



International Legal Framework for Adoption of Children

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Abstract. This article forms part of a doctoral research in progress on adoption and child's right to identity. Its aim is, however, to introduce the general international law context of the institution of adoption, including the combined effects of various international norms. Conventions and international documents provide numerous requirements, protecting the rights of the child and the rights of adults involved. One should remember that the purpose of adoption is to provide a child with a safe and stable family environment. Noting the special position of the case law of the ECHR, the text presents the most important specialized international instruments, primarily: the UN Convention on the Rights of the Child, the HCCH 1993 Adoption Convention, and the European Adoption Conventions. Information about each convention will be provided to systematise the sources of law. In addition, individual institutions within child adoption will be examined with a view to how the analysed instruments include them. As part of the study, critical issues for adoption will be identified from the point of view of human rights and children's rights standards. Consequently, the chapters of the paper deal with individual safeguards within child adoption: forming the basis of each decision about a child – the best interest principle, the subsidiary character of adoption and intercountry adoption, required consents for adoption, requirements for adoption procedure and adoptive parents, and the aspects of the child's right to identity.

Keywords: adoption, rights of the child, human rights, best interests of the child, family life

1. Introduction

The modern concept of adoption (in the case of children; adoption of adults is also known as a concept, albeit mostly in the field of the history of law) consists in making 'a legal decision to transfer definitive and absolute parental responsibility

for a child, creating a new parent–child relationship as a result of which the child becomes a fully-fledged member of the adoptive family’.¹ The legal institution of adoption in the form known today is based on the desire for seeking the best possible solutions for the child and both its biological and adoptive parents. The situation of these persons is described in scholarly thought as an adoption triad, or even as a triple-win concept.² Of course, as stated in the above-mentioned definition, a legal decision is the necessary element of an adoption proceeding. Therefore, a state and its organs are involved in the proceedings. Their role is to safeguard the interests of the individuals who represent the triad in a given case. State authorities are in charge of protecting and assisting a child whose best interest cannot be guaranteed in their family environment, ensuring alternative care for such a child. Conventions and international documents provide various requirements, protecting the rights of the child and the rights of adults involved. In Europe, the most effective instrument to protect human and child rights during adoption is the European Convention on Human Rights (ECHR).³

Noting the special position of the ECHR, and the case law of the European Court of Human Rights (ECtHR) which interprets the convention, the following remarks will also introduce the international legal context of the institution of adoption, including the combined effects of the various international provisions. Of course, these international instruments do not provide a complete conceptualisation and regulation of the issue, which remains in the regulatory domain of particular countries. However, multiple sources refer to the requirements for adoption. They constitute human rights and children’s rights standards. The international legal basis for alternative care for children and adoption is provided for in arts. 20 and 21 of the Convention on the Rights of the Child (CRC).⁴ Moreover, the Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (HCCH 1993 Adoption Convention; the Hague Convention)⁵ is undoubtedly of importance to adoption in its cross-border version. Moreover, the European Convention on the Adoption of Children⁶ and its revised version⁷ (together: the European Adoption Conventions) include regional standards in adoption.

In the scope of their application, the conventions are binding on the domestic level after having been ratified.⁸ Even if non-binding, they would constitute a reference point for national legislation and research or set directions for potential

1 Council of Europe, Commissioner for Human Rights, 2011, p. 7.

2 Smith Rotabi and Bromfield, 2016, p. 3 and the quoted sources therein.

3 Council of Europe, 1950, ETS 5.

4 United Nations, 1989, p. 3.

5 Hague Conference on Private International Law, 1993, p. 167.

6 Council of Europe, 1967, ETS 58.

7 Council of Europe, 2008b, CETS 202.

8 Regardless of the way of incorporation of the international standards on the domestic level, see e.g. Luhamaa and O’Mahony, 2021, p. 179 and the quoted sources.

international co-operation in the field of adoption. Therefore, I will present the institution of adoption in the light of international law. Information about each convention will be provided in order to systematise the sources of law – to determine their scope of application. In addition, individual institutions within child adoption will be examined regarding how the analysed instruments include them. As part of this study, critical issues for adoption will be identified from the point of view of human rights and children's rights standards.

2. The European Convention on Human Rights and Other Sources of International Law

The ECHR does not explicitly address the rights of the individual in adoption, but Art. 8 (the right to respect for private and family life) includes adoption cases in its scope of application.⁹

It is clear that the ECHR does not exist independently of other instruments of international law and that its application must conform to international law, notwithstanding its particular status and the interpretation methods and tools. The ECtHR has emphasised this numerous times.¹⁰

The most relevant topic for the present analysis is, however, the juxtaposition of international children's rights law and the ECHR. Children's rights are enshrined in the CRC. The relationship between the ECHR and the CRC is complex.¹¹ As Trond Helland and Ragnild Hollekim noted:

Similarities are apparent between the Contracting States' positive obligations to protect children under the ECHR and CRC. However, while the ECHR focuses on *all* individuals (adults and children alike), the CRC revolves around only children's rights and thus has a more comprehensive approach to these rights. The ECtHR seems to acknowledge that the CRC is more comprehensive concerning children's rights (...).¹²

Particularly, concerning children, 'the Court considers that the positive obligations that Article 8 lays on the Contracting States (...) must be interpreted in the light of the Convention on the Rights of the Child of 20 November 1989'.¹³

9 On the scope of application of ECHR in connection with adoption, see e.g. Draghici, 2011 or Fenton-Glynn, 2021.

10 E.g.: ECtHR, *Al-Adsani v. the United Kingdom* judgment (Grand Chamber) of 21 November 2001, Application no. 35763/97, para. 55.

11 See e.g. Helland and Hollekim, 2023 and the quoted sources, Kilkelly, 2015.

12 Helland and Hollekim, 2023, p. 214.

13 ECtHR, *Wagner and J.M.W.L v. Luxembourg*, judgment (Chamber) of 28 June 2007, Application No. 76240/01, para. 120.

The CRC is undoubtedly a point of reference in ECtHR cases concerning children and, as such, contributes to the development of children's rights in the law of the ECHR. Yet, the mentioning of CRC provisions is sometimes considered inconsistent and their following insufficient.¹⁴

The significance of substantive international instruments in the field of adoption was recognized by the ECtHR in the case of *Pini and others v. Romania*. The case concerned the adoption of Romanian girls by Italian citizens, which was opposed by the children themselves. The Court stated explicitly 'the Convention must be applied in accordance with the rules of international law, in particular those concerning the international protection of human rights' and that 'with regard in particular to the obligations imposed by Article 8 of the Convention on the Contracting States in the field of adoption, and to the effects of adoption on the relationship between adopters and those being adopted, they must be interpreted in the light of' specialized international agreements.¹⁵

Therefore, it remains necessary to present the international sources of law governing the adoption.

3. The Most Important Specialized International Instruments

3.1. The UN Convention on the Rights of the Child

As far as the adoption of a child is concerned, the CRC should be mentioned first. With 196 State Parties, it remains the most widely ratified international human rights treaty. The Convention entered into force more than 30 years ago. One should remember the role of Poland, particularly Prof. Tadeusz Smoczyński, in its preparation.¹⁶ However, the initial draft from Poland contained no reference to adoption; the early proposals on domestic and intercountry adoption were submitted from Barbados and Columbia.¹⁷ In the final version of the text, these provisions became arts. 20 and 21. In view of their decisive character for international adoption standards, it is worth recalling them:

¹⁴ Fenton-Glynn, 2021, p. 394.

¹⁵ ECtHR, *Pini and others v. Romania*, judgment (Chamber) of 22 June 2004, Application No. 780028/01 and 780030/01, paras. 138–139.

¹⁶ E.g. the study by Dr. hab. Marek Andrzejewski, prof. INP PAN titled *The Role of Prof. Tadeusz Smoczyński as a Drafter of the UN Convention on the Rights of the Child* in Issue 1/2024 of *Acta Universitatis Sapientiae, Legal Studies* (under publication).

¹⁷ See e.g. Lansdown, 2022, p. 172 and the quoted sources.

Art. 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption, or, if necessary, placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Requirements for the system of adoption are provided in the subsequent Art. 21 of UNCRC:

Art. 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.

Due to the holistic approach of the CRC, it remains necessary to consider other rights of the child related to adoption: the prohibition of discrimination, the right to know and preserve their identity, the right to live with their parents and to an upbringing in the family, the right to express their opinion, to an adequate standard of living and to protection from violence, mistreatment, abuse, or exploitation. Obviously, addressed in the CRC from the perspective of children, they also reflect the rights of adults, particularly biological parents. However, the holistic approach to different aspects of the situation of a child reflects the child-centricity of the institution of adoption, as well as the children's rights-based approach.¹⁸

The provisions of the Convention are supplemented by three optional protocols: on the involvement of children in armed conflict,¹⁹ on the sale of children, child prostitution and child pornography,²⁰ and on a communications procedure.²¹ They bind 173, 178, and 50 countries respectively.²²

One may note that the final provision of Art. 21 of the CRC encourages the development of bilateral and multilateral arrangements for child protection in adoption. Consequently, the other conventions, concluded after the CRC constitute its implementation instruments.

3.2. The HCCH 1993 Adoption Convention

Unquestionably, the Hague Convention is a highly relevant international instrument in the field of adoption in its inter-country version. It was concluded under the auspices of the Hague Conference on Private International Law, the leading international organization in the field of private international law. Family matters in a wider sense (including forms of the protection of adults lacking capacity) are a vital area of the HCCH's activities. The organization created a number of conventions during the last few decades with the express purpose of addressing the dangers and cross-border concerns that families and children experience when operating under civil law.²³

One may name the 1993 Convention a continuation of Art. 21 of the CRC (provisions on inter-country adoption). Also, I should draw particular attention to Art. 21 (c) of the CRC: '[State Parties shall] ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption.' However, due to the popularity and detailed character of the Hague Convention, from an international law perspective,

18 See Tobin, 2023.

19 United Nations, 2000a, p. 222.

20 United Nations, 2000b, p. 227.

21 United Nations, 2011, p. 135.

22 According to status as of 3 April 2024.

23 See e.g. Loon, 2017, p. 32.

the substantive obligations enshrined therein can serve as an interpretation of a child's rights in an adoption situation as such.

The number of Contracting Parties to this Convention reached 106 after the accession of Angola in March 2024. The Convention was created in response to the increasing number of international adoptions in the second half of the 20th century and the risks resulting from them. The crucial objectives were to prevent abuse by establishing minimal standards for inter-country adoption and a system of co-operation between State Parties. The Convention emphasizes a role of central authorities of the State of Origin and Receiving State and of accredited bodies and other competent – judicial and administrative – authorities. Moreover, the Convention secures the automatic recognition of adoptions made following its requirements. The 1993 Convention respectively refers to post-adoption matters, noting that what happens during the adoption procedure will be relevant to the adopted child at a later stage in life.

Since its signature, the United Nations Fund for Children and the Committee on the Rights of the Child have given the HCCH Adoption Convention particular consideration and support, seeing it as a crucial implementation tool of the CRC.²⁴ The 1993 Convention has encouraged the enactment of laws and rules, stronger protocols, more stringent controls, and the processing of inter-country adoptions by authorized authorities. These have all aided in generating the political will to step up measures to stop and deal with unethical inter-country adoption operations. Being a Party to the Convention, however, has no bearing if the Contracting States fail to carry it out properly, and illegal activities may continue. Therefore, the HCCH itself promotes the evaluation of good practices and challenges, addressing particular risks and illicit practices.²⁵

It is necessary to clarify that the Hague Convention

[D]oes not cover all international adoption cases, but only one class of them: those expressly indicated in Article 2, i.e. the adoption of a child habitually resident in one State (the 'State of origin') by spouses or a person habitually resident in another State (the 'receiving State').²⁶

One may note that all adoptions are potentially international, e.g. in the case of a family moving abroad, when the need to recognize adoption in a different country appears.²⁷

24 Id., p. 41.

25 See e.g. Hague Conference on Private International Law, 2023.

26 Parra-Aranguren, 1993, para. 34.

27 See e.g. Commission Internationale de l'État Civil, 2015.

3.3. The European Adoption Conventions

Additionally, the Council of Europe had an impact on setting regional standards in adoption because of the European Convention on the Adoption of Children from 1967 and its revised version from 2008 concluded under its auspices. The aim of these conventions was to harmonize domestic regulations on adoption. The Convention from 1967 was the first international document referring in detail to the substantive aspects of adoption. Among others, the European Adoption Conventions address the issue of the effects of adoption and restrictions on revoking or annulling an adoption, which, in principle, should create parent–child relationships, which are permanent.

One of the general recommendations of the Council of Europe’s Commissioner for Human Rights published in 2011 was to ‘adapt national legislation and practices to the 1993 Hague Convention and the European Convention on the Adoption of Children (Revised), and ratify these conventions immediately where this has not yet been done’.²⁸ It is worth noting that the European Adoption Conventions are still binding upon a limited number of states.²⁹ One of the reasons that may prevent States from adhering to international agreements on family matters is a different understanding of the fundamental institutions in domestic legal orders combined with different approaches to sensitive matters such as availability of adoption to homosexual persons and joint adoption to unmarried or same-sex couples.³⁰ Following this, one may note that the revision of the European Convention provides for adoption either by a couple or by one person (Art. 7). This may include registered partners, unmarried couples; different and same-sex couples, to which the states are free to extend the scope of the Convention. Nevertheless, they are not obligated to introduce institutions which are not known to their domestic law, such as registered partnerships of any kind.

The 2008 Convention provides for the possibility of stating reservations. These may relate to provisions on the consent of the child to adoption (mainly the aspect of age limits; Art. 5), on the status of a person or couple capable of adopting a child (the above-mentioned Art. 7), and on the access of the adopted child to information concerning their origin (Art. 22(3)).

Shortly after the Convention came into being, from a Polish perspective, Anna Natalia Schulz positively assessed the possibility of stating reservations as a realistic

28 Council of Europe, Commissioner for Human Rights, 2011, p. 5.

29 As of 1 February 2024: the European Convention of 1967 is binding upon 16 states, among them the Czech Republic, Poland, and Romania; the revised version of 2008 is binding upon 10 states, Romania being among them.

30 E.g. Denunciation by Sweden or Norway of the 1967 European Convention, within the scope of which there is no adoption by same-sex registered partners; very cautious position of Poland with regard to any international instrument related to marriage in any way.

solution.³¹ As it turned out, however, this flexibility did not increase the popularity of the Convention among states. The above-mentioned questions – the child's consent to adoption, their possible access to information on their origin, and the issue of access to adoption for registered partners – are ones that the 2008 Convention addresses differently from its predecessor from 1967. A different approach is also remarkable with regard to the position of the biological father, which is linked to the disappearance of the distinction between 'legitimate' and 'illegitimate' children. The latter also entails the 'modernized' language of the 2008 Convention.

4. Other Relevant Documents

Among documents that cover children's rights more generally, the European Convention on the Exercise of Children's Rights³² requires mentioning. It is another instrument of the Council of Europe (apart from the ECHR or European Adoption Conventions). In the context of adoption, it is particularly important to refer to this Convention as the one focused on empowering the child's participation in the decision-making process. It is devoted particularly to the procedural measures of promoting the exercise of children's rights. The Convention was ratified by 20 states, including Croatia, the Czech Republic, Poland, and Slovenia.³³

One should remember that in a given adoption case, it may be necessary to consider the special needs of a child (or parents) resulting, e.g., from their disability.³⁴

Some auxiliary, non-binding instruments are relevant for interpreting the rights of the child and state obligations during or in relation to adoption. The first of them is 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.³⁵ This document influenced the drafting of Art. 21 of the CRC.³⁶ Additionally, the Committee on the Rights of the Child makes recommendations on issues relating to children to which it believes the State Parties to the CRC should devote more attention. These are, *inter alia*, essential to adoption issues such as the best interest of the child and the right of the child to be heard.³⁷

31 Schulz, 2008, p. 118.

32 Council of Europe, 1996, ETS 160.

33 As of 12 May 2024. Among Central European countries, the Convention was respectively signed by Hungary, Serbia, and Slovak Republic.

34 See United Nations, 2006, p. 3.

35 UN General Assembly Resolution, A/RES/41/85, 3 December 1986.

36 See e.g. Lansdown, 2022, p. 172 and the quoted sources.

37 United Nations Committee on the Rights of the Child, 2009, Art. 3(1) and United Nations Committee on the Rights of the Child, 2013.

5. The Main Principles of Adoption According to International Instruments

5.1. The Best Interest of the Child

The best interest of the child as a principle serves as the foundation for the requirements for protecting the child's rights. This includes adoption contexts. The CRC and the other multilateral treaties mentioned above expressly support this principle. Determining the best interest and means of protection in a particular case can certainly be difficult. Beyond adoption, one could argue that the child's best interest is rarely served in a variety of circumstances (such as protracted, contentious disputes between parents). However, at least as to its purpose, the best interest of the child should be considered in adoption.

The term remains widely used in the debate on children's rights as well as in specific cases. Not without a reason, as it is a general principle of the CRC. According to its Art. 3, in all actions of public or private social welfare institutions, courts, administrative or legislative bodies, the best interest of the child must be a primary consideration. This should be viewed from multiple dimensions. The concept of the best interest of the child has implications for both the making and application of the law, substantive as well as procedural law. It can be seen as an interpretative as well as a corrective clause. Consequently, one may call it a general principle of the rights of the child. The principle requires a comprehensive analysis and is interpreted on a case-by-case basis due to cultural differences and the unique circumstances of each child. It is out of the scope of the present text to refer to the history of the best interest of the child as a concept, its understanding and questions arising in various contexts.³⁸ Here, the aim is to analyse the above-mentioned instruments in terms of their references to the best interests of the child.

In the most general way, one may note that all the conventions mentioned are optimised to guarantee that adoption takes place in the best interest of the child. In each case, the best interest of the child should be examined, and it should be decisive regarding the means used. This applies both to the decision on adoption as such and to all decisions made at the various stages of the adoption process. The best interests of the child must be the 'paramount consideration' in adoption situations, according to Art. 21 of the CRC. Art. 21's standards surpass Art. 3(1)'s general requirement that it be 'a primary consideration'. Additionally, as Katre Luhamaa and Conor O'Mahony put it, analysing General Comment No. 14 of CRC Committee (Art. 36) and the ECtHR judgment in the case of *Strand Lobben v. Norway*:³⁹

38 See e.g. Freeman, 2007; Kilkelly, 2016 and the quoted sources.

39 ECtHR, *Strand Lobben and others v. Norway*, judgment (Grand Chamber) of 10 September 2019, Application no 37283/13.

The legal requirements deriving from [Art. 21] are specified in General Comment no 14, where the CRC Committee (2013: para 36) stressed that the word ‘shall’ places a strong legal obligation on states and means that states do not have discretion as to whether children’s best interests are to be assessed. Thus, the best interests cannot be one among several considerations; rather, it should guide the whole adoption process and be the primary driver of the adoption (*Strand Lobben v Norway*).⁴⁰

The CRC Committee mandated that the best interest of the child is the determining factor when making decisions on adoption. The European Adoption Convention from 2008 follows the same approach, stating in its Art. 4(1), ‘The competent authority shall not grant an adoption unless it is satisfied that the adoption will be in the best interests of the child.’

In the Hague Convention, consideration for the best interest of the child is relevant in connection to procedural public policy exceptions. Art. 24 provides 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 interest of the child. The Hague Convention is crucial in ensuring safeguards for the best interest of the child in inter-country adoption. Although this instrument of private international law is in itself an attempt to protect the best interest of the child, it leaves a significant flexibility to the applicable law. By focusing punctiliously on the most essential issues, procedural aspects or international cooperation in this regard and recognition of the adoption decision, it enforces an approach to implementation of the children’s rights standards.

5.2. Subsidiarity

5.2.1. *Alternative Care: Protection of the Family of Origin (and Family Life)*

It is worth remembering that all mentioned instruments recognize the central role of the family in taking care of a child, providing for him or her a stable and harmonious home. Therefore, adoption remains a form of care subsidiary to that of a family of origin and provides alternative care to children who are unable to enjoy family life within their biological families. Such conventions provide safeguards for the family of origin; however, the aim of adoption is to secure ‘alternative’ family life for a child.

The term ‘alternative care’ encompasses the situation of children who do not live with their parents. Of course, this is not a homogeneous group. It includes children who are looked after by relatives or other adults (not family

⁴⁰ Luhamaa and O’Mahony, 2021, pp. 183–184.

members) or stay in an institutional care establishment. From a different angle, alternative care is a set of activities of a state designed to provide temporary care and upbringing for children deprived of parental care.⁴¹ Adoption is one of the forms of alternative care, mentioned by Art. 20 of the CRC, albeit a very special one, terminating the rights and responsibilities of the biological parents.⁴² Undoubtedly, implementing the obligation to provide adequate care for a child deprived of parental care remains a challenge for the state and its specialized bodies. It is worth remembering that they are in charge of providing the enjoyment of the fullness of the child's rights, which are, for the ones in alternative care, the same as for any other child. Under the CRC, particular attention should be paid to the role of the family in the upbringing of the child (inter alia, Art. 9). The best interest of the child is referred to in the aforementioned Art. 20. Only this can help decide on separating a child from the family of origin on or placing them in alternative care, possibly temporarily. It is the child's fundamental right to live with the biological family, and only as a last resort, in their best interest, should the child be placed in alternative care. This right extends to providing care and upbringing in the form of alternative care and to guaranteeing a return to the natural family when it can provide appropriate conditions. Adoption is possible when there is no longer any chance of family reunification. Subsidiarity in adoption is a principle that aims to ensure that a child's right to a family environment is respected in the most appropriate manner.

5.2.2. Subsidiarity of Inter-country Adoption to Care in the Child's Country of Origin

The principle of subsidiarity dictates that the primary responsibility for the care and upbringing of a child lies with the child's biological family and, failing that, within the child's country of origin. Only when these options are not in the best interest of the child should inter-country adoption be considered by competent authorities. Domestic adoption is seen as preferable because it allows the child to remain within their own cultural, social, and linguistic environment. However, the care by a family (even abroad) should be prioritized over the institutionalized forms of care. Also, as stated in para. 123 of the explanatory report to the Hague Convention:

[N]otwithstanding the express acceptance of the subsidiarity principle, there was consensus that, in certain circumstances, the best interests of

41 Maj, 2015, p. 264.

42 Noting also that adoption is not known to legal systems of all of the countries, e.g. Islamic countries. Art. 20 refers respectively to *kafalah*. However, it is not covered by the Hague Convention, despite Egypt's initial suggestion.

the child may require that he or she be placed for adoption abroad, even though there is a family available in the State of origin, for instance, in cases of adoption among relatives, or of a child with a special handicap and he or she cannot adequately be taken care of.⁴³

The subsidiarity principle requires balancing the child's best interests with respect for the sovereignty and capabilities of the child's country of origin. This can be a delicate and complex process, particularly in cases involving differing cultural norms and legal standards. These challenges are reflected also from the perspective of an individual child and respect for their original identity.

The idea of subsidiarity of inter-country adoption is upheld by both the CRC and the HCCH 1993 Adoption Convention, guaranteeing that inter-country adoption is a last resort. While the Hague Convention offers a precise procedural framework expressly for inter-country adoption, guaranteeing ethical procedures and careful examination of domestic alternatives, the CRC provides a generic framework emphasising the best interests of the child and giving priority to domestic options. When used in tandem, these tools support and safeguard children's rights throughout the adoption process.

5.3. Consent for Adoption

The realization of the subsidiarity of adoption is the requirement of consent concerning parents, relatives, and legal guardians, as mentioned by Art. 21(a) of the CRC.⁴⁴ This provision emphasizes the necessity of informed consent, ensuring full understanding of the implications of adoption. Also, the Hague Convention mandates in Art. 4 that the biological parents' consent must be counselled, informed, free from coercion, and given in the proper legal form. One should also remember the requirements of Art. 29 of the Hague Convention, which prohibit, as a rule, personal contact between prospective adoptive parents and the child's parents or guardians until the consent requirements are met. This ensures the integrity of the adoption process and the protection of all parties involved. Special protection is offered to mothers after giving birth to a child.

The European Adoption Conventions refers respectively to the consent to adoption of the spouses (partners, see above) of the prospective adoptive parents. Although provisions on consent and enquiries concerning the views of the child were also included in the 1967 European Convention, the empowerment of the biological father and the child themselves in consenting to the adoption, as provided for in Art. 5 of the revision of the European Convention, can serve as

⁴³ Parra-Aranguren, 1993, para. 123.

⁴⁴ This may also refer to the consent of the competent authorities when required; see e.g. Art. 4(c) (1) of the Hague Convention.

an example of a preferable direction of development in adoption standards.⁴⁵ The father's consent has been equated in importance with the mother's, regardless of the parents' relationship status.

Similarly, the consent of the child is required for granting adoption according to the revised version of the European Convention. Concerning the child, this is the realization of his or her right to be heard (Art. 12(2) of CRC), which, together with the child's best interest, should be at the centre of the adoption proceedings. This is reflected in the Hague Convention (Art. 4 (d) or Art. 21(2)) as well. Considering the child's views is a procedural obligation and a substantive requirement for the State. The consent of the child shall be given not to adoption in general but for the specific adoption by the specific adoptive parents. The child's degree of maturity must, however, be taken into account. One of the factors that requires attention is the age of the child considered by law as having sufficient understanding. Setting age limits in this regard is left to the decision of the domestic legislature. However, the 2008 Adoption Convention states in Art. 5(1)(b) *in fine* that: 'a child shall be considered as having sufficient understanding on attaining an age which shall be prescribed by law and shall not be more than 14 years'.⁴⁶ Younger children⁴⁷ shall be consulted, unless it is manifestly contrary to the child's best interests. Providing a child's views an opportunity to be included in the decision-making process is one of the most challenging aspects of adoption, requiring an interdisciplinary approach.

The provisions on consent ensure that adoptions are conducted ethically, respecting the rights of the biological parents while prioritizing the best interests of the child.

5.4. Requirements for Adoption Procedure and Adoptive Parents – Selected Aspects

Carefully examining the situation of the child and deciding on adoption constitute the role of the competent authorities.⁴⁸ The European Adoption Conventions refer directly to qualifications and training of social workers, who typically deal with adoption matters. Substantive and procedural requirements in accordance with applicable law should assure the protection of biological parents, intended

45 See Council of Europe, 2008a, paras. 29–30.

46 Save on exceptional grounds determined by law; see Art. 5(3).

47 Or those who suffer from disability preventing the expression of a valid consent; see Art. 5(3) *in fine*.

48 See more on the professional requirements towards them according to the Committee on the Rights of the Child in Vité and Boéchat, 2008, paras. 62–64. The Hague Convention refers in detail to the necessary attributes of the accredited 'central authorities', which have numerous obligations under the Convention.

adoptive parents and – first and foremost – the child. The conventions refer to certain matters in particular.

The mechanisms of the CRC, starting with Art. 35, aim to prevent the sale of children. Achieving improper financial benefits from adoption could lead to such situations. For inter-country adoption, this is explicitly addressed by Art. 21(d) and continued by the Hague Convention. Its Art. 4(c)(3) states that the consent of parents and children, mentioned above, cannot be induced by payment or compensation of any kind. Art. 32(1) adds that: ‘no one shall derive improper financial or other gain from an activity related to an intercountry adoption.’ The European Adoption Conventions contain similar safeguards for domestic adoptions.

Furthermore, to ensure that adoption is indeed the best way to protect a child and prospective adoptive parents are suitable (see below), the Hague and European instruments relate to the ‘all pertinent and reliable’⁴⁹ information circulation process. For instance, as stated in Art. 9(1) of the 1967 European Adoption Convention: ‘the competent authority shall not grant an adoption until appropriate enquiries have been made concerning the adopter, the child and his family’, therefore all relevant actors in adoption. These enquiries concern in particular the appropriateness of the child’s placement, the situation of the persons involved, and the prospective adopter’s eligibility, suitability, and motivations. Circumstances on the part of the child are in particular those that affect their identity.

The European Adoption Conventions address the issue of the age of prospective adoptive parents. This relates to two questions: the minimum age of the adoptive parents that should be prescribed by law and the age difference between them and the child. As a rule, the 1967 Convention set the minimum age of parents as being between 21 and 35 years (Art. 7). Furthermore, it required the difference in age between the adopter and the child to be no less than the normal difference in age between parents and their children (Art. 8). The revision from 2008 determines these limits differently. As a matter of principle, the minimum age should be neither less than 18 nor more than 30 years. Also, there should be an appropriate age difference between the adopter and the child, preferably a difference of at least 16 years (Art. 9(1)). The Conventions do not allow restrictions on the number of children adopted or a prohibition of adoption by those who may have children. The conventions of 1967 and 2008 treat the issue of contact between prospective adoptive parents and the child differently. This ‘probationary period’ is respectively required and optional. The Hague Convention refers to the probationary period as well (Art. 20). Also, it provides for the mechanisms which ensure the care for the child if the continued placement of the child with the prospective adoptive parents is not in the child’s best interests (Art. 21).

⁴⁹ Art. 21(a) of the CRC.

The Hague Convention, and likewise the 2008 European Adoption Convention, draws attention to the need for the State to provide pre-adoption counselling and post-adoption support to adoptive families.

5.5. The Child's Right to Identity

Unquestionably, a child's identity is interfered with by adoption. The consequences of adoption may create a new legal parent-child relationship or change the child's name. Thus, adoption influences the fundamentals of an origin of a person. Hence, there is a need to study this interaction.

One has to agree with the remarks of Philip Alston, Nigel Cantwell, and John Tobin that:

[N]ational adoption presents challenges in preserving a child's identity. These problems are likely to be magnified in inter-country adoptions which generally sever not only the physical ties with a child's biological parents or previous carers, but the social, racial, cultural, linguistic, and religious ties between an adopted child and his or her country of origin.⁵⁰

Therefore, international instruments specialized in the area of adoption invoke the issues relevant for the protection of child's identity.

As the starting point, one may refer to Art. 20(3) *in fine* of the CRC. It is worth recalling that according to this text: 'when considering solutions [for ensuring alternative care for a child], due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background'. The provision is a response to bad past practices. These consisted of enforcing the compulsory removal of children from indigenous or minority populations and giving them to wealthy childless parents in violation of these rights. Even with the best of intentions, these acts demonstrate overt racism and have harmed a significant number of children and adults alike.⁵¹ Nowadays, the tenets of placement continuity and identity preservation remain crucial components of assessments of the situation of the child, although they are not exclusively decisive. Of course, the best interests of the child are decisive, combined, however, with the importance of availability and feasibility of different solutions.

These issues are also mentioned in the Hague Convention (Art. 16). Information about a child's background, social environment, and medical or family history have a role in the process of deciding on the (inter-country) adoptability of a

⁵⁰ Alston, Cantwell and Tobin, 2019, p. 792.

⁵¹ Tobin, 2019, p. 754 and the quoted sources.

child.⁵² Also, in this respect, due consideration shall be given to the ethnic, religious, and cultural background of the child.

On the topic at hand, it is worth noting the differences between the 1967 European Convention and its 2008 revised version. The first change concerns the catalogue of factors to be taken into account in adoption enquiries. In the 2008 version, it is longer and includes circumstances reminiscent of those in the Hague Convention. Either way, however, it is exemplary in nature. Furthermore, the newer version approaches differently the question of the child's surname after adoption. According to the Convention of 1967, the adopted person should generally be able to acquire the adopter's surname, either replacing or adding to their original surname. The Convention of 2008 allows states to make exceptions regarding the child's surname's change. One may note that the revised version is characterized by a greater openness to forms of adoption with limited effects, those preserving some elements of the child's contact with their roots in terms of name or family ties. However, for the integration and protection of a child from statelessness, both Conventions provide that the adopted child should acquire the nationality of the adoptive parents.

Access to and disclosure of information is another essential issue to which attitudes have changed in recent decades. It reveals the tension between 'open' and 'secret' adoption. The Conventions both of 1967 (Art. 20(2)) and 2008 (Art. 22(2)) agree that 'provision shall be made to require or permit adoption proceedings to take place *in camera*'. However, recurrence ends on this procedural aspect. As to making provisions to enable an adoption to be completed without disclosing the identity of the adopter to the child's family of origin, it is obligatory in the Convention of 1967 (Art. 20(1)) and optional in its 2008 revised version (Art. 22(1)). Both versions of the European Adoption Convention allow the adopter and the adopted person to obtain a document that attests to the date and place of birth without revealing the fact of adoption or the identity of the biological parents. Also, they both require public records to be kept and reproduced in a manner that prevents individuals without a legitimate interest from learning about the adoption or the identity of the biological parents. Nevertheless, provisions of the older Convention do not address the adopted child's access to information about their origins. In contrast the revised one explicitly grants the adopted child access to information about their origins held by the competent authorities. Furthermore, it provides a mechanism for potentially overriding the biological parents' right to anonymity, considering the circumstances and rights involved. Also, the analysed Convention of 2008 specifies that information regarding an

52 At the start of the same process, from the point of view of the decision on parents' suitability, information is collected about their background, family and medical history, social environment, reasons for adoption, ability to undertake an inter-country adoption, as well as the characteristics of the children for whom they would be qualified to care (Art. 15).

adoption must be collected and retained for at least 50 years after the adoption becomes final. The Convention takes a broad perspective on a challenging and complex matter. It is worth recalling that reservations to the provision on access to information concerning the child's origin are allowed (Art. 22(3)). As of 14 May 2024, a reservation in relation to the child's access to information about their origin was made only by Finland, which will not apply the given provision to granting access to information for a child under 15 years of age.

The regulation of the Hague Convention is not so broad. It refers to the preservation of the information concerning the child's origin and access to them by the child and its representative (in so far as it is permitted by the law of the State), as well as data protection.

Issues of the child's identity must be considered as important ones, elements of which are addressed by all the conventions discussed.

6. Conclusions

In conclusion, it is worth noting that the individual's protection standards in adoption are included in instruments of (almost) universal significance as well as regional, European ones. Yet, the latter have not been successful in terms of the number of adhering states. The international legal framework for adoption includes various elements of the situation of the child, the biological and adoptive parents, which are relevant in the context of adoption. Of course, the most important instrument concerning the child's situation is the CRC. It refers explicitly to alternative care and adoption, as well as to factors that may be relevant in the context of adoption. It also sets out general directives to protect the situation of each child. The Hague Convention develops the UN Convention's requirements for inter-country adoption. For purposes of the present research, the aspect of child protection was much more important than co-operation in cases of inter-country adoption, as per the title of the 1993 Convention. In principle, for obvious reasons, the phenomenon of inter-country adoption poses more challenges for the protection of children than domestic adoption. Therefore, and given the wide geographical scope of the Convention, its provisions may serve as a guide in interpreting the various questions of adoption, including domestic ones.

The international legal framework for adoption forms an essentially coherent landscape. Therefore, one may claim that other instruments, when referring to the situation of the child, uphold the rights provided by the CRC.

Broadly speaking, it can be observed that all of the main specialized instruments are designed to ensure that adoption occurs in the child's best interest. It should always dictate the methods applied to each situation. Secondly, every analysed convention acknowledges that a family is a child's primary carer. Thus,

adoption continues to be a subsidiary form of care, one of the possible types of alternative care for a child unable to experience family life in their original homes. Additionally, possibly with a preference for domestic adoption before an inter-country one. Another relevant issue is consent for adoption, including consideration for the voice of the child. Also, the requirements for the adoption process and prospective parents are crucial, which should assure the suitability of adoptive parents for a child.

The 1967 Adoption Convention and its 2008 revised version differ in their approach to certain issues, such as the means of protection of the child's right to identity. Controversial and challenging issues can and indeed are encountered by the ECtHR in the context of specific cases. The ECHR law gains even greater significance when considering the relatively limited applicability of the specialized European treaty arrangements with regard to adoption.

References

- Aaken, A. and Motoc, I. (eds.) (2020) *The European Convention on Human Rights and General International Law*. Oxford: Oxford University Press. Available at: <https://doi.org/10.1093/oso/9780198830009.001.0001> (Accessed: 8 June 2024).
- Aaken, A., Motoc, I. and Vassel, J.J. (2018) 'Introduction: The European Convention on Human Rights and General International Law', in A. Aaken and I. Motoc (eds.) *The European Convention on Human Rights and General International Law*. Oxford: Oxford University Press, pp. 1–20.
- Alston, P., Cantwell, N. and Tobin, J. (2019) 'Article 21: Adoption', in J. Tobin (ed.) *The UN Convention on the Rights of the Child: A Commentary*. Oxford: Oxford University Press, pp. 759–817.
- Commission Internationale de l'État Civil (2015) *Recommandation (n°11) relative à la reconnaissance de certaines décisions d'adoption rendues ou reconnues dans un État membre de la Commission Internationale de l'État Civil*, adopted at Strasbourg, 17 September 2015. Available at: <https://www.ciec1.org/recommandation-11-fr> (Accessed: 9 April 2024).
- Council of Europe (1950) *Convention for the Protection of Human Rights and Fundamental Freedoms*, signed at Rome, 4 November 1950. Available at: https://www.echr.coe.int/documents/convention_eng.pdf (Accessed: 8 June 2024).
- Council of Europe (1967) *European Convention on the Adoption of Children*, signed at Strasbourg, 24 April 1967. Available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/058> (Accessed: 8 June 2024).
- Council of Europe (1996) *European Convention on the Exercise of Children's Rights*, signed at Strasbourg, 25 January 1996. Available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/160> (Accessed: 8 June 2025).

- Council of Europe (2008a) *European Convention on the Adoption of Children (revised)*, signed at Strasbourg, 27 November 2008. Available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/202> (Accessed: 8 June 2024).
- Council of Europe (2008b) *Explanatory Report to the European Convention on the Adoption of Children (Revised)*. Available at: <https://rm.coe.int/16800d3833> (Accessed: 28 April 2024).
- Council of Europe, Commissioner for Human Rights (2011) *Adoption and Children: A Human Rights Perspective*. CommDH/Issue Paper (2011) 2, 28 April. Available at: <https://rm.coe.int/adoption-and-children-a-human-rights-perspective-issue-paper-commissio/16806dac00> (Accessed: 1 February 2024).
- Draghici, C. (2011) 'Adoption and the European Court of Human Rights: From laissez-faire to judicial law-making', in L. Panella and E. Spatafora (eds.) *Scritti in Onore di Claudio Zanghì (Diritti umani)*. Milan: Giuffrè Editore, pp. 255–282.
- Fenton-Glynn, C. (2021) *Children and the European Court of Human Rights*. 1st ed. Oxford: Oxford University Press. Available at: <https://doi.org/10.1093/oso/9780198787518.001.0001> (Accessed: 8 June 2024).
- Freeman, M. (2007) 'Article 3: The best interests of the child', in A. Alen *et al.* (eds.) *A Commentary on the United Nations Convention on the Rights of the Child*. Leiden: Martinus Nijhoff.
- Hague Conference on Private International Law (1993) *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, United Nations Treaty Series, vol. 1870, p. 167. Available at: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=69> (Accessed: 8 June 2024).
- Hague Conference on Private International Law (2023) *Toolkit for Preventing and Addressing Illicit Practices in Intercountry Adoption*. Available at: <https://www.hcch.net/en/publications-and-studies/details4/?pid=8530&dtid=3> (Accessed: 29 April 2024).
- Helland, T. and Hollekim, R. (2023) 'The Convention on the Rights of the Child's imprint on judgments from the European Court of Human Rights: A negligible footprint?', *Nordic Journal of Human Rights*, 41(2), pp. 213–233. Available at: <https://doi.org/10.1080/18918131.2023.2204634> (Accessed: 8 June 2024).
- Hodgkin, R., Newell, P. and UNICEF (2007) *Implementation Handbook for the Convention on the Rights of the Child*. 3rd ed. New York: UNICEF. Available at: <https://digitallibrary.un.org/record/620060?ln=en> (Accessed: 8 June 2024).
- Kilkelly, U. (2015) 'The CRC in litigation under the ECHR', in T. Liefwaard and J.E. Doek (eds.) *Litigating the Rights of the Child*. Dordrecht; Heidelberg; New York; London: Springer, pp. 193–209.

- Kilkelly, U. (2016) 'The best interests of the child: A gateway to children's rights', in E. Sutherland and L.-A. Barnes Macfarlane (eds.) *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-Being*. Cambridge: Cambridge University Press, pp. 51–66.
- Lansdown, G. (2022) 'Article 21 – Adoption', in Z. Vaghri *et al.* (eds.) *Monitoring State Compliance with the UN Convention on the Rights of the Child: An Analysis of Attributes*. Children's Well-Being: Indicators and Research. Cham: Springer. Available at: <https://doi.org/10.1007/978-3-030-84647-3> (Accessed: 8 June 2024).
- Loon, H. van (2017) 'Protecting children across borders: The interaction between the CRC and the Hague Children's Conventions', in T. Liefwaard and J. Sloth-Nielsen (eds.) *United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead*. Leiden: Brill Nijhoff, pp. 32–46. Available at: <https://doi.org/10.1163/9789004295056> (Accessed: 8 June 2024).
- Luhamaa, K. and O'Mahony, C. (2021) 'International human rights law governing national adoption from care', in T. Pösö, M. Skivenes and J. Thoburn (eds.) *Adoption from Care: International Perspectives on Children's Rights, Family Preservation and State Intervention*. Bristol: Bristol University Press, pp. 177–194. Available at: <https://doi.org/10.2307/j.ctv1n1brv7> (Accessed: 8 June 2024).
- Maj, E. (2015) 'Prawo dziecka do godziwych warunków socjalnych', in S.L. Stadniczeńko (ed.) *Konwencja o prawach dziecka. Wybór zagadnień. Artykuły i komentarze*. Warsaw: Biuro Rzecznika Praw Dziecka, pp. 255–269.
- Meron, T. (2006) *The Humanization of International Law*. Leiden: Brill Nijhoff. Available at: <https://brill.com/view/title/12772> (Accessed: 8 June 2024).
- Parra-Aranguren, G. (1993) *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*. Offprint from *Proceedings of the Seventeenth Session, tome II, Adoption – Co-operation*. The Hague: Hague Conference on Private International Law, Permanent Bureau, pp. 1–91. Available at: <https://assets.hcch.net/docs/78e18c87-fdc7-4d86-b58c-c8fdd5795c1a.pdf> (Accessed: 1 February 2024).
- Peters, A. (2016) *Beyond Human Rights: The Legal Status of the Individual in International Law*. Cambridge: Cambridge University Press. Available at: <https://doi.org/10.1017/CBO9781316687123> (Accessed: 8 June 2024).
- Schulz, A.N. (2008) 'Nowa Konwencja Rady Europy o przysposobieniu dzieci', in M. Andrzejewski and M. Łączkowska (eds.) *Prawne i pozaprawne aspekty adopcji*. Poznań: WSNHiD, pp. 101–118.
- Smith Rotabi, K. and Bromfield, N.F. (2016) *From Intercountry Adoption to Global Surrogacy: A Human Rights History and New Fertility Frontiers*. London; New York: Routledge/Taylor & Francis Group.

- Tobin, J. (2023) 'Understanding Adoption: The Rights Approach', in N. Lowe and C. Fenton-Glynn (eds.) *Research Handbook on Adoption Law*. Cheltenham: Edward Elgar Publishing, pp. 37–57. Available at: <https://doi-org.peacepalace.idm.oclc.org/10.4337/9781800883260.00008> (Accessed: 8 June 2024).
- United Nations (1989) *Convention on the Rights of the Child*, signed at New York, 20 November 1989, United Nations Treaty Series, vol. 1577, p. 3. Available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201577/v1577.pdf> (Accessed: 8 June 2024).
- United Nations (2000a) *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, United Nations Treaty Series, vol. 2173, p. 222. Available at: https://treaties.un.org/doc/Treaties/2000/11/20001112%2004-50%20AM/Ch_IV_11_cp.pdf (Accessed: 8 June 2024).
- United Nations (2000b) *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, United Nations Treaty Series, vol. 2171, p. 227. Available at: https://treaties.un.org/doc/Treaties/2000/09/20000908%2011-03%20AM/Ch_IV_11_cp.pdf (Accessed: 8 June 2024).
- United Nations (2006) *Convention on the Rights of Persons with Disabilities*, signed at New York, 13 December 2006, United Nations Treaty Series, vol. 2515, p. 3. Available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%202515/v2515.pdf> (Accessed: 8 June 2025).
- United Nations (2011) *Optional Protocol to the Convention on the Rights of the Child on a communications procedure*, United Nations Treaty Series, vol. 2983, p. 3. Available at: https://treaties.un.org/doc/Treaties/2011/12/20111219%2006-03%20PM/Ch_IV_15.pdf (Accessed: 8 June 2025).
- United Nations Committee on the Rights of the Child (2009) *General Comment No. 12: The right of the child to be heard*. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11 (Accessed: 14 May 2024).
- United Nations Committee on the Rights of the Child (2013) *General Comment No. 14: The right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1)*. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11 (Accessed: 14 May 2024).
- Vité, S. and Boéchat, H. (2008) 'Article 21: Adoption', in A. Alen *et al.* (eds.) *A Commentary on the United Nations Convention on the Rights of the Child*. Leiden: Martinus Nijhoff. Available at: <https://doi.org/10.1163/ej.9789004148741.i-62> (Accessed: 8 June 2024).