

<b>Title</b>	<b>Brief Explanatory Note and Next Steps on the “Draft Toolkit for Preventing and Addressing Illicit Practices in Intercountry Adoption”</b>
<b>Document</b>	<b>Prel. Doc. No 6 REV of January 2022</b>
<b>Author</b>	Working Group on Preventing and Addressing Illicit Practices in Intercountry Adoption (Working Group), with the support of the Permanent Bureau (PB) of the HCCH
<b>Agenda Item</b>	Items 4 to 8
<b>Mandate(s)</b>	C&R No 24 of 2017 CGAP
<b>Objective</b>	To discuss major outstanding issues of the draft Toolkit at the meeting of the Special Commission, with a view to seeking general endorsement from the Special Commission
<b>Action to be Taken</b>	For Decision <input type="checkbox"/> For Approval <input type="checkbox"/> For Discussion <input checked="" type="checkbox"/> For Action / Completion <input type="checkbox"/> For Information <input type="checkbox"/>
<b>Annexes</b>	Part I – Introduction to the Toolkit Part II – Fact Sheets on illicit practices Part III – Checklist to assist decision-making by Central Authorities Part IV – Model Procedure to respond to illicit practices Part V – Guidelines on enhancing cooperation and coordination
<b>Related Documents</b>	Report of the Working Group ( <a href="#">meetings of September and November 2021</a> ) Report of the Working Group ( <a href="#">meeting of 8–10 July 2020</a> ) Conclusions & Recommendations of the Working Group ( <a href="#">meeting of 21-23 May 2019</a> ) Conclusions & Recommendations of the Working Group ( <a href="#">meeting of 13–15 October 2016</a> )

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### Annex – Draft Toolkit for Preventing and Addressing Illicit Practices in Intercountry Adoption

<b>Part I</b>	Introduction to the Toolkit	Prel. Doc. No 6A REV of January 2022
<b>Part II</b>	Fact Sheets on illicit practices	Prel. Doc. No 6B REV of January 2022
<b>Part III</b>	Checklist to assist decision-making by Central Authorities	Prel. Doc. No 6C REV of January 2022
<b>Part IV</b>	Model Procedure to respond to illicit practices	Prel. Doc. No 6D REV of January 2022
<b>Part V</b>	Guidelines on enhancing cooperation and coordination	Prel. Doc. No 6E REV of January 2022

# Brief Explanatory Note and Next Steps on the “Draft Toolkit for Preventing and Addressing Illicit Practices in Intercountry Adoption”

## I. Introduction

- 1 Preventing and addressing illicit practices is one of the topics that will be discussed at the Fifth Meeting of the Special Commission (SC) on the practical operation of the *Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption* (1993 Adoption Convention).<sup>1</sup> In particular, one of the aims of that meeting is to discuss major outstanding issues on the draft Toolkit for Preventing and Addressing Illicit Practices in Intercountry Adoption (draft Toolkit), with a view to seeking general endorsement from the SC.
- 2 This document presents a revised version of the draft Toolkit that was circulated to Members and Contracting Parties in March 2021. The draft Toolkit has been revised in light of the comments received from HCCH Members and Contracting Parties to the 1993 Adoption Convention, as well as the comments received and discussions that took place at the meetings of the Working Group on Preventing and Addressing Illicit Practices in Intercountry Adoption (WG)<sup>2</sup> in September and November 2021.

## II. Key Changes

- 3 Some of the major changes to the draft Toolkit, which retains the core structure and language from its March 2021 draft version, are as follows:<sup>3</sup>
- 4 **Part I: Introduction:** some revisions have been included to the definitions of illegal adoption and illicit practices (under 2.1. Definitions), as well as revised language for references to historic cases (para. 17). A definition of prospective adoptive parents has also been included.
- 5 **Part II: Fact Sheets:**
  - Fact Sheet 3 “Improper Financial Gain”:
    - ⇒ this Fact Sheet is now Fact Sheet 3 (formerly Fact Sheet 11). All Fact Sheets which present overarching issues (*i.e.*, issues that may happen at any stage of the adoption procedure) thus appear together at the beginning of the Toolkit;
    - ⇒ following a suggestion made, the different views that States have on contributions, donations and cooperation projects are now presented in the “Illicit practices” section of this Fact Sheet;

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All HCCH documents on adoption mentioned in this document are available on the HCCH website at < [www.hcch.net](http://www.hcch.net) > under “Adoption Section”.

<sup>1</sup> Members of the HCCH and Contracting Parties to the 1993 Adoption Convention recommended that illicit practices in intercountry adoption is one of the main topics that should be discussed at the Fifth Meeting of the Special Commission (SC) on the practical operation of the 1993 Adoption Convention. See “Analysis of the responses to the 2019 Questionnaire on possible topics and format for the Fifth Meeting of the Special Commission to review the practical operation of the 1993 Adoption Convention”, Prel. Doc. No 2 of December 2019 for the attention of the Fifth Meeting of the SC on the practical operation of the 1993 Adoption Convention, para. 41.

<sup>2</sup> The meetings of the WG were attended by participants representing 26 States (Member Contracting Parties: Australia, Belgium, Brazil, Canada, Chile, People’s Republic of China, Croatia, Denmark, France, India, Ireland, Italy, Luxembourg, Malta, Mexico, Netherlands, Norway, Panama, Peru, Philippines, Portugal, Sri Lanka, Switzerland, United States of America, Viet Nam; Member non-Contracting Party: Republic of Korea; non-Member Contracting Parties: Cabo Verde, Haiti, Togo and Zambia) and four international organisations (UNICEF, ISS, ICAV and the Nordic Adoption Council), as well as members of the Permanent Bureau (PB).

<sup>3</sup> References to sections, paragraphs and pages in this document are made to the new revised version of the draft Toolkit (January 2022).

Most of these key changes were discussed at the last meetings of the WG. See “Report of the WG on Preventing and Addressing Illicit Practices in Intercountry Adoption (meetings of 28-30 September and 8 November 2021)”, Prel. Doc. No 11 REV of November 2021 for the attention of CGAP 2022.

- ⇒ the first endnote of this Fact Sheet has been revised and explains that this Fact Sheet is based on current thinking and practices (following HCCH documents already published on this topic), but that the WG acknowledged that there are still problems and that it therefore recommended that further discussion take place.
- Fact Sheet 8 “PAPs”: it was clarified in the wording of the title that this Fact Sheet should address illicit practices which are in relation to prospective adoptive parents (PAPs) generally, and not only about their assessment. Thus, the title was changed to reflect this broader scope;
- After discussions at the WG meeting, some other changes were made to the wording of, among others, the following lines:
  - ⇒ emergency situations and the need to focus on efforts to reunify children with their family (FS 2 “Circumventing the Convention”, line 9; FS 6 “Subsidiarity”, line 6; FS 8 “Unknow parents”, line 5);
  - ⇒ contact between the PAPs and the child that takes place before or outside the matching process (FS 2 “Circumventing the Convention”, line 16; FS 9 “PAPs”, line 17; FS 10 “Matching”, line 13);
  - ⇒ examples of anonymous abandonment of children (e.g., baby boxes and anonymous or secret birth) (FS 4 “Identity”, line 15; FS 8 “Unknown parents”, line 13; FS 11 “Origins”, line 19);
  - ⇒ situations where children are falsely assessed as having special needs in order to fast track their adoption procedure (FS 6 “Subsidiarity”, line 17; FS 10 “Matching”, lines 14 and 15); and
  - ⇒ prohibition of contact between PAPs and birth parents and the exceptions included in Article 29 of the 1993 Adoption Convention (FS 9 “PAPs”, line 6; FS 10 “Matching”, line 4).

6 **Part III: Checklist:** Key changes in the Checklist include:

- the verification of the principle of subsidiarity appears now as Step 2 (formerly Step 3) before adoptability;
- the addition of a new step 6 where States should verify whether the Central Authority of the receiving State has approved the proposed match;
- a clarification as to what should be done when the identity of a child cannot be verified (e.g., whether the child may still be adopted); and
- the addition of another verification regarding the possibility for the birth parents and / or the child (in accordance with their age and maturity) to be provided additional legal counselling before consenting to adoption.

7 **Part IV: Model Procedure:** the following are some of the major changes in this tool:

- the information regarding confidentiality and rules of privacy has been regrouped and included in a text box in the introduction (p. 4);
- a new text box on actions that States may take to facilitate the disclosure of illicit practices in cases of patterns has been included (see section 1.3);
- the wording regarding general considerations in section 3 under “Ongoing Step: Services to Impacted Person” has been simplified and merged with the wording in the introduction of this step (paras 16 and 18);
- under “Step 3: Possible Actions following the Investigation”:
  - ⇒ a short paragraph has been included regarding considerations to be made when the adoption has been completed but the Article 23 certificate has not been issued (new section 6.1.2.1 – para. 50);

- ⇒ the wording under “Considerations regarding the non-recognition of the adoption” (section 6.1.2.4, paras 60-61) has been revised;
- ⇒ some of the actions under the section “Actions regarding other actors” (section 6.2) have been refined and made coherent between the different actors;
- ⇒ the text under “civil suits” (section 6.3.2, paras 67-68) has been revised.

8 **Part V: Guidelines:** no major changes have been made to the draft Guidelines.

### III. Possible questions for discussion at the SC Meeting

9 The WG agreed that only a full and open discussion between most Contracting Parties during the SC Meeting would help in finding an appropriate response to some of the pending issues. These questions<sup>4</sup> are the following:

#### 10 **Part I: Introduction:**

- How to specify that Contracting Parties might also consider referring to the Toolkit in dealing with suspected illicit practices arising from adoptions completed prior to the coming into force of the Convention in their State (historic cases) (para. 17)?

#### 11 **Part II: Fact Sheets:**

- How should contact between the PAPs and the child that takes place before or outside the matching process be qualified (FS 2 “Circumventing the Convention”, line 16; FS 9 “PAPs”, line 17; FS 10 “Matching”, line 13)?
- FS 3 “Improper Financial Gain”:
  - ⇒ how can standards in relation to improper financial and other gains be raised?
  - ⇒ how to present the different views that States may have with regard to the separation of contributions, donations and cooperation projects, from intercountry adoption (lines 6 – 13)?
  - ⇒ how should contributions, donations and cooperation projects aimed at supporting child institutions be characterised (illicit practice or enabling factor) (line 10)?
  - ⇒ if the Central Authority is responsible for monitoring and supervising the cooperation projects of its AABs, how can the clear separation of cooperation projects from intercountry adoptions be ensured (line 42)?
- FS 11 “Origins”: Should the denial of access to origins be considered an illicit practice only when it is unlawful to deny such access? Or should a broader view be taken, and the denial of access to origins be considered an illicit practice if no valid reasons can be provided?

#### 12 **Part III: Checklist:**

- Should the Checklist include a mention of the reversal of the flow of the files (footnote 6), and if so, which guarantees, and requirements should be put in place to prevent illicit practices?

#### 13 **Part IV: Model Procedure:**

- Should the Model Procedure include information on (1) possible measures considered by some as political measures (e.g., Commissions (text box under para. 37), national apologies (text box under section 6.3.4)), (2) remedies available through civil suits (para. 68), and

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<sup>4</sup> In some cases draft text for discussion appears in brackets (“[...]”) in the draft Toolkit.

(3) international mechanisms when national recourses have all been exhausted (section 6.3.3)?

#### IV. Timeline

14 Further to the directions given by the Council on General Affairs and Policy (CGAP), the following next steps are tentatively proposed:

- 1) **Comments on the Toolkit by Tuesday 31 May 2022**: Members and Contracting Parties are kindly invited to submit comments on the Toolkit in writing (if possible, in a Word version in track changes, and if necessary, providing an explanation of the change in a comment) to the PB. Organisations that have the status of Observers at the HCCH may also submit comments. All comments should be sent by e-mail to [secretariat@hcch.net](mailto:secretariat@hcch.net).  
Unless indicated otherwise, comments received may be shared with Members and Contracting Parties through the HCCH Secure Portal.
- 2) **SC Meeting** (4 - 8 July 2022): participants to the SC will have an opportunity to raise any major issues they may still have, in particular issues that may not have already been agreed upon by all Members and Contracting Parties, and comment on any new additions or modifications made in the Toolkit.
- 3) **Final revision of the Toolkit** (end 2022 / early 2023): after the SC, the PB will make a final revision of the draft Toolkit in light of the comments made at that SC Meeting. If needed, the revised Toolkit will be circulated one last time.
- 4) **Approval of the Toolkit by CGAP**: the final version of the Toolkit will be submitted to the 2023 CGAP meeting for approval.

#### V. Proposal for the SC

15 The SC is invited to discuss the major outstanding issues, and if possible, to approve, in-principle, the draft Toolkit, noting that amendments will be made to the text to reflect comments from delegations and the Conclusions and Recommendations as decided at the 2022 SC Meeting.

16 The SC is also asked to recommend to CGAP that it approve the Toolkit for publication.