

Title	Draft Toolkit for Preventing and Addressing Illicit Practices in Intercountry Adoption PART I – INTRODUCTION
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PART I: INTRODUCTION

1. Abbreviations

Abbreviations	Phrase
- 1993 Adoption Convention - Convention - HC	<u>Convention of 29 May 1993 on Protection of Children and Cooperation in respect of Intercountry Adoption</u> done at The Hague
AAB	Adoption accredited body ¹
CRC	<u>1989 UN Convention on the Rights of the Child</u>
C&R	Conclusion and Recommendation
Explanatory Report	<u>Explanatory Report</u> of the 1993 Adoption Convention by G. Parra-Aranguren
FS	Fact Sheet
GGP No 1	<u>Guide to Good Practice No 1</u> “The implementation and Operation of the 1993 [...] Adoption Convention”
GGP No 2	<u>Guide to Good Practice No 2</u> “Accreditation and Adoption Accredited Bodies”
HCCH	Hague Conference on Private International Law
ISS	International Social Service
Note on Financial Aspects	<u>Note on the Financial Aspects of Intercountry Adoption</u>
Note on Habitual Residence	<u>Note on Habitual Residence and the Scope of the 1993 [Adoption] Convention</u>
OPIC	<u>Optional Protocol to the CRC on a Communications Procedure</u>
OPSC	<u>Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography</u>
PAPs	Prospective adoptive parents
RS	Receiving State
SC	Special Commission on the practical operation of the Convention
SO	State of origin
UN Guidelines	<u>2009 UN Guidelines for the Alternative Care of Children</u>
UNICEF	United Nations Children’s Fund
2017 UN Rapporteur Report	UN Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, <u>Thematic Report on Illegal Adoptions</u>
2020 UN Rapporteur Report	UN Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, <u>Final Report</u>

¹ In this Toolkit, all the content regarding AABs applies to approved (non-accredited) persons (HC, Art. 22(2)), unless otherwise indicated.

2. Glossary

- 1 The terms below have been defined for the purposes of this Toolkit only. Where the definitions are drawn from other sources, such sources are noted in parentheses.

2.1. Definitions

Abandonment: an act which may include:

- permanently leaving a child anonymously in a place where they may, or may not, be found and looked after; or
- entrusting a child to another person, without coming back to collect the child after a given period of time, and where it is impossible to contact or find the person(s) who entrusted the child.

Abduction of children: “the act of taking a child away illegally, especially using force” (Oxford Dictionary), including through coercion or threats, for the purpose of intercountry adoption. This can be done by, for example, kidnapping a child or falsely informing parents that their baby was stillborn or died shortly after birth (see 2017 UN Rapporteur Report, para. 28).

Enabling factors: social, economic and other factors and weaknesses related to the legal frameworks, institutions, resources and / or procedures within a State that may facilitate or contribute to the occurrence of illicit practices.

Family: where reference is made to family or birth family instead of parents or birth parents, it is meant to include not only the birth parents but also the close relatives (e.g., siblings, grand-parents) living in the same household. When reference is made to adoptive family instead of adoptive parents, it is meant to refer to the family unit composed of the adoptee, their adoptive parent(s) and possible siblings.

Falsification: the act of changing a document such that it contains false information. Falsification is a form of fraud.

Forgery: the creation of a false document. Forgery is a form of fraud.

Illegal adoption:² “an adoption resulting from ‘abuses, such as abduction, the sale of, traffic in, and other illegal or illicit activities against children’” and usually prohibited by law (GGP No 1, Glossary).

Illicit practices in intercountry adoption:³ “situations where a child has been [or is to be] adopted without respect for the rights of the child or for the safeguards of the [1993 Adoption] Convention”. (2012 Australia / HCCH Discussion Paper).⁴

Independent adoptions: “cases where the [PAPs] are approved as eligible and suited to adopt by their Central Authority or [AAB]. They then travel independently to a [State] of origin to find a child to adopt, without the assistance of a Central Authority or [AAB] in the State of origin. [...] They do not satisfy the Convention’s requirements and should not be certified under Article 23 as a Convention adoption” (GGP No 1, Glossary).

Inducement: an improper or illicit means of obtaining consent for adoption. “[I]nducement may be present if any form of compensation or payment is used to influence or bring about the decision to relinquish a child for adoption” (GGP No 1, para. 83).

² Broadly, the term ‘illegal’ refers to actions that would be forbidden by law while ‘illicit’ could be either forbidden by law or unethical or immoral. Neither term refers solely to actions which are contrary to best practice.

³ *Ibid.*

⁴ See [Discussion Paper: Co-operation between Central Authorities to develop a common approach to preventing and addressing illicit practices in intercountry adoption cases](#), 2012.

Orphan: a child under 18 years of age who has lost all their legal parents to any cause of death.

Parent: parent(s) of the child at birth. In this Toolkit, they are also referred to as “birth” parent(s). In addition, depending on the issue discussed, the reference to “parent(s)” or “birth parent(s)” may be to the legal parent(s), or the biological parent(s) whose legal parentage is not established or both. For the sake of clarity, the term “parent” does not refer to adoptive parent(s), rather they are referred to as “adoptive” parent(s).

Pattern of illicit practices: illicit practices should be understood as constituting a pattern where there have been repeated abuses of a similar type over a given period of time, usually involving the same actors.⁵

Private adoptions: “where arrangements for adoption have been made directly between a [birth] parent in one Contracting State and [PAPs] in another Contracting State. Private adoptions arranged directly between birth parents and adoptive parents come within the scope of the Convention if the conditions set out in Article 2 are present (*inter alia*, the child has been, is or will be moved from the State of origin to the receiving State), but such adoptions are not compatible with the Convention” (GGP No 1, Glossary).

Prospective adoptive parent(s) (PAPs): person or persons wishing to adopt, regardless of whether they have been determined to be eligible and suitable for adoption.

Relinquishment: “a [legal] parent’s decision to forego or surrender [parental] rights and responsibilities in respect of a child, or to [give] consent to the adoption of a child”, before an authority (GGP No 1, para. 267).

Sale of children: “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration” (OPSC, Art. 2(a)). This includes, among other things, “[i]mproperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption” (OPSC, Art. 3(1)(a)(ii)).

Subsidiarity principle: “a child should be raised by [their] birth family or extended family whenever possible. If that is not possible or practicable, other forms of permanent family care in the [State] of origin should be considered. Only after due consideration has been given to national solutions should intercountry adoption be considered, and then only if it is in the child’s best interests” (GGP No 1, para. 47).

Traffic in children: “the payment of money or other compensation to facilitate the illegal movement of children for the purposes of illegal adoption or other forms of exploitation” (GGP No 1, para. 74).⁶

2.2. Definitions linked to financial issues (see in particular Fact Sheet 3)

2 The terms below reproduce some of the definitions included in the Note on Financial Aspects:

⁵ Possible examples of patterns include: children who are routinely admitted to child institutions and declared to be “orphans” in need of adoption without sufficient investigation of their background, including reasonable efforts being made to locate the child’s birth family; the “consent” of the parents is routinely obtained by representatives of child institutions which make misleading or false promises to the often uneducated or illiterate parents. The latter may believe that the child is going to a boarding school in the receiving State and will return to the family after a period of time, when in fact the intent is to declare the child adoptable; children are routinely directed to intercountry adoption without assistance first being offered to the family and / or consideration given to suitable permanent domestic alternative care solutions; PAPs are routinely permitted to visit child institutions and identify children they wish to adopt. The “matching” of these children is subsequently carried out by officials in such institutions in accordance with the preferences stated by the PAPs; AABs that often charge fees for work not carried out.

⁶ This Toolkit uses the term “traffic in children” as it is the term used in the Convention; it can be used interchangeably with “trafficking in children”. It has to be noted that most of the forms of exploitation mentioned in the definition of trafficking in the Palermo Protocol (e.g., sexual exploitation, forced labour, slavery, servitude, removal of organs) would not be common in traffic of children for the purpose of intercountry adoption (see further, D. Smolin, *Intercountry Adoption as Child Trafficking*, 39 Val. U. L. Rev. 281 (2004), p. 296).

Cooperation projects: “programmes or projects with the aim of strengthening the child protection system in a State of origin. These are mostly focused on capacity building and training of stakeholders and should ideally be self-sustainable in the future. Without compromising other forms of cooperation projects, the cooperation projects [...] are considered as a category of development aid.”

Contribution: there exist two forms of contributions:

- “Contributions demanded by the **State of origin**, which are mandatory and meant to improve either the adoption system or the child protection system. The amount is set by the State of origin. These contributions are managed by the authorities or others appropriately authorised in the State of origin which decide how the funds will be used.
- Contributions demanded by the **[AAB]** from PAPs. These contributions may be for particular children’s institutions⁷ (e.g., for maintenance costs for the child) or for the cooperation projects of the accredited body in the State of origin. The cooperation projects may be a condition of the authorisation of that body to work in the State of origin. The amount is set by the accredited body or its partners. The payment may not be a statutory obligation and accredited bodies may present the demand in terms of ‘highly recommended contribution’, but in practice it is ‘mandatory’ for the [PAPs] in the sense that their application will not proceed if the payment is not made.”

Costs (HC, Art. 32(2)): “a collective term to refer to the amount requested to obtain a specific service or group of services (e.g., translation costs, administrative costs) to complete the adoption. [...] the term ‘costs’ may be used in conjunction or interchangeably with the term ‘expenses’. Costs include fees and other amounts for specific services and for obtaining specific documents.”

Donations: “voluntary *ad hoc* payments or gifts of material goods from [PAPs] or [AABs] for the well-being of children in institutions. Donations are usually given to the orphanage or institution connected to the [...] adopted child. The donation might also be given by an accredited body to a specific fund in the State of origin.”

Expenses (HC, Art. 32(2)): “an amount of money spent on a particular service to complete the adoption. Costs are charged and expenses are paid. A cost converts into an expense as soon as it is paid.”

Fees (HC, Art. 32(2)): “an amount that a person or entity charges for a particular service (e.g., court filing fee). It generally takes the form of a lump-sum paid in one instalment for one particular service or group of services, but it might also be fixed on an hourly rate (e.g., lawyers’ fees). It may be classified as a subcategory of the costs of the adoption. “‘Professional fees’ referred to in Article 32(2) refer to the amount requested by professionals, such as lawyers, psychologists and doctors, for their work on a particular case.”

3. Why this Toolkit?

- 3 The 1993 Adoption Convention was developed to respond to the serious and complex human and legal problems in intercountry adoption and the absence of an international legal instrument that could respond to the situation. Thus, two of the objectives of the Convention are to “*establish safeguards to ensure that intercountry adoptions take place in the **best interests of the child** and with respect for his or her **fundamental rights** as recognised by international law*” and to “*establish a system of cooperation amongst Contracting State to ensure that those safeguards are respected*”

⁷ In this Toolkit, child institution should be understood as one of the possible forms of residential care facilities (see UN Guidelines, section 29(c)(iv)).

and thereby *prevent the abduction, the sale of, or traffic in children*” (HC, Art. 1(a) and (b), emphasis added).

- 4 The Convention has promoted the adoption of laws and regulations, more rigorous procedures, stricter controls and the processing of intercountry adoptions through competent authorities. All of which have contributed to mobilising political will to increase efforts to prevent and address illicit practices in intercountry adoption. However, being a Party to the Convention has little effect if Contracting States do not implement it correctly, and illicit practices may thus still occur.⁸ In addition, while the Convention provides safeguards that significantly reduce the risks of illicit practices, where it is properly applied, it does not address all the enabling factors that may facilitate or contribute to the occurrence of illicit practices. It is therefore crucial that States identify and recognise the problems, tackle the enabling factors that create an environment conducive to illicit practices, establish prevention mechanisms, ensure adequate control of their authorities and bodies (in particular AABs), monitor the adoption procedures, and cooperate to respond effectively whenever illicit practices occur.
- 5 Against this background, it was decided to convene a Working Group responsible for developing tools to assist in preventing and addressing illicit practices, which are now included in this Toolkit.

Damaging effects of illicit practices and potential consequences if nothing is done to prevent and address illicit practices

Illicit practices have extremely damaging results:

- they can result in **children being unnecessarily taken away** from their birth families and / or being unnecessarily drawn into child institutions;
- they often inflict **lasting and profound trauma and harm** (e.g., distress, life-altering situations, vulnerability, uncertainty) on the persons involved, especially on adoptees and families;
- when there are no consequences, **deterrence is weakened**, and **rules** may become **ineffective**; in addition, impunity can lead to **further violations**;
- it is **difficult to improve** existing preventive measures **without information** from thorough investigations of illicit practices;
- they have a **cost for society** (e.g., people impacted may need professional assistance or may be excluded from their community);
- they may **limit the potential benefits** of intercountry adoption as a child protection measure (e.g., they undermine the necessary trust between States and the public trust within a State, trust which the 1993 Adoption Convention seeks to establish through a system of cooperation and safeguards; States may prohibit or severely limit intercountry adoption by moratoria and shutdowns).

4. What can you find in this Toolkit?

- 6 This Toolkit is composed of the tools listed below that can be read independently or together. Where relevant, cross-references between the tools are made to allow for a holistic view of the approach to be taken to facilitate the identification and prevention of, and the response to, illicit practices.

⁸ See “20 years of the 1993 Hague Convention: Assessing the impact of the convention on laws and practices relating to intercountry adoption and the protection of children”, Prel. Doc. No 3 of May 2015 for the attention of the SC of June 2015 on the practical operation of the 1993 Adoption Convention (available on the HCCH at website < www.hcch.net > under “Adoption Section” then “All Special Commission meetings” and “Special Commission of 2015”).

- 7 The tools are deliberately drafted in general terms in order to encourage States to adapt them to their specific realities by establishing their own procedures, measures and safeguards, and to widely disseminate them. This Toolkit does not replace the need for States to have their own measures, policies, guarantees and procedures to safeguard against, and address, illicit practices in intercountry adoption.

Part I – Introduction

- 8 The first part of the Toolkit presents a list of abbreviations and a Glossary. It also explains the reasons for drafting the Toolkit, its content, to whom it is addressed, its scope of application and recalls the importance of the best interests of the child and respect for their fundamental rights in all adoption matters.

Part II – Fact Sheets on Illicit Practices

- 9 Fact Sheets aim at assisting in better **identifying** and **recognising**:
- illicit practices in intercountry adoption;
 - factors that may contribute to and / or facilitate the development of illicit practices (“enabling factors”); and
 - measures and safeguards that may assist in **preventing** illicit practices.

Part III – Checklist

- 10 The Checklist aims to provide Central Authorities and / or AABs with a **list of issues they should watch out for** and what **actions they may take at each step** in an intercountry adoption procedure to help prevent or reduce, to the extent possible, the risk of illicit activity from permeating or influencing the intercountry adoption process, in light of the respective responsibilities and co-responsibilities of States of origin and receiving States.

Part IV – Model Procedure to respond to illicit practices

- 11 The Model Procedure aims at providing guidance on **how to respond** to specific cases of illicit practices that occurred in the past.

Part V – Guidelines on cooperation and coordination to prevent and address illicit practices, including patterns

- 12 The Guidelines aim at providing **guidance on how States can cooperate and coordinate** their efforts in order to prevent and respond to illicit practices, including patterns of illicit practices.

5. To whom is this Toolkit addressed?

- 13 This Toolkit is primarily addressed to authorities and bodies directly or indirectly involved in the intercountry adoption process and each tool is more specifically addressed to different actors:
- The Fact Sheets are primarily directed at Central Authorities, other competent authorities (e.g., judges, administrative authorities) and bodies (e.g., AABs). They may also be useful when providing technical assistance for new State Parties to the Convention or State Parties wishing to improve their adoption system.
 - The Checklist is directed at Central Authorities and, when applicable, AABs.
 - The Model Procedure and the Guidelines are primarily directed at all State actors.

14 In addition, the Toolkit may be of relevance to other professionals working in adoption (e.g., lawyers, social workers, psychologists) and personnel working in child institutions. It may also be of interest to adoptees,⁹ birth families and prospective / adoptive parents and families.

6. What is the scope of application of this Toolkit?

15 This Toolkit is aimed at preventing and addressing illicit practices in intercountry adoptions made under the 1993 Adoption Convention.

16 However, Contracting States are also encouraged to apply this Toolkit, as far as possible, to intercountry adoptions made between a Contracting State and a non-Contracting State: experience shows that intercountry adoptions made outside the scope of the 1993 Adoption Convention are linked to a higher risk of illicit practices. Consequently, past Special Commission meetings have recommended that States Parties to the 1993 Adoption Convention should, “as far as practicable, apply the standards and safeguards of the Convention to the arrangements for intercountry adoptions which they make in respect of non-Contracting States” (see C&R No 11 of the 2000 SC, C&R No 19 of the 2005 SC and C&R No 36 of the 2010 SC).

17 [In addition, Contracting States might consider referring to the Toolkit in dealing with suspected illicit practices arising from adoptions that occurred prior to the coming into force of the Convention in their State.]¹⁰

18 Nothing in this Toolkit may be construed as binding on particular States or Central Authorities or as modifying the provisions of the Convention; however, all States are encouraged to review their own practices, and where appropriate and feasible, to modify them in line with the Toolkit. For both established and developing Central Authorities, the implementation of the Convention should be seen as a continuing, progressive or incremental process of improvement.

7. Ensuring the best interests of the child and child-friendly measures in preventing and addressing illicit practices in intercountry adoption

19 The best interests of the child shall be the paramount consideration in adoption (CRC, Art. 21). Explicit guidance on how to determine in adoption what is in the best interests of a child can act as a safeguard against illicit practices. This guidance should reflect the principles and safeguards enshrined in the CRC and the 1993 Adoption Convention. This includes that a best interests’ assessment¹¹ should always be carried out in an adoption procedure, should be individualised and conducted on a case-by-case basis, and should be informed by the child’s views, in accordance with their age and maturity (*i.e.*, the child should have an active role in decisions made about them) as well as the life-long effects of an adoption. In addition, as for any decision that impacts a child, their fundamental rights should be respected.

20 All actors should always take into consideration the importance of the best interests of the child in addressing suspected and actual cases of illicit practices and need to be sensitive to concerns of adoptees, as well as birth and adoptive families. It is also of the utmost importance to consider not

⁹ Where the term “adoptee” is used in this Toolkit, it usually refers to an “intercountry adoptee”.

¹⁰ Note for the 2022 Special Commission meeting: The Working Group on preventing and addressing illicit practices in intercountry adoption recommended in its 2019 Report (C&R No 5) and its 2020 Report (para. 8) that “the Toolkit should address how to respond to all cases of illicit practices, including those in non-Convention countries and those preceding the entry into force of the 1993 [Adoption] Convention.” However, “some participants raised possible concerns as to applying the Toolkit to cases preceding the entry into force of the 1993 Adoption Convention” (see 2020 WG Report, para. 8). Further discussions took place at the 2021 meeting, where the majority of the experts of the Working Group supported the inclusion of para. 17 above. Other experts were of the view that it would be best to include the text of para. 17 as a footnote.

¹¹ See N. Cantwell, *The Best Interests of the Child in Intercountry Adoption*, Innocenti Insight, - UNICEF, 2013.

only the short, but also the long-term effects on the adoptee of any action taken to address an illicit practice.

21 In the context of adoption, authorities and bodies should also have a child-friendly approach. Therefore, approaches, processes and systems designed for and by adults may need to be altered to reflect the capacities, needs and rights of children and to ensure that they have adequate support and are properly involved. Child-friendly approaches¹² in adoption may include:

- devoting time and attention to ensure the child is properly informed, prepared and given the opportunity to contribute their views at all stages of the adoption process;
- altering language and communication styles to reflect the capacities of the child;
- establishing complaints mechanisms and possible remedies that are easily accessible to children.

¹² See for example, *Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice*, 2010; T. Liefwaard, “[Access to Justice for Children: Towards a Specific Research and Implementation Agenda](#)”, *The International Journal of Children’s Rights* 27, 2019.