

Chapter 19

Chapter 7: Article 21—Adoption



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States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- (a) Ensure that the adoption of a child is authorised only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
- (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(continued)

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- (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

What Did Children Say?

‘For me when a child is adopted, he should be able to know what his past is like, who his parents are, etc. And you can’t adopt a child without his consent.’
(*Eastern Europe*)

People who are involved in making decisions about adoption must be properly trained. (*Eastern Europe*)

Government should create a programme that would support parents to raise up their children. Adoption laws should be made to protect the interest of the children. (*Africa*)

Interests of children should be put over others. Only special professional services and organisations have to deal with the documents and support children in the process of adoption. (*Eastern Europe*)

Overview

Article 21 constitutes the first introduction into international human rights law of a provision relating to adoption, although a UN Declaration in 1986 made provision for its recognition and regulation (UN General Assembly, 1987) and influenced the drafting of Article 21 (Office of the United Nations High Commissioner for Human Rights & Rättsutskottet (Society: Sweden), 2007, pp. 537–538). The initial draft of the Convention from Poland contained no reference to adoption, but early proposals were submitted from Barbados on domestic adoption and Colombia on inter-country adoption, providing a framework for regulation and standards in respect of both (Office of the United Nations High Commissioner for Human Rights & Rättsutskottet (Society: Sweden), 2007, pp. 537–538). Building on the preamble that affirms the centrality of the family as the fundamental group of society, the drafting committee took the view that adoption should be recognised as a permanent solution for children unable to have their needs met within their birth families. However, a proposal that States Parties should actively facilitate adoption was rejected in favour of a position that it should be neither promoted nor advocated. Rather, the text defines the contexts in which it can be authorised and stipulates a regulatory framework must be present to avoid harm or exploitation (Hodgkin et al., 2007).

The Committee has subsequently encouraged States Parties to proactively recognise adoption as a means of providing alternative care where appropriate.¹ The best interests principle was recognised, not simply as a legal reference to prevail in all aspects of adoption, but as an overarching principle governing the issue (Vité & Boéchat, 2008, p. 22). Representations from Islamic countries, where adoption is not permitted, led to the introductory paragraph clarifying that Article 21 only applies to those countries where adoption is recognised or permitted (Office of the United Nations High Commissioner for Human Rights & Rädna Barnen (Society: Sweden), 2007, p. 547). The final text places emphasis on the imperative for adoption to be undertaken only through competent and authorised authorities with rigorous consent procedures involving birth parents, and where appropriate, the child. It demands equivalent safeguards and standards between national and inter-country adoption, with a prohibition on improper financial gain in respect of inter-country adoption. It embodies recognition of the principle of subsidiarity—inter-country adoption must only be pursued when all domestic options have been considered, consistent with the best interests of the child.² Finally, it encourages the development of bilateral and multilateral arrangements to ensure the effective protection of children.

General Principles

Article 2 Article 21 demands parity in the safeguards and standards provided between domestic and inter-country adoption, thereby prohibiting any unequal treatment of children between the two procedures, consistent with Article 2 (Vité & Boéchat, 2008, p. 48). The right to non-discrimination also imposes a requirement for equal treatment of children within domestic adoptions, whether placed within or outside their kinship networks (Vité & Boéchat, 2008, p. 49). The Committee has expressed concern about discriminatory practices towards certain groups of children, for example, Roma children, those with severe disabilities or, in certain cases, boys, being denied opportunities for adoption.³ It has also criticised patterns of prioritising rich families as potential adopters (2006b). Disaggregated data on which children have been placed for adoption is necessary to identify and address any such patterns of discrimination (UN Committee on the Rights of the Child, 2009a).

Article 3 The Convention establishes a presumption that children's best interests are served by living with their parents whenever possible and requires States Parties to implement policies designed to support family preservation (UN Committee on

¹See, for example concluding observations for Bosnia and Herzegovina (2012a, para. 51(b)), China (1996, para. 38), and Eritrea (2003, para. 36).

²See, for example, concluding observations for the Russian Federation, (2005a, para. 42) and Commentary on the UNCRC Article 21, Adoption (Vité & Boéchat, 2008, p. 45).

³See, for example, Concluding observations for Grenada (2000a, para. 19), Hungary (2006a, paras. 34–35), and Serbia (2017a).

the Rights of the Child, 2005b). However, for those circumstances where adoption is required, the paramountcy of the best interests of the child must be embedded in all relevant legislation and explicitly frame every dimension of adoption processes, taking precedence over all other considerations. This represents the strongest formulation of the principle in the Convention.

Adoption cannot, therefore, be considered as a general approach to children without care, but rather, decisions must be made on a case-by-case basis. Furthermore, regulations such as rigid rules on age of adopters, or time limits before an adoption can take place, could serve to fetter, and thereby breach this principle (Hodgkin et al., 2007, p. 295; UN Committee on the Rights of the Child, 2002, para. 36, 2005c, para. 48). In respect of inter-country adoption, the paramountcy of the best interests of the child means proposals of adoptable children by country of origin take precedence over requests by receiving countries (Vité & Boéchat, 2008, p. 27). However, any assessment of the child's best interests must be determined with reference to the rights and principles of the Convention and not according to vague or subjective criteria (Hague Conference on Private International Law, 2008, para. 44).

Article 6 The overall aim of adoption is to promote the optimum development of a child consistent with the goal of Article 6 and the preamble of the Convention, which states that the child 'for the full and harmonious development of his or her personality, should grow up in a family environment in an atmosphere of happiness, love and understanding'.

Article 12 Although no reference is explicitly made to children's views in Article 21, the provision of Article 12, that children have the right to express views on all matters of concern to them, and to have them given due weight in accordance with age and maturity, clearly extends to adoption (UN Committee on the Rights of the Child, 2009b, para. 55). The Committee has consistently emphasised that the ascertainable views of children must be into account (1994, para. 18, 1995a, para. 29, 2016a, para. 29(c)). The first paragraph of Article 21 indicates that adoption can only take place where, if required, 'persons' concerned' have given their informed consent. The Committee has interpreted 'persons concerned' to include children, and, accordingly, has recommended that States Parties introduce age limits below the age of 18 years when children can give consent to an adoption (2016b). The Hague Convention makes specific reference to the requirement that children have given consent where such consent is required, and consideration given to their wishes and opinions (Hague Conference on Private International Law, 1995, para. 4(d)).

Articles Related to or Linked to Article 21

Article 7 provides for the right of children to know and be cared for by their biological parents, wherever possible.

Article 8 affirms the right of children to preserve their identity and to have their identity restored if illegally removed, with implications for access to information about birth parents in respect of adoption.

Article 9 affirms the principle of non-separation from parents unless it is in the best interests of the child.

Article 10 requires a positive approach to family reunification for refugees and asylum seekers. This mitigates against seeking early adoption as a solution for refugee and asylum-seeking children.

Article 11 demands measures to protect against illicit transfer and return of children.

Article 16, protection of privacy, includes prohibition of arbitrary or unlawful interference with one's family.

Article 18 recognises the joint responsibility of parents and rights of unmarried parents with regard to consent to adoption. The rights and responsibilities also extend to adoptive parents.

Article 20 recognises the right of children to alternative care, and also adoption, if unable to be cared for by parents.

Article 25 introduces the right of children placed by competent authorities to periodic review of their care.

Article 27 (3) obliges States Parties to provide assistance to parents to ensure that the child has an adequate standard of living for their proper development.

Article 35 requires states to introduce measures to prevent sale of or trafficking of children. It also requires States Parties to ensure all possible measures to ensure that adoption of children is compliant with applicable international instruments, including the Hague Convention on Protection of Children and Co-operation in respect of Inter-country Adoption.

Optional Protocol on the sale of children, child prostitution, and child pornography: Article 3 includes improperly inducing consent, as an intermediary, for the adoption of a child is prohibited. Article 3(5) requires States Parties to ensure all possible measures to ensure that adoption of children is compliant with applicable international instruments, including the Hague Convention on Protection of Children and Co-operation in respect of Inter-country Adoption.

Relevant Instruments

UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally (1987)

Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption (1993)

European Convention on the Adoption of Children (Revised) (2008)

Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors (1984)

African Charter on the Rights and Welfare of the Child (1990), Article 24

Attributes

Attribute One: Authorisation and Regulation

All adoptions must be authorised by competent authorities, which includes judicial and professional authorities that are properly accredited, inspected by state authorities, and run by appropriately trained staff.⁴ States Parties must also establish legislation and procedures to regulate adoption. Article 21 does not provide any provisions to guide potential eligibility of a person to adopt a child but the Committee,⁵ as well as the Hague Convention (Article 15), recommends that States Parties draw up clear policies and procedures for determining both criteria and assessment of applicant parents to ensure that children are placed in appropriate environments consistent with their best interests. The Committee has emphasised the necessity for comprehensive policy, guidelines and collection of national statistics for adoption (2004a, para. 47, 2005d, para. 52), as well as mechanisms for reviewing, monitoring and following up on adoption procedures (2000b, paras. 31, 31, 2000c, para. 33). Inter-country adoption should always be undertaken by accredited adoption bodies, as defined in the Hague Convention,⁶ and not through individual channels which can lead to risk of trafficking or sale of children, or to individual adopters being able to select the child they adopt.⁷ The Committee has been critical of any use of informal adoption processes (2004c, para. 38, 2004d, para. 45). The more detailed Hague Convention can serve as an implementing instrument of Article 21 and the Committee consistently recommends its ratification by States Parties.⁸

Attribute Two: Permissibility of Adoption

Adoption must only be considered when parents are unwilling or unable to care for their child. The wording of paragraph 1, which refers to permissibility in respect of

⁴See, for example, concluding observations for Panama (1997, para. 31).

⁵See, for example, concluding observations for El Salvador (2010a, para. 50).

⁶Article 11 of the Hague Convention defines an accredited body as one pursuing only non-profit objectives, directed and staffed by competent authorities and subject to supervision by competent authorities of the State.

⁷See, for example, concluding observations for France (2004b, para. 33) and for the Russian Federation (2005a, para. 42).

⁸See, for example, concluding observations for Myanmar (2012b).

parents, relatives, and legal guardians, testifies to the fact that if the parents are unable, consideration must be given to the wider family and only if they too are unable to provide care, should adoption be considered. Consent to the adoption must be sought, if required by the state. In other words, the wording in Article 21 allows that individual states can determine whether to provide for this obligation. However, failure to make such provision, either in respect of parents or the child, could constitute a violation of other rights, for example, in respect of Articles 7, 9, or 12, and should therefore be seen to be the exception rather than the rule to accommodate situations where consent is not possible or its pursuit would run counter to the child's best interests (Alston et al., 2019, p. 792). States Parties should always provide parents with appropriate information and counselling prior to them giving consent to an adoption (Hague Conference on Private International Law, 1995, para. 4(c)). Furthermore, the Committee has stressed that parents should never be pressured to give consent before or immediately after a child is born (2004e, para. 41, 2006a, para. 34). In respect of unaccompanied and separated children, they should only be considered for adoption after all efforts at tracing and reunification, or safe, dignified, and voluntary repatriation, have been exhausted (UN Committee on the Rights of the Child, 2005e, para. 91; UN High Commissioner for Refugees, 1994).

With regard to inter-country adoption, both the Convention on the Rights of the Child (Article 21(b)) and the Hague Convention (preamble) affirm that states may only consider inter-country adoption if the child cannot be placed in a foster or adoptive family, or the child cannot be cared for in a suitable manner in the child's country of origin. The Committee consistently encourages states to invest in promoting domestic solutions to the provision of care (1994, para. 18, 2004a, para. 47, 2005a, para. 42, 2005f, para. 39). Inter-country adoption must not be viewed as a source of babies for would-be parents in rich countries.

Attribute Three: Safeguards for Inter-Country Adoption

Article 21 introduces specific safeguards for inter-country adoption. Both Article 21 paragraph (b) and the Hague Convention Article 4(b) embody a principle of subsidiarity. In other words, as indicated above, inter-country adoption should only be considered if the child cannot be cared for in their country of origin. The Committee has emphasised that both foster care and domestic adoption must be prioritised over inter-country adoption, bearing in mind the best interests of the child.⁹ However, inter-country adoption can be prioritised if the alternative for the child is long-term institutional care in their country of birth.¹⁰

⁹See, for example, concluding observations for Belize (2005g, para. 47) and Lithuania (2001a).

¹⁰See, for example, concluding observations for Nicaragua (2010b, paras. 56–57).

In cases where it is considered appropriate, Article 21 requires that States Parties ensure that children affected by inter-country adoption are provided with equivalent standards and safeguards to those applicable in national adoption. In addition, the Optional Protocol on the sale of children, child prostitution and child pornography, in Articles 3 and 5, requires States Parties to take measures to criminalise any act of improperly inducing consent for adoption as well as making any sort of trafficking in children an extraditable offence. It also demands that States Parties undertake measures to combat illegal practices. The Committee has frequently raised grave concerns over the lack of normative frameworks and illegal practices placing children at risk of trafficking and exploitation, and demands that effective mechanisms are in place to prevent and combat such violations (1995b, para. 18, 2001b, para. 4). The requirement in Article 21 paragraph (d) that placement of a child must never result in improper financial gain for those involved is designed to protect against potential exploitation of the adoption process. Some concerns were expressed during the drafting process that this wording might imply that proper gain was permissible and thereby allow for a market in children (UN Commission on Human Rights, 1989, paras. 356, 729). However, the Hague Convention has since clarified (Article 32 (2) and (3)) that only costs and expenses including reasonable professional fees of persons involved in the adoption may be charged with no remuneration permitted that is unreasonably high in relation to the services rendered.

States are encouraged to promote bilateral or multilateral arrangements and to ensure that such arrangements guarantee that placement of a child in another country is always carried out by competent authorities or organs. To this end, the Committee recommends to all states that have not yet done so, that they ratify the Hague Convention, which provides for a co-operative system between states, through competent authorities and accredited adoption bodies, to promote the best interests and rights of children (2000b, para. 31, 2017b, 2017c).

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