PART III

Human rights platform and ways of belonging
Introduction

Although adoption is primarily regulated at the level of national law, it has become the subject of an increasing volume of international law and practice with which national laws are required to comply. Articles 20 and 21 of the 1989 Convention on the Rights of the Child (CRC) set general standards that must be adhered to in national and international adoptions, and these general standards are developed in more detail in a number of other international treaties, policy and supervisory instruments. Of these, Article 8 of the European Convention of Human Rights (ECHR) has generated a substantial body of adoption-related case law, while dedicated provision for adoption is made in the 1968 European Convention on the Adoption of Children (ECAC) and the 2008 European Convention on the Adoption of Children (Revised) (ECAC (Rev)). In addition, specific provision for inter-country adoptions is made by the 1965 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention).

The purpose of this chapter is to examine the international law standards governing adoption that the countries examined in this book have committed to, and to extract the key principles and themes from those standards. In line with the theme of the book, the analysis will focus on the issue of adoptions from care. The international standards governing this specific issue have received limited attention in the literature to date. International, inter-country or transnational adoptions have received some attention (for example, Covell and Snow, 2006; Chou and Browne, 2008; Vité and Boéchat, 2008; Lowe, 2009; O’Halloran, 2015a, 2018), with some of the discussion focusing on the position of the child and their rights in this process (Barrozo,
The adoption requirements of Article 8 of the ECHR and its connection to the ECAC (Rev) have also been discussed (albeit often in passing) in the general international scholarship dealing with the right to respect for family life (Kilkelly, 2015, 2017; Pascual and Pérez, 2016) or the child’s right to family life, as protected by the European Court of Human Rights (ECtHR) (O’Halloran, 2015b; Skivenes and Søvig, 2016; Breen et al, 2020).

However, to date, a comprehensive analysis of the combined effect of the various international provisions in the specific context of adoptions from care has not been provided. This chapter will fill that gap by asking: what are the international law standards that bind the countries featuring in this book (see Table 11.1) when making decisions to place children for adoption without parental consent? To answer this question, the various international instruments of relevance to adoption will first be introduced. This will be followed by a thematic analysis of key issues that feature in the international law provisions.

The analysis utilises the doctrinal legal method (for example, Kilcommins, 2016) to international human rights law, where the focus is on systematisation and legal interpretation of existing legal norms, with the aim of finding out the precise obligations deriving from these norms. Thus, the research focuses on the primary norms of the relevant treaties, as well as the interpretive practice of the treaties’ supervisory bodies (the CRC Committee and ECtHR). Such an approach is in its nature conservative and backward-looking, and the norms defined should be seen as minimum core obligations (Young, 2008) that limit the legislative discretion of the state, as well as guide the implementation of national legislation. The discussion encompasses both the substantive

Table 11.1: Entry into force year of the conventions for the different states

<table>
<thead>
<tr>
<th>Country</th>
<th>CRC</th>
<th>Hague Convention</th>
<th>ECHR</th>
<th>ECAC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany</td>
<td>1992</td>
<td>2002</td>
<td>1953</td>
<td>ECAC (Rev), 2015</td>
</tr>
<tr>
<td>Ireland</td>
<td>1992</td>
<td>2010</td>
<td>1953</td>
<td>1968</td>
</tr>
<tr>
<td>Spain</td>
<td>1990</td>
<td>1995</td>
<td>1979</td>
<td>ECAC (Rev), 2011</td>
</tr>
<tr>
<td>US</td>
<td>1995a</td>
<td>2008</td>
<td>–</td>
<td>–</td>
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Note: a Signature only
and procedural requirements of adoptions. Exhaustive treatment of all international human rights norms related to adoption is beyond the scope of this chapter, and other themes that have featured in the source material, such as the issue of parental eligibility to adopt, have been omitted due to space constraints.

Two key themes emerge: the manner in which the law has treated the best interests principle; and the right of the child to express their views during the decision-making process. Other issues to be considered include the requirements relating to the institutional system for adoption, adoption procedure and protection for the child’s right to identity.

**Key international law provisions**

At the outset, it should be clarified that the international law provisions discussed in this chapter are binding on the countries that subscribe to them as a matter of international law (Rehman, 2003). The position on whether those standards have been incorporated into national law and can be directly enforced in a national court varies from one jurisdiction to another, and, indeed, different international law conventions may have a different status even within a single jurisdiction. However, regardless of the level of domestic incorporation of the international law standards in a given state, it remains the case that states are legally committed to comply with international law conventions that they have signed and ratified, and to make any necessary changes to domestic law, policy and practice (for example, Article 4 CRC; Article 1 ECHR).

Non-compliance with a state’s international law obligations may result in various consequences, such as a judgment of the ECtHR (for example, Strand Lobben v Norway [2019]) or critical concluding observations by the CRC Committee (for example, CRC Committee, 2010: para 29; 2017: para 51). It should be noted that the international monitoring bodies afford significant discretion to national authorities as to how the rights set down in international instruments are to be protected in national law and practice; however, nonetheless, judgments of the ECtHR are binding on the state party to which they are addressed, and execution of the judgment is monitored by the Committee of Ministers of the Council of Europe. Similarly, the CRC Committee expects that its recommendations will be complied with in substance, even if there is a degree of flexibility regarding the means by which this is to be achieved.

In the context of the current book, all of the countries considered have signed and ratified the CRC (apart from the US, which has signed
but not ratified it). The eight European countries are parties to the ECHR, while seven of the countries are parties to either the ECAC or the ECAC (Rev). The ECtHR has held that state obligations under Article 8 of the ECHR relating to adoption must be interpreted in the light of these conventions (Pini et al v Romania [2004]). This holds even for those European countries that are not parties to the ECAC (Rev) (AK and L v Croatia [2013]). Thus, with the sole exception of the US, the standards outlined in this chapter are legally binding on the countries under consideration and domestic law and practice is required to comply with them.

The Hague Convention is an inter-country adoption standard for all its states parties. The ECtHR uses the Hague Convention as an interpretive aid in inter-country adoption cases (for example, Paradiso and Campanelli v Italy [GC] [2017]; Pini et al v Romania [2004]). Similarly, the CRC Committee has pointed out the importance of ratifying the Hague Convention in relation to all of the eight states, and has stressed that states should refrain from adopting children to or from countries that have not ratified the Hague Convention (for example, CRC Committee, 2010: para 45).

**Convention on the Rights of the Child**

The CRC, together with the supervisory practice and general interpretations of the CRC Committee (Oette, 2018), is a general frame of reference for children’s rights both for states parties and for other international human rights instruments, including the interpretation of the ECHR (Kilkelly, 2015). The CRC Committee has identified the following provisions as encapsulating the ‘general principles’ of the CRC: non-discrimination (Article 2); the best interests of the child (Article 3(1)); the child’s right to life, survival and development (Article 6); and the child’s right to express the views in matters that affect the child (Article 12) (CRC Committee, 2003a).

In addition to these general principles, the CRC has two provisions that include specific individuals’ rights or state obligations in the area of adoption. Article 20 provides that the state has an obligation to provide special protection and assistance for children temporarily or permanently deprived of their family environment. Article 20(3) provides:

> 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.

The list of possible alternatives in this provision is not exhaustive, and it should be seen as at least partially hierarchical, giving preference to the kinship placement and other types of family-based care before any placement in an institution (UN General Assembly, 2019; Cantwell and Holzscheiter, 2007; Hodgkin and Newell, 2007). This view has also been stressed by the CRC Committee, which has discouraged the placement of children in institutional care and prefers family-based care settings (CRC Committee, 2017: para 37).

Article 21 provides both a general standard for all adoptions (para a) and specific requirements for inter-country adoptions (paras b–e):¹

States Parties that recognise 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.

Thus, Article 21(a) emphasises the centrality of the best interests principle in adoption cases – describing it as ‘the paramount consideration’, in contrast with Article 3, which states that the best interests principle is ‘a primary consideration’ – and further stipulates both institutional and procedural requirements. These issues will be examined further in the following.

Hague Convention

The Hague Convention aims ‘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’ (Article 1(a)). From the countries included in the current book, eight receive children adopted from third countries and Estonia is the only country that allows inter-country adoption of
children in care from Estonia to a limited number of other countries. The regulation of inter-country adoptions is not the focus of the current chapter, but it is shown elsewhere in the book (for example, in the chapter on Estonia) that international adoptions from care can give rise to important dilemmas in some countries. The standard used in the Hague Convention follows the requirements of the CRC, in particular, the Hague Convention stresses that the best interests principle is the main guiding principle for inter-country adoptions, together with the protection of the fundamental rights of the child (presumably including those protected by the CRC).

**European Convention on the Adoption of Children**

The 1968 ECAC and the 2008 ECAC (Rev) aim to unify some common principles and standards as international benchmarks for all states and state institutions included in the process. The principles underpinning both conventions are broadly similar to those espoused in the CRC (Shannon et al, 2013); for example, the ECAC (Rev) states in Article 4 that ‘[t]he competent authority shall not grant an adoption unless it is satisfied that the adoption will be in the best interests of the child’. However, the ECAC (Rev) goes somewhat further than other instruments on the question of child participation (Burns et al, 2019), providing that adoption should not be granted by the competent authority without ‘the consent of the child considered by law as having sufficient understanding’, and that a child is considered as having sufficient understanding on attaining an age that is prescribed by law and should not be more than 14 years (Article 5). Children not deemed to have sufficient understanding should, ‘as far as possible, be consulted’ and their ‘views and wishes’ taken into account having regard to their degree of maturity (Article 6).

**European Convention on Human Rights**

Although the ECHR does not contain dedicated provisions on the issue of adoption, a substantial body of case law on adoption, and especially adoptions from care, has developed in relation to the right to respect for family life under Article 8:

1. Everyone has the right to respect for his private and family life …
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance
with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Analysis of Article 8 practice shows that the focus of the ECtHR to date has been not on the rights of the child, but on the rights of the biological parents (Breen et al, 2020; Kilkelly, 2017), and where the right to respect for family life has been established, the state has an obligation to protect it, including through positive measures (see, for example, Kilkelly, 2010). Nevertheless, the parents’ (or other adults’) right to respect for family life may be overridden by the child’s best interests, which might require prioritising the child’s existing or emerging bonds with their non-biological family (see, for example, Kilkelly, 2017: 159–163; see also ECtHR, 2019: paras 299–308).

The ECtHR has established that the relations between an adoptive parent and an adopted child are, as a rule, protected by Article 8 (Kurochkin v Ukraine [2010]; Ageyev v Russia [2013]). Thus, a lawful and genuine adoption may constitute family life, even in the absence of cohabitation or any real ties between an adopted child and the adoptive parents (for example, Topčić–Rosenberg v Croatia [2013], para 38).

Key themes and principles

Systematic analysis of the key human rights norms cited earlier reveals two central themes: the manner in which the law treats the best interests principle; and the right of the child to express their views during the adoption decision-making process. International human rights law also guides the organisation and procedure of adoption, as well as protection for the child’s right to identity.

Best interests of the child

All the instruments stress the importance of the best interests principle in adoption decisions. Under Article 21 of the CRC (cf Article 4(1) ECAC (Rev)), the best interests of the child must be the ‘paramount consideration’ in adoption cases. The legal requirements deriving from this provision 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 [2019], para 204).

Article 21 of the CRC goes further than Article 3(1), and strengthens the implementation of the best interests principle in adoption as it is not simply to be ‘a primary consideration’ (as in Article 3(1)), but ‘the paramount consideration’. The CRC Committee (2013: para 38) has gone even further and required that the best interest of the child is the determining factor when making decisions on adoption (see also Vité and Boéchat, 2008: paras 42–58). A uniform process is necessary to determine what is the best interest of the child (CRC Committee, 2010: paras 27–8). This principle is relevant for both national and inter-country adoptions, though ensuring it in relation to states that have not ratified the Hague Convention might prove problematic (CRC Committee, 2012: paras 42–3).

Likewise, the ECtHR has emphasised that the best interests of the child may override the rights of the parent in the cases of adoption (for example, Pini et al v Romania [2004]). However, the Grand Chamber of the ECtHR recently emphasised in Strand Lobben v Norway ([2019], paras 220, 225) that adoption decisions cannot solely focus on the best interests of the child; rather, adoption from care should be a ‘last resort’ measure and the child’s interests must be combined with those of the parent(s), with a genuine balancing exercise being conducted between the two. Thus, adoption against the wishes of the biological parents should only occur in exceptional circumstances and should be justified by an overriding requirement pertaining to the child’s best interests (see, for example, Ageyev v Russia [2013], para 144; see also Kilkelly, 2017). Since adoption orders are irreversible, ‘there is an even greater call than usual for protection against arbitrary interferences’ and they ‘must be subject to the closest scrutiny’ (YC v the United Kingdom [2012], paras 136–7; see also Burns et al, 2019). The best interests of the child cannot be the only or central consideration for an adoption judgment; it is of most use when balancing different rights and interests.

The underlying presumption of the CRC is that children’s best interests are served by being with their parents wherever possible (Articles 7 and 9) and that their parents have ‘primary responsibility’ for their upbringing. Adoptions from care are permissible only if parents are unwilling or are deemed by judicial process to be unable to discharge this responsibility; any legislation that permits adoptions under less stringent conditions would probably amount to a breach of both children’s and parents’ rights under the CRC (cf Council of Europe and PACE, 2018).
The best interests of the child principle includes a number of practical considerations. It requires that the decision-maker takes into account the child’s relations and attachment, and the lack of relation or attachment to birth parents can support an adoption order (Breen et al, 2020). States would violate their obligations in cases where their conduct is responsible for the breakdown of the relationship between the child and the parent (for example, EP v Italy [1999]; Pedersen v Norway [2020]). However, when a considerable amount of time has passed since the child was taken into care, the interests of the child not to have their de facto family changed again may override the interests of the parents to have the family reunified (for example, K and T v Finland [2001], para 155; R and H v United Kingdom [2011], paras 82–9).

Several judgments have found adoption orders to be justified, including: where there was a loss of attachment with parents, when the child was particularly vulnerable, and the parents were unable to care for the child (for example, Aune v Norway [2010]; Mohamed Hasan v Norway [2018]); and where the parents were unable to care for children even after appropriate efforts were made by the authorities to provide support (for example, SS v Slovenia [2018]). While adoption terminates all de jure parental ties between the child and the biological parents, the ECtHR has commented positively on cases where the contact was retained after adoption (Aune v Norway [2010]; SS v Slovenia [2018]). In Pedersen v Norway ([2020], para 70), the ECtHR went further and noted that such contact should create a meaningful relationship. The ECtHR was unclear whether post-adoption contact should become a mainstream (cf Burns et al, 2019).

The ECtHR has found violations of Article 8 due to, for example: the initial care order being found unjustified (RMS v Spain [2013]); a failure to take account of changes in circumstances (Strand Lobben v Norway [GC] [2019]); and a failure to commission expert reports or to take adequate account of reports that were commissioned (SH v Italy, [2015]; Strand Lobben v Norway [GC] [2019]). However, when the ECtHR establishes a violation, this does not mean that the biological relationship has to be re-established as the child’s bests interests also require stability and attention to the attachment of the child (Johansen v Norway [II] [2002]).

**Child’s views and consent for adoption**

According to Article 12 of the CRC, the child’s views, together with the best interests of the child, should be at the centre of the adoption proceedings. It is both a procedural obligation of the states and a
substantive requirement – the child must be heard and must have their opinions taken into account having due regard to their degree of maturity as far as possible. The CRC Committee has linked these two concepts and stressed, for example, in General Comment no 12, that ‘[i]n decisions on adoption, kafalah or other placement, the “best interests” of the child cannot be defined without consideration of the child’s views’ (CRC Committee, 2009: para 56).

The same emphasis on child participation in involuntary adoption cases is not evident in ECHR case law. Breen et al (2020) noted that the incorporation of the child’s views of what is in their best interests is lacking in much of the ECtHR adoption-related jurisprudence, as is any independent representation for the child in such ECtHR proceedings. This potential oversight reflects broader questions about the application of children’s rights and their exercise by children themselves. These questions are important because in many national child protection laws, the opinion of the child is an essential component for defining the child’s best interests (Skivenes and Sørsdal, 2018), a point that underpins the views of the CRC Committee (2013) as developed in its General Comment no 14 on the interpretation of the child’s best interests principle.

The approach seen in the majority of the adoption cases can be contrasted with that taken in Pini et al v Romania (2004), where the ECtHR considered that the interests of two girls, who had consistently objected to their adoption by an Italian couple, should prevail over the interests of the prospective adoptive parents to create a new family with the children. The ECtHR stated that placement decisions should take into account the child’s views as emotional ties cannot be created against the will of the child (para 153 et seq). This approach to incorporating the views of the child into the decision-making process is in line with the emerging approach in ECtHR judgments in other areas of child and family law (see, for example, M and M v Croatia [2015]).

**Institutional and procedural requirements**

Implementing the CRC requires both institutional and legal measures as Article 21 of the CRC requires that the adoption of a child is permissible only when authorised by ‘competent authorities’. Neither the CRC nor the ECHR requires a specific type of institutional system, but they do stress that adoptions require inclusion of multidisciplinary services competent in child protection, which are subject to accreditation and periodic inspection by competent national authorities (Vité and Boéchat, 2008: paras 63, 110). Decisions related to adoptions must be made by bodies that have diverse and complementary professions and
experiences at their disposal (Vité and Boéchat, 2008: paras 63–4). At the same time, such an institutional system should guarantee a uniform interpretation and implementation of the rights of the child in the adoption proceedings; the CRC Committee has been concerned when there have been persisting local differences and a lack of a uniform process to determine what constitutes the best interests of the child in adoption proceedings (CRC Committee, 2010: para 27).

States are free to set out their own adoption procedure, provided that it includes a formal institutional framework and guarantees the rights of all the parties (including the child, the biological parents and the adoptive parents). Thus, adoptions can only be decided by the appropriate institutions following applicable law and procedure. Failure to follow such a procedure can result in unlawfulness of the adoption for the purposes of the ECHR (Paradiso and Campanelli v Italy [GC] [2017], paras 165, 215). Where there is insufficient legislation to protect parental rights, then an adoption decision violates the parent’s right to family life (Zhou v Italy [2014]).

Article 10 of the ECAC (Rev) sets forth a list of preliminary inquiries that need to be completed prior to adoption (similarly in the CRC context, see Vité and Boéchat, 2008: para 75). These procedural requirements are aimed at ensuring the suitability of the adoptive parents. A similar point has been made by the CRC Committee, which has stressed the need to: have an effective system for the screening of adoptive parents, including national standards and efficient mechanism to prevent the sale and trafficking of children; review, monitor and follow up the placement of children; and collect statistics on adoptions, including inter-country adoptions (CRC Committee, 2003b: paras 36–7).

Vité and Boéchat (2008: paras 73–4), when summarising the practice of the CRC Committee, point out that state authorities also have to gather sufficient information about the child to be adopted, including their past, present and future. Such information should be detailed and must determine, among other things, ‘the child’s status concerning parents, relatives and legal guardians’ (Vité and Boéchat, 2008: paras 80–4). The ECtHR has similarly held that adoption decisions should be based on updated technical reports prepared by appropriate specialists, detailing the circumstances and needs of the individual child (see, most recently, Strand Lobben v Norway [GC] [2019], para 222 ff).

Involvement of the biological parents within the adoption procedures has been stressed by the ECtHR, focusing on their right to be substantively protected by informing and involving them adequately during the adoption process (see, for example, SS v Slovenia [2018]). In W v United Kingdom ([1987], paras 63–4), the ECtHR stated that:
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The relevant considerations to be weighed by a local authority in reaching decisions on children in its care must perforce include the views and interests of the natural parents. The decision-making process must therefore, in the Court’s view, be such as to secure that their views and interests are made known to and duly taken into account … what therefore has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as ‘necessary’ within the meaning of Article 8.

Inclusion of biological parents in the adoption process in cases where their rights have been limited or removed is another issue that has been discussed by both the CRC Committee and the ECtHR. The CRC Committee has pointed out when national legislation has disadvantaged the situation of children born of unmarried parents, and where there was a lack of an appropriate procedure to name the father in the birth registration of the child. This had adverse impact on the implementation of other rights in relation to adoption, which could take place without the consent of the father (CRC Committee, 1998: para 17). This issue has also generated case law in the ECtHR, which found that permitting adoption of the child without the father’s knowledge or consent can constitute an Article 8 violation (Keegan v Ireland [1994]). Finally, the ECtHR has stressed that child protection decision-making must not involve unnecessary delays that make family reunification more unlikely, or amount to a de facto determination of the issue; future relations between parent and child should be determined solely in the light of all relevant considerations and not by the mere passage of time (Strand Lobben v Norway [GC] [2019], para 212).

The child’s right to identity

A child’s right to know their origins has gained particular importance in the context of adoption. Article 8 of the CRC obliges states to respect the right of the child to preserve their identity, including
nationality, name and family relations as recognised by law, without unlawful interference. The CRC Committee has made it clear that adopted children have the right to be told they are adopted and, if they so wish, to know the identity of their biological parents, which implies keeping accurate and accessible records of the adoption (Hodgkin and Newell, 2007: 115, 296).

Similarly, Article 22(3) of the ECAC (Rev) gives the adopted child the right to access information held by the authorities concerning their origins. However, the level of protection seen here is somewhat weaker than in the CRC context; Article 22 also allows states to protect the privacy of parents and give them the right not to disclose their identity as long as the child can receive some information about their origins.

The position under the ECHR follows the ECAC (Rev) and the ECtHR has recognised that ‘respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual’s entitlement to such information is of importance because of its formative implications for his or her personality’ (Mikulić v Croatia [2002]). In the context of adoption, ‘[b]irth, and in particular the circumstances in which a child is born, forms part of a child’s, and subsequently the adult’s, private life guaranteed by Article 8’ (Odièvre v France [GC] [2003]).

At the same time, the ECtHR accepted in the Odièvre case that the right to identity can be balanced against the right to privacy of the parent in certain circumstances, and that laws that protect the privacy of a natural mother who expressly requests that information about the birth remains confidential may fall within a state’s margin of appreciation, provided that they seek to strike a balance between the competing interests. In contrast, a violation of Article 8 was found in Godelli v Italy (2012) on the basis that Italian law resulted in the applicant’s request for both identifying and non-identifying information being totally and definitively refused, without any balancing of the competing interests.

In cases where a child in care is placed for adoption without the consent of their parents, the issue of identity tracing is less likely to be an issue than in other adoption cases since it is unlikely that the parent would have been afforded a legal guarantee of privacy of the sort seen in the Odièvre case. The process leading up to the placement for adoption would have been documented in the child’s social work records, and in Gaskin v United Kingdom (1989), the ECtHR held that a refusal by the authorities to provide the applicant with access to his social work records violated Article 8 as ‘persons in the situation of the applicant have a vital interest, protected by the Convention, in
receiving the information necessary to know and to understand their childhood and early development’.

**Conclusion**

As shown earlier, international human rights law establishes a number of important rights and sets down minimum standards to be met by national legal systems. These standards are binding on states that commit to them, and require compliance and implementation in national laws, policies and practices. The requirements of international human rights law cover a range of institutional and procedural issues, as well as substantive rights. In the context of adoptions from care, two themes stand out, namely, the best interests principle and the obligation to allow children the opportunity to express their views. It was noted that the best interests principle could potentially be invoked on either side of these disputes: parents might argue that family reunification is in the best interests of the child (citing Articles 7 and 9 of the CRC in support); while state authorities might argue that adoption by a foster family where the child is settled is in the child’s best interests (citing Articles 3 and 21 of the CRC in support).

On the obligation to ascertain the views of the child, it was seen that this is strongly protected in the CRC, and even more so in the ECAC (Rev), which goes so far as to require the consent of older children to adoption. In contrast, the ECHR case law places less emphasis on child participation in adoption decisions. This is most likely a by-product of the fact that applications challenging such decisions are invariably brought by the parents; indeed, it is notable that the ECtHR has stressed the importance of the participation of the parents in the adoption process. The case law here could become more CRC-compliant by placing a greater emphasis on the child’s views and independent interests (cf Breen et al, 2020).

To date, little research has been done on the effect of the international human rights legislation in the area of adoption on national legal systems. An interesting topic for future research would be to explore the extent to which these international requirements are considered and included in national legal systems.

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Note

1 Discussions during the preparation of this provision, as well as reasons for selecting the wording that has been included in Article 21, are discussed in Vite and Boéchat (2008).

References

CRC Committee (2009) ‘General comment no. 12. The right of the child to be heard (Art. 21, para 56)’, CRC/C/GC/12.
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CRC Committee (2013) ‘General comment no 14 on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para 1)’, CRC/C/GC/14.