free consent of

[23] *Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification*. Official Journal L 251, 03/10/2003. P. 0012 - 0018

[24] See, e.g.: Hoffmann v. Austria, ECtHR, [1993] 17 E.H.R.R. 293; Sylvester v. Austria, ECtHR, [2003] 2 FLR 210; W. v. UK, ECtHR, [1987] 10 EHRR 29 etc.

[25] See, e.g.: Berrehab v. Netherlands, ECtHR [1988], 11 E.H.R.R. 322; Mehemi v. France, ECtHR [1997] 30 EHRR 739; Nasri v. France, ECtHR, [1995] 21 EHRR 458 etc.

[26] *World Population Plan of Action from the United Nations World Population Conference*, Bucharest, August 19-30, 1974. Available at: http://www.un.org/popin/icpd/conference/bkg/wppa.html (last visited: 17 August 2007).

[27] Art. 16(e) of the *Convention on the Elimination of All Forms of Discrimination against Women*, Dec 18 1979. Adopted by the UN General Assembly Resolution #34/180. Available at: http://www.hrweb.org/legal/cdw.html (last visited: 17 August 2007).

spouses, equality of spouses etc. – the principles directed to protection of individual liberty and basic individual rights; and 3) the state protection of family – reflection of the doctrine of social, welfare state, relating to the human rights law of the latest generation. This element includes a number of state's positive obligations, in particular – protection of children, which borders on the other – fourth element of the right to family – 4) the right of family members to communication and being together; and, finally, 5) the right to family planning. Thus, the right to family in the modern jurisprudence is a complex and somehow controversial institution. Which of the elements of this legal conception constitute the right of the child to family – will be discussed below.

C. Children's Rights and Human Rights: Theoretical Background for the Child's Right to Family.

It is obvious that the right of the child to family constitutes a part of the general right to family as an institution of international human rights law, and this part is probably the biggest and the most elaborated in international law among all its other components. Thus, the general framework for the child's right to family is constituted by certain provisions of basic international human rights documents: a considerable part of such provisions concerning the right to family in general may be applied to children as well. From this point, such fundamental human rights treaties as UDHR, ICCPR, ICESC, ECHR, ESC have almost the same significance for children as for adults. However, since the very concept of children's rights has some specificities allocating them from a general human rights doctrine, the right to family for children as envisaged in these fundamental treaties has its own substantial peculiarities.

It should be remembered, at the first place, that children's rights jurisprudence of the XX century is based on the two separate, even opposite trends: libertarian, or autonomy-based, or participation model and protective model. The former one – an achievement of

the most recent human rights jurisprudence (primarily the CRC), emphasizes on the autonomy of children and grants them civil rights and freedoms traditionally envisaged in the fundamental human rights instruments (such as, for example, freedom of expression, freedom of religion etc.), including the right to participation in all decisions concerning them. The latter model endows children solely with rights to different kinds of protection and support, treating them rather as objects of legal regulation than as its subjects[28]. The second model historically prevailed in original children's rights jurisprudence: the first children's rights instruments, such as Geneva Declaration of the Rights of the Child (1924)[29] and then the UN Declaration on the Rights of the Child (1959),[30] did not contain any autonomy-based rights for children and provided only for their protection and well-being. Although the UN CRC of 1989 combined both these models, stipulating a number of civil and participation rights which can be exercised by children as independent subjects of legal regulation, the objectors of such an autonomy-based approach are still numerous[31] (in particular, one of the reasons why the CRC was not ratified in the USA were the fears of the public of too much autonomy for children[32]). And, as it is admitted by almost all of the commentators, even if the children possess certain autonomy rights, they can not be fully equated with the rights of adults: they have a limited character because of the children's intellectual and emotional immaturity. It seems that, even combining the two approaches to the children's rights conception, as it does the CRC, protection of children versus their autonomy would still be emphasized on.

[28] See: for example: Gerison Landsdown, "Children's Rights" in *Children's Childhoods: Observed and Experienced.* Ed. by Berry Mayall, The Falmer Press, 1994. P. 33-45; David Archard, *Children: Rights and Childhood*, *Liberation or Caretaking?* Routledge, 2004. P. 70-73, etc.

[29] *Geneva Declaration of the Rights of the Child*. Adopted 26 September, 1924, by the League of Nations. Available at: http://www.un-documents.net/gdrc1924.htm (last visited: 18 September 2007).

[30] *Declaration on the Rights of the Child*, 20 November 1959. Proclaimed by General Assembly resolution 1386(XIV). Available at: http://www.unhchr.ch/html/menu3/b/25.htm (last visited: 18 September 2007).

[31] See: for example: Laura M. Purdy, *In Their Best Interest? The Case Against Equal Rights for Children*. Cornell University Press, 1992; Catherine Lawy, "Autonomy and the Appropriate Projects for Children: a Comment on Freeman" in *Children's Rights and the Law*, ed. by Phillip Alston et al., Oxford University Press, 1992. P. 72-76.

[32] See: for example: S. Goonesekere, "Human Rights as a Foundation for Family Law Reform" in *The International Journal of Children's Rights*, Brill Academic Publishers, vol. 8, #2 (February 2000). P. 33-45.

So, are children's rights in their essence different from the human rights of adults? It seems that in some sense they are. While the traditional human rights doctrine proceed on the assumption of the free well and autonomy of an individual (even if the latter is acting on a way detrimental to him or her), in the case of children's rights the child's autonomy should be assessed in each case and weighed vis-à-vis their best interests. Children are legally presumed to lack a full autonomy necessary for exercising their human rights: in most of national jurisdictions persons under the age of majority are deprived of their basic civil rights (such as the right to vote, freedom of contracts etc.) and this is unlikely to be challenged by anyone. Hence, the scope of rights belonging to children and the mechanisms to ensure them (such as children's participation) should be specific. Another peculiarity of children's rights is their dependency on both the state and parents, the latter ones bearing the primary responsibility for the child and acting as his/her legal representatives. The dividing line between the "jurisdiction" of these two entities – the state and the parents – is probably the child's well-being: the former may act when the latter ones' conduct is detrimental to the child; but in practice this issue is highly controversial.

Thus, not all of the components of the right to family as envisaged in international law can be applicable to children. There is no such an element in international human rights law as the child's right to marry and found a family, even although in most countries marriage of persons under 18 is allowed under certain circumstances: both UDHR and ICCPR, as well as other universal documents refer to right to marry of the persons of a certain age which has to be ultimately defined by the state. There is no right to equality in family relations, as such of the spouses in the ICCPR: as it was mentioned above, art. 23 of the ICCPR stipulates the right to equality of spouses in the family, but no international document provides for the similar right in respect of children. Art. 12 of the CRC only allows children to express their views and have them considered. This probably means that parents unavoidably have power to direct their children's behavior but this power is subject

to the child's right to be consulted, his/her best interests and also to the rights of the CRC themselves (although with certain limitations too – for example, it is hardly disputable that parents of a small child can prevent him/her from, let's say, attending a Satanist sect, though it infringes the child's freedom of religion).

The right to family privacy of the child is even more controversial issue. The CRC in its art. 16 prohibits an arbitrary or unlawful interference to the child's privacy, family, home or correspondence. But what does privacy, especially family privacy, imply for the child? A lot of legal and sociological research is devoted to the problem of public/private dichotomy but the borders of these spheres are still an object of active debates. Some commentators propose that the borders of inviolable by the state private sphere should be defined according to the principle of personal autonomy: the state should protect the possibility of every individual for self-realization and self-development within any private community; it should neither deprive its members of such an autonomy nor allow other members to do so.[33] This quite reasonable approach, however, can hardly be fully applicable to children, since, as it was mentioned above, they do not possess the full autonomy, at least in a certain age (to say more correctly, they can possess different degrees of autonomy on different stages of their development). In respect of children the borderline between these spheres is much more eroded. According to Betina Cass, the CRC totally breaks the dichotomy between the family and the state: it disaggregates the rights of children from that of the families thus making a child an independent legal person vis-à-vis his or her parents[34]. This is, however, not absolute, too. The scope of parental rights over children, primarily concerning their upbringing, unavoidably involves some degree of coercion, as it has been discussed above, and certainly exceeds the scope of rights which one individual simply has over another one. The child is dependent on family and needs

[33] See: John Gardner et. al., *Private Acts and Personal Autonomy: at the Margins of Anti-Discrimination Law.* Mansell, 1992.
[34] See: Bettina Cass, "The Limits of the Public/Private Dichotomy: a Comment on Coady and Coady" in *Children's Rights and the Law*. Ed. by Phillip Alston et. al. Oxford University Press, 1992. P. 140-141.

family, but at the same time this makes him or her particularly vulnerable to his/her rights' violations by its members. Family privacy for a child is protected by law in situations of, for example, forceful separation of the child from parents; dictating the way of upbringing the child, requiring him or her to reveal some information about his/her family, regulating the contacts with family members etc., but at the same time the same methods may realize the state's positive duty to protect the child from his/her family. The only directive the law contains in such cases is an indication of "unlawfulness" and "arbitrariness" (art. 16 of the CRC) which must be avoided in the state's interference to family privacy. Thus, since no single way of determining the borders of the child's family privacy may be proposed because of an infinite variety of possible situations, the procedural guarantees of such an interference come to the foreground. Other principles – child's best interests and his/her right to be heard in all questions concerning him or her – should also be paramount in determining the limits where the family privacy of the child extends. As for the applicable standard, it can only be defined on case-by-case basis.

Thus, the right to found a family is not applicable to children and the right to family privacy for children has a limited character. Hence, two other elements – the right to protection and the right of communication – play the biggest role here. We may even say that the right of communication does not need to be singled out in the context of children's rights: it is basically encompassed by the rights to protection and to family privacy. Since the very institution of the child's right to family, unlike the one of an adult, is concentrated on protection, the family privacy for children as well as the right of contacts and non-separation from parents also have protective connotations. Therefore considering the right to communication separately in respect of children looses its meaning.

So, if it was pointed in the first section that the third component of the right to family was the protection of family by the state, we may say that with regard to the child this component appears as the right of the child to be protected by the state within the family.

However, in contemporary human rights law the state's protection of the child in child-family relations goes much further than this: it presupposes a number of elements specific precisely to children's rights law. I will, thus, attempt to single out those aspects of the child's right to family as provided by international law which have the broadest legal regulation and a particular significance for children's lives.

D. Legislative Framework and the Content of the Child's Right to Family.

To begin with, an applicable range of sources should be defined. Apart from general and fundamental human rights treaties there is another category of legal instruments from where the child's right to family can be derived: these are the international conventions, declarations and other documents devoted specifically to the rights of the child. By this broad category I mean all kinds of documents prepared on international, including non-governmental, level, both legally binding and not, that may serve as a source of recommendations and directions for national policies concerning some aspects of the child's right to family. While analyzing this extensive international framework for the child's right to family one can not help mentioning a remarkable feature of this area of regulation: the question in principle, especially concerning children without parental care, is in focus of rapt attention of many international non-governmental organizations working with children's rights, and is being on the agenda of several intergovernmental institutions, but only quite few - most general and basic - aspects of the child's right to family were converted into rigorous obligations for the states. As it will be shown in the second subchapter, most part of this complex institution is constituted by recommendations, guidelines, standards and other soft-law, non-binding provisions. Such a specificity of its legal nature and a high interest to this topic of both international organizations and civil society promoted a close cooperation between these two actors so that their functions have almost merged. A lot of proposals of international NGOs concerning the child's right to

family inspired and even laid a foundation for a number of the United Nations, Council of Europe and European Union documents or even were taken themselves as guidelines for national policies.[35] Therefore for the purposes of the present paper I would include in this category not only international treaties but also suggestions and guidelines prepared by international non-governmental organizations which contributed significantly to children's rights' protection in the world, such as, for example, Save the Children International, SOS Children's Villages, International Foster Care Organisation etc.

The primary position in the list of such sources belongs to the UN CRC as the most universal and comprehensive document on children's rights. The most authentic interpretation of the Convention is contained in the UN Committee's on the Rights of the Child periodic Recommendations on certain issues, commentaries on the CRC and concluding observations (CO) for initial and periodic country reports. The list of legal sources also includes the UN Declaration on the Rights of the Child of 1959; the UN Declaration on Social and Legal Principles Relating to (…) Foster Placement and Adoption of 1986 (hereinafter: the UN Declaration on Social and Legal Principles)[36]. A special role in our topic belongs to the draft UN Guidelines for the Appropriate Use and Conditions of Alternative Care for Children (hereinafter – the draft UN Guidelines) which is intended to become the most comprehensive international act on the child's right to family[37], but for the moment it has not been ultimately adopted; only its draft is available[38]. The list, then, includes a number of conventions adopted by the Hague Conference on International

[35] For example, *Quality Standards in Out-Of-Home Child Care in Europe* prepared by SOS-Kinderdorf, IFCO and FICE were taken as guidelines for European countries by the European Commission (see: http://www.quality4children.info); the UN draft guidelines on the alternative care for children were prepared by the NGO working group; the UN Committee on the Rights of the Child in its 37th session decision refers to the Inter-Agency Principles on Unaccompanied and Separated Children prepared by the Red Cross Organization (see: http://www.ohchr.org/english/bodies/crc/decisions.htm) etc.

[36] *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*, 3 December 1986. Adopted by General Assembly resolution 41/85. Available at: http://www.unhchr.ch/html/menu3/b/27.htm (last visited: 1 September 2007).

[37] See: the CRC Report on Children Without Parental Care, *supra.*

[38] See at: http://64.233.183.104/search?q=cache:vKf--olPdnYJ:crin.org/docs/DRAFT_UN_Guidelines.pdf+guidelines+for+alternative+care&hl=ru&ct=clnk&cd=2&gl=ru (last visited: 11 September 2007).

Private Law which, though were intended originally to regulate on issues of applicable jurisdiction, contain also provisions on children's rights and their enforcement, and therefore are easily blended in with the general children's rights' framework (e.g., Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption of 1993 and others). The next subcategory of sources is represented by the Council of Europe conventions and recommendations concerning the rights of the child, such as, for example, the European Convention on the Adoption of Children of 1967[39], the Committee of Ministers Recommendation on the rights of children living in residential institutions of 2005[40] etc. (the choice of the Council of Europe instruments from other regional ones is determined by the second chapter, since the country which is in focus of it - Russia – is its member). Finally, as it has already been mentioned, an important part of this framework are the documents prepared by non-governmental organizations and final statements of international conferences on the related issues, such as, for instance, the Stockholm Declaration adopted on the Second International Conference on `Children and Residential Care' in 2003[41] etc.

Numerous provisions on child-family relations contained in these documents stipulate an enormous variety of children's rights which the states are recommended to ensure. However, all of them are basically focused around a few fundamental issues. I would single out the following basic aspects of child-family relations which, in accordance with this extensive framework, should be protected by the state:

[39] *European Convention on the Adoption of Children*, adopted by the Council of Europe on 24 April 1967. ETS #58. Available at: http://www.racinescoreennes.org/english/adoption/loi/cemae58en.html (last visited: 15 August 2007).

[40] Recommendation Rec(2005)5 of the Committee of Ministers to member states on the Rights of Children Living in Residential Institutions (hereinafter: CE Recommendation on Residential Institutions). Adopted by the Committee of Ministers on 16 March 2005. Available at: https://wcd.coe.int/ViewDoc.jsp?id=835953&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75 (last visited: 15 August 2007).

[41] The Stockholm Declaration on Children and Residential Care. The second international conference on Children and Residential Care held in Stockholm on 12 – 15 May, 2003. available at: http://64.233.183.104/search?q=cache:YYqkwOG3hWcJ:www.children-strategies.org/Declaration%25202003/Stockholm%2520Declaration%2520PDF%2520english.pdf+stockholm+declaration&hl=ru&ct=clnk&cd=7&gl=ru (last visited: 15 August 2007).

- the right of the child to grow up in his/her own family unless it is impossible or absolutely contrary to his/her interests (the CRC Preamble, art. 7 para.1, art. 9 of the CRC, Decision of the UN Committee on the Rights of the Child on Children without parental care (hereinafter - the CRC Decision),[42] Principle 6 of the UN Declaration on the Rights of the Child, art. 3, 4 of the UN Declaration on Social and Legal Principles etc. This legal principle, on my opinion, implies at the first place the right not to be separated from parents unless on the conditions provided by international law. It may also imply the state's obligation to facilitate reunification if the separation occurred (e.g., art. 9(4) of the CRC, Inter-Agency Guiding Principles on Unaccompanied and Separated Children (hereinafter Inter-Agency Guiding Principles)[43] etc.). This principle has to be applied also in emergency situations (armed conflicts, natural disasters) and means that a forceful separation of children from parents should only occur as a last resort, for the compelling reason and the shortest possible time (the Committee's on the Rights of the Child recommendations[44], Inter-Agency Guiding Principles, the draft UN Guidelines etc.).

- The right of well-being within the family. A corresponding obligation of the state to support parents in their children's upbringing is provided by, *inter aila,* the CRC Preamble and its art. 18 (2,3), art. 3(2,3), art. 27(3), the CRC Report on Children Without Parental Care, UN Declaration on the Rights of the Child, CE Recommendations on Residential Institutions, CE Recommendations #R(1994)14 On Coherent and Integrated Family Policies[45], CE Recommendations #R(2003)19 On Access to Social Rights[46],

[42] Decision of the UN Committee on the Rights of the Child on Children without parental care, 37th session, 2006. Available at: http://www.ohchr.org/english/bodies/crc/decisions.htm#7(last visited: 15 August 2007).
[43] Inter-Agency, *Inter-Agency Guiding Principles on Unaccompanied and Separated Children*, January 2004. Available at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4113abc14 (last accessed 11 September 2007)
[44] See: *Implementation Handbook for the Convention on the Rights of the Child*. Fully revised edition. UNICEF, 2005. P. 285 (quoting Myanmar IRCO, ad. 69, para. 40).
[45] The Council of Europe Committee of Ministers' Recommendation (1994) 14 on coherent and integrated family policies. Available at: http://www.coe.int/t/e/integrated_projects/violence/04_key_texts/domestic.asp (last visited: 20 August 2007).
[46] The Council of Europe Committee of Ministers' Recommendation Rec(2003)19 to member states on improving access to social rights. Adopted by the Committee of Ministers on 24 September 2003

recommendations of the international non-governmental children's rights organizations[47] etc. This right may be also construed as part of the right to be brought up by parents (the first element), since such supportive measures have a primary aim to prevent separation of children from families. However, this is a rather narrow interpretation: not only native parents have the right to be supported and the support should be not limited to cases where the separation is possible. Here we may also place the right of the child to be protected from abuse and neglect within the family, stipulated, inter alia, by art. 19 of the CRC. But generally the latter right could hardly be considered within the right to family – it is rather the right to protection *from* the family which is not in focus of this paper.

- the right to be provided with an alternative care, preferably a family-type one, if the child is deprived of parental care for some reason. The legal framework for this right is quite extensive since it requires the most carefully regulated protection of the state. It is based on art. 20, 21, 25 of the CRC and includes, *inter alia,* international documents on adoption and foster care (such as, for example, the UN Declaration on Social and Legal Principles, the Hague Conventions on Intercountry Adoption of 1993 and on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions of 1965, European Convention on the Adoption of Children of 1967 by the Council of Europe, the CE Committee of Ministers' Recommendations #R(1987)6 On Foster Families[48] and others), on residential care (e.g., the CE Recommendations on Residential Institutions) and on more general issues (e.g., the CE Committee of Ministers' Resolution #R(1977)33 On the

at the 853rd meeting of the Ministers' Deputies. Available at: https://wcd.coe.int/ViewDoc.jsp?id=70043&Lang=en (last visited: 20 August 2007).

[47] See, for example: International Save the Children Alliance. *A Last Resort: The Growing Concern About Children in Residential Care*. Save the Children position on residential care. Available at: www.savethechildren.net (last visited: 20 August 2007).

[48] The CE Committee of Ministers' Recommendation # R(87)6 on Foster Families, adopted by the Committee of Ministers on 20 March 1987, at the 405th meeting of the Ministers' Deputies. Available at: www.coe.int/t/e/legal_affairs/legal_cooperation/family_law_and_children_rights/Documents/Rec_87_6.pdf (last visited: 20 August 2007).

Placement of Children[49], Inter-Agency Guiding Principles, the CRC Report on Children Without Parental Care [50], draft UN Guidelines from June 2007 etc.

- The right to have contacts with parents and other relatives if the child does not live with them (art. 9(3), art. 10(2), art. 16 of the CRC, the CRC Report on Children Without Parental Care, the CE Convention on Contacts Concerning Children, the CE Committee of Ministers' Recommendations on Residential Institutions, ECtHR case-law, e.g., Olsson v. Sweden[51] etc. This right must be provided in different situations, including those when the child is placed outside his/her biological family or in case of his/her parents' separation. It is, however, may be limited in cases when it is contrary to the child's interests or, for example, in a situation of adoption.

Thus, the child's right to family as protected by international children's rights law may be understood as: 1) the right to be brought up by parents wherever possible, 2) the right to the state's support for his/her family in order to provide his/her well-being in it; 3) the right to be placed in a caring environment when being deprived of his/her own family, and 4) the right to maintain contacts with parents and other family members. It seems that this list basically covers all provisions of international children's rights law which can be construed as included into the child's right to family. Although here the components are different from those of the general right to family as was discussed in the first sections, I think, the content of these rights in some parts coincide; only the accents should be put differently. So, the list above, on my opinion, is the one that represents the child's right to family as a complex institution of international law.

[49] The CE Committee of Ministers' Resolution (77)33 on Placement of Children (hereinafter the CE Resolution on Placement) Adopted by the Committee of Ministers on 3 November 1977, at the 277th meeting of the Ministers' Deputies. Available at: http://64.233.183.104/search?q=cache:Pu24rL0zPiYJ:https://wcd.coe.int/com.instranet.InstraServlet%3FCommand%3Dcom.instranet.CmdBlobGet%26DocId%3D659762%26SecMode%3D1%26Admin%3D0%26Usage%3D4%26InstranetImage%3D48358+Resolution+(1977)33+On+the+Placement+of+Children,&hl=ru&ct=clnk&cd=1&gl=ru (last visited: 20 August 2007).

[50] The CRC Report on Children Without Parental Care, *supra.*

[51] Olsson v. Sweden, ECtHR, [1992] 11 EHRR 259.

It is apparent that the most crucial meaning of the right to family appears when the child is deprived or at risk of deprivation of his/her family environment. There may be quite few situations when the right to family could be invoked without any linkage to potential or actual deprivation of the child of his/her family. In normal circumstances of family care most of the child's rights are exercised through his/her parents who bear the primary responsibility for child's well-being. Children who are deprived of family are so vulnerable, both legally, morally and physically, that their protection may be ensured only by the most rigorous and detailed state's obligations. Thus for children without parental care realization of right to family is the most vital and requires the most careful regulation. Therefore, in the rest part of the present paper I will look at the child's right to family only in respect of children without parental care or at risk of loosing it.

2. International Standards of the Right to Family for Children Without Parental Care.

A. The Concept of Children Without Parental Care and the Forms of Their Protection in International Law.

International children's rights law operates by two close but not analogous terms: a "child deprived of his or her family environment"[52] and a "child without parental care"[53]. Both concepts are used to determine the legal ground for the state's obligation to provide an alternative care for a child. But speaking about the child's right to alternative placement from the international law perspective, a one single term is needed to define when – after deprivation of family environment or parental care – the state has a respective obligation.

The second concept seems to be more appropriate for that. According to art. 18 of the CRC and most national jurisdictions parents bear the primary responsibility for a child

[52] Art. 20 of the UN Convention on the Rights of the Child.
[53] Para. 31 of the Draft UN Guidelines for the Appropriate Use and Conditions of Alternative Care for Children.

and are the only persons who represent his/her interest without a special authorization. Accordingly, the lack of such representation necessarily requires some legal action from the state, even in ascribing such a responsibility to the closest child's relative. The CRC's formulation – child without a family environment - probably reflects the Convention's tendency to broaden its frames in order to accommodate various national practices (for example, a situation of an extended family in some rural African areas where parental responsibility is shared among a broad range of family members, and the death of the child's parents may automatically lead to the shift of such a responsibility to another relative[54]) but it should not be construed in a way limiting the state's protective duties towards children deprived of a parental care. The Committee on the Rights of the Child corroborates this statement: it stresses that the lack of family environment means primarily the lack of parental care and implies the state's duty to seek for the child's placement in a wider family before deciding on alternative care.[55] This view is also supported by the UN Declaration on Social and Legal Principles, which provides in its Pr. 4 that: "When care by the child's own parents is unavailable or inappropriate, care by relatives of the child's parents, by another substitute--foster or adoptive--family or, if necessary, by an appropriate institution should be considered", and it is likely to be shared by most of practitioners and commentators, who commonly use the term "children without parental care".[56]

The draft UN Guidelines in para. 31 define children without parental care as "children not living with at least one of their parents, for whatever reason and under whatever circumstances". This definition does not seem perfect since the mere fact that the child lives not with his/her parents does not witness about parental care deprivation: he/she may

[54] See, for example: John Lawson Degbey, *Africa Family Structure*. Available at: http://www.jicef.or.jp/wahec/ful217.htm (last visited: 2 September 2007)
[55] See*: Implementation Handbook on the Convention on the Rights of the Child*, *supra*. P. 280.
[56] See, for example, SOS-Kinderdorf International, *Child Rights Situation Analysis: Rights-Based Situational Analysis of Children without Parental Care and at Risk of losing Their Parental Care (*Summary paper). November 2006.; UNICEF and International Social Service, I*mproving Protection for Children without Parental Care*: *a Call for International Standards*. August 2004. Available at: www.iss.org.au/documents/ACALLFORINTLSTANDARDS.pdf (last visited: 5 September 2007)
etc.

live alone or with another relative by mutual agreement and being under control and protection of his/her parents, and, vice versa, a child living with his/her parents may be deprived of their care. By this term I would rather mean the children who do not get the necessary care and protection from his/her both or the only parent for whatever reason, permanently or temporarily. This definition may cover a broad variety of situations, including the death of parents, refusal or inability to provide such care, absence of parents in the child's place of residence etc. Accordingly, the required solutions may also vary considerably. Generally they can be divided into two directions: assistance to parents and alternative placement of the child. It would not be correct, therefore, to declare that the state's obligation towards every child deprived of parental care is to provide for his/her placement with another responsible person. Sometimes, for example, in a situation when appropriate care can not be granted only because of the extreme poverty of parents, such a solution would be not only undesirable but also contrary to international legal standards.[57] The concrete forms of protection of children without parental care – both of an assistance to families and alternative placement – are regulated by national jurisdictions and differ substantially from country to country. However, international child rights law attempts to put all these forms in the framework of unified basic standards for childcare which are scattered along numerous international instruments discussed in the previous subchapter. These standards related to each form of solution will be identified below.

But before proceeding with the international standards themselves, it should be defined what types of solution for the child's deprivation of parental care are recognized and regulated by the international law. The family support is probably the type which is most widely agreed on, since it is mentioned in almost all of the documents on children without parental care. The forms of alternative placement is a more controversial issue. Art. 20 of the CRC stipulates as the placement options the following forms: foster care, adoption,

[57] See: the CRC Report on Children without parental care.

kafalah in Islamic law[58] and residential care, and also implies the priority for a child to stay in his/her family environment (extended family). The Principle 4 of the UN Declaration on Social and Legal Principles speaks about kinship care, foster care, adoption and residential care. The draft UN Guidelines single out only kinship, foster and residential care, not considering adoption as it is equivalent to parental care. Some commentators propose one term – foster care – for both kinship and professional (though not residential) care.[59] Others equate this term with formal, i.e., legally recognized childcare as opposed to informal, most frequently kinship care[60]. The differences in approaches might seem not so important at the first sight since in principle all forms of alternative care of the child are legitimate until they are in compliance with law and the child's best interests. But the difficulty is that some proposed international standards could operate only in respect of the particular type or types of care, and the lack of clarity and precise definitions in this respect may hamper the placement process contrary to the best interests of the child. For example, rigorous criteria in selecting foster or adoptive parents may be appropriate, but the similar criteria required from the next-of-kin of the child with whom he/she already has strong bonds of affection is absurd. Or, apparently, there is no need for a systematic on-going training and parental education services which are recommended for foster parents[61] for, let's say, the child's grandmother who has been bringing up the child since his/her birth.

So, the most reasonable general classification of alternative care forms in international law seems to be reflected in the UN Declaration on social and Legal Principles and should, on my opinion, be as follows: kinship care, which means all forms of care by relative or friend who is familiar to the child and usually has already some bonds of affection with

[58] *Kafalah* in Islamic law is a legal institution similar to the adoption in Western jurisprudence with the difference that in *kafalah* , unlike the adoption, the child is not entitled to use the family name nor to inherit from the family – See: Geraldine Van Bueren, *supra.* P. 95.
[59] See, for example: Nayak, Nina P. *The Child's Right to Grow Up in a Family: Guidelines for Practice on National and Intercountry Adoption and Foster Care*. Bangalore, India. 1997; International Foster Care Organization. *Guidelines for Foster Care (2006)*. Available at: http://www.crin.org/docs/IFCO-Guidelines%20for%20Foster%20Care.doc (last visited: 5 September 2007).
[60] See: UNICEF and International Social Service*, supra.*
[61] See, for example: International Foster Care Organization. *Guidelines for Foster Care*. Para. A30.

him or her; foster care meaning usually but not necessarily paid childcare in a family which is considered to be professional; adoption or *kafalah* in Islamic countries (see above) and institutional care. This division is certainly very schematic, since the CRC in art. 20(3) permits other forms of substitute care and in fact a lot of mixed forms may exist. But such a classification seems to be the most suitable for recommended standards of childcare.

So, I will try to identify the basic international standards applicable, first, to family support and prevention of family separation; then, to common principles of family separation and alternative placement and then – to every type of alternative care as has been pointed out above.

B. Family Support and Prevention of Separation.

The duty of the state to provide assistance to family with children follows from art. 18(2,3) and 27(3) of the CRC. Many international soft-law instruments emphasize on a broad interpretation of this provision: in accordance with them the state is obliged to grant such an assistance in order to avoid family separation to the biggest possible extent.[62] Even the fact of the parent's request for alternative placement of his/her child should, in the first turn, give rise to measures of support for family in its needs.[63]

The family in need, especially in danger of separation, should be provided with adequate material resources, including accommodation if needed, and necessary skills for parenting, conflict resolution, overcoming crisis, which could be done by special family education, arranging support services, such as day-care centers, youth services, teaching conflict resolution methodic, organizing information campaigns on non-violent forms of promoting discipline, providing mediation and counseling for families in crisis.[64]

[62] See, for example: paras. 33, 34, 35 of the draft UN Guidelines; para. 1.1. of the CE Resolution on Placement; paras. 644-653 of the CRC Report on Children without parental care, *supra.*
[63] Para. 1.2. of the CE Resolution on Placement; para. 45 of the draft UN Guidelines.
[64] See: paras. 34, 35 of the draft UN Guidelines; paras. 644-653 of the CRC Report on Children without parental care, *Implementation Handbook on the Convention on the Rights of the Child, supra.* P. 272; para. 2 of the CE Committee of Ministers Recommendation R(1985)4. Adopted on 26 March 1985. Available at:

Prevention of separation has to take place as early as possible. This must be ensured in particular by endowing the broadest range of individuals with the duty of reporting child abuse and neglect cases, as well as stimulating the development of widely accessible helplines and other reporting mechanisms[65]. A special training should be organized for personnel working with families, including the police forces, social workers etc. so that to ensure their knowledge of family protection methods and principles; psychological counseling should also be made available for them.[66] As far as possible, the functions of assistance to families and organizing the children's alternative placement should be combined in one body[67].

The state's support should be both general, provided to all families with children, and special, addressing particular needs of families, such as preparation for school, or a particular category of children, such as handicapped ones[68]. Assistance must be provided, as far as possible, to the extended family (not only to parents but also to other relatives)[69] and to the child-headed households where their placement has not occurred.[70] The state should also undertake measures to organize and direct local communities to play a major role in family supportive activities. In particular, multidisciplinary community protection teams including specialists from different areas working with children should be strongly encouraged.[71] Information on family services should be carefully collected and evaluated by the state in order to reassess systematically their effectiveness[72]

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http://64.233.183.104/search?q=cache:IUZqM1Y5u8EJ:www.coe.int/t/e/legal_affairs/legal_co-operation/family_law_and_children%27s_rights/Documents/recR(85)4e%255B1%255D.pdf (last visited: 2 September 2007) etc.

[65] *Implementation Handbook on the Convention on the Rights of the Child, supra.* P. 273, quoting Belize IRCO, ad. 99, para. 62.

[66] See: para. 650 of the CRC Report on Children without parental care, *Implementation Handbook on the Convention on the Rights of the Child, supra.* P. 272, quoting Macedonia IRCO, ad. 118, paras. 27 and 28.

[67] Para. 2.7 of the CE Resolution on Placement

[68] Ibid, para. 2.1.

[69] *Implementation Handbook on the Convention on the Rights of the Child, supra.* P. 273, quoting the Central African Republic IRCO, ad. 138, para. 49.

[70] Para. 38 of the draft UN Guidelines.

[71] Paras. 673, 674 of the CRC Report on Children without parental care.

[72] Ibid, paras. 681-684

I would also emphasize on the necessity for family support in cases of family violence. The specificity of such an assistance is that it is required only to some of the family members – the victims of ill-treatment, usually children and women. Special measures of assistance to the victims and sanctions for offenders can play an invaluable role in preventing the child's separation. In the developed countries in the recent times quite a lot is been doing to address the issue of family violence, both by the civil society and the governments. This broad topic is not in focus of the present paper, but I would stress the necessity to tackle this problem also in the context of family support and prevention of the children's abandonment.

C. Separation of Family.

Based on art. 9 of the CRC, the set of guarantees protecting the rights of participants in a forceful separation of the child from family is particularly crucial for the child's right to family[73]. It should be mentioned firstly that the ground for separation may be not only the deprivation of parental care, but also abuse and ill-treatment of the child standing alone (art. 9(1) of the CRC). Such children may be not deprived of parental care (though in the majority of cases both grounds are present), but the applicable rules in this case are the same as for parental care deprivation. Therefore it would not be necessary to consider the situation of ill-treatment separately.

The main governing principle here is that the forceful separation should occur only as a last resort and for the shortest possible period:[74] other alternatives, such as an assistance to family discussed above should necessarily be considered. A forceful separation may not take place for the sole reason of the family's poverty[75], parents' health

[73] The use of the word "forceful" here may seem confusing as the child's alternative placement may occur with his/her parents' or his/her own consent. But here I use the word "forceful" in order to distinguish it from cases of separation not connected with deprivation of parental care or ill-treatment of the child.
[74] See: art. 5, 7, 9 of the CRC; para. 13 of the draft UN Guidelines; para. 1.1 of the CE Resolution on Placement etc.
[75] Para. 14 of the draft UN Guidelines; para. 658 of the CRC Report on Children without parental care

status or the lack of the child's school attendance[76]. Best interests of the child stipulated by art. 3 and 9 of the CRC should be the basic guidance for every particular situation of separation. The best interest of the child in taking the decision on separation must be ensured by careful multidisciplinary assessment of the situation which should lead to elaboration of an individual plan maximally adapted to child's needs[77].

If the separation of the child from family is considered as an option, the child should necessarily be informed on the alternatives and consequences of separation; he/she must be consulted and his/her opinion should be taken into account on every stage of the process in accordance with his/her ability to understand the relevant information[78]. In many countries the legislation stipulates a certain age of the child when his/her consent is necessary for deciding the questions concerning him/her, but such a requirement standing alone would scarcely satisfy the principle of child's participation: opinion of the child should always be taken into account as far as possible[79]. Moreover, the European Court of Human Rights stresses that the child's parents should also be consulted and their views considered[80]. The mechanism of family conferences with the participation of both the child, the competent authority and the biological family is especially encouraged by the Committee on the Rights of the Child.[81]

It has already been mentioned in the previous subchapter (p. 14 (17?)) that in the process of forceful separation of the child the procedural guarantees play the major role. Art. 9 of the CRC stipulates the following requirements: separation must be decided by the competent authority (the word "competent" on the Committee on the Rights of the Child's

[76] See: *Implementation Handbook on the Convention on the Rights of the Child, supra.* P. 273, quoting the Croatia IRCO, ad. 52, para. 17.
[77] See: para. 2.19 of the CE Resolution on Placement; paras. 667-669 of the CRC Report on Children without parental care.
[78] Para. 2 of art. 9, art. 12 of the CRC; art. 4 of the European Convention on the Exercise of Children's Rights. Adopted by the Council of Europe in 25 January 1996. ETS #160. Available at: http://conventions.coe.int/Treaty/en/Treaties/Html/160.htm ETS 160 (last visited: 11 September 2007) etc.
[79] See: *Implementation Handbook on the Convention on the Rights of the Child, supra.* P. 139.
[80] See: O., H., W., B., R. v. UK. ECtHR, [1987] 10 E.H.R.R. 29–95
[81] See: para. 664 of the CRC Report on Children without parental care.

opinion means not only having a respective position but also possessing necessary skills and training[82]); the decision on separation should be subject to judicial review (the draft UN Guidelines further explain that the right of appeal should belong to parents with whom the child is separated[83]) and should be based on applicable law and procedures. The prohibition of "arbitrariness" in art. 16 of the CRC in interference to the private life implies that the decision on separation must be taken in accordance with the specific criteria and on the grounds stipulated by national law. Moreover, the process of taking such a decision should be based on common judicial guarantees: the lack of personal interest of the competent authority, the right of all parties to be heard and to be informed about the nature of the process, well-reasoning of the decision[84]. Both the child and parents have to be provided with legal representation.[85]

Apart from the guarantees in cases of the forceful separation when the child is deprived of parental care or ill-treated there are certain state's duties to prevent family separation on other grounds. The basic international obligation of the state which is a party to at least one of the two Hague Conventions[86] is to make illegal, investigate and sanction the removal or retention of the child from person who is entitled to custody over him/her (parents or guardians).[87] In the situation of emergency (armed conflicts, natural disasters etc.) the state should avoid a forceful separation of children from family; evacuation of children without parents should take place as a last resort for a compelling reason.[88]

[82] See: *Implementation Handbook on the Convention on the Rights of the Child, supra.* P. 137.
[83] Para. 48.
[84] See: *Implementation Handbook on the Convention on the Rights of the Child, supra.* P. 137; art. 3(2) of the UN Rules on the Administration of Juvenile Justice (Beijin rules).
[85] See: art. 4 of the European Convention on the Exercise of Children's Rights; Principle 8 of the UN Declaration on Social and Legal Principles; para. 48 of the draft UN Guidelines.
[86] The Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980. Available at: http://www.hcch.net/index_en.php?act=conventions.text&cid=24; the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children of 19 October 1996. Available at: http://www.hcch.net/index_en.php?act=conventions.status&cid=70. (both last visited: 2 September 2007)
[87] Ibid, art. 3 and 7 respectively.
[88] See: Inter-Agency Principles on Unaccompanied and Separated Children, supra.

Separation due to the local customs (e.g. of illegitimate children) should be considered illegal.[89]

Where the separation occurred the state is obliged to undertake measures for reunification: namely, to organize the return of children by efforts of specially designated bodies.[90] The states are also recommended to use non-custodial sentences to offenders who are the sole child carers wherever possible in order to prevent abandonment of children.[91]

D. Alternative placement: common standards.

Para. 18 of the draft UN Guidelines recommends the states that no child should be left without a legal guardian or other recognized responsible adult at any time. Representation of the child's interests by the competent organ should be provided by the state in case when the parents' representation can be detrimental to the child.[92] In cases when the decision of separation with family has been taken by the competent authority or when the deprivation of parental care occurred for objective reasons (death of parents or their absence) the child must be immediately provided with another person who would bear the responsibilities for him or her. The decision on separation should therefore be taken simultaneously with the decision on alternative placement.

All of the commentators and international documents referred to in the present chapter agree that among the forms of placement family-type care must be an absolute priority. Art. 9 of the CRC and art. 4 of the UN Declaration on Social and Legal Principles set up a kind of hierarchy of the placement types: first, the possibility for the child to be brought up in an extended family (with a relative) or a friend of parents; then an option of foster care or adoption and only in the last turn – an option of institutional care. A strong

[89] See: *Implementation Handbook on the Convention on the Rights of the Child, supra.* P. 135.
[90] Ibid, quoting Myanmar IRCO, ad. 69, para. 40.
[91] Para. 49 of the draft UN Guidelines.
[92] Principle 4 of the Council of Europe's Committee's of Ministers' Recommendation R(84)4 on Parental Responsibilities. Adopted on 28 February 1984. Available at: http://64.233.183.104/search?q=cache:-cQyqfHMhsJ:www.coe.int/t/e/legal_affairs/legal_co-operation/family_law_and_children%27s_rights/Documents/Rec_84_4.pdf+committee+of+Ministers+Recommendation+(84)4+on+Parental+Responsibilities.&hl=ru&ct=clnk&cd=3&gl=ru (last visited: 2 September 2007).

reluctance of international child rights law to institutional placement is based on the research data demonstrating detrimental effects of institutional care on children's psychological, emotional and physical development[93]. Residential or institutional care should be considered as not only a measure of the last resort but also as a temporary solution before family reunification or placement to another family[94], and the placement of infants up to 3 years old to institutions should be avoided at all as far as possible[95]. The development of residential facilities should be discouraged and limited by the state and the family-type and community care should be supported.[96]

The main guiding principle in taking the decision on alternative placement is probably an individual and careful assessment of the situation subject only to the best interests of the child. Various sources emphasize on the need for holistic multidisciplinary assessment taking into account the child's life situation, his/her original family environment, special needs, individual features of physical and mental condition[97]. In order to practically ensure an individual approach to the child, a wide array of models of care should be available[98] (instances of such models are provided, e.g., in the Appendix to the CE Resolution on Placement). Art. 25 of the CRC requires a systematic evaluation of further necessity for the child to be in an alternative placement and the draft UN Guidelines further specifies the period of every 3 months for this and the right of the child's own participation and participation of a person relevant in his/her life in this process.[99]

The child, again, must be consulted about the alternatives of placement and about all the decisions made about his/her destiny together with all other relevant actors, such as

[93] See, for example: Nicola Madge, *Children and Residential Care in Europe*, National Children's Bureau, Guilford, 1994. P. 49-50.
[94] Para. 126 of the draft UN Guidelines
[95] Ibid, para.21; para. 1.6 of the CE Resolution on Placement.
[96] Para. 161 of the draft UN Guidelines
[97] See: ibid, paras. 50-51; paras. 1.3-1.5 of the CE Resolution on Placement; para. 667 of the CRC Report on Children without parental care; International Save the Children Alliance, *supra*; SOS-Kinderdorf International, IFCO and FICE, *Quality Standards in Out-Of-Home Child Care in Europe*/ Available at**:** http://www.quality4children.info/ps/tmp/q4c_docudb/Q4C_bw.pdf (last visited: 25 August 2007).
[98] Para. 2.10 of the CE Resolution on Placement.
[99] Para. 69.

his/her biological family, professionals who know the child closely (such as school workers), social workers and the perspective adoptive\foster family.[100] A specific complaint mechanism should ensure that the actions of both the competent authorities and the alternative family\institution may be challenged by the child or people close to him/her.[101]

While being placed into an alternative family or institution the child has the right to maintain contacts with his/her parents[102] as well as with his/her former friends and neighbors[103] (this provision, however, seems arguable in respect of adoption). The ECtHR even declared that the right of contacts includes the right to take measures for reunification with the child[104] (in the present case the right of mother, but the same standard could be applied also to the right of a child). Parents should be supported in their efforts to return the child to family during all the time of placement[105]. The state bodies are recommended to ensure the child's placement in the closest possible location to his/her native community[106]. Last but not least twins and siblings should be put together as far as possible; and if they are not – their contacts should be supported and facilitated.[107]

A substitute family or institution must provide satisfaction of the child's basic physical, spiritual and emotional needs: the competent authorities should ensure that the child in an alternative care obtains necessary nutrition, clothing, housing, health care, education. He should be prepared to exercise informed choices about the questions concerning him/her and receive practical skills necessary for an adult life[108]. Any cruel

[100] See, e.g.: art. 12 of the CRC; Nayak, Nina P*, supra;* para. 2.4 of the CE Resolution on Placement; *Quality Standards in Out-Of-Home Child Care in Europe, supra*, etc.
[101] Para. 97 of the draft UN Guidelines.
[102] See, e.g., art. 8 of the CE Convention on Contact Concerning Children. Adopted by the Council of Europe on 15 May 2003. ETS 129. Available at: http://conventions.coe.int/Treaty/EN/Treaties/Html/192.htm ETS 192 (last visited: 20 August 2007); para. 1 of the CE Resolution on Placement.
[103] Para. 79 of the draft UN Guidelines.
[104] Eriksson v. Sweden, ECtHR, [1989], 12 EHRR 183. Para. 171.
[105] The CE Recommendations on Residential Institutions.
[106] Para. 77 of the draft UN Guidelines .
[107] Ibid, para. 16.
[108] Ibid, paras. 81-87; 91.

treatment including corporal punishment should be avoided in substitute care[109]. The child who has been placed in alternative care has the right to maintain his/her national, cultural or religious identity, to know his/her cultural/ethnic background, to preserve his/her name and nationality[110]. An alternative placement should provide bonds of affection with a caregiver; therefore the competent authorities should ensure stability and permanency of care as far as possible.[111] In order to satisfy these requirements the state in the person of competent authorities must make certain demands from the substitute caregivers: they have to be qualified for bringing up the child, have adequate material and living conditions and a positive family environment[112]. The substitute carers must receive a special authorization from the competent body and be subject to an on-going control by it[113].

The competent authorities themselves must also be controlled by the state and the requirements to them are even stricter: they need to be registered and licensed to arrange an alternative placement of children; they must have written policies and standards of work; they should keep records about every child's situation and the mechanism of their financing should not encourage unnecessary placement. The work of such services must be coordinated at all levels and well-cooperated with other child care bodies[114]. The staff of these organs should receive a systematic training including the one on children's rights and be provided with support services (such as a psychological aid)[115].

The process of placing the child to a substitute family\institution should take place "with utmost sensitivity and in a friendly manner"[116]. The child should in no circumstances be stigmatized or disadvantaged because of the placement under substitute care[117].

[109] Ibid, para. 94.
[110] Art. 8 of the UN Declaration on Social and Legal Principles; art. 7, 8, 14 of the CRC.
[111] Para. 1.3 of the the CE Resolution on Placement.
[112] See e.g.: *Quality Standards in Out-Of-Home Child Care in Europe, supra.* P. 35-38; 41-43; para. 56 of the draft UN Guidelines.
[113] para. 56 of the draft UN Guidelines.
[114] Ibid, paras. 71-72; 108-113.
[115] See, e.g.: SOS Kinderdorf-International. *A Child's Right to Family: Family-Based Child Care*. Position Paper, 2005.
[116] para. 78 of the draft UN Guidelines

Finally, the state is required to develop a national monitoring and evaluation mechanism for child care and placement services. In particular, it is obliged to collect data on children without parental care and their placement; assess the effectiveness of different forms of placement; evaluate the work of competent authorities; search for new forms of placement and conduct research in order to ensure maximum effect of its policies.[118]

E. Kinship and foster care.

Kinship care seems to be the least regulated by international children rights law. International standards which can be found specifically in regard of kinship child care are very few. International Reference Center for the Rights of Children Deprived of their Family and the UN Committee on the Rights of the Child propose only three guiding principles which should direct the national policies in this respect: the child welfare services must check whether children who are deprived of parental care can be placed with relatives or other adults known to them; formal and informal kinship care families should be provided with adequate financial and psycho–social assistance; and the registration, preparation, support, supervision and permanency planning systems attuned to the specific characteristics of kinship care should be established[119].

Kinship care is often mixed with informal care. Although these two terms are absolutely independent (the first one meaning that the child is brought up with his/her relatives or other persons who are closely familiar to him/her and the second one meaning taking the responsibilities of the substitute child care without a proper authorization from the state), informal care is indeed most likely to occur within the kinship child care model.

[117] Art. 2 of the CRC; para. 657 of the CRC Report on Children without parental care.
[118] See, e.g., the Stockholm Declaration on Children in Residential Care, March 2003; paras. 681-685 of the CRC Report on Children without parental care; para. 3.2 of the CE Resolution on Placement.
[119] International Social Service, *A Global Policy for the Protection of Children Deprived of Parental Care*. P. 7-9. Available at: http://www.crin.org/docs/A%20Global%20Policy%20for%20the%20Protection.pdf (last visited: 15 August 2007).

All other cases, like an unauthorized foster care or the more so adoption, would be obviously illegal, whereas informal kinship care may be recognized by the state.

Therefore it would be justifiable to point at some international requirements for informal care within this topic. So, the states are recommended to support and recognize it; to ensure legal protection for informal care arrangements and to recognize *de facto* responsibilities for child of informal caregivers as their legal guardians[120]; but at the same time to encourage informal caregivers to register and notify the competent authorities; to carry out systematic monitoring of their situation and ensure the protection of children under informal care as well as financial and other support of informal caregivers.[121] It seems that these provisions are hardly compatible with each other, but still a carefully elaborated policies can find an optimal compromise between the existence of unauthorized substitute care and the state's control over it.

As for the foster care, this type of placement which means, as it has been determined above, a family-type but somehow professional child care is regulated rather broadly. The CE Resolution on Placement proposes to encourage its development as of the best temporary solution for a child without parental care[122] (though apparently the Resolution implies by this term both foster and kinship arrangements). I would hardly agree that foster care is always optimal for the child: for example, in the USA where foster care is widespread many commentators are alarmed by the neglect of children under it and the lack of stability of care due to frequent changing of foster families[123]; but this does not witness against foster care at all; it rather requires perfecting of foster care arrangements.

[120] Paras. 17, 99, 101, 102 of the draft UN Guidelines
[121] Ibid, paras 57, 100, 103.
[122] Para. 2.13.
[123] See, e.g.: See: UNICEF and International Social Service, I*mproving Protection for Children without Parental Care*: *a Call for International Standards, supra*. P. 4.

Firstly, foster care is commonly viewed as a temporary arrangement. Therefore being in foster family should not preclude return to biological family or adoption.[124] Competent authorities should immediately plan a further permanent care for child while placing him/her into foster family[125]. The child should immediately return to his/her biological family when the conditions there normalized or on the request of parents if the child's placement was initiated by them.[126]

The decision on foster care should be made in the child's best interests and based on individual assessment, as it is stipulated by general standards on placement, but here also an individual plan determining the child's needs and specific features and the case-plan about the child's perspectives on reunification with family is desirable[127]. All questions including current problems and issues of child's upbringing should be decided together by the competent authority, his/her foster parents; biological parents and the child himself/herself according to his/her degree of maturity.[128] An involvement of biological parents is especially emphasized on: they must be provided with the right of complaint and participation in his/her child's life.[129] They should also have access to information about foster family and receive psychological counseling and support wherever possible[130].

Foster care can be arranged only by special accredited bodies or agencies being guided in their activities by adopted written policies and procedures. They should seek for, recruit, train and orient perspective foster parents and carry out an on-going surveillance of the child's situation including periodic evaluation of strengths and needs of foster family and immediate and careful investigating of reported cases of neglect and abuse by foster

[124] Art. 11 of the UN Declaration on Social and Legal Principles.
[125] Para. C14 of the Guidelines for Foster Care, *supra.*
[126] See: Nayak, Nina P.*, supra.*
[127] See: ibid, para. A16; Nayak, Nina P.*, supra.*
[128] Art. 12 of the UN Declaration on Social and Legal Principles; paras. B2-3 of the Guidelines for Foster Care, *supra.*
[129] Para. D7 of the Guidelines for Foster Care, *supra.*
[130] See: Nayak, Nina P.*, supra*

parents[131]. Their personnel should comply with the requirements of competence and high moral standards; their eligibility for job with children including the lack of criminal records in the past, motivation for job etc. should be tested before the employment.[132] The state should ensure that can not receive profits and financing beyond a common professional fees.[133] The states are also recommended that foster care agencies all over the country have a common system of standards, and that they should be regularly monitored by the state.[134]

The selecting criteria for foster parents are stricter than in general placement standards: here a lot of details on their status, material, physical and mental condition, criminal records, family environment, personal characteristics and lifestyle and even childhood experience should be assessed by the competent authorities in a special home-study report.[135] They must necessarily be approved and licensed by the competent body – informal foster care should not be permitted[136]. An important condition of foster care is a fostering agreement which is concluded between the competent authority and foster parents specifying their mutual rights and obligations.[137] Foster parents should be provided with an on-going training and psychological support.[138]

The child in foster family should be ensured a well-being by the competent authority, and the proposed standards stipulate an extensive list of needs which should be satisfied in foster care.[139] The list includes not only material, spiritual and emotional needs, but also the right to play, the right to be prepared for an adult life and the right to receive legal representation and to have his/her property rights protected. Interestingly, the ICFO Guidelines for Foster Care also recommend the list of duties that the child must be

[131] See, e.g.: paras. A19-21 of the Guidelines for Foster Care, *supra*; Nayak, Nina P.*, supra*.
[132] See, e.g., para, A17 of the Guidelines for Foster Care, *supra;* paras. 115-117 of the draft UN Guidelines.
[133] See: Nayak, Nina P.*, supra*.
[134] See: *Implementation Handbook on the Convention on the Rights of the Child, supra.* P. 283, quoting the Mali IRCO, ad. 113, para. 22.
[135] Paras. C3-9 of the Guidelines for Foster Care.
[136] Paras. 2.14-2.15 of the CE Resolution on Placement; para. C1of the Guidelines for Foster Care.
[137] Para. A9 of the Guidelines for Foster Care.
[138] Para. 2.23 of the CE Resolution on Placement; para. A30 of the Guidelines for Foster Care.
[139] Paras. B3-10 of the Guidelines for Foster Care.

endowed with in foster family[140] (which is a novelty in international law). The child should be provided with an opportunity to get acquainted with the perspective foster family in advance and the right of psychological counseling[141], apart from general participation rights. All other basic standards on placement are applicable here too.

F. Adoption.

Adoption is an institution characterized by total identification of the legal status of an adopted child with the status of a biological child. International law distinguishes two types of situation: when adoption takes place in the country where the child was born and inter-country adoption where the child is brought to another country to live with his/her adoptive parents. According to Geraldine Van Bueren, the term "inter-country", as opposed to international, is used to avoid the impression that there is a uniform type of adoption and that substantive rules exist which differ from national adoptions.[142] International law regulates both situations, but the second one is in focus of a particular attention of international organizations, and not only because of the international character of inter-country adoption but also because the latter poses numerous threats to the well-being of children. The "demand" for children in Western developed countries often exceeding the "supply" in the perspective adopter's own country acted as a stimulus to the creation of "child markets" in certain Third World countries: such "markets" often imply abduction of children from their own families or pressures put on their biological parents by threats or material incentives to give up the child.[143] The lack of control for adoptive families abroad is also a matter of great concern for public. The cases of ill-treatment or even murder of children by their foreign adoptive parents is the first category of scaring examples[144]; the

[140] Ibid, para. B2.
[141] See: Nayak, Nina P.*, supra.*
[142] See: Geraldine Van Bueren, *supra.* P. 96.
[143] See: ibid.
[144] See, e.g.: Д. Филимонов, Э. Максимова. *Рената может умереть*./Известия. 2005. 22 апр./Filimonov, E. Maximova, "Renata can die". *News,* 2005, April 22.

second one is the cases of false adoption for the purpose of exploitation, sexual abuse or other criminal activities[145]. International law aimed to prevent such situations has evolved since 1950-s and resulted in a number of instruments among which the major role nowadays belongs to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993[146] (hereinafter Convention on Inter-country adoption), the European Convention on the Adoption of Children 1967[147] regulating both inter-country and national adoptions and the UN Declaration on Social and Legal Principles 1986 mentioned above regulating also both types of adoption. Besides, art. 21 of the CRC is specifically devoted to this form of placement.

The primary consideration in adoption is, again, the best interest of the child: this principle, however, has not always been an axiom. The first Hague Convention on Adoptions of 1965 mentioned only an "interest of the child". Art. 21(1) of the CRC was the first to emphasize that the child's interest should be a "paramount consideration" which is likely to imply that the rights of biological or adoptive parents as well as possible burdensome legal formalities may not prevail over the benefit for the child. This view is shared by the UN Committee on the Rights of the Child.[148]

One of the first CRC requirements is that adoption should be authorized by the competent authorities of the state on the basis of applicable law and procedures and taking into account all the relevant and reliable information[149]. Experts also specify that the states should permit adoption arrangements only by the governmental bodies or by agencies specially authorized by the Government and prohibit direct adoption (between biological

[145] See, e.g.: *Implementation Handbook on the Convention on the Rights of the Child, supra.* P. 295, quoting the Russia RCO, ad. 110, para. 43.
[146] The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption. Available at: http://www.hcch.net/index_en.php?act=conventions.text&cid=69 (last visited: 20 August 2007).
[147] I will not touch upon the provisions of this Convention in the present section, since Russia – the country examined in the second chapter – is not a party to it.
[148] See: *Implementation Handbook on the Convention on the Rights of the Child, supra.* P. 296.
[149] Art. 21(1) of the CRC.

and adoptive family)[150]. They also recommend the list of qualifications which the adoption agencies should correspond (such as competence, multidisciplinary staff etc.) and emphasize on the need for periodic surveillance for them by the state.[151] In respect of inter-country adoption these requirements are even more elaborated.[152] International instruments particularly stress on the prohibition of improper gain by the adoption agencies[153] (all that goes beyond "costs and reasonable professional fees"[154]) since the "black market" in this area is especially probable.

As an adoption has the most profound legal effects from all other forms of child placement, an important issue in adoption procedure is obtaining all the necessary consents. These are, firstly, the consent of biological parents or other persons with parental responsibilities (subject to some exceptions such as deprivation of parental rights). In respect of inter-country adoption it is further specified that the consents should be given voluntarily and without inducement[155]. As for the consent of the child, although it is not always required, providing all necessary information to him/her, consultation and taking his/her views into account where his/her maturity allows is necessary in each case.[156] A psychological and social counseling to biological parents wishing to give up the child for adoption and for the child herself/himself is highly recommended.[157]

Other legal requirements in adoption process reflected in international law are the ability of perspective adopters to create a proper and caring environment for the child. The duty to provide the best environment for the child from all placement options is on the adoption agencies[158], and this must be ensured by the detailed home-study of the adoptive

[150] See: Nayak, Nina P., *supra.*
[151] See: ibid.
[152] Art. 10, 11 of the Convention on Inter-country Adoption.
[153] See: art. 21d of the CRC; art. 20 of the UN Declaration on Social and Legal Principles.
[154] See: Nayak, Nina P. *The Child's Right to Grow Up in a Family, supra.*
[155] Art. 4 of the Convention on Inter-country Adoption.
[156] Art. 4(d) of the Convention on Inter-country Adoption; *Implementation Handbook on the Convention on the Rights of the Child, supra.* P. 296.
[157] Art. 15 of the UN Declaration on Social and Legal Principles; Nayak, Nina P., *supra.*
[158] Art. 14 of the UN Declaration on Social and Legal Principles.

family reflecting data about their personalities and material condition (see the section on foster placement above), as well as by the condition of prior close contacts of perspective adopters with the child.[159] Moreover, the well-being of the child in adoptive family must be ensured by an on-going monitoring of the child's situation for a certain period after the adoption. Surprisingly, international documents do not provide for such a requirement (certain duties of the state are stipulated only in respect of inter-country adoption and only if it "*appeared* to the state that the adoption is not in the child's best interest"[160] – emphasis added), but this principle is widely agreed on among commentators.[161]

A controversial issue in adoption standards may be a clash between the principles of secrecy traditionally inherent to this institution with the adopted child's right to know his/her identity and maintain contacts with his/her biological family following from art. 7 of the CRC. On my opinion, the secrecy of adoption may require deviation from the art. 7 principle, but the Committee on the Rights of the Child is likely not to share this view[162].

A few words should be said about the peculiarities of inter-country adoption. Generally, inter-country adoption is permitted only if the child cannot be properly cared for in his/her country of origin[163]: so, the alternatives of placement within the country must be considered in the first turn. The level of legal protection of the child in inter-country adoption must be not lower than in national one[164]. Legality of adoption must be ensured in both countries[165]. The Convention on Inter-country Adoption further specifies the checklists of requirements which must be satisfied in the country of origin and in the receiving country in order to declare an inter-country adoption legally valid[166]. This

[159] Nayak, Nina P.*, supra.*
[160] Art. 21 of the Convention on Inter-country Adoption.
[161] See, e.g.: International Save the Children Alliance*, supra;* Nayak, Nina P., *supra.*
[162] See: Para. 41 of the CRC Concluding Observations on the Third Periodic Report of the Russian Federation. CRC/C/15/Add.274, 30 September 2005
[163] Art. 21b of the CRC; art. 17 of the UN Declaration on Social and Legal Principles.
[164] Art. 21e of the CRC.
[165] Art. 23 of the UN Declaration on Social and Legal Principles.
[166] Art. 4, 5 of the Convention on Inter-country Adoption.

Convention establishes a detailed mechanism of cooperation of both states through specially designated authorities in order to ensure child's protection in adoption process.

G. Residential/Institutional Care.

By this term I mean a substitute care taking place in special institutions under supervision of professionals. The difficulty with this definition is that transforming such institutions into more family-type units could mix this form of placement with foster care. Thus, these two types of alternative care are not completely separate; rather, they should be considered as two extreme points of one continuum.

Traditional institutional placement is understood as formal, depersonalized care by big institutions. This type of substitute care is, as it was mentioned above, strongly opposed by international child rights law. The basic recommendation to the states in this respect is to make efforts towards gradual deinstitutionalization by running down big institutions, creating smaller home-type units within them with less but more trained and more permanent staff.[167] Generally, institutional care should be considered as a temporary solution of the last resort (see section on alternative placement above). Since children in institutions are particularly vulnerable, a special attention should be paid to satisfaction of their needs and protection of their rights stipulated by the CRC, such as freedom from torture and ill-treatment; freedom of expression and religion; preservation of cultural identity; privacy; dignity; non-discrimination; right to education and vocational training; health care etc[168]. Rigorous requirements to staff of institutions and adequate conditions of their work including salary rate and systematic training[169] as well as a continuing independent monitoring with sanctioning of violations by the state bodies[170] must ensure

[167] See, e.g.: para. 2.16 of the CE Resolution on Placement; the CE Recommendations on Residential Institutions etc.
[168] See, e.g.: the CE Recommendations on Residential Institutions; International Save the Children Alliance, *, supra;* SOS Kinderdorf-International. *A Child's Right to Family: Family-Based Child Care, supra.* P 10.
[169] Para. 2.21 of the CE Resolution on Placement; the CE Recommendations on Residential Institutions.
[170] The CE Recommendations on Residential Institutions.

this protection. A special emphasis is made on prohibition of all violent forms of treatment including corporal punishment[171] (here the standards should be more rigorous than in family care because of particular vulnerability of institutionalized children). An important safeguard is a complaint mechanism which should be accessible to all institutionalized children and followed by a proper reaction of competent authorities together with informing children on their rights, in particular provided by the CRC.[172] Institutional care must ensure an individual approach to every child considering his/her special needs and personal features; an individual plan of development in respect of every child is highly recommended.[173] Children should be provided with an opportunity to contact with the surrounding community and should necessarily keep in contact with their biological families unless it is manifestly contrary to their best interests[174]. Siblings must be placed together. In deciding on the location of institution preference should be given to the child's own community[175]. States are also recommended to provide an after-care support for a transition period to adult life including assistance in housing, seeking for a job etc.[176] All other general safeguards, such as child's participation in all questions concerning him or her, ensuring their survival, well-being and development etc. are also applicable here.

H. Concluding Remarks: Private Arrangements Versus Public Regulation.

As it has been shown above, international law, both binding and non-binding, provides for a rather detailed regulation of the state's responsibilities towards children without parental care. However, a lot of questions are left open for national policy-makers. The basic issue, on my opinion, is, again, delimitation of spheres of private family life and the acceptable state intervention. As it has been noted above, child rights law is an area where

[171] See: I*mplementation Handbook on the Convention on the Rights of the Child, supra.* P. 283.
[172] See: ibid. P. 285, quoting Russia 2CRO, ad. 110, paras. 37-38.
[173] The CE Recommendations on Residential Institutions.
[174] Ibid, art. 9(3) of the CRC.
[175] The CE Recommendations on Residential Institutions.
[176] Ibid, I*mplementation Handbook on the Convention on the Rights of the Child, supra.* P. 285.

this delimitation is especially difficult: children are supposed to be under protection of both their family and the state, and actually both entities should bear responsibilities for them. So, where the line determining the end of parental authority for children and the beginning of the state's coercion should be drawn?

One of the shortcomings of existing international standards is, on my opinion, its assumption of the good faith of parental behaviour which is not always the case. If we take, first, the support for family in order to provide for child's well-being and to prevent family separation, it is not clear whether the support should transfer to coercion if the family rejects cooperation with the state authorities. It may happen that the child's parents do not want to change their way of life and make efforts to keep their child within the family. Should the state in this case try to impose their will on family in the name of the child's best interests (which are presumed to be keeping the child with his/her parents) or simply take the child from the family? And if the first solution is correct (as it seems from international standards), then how should the state deal with the parents' own autonomy and human rights? For example, if parents are alcohol abusers (which is a very frequent reason for family separations) the solution often may only be a forceful medical treatment of them; but an involuntary treatment of an individual is contrary to human rights. Or, if parents refuse to work and the children's material needs are not satisfied, the state may not compel them to earn their living and so on. Another issue is a parental responsibility. International standards do not provide an answer to an important question which is unavoidably faced by the child protection services: should parents be subject to sanctions for non-compliance with their parental obligations and rejecting to cooperate with support services? It is true that these questions are difficult to address for international law since they require a carefully balanced approach considering concrete situations, but some guidelines on the issue of parental responsibilities would be useful.

Another gap in considered above international standards seems to be the lack of regulation for private arrangements for child care which may not require or require a minimum of state's intervention. Although it is generally addressed in the draft UN Guidelines (paras. 104-106 recommending the states to ensure a mechanism for designating individual with a legal capacity to represent a child in parents' absence or inability to do so) none of the standards provides for a possibility of voluntary shared parental responsibilities which in fact may be very effective. There is not always the need to provide an alternative placement of the child if some parental duties cannot be performed by the child's parents: for example, if they live far from the child, another family member may be granted legal responsibilities to represent a child in common day-to-day affairs by a private agreement but with a current support and care by the child's own parents. In these cases the state only needs to ensure that an additional care of the child is not contrary to his/her interests. Thus it would be desirable to specifically point at the possibility of such mechanisms and the required level of protection of child's interests within them.

It also seems undesirable that kinship care is not singled out in adopted international standards (except for the recommendations of international NGOs). The specificity of this type of care requires its own set of standards leaving less space for public regulation than other placement forms but at the same time allowing to ensure protection of children.

It must be remembered that all of the standards considered in the present subchapter constitute a major part of the institution of the child's right to family and have to be construed respectively. It should also be noted that, apparently, in whatever situation any standard should be assessed vis-a-vis the principle of the best interest of the child. If the standard may hamper the child's best interest in a particular situation the former should not be taken as an axiom. The child's right to be provided a family in his/her best interests is a foundation on which the complex institution of international protection of children without parental care is built upon.

Chapter II. Children Without Parental Care and Their Right to Family in Russian Child Protection System in the Context of International Law.

During the last two decades a considerable part of the world is experiencing transition from the command socialist systems to the free market democratic ones. The consequences of this transition differ for each country of the former socialist camp depending on many geographical, historical, cultural and other factors. But the 70-year long existence of the common legal system and history of the former USSR could not help having a deep impact on its member states in their subsequent development.

Due to this fact a lot of similarities in child protection systems and their regulation of the right to family still can be found in the CIS countries. Their common legacy of the soviet attitude to social protection (a highly paternalistic one), widespread recourse to residential care of children with such inherent to the soviet period features as its high centralization, the lack of check and monitoring mechanisms[177] and a depersonalized approach to the child's upbringing; an inclination to punitive rather than supportive methods of dealing with family crisis etc. – all this still determines the contemporary picture of the child's right to family in the CIS countries. At the same time effects of transition from the command to market economy is one more factor making the CIS-countries child protection system similar to each other. After the USSR breakdown most of them passed through (and some of them still experience) an economic recession, increasing inequality and high poverty of masses of people[178] simultaneously with destroying an old system of social protection without offering adequate alternatives.

All these factors drawing together the CIS countries in their contemporary regulation of the child's right to family are most vividly demonstrated by the history and legislation of

[177] These features are, inter alia, mentioned by the UNICEF in the *Regional Overview of Out-of-Home Care*, available at: http://www.ceecis.org/child_protection/Reg_out_reform.htm, last visited: November 20, 2007.
[178] See, e.g.: Anton Dobronogov, *Social Protection in Low Income CIS Countries*, World Bank, 2003. P. 6-7.

Russia. For about seventy years Russia as the USSR dominant state determined the legal systems of other member states, including the regulation of family, and, as the biggest country of the Commonwealth, may serve as the best example of the transformation of the socialist child protection system to a liberal pattern. Therefore in the remainder of this chapter I will examine the situation of Russia as a model of country - the former USSR member-state in transition to more democratic forms of child protection.

1. The Family and the Child's Rights to Family in Russia: Historical Background and Legislative Framework.

A. The State Protection of Family and of the Children Without Parental Care in the History of Russia.

The legal tradition of Russia has its origin in the law of the Byzantium empire, and the first family regulations in Russia were strongly influenced by the Byzantium clerical rules.[179] During the era before Peter the Great the state regulation of family was rather limited: this sphere belonged to the jurisdiction of the church which dictated certain rules on property of family members as well as of their required behavior. In the beginning of the XVIII century during the ruling of Peter the Great an extensive codification of civil regulations was undertaken, which also touched upon the institution of family. But a high influence of clerical doctrine on this area remained untouched until the XX-th century: it determined the rigid regulation of relations between family members based on an extensive power of the head of family (the father) over the wife and especially the children[180].

The beginnings of the state protection of children without parental care in Russia are also referred by the historians to the XVIII-th century. It is accepted among experts that the first institution for abandoned children was opened in 1706 at a monastery, and the

[179] See: *Семейное право:* учебник для вузов. Под редакцией П. В. Алексия и др. М.: Юнити, 2006. С. 38./*Family Law*: the text-book for the institutions of higher education. Edited by P. V. Alexiy et. al. Moscow, Unity, 2006. P. 38.
[180] See: ibid. P. 38-45.

system of orphanages financed by state and private donations began to develop thereafter[181]. Residential institutions for abandoned children often supported by local authorities continued to exist during the XIX-th century, sometimes providing their wards with education and vocational training. The objective of these institutions was often declared as providing temporary accommodation for children before placing them to the "family of descent behavior"[182] which shows that the state undertook the duty of the child's alternative placement already in that time. However, the conditions in these institutions were so poor that, as some experts observe, the majority of children in these homes died[183].

Apparently, however, upbringing of children deprived of parental care in a substitute family could not help being a dominant form of placement in that period, because a limited number of orphanages could not be sufficient for all children in need of care. In peasantry communes, with their collective way of governance and mutual responsibility influenced by the era of serfdom, upbringing of orphans by substitute families was quite a common fact. However, the literature of this period illustrates the lack of legal mechanisms regulating the status and protecting rights of the child under substitute family care (except for the cases of outstanding cruelty), which is quite understandable considering the dominating at that time doctrine of an absolute monopoly of family over the child. Although an institution of adoption was legally regulated in the XIX century, it was understood not as the mechanism of child protection but rather as the way of protection of property of childless couples (in fact, even an adult could be adopted).[184]

After the Great October Revolution of 1917 the legislative regulation of family changed completely. Most importantly for our topic, the institute of parental power over the

[181] See: Александр Гезалов, *Дети-сироты в истории Россиu*/Alexandr Gezalov, *Children-orphans in the history of Russia.* Available at: http://www.balance.sampo.ru/release/release_04.html (last visited: 19 September 2003).
[182] See: Alexandr Gezalov, *supra*.
[183] See: See: David Tobis, *Moving from Residential Institutions to Community-Based Social Services in Central and Eastern Europe and the Former Soviet Union*, The World Bank, Washington, D.C, 2000. P. 5.
[184] See: *Family Law, supra.* P. 45.

children was abolished, and the children were recognized as the possessors of rights.[185] The Code on Marriage and Family of 1926 considered all the family problems from the point of the child's interests[186]. At the same time, the World War I and the Civil War of 1917-1920-s in Russia led to an enormous rise of the children's abandonment – their number approached to 7 million in 1922[187]. In combating this problem the state and society undertook a variety of measures which can be viewed as origins of the modern child protection system: apart from creating residential educational institutions where the children were sent, the state organized the work of admission centers which prepared children for permanent placement or promoted their reunification with families or helped in their independent employment; provided their nutrition and health care.[188] However, in spite of the variety of protective measures, as some experts notice, the social philosophy of that time insisted on benefits of the institutional system to care for these children: collective upbringing was considered to be a more effective way of raising the new Soviet citizen[189]. The work of a famous pedagogue Anton Makarenko who carried out his activities in that time with its emphasis on collective discipline and group competitiveness for abandoned children had a great impact on the subsequent child care ideology.

During the Stalinist period and the beginning of the Krushev era this ideology was promoted to the extreme. The recourse to residential care for millions of orphans who appeared at that time of terror was the main solution for such children. Boarding schools were widely used not only for hosting orphans but also for educating children with parents since this form of child care was considered to be optimal[190]. This attitude gradually changed: in the subsequent socialist era residential institutions were commonly used for

[185] See: Ibid. P. 47.
[186] See: Ibid.
[187] See: David Tobis, *supra.* P. 6.
[188] Кривоносов А. Н. *Исторический опыт борьбы с беспризорностью* // Государство и право, 2003. № 7. С. 95—97.//Krivonosov A. *Historical experience of combating child's abandonment*//The State and the Law, 2003. #7. P. 95-97.
[189] See: See: David Tobis, *supra.* P. 6.
[190] See: Ibid, P. 7.

children deprived of parental care together with such forms of placement as guardianship (usually being in fact the kinship care), adoption and some mixed forms (such as, e.g., the family children's home: some kind of foster care in a family or family-type environment).

An important aspect of child protection was the state family support policies: day care centers for children, including those working twenty-four hours, were commonly available for all families. Other social guarantees, such as free nutrition of children from disadvantaged families, centers for the so-called additional education of children, summer camps etc. also had a positive impact on liquidation of children's abandonment. A highly paternalistic system of social protection allowed the state to influence parents' behavior in socially dangerous families: for example, alcohol abusers could be sent to undergo a forceful treatment which apparently also worked for the prevention of family separation.

These protective measures, though undoubtedly very effective in a socially oriented society, however, were based on a collectivistic formalistic approach to the child upbringing and the too paternalistic view on the role of the state which had also significant negative sides. The main shortcoming of the system seems to be, again, its frequent recourse to large residential institutions in providing alternative care. A common approach to children in residential care implied the lack of attention to the child's individuality and participation rights (for example, in many "children homes" all wards had to wear the same cloth). Poor financing and the lack of respect for children's basic rights, such as dignity, privacy etc., often all the more deteriorated the picture.

During the early 90-s, when the whole country found itself in a deep economic and social crisis, this could not help having an impact on family and child protection system. Generous allocations to social care system typical for the Soviet state ceased to continue; a few children's homes were closed without offering alternatives, and the "street children" – phenomena generally unknown in the post-war socialist era – became a reality. A lot of families found themselves deprived of their jobs and could see no further opportunity to

have a stable income, and a certain part of them, not able to fight with the new circumstances, slipped into social degradation. As the UNICEF report indicates, economic transformation deprived a lot of families of the opportunity to care about their children [191]. The latter ones joined the category of the co-called "social orphans" – a term used for the children deprived of parental care whose parents are alive. According to the statistical data, for the period 1990-2000 the number of children without parental care in institutions raised twice, considering that only 10 percent of these children were real, not "social", orphans[192].

The new regime gave up the previously existing system of social protection and proposed a pure libertarian model of socio-economic relations. But in the situation of economic crisis, lack of the stable legal space and a psychological unpreparedness of people for such a radical transformation this model turned out to be a disaster for many families. A new system of family and child protection was not built yet, while an old one was broken. It seems that building such a new system is still in process nowadays, and there is still no agreement what principles it should be based on.

B. The Family and the Child's Right to Family: Legislative Regulation and Contemporary Situation in Russia.

Art. 7(2) f the Russian Constitution stipulates that: "The family, the motherhood and the childhood are under protection of the state". However, no legislative act of Russian Federation, including the Family Code, contains the definition of family: as well as the international law Russian legislation leaves this question opened. Certain attempts to

[191] See: *Анализ положения детей в Российской Федерации*. Представительство UNICEF в России. 2007. С. 83./*Analysis of the Situation of Children in Russian Federation*, UNICEF, Russia. 2007. P. 83. Available at: http://www.unicef.org/russia/ru/ru_ru_situation-analysis_170907.pdf (last visited: 3 September 2007).

[192] See: Г.И.Климантова, "О профилактике беспризорности и безнадзорности несовершеннолетних, находящихся в трудной жизненной ситуации".// СФ ФС РФ. *Детская беспризорность и безнадзорность: проблемы, пути решения.* Аналитический вестник №20 (176). Москва, 2002. С. 25./G. I. Klimantova, "On the Prevention of Neglect and Abandonment of Minors in a Difficult Life Situation" in: Council of Federation of the Federal Assembly of Russian Federation, *Child Neglect and Abandonment: Problems, Ways of Solution.* Analytical Bulletin #20 (176). Moscow, 2002. P. 25.

provide for such a definition are often made by family law experts[193], but they do not have any legal meaning in the continental law system of Russia. The family is not recognized as an independent subject of law which is highly criticized by commentators.[194] Since the lack of legal definition of family led to substantial inconveniencies in practice, primarily in the area of housing, the Russian Housing Code only attempted to define the concept of "family member" of the owner of the living quarters[195]. Not to mention this definition itself, it can be applicable solely to the area of housing regulation and can hardly have any meaning for the child's right to family, regardless of the way the latter is construed.

The right of the child to family in Russian legislation, however, is somehow stipulated. The Family Code of 1995 in its art. 54 declares the right of the child to be brought up and live in a family as far as possible, and endows guardianship agencies with the duty to provide this right for children without parental care[196]. Interestingly, the main Federal Law on child rights in Russia , "On the Basic Guarantees of the Right of the Child in Russian Federation"[197], does not mention family at all. Some regional normative acts can go even further than the Family Code: e.g., art. 8 of the Ivanovo regional Law "On the Protection of Rights of the Child" of 1997 stipulates the right to live in a family omitting the proviso "as far as possible"[198]; but referring the mechanism of enforcement to federal regulations it actually deprives this norm of any independent meaning.

In spite of the Family Code guarantee, in the recent years the question of the child's right to family has become an object of broad discussions and criticism of government in

[193] See, e.g.: *Family Law, supra.* P. 7.
[194] See, e.g.: С. Е. Бочарова, «России нужны сироты? Зачем?»/ Право ребёнка на семью и семейное окружение: Сборник статей. М., 2002. С. 5./S. E. Bocharova, "Does Russia need orphans? Why?", in: *The Child's Right to Family and Family Environment:* Collection of Articles. Moscow, 2002. P. 5. Available at: http://www.npf.ru/childrens-rights-family/ru/ (last visited: 3 September 2007).
[195] Ст. 31(1) Жилищного Кодекса РФ от 29 декабря 2004 г. №189-ФЗ. СЗ РФ, 03.01.2005, №1, ст.14/Art. 31(1) of the Housing Code of the RF.
[196] See: Семейный кодекс РФ. 29 декабря 1995 г. №223-ФЗ./СЗ РФ, 01.01.1996, №1, ст. 16
[197] Федеральный закон «Об основных гарантиях прав ребёнка в Российской Федерации». 24 июля 1998 г. №124-ФЗ./СЗ РФ, 03.08.1998, №31, ст. 3802.
[198] See: Закон Ивановской области «О защите прав ребёнка», 6 мая 1997 г. №9-ОЗ./СЗ ИО, 1997, №9(75).

Russia, especially among the practitioners working with children.[199] Different statistical sources estimate the numbers of abandoned children (children lacking appropriate parental care) for the year 2002 as varying from 1 to 5 million[200] (with the total population in Russia of about 140 million), and this figure is likely to remain similar now. The number of officially registered children without parental care is being growing every year during the last 6-7 years[201], and in 2004 amounted to about 735 thousand.[202] In the year 2003 over 440 thousand parents were sanctioned for failing to perform their parental duties[203]. An alarming tendency in the recent years has also been the slow decrease of number of children without parental care placed in a substitute family (60,8% in 2001; 59,2% in 2003 and 57,9% in 2004) with a simultaneous increase of the part of children placed in institutions (30,5% in 2003, 31,1% in 2004). Ten percent of children without parental care were not provided with alternative placement in 2004.[204] An alternative country report on Russia of NGO coalition presented to the UN CRC in 2005 as a starting point indicates the problem of a deep family crisis in Russia.[205]

It is easy to note that in most of discussions, civil society initiatives and legislative proposals where the term "the child's right to family" is used, the question is about the

[199] See, e.g.: С. Е. Бочарова, указ. соч./ S. E. Bocharova , *supra*; Право на семью: круглый стол по вопросам семейного устройства детей./*The Right to Family: Round-Table Discussion on the question of family placement of children.* Available at: http://ps.1september.ru/2001/42/6-1.htm (last visited: 3 October 2007); etc.

[200] See: В. А. Озеров, "Детская беспризорность и безнадзорность как один из факторов угрозы национальной безопасности России"// *Детская беспризорность и безнадзорность,* 2002. С. 6./V. A. Ozerov, "Child Neglect and Abandonment as One of the Factors of the Threat to Russia's National Security" in: *Child Neglect and Abandonment,* 2002, *supra.* P. 6.

[201] The latest officially available data refer to 2004.

[202] *О положении детей в Российской Федерации*. *Государственный доклад*. Составитель: Министерство здравоохранения и социального развития РФ. Москва, БЭСТ-Принт, 2006. С. 58./*On the Situation of Children in Russian Federation*. The State Report prepared by The Ministry of Health Care and Social Development of RF, Moscow, BEST-Print, 2006. P. 58.

[203] See: Альтернативный доклад российских НПО в Комитет ООН по правам ребенка: Комментарии к третьему государственному «Периодическому Докладу о реализации Российской Федерацией Конвенции о правах ребенка в 1998-2002 гг.». 10 февраля 2005 г./*Alternative country report of the NGO coalition for the Committee on the Rights of the Child*: A Commentary on the Third State Periodic Report of Russian Federation on the Realization of the CRC. 10 February 2005. P. 29.

[204] See: *О положении детей в Российской Федерации*. *Государственный доклад/ On the Situation of Children in Russian Federation*. *The State Report, supra.*

[205] See: Alternative country report, *supra*. P. 8.

family placement of children without parental care[206]. But sometimes this concept is construed as covering also certain social guarantees to families directed to prevent family separation. The most vivid example of such an approach is the proposed in 2002 draft of the law on guarantees of the child's right to family. The draft contained the state guarantee of the child's family placement, definition of family, the list of forms of alternative placement and also a series of measures of support for families with children not deprived of parental care.[207] However, it did not become a law.

It seems that all these initiatives, as well as the Family Code provision itself, have a common theoretical shortcoming: they construe the child's right to family as the right to be provided with a family in all circumstances. But these concepts should not be equated. The latter right can not be guaranteed by the state because the state is not the provider of this right, and it can not force families to undertake the duty of alternative child care. Hence, it should not be considered as right, because it can have no corresponding obligation of the state (it could be argued that the state is obliged to *facilitate* the child's family placement, but in this case the corresponding right of the child would be no more than the right of assistance in finding a substitute family). As it was attempted to demonstrate in the first chapter, the child's right to family is a complex set of standards. From this point, it may be not so necessary to adopt a special law guaranteeing this right: it would be enough to ensure the compliance of national legislation and practice with these standards.

In addition to the discussed provision of the Family Code, Russian legislation contains a developed system of normative documents which could serve at least as a basis for guaranteeing the child's right to family. The Family Code provides a detailed framework for the process of revelation, protection and placement of children without

[206] See, e.g.: ibid; Международная открытая партнерская программа «Право на семью»./International Open Partnership Program "The Right to Family", available at: http://www.good.cnt.ru/family/ConcFR.htm (last visited: 3 September 2007); the draft Federal Law "On the Guarantees of the Child's Right to Family" proposed on 21 May 2002 by the NGO "The Good Without Limits", available at: http://detirossii.narod.ru/Zakpr2.htm (last visited: 3 September 2007) etc.
[207] See: the draft Federal Law "On the Guarantees of the Child's Right to Family", *supra*.

parental care; contains the mechanisms on the child's right to be brought up by parents and guarantees for the process of separation with them, as well as of the right of contacts between family members. The legislative framework then includes the Federal Law of 1999 "On the Basis of the System of Minors' Abandonment and Delinquency Prevention"[208] addressing some issues of family support and prevention of family separation; the Federal Law of 1996 "On the Additional Guarantees for the Social Support of Children-Orphans and Children Left Without Parental Care"[209] stipulating important social benefits for this category of children etc. More concrete measures and budget allocations for the protection of children and family are, *inter alia,* stipulated by Federal Programs, among which the latest and the most comprehensive one is the Federal Program "Children of Russia" for the years 2007-2010 adopted by the Government.[210] Similar legislative measures, such as Laws, Special Programs etc. granting some additional guarantees to children and families are adopted also on regional and local level.[211]

For the purposes of the present paper it is especially important to mention that Russia is a party to basic international human rights instruments, such as certainly the UN Declaration of Human Rights, the ICCPR, ICESCR, ECHR. It has ratified the UN CRC in 1990 and thus is subject to the jurisdiction of the Committee's on the Rights of the Child.

It could be said generally that Russia has the basic legislative prerequisites for guaranteeing the components of the child's right to family as discussed in the first chapter: the child's right to be brought up by parents which is stipulated by the Family Code (though one very important element of this aspect is lacking in Russian legislation: the

[208] Федеральный закон «Об основах профилактики безнадзорности и правонарушений несовершеннолетних» . 24 июня 1999 г. №120-ФЗ./СЗ РФ,28.06.1999, №26, ст. 3177.
[209] Федеральный закон «О дополнительных гарантиях по социальной поддержке детей-сирот и детей, оставшихся без попечения родителей». 21 декабря 1996 г. №159-ФЗ./СЗ РФ, 23.12.1996, №52, ст. 5880.
[210] Постановление Правительства Российской Федерации «О Федеральной целевой программе «Дети России» на 2007-2010 годы». 21 марта 2007 г. №172./СЗ РФ, 02.04.2007, №14, ст. 1688.
[211] See, for example: Закон Ивановской области «О защите прав ребёнка»/The Law of Ivanovo Region "On the Protection of Children's Rights", *supra*; Закон Ивановской области «Об областной целевой программе «Дети Ивановской области на 2007-2009 годы», 9 января 2007 г. №8-ОЗ./СЗ ИО, 27 апреля 2007 г. №16(336) (The Law of Ivanovo Region "On the Regional Special Program " The Children of Ivanovo Region" for the years 2007-2009") etc.

right to reunification with parents for children coming from other countries, which has been repeatedly pointed at by the child protection experts[212]); the right for family support protected by a series of social benefits which will be discussed later; the right to alternative placement and the right of contacts guaranteed, again, by the Family Code. It is however clear from the statistics above that the child's right to family in Russia is far from being realized. In the next subchapters I will try to assess the mechanisms of protection of the right to family in respect of children without parental care and at risk of its deprivation in the context of international standards.

2.Family Support, Prevention of Family Separation and Organizing Alternative Placement in Russia: General Provisions.

A. Promotion of the Child's Well-Being in the Family[213].

Taking measures to provide the well-being of the child in a family through family support policies is a duty of the state and a part of the child's right to family, as it has been discussed in the first chapter. In respect of children without parental care and at risk of its deprivation this duty should be assessed in light of its role for the prevention of family separation. Though more concrete mechanisms of such a prevention will be addressed in the next section, general family policies directed to all families, regardless of their situation, also play a big role for the prevention and are worth considering them separately.

Russian system of social protection is based on: 1) insurance and non-insurance monetary donations; 2) financial allowances for certain categories of people for obtaining certain goods and services; and 3) social services for certain vulnerable groups[214]. Among the family and child support measures to the first group I would refer a series of the so-

[212] See, e.g.: Н.Кравчук, Конвенция ООН о правах ребёнка как инструмент защиты семейных прав ребёнка в России./Государство и право. 2006. №4. С. 51./N. Kravchuk, "The UN CRC as an Instrument of the Protection of Family Rights of the Child in Russia", in: *The State and the Law*, 2006, #4. P. 51.
[213] In this section I will address the state support for the child's biological family; providing the child's well-being in a substitute family will be discussed within the context of the alternative placement forms.
[214] See: *Анализ положения детей в Российской Федерации*. С. 25./*Analysis of the Situation of Children in Russian Federation, supra.* P. 25.

called “child allowances”: these are the lump-sum for the reason of child bearing or adopting a child (about 300 US Dollars); a monthly child-care allowance up to the 18 months of the child (about 55 USD) and a monthly allowance for every child in families under the level of poverty (the size of the latter allowance has been referred to the competence of the regions by the famous Federal Law #122[215] which is highly criticized by human rights practitioners[216]; and, indeed, in many regions of Russia including Ivanovo region it is equal to about 4-5 USD per month). A recently introduced family support measure has become a so-called “maternity capital”: a lump sum of about 9400 US Dollars for the birth of the second and each subsequent child which, however, can be directed only to strictly defined purposes and is given 3 years after the childbirth (so the effects of this measure could not yet be probated).

It should be noted that the above mentioned Law №122 annulled a previously existing rule of granting an addressed material assistance in the form of payment (though usually a small one) or certain natural products (such as, e.g., school materials for children) to families under the poverty level, including those with children. Now this practice can be exercised by regions according to their possibilities and will which they may not have.

To the second group of measures I would refer, *inter alia*, a partial compensation to parents of the fee for attending the non-private day-care center (“детский сад”) by their child equal to 20% for one child, 50% for the second and 70% for third; the recently introduced “maternity certificates” directed to compensate for the health care expenses in the period of pregnancy and child bearing; and compensating for certain medicines for the disabled children. A series of other benefits for the families with disabled children were also abolished by the Federal Law #122 stipulating monetary allowances instead.

[215] See: Федеральный закон от 22.08.2004 №122-ФЗ «О внесении изменений в законодательные акты РФ и признании утратившими силу некоторых законодательных актов РФ в связи с принятием федеральных законов «О внесении изменений и дополнений в Федеральный закон «Об общих принципах организации законодательных (представительных) и исполнительных органов государственной власти субъектов РФ» и «Об общих принципах организации местного самоуправления в РФ»./СЗ РФ, 30.08.2004, №35, ст. 3607.
[216] See, e.g.: Alternative country report of the NGO coalition, *supra*. P. 14.

The third group may probably include providing day-care centers for children. Unfortunately, the system of day-care institutions with the transition to new regime after the socialist era lost much in its accessibility and sufficiency: since 1990 47% of such centers were closed without proposing any alternatives.[217] In many regions no options exist for twenty-four-hour child care which may be extremely necessary, especially for single mothers working twenty-four hours. In the year 2005 about 28% of children of certain age in Russia did not attend day-care centers[218], and the Ivanovo regional practice demonstrates that this are in a big part the families who have an urgent need in them.

Other social services include providing social assistance to families under the poverty level by the social protection bodies and some educational institutions. These are primarily a psychological aid and counseling, which will be addressed more in detail in the next section. Here it should only be mentioned that such services still remain quite limited and the practice of resorting to them by families is still rather infrequent.

In the recent years an urgent need of family support measures in order to combat population decrease is often stressed by the government and some legislative measures try to address this necessity: thus, the Federal Program "Children of Russia" for the years 2007-2010 (see above) stipulates a broad complex of governmental activities in this direction. However, the situation with family support is still far from being perfect. According to the statistics, the risk of poverty in households with children is about twice bigger than among the whole population[219]. In spite of the stable economic growth in the last 5-6 years, a huge gap between the incomes of different social groups remains constant, and the number of families with children living under the poverty line was amounting to 54% in the year 2005[220].

[217] See: *Анализ положения детей в Российской Федерации*. С. 65./*Analysis of the Situation of Children in Russian Federation, supra.* P. 65
[218] See: ibid.
[219] See: ibid. P. 13.
[220] See: Alternative country report of the NGO coalition, *supra*. P. 9.

A significant negative moment in the family support system is the decentralization of competence undertaken by the Federal Law #122. The latter gave up the federal jurisdiction over the most part of social protection measures and transferred it to regions without setting any unified standards on a federal level. In particular, it gave up in favor of regions a previously existing obligation of the state to support children in a hard life situation (art. 109). As a consequence, the system of child and family protection differs significantly in various regions which leads to the discrimination of children from economically disadvantaged localities. Depriving the state by the Law #122 of any responsibility for the quality of life of children and their situation has been criticized by the Committee on the Rights of the Child which recommended to adopt and ensure effective implementation of the minimal standards for the enjoyment of rights of children[221].

Thus, the existing general family support system is far from being enough to ensure the child's well-being in a family, and this can not help having an impact on the development of "social orphanhood": separation of children with parents is most likely to occur in a socially disadvantaged family. Feeling themselves unprotected, mothers more frequently give up their children right after their birth. As UNICEF in Russia notes, since the system of support for families with disabled children is undeveloped in Russia, parents of such children often give them up right in the maternity hospitals[222]. The same may happen (and often does) with "normal" children as well. Certainly, significant efforts were taken in the last few years to address this problem (such as, e.g., the "maternity capital" program) but it seems that the state policy should be directed not so much at stimulating the population growth but rather at improving the conditions of an actual population, especially the children.

[221] Para. 10(b) of the CRC Concluding Observations, *supra.*
[222] See: *Анализ положения детей в Российской Федерации*. С. 94./*Analysis of the Situation of Children in Russian Federation, supra.* P. 94

B. Prevention of Family Separation.

The official State Report "On the Situation of Children in Russia" for the years 2003-2004 indicates the following reasons for constant increase of the "social orphanhood" in Russia: 1) a widespread social exclusion of families; 2) asocial behavior of parents (primarily alcohol abuse); and 3) the lack of mechanisms of early identification of socially dangerous families and insufficient rehabilitation mechanisms for them[223] (on my opinion, this also may be connected with a well-known sociological phenomena that asocial families with a lack of the sense of parental responsibility are more likely to have more children than the "well-off" families). The serious shortcomings of Russian system of prevention are pointed at also by UNICEF in Russia[224] and by the Committee on the Rights of the Child which in 2005 recommended Russia to "adopt a comprehensive strategy and take immediate preventive measures to avoid separation of children from their family environment (…) by providing assistance and support services to parents and legal guardians in the performance of their childrearing responsibilities, including through education, counselling and community based programs for parents"[225].

From these documents it obviously follows that prevention of family separation is one of the weakest points of child protection system in Russia. However, it would be unfair to state that this aspect is not addressed by the Russian authorities. In fact, prevention of children's abandonment is one of the major sections in the Russian system of child protection. Based on the Federal Law "On the Basis of the System of Minors' Abandonment and Delinquency Prevention" (hereinafter the Law on Prevention), this complex set of norms addresses the functions of different state and local bodies concerning the work with children in a socially dangerous situation. The Law on Prevention prescribes

[223] See: *О положении детей в Российской Федерации,* С. 58./ *On the Situation of Children in Russian Federation, supra.* P. 58.
[224] *Анализ положения детей в Российской Федерации*. С. 94-95./*Analysis of the Situation of Children in Russian Federation, supra.* P. 94-95.
[225] See: para. 39(a) of the CRC Concluding Observations, *supra*.

to the social protection bodies (more precisely to the special institutions of social work in this system), *inter alia*, to reveal minors in a socially dangerous situation and provide them with an assistance and rehabilitation (art.12(2)); to the specialized social-rehabilitation centers which will be more discussed further – to provide minors and their families with social, psychological and other support and to facilitate family reunification (art. 13(5)); to educational institutions – to help socially dangerous families in bringing up their children (art. 14(2) etc. The key role in coordinating this system is assigned to the Commissions on Minors' Affairs. These organs are attached to local and regional governments and consist of usually a multidisciplinary team of specialists – the militia (police) officers, medical workers, social workers etc. – working in the child protection sphere. Their functions are defined by the Law on Prevention and the Code on Administrative Offences of Russia and includes, *inter alia*: investigating and taking decisions on cases of administrative offences committed by minors and on cases of some minors' offences not punishable by virtue of their age; taking measures for protection of rights of minors (primarily of labor and educational rights); supervising of situation on minors in children's institutions; coordinating the work of other bodies involved in the prevention of child delinquency and abandonment etc. Some regions where the laws concerning the Commissions' functioning are adopted may endow them with additional tasks, such as, in Ivanovo region, providing minors in need of state protection with an assistance (art. 5 of the Law on Commissions).[226]

Since no unified regulations on the process of prevention of separation exist on a federal level apart from the general guidelines mentioned above, the mechanisms of prevention may vary from region to region. Ivanovo region has the following basic scheme of the prevention process which, as the child protection experts indicate, is more or less common for most of other regions: when the fact of the child's deprivation of parental care

[226] See: ст. 5 Закона Ивановской области «О комиссиях по делам несовершеннолетних и защите их прав», 9 января 2007 г. №1-ОЗ./СЗ ИО, 16.03.2007, №10(330)./

or the danger to his/her life or health[227] becomes known to competent authorities (according to art. 122(1) of the Family Code, each person to whom such facts became known is obliged to inform the guardianship agencies on this), the latter ones have to undertake measures towards his/her protection, and most commonly this measure would be placing him/her into a social-rehabilitation center for the period from 3 to 6 months. The Commission is usually informed on this and organizes the work with family with the participation of other competent subjects (specialists of the center, social protection bodies and sometimes others). The situation of family is assessed by this team and is then assisted according to an individual working plan. The family may be offered medical treatment (for example, from alcohol abuse), psychological counseling provided in certain social protection system institutions, material support by the social protection bodies, assistance in seeking the job. It may offer to provide for the child's temporary placement in institution for the period of overcoming the crisis of family. If parents refuse to cooperate within a certain period, the question of the child's alternative placement is raised. But the regional statistics indicate that absolute majority of children who undertook rehabilitation in such social-rehabilitation centers (84% in Ivanovo region in 2006) return to families.[228]

Apart from this basic scheme the support to family may be provided on the results of systematical visitation of socially dangerous families, which in most regions are registered in a special database of social protection bodies and on the application of the family members themselves (in this case they usually apply directly to social protection institutions). In some regions family support services may be created under the auspices of youth affairs bodies (as, e.g., in St-Petersburg) or by efforts of multi-sectoral projects

[227] Art. 122 and 77 of the Family Code respectively.
[228] See: Ежегодный доклад Уполномоченного (Комиссара) по правам ребёнка Ивановской области "*О соблюдении и защите прав, свобод и законных интересов ребёнка в Ивановской области в 2006 году"*. Иваново, 2007./The Child's Rights Ombudsman's (Commissioner's) of the Ivanovo Region Annual Report "*On the Observance and Protection of the Rights, Freedoms and Legal Interests of the Child in the Ivanovo Region in 2006*". Ivanovo, 2007.

providing parental education and other assistance (such project "The Young Family" existed in Ivanovo region before the adoption of the above mentioned Federal Law #122).

In several regions the work on prevention is taken more seriously. Thus, in the Republic of Carelia prevention of family crisis is organized on the early stages, in maternity clinics, children's day-care centers and includes parental education;[229] Samara region developed a broad network of social centers "The Family" of different directions: they work with the victims of family violence, alcohol abusing parents, disabled children etc. and have a big success in keeping the families together.[230] Perm region initiated creating the new prevention system based on the child support principle which includes a series of projects of family reunification and conflict resolution[231].

So, comparing the system of prevention of children's separation with family with the respective international standards as was described in the first chapter one can have an impression that the general requirements of international law in this area are, in principle, complied with. It may seem unclear, then, that the prevention system in Russia is so much criticized (see above). The reasons for inefficiency of the system, on my opinion, are the following. The main shortcoming of the Russian "prevention system" is the lack of unity in approaching the question of family support in order to prevent separation over the country[232]. The general scheme of prevention described above does not have any legislative consolidation: it is only an example of practice followed in many, but not all regions. There is no legal base for coordinated work of competent authorities directed to prevention.

[229] See: Г. Григорьева, *Республика Карелия: предотвращение и преодоление социального сиротства*./Защити меня. 1/2003. С. 40-41./G. Grigoryeva, "Republic of Carelia: Prevention and Overcoming Social Orphanhood" in *Protect Me,* 1/2003. P. 40-41.

[230] See: Светлана Нечаева, *Чтобы дети не стали сиротами*. / Уполномочен защитить: Информационный бюллетень Уполномоченного по правам ребёнка в Саратовской области, 2006, №13. С. 30./Svetlana Nechaeva, "In Order That the Children Would not Become Orphans" in: *Designated to Protect: Information Bulletin of the Child Rights Ombudsman of the Samara Region*, 2006, #13. P. 30.

[231] See: Марголина Т. И. *Профилактика социального сиротства – основа соблюдения и защиты прав детей*./Margolina T. I. *The Social Orphanhood Prevention – is the Basis for the Realization and Protection of Children's Rights*. Available at: http://uppc.perm.ru/_res/main_docs/115.doc (last visited: 2 October 2007).

[232] This problem is pointed at by many experts and human rights activists: see, e.g.: Т. Фральцова, Право ребёнка на семью: проблемы семейного устройства детей-сирот./Защити меня. 2/2005. С. 20./T. Fraltsova, "The Right of the Child to Family: the Problems of the Family Placement of Children-Orphans" in: *Protect Me,* 2/2005. P. 20; Alternative country report of the NGO coalition, *supra*. P. 11-12.

Actually, the prevention methods in most part depend on material resources, legal traditions and concrete personalities working in this sphere in the concrete locality. For example, in the Republic of Dagestan the Commissions on Minors' Affairs do not work at all[233]. Special social protection institutions aimed at supporting the family rarely exist in smaller local units; thus, for their inhabitants family services may also be not available.

Another crucial moment of the Russian "prevention system" is its simultaneous approach to the prevention of both child delinquency and abandonment; moreover, the child abandonment itself is construed in the law rather not as his/her separation with family but as the lack of control over the child from his/her parents which is, in the first turn, estimated as a factor of his/her anti-social behavior. Thus, preservation of family is not indicated in the law as a primary objective. Such a duality of approach has an effect on the work of the main organs of prevention – the Commissions on Minors' Affairs. They are overloaded with the tasks of investigating and taking decisions on minors' administrative offences and criminal acts[234]; their attitude and working methods therefore may be more punitive than assisting; the lack of precise guidelines for assisting families and minors in danger of separation can make them ignore this part of work or fail to take it seriously. Of course, a significant negative factor here is a common problem of all social services in Russia – the lack of financing (the specialists in social-rehabilitation centers in Ivanovo region get the salary of about 40-50 Euro per month) and therefore insufficiency of staff. Limited allocations also do not allow to provide families in crisis with more or less substantial material aid; in particular, one of the sharpest and most common reasons for separation of children with parents – the lack of accommodation for family – can not be combated in most of the regions with all the good faith of child protection workers.

[233] See: Н. В. Кравчук, указ. соч. С. 50./N. V. Kravchuk, *supra*. P. 50.
[234] According to the Statistical Report on the Work of the Commissions on Minors' Affairs of the Ivanovo Region for the year 2006, 82% of all measures taken by the Commissions belong to the category of administrative and criminal procedures; only the rest concern specifically the protection of children's rights and, moreover, measures of family support are not singled out in the report at all.

But to the main shortcomings of the existing "prevention scheme" I would refer the following. As it was described above, the mechanism of prevention usually starts to function when the separation (though temporary) has already occurred. The cases when the work with family begins at an earlier stage, certainly, take place (as, for example, in Samara), but for most of the regions this is not yet a tradition. Apart from the limited resources and the lack of precise legal framework for an "early prevention", the reason for this, as indicated by the child protection services themselves, is insufficiency of their power to interfere the family relations granted to them by law. The Family Code endows them with the right to undertake any forceful action *only* when the deprivation of care or danger to the child is already present (art. 122 and 77). Surprisingly, the law enforcement bodies are inclined to interpret this provision even narrower and require to present sufficient evidence about the "danger" or "care deprivation" which is not always possible. When an authorization to undertake an action is still granted, competent bodies usually isolate the child from family in a social-rehabilitation center, since when the process of family support should begin. But this measure is itself a separation and can be very stressful for the child (especially considering bad living conditions in some of such centers). As the Russian NGO coalition for the CRC report indicates, this system rather contributes to the spread of social orphanhood than prevents it.[235] The same coalition also points at the possibility for the development of the "social patronage" for families (an assistance in child care by another family) which is hindered by the Ministry of Finance, though this would require much less expenses than placing the child into the institution.[236]

To conclude, I will give one example from the Ivanovo region Children's Rights Ombudsman's practice which vividly demonstrates the defects of the prevention system. M. with her two children suffered from family violence. Her husband was convicted for cruelty to their child, but when he was released she, being fearful of his further behavior,

[235] See: Alternative country report of the NGO coalition, *supra*. P. 12.
[236] See: ibid.

had to leave their home with both children. She left her job and tried to move into another local unit to start a new life without her husband and with her children. Faced with substantial hardships, she applied for help to the local social protection services. They did not take any actions of support and, in their turn, informed the child protection services who took both children away from M. and placed them into the institution. She was limited in parental rights and was not allowed to visit her children, though no indications of any deficiencies in her behavior were noticed in materials. Finally, with the help of Ombudsman her children were returned to her, but her situation still remains critical.

So, what recommendations to Russia should be made in the sphere of prevention of family separation (concerning only children at risk of parental care deprivation) in light of international standards described in the first chapter? To begin with, a primary international principle according to which a comprehensive, multi-sectoral family support addressing its needs must be provided by the state to prevent a separation of the child with his/her parents as early as possible, should be precisely stipulated by law. The law must define a unified, step-by-step scheme of addressing the needs of such families with distributing competence between the existing bodies of prevention and specifying their tasks, and it should not begin, as far as possible, from the child's placement into an alternative institution, since this is itself contradicting the aim of "prevention of separation". Undertaking the preventive work simultaneously with the child and the mother would be the most effective way; and the "crisis centers" for the victims of family violence would be an important part of this work. It must include all the spectrum of assistance (psychological, social, material, providing temporary accommodation etc.) and ensure their availability in all local units. In fact, the state does need to change a lot in existing structures; it only has to define common concrete methods of their work and improve their material base. It may also effectively use the resource of families; e.g., the "social patronage" scheme mentioned above.

Importantly, the child protection services should be endowed with a wider competence for the early intervention to family. A too libertarian approach to the state interference to family may be harmful in the present Russian situation. But this intervention should be more assisting than punitive.

According to the international recommendations, it would be desirable to unite the functions of family support and organizing alternative placement in one body. A systematical training, exchange of best practice and providing support for the child protection specialists themselves would also play a big role; and a systematical monitoring of the situation with these services, their strengths and shortcomings, would be necessary to ensure their effectiveness.

C. Separation With Parents and Organizing Alternative Placement: General Principles.

As it was mentioned above, art. 122(1) of Russian Family Code stipulates the duty of every person to whom the fact of the child's parental care deprivation became known to inform on this the guardianship agencies (органы опеки и попечительства). The latter within the three days since this moment is obliged to examine the child's living conditions, and if the fact of parental care deprivation is confirmed – to organize his/her protection (most commonly by placing him/her to social-rehabilitation center, as it was discussed above) "until deciding on the question of his/her placement" (art. 122(1). Another situation which may lead to separation of family is an immediate danger to the child's life or health: according to the art. 77, in this case the guardianship agencies take the child from the family and then bring a lawsuit about deprivation of parental rights or limitation in them.

According to the art. 122(3), the guardianship agency within one month since the date when this fact became known to it provides for the child's placement which, by virtue of the art. 123(1), should take place in a substitute family (as an adoption, guardianship or

foster family), or in the absence of such an opportunity - in institutions for children without parental care (other forms of placement may be stipulated by regional laws). The data on a child who has not been placed to family are directed to the Regional Data Bank on children without parental care; and if the child has not been placed to family by regional authorities within one subsequent month – his/her data are sent further to the Federal Data Bank (art. 122(3)). Persons wishing to adopt or foster a child may receive data from this Bank in accordance with a special procedure stipulated by the respective Federal Law.[237]

Basic grounds for recognizing the child as "deprived of parental care" enumerated by law as follows: the child's parents (both or the only one) are dead; or deprived of parental rights/limited in parental rights; or legally recognized as permanently absent, dead or legally incapable; permanently staying in a medical or penitentiary institution; or fail to comply with their parental duties, *inter alia,* by refusing to take the child from maternity hospital or another institution[238]. In practice the child's placement may be organized by guardianship agencies also upon a simple request of parents not giving up their parental responsibilities, for example, if they are on a trip or if their difficult situation prevents them from child's upbringing. But in the latter case they would not be able to take their child back without a preceding assessment of their situation by the guardianship agency: if their circumstances did not change it may refuse to return the child to family.

As a common rule, when a parent is found by the guardianship agency to be systematically failing to provide appropriate care for the child, the latter's alternative placement is preceded by deprivation of parental rights.[239] According to the art. 69 of the Family Code, deprivation of parental rights occurs if: parents fail to comply with their

[237] See: Федеральный закон «О государственном банке данных о детях, оставшихся без попечения родителей», 16 апреля 2001 г., №44-ФЗ./СЗ РФ, 23.04.2001, №17, ст. 1643./Federal Law "On the State Data Bank on Children Left Without Parental Care", 16 April 2001, #44-FZ.

[238] Art. 1 of the Federal Law "On the Additional Guarantees for the Social Support of Children-Orphans and Children Left Without Parental Care", *supra.*

[239] For example, according to the Annual Report of the Child Rights Ombudsman of the Ivanovo Region (*supra*, P. 17), 1243 children were revealed as deprived of parental care and 696 parents were deprived of parental rights in 2006, which confirms the Alternative NGO country report's (*supra*) statement that over 50% of children get the status of "social orphans" because of their parents' parental rights deprivation (p. 22).

parental duties; refuse to take their child from maternity hospital or another institution; abuse their parental rights; ill-treat and commit violence towards their children; suffer from chronicle alcoholism or drug abduction; committed an intentional crime against life or health of their child or another spouse. The decision is taken by the court, and the process of deprivation is based on the same rules as other civil lawsuits (with the right of parent to present evidence etc.) with the difference that the necessary participants in this process are representatives of the prosecutor office and the guardianship agency (art. 70 of the Family Code). The agency should in each case make a report on the situation of family based on personal examination which serves as the basic evidence in the process. A person deprived of parental rights "looses all rights based on the fact of kinship with the child" including representing his/her child's interests (art. 71(1)). He/she may be later restored in parental rights if he/she "changed their way of life, behavior and/or an attitude to the child" (art. 72(1)). In this case (but not in deprivation of parental rights) the child's opinion is taken into consideration, and if he/she is over 10 y.o. – his/her consent is required (art. 72(4)).

If the grounds for deprivation of parental rights are not sufficient, or if living with parents may be dangerous to the child for the reasons not depending on parents (their disease, hard life situation etc.), parents may be limited in parental rights (art. 73). This is a temporary measure: after 6 months guardianship agencies are obliged either to cancel the limitation or to bring a lawsuit on deprivation of parental rights. Statistic data demonstrates that this measure is applied very infrequently[240]. Interestingly, the law specially stipulates the possibility for guardianship agency *to permit* the contacts of parents limited in their rights with a child if this does not have a bad effect on a child (art. 75). If parents are deprived of their rights, such an opportunity is not presupposed to exist.

The decision on placement is taken by the guardianship agency. The law contains no guidelines on this process except for the "hierarchy" of placement forms mentioned

[240] For example, Annual Report of the Ivanovo Region Child Rights Ombudsman (p. 17, *supra*) demonstrates the correlation between cases of deprivation of parental rights and limitation in them as 1:0,017 respectively.

above and the notion that the "child's ethnic, religious, cultural and linguistic background must be taken into consideration" (art. 123(1) of the Family Code). Statistics indicate that in average absolute majority of children are placed under guardianship care (63% in Ivanovo region in 2006[241]; 52% in Russia in 2004[242]); about 25-30% are sent to residential institutions[243] (26% in 2004[244]); about 20% are adopted both nationally and internationally (22% in 2004[245]) and a small part is placed into foster families (1,6% in 2004[246]).

The main actors in this process – guardianship agencies – are currently included into the local authorities governmental structures and basically are not accountable to anyone except for the head of the local unit. Their power is further strengthened by the process of challenging their statements presented in the court: this can be done only by counter-evidences which would still have a less weigh in a trial. Luckily, according to the amendments to art. 121 of the Family Code, since 1 January 2008 they will form a part of a regional state government and will be accountable to regional social protection bodies.

The system described in this section is often subject to a sharp criticism. Indeed, it fails to comply with many international standards applicable to this area. To begin with, the system does not consider family separation as the last resort and temporary solution: usually the process already starts from separation (as it was mentioned in the previous section) and than, operating basically by mechanisms of deprivation of parental rights, often rather promotes further permanent separation than prevents it. No interim measures for parents are stipulated by law except for limitation in parental rights which is used quite

[241] See: ibid.
[242] See: *О положении детей в Российской Федерации,* Табл. 31./*On the Situation of Children in Russian Federation, supra.* Table 31.
[243] See: С. Апатенко (Директор Департамента по государственной молодёжной политике, воспитанию и социальной защите детей Министерства образования РФ), Выступление на круглом столе «Право ребёнка на семью»/Защити меня. 2/2005. С. 26./S. Apatenko (Head of the Department of the state youth policy, education and social protection of children of the Ministry of Education of RF), Presentation at the Round-table discussion "The Child's Right to Family" in: *Protect Me*, 2/2005. P. 26.
[244] See: *О положении детей в Российской Федерации,* Табл. 31./ *On the Situation of Children in Russian Federation, supra.* Table 31.
[245] See: ibid.
[246] See: ibid.

infrequently; thus usually the child is either separated with family completely or is returned to family without any further control. Contrary to international requirements, separation *may* occur for the reason of family poverty or parents' health status (limitation of parental rights then leading to their deprivation). The requirements on multidisciplinary assessment of the child's situation, elaborating an individual plan; participation of all interested subjects including the child[247] and his/her parents in the process of deciding on the child's placement are not stipulated by law[248]. Even the principle of the best interest of the child is not mentioned in the Family Code.

Further, the process of separation itself is not regulated by precise legislative guidelines, though the basic procedural guarantees here exist. In principle, the guardianship agency's decision on separation may probably be challenged in the court upon the general rules of the civil procedure. Deprivation of parental rights takes place in a fair trial. The alarming moments here are the lack of the complaint mechanisms and of legal representation for a child, as well as the lack of representation for parent. Usually judges tend to treat parents denying their parental duties very severely, and the whole process in practice often looks inquisitional.

Moreover, the decision on separation is not taken simultaneously with the decision on placement: quite frequently children spend a lot of months in social-rehabilitation centers unaware of their further destiny. Being usually very limited in staff and resources[249], the guardianship agencies can not afford a "careful assessment of the child's needs" and looking for the most suitable type of placement; usually in the absence of relatives wishing to take a child immediately they prefer to place him/her into an

[247] Art. 57 of the Family Code allows the child to express his/her opinion in all matters concerning him/her. However, not all of the procedures concerning separation and placement require to consider the child's views.
[248] This was, *inter alia*, pointed at by the Committee on the Rights of the Child in para. 39(b,e) of the CRC Concluding Observations on the Third Periodic Report, *supra*.
[249] See, e.g.: Михеева Л. Ю. Научно-аналитический материал по проблемам опеки и попечительства к Парламентским слушаниям на тему: «О совершенствовании законодательства об опеке и попечительстве». Москва, 4 апреля 2005. С. 43-44./Micheeva L. Yu. Research Analytical Material on the Problems of Custody and Trusteeship for the Parliamentary hearings "On the Perfection of Legislation on Custody and Trusteeship". Moscow, 4 April 2005. P. 43-44.

institution.[250] These bodies are not provided with training and education on the principles of proper alternative placement and protecting children's rights which also leads to the substantial shortcomings in their work and sometimes even abuses of their power.[251]

Other aspects of the Russian legislation which are not in compliance with international requirements are that the law does not contain the right of contacts with parents deprived of parental rights; even if they are only limited in them this right is subject to the discretion of guardianship agency. There is no duty of the state to evaluate systematically the need for alternative placement of the child contrary to the art. 25 of the CRC[252]. There is no universal system of monitoring and evaluation of the child care forms and guidelines for their development.

A separate issue is the forms of placement. As it was mentioned in the first chapter, international standards are very reluctant to institutional form of child care, and Russia is often criticized for its frequent recourse to this type of placement[253]. In the recent years the transition to family-based types of care and refusal from the institutional system has been in focus of broad discussions. In the President's annual Appeal to the Federal Assembly for the year 2006 for the first time the child's right to be brought up in a family was formulated as part of the national strategy on child protection policy; and from the year 2007 the Ministry of Education of Russia actively promotes the development of family types of placement[254]. Some commentators propose to give up institutional care at all[255]; others

[250] See: С. Е. Бочарова, указ. соч./ S. E. Bocharova , *supra.*
[251] On examples of abuses see, e.g.: ibid.
[252] This was also mentioned by the UN CRC in para. 39(b) of the CRC Concluding Observations, *supra.*
[253] See, e.g.: *Анализ положения детей в Российской Федерации*. С. 95-96./*Analysis of the Situation of Children in Russian Federation, supra.* P. 95-96.
[254] See: Пресс-релиз «Об опыте работы на федеральном и региональном уровнях по профилактике сиротства и семейного устройства детей-сирот и детей, оставшихся без попечения родителей», 24.07.2007./Press-release "On the Experience of Work on the Federal and Regional Level for the Orphanhood Prevention and Family Placement of the Children-Orphans and Children Left Without Parental Care", 24.07.2007. Available at: www.ed.gov.ru/news/obnews/5543print/ (last visited: 1 October 2007).
[255] See, e.g.: И. Белашева, интервью с Б. Альтшулером, руководителем РОО «Право ребёнка»./Защити меня. 4/2006. С. 41./I. Belasheva, An Interview with B. Altshuler, the Head of the Federal NGO "The Child's Right"./Protect Me. 4/2006. P. 41.

insist on only some modifications making institutions more family-like[256]. In any case, Russian authorities do address this issue in accordance with international requirements (some measures for this will be discussed more in detail below).

But one of the main problems here which is an object of concern for many child protection specialists is the system of searching and selection of the prospective substitute caregivers. This is solely a duty of guardianship agencies which are overloaded with work, almost everywhere lacking staff and resources and not interested in the child's family placement since they bear responsibility for any problems with a child in a substitute family unlike the ones in institution. This often makes them excessively demanding with regard to the prospective caregivers[257] (the cases of corruption are also frequent[258]). But the worst moment here is the process of taking the child from an institution itself which will be addressed in the next subchapter: here it only should be mentioned that it rather prevents people from undertaking the childcare responsibilities than facilitates it.

So, in order to bring the national legislation in compliance with international standards the following recommendations could be made. The principles of a careful multidisciplinary assessment of the child's situation considering all his/her characteristics and with the participation of all interested parties, including necessarily the child, his/her parents, extended family and perspective caregivers, as well as an obligation of the authorities to organize the child's family placement as far as possible should be fixed in the law. This must be ensured by prescribing a detailed step-by-step procedure of family separation and alternative placement of the child with an opportunity to challenge the decision of competent authorities for the child and other participants. Commissions on Minors' Affairs could play a significant role in this process, since they have a multidisciplinary staff and competence in family support measures.

[256] See, e.g.: Право на семью: круглый стол./The Right to Family: Round-Table Discussion*, supra*.
[257] See, e.g.: Г. Красницкая, Три круга ада российских усыновителей./Защити меня. 2/2005. С. 9-10./G. Krasnitskaya, "Three Circles of Hell for Russian Adopters" in: *Protect Me,* 2/2005. P. 9-10.
[258] The examples see, e.g., in: С. Е. Бочарова, указ. соч./ S. E. Bocharova , *supra*

The law should stipulate additional legal procedures for parents at risk of separation with children. Deprivation of parental rights should not be the only recourse. Interim and test measures without separation with children but with a strong control of the competent authorities would be the most effective solution. Contacts of children with parents should be presumed permitted and promoted, not limited, in each case, except for the danger to the child from such contacts which should be an object of a separate legal assessment.

In order to ensure periodic evaluation of the child's situation, in each case an individual care plan must be elaborated which would stipulate periodic visitations and assessment of the child's situation by the competent authorities.

Finally, facilitating the child's family placement would be more effectively promoted by the structures other than guardianship agencies with the sole function of searching and selecting the prospective caregivers. Some experts propose to convert all institutions for children to "family placement agencies" with only functions to provide the child's family placement and support to families[259]. Such model or creating separate governmental structures with the duty to provide family placement of children, as well as conducting broad information campaigns stimulating public to adopt or foster a child, would make the system of child protection much more effective.

3. Basic Forms of Alternative Placement in Russia: Legislative Regulation and Practice.

The Family Code of Russia recognized four basic forms of alternative placement of children: guardianship, foster care, adoption and residential care. Other forms may be stipulated by regional legislation. In this subchapter I will briefly examine the four traditional forms of childcare and the most widespread alternative forms of placement.

[259] See: И. Белашева, указ.соч. С. 42/I. Belasheva, *supra*. P. 42.

A. Guardianship (Kinship Care).

Guardianship is a form of childcare in which the guardian undertakes a number of parental responsibilities over the child, such as the child's upbringing, maintenance and legal representation, but exercises them under a certain control of competent authorities and does not acquire a legal status similar to the one of parent in a biological family.[260] The child under guardian's care preserves the status of an "orphan", i.e. possesses all rights and social benefits to which the children without parental care are entitled. Guardianship is in almost all cases undertaken by the child's relatives or parents' close friends; thus, this institution is in fact very close to kinship care. This form of placement is the most widespread in Russia covering an absolute majority of children without parental care[261].

According to the Russian legislation, guardianship duties are exercised for free, but he/she receives an allowance for the child's maintenance the sum of which is defined by regional authorities[262]. The allowance is awarded only if the child's biological parents do not exercise their parental rights for objective reasons (are deprived of them, dead etc.). The sum of allowance varies from region to region, but the adopted in 30 December 2006 Governmental Decree #842 stipulated the governmental donations for regions in order to ensure the minimal level of such allowance of about 160 USD per child[263]. Apart from this guardians are not entitled to other forms of support (psychological, social etc.); moreover they have to cover all expenses following from the child's property rights.

Guardians are appointed by the guardianship agencies on the application of candidates. Informal guardianship is not recognized: a person taking care about the child without a proper authorization may not legally represent a child. The Family Code mentions the factors which must be taken into consideration in appointing the guardian

[260] The term "guardianship" is not defined in legislation but the present definition follows from a number of Family Code provisions.
[261] See data on children's placement at. p. 74.
[262] Art. 150(5) of the Family Code.
[263] See: Пресс-релиз, 24.07.2007./Press-release, 24.07.2007*, supra*.

(relations with the child, personal characteristics etc.) and factors absolutely prohibiting a person from being a guardian: chronic alcoholism, deprivation of parental rights and also some serious diseases[264]. The latter factor often prevents the child's grandparents from becoming his/her guardians which may be contrary to the child's interests. Quite frequently the guardianship agencies make also demands on presenting other documents from perspective guardians (e.g., on property, housing and residence registration etc.) which substantially hamper the process. The commentators argue (the law contains no separate guidelines on this) that the guardianship agency's refusal to appoint a person as a guardian can not be challenged in the court, only an act of appointment of a certain guardian can[265].

A child can have only one guardian who bears the sole legal responsibility for him/her. Such a situation was proposed to be changed by a famous expert in family law L. Micheeva in the Conception of the reform of custody institution 2005[266] which introduced the concepts of collective guardianship (sharing responsibilities between parents and guardians) and temporary guardianship upon the will of parents. But it was not realized.

In order to bring the institution of guardianship in compliance with international standards, I would consider necessary, first, to soften the requirements to perspective guardians: to allow deviations from the prohibition of guardians with certain illnesses when the best interest of the child so requires; to clarify the list of documents which the guardianship agencies may require; to provide for the agencies' accountability and ensure an easier mechanisms of challenging their decisions. The child's participation in appointing a guardian should be specially prescribed. Then, it would be desirable to provide support services for guardians together with a periodic control of the situation in a family and to

[264] See: Постановление Правительства РФ «О перечне требований к лицам, желающим быть опекунами (попечителями)» от 1 мая 1996 г. №542//СЗ РФ. 1996. №19. Ст.2304.
[265] See: Михеева Л. Ю. Опека и попечительство: правовое регулирование. М., Палеотип, 2002. С. 47./Micheeva L. Yu. Guardianship and Trusteeship: Legal Regulation. Moscow, Paleotip, 2002. P. 47.
[266] Концепция реформы законодательства об опеке и попечительстве, предложенная на парламентских слушаниях «О совершенствовании законодательства об опеке и попечительстве», 4 апреля 2005 г. /Conception of the Reform of Legislation on Custody and Trusteeship, proposed on Parliamentary hearings "On the Development of Legislation on Custody and Trusteeship"; 4 April 2005.

permit deviations from the principle of awarding the "guardianship allowance" only when parents are dead or deprived of parental rights: such practice stimulates deprivation of parental rights and thus promotes "social orphanhood". To prevent the misuse of guardianship come other control mechanisms must be found instead.

B. Foster Care.

Foster care is characterized by the contractual relations between the guardianship agency and foster parents who are paid by the state for their childcare duties (art. 151, 152, 155 of the Family Code). The contract determines mutual rights and responsibilities of the parties, primarily concerning upbringing and maintenance of the child. As in the case of guardianship, the child under foster care preserves the status of an "orphan". Unlike guardianship, this institution presupposes the fee or salary paid to foster parents for the child's upbringing (defined also by regions) plus to the childcare allowance similar to the one paid to guardians (art. 152, 155 of the Family Code). The Governmental Decree #842 mentioned above set up the minimal level of foster parents salary as equal to about 100 USD[267] (this size of salary is stipulated by the Law of Ivanovo region with a 30% raise for families with disabled children, ill children and infants up to three years old[268]). Besides, guardianship agencies must provide foster families with necessary support and have a right (not a duty!) to control the fulfillment of foster parents' functions (art. 155).

The requirements to perspective foster parents are basically similar to the ones to guardians but in the case of foster parents, strangely enough, prohibition of alcohol and drug abusing candidates is lacking (art. 153). No other qualifications, such as their moral and material capacities, are not mentioned. This seems to be unfair. The main difference between the guardianship and foster care is that in the former, unlike the latter, close personal relations between the caregiver and the child usually already exist and, thus, the

[267] See: See: Пресс-релиз, 24.07.2007./Press-release, 24.07.2007*, supra*.
[268] See: Закон Ивановской области от 18 мая 2000 г. №13-ОЗ «О выплате денежных средств на содержание детей, переданных на воспитание в приёмную семью»/СЗ ИО №10 (148), 30.05.2000.

requirements to perspective caregivers should be much softer there. In order to ensure the child's well-being in a foster family the perspective foster parents' situation must be subject to a careful assessment, and further they should be provided with an on-going control and assistance which is often not the case in spite of the legislative guarantee[269].

Comparing foster care regulation in Russia with international standards an important point seems to be missing: the child under foster care is not indicated in the Data Bank (see above) and, thus, is deprived of an opportunity to be placed to a permanent family, though international law regards foster care as a temporary arrangement. But the practice demonstrates that usually foster parents view the child's placement with them as permanent, and therefore it may be not necessary to change the legislation in this respect. One more contradiction between Russian and international law - the lack of cooperation between foster family and the child's biological parents – probably needs more correction.

But the main problem with foster families in Russia is not the shortcomings of foster care system but the fact that this system is still very undeveloped in the country. The data below indicate that only about 1,5% of children without parental care are raised in foster families.[270] The reason for this is banal – the lack of financial resources in most regions. The need to develop this form of childcare is underlined in many sources, including the CRC Concluding Observations to the last periodic report.[271]

C. Adoption.

Adoption is characterized by equating the legal status of adopted child with the one of a biological child of adopters. According to the Family Code, adopted child looses his/her status of "deprived of parental care" and all benefits linked to it, as well as all rights based on kinship with his/her biological family. Adoption is declared to be a priority among all other forms of placement by art. 124 of the Family Code.

[269] See, e.g.: Право на семью: круглый стол./The Right to Family: Round-Table Discussion*, supra*.
[270] See data on page 74.
[271] See: para. 38(d) of the CRC Concluding Observations on the Third Periodic Report, *supra*

Adoption is permitted only in the interests of the child (art. 124(2)). It takes place upon the application of perspective adopters and is decided by the court with the participation of the prosecutor office and guardianship agency. The latter must make a conclusion on the possibility of adoption based on the evaluation of the perspective adopters' living conditions and on the documents submitted by them (art. 125). The requirements which the perspective adopters must satisfy include, apart from general guardianship requirements, also the lack of certain criminal records, living in an appropriate house/apartment and having an income over the living wage, though in respect of the latter two conditions the court can make a derogation if the child's interests so require (art. 127).

Necessary conditions for adoption include also a number of consents: the one of the child since ten y.o. (art. 132), though if he/she is younger the law does not even require a consultation with him/her; of the child's parents with certain exceptions including a failure of parents to bring up and maintain a child for invalid reasons (art. 129, 130); of the adopter's spouse (art. 133) and of the child's legal representatives including the head of the institution where the child is placed, but the latter condition may be derogated from by the court in the interests of the child (art. 131). The law indicates a minimal age difference between the child and the adopter as 16 years (art. 128).

In respect of national adoption the law prohibits any adoption arrangements, including any assistance in searching a child, by any person or institution except for the guardianship agencies and regional executive bodies in accordance with their functions (art. 126.1). This provision is highly disputable. On the one hand, the system where the guardianship agencies are the only bodies responsible for adoption disadvantages Russian adopters who, unlike foreign ones, may not apply to professional adoption services[272]. On the other hand, it ensures a higher level of protection for children. On my opinion, it would be better to

[272] This was mentioned with concern in Alternative country report of the NGO coalition, *supra*. P. 26.

entrust the task of adoption arrangements to independent but included into the system of state government bodies with the sole function to provide family placement of children.

Guardianship agencies must also carry out an annual evaluation of the child's conditions in the adoptive family during at least the first three years since adoption[273].

It seems, on the first glance, that basically the legal requirements for national adoptions in Russia are close to international standards; the exceptions are only non-considering the child's view if he/she is under 10 y.o. and the lack of protection of the child's right to know his/her original identity as was indicated by the CRC[274]. In practice, however, the main problem here is an extremely burdensome and inconvenient process of selecting the child for adoption which will be described in the next section. As the Russian Human Rights Ombudsman's Expert Council declared in 2005, this process is based on the principle "a child for family", not "family for a child", and fails to promote child's family placement[275].

These statements are confirmed by the statistics. In Ivanovo region during the period 2001-2006 approximately only 1-2% of all children registered as deprived of parental care were adopted (2% in 2006); and during the last five years a part of inter-country adoptions significantly exceeds this of national adoptions (66% to 34% respectively in 2006).[276] A similar situation is traced in the whole country: in 2004 a number of children given for adoption was 2% of all children deprived of parental care (which is about 9% of children registered in the State Data Bank), among which, again, a major part belongs to inter-country adoptions (42% national versus 57% inter-country ones on 2004)[277].

[273] See: п. 21-23 Правил передачи детей на усыновление (удочерение) и осуществления контроля за условиями жизни и воспитания в семьях усыновителей на территории РФ, утв. Постановлением Правительства РФ от 29 марта 2000 №275./СЗ РФ, 10.04.2000, №15, ст. 1590.
[274] See: paras. 40, 41 of of the CRC Concluding Observations on the Third Periodic Report, *supra.*
[275] See: The Human Rights Ombudsman's Expert Council's Recommendations based on the round-table discussion "The Child's Right to Family: the Problems of Family Placement of Children-Orphans", Moscow, President-Hotel, 28.03.2005.
[276] See: Annual Report of the Child Rights Ombudsman of the Ivanovo Region, *supra.* P. 17.
[277] See: *О положении детей в Российской Федерации, P. 61; Табл. 31./ On the Situation of Children in Russian Federation, supra. P. 61;* Table 31.

An attitude of Russian policy-makers and civil sector to inter-country adoptions is very controversial. The Family Code sets up an absolute priority for national adoptions (a child may be adopted abroad if there are no Russian candidates and not before 6 months since placing his/her data in the Federal Data Bank (art. 124) which may be detrimental to child's interests, especially in cases where a costly and urgent medical treatment is needed[278]). Inter-country adoption should be regulated by law of the adopter's country but most of national rules are applicable to the adoption process (art. 165). This, however, could hardly guarantee the child's protection in the adopter's country. In 2000 Russia signed the Hague Convention on Inter-country Adoption (see *supra*) which stipulated a detailed process of the state parties' cooperation and mutual control in such cases. However, its ratification process faced a strong resistance from many policy-makers. On the opinion of the Chair of the State Duma Committee on Women, Family and Youth Ye. Lachova this Convention protects interests of adopters, not children (which is not quite clear), and would promote inter-country adoption to the detriment of national one.[279] So, for the present moment it is not ratified; instead, the Government adopted the Regulations on the adoption arrangements by foreign organizations on Russian territory which sets up an order of accreditation of foreign adoption agencies and prescribes them to present at least four regular reports on child's situation after adoption to Russian authorities.[280] It seems, however, that efforts to hamper the process of inter-country adoptions are contrary to the child's right to family and I would still consider necessary ratification of the Convention.

D. Residential Care and Family Placement of Children Under It.

As it was mentioned above, children are placed in institutions if an opportunity of family placement is lacking (art. 123). The main types of institutions are: the infant's

[278] See, e.g.: Рената может умереть./*Renata Can Die, supra.*
[279] See: Interview with Ye. Lachova, Available at: http://www.vesti.ru/doc.html?id=116499&tid=27510 (last visited: 2 October 2007).
[280] See: Положение о деятельности органов и организаций иностранных государств по усыновлению (удочерению) детей на территории РФ и контроле за её осуществлением, утв. Постановлением Правительства РФ от 4 ноября 2006 г. №654/СЗ РФ, 13.11.2006, №46, ст. 4801.

homes (for children up to 3 y.o.); children's homes (where children from 3 to 16 live but study in ordinary schools), boarding schools where children live and study and specialized institutions for disabled children whose wards are not necessarily deprived of parental care. The Family Code also singles out a family children's home (art. 123) which is, in fact, not an institution but a form of family placement, though extremely undeveloped.[281] Residential institutions vary in conditions and organization but most commonly they are characterized by a significant (comparing to family) number of wards living together and formal, depersonalized type of childcare. Family-type institutions (which should not be confused with family children's homes) with a smaller number of children and more home-like organization are rather few: e.g., in Ivanovo region they are absent at all.

Children in residential institutions constitute a separate category of children without parental care. Their data are placed in Regional and then Federal Data Bank and, thus, they are the only category of children considered to be eligible for further family placement. The procedure of selecting a child from the Bank is as follows. Persons wishing to adopt or foster a child first apply to the guardianship agency with all necessary documents. If an agency grants an authorization to be an adopter (or foster parent etc.) they may apply to the Regional Data Bank (the Bank contains only minimal information on the child with a photo which is even not always shown to candidates[282]). Then the candidates receive a permission on visitation of the child in institution (only one per one visit)[283]. A direct access to children in institutions in order to make a choice is not allowed. Obviously, such a burdensome and formalized procedure hardly stimulates children's family placement.

An extremely closed character of children's institutions has one more negative side. There, unlike the social-rehabilitation centers, an objective of family reunification is not pursued, and contacts with parents, especially deprived of parental rights, are usually not

[281] According to the State Report *On the Situation of Children in Russian Federation, supra, Table 31,* a part of children under this form of childcare in 2004 was 0,009%.
[282] See: Г. Красницкая, указ.соч./G. Krasnitskaya, *supra*.
[283] See: ibid.

encouraged. An order of meetings between children and relatives is commonly decided solely by the head of institution which obviously contradicts the child's right to family.

As it is absolutely agreed among the child protection specialists, children in institutions are entitled to a higher level of protection than in families: in their case any violence by staff in respect of children would be unlawful, whereas moderate corporal punishments of children in families is not legally prohibited. A necessary level of material well-being of children in institutions is supposed to be ensured by the state minimal standards of children's maintenance provided by the Governmental documents. Generally, the law does not specifically elaborate on the rights of children in institutions, but traditionally supervising authorities evaluate rather their well-being in institution (education, proper nutrition, health care etc.) than autonomy-rights, such as privacy, freedom of expression and religion, cultural identity and the right to participation.

Practice demonstrates that the cases of violations of children's rights in institutions are rather frequent and usually very difficult to address. Thus, in practice of the Ivanovo region Children's Rights Ombudsman a number of complaints concerned serious violations of the rights of children's homes' wards among which the gravest one revealed the whole series of violations in the main Ivanovo children's home, including physical, sexual and mental abuse of children by staff. In spite of the fact that most of the violations were confirmed by the official prosecutor office report, this case practically did not have any consequences (apparently for the reason of corruption in the regional government). A lot of people close to child protection spheres in Ivanovo region also mention illegal adoptions organized with the help of some heads of children's homes, but such cases were not officially reported. Violations of basic children's rights in institutions are frequently observed in other regions as well.[284]

[284] For example, violations of practically all human rights of wards in institutions were found by the Public Control Committee in Perm region - see its Report available at: http://detskidom.info/magazine/?act=more&id=142 (last visited: 25 September 2007); bad living conditions

Ineffectiveness of the child protection system in institutions is in most part caused by the existing monitoring and complaint mechanism. First, the child usually has no means to complain. In all residential institutions their heads act as the only children's legal representatives, and most of children's actions may be launched only by him/her. Opportunities for children to complain independently and anonymously (which is crucial, considering total dependency of children on the head of the institution) are very few. The control over children's homes is exercised by the regional educational officers and prosecutor office, but this is usually done in a formal way not helping reveal a real situation, and there is no duty of systematical assessment of the child's situation in institution as art. 25 of the CRC requires[285]. Luckily, at the present moment the practice of public control (control of the NGOs) over the institutions is developing in the regions.

It is often stated by commentators, both Russian and foreign, that it would be more effective to give up the institutional system at all than to correct its shortcomings. It seems that the Russian government started to heed this view. Gradual deinstitutionalization is promoted by breaking institutions into smaller family-type units and stimulating family types of childcare which was stipulated by the draft National Plan on Action on children (though not yet adopted)[286]; pointed at by the President and repeatedly by the Minister of Health Care and Social Policy and followed by a number of regions, *inter alia*, the Ivanovo region in its Governmental Order #145 from April 2007[287]. Thus, the transition from institutional to family care system should take place by gradual transformation of

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and human rights violations in Russian orphanages were mentioned by the Human Rights Watch – see: *Conditions in Russian Orphanages,* available at: www.12georgetown.edu/students/cal55/conditions.html (last visited: 20 September 2007); grave abuses by children's homes' staff were reported in Novosibirsk – see: http://news.mail.ru/incident/1443664/, (last visited: 19 September 2007) etc.

[285] This was, *inter alia*, pointed at by the Committee on the Rights of the Child in s. 39b of its third country report concluding observations, *supra*.

[286] See: Проект Национального плана действий в интересах детей до 2010 года./The Draft National Plan on Action in the Interests of Children till the year 2010, available at: http://sovetpamfilova.ru/7576.php (last visited: 11 September 2007).

[287] See: Распоряжение Правительства Ивановской области от 25 апреля 2007 г. №145-рп «О мерах по развитию семейных форм воспитания детей-сирот и детей, оставшихся без попечения родителей»./СЗ ИО, 3.05.2007, №15(340).

traditional institutions, with the help of intermediary forms, some of which will be discussed in the next section.

E. Alternative Forms of Placement: Patronage, Family Educational Group and Children's Villages.

As it was already mentioned, regions of Russia may introduce forms of children's placement other than enumerated in the Family Code. Besides, some alternative forms may exist without any legislative regulation if they are based on general family law provisions on the child's legal representation: thus, for example, orphanages attached to monasteries, a rather widespread form of alternative childcare, is not separately regulated but legally considered as guardianship (the head of monastery being a legal guardian of all children). In the present section I will briefly address only those forms of alternative childcare which seem to be the most progressive and promising in developing a family care system in Russia and which attract a particular attention of authorities in the recent time.

The primary position in this list belongs to patronage – a form acquiring a broad development in the last years and supported by most of the child protection specialists. It has been introduced in a number of regions, including Ivanovo region, by special law.[288] Besides, in 2005 an attempt was made to regulate this form on a federal level[289], but this law was not adopted. The specificity of this form of placement is a novelty for Russian child protection system – sharing childcare responsibilities among several subjects: patronage family, guardianship agency and children's institution. According to the Ivanovo law on patronage, their functions and duties should be defined by a three-partite contract including an individual plan on the child's protection. The child may not necessarily live permanently with a patronage guard; an order of his/her participating in a child's life is set by the contract. And the institution from where the child is taken is obliged to exercise an

[288] See: Закон Ивановской области от 26 октября 2005 г. №148-ОЗ «Об органах опеки и попечительства и патронате над несовершеннолетними в Ивановской области»/СЗ ИО, 15.11.2005, №21(279).
[289] See: Conception of the Reform of Legislation on Custody and Trusteeship, supra.

on-going control over patronage family, organize medical and psychological support for the child under patronage, provide the guard with necessary training and assistance. Importantly, this form does not exclude further family placement of the child: he/she may be adopted or even returned to his/her native family.

The biggest problem with patronage, however, is its temporary character. In Ivanovo, for example, it can be exercised for not more than 2-3 months, and then the child must be taken into custody or adopted. Another problem is the lack of clarity with the child's legal representation[290]: the law permits to represent a child only to guardians and heads of children's institutions. Apparently, a federal law elaborating on this question is still needed.

Still, patronage is a very flexible model of family care and, being performed properly, allows for the fullest compliance with the child's interests and international standards. Besides, it plays an important role in the process of deinstitutionalization: even being a temporary form of placement, patronage allows perspective caregivers to prepare for future permanent relations with a child and thus facilitates the child's family placement. In some children's homes of Russia all children have been already given to patronage families,[291] and it has been proved that this model saves 37% of budget allocations to institutional system.[292] However, sometimes promoting this form of placement faces resistance from governmental officials,[293] which is apparently connected with fears of abolishing institutional system of people interested in its preservation.

Patronage model can play one more extremely important role: it may be a form of placement for children from socially dangerous families. In this case a contract may be signed between a biological family, patronage family and guardianship agency with sharing childcare duties among them. However, for the moment such practice scarcely exists.

[290] See: Михеева Л. Ю., указ. соч. С. 20-22./Micheeva L. Yu., *supra*. P. 20-22.
[291] See: Защити меня, 2/2005. С. 23/Protect Me, 2/2005, P. 23.
[292] See: ibid. P. 24.
[293] See: ibid.

Family educational group – another alternative form of children's placement – is somehow similar to patronage. It presupposes placing the ward of children's institution to family which at the same time works as a structural unit of an institution. An institution preserves the status of the child's legal guardian, finances the child's maintenance in accordance with the norms common to the institution and pays for the work of family members as "educators" who are included into the institution's personnel. This form also allows a flexible reaction to the child's situation: it may be rather permanent, or provide the child's temporary rehabilitation while social services work for his/her reunification with a biological family, or place the child to family environment while his/her parents are currently unable to care about him or her (being, for example, in prison). At the present moment this form of placement exists in about 30 regions of Russia.[294]

Last but not least, I would mention the SOS-children's villages – an alternative form of childcare widespread all over the world as one single network of non-profit non-governmental organizations of the same type which provide family environment for children without parental care. SOS Children's Villages (officially SOS-Kinderdorf International) is an influential organization engaged also in research and lobbying.

The first children's village was created in 1949 in Austria by Hermann Gmeiner and then this form spread over 132 countries of the world[295]. As the head office of SOS-Kinderdorf notes, the children's villages in many countries are not only a form of children's placement but also work as a kind of social service providing assistance for families in crisis and facilitating further family reunification[296]. However, apparently, Russian children's villages concentrate only on providing child's alternative care, because the sources on children's villages do not indicate other types of work. In Russia there are

[294] See: Г. М. Иващенко, Семейная воспитательная группа – перспективная форма семейного воспитания детей, лишённых родительского попечения./Право ребёнка на семью и семейное окружение./G. M. Ivashenko, "Family Educational Group – a Promising Form of Family Upbringing of Children Deprived of Parental Care", in: *The Right of the Child to Family and Family Environment*, *supra*.
[295] See: Т. Зорина, Детские деревни – SOS: педагогика любви и уважения./Защити меня. 4/2003. С. 21./T. Zorina, SOS Children's Villages: Pedagogic of Love and Respect./Protect Me. 4/2003.P. 21.
[296] See: SOS Kinderdorf-International. *A Child's Right to Family: Family-Based Child Care*, *supra.*

currently four children's villages[297]. Their organization may be schematically described as private-sponsored (they are financed mostly from private donations) institutions for children with a family type of care. One village consists of several homes where 7-10 children live with one "mother" – a paid permanent guardian – and some assistant guardians who replace the "mother" when she is out of work[298]. A very positive feature of children's villages is a special system of pedagogical principles directed at providing the sense of security, love and respect for the child's individuality which should form the basis of the child's upbringing in children's villages all over the world. Another important aspect of villages is providing a follow-up support of children after reaching the age of majority which provides a gradual transition to an independent life, unlike the state children's institutions. Thus, children's villages as an alternative form of childcare can play an important role in providing the child's right to family, and granting support to them by the state would be very desirable.

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The present chapter addressed the regulation of the right of the child to family in Russia in respect of children deprived of parental care from the point of international standards and recommendations. It can be seen from above that, although contemporary Russian legislation contains references to the child's right to family, still a lot of aspects in its legal regulation and policies prevent Russia from full compliance with them. On the one hand, the legacy of 70-years socialist era had a negative impact on the contemporary childcare system in its frequent recourse to residential care with all its possible consequences of abuses and corruption; in the lack of respect for the child's individuality; in a paternalistic attitude of the state officials dealing with child protection who tend to view the child and his/her biological family as objects, not participants, of the child's protection process and to use punitive rather than assisting methods of child's protection. On the other hand, a

[297] See: Т. Зорина, указ.соч./T. Zorina, *supra.*
[298] In some villages slightly different schemes may exist.

libertarian approach of the new regime deprived a huge number of families of the state's support without offering adequate alternatives which led to an enormous rise in children's abandonment the state is unable to cope with. A new libertarian doctrine also helped form an attitude which justifies the state's interference into family affairs only if a serious trouble with a child has already occurred, and, thus, deprives the child protection services of powers necessary to prevent family separation.

Such a controversial background together with common social and economic problems in Russia occasioned, on my opinion, the following general flaws in Russian regulation of all elements of child's rights to family (as was discussed in the first chapter) in respect of children without parental care or at risk of loosing it. First, the child's right not to be separated with parents unless it is absolutely necessary for his/her interests is prevented from full realization by the lack of appropriate family support services, including respective social support measures to vulnerable families and by the tradition of punitive reactions to family crisis (a most common measure being deprivation of parental rights). Second, providing the child's well-being in a family in order to prevent child's abandonment, again, can not be fully realized without respective social policies addressed to the most disadvantaged social groups and specifically aimed at supporting the children's needs, rather than only stimulating the birth rate increase, as it is done by current policies. Third, the present family legislation fails to provide properly the right of contacts between the child and his/her biological parents if the child had been previously placed under substitute care: this primarily concerns the existing order of limitation and deprivation of parental rights which automatically becomes the ground for proscribing contacts, whereas this should be decided in a separate process and on separate grounds by the court. Finally and most importantly, Russian legislation and policies fail to provide the child with appropriate alternative placement in process based on international standards and ensuring a further compliance with them. Not to mention all recommendations proposed in this regard in the

second chapter, the main directions on which the Russian legislation should develop in order to comply with international standards must become: a gradual transformation from institutional care to family-care systems, including alternative forms and considering the best practices of already existing childcare forms; making the system of family separation and alternative placement more flexible and all-parties cooperative rather than imperative, depending on a single official's discretion and strictly formal, *inter alia*, by reconsidering the principle of endowing only one person with all childcare responsibilities (using the experience of patronage model); ensuring participation of the child, his/her biological family and perspective family with an on-going assistance and control by the competent authorities etc. The system of providing family placement should become more friendly and open to the perspective substitute caregivers for which a reorganization of competent services and re-training of their officials may be required. To provide all children without parental care with family environment a very effective instrument could become the recourse of the state to the civil society (e.g., the state's support of the Children's villages) and a broad appeal to public. Practice demonstrates that volunteers wishing to become substitute caregivers for children are found rather easily provided that the respective processes and mechanisms are open and flexible. In this aspect of the child's right to family the state is endowed only with an obligation to facilitate the child's family placement, and the ultimate right-providers are the people. So, a proper cooperating with people and supporting them in their desire to foster a child is all what is required from the state.

Conclusion.

As it has been repeatedly pointed out in the present paper, the right to family and the right of the child to family are the complex institutions of international human rights law derived from different international documents. The right to family in contemporary international jurisprudence implies several basic elements: the right to found a family and be equal in family relations; the right to family privacy; the right to support for family from the state; the right of unification and communication of family members and the right to family planning. The right of the child to family has a partly different content: it implies the right to be brought up by the child's own parents; the right to state support within the family; the right of contacts with family members and the right to alternative placement if the child is deprived of parental care. The right of the child to family therefore should not be understood as the right solely to be provided with family environment in all circumstances; but its elements, indeed, may be invoked mainly in respect of children without parental care or at risk of its deprivation. Numerous international standards and recommendations scattered along various international documents concerning children without parental care, thus, also constitute a part of the institution of the child's right to family, though they may have different legal force, both binding and not.

In Russia the right of the child to family was stipulated in the new Family Code adopted with the transition to a new democratic regime. However, the social situation in the country still witnesses about a deep family crisis and a large scale of children's abandonment which particularly increased after the socialist era. The existing system of protecting the child's right to family in Russia based on the socialist epoch experience but containing certain new liberal features is insufficient to combat properly the children's abandonment. These factors, in most part, remain common for the protection of the child's right to family in the CIS countries where the historical conditions and legislative prerequisites for its regulation were similar to the Russian ones.

Realization of the child's right to family must begin with the respective social policies providing addressed support and assistance to socially vulnerable families with children. Then, appropriate mechanisms for prevention of separation of children with families must be created: for the moment such practices exist in many regions, but no unified schemes for their work and standards for their outcomes are stipulated in the law. The next stage of protection of the child's right to family - separation with family and providing alternative placement of children – should become more cooperative, friendly and individualized towards all the participants of this process in order to correspond the international standards. International law also requires paying more respect to the child's biological family in the process of alternative placement, including the right of contacts with them and facilitating further reunification with family, which is a weak point of the Russian child protection system. A very important aspect of the child's right to family is facilitating by the state the child's placement into family environment and avoiding institutionalizing children. So, developing family types of care, providing a more open access to children eligible for adoption (foster care etc.) and stimulating the public to adopt or foster a child is the duty of the state.

During the recent years some steps are already being done by Russian authorities in the directions indicated above. However, yet there is no unified plan of action for providing the right of the child to family in Russia: one of the most important rights for every child's well-being. All of the recommendations mentioned in the present paper could become a part of such plan and their realization could significantly improve the situation with children.

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