2024

Introduction: Out of the Fog: Responses and Remedies for the Illegal Separation of Children from their Families in the Context of Intercountry Adoption

David M. Smolin

Out of the Fog: Responses and Remedies for the Illegal Separation of Children from their Families in the Context of Intercountry Adoption

David M. Smolin

The Fog and Confusion Surrounding Discussions of Illegal Adoption

Adoptee literature speaks of the process of coming out of the fog, which can be described as moving from a naive and entirely positive view of adoption to a more realistic perspective that acknowledges the inherent loss and pain in adoption, including separation from the first family.[1] I am using the phrase in a related but different way.

First, the fog about adoption envelopes not only adoptees but also adoptive parents, sometimes even first families, and also the general society. The fog has enveloped us all within the romanticized mythology of adoption as a saving, selfless act of rescue, making it difficult for us to live with and legislate about real adoption with all of its multi-layered complexities.

Second, even for those who acknowledge the inherent emotions and complexities of adoption and thus have moved out of what is commonly termed the adoption fog, there is often scant or no awareness of the prevalence of illegal adoption. We are enveloped within the fog of presuming that adoption systems, including intercountry adoption systems, have generally operated in accordance with legal and ethical standards. Given the necessary governmental approvals in two countries, the involvement of "adoption professionals," applicable international treaties and specialized international bodies, and various bureaucratic processes and seemingly endless paperwork, many presume that seriously illegal or unethical practices are kept to a minimum. This is an additional level of ignorance and confusion, I would argue, that has made it very difficult to discuss, enact, and implement remedies and responses to illegal and unethical adoptions.

Dispelling the fog concerning illegal adoptions is not about taking a negative stance toward intercountry adoption as a political or ideological matter, but rather about realizing the degree to which systemic violations of legal and ethical standards have occurred in intercountry adoption systems over the entire modern history of intercountry adoption. Dispelling the fog is about using that awareness and accompanying clarity as a foundation for action and narratives concerning remedies and responses.

---

[1] See, e.g., L. MacFarquhar, 'Living in Adoption's Emotional Aftermath', *New Yorker*, 3 April 2023, https://www.newyorker.com/magazine/2023/04/10/living-in-adoptions-emotional-aftermath; S.F. Branco, J. Kim, G. Newton, S. Kripa Cooper-Lewter and P. O'Loughlin, 'Out of the Fog and into Consciousness: A Model of Adoptee Awareness', *ICAV*, 2022, https://intercountryadopteevoices.com/wp-content/uploads/2022/06/adoptee-consciousness-model.pdf.

I have spent nearly a quarter-century personally and professionally responding to illegal intercountry adoption.[2] This chapter is a reflection on identifying and overcoming the severe obstacles to the provision of remedies for illegal intercountry adoption, based on a clear and realistic assessment of those barriers and obstacles.

Out of the Fog: Reconceptualizing Illegal Adoption as usually involving the Illegal Separation of Children from their Families

A foundational step in moving out of the fog is reconceptualizing illegal adoption as usually involving the illegal separation of children from their families.[3] While not all illegal adoptions involve this wrong, the most important – and in many instances the most widespread – forms of illegal adoption commonly do involve the illegal and wrongful separation of a child from the child's family. Illegally separating children from families is a wrong easily understandable to the general public. Parents normally have an intrinsic fear of losing their children. Modern societies have created organized response systems that treat a missing or stolen child as an emergency requiring an immediate response. The fact that not all missing or stolen children receive the same publicity and effort – often based on race, ethnicity, or socioeconomic status – is understood broadly as a wrong to be rectified, not a difference to be embraced.[4] In order to dispel the fog, in addressing illegal adoptions we should constantly speak of the illegal and indeed cruel separation of children from their families.

Second, once the focus is on illegal separation of children from their families, the opportunity arises to explain how adoption systems incentivize, facilitate, and hide such wrongs. Adoption systems have unfortunately caused the needless separation of children from their families.[5] Adoption systems have unfortunately exacerbated rather than remedied separations of children from their families that otherwise could have been remedied.[6] Intercountry adoption further exacerbates separations through the geographical, linguistic, and cultural distances it creates

---

[2] Many of my writings on intercountry adoption are available for free download here: https://works.bepress.com/david_smolin/.
[3] UN Human Rights Treaty Bodies, Joint Statement on illegal intercountry adoptions, 29 September, para 3.
[4] G. Barton, 'What happens when a child disappears in American', *CNN*, 26 August 2022, https://www.usatoday.com/in-depth/news/investigations/2022/08/26/racial-disparities-abound-efforts-find-missing-children/10331706002/.
[5] See, e.g., Committee Investigating Intercountry Adoption, *Consideration, analysis, conclusions, recommendations, and summary*, February 2021, https://www.government.nl/documents/reports/2021/02/08/summary-consideration-analysis-conclusions-recommendations; see Chapters 2, 3, 4, 5, 6, 7, 8, 9; E. Loibl, *The transnational Illegal Adoption Market: A Criminological Study of the German and Dutch Intercountry Adoption Systems*, The Hague, Eleven International, 2019; D.M. Smolin, Child Laundering: How the Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping, and Stealing Children, *Wayne Law Review*, Vol. 52, No. 1, 2006, pp. 113-200.
[6] See, e.g., S.A. Jafri, 'Missing girl among children rescued in Tandur', *Rediff*, 1 May 2001, https://m.rediff.com/news/2001/may/01ap1.htm; D.M. Smolin, 'The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals', *Seton Hall Law Review*, Vol. 35, 2004, pp. 403-493; Smolin, 2006, pp. 121-122.

between children and their original families.[7] Such an understanding counters the common view of adoption as an inherent good, and sets the premise for limiting, reforming, and regulating adoption.

Third, a focus on the illegal separation of children from their families clarifies the question of remedies. Where illegal adoptions include an illegal separation of children from their families, the remedy normally should involve a restoration of that relationship.[8] Yet, depending on the facts of the case, remedies for illegal adoptions should also take into account the time and events between the separation and the reunion, including the relationships the child has formed due to the adoption. Remedies commonly should be "additive" rather than "subtractive," or "both/and" remedies, meaning that remedies should acknowledge the importance of the child's relationships with both the original family and the adoptive family, as well as the child's complex cultural, racial, and national identities. In practice, remedying illegal adoptions turns out to be an exceedingly complex process over time.[9]

Fourth, a clear focus on how intercountry adoption systems have incentivized, facilitated, exacerbated, and hidden the illegal and unethical separation of children from families, in combination with the grave difficulties in supplying even partially effective remedies, underscores the case for ending the modern era of intercountry adoption. On a systemic level, the harm to benefit ratio of intercountry adoption is much worse than has been recognized. Most interventions with such a poor record as to systemic abuses over such a long period of time would have been discontinued long ago. The difficulties involved in even partial remedies underscore this need to end the modern era of intercountry adoption.[10]

Fifth, reviewing the accuracy of past predictions about intercountry adoption systems, I will make new predictions on how recent efforts to remedy illegal intercountry adoptions will likely proceed. While of course no one can predict the future, it is often possible to make reasonable hypotheses about the future based on the past and on the nature of the systems involved. These predictions can serve as an important reality check.

Legal Premise: Children Normally have the Right to be raised by their Original Family

---

[7] Compare United Nations Convention on the Rights of the Child (1989) 1577 UNTS 3, Art. 20(3): "due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background."

[8] See Art. 8(2) UNCRC; UN Human Rights Treaty Bodies, Joint Statement on illegal intercountry adoptions, 29 September 2022, para. 15-18.

[9] On the complexities of reunions in general, and the complexity of kinship post reunion and long term, see G. Clapton, 'Close Relations? The Long-Term Outcomes of Adoption Reunions', *Genealogy*, 2018, Vol. 2, No. 4, p. 41; L. Long, ICAV perspective paper: The Experiences and Views of Intercountry & Transracial Adoptees', July 2016, https://intercountryadopteevoices.com/wp-content/uploads/2016/07/search-and-reunion-icav-perspectives-july-2016-v12.pdf.

[10] I make the case at greater length for ending the modern era of intercountry adoption in D.M. Smolin, 'The Legal Mandate for Ending the Modern Era of Intercountry Adoption', *in* N. Lowe and C. Fenton-Glynn (eds.), *Research Handbook on Adoption Law*, Cheltenham, UK, Edward Elgar, 2023, pp. 384-407, draft version available at https://works.bepress.com/david_smolin/24/.

As a matter of children's rights, the child has a right to "know and be cared for by his or her parents" (Art. 7(1) UNCRC). The child also has rights to "a name" and "nationality" and to "preserve his or her identity, including nationality, name, and family relations […]." (Art. 8(1) UNCRC). Hence, many separations of a child from parents violate the rights of the child and require remedies; indeed, the UNCRC states: "Where a child is illegally deprived of some or all of the elements of his or her identity, State Parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity." (Art. 8(2)). As will be discussed later, Article 9 requires further actions from the State where the separation results from "any action initiated by a State Party […]", and Article 10 requires States to accommodate international travel for purposes of "family unification."

As a technical matter, the right of the child to "know and be cared for by his or her parents" is limited by two contingencies: "as far as possible" (Art. 7(1) UNCRC) and the "best interests of the child" (Art. 3(1) and Art. 20-21 UNCRC). These are explained below.

"As far as possible"

Under the UNCRC, where it is not "possible" for the child to be raised by their original family, the child's rights have not been deprived when the child is not raised by the original family. The African Charter on the Rights and Welfare of the Child (hereinafter ACRWC) has a similar provision, stating that "[e]very child […] shall, whenever possible, have the right to reside with his or her parents." (Art. 19(1)). These provisions make it important to distinguish between a tragic loss, and the deprivation of a right.

Practically speaking, there are some tragic circumstances that cannot be avoided by either the state or society, and thus since no one has committed a deprivation of a right, there is no deprivation of a right. For example, if the parents die from an illness, despite receiving appropriate medical care, and thus neither state or society or any individual is liable, then there is great loss but technically no rights deprivation. Psychologically, of course, loss occurs regardless of whether there is a rights deprivation.

The distinction is foundational to the legality of adoption. Where it was not possible for the child to remain and be raised by their family, and it is not possible to remedy that separation, a subsequent adoption may be legal. On the other hand, an adoption built on top of an illegal separation that could have been avoided or remedied is an illegal adoption, which constitutes the deprivation of the rights of the child. An adoption built upon an illegal separation is an illegal adoption no matter how many legal procedures were followed at later stages of the adoption process, and even if the adoptive family was unaware of the illegal separation – although the adoptive family would not be legally or ethically responsible for such illegality if the adoptive family neither created nor knew of the illegal separation. An adoption built upon an illegal adoption exacerbates the deprivation of the child's rights in relationship to the original family, because the adoption makes it more difficult to remedy the illegal separation.

"Best interests of the child"

The principle of the best interests of the child is often mis-understood. As Nigel Cantwell has pointed out, the term "best interests of the child" can be and has been mis-applied to justify deprivations of the rights of the child, and indeed, of the *human rights* of the child.[11] To the contrary, the term best interests of the child should be understood as a shorthand for respecting all of the rights of the child.[12] Beyond that, a best interests of the child determination is an important procedure for making what are often fact-intensive and complex decisions about the child.[13]

The term "best interests of the child" also embodies the balancing between the rights of the child and the rights of adults implicated in specific situations. Hence, the UNCRC specifies that "in all actions concerning children […] the best interests of the child shall be a primary consideration." (Art. 3(1)). This "primary consideration" test prioritizes the rights of the child while leaving significant room for consideration of the rights of others, including adults, who may be impacted by decisions.[14] By contrast, the UNCRC insists that, as to adoption, the best interests of the child should be "the paramount consideration" (Art. 21). "The paramount consideration" as compared to "a primary consideration" elevates the priority of the rights of the child as compared to adults[15] and counters longstanding tendencies to create and employ adoption for the interests of adults, such as the wishes of adults for children.[16] This tendency to create adoption systems in order to fulfil the wishes and demands of adults continues all the way to the present day, despite the contrary provisions of the UNCRC.[17]

The UNCRC refers specifically to children "in whose best interests cannot be allowed to remain in [his or her family environment]." (Art. 20(1)). This standard follows immediately after Article 19 concerning abuse, neglect, negligent treatment, exploitation and sexual abuse, and in context refers to circumstances where the life and safety of a child are seriously endangered (see also Art. 25, 34, 35, 36 UNCRC). Certainly the UNCRC does not permit removal of a child merely because the state might view another family as "better" or "best" for

---

[11] N. Cantwell, *The Best Interests of the Child in Intercountry Adoption*, UNICEF, 2014, https://www.unicef-irc.org/publications/712-the-best-interests-of-the-child-in-intercountry-adoption.html.
[12] Cantwell, 2014, pp. 54, 60, 81; United Nations Committee on the Rights of the Child, 'General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)', 29 May 2013, CRC/C/GC/14, para. 4.
[13] Cantwell, 2014, pp. 54-60; United Nations Committee on the Rights of the Child, 'General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)', 29 May 2013, CRC/C/GC/14, pp. 12-20.
[14] United Nations Committee on the Rights of the Child, 'General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)', 29 May 2013, CRC/C/GC/14, para. 36-40.
[15] Ibid., para. 38.
[16] C. Baglietto, N. Cantwell and M. Dambach, 'Responding to illegal adoptions: A professional handbook', *International Social Services*, 2016, https://fiom.nl/sites/default/files/responding-to-illegal-adoptions-a-professional-handbook-iss-april-2016.pdf, sections 7.1.2b, c, d.
[17] See, e.g., Committee Investigating Intercountry Adoption, *Consideration, analysis, conclusions, recommendations, and summary*, February 2021, https://www.government.nl/documents/reports/2021/02/08/summary-consideration-analysis-conclusions-recommendations, pp. 8-11 (acknowledging that, despite invoking constantly the best interests of the child, in practice intercountry system primarily served adoptive parents and the demand for children).

a child as compared to the original family. To the contrary, from a child rights point of the view, absent significant harm, the "best interests" of a child reside in being cared for and raised by the child's original family, particularly given the child's identity rights (see Art. 7, 8, 9 UNCRC; Art. 18, 19, 20 ACRWC).

This understanding of the concept of "best interests of a child" is embedded in a child rights and human rights understanding of the relationship of children to their parents and families. From a child rights perspective, children do *not* have a right to be raised in "a family," but rather each child has the right to know and be cared for by their specific family (see Art. 7, 8, 9 UNCRC; Art. 18, 19, 20 ACRWC). Children and families are not fungible and parent-child relationships are not like dating relationships. There is a certain "givenness" to original parent-child relationships that is permanent, no matter what happens subsequently; the relationship is literally written into our bodies as DNA reveals. Children of course are not clones of their parents and have an original and unique humanity; but that humanity arises in and from specific relationships.

The recognition of the importance of parent-child and family bonds are not a mere sentiment and are not based on a romanticized understanding of family life. Family life indeed is often difficult and a mix of beautiful, mundane, foundational, frustrating, and toxic. Nonetheless, procreation and family life are constitutive of our humanity; family life is where we come from in the literal physical sense of human procreation, genetic and gestational, as well as in the bonding in early childhood necessary to normal development.[18] We may in adult life grow away from our original families and parts of our original identities, but the very significance of those choices is based on the constitutive and formative nature of family life for human development. We are never blank slates insofar as we are human. Our stories always begin somewhere and with specific parents and family. To treat children as fungible objects that can simply be re-matched at will to a different family is to strip the child of a part of the human dignity that is the foundation of human rights, as it fails to recognize the child as a unique person.[19]

Hence, the "best interests" exception to the child's right to be cared for and raised by the original parents and family is narrow.

Adoption, Children's Rights, and the Separation of Children from Families

[18] See, e.g., R. Karen, *Becoming Attached: First Relationships and How They Shape Our Capacity to Love*, Oxford University Press, 1998; B. van der Kolk, *The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma*, Penguin Books, 2014, pp. 107-124; M. van IJzendoorn, 'Attachment at an Early Age (0-5) and its Impact on Children's Development', *Encyclopedia on Early Child Development,* September 2019, Rev. ed.

[19] Universal Declaration of Human Rights, preamble & Art. 1; C. Baglietto, L. Bordier, M. Dambach and C. Jeannin, *Preserving "Family Relations": An Essential Feature of the Child's Right to Identity,* Geneva, Switzerland, Child Identity Protection, 2022, https://child-identity.org/images/files/CHIP-Preserving-Family-Relations-EN.pdf.

Adoption – particularly full adoption – is a legal transfer of a child from the original family to the adoptive family and hence involves a modification of identity.[20] Hence, every adoption involves a significant loss. The child loses the identity and experience of being raised by (or continuing to be raised by) the original family; the original family loses the experience of raising the child (or continuing to raise the child) within the original nuclear and extended family.[21]

Adoption in this sense is not so much "lesser" as it is additive; adoption necessarily builds upon the procreative acts and family life that preceded the adoption. Whoever "parents" a child day to day and over a significant portion of childhood and adolescence also becomes constitutive of the identity and humanity of the child, as human beings developmentally require parenting and family life in order to mature into mature adulthood. To be adopted in that sense is intrinsically complex and multi-layered. Everyone who procreated and gestated and loved and parented that child counts; nothing goes to waste and all of it matters. Although children can be resilient to different degrees, the fact that it all counts means that deficits all matter as well, including the losses intrinsic to adoption and neglect or abuse at any stage.[22]

Adoptive parenting then is also "real parenting." However, to the degree that adoption is based on an understanding of negating and completely replacing all that went before, adoption itself becomes a self-contradiction and contrary to human nature. Such self-contradiction complicates the life and development of adoptees, who are asked to deny a part of who they are as the price for the family life of the present and future that they need and enjoy. Too often, adoption has been conceived of as a Faustian bargain in which adoptees must betray either original or adoptive family; to the degree adoptees care about both the original and adoptive family they are understood to be betraying both.[23]

Adoption, however, can be lived in a more open and additive way. Rather than subtracting the original family, adoption as additive self-consciously recognizes and builds on the original family's foundational roles. Adoption when done in this way can be legal and compatible with the rights and human dignity of the adoptee, so long as the prior separation of the child from the original family was legal and ethical.

Parental Responsibility and Rights and the Separation of Children from Families

---

[20] M. Dambach and C. Jeannin, (2021). Policy Brief 1: Respecting the child's right to identity in intercountry adoption. Geneva, Switzerland: Child Identity Protection (2021), available at https://child-identity.org/images/files/CHIP-Policy-Brief-Adoption-EN-V2.pdf.

[21] Child Welfare Information Gateway, Helping Adopted Children Cope with Grief and Loss, https://www.childwelfare.gov/topics/adoption/adopt-parenting/helping/ ("Loss is a central theme to adoption, and it is experienced by all constellation members.")

[22] See, e.g., H.D. Grotevant, A.Y.H. Lo, L. Fiorenzo and N.D. Dunbar, 'Adoptive Identity and Adjustment from Adolescence to Emerging Adulthood: A Person-Centered Approach', *Dev Psychol*., 2017, Vol. 53, No. 11, pp. 2195-2204, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5679095/; Intercountry Adoptee Voices (ICAV), various resources about identity, https://intercountryadopteevoices.com/?s=identity.

[23] See, e.g., B.J. Lifton, *Twice Born: Memoirs of an Adopted Daughter*, Other Press, 1975/2006; L. Dusky, *Hole in My Heart*, Leto Media, 2015/2022.

Parental Rights and Responsibilities

Parents and families also have rights – and responsibilities – in relationship to their children. Hence, the separation of a child from the child's original family also can constitute serious deprivations of the rights of parents and families, as recognized in the September 2022 Joint Statement on illegal intercountry adoptions (Joint Statement).[24] The Joint Statement has particular weight, having been issued by the Committee on the Rights of the Child (hereinafter CRC), the Committee on Enforced Disappearances (hereinafter CED), the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, the Special Rapporteur on the Sale and Sexual Exploitation of Children, the Special Rapporteur on Trafficking in Persons, and the Working Group on Enforced or Involuntary Disappearances.[25] The Joint Statement specified that both the rights of the child and "the right of family to protection" are violated by "illegal intercountry adoptions."[26]

The rights of family to protection, and allied rights and responsibilities of parents in relationship to their children, are recognized in a variety of modern human rights instruments. Thus, the UNCRC, while of course focused on children's rights, acknowledges that: "[…] both parents have common responsibilities for the upbringing and development of the child. Parents […] have the primary responsibility for the upbringing and development of the child." (Art. 18) Further, States are obligated to "render appropriate assistance to parents […] in the performance of their child-rearing responsibilities." (Art. 18(2)).

Indeed, the modern human rights tradition from the beginning focused on the family and thus, explicitly or implicitly, the rights and responsibilities of parents. The Universal Declaration of Human Rights (hereinafter UDHR)[27] provided that "[n]o one shall be subjected to arbitrary interference with his privacy, family, home […]" (Art. 12). Further, "men and women of full age" have "the right to marry and to found a family" (Art. 16(1) UDHR). "Motherhood and childhood are entitled to special care and assistance." (Art. 25(2) UDHR). These rights are founded in the recognition that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State." (Art. 16(3) UDHR). While developments as to gender and sexual orientation may make some of this language controversial today, the basic direction and meaning is still foundational. Further, if the other rights recognized in the UDHR were successfully implemented – rights as to the standard of living "including food, clothing, housing, and medical care" (Art. 25), employment, just remuneration, and just working conditions (Art. 23), and "reasonable limitation of working hours," (Art. 25), the capacity of parents and families to care for and raise their children would be much improved.

---

[24] UN Human Rights Treaty Bodies, Joint Statement on Illegal Intercountry Adoptions, 29 September 2022.
[25] Ibid., para 1.
[26] Ibid., para. 3.
UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, G.A. Res. 217 A (III), https://www.ohchr.org/en/human-rights/universal-declaration/translations/english.

The protection of the family is echoed in very similar language in the International Covenant on Civil and Political Rights (hereinafter ICCPR) (see Art. 23) and in the International Covenant on Economic, Social, and Cultural Rights (hereinafter ICESCR) (see Art. 10), which both re-state the foundational view of the family as the "natural and fundamental group unit of society."[28] The ICCPR restates the language as to the right to marry and found a family (Art. 23), while the ICESCR confirms the obligation of special protections to mothers (Art. 10).

Regional human rights instruments also focus on the protection of the family. The European Convention on Human Rights requires respect for "private and family life" (Art. 8) and also protects the right to marry and found a family (Art. 12).[29] The American Convention on Human Rights echoes the UDHR language on the family as the "natural and fundamental group unit of society," and protects the right to "marry and to raise a family"[30] (Art. 17). The African Charter on Human and People's Rights states in Article 18:

> 1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
> 2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.[31]

The lack of state-granted remedies to first families

Of course it should be obvious that parents and families have rights and responsibilities in relationship to their children. Similarly, it should be obvious that the loss of children to parents and the family is a serious loss which can constitute a substantial deprivation of fundamental rights deserving of substantial remedies. Yet, what is obvious becomes obscure to many in the context of adoption.

Hence, so far as I can tell, very few states have ever offered state assistance and remedies to original families that have lost their children to illegal intercountry adoption. The primary exception ironically occurs outside the context of the conventional intercountry adoption system. Thus, the activism of the Mothers of the Plaza de Mayo, and later Grandmothers of the Plaza de Mayo, organized in response to the estimated 30,000 disappeared persons during the Dirty War in Argentina between 1976 to 1982, did lead to some state-assisted national

---

[28] International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171 (ICCPR), https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights; International Convention on Economic, Social, and Cultural Rights, 16 December 1966, resolution 2200A (XXI), https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights.

[29] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 15, 4 November 1950, https://www.echr.coe.int/documents/d/echr/convention_ENG.

[30] AOS, American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32), 22 January 1969, https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights.pdf.

[31] African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 October 1986, (1982) 21 ILM 58 (African Charter), https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf.

remedies. Of course many of the disappeared were murdered, but remedies regarding illegal adoptions or placements of children are encompassed within these remedial efforts (see Chapter 3). This is an important model of first family activism leading to cooperation between activist organizations and states, but of course occurs outside of the conventional intercountry adoption system in the context of a separate national trauma. It does not appear that remedial efforts in other Latin American countries, addressing abuses within intercountry adoption systems, have advanced as far as Argentina's response to disappeared persons in the context of the Dirty War (see Chapter 3). The lack of state-provided remedies for first families regarding illegal adoptions from conventional intercountry adoption systems is notable.

Further, in the entire modern history of intercountry adoption I can only identify a handful of cases in which original family members were successful in obtaining remedies from states, and these required the original family to pursue litigation in the courts of the receiving state, something beyond the capacity of most families of origin. These few cases are discussed below in the sections about remedies. For now, it is sufficient to lament the scarcity of state-provided remedies for first families.

If you lost your child…

Imagine that you sent your child to summer camp. The day comes to pick up your child but are told that your child is gone.
Imagine that a few days after birth your child disappears from the hospital nursery.
Imagine that your child signed up for an international exchange program, living with a host family in another country while studying abroad. When the time comes for your child to return, you are notified that the host family has adopted your child, who is now no longer a part of your family.

In all of these instances, the normal expectation of parents would be that state and society treat such instances as kidnappings or missing children cases requiring immediate emergency response. Yet, such response is almost unknown in the context of intercountry adoption. It is characteristic of intercountry adoption that the class of parents and families who lose their children typically are unable to elicit much response to the loss of their children even before the case is linked to adoption. If the case does become linked to intercountry adoption, the chances of any kind of assistance or investigation decline even further. Adoption legitimizes the separation in a context of state-enforced secrecy that creates a dead end as to investigations or remedies.

Even more discouraging is that recent state plans to respond to illegal intercountry adoption apparently lack remedies and responses for the original family, unless such are provided in the context of responding to requests and remedies for adoptees (see Chapter 3). Adoptees, however, commonly are unaware of the circumstance which separated them from their original family, and commonly do not initiate requests for birth/roots searches until well into adult life. If remedies for illegal separations of children from families wait for adoptees to initiate an investigation or roots search, such often will never occur, and the vast majority will not start

until decades after that separation. Given the legal understanding of illegal separations and illegal adoptions as continuing wrongs,[32] the failure to provide mechanisms by which original families may initiate investigations and receive assistance is a fatal flaw in intercountry adoption systems.

Illegal Separations of Children from Families and Intercountry Adoption Systems

The separation of a child from the child's original family is only legal, under the UNCRC, where either 1. It was not possible for the child to remain or be returned to the original family (Art. 7(1)); or 2. Owing to circumstances such as abuse, neglect, maltreatment, or sexual abuse, the child cannot remain, according to the best interests of the child (Art. 3(1), 19, 20(1), 34, 36).

Given years of research on illicit adoption practices, combined with the reported results of recent investigations, my conclusion is that "[t]he majority of the estimated one million intercountry adoptions completed over the last seventy years […] occurred in contexts of chronic violations of basic ethical principles as now codified in international instruments."[33] The basic ethical violation in view is that of wrongfully building adoptions on a foundation of unnecessary separations of children from their original families.

I have previously identified the following circumstances by which children commonly have been separated from their families, which all violate current international children's rights standards:[34]

Child laundering

Child laundering is the use of force (i.e., kidnapping), fraud (misinforming the original family as to the significance of consents or the consequences of placements), or funds (the buying of children and/or consents, usually from desperately poor original families), to illicitly obtain children and separate them from the original family. The term child laundering captures as well the next stages, by which children illicitly separated from their families are then given paperwork identifying them as adoptable orphans, and then processed for adoption.[35] Such illegal behavior has been identified in adoptions from South Asia, East Asia, Southeast Asia, Latin America, and Africa.[36]

Poverty

[32] UN Human Rights Treaty Bodies, Joint Statement on illegal intercountry adoptions, 29 September, para. 12 ("States shall prohibit illegal intercountry adoptions as a continuing offense under criminal law.").
[33] See, e.g., D.M. Smolin, 'The case for moratoria on intercountry adoption', *Southern California Interdisciplinary Law Journal*, Vol. 30, No. 2, 2021, pp. 501, 506.
[34] Ibid., pp. 504-511; Smolin, 2006; Smolin, 2023.
[35] Smolin, 2006; Smolin, 2021, pp. 506-507; Smolin, 2023.
[36] Ibid.

Adoptions due primarily to poverty have been an often accepted and central part of intercountry adoption systems from Latin America, South Asia, Southeast Asia, East Asia, Africa, and Europe. To this day, too many perceive intercountry adoption as an appropriate response to poverty. To the contrary, current ethical and legal standards prohibit intercountry adoption or child separations due primarily to poverty. Given contemporary human rights standards, taking the children of the poor is a form of exploitation rather than compassion. There is cruelty and irony in spending far more on an intercountry adoption, including the expensive international travel involved, than would have been necessary to assist the family in staying together.[37]

When adoption is understood as a set of relationships and interactions between the first family, child, and adoptive family, the problem becomes clearer. Imagine a circumstance where a comparatively wealthy family from Europe, Australia, the United States or Canada is traveling in a developing country, and meets there a desperately poor family struggling to provide the basics of food, shelter, clothing, and education for their children. As the families interact, the wealthy foreign family is faced with a choice. They could easily afford to provide some forms of assistance that would enable the poor family to stay together and provide sufficiently for the children. But since the foreign family wants children for themselves, they instead spend far more money on an intercountry adoption than would be necessary to keep the first family intact, and take one or more of the children away forever from the original family, leaving the remaining family members destitute. Or perhaps the wealthy family even provides assistance to the poor family, but conditions that assistance on relinquishing some of their children. Or perhaps the wealthy family allows the poor family to relinquish their children based on the false premise that in sending their children abroad to another family they are expanding their family overseas, rather than subtracting some of their children from their family – the false hope that their children will still be a part of their family, will stay in contact while growing up, and as an adult will be in a position to assist them.

Conceived as a set of interactions, such a choice is indefensible, and clearly exploits the vulnerabilities created by poverty. Clarity may come when the adoptee grows up and asks the adoptive parents: "why didn't you help me stay with my original parents and family?" If the truthful answer is "we wanted you for ourselves," the ethical and legal breach should be painfully obvious.

Of course in intercountry adoption practice such an interchange usually does not happen directly as intermediaries navigate all stages and the first and adoptive families do not meet at all, or only do so after the adoption has been arranged. But creating systems that scale up and depersonalize an illegal and unethical set of interactions makes the situation worse rather than better. Hence, adoption systems which systemically permit adoptions based primarily on poverty, without systemically offering unconditional aid for the family to stay together as an alternative to adoption, are systemically illegal and unethical.

---

[37] UN Guidelines for the Alternative Care of Children, 24 February 2010, G.A. Res. 64/142, Art. 10, 15, 32; Smolin, 2021, p. 308; D.M. Smolin, 'Intercountry Adoption and Poverty: A Human Rights Analysis', *Capitol University Law Review,* Vol. 36, No. 2, 2007, pp. 413-454.

Unmarried mothers

Much of the modern history of adoption law and practice was shaped by systemically using adoption as a response to the situation of unmarried parents and the single mother. For example, the secrecy and closed records so central to many modern domestic systems arose because adoption laws were aimed primarily at single mothers in times of extreme stigma for mother and child. After all, the practices of secrecy and closed records make little sense for adoptions of literal orphans whose parents are both deceased. The baby-scoop era of systemically coercive domestic adoptions from single mothers occurred from around 1945 until around 1980 in many nations, including Australia, Belgium, Canada, the United States, and the UK.[38] Related mistreatment of single mothers and their children in Ireland are a major national scandal.[39] Domestic adoption systems were organized around exploiting societal and professional stigmas against single mothers and their children. Unfortunately, the same practice of building adoption systems in significant part around coercing stigmatized unmarried mothers to relinquish their children has also been a significant part of some intercountry adoption systems: particularly in adoptions from South Korea,[40] and also from other nations such as Greece[41] and India.[42]

Like adoptions based on poverty, this is another example where the adoption systems of the past were self-consciously based on criteria which today are understood to constitute serious ethical and legal violations.[43] Like adoptions based on poverty, this is a kind of unethical and illegal adoption that persists to an embarrassing degree in some intercountry adoption systems.

---

[38] See, e.g., A. Fessler, *The Girls Who Went Away: The Hidden History of Women Who Surrendered Children for Adoption in the Decades Before Roe v. Wade*, Penguin Books, 2007; Baglietto et al., 2016, pp. 35-39 and 187-88; Senate Community Affairs References Committee, Parliament Australia, Commonwealth Contribution to Former Forced Adoption Policies and Practices, 29 February 2012, https://www.aph.gov.au/parliamentary_business/committees/senate/community_affairs/completed_inquiries/2010-13/commcontribformerforcedadoption/report/index; Who Are We?, Origins Australia, Forced Adoption Support Network, https://www.originsnsw.com/#:~:text=Origins%20was%20formed%20to%20research,care%3B%20and%20Aboriginal%20child%20removal; 'Flemish bishops apologize for forced adoptions', *Catholic Culture*, 25 November 2015, https://www.catholicculture.org/news/headlines/index.cfm?storyid=26798.

[39] See, e.g., Government of Ireland, Department of Children, Equality, Disability, Integration and Youth, *Final Report of the Commission of Investigation into Mother and Baby Homes*, 12 January 2021, last updated on 22 November 2021, https://www.gov.ie/en/publication/d4b3d-final-report-of-the-commission-of-investigation-into-mother-and-baby-homes/#; CLANN: Ireland's Unmarried Mothers and their Children: Gathering the Data, 17 December 2021, http://clannproject.org/.

[40] See, e.g., T. Hubinette, 'Korean Adoption History', in E. Kim (ed.), *Community 2004. Guide to Korea for overseas adopted Koreans*, Overseas Koreans Foundation, 2004, http://www.tobiashubinette.se/adoption_history.pdf, p. 10; C. Sang-Hun, 'Group Resists Stigma for Unwed Mothers', *New York Times*, 7 October 2009, https://www.nytimes.com/2009/10/08/world/asia/08mothers.html.

[41] See, e.g., G. Van Steen, *Adoption, Memory, and Cold War Greece: Kid pro quo?*, Ann Arbor, University of Michigan Press, 2019; R. Bonner, 'Tales of Stolen Babies And Lost Identities; A Greek Scandal Echoes in New York', *New York Times*, 13 April 1996, https://www.nytimes.com/1996/04/13/nyregion/talesof-stolen-babies-and-lost-identities-a-greek-scandal-echoes-in-new-york.html.

[42] See, e.g., P. Bos, *Once a Mother: Relinquishment and Adoption from the Perspective of Unmarried Mothers in South India*, PhD Thesis, University of Amsterdam, 2007.

[43] UN General Assembly, Guidelines for the Alternative Care of Children: resolution / adopted by the General

Exploiting cultural contrasts on the meaning of adoption

In many cultures and nations that have served as sending countries, family life is comparatively "additive," allowing for the addition or acceptance of family members beyond the nuclear family – additional fathers, mothers, uncles, and aunts. Similarly, the extended family and broader categories of kinship have more day to day centrality and authority than may be common in some contemporary Western cultures. In such contexts, children may commonly circulate among trusted adults.[44] In addition, in some nations that have served as sending countries, "orphanages" or "hostels" serve as a kind of social safety net or boarding school for the poor, which poor families rely on in times of stress for the provision of food and education, while maintaining parental responsibility and status. In many cultures the concept that a parent can sever parental rights and responsibilities through signing a document is unfamiliar and appears absurd.[45]

These widespread cultural contexts in many nations that have served as countries of origin for intercountry adoption make purported "consents to adoption" problematic. Families are likely to understand adoption as an opportunity to extend their family and create opportunities for their children and family, without in any way relinquishing the child's status in the original family. Families are unlikely to understand themselves as severing their relationship with their children. Even if the families understand that the child will be traveling overseas, they are likely to understand adoption as a kind of long term sponsorship, or study abroad program, and to perceive the "adoptive" parents as additions to and extensions of the original family, rather than replacements for the birth family. If the term "adoption" exists in the culture, it may refer to practices similar to simple adoption or guardianship that do not sever the link between the child and original family. Indeed, even judges or government officials may not always understand fully the implications of full adoption in contexts where simple adoption or guardianship is also the prevalent legal practice, and the concept of full adoption involving a full severance of the parent-child relationship is not present in domestic law or practice.[46]

These cultural contrasts have been exploited as a part of child laundering schemes to fraudulently obtain consents. Intermediaries obtain consents to "adoption" while making false promises of continued contact and relationship. Indeed, intermediaries do not necessarily have to lie, but can instead simply allow first families to apply their own cultural understandings to the arrangement. Even if intermediaries are more ethical and attempt to explain the true

---

Assembly, 24 February 2010, Art. 10, A/RES/64/142.

[44] C. Fonseca, D. Marre and B. San Román, 'Child Circulation in a globalized era: anthropological reflections', in R.L. Ballard, N.H. Goodno, R.F. Cochran, Jr. and J.A. Milbrandt (eds.), *The Intercountry Adoption Debate: Dialogues Across Disciplines*, Newcastle upon Tyne, UK: Cambridge Scholars Publishing, 2015, pp. 157-192; C. Fonseca, 'Patterns of Shared Parenthood among the Brazilian Poor', Social Text, Vol. 21, No. 1, 2003, pp. 111, 113-115; R.R. Högbacka, *Global families, inequality and transnational adoption: The de-kinning of first mothers*, Springer, 2017; Loibl, 2019, pp. 67-68, 91-93.

[45] Ibid.

[46] Ibid.

meaning of a consent to an international adoption to a first family, it may be difficult or nearly impossible to achieve actual understanding on behalf of the family.[47]

Recent developments in receiving states, like the United States, toward "open adoption" as a prevalent practice within domestic full adoption systems traditionally practicing full severance, closed records and secrecy, as well as the increased acceptance of birth searches in both domestic and intercountry adoptions, suggests that perhaps the "additive" views common in non-Western cultures are more realistic views of the concept of "adoption."[48] Building adoption on the legal fiction that children are not related to those who brought them into this world, despite ties of genetics, gestation, and varying periods of family life, was in my view never compatible with human dignity and human nature. This is an issue for adoption reform in general. But for present purposes, it is clearly illegal and unethical to fraudulently obtain consents to adoption by exploiting the cultural and legal disjunctions in the meaning of "adoption."

Adoptions from China

China has been the leading country of origin since taking over that position from South Korea in the mid-1990s. China maintained that position until China's numbers were sharply reduced during COVID. China has sent over 140,000 children to other nations for intercountry adoption.[49]

The Chinese adoption system has several distinctives that complicate discussion of both illegal adoptions and also remedies. First, unlike many other nations, the Chinese system is state controlled, including the participating "orphanages" or social welfare institutions. The Chinese government arranges and controls all aspects of China's side of intercountry adoption; matches between children and prospective adoptive parents are determined by China's central authority.[50] China thus avoids the situation of private orphanages dealing directly with foreign agencies or intermediaries. To the degree private Chinese intermediaries are involved, it occurs in illegal procedures in which private individuals have obtained children and then sold them to orphanages. Unfortunately, government officials reportedly have abused their coercive authority to obtain children and then also sold the children to government orphanages.[51]

---

[47] Ibid.
[48] M.L. Seymore, 'Openness in International Adoption', *Columbia Human Rights Law Review*, Vo. 46, No. 3, 2015, pp. 163, 164, 168-183 (describing movement toward openness in domestic adoptions in the United States).
[49] P. Selman, *Twenty Years of Hague Convention: A Statistical Review*, HCCH, 2015, https://www.hcch.net/en/instruments/conventions/publications1/?dtid=32&cid=69; P. Selman, *Global statistics for intercountry adoption: Receiving states and states of origin 2004-2021*, HCCH, 2023, https://www.hcch.net/en/publications-and-studies/details4/?pid=5891&dtid=32.
[50] HCCH, Country Profile: China, 17 May, 2022, https://assets.hcch.net/docs/7c03cfbb-288f-4260-a58f-397585e12728.pdf; United States Department of State, How to Adopt, China, https://travel.state.gov/content/travel/en/Intercountry-Adoption/Intercountry-Adoption-Country-Information/China.html; L. Meng and Z. Kai, 'Orphan Care in China', *Social Work & Society*, Vol. 7, No. 1, 2009, pp. 46-47.
[51] B. Demick, 'Chinese Babies Stolen by Officials for Foreign Adoptions', *L.A. Times*, 20 September 2009, https://www.latimes.com/archives/la-xpm-2009-sep-20-fg-china-adopt20-story.html; B.H. Stuy, 'Open Secret:

Second, unlike many other nations, China does not provide a legal means for parents to relinquish their children for state care or place their children for adoption. Thus, first families secretly "abandon" their children while trying to avoid getting detected or caught, a process that also creates risks as the child must simply be left somewhere in the expectation of being quickly found.[52] This use of abandonment limits the information available as to origins, because there are no official documents identifying or describing the original parents. Abandonment as the official pathway for adoption also makes it even easier to hide illicit practices, as officials may follow the procedures for an abandoned child even where the child has been purchased or coercively taken.[53]

Third, the modern history of Chinese intercountry adoption developed in the context of China's population control policies, which provide a highly coercive context for decisions by first families. Given that coercive context, the concept of giving consents "freely" (Art. 4(c)(2) The Hague Adoption Convention) is quite doubtful.[54]

Fourth, in order to protect against evasions of that population control policies, China during some periods of time had stricter rules for domestic prospective adoptive parents than for foreign prospective adoptive parents, a systemic violation of the subsidiarity principle requiring preference for domestic adoption over intercountry adoption.[55]

Fifth, during the peak years of China's role as a sending nation, girls overwhelmingly outnumbered boys. For example, as reported by China to the HCCH for 2005, one of China's peak years, China sent 18 boys and 1626 girls under one year old, and 596 boys and 11,785 girls ages one to four.[56] This confirms the narrative that China's internationally adopted children were relinquished due to a combination of the coercive impacts of China's population control policies and a culturally felt need to have at least one son.[57] Thus, probably most of the children sent for intercountry adoption in China, particularly during the peak years when most were healthy young girls, were separated from their families due in significant part to China's coercive population control policies.[58]

The numbers and characteristics of children being sent for adoption from China changed significantly in recent years. As it became clearer that there were very few healthy infants or toddlers of either sex in the orphanages, and as domestic adoptions were allowed more room to flourish, it became clear that there was no need to send healthy infants or toddlers for foreign

---

Cash and Coercion in China's International Adoption Program', *Cumberland Law Review*, Vol. 44, No. 3, 2014, pp. 355-422.

[52] K.A. Johnson, *Wanting a Daughter, Needing a Son: Abandonment, Adoption, and Orphanage Care in China*, Yeong & Yeong, 2004; K.A. Johnson, *China's Hidden Children: Abandonment, Adoption, and the Human Costs of the One-Child Policy*, University of Chicago Press, 2016.

[53] See sources cited in note 51.

[54] See sources cited in note 52.

[55] Johnson, 2004, pp. 118-119, 155-182.

[56] HCCH, China Adoption Statistics, https://assets.hcch.net/docs/f206acda-7dd4-4971-bca4-876a29dad958.pdf.

[57] Johnson, 2004; Johnson, 2016.

[58] Ibid.

adoption. Chinese citizens were willing to adopt healthy infants and toddlers of both sexes in sufficient numbers to negate any need for foreign adopters of such children. Further, as China has progressed from a one child to two child to three child policy,[59] and from concerns with overpopulation to concerns with an aging and gender imbalanced population, sending healthy young girls abroad became an absurdity. In more recent years almost all of the children made available for adoption from China have been children with very serious disabilities, and/or much older children. Even with these changes, the numbers declined significantly.[60]

This analysis suggests that the modern program of intercountry adoption from China was built upon systemic government pressures in pursuit of population control that had the unintended but systemic impact of producing large numbers of abandonments of baby girls.[61] Building an adoption program upon such coercive policies violates human rights norms.[62] Nonetheless, in the early years, when reports indicated that the Chinese orphanages were overwhelmed by the large numbers of abandoned baby girls, and that children were sometimes receiving catastrophically poor care, there were sympathetic reasons to adopt from China. The numbers of adoptions from China increased dramatically and China seemed to have unlimited numbers of infant and toddler girls available for adoption. Chinese orphanages participating in sending children for intercountry adoption received thousands of dollars per intercountry adoption directly from the adoptive parents, and adoptive parents formed non-profit organizations to funnel additional funds to those orphanages for the children left behind. Scaling up Chinese adoptions to meet these felt needs, however, helped create financial incentives. Those financial incentives may not have been harmful in the early years when China's orphanages were overwhelmed with abandoned baby girls; indeed, perhaps those incentives caused some to pick up abandoned babies and take them to the orphanages. However, by the time the numbers were peaking around 2005, the numbers of abandoned baby girls had sharply declined. It appears that sex selective abortion significantly replaced sex-selective abandonment when ultrasound machines became widely used in China. China made it illegal to tell pregnant women the sex of their fetus, and tried to make sex selective abortion illegal in a context where abortion itself was widely available and legal. These prohibitions were difficult to enforce, however, and it appears that sex selective abortion became common. Orphanages that had grown used to the benefits of sending children for intercountry adoption now had a shortage instead of overabundance of healthy young baby and toddler girls. In order to continue the revenue stream of orphanage "donations" the orphanages that had once been overwhelmed with abandoned baby girls were buying children. A market in adoptable young infants had been created with the orphanages as buyers in order to secure children to send abroad. This led to other abuses as population control officials sometimes took children from first families for the purpose of

[59] BBC, 'China allows three children in major policy shift', *BBC News*, 31 May 2021, https://www.bbc.com/news/world-asia-china-57303592.
[60] Selman, 2023.
[61] Johnson, 2004, pp. 1-23, 43-48, 49-64, 76.
[62] See, e.g., Art. 16(e) CEDAW: right to "decide freely and responsibly on the number and spacing of their children".

selling the children to orphanages. Private intermediaries were also selling children to orphanages. What had begun to fill a need was now incentivizing a market in children.[63]
This is of course a compressed and simplified narrative of the Chinese adoption system. It sets the context, however, for trying to define when, in the context of China, children were illegally separated from their families, and also indicates the difficulties of creating remedies for Chinese adoptions.

This narrative regarding adoptions from China is a reminder that each country of origin has its own specific narrative that impacts the kinds of illegal practices and the availability of remedies. Most of this chapter does not focus on individual nations, but instead describes categories of illegal adoptions and issues as to remedies that are common across multiple nations. Some of the chapters that follow focus more specifically on a single nation or a specific group of nations.

In the end, however, remedies for illegal intercountry adoptions must be remedies for individual adoptions that occurred between a specific country of origin and specific receiving state. Hence, in the end there will be no unified system of remedies, as expertise as to each state involved is needed to effectively provide remedies, and remedies ultimately must be local. One question, then, is how one creates systemic remedies in this complex multinational context.

Creating Systemic Remedies for Systemic Abuses

Seventy years of systemic abuses in intercountry adoption systems require systemic remedies. The remedies should match the gravity of the wrongs. Hundreds of thousands of adoptees were directly impacted. Often overlooked, however, is that such systemic abuses also deeply harmed many millions who comprise the original parents, siblings, and family members of those who lost children to unethical and illegal intercountry adoptions. Adoptive families may appear to be the beneficiaries of such a system, but in fact those families relied on governments, intermediaries, agencies and intercountry adoption systems to ensure that the children they adopted came to them legally and ethically, and were truly in need of a family – rather than having been wrongly separated from a family. The breaking of that implicit promise means that in many instances the adoptive families are also victims of these systems. It is a tragedy to make the extraordinary commitment and effort to adopt a child in need of a family, when the truth is that the child was in fact wrongfully taken from the first family.

The systemic nature of the abuses means that, in principle, most intercountry adoptions require a remedy. The majority of adoptions occurred in times and places where at least one of the

[63] I describe and analyse these events at greater length in D.M. Smolin, 'The missing girls of China: Population, policy, culture, gender, abortion, abandonment, and adoption in East-Asian perspective', Cumberland Law Review, Vol. 41, No. 1, 2010, https://works.bepress.com/david_smolin/9/; see also HCCH, China Adoption Statistics, https://assets.hcch.net/docs/f206acda-7dd4-4971-bca4-876a29dad958.pdf; Demick, 2009; Stuy, 2014; American World Adoption, China Adoption Travel Overview, p. 7, (adoptive families required to bring $7,700 in cash to China, including $7,500 in $100 bills, which includes "orphanage donation" of $5,000 to $5,500), http://legacy.awaa.org/downloads/Travel/China_NonHague_Travel_Packet.pdf.

kinds of unethical and illegal separations of children from parents was endemic – child laundering, exploitation of poverty, coercive pressures on single mothers, or exploitation of cultural disparities. The first needed remedy is a determination of whether the adoptee was unethically and illegally separated from the original family. The only way to know whether an individual adoptee was illegally separated from the original family is to do an investigation that includes a birth search. Reviewing records and interviewing intermediaries is relevant but not sufficient, because records are so often unreliable and intermediaries not always truthful or accurate in their accounts.

This creates several dilemmas. In principle, most of the intercountry adoptions over the last seventy years should be investigated to determine whether the adoptees were improperly separated from their families. Such investigations would require a birth search in addition to a review of records and interviews of intermediaries and others. Who is going to initiate such investigations? Who is going to conduct them? Who is going to pay for them? Who is going to help adoption triad members navigate the relational and emotional complexities and traumas?

Thus far, governments generally have not provided remedies or assistance, and indeed sometimes have impeded remedies by refusing to make records available. There is no system for remedies but rather adoption triad members (adoptees, adoptive families, or original family members) working to self-remedy by initiating their own investigations and searches. Adoption triad members are often assisted by a variety of non-governmental actors. Some non-profit organizations have been formed to assist adoption triad members. Some individuals may assist without charging anything, or only request reimbursement of expenses. Some offer their services for pay, with widely varying levels of expertise and empathy; the fees and expenses charged can be quite high, with the costs typically borne by adult adoptees. The rates of success with searches vary widely from country to country, the years since separation from the original family, and the information available. The current situation of self-remedying illegal intercountry adoption necessarily produces haphazard results that supply remedies only to a very small proportion of those impacted (see Chapters 2 to 7 and 9).

A few nations (e.g., the Netherlands and Colombia) have proposed or initiated systems to provide remedies, or at least post-adoption services, for adoptees. No nation, so far as I know, has created a system for original family members that does not depend on adoptees first initiating a search, with the possible exception of Argentina, which is a response to the national trauma of the Dirty War and does not involve the conventional intercountry adoption system (see Chapters 3, 7, 9).

Could a system be created for systemically providing remedies for illegal intercountry adoptions? The following obstacles would have to be overcome.

Obstacles to Remedies

To the degree that remedies are not sought until the adoptee is an adult, full remedies are literally impossible. The adoptee was raised in a different family, culture, and nation than would have occurred had the wrongful separation and subsequent adoption never occurred. The adoptee has become in many ways a different person than they would have been had the wrongful separation and subsequent adoption never occurred. No one can give back to the adoptee the childhood that would have been and the person they would have become. Similarly, no one can give back to the family of origin the experience of raising their child to adulthood, and the bonding that would have occurred. Childhood is a developmental stage of life that cannot be re-done, and its consequences for the child and the child's family are permanent.

The impossibility of full remedies for adult adoptees and their original families highlight the even higher stakes for remedies when adoptees are still children. Remedies for adoptee children obviously may still impact the childhood of the adoptee. Remedies for child adoptees raise the controversial issue of possibly returning the adoptee to the original family. Once the adoptee is an adult, the adoptee has the choice of where to live and with whom to relate; during childhood, however, while the child should participate in such decisions,[64] adults must take the responsibility to make difficult decisions.

Before addressing the difficult remedial issues related to child adoptees, this section reviews the barriers to remedies applicable regardless of the age of the adoptee.

1. First families are typically too powerless and poor to effectively seek remedies. First families may have been enlisted in their own victimization, for example, signing documents they did not understand, or making decisions under the coercive impacts of poverty and/or stigmatized single parenthood. Being manipulated into participating in one's own victimization (and that of one's child) can create a crippling sense of guilt and self-blame that inhibits victims from seeking remedies. First families may face abuse and threats from the intermediaries in their own country that profited from the intercountry adoption, and likely are not in a social or economic position to defend themselves or challenge the power and connections of those intermediaries. Government officials in their own country that participated in the adoption most likely will be completely unsympathetic and non-cooperative, and also may subject the original family to threats of negative consequences if they pursue remedies.

2. Adoptees most often are not aware of their own history, as they were too young to understand or even remember the circumstances under which they were separated from their original families. Even those separated at older ages may not understand the adult interactions and decisions that led to their losing their original families. Providing investigations and remedies for victims who do not know the stories of their own victimization is particularly difficult.

3. Adoptees have been recruited into their adoptive identity at ages at which this identity is constitutive of their development, family relations, personality, and character. This recruitment and formation into their adoptive identity delays, changes, and can limit the extent to which

[64] Art. 12 UNCRC.

adoptees actually want remedies. Although some adoptees crave more information about their origins at a young age, most adoptees are not interested in investigating their pre-adoptive history until at least the teen years, and many not until well into adulthood. Some adoptees would prefer never to confront the intense emotions and questions intrinsic to a birth search. Adoptees may experience investigations and birth searches as profoundly unsettling and threatening as they can disrupt the adoptee's sense of self as formed in the adoptive family. While many, perhaps most adoptees do eventually wish – sometimes intensely – for more information about their origins, they often lack the cultural and linguistic knowledge and skills to fully understand the stories of their origins once discovered. This lack of cultural and linguistic knowledge and skills also create substantial barriers to positive post-reunion relationships. Adoptees may wish to stop the process of remedies, temporarily or permanently, at any stage of the process – investigation, document search, birth search, reunion, or post-reunion relationships. Providing remedies for a group of victims that have been socialized in such a way as to limit their interest and desire for remedies, and for whom remedies can be sometimes intensely desired and sometimes rejected or delayed, is extremely difficult.

4. Remedies for illegal adoptions contradict the legal regime for intercountry adoption, which have strongly favored full severance adoption and thus are based on the legal destruction of the original identity of the adoptee and the legal destruction of relationships between the adoptee and first family. The same states which legally destroyed the original legal identity of the child and the original parent-child relationship now are expected to investigate and attempt to at least partially restore what those states had destroyed. Adoptees who were often raised in their adoptive families based upon a unitary adoptive identity are now exploring or asked to explore a completely new identity which includes both original and adoptive identity. The process of exploring, seeking, and providing remedies radically alters and places into flux the expectations to which adoptees, adoptive parents, and first families are subject.

5. Adoptive parents usually were not involved in and were unaware of the illegal conduct involved in the adoption of their children. The information that adoptive parents were given about the adoption are often inaccurate or lack critically important details. Adoptive parents generally have trusted the often false information they have been given, and thus presume their adoptions were legal and ethical. Having been promised full severance adoptions, many adoptive parents perceive the original family as a threat to their relationship with their adopted children. Even if adoptive parents have been more comfortable with the concept of openness in adoption, the possibility of illegal adoption raises the fear of literally losing the child forever if the child is returned to the first family. Adoptive parents who feel bonded to the adoptee and understand that they made a permanent commitment to the adoptee understandably have trouble pivoting to the possibilities for altering those relationships and commitments. All of these circumstances often result in adoptive families being highly resistant to investigations or birth searches or reunions, and often lead adoptive families to minimize any wrongdoing that is discovered.

6. The legal and cultural practices of full severance secret adoption in many states are weakening in recent years, but nonetheless create obstacles to remedies. Agencies, courts,

hospitals, orphanages and governments may refuse to turn over documents or information based on the premise of full severance secrecy. Wrongdoing is particularly easy to hide in adoption systems that maintain secrecy, rather than transparency, as their ethical code. Adoptive parents and adoptees may experience information about origins, investigations, searches, and reunions as destabilizing to adoptive relationships. Interest in the original family may be perceived as disloyalty to the adoptive family. Full severance adoption creates expectations that the past will not be examined or re-opened and that no family relationship exists between adoptees and original families; these expectations then serve to hinder the investigations, searches and reunions necessary to remedy illegal adoptions.

7. The common situation of not seeking or providing remedies until adoptees are well into adulthood, decades after separation of the child from the original family, creates numerous obstacles. Original family members may have died, moved, or remarried. The intermediaries involved also may have died, changed jobs, moved, or be difficult to locate. Memories may become increasingly unreliable. Records may have been discarded, lost, or destroyed. Investigations, searches, and reunions decades after the separation can still be highly productive and healing, especially given the inter-generational and broader familial impacts of adoption. But the difficulties do increase over time.

8. The expectations and wishes of adoption triad members often conflict. Sometimes original family members resist reunion entirely, reject adopted-out family members, or only want to meet in secret, while adoptees are seeking reunions and restored relationships. On the other hand, sometimes adoptees want information but not reunion, or after reunion adoptees may refuse to engage in ongoing contact, while first families wish to restore familial relationships and make up for lost time. Given the full spectrum of responses by adoption triad members, there is often going to be a mis-match between the wishes of adoption triad members. These conflicts arise as traumas are re-opened in a context of conflicting cultural understandings of family life. Communication is often hindered in addressing these sensitive issues by the lack of a common language.

9. Many intercountry adoptions took the children from the poor of developing countries and sent them to middle class to wealthy families in developed nations. This means that there is often a very large economic disparity between the first family and the adoptive family, and also between the first family and the adoptee. In the context of such a large disparity, what the adoptive family or adoptee perceives as the normal cost of a casual evening out for a meal and/or entertainment may constitute more than the monthly income of the first family. Family relationships across such stark economic disparities pose severe difficulties. It is natural for first families to ask for money from family members perceived to be quite wealthy, in cultural contexts where relatives are commonly expected to help one another financially. It is also natural for adoptees to experience requests for money, in the midst of or after reunions, as an indication that their first family cares more about money than about them. First families are unlikely to understand the monetary pressures that adoptees and adoptive families experience in their own contexts and are unlikely to understand cultural contexts which discourage constant sharing of financial resources within extended families. Requests for assistance are

likely to be a chronic feature of restored family relationships, rather than a mere one-time request. Thus, economic disparities and cultural differences as to how money is or is not shared within extended families are a severe obstacle to a fully restored relationship between the adoptee and first family.

10. There is a distinct lack of political will on behalf of both receiving states and states of origin to provide remedies for illegal intercountry adoption. Intercountry adoption is a low priority governmental service impacting comparatively few children and families, as compared to either the entire population or more specifically as compared to the numbers of vulnerable children or the numbers of children in some form of alternative care (i.e., foster care, institutional care, etc.) To the degree intercountry adoption has been prioritized in ways disproportionate to its actual impacts, it stems from the monetary inducements providing disproportionate financial benefits for intermediaries, the demand for children within receiving states, and the historical reputation of intercountry adoption as a humanitarian intervention and an opportunity for positive international relations. Whatever priority intercountry adoption may have had dissipates when the subject turns to providing remedies for illegal intercountry adoption. Most of the empowered stakeholders in intercountry adoption – the governmental agencies, private and governmental intermediaries, adoptive parents and prospective adoptive parents – are highly resistant to accepting the evidence regarding a high prevalence of illegal and unethical practices, and also resistant to providing resources or assisting remedies. Remedies for illegal intercountry adoption require states to acknowledge serious failures, which many states are quite unwilling to do. Thus far, activist adoptees and child rights institutions and organizations have been the primary voices urging investigations and remedies. Those voices, however, are usually only enough to create temporary and symbolic action regarding illegal adoptions that fall far short of any kind of systemic response to systemic abuses.

11. Remedies for illegal intercountry adoptions require actions to be carried out in both the receiving state and the state of origin. The adoptee and adoptive family reside in the receiving state, while the first family reside in the state of origin. In addition, there are important records and documents in both the receiving state and state of origin, and intermediaries are located in the both the receiving state and state of origin. Places of birth and of temporary care are located in the state of origin. The necessity of actions in both receiving state substantially raise the cost and complexities of undertaking investigations, searches, and reunions.

12. The necessity of investigations and actions in both states exacerbates the problem of a lack of political will. Even if one state has the political will, this is often not enough, as help is needed from both. Further, even states that might be willing to attempt to remedy illegal adoptions may hesitate or refuse to do so if it risks poisoning relationships with the other state. Intercountry adoption is a low priority compared to the strategic, military, trade, cultural, and economic priorities in international relationships, and states are unlikely to be willing to unsettle these more important goals of international relationships for the sake of addressing wrongdoing in intercountry adoption.

13. Intercountry adoption as a practice is built on the cooperation of receiving states and states of origin. The Hague Adoption Convention sought to formalize this cooperation into a "system of co-operation" (see Art. 1(b) The Hague Adoption Convention), but of course it is basic to any intercountry adoption, as a child is transferred from one family and nation to another family and nation. Given the necessity for investigations of illegal practices to be conducted in both states, it would be logical for states to cooperate in these investigations. The Hague Adoption Convention provides the possibility of a formal procedure by which the Central Authorities of one state may communicate with the central authority of another state, both as to "general evaluation reports" (Art. 9(d)) or as to "a particular adoption situation" (Art. 9(e)). Unfortunately, that procedure of cooperation has either been unused or abused as to remedies for illegal intercountry adoptions. Typically of course there have been no governmental investigations of illegal intercountry adoptions, but when they have occurred, it has usually been only one state of the two willing to take the investigation seriously. Too often, when one state has made inquiries of another, the second state has offered false reassurances that nothing significant was amiss. The problem of course is that governments have self-protective motivations to minimize or deny wrongdoing, since investigations into illegal intercountry adoption inevitably include investigation into intentional, knowing, and/or negligent wrongdoing by the government. Thus, one of the obstacles to remedies is that the same "system of co-operation" used to facilitate intercountry adoption has not been, and cannot be expected to be, effective to investigate and create remedies for illegal intercountry adoption.

14. Appropriate remedies for illegal intercountry adoptions would be expensive. Conducting record and document searches and reviews, interviews of intermediaries and others with significant knowledge, and birth search and reunions, in addition to appropriate counseling services for adoption triad members, could cost tens of thousands of dollars per adoption. The travel costs alone could be quite substantial. Ongoing travel costs for additional trips after an initial reunion occurs is another significant expense. Rough estimates suggest that total remedial costs, if provided systemically, would be in the billions of dollars (for example, a remedial cost of $10,000 USD per adoption across half of the one million adoptions in the modern era of intercountry adoption would cost five billion dollars). While such costs of course could be shared among many countries, it seems unlikely in the extreme that governments would be willing to provide these remedies at the scale necessary to address the systemic nature of the illegal and unethical conduct – that is to say, to provide investigations of the majority of intercountry adoptions completed in systems where at least one form of illegal separation was endemic.

15. A possible mitigating factor regarding costs is that most victims will not come forward. Upon examination, however, this lack of large numbers of victims coming forward is itself a significant barrier to the provision of remedies. As noted above, most adoptees have been recruited into their adoptive identity in a way that makes confronting the possibility of an illegal adoption difficult. Most original family members are far too powerless economically and socially to come forward, and many have been induced to participate in their own victimization in a way that tends to impede them from self-identifying as victims. Adoptive parents are usually unaware of the wrongdoing, and have been socialized to expect full severance adoption,

and thus may not be supportive of investigations and other remedies. Some may wrongly perceive a lack of victims coming forward as a reason that remedies are not necessary – if victims do not come forward, what is the problem? Of course the same problem occurs with many other kinds of crimes; for example, most adult and child victims of rape, sexual assault or sexual abuse do not report the crimes to the police or authorities.[65] The fact that certain kinds of victimization tend to dissuade victims from coming forward is not a victory but of course a profound defeat from human rights and justice perspectives. Rape victims are still victims even if they are too traumatized and mistrustful of the authorities to come forward. The lack of large numbers of victims of intercountry adoption coming forward, despite the evidence of systemic illegal and unethical adoptions, is another severe obstacle to providing remedies.

16. Although the best interests of children should be "the paramount consideration" (Art. 21 UNCRC) in systems of adoption, in practice intercountry adoption systems have been driven instead by the adult demand for children in receiving states. This political dominance of prospective adoptive parents and their allies is a major reason why intercountry adoption systems have remained open, or been re-opened, despite repeated scandals and indications of illegal and abusive practices. The political dominance of this demand for children also presents a severe obstacle to the provision of remedies for past illegal adoptions. This overwhelming wish for children tends to blind prospective adoptive parents and their allies to the realities of seriously illegal and unethical practices, and hence severely lessens support for investigating and remedying illegal adoptions. While some adoptive parents are quite active in attempting to self-remedy illegal intercountry adoption, and in advocating for investigations and remedies, the predominate and heard voice of adoptive parents as a whole remains a severe obstacle to the provision of remedies (see Chapter 9).

17. The amount of expertise required to provide remedies for illegal adoption is daunting. Receiving states generally have worked with multiple states of origin, and states of origin typically have worked with multiple receiving states. Remedies for investigating individual adoptions require expertise into the laws and actual practices of each state involved, an understanding of the cultures involved, competency in the relevant languages, and an understanding of the relevant bureaucracies involved. Expertise about a nation's law and practices is not always sufficient, as sometimes the regional cultural differences will matter, the local languages used may differ in different parts of a nation, and some of the relevant legal rules may be local rather than national, requiring more localized expertise as well. Assisting reunions requires expertise into the psychological issues of adoption triad members, and an

---

[65] See, e.g., World Health Organization, *Sexual Violence*, WHO/RHR/12.37, 2012, https://apps.who.int/iris/bitstream/handle/10665/77434/WHO_RHR_12.37_eng.pdf; D. Lievore, *Non-reporting and Hidden Recording of Sexual Assault: An International Literature Review*, Commonwealth of Australia, 2003, https://www.aic.gov.au/sites/default/files/2020-05/non-reporting-and-hidden-recording-of-sexual-assault-an-international-literature-review.pdf; L. Sardinha, M. Maheu-Giroux, H. Stöckl, S.R. Meyer and C. García-Moreno, 'Global, regional, and national prevalence estimates of physical or sexual, or both, intimate partner violence against women in 2018', *The Lancet*, Vol. 399, No. 10327, pp. 803-813; National Sexual Violence Resource Center, Statistics about Sexual Violence, https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf.

understanding of cultural understandings and family practices relevant to both the adoptive and first family. Creating systems for remedies includes expertise related to the creation and management of DNA match services and data services, as well as data privacy considerations. If remedies were scaled up there likely would be a shortage of those with relevant expertise; even now with only sporadic self-help remedies available for most, it is often very difficult to find individuals to assist with relevant expertise.

18. The perception that victims have benefitted is another obstacle to the provision of remedies. Both in receiving states and in states of origin, there are broadly held perceptions that adoptees have benefitted from their adoptions, and that this benefit outweighs any illegal or unethical conduct, including being stolen from their original families. Many intermediaries in states of origin are middle class persons or higher in their society that may perceive being able to immigrate to developed, wealthier states and societies, and to attain citizenship there, as a huge benefit that they or their family members would want. Some intermediaries in states of origin may have very negative views of the social and economic classes from which most adoptees come, and may not perceive being removed from those families or communities as a significant loss. Those in receiving states often have stereotyped views of the greater benefits of their own society as compared especially to developing nations.

Most adoptees indeed do live much more privileged lives, as to standard of living and education, than they would have lived if they had remained with their original family. The wounds of being torn illegally from one's original family, community, culture, and nation are much more invisible than the tangible benefits of growing up in a middle class or wealthy family in the United States, Europe, or other developed economy. The sorrow and loss of original families is also invisible since their voices and faces remain unheard and unseen. This perception and even reality of significant benefit, accompanied by a minimization of the harms involved, makes it very difficult to mobilize support for investing significantly in remedies.

This set of perceptions is corrosive and harmful, as it diminishes the significance of family and community connections for the hundreds of millions of people who live in relative poverty in developing nations. Stealing children from the poor is implicitly viewed as a humanitarian rather than criminal act. This set of attitudes also undercuts the much more central projects of improving the lives and living standards of the poor in developing nations, which remains one of the most important and unfinished projects of this century. Such attitudes of course also facilitate the wrongful taking of children from the poor, which unfortunately too often can be done with impunity, whether it is done for adoption trafficking, sex trafficking, or labor trafficking.

The Cumulative Impact of the Barriers to Remedies

Given the cumulative impacts of the many barriers to remedies for illegal intercountry adoptions, systemic remedies for illegal intercountry adoptions of the past seventy plus years will not be made available in the foreseeable future. To the degree that governments do provide remedies, it will be primarily due to the advocacy of adult adoptees and their allies, as well as

child rights and human rights groups. Such governmental remedies will be quite incomplete, and focused primarily on offering limited remedies to adoptees who come forward asking for assistance. Most remedies will continue to be self-help by adoption triad members assisted by a variety of non-governmental actors. Original families will continue to be usually outside the scope of remedial efforts, except to the degree that assisting them is a part of the remedy for adoptees. There are currently a small number of small non-profit groups focused on assisting original families who are victims of illegal intercountry adoption in a particular country; hopefully they can create positive models that will find much greater support in the years to come. But realistically, the vast majority of original families victimized by the illegal loss of their children will never receive remedies, except to the degree that adoptees receiving or creating remedies include them.

Present Predictions in Light of Past Events

I hope I am wrong about these pessimistic predictions regarding provision of remedies for illegal intercountry adoptions. For what it is worth, my past pessimistic predictions have turned out to be mostly accurate. Indeed, it is helpful to put our present dilemmas in the context of past decades.

My early published analyses of the intercountry adoption system were written around 2004 to 2006[66] at what turned out to be the statistical high point of intercountry adoptions – about 45,000 in 2004.[67] Intercountry adoption had tripled in numbers from the early 1990's,[68] the Hague Adoption Convention was being increasingly implemented,[69] and proponents of intercountry adoption were optimistic. Reports of abuses were usually ignored or dismissed as rare aberrations within a safe, already over-regulated system[70] or as historical, pre-UNCRC/Hague Adoption Convention cases with little relevance to the present. Amidst this time of optimism regarding intercountry adoption, I was among the dissenters voicing significant concerns related to illicit practices prior to 2010, including, among many others,

[66] Smolin, 2005; Smolin, 2006; D.M. Smolin, 'Intercountry Adoption as Child Trafficking', *Valparaiso University Law Review,* Vol. 39, No. 2, 2004, pp. 281-326.
[67] Selman, 2023.
[68] P. Selman, 'The Rise and Fall of Intercountry Adoption in the 21st Century', *International Social Work,* Vol. 52, No. 5, 2009, pp. 575-594; D.M. Smolin, 'Child laundering and the Hague Convention on Intercountry Adoption: The future and past of intercountry adoption', *Louisville Law Review*, Vol. 48, pp. 441-498.
[69] See HCCH, Status Table, https://www.hcch.net/en/instruments/conventions/status-table/?cid=69.
[70] See, e.g., E. Bartholet, 'International Adoption: The Child's Story', *Georgia State Law Review*, Vol. 24, 2007, pp. 333-371.

Trish Maskew,[71] Gita Ramaswamy,[72] Desiree Smolin,[73] Jane Jeong Trenka,[74] Benyam Mezmur,[75] E.J. Graff,[76] Arun Dohle,[77] and Roelie Post.[78] By 2010, significant organizations were expressing concern with serious illicit practices in intercountry adoption, including Terre des Hommes (hereinafter TDH)[79] and International Social Services (hereinafter ISS).[80] The Hague Conference on Private International Law added a very significant focus on illicit practices at the 2010[81] and 2015[82] Special Commissions, under the brave leadership of Jennifer Degeling (2010) and Laura Martinez-Mora (2015), while institutionalizing that concern with ongoing work between Special Commissions.[83]

---

[71] T. Maskew, 'Child Trafficking and Intercountry Adoption: The Cambodian Experience', *Cumberland Law Review*, Vol. 35, 2004, pp. 619-638; T. Maskew, 'The Failure of Promise: The U.S. Regulations on Intercountry Adoption Under the Hague Convention', *Administrative Law Review,* Vol. 60, 2008, pp. 487-512. Maskew later served for several years as chief of the Adoption Division in the Office of Children's Issues, U.S. Department of State.

[72] G. Ramaswamy and B. Bhukya, *The Lambadas: a community besieged: a study on the relinquishment of Lambada girl babies in South Telangana*, Women Development & Child Welfare, Government of Andhra Pradesh, 2001, https://www.scribd.com/document/70681194/Unicef-A-Study-on-the-Relinquishment-of-Lambada-Girl-Babies-2001; R. Bonner, 'A Challenge in India Snarls Foreign Adoptions', *New York Times*, 23 June 2003, https://www.nytimes.com/2003/06/23/world/a-challenge-in-india-snarls-foreign-adoptions.html (discussing work of group led by Gita Ramaswamy seeking a moratoria based on view that "foreign adoption system in India is riddled with corruption and encourages trafficking in baby girls"). As can be seen from these dates, Gita Ramaswamy's work on adoption started a few years prior to 2004. Gita Ramaswamy recently published a well-received memoir of her life as an activist: G. Ramaswamy, *Land, Guns, Caste, Woman: The Memoir of a Lapsed Revolutionary*, Navayana, 2022.

[73] Founder of adoption blog which tracked abusive practices: http://fleasbiting.blogspot.com/; my own work was significantly done in partnership with Desiree.

[74] See, e.g., J.J. Trenka, *The Language of Blood: A Memoir*, Minnesota Historical Society Press 2003; C. San-Hung, 'An adoptee returns to South Korea and Changes Follow', *New York Times*, 28 June 2013, https://www.nytimes.com/2013/06/29/world/asia/an-adoptee-returns-to-south-korea-and-changes-follow.html.

[75] B. Mezmur, 'From Angelina (To Madonna) to Zoe's ark: What are the 'A–Z' Lessons for Intercountry Adoptions in Africa?', *International Journal of Law, Policy and the Family*, Vol. 23, No. 2, 2009, pp. 145-173; Mezmur went on to become a leading global expert in children's rights, see bio at https://hrp.law.harvard.edu/faculty/benyam-dawit-mezmur/.

[76] See, e.g., E.J. Graff, 'The Lie We Love', *Foreign Policy Magazine*, 12 January 2008. Graff was also primarily responsible for initiating and overseeing the valuable website, since archived, on illicit intercountry adoption practices, at Brandeis University's Schuster Institute for Investigative Journalism. For many years the Schuster Institute usefully collected link materials while also creating summaries, which were available for free on the website.

[77] A. Dohle, 'Inside Story of an Adoption Scandal', *Cumberland Law Review*, Vol. 39, 2008, pp. 131-185; see also https://www.againstchildtrafficking.org/our-team/.

[78] R. Post, *Romania For Export Only: The Untold Story Of The Romanian Orphans*, 2007; see also https://www.againstchildtrafficking.org/what-we-do/roelie-post/.

[79] I. Lammerant and M. Hofstetter, *Adoption: at what cost? For an ethical responsibility of receiving countries in intercountry adoption*, Terre Des Hommes, 2007, https://resourcecentre.savethechildren.net/pdf/1650.pdf/; UNICEF, Terre Des Hommes, *Adopting the Rights of the Child: A Study on Intercountry Adoption and its influence on child protection in Nepal*, 2008, https://bettercarenetwork.org/sites/default/files/attachments/Adopting%20the%20Rights%20of%20the%20Child.pdf.

[80] See, e.g., H. Boéchat, N. Cantwell and M. Dambach, *Adoption from Viet Nam Findings and recommendations of an assessment*, ISS, November 2009, https://resourcecentre.savethechildren.net/pdf/5366.pdf/.

[81] HCCH, Special Commission of June 2010, https://www.hcch.net/en/publications-and-studies/details4/?pid=6162&dtid=57.

[82] HCCH, Special Commission of June 2015, https://www.hcch.net/en/publications-and-studies/details4/?pid=6161&dtid=57.

[83] See, e.g., HCCH, Working Group on preventing and addressing illicit practices in intercountry adoption, https://www.hcch.net/en/publications-and-studies/details4/?pid=6309&dtid=62.

The critical voices of that time were echoing many of the concerns of a prior generation, who had been involved in the processes that created the UNCRC adoption provisions and the 1993 Hague Adoption Convention.[84] Indeed, those foundational instruments, including the brilliant analysis of Hans van Loon, reflected the concerns of that time with illicit adoption practices.[85] Some of those active from that earlier work, prominently including Nigel Cantwell, remained active not only in their own work but also in generously training the next generation of experts.[86] It seemed that in every decade and in every generation, throughout much of the modern history of intercountry adoption, it has been necessary to re-learn the risks and realities of illicit practices, in a context where thus far the problems have been systemically intractable.

There have been two main lines of response to realization of the systemic nature of illicit intercountry adoption practices: reform through regulation, or ceasing the systemic practice of intercountry adoption. The UNCRC allows either choice since neither adoption nor intercountry adoption are mandatory practices for states (see Art. 20(3) and 21); even the Hague Adoption Convention does not require Contracting States to participate in intercountry adoption,[87] but of course the Convention primarily is designed as a regulatory solution to allow intercountry adoption to continue.[88]

Experts and activists have divided along this spectrum of reform to abolition of intercountry adoption. My own response was to work with the HCCH and others on the reform agenda, while in my writings predicting that it would fail. I described the structural features and practices of intercountry adoption that incentivized illicit conduct.[89] I warned that mere ratification of the 1993 Hague Adoption Convention would not be sufficient to avoid child laundering, given a lack of political will and poor implementation by states.[90] I proposed specific reforms that could address the flaws of intercountry adoption systems and practice,[91] while also predicting those reforms would not be adopted or implemented, with the longer term result of the fall of intercountry adoption.[92] The Permanent Bureau of the HCCH, and many others devoted to the reform agenda were and are, in my view, extraordinarily committed and competent, but structurally quite limited to what they may do. What I was predicting, [93]therefore, was ultimately the unwillingness of States and the "adoption-community" –

---

[84] J.H.A. van Loon, Report on Intercountry Adoption, Preliminary Document No. 1 of April 1990, in Preliminary
Work, Proceedings of the Seventh Session 101, 10-29 May 1993, https://www.hcch.net/en/publications-and-studies/details4/?pid=918; Smolin, 2010 (analyzing text and preparatory materials of the 1993 Hague Adoption Convention evidencing a primary concern with illicit practices such as child trafficking and the sale of children).
[85] Ibid.
[86] See, e.g., Cantwell, 2014. I am personally grateful to Nigel Cantwell for informally helping to train me in my own work on adoption and the rights of the child.
[87] HCCH, *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice No. 1,* Bristol, Jordan Publishing, 2008, Section 8.2.1, para. 448, pages 100-101.
[88] See, e.g., H. van Loon, 'Statement on the Occasion of the Deposit of Ratification of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, by the United States of America (Dec. 12, 2007)', quoted in Smolin, 2010, pp. 452-453.
[89] Smolin, 2006; Smolin, 2004.
[90] Ibid.
[91] Smolin, 2006, pp. 171-200; Smolin, 2004, pp. 475-493.
[92] Smolin, 2006, p. 200.
[93] Ibid.

especially the majority of adoptive parents and prospective adoptive parents and agencies and intermediaries – to regulate with sufficient strictness to overcome the structural pressures producing illicit practices.[94] It was not until 2021 that I finally called for moratoria on intercountry adoption,[95] and then finally in 2022 advocated for ending the modern system of intercountry adoption.[96]

However, I had warned almost two decades ago:

> Without such systems of accountability, one can virtually never know, when holding an adopted child, whether the child was an orphan needing a home, or a beloved daughter or son illicitly taken from a home.[97]

> [A]lthough these reforms may be rational, it is not clear that there is a rational reason to hope for their adoption.[98]

> Intercountry adoption is a conditional good; intercountry adoption as child trafficking is an evil. Only when the law, society, and intercountry adoption system are reformed will the conditions under which intercountry adoption can flourish as a good be established. Unfortunately, the prospects for such reform are poor because there are few within the current intercountry adoption system with the motivation to demand it. Hence, the recurrent cycle of scandal, excuse, and ineffective "reform" will probably continue until intercountry adoption is finally abolished, with history labeling the entire enterprise as a neocolonialist mistake.[99]

The Dutch report of February 2021[100] in combination with the UN Joint Statement of September 2022[101] appear to represent a pivotal point as to recognition of the systemic nature of illegal and unethical practices in intercountry adoption, both before and after implementation of the 1993 Hague Adoption Convention. Of course most people globally would not have heard of either, but for those involved in international discourse on intercountry adoption it has become increasingly difficult to maintain the illusion of a safe system of intercountry adoption with only very occasional abuses.

The most irrefutable fact of intercountry adoption has been statistical decline: according to Professor Selman's statistics on intercountry adoption as published on the HCCH website a reduction of more than 85% from the 2004 high of 45,482 adoptions to 6,527 adoptions in 2019, the last pre-COVID year.[102] COVID occasioned further decline, to 3,730 adoptions in

---

[94] Ibid.
[95] Smolin, 2021.
[96] Smolin, 2023.
[97] Smolin, 2004, p. 493.
[98] Smolin, 2006, p. 200.
[99] Smolin, 2006, p. 325.
[100] Committee Investigating Intercountry Adoption, *Consideration, analysis, conclusions, recommendations, and summary*, February 2021, https://www.government.nl/documents/reports/2021/02/08/summary-consideration-analysis-conclusions-recommendations.
[101] UN Human Rights Treaty Bodies, Joint Statement on illegal intercountry adoptions, 29 September 2022.
[102] Selman, 2023.

2020 and 3,983 adoptions in 2021.[103] Thus, intercountry adoption has declined more than 90% and appears to be stabilizing at this much lower level.

I may have been wrong in predicting the complete abolition of intercountry adoption; such a prediction underestimates the continuing political impact of the demand side of intercountry adoption in receiving states. At the present time, for example, the United States and Italy continue to be significant receiving states, even if numbers are reduced internationally. But my predictions of substantial decline due to a continuing cycle of abusive practices leading to scandals leading to moratoria or slowdowns has generally been proven true. My predictions of a lack of political will sufficient to implement sufficient reforms has been accurate in at least most of the most active receiving states and in most of the active states of origin. Of course in many instances the primary form of reform has been simply to withdraw from participating in intercountry adoptions, or slow the numbers to a mere trickle, which are responses I anticipated. My skepticism concerned the capacity of states to implement reforms while still being quite active in intercountry adoption as to the numbers of children sent or received.

However, there may be some exceptions regarding a lack of reform within active nations that I did not anticipate. Although I am not in a position to verify it, there are indications that some of the most active states of origin today – for example, Colombia and the Philippines – have implemented Hague Adoption Convention norms with some degree of success. Colombia as described in Chapter 3 is one of many Latin American countries that suffered with systemic illegal adoption practices prior to Hague Adoption Convention implementation, and so a marked improvement in Colombia's practice, while still sending large numbers of children, would be significant. These possible exceptions to the general failure to implement reforms are suggestive. Certainly, if some states did reform successfully, it heightens the responsibility of the majority that did not, for it proves it was and is possible to implement real reforms and changes in intercountry adoption systems.

My pessimistic predictions regarding a lack of state-provided systemic remedies should not be taken as a rationale for fatalistic inaction but to the contrary is a mandate for activism. Whatever remedies are provided will occur only through activism driven by adoption triad members, allies, and NGOs. Most remedies will be self-remedies by adoption triad members assisted by NGOs and informal networks of assistance, apart from state assistance, but activists in some circumstances may be able to spur some state-assisted remedies. Activism can and already has achieved some partial successes. Nothing will be given that is not first demanded.

Remedies when Adoptees are still Children

What should be done when possible or confirmed illegal separation of a child from the original family is discovered after the child has traveled overseas and is living with the adoptive family? There are clearly different approaches.

[103] Ibid.

One approach sends the child back to the original family, and in some instances annuls or voids the adoption. The situation, other words, is treated in a way analogous to a kidnapping – when the victim is found they are reunited and returned to their family. So far as this author can tell there are perhaps only about fifteen such instances in the modern history of intercountry adoption, including both instances where the adoptive family voluntarily returned the child to the first family, and also cases in which a court ordered such return. In the publicized case of the Ugandan child Namata adopted by the Davis family in the United States, the adoptive family in 2016 returned the child to the original family with the assistance of the small NGO Reunite.[104] A related Ugandan case had the same result.[105] Decades ago the Israeli courts returned a child to Brazil in the rare instance where the original family, with assistance, brought a lawsuit in Israel.[106] After a criminal prosecution related to the illegal adoption of about 80 children from Samoa, at least one of the families returned the child to the first family.[107] The chaotic mass evacuation of children from South Vietnam in Operation Babylift in 1975 at the close of the Vietnam War led to litigation when original family members who had made their way to the United States sought the return of their children through civil litigation, leading to a reported twelve children being returned to their original family. Of course the Babylift children had left Vietnam under chaotic circumstances at the end of the Vietnam War.[108]

The opposite approach, which is what most often occurs, is that the child remains with the adoptive family without any contact with the original family, as the adoptive family successfully resists any remedies.[109] While most of these cases go unreported, there has been substantial reporting on the case of Karen/Anyeli, a child who reportedly was abducted at age two from her middle class family in Guatemala. The parents, Dayner Orlando Hernández and Loyda Rodríguez immediately filed multiple complaints with various authorities, stating that two women had seizued Anyeli and fled in a taxi. The authorities reportedly did nothing. Eventually, Anyeli was adopted by an American couple, Timothy and Jennifer Monahan. The details of the adoption process are available in much fuller form than typical due to extensive investigation by the authorities in Guatemala and extensive journalistic reporting, and describe a classic case of child laundering. After the abduction a fake birth mother was paid to consent

---

[104] J. Davis, 'The "orphan" I adopted from Uganda already had a family', *CNN*, 13 October, 2017, https://www.cnn.com/2017/10/13/opinions/adoption-uganda-opinion-davis/index.html; see 'Kids for Sale', *CNN*, https://www.cnn.com/specials/kids-for-sale; Reunite, https://reunite.live/.

[105] Ibid.; see also CNN, 'Violah is reunited with her family', 13 October 2017, https://www.cnn.com/2017/10/12/africa/gallery/uganda-adoptions-violah-reunion/index.html.

[106] See Chapter 4, at page , citing M. Goldfeder, 'Adoption in Judaism and in Israel', in R.L. Ballard, N.H. Goodno, R.F. Cochran, Jr. and J.A. Milbrandt (eds.), *The Intercountry Adoption Debate: Dialogues Across Disciplines*, Cambridge Scholars Publishing, 493-525, p. 520.

[107] NZPA, 'Four sentenced in Samoan adoption scam', *New Zealand Herald*, 28 February 2009, https://www.nzherald.co.nz/world/four-sentenced-in-samoan-adoption-scam/N5GNQF6LKNO5GL2JDZFYA4PD4I/; U.S. Dept. of State, 'Defendants In "Focus On Children" Case Sentenced In Federal Court', 25 February 2009, https://2009-2017.state.gov/m/ds/rls/127131.htm; B. Adams, 'Samoan adoption scheme payments to be cut', *Salt Lake Tribune*, 1 June 2011, https://archive.sltrib.com/article.php?id=51885509&itype=CMSID.

[108] PBS, 'Operation Babylift (1975)', https://www.pbs.org/wgbh/americanexperience/features/daughter-operation-babylift-1975/; A. Varzally, 'Vietnamese Adoptions: A Question of Parenthood', *Boom California*, 30 March 2018, https://boomcalifornia.org/2018/03/30/vietnamese-adoptions/.

[109] See, e.g., E.S. McIntyre, 'The Limits of Jurisdiction', *Guernica*, 1 December 2014, https://www.guernicamag.com/the-limits-of-jurisdiction/.

to the adoption, but the consent was voided when a DNA test (as then required in Guatemalan adoptions) showed the assigned birth mother was unrelated to the child. The adoption then stalled, until in a workaround the child was falsely labeled as abandoned, which facilitated the adoption. Loyda later found her daughter's photo in the adoption file and validated her status as natural mother through a DNA match using a sample of the child's DNA that had been preserved. The Guatemalan government treated the case as a trafficking case and criminally prosecuted a number of individuals involved in the adoption; the Guatemalan government sought a second confirming DNA test and then the return of the child, but the US government refused to assist with either.[110] It appears that Loyda was unable to find or afford legal counsel to carry out her wish to file a case in the locality of the adoptive family. So far as can be determined the child grew up in the United States with the adoptive family, apparently without any contact with the first family. This case is unusual in the degree of detail that is publicly available and unusual in the legal activism of the country of origin on behalf of the first family; the case is typical in the capacity of the adoptive family to refuse all remedies during the childhood of the adoptee.

A third approach has sometimes been initiated by adoptive parents, which is to establish contact and reunions, after which a kind of de facto open adoption is practiced with continuing contacts and possibly visits. Of course this approach includes the participation and input of the adoptee and depends on the interest and cooperation of the original family. Since this has been a form of self-remedy, the high costs of international travel make the approach only accessible when the adoptive family can afford it. I know of various instances of this approach but none in which governments have contributed financially to the remedy.[111]

One creative approach was attempted in the prosecution mentioned above of a set of illegal adoptions from Samoa involving around 80 children. The sentencing agreement required the former operators of the American adoption agency to contribute to a trust fund designed to facilitate contact between the adoptees, adoptive families and first families. The trust fund was overseen by an expert, Professor Jini Roby (herself an international adoptee and Professor of Social Work). Although a married couple and two other defendants were ordered to pay into the trust fund, the amounts paid and sought were around $85,000 USD with an ultimate goal of $100,000. The amount of money involved, however, amounted to only about $1,200 per child living in the United States, which was far too little to provide for travel; hence, the remedy focused on covering costs associated with communicating long-distance, including translation services and language lessons. This remedy was innovative but fell far short of providing an adequate remedy for such a large group, illustrating the problem with inadequately funded remedies. The remedy also allowed adoptive parents control over the amount of contact, making it irrelevant where the adoptive parents preferred to avoid any kind of contact. The remedy was also criticized because the perpetrators were subjected only to a probationary period with no time served in prison, despite the seriousness of their actions which had

[110] Ibid.
[111] See, e.g., J. Rollings, *Love our Way: A courageous mother's story that gives new meaning to the world family*, Harper Collins, 2008.

impacted so many families. Theoretically probation rather than prison enabled the perpetrators to be in a better position to contribute to the trust fund, but this benefit was ultimately minimal because the perpetrators were required to provide only minimal contributions. Indeed, one wonders why the perpetrators, who reported would have earned over a million dollars over at least three years from the scheme, were as a group only required to contribute less than $100,000. While allowing the perpetrators to be on probation theoretically would have allowed them to continue to earn funds to contribute to the trust fund, it appeared that the subsequent contributions were very small – at most $15,000.[112] The married couple convicted in the case reportedly were allowed to complete the adoption of a child from China after being convicted, having previously adopted two infants from Romania who were then reportedly sent to Samoa to live around ten years later.[113]

Given these very different approaches, what are the best approaches to remedies for illegal adoptions when discovered while the adoptee is still a child? I would suggest the following principles:

1. Remedies in principle should be available to all members of the adoption triad – adoptees, the first family, and the adoptive family. The first family and adoptive family include of course not only parents but also siblings, grandparents, etc., as the intergenerational nuclear and extended families are all impacted.

2. Investigation and truth-finding and truth-telling are essential.[114]

3. Dependent on the particular circumstances, it can be helpful that adoption triad members have multiple opportunities to tell their stories, from their own perspectives, to one another.

4. Remedies should respect all of the adoptee's family ties and lived experience of family. Thus, so long as such relationships have been and would be positive, remedies should where possible be both/and, or additive rather than subtractive, allowing for the adoptee to have continuing relationships with both the first and adoptive family.[115]

---

[112] See P. Manson and S. Gehrke, 'Focus on Children scam: No jail time in adoption-fraud case', *Salt Lake City Tribute*, 25 February 2009, https://archive.sltrib.com/story.php?ref=/ci_11782689; B. Adams, 'Samoan adoption scheme payments to be cut', *Salt Lake City Tribute*, 1 June 2011, https://archive.sltrib.com/article.php?id=51885509&itype=CMSID.

[113] P. Manson, 'Couple on probation in Samoan adoption case adoption child', *Salt Lake City Tribune*, 3 March 2010, https://archive.sltrib.com/story.php?ref=/news/ci_14507609.

[114] UN Human Rights Treaty Bodies, Joint Statement on Illegal Intercountry Adoptions, 29 September 2022, para. 13, 15, 17-18; E. Loibl, 'The aftermath of transnational illegal adoptions: Redressing human rights violations in the intercountry adoption system with instruments of transitional justice', *Childhood*, 2021, Vol. 28, No. 4, pp. 477, 484-485, 487.

[115] Loibl, 2021, pp. 482-484 (discussing complexities of determining the child's best interests as to remedies for an illegally adopted child).

5. It is appropriate in some cases to return the child to the first family, possibly annul the adoption, and restore the parent-child relationship of the first family.[116] But such a remedy does not necessarily require excluding continuing contact with the adoptive family. It is appropriate in some cases for the child to remain primarily with the adoptive family, while re-opening the relationship of the child to the first family in a way analogous to an open adoption. In instances where the child has been illegally taken from the first family, the approach of allowing the adoptive family to simply prevent remedies is not appropriate, unless it can be demonstrated that the first family would be abusive to the child.

6. Remedies should be attempted even if child adoptees initially do not want to know about or have contact with the first family, unless that wish is based on a history of abuse or similar circumstances. It must be remembered that many adoptees have few memories of the first family and have been recruited into their adoptive identity, and may not feel ready to confront difficult facts or have their lives be unsettled. Other adoptees may have had many memories of the first family, but have been through the difficult process of adapting to a new identity, language, culture, and family, in the process likely forgetting much of their first language (subtractive bilingualism or second first language acquisition).[117] The initial reluctance and reticence of young adoptees is understandable but should not be determinative. Some actions which are in the best interests of a child may go against the wishes of the child, which is why children have participation rather than autonomy rights as to many decisions (Art. 12 UNCRC). Moreover, where the child was illegally taken from the first family, the separation constitutes a continuing wrong and should in principle be remedied.[118] By analogy, if a child were stolen from a hospital nursery and raised by the kidnapper the child would be returned to the first family regardless of the wishes of the child. In most cases, the adoptive parents were not responsible for or aware of the illegal separation and thus as to the adoptive parent-child relationship the issue is somewhat different. But as to the loss of the child by the original family the situation is the same as a kidnapping. Hence, the child adoptee should be guided by adults to understand the situation and to gradually process the facts of their life and the reality of their first family.

7. Where possible, adoption triad members should be supported by competent counseling.[119] However, in practice there often are not enough counselors available. There are severe shortages of counselors who are competent in adoption, and even fewer who would be sensitive

---

[116] UN Human Rights Treaty Bodies, Joint Statement on Illegal Intercountry Adoptions, 29 September 2022, para. 12, 15-18; E. Loibl, 2021, pp. 482-484; L. Long (ed.), ICAV Perspective Paper, Illicit Intercountry Adoptions: Lived Experience Views on How Authorities and Bodies Could Respond, July 2020, page 10, https://www.academia.edu/43560775/Illicit_Intercountry_Adoptions_Lived_Experience_Views_on_How_Authorities_and_Bodies_Could_Respond_Perspective_Paper_2020.

[117] See J. Price, K. Pollock, and D. Oller, 'Speech and language development in six infants adopted from China', *J Multiling Commun Disord*, Vol. 4, No. 2, 2006, pp. 108–127; P. Silva, *Speech and language development for children adopted internationally after age 3: two clinical case studies*, MA thesis, University of Texas, May 2015, https://repositories.lib.utexas.edu/bitstream/handle/2152/32239/SILVA-MASTERSREPORT-2015.pdf?sequence=1.

[118] UN Human Rights Treaty Bodies, Joint Statement on Illegal Intercountry Adoptions, 29 September 2022, para. 12, 15-17.

[119] Ibid., para. 17.

to the difficulties of remedying illegal adoption.[120] The high cost of counseling is an additional barrier, unless the state provides very significant resources.[121] Hence, in practice culturally appropriate ways may have to be found to support adoption triad members even if professional counseling is not available.

8. Where possible, the adoption triad should be guided through a set of processes and interactions to mediated understandings as to the nature of future relationships and living arrangements. In some ways, the potential conflict between the adoptive and first family can be viewed as analogous to a blended family created when divorced parents with children find new partners, providing the children with multiple parental households.[122] At best, the life of each child may be enriched by having supportive relationships and family in both households. However, as in divorce, there is a risk of the children instead being caught between conflicting adults who disparage one another to the children. As to adoption, the ultimate goal is that all of the adults who have played positive parental roles in the life of the child (including those who are genetic and/or gestational parents), are able to contribute positively to the growth and development of the child over time, while at the same time providing sufficient stability and clarity to the child. Even with ideal relationships among the adults, the specifics of living arrangements, means of contacts, visits, etc., will need to be worked out and adjusted over time.

9. Ideally, where an intercountry adoption may have been built upon the illegal separation of the child from the child's original family, one or both states, and the private intermediaries if any, should pay the costs of the remedy. This means paying for investigations, birth searches, travel, translators, counselors, language study, means of long distance communication, etc.[123] However, while the government or original intermediaries may justly be charged the costs, most often the services should be provided and guided by experts or NGOs independent of the government and of the original intermediaries who arranged the adoption. The government and original intermediaries have conflicts of interests and often a lack of expertise and should not be permitted to control or provide the critical services basic to remedies.

Remedies when Adoptees are Adults

Some principles regarding remedies are similar regardless of whether the adoptee is a child or adult. In both instances, if adoptions were processed in times and places where the wrongful separation of children from families was systemic, a complete investigation is necessary, including document disclosure and review, interviews with intermediaries and others with

---

[120] L. Long, Intercountry Adoptee Voices, Consultation on the Intercountry Adoption Family Support Service, February 2020, https://engage.dss.gov.au/consultation_ica_family_support_service_feb2020-submissions/1584003537/; Australian Psychological Association, Understanding Forced Adoption: Training for Psychologists, https://psychology.org.au/event/23364; B. Purrington, 'Adoption-Competent Therapy — What It Is, Why It Matters, and How to Find It', Boston Post Adoption Resources, 23 June 2022, https://bpar.org/adoption-competent-therapy-what-it-is-why-it-matters-and-how-to-find-it/.
[121] Long, 2020.
[122] V. King, L. Boyd and M. Thorsen, 'Adolescents' Perceptions of Family Belonging in Stepfamilies', *Journal of Marriage and Family*, Vol. 77, No. 3, 2015, pp. 761–774.
[123] UN Human Rights Treaty Bodies, Joint Statement on Illegal Intercountry Adoptions, 29 September 2022, para. 17.

information, and birth searches. In both instances, the expenses for such should in principle be paid for by the responsible states and intermediaries, including paying for investigations, birth searches, and counseling during the search stage. If the search is successful, the responsible states and intermediaries should pay for services related to reunions and restored relationships, including travel, translators, counselors, language study, means of long distance communication, etc.[124] In both instances, investigations, searches, counseling services, and reunion and restored relationship assistance services should be provided by NGOs and other non-governmental actors who were not involved in the original adoption, because governments and intermediaries who were involved have a conflict of interest. The role of states is to pay the costs, and to use governmental authority to ensure access to information and documents.

However, the responsibility and power dynamics change significantly when adoptees are adults, which substantially changes the context for remedies. There can no longer be a dispute between the first and adoptive families concerning the custody or living arrangements of the adoptee. The power of adoptive parents and family is much reduced when adoptees are adults, as they no longer have the authority to control access to the adoptee. The adult adoptee cannot be prevented from relating to the first family, and the adoptee cannot be forced to relate to either adoptive or first family. The financial situations of adoptees of course vary significantly, but some adoptees who have achieved financial independence also would have practical power to impact remedial possibilities.

Of course, as noted above, the remedies for adult adoptees are different because childhood is over, and hence remedies cannot restore relationships with the first family during that critical stage of life. No one can give back to the adult adoptee or first family the childhood together that was wrongly taken from them. No one can give back to the adult adoptee the person they would have been had they been raised to adulthood by their first family. In that sense, it is impossible to achieve "restitution to the original situation of the victim before the illegal intercountry adoption […]"[125] for most illegal adoptions, since remedies are not attempted until childhood is over. This fundamental fact impacts those remedies that are available, in profoundly impacting the dynamics of reunions and restored relationships.

Given the formative nature of childhood, reunions are necessarily complicated by the adoptee having been formed, as to identity, language, culture, personality, character, and religion, by a different family than their first family. Of course the exact situation varies as to the age at which the adoptee left the first family, and came into the adoptive family, and also what occurred during any periods of temporary care. Nonetheless, reunions are an odd combination of the familiar and foreign, the familial and the stranger. The process is stressful, and with adult adoptees completely dependent on the interest and choice of the adoptee to travel down this pathway. Either first family or adoptee may withdraw or limit involvement at any point in time.

[124] Ibid., para. 15-18.
[125] UN Human Rights Treaty Bodies, Joint Statement on Illegal Intercountry Adoptions, 29 September 2022, para. 17.

Remedies for adult adoptees can be revelatory and healing, but they are also immensely challenging.[126]

The Paradox of Remedies for First Families

Paradoxically, if remedies for original families were systematized, it would create an unsustainable model that could incentivize future abusive practices – at least if intercountry adoption continued. This problem would not occur if intercountry adoption as a systemic practice was ended. Hence, remedies being effective without incentivizing further abusive practices requires the ending or at least sharp limitation of intercountry adoption.

The problem is this: the proper remedy for first families typically would be restoration of relationship and regular contact with their children.[127] Whether done in childhood or adulthood, this would in many cases create the equivalent of an open adoption in which first families were connected to both their child (often by then an adult) living in a developed nation, and often to the adoptive family as well; in addition, their child would have citizenship in a developed economy. If these restored relationships were successful, there in time would be substantial financial benefits to the first family. Being related to family in the United States, Europe, or other developed economies would in time bring the kind of remittances and assistance that relatives commonly send back to family still living in developing nations.[128]

This practice would in many instances fulfill the implicit promises that some first families explicitly or implicitly had received – that their child would go to a developed country and receive an education and other benefits there while supported by a host family, and over time would benefit the rest of the family remaining in the country. As indicated above, it is one common form of child laundering to trick first families into believing that their children will in effect have a host family experience in another country, while remaining a part of their own family. Of course, in the typical child laundering scenario, those were false promises: the first family instead loses contact with their child, does not even know where or with whom their child is living, and legally is fully severed from a parental relationship with their child.

The remedial practice of restored relationship is just and necessary in a context of illegal separation. This result also practices adoption in a way more compatible with human dignity, as in fact full severance adoption is based on a legal fiction of no relationship with the original family that fails to honor and respect our full humanity. Even if the original separation of the child from the original family was legal and ethical at the time, absent serious abuse or other

---

[126] See, e.g., ICAV, Key Messages: Reunion and Beyond in Intercountry Adoption, August 2023, https://intercountryadopteevoices.com/wp-content/uploads/2023/08/Reunion-and-Beyond-Key-Messages.pdf; L. Long (ed.), ICAV, Search and Reunion: Impacts and Outcomes, July 2016, https://intercountryadopteevoices.com/wp-content/uploads/2016/07/search-and-reunion-icav-perspectives-july-2016-v12.pdf.

[127] UN Human Rights Treaty Bodies, Joint Statement on Illegal Intercountry Adoptions, 29 September 2022.

[128] World Bank Group, Remittances Brave Global Headwinds, November 2022, https://www.knomad.org/publication/migration-and-development-brief-37.

such circumstances, open adoption, and continuation or restoration of relationship between the adoptee and birth family is usually the best adoption practice.[129]

However, connecting family members from middle class to wealthy circumstances in developed countries, with poor to lower-middle class family members in developing countries, creates expectations and often the practice of financial support. Apart from adoption, family members living in developed economies commonly send funds regularly to their relatives living in developing or transition economies. Thus, remittances to low and middle income countries comprise more than six hundred billion dollars annually, with India, China, Mexico, and the Philippines being top recipients.[130] Remittances are a systematized and expected practice when families live across in very different economic circumstances. Further, staying connected across international borders, and sending remittances, are far easier than in decades past, given technological advances available even among many of the poor in developing nations like India. Hence, when family relationships are restored, financial benefit will be expected and often practiced.

If in fact the equivalent of open intercountry adoption with accompanying lifeline financial family benefits were available to the poor of developing countries, it would likely be irresistible for large numbers of families of origin to agree to such circumstances. This would be seen as an alternative form of intergenerational migration and immigration to countries of greater opportunity. If instead of using this promise as a fraudulent inducement to full severance relinquishments, the offer of continued relationship was real and fulfilled on a regular basis, the temptation to turn children over for the benefit of the whole extended family would be difficult to resist. Indeed, many of the middle class in developing nations might be eager to send their older children to "host families" in developed economies if this was practiced as a form of family addition, immigration, citizenship in a developed nation, and economic opportunity. Intercountry adoption would be transformed essentially into a massive hosting program with citizenship, immigration, and remittance benefits.

This is NOT an argument against supplying remedies to families of origin, who are owed such as a matter of remedying severe loss and injustice. Rather this is an argument against continuing intercountry adoption. On the one hand, the only just way to continue intercountry adoption would be transform it into a system of systemically open intercountry adoption, which would provide a transparency and set of continued relationships that would guard against many of the abuses and harms of intercountry adoption practice. Yet, as soon as the actuality or perception of such a practice of intercountry adoption were systematized and scaled up, it would be perceived in developing nations as a kind of hosting, foster family program with citizen and remittance benefits. This would create another set of injustices: adoptees as sacrificial lambs, sent away in childhood for the economic benefit of the entire extended family with expectations of lifelong assistance.

[129] Seymore, 2015.
[130] World Bank Group, 2022.

Full severance intercountry adoption is filled with hidden abuses, suppressed traumas and blatant injustices; correcting such programs into more humane and transparent open intercountry adoptions would trade those harms for a different set of injustices. Sending babies, young children or even teenagers away from their families with a mission and responsibility to succeed in a competitive developed economy and help support the entire nuclear and extended family back home is also a scenario highly incompatible with children's rights. The intercountry adoption system should not become an inducement to send children away. That inducement could be magnified to an unprecedented degree if the remedial approach to intercountry adoption became a model for future intercountry adoptions.

The modern intercountry adoption system grew and continued over seventy plus years in environments of false promises, traumatic lifelong separations, hidden abuses, and exploitation of severe economic and social disparities within and between nations. The remedies of truth telling, reunion, openness and restoration of relations are required by justice but are not a bridge to a restored intercountry adoption system. Creating a new intercountry adoption based on remedying the flaws of the past would simply set the stage for a new and different set of injustices.

The Significance of Apologies

It is easy to be cynical about apologies. In themselves apologies do not provide the benefits of investigations, birth searches, reunions, or counseling. Given that wrongful separations of children from families constitute continuing wrongs (and thus are not mere "historical cases"),[131] apologies without remedies can add insult to injury; it would be like apologizing while simultaneously continuing to commit the crime. Apologies thus should not be a substitute for other remedies.

But apologies in conjunction with remedies can be a particularly meaningful addition in the context of illegal intercountry adoption. Done well, apologies are a way of communicating, to the adoption triad victims, to their broader families and communities, and to the society, that something seriously wrong has occurred.[132] Apologies thus can counter the deeply entrenched tendencies to minimize the harms of illegal adoptions – a tendency that exists even among many of the direct victims, adoption triad members. Adoptees have been recruited into adoptive identities that, usually unknown to the adoptee, are often built on illegal separations from the first family. This recruitment may make it difficult for adoptees to conceptualize themselves as victims, even when investigation reveals that they were taken wrongfully from their original family. First families are typically ignored and sometimes have been tricked, coerced or tempted into participating in their own victimization in ways that may accentuate self-blame. Adoptive parents usually were unaware of the illegal conduct and may have difficult even conceptualizing the idea that their beloved child was wrongfully taken from another family.

[131] UN Human Rights Treaty Bodies, Joint Statement on Illegal Intercountry Adoptions, 29 September 2022, para. 12.
[132] E. Loibl 2021, pp. 486-487.

Apologies would be a critical validation of adoption triad members as victims of illegal adoptions.[133]

This validation is also necessary in a context in which many in society do not recognize illegal intercountry adoption as a serious wrong, and continue to see the adoptee as primarily a beneficiary of the adoption even when they were stolen or bought. Official apologies could communicate a necessary message that children being wrongfully taken from their first families is a real harm for which recompense and reparation are due.[134]

There are at least two kinds of apologies, both of which could be helpful in this context.

First, there are apologies to a group of victims, such as have been made regarding mistreatment of single mothers, and regarding the forcible removal of indigenous children into boarding schools or for adoption. Such apologies are often national in scope, and may come from the state, religious leaders, or others. Typically such do not occur until decades after most of the relevant wrongs were first committed.[135] Obtaining these kinds of national or even international apologies to the victims of illegal intercountry adoption would be a significant step forward, since to this point of time they have been mostly absent, the first such official apology occurring in the Netherlands in 2021.[136]

Second, apologies can be made to those impacted by a particular illegal adoption. Apologizing to each particular impacted family and individual would take an enormous amount of work, as it would require verification of the facts of each particular case and of course creating and delivering each individualized apology. Sometimes such apologies are avoided out of fear of opening the door to legal liability. Nonetheless, individual apologies can be particularly powerful precisely because they are so personalized. Unfortunately, the main circumstance where such might occur is in the context of victims suing for civil remedies; apologies in that context may feel forced which would lessen their impact.

Criminal Prosecutions

There are numerous examples of criminal prosecutions related to intercountry adoption. For example, criminal prosecutions have been pursued by Brazil, China, Chile, Colombia, Guatemala, and India as countries of origin.[137] In the United States criminal prosecutions have been brought against American intermediaries as to adoptions from Cambodia, Poland, Samoa,

---

[133] Ibid.
[134] Ibid.
[135] Ibid.; D.M. Smolin, 'Beyond Apologies: Children, Mothers, Religious Liberty, and the Mission of the Catholic Church', Cumberland Law Review, Vol. 53, 2023.
[136] E. Loibl, 2021, pp. 486-487.
[137] D.M. Smolin, 2004, pp. 456-474; E. McIntyre, 2014; B.H. Stuy, 2014; W. Hoge, 'Ring in Colombia Kidnaps Children for Sale Abroad', *New York Times*, 16 August 1981, https://www.nytimes.com/1981/08/16/world/ring-in-columbia-kidnaps-children-for-sale-abroad.html; see Chapters 4 and 5.

and Uganda.[138] The Zoe's Ark case concerning an attempt to smuggle over a hundred children from Chad to France resulted in prosecutions in both Chad and France.[139]

Despite these and other examples, the proportion of illegal adoptions that have been subjected to criminal prosecution is quite tiny, prosecutions have not always been successful, and statutes of limitations pose barriers in older cases, all of which significantly lessens the deterrent effect, as those involved in illegal adoptions may operate with virtual impunity, at least as to the risks of criminal prosecution. As a practical matter, those involved in illegal intercountry adoption have a very low risk of being criminally prosecuted, and even more so if they a few precautions against exposing their behavior.[140]

There are three other difficulties. First, criminal prosecutions in themselves do not provide remedies for victims, such as birth searches and reunions. Punishing criminals and deterring crimes is a different function than providing remedies to victims, and in some systems the needs of victims can be ignored during the prosecutorial process.[141] Second, states may sometimes prosecute less significant wrongdoers as sacrificial lambs while protecting higher status wrongdoers.[142] Third, states may use criminal prosecutions to create the appearance of a response to scandal, while generally doing very little as to remedies or reform.[143]

For all of these reasons, criminal prosecutions, while a significant form of response to illegal adoptions, are only one form of response and not necessarily the most important.

Conclusion

Progress has been made in recent years in recognizing that illegal, abusive, and exploitative practices have been systemic and pervasive in the entire modern era of intercountry adoption. This chapter has suggested framing illegal intercountry adoption as usually involving the illegal separation of children from families. This reframing is factually accurate, as most forms of illegal intercountry adoptions do involve illegal separations of children from their first families. This reframing is also a helpful predicate to the task of providing systemic remedies for the systemic abuses in the modern intercountry adoption system, as it identifies the fundamental harms at the center of illegal, abusive, and exploitative intercountry adoptions.

---

[138] U.S. Department of Justice, Texas Woman Pleads Guilty to Schemes to Procure Adoptions from Uganda and Poland through Bribery and Fraud, 11 November 2021, https://www.justice.gov/opa/pr/texas-woman-pleads-guilty-schemes-procure-adoptions-uganda-and-poland-through-bribery-and; U.S. Department of Justice, Former Executive Director of International Adoption Agency Pleads Guilty to Fraudulent Adoption Scheme, 2 February, 2022, https://www.justice.gov/opa/pr/former-executive-director-international-adoption-agency-pleads-guilty-fraudulent-adoption; NZPA, 2009; U.S. Department of Justice, Hawaii Resident Pleads Guilty in Cambodian Adoption Conspiracy, 23 June 2004, https://www.justice.gov/archive/opa/pr/2004/June/04_crm_434.htm; D.M. Smolin, 2006, pp. 135-146.

[139] B.D. Mezmur, 2009; 'French charity workers jailed in children-smuggling case', *France24*, 2 December 2013, https://www.france24.com/en/20130212-france-charity-workers-jail-sentences-children-smuggling-case.

[140] E. Loibl, 2021, p. 480.

[141] Ibid., p. 481.

[142] B.H. Stuy, 2014.

[143] Ibid.

Responses, remedies and reparations for illegal intercountry adoption have been rare and sporadic during the modern era of intercountry adoption. Yet, in recent years the question of remedies has received increased attention, and thus now is a particularly opportune time to address the issue. This chapter and indeed this book are designed to assist in these recent efforts to provide remedies for the many victims of the modern era of intercountry adoption. The task is not easy and, in the nature of things, some harms cannot be undone. It will be a struggle to achieve even very partial remedies and responses. Yet the effort must be made, as remedying illegal intercountry adoption is an obligation under international law. Indeed, every appropriate response and remedy that is provided has the potential to positively impact the lives of many across generations.

These remedial efforts are also necessary to strip away the blinders that prevent us from really seeing the harms done in the name of intercountry adoption. We cannot fully perceive the harms and costs of illegal intercountry adoption, until we are fully engaged in the task of providing remedies and reparations. This eye-opening work hopefully then can guide decisions about the future of intercountry adoption.

The potential benefits of intercountry adoption have been obvious to many; we need to see just as clearly the very real harms and costs. Only then can we be equipped to make balanced decisions about the future of intercountry adoption and whether, and in what form, it should continue.