

Council of Europe Consultation Group on the Children of Ukraine (CGU)



Information note:
Responding to adoption initiatives
during the war in Ukraine

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Information note: Responding to adoption initiatives during the war in Ukraine

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Not all treaty bodies of the international conventions and international
organisations mentioned in this document were consulted.*

GENERAL STANDARDS RELEVANT TO ADOPTION TO BE RESPECTED AT ALL TIMES

The core international instruments relevant to this issue are:

- ✚ the **1989 United Nations Convention on the Rights of the Child** (UNCRC) to which all Council of Europe (CoE) member states are parties;
- ✚ the **1993 Hague Adoption Convention** to which all CoE member states but two (of which Ukraine is one) are parties;
- ✚ the **2008 European Convention on the Adoption of Children** to which Ukraine is a party among only a minority of CoE member states;
- ✚ the **1996 Hague Child Protection Convention**, as concerns alternatives to adoption, to which Ukraine is a party, also among only a minority of CoE member states.

Neither these nor other relevant treaties contain a derogation clause allowing non-compliance with any provision during an emergency. Further, states parties to the 1993 Adoption Convention are urged to “apply as far as practicable the standards and safeguards of the Convention to the arrangements for intercountry adoption which they make in respect of non-contracting states.”¹

Consideration of **the best interests of the child is the “paramount” factor** in coming to an adoption decision.² However, decisions based on best interests **must respect all other rights of the child in the UNCRC**;³ they cannot be based on *ad hoc* or subjective evaluations. The UN Committee on the Rights of the Child (CRC) has set out the criteria and procedures for assessing and determining best interests and has highlighted the requirement that such determination **take account of the opinion and wishes of the child** or children concerned and that it in principle be carried out by a qualified, **multidisciplinary team**.⁴

UNCRC Article 21: 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 authorized 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;
- (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.

1993 Adoption Convention Article 1(a): The objects of the present 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 in international law.

Among other key rights to be respected in adoption decisions are: the right to be brought up by one's parents wherever possible (**UNCRC Article 7**); right to be heard (**UNCRC Article 12**); preservation of identity, including name, nationality and family relations (**UNCRC Article 8**); non-separation from parents, save in a child's best interests (**UNCRC Articles 9, 20**); efforts to secure continuity of upbringing (**UNCRC Article 20**); subsidiarity of intercountry adoption (**UNCRC Article 21.b**); and prevention of sale, trafficking and abduction (**UNCRC Article 35**).

As with many other rights, these are recognised as being particularly difficult to ensure in, or in the aftermath of, emergency situations. Hence the additional safeguards foreseen in other instruments are applicable to such situations.

¹ [Special Commission on the Practical Operation of the 1993 Adoption Convention, Conclusions & Recommendations](#) (C&R), §11 (2000); reiterated in 2005 (§19) and 2010 (§36). Furthermore, the HCCH Toolkit on Preventing and Addressing illicit practices in Intercountry Adoption notes that “experience shows that intercountry adoptions made outside the scope of the 1993 Adoption Convention are linked to a higher risk of illicit practices” (§14).

² UNCRC Art. 21; 1993 Adoption Convention Art. 1(a).

³ CRC General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration.

⁴ *Ibid.*, notably §46-51.

ISSUES SPECIFIC TO ADOPTION IN EMERGENCY SITUATIONS

Concerns have been raised about the advisability of intercountry adoptions in emergency situations ever since the early days of the practice. The landmark 1960 European Seminar concluded, for example, that “in times of national disasters, special care should be taken to prevent hasty placements outside the children's country of origin.”⁵ It became increasingly acknowledged that **adoption should not be envisaged during, or for the necessary time following, an emergency situation.** After the **UN Refugee Agency (UNHCR) warned against the adoption of “unaccompanied minors” in 1981**,⁶ it adopted policy that “refugee children in an emergency context are not available for adoption. Since most unaccompanied children are not orphans, what they need is suitable interim care with a view to possible reunification with their families, not adoption”.

Two main and related concerns underpin this principle, recognising the need to protect the family unit and the life-changing and definitive measure that adoption constitutes: first, to prevent any or all steps of an adoption procedure being circumvented or “expedited” through *ad hoc* provisions or actions; second, to protect unaccompanied and/or displaced children from falling victim to adoption fraud and trafficking. To those ends, international humanitarian law also seeks to restrict and regulate the evacuation of children.⁷

In 2022, the European Council called on EU member states to seek “to ensure that there is no instrumentalisation of crisis or emergency situations regarding the guardianship of children, and in particular [...] that **no adoption should take place pending the duration of armed conflicts.**”⁸

UNICEF and the UNHCR also stated that for unaccompanied and separated children fleeing escalating conflict in Ukraine without their families, temporary foster or other community-based care through a government system offers critical protection. The international community is unanimous in affirming the principle that **adoption should not occur during or immediately after emergencies**, and that every effort should be made to reunify children with their families, when possible, if such reunification is in their best interests.⁹

The adoption of a child in emergency situations could exceptionally be envisaged only if at least three conditions can be fulfilled:

- a) all practicable efforts have demonstrably been made to trace and reunify their family;
- b) all information required for an adoption decision has been obtained, including an individual best interests determination;
- c) all competent authorities are in a position to apply prescribed safeguards and to respect all aspects of their adoption process.

These requirements apply regardless of whether, at any given time, a child is in their country of habitual residence or abroad, and thus to domestic and intercountry adoption procedures alike.

CRC General Comment No. 6, §91: Adoption should not be considered: Where there is reasonable hope of successful tracing and family reunification is in the child's best interests; If it is contrary to the expressed wishes of the child or the parents; Unless a reasonable time has passed during which all feasible steps to trace the parents or other surviving family members has been carried out. This period of time may vary with circumstances, in particular, those relating to the ability to conduct proper tracing; however, the process of tracing must be completed within a reasonable period of time; **Adoption in a country of asylum should not be taken up when there is the possibility of voluntary repatriation under conditions of safety and dignity in the near future.**

UN Guidelines for the Alternative Care of Children, § 166: The validity of relationships and the confirmation of the willingness of the child and family members to be reunited must be verified for every child. **No action should be taken that may hinder eventual family reintegration, such as adoption**, change of name or movement to places far from the family's likely location, **until all tracing efforts have been exhausted.**

HCCH Toolkit for Preventing and Addressing Illicit Practices in Intercountry Adoption¹⁰ considers “Unregulated and premature attempts to organise the intercountry adoption of children during and after emergency situations (e.g., natural disasters, calamities, war)” as an illicit practice. The Toolkit recommends states to “prohibit adoption procedures from taking place, unless the circumstances in the state and / or the situation of the child concerned allow for the proper application of the Convention; avoid premature and unregulated attempts to organise intercountry adoptions; publicise these policies clearly so that public pressure for immediate premature actions and private adoption attempts do not take place.”

⁵ *European Seminar on Adoption between countries*, Leysin, Switzerland, May 1960, supported by the United Nations, pp. 1-12, 94.

⁶ UNHCR Executive Committee (1981) Conclusion No. 24 (XXXII), p. 32.

⁷ Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Article 78.

⁸ European Council, *Conclusions on the EU Strategy on the rights of the child, Doc. 10024/22*, 9 June 2022, p. 10, §3.x.

⁹ Interagency *Call for a moratorium on intercountry adoption in response to the conflict in Ukraine*, July 2022.

¹⁰ In 2023, all the Members of HCCH approved the Toolkit for Preventing and Addressing Illicit Practices in Intercountry Adoption.

THREE MAIN SCENARIOS ARE IN QUESTION AS REGARDS THE WAR IN UKRAINE

1. Adoption within the country where the emergency is occurring (domestic adoption):

International Standards	Case of Children of Ukraine
Domestic adoptions are the sole responsibility of the state in question, in this case Ukraine. The law and practice of Ukraine must reflect obligations under the UNCRC and the procedures and safeguards foreseen in the 2008 European Convention on the Adoption of Children . Ukraine must at a minimum be satisfied that their competent administrative and judicial authorities are in a position to meet all obligations in order to allow a domestic adoption to proceed in an emergency situation.	Ukrainian legislative texts regarding adoption are numerous and complex. One foundational law (Resolution No 905/2008 ¹¹) has been substantially amended several times, including in the past two years. Current provisions in force (under martial law) ¹² establish legal mechanisms that allow for the domestic adoption of children in non-occupied regions and outside conflict zones where the competent authorities – Children’s Affairs Services (CAS) in particular – are functional and can register both children and prospective adopters. Under Ukrainian law, only children with the status of orphans or whose parents have been deprived of their rights are adoptable and must be registered as such in the local register of adoptable children.

2. Adoption from the country where the emergency is occurring to another country (intercountry adoption):

International Standards	Case of Children of Ukraine
<p>As noted previously, states parties to the 1993 Adoption Convention are urged to “apply as far as practicable, the standards and safeguards of the Convention to the arrangements for intercountry adoption which they make in respect of non-contracting states”.</p> <p>For a non-contracting state such as Ukraine, UNCRC Art. 21 sets out certain mandatory safeguards for adoption procedures and points to the need for cooperation to achieve their implementation. Evacuation of children with a view to their adoption abroad should not be envisaged in the context or aftermath of an emergency. The only motivation for evacuations should be “compelling health, medical or safety reasons”;¹³ they should then be carried out in line with UNHCR standards.¹⁴ According to the HCCH Toolkit, unregulated and premature attempts to organise the intercountry adoption of children during and after emergency situations constitute an illicit practice.</p> <p>A Council of Europe Parliamentary Assembly resolution on intercountry adoption enjoins states to “declare moratoria if, for whatever reason (humanitarian disasters for example), safe adoption procedures can no longer be ensured”, but emphasises the need to “maintain open lines of communication between central authorities...”¹⁵</p>	<p>A resolution of the Cabinet of Ministers of Ukraine prohibits foreign nationals from adopting children of Ukraine or registering as prospective adoptive parents during martial law and within three months after its revocation/cancellation.¹⁶ Ukraine has nonetheless identified four situations allowing for adoption abroad during this period, where the potential adopter:</p> <ol style="list-style-type: none"> is a child’s relative, intends to adopt a sibling of a child already adopted by them, intends to adopt as a step-parent, or seeks to finalise a pending adoption.¹⁷ <p>Should a case involving one of these exceptions be envisaged, states should ensure that all international standards can be met, notably those relating to adoptability, subsidiarity (including family tracing efforts), eligibility and suitability of the prospective adopters, and best interests determination. The grounds for finalising a pending adoption should be examined carefully, taking account in particular of the stage that the suspended procedure had reached.</p>

¹¹ [Resolution No. 905](#) of 1 December 2008 on the approval of the Procedure for conducting adoption activities and supervising the observance of the rights of adopted children, as amended. (Ukrainian)

¹² Cabinet of Ministers, No. 576/2023 “Decrees Concerning the Adoption and Placement of Orphans and Children Removed from Parental Care by/with Families of Ukrainian Citizens under Martial Law”.

¹³ UN Guidelines for the Alternative Care of Children, §160

¹⁴ UNHCR (1994) Refugee Children: Guidelines on Protection and Care. See also “‘Expedited’ adoptions: forced migration by another name” in World Disasters Report 2012, IFRC Geneva, pp. 68-70.

¹⁵ PACE Resolution 1909 (2012), sub-para 6.8.4.

¹⁶ [Resolution No. 907](#) of 16 August 2022 of the Cabinet of Ministers of Ukraine. (Ukrainian)

¹⁷ Cabinet of Ministers, Decree n. 576/2023, §135.

3. *Adoption of children displaced/evacuated from the country where the emergency is occurring:*

International Standards	Case of Children of Ukraine and Challenges
<p>States parties to the UNCRC are responsible for respecting and ensuring the rights therein for every child “within their jurisdiction without discrimination of any kind” (Article 2).</p> <p>The 1993 Hague Adoption Convention covers any adoption involving a child whose country of habitual residence differs from that of the (prospective) adoptive parents, regardless of factors such as a common nationality or family ties between them (Article 2.1).</p> <p>Citizens of a state who are, for whatever reason, outside their own country may receive consular protection from that state to defend their rights and interests in accordance with the legal system of the “host” state.¹⁸ This does not extend to a unilateral decision on an adoption within or from that “host” state being made by the state of which the child is a national, albeit among its own citizens.</p> <p>Return of a child to a country at war must be determined by the child protection authority in the “host” state to be in their best interests, taking into account their wishes, rights and specific needs, and must be carried out in safety and in dignity.¹⁹</p>	<p>Determination of habitual residence</p> <p>Habitual residence is the only basis for determining the domestic or intercountry nature of an adoption under the 1993 Adoption Convention²⁰, and “despite being an autonomous/factual concept to be established case by case, it should also be interpreted in light of the objectives of the 1993 Adoption Convention.”²¹</p> <p>There is no concrete definition of the concept of “habitual residence” in international law. In various circumstances, criteria put forward for determining habitual residence have included length of time, reasons for moving and living in the state, intentions, and ties to the different states.²²</p> <p>The essence of the HCCH approach is that, once a child is “settled”, they are deemed to have residence in the country of refuge.²³ In contrast, Ukraine considers its children abroad to be “temporarily displaced (evacuated)” and neither “settled” nor habitually resident in the “host” state.</p> <p>Ukrainian children displaced/evacuated from Ukraine may in principle be adopted by:</p> <p>Scenario 3.a) Ukrainian citizens who have remained in Ukraine; Scenario 3.b) Prospective adoptive parents who are in the “host” state; or Scenario 3.c) Prospective adoptive parents who are in a third state.</p> <p>Scenario 3.a:</p> <p>Ukraine has decided to allow children without parental care already abroad to be adopted by citizens who have remained in Ukraine,²⁴ deeming such cases to correspond to domestic adoptions.</p> <p>Scenarios 3.a and 3.b:</p> <p>Depending on where the child is considered to have their habitual residence, the adoption would be considered domestic or intercountry:</p> <ul style="list-style-type: none"> - Should the adoption be considered domestic, international standards and challenges presented in under Scenario 1 would apply. - Cooperation between Ukraine and the “host” state would also be crucial: <ul style="list-style-type: none"> - in Scenario 3.a, to share latest information on these children and ensure their wishes and opinions are taken into consideration; - in Scenario 3.b, to ensure these children are genuinely adoptable. - Should the adoption be considered intercountry, international standards presented under Scenario 2 would apply. <p>Scenario 3.c:</p> <p>Irrespective of which state would be considered as the state of origin (<i>i.e.</i>, Ukraine or the “host” state), since the child would be moved to a third state, any such adoption would always be considered intercountry, and international standards presented under Scenario 2 would therefore apply.</p>

¹⁸ [1963 Vienna Convention on Consular Relations](#).

¹⁹ [UN Committee on the Rights of the Child \(CRC\), General comment No. 6](#), §91; [European Convention on Human Rights](#), Article 3 and 8.

²⁰ [1993 Adoption Convention](#), Art. 2(1).

²¹ ISS/IRC Briefing Note on Ukraine, 23 April 2024. See also [HCCH Note on Habitual Residence](#), §5.

²² [HCCH Note on Habitual Residence](#), para. 70; Bumbaca contends that “[t]he interplay of habitual residence with modern connecting factors, such as mere presence and closest connection, reflects the important need to face increasing migration issues, in particular concerning asylum-seekers and refugees, whose habitual residence can hardly be established. In its absence, recourse should in principle be made to closest connection and, subsidiarily, mere presence.” (Vito Bumbaca (2022): Habitual Residence in International Family Law: Theory, Practice and Reform. Schulthess Genève (Collection genevoise, droit international), p. XI)

²³ HCCH Special Commission, [Recommendation concerning the application to refugee children and other internationally displaced children of the Hague Convention on protection of children and co-operation in respect of intercountry adoption \(1994\)](#), §1.

²⁴ Cabinet of Ministers, Decree n. 576/2023, amending Foster Family Regulation §78.3.

SUMMARY OF MAIN FINDINGS

In principle, no adoptions should take place during, or in the immediate aftermath of, an emergency situation, whether within the country where the emergency is occurring, from the country where the emergency is occurring to another country, or within or from the host country.

The cross-border evacuation or removal of a child in an emergency situation cannot be justified by the purpose or intent of securing that child's adoption in the destination country or any other country.

For displaced or evacuated children, care arrangements not involving definitive rupture of filiation should be considered, in line with the approach of the 1996 Child Protection Convention, such as foster care and kinship care, where appropriate within the refugee community.

In cross-border cases, the State where the child is physically present has *de facto* and *de jure* jurisdiction under the UNCRC, the only key treaty to which all member States are parties. The obligations of that State include determining the best interests of the child prior to any decision on their care, ensuring that the views and wishes of the child are heard and duly considered. Consultation and all pertinent information for this exercise should also clearly be sought from the State of which the child is a national.

Since there are no binding criteria for determining at what point the key concept of "habitual residence" is deemed to exist, its application in relation to adoption decisions may be subject, in good faith, to differing interpretations in some situations. As time passes, it will likely become ever more challenging to reconcile these interpretations, given in particular the consequent increased significance of duration as a factor.

Context: Ukraine understandably seeks to ensure the protection of its children affected or displaced by the conflict. It considers their cross-border displacement to be essentially temporary in nature, and hence would assert the primacy of "closest connection" over "mere presence" as the determining factor for habitual residence. The contrasting view maintains that the "host" State becomes the de facto country of residence with, notably, consequent obligations on adoption matters for States parties to the 1993 Adoption Convention. Considerations of presence and duration in particular would seem to underpin this stance.

This implies the need to go beyond interpretations of the letter of the law to consider its spirit and purpose, a point made by a number of sources cited above. The watchwords for such an exercise can only be "cooperation" and "protection". Dialogue should be sought between appropriate competent authorities to protect children's rights outlined in the UNCRC and the "paramount" best interests of children, with the sole aim of securing viable and positive outcomes for the children concerned.

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