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The Legal Mandate for Ending the Modern Era of Intercountry Adoption

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NOTE: THIS IS A DRAFT VERSION AND A FEW ERRORS, PARTICULARLY AS TO FOOTNOTES THAT REFER BACK TO PRIOR FOOTNOTES, REMAIN

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THE LEGAL MANDATE FOR ENDING THE MODERN ERA OF INTERCOUNTRY ADOPTION

David Smolin

1. Introduction

Intercountry adoptions declined by 86 per cent between 2004 and 2019.[1] The COVID-19 pandemic is deepening those declines. Stark statistical reductions in intercountry adoption have been accompanied by the increasing recognition of illicit practices as a chronic feature of intercountry adoption systems. There is a trend toward governmental investigations of illicit practices and even moratoria. States must decide whether to reform and continue intercountry adoptions, or end their participation.

Such an evaluation requires consideration of the decades-long efforts to create international legal standards to govern the practice of intercountry adoption. The foundational United Nations Convention on the Rights of the Child (UNCRC) provided an indispensable child rights framework.[2] The Hague Conference for Private International Law 1993 Adoption Convention ('Hague Adoption Convention') soon followed, establishing a 'system of cooperation' and procedural rules by which intercountry adoptions would 'take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law.'[3] In 2000, the Optional Protocol to the UNCRC, on the Sale of Children (OPSC) provided an overarching definition of sale of children, and state obligations to prohibit sale of children and to criminalise certain forms of sale of children in the context of adoption.[4] Also in 2000, the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (the Palermo Protocol) defined human trafficking, including child trafficking. These definitions left open the possibility that some forms of illicit adoption practice could (as the Hague Adoption Convention had suggested) constitute a form of human trafficking.[5] Finally, the Guidelines for the Alternative Care of Children created standards for all kinds of alternative care, providing important contexts for the specific question of intercountry adoption.[6]

These international instruments have been an important success, changing fundamentally and positively the way these subjects are understood. Unfortunately, the project of bringing intercountry adoption practice into conformity with these standards has largely been a failure, particularly in relation to those aspects that

[1] P Selman *The Rise and Fall of Intercountry Adoption 1995-2019*, this volume, Ch. 18*;* P Selman *Global Statistics for Intercountry Adoption: Receiving States and States of origin 2000-2020, available at file:///C:/Users/dmsmolin/OneDrive%20-%20Samford%20University/selman.adoption.stat.2022.pdf*.
[2] United Nations Convention on the Rights of the Child (1989) 1577 UNTS 3.
[3] Hague Adoption Convention, Art. 1.
[4] Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000) 2171 UNTS 227.
[5] Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000) 2237 UNTS 319.
[6] UN General Assembly A/RES/64/142 (2010).

most impact the rights of the child. Applying these developing standards to the approximately 70 year history of modern intercountry adoption nets one overall conclusion: the system as a whole has failed to implement its own principles and standards. Whatever shortcomings there are in these admittedly imperfect international instruments, the deeper issue has been the wholesale failure to live up to their standards.

There have been laudable efforts by many international actors, including the Permanent Bureau of the Hague Conference on Private International Law (HCCH), the Committee on the Rights of the Child, and the UN Special Rapporteur on the Sale and Sexual Exploitation of Children. Yet these international actors lack the mandate and capacity to regulate intercountry adoptions, generally being limited to standard-setting, recommendations, and reports. Some States have laboured to respond to significant past abuses through suspensions, investigations, or reforms, such as Guatemala and Ethiopia. Some countries of origin, such as the Philippines, have worked diligently to implement and improve international standards. More recently, some receiving States, such as the Netherlands, Switzerland, and Belgium, have significantly investigated their own roles in the intercountry adoption system.[7] Yet, the context for most of these positive efforts are extensive histories of systemic abuses, usually with little or no governmental provision of remedies or assistance to the persons and families deeply hurt by those abuses. The positive efforts by some, however laudable, are far too little far too late, in a context where States and societies most often have practiced intercountry adoption, including up to the present day, in ways that fundamentally undermine international standards.

Intercountry adoption has a conditional legality under international law. This chapter reviews some of the relevant standards (Section 2) and the ways in which those standards and conditions have been systemically violated (Section 3). The conclusion is that there is a legal mandate to end the modern era of intercountry adoption. If systemic intercountry adoption is to continue, there would need to be a large-scale revision as to implementation of norms and the provision of remedies when norm violations occur. Trying to do intercountry adoption the same way will end up with the same unremedied harms to children and families that we have seen over the last 70 years.

This conclusion does not mean that every international adoption has been illegal in the modern era of intercountry adoption. Some individual adoptions most likely have met international standards. Further, some nations during certain periods of time may have had practices in conformity with, or close to conformity with, international standards. However, these exceptional circumstances cannot justify the maintenance of a system of intercountry adoption which pervasively and systematically violates international standards.[8]

2. International Standards

International standards begin by recognizing the child's rights to name, nationality, and family relations within the original family, including the child's right to "know and be cared for by his or her parents."[9] Then, international standards examine whether any separation of the child from the original family is appropriate and remediable. These standards precede and frame the subsequent standards specifically concerning adoption and alternative care.

[7] See https://intercountryadopteevoices.com/2021/09/04/governments-finally-recognising-illicit-and-illegal-intercountry-adoption-practices/

[8] This chapter focusses on adoptions by persons resident in one country of non-related children residing in another country, by which the children are moved permanently out of their native country. It excludes from consideration situations where expats resident for long periods in a country use the domestic laws of a nation to adopt, or where intercountry adoption is used to move children to extended family members across borders.

[9] UNCRC, arts. 7, 8.

Much adoption discourse, by contrast, begins with the question of how best to provide for 'orphans', without giving much attention to how the child came to be labeled as adoptable. This common approach of beginning with an isolated and vulnerable child, however appealing, dooms any real possibility of ethical adoption.

Hence, it is necessary to review the relevant child rights standards.

(a) Child's Rights to Preserve Identity and Corresponding State Obligations: UNCRC Articles. 7, 8, 9, 3, 18

UNCRC Article 7 states:

"The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents."

Article 8 adds:

"State Parties undertake to respect the right of the child to preserve his or her identity, nationality, name and family relations as recognized by law without unlawful interference."

As a remedial matter, Article 8(2) 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 re-establishing speedily his or her identity."

Article 9 further states:

"State Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child."

This reference to the best interests of the child connects to Article 3, which requires that '[i]n all actions taken concerning children….the best interests of the child shall be a primary consideration'. In the case of adoption, children's best interests are elevated to *the paramount* consideration, under Article 21.

In addition, Article 18 importantly adds:

"States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents, or as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child shall be their basic concern….State Parties shall render appropriate assistance to parents…in the performance of their child-rearing responsibilities…"

Looking at Articles 7-9, 18, and 21 together, the following can be concluded:

Children have a right to be raised by and live with their original parents, which in the context of international adoption would generally include the woman who gave birth to the child, and

the second parent as determined under local law and/or custom, generally through marriage, partnership, and/or biological relationship.[10]

(b) An unnecessary separation of the child from his or her original parents is a serious violation of the rights of the child.

The UNCRC recognises practical realities, as indicated by the phrase 'as far as possible' modifying the right of the child to 'know and be cared for by his or her parents.'[11] However, 'as far as possible' must be evaluated in light of the State's obligation to assist and support parents in their child-rearing responsibilities. An *unnecessary* separation of original parent and child is clearly a violation of the rights of the child. Further, a separation of parent and child is unnecessary and violates the rights of the child when it occurs because the State failed in its responsibilities to appropriately assist and support parents.

Of course, if the State itself facilitated or directly instigated an unnecessary separation of the child from his or her original parents, a particularly egregious violation of the rights of the child would have occurred. It is important to evaluate the linked cascade of events that begins with the State's wrongful inactivity and then proceeds to the State's wrongful activity. First, the State fails to provide appropriate assistance. Second, the State's inactivity leads to a circumstance where the State actively separates the child from his or her parents through the State's child protection functions. Then, finally, the State facilitates and approves an adoption, which makes the separation from the original parents permanent. Frequently, the State and observers perceive the State as a rescuer acting properly to protect children, when the State is really aggravating, rather than remedying, a rights deprivation that occurred because of the initial failure of the state to appropriately support parents.

Article 9 further clarifies that the State is only justified in separating children from their original families when "necessary for the best interests of the child," in view of circumstances such as child abuse or neglect, or where the parents are living separately. "Necessary" indicates that even in such circumstances the State must be competent in its assessments and implement protective measures, or child custodial arrangements, that require the least amount of separation necessary for the child's best interests. Article 9 also requires that such determinations be made by "competent authorities subject to judicial review."

(c) Adoption is an optional practice of conditional legality

(i) Adoption as an optional practice

UNCRC Article 21 begins: 'State Parties that recognize and/or permit the system of adoption….,' clearly indicating that States are not required to provide for any system of adoption, nor the practice of adoption. By contrast, Article 20 makes clear that States are obligated to ensure an appropriate form of alternative care for a child 'temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment…' Why is alternative care a State obligation, whereas adoption, which many consider one of the best forms of care for children deprived of the care of their original family, is not?

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[10] The UNCRC does not specifically mention Assisted Reproductive Technologies (ART) or surrogacy, and does not directly define the term "parent." While child rights standards are applicable to ART and surrogacy, that complex task is not necessary for purposes of discussing intercountry adoption. See, for example, International Social Service, Verona Principles (2021); OHCHR, Surrogacy, <https://www.ohchr.org/EN/Issues/Children/Pages/Surrogacy.aspx> accessed 21 March 2022.

[11] Article 7.

The discordant treatments of alternative care and adoption begins with the fact that many nations and communities are culturally or legally opposed to adoption, particularly the full severance models of adoption predominant in international discussions. As a practical matter, full adoption is globally comparatively rare and, statistically, the majority are concentrated in a relatively small number of countries, including Brazil, Canada, China, Germany, the Russian Federation, the United Kingdom, and the United States; indeed, almost half occur in the United States. Domestic adoptions comprise the vast majority of adoptions, with over 85 per cent concentrated in just 14 countries. The numbers of adoption are quite low as compared with the numbers of children in institutional care or foster care. Throughout much of the world, formal full severance adoption is absent or rare in practice.[12]

Full adoption generally refers to a policy where:

1. Adoption totally severs the familial relationship of the child to his or her original parents, siblings not adopted with them, and extended family;
2. Adoption changes the legal and social identity, and usually name, of the adoptee;
3. Adoption brings the adoptee fully into the family tree of the adoptive family for most purposes, including custody, parental responsibility, and inheritance.

Full adoption has also often in the past been accompanied by secrecy whereby even the adoptee, even as an adult, normally is not allowed to know the identity of their original parents and family members.[13]

As a matter of terminology, there are a number of practices, some of which are colloquially called 'adoption' and most of which are not, which differ from full adoption in important ways. Such practices include simple adoption, kafala under Islamic law, guardianship, informal care, and long term foster care. These practices have in common two primary circumstances:

1. The child is provided with a family environment outside of the household of their parent(s) with a new or additional family;
2. The child remains related to their original family as a matter of law, social identity, name, and sometimes ongoing relationship.[14]

As a comparative matter, full adoption involves the greatest deprivation of the rights of the child to their original name, identity, and family relations. The question is whether such a total deprivation of the identity rights of the child is really necessary for the best interests of children. The UNCRC permits nations to reach disparate conclusions on that question.

Proponents of full adoption often view it as superior to other alternative care options in two ways: First, the child is incorporated completely into the adoptive family, ideally being treated as equal members of the family in both legal terms (including inheritance rights) and also lifelong love, care, and identity. Other options can result in the child being raised in a family in which they have a kind of outsider, second-class status, or even are reduced to the status of servants. Second, adoption is seen as fulfilling the goal of "permanency" for children, which many see as one of the primary purposes of State intervention and social work practice. By contrast, some of the alternatives can be quite temporary and even if they last throughout childhood may not provide the child as an adult with a family in the full sense.[15]

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[12] United Nations Department of Economic and Social Affairs, *Child Adoption: Trends and Policies* (ST/ESA/SER.A/292, 2009) 66-73, <https://www.un.org/en/development/desa/population/publications/pdf/policy/child-adoption.pdf> accessed 22 March 2022. The proportion of intercountry adoptions today would be even smaller, given the sharp declines since this 2009 report. See Selman (n 1).

[13] Keating, history, this Volume

[14] Vonk, chapter this Volume

[15] Thoburn chapter

Ironically, in the United States, the nation most active in regard to full adoption, the legal definition of permanent severance is being pervasively modified in practice by a combination of 'open adoption' and birth searches. Most private infant adoptions in the United States are now informally open, meaning that the original parent(s) know and generally meet and help choose the adoptive parent(s). Open adoption usually involves a formal agreement or informal understanding of some degree of ongoing information and/or contact. These open adoption arrangements however often lack legal protections for original parents.[16]

Birth searches also undercut those premises, since it has become so common for adoptees and/or original family members to seek and find one another. These searches are much more often successful due to the common use of DNA databases and social media to find relatives. In such circumstances, a complete and life-long severance of the adoptee's relationship to his or her original family becomes much less likely.

Under these circumstances, it may be that the case for full severance adoption is weakening. The UNCRC looks prescient in indicating that adoption is not a normative practice. The task for the future would be to create forms of 'adoption' or alternative care that combine the most positive aspects of full adoption with the most positive aspects of simple adoption, kafala, or guardianship. Such a practice could fully incorporate the child into the new family for purposes for inheritance and family life, without requiring the full severance of the child's relationship with their original family. There are models for this from customary and informal forms of adoption and alternative care, which can be seen in multiple regions of the world, and which often reflect an 'additive' rather than 'subtractive' view of family life. Under such an additive view, children can be incorporated into a new family without being removed from their original family.[17] Another analogy would be blended families after divorce and remarriage, in which children find themselves a part of two households, which is a circumstance common in many parts of the world.

Hence, while there will always be ways of providing families for children who are not living with their original parents, it appears that full severance adoption never has been, is not now, and will not in the future be the predominant or normative way of doing so.

(ii) Adoption has a conditional legality

Under the UNCRC, adoption is only lawful where specific conditions are satisfied. This section reviews two. First, the separation of the child from his or her original family must be legal; second, the adoption must be in the child's best interests.

The first condition – that the separation of the child from his or her original family must itself be legal – emphasises the importance of the family as 'the fundamental group of society' and the 'natural

[16] See Child Welfare Information Gateway, Openness in Adoption: Building Relationships Between Adoptive and Birth Families (January 2013), <https://www.michigan.gov/documents/mdhhs/f_openadopt_507731_7.pdf> accessed 22 March 2022 ; DH Siegeland and SL Smith, *Openness in Adoption* (Donaldson Adoption Institute 2012) <https://library.childwelfare.gov/cwig/ws/library/docs/gateway/Blob/81159.pdf?r=1&rpp=10&upp=0&w=+NATIVE%28%27recno%3D81159%27%29&m=1> accessed 21 March 2022.

[17] C Fonseca, D Marre & B San Roman, 'Child Circulation in a Globalized Era: Anthropological Perspectives' in R Ballard et al (eds), *The Intercountry Adoption Debate: Dialogues Across Disciplines* (Cambridge Scholars Publishing 2015); C Fonseca, 'Inequality Near and Far: Adoption as Seen from the Brazilian Favelas' (2002) 36(2) *Law and Society Review* 397; C Fonseca, 'Patterns of shared parenthood among the Brazilian poor' (2003) 21(1) *Social Text* 2111; J B Leinaweaver, *The Circulation of Children: Kinship, Adoption, and Morality in Andean Peru* (Duke University Press 2008); R Högbacka, *Global Families, Inequality and Transnational Adoption: The De-Kinning of First Mothers* (Palgrave Macmillan 2016).

environment for the growth and well-being of…children'. (UNCRC preamble) If such separation violated the principles discussed above in part 2(A) – specifically Articles 7, 8, 9 and 18 – then the UNCRC generally requires the remedy of re-establishing the child's rights within the family. For example, Article 8(2) 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 re-establishing speedily his or her identity.' The State also generally shall treat 'in a positive, humane and expeditious manner'[18] an application by the child or parents to 'enter or leave a State Party for the purpose of family reunification.'[19]

An adoption, and even more so a full adoption, by unrelated persons (and, even more, unrelated persons in another country), would aggravate this original separation and loss of identity rights. Hence, an adoption after an illegal separation of the child from his or her parents would generally itself be illegal, even if the appropriate formalities for the adoption were otherwise in place. As discussed, such separation is illegal when the State failed to meet its positive obligations to act (such as in providing "appropriate assistance to parents"[20]), as well as when the State unnecessarily separated the child from the child's family. Only when the State reasonably tried to re-unite a child illegally separated from his or her parents, and such proved impossible, would the possibility of an adoption being legal arise after the child was illegally separated from his or her original family. Even then, the greater deprivation of identity rights that occurs in intercountry adoption would make such an adoption a particularly suspect response to a situation where the child was 'illegally deprived of some or all of the elements of his or her identity.'[21]

This issue of the child's separation from his or her parents is linked to the additional requirement that the child must be adoptable. The UNCRC requires that the State 'ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians….'[22] A child should not be viewed as adoptable if 'with appropriate assistance' from the state the child could remain or be re-united with his or her family.[23]

The issue of adoptability is further linked to the propriety of any necessary consents by parents or family members. The UNCRC requires that 'the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary.'[24] The Hague Adoption Convention has more specific requirements for intercountry adoption, which nevertheless seem so fundamental as to be applicable to all adoptions. It requires that original family members be 'duly informed of the effects of their consent, in particular whether or not adoption will result in the termination of the legal relationship between the child and his or her family of origin.'[25] This responds to the problem of obtaining consents for full adoption in cultures where full adoption is not practiced and hence not well understood. It is difficult to see how there could be a true '*informed* consent'[26] to adoption (as required by the UNCRC) without an understanding of the impact of adoption on the parent-child and family relationships. Hence, this addition by the Hague Adoption Convention is implicit in the UNCRC, and therefore applicable to both domestic and intercountry adoptions.

[18] Article 10(1).
[19] Ibid.
[20] Article 8(2).
[21] Article 8(2).
[22] Article 21(a).
[23] Article 18(2).
[24] Article 21(a).
[25] Article 4(1).
[26] Article 21(a).

In addition, the Hague Adoption Convention forbids inducing consent 'by payment or compensation of any kind',[27] in line with the prohibition on the sale of children under the OPSC.

Further, the Hague Adoption Convention requires that 'the consent of the mother, where required, has been given only after the birth of the child.'[28] Forbidding binding pre-birth consents to adoption is an important protection against exploitation of the possible vulnerability of pregnant women and ensuring that consents are truly informed. A significant proportion of women considering adoption during pregnancy change their minds after birth, indicating that a truly informed decision requires the birth of the child. The requirement that consents 'have not been withdrawn'[29] seems related, as both the prohibition of pre-birth consents and requirement to honor withdrawals of consent indicate that a transitory consent to adoption is not sufficient. Again, this seems supportable by fundamental child rights principles. Children should not lose identity rights if their family, possibly during a temporary set of difficulties, for a time plans to place them for adoption, but then quickly change their mind.

Finally, a perhaps controversial norm protects parenting by unmarried parents and single parents, including adolescent parents. This principle is a response to the negative practices of the 'baby-scoop' era in the twentieth century during which single mothers in many nations were coerced, forced, and pressured to relinquish children for adoption.[30] This norm builds on the fundamental protections of children's identity rights, including being raised by original parent(s), with a more particular emphasis on State obligations to 'the provision and promotion of support and care services for single and adolescent parents and their children, whether or not born out of wedlock.'[31] The UNCRC's emphasis, in Article 18(1), on both parents having parental responsibility is consistent with States preferring, where possible, the involvement of both parents. While States may rationally believe that the cooperative and stable involvement of both parents is most likely to occur when parents are married, and hence that marital families benefit children, the child's identity and relational rights cannot be sacrificed to further a preference for traditional family structures. Hence, the State's obligations to provide 'appropriate assistance to parents'[32] has a special application in the context of unmarried and single parents, and applies even when the State is unable to secure the active and equal involvement of both parents in the care of the child.

The second condition is that the adoption must be in the best interests of the child. As discussed above, the UNCRC heightens the best interests standard from "a primary consideration" under Art. 3(1) for "all actions concerning children," to "the paramount consideration" under Article 21 particularly for adoption. Formal legal adoption for most of its history, across multiple cultures, was directed primarily at the interests of adoptive families rather than children.[33] Hence, the best interests condition reverses the weight of historical practices as to adoption, and is more difficult to achieve than most realize---as indicated by the recent Dutch Report indicating that intercountry adoption has been practiced primarily to fulfill the demands of prospective adoptive parents for children.[34]

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[27] Article 4(3).
[28] Article 4(4).
[29] Article 4(3).
[30] See D Smolin, 'Aborting Motherhood: Adoption, Natural Law, and the Church' (2021) 11 *Journal of Christian Legal Thought* 30.
[31] Alternative Care Guidelines, para. 36.
[32] Article 18(2).
[33] See, for example, D Smolin 'Concluding Considerations' in C Baglietto, N Cantwell and M Dambach *Responding to Illegal Adoptions: A Professional Handbook* (International Social Service 2016).
[34] See Committee investigating intercountry adoption, Consideration, Analysis, Conclusions, Recommendations and Conclusions (Feb. 2021) [hereinafter Dutch Summary]. See also Section 4(a) below.

(d) Intercountry Adoption

i. The conditional legal status of full-severance adoption impacts intercountry adoption

The nature and conditional legal status of full severance forms of adoption impact intercountry adoption in at least four ways.

First, if full adoption is suspect because it involves a profound loss of the child's identity rights, including to 'nationality, name and family relations,'[35] intercountry adoption is even more suspect as it involves an even greater deprivation. Intercountry adoption of course involves the additional loss of the right to preserve nationality under UNCRC Article 8, and also commonly involves a loss of the child's original language and culture.

Second, intercountry adoption almost always involves, in legal form, full adoption, rather than simple adoption, for several reasons: (a) full adoption may be normative in the receiving State and hence viewed as superior; (b) receiving States may prefer the full severance model of adoption since it legally severs any relationship of the adoptee to their original family members, removing the possibility of a chain of familial-based immigration, and (c) simple adoption may be seen as inappropriate for intercountry adoption, given the vast geographical distances common in most international adoptions, and the linguistic, cultural, and economic differences between adoptive families and original families.

Third, intercountry adoption to receiving nations where full adoption is normative or common, from States of origin where full adoption is not recognised by local law or custom, invites fraud and child laundering. It is easy to mislead original family members as to the significance and impact of 'consenting' to an adoption, when the family of origin has no cultural context for understanding that such consent means losing their child forever and being legally labelled a stranger to their own child.[36] Even with the best efforts to explain (which is often lacking), families of origin and even local government officials may have difficulty understanding the consequences of an intercountry adoption.

Fourth, the secrecy and privacy often associated with full adoption makes full severance adoption systems particularly vulnerable to illicit adoption practices, and particularly resistance to investigation and remedies for such. Various forms of illicit practices, including obtaining children illicitly through force, fraud or funds (child laundering), and the use of pressure tactics against single women and/or poor families, easily hide within the secret spaces and closed-record environments provided in full adoption. This difficulty is exacerbated by intercountry adoption, where multiple legal systems are involved, separated geographically, linguistically, and culturally.

ii. The Legality of Intercountry Adoption is Limited by Several Additional Principles

The child rights principles applicable to adoption generally also apply to intercountry adoption. Additional child rights principles apply specifically to intercountry adoption.

[35] UNCRC Article 8(1).
[36] See D Smolin, 'The Case for Moratoria on Intercountry Adoption' (2021) 30(2) *Southern California Interdisciplinary Law Journal* 501, 509-10 and sources cited notes 63-73.

(a) There is no State obligation for either receiving or sending states to participate in intercountry adoption.

Under Article 21 UNCRC, States that "recognize and/or permit the system of adoption …. shall recognize that inter-country adoption *may* be considered as an alternative means of child's care…" Intercountry adoption thus has a double layer of optionality under the UNCRC: States do not need to practice or recognise adoption at all, and those that do are not obligated to practice intercountry adoption. States that have ratified the Hague Adoption Convention are not obligated to participate in intercountry adoption.

(b) Intercountry Adoption is legally limited by the Subsidiarity Principle

The subsidiarity principle creates a hierarchy or ranking of preference as to interventions on behalf of the child, both as general classifications of interventions and also in regard to each child. An intercountry adoption examined in isolation might appear legal but would violate international standards if such an adoption was accomplished despite the availability of another intervention preferred under the subsidiarity principle. Subsidiarity has multiple implications, as explored below.

(i) Maintaining and Re-Establishing Identity Rights

The first preference under international law is to maintain or restore the child's relationship with his or her original parents and original family. The State is required, as noted above, to 'render appropriate assistance to parents…in the performance of their child-rearing responsibilities.'[37] It must therefore act affirmatively to maintain and/or re-establish the child's identity rights, including 'nationality, name and family relations.'[38]

An intercountry adoption is illegal if the State could have maintained the child with his or her original family with 'appropriate assistance'[39] and failed to do so. Further, an intercountry adoption is illegal if the State failed in its obligation to 'ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.'[40] In addition, an intercountry adoption is illegal if the State failed to 'provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity,' where 'a child is illegally deprived of some or all of the elements of his or her identity.'[41]

These kind of State failures are quite common globally. Indeed, many sending States lack capacity and systems to systemically fulfill these State obligations to assist families, actively re-unite, and process separations of children from their families formally through administrative and judicial systems which operate 'on the basis of all pertinent and reliable information.'[42] However, building intercountry adoptions systems upon the systematic incapacities of States to fulfill these state obligations would build on a legal foundation of sand. Such systems built on systemic violations of the rights of the child would be systemically illegal.

(ii) Preference for Domestic Adoption over Intercountry Adoption

[37] Article 18(2).
[38] Article 8(1).
[39] Article 18(2).
[40] Article 9(1).
[41] Article 8(2).
[42] Article 21(a).

Where State obligations to maintain and/or re-establish the child's identity rights have been fulfilled, there remain further options which, in general, are preferred to intercountry adoption. First, there is general agreement that domestic adoption is preferred to intercountry adoption. This requirement should be viewed both systemically and individually. States that have more difficult and onerous requirements for domestic adoptive families than for intercountry adoptive families would be systemically violating this part of the subsidiarity principle. For example, China, for many years the leading country of origin, severely limited domestic adoption within China through age limits and application of China's population control rules to domestic adoption, while having far less restrictive rules for foreign families.[43] Building an intercountry adoption system upon a system which systemically restricts and represses domestic adoption and prefers intercountry adoption to domestic adoption would also build upon a legal foundation of sand: such a system built on systemic violations of the rights of the child would be systemically illegal.

(iii) Intercountry Adoption versus Foster Care, Institutional Care, and Congregate Care

There have disputes over how the subsidiarity principle applies to a choice between intercountry adoption and various forms of alternative care in the country of origin, including foster care, family-based care, institutional care, residential care, congregate care, and informal care. There are a spectrum of positions.[44] On the one hand, some may interpret the UNCRC's language in Article 21 to prefer virtually any form of alternative care in the country of origin to intercountry adoption. Article 21 states that intercountry adoption 'may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin.'[45] At the other end of the spectrum, some consider that only domestic adoption or a return to the original family are ranked above intercountry adoption, because those are the only options that provide permanency for the child. Proponents may rely here on the preamble of the Hague Adoption Convention, which states:

> 'Recognizing that intercountry adoption may offer the advantage of a *permanent family* to a child for whom a suitable family cannot be found in his or her State or origin;' (emphasis added)

Finally, some may resist any fixed hierarchy by category and argue that such choices are ultimately governed by the best interests of the child standard, which must be individually applied to each situation, and which as to adoption 'shall be the paramount consideration.'[46]

As to these interpretative approaches, several things can be said. First, an approach that reads the UNCRC and Hague Adoption Convention as fundamentally in conflict seems incongruent with the understanding that the two Conventions are intended to be read together. The Preamble to the Hague Adoption Convention explicitly builds on 'the principles set forth' in the UNCRC, Article 21 of which, particularly promotes the creation of future multilateral agreements, encouraging the creation of the Hague Adoption Convention. Hence, the two Conventions, created just four years apart, are intended to be interpreted together, which favours interpretations which harmonise the Conventions.

Second, while it is true that the best interests of the child is the 'paramount consideration' for adoption under the UNCRC, there are dangers in relying solely on individual determinations made in the name of the sometimes vague and elastic best interests of the child standard. Cantwell's work on the best interests of the child in intercountry adoption demonstrates that 'many decisions justified by best interests considerations alone have had very damaging consequences for children.'[47] Thus, it is necessary to interpret

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[43] See infra notes and accompanying text.
[44] See S Brakman, this volume.
[45] Article 21(b).
[46] Article 21.
[47] N Cantwell, *The Best Interests of the Child in Intercountry Adoption* (UNICEF 2014), page 4.

the best interests of the child 'within a human rights framework.'[48] The best interests of the child principle is fulfilled in significant part by adherence to more specific human rights and children's rights standards, rather than being a means to ignore such specific standards. Further, the best interests of the child standard governs the interests of children generally, as well as those of each child impacted by an individual adoption or alternative care decision. Hence, the best interests standard should not be used to avoid systemic analysis of systems of care for children, including adoption, intercountry adoption, and alternative care systems. Further, the best interests standard should not be used to avoid the articulation of more specific standards which protect the best interests of the child. The purpose of designating the best interests of the child as the paramount consideration for adoption is to make clear that the interests of the child are more important than those of adults, which is necessary because much of the history and even present practices of adoption are more orientated toward the interests of adults than children.

Given these two interpretative points, several conclusions can be drawn. First, the general language of the UNCRC which seems to favour any form of care over intercountry adoption is limited by the critical term 'suitable.' An alternative care option is not preferred to intercountry adoption unless it is a 'suitable manner' of care.[49] The interpretation of what is a 'suitable' form of alternative care for children has developed since the creation of the UNCRC, in significant part through the development of the Guidelines for the Alternative Care of Children. From these Guidelines and other developments we learn that, subject to very limited exceptions, 'alternative care for young children, especially those under the age of 3 years, should be provided in family-based settings.'[50] Hence, institutional or congregate care generally would not be 'suitable care' for a child under the age of three, unless it was for a short duration as a part of a planned move to another form of care. Similarly, large-scale institutional or residential care is generally viewed as an inappropriate form of alternative care and hence would not be a suitable form of care. Further, there could be situations where a form of care that was "suitable" as a general category of care, was not suitable or appropriate for a particular child or sibling group. Taking account of these developments in articulating what is 'suitable care' for children, it should be clear that not every care option for a child in the country of origin should be viewed as having priority over intercountry adoption.

On the other hand, the language in the preamble of the Hague Adoption Convention that intercountry adoption 'may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin' should not be read as an encompassing mandate to favour intercountry adoption over every option except domestic adoption. Formal legal permanency is a benefit and goal for a child, but it is not the only goal. Informal care, long-term foster care, and kinship care in a child's own country may offer children the benefits of 'continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.'[51] Informal and formal kinship care offers the enormous advantage of maintaining the child within their extended family of origin, even if such care is not formalised by an adoption. In addition, some children may lack the capacity or motivation, due to age or other characteristics, for the enormous linguistic and cultural adaptations necessary for most intercountry adoptions. It would be a distortion of both Conventions to read them to favour intercountry adoption automatically over every other option beyond either return to the original parents or formal adoption. This preamble language mirrors the UNCRC's treatment of intercountry adoption in use of the word 'may' rather than 'shall' in describing the role of intercountry adoption. Even under the Hague Adoption Convention, participating in intercountry adoption is never a state obligation, even for nations that have ratified the Convention. Hence, there is no category of cases where the subsidiarity or best interests principles require intercountry adoption.

[48] Ibid.
[49] Article 21(b).
[50] Alternative Care Guidelines, para. 22.
[51] CRC, art 20(3).

(iv) Sale of Children, Child Trafficking, and Child Laundering

The sale of children, trafficking, and child laundering are sometimes overlapping terms which constitute serious violations of the rights of the child and often crimes. Such practices also commonly violate other rights of the child, since they typically cause unnecessary separations of children from their original families, communities, and nations. International instruments define these illicit practices and create state obligations to prohibit, prevent, and remedy them.

UNCRC Article 35 requires States to take 'all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.' One of the stated objectives of the Hague Adoption Convention is to 'prevent the abduction, the sale of, or traffic in children.' This language in combination with the preparatory materials indicate that the Hague Adoption Convention views obtaining children illicitly for adoption (i.e., through force, fraud, or funds) as a form of exploitation and hence a form of child trafficking.[52]

The OPSC requires States to prohibit the sale of children, which is generally defined as 'any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.' The OPSC further requires States to criminalise the particular form of sale of children defined as '[i]mproperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption.'[53]

Child trafficking is defined in the Palermo Protocol as '[t]he recruitment, transportation, harboring or receipt of a child for the purpose of exploitation.' The definition of 'exploitation' in the Palermo Protocol 'shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.' The phrase "shall include, at a minimum" indicates the open-ended nature of the definition which may include forms of exploitation beyond those listed. Hence, it is appropriate for the Hague Adoption Convention to consider that, under some circumstances, the illicit sale and/or transfer of a child which separates a child from the original family can also constitute a form of child trafficking.

The term 'child laundering' is not contained in the official international instruments on adoption, but nonetheless is a useful descriptive term used commonly in the literature. Child laundering involves obtaining children illicitly by force, fraud, or funds, mis-labelling the children as adoptable orphans, and then processing them through official adoption systems. Child laundering describes the troubling way that the official processes created for intercountry adoption can themselves become vehicles for illicit conduct.[54]

3. Applying International Standards to the Modern Era of Intercountry Adoption

Having spent more than fifteen years documenting pervasive violations of international standards in intercountry adoptions, there is no way to present anything close to the full evidence in this chapter. Hopefully, this brief survey will convey the depth of the issues.

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[52] D Smolin, Child Laundering and the Hague Convention on Intercountry Adoption, 48 University of Louisville Law Review 441, 447-61 (2010), available on https://works.bepress.com/david_smolin/.
[53] OPSC section 3(1)(a)(ii).
[54] My own work extensively describes the concept and phenomenon of child laundering. See https://works.bepress.com/david_smolin/.

There has been a misperception that the primary deficits in intercountry adoption practices occur in the countries of origin with receiving States being victims of that misconduct. In order to counter that misperception, this review begins with deficits on the receiving State side.

(a) The Dutch Report

In February 2021 the Dutch Committee investigating intercountry adoption released its reports and recommendations, including an immediate suspension.[55] The Dutch Government responded by suspending intercountry adoptions.[56]

Initially the Committee investigated adoptions from five countries---Bangladesh, Brazil, Colombia, Indonesia, and Sri Lanka from 1967 to 1998.[57] The Committee ultimately screened an additional 18 countries beyond the initial five, both before and after Hague Adoption Convention came into force. The Committee found that 'abuses were or are reported in all the countries screened, and … abuses continued to take place after the Hague Adoption Convention came into force in the Netherlands in 1998.'[58]

Significantly, the Committee concluded that

> similar abuses …took place before 1967, after 1998 and in other countries…Regardless of the different contexts, it has been shown that abuses related to intercountry adoption continue to occur to this day, all over the world. The most important factors that maintain this situation are the demand for children and the international adoption market, which is driven by financial incentives and where socioeconomic inequality, poverty and the act of transforming children into commodities come together.[59]

Indeed, The Committee concluded that 'abuses have been shown to be a near-permanent, structural problem.'[60]

The abuses found by the Dutch Government systemically violated nearly every principle governing adoption and intercountry adoption described above. While the best interests of children were invoked constantly,[61] in fact 'intermediaries saw their primary task as satisfying the demand for children.'[62] Similarly, politicians, including members of the Dutch parliament and the 'Dutch political establishment' 'primarily served the interests of adoptive families'.[63] The relevant governmental ministries as to policy were 'dominated by the demand for children and the interests of adoptive parents.'[64] The entire system, as a whole, was subservient to the demand for children by families in the Netherlands, rather than serving the best interests of the child as the paramount consideration. This demonstrates that illegal intercountry adoption practices have their roots in the receiving States, the source of this demand pressure.

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[55] See Committee Investigating Intercountry Adoption, *Consideration, Analysis, Conclusions, Recommendations and Conclusions* (2021) [hereinafter Dutch Summary].
[56] C Moses, 'Netherlands Halts Adoptions From Abroad After Exposing Past Abuses' *New York Times* (New York, 9 February 2021).
[57] Dutch Summary (n 54) 23.
[58] Ibid, 24.
[59] Ibid, 15.
[60] Ibid. See also 24.
[61] Ibid, 8-10.
[62] Ibid, 10.
[63] Ibid, 11.
[64] Ibid, 9.

Child rights norms safeguarding the child's relationship and identity with their original family were pervasively violated. This means that intercountry adoptions occurred commonly or even typically in situations where, if child rights norms had been followed, the child would have been able to remain or be re-united with their original family. Hence, the Committee found illegal activities to include

> 'causing children to be given up in return for payment or through coercion; child trafficking and kidnapping; baby farming and obscuring a child's identity…causing children to be given up under false pretexts or moral pressure; taking advantage of mothers' poverty or other … circumstances such as war, natural disasters and social taboos.'[65]

Furthermore:

> 'The decision to put a child up for adoption was often made under social pressure or through coercion….children were also given up as a result of false promises made to the birth families or by convincing those families to sign documents they did not understand. In other cases, birth parents were unaware of the extent, the implications and the finality of intercountry adoption.'[66]

Hence, 'the intercountry adoption system itself served as a kind of "child-laundering" mechanism, as children who were put up for adoption under suspicious circumstances could be transformed into legitimately adopted children.'[67]

The Committee also concluded that the Central Authority created pursuant to the Hague Adoption Convention

> 'experienced tension between the principle of trust and its roles as a monitor and regulatory body…as a result, the Central Authority did not sufficiently fulfill its role as a regulatory body and a protector of the bests interests of the child….Even today, the interests of the child are still not the top priority, because the system is not robust enough to protect them.'[68]

Significantly, the Committee expressed 'doubts about whether it is possible to design a realistic alternative system, in view of the failure, to date, of the many attempts which have been made to tackle abuses through tighter regulation'.[69]

(b) The German System and Beyond

Loibl's significant study of the German intercountry adoption system indicated that despite significant improvement after ratification of the Hague Adoption Convention in 2001, 'the adoption system does not effectively prevent the trafficking of children for adoption purposes.'[70] The 'structural features that encourage and facilitate the trafficking in children to Germany; include tolerance of private adoption, ideological and financial incentives to 'ignore signs of irregularities in the sending countries,'[71] 'unregulated flow of money into the sending countries; due to a lack of limits on payments and donations

[65] Ibid, 15.
[66] Ibid, 12.
[67] Ibid, 7.
[68] Ibid, 11.
[69] Ibid, 22.
[70] E Loibl, *The Transnational Illegal Adoption Market* (Eleven 2019) 267.
[71] Ibid, 269.

to foreign partners and child care institutions, and a fragmented monitoring structure 'that cannot be considered suited to effectively prevent the laundering of children.'[72]

Significantly, Loibl's study found that '[f]rom the 90s, intercountry adoptions were almost entirely driven by the adopters' need for children'.[73] Loibl points out that even when intercountry adoptions are motivated by 'humanitarian convictions and religious faith,'[74] the demand for children from receiving States 'exerts an inexorable pull'[75] to obtain children from poor countries. Thus, the same foundations for illicit adoption practice are found throughout the intercountry adoption system, which is the demand for children coming from the receiving States. Loibl is not alone in this insight of course. As just one example, the UN Special Rapporteur on the sale and sexual exploitation of children, de Boer-Buquicchio, concluded in her 'Study on illegal adoptions' that a 'major enabling factor for illegal adoptions is the significant discrepancy between the number of prospective parents seeking to adopt and the number of children who are truly adoptable.'[76] This "discrepancy is greatest in respect of the most sought-after children (generally those who are younger and healthy)'.[77] This 'disproportionate demand for adoption is particularly relevant in the context of intercountry adoptions and leads to excessive pressures from receiving countries on countries of origin.'[78]

(c) The United States

The United States has for decades been the dominant receiving State, representing 40 to 50 per cent of all intercountry adoptions. My prior work has described the negative impacts of the United States on the intercountry adoption system. In 'The Corrupting Influence of the United States on a Vulnerable Intercountry Adoption System', I argued that the 'many scandals, moratoria, closures, abusive practices, and the declining numbers of intercountry adoptions are due in significant part to the practices of the United States.'[79] In 'The One Hundred Thousand Dollar Baby: The Ideological Roots of a New American Export,' addressing both adoption and commercial surrogacy, I argued that '[t]he United States of America, as represented by the United States government, some states, and leading legal institutions, is actively building worldwide markets in children.'[80] It is difficult to condense over 120 pages of those articles (which are available for free download online) into just a few words. However, here are some of the highlights:

a. The United States is the only nation in the world that has declined to ratify the UNCRC.[81] Hence, the United States lacks the child rights norms necessary to protect children in the complex contexts of intercountry adoption. The United States also ratified the Hague Adoption Convention very late—effective April, 1, 2008.
b. The United States has to a significant degree accepted a market-based approach to the allocation of parental rights and family formation. While there are elements of resistance to such market-based approaches, in practice they predominate, and there are deep ideological reasons why both left and right tend in the United States to support such approaches.

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[72] Ibid, 270-71
[73] Ibid, 31.
[74] Ibid, 31-32.
[75] Ibid, 32.
[76] UN General Assembly, Reoprt of the Special Rapporteur on the sale of children, child prostitution and child pornography (A/HRC/34/55, 22 December 2016) para 59.
[77] Ibid, para 59.
[78] Ibid, para 60.
[79] Utah Law Review 1065, 1067 (2013).
[80] 49 Cumberland Law Review 1, 1 (2018).
[81] United Nations Treaty Collection, <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en> accessed 22 March 2022.

c. The Unites States Government has taken the position that the sale of children for adoption can never constitute human trafficking or child trafficking. The Government has further taken the position that the Optional Protocol on the Sale of Children (OPSC) can never apply to surrogacy and that the OPSC can only apply to official Hague Adoptions---those adoptions in which both sending and receiving States have ratified the Convention. Hence, the United States has minimised the harms and restricted the remedies for even the most egregious forms of illicit practices.

d. The United States has accepted an unusual degree of privatisation and commercialisation in even its purportedly Hague-compliant intercountry adoption system, by delegating critical regulatory functions to private non-profit actors, permitting unreasonable profiteering within its officially non-profit agencies, allowing for-profit actors to participate as in effect adoption agencies, and refusing to limit the amounts American agencies can route to sending country intermediaries or governments.

e. The United States has a naively pro-adoption culture which predominately views adoption as an almost inherent good, rather than as a conditional good with inherent losses and risks. The Dutch Committee report highlighted a similar perception that 'both the child … and the prospective adoptive parents would benefit from adoption; it was seen as 'doing good….The view that any adoption, even an unauthorised one, was better than no adoption at all was unshakeable.'[82] American adoption culture perhaps goes further than others in the accompanying hostility, by many prospective adoptive parents, agencies, and adoption advocates, for international norms like the UNCRC and Hague Adoption Convention, international actors such as the Hague Conference, the UN Committee on the Rights of the Child, and UNICEF, as well as for domestic regulators like the State Department. These attitudes have seriously hindered reform efforts.

(d) States of origin

Many violations of the rights of the child related to intercountry adoption systems occur in the States of origin. The harms occurring in these States are commonly caused by practices in both States of origin and receiving States, and in response to the demand for children by the receiving States, and hence are the joint responsibility of receiving states and countries of origin. Here are some examples:

1. South Korea

South Korea was the dominant sending nation for intercountry adoption from the mid-1950's through the 1980s. Even after other nations (briefly Romania and Russia, then China) displaced South Korea as the leading State of origin, South Korea remained a significant sending country, sending 1800 to 2500 children annually. The numbers of children sent by South Korea declined significantly after 2006 to an annual range of 800 to 1400, and then declined even further after 2012 to a range of around 200 to 500 annually, with the latest (2019) pre-COVID numbers around 259.[83] Thus, over some 65 plus years South Korea has sent some 170,000 to 200,000 children abroad for intercountry adoption.

South Korea's relationship with international adoption standards is complicated by its dominant posture for decades prior to the creation of those standards. A further complication is that South Korea has never ratified the Hague Adoption Convention, although like almost all nations it has ratified the UNCRC. It also has ratified the OPSC.

[82] Dutch Summary (n 54) 3.
[83] See Selman (n 1)

Intercountry adoption arose in South Korea from the devastation of the Korean War. Initially, adoptees were understood either to be war orphans or biracial children fathered by American soldiers. The paradox of the South Korean adoption programme is its continuation for so many decades after the end of the Korean War, when South Korea became one of the leading economies of the world.[84]

Most likely the early decades of South Korean adoptions would not come close to meeting modern international standards, as the system lacked necessary organisation and child rights protections. As the system became more organised, it was viewed by some as a model sending nation. However, over time most children sent for intercountry adoption were the children of single mothers. South Korea has one of the lowest rates (less than 2 per cent) of births to unmarried mothers, and there are formidable economic and social obstacles to a single mother raising her child. Hence, most pregnant single women either undergo an abortion or place their child for adoption. From that perspective, most of the history of Korean adoptions after the immediate post-War period was built on a governmental and societal failure to make a social and economic space for single mothers to keep and raise their children.[85]

Despite the 'model country' reputation, there is substantial indication that records have been chronically inaccurate in South Korean adoptions. These inaccurate records have often hidden circumstances where disagreements within families or other circumstances have led to children being placed for adoption without the consent of the mother.

In summary, intercountry adoption from South Korea has, in different ways over its long history, systemically violated modern international law and standards.

2. China

China has been the leading country of origin for intercountry adoption from 2000 to the present. China has sent more than 125,000 children for intercountry adoption from the early 1990s to the present, with 2005 being the peak year at almost 14,500.[86]

China, like South Korea, has sometimes been viewed as having a model programme for intercountry adoption, based on its highly-organised approach. China did not ratify the Hague Adoption Convention until 2006.[87] However, China had Hague-style structures for intercountry adoption long before ratification, combining central governmental control and a system of government orphanages (welfare institutions) run at provincial or local levels. China thus represented the ideal of those who would have preferred intercountry adoption to be a government monopoly with all significant functions, including the care of children, performed by government.

China opened its intercountry adoption programme after its implementation of a strict population control policy (originally the 'one child' policy) caused, in combination with cultural factors, China's welfare institutions to be overwhelmed with abandoned baby girls.[88] The need for the programme was thus

[84] D Smolin, 'The Case for Moratoria on Intercountry Adoption' (2021) 30 *Southern California Interdisciplinary Law Journal* 499, 507-08.
[85] See generally L Kyung-eun, *The Global Orphan Adoption System: South Korea's Impact on its Origin and Development* (Koroot 2021); Hosu Kim, Birth Mothers and Transnational Adoption Practice in South Korea (Palgrave 2016); see R Tschida, *Unwed Mothers Experience Limited Reproductive Choices in South Korea* (University of Minnesota 2016).
[86] See Selman (n 1).
[87] https://www.hcch.net/en/instruments/conventions/status-table/?cid=69.
[88] K Johnson, *Wanting a Daughter, Needing a Son: Abandonment, Adoption, and Orphanage Care in China* (Yeong & Yeong 2004); K Johnson, China's Hidden Children: Abandonment, Adoption, and the Human Costs of the One-Child Policy (University of Chicago Press 2016).

instituted by the government's systemic violation of the reproductive right of women and families 'to decide freely and responsibly on the number and spacing of their children.'[89] Cultural discrimination against girls was highly exacerbated by the one child policy, with China missing about 10 per cent of girls at birth for decades: in raw numbers missing more than 700,000 girls per year from birth statistics.[90] China's intercountry adoption programme is inexorably linked to this combination of rights deprivations: the severe limitations on procreative freedom combined with severe and systemic violations of the norm under Article 2 (1) UNCRC that children not be discriminated against on the basis of 'sex'.

China's intercountry adoption system also systemically violated the subsidiarity principle, which requires that domestic adoption be preferred over intercountry adoption. China depressed and strictly limited domestic adoptions as it opened to intercountry adoption. Thus, the 1992 Adoption Law which opened intercountry adoption, limited domestic adoption to childless couples, at least thirty-five years old, and allowed each couple to adopt only one child.[91] Adopting a child thus counted against a couple's allotment of children under the one-child policy. The apparent rationale was to prevent domestic adoption from being used to circumvent population control policies by couples secretly adopting their own children or placing their children with relatives or neighbours.[92] China did not apply these age and family size restrictions to foreign adoptive parents. While China relaxed its limitations on domestic adoption somewhat in 1999, even under those amendments the rules for domestic adoption were more restrictive than for foreign adoptions.[93]

In addition, China systemically violated the identity rights of adoptees by outlawing relinquishment or lawful placement of a child for adoption by original parents.[94] Thus, children were secretly and anonymously abandoned by their birth families, making later birth searches and tracing of families extremely difficult for adoptees, since there would be no records listing the original parents.[95]

In the early 2000s China became subject to a significant incidence of child laundering, the sale of children, and child trafficking for adoption.[96] The Chinese system was built on the perception of unlimited numbers of abandoned, generally healthy, baby girls overwhelming Chinese orphanages, but the reality changed when the numbers of abandoned baby girls in orphanages sharply declined. The most likely explanation is that sex-selective abortion, although illegal in China, replaced sex selective abandonment as ultrasound machines become dispersed throughout China.[97] Orphanages thus developed 'shortages' of abandoned baby girls, as compared with demand for foreign adoption, during the peak years of Chinese adoptions. By this time, there were strong financial incentives for child welfare institutions to place children internationally, due to the fee paid directly to institutions by adoptive parents, and the donations sent to child welfare institutions by adoptive parents and their organisations. Chinese orphanages began to purchase adoptable infants.[98] Sometimes government control officials abused their power to seize

[89] CEDAW 16(e).
[90] D Smolin, 'The Missing Girls of China' (2011) 41 *Cumberland Law Review* 1, 4-7 and sources cited.
[91] Johnson (n 87*)* 118-19; Smolin (n 89) 57 & note 295.
[92] Johnson (n 87) 155-82; Smolin (n 89) 57.
[93] Smolin (n 89) 57-58.
[94] B Stuy, 'Open Secret: Cash and Coercion in China's International Adoption Program' (2014) 44 *Cumberland Law Review* 355; P Meier & X Zhang, 'Sold Into Adoption: The Hunan Baby Trafficking Scandal Exposes Vulnerabilities in Chinese Adoptions to the United States' (2008) 39 *Cumberland Law Review* 87; B Demick, 'A Family in China Made Babies Their Business' *LA Times* (Los Angeles, 24 January 2010).
[95] See sources cited n 93.
[96] See sources cited n 93.
[97] Smolin (n 89).
[98] See sources cited n 93.

purportedly over-quota children and then sell them. Children were being illicitly obtained by force, fraud, or funds, labeled as adoptable orphans, and then placed for intercountry adoption.[99]

In more recent years Chinese adoptions have changed significantly. In a context where global intercountry adoption has declined by 85 per cent, adoptions from China have declined by more than 90 per cent prior to COVID (from 14,484 in 2005 to 1062 in 2019.)[100] Yet, prior to the pandemic, China remained the leading country of origin.[101] The characteristics of children adopted from China have also changed. In the past, the overwhelming majority of placements were healthy female infants or toddlers. Now, the children generally either have serious special medical needs or disabilities, or are much older children, with very few healthy infants or toddlers placed of any sex. The population policies of China have also changed substantially, with multiple relaxations leading to a formal three child policy in 2021.[102] Concern is now focused on the risks of an aging population amidst deeply falling birth rates. China now is missing the girls who were sent away.

The demographic impact of China's intercountry adoption programme should not be exaggerated. The estimated 125,000 plus girls sent away for intercountry adoption over decades are a small proportion of the perhaps 30 million missing girls from the same period of time. With a population of about 1.4 billion people and annual births between 1992 and 2020 between around 20 million to around 10.6 million, even China's high point of around 14,500 intercountry adoptions in 2005 is demographically insignificant. From a demographic perspective, accounting for the rest of the missing girls is much more important.[103]

From an adoption and child rights standpoint, it is significant that adoptions from the dominant sending country for almost the entire period after creation of the UNCRC and Hague Adoption Convention systemically violated those standards.

Whether adoptions from China continue to systemically violate international standards today, with the rapidly shrinking numbers and very different population of children sent abroad, is complex. It would be inappropriate under the subsidiarity principle for healthy young children, female or male, to be adopted internationally, as the domestic desire to adopt children can easily absorb the diminished number of such children available. As to the 'special needs' adoptions that are predominate, the question is whether China could, with reasonable effort, domestically provide adoptive families or other suitable alternative care for the small number currently being sent for intercountry adoption. Further, there are issues as to cultural and legal discrimination against disabled children and persons in China. The opaqueness of processes in China makes those questions difficult to answer, particularly in the midst of the pandemic.

3. Sale of Children, Child Trafficking, and Child Laundering in Adoptions from Africa, Latin America, East Asia, South Asia, and Southeast Asia

[99] See sources cited n 93; B Demick 'A Young Chinese Girl Pines for Her Twin' *LA Times* (Los Angeles, 20 September 2009); Schuster Institute for Investigative Journalism, *News Reports of Adoption Irregularities in China* (Brandeis University, 31 July 2010) <http://www.brandeis.edu/investigate/ gender/adoption/ChinaNews.html> accessed 21 March 2022.
[100] See Selman (n 1)
[101] See ibid.
[102] See BBC, 'China allows three children in major policy shift' BBC News (Online, 31 May 31 2021) <https://www.bbc.com/news/world-asia-china-57303592> accessed 21 March 2022.
[103] See Selman (n 1); Smolin (n 87); https://data.worldbank.org/indicator/SP.POP.TOTL?locations=CN; https://www.bbc.com/news/world-asia-china-51145251; https://www.bloomberg.com/news/articles/2022-01-17/why-china-is-struggling-to-boost-its-birthrate-quicktake.

The sale of children, child trafficking, and child laundering have occurred commonly in many sending nations throughout the modern history of intercountry adoption. These illicit practices, particularly in Latin American sending nations, was a major impetus for creation of the Hague Adoption Convention.[104] Child laundering occurred frequently in Southeast Asia – for example, in Cambodia between January 1997 and December 2001,[105] and recurrently in Vietnam.[106] Child laundering was first documented in China in 2005 (with evidence indicating it continued in various forms for some years).[107] South Asian child laundering has been documented extensively in India and Nepal.[108] Likewise, such practices occurred on a very large scale in Guatemalan adoptions for most of the 2000s until intercountry adoptions were stopped in 2008.[109] Child laundering and related illicit practices occurred significantly in African nations, for example, in the Democratic Republic of Congo, Ethiopia, and Uganda.[110] While other examples could be listed, these are sufficient to indicate the pervasive nature of these illicit practices in the intercountry adoption system. Also pervasive has been the failure in almost all instances for states to provide remedies or assist the victims of these crimes.

4. Poverty and Intercountry Adoptions from Africa, Latin America, South Asia, and Southeast Asia

Under international standards the placement of children for intercountry adoption due substantially to poverty is a serious violations of the rights of the child, as outlined in Section two of this Chapter.[111] Yet, intercountry adoption primarily due to poverty has been typical and treated as normal throughout its modern history, particularly in adoptions from Africa, Latin America, South Asia, and Southeast Asia.[112] Intercountry adoption systems have systemically accepted abandonments and relinquishments caused primarily by poverty as valid grounds for adoptability without offering assistance to preserve families. Family preservation efforts designed to address poverty and thus avoid the need for adoptive placements have been rare.[113]

Systemically spending thousands of dollars to send the children of the poor abroad for adoption, often with the involvement of profiteering intermediaries, is like putting salt in the wounds of the vulnerable poor. Building intercountry adoption systems on such hypocritical cruelties is an ethical obscenity. The prevalent viewpoint that such adoptions are an acceptable response to poverty shows just how far intercountry adoption has strayed from any kind of viable human rights foundation.

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[104] Smolin (n 52).
[105] D Smolin, 'Child Laundering' (2006) 52 *Wayne Law Review* 113, 135-46; T Maskew, 'Child Trafficking and Intercountry Adoption' (2005) 35 *Cumberland Law Review* 619.
[106] International Social Service, *Adoption from Vietnam* (2009) <https://resource-centre-uploads.s3.amazonaws.com/uploads/5366.pdf> accessed 21 March 2022; Schuster Institute for Investigative Journalism, *Adoption: Vietnam* (Brandeis University, 24 February 2011) <https://www.brandeis.edu/investigate/adoption/vietnam.html> accessed 21 March 2022.
[107] See sources cited n 94.
[108] See Smolin (n 105) 146-63; D Smolin, 'The Two Faces of Intercountry Adoption' (2005) 35 *Seton Hall Law Review* 403; UNICEF & Terre des hommes Foundation, *Adopting the rights of the child: A study on intercountry adoption and its influence on child protection in Nepal* (2008) <https://resourcecentre.savethechildren.net/document/adopting-rights-child-study-intercountry-adoption-and-its-influence-child-protection-nepal/> accessed 21 March 2022.
[109] CICIG, *Report on Actors involved in Illegal Adoptions in* Guatemala (2010); E Siegal, *Finding Fernanda* (Beacon Press 2012).
[110] Smolin (n 37) 507 & sources cited notes 48-51.
[111] D Smolin, 'Intercountry Adoption and Poverty: A Human Rights Analysis' (2007) 36 *Capital University Law Review* 413, 417.
[112] Ibid; Indian Adoption Scandals (n 37) 447–50.
[113] Smolin (n 100) 423.

4. Conclusion

This summary makes clear that the intercountry adoption systems of leading receiving States and leading States of origins systemically have violated international standards. Hence, the vast majority of intercountry adoptions were processed through systems that systemically violated international standards.

Seventy plus years of systemic violations of human rights and child rights norms is more than enough. Despite the valiant efforts of many to create a stable, safe, and rights-protective intercountry adoption system, the results have been intercountry adoption systems often built on a foundation of normalising rights violations. Remedies and assistance for victims of illicit adoption practices have been almost entirely lacking. At this time, the most rational decision is to end systemic intercountry adoption, and refocus efforts to other, more effective means of assisting children and families, as well as to providing remedies for the many victims of the intercountry adoption system.