

<b>Title</b>	<b>Draft Toolkit for Preventing and Addressing Illicit Practices in Intercountry Adoption PART IV – MODEL PROCEDURE TO RESPOND TO ILLICIT PRACTICES</b>
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## PART IV: MODEL PROCEDURE TO RESPOND TO SUSPECTED AND ACTUAL CASES OF ILLICIT PRACTICES

- 1 This Model Procedure presents what actions State actors should consider taking to effectively address and respond to situations involving suspected or actual cases of illicit practices under the 1993 Adoption Convention.
- 2 The circumstances relating to each individual intercountry adoption will be unique, and the needs of each adoptee,<sup>1</sup> the birth parents (/family) and adoptive parents (/family)<sup>2</sup> may differ. In working to address the various issues, it is important to focus on the best interests of the child which should be the paramount consideration,<sup>3</sup> while remaining sensitive to the concerns of birth families and adoptive families. It is also important to consider “not only the short, but also the long-term effects on the adoptee of any action taken to address the illicit practice”.<sup>4</sup>
- 3 This Model Procedure presents a wide array of measures and is deliberately general, so as to encourage States to develop their own procedure, adapted from this Model Procedure, and to widely disseminate it to all State actors involved in intercountry adoption. It has to be noted that “not all services and measures may be available in all States and that each State may develop its own procedure based on its own legislative and institutional framework, as well as their available resources”.<sup>5</sup>
- 4 The order of the steps and actions presented in this Model Procedure may need to be adapted according to the nature of the case, the national system, and the different authorities and bodies involved at the national or local level. For example, certain actions may be relevant throughout the procedure, some may need to occur simultaneously or in a different order.
- 5 The Model Procedure is designed to potentially apply to any situation, whether an individual case or where a more generalised problem is suspected (*i.e.*, a pattern). Where appropriate, additional information mainly relevant to responding to cases affected by a pattern of illicit practices has been included in box format.

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<sup>1</sup> The Model Procedure is also applicable to suspected illicit practices when the adoption procedure is taking place, but the child has not yet been adopted (*i.e.*, the child is not yet an “adoptee”); however, for ease of reference the word “adoptee” is used also to refer to these children.

<sup>2</sup> The Model Procedure sometimes refers to “parents (/family)” to indicate that the action specifically refers to (birth or adoptive) parents, but in some cases, it may also involve other members in the (nuclear) family (see definition of “family” in the Glossary of the Toolkit).

<sup>3</sup> See CRC, Art. 21; and UNHCR, “[Guidelines on Assessing and Determining the Best Interests of the Child](#)”, 2021.

<sup>4</sup> Report of the Working Group on Preventing and Addressing Illicit Practices in Intercountry Adoption (meeting of 8–10 July 2020) (2020 WG Report), para. 22.

<sup>5</sup> *Ibid.*, para. 21.

### Potential obstacles to disclosing possible illicit practices and / or responding to illicit practices

Various factors can make it difficult to disclose and / or respond in an effective manner when illicit practices are suspected to have occurred, for example:

1. **lack of resources**, lack of established **frameworks** (such as protocols), **denial of responsibility or mandate**, and **lack of political will**, to identify, confront, investigate, address and respond to illicit practices;
2. **lack of access to documents and records**, especially when concerned bodies cease their activities or refuse to cooperate;
3. **lack of accessible complaints mechanisms**;
4. **lack of protection for witnesses**;
5. **statute of limitations**<sup>6</sup> (*i.e.*, the maximum time after an event within which legal proceedings may be initiated has elapsed);
6. **fears** that investigation may lead to **children** being **returned** to the State of origin;
7. **fears** that investigation may lead to **litigation**;
8. **fears** that the adoption may be **revoked**, and the adoptee becomes **stateless**;
9. **fears** that investigation may **jeopardise** intercountry adoption **relations** between States and / or lead to the **suspension** of an intercountry **adoption programme** between States (or an individual case will be blocked);
10. **failure** to fully acknowledge and properly implement the **co-responsibility** of States to prevent and address illicit practices;
11. **environment of impunity**;
12. **power imbalances** which may exist in intercountry adoption and, in particular, the difficulty for birth families to have their voices heard.

### Confidentiality and rules of privacy

States should ensure that the information collected during the disclosure of suspected cases of illicit practices and in the course of an investigation is protected and managed in accordance with the relevant rules on privacy and the sharing of information of the concerned State.

Unless the law of the State provides otherwise, the sharing of any identifying information should be subject to appropriate consents.<sup>7</sup> This may be particularly important if the case is receiving media attention. In addition, unless the law of the State provides differently, confidentiality should not be used to hinder or prevent investigation.

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<sup>6</sup> In some States, despite the statute of limitations for criminal charges or a criminal investigation, a Central Authority could nevertheless investigate and respond appropriately. The statute of limitations would, however, not allow the affected person to seek legal redress for the harm caused.

<sup>7</sup> See Australian Central Authority's *Protocol for Responding to Allegations of Illicit or Illegal Practices in Intercountry Adoption, 2021* ("Australian Protocol").

## 1. STEP 1: DISCLOSURE AND RECORDING OF SUSPECTED CASES OF ILLICIT PRACTICES

### 1.1. How may suspicions of illicit practices arise?

- 6 Suspicions of illicit practices may arise as a result, among others, of the following:<sup>8</sup>
- observations of irregularities in intercountry adoption cases;
  - comments made by an adoptee about their background;
  - concerns about an ongoing or already finalised intercountry adoption raised by an adoptee, a birth family, PAPs, an adoptive family, an authority, a community member or anyone related to that adoption;
  - reviews or investigations conducted by authorities or bodies in the State of origin or the receiving State, international organisations, or other;
  - monitoring, supervision and audits of AABs;
  - media reports;
  - legal proceedings;
  - law enforcement activity;
  - DNA testing;
  - searches for origins.
- 7 In addition, the presence of **multiple enabling factors** may be the precursor to suspicions of illicit practices.

#### 1993 Adoption Convention

“A competent authority which finds that any provision of the **Convention** has not been respected or that there is a serious risk that it may not be respected, shall **immediately inform the Central Authority of its State**. This Central Authority shall be responsible for ensuring that appropriate measures are taken.” (Art. 33)

#### In addition, in the context of disclosure of a (suspected) pattern of illicit practices:

The **disclosure** of a **single** illicit practice may further **reveal** a **pattern** of illicit practices: therefore, wherever an illicit practice is disclosed, it is important to always verify whether this illicit practice is an isolated case or whether it might be part of a pattern (*i.e.*, question if, depending on the illicit practice and its circumstances, the concern which arose in a particular case may also have arisen in other cases (and review these other cases)).

### 1.2. Which authority should record suspected cases of illicit practices?

- 8 Central Authorities should record any suspicions of practices or activities that may potentially be illicit and that they discover or that are brought to their attention by any interested person, authority or body. Central Authorities should take any reasonable allegations or concerns seriously. Central Authorities may also consider using diplomatic channels to raise their concerns regarding suspicions involving their counterpart in the other State.
- 9 States should also designate an alternative competent authority (e.g., an administrative tribunal, an investigative authority, an ombudsman) to report to in the case that there are suspicions that the Central Authority may be involved in a suspected illicit practice.

<sup>8</sup> *Ibid.*

### 1.3. What actions should States take to facilitate the disclosure of illicit practices?

10 To improve the likelihood that suspected cases of illicit practices are disclosed and properly recorded, States should:

- designate an individual (or individuals) within the Central Authority to serve as the **official point of contact** on matters relating to illicit practices, and provide such individuals with appropriate training to help them recognise indications of potential illicit practice (e.g., training on illicit practices, adoptees and children’s rights, child-friendly procedures);
- establish easily **accessible means of reporting**, whether orally (e.g., via a hotline) or in writing (e.g., by means of a complaint registry), in the Central Authority (or other competent authority), and widely publicise its existence and the relevant contact information;
- establish automatic and / or institutionalised **feedback mechanisms** for adoptive parents once the adoption is finalised (e.g., through an online form to the Central authority);
- remind competent authorities of their **duty to inform the Central Authority** of their State immediately upon learning about possible illicit practices or if anything of concern is suspected (see HC, Art. 33);
- encourage all **individuals and bodies** involved in the intercountry adoption process (e.g., adoptees, birth parents (/family), PAPs, adoptive parents, AABs, child institutions) to **report promptly** to the Central Authorities or other relevant authority whenever a potential illicit practice is suspected or anything of concern<sup>9</sup> is raised, and ensure such individuals and bodies have proper protection (e.g., confidentiality of their names) so they are **free from harassment and retaliation**;
- ensure that all **information** that is disclosed by any of the above means is properly **recorded and preserved**, in order to prevent impacted persons from having to provide the information repeatedly;
- provide **information** to adoptees, birth families, PAPs and adoptive families about illicit practices, the importance of disclosing suspected illicit practices as early as possible, and on what to do when they suspect that an illicit practice has taken place;
- include **training** on how to identify / report illicit practices in information sessions for (prospective) adoptive **parents**;
- include **training** on how to identify / report illicit practices as part of the accreditation and authorisation process for **AABs** and licensing of child institutions; staff of AABs and institutions should also receive such training;
- establish **channels of communication** with counterparts in the Central Authorities of other States to discuss possible illicit practices, and exchange information on a regular basis about how to facilitate the disclosure of illicit practices and how to prevent and address them.

#### In addition, in the context of a (suspected) pattern of illicit practices:

States may wish to:

- provide for a specific register for adoptees and birth families to report suspected and confirmed illicit practices;
- elaborate specific protocols between concerned States on the applicable procedures to facilitate responses to illicit practices;

<sup>9</sup> For example, what seems to be a simple incoherence for (prospective) adoptive parents might actually be an illicit practice.

- develop brochures (or other materials) for adoptees and provide information on the possible avenues in case of suspected and confirmed illicit practices.

## 2. IF APPROPRIATE: CONSIDERATIONS OF TEMPORARY CHILD PROTECTION MEASURES

### 2.1. Temporary protection measures for the child for ongoing adoption processes and already finalised adoptions

11 From the moment credible allegations or suspicions of illicit practices are disclosed and until final measures following the investigation can be taken, any potential child protection concerns should be promptly reported to the competent authorities of the concerned State.

12 The competent authorities of the State where the child is physically present should have primary responsibility for the protection of the child but should cooperate with the other concerned States. In accordance with their domestic law, they should assess the situation and determine what, if any, temporary measures may be needed to protect the child (e.g., temporary arrangements for the child's care) pending the results of the investigation.<sup>10</sup>

### 2.2. Additional considerations regarding ongoing adoption processes

13 If suspicions of illicit practices are disclosed during an ongoing adoption process (*i.e.*, the adoption is not yet completed):

- it may be desirable to immediately **halt** the adoption process from the moment suspicion of illicit practice is disclosed (with the assistance, where appropriate, of the Central Authority (or competent authority) of the other State);
- Central Authorities should **not issue the Article 17(c)** agreement to proceed, nor should the competent authorities issue the adoption decision and issue the Article 23 certificate;
- if warranted, the Central Authority (or competent authority) of the State of origin where the child is physically present should consider taking steps to **prevent the removal** of the child from their State while the matter is being investigated.

14 A final decision on whether the adoption process can be resumed should only be made after the investigation has been completed or when the investigation clearly shows that the illicit practice does not have any incidence on the possible continuation of the particular adoption case (see further below section 6 and Checklist). In addition, if a suspected illicit practice potentially involves the PAPs initially selected, consideration should be given as to whether the child may be adopted by other PAPs if there are no other concerns about the child's adoptability and availability for an intercountry adoption.

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<sup>10</sup> See [2012 Australian Discussion Paper](#), p. 8. See also UN Guidelines for the Alternative Care of Children.



### 3. **ONGOING STEP: SERVICES TO IMPACTED PERSONS**<sup>11</sup>

- 15 Professional support is key when facing (suspicions of) illicit practices given the complexities of such situations. Services or sources of assistance and support should therefore be available to adoptees, birth parents, PAPs and adoptive parents who may be confronted with a situation where suspicions of an illicit practice are raised or an illicit practice is confirmed following an investigation.<sup>12</sup> When providing such services, assistance and support, a child-friendly approach in which the child can participate, in accordance with their age and maturity, should be adopted.
- 16 Some Central Authorities may themselves be able to provide (some of) the services mentioned below. If they cannot, or do not, provide these services, the Central Authority may help impacted persons **identify** appropriate support and advocacy, where appropriate. A protocol or other form of formal advice regarding where to get assistance could also be established. Adoptees, birth families and adoptive families may also wish to access other services or resources. Central Authority personnel and the staff (and others acting on behalf) of AABs should receive training on how to assist impacted persons, including by directing them to available and appropriate services and support.
- 17 The following paragraphs provide a list of the services, support and assistance<sup>13</sup> that may be available and to which Central Authorities and AABs should direct adoptees, birth parents (/families), PAPs and / or adoptive parents (/families),<sup>14</sup> as appropriate, on a case-by-case basis and, if the adoptee is still a child, taking into account their best interests.
- 18 For some, this may involve point-in-time support when a particular illicit practice is disclosed. For others, it may involve support over several years, even after actions have been taken to respond to the illicit practice. Support should be available as long as it is deemed necessary.
- 19 **Counselling and casework support services:** the Central Authority should provide counselling and casework support by qualified professionals (or direct impacted persons to qualified professionals who can provide such counselling and casework support in case it cannot provide it itself). The nature and scope of available services may be adapted on a case-by-case basis and may vary from one State to another.<sup>15</sup>
- 20 **Mediation:** when a suspected illicit practice is disclosed, adoptees, birth parents and adoptive parents may have conflicting needs and desires. Where appropriate, mediation with a trained impartial mediator may be available to help them reach a satisfactory outcome.<sup>16</sup>
- 21 **Legal assistance:** impacted persons may need the assistance of a legal practitioner with experience in family law or children's issues to deal with their case. The adoptee may need to have a separate representative to avoid conflicts of interest. Upon request, the Central Authority should direct them to the referral service of the private bar or other available resource for assistance in finding legal information and / or a legal practitioner.

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<sup>11</sup> Multiple terms can be used (e.g., victims, persons with lived experience).

<sup>12</sup> Impacted persons may include the adoptee, a child in need of adoption, the birth parents and the (prospective) adoptive parents. In some cases, it may also include other members of the birth family or adoptive family (e.g., siblings). Some of the services presented in this Model Procedure may also be available to other impacted persons who are members of the family but who are neither the (birth or adoptive) parents nor the adoptee. Each State should specify to whom the services will be addressed in that particular State.

<sup>13</sup> States may also consider developing a protocol regarding where impacted persons may find assistance. See for example the Australian Protocol, *supra* note 7, which includes many of the services mentioned in this section.

<sup>14</sup> Adoptees, birth families and adoptive families may choose to access other services or resources.

<sup>15</sup> See Australian Protocol, *supra* note 7: [Australian Government-funded Intercountry Adoptee and Family Support Service](#).

<sup>16</sup> See C. Baglietto, N. Cantwell, M. Dambach (Eds.), *Responding to illegal adoptions: A professional handbook*, ISS, Geneva, Switzerland, 2016 (hereinafter, "ISS Handbook"), Chapter 3. See also a [list by country of international mediators](#).

22 **Financial assistance:** legal and other related costs may be incurred by adoptees and their families in accessing services. General information about possible financial assistance should be provided by the Central Authority (e.g., some States may offer some services for free, others may provide for legal aid or for other low-cost services, or subsidise services provided by other authorities or bodies). Queries about whether any applicable financial assistance options apply under the circumstances of a case should be directed to the relevant Central Authority or competent authority.

23 **Other assistance:** other assistance such as translation of documents and interpretation may also be available. Where relevant, information about such assistance and where to apply to obtain it should be provided by the Central Authority to the adoptee, the birth parents and / or the (prospective) adoptive parents.

24 **Maintaining contact between the authorities and the concerned persons:** the suspicion of illicit practice may be raised by 1) the adoptee and / or the birth parent(s) and / or the (prospective) adoptive parent(s) or 2) by someone else.

In the first case, the competent authority should ensure ongoing contact with the adoptee, the birth parents and / or the (prospective) adoptive parents (depending on by whom the suspicion was raised) throughout the procedure. The Central Authority (or the competent authority) may be the primary contact for providing updated information about the progress of the investigations (where such updates are available) or responding to further questions or concerns. It would be useful to designate a contact person within the relevant authority who could be in charge of having day-to-day contact with the affected families.

In the second case, once it is decided to reach out to the adoptee (see para. 41 below), birth parents and / or (prospective) adoptive parents, contact between the authorities and the concerned persons should be maintained.

In both the above cases, such contact may also require appropriate support.

25 **Contact facilitation between the adoptee and their birth family:** following the disclosure of a (suspected) illicit practice, the competent authorities and bodies may try to facilitate the contact between the adoptee and their birth family, in accordance with the wishes of the adoptee and their birth family and taking into consideration the best interests of the child. This may involve in some cases first finding the birth family (e.g., searching, tracing, DNA testing). Support and counselling for contact facilitation and family reunification is very important. The availability, scope and nature of such services may vary from one State to another.

26 **Managing media attention:** concerns about illicit practices may be raised in the media. Intercountry adoption often attracts media attention, and this can present additional challenges when dealing with illicit practices. If this does occur and assistance is required in managing that interest, the Central Authority may be able to provide some assistance in the first instance, depending on the circumstances.

27 **Associations, support groups and NGOs:** associations, support groups and NGOs may provide important support and assistance to impacted persons. Where available, the Central Authority should therefore direct impacted persons to such associations, groups or organisations. They should also consider encouraging the organisation of such associations and groups to develop networks between themselves and establish a community or communities of practice.

**In addition, in the context of a (suspected) pattern of illicit practices:**

States may wish to provide **additional services** and / or adapt their services for impacted persons where there is a (suspected) pattern. States may also direct impacted persons to other authorities, bodies, associations or NGOs which have experience in providing services to persons impacted by a pattern.

## 4. **STEP 2: INVESTIGATION**

28 The Central Authority (or other competent authority) of the State where an illicit practice may have occurred should initiate (or ask the relevant authority to initiate) an investigation as soon as possible, in coordination with the relevant authorities, to determine whether the illicit practice occurred and, if so, what action(s) may be required.<sup>17</sup> It should be made clear who is responsible for leading the investigation. It is also important that the investigation is carried out in a timely manner. The Central Authorities of other concerned States should assist to the extent possible and cooperate in such investigation.

29 Depending on the type of illicit practice that is suspected, initial questions that might need to be considered include, for example:<sup>18</sup>

- Is a valid birth certificate available?
- Was the child properly declared adoptable (HC, Art. 4)?
- Were suitable permanent family alternative care options, other than intercountry adoption, given due consideration in the State of origin (HC, Art. 4)?
- Were the birth parents counselled and duly informed of the effect of their consent (HC, Art. 4)?
- Did authorities ensure that the consents were not obtained under false pretences or as a result of coercion, or inducement by payment or compensation of any kind (HC, Art. 4)?
- Were the PAPs and the child habitually resident in different States (HC, Art. 2)?
- Was the legal adoption procedure in the concerned States followed?
- Have the authorities in the State of origin or receiving State approved the adoption (HC, Art. 17)?

### 4.1. **Different aspects of investigation**

30 **Review of documentation:**<sup>19</sup> the authority responsible for conducting the investigation should closely review all documents relating to the intercountry adoption for possible irregularities. In doing so, it should consider whether there are irregularities or information on file to suggest that further action is required. A review of the adoption documentation alone may not suggest any obvious irregularities that could amount to an illicit practice (*i.e.*, the available information on file may appear consistent with established practice and procedures for an adoption from a State at that particular time). Careful consideration should nevertheless be given if, despite the existence of appropriate adoption documentation, reasonable concerns continue to suggest possible illicit practice. The type of illicit practice and the circumstances may suggest the need to review the documentation in other files to see if possible patterns arise.

31 **Outreach:** the authority responsible for conducting the investigation should contact the relevant authorities, the adoptee, the birth family, the (prospective) adoptive parents, concerned AABs, child institutions and other relevant actors, as appropriate and in a timely manner. If there is an Embassy or a Consulate of the investigating State located in the other concerned State, it may be requested to provide all possible assistance. The adoptee, birth family, PAPs and adoptive family should be

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<sup>17</sup> ISS Handbook, *ibid.*, Chapter 7. In a State with a federal system, this should include coordination with the relevant jurisdictions within the State. Adoptees, birth families and (prospective) adoptive families may undertake private enquiries about illicit practice concerns, through the law enforcement authorities, private investigators, NGOs, or other channels. This may occur in addition to, or instead of, formal investigation made through the Central Authority. Where private enquires are pursued, the Central Authority should be notified of any illicit practice concerns, as there may be broader implications to be considered.

<sup>18</sup> See also Part III “Checklist” of this Toolkit where more questions are included to assist decision making by CAs and ISS Handbook, *supra* note 16, Chapter 5.

<sup>19</sup> See Australian Protocol, *supra* note 7. For example, similar concerns in multiple files.

approached in a respectful and careful way, and contact with children should also be made in a child friendly and age-appropriate manner.

- 32 **Preservation of records:** regardless of the outcome, the information and records of the investigation should always be documented, recorded and preserved (if possible, indefinitely) by the investigating authority. This information could be valuable in possible future cases and will be of importance to the persons involved.<sup>20</sup> Likewise, any information and records received by a State in the course of an investigation conducted in another State should be documented, recorded and preserved.
- 33 **Verification of identity:** where appropriate and necessary, DNA testing<sup>21</sup> could be carried out to verify the identity of the child and the birth parents (/family).
- 34 **Referral to law enforcement:** any cases where potentially criminal activities are suspected should be referred to the appropriate law enforcement authorities.
- 35 **Request that another State make enquiries or investigation:** the Central Authority or competent authority conducting an investigation may request another concerned State to make appropriate enquiries or investigations into the circumstances surrounding the illicit practice, concerns or allegations.<sup>22</sup> If relevant, investigations should take place in **both** the **State of origin** and the **receiving State**. In this case, and if feasible, concerned States should consider **collaborating** in their respective investigations.
- 36 **Suspension of intercountry adoption programme:** depending on the circumstances, the type and seriousness of illicit practice that is suspected, States should consider suspending their intercountry adoption programme with the concerned State during the investigation.
- 37 **Suspension of accreditation and / or authorisation of AABs:** depending on the circumstances and the type of illicit practice that is suspected, States should consider suspending the authorisation and / or accreditation of AABs that are suspected to be involved in an illicit practice.

**In addition, in the context of a (suspected) pattern of illicit practices:**

- The **investigation** may be done specifically for each **individual** case or **collectively** for all cases falling in the same pattern, taking into account options available in the concerned State(s).
- [A few States have put, or are putting, in place government processes (e.g., a Commission) to investigate patterns of illicit practices.<sup>23</sup>]<sup>24</sup>

#### **4.2. Identification of the potential illicit practice and assessment of its nature and gravity**

- 38 At the conclusion of the investigation, the investigating authority should usually be able to determine if an illicit practice has occurred under the law of the investigating State,<sup>25</sup> and the

<sup>20</sup> In that respect, concerned States should have legislation in place to determine which information may be collected by the Central Authority and other competent authorities and for what purposes. The legislation should also include rules regarding the retention and subsequent use of this information.

<sup>21</sup> See ISS, “The use of DNA tests: A sufficient safeguard to determine the identity of the child and their biological parents?” in *ISS/IRC Monthly Review No 222*, June 2018.

<sup>22</sup> *Ibid.*

<sup>23</sup> *E.g., France*, the Netherlands (Committee Investigating Intercountry Adoption in the past), *Sweden* and *Switzerland (Conseil Fédéral)*.

<sup>24</sup> Note for the 2022 Special Commission Meeting: see 2020 WG Report, *supra* note 4, para. 21 regarding the commissions: “Some participants pointed out the possible challenges relating to certain of the services and the political nature of some of the measures described in the Model Procedure. Nonetheless, many participants emphasised the importance that the Model Procedure be addressed to all State actors and recognised the value of proposing a wide array of measures”.

<sup>25</sup> The law of the investigating State would include its domestic legislation and regulation, but also any regional or international treaty to which it may be a Party, *i.e.*, including the 1993 Adoption Convention and the CRC. The ‘investigating authority’ may involve the combined actions of the Central Authority and relevant law enforcement authorities.

nature of such practice. If an illicit practice has indeed occurred, this information will be critical to determine the **future actions** to be taken, including whether administrative or penal sanctions may be applicable.

## 5. AT THE APPROPRIATE TIME: INFORMING concerned authorities, bodies and persons

39 Communication, cooperation, and coordination amongst different relevant counterparts (e.g., Central Authorities, competent authorities, law enforcement authorities) within a specific State, as well as between the concerned States, should happen throughout the process of responding to the illicit practice.<sup>26</sup> To facilitate communication, the Central Authority may identify a person or body which will act as the contact point for all matters relating to illicit practices.

### 5.1. Information exchange between Central Authorities of different States

40 The Central Authorities of the State of origin and the receiving State should, as far as possible and unless inappropriate given the particular circumstances, inform each other as soon as information is available on the alleged illicit practice and / or as soon as the particular circumstances of the case permit. Thereafter, the Central Authorities should keep each other informed of developments in the investigation and the response to the illicit practice. They may also consider meeting to cooperate and exchange information in the investigation of the case (see Part V - Guidelines).

#### 1993 Adoption Convention

“[Central Authorities] shall take directly all appropriate measures to [...] **keep one another informed** about the **operation** of the Convention and, as far as possible, **eliminate any obstacles** to its application.” (Art. 7(2)(b))

“Central Authorities shall take, directly or through public authorities or other bodies duly accredited in their State, all appropriate measures, in particular to [...] **reply**, in so far as is permitted by the law of their State, to justified requests from other Central Authorities or public authorities for **information** about a **particular adoption situation**.” (Art. 9(e))

#### In addition, in the context of a (suspected) pattern of illicit practices:

The Central Authorities involved may **contact other concerned Central Authorities** at an appropriate time and manner. For example:

- The Central Authority of a State of origin (or receiving State) that suspects that a child institution has or still is falsifying the consents of birth parents should contact the Central Authorities of the receiving States where children from this institution have been adopted or are in the process of being adopted to properly investigate the situation. If it is the Central Authority of a receiving State that has a suspicion, it should communicate it to the Central Authority of the State of origin.
- A State of origin that suspects that an AAB working in its State has participated in illicit activities should reach out to the receiving State where the AAB is accredited to initiate a proper investigation. The Central Authority of the receiving State may need to contact other States of origin where the AAB is also working as part of its investigation. If it is a receiving State that suspects that their own AAB has participated in illicit activities in (a) State of origin(s), it should inform the concerned States of origin.
- Depending on the circumstances, the Central Authority of a State that is aware that illicit practices have occurred in its partner State should consider informing the Central Authorities of other States working with that particular State.

<sup>26</sup> See GGP No 1, Chapter 2.3.3.

## 5.2. Informing concerned persons

- 41 Suspected illicit practices may come to the attention of the Central Authority (or other competent authorities) without the knowledge of the adoptee, the birth family and / or the (prospective) adoptive parents. If this is the case, the competent authority should take action as appropriate. This could involve liaising with other authorities and may include the relevant authorities contacting the adoptee, birth family and / or (prospective) adoptive parents (see further para. 24 above).<sup>27</sup> In such cases, authorities should follow trauma-informed practices. Additional support, such as **counselling**, should be offered to the adoptee, the birth family and / or the (prospective) adoptive parents when informed and where appropriate (see above section 3 “Services to impacted persons”).

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<sup>27</sup> See Australian Protocol, *supra* note 7.

## 6. **STEP 3: POSSIBLE ACTIONS FOLLOWING THE INVESTIGATION**

42 Where an **investigation** does **not substantiate the concerns or allegations** of illicit practice,<sup>28</sup> depending on the circumstances, the Central Authority or other competent authority may still need to address one or more enabling factors to strengthen the intercountry adoption procedure (see Toolkit - Part II: Fact Sheets).<sup>29</sup> In addition, the adoptee, the birth parents and / or the (prospective) adoptive parents may want to seek post-adoption support services available to them (see above section 3 “Services to impacted persons”). The Central Authority should direct them accordingly.

43 Where an **investigation substantiates the concerns or allegations** of illicit practice, possible actions by the competent authorities may vary depending on the particular circumstances and factors, such as:

- the best interests and fundamental rights of the child;
- the type of illicit practice itself (see Toolkit - Part II: Fact Sheets);
- by whom the illicit practice was committed;
- the degree or level of knowledge or involvement of the various actors;
- the stage of the adoption at which the suspicion of the illicit practice was raised;
- the consequences of the illicit practice on the validity of the adoption or the adoption process;
- the short and the long-term effects of the illicit practice on the adoptee;
- where appropriate, the views of the concerned persons, *i.e.*, the adoptee, the birth parents or others with pre-adoption responsibility for the child, and the (prospective) adoptive parents; and
- consideration of not creating other harms.

44 In addition to the actions that may be taken regarding a particular case and adoptee, the State should also consider taking **measures to prevent the recurrence** of the illicit practice (which will be directed at future similar cases). Following an investigation, possible actions to be taken in a particular case may also depend on whether the illicit practice is an isolated incident or part of a pattern.

### 6.1. **Actions regarding the adoptee (or adoptable child) and the families in a specific adoption case**

#### 6.1.1. **If the adoption has not yet been completed**

45 **If it is in the best interests of the child** (including long-term considerations) **and** it does not affect the integrity of the adoption process, consideration should be given to assessing whether it is possible to **rectify the situation or “heal” the illicit practice** by doing what should have been done had the provisions of the 1993 Adoption Convention and applicable laws been respected (e.g., obtain valid consent(s) *a posteriori*, give due consideration to the principle of subsidiarity retroactively, refund a specific amount).<sup>30</sup> If it is possible to rectify the situation and it is in the best interests of the child, the adoption process may then continue.

46 Rectification, however, should not be seen as an expedient alternative to compliance with the Convention. It should be an **exception** made, where practicable, to protect the best interests of the child. Contracting States have an international legal obligation to adhere to the Convention and

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<sup>28</sup> This covers situations where the investigation positively shows that an illicit practice was not committed; situations where there is some reliable evidence to support the allegation, but it is insufficient to fully substantiate the complaint; and situations where the investigation is inconclusive, which could be due in part to missing or incomplete records. See further *supra* note 6 for statutes of limitations.

<sup>29</sup> To assist them in this respect, authorities and bodies may use the Fact Sheets in the Toolkit. The competent authorities should do their utmost to follow the actions suggested in the Fact Sheets to prevent such enabling factors.

<sup>30</sup> See GGP No 1, para. 533.



apply its safeguards.<sup>31</sup> In addition, Contracting States have the obligation to apply their domestic laws and regulations. Consequently, depending on the nature of the illicit practice and the concerned States' laws and regulations, rectification may not be possible.

47 If it is **not possible** to **rectify** the situation or heal the illicit practice, and / or if it is not in the **best interests of the child** to do so, the following may be considered:

- the termination of the process, by one or both Central Authorities, by not issuing the agreement to proceed under Article 17(c) of the 1993 Adoption Convention or by withdrawing such agreement;<sup>32</sup>
- not issuing the adoption decision (usually made in the State of origin);
- the establishment of a **new life plan for the child** by, for example:<sup>33</sup>
  - ⇒ ensuring that the best interests (including long-term considerations) and fundamental rights of the child are the paramount consideration (HC, Art. 1(a); CRC, Art. 21);
  - ⇒ making a comprehensive and rigorous assessment of the child's particular circumstances;
  - ⇒ taking into consideration the child's wishes, opinion and consent, considering their age and degree of maturity as well as their evolving capacity (CRC, Arts 5 and 12);
  - ⇒ depending on the nature of the illicit practice (e.g., irregularities in the identity of the child or the consents to adoption) and the stage of the adoption process at which it was halted, assessing the need to involve the child's birth family;<sup>34</sup>
  - ⇒ considering possible options for care which may include:
    - > the reintegration of the child with their birth parents, after appropriate counselling and support for all persons concerned;
    - > a kinship placement with extended family;
    - > a new placement of the child with a view to adoption;
    - > suitable alternative long-term family care.

### 6.1.2. If the adoption has already been completed<sup>35</sup>

48 Possible actions will vary depending on the factors mentioned in the introduction to this Step 3. Some actions should apply only if the adoptee is still a child. In that case, the best interests and fundamental rights of the child should be the paramount consideration (HC, Art. 1(a); CRC, Art. 21). The considerations presented below may be taken in conjunction or independently.

#### 6.1.2.1. Considerations regarding the non-issuance of the Article 23 certificate of conformity

49 In some cases, the illicit practice may be discovered after the adoption decision has been issued and the child is still in the State of origin, but the certificate of conformity of the adoption with the Convention (Art. 23) has not been issued. In such cases, if it is not possible to rectify the situation or heal the illicit practice, and / or if it is not in the best interests of the child to do so (see section 6.1.1), the competent authority may decide not to issue the certificate of conformity (see also the considerations under section 6.1.2.4).

<sup>31</sup> See [Note on Habitual Residence](#), para. 80. All States have also obligations under the CRC and / or the OPSC.

<sup>32</sup> See GGP No 1, para. 527.

<sup>33</sup> See further UN Guidelines for the Alternative Care of Children and the [2019 UNGA Resolution on the Rights of the Child](#).

<sup>34</sup> This may be the case if, for example, the consent of the child's birth parents was not obtained. However, it may not be relevant to involve the child's birth parents for an illicit practice that occurred during the socialisation period where the birth parents are not involved.

<sup>35</sup> This includes situations where the adoption has already been completed even though the Art. 23 certificate of conformity has not yet been issued.

### 6.1.2.2. Considerations regarding possible child protection concerns if the adoptee is still a child

50 Depending on the nature and circumstance of the illicit practice, and the situation of the child, child protection concerns (e.g., serious problems in the family, disruption or breakdown of the adoption, abuse or neglect in the family, adoptee refusing to continue living with the family<sup>36</sup>) may arise during, or as a result of, the investigation (see also above paras 11-14). Central Authorities or any other authorities that become aware of such concerns must promptly report them to the competent child protection authorities in the State of the child's habitual residence.<sup>37</sup> Such authorities should take the necessary measures to protect the child and handle the situation expeditiously in accordance with the child welfare legislation.

51 Where necessary to protect the child, and after very careful consideration, the child may be removed from their home and taken into care (in principle, placement within the wider family or community should be preferred).<sup>38</sup> Any such measures should be taken after a full assessment, which should at least include an assessment of the following:

- the alleged child protection concerns;
- the child's circumstances, needs, best interests, views and life plan;<sup>39</sup>
- the adoptive parents' parenting ability and capacity to address the child protection concerns;
- the extended family and social networks;
- whether the adoptive parents knew and / or were involved in the illicit practice.

52 Central Authorities should also cooperate, to the greatest extent possible and in accordance with applicable legislation and procedures, in this assessment, in order to find a solution that is in the best interests of the child. If needed, a new life plan for the child may need to be established.

53 Child protection measures, including taking the child into long-term care, affect the exercise of the adoptive parents' parental responsibilities but not the child's legal parentage.<sup>40</sup> In very serious situations, the legislation in the State of habitual residence may allow the taking of measures to extinguish the adoptive parents' parental responsibilities.

### 6.1.2.3. Considerations regarding revocation or annulment of the adoption

54 Depending on the nature of the illicit practice and the possible consequences on the validity of the adoption, the law of the State where the adoption was granted and / or the law of the State of the habitual residence of the adoptee may allow for the revocation or annulment of the adoption. Such law will notably determine the following issues:

- which State and competent authority (usually a court) would have jurisdiction;
- who may seek the revocation or annulment (e.g., adoptee, birth parents, adoptive parents, the State through a competent authority);
- the grounds upon which revocation or annulment may be granted and the procedure involved (including whether there is an age limit or time limit within which to seek the revocation or annulment);

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<sup>36</sup> See GGP No 1, para. 605.

<sup>37</sup> However, if the child is not present in their State of habitual residence and child protection concerns need to be urgently addressed, the competent authorities in the State where the child is physically present may have to be involved. The 1996 HCCH Child Protection Convention would be particularly helpful in such situations.

<sup>38</sup> If a child is taken into care, this should be done following the law of the State of habitual residence of the child, as well as the criteria and procedures set out in the UN Guidelines for the Alternative Care of Children.

<sup>39</sup> It may also be relevant to consider if the child is settled in their adoptive family, if a long period has elapsed since the adoption, if the child (of proper age and level of maturity) expressed their preference (or if appropriate, consent) to stay with the adoptive family.

<sup>40</sup> See section 6.1.2.4. below for measures which may affect the child's legal parentage.

- the legal consequences of a revocation or annulment (e.g., extinction of the legal parentage of the adoptive parents and termination of their parental responsibilities, possible restoration of the initial identity of the person), including regarding the nationality or nationalities<sup>41</sup> of the adoptee.

55 Where the applicable law would allow the State (through a competent authority) to seek the revocation or annulment of an adoption and the adoptee is still a child, any such decision should only be given consideration after:

- a full assessment by the competent child protection authority of the child's particular circumstances, needs and their best interests (including their views, and having regard to the age and degree of maturity, and if applicable, their consent);
- a determination by such authority that maintaining legal parentage with the adoptive parents is not in the best interests of the child; and
- the establishment of a new life plan, in consultation with, where appropriate and possible, all impacted persons.

56 The new life plan for the child after revocation or annulment may involve:

- securing the **return of the child to their birth family**, if the interests of the child so require, depending on the current circumstances and other factors, and after appropriate counselling and support for all parties. In such case, the State of origin has to ensure that the birth family is capable of taking care of the child; this option would necessarily involve a significant degree of cooperation between the receiving State and the State of origin; or
- organising a **new placement** of the child with respect to **adoption**; or
- finding other alternative **long-term family care** or other suitable arrangement in the child's best interests.

57 Central Authorities should strongly encourage any adult adoptee, birth parent or adoptive parent who may be considering a revocation or annulment to seek support and legal advice, including concerning the possible consequences on the nationality or nationalities of the adoptee, before initiating legal proceedings. States should try to ensure that adoptees do not lose any benefits gained (e.g., nationality) by the adoption in the case of revocation or annulment.

#### 6.1.2.4. Considerations regarding the non-recognition of the adoption

58 The 1993 Adoption Convention establishes that “the recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child” (Art. 24). Some States may consider that recognising an intercountry adoption where illicit practices occurred is contrary to their public policy (including laws and regulations), and therefore may refuse to recognise that adoption.

59 “Non-recognition of the adoption would be an extreme sanction for very exceptional cases, for example, where there has been a violation of fundamental rights of the [birth] family”<sup>42</sup> and / or an illegal adoption. Some illicit practices may constitute such violations. Non-recognition should be balanced against the best interests of the child and the other different interests at stake. In assessing the best interests of the child, consideration should be given to the adoptee's wishes and opinion.

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<sup>41</sup> Nationality refers to the legal status of an individual belonging to a sovereign State with the legal rights and protection of the sovereign State's government. In some States this legal status is referred to as 'citizenship'. References to 'nationality' should therefore be understood as including 'citizenship'.

<sup>42</sup> See GGP No 1, para. 529.

60 To avoid limping legal parentage (*i.e.*, different legal parentage in different States), States should collaborate in the investigation steps and arrive at the same conclusion, in order to avoid a situation in which both States have different views on the validity (and consequent recognition) of the adoption.

## 6.2. Actions regarding other actors<sup>43</sup>

### 6.2.1. Authorities

61 If the investigation reveals that staff, volunteers, or other persons working for the Central Authority or competent authority were involved in illicit practices, appropriate consideration should be given to what would be the most suitable action given the particular circumstances. For example, it could involve corrective actions and / or disciplinary sanctions such as demotion, suspension of functions or removal from position.

### 6.2.2. AABs

62 Where AABs, including their staff, representatives or volunteers, are involved in illicit practices, authorities should consider what the most appropriate action would be given the particular circumstances, including the seriousness of the conduct:

- For less serious misconducts, sanctions may include a **letter of warning**, a request for **corrective action** or a **fine**.
- For more serious misconducts, sanctions may include the **suspension** of the accreditation, authorisation, approval or license or the **withdrawal** (or refusal to renew) of such accreditation authorisation, approval or license.<sup>44</sup> In some cases, suspension may be imposed with the understanding that accreditation, authorisation, approval or license will be withdrawn if the body or institution concerned does not take certain steps to address the illicit practice that took place.<sup>45</sup> In either situation, provisions should be in place for another body or authority to deal with the cases being managed by the AAB.

### 6.2.3. Child institutions, independent professionals, and other actors

63 When child institutions, independent professional or other actors (*e.g.*, lawyers, middlemen, interpreters, drivers) are involved in illicit practices, authorities should consider what the most appropriate action would be, given the particular circumstances, including the seriousness of the conduct:

- For less serious misconducts, sanctions may include a letter of warning, a request for corrective actions or a fine.
- For more serious misconducts, sanctions may include:
  - ⇒ For child institutions: the possibility that the child institution is no longer permitted to take care of children in need of adoption, or that the child institution be closed (in some cases their licence or authorisation may be suspended, in others completely withdrawn).
  - ⇒ For independent professionals and other actors: suspension or withdrawal of their licence, suspension or withdrawal of their affiliation to bar, demotion, suspension of functions, removal from position, etc.

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<sup>43</sup> See also section 6.3.

<sup>44</sup> See GGP No 2, para 324; if the accreditation and / or authorisation is withdrawn, the Permanent Bureau should be informed in order to update the HCCH website as necessary.

<sup>45</sup> *Ibid.*, para. 324.

- In the case of child institutions, appropriate and well-planned decisions should be made with regard to the children living in that institution.

### 6.3. Other Actions

#### 6.3.1. Criminal prosecutions

64 Where the situation raises concerns about potential criminal activity, Central Authorities or other competent authorities should alert the law enforcement authorities in a timely manner, which will then conduct a criminal investigation. The decision to prosecute will be taken by the competent authority (usually the Attorney General) based on the available evidence in light of applicable criminal law provisions. Central Authorities should cooperate to the extent possible with any such investigation or prosecution.

65 States may refer to the Fact Sheets for further information about the importance of legislating in this area, including criminalising illicit practices and establishing penalties which are significant enough to deter all persons and actors involved in intercountry adoptions from engaging in them.<sup>46</sup> Statutes of limitations should be of sufficient length to be able to ensure prosecution of those involved in illicit practices. In any case, although criminal prosecutions are an essential remedy, they should never be seen as the sole remedy for illicit practices.

#### 6.3.2. Civil suits

66 In some States, civil suits may be available to persons who have been impacted by illicit practice. As noted above,<sup>47</sup> Central Authorities or other competent authorities should, upon request, direct persons seeking information about possible recourses and remedies to the referral service of the private bar or to other available resources, for assistance in obtaining legal information and / or finding a legal practitioner. They should also provide general information, where applicable, about available financial assistance (e.g., some States may offer some services pro bono, others may provide for legal aid or for other low-cost services, or subsidised services provided by other authorities or bodies).<sup>48</sup>

67 [Central Authorities or other competent authorities may also provide information on possible remedies available through civil suits. For example, in some States, this includes restoration of the adoptee's identity, restoration of nationality of the State of origin (if applicable), the suspension of the wrongful activity, the revocation or annulment of the intercountry adoption, as well as monetary relief (e.g., damage compensation, refund of fees, etc.).]

#### 6.3.3. [International and regional courts and other international mechanisms<sup>49</sup>

68 When cases of illicit practices are not addressed, international courts and other international mechanisms, to which the State is party, may be relied on.<sup>50</sup> Treaties providing complaint procedures for individuals at the international level include the *Convention on the Rights of the Child* (CRC) (through its Optional Protocol on a Communications Procedure (OPIC)), the *International Covenant on Civil and Political Rights* and the *International Convention for the Protection of All Persons from Enforced Disappearances*. The *African Charter on the Rights and Welfare of Children*, the *European Convention on Human Rights* and the *Inter-American Convention of Human Rights* provide regional complaints mechanisms.

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<sup>46</sup> See ISS Handbook, *supra* note 16, Chapter 5.

<sup>47</sup> Para. 21.

<sup>48</sup> Para. 22.

<sup>49</sup> See *supra* note 24.

<sup>50</sup> See ISS Handbook, *supra* note 16, Chapter 5.

69 These mechanisms can only be relied upon when the practice that occurred in intercountry adoption constitutes a violation as described in the international instrument on which the mechanisms are based and after all available domestic remedies are exhausted (as well as other admissibility criteria). States Parties to these instruments may provide information about such available mechanisms to interested persons.]

**[In addition, in the context of a (suspected) pattern of illicit practices:**

- Central Authorities and other competent authorities should be aware that if their State is party to the OPIC (as well as the CRC and / or the OPSC), the Committee on the Rights of the Child may initiate an inquiry procedure if it receives reliable information indicating grave or systematic violations of rights set forth in the CRC or the OPSC by the State. This may include a pattern of illicit practices in intercountry adoption. This information may be provided by any actor and domestic remedies need not be exhausted for this procedure to commence. The Committee will seek the cooperation of the State party at all stages of the inquiry.]

**6.3.4. [Other measures<sup>51</sup>**

**In the context of a (suspected) pattern of illicit practices:**

- Some authorities have liaised with their respective Minister, in order to discuss the possibility that the government makes a national apology.
- States may also wish to consider if restorative justice<sup>52</sup> and transitional justice<sup>53</sup> may be appropriate.]

**6.4. Actions to strengthen the LEGAL FRAMEWORK and address enabling factors**

70 States should commit to addressing the factors that enable and / or facilitate illicit practices. To assist them in this aspect, States may request technical assistance (see Part V – Guidelines).

71 States should consider **modifications** to their laws, regulations, practices, procedures or protocols to make them more “robust” and effective in preventing and addressing any possible future illicit practices. They should also consider the addition of resources for training and the development of best practices.

**6.5. Actions regarding the other State(s) concerned**

72 States may consider recommending that the other concerned State (either the State of origin or the receiving State) undertake an investigation as to the **legality of the adoption process** in its State.

73 Depending on the circumstances and the type of illicit practice, States may need to consider **suspending their intercountry adoption programme** with the concerned State, permanently or temporarily, until effective actions have been taken to address the situation. If this step is to be taken, States should also have a protocol for transition cases.

**In addition, in the context of a (suspected) pattern of illicit practices:**

<sup>51</sup> See *supra* note 24.

<sup>52</sup> Restorative justice aims to repair the harm caused by the crime by holding victim-offender mediation and, where appropriate, meetings with the wider community. An essential part of the process is confidentiality which promotes open and honest communication.

<sup>53</sup> Transitional justice seeks to promote truth, justice, reparation and guarantees of non-recurrence. Such measures might include prosecution initiatives, reparations, truth-seeking and institutional reform. For more information, see for example <https://www.ictj.org/about>.

- A decision to suspend the intercountry adoption programme may be even more relevant in the context of patterns of illicit practices.
- States where a pattern of illicit practices has been disclosed may also wish to share with other States what happened and how the situation was handled in a spirit of cooperation, so that lessons learned can be shared and the other States can take measures to prevent those patterns from occurring in their own States. For example, if a particular AAB is involved in illicit practices in one State, other States of origin in which that AAB operates should take appropriate steps, and if necessary, limit its activities or suspend its operations. See further Part V – Guidelines.