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THE CASE FOR MORATORIA ON INTERCOUNTRY ADOPTION

David M. Smolin*

Now is the time for moratoria on intercountry adoption.

Further, resuming intercountry adoption should depend on certain conditions.

Such a call is neither radical nor unattainable, but would be entirely consistent with international law and the historical development of intercountry adoption.

In summary, the message is simple: intercountry adoption should not be done until and unless it can be done right. Doing intercountry adoption correctly means meeting international standards and providing remedies for past adoptions which violated those standards. The majority of intercountry adoptions over the last seventy years have occurred in contexts of chronic violations of current international standards, in the core sense that the separation of children from their original families frequently was unnecessary and hence adoptions induced and/or exacerbated unnecessary separations of family members.¹ Remedies for such past practices have only rarely been provided.² In practice, preventing future illicit practices without addressing past illicit practices has not worked, because it creates cycles of abuse amidst never-ending impunity.³ Hence, doing intercountry adoption correctly means not only preventing future illicit practices, but also providing remedies for past illicit practices.⁴

Under these circumstances, it would be appropriate to impose moratoria on intercountry adoptions until and unless the issue of remedies for past wrongs is properly addressed. Now

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¹ See *infra* notes and accompanying text. Beyond the sources cited in this essay, I plan to provide country by country reports to document further this claim.

² UN General Assembly, Report of the Special Rapporteur on the Sale of Children, Child Prostitution, and Child Pornography, para. 80-81, 83 (Dec. 22, 2016), A/HRC/34/55 (last visited Aug. 4, 2020) [hereinafter *UN Special Rapporteur Report*], available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/440/24/PDF/G1644024.pdf?OpenElement>.

³ See *id.*; see also David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping, and Stealing Children*, 52 WAYNE L. REV. 113, 132-35 (2006) [hereinafter Smolin, *Child Laundering*], available at https://works.bepress.com/david_smolin/.

⁴ See *UN Special Rapporteur Report*, *supra* note 2.

would be a particularly propitious time for such moratoria. Prior to the COVID-19 pandemic global intercountry adoptions were already down more than 80% from the peak around 2004⁵. COVID-19 is producing a further reduction in intercountry adoption, approaching at times de facto moratoria as nations shut their borders to international travel.⁶ Rather than reactively freezing the intercountry adoption system due to the pandemic, it would be better for states to implement intentional moratoria directed at specific goals: a time of accountability and remedies for past practices contrary to international standards. Out of that process can emerge intentional state decisions about whether, and to what degree, to re-open intercountry adoption.

WHY MORATORIA (PLURAL) RATHER THAN A SINGLE GLOBAL MORATORIUM

A global moratorium on intercountry adoption is not a legal possibility, because there is no international actor with the authority to put such in place. Indeed, even in individual cases, possibilities for remedies under international or regional instruments or organizations have thus far been quite limited.⁷ The international actors who address intercountry adoption globally, such as the Hague Conference on Private International Law (HCCH),⁸ the Committee on the Rights of the Child,⁹ UNICEF,¹⁰ and International Social Service (ISS),¹¹ could make such a recommendation, but lack the authority to force states to act in accordance. Thus, in practice the only actors who can actually create moratoria are nations (States) or sometimes subdivisions of

⁵ See PETER SELMAN, *Global Statistics for Intercountry Adoption: Receiving States and States of origin 2005-2018* (Dec. 20, 2019) (last visited July 30, 2020) [hereinafter GLOBAL STATISTICS FOR INTERCOUNTRY ADOPTION], available at <https://assets.hcch.net/docs/a8fe9f19-23e6-40c2-855e-388e112bf1f5.pdf>; Peter Selman, *The Rise and Fall of Intercountry Adoption in the 21st Century*, 52 *International Social Work* 575 (2009).

⁶ See, e.g., Patricia Fronek & Karen S. Rotabi, *The Impact of the COVID-19 Pandemic on Intercountry Adoption and International Commercial Surrogacy*, *International Social Work* (July 14, 2020) [hereinafter Rotabi, *COVID Impact on Intercountry Adoption*], available at <https://doi.org/10.1177/0020872820940008>.

⁷ See, e.g., Baglietto C, Cantwell N., Dambach M. (Eds.) (2016). *Responding to Illegal Adoptions: A Professional Handbook*. Geneva, Switzerland: International Social Service (ISS), Chapter 2, [hereinafter ISS Handbook], available at https://www.iss-ssi.org/images/advocacy/Illegal_Adoption_ISS_Professional_Handbook.pdf; Nigel Cantwell, *The Sale of Children and Illegal Adoption* 32 - 41 (2017) [hereinafter Cantwell, *The Sale of Children*], available at <https://defenceforchildren.org/new-report-sale-children-illegal-adoption-nigel-cantwell/>; Nigel Cantwell, *The Best Interests of the Child in Intercountry Adoption*, 35 – 48 (UNICEF 2014) [hereinafter Cantwell, *Best Interests*], available at <https://www.unicef-irc.org/publications/712-the-best-interests-of-the-child-in-intercountry-adoption.html>; Jordan Bunn, *Regulating Corruption in Intercountry Adoption*, 52 *VAND. J. TRANSNAT'L L.* 685 (2019) [hereinafter Bunn, *Regulating Corruption*], available at <https://cdn.vanderbilt.edu/vu-wp0/wp-content/uploads/sites/78/2019/07/12054153/Jordan-Bunn.pdf>.

⁸ Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134 [hereinafter Hague Convention], available at <https://www.hcch.net/en/instruments/conventions/specialised-sections/intercountry-adoption> (stating “that the Permanent Bureau of the Hague Conference has no mandate to assist in individual adoption cases.”).

⁹ Convention on the Rights of the Child, Nov. 20, 1989 1577 U.N.T.S. 3 [hereinafter CRC], available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.

¹⁰ United Nations Children Fund [hereinafter UNICEF], available at <https://www.unicef.org/what-we-do>.

¹¹ International Social Service [hereinafter ISS], available at <https://www.iss-ssi.org/index.php/en/>.

nations (such as provinces).¹² Hence, practically what is needed are many moratoria by individual governments.¹³

As will be seen below, this need for many moratoria is ultimately an advantage, as what is needed is a state by state evaluation of present and past practices and the creation and implementation of remedies for past and present wrongs.¹⁴ Individual moratoria set the stage for such evaluations and reforms.

WHY NOW?

Prior to COVID-19, global intercountry adoption was already down more than 80% from its peak around 2005.¹⁵ Intercountry adoptions have declined from an estimated 44,000 in 2005 to approximately 8300 in 2018.¹⁶

COVID-19 is producing something close to a global moratorium on intercountry adoption, given the severe limits on international travel and other impacts.¹⁷ Hence, intercountry adoptions in 2020 will likely decline to less than two thousand, even without formal moratoria.¹⁸

From that perspective, individual state moratoria would not be a radical departure from current realities. Implementing intentional moratoria would better use the opportunity created by the de facto global moratorium to accomplish an evaluation and reform of intercountry adoption.¹⁹

This proposal, however, is not dependent on the continuity of the COVID-19 pandemic. While the pandemic is an ideal time to implement intentional moratoria, the case for moratoria is based on the fundamental legal and ethical necessity of moratoria in the context of the modern history of intercountry adoption.²⁰

¹² See Hague Convention, *supra* note 8, art. 8 (“Central Authorities shall take, directly or through public authorities, all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention.”).

¹³ See *supra* sources at notes 8 – 11.

¹⁴ UN Special Rapporteur Report, *supra* note 2, at para. 91-100; David M. Smolin, *Child Laundering and the Hague Convention on Intercountry Adoption: The Future and Past of Intercountry Adoption*, 48 U. LOUISVILLE L. REV. 441, 497 [hereinafter Smolin, *Hague Convention*] (“Hopefully, important stakeholders in intercountry adoption will realize that the only way to develop an ethical, orderly, and sustainable intercountry adoption system is to directly meet the challenges posed by abusive adoption practices, rather than avoiding the problem by minimizing the prevalence and significance of these abusive practices.”).

¹⁵ See GLOBAL STATISTICS FOR INTERCOUNTRY ADOPTION, *supra* note 5.

¹⁶ *Id.*

¹⁷ See, e.g., Emma Reynolds, *Some families have been kept apart by coronavirus* (June 14, 2020) (last visited Aug. 1, 2020), London (CNN), available at <https://www.cnn.com/2020/06/14/world/adopted-children-families-coronavirus-intl-gbr/index.html>.

¹⁸ See Rotabi, *COVID Impact on Intercountry Adoption*, *supra* note 6.

¹⁹ *Id.*; see also Cantwell, *The Sale of Children*, *supra* note 7; Cantwell, *Best Interests*, *supra* note 7.

²⁰ See, e.g., Dr. Benyam D. Mezmur, INTERCOUNTRY ADOPTION AS A MEASURE OF LAST RESORT IN AFRICA, SUR 10 (2009) (last visited Aug. 1, 2020), available at <https://sur.conectas.org/en/intercountry-adoption-measure-last-resort-africa/> (“[the] possibility [of moratoria] (and sometimes necessity) should be explored only to promote and protect the best interests of children, and not to hamper them. In other words, the fact that there is no obligation to allow

WHY DOES INTERCOUNTRY ADOPTION REQUIRE FURTHER REFORM NOW?

A. Development of International Standards

Past global efforts to reform intercountry adoption are reflected in the creation of international instruments.²¹ The 1989 Convention on the Rights of the Child (CRC),²² 1993 Hague Convention on Intercountry Adoption (HCIA),²³ and 2010 UN Guidelines on the Alternative Care of Children²⁴ are all positive developments that have in combination defined standards, procedures, and safeguards for intercountry adoption and related areas like adoption and interventions for vulnerable children and families. These contributions are foundational in providing standards against which to evaluate past and contemporary practices.²⁵

Ultimately, however, these international standards require implementation by governments that actually oversee intercountry adoption.²⁶ None of the international actors who have defined standards have either the mandate or capacity to regulate intercountry adoptions, or to provide remedies for illicit practices.²⁷ Intercountry adoption, since it involves both immigration and state recognition of parent-child relationships is inherently a state function carried out at both national

intercountry adoption as a means of alternative care also implies, *albeit* remotely, the possibility of suspending the practice [of intercountry adoption] when the best interests of a child is compromised. Therefore, the need and possibility to impose a moratorium on intercountry adoption in instances where a country is affected by a catastrophe or where irregularities are compromising the best interests of the child, exists.”).

²¹ Marianne Blair, *Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers*, 34 CAP. U. L. REV. 349 (2005) [hereinafter Blair, *Assessing the Gatekeepers*], available at https://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=1103&context=fac_pub.

²² See CRC, *supra* note 9.

²³ See Hague Convention, *supra* note 8.

²⁴ UN General Assembly, *Guidelines for the Alternative Care of Children: resolution / adopted by the General Assembly* (Feb. 24, 2010), A/RES/64/142 (last visited Aug. 1, 2020) [hereinafter UN Alternative Care Guidelines], available at https://www.unicef.org/protection/alternative_care_Guidelines-English.pdf; see also UN General Assembly, ‘*Promotion and protection of the rights of children*’ (Nov. 19, 2019), A/74/395 (last visited Aug. 28, 2020), available at <https://digitallibrary.un.org/record/3837858?ln=en> (further restating and refining international standards).

²⁵ Department of Economic and Social Affairs (DESA)/Population Division, *Child Adoption: Trends and Policies*, ST/ESA/SER.A/292 (2009) (see generally, § IV. International, Regional and Bilateral Agreements on Intercountry Adoption), available at <https://www.un.org/en/development/desa/population/publications/pdf/policy/child-adoption.pdf>.

²⁶ See HCCH, Guide to Good Practice No. 1, available at <https://www.hcch.net/en/publications-and-studies/details4/?pid=4388>; HCCH Guide to Good Practice No. 2, available at <https://www.hcch.net/en/publications-and-studies/details4/?pid=5504>; Hague Convention, *supra* note 8, pmbl., art. 1(b), art. 4; Blair, *Assessing the Gatekeepers*, *supra* note 21.

²⁷ *Id.*; Relatively untested in the context of illicit adoption practices are several international or regional procedures which most likely could only provide some measure of remedy in occasional cases and where the state involved cooperated, see, e.g., UN, Optional Protocol to the Convention on the Rights of the Child on a communications procedure (2011), available at <https://www.ohchr.org/en/professionalinterest/pages/opicrcr.asp>; see also ISS Handbook, *supra* note 7, at Chapters 2.1.1 & 2.1.2.

and local governmental levels.²⁸ No international instrument or international organization may reduce or substitute for state responsibility for intercountry adoption.²⁹

International standards for intercountry adoption reflect the most basic ethical norms.³⁰ Children should not be separated from their families, especially on a permanent basis, unless such is truly necessary and less drastic interventions would not be sufficient.³¹ Hence, there should be a priority on family preservation, creating duties to act affirmatively to avoid unnecessary temporary separations and to re-unite children with their families when separations occur.³² Children should not be obtained for intercountry adoption by fraudulently tricking parents and families, by purchasing children, or by stealing or kidnapping children.³³ Children should not be obtained for intercountry adoption---an inherently expensive practice---merely due to poverty.³⁴ Children should not be taken from a parent or parents merely because the parents are not married.³⁵ Where children cannot be maintained in their own families, alternative care and adoption options should generally favor those within the child's nation and closer to the child's origins.³⁶ Adopted persons have a right to accurate information regarding their identity and origins.³⁷

These standards acknowledge that sometimes children must, for their own protection and safety, be separated from their families due to severe abuse or neglect.³⁸ These standards also acknowledge that sometimes separations occur despite the best efforts of all involved.³⁹ However, intercountry adoption itself---the demand for children by those wishing to adopt, the possibility of monetary remuneration for intermediaries or governmental actors, the very existence of intercountry adoption systems---should not create separations.⁴⁰ To the contrary, governments

²⁸ See generally, Elvira C. Loibl, *The Transnational Illegal Adoption Market: A Criminological Study of the German and Dutch Intercountry Adoption Systems*, Eleven International Publishing (2019) [hereinafter Loibl, *Transnational Illegal Adoption Market*], available at <https://doi.org/10.26481/dis.20190515el>.

²⁹ ISS Handbook, *supra* note 7; see also sources cited *supra* notes 26 - 27.

³⁰ See HCCH, Guide to Good Practice No. 1, *supra* note 26 at Chapter 7.1.2(a) (summary of international standards).

³¹ See CRC, *supra* note 9, at art. 7-11, 20; UN Alternative Care Guidelines, *supra* note 24, at art. 2a, 3, 5, 9, 10, 14, 15, 32-52; Blair, *Assessing the Gatekeepers*, *supra* note 21, at 355; HCCH, Guide to Good Practice No. 1, *supra* note 26, at Chapter 6.2.

³² See sources cited *supra* note 31.

³³ See Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, 2171 U.N.T.S. 227 (note specifically art. 1, 2, 3) [hereinafter Optional Protocol], available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx>; see also UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, Nov. 15, 2000, available at <https://www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx>; Hague Convention, *supra* note 8, pmbl. and art. 1(b); Smolin, *Child Laundering*, *supra* note 3.

³⁴ See UN Alternative Care Guidelines, *supra* note 24, at art. 10, 15, 32; David M. Smolin, *Intercountry Adoption and Poverty: A Human Rights Analysis*, 36 CAP. U. L. REV. 413 (2007) [hereinafter Smolin, *Poverty*], available at https://works.bepress.com/david_smolin/.

³⁵ See UN Alternative Care Guidelines, *supra* note 24.

³⁶ *Id.*; see also CRC, *supra* note 9, art. 7, 8, 9, 18.

³⁷ Hague Convention, *supra* note 8, art. 30.

³⁸ CRC, *supra* note 9, at art. 9, 19, 20, 34, 36.

³⁹ *Id.* at art. 7, 9.

⁴⁰ See, e.g., UN Special Rapporteur Report, *supra* note 2, at para. 59-60; Blair, *Assessing the Gatekeepers*, *supra* note 21, at 355 ("a common premise ... supported by most advocates of intercountry adoption ... that the children placed

and NGOs should prioritize family preservation, and any intercountry adoption systems should reinforce, rather than weaken, this priority on family preservation.⁴¹

B. Pervasive Violations of International Standards

The majority of the estimated one-million intercountry adoptions completed over the last seventy years (1950 to 2020) occurred in contexts of chronic violations of basic ethical principles as now codified in international instruments.⁴² These unethical adoption systems have profoundly altered the lives of hundreds of thousands of adoptees and millions of original and adoptive family members of those adoptees.⁴³

Without trying to be comprehensive, the following summarizes some of the categories of chronic violations of international standards and their impact on various regions and nations.

1. Child Laundering: Obtaining Children Illicitly by Force, Fraud, or Funds for Intercountry Adoption

Child laundering scandals, also termed child trafficking, occurred commonly in Latin American countries in the 1980s, and were a major impetus for creation of the 1993 HCIA.⁴⁴ Major child laundering scandals have occurred in Southeast Asia, including especially Cambodia and Vietnam.⁴⁵ The problem was documented in China beginning in 2005, and in India sporadically for many decades and from diverse states.⁴⁶ Such scandals occurred on a large-scale

through intercountry adoption should be those who would be in need of families even if intercountry adoption did not exist.”).

⁴¹ See sources cited *supra* at note 31.

⁴² See Peter Selman, *Global Trends in Intercountry Adoption*, page 4, (Feb. 2012), available at https://www.adoptioncouncil.org/images/stories/documents/NCFA_ADOPTION_ADVOCATE_NO44.pdf; Hague Convention, *supra* note 8; CRC, *supra* note 9; UN Alternative Care Guidelines, *supra* note 24; see *infra* notes 43–83 and accompanying text.

⁴³ See Cantwell, *The Sale of Children*, *supra* note 7; see *infra* notes 44–83 and accompanying text.

⁴⁴ See Hague Convention, *supra* note 8; Smolin, *Hague Convention*, *supra* note 14, at pages 447–61; see also E.J. Graff, *The Lie We Love*, FOREIGN POLICY (Oct. 6, 2009, 5:14 PM) (last visited Aug. 3, 2020) [hereinafter Graff, *The Lie We Love*], available at <https://foreignpolicy.com/2009/10/06/the-lie-we-love/> (“As international adoptions have flourished, so has evidence that babies in many countries are being systematically bought, coerced, and stolen away from their birth families.”).

⁴⁵ See, e.g., Trish Maskew, *Child Trafficking and Intercountry Adoption: The Cambodian Experience*, 35 CUMB. L. REV. 619 (2005); CAMBODIAN LEAGUE FOR THE PROMOTION OF HUMAN RIGHTS (LICADHO) (Jan. 2002), Briefing Paper, *Abuses Related to the International Adoption Process in Cambodia*, available at <https://www.licadho-cambodia.org/reports/files/31AdoptBPaper.pdf>; Jason Barber, *Adoptions: Saving Lives or Selling Young Souls?*, PHNOM POST (June 28, 1996), available at <https://www.phnompenhpost.com/national/adoptions-saving-lives-or-selling-young-souls>; Richard Cross, *What Really Happened in Cambodia*, Lecture at Samford University, Cumberland Law School, Rushton Distinguished Lecture Series, *Reforming Intercountry Adoption: Present Realities and Future Prospects* (Apr. 15, 2005), available at <http://fleasbiting.blogspot.com/2015/07/us-ice-agent-what-really-happened-in.html>; see generally Schuster Inst. for Investigative Journalism, *Capsule overview of adoption issues in Vietnam*, BRANDEIS UNIV. (last page update: Feb. 24, 2011) (last visited Aug. 3, 2020), available at <https://www.brandeis.edu/investigate/adoption/vietnam.html>; *Adoption from Vietnam*, ISS (Nov. 2009), available at <https://resourcecentre.savethechildren.net/node/5366/pdf/5366.pdf?embed=1>; Smolin, *Child Laundering*, *supra* note 3, at 135–46.

⁴⁶ See, e.g., Patricia J. Meier & Xiaole Zhang, *Sold Into Adoption: The Hunan Baby Trafficking Scandal Exposes Vulnerabilities in Chinese Adoptions to the United States*, 39 CUMB. L. REV. 87, 90–91 (2009) [hereinafter Meier, *Sold Into Adoption*]; David M. Smolin, *The Missing Girls of China*, 41 Cumberland Law Review (2011), available at

in Guatemala during most of the 2000s before Guatemalan adoptions were closed in 2008.⁴⁷ Later, as intercountry adoption moved in substantial numbers into Africa,⁴⁸ such scandals have occurred significantly in the Democratic Republic of Congo (DRC),⁴⁹ Ethiopia,⁵⁰ and Uganda.⁵¹ The earlier Zoe's Ark scandal involved children from Chad who were to be sent under false

https://works.bepress.com/david_smolin/1/; Brian H. Stuy, *Open Secret*, 44 CUMB. L. REV. 355 (2014), available at https://works.bepress.com/david_smolin/15/; Barbara Demick, *Chinese Babies Stolen By Officials for Foreign Adoption*, L.A. TIMES (Sept. 20, 2009) (last visited Aug. 3, 2020), available at <http://www.latimes.com/news/nationworld/world/la-fg-china-adopt20-2009sep20.0.491086.story>; Beth Loyd, *China's Lost Children*, ABC NEWS (May 12, 2008) (last visited Aug. 3, 2020), available at <https://abcnews.go.com/print?id=4774224>; Peter S. Goodman, *Stealing Babies for Adoption*, WASHINGTON POST FOREIGN SERVICE (March 12, 2006) (last visited Aug. 3, 2020), available at https://www.washingtonpost.com/wp-dyn/content/article/2006/03/11/AR2006031100942_pf.html; Smolin, *Child Laundering*, *supra* note 3, at 146-63; Arun Dohle, *Inside Story of an Adoption Scandal*, 39 CUMB. L. REV. 131 (2009) (discussing Indian adoption scandals), available at https://www.brandeis.edu/investigate/adoption/docs/adoption_Dohle_cumb_final.pdf; see generally Schuster Inst. for Investigative Journalism, *News Reports of Adoption Irregularities in India*, BRANDEIS UNIV. (last page update Feb. 23, 2011) (last visited Aug. 4, 2020), available at <https://www.brandeis.edu/investigate/adoption/india.html>; Aditya Kaul, *Maharashtra Officials Linked to Adoption Scam: CBI, DNA INDIA* (May 18, 2010) (last visited Aug. 3, 2020), available at <https://www.dnaindia.com/india/report-maharashtra-officials-linked-to-adoption-scam-cbi-1384343>; Rory Callinan/Chennai, *Stolen Children*, TIME (Aug. 21, 2008) (last visited Aug. 3, 2020), available at <http://poundpuplegacy.org/node/28541>.

⁴⁷ See International Commission Against Impunity in Guatemala [hereinafter CICIG], *Report on Actors Involved in Illegal Adoptions in Guatemala* (2010), available at <https://www.cicig.org/history/index.php?page=0003-20120323E>; Schuster Inst. for Investigative Journalism, *Capsule overview of adoption issues in Guatemala*, BRANDEIS UNIV. (last page update March 8, 2012) (last visited Aug. 3, 2020), available at <https://www.brandeis.edu/investigate/adoption/guatemala.html>; Ezra Fieser, *Guatemala: A Baby Factory No Longer?*, GLOBAL POST (Dec. 23, 2009) (last visited Aug. 3, 2020), available at <https://www.pri.org/stories/2009-12-23/guatemala-baby-factory-no-longer>; Siegel, *Finding Fernanda*, *infra* note 102; Smolin, *Child Laundering*, *supra* note 3, at 163-170; Smolin, *Hague Convention*, *supra* note 14, at 476-80.

⁴⁸ See Dr. Benyam D. Mezmur, *From Angelina (To Madonna) to Zoe's Ark: What are the 'A-Z' Lessons for Intercountry Adoption in Africa?*, printed in *The Intercountry Adoption Debate* 651 – 679 (ed. R. Ballard, N. Goodno, R. Cochrane & J. Milbrandt (2015) [hereinafter Mezmur, 'A-Z' Lessons for Intercountry Adoption in Africa], available at <https://www.cambridgescholars.com/download/sample/62311>.

⁴⁹ Schuster Inst. for Investigative Journalism, *News Reports of Adoption Irregularities in the Republic of Congo*, BRANDEIS UNIV. (last page update Feb. 22, 2011) (last visited Aug. 4, 2020), available at <https://www.brandeis.edu/investigate/adoption/congo.html>.

⁵⁰ See Kelley McCreery Bunkers, Karen Smith Rotabi, & Dr. Benyam Dawit Mezmur, *Ethiopia at a Critical Juncture in Intercountry Adoption and Traditional Care Practices*, at 133 – 142, printed in *The Intercountry Adoption Debate* 133-42 (ed. R. Ballard, N. Goodno, R. Cochrane & J. Milbrandt (2015), available at <https://www.cambridgescholars.com/download/sample/62311>; Schuster Inst. for Investigative Journalism, *Officials Review International Adoption in Ethiopia*, BRANDEIS UNIV. (last page update Nov. 24, 2014) (last visited Aug. 4, 2020), available at <https://www.brandeis.edu/investigate/adoption/ethiopia-adoption-foias.html>; E.J. Graff, *They Steal Babies, Don't They?*, PAC. STANDARD (Nov. 24, 2014) (last updated May 3, 2017) (last visited Aug. 4, 2020), available at <https://psmag.com/news/they-steal-babies-dont-they-international-adoption-schuster-institute-95027>.

⁵¹ *Kids for Sale*, CNN (2017), available at <https://www.cnn.com/2017/10/12/health/uganda-adoptions-investigation-ac360/index.html>; Anna Cavell, *'Those Kids Are No Longer Yours': An Investigation into Uganda's Adoption Market*, THE NATION (Oct. 11, 2018) (last visited Aug. 4, 2020), available at <https://www.thenation.com/article/archive/those-kids-are-no-longer-yours-ugandas-adoption-market/>; Evelyn Lirri, *Uganda tightens foreign adoption rules to thwart child trafficking*, KAMPALA (Thomas Reuters Foundation) (March 4, 2016) (last visited Aug. 4, 2020), available at <https://www.reuters.com/article/us-uganda-children-adoption/uganda-tightens-foreign-adoption-rules-to-thwart-child-trafficking-idUSKCN0W61OI>.

pretenses to France for adoption.⁵² South Pacific adoptions from Samoa and the Marshall Islands have been similarly impacted.⁵³

These improper placements are also documented in early adoptions from Greece to the Netherlands and US in the 1960s⁵⁴ and in South Korean adoptions.⁵⁵

2. Children Placed Primarily Due to Poverty

Adoptions due primarily to poverty have been a typical part of the intercountry adoption system throughout its history, impacting adoptions from Latin America, Africa, Southeast Asia, East Asia, South Asia, and Europe.⁵⁶ Family preservation efforts to address poverty and avoid adoptive placements have been the exception rather than the rule.⁵⁷ Intercountry adoptive systems have typically accepted relinquishments and abandonments caused primarily by poverty as a fact of life over which they have no control and usually have made little or no effort to offer financial assistance to preserve families.⁵⁸

3. Children Placed Primarily Due to Lack of Support for Single Mothers

After the initial period of post-war adoptions, the placement of children from single mothers became the predominant form of adoption in South Korea, as intercountry adoption continued despite the nation's increasing wealth.⁵⁹ Similar placements occurred in many other

⁵² See Mezmur, 'A-Z Lessons for Intercountry Adoption in Africa', *supra* note 48; Schuster Inst. for Investigative Journalism, *News Reports of Adoption Irregularities in Chad*, BRANDEIS UNIV. (last page update Feb. 22, 2011) (last visited Aug. 4, 2020), available at <https://www.brandeis.edu/investigate/adoption/chad.html>.

⁵³ See Schuster Inst. for Investigative Journalism, *Overview of Adoption Issues in Samoa*, BRANDEIS UNIV. (last page update Feb. 23, 2011) (last visited Aug. 4, 2020), available at <https://www.brandeis.edu/investigate/adoption/samoa.html>; Schuster Inst. for Investigative Journalism, *News Reports of Adoption Irregularities in the Marshall Islands*, BRANDEIS UNIV. (last page update Feb 23, 2011) (last visited Aug. 4, 2020), available at <https://www.brandeis.edu/investigate/adoption/marshall-islands.html>.

⁵⁴ See Gonda Van Steen, *Adoption, Memory, and Cold War Greece: Kid pro quo?* (2019) [hereinafter Van Steen, *Kid pro quo?*] (available from author at <https://doi.org/10.3998/mpub.11333937>).

⁵⁵ See Tobias Hubinette, *Korean Adoption History*, in GUIDE TO KOREA FOR OVERSEAS ADOPTED KOREANS (Eleana Kim, ed., Overseas Korean Foundation 2004), available at http://www.tobiashubinette.se/adoption_history.pdf [hereinafter *Korean Adoption History*]; see generally Schuster Inst. for Investigative Journalism, *Fraud and Corruption in International Adoption*, BRANDEIS UNIV. (last page update May 13, 2012) (last visited Aug. 4, 2020), available at <https://www.brandeis.edu/investigate/adoption/index.html>; Ethan B. Kapstein, *The Baby Trade*, FOREIGN AFF., Nov./Dec. 2003, available at <https://www.foreignaffairs.com/articles/2003-11-01/baby-trade>.

⁵⁶ See Flavie Fuentes, Herve Boechat, Felicity Northcott, *Investigating the Grey Zones of Intercountry Adoption*, ISS (2012) ("poverty which is rampant throughout the world should be considered as the main factor for abandonment"); Smolin, *Poverty*, *supra* note 34; see also Riitta Hogbacka, *Intercountry adoption and the social production of abandonment*, 62 International Social Work 271 (2019), available at <https://journals.sagepub.com/doi/pdf/10.1177/0020872817725142>.

⁵⁷ *Id.*; see also Elizabeth Bartholet, *International Adoption: Propriety, Prospects and Pragmatics*, 13 J. AM. ADAC. MATRIM. LAW. 181, 182-83 (1996).

⁵⁸ See Loibl, *Transnational Illegal Adoption Market*, *supra* note 28; David M. Smolin, *The Corrupting Influence of the United States on a Vulnerable Intercountry Adoption System: A Guide for Stakeholders, Hague and Non-Hague Nations, NGOs, and Concerned Parties*, 2013 UTAH L. REV. 1065, 1076 (2013) [hereinafter Smolin, *Corrupting Influence*]; David M. Smolin, *Intercountry Adoption as Trafficking*, 39 VAL. U. L. REV. 281 (2005) [hereinafter Smolin, *Trafficking*]; Smolin, *Poverty*, *supra* note 34.

⁵⁹ See e.g., Paul Y. Chang & Andrea K. Cavicchi, *Claiming Rights: Organizational and Discursive Strategies of the Korean Adoptee and Unwed Mothers Movement**, KOREA OBSERVER, Vol. 46, No. 1, Spring 2015, pp. 145-180

nations, including early Greek adoptions in the 1960s⁶⁰ and in India.⁶¹ Many adoption systems, intercountry and domestic, have been built upon and contributed to the pressures on single and unmarried parents to relinquish their children for adoption.⁶²

4. Consents and the Problem of Full Adoption

In many cultures it is conceptually easy to add family—extra fathers and mothers or uncles and aunts. Children may circulate fairly freely among trusted adults.⁶³ Further, in some cultural

[hereinafter Chang, *Claiming Rights*], available at http://sskhumanrights.org/wp-content/uploads/2014/01/05_Chang_Cavicchi_FINAL.pdf; Rachel K. Tschida, *Unwed Mothers Experience Limited Reproductive Choices in South Korea*, UNIV. OF MINN., Dec. 13, 2016 [hereinafter Tschida, *Unwed Mothers South Korea*], available at https://intercountryadopteevoices.com/wp-content/uploads/2018/10/PA5601-Final-Paper_RTschida_122016.pdf; Kim K. Sook, Comment, *Abandoned Babies: The Backlash of South Korea's Special Adoption Act*, 24 WASH. L. REV. 709 (2015) [hereinafter Sook, *Abandoned Babies*], available at <https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=1708&context=wilj>; see Hubinette, *Korean Adoption History*, *supra* note 55; Korean Family Preservation Network, *Monitoring South Korean Intercountry and Domestic Adoption From a Human Rights Perspective*, Joint Submission to the UN Universal Periodic Review (submitted April 2012), available at <http://kumfa.or.kr/wp-content/uploads/2014/07/2012-Monitoring-South-Korean-Intercountry-and-Domestic-Adoption-From-a-Human-Rights-Perspective-english.pdf>; Catherine M. Bitzan, *Our Most Precious Resource: How South Korea Is Poised to Change the Landscape of International Adoption*, 17 MINN J. INT'L L. 121, 124–25 (2008); TOBIAS HUBINETTE, COMFORTING AN ORPHANED NATION (Stockholm University 2005) [hereinafter ORPHANED NATION], available at https://www.researchgate.net/publication/277993137_Comforting_an_orphaned_nation_Representations_of_international_adoption_and_adopted_Koreans_in_Korean_popular_culture; KOREAN WOMEN'S DEVELOPMENT INSTITUTE, REVIEWING ISSUES ON UNWED MOTHERS' WELFARE IN KOREA: INTERCOUNTRY ADOPTION, RELATED STATISTICS, AND WELFARE POLICY IN DEVELOPED COUNTRIES (2009) [hereinafter KWDI], available at <https://eng.kwdi.re.kr/main/main.do>; Boon Young Han, *Contextualizing Modern Korean Adoption Law*, in PROCEEDINGS OF THE FIRST INTERNATIONAL KOREAN ADOPTION STUDIES RESEARCH SYMPOSIUM 37 (ed. Kim Park Nelson July 31, 2007) (available from author).

⁶⁰ See e.g., Raymond Bonner, *Tales of Stolen Babies And Lost Identities; A Greek Scandal Echoes in New York*, (April 13, 1996) (last visited Aug. 4, 2020), N.Y. TIMES, available at <https://www.nytimes.com/1996/04/13/nyregion/tales-of-stolen-babies-and-lost-identities-a-greek-scandal-echoes-in-new-york.html>; Van Steen, *Kid pro quo?*, *supra* note 54.

⁶¹ See, e.g., Pien Bos, *Once a mother: relinquishment and adoption from the perspective of unmarried mothers in South India* (2007), available at <https://intercountryadopteevoices.com/wp-content/uploads/2016/11/pien-bos-dissertation-once-a-mother-on-unmarried-mothers-in-south-india-who-relinquish-for-adoption.pdf>.

⁶² See e.g., sources cited *supra* note 59; Philip Sherwill, *Guatemalan Mother Reunited with Baby Stolen and Sold for Adoption by US Couple*, THE TELEGRAPH UK (July 26, 2008) (last visited Aug. 3, 2020), available at <https://www.telegraph.co.uk/news/worldnews/centralamericaandthecaribbean/guatemala/2461557/Guatemalan-mother-reunited-with-baby-stolen-and-sold-for-adoption-by-US-couple.html>; Choe Sang-Hun, *Group Resists Korean Stigma for Unwed Mothers* (Oct. 7, 2009) (last visited Aug. 4, 2020), N.Y. TIMES, available at http://www.nytimes.com/2009/10/08/world/asia/08mothers.html?_r=1; Ann Babe, *The Stigma of Being a Single Mother in South Korea* (Feb. 28, 2018) (last visited Aug. 4, 2020), AL JAZEERA, available at <https://www.aljazeera.com/indepth/features/stigma-single-mother-south-korea-180226144516720.html>; Lisa B. Ellingson, *Creating a Climate for "Best Interests": Recognizing Intercountry Adoption as a Disfavored Placement under the Hague Convention*, in PROCEEDINGS OF THE FIRST INTERNATIONAL KOREAN ADOPTION STUDIES RESEARCH SYMPOSIUM 15 (ed. Kim Park Nelson July 31, 2007) (available from author); Loibl, *Transnational Illegal Adoption Market*, *supra* note 28, § 4.2.1 Individual and Social Harm.

⁶³ See Claudia Fonseca, Diana Marre, & Beatriz San Roman, *Child Circulation in a Globalized Era*, printed in The Intercountry Adoption Debate 157, 167 (ed. R. Ballard, N. Goodno, R. Cochrane & J. Milbrandt (2015) [hereinafter *Child Circulation*], available at <https://www.cambridgescholars.com/download/sample/62311>; Claudio Fonseca, *Patterns of Shared Parenthood among the Brazilian Poor*, 21 Soc. Text at 111, 113-15 (2003) [hereinafter Fonseca, *Patterns of Shared Parenthood*]; Riitta Hogbacka, *Global Family, Inequality, and Transnational Adoption* (2016); Briggs, L.; Fonseca, C.; Cardarello, A.; Marre, D.; Collard, C. and Yngvesson, B. (2012), *Feminism and transnational*

contexts “hostels” or “orphanages” in practice are boarding schools for the poor: a way in which poor families under stress ensure that their children will receive an education and food, while intending to maintain parental status and relationship.⁶⁴ The concept of full severance adoption, in which a parent will permanently lose parentage and any contact and relationship with the child merely through signing a document, is an unfamiliar, even ludicrous, practice to much of the world.⁶⁵ These widespread cultural contexts make it very difficult in practice to evaluate a purported “consent to adoption.”⁶⁶ The consent may be understood by parent(s) as consent to a boarding school experience or some kind of child sponsorship, exchange program, or temporary placement.⁶⁷ To the degree that “adoptive” parents are in view, they will likely be viewed as new and additional family members, rather than as complete replacements for the birth family.⁶⁸

Under these circumstances, it has been very easy for intermediaries to intentionally extract children for adoption under the false pretenses that the children would remain in law and fact the children of their original families.⁶⁹ Indeed, even intermediaries who intend to explain the meaning of full adoption may have trouble making themselves understood by first families that lack a cultural context for such an arrangement.⁷⁰ Intercountry adoption has been understood by innumerable first families as educational and economic opportunities for their children that ultimately would assist the family, rather than as permanently severing the child’s relationship with the family.⁷¹

adoption: Poverty, precarity, and the politics of raising (other people’s?) children. *Feminist Theory* 13(1): 81-100; Asha Krishnakumar, *The Adoption Market*, FRONTLINE (June 3, 2005) (last visited Aug. 5, 2020), available at <https://frontline.thehindu.com/cover-story/article30204931.ece>; Loibl, *Transnational Illegal Adoption Market*, *supra* note 28, § 4.2.2 Invisibility; Caeli E. Kimball, *Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, 33 DENV. J. INT’L L. & POL’Y, 561 (2005) [hereinafter Kimball, *Barriers to Hague Convention*], available at <https://digitalcommons.du.edu/djilp/vol33/iss4/2/>.

⁶⁴ See e.g., Fonseca, *Patterns of Shared Parenthood*, *supra* note 63; Krishnakumar, *The Adoption Market*, *supra* note 63.

⁶⁵ See *Child Circulation*, *supra* note 63, at 167; Loibl, *Transnational Illegal Adoption Market*, *supra* note 28, pages 67- 68, § 4.2.2 Invisibility.

⁶⁶ *Id.*; Smolin, *Child Laundering*, *supra* note 3.

⁶⁷ See e.g., Asha Krishnakumar, *Behind The Façade*, FRONTLINE (June 3, 2005) (last visited Aug. 5, 2020), available at <https://frontline.thehindu.com/cover-story/article30204916.ece>; see generally, The Schuster Inst. for Investigative Journalism, *Cambodia: Resources & Related Documents*, BRANDEIS UNIV. (last page update April 7, 2011) (last visited Aug. 5, 2020), available at <https://www.brandeis.edu/investigate/adoption/cambodia-sources.html>; Kristen Cheney, ‘Giving Children a Better Life?’ *Reconsidering Social Reproduction, Humanitarianism and Development in Intercountry Adoption*, EUROPEAN JOURNAL OF DEVELOPMENT RESEARCH (2014), available at https://www.academia.edu/5891599/Giving_Children_a_Better_Life_Reconsidering_Social_Reproduction_Humanitarianism_and_Development_in_Intercountry_Adoption.

⁶⁸ See Loibl, *Transnational Illegal Adoption Market*, *supra* note 28, § 4.2.1 Individual and Social Harm.

⁶⁹ *Id.*; Patricia J. Meier, *Small Commodities: How Child Traffickers Exploit Children and Families in Intercountry Adoption and What the United States Must Do to Stop Them*, 12 J. GENDER RACE & JUST. 185 (2008-2009) [hereinafter Meier, *Small Commodities*], available at <https://heinonline.org/HOL/LandingPage?handle=hein.journals/jgrj12&div=10&id=&page=>.

⁷⁰ See Loibl, *Transnational Illegal Adoption Market*, *supra* note 28, § 4.2.2. Invisibility; Smolin, *Trafficking*, *supra* note 58; Smolin, *Poverty*, *supra* note 34; Smolin, *Child Laundering*, *supra* note 3.

⁷¹ See e.g., Fonseca, *Patterns of Shared Parenthood*, *supra* note 63; Krishnakumar, *The Adoption Market*, *supra* note 63; Smolin, *Child Laundering*, *supra* note 3; U.S. Immigration and Customs Enforcement, *BACKGROUND, Operation Broken Hearts* (2004) [hereinafter *Operation Broken Hearts*], available at

Hence, this disjunction between the concept of full severance adoption and common cultural practices in many places has contributed both to intentional child laundering schemes, and also to unintentional placements despite a lack of true consent and real understanding by the birth family.⁷² Countless parents who intended to benefit their children with opportunities and support while maintaining contact and parental status, have found themselves permanently severed from their children.⁷³

To translate this to the cultural practices of some western parents: it is as though you signed a contract for a summer camp or boarding school or exchange program for your child, only to be later told that you signed a contract to permanently relinquish your child, and would never see your child again.⁷⁴ Then you are told that it is your fault and there is no remedy, since you “signed” --- a permanent and irrevocable act.

5. The Problem of Lost Children

Children who are accidentally separated from their families, for example, while traveling or in other understandable circumstances, become subjects of adoption and intercountry adoption systems with little or no effort made at family re-unification.⁷⁵ Low levels of education and literacy and a multitude of national languages can contribute to the difficulties in accomplishing re-unifications.⁷⁶ The lack of effort made toward re-unification is sometimes due to the financial incentives favoring adoption.⁷⁷

6. “Abandoned” Children

One way to hide the origins of a child is simply to record them as being found abandoned.⁷⁸ Further, in China, a prominent country of origin, relinquishments have been unlawful, making abandonments the normative route for children to come into care.⁷⁹ This limits the possibilities

https://www.brandeis.edu/investigate/adoption/docs/galindo_backgr.pdf (describing a criminal investigation into a Cambodian adoption scandal involving baby buyers who persuaded birth families to give up their children using false statements that the families “could have their child back at any time,” and could “visit [their] child at the orphanage” and the child would receive food, medical care, and an education).

⁷² See Fonseca, *Patterns of Shared Parenthood*, *supra* note 63.

⁷³ *Id.* at 114 (describing a poor Brazilian family who regularly relied on an orphanage for temporary care of their children and were surprised when the youngest, a “fairly light-skinned, healthy infant,” had been up for adoption); Mary Ellen Fieweger, *Stolen Children and International Adoptions*, 70 CHILD WELFARE (1991) (providing evidence that suggests a child left in the temporary care of an orphanage in Ecuador was given a false death certificate and then put up for international adoption); Smolin, *Child Laundering*, *supra* note 3, at 120.

⁷⁴ See *Operation Broken Hearts*, *supra* note 71; Smolin, *Child Laundering*, *supra* note 3, at 120.

⁷⁵ See Saroo Brierley, *A Long Way Home* (2013) (the true story behind the film *Lion*); Smolin, *Child Laundering*, *supra* note 3, at 121-22; David M. Smolin, *The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals*, 35 Seton Hall L. Rev. 403, 560-61 (2005) [hereinafter Smolin, *Indian Adoption Scandals*]; Krishnakumar, *Behind The Façade*, *supra* note 67.

⁷⁶ See sources cited *supra* note 71.

⁷⁷ See Loibl, *Transnational Illegal Adoption Market*, *supra* note 28, § 4.2.2. Invisibility; Kristen E. Cheney & Karen S. Rotabi, *Addicted to Orphans: How the Global Orphan Industrial Complex Jeopardizes Local Child Protection Systems*, Springer Science+Business Media Singapore (2014), available at https://link.springer.com/content/pdf/10.1007%2F978-981-4585-98-9_3-1.pdf; Smolin, *Child Laundering*, *supra* note 3.

⁷⁸ See e.g., *Operation Broken Hearts*, *supra* note 71; Smolin, *Child Laundering*, *supra* note 3, at 121.

⁷⁹ See Meier, *Sold Into Adoption*, *supra* note 46.

of family preservation efforts while creating a shield for misconduct, since every case is an abandonment with the original situation of the child and the child's family officially unknown.⁸⁰

Hence, adoption systems that rely to a significant degree on placing "abandoned" children are particularly vulnerable to illicit practices.⁸¹ Abandonments also make it particularly difficult to protect adoptee identity rights.⁸²

Of course, sometimes it is simply true that a child is abandoned, and that fact should not in itself limit the range of alternative care options for the child. However, adoption systems built upon significant numbers of purported abandonments are often due to either illicit practices or to state policies favoring abandonment.⁸³

C. Standards for Remedies for Illicit Adoption Practices

The relevant international instruments on intercountry adoption do not provide specific standards on remedies when children are wrongfully separated from their families and then placed for adoption, whether domestic or intercountry.⁸⁴ However, remedies for separations of children from their families are addressed as a general category.⁸⁵ Further, international human rights standards do address general principles on remedies for significant human rights violations.⁸⁶ Hence, it is necessary to apply these more general standards to the specific context when a wrongful separation has been followed and/or induced by an adoption.⁸⁷ The details of this analytic task are complex and beyond the scope of this paper. However, the following standards would seem to be necessary. Indeed, if the below standards are not applicable, it would undermine

⁸⁰ See Smolin, *Indian Adoption Scandals*, *supra* note 75 (reviewing relevant international law materials concerning relative prioritization of intercountry adoption, domestic adoption, in-country foster care and in-country institutional care); CRC, *supra* note 9; Hague Convention, *supra* note 8.

⁸¹ See Smolin, *Indian Adoption Scandals*, *supra* note 75, at 460-61 (2005) (citing Syed Amin Jafri, *Missing Girl Among Children Rescued in Tandur* (May 1, 2001), available at <https://www.rediff.com/news/2001/may/01ap1.htm>); Ambujam Anantharaman, *Big Racket of Small Babies*, BOLOJI.COM (June 12, 2005), available at <http://www.boloji.net/wfs3/wfs399.htm>.

⁸² *Id.*; Smolin, *Child Laundering*, *supra* note 3, at 121-22.

⁸³ See Anantharaman, *Big Racket of Small Babies*, *supra* note 81; Loibl, *Transnational Illegal Adoption Market*, *supra* note 28, § 2.4.1 Child Laundering – Connecting Demand and Illegal Supply; Smolin, *Child Laundering*, *supra* note 3, at 122.

⁸⁴ See Hague Convention, *supra* note 8, art. 6; Kimball, *Barriers to Hague Convention*, *supra* note 63; Smolin, *Child Laundering*, *supra* note 3, at 129.

⁸⁵ See Smolin, *Poverty*, *supra* note 34, at 422; CRC, *supra* note 9; Hague Convention, *supra* note 8; UN Alternative Care, *supra* note 24; Hilbrand W.S. Westra, *International Adoption and the Fight for Human Rights*, CONDUCTIVE MAGAZINE (Aug./Sep. 2009) [hereinafter Westra, *Fight for Human Rights*], available at <https://intercountryadopteevoices.com/wp-content/uploads/2015/01/international-adoption-and-the-fight-for-human-rights-by-h-westra.pdf>.

⁸⁶ UNICEF, *supra* note 10; Hague Convention, *supra* note 8; CRC, *supra* note 9; UN Alternative Care, *supra* note 24; International Organization for Migration, available at <https://www.iom.int>; Save The Children, available at <https://www.savethechildren.org/us/what-we-do>; Terre des Hommes, available at <https://www.terredeshommes.org>; Westra, *Fight for Human Rights*, *supra* note 85.

⁸⁷ See Elvira Loibl, *The Aftermath of Transnational Illegal Adoptions: Redressing Human Rights Abuses in the Intercountry Adoption System with Instruments of Transitional Justice* (publication pending 2020); Kimball, *Barriers to Hague Convention*, *supra* note 63; Westra, *Fight for Human Rights*, *supra* note 85; Susann M. Bisignaro, *Comment: Intercountry Adoption Today and the Implications of the 1993 Hague Convention of Tomorrow*, 13 DICK. J. INT'L L. 124 (1994) [hereinafter Bisignaro, *Implications of the Hague Convention*].

the entire enterprise of adoption, for it would mean that in principle there are no meaningful remedies for wrongful adoptions, whether domestic or intercountry.⁸⁸

Hence, the following standards for remedies for adoptions following or inducing wrongful separations are necessary:

The remedy should address the harm. If the harm is wrongful separation of a child from the child's family, the remedy should address that separation.⁸⁹

The need for a remedy is not lessened by the legal event of an adoption built upon a wrongful separation. Rather, the adoption exacerbates the separation and therefore heightens, rather than reduces, the need for a remedy.⁹⁰

Where the adoptive family was not significantly at fault, the adoptive family should be included as additional victims to whom remedies are due. Even where adoptive parents are significantly at fault, there may be other members of the adoptive family, such as adoptive siblings to the adoptee, who are innocent and hence victims.⁹¹

The family bonds created and lived by adoption radically complicate the question of remedies, placing adoption triad members in conflicted and extraordinarily difficult dilemmas.⁹² Hence, remedies should seek to address those conflicts and dilemmas.

The passage of time does not eliminate the need for remedies, but rather changes the available remedies. Wrongful adoption still matters after more than a half century to those whose lives were profoundly altered.⁹³ Hence, remedies must be long-term and inter-generational.

D. The Standards for Remedies for Illicit Adoption Practices have been Systematically Violated and Ignored by States

Wrongful separations of children from families induced and/or followed by intercountry adoption has been a wrong without a remedy for more than a half century. The instances in which any kind of acknowledgement or remedy has been facilitated or provided by governments are quite rare.⁹⁴ In general, wrongdoers have been able to act with complete impunity.⁹⁵ In general,

⁸⁸ See generally Loibl, *Transnational Illegal Adoption Market*, *supra* note 28; Smolin, *Poverty*, *supra* note 34.

⁸⁹ Hague Convention, *supra* note 8, art. 4(c)(3); UNICEF's *Position on Inter-Country Adoption* (July 22, 2010) (last visited Aug. 7, 2020), available at https://www.unicef.org/media/media_55412.html.

⁹⁰ *Id.*; see also sources cited *supra* note 75.

⁹¹ See Loibl, *Transnational Illegal Adoption Market*, *supra* note 28, § 4.2.1 Individual and Social Harm; Blair, *Assessing the Gatekeepers*, *supra* note 21.

⁹² Jessica Walton, *Supporting the Interests of Intercountry Adoptees Beyond Childhood: Access to Adoption Information and Identity*, SOCIAL POLICY & SOCIETY (2012) [hereinafter Walton, *Intercountry Adoptees Beyond Childhood*], available at <http://dro.deakin.edu.au/eserv/DU:30057330/walton-supportingtheinterests-2012.pdf>.

⁹³ See Lynelle Long, *Adoptee Activism in America*, INTERCOUNTRY ADOPTEE VOICES (ICAV) (Sep. 21, 2019) [hereinafter Long, *Adoptee Activism*], available at <https://intercountryadopteevoices.com/2019/09/21/adoptee-activism-in-america/>; Smolin, *Poverty*, *supra* note 34.

⁹⁴ See UN Special Rapporteur, *supra* note 2, at para. 69, 80-88; Blair, *Assessing the Gatekeepers*, *supra* note 21, at 355-74.

⁹⁵ See Smolin, *Poverty*, *supra* note 34; Smolin, *Hague Convention*, *supra* note 14.

adoption triad members have been forced to manage the harms and traumas on their own, sometimes with the assistance of NGOs.⁹⁶

Indeed, to a significant degree, being wrongfully separated from family and then adopted has not even been treated or defined as a harm or wrong at all.⁹⁷ Instead, the positive image of adoption has defined these wrongs as ultimately beneficial and hence in no need of a remedy.⁹⁸

Even in the rare cases of some kind of criminal prosecution, the complex question of how to handle adoption triad relationships over lifetimes amidst these crimes has been usually left unaddressed.⁹⁹ Remedies for adoption triad members that would address the wrongful separation have generally been neglected, with rare, and often only partially successful, exception.¹⁰⁰

Beyond the issue of providing remedies for individual cases is that of providing national responses to long-standing practices that violate human rights.¹⁰¹ Some degree of national reckoning has occurred in a few states in response to the wrongful taking of children from indigenous peoples, and from single mothers, generally in the context of domestic adoption or apart from adoption.¹⁰² However, in the context of intercountry adoption such responses have been even more rare, or are just in early stages.¹⁰³ The Impunity Commission in Guatemala is a rare exception, although it did not really include the provision of remedies for victims in regard to the illegal separations of children from families.¹⁰⁴

⁹⁶ See Graff, *The Lie We Love*, *supra* note 44; Smolin, *Hague Convention*, *supra* note 14, fn. 19 (citing sources including government, NGOs, press, activists, and scholars that provide substantial documentation indicating systemic abuses within many sending countries).

⁹⁷ See ICAV Perspective Paper, *Illicit Intercountry Adoption* (compiled by Lynelle Long, July 2020), statement of Desiree Smolin, pages 142-144 [hereinafter ICAV Perspective Paper], available at <https://intercountryadopteevoices.com/2020/08/08/lived-experience-suggestions-for-responses-to-illicit-adoptions/>; Loibl, *Transnational Illegal Adoption Market*, *supra* note 28, § 4 The Prism Of Child Trafficking For Adoption Purposes.

⁹⁸ See generally Graff, *The Lie We Love*, *supra* note 44.

⁹⁹ See CICIG, *supra* note 47; Loibl, *Transnational Illegal Adoption Market*, *supra* note 28, § 4 The Prism OF Child Trafficking For Adoption Purposes.

¹⁰⁰ See CICIG, *supra* note 47; Loibl, *Transnational Illegal Adoption Market*, *supra* note 28, § 4.2.4 Lack of Public Agreement on Seriousness; see also The Schuster Inst. for Investigative Journalism, *Int'l Adoption Fraud & Corruption: Samoa*, BRANDEIS UNIV. (last page update: Feb. 23, 2011) (last visited Aug. 28, 2020), available at <https://www.brandeis.edu/investigate/adoption/samoa.html> (In a rare effort to address adoption triad relationships, the Samoan Adoptee Restitution Fund was created as a court ordered remedy after criminal convictions, with respected expert Professor Jini Roby generously serving without pay as trustee. While innovative and helpful, the remedy was limited by the comparatively small amount of funds for a remedy involving 80 adoptees and their adoptive and birth families, see <https://archive.slttrib.com/article.php?id=51885509&itype=cmsid>).

¹⁰¹ See UN Special Rapporteur, *supra* note 2, at para. 80 – 88.

¹⁰² See, e.g., ISS Handbook, *supra* note 7, at Chapter 2.3, Responding to Illegal Adoption; Long, *Adoptee Activism*, *supra* note 93; Smolin, *Trafficking*, *supra* note 58; Erin Siegal, *Finding Fernanda: Two Mothers, One Child, and a Cross-Border Search for Truth*, BEACON PRESS, May 8, 2012 [hereinafter Siegal, *Finding Fernanda*], available at <https://www.amazon.com/Finding-Fernanda-Mothers-Cross-Border-Search/dp/0983884501>.

¹⁰³ See UN Special Rapporteur, *supra* note 2, at para. 69, 80-88; Westra, *Fight for Human Rights*, *supra* note 85; Blair, *Assessing the Gatekeepers*, *supra* note 21; Loibl, *Transnational Illegal Adoption Market*, *supra* note 28, § 4.2.4 Lack of Public Agreement on Seriousness.

¹⁰⁴ See CICIG, *supra* note 47.

Unfortunately, it has been more common for governments to create obstacles to systemic or individual remedies.¹⁰⁵ For example, an NGO assisting Ethiopian birth families victimized by wrongful intercountry has been threatened by European governmental actors with claims that the NGO is violating privacy laws, even though their information came directly from birth families rather than from adoption files, and even though the NGO was providing a service that should have been seen as supportive of governmental duties to provide remedies for illicit practices. Indeed, a birth mother who wanted to tell her story regarding the loss of her child to a domestic adoption to my own law school class was threatened by court action. Hence, privacy laws have been used as a shield by governmental actors to protect unethical or illicit adoption practices against being disclosed to the public or remedied.¹⁰⁶

Governments typically have failed to do their job of preventing and investigating and remedying illicit intercountry adoption---and yet when others work on these tasks, governments sometimes try to block their work. Unfortunately, as a group, governments involved in intercountry adoption have often done more to cover up and hide illicit and unethical adoptions, then to investigate and remedy them.

WHY “WE WILL FIX IT FOR THE FUTURE AND LEAVE THE PAST ALONE” IS NOT ENOUGH?

The question of remedies for past illicit adoptions, whether recent or from decades ago, is complex and difficult. Hence, when attention does turn to illicit adoption practices, the response has often been to promise or attempt reforms for future adoptions, while leaving illicit practices in completed adoptions unaddressed.¹⁰⁷

At this point, given the small numbers of intercountry adoptions immediately prior to COVID-19, and the virtual de facto moratorium created by COVID-19, there is no excuse to defer addressing past victims of illicit adoption practices.¹⁰⁸ There are now far more people harmed by the lack of remedies for past practices, than would be helped for the foreseeable future even if intercountry adoption could be completely reformed.¹⁰⁹ There are seventy years of misconduct, and substantial harm to millions of people, to address.¹¹⁰

In any event, reforming intercountry adoption without addressing the harms of the past is not really practical. Such an approach creates a never-ending cycle of impunity. No matter how

¹⁰⁵ See Walton, *Intercountry Adoptees Beyond Childhood*, *supra* note 92; Kathleen J. S. Bergquist, M. Elizabeth Vonk, Dong Soo Kim & Marvin D. Feit, (Ed.), *International Korean Adoption: A Fifty-Year History of Policy and Practice* (2007), New York, Routledge, available for download at <https://www.taylorfrancis.com/books/9780203051450>; Long, *Adoptee Activism*, *supra* note 93; Kimball, *Barriers to Hague Convention*, *supra* note 63; Loibl, *Transnational Illegal Adoption Market*, *supra* note 28, § 7.1 Systemic Abuses in the Ethiopian Adoption System.

¹⁰⁶ See Loibl, *Transnational Illegal Adoption Market*, *supra* note 28, § 4.25 Low Probability of Severe Social Response, § 4.3 Accountability of Adoption Agencies; Smolin, *Child Laundering*, *supra* note 3; E. J. Graff, *The Baby Business*, DEMOCRACY JOURNAL, Summer No. 17 (2010) [hereinafter Graff, *Baby Business*], available at <https://democracyjournal.org/magazine/17/the-baby-business/>.

¹⁰⁷ See generally Long, *Adoptee Activism*, *supra* note 93; Loibl, *Transnational Illegal Adoption Market*, *supra* note 28, § 4.2.4 Lack of Public Agreement on Seriousness; Smolin, *Child Laundering*, *supra* note 3.

¹⁰⁸ See *supra* notes 15 – 18, 42 – 83 and accompanying text.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*; Graff, *Baby Business*, *supra* note 106.

many reforms there are, if there are no consequences or remedies for past illicit practices, this practice of impunity will tend to fuel new abuses. So long as the impression continues that “the end justifies the means,” that the good of adoption is far greater than the harm even in cases of children wrongfully separated from their families, the abuses will continue.¹¹¹

Most likely, states and societies will never appreciate the profound harms caused by wrongful adoption practice until and unless there is a time of national accountability for the past. It is simply too easy to minimize these harms, because the concept of a harmful adoption is a contradiction to the mental construct of adoption as a wonderful, generous and even saving act of love.¹¹² And yet, until and unless adoption policy truly takes into account the depth and scope of harm done by intercountry adoption, rational decisions about the future of intercountry adoption are impossible.¹¹³

ILLEGAL ADOPTION AS THE PERFECT CRIME

Illicit intercountry adoption practices are often the “perfect crime” in the sense of a crime which will almost surely go unpunished.¹¹⁴ Wrongful adoption is a crime whose methodology effectively disables its victims from timely complaining or acting. Birth families are usually too powerless and poor to effectively seek redress.¹¹⁵ Adoptees as children often are unaware of their own history and victimization and due to their developmental processes may not feel ready to investigate their history until decades after the crime.¹¹⁶ Adoptive parents are usually unaware of the wrongdoing, and in the context of full severance adoption tend to see birth families as a threat rather than an opportunity for further relationships. Hence, it is not surprising that it is rare for there to be any kind of legal accountability, criminal, civil or administrative, for illicit adoption practices.¹¹⁷

Listing the barriers to criminal prosecution, or indeed any kind of legal liability or accountability, makes a daunting and discouraging picture:

- (1) The division of responsibility between the receiving state and the country of origin make it particularly difficult to prevent or investigate wrongdoing.¹¹⁸
- (2) The economic and power disparities between intermediaries and first families in the state of origin, and between the adoptive and first family, are extreme.¹¹⁹

¹¹¹ See Long, *Adoptee Activism*, *supra* note 93; Loibl, *Transnational Illegal Adoption Market*, *supra* note 28; Smolin, *Child Laundering*, *supra* note 3.

¹¹² See Graff, *The Lie We Love*, *supra* note 44.

¹¹³ See Long, *Adoptee Activism*, *supra* note 93.

¹¹⁴ See ISS Handbook, *supra* note 7, at Chapter 7.1.4; UN Special Rapporteur, *supra* note 2, at para. 80-88; Loibl, *Transnational Illegal Adoption Market*, *supra* note 28.

¹¹⁵ See Siegal, *Finding Fernanda*, *supra* note 102.

¹¹⁶ See ISS Handbook, *supra* note 7, at Chapter 7.1.4; Loibl, *Transnational Illegal Adoption Market*, *supra* note 28; Smolin, *Child Laundering*, *supra* note 3.

¹¹⁷ See ISS Handbook, *supra* note 7, at Chapter 7.1.4; Long, *Adoptee Activism*, *supra* note 93; Loibl, *Transnational Illegal Adoption Market*, *supra* note 28, § 4.2.4 Lack of Public Agreement on Seriousness; Smolin, *Child Laundering*, *supra* note 3; Graff, *Baby Business*, *supra* note 106.

¹¹⁸ See generally Smolin, *Poverty*, *supra* note 34.

¹¹⁹ *Id.*

(3) The cultural differences within and between the receiving state and country of origin facilitate both intentional fraud and accidental mis-understandings.¹²⁰

(4) The financial incentives toward intercountry adoption, for intermediaries in both the country of origin and the receiving state, and sometimes for governmental officials, create incentives to favor intercountry adoption and reluctance to address illicit practices.¹²¹

(5) State actors are often knowingly, negligently, or accidentally involved in wrongdoing, and thus have the motivation to hide rather than investigate wrongdoing, since it will expose their own crimes or mistakes.¹²²

(6) Birth families are usually too poor and lacking in capacities to challenge in any practical way either the state actors or intermediaries who have wronged them; given the lack of social status of birth families, police and government officials are unlikely to assist them, particularly when they are claiming wrongs by higher status intermediaries and government officials. Indeed, birth families may be threatened or harmed by private or governmental actors if they are too active in seeking remedies for the loss of their children.¹²³

(7) The full severance adoption system which predominates the intercountry adoption system communicates to adoptees and adoptive parents that the adoptive relationship is built upon the severance of the first family relationships.¹²⁴ Hence, birth searches or investigations may be experienced as disloyal or threatening to the adoptive family relationships, leading to resistance by adoptive parents and/or adoptees.¹²⁵ Further, in a full severance adoption system it is particularly easy to hide illicit practices, and particularly difficult to uncover them.¹²⁶ The atmosphere of secrecy---and often shame---that accompanies full severance adoption makes it appear that it is the uncovering of crimes, rather than the crimes themselves, that are illegal.¹²⁷

(8) Adoptees are understandably invested in their adoptive identity and may themselves, at various stages of their lives, be uninterested in investigating their origins, and not yet ready to open the door to relationships with their birth families.¹²⁸ While most adoptees eventually develop an interest in their origins, that sometimes does not occur until decades after their separation from their family of origin. Hence, if remedies follow only the wishes of adoptees, it may in many cases delay for decades the necessary investigation and re-union.¹²⁹ The more time that passes, the less that can be remedied as family members experience a greater proportion of their lives separated and without contact; as decades pass some first family members inevitably die. Investigation also becomes more difficult when it is not begun until decades after the key events.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*; Krishnakumar, *Behind The Façade*, *supra* note 67.

¹²⁷ See Graff, *Baby Business*, *supra* note 106.

¹²⁸ See Loibl, *Transnational Illegal Adoption Market*, *supra* note 28.

¹²⁹ See Walton, *Intercountry Adoptees Beyond Childhood*, *supra* note 92.

(9) Reunions tend to uncover trauma and can produce trauma.¹³⁰ The wishes and needs of adoptees and first families are often conflicting. First families sometimes reject adopted-out children when they return, or wish to keep such relationships secret. Adoptees sometimes want information but are not ready for relationships. Adoptees have become enculturated into different understandings of family and culture than their families of origin, creating conflict between family members with completely different understandings of what it means to be “family” together.¹³¹ Language can be a huge obstacle requiring the intrusive presence of translators for the most basic communication. The question of monetary support can be divisive and cause mis-understandings. Explanations given for the past may be partial or unsatisfactory.

Because the obstacles to remedies are so daunting, it takes the intentional creation of processes and services for investigation and remedies to overcome the obstacles.¹³² Without such intentionality, the vast majority of instances of illicit practices will not be remedied, even if there are sporadic high profile legal actions.¹³³

BUT WOULD CHILDREN BE HARMED BY MORATORIA?

A basic objection to moratoria is the alleged harm to children who would otherwise benefit from intercountry adoption. On balance, that is not a sufficient reason to oppose moratoria.

The risks of harm of moratoria to children should not be exaggerated. Given the small numbers of intercountry adoptions, it is not the primary alternative care option for any category of child anywhere in the world.¹³⁴ Thus, even for the most active states, intercountry adoption is a rarity in proportion to any category of children in need of alternative care—the CRC term for children being cared for when separated from parents.¹³⁵ If such moratoria prevented all or most intercountry adoptions over the next two years, including the period of COVID-19, such moratoria might prevent about 10,000 or less intercountry adoptions that would otherwise occur.¹³⁶

To place this into scale, there are apparently several million children globally in some form of residential or foster care.¹³⁷ In the United States alone, there are about 400,000 children residing in foster care (which includes both foster homes and residential care), and a range of 50,600 to 63,000 children adopted domestically from the public foster care system over each of the last four

¹³⁰ See Long, *Adoptee Activism*, *supra* note 93.

¹³¹ See generally Loibl, *Transnational Illegal Adoption Market*, *supra* note 28.

¹³² See Bunn, *Regulating Corruption*, *supra* note 7; Smolin, *Child Laundering*, *supra* note 3; Smolin, *Poverty*, *supra* note 34; Smolin, *Indian Adoption Scandals*, *supra* note 75.

¹³³ See Long, *Adoptee Activism*, *supra* note 93; Graff, *Baby Business*, *supra* note 106.

¹³⁴ See GLOBAL STATISTICS FOR INTERCOUNTRY ADOPTION, *supra* note 5.

¹³⁵ See CRC, *supra* note 9, art. 20; UN Alternative Care Guidelines, *supra* note 24.

¹³⁶ See GLOBAL STATISTICS FOR INTERCOUNTRY ADOPTION, *supra* note 5.

¹³⁷ Nicole Petrowski, Claudia Cappa, & Peter Gross, *Estimating the Number of Children in Formal Alternative Care: Challenges and Results*, 70 *Child Abuse & Neglect* 388-98 (Aug. 2017) [hereinafter *Estimating the Number of Children in Formal Alternative Care*], available at <https://doi.org/10.1016/j.chiabu.2016.11.026> (stating that “it is estimated that approximately 2.7 million children between the ages of 0 and 17 years could be living in institutional care worldwide.”).

years for which there is data.¹³⁸ Moratoria on intercountry adoption, whether temporary or even permanent, would not produce a statistically significant difference in the numbers of children in alternative care globally, even if one assumes—wrongly—that every child not placed internationally thereby would remain in formal alternative care.

The negative view of moratoria views each intercountry adoptive placement prevented as a harm to that child, regardless of whether it is a statistically significant harm overall. To the contrary, it is more likely that more children would be helped than harmed by such moratoria. Moratoria would most likely prevent a significant number of intercountry adoptive placements that violate international standards. Most likely, a significant proportion of those adoptions would have been situations where the child's separation from their family was induced by the availability of intercountry adoption, and/or was the result primarily of child laundering, poverty, or non-marital parents. Intercountry adoption in those cases would have exacerbated an unnecessary separation of a child from the child's family.

Moratoria would eliminate the “demand” pull of intercountry adoption, whereby children are removed from their families to satisfy the demand for children from receiving states and accompanying financial incentives for intermediaries.¹³⁹ Thus, moratoria would in most likely result in more children remaining with their families, even without more active family preservation efforts.¹⁴⁰

If implemented correctly, a moratoria on intercountry adoption would also refocus attention on active family preservation efforts, as well as greater attention to suitable domestic solutions.¹⁴¹ Thus, even as to the children who are denied intercountry adoptive placements due to a moratoria, it is likely that a significant number would end up in different, but entirely appropriate—even better—situations. It is an unfortunate kind of arrogance, which can be labeled neo-colonialist, to assume that children are always better off by being removed from their country of origin.¹⁴²

¹³⁸ *Adoption and Foster Care Analysis and Reporting System (AFCARS) FY 2018 Data*, THE AFCARS REPORT (Aug. 22, 2018) [hereinafter AFCARS FY 2018 Data], available at <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport26.pdf>.

¹³⁹ See Cantwell, *The Sale of Children*, *supra* note 7, at 39-40 (2017) (stating that “[t]he increasingly limited legal ‘supply’ of children for adoption abroad sets the scene for attempts in countries of origin . . . to provide that missing link of ‘opportunity.’ This is a context where illegal adoptions can flourish if effective action is not taken.”); UN *Special Rapporteur Report*, *supra* note 2 (stating “[i]ntercountry adoptions have been fueled by a demand from prospective adoptive parents in higher-income countries for children from lower-income countries . . . [which] has put major pressure on countries of origin with weak child protection systems and often led to illegal acts and illicit practices that have resulted in the sale of children and illegal intercountry adoptions.”); Kelly Condit-Shrestha, *South Korea and Adoptions Ends: Reexamining the Numbers and Historicizing Market Economies*, 6 ADOPTION & CULTURE 364-400, at 370 [hereinafter *Reexamining the Numbers of South Korean Adoptions*] (stating that “[a] new population of adoptable Korean children (the industry’s supply, if you will) was actively sought out to sustain Korea’s orphanages and adoption agencies (the industry’s central means of production and operation) and fulfill the institution’s American-consumer adoption demands.”).

¹⁴⁰ *Id.*

¹⁴¹ See CRC, *supra* note 9, art. 20, 21.

¹⁴² David M. Smolin, *Can the Center Hold? The Vulnerabilities of the Official Legal Regimen for Intercountry Adoption*, THE INTERCOUNTRY ADOPTION DEBATE: DIALOGUES ACROSS DISCIPLINES, 4 (2015) [hereinafter Smolin, *Can the Center Hold*], available at http://works.bepress.com/david_smolin/16/ (stating “[i]n one strand, intercountry

One of the ironies of illicit adoption practices is that they victimize additional children beyond those placed abroad. The prospects of large intercountry adoption fees can induce some orphanages to bring children into orphanages to effectively be a kind of catalogue of options for prospective adoptive parents.¹⁴³ The orphanages know only a small percentage will be sent abroad, but the financial benefits of the international placements nonetheless motivate a broader practice of building up an “orphan” population.¹⁴⁴ This is related also to the practice of orphanage trafficking, which is the practice of bringing children unnecessarily into residential care for the purpose of attracting donations from usually foreign donors.¹⁴⁵ Moratoria on intercountry adoption is thus one part of a broader agenda of preventing the unnecessary and harmful pulling of children into residential care for purposes of profit.

Those who presume that most intercountry adoption in the present system will be ethical and compatible with international standards under-estimate the difficulties inherent in intercountry adoption systems. Most intercountry adoptive placements connect nations that are economically disparate.¹⁴⁶ Countries of origin generally still have developing or transition economies and, like all nations, have significant numbers of children in need of state intervention for various reasons--but usually with completely inadequate resources.¹⁴⁷ In the face of often overwhelming needs of children and families, the question is how much in the way of attention and resources to place in the construction of a strong intercountry adoption system. Since that system helps comparatively few children, and is comparatively expensive to run correctly, the very existence of

adoption is viewed as a neocolonialist/postcolonial act that takes children from vulnerable and poor families, often from non-white racial or ethnic groups and often from nations that have been under colonial rule or neocolonial domination, and gives them to wealthy, predominately white families in rich nations who often had been involved in colonial rule or neocolonial domination.”); ORPHANED NATION, *supra* note 59 (discussing Korea as a nation which struggles to understand the effects of colonialism and neo-colonialism.); Arissa Hyung Jung Oh, *Into the Arms of America: The Korean Roots of International Adoption 2* (Ph.D. Dissertation, Department of History, UNIV. OF CHICAGO (Aug. 2008)) (analyzing the history and development of Korean adoption).

¹⁴³ See, e.g., *The Problem*, FORGET ME NOT – Australia, (last visited Aug. 5, 2020), available at <https://fmn.org.au/the-problem/> (“[m]illions of children have been taken from their families, trafficked into orphanages and used to generate funds.”); Kate Van Doore, *From Orphanhood to Trafficked: Examining Child Trafficking For The Purpose of Orphanages*, GRIFFITH LAW SCHOOL (Oct. 2018), available at [https://research-repository.griffith.edu.au/bitstream/handle/10072/382724/van%20Doore%2cKathryn Final%20Thesis redacted.pdf?sequence=1&isAllowed=y](https://research-repository.griffith.edu.au/bitstream/handle/10072/382724/van%20Doore%2cKathryn%20Final%20Thesis%20redacted.pdf?sequence=1&isAllowed=y).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*, at Chapter Two: *The Prevalence of Paper Orphaning in Developing States*, § II The Production of Paper Orphans: (“[i]t is well documented that many children in developing States are recruited from their families into orphanages for the purpose of exploitation and profit, a process known as ‘paper orphaning’ or ‘orphanage trafficking.’”).

¹⁴⁶ See Smolin, *Poverty* *supra* note 34; Smolin, *Can The Center Hold*, *supra* note 142, at 13 (“[t]he demand side of intercountry adoption creates a huge pull factor that could threaten to become the primary basis of intercountry adoption, particularly given the financial and power advantages of prospective adoptive parents in rich countries as compared to the economic and power vulnerabilities of billions of people living in developing and transition economies.”); *Note on the Financial Aspects of Intercountry Adoption*, HCCH (June 2014) [hereinafter HCCH NOTE ON THE FINANCIALS OF INTERCOUNTRY ADOPTION], available at https://assets.hcch.net/upload/wop/note33fa2015_en.pdf (stating “[i]nternational adoption involves amounts of money that may be disproportionately large in relation to developing countries’ economies.”).

¹⁴⁷ *Id.*

an intercountry system can sap resources and attention from other child welfare programs and interventions that benefit much larger numbers of children at lower cost.¹⁴⁸

Governments, adoptive parents, and NGO's in receiving states sometimes react to this problem of under-resourced intercountry adoption systems in countries of origin by providing extra resources and assistance.¹⁴⁹ However, it is precisely that extra assistance and support that can corrupt and undermine an intercountry adoption system, by creating incentives to steer children unnecessarily toward intercountry adoption.¹⁵⁰ Even extra aid given to care options other than intercountry adoption, if linked to intercountry adoption, can cause actors in states of origin to feel obligated to send children for international placement.¹⁵¹

Thus, it is exceedingly difficult to adequately resource the inherently expensive and complex intervention of intercountry adoption, without taking away resources from other, less expensive interventions that would help more children---and without corrupting the system through forms of assistance that have the effect of steering children unnecessarily toward intercountry adoption.¹⁵² Further, even when particular pathways of intercountry adoption manage to navigate these difficulties and conform to international standards, scaling up those pathways to larger numbers almost always invites corruption.¹⁵³ One can find heroic actors oblivious to financial incentives who will always put children first, but once intercountry adoption systems are scaled up those financial incentives corrupt good actors and attract bad actors.¹⁵⁴

The call for moratoria on intercountry adoption thus can be made in the hope that, in fact, far more children will be helped than harmed. Moratoria on intercountry adoption need not be based on any kind of political or ideological view of adoption or intercountry adoption. Moratoria on intercountry adoption is a rational response to reality in a child welfare and child right's context.

WHAT WOULD A FORMAL MORATORIA LOOK LIKE?

The basic concept of formal moratoria by states would be that intercountry adoption involving that state cease until and unless adequate systems are created to remedy past, and prevent and remedy future, illicit practices. These moratoria could be equally instituted by either states of origin or receiving states, for both have contributed equally, even if in different ways, to both past illicit practices and failures to remedy illicit practices.

¹⁴⁸ See GLOBAL STATISTICS FOR INTERCOUNTRY ADOPTION, *supra* note 5.

¹⁴⁹ See *What We Do*, AGAPE ASIA (last visited August 5, 2020), available at <https://www.agapeasia.org/what-we-do/>; *Love Without Boundaries* (last visited August 5, 2020), available at <https://www.lovewithoutboundaries.com/>.

¹⁵⁰ See HCCH NOTE ON THE FINANCIALS OF INTERCOUNTRY ADOPTION, *supra* note 146, at p. 26 (stating “[c]ontributions, especially when they are not transparent and well-regulated, and donations, may undermine the integrity of a safe adoption procedure. Among other things, they may have the effect of prioritizing intercountry adoption over national solutions and, therefore, they may result in insufficient support being provided to the birth family and an absence of, or deficient, investigations being undertaken into the adoptability of the child and / or the availability of domestic alternative care solutions.”).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See HCCH NOTE ON THE FINANCIALS OF INTERCOUNTRY ADOPTION, *supra* note 146.

¹⁵⁴ *Id.*

It would be helpful if states of origin and receiving states were able to act in cooperative and even coordinated ways, as to moratoria, investigations, remedies, and reform, as cooperation was one of the purposes and methodologies of the 1993 Hague Adoption Convention.¹⁵⁵ Indeed, the “term” co-operation is part of the official name of the Convention: “Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.”¹⁵⁶

It could also be helpful if receiving states were able to work in cooperative and coordinated ways, since they face similar challenges and have often had similar past deficits. Similarly, it would be helpful if states of origin, perhaps sometimes on a regional basis, were able to work in cooperative and coordinated ways, since they also face similar challenges and pressures.

There has sometimes been a misperception that the real deficits in intercountry adoption occur primarily or only in the countries of origin, with the receiving states at worst victims of misconduct in or by countries of origin. The tendency to label adoption scandals---as this author has done---by the place of origin of the children, may have unintentionally facilitated this misperception.¹⁵⁷ However, receiving states are actually often the true origin of systemic illicit practices, because it is receiving states that create undue pressure and demand for children with accompanying monetary incentives that corrupt adoption systems.¹⁵⁸

Ultimately, each state is responsible for its own conduct and adherence to international standards. Hence, moratoria should be instituted even if other states do not choose to co-operate as to moratoria, investigations, remedies, or reforms. Indeed, the refusal of states to cooperate as to moratoria, investigations, remedies, and reforms would in itself suggest a further need for moratoria. If states cannot cooperate as to moratoria, investigations, remedies, and reforms the requisite cooperation to process intercountry adoptions is also lacking. One cannot have an intercountry adoption system where one purportedly cooperates to conduct adoptions according to international standards, but then is unwilling to cooperate as to those adoptions which violated such standards. Such a system of “cooperation” would be an absurdity.

It must also be stressed that a system of cooperation where each state simply informs the other state that everything was done correctly, even when it was not, would undermine rather than effectuate the system of cooperation envisioned by the 1993 Hague Adoption Convention.¹⁵⁹ The 1993 Hague Adoption Convention was not intended to be a “see no evil” pact whereby each state assures the other that all is well.¹⁶⁰ Each state is responsible for determining whether each adoption is ethical and compatible with international standards, including determining whether documents or assertions from another state are sufficiently reliable. Hence, if there are indications that children from a particular situation were not truly adoptable, a receiving state must take account of such regardless of assurances from the state of origin.¹⁶¹ Similarly, if there are

¹⁵⁵ See Hague Convention, *supra* note 8.

¹⁵⁶ *Id.*

¹⁵⁷ See Smolin, *Indian Adoption Scandals*, *supra* note 75; Smolin, *Child Laundering*, *supra* note 3.

¹⁵⁸ See HCCH NOTE ON THE FINANCIALS OF INTERCOUNTRY ADOPTION, *supra* note 146; Smolin, *Can the Center Hold*, *supra* note 142.

¹⁵⁹ See Loibl, *Transnational Illegal Adoption Market*, *supra* note 28; Hague Convention, *supra* note 8.

¹⁶⁰ *Id.*

¹⁶¹ See Loibl, *Transnational Illegal Adoption Market*, *supra* note 28.

indications that inappropriate demands or financial incentives are arising from receiving states, countries of origin should take account of that, no matter how organized and purportedly reliable the receiving state may believe itself to be.¹⁶²

States instituting moratoria would necessarily have to decide the impact on cases already in process. It would be reasonable to allow intercountry adoptions that were almost completed, and perhaps delayed due to COVID-19, to potentially be completed. Under current circumstances, it might be possible to provide extra scrutiny to any such completions of adoption. Once a substantial amount of time has been spent developing a life plan for a particular child, it may be prudent to follow through with it, so long as it meets ethical and legal standards for intercountry adoption---which extra scrutiny could help facilitate. In addition, it may not be worth fighting over these in-process cases, for such could distract attention from the primary issues of stopping future adoptions until and unless there are systems created for addressing the past.

Moratoria should certainly mean that no new cases of intercountry adoption are put into motion or process during the moratoria. As noted above, in practice only a tiny percentage of the categories of orphans and vulnerable children are adopted internationally, and hence this moratoria would not in practice change anything regarding the options put in place for the vast majority of children. Of course it is hoped that the process of reviewing systems would eventually lead to improvements in alternative care options for all children, not just for the few who would have been placed internationally.¹⁶³

Moratoria would not necessarily impact adoptions by foreign nationals actually resident in other nations for significant periods of time, who use the domestic adoption system in which they are living to conduct those adoptions, and who plan to live in the child's country with the child for significant periods of time after the adoption. In addition, the complex issue of extended family members adopting relatives across international boundaries, could also be excluded from moratoria. Moratoria would be imposed as to the practice of residents of one country adopting unrelated children residing in a different country.

FULL MORATORIA OR PARTIAL MORATORIA?

Several active countries of origin have over time purportedly improved their systems to the point of meeting international standards. Some would include in this list the Philippines,¹⁶⁴ and some of the Latin American countries after implementation of the 1993 HCIA.¹⁶⁵ While it is difficult to fully evaluate these claims, claims of substantial improvement in specific national systems are plausible. For the most part, such improvements pertain to present and recent practices, and do not include the provision of remedies for those impacted by prior illicit practices.

¹⁶² See Smolin, *Can the Center Hold*, *supra* note 142.

¹⁶³ See UN Alternative Care Guidelines, *supra* note 24.

¹⁶⁴ See The Schuster Inst. for Investigative Journalism, *News Reports of Adoption Practice in the Philippines*, BRANDEIS UNIV. (last page update: Feb. 23, 2011) (last visited Sep. 29, 2020), available at <https://www.brandeis.edu/investigate/adoption/philippines.html> (noting that many experts praise the Philippine intercountry adoption system as “exemplary”).

¹⁶⁵ See, e.g., Smolin, *Hague Convention*, *supra* note 14, at pages 484-486.

This lack of remedies for the past is significant, since some of these nations---particularly those in Latin America---were particularly implicated in illicit practices in prior decades.¹⁶⁶

Based upon this perception of substantial improvement in some intercountry adoption systems, some might propose that there be moratoria only in regard to particularly troubled nations, or at least that the “best” national adoption systems be excluded from moratoria. Thus, a receiving state might choose to impose moratoria only in relationship to some countries of origin, and not as to others viewed as more reliable. A country of origin might choose to impose moratoria only in relationship to particular receiving states with a history of undermining international standards through the allowance of unregulated and large monetary incentives and strong demands for children.

Properly done, these lesser forms of moratoria would lead to a much reduced intercountry adoption system, for the receiving states and countries of origin with the highest numbers of intercountry adoptions have often been the worst offenders. For instance, the United States has been the largest receiving state for decades but also has done more than any other significant receiving state to undermine international standards.¹⁶⁷ Similarly, most of the top countries of origin of the last fifteen years have been significantly involved with practices that violate international standards within that time period, and not merely in the distant past.¹⁶⁸ For example, China has been the leading country of origin for many years and was considered a model country of origin, until particular scandals caused deeper examinations exposing an intercountry adoption system with systemic problems.¹⁶⁹ A similar narrative could be constructed for South Korea, which for a period of time was viewed as a leading country of origin and a model system, until deeper examinations showed systemic violations of international standards.¹⁷⁰ By contrast, most of the countries of origin which plausibly have significantly improved systems send only modest or moderate numbers of mostly older children, sibling groups, and “special needs” children for intercountry adoption. Hence, properly selected, selective moratoria would very significantly reduce intercountry adoptions.

This author is a pragmatist, and thus views selective moratoria, if properly administered, as better than no moratoria. However, such a selective approach has dangers which should be considered. The first danger is that selective moratoria would be based primarily on international relations and political considerations rather than on adherence to international standards related to adoption. Selective moratoria involve an implicit or even explicit accusation of wrongdoing against specific nations, and thus are more likely to create diplomatic issues than full moratoria. In general, for nations, intercountry adoption is an insignificant matter as compared with the importance of maintaining positive relationships with other nations, particularly nations viewed as

¹⁶⁶ *Id.*; see also The Schuster Inst. for Investigative Journalism, *News Reports of Adoption Irregularities in Columbia*, BRANDEIS UNIV. (last page update: Feb. 22, 2011) (last visited Sep. 29, 2020), available at <https://www.brandeis.edu/investigate/adoption/colombia.html>.

¹⁶⁷ See Smolin, *Corrupting Influence*, *supra* note 58.

¹⁶⁸ See *supra* notes and accompanying text.

¹⁶⁹ See Meier, *Sold Into Adoption*, *supra* note 46; Smolin, *The Missing Girls of China*, *supra* note 46; Stuy, *Open Secret*, *supra* note 46; Demick, *Chinese Babies Stolen By Officials for Foreign Adoption*, *supra* note 46; Loyd, *China's Lost Children*, *supra* note 46; Goodman, *Stealing Babies for Adoption*, *supra* note 46.

¹⁷⁰ See *supra* notes 55, 59 and accompanying text.

powerful or significant. Hence, it seems unlikely, in practice, that selective moratoria would actually be implemented properly. To put the matter concretely, would nations really be willing to selectively apply moratoria to powerful nations like China and the United States, while exempting the Philippines and Australia?

The second danger of selective moratoria is that it would fail to provide the kind of reckoning over the history of intercountry adoption that is necessary. Nations need time to consider whether intercountry adoption does more harm than good, and hence whether or not it should continue. Selective moratoria may not provide the right context for such an overdue and necessary reckoning. In addition, countries like Columbia with purportedly much improved systems, have never offered real remedies and accountability for the decades of prior illicit and unethical practice---and the receiving state governments involved also have failed to provide remedies and accountability for their roles in these older Columbian adoptions.¹⁷¹ In the absence of full moratoria, such a time of accountability and remedy may never occur.

WHAT WOULD BE THE CONDITIONS FOR RESUMING INTERCOUNTRY ADOPTION?

Each state would have to determine its own exact criteria for removing the moratoria and resuming intercountry adoption. In general, however, the following guidelines would be relevant:

- (1) A system for providing remedies for both individual cases and systemic patterns of abuse practices would have to be put in place. That system would have to have significantly begun the work of addressing past cases, creating a momentum that would continue.
- (2) Out of that experience of addressing remedies for the past, changes to both domestic and intercountry adoption systems should be addressed.
- (3) The process of addressing the past should inform the decision of how, and whether, to re-open intercountry adoptions—including the selection of which other states to partner with if intercountry adoption is re-opened.
- (4) In addressing the possibility of re-opening intercountry adoption, the question of the various models of adoption should be addressed. Many of the harms created by the intercountry adoption system, and many of the obstacles to remedies for past abuse, have been occasioned by the favoritism of the intercountry adoption system for full severance adoption. That favoritism should be re-examined.

CONCLUSION: A PERSONAL NOTE

In 1999, Desiree Smolin and I received information indicating that our recently-arrived adoptive daughters may have been stolen from their family, with whom they had spent most of

¹⁷¹ See Richard McColl, *Locating Columbia's Stolen Children*, COLUMBIA REPORTS (June 21, 2017), available at <https://colombiareports.com/locating-colombias-stolen-children/>; Christian Tribowski, *Children for Trade? Transnational Adoption and a Colombian Scandal, governance across borders* (Aug. 16, 2013), available at <https://governancexborders.com/2013/08/16/children-for-trade-transnational-adoptions-and-a-colombian-scandal/>.

their childhood.¹⁷² Over the next years it became clear that the governments and agencies involved felt no duty to investigate or respond to this situation. People in the adoption community to whom we turned for advice mostly criticized us for taking seriously the possibility that the children were stolen from their family. A psychologist told us that it would be wrong to return the children to their mother---as yet unlocated---even if they were stolen, because their country of birth mistreated females. The agency social worker told us that our adoptive daughters did not need to know whether they had been stolen from their mother---the truth of what had happened did not matter, but only what they believed mattered. We were made to feel crazy for caring about whether our adoptive daughters had been stolen from their mother, as though there was something wrong with us.

In 2004-2006, through the assistance of Gita Ramaswamy, a social activist in India, we were able to locate the first family and achieve reunions. We were able then to confirm, after more than six years, that what we feared was true: our adoptive daughters were victims of child laundering, having been obtained from their family under the pretense of temporary care for purposes of board and education, without any intent or need to relinquish or abandon them. Indeed, the “orphanage” had actively recruited them for the purpose of making money from intercountry adoption fees, in full awareness that the mother did not intend to place them for adoption; the orphanage continued with adoption plans despite the mother’s repeated visits back to the orphanage to try to see them and get them back---visits that occurred before the children left the country. Their mother was turned away with the statement that she could not get her children back unless she paid a large sum to reimburse the costs of their care---an amount they knew would be far beyond her capacity to pay.

Recently, it occurred to me that despite my very privileged situation, I have never been able to secure anything in remedial action from any of the governments or agencies involved. Indeed, my access and privilege are nearly unique: I am a law professor, who has presented about this experience before representatives of 70 nations at the Hague Conference on Private International Law, to members of the United States Central Authority over intercountry adoption, and at Harvard Law School. I have communicated directly with the relevant authorities in the two nations. If I cannot achieve a remedy from governments or agencies, how likely is it that less privileged individuals would be able to do so?

From this personal experience, I have learned that individual efforts to investigate and secure reunions, even when they have some success, are not nearly enough in the context of illicit adoption practices. Without governmental and societal acknowledgement of wrongs as wrongs, adoption triad members live in an emotionally traumatized and ethically compromised contexts. When family ties are formed by unacknowledged crimes the project of family life is fatally undermined. The temptation is overwhelming to reconcile these discordant realities by normalizing child stealing. After all---if neither governments nor adoption agencies nor society

¹⁷² On our personal adoption story, see NPR, *An Adoption Gone Wrong*, 7/24/2007, available at [https://www.npr.org/2007/07/24/12185524/an-adoption-gone-wrong#:~:text=](https://www.npr.org/2007/07/24/12185524/an-adoption-gone-wrong#:~:text=;); see ICAV Perspective Paper, *supra* note 97.

perceive a need to investigate or remedy or address the crimes involved in an adoption formed by child stealing---does that situation not by default become “normal”?

Over more than twenty years, I have repeatedly been told that the past cannot be addressed, either in my family’s case or that of many others, but “we will do better in the future.” As the years passed, and that promised “future” included new adoption scandals in so many nations---Guatemala, Cambodia, China, Ethiopia, Uganda, DRC, Nepal, India, etc.---it has become clear to me that this promise of “we will do better in the future” is impossible without a reckoning of the past.

Through these many years I have resisted commenting on the question of when and whether adoptions should be stopped, in light of scandals and revelations of illicit adoption practices. I have concentrated instead on furthering international and domestic efforts to prevent and remedy illicit adoption practices.

I have finally realized that moratoria are a necessary part of the agenda of prevention and remedy of illicit intercountry adoption practices. Countries, like Guatemala, that have taken seriously the task of accountability for past illicit adoption practices have instituted moratoria. Even the United States has instituted moratoria in relationship to specific countries, like Cambodia and Vietnam. A call for broader moratoria is based on the evidence that violation of international standards in intercountry adoption is a much more widespread problem than has been recognized. A call for broader moratoria is also based on the glaring absence of remedies for the vast majority of instances of illicit adoption practices.

Enough is enough. The time for accountability is overdue. Let decisions about the future of intercountry adoption finally be made in full view of the past. Let the future of intercountry adoption depend on the willingness to acknowledge and remedy, so far as is possible, the past.