

Toolkit for Preventing and Addressing Illicit Practices in Intercountry Adoption

Introduction



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1. Why this Toolkit?

- 1 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 and thereby **prevent the abduction, the sale of, or traffic in children**” (HC, Art. 1(a) and (b), emphasis added).
- 2 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.¹ 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 may have occurred.
- 3 Against this background, it was decided to convene a Working Group² responsible for developing tools to assist in preventing and addressing illicit practices, which are now included in this Toolkit.³

¹ 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.

² Further information on the work of the Working Group is available on the HCCH website at www.hcch.net under “Adoption Section” and then “Preventing and Addressing Illicit Practices”.

³ Many experts have participated in the work of the Working Group since its inception. The following experts participated in at least two meetings of the Working Group and / or had an active role in the discussions and drafting of the Toolkit:

HCCH Members Contracting Parties: Australia (Ms Rosie Elliot, Ms Sarah Healy, Mr Samuel Mackay, Ms Elisabeth Wale); Belgium (Ms Ariane Van Den Berghe, Mr Koen Rummens); Brazil (Ms Natalia Camba Martins); Canada (Ms Louise Gagnon, Ms Josée-Anne Goupil, Ms Erin O’donoghue Given, Ms Geneviève Poirier, Ms Marie Riendeau, Ms Michèle Salmon); Chile (Ms Marisol Fernández, Ms Orietta Orellana, Ms Martina Strobel, Ms Maria Isabel Torres); China (Ms Juan Li, Ms Yanbo Ma, Mr Dongliang Wang, Ms Yunmei (May) Wang, Mr Liu Jun Zhang); Croatia (Ms Irena Majstorovic, Ms Jasna Palić Babić, Ms Martina Tutić); Denmark (Ms Karina Haahr-Pedersen, Ms Karin Rønnow-Søndergaard); France (Ms Nathalie Brat, Ms Cécile Brunet-Ludet, Ms Marie-Laure Gounin, Mr Etienne Rolland-Piegue); Ireland (Ms Patricia Carey, Mr Kiernan Gildea, Ms Tara Downes); India (Mr Sanjay Barshilia, Mr Manoj Kumar Singh); Italy (Ms Alessandra Barberi, Ms Grazia Cesaro, Ms Anna Guerrieri, Mr Joseph Moyersoan); Malta (Ms Denise Frendo, Ms Edwina Gouder); Mexico (Ms Dulce María Mejía Cortés, Mr Miguel Angel Reyes Moncayo); Norway (Ms Benthe Hoseth); Netherlands (Mr Arjan Van Leur); Peru (Ms Soledad Cisneros Campoverde, Ms Kerin Ludeña Torres, Ms Mayda Ramos Ballón); Philippines (Ms Bernadette Abejo); Portugal (Ms Eliana Costa Mendes Dos Santos,

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 childcare institutions;
- they often inflict **lasting and profound trauma and harm** (e.g., distress, mental health concerns, 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).

Ms Bárbara Sacur); Sri Lanka (Ms Nirmalee Perera); Switzerland (Ms Joëlle Schickel-Küng); United States of America (Ambassador Susan Jacobs, Ms Marisa Light, Ms Trish Maskew, Ms Kjersti Olson, Ms Carine Rosalia); Venezuela (Judge Rosa Isabel Reyes Rebolledo); Vietnam (Mr Anh Tuan Dang Tran, Ms Thi Hao Nguyen, Ms Minh Phuong Nguyen, Ms Thi Kim Anh Pham); Zambia (Ms Nomsisi Wonani).

HCCH Members non-Contracting Parties: Republic of Korea (Ms Hyunhee Han, Ms Hwayon Lee).

Observers Non-Members Contracting Parties: Cabo Verde (Ms Catia Cardoso, Mr Jose Carlos Correia, Ms Margarida Lopes Borges Andrade); Haiti (Mr Andolphe Elie Ducarmel Guillaume); Togo (Ms Djanguenane Epse Penn Y. Falaman, Mr Abd-Nafiou Mamanh, Mr Pascal Tchilteme Toatre).

Observers International organisations: UNICEF (Mr Nigel Cantwell); Intercountry Adoptee Voices (ICAV) Ms Lynelle Long); International Social Service (Ms Mia Dambach, Mr David Smolin, Ms Jeannette Wöllenstein-Tripathi); Nordic Adoption Council (NAC) (Mr Øystein Gudim, Mr Kristinn Ingvarsson).

2. What can you find in this Toolkit?

4 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.

5 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.

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6 The introduction 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 I – Fact Sheets on Illicit Practices

7 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 II – Checklist to Assist Decision-Making by Central Authorities

8 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 III – Model Procedure to Respond to Suspected and Actual Cases of Illicit Practices

9 The Model Procedure aims at providing guidance on **how to respond** to specific cases or suspected cases of illicit practices, including when these cases part of a pattern of illicit practices.

Part IV – Guidelines on Enhancing Cooperation and Coordination to Prevent and Address Illicit Practices, including Patterns

10 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.

3. To whom is this Toolkit addressed?

- 11 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 Contracting States to the Convention or Contracting States 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, with respect to their respective roles and responsibilities.
- 12 In addition, the Toolkit may be of relevance to other professionals working in adoption (*e.g.*, lawyers, social workers, psychologists) and personnel working in childcare institutions. It may also be of interest to adoptees,⁴ birth families and prospective / adoptive parents and families.

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

- 13 This Toolkit is aimed at preventing and addressing illicit practices in intercountry adoptions made under the 1993 Adoption Convention.
- 14 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 Contracting States 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".⁵
- 15 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.⁶
- 16 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 consider reviewing their own practices, and where appropriate and feasible, to modify them in line with the Toolkit. For both established and developing Central

⁴ Where the term "adoptee" is used in this Toolkit, it usually refers to an "intercountry adoptee".

⁵ 2000 SC, C&R No 11; 2005 SC, C&R No 19; 2010 SC, C&R No 36.

⁶ 2022 SC, C&R No 5.

Authorities, the implementation of the Convention should be seen as a continuing, progressive or incremental process of improvement.

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

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' assessment 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 by the life-long effects of an adoption. In addition, as for any decision that impacts a child, their fundamental rights should be respected.

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

In the context of adoption, authorities and bodies should 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 approaches in adoption may include:

- devoting time and attention to ensure that 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 that are adapted to the child and assisting them in accessing such mechanisms.