

2.1.1 Subsidiarity

46. The principle of subsidiarity is highlighted in the Preamble to the Convention and in Article 4 *b*). Article 4 *b*) provides that:

“An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin [...] have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child’s best interests”.

47. “Subsidiarity” means that States Party to the Convention recognise that a child should be raised by his or her birth family or extended family whenever possible. If that is not possible or practicable, other forms of permanent family care in the country of origin should be considered. Only after due consideration has been given to national solutions should intercountry adoption be considered, and then only if it is in the child’s best interests.²⁴ Intercountry adoption serves the child’s best interests if it provides a loving permanent family for the child in need of a home. Intercountry adoption is one of a range of care options which may be open to children in need of a family.²⁵

48. The subsidiarity principle is central to the success of the Convention. It implies that efforts should be made to assist families in remaining intact or in being reunited, or to ensure that a child has the opportunity to be adopted or cared for nationally. It implies also that intercountry adoption procedures should be set within an integrated child protection and care system, which maintains these priorities. However, States should also ensure that efforts to achieve this goal do not unintentionally harm children by delaying unduly a permanent solution through intercountry adoption. States should guarantee permanency planning in the shortest possible time for each child deprived of his / her parents. Policies should work to promote family preservation and national solutions, rather than to hinder intercountry adoption.

49. This Guide encourages incorporating intercountry adoption within a comprehensive child and family welfare policy. Important steps toward this goal include coherent legislation, complementary procedures and co-ordinated competences. Such a policy would ultimately incorporate support to families in difficult situations, prevention of separation of children from their family, reintegration of children in care into their family of origin, kinship care, national adoption and more temporary measures such as foster and residential care. Matching for both national and intercountry adoption should be a professional, multi-disciplinary and qualitative decision taken in the shortest possible time on a case-by-case basis, after careful study of the situation of the child and the potential families, and with care being taken that the procedure does not unnecessarily harm the child through its methods of implementation. Such decisions would include systematic implementation of the subsidiarity principle, as appropriate.

50. The Convention refers to “possibilities” for placement of a child in the State of origin. It does not require that all possibilities be exhausted. This would be unrealistic; it would place an unnecessary burden on authorities; and it may delay indefinitely the possibility of finding a permanent home abroad for a child.

51. The principle of subsidiarity should be interpreted in the light of the principle of the best interests of the child. For example:

²⁴ See, for example, the responses of Chile, Ecuador, Estonia, India, Latvia, Lithuania, Peru and South Africa to question No 4(b) of the 2005 Questionnaire on the Practical Operation of the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption*. The Questionnaire and the responses are available on the website of the Hague Conference at: < www.hcch.net > under “Intercountry Adoption Section” and “Special Commissions” (hereinafter “2005 Questionnaire”).

²⁵ Statement of Unicef’s position on intercountry adoption at Annex 10 of this Guide and at < www.hcch.net > under “Intercountry Adoption Section” and “Related documents and links”.

- It is true that maintaining a child in his or her family of origin is important, but it is not more important than protecting a child from harm or abuse.
- Permanent care by an extended family member may be preferable, but not if the carers are wrongly motivated, unsuitable, or unable to meet the needs (including the medical needs) of the particular child.
- National adoption or other permanent family care is generally preferable, but if there is a lack of suitable national adoptive families or carers, it is, as a general rule, not preferable to keep children waiting in institutions when the possibility exists of a suitable permanent family placement abroad.²⁶
- Finding a home for a child in the country of origin is a positive step, but a temporary home in the country of origin in most cases is not preferable to a permanent home elsewhere.
- Institutionalisation as an option for permanent care, while appropriate in special circumstances, is not as a general rule in the best interests of the child.

52. It is noted that in-family adoptions (adoptions by a relative) come within the scope of the Convention (see Chapter 8.6.4 of this Guide). The question may arise as to where the child's best interests lie when the choice is between a permanent home in the State of origin and a permanent home abroad with a family member. Assuming that the two families in question are equally suitable to adopt the child, in most cases the child's interests may be best served by growing up with the biologically-related family abroad. This example illustrates that it is not subsidiarity itself which is the overriding principle of this Convention, but the child's best interests.

53. It is sometimes said that the correct interpretation of .subsidiarity. is that intercountry adoption should be seen as "a last resort". This is not the aim of the Convention. National solutions for children such as remaining permanently in an institution, or having many temporary foster homes, cannot, in the majority of cases, be considered as preferred solutions ahead of intercountry adoption. In this context, institutionalisation is considered as "a last resort".²⁷

²⁶ One State of origin indicated at the 2005 Special Commission that due to a lack of national solutions for its large number of abandoned and orphaned children, and children of destitute parents, intercountry adoption was the best solution for such children at that time.

²⁷ See Unicef statement, *supra*, note 25.