

RESPONDING TO ILLEGAL ADOPTIONS:

A PROFESSIONAL HANDBOOK



International Social Service
Service Social International
Servicio Social Internacional

General Secretariat • Secrétariat Général • Secretariado General

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Quai du Seujet 32
1201 Geneva
Switzerland

Published by:

International Social Service
Quai du Seujet 32
1201 Geneva
Switzerland

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Cite as:

Baglietto C, Cantwell N, Dambach M (Eds.) (2016). *Responding to illegal adoptions: A professional handbook*. Geneva, Switzerland: International Social Service (please refer to author contributions when relevant)

ISBN

978-2-9700976-7-9

ACKNOWLEDGEMENTS

The research, collaboration, consultation and drafting of this publication involved many partners and contributors, and the editors would like to express their sincere gratitude to all who helped to bring this work to fruition through their time, expertise and contributions. We are also very grateful to the numerous individuals and organisations who gave their time and expertise to provide feedback and/or review sections of earlier drafts. We have included all authors' names in each individual contribution with a short biography at the end. We trust that the product of this joint exercise will unite professionals to ensure that ethical and adequate responses to illegal adoptions are offered to those affected.

Unequivocally, adoption in a rights framework as a child protection measure, offers many advantages to children who cannot be cared for by their family of origin. The Convention on the Rights of the Child outlines safeguards necessary to ensure that the best interests of the child shall be the paramount consideration in adoption. The Optional Protocol on the sale of children, child prostitution and child pornography stipulates, in the context of sale of children, that States must ensure that the improper inducement of consent, as an intermediary, for the adoption of a child, in violation of applicable legal instruments on adoption, is covered by their criminal law. The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption provides more detailed guidance in cases where children are placed in another country. The 1993 Hague Convention stresses the importance that significant efforts be made to ensure children remain in families of origin and that national family-based solutions are exhausted before considering intercountry adoption.

Regrettably, despite such an international framework, thousands of children continue to be adopted illegally. For example, the consent of mothers or parents is not being obtained, children are fraudulently considered orphans, fraudulent birth certificates are issued, professionals involved in the process are being bribed, and systematic improper financial or other gain are widespread. This situation results in immense suffering for the child, families of origin and adoptive families. Many of these cases are widely documented.

Whilst efforts have been undertaken to address such violations of International Law – mostly of a disparate and fragmented nature – a comprehensive resource for professionals dealing with such tragedies has been lacking till now.

We wholeheartedly welcome this professional handbook on illegal adoptions as the first attempt to provide a consolidated overview of potential avenues for remedies, reparation and above all prevention. The handbook recognises that the path to healing and restoration is likely to be long, painful and challenging, as demonstrated by various testimonies and contributions. Yet, what is most encouraging is that the story of those involved has not stagnated at the discovery of an illegal adoption. The handbook offers broad solutions from various perspectives – legal, psychosocial, social and political – thereby acknowledging that each journey for dealing with such tragedies is unique. Importantly, a number of promising practices focus on the joint responsibility of countries of origin and receiving countries. Innovatively, the handbook likewise provides insights from lessons learned for the practice of international surrogacy arrangements, which, when unregulated, can lead to the sale of children.

This handbook provides hope in what would otherwise be a rather gloomy reality. We unreservedly encourage all professionals working in alternative care, adoption and international surrogacy arrangements to read this publication and take courage. Our hope is that we can learn from our past, to ensure that adoption is truly used as a child protection measure.



Benyam Dawit Mezmur

**Chairperson of the Committee
on the Rights of the Child**

April 2016



Maud de Boer-Buquicchio

**Special Rapporteur on the sale of children,
child prostitution and child pornography**

SYMBOLS AND ACRONYMS |

1993 Hague Convention	Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption
1996 Hague Convention	Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children
AAB	Accredited adoption body
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHR	American Convention on Human Rights ('Pact of San José, Costa Rica')
ACTHPR	African Court on Human and Peoples' Rights
African Charter	African Charter on Human and Peoples' Rights
African Commission	African Commission on Human and Peoples' Rights
AU	African Union
AUC	African Union Commission
CA	Central Authority
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	Committee on the Rights of the Child
CoE Convention against Trafficking	Council of Europe Convention on Action against Trafficking in Human Beings
Directive 2011/36/EU	Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EMDR	Eye Movement Desensitisation and Reprocessing
EU	European Union
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide
Guidelines	Guidelines for the Alternative Care of Children
HCCH	Hague Conference on Private International Law
HCCH Guide to Good Practice No. 1	The Implementation and Operation of the 1993 Intercountry Adoption Convention: Guide to Good Practice No 1
HCCH Guide to Good Practice No. 2	Accreditation and Adoption Accredited Bodies: General Principles and Guide to Good Practice No 2
IACITM	Inter-American Convention on International Traffic in Minors
IACtHR	Inter-American Court of Human Rights
ICA	Intercountry adoption

SYMBOLS AND ACRONYMS |

ICCPR	International Covenant on Civil and Political Rights
ICPPED	International Convention for the Protection of All Persons from Enforced Disappearances, International Convention for the Protection of All Persons from Enforced Disappearance
Inter-American Commission	Inter-American Commission on Human Rights
ISA	International surrogacy arrangement
ISS	International Social Service
ISS/IRC	International Social Service / International Reference Centre for the rights of children deprived of their family
NGO	Non-governmental organisation
OAS	Organisation of American States
OP3	Optional Protocol to the Convention on the Rights of the Child on a communications procedure
OPSC	Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography
Protocol to the African Charter	Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights
UN	United Nations
UN Protocol on Trafficking	United Nations Convention against Transnational Organised Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children
UNCRC	Convention on the Rights of the Child
UNICEF	United Nations Children's Fund

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INTRODUCTORY AND HISTORICAL CONSIDERATIONS

ISS estimates that, worldwide, more than half a million children have been adopted abroad. Today, these children have become adults and many are searching for their origins, history, biological parents or extended family. At times, these searches can lead to findings of illegal practices.

As a result of the increasing visibility of illegal adoption cases, potentially affecting thousands of children, ISS undertook research in 2012 resulting in the study *Investigating the grey zones of intercountry adoption*. The study includes a collection of cases where people have been convicted of illicit practices in the field of intercountry adoption (ICA) covering more than 50 countries over the last 30 years.

DEFINITION OF “ILLEGAL ADOPTION”

Where the term ‘illegal adoption’ is used in this publication, it is intended to signify ‘an adoption resulting from abuses, such as abduction, the sale of, traffic in, and other illegal or illicit activities against children’, as defined in the HCCH Guide to Good Practice No. 1. In other words, it will always imply illegal acts prior to the adoption order being made, but may or may not imply illegality in the granting of the order itself.

The 2012 study demonstrates that the development of ICA was (and still is) marred by multiple forms of abuses and poor practices (see ‘*Historical considerations: Irregularities in intercountry adoption*’ below). Adoption was often especially prevalent in countries of origin suffering from precariously functioning systems and inadequate legal frameworks, as well as corruption within government authorities and unscrupulous middlepersons who often turned adoption into a veritable industry based on ‘supply and demand’. Frequently, children were hauled to the adoption market without any consideration for their birth parents’ consent and safeguards for their rights. Likewise, an additional complicating factor was the extent of the adoptive family’s potential awareness and degree of involvement in the unethical situation.

Not surprisingly, how one responds to concerns about the way in which an adoption took place, has become an increasing preoccupation of adoption professionals as well as of those personally affected. A special Working Group of States Parties to the 1993 Hague Convention was set up in 2010 to develop a common approach to preventing and addressing illicit practices in ICA cases (see *Promising practice: HCCH continues its efforts to identify mechanisms for responding to illicit practices* and *Promising practice: Working Group to develop a common approach to preventing and addressing illicit practices in intercountry adoption* in *Chapter 5: Political considerations*)¹. In parallel to these efforts, ISS is now regularly receiving requests for support from adoptees, adoption associations and professionals looking for effective responses and tools in the face of this complex situation. To address this gap, ISS decided that a practical handbook covering the array of key responses and potential remedies for professionals should be developed.

¹ See: HCCH, Intercountry adoption, Working Groups, <https://www.hcch.net/en/instruments/conventions/specialised-sections/intercountry-adoption>.

1.1 HANDBOOK OUTLINE

The professional handbook is structured around four main chapters, each focusing on the potential responses available to a finding of an illegal adoption from a specific standpoint: legal, psychosocial, social and political.

Personal testimonies are woven into the chapters, highlighting the harsh reality, challenges and achievements of those most affected. In some instances, **case studies** are also provided to offer additional guidance and jurisprudence reasoning for undertaking other possible litigation. Likewise, multiple **promising practices** illustrating initiatives to address potential difficulties successfully, creatively and sustainably are provided.

- **Legal considerations** – This Chapter examines whether international and regional law offers answers concerning the rights to search for information and possible legal actions, including compensation, if a finding of illegal practice comes to light. Selected national experiences are showcased that may be helpful for others in similar situations.
- **Psychosocial considerations** – This Chapter explores the potential ramifications – including trauma and disillusionment – of undertaking searches for roots and discovering illicit practices. Testimonies are provided about the anguish and anxiety involved in conducting a search, the frustrations of finding incomplete answers as well as the courage needed to face the fact of an illegal adoption.
- **Social considerations** – Social responses are wide ranging, and this Chapter deals with the various behaviours, activities and interactions of individuals, as well as of society, in response to illegal adoptions. It focuses firstly on the array of professional assistance necessary for accompanying the different parties when searching for the truth and, secondly, on breaking taboos through media, social networks and advocacy campaigns.
- **Political considerations** – This Chapter identifies the responsibilities of various actors depending on the nature of the illegal adoption, who is undertaking the search and who was potentially involved. The promising practices highlight ways in which receiving States and States of origin can cooperate to address this situation.
- **Future considerations** – This Chapter examines how the lessons learned in relation to adoptions might help to address some of the challenges faced by professionals working in international surrogacy arrangements. A particular focus centres on the need to preserve information in order for future searches for origins to be effected without the many frustrations currently faced by adoptees.
- **Concluding considerations** – This Chapter seeks to draw together the various contributions, recommendations and lessons learned, providing professionals with closing thoughts on this delicate theme of responding to illegal adoptions.

1.2 METHODOLOGY

ISS contacted various experts and stakeholders to gauge their interest in contributing to this handbook. ISS approached individuals – in particular adoptees and adoptive families – who might be willing to share their testimonies in a public arena. Likewise, ISS contacted those working in these situations, such as lawyers, psychologists, social workers, child protection professionals and academics. On a more political level, given the responsibilities of States, ISS also contacted Central Authorities, accredited adoption bodies, UNICEF and, of course, the Permanent Bureau of the Hague Conference on Private International Law. It was also important to include the experiences of advocacy and media groups, as well as adoption associations, so they were similarly invited to contribute to the handbook.

The role of ISS in this project was to collate the various contributions and present them in one handbook for professionals to use as they wish. ISS's principal role as editor was to ensure that the contributions would complement each other, which meant some articles were shortened to avoid repetitions or refined to ensure that the content was as accessible as possible. Editing was kept as 'light' as possible, since ISS wanted to give each author the freedom to express their experience in their own words, which is why various styles are to be found. Each author was given the liberty to write in the first person or impersonally, and their choice has been respected in the final document. Where appropriate, ISS encouraged authors to provide suggestions for further reading for those interested. Each contributor provides a short biography and specifies their link to the ICA field.

1.3 HANDBOOK OBJECTIVES

The primary aim of the handbook is to demonstrate the need for professional support when facing and/or responding to an illegal adoption. Given the complexities of such a situation, adoptees, biological families and adoptive families are strongly encouraged to take inspiration from the handbook always with professional support.

A second aim of the handbook is to equip professionals working with adoptees, biological families and adoptive families with a range of resources for responding to an illegal adoption. It is particularly relevant for professionals working on searching for origins and reunion cases, where information about adoption of an illegal nature may be forthcoming. Specifically, the handbook is designed for use by government authorities, accredited adoption bodies and adoption associations. It likewise targets concerned international agencies, such as UNICEF, civil society and policy makers. It is also intended for journalists, advocacy groups as well as national networks.

The third aim of the handbook is to provide tools and inspiration for moving forward in such a challenging context. The handbook does not, of course, purport to have an answer to every situation, but it does provide numerous avenues for dealing with feelings such as anger, grief, regret, disappointment and disillusionment when facing an illegal adoption – ideally providing some hope. Whilst the past cannot be changed, we live in the present with an opportunity to make the future brighter.

From the errors of others, a wise man corrects his own. Syrus

HISTORICAL CONSIDERATIONS: IRREGULARITIES IN INTERCOUNTRY ADOPTION

Hervé Boéchat, former Director of ISS's International Reference Centre for the Rights of Children Deprived of their Family, provides an overview of the historical role and understanding of ICAs, in order to shed light on how misconceptions and fantasies played a significant role in the development of bad practices.

The history of ICA remains a complex social phenomenon, sometimes erratic, subject to or encouraged by political events, accepted or rejected by society, regulated or unregulated, depending on the place or the period considered. The analysis of this development remains a difficult exercise as there are numerous variances, and it is essential to acknowledge the background to the development of ICA up to the end of the twentieth century in order to better understand what led to the countless abuses described in this publication.

Adoption – within the meaning of full adoption – was a creation of Roman law and was essentially devised to preserve a name, to honour the ancestors or for family heritage². Falling into disuse in the Middle Ages, adoption resurfaced after the French Revolution when it was perceived as a social interest institution that allowed the division of assets between the rich adopter and the poor adoptee. However, the Napoleonic Code severely limited this principle by reserving adoption for adults who consented to it. In addition, the adoptive parent had to be over 50 years of age and without descendants.

The Swiss Civil Code of 1907 is one of the first legislations to allow the adoption of an underage person, but it was the First World War and its disastrous consequences for the structure of European society that encouraged legislators to reform adoption. They sought to make it an instrument for the 'reconstruction' of families: for example, in 1917, France created the status of 'Ward of the Nation' and, in 1923, adoption was opened to underage persons, having previously been reserved for adults. Adoption also took on a social and even political role after the Second World War. France, for instance, connected it to the question of the fate of children born from the unions of French soldiers of the occupation in Germany, subsequently abandoned by their mother and not recognised by their father³.

At this time, and until the mid-twentieth century, adoption was managed and regulated by the State in its capacity as organiser of society. The State, protector of the traditional family, defined the socio-legal framework but seldom intervened in the private sphere of the people concerned. Adoption was a judicial and administrative decision and essentially domestic.

A LACK OF KNOWLEDGE CAN ONLY LEAD TO ABUSE AND ILLICIT PRACTICES

During the 1950s, a new stakeholder appeared in the world of adoption that would later be known as non-governmental organisations (NGOs). Two organisations symbolise this evolution. In the United States of America, Holt International was founded in 1956 after the Holt couple became involved in the adoption of mixed-race children born to American soldiers and Korean women during the Korean War. Their Christian belief led them to transcend ethnic barriers and encouraged them to support other prospective adopters, thereby bringing in the international dimension⁴. In Europe, the emergence of 'Third World' movements encouraged a more committed approach to adoption, with the aim of saving children from hunger and poverty. The founder of Terre des Hommes, Edmond Kaiser, was one of the most outspoken representatives of this group⁵. From there, the social changes of the 1960s

² Manai, D (1990). 'La dispense de consentement en matière d'adoption: autonomie individuelle et contrôle social' in *Déviance et Société*, Vol. 14, No. 3, pp. 275-294; available at: http://www.persee.fr/web/revues/home/prescript/articles/qs_03787931_1990_num_14_3_1190

³ Denéchère, Y (2011). *Des enfants venus de loin. Histoire de l'adoption internationale en France*. Paris, France: Armand Colin.

⁴ See: Holt International, Historical Perspective, <http://holtinternational.org/about/historical.shtml>

⁵ Kaiser, E (1979). *La Marche aux Enfants*. Lausanne, Switzerland: Editions Favre.

and 1970s, the philosophical interest (or the fashion of the time) for countries of the 'South' (with India in primary place), media development (particularly television), and the images that this brought into homes (the Biafra and Vietnam Wars), the passion for travel, the birth of 'humanitarian organisations' (*Médecins Sans Frontières* (Doctors Without Borders) in 1971), all contributed in their own way to gradually bringing together the West with what was still known as the 'Third World'. ICA came to be perceived as something becoming increasingly feasible and no longer only a family matter: it had become a moral, philosophical, humanitarian and, indeed, religious commitment.

Consequently, from 1980 onwards, the statistics of receiving countries began an upward curve. The number of children adopted abroad continued to increase until 2004, the peak year with more than 42,000 ICAs for the top 12 receiving countries alone. However, that development also brought with it a shift in paradigm. The above-mentioned factors had certainly cleared the way for greater social acceptance of ICA, to which can be added a greater facility to travel and to communicate across the world thanks to technological progress. However, the exponential growth of ICA was mainly due to the fact that it had gradually become a response to the fertility problems of Western societies. Reproductive medicine was still at an early stage, childless couples envisaged ICA as an alternative and, thus, the numbers who considered this path increased. ICA therefore became a response to prospective adopters' desire for a child.

With the hindsight we have today, it is clear that such a large and rapid growth in ICA already carried potential risks of abuse and bad practice. Countries of origin were not prepared, or were even completely alien to the concept of adoption itself. Prospective adopters were more often than not left to themselves in undertaking their procedures abroad, and were generally unaware of the hazards and the potential for financial gain that they represented. Risk factors were present but there were very few means to prevent mistakes. We should also remember that, for a long time, ICA was only considered from the perspective of adoptive parents, and was widely perceived as being, 'in any case', beneficial to children who were thereby extricated from destitution.

MULTIPLE ABUSES OCCUR DESPITE LEGAL FRAMEWORKS

1989: the United Nations Convention on the Rights of the Child; 1993: the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. These two fundamental texts form the basis of a coherent and ethical ICA, grounded in four essential requirements: the best interests of the child, the principle of subsidiarity, the informed consent of birth parents and the prohibition of unjustified financial gain. Although action was taken to reverse the prevailing commonly-accepted logic and advocate for 'a family for a child' and not 'a child for a family', the preparatory work for the 1993 Hague Convention had already exposed some serious irregularities involving ICA over many years, citing documented cases of sale, fraud, kidnapping and trafficking⁶. It was therefore time to act.

Countries of origin and receiving countries worked on the implementation of the 1993 Hague Convention more or less enthusiastically... and more or less effectively. We could discuss, for a long time, the actual role that the 1993 Hague Convention played in the development – or reduction – of ICA throughout the world, or about its real influence on regulating procedures and preventing abuse. This debate – still alive today – is unfortunately missing the point. Obviously, the 1993 Hague Convention was never intended to resolve all the problems of the country of origin and the receiving country in relation to their management of ICA procedures. It offers, instead, a number of tools that enable State parties to better understand each other through common operating methods and recognised minimum standards. Professional training in substantive law and procedures increases the competence of each of the States concerned. If these matters are not given adequate attention, abuses facilitated or motivated by monetary transactions will automatically (re)appear.

⁶ van Loon, J A H (1990). *Report on intercountry adoption* (Prel. Doc. No 1 of April 1990). The Hague, The Netherlands: HCCH; available at: https://assets.hcch.net/upload/adoption_rpt1990vloon.pdf

IN PRACTICE, GREY ZONES EXIST DESPITE PROGRESS

ISS's study *Investigating the grey zones of intercountry adoption*⁷ has amply demonstrated this phenomenon based on dozens of documented cases that have been subject to reports and convictions. The conclusion of the study is very clear: multiple abuses take place systematically before the beginning of the adoption procedure, and therefore before the 1993 Hague Convention applies to the process. It is therefore the responsibility of States to put in place systems of child protection, which are efficient and coherent, to enable adoption to adhere to these in its role as a subsidiary measure of protection.

Considerable efforts have been made by the Permanent Bureau of the Hague Conference on Private International Law, by certain countries of origin and receiving countries, by UNICEF, by NGOs and other actors, to give ICA its proper place and to combat prejudice and bad practice. This commitment has undoubtedly ensured the development of ICA in the right direction, not only in relation to the way it is practised but particularly in its better understanding, on the part of both, professionals and the general public. The idea that the world is somehow full of children who are waiting to be adopted, is losing ground, and statistics show that countries of origin have a decreasing need to resort to ICA, demonstrating the efficacy of the reforms undertaken.

The fact remains that causes of concern still exist: the proportion of adoptions carried out outside the framework of the 1993 Hague Convention continues to be substantial (just under 50% in 2013), many countries of origin are still far from having a system in place that guarantees the minimum principles of child protection, and the 'conservative' movement that advocates for ICA 'at all costs' is still powerful in certain key receiving countries. Furthermore, events, such as the earthquake in Haiti in 2010, demonstrate that progress is fragile, and that it does not take much to sweep away the elementary principles that took so long to get accepted⁸.

FACING THE FUTURE WITH AN UNDERSTANDING OF THE INTERCOUNTRY ADOPTION PARADOX

Working in depth on the question of ICA requires a constant and difficult reflection process that should exclude pre-formed opinions about the practice itself, whether positive or negative. While the widespread existence of abuse is undeniable, the sincerity of adoptive parents is equally relevant; ignoring the birth family is untenable, but the success of an adoption and of the adoptee is inspiring; the financial exploitation of adoption in countries of origin is scandalous, but the tolerance of this in receiving countries is no less unacceptable. This paradox originates, in part at least, in the often biased conceptions that societies, in both receiving countries and countries of origin, still reserve for ICA (e.g. life in an industrialised country is better than living with one's biological family in poverty). If responsibilities are shared, it is necessary to recognise and accept the consequences of so doing. The generation of adopted adults who are now questioning their history, have the right to obtain clear answers, whatever the circumstances of their adoption. It is time to end the taboos and to approach, in a responsible manner, the history of ICA with all its successes and failures, to acknowledge the mistakes of the past, and to build the future while there is still time. This publication is undoubtedly a step in that direction.

Hervé Boéchat is a Swiss lawyer with over a decade of experience in the field of child protection. After several missions for the International Committee of the Red Cross and working for the Swiss Federal Department of Justice, he joined ISS in 2005 and took on the functions of Under-Secretary General and Director of the International Reference Centre for the Rights of Children Deprived of their Family. In 2015, he embarked on new professional opportunities in Switzerland.

⁷ Boéchat, H and Fuentes, F (2012). *Investigating the grey zones of intercountry adoption*. Geneva, Switzerland: ISS; available at: http://www.iss-ssi.org/venteonline/product.php?id_product=14&id_lang=3.

⁸ Dambach, M and Baglietto, C (2010). *"Expediting" intercountry adoptions in the aftermath of a natural disaster ... preventing future harm*. Geneva, Switzerland: ISS; available at: http://www.iss-ssi.org/venteonline/product.php?id_product=19&id_lang=1.

LEGAL CONSIDERATIONS

Laura Vialon, Jeannette Wöllenstein and Mia Dambach examine international and regional instruments that could potentially provide a right to search for one's origins as well as possible remedies in case the search leads to the finding of an illegal adoption. National examples from Argentina, Australia, the Netherlands and Spain provide further insight into such considerations.

When discussing illegal adoptions, a preliminary question arises about the existing legal basis that permits the search for origins to confirm or deny such a situation. Should an illicit practice be confirmed, a follow-up question could then be the possible legal avenues available, such as the instigation of criminal proceedings or perhaps even compensation. Accordingly, this Chapter is divided into considerations that provide a legal basis, firstly for undertaking a search for origins, and secondly for pursuing legal remedies.

This Chapter primarily covers international and regional instruments, with a few national practices cited. It does not address the multitude of domestic laws and policies covering the preservation of information (*i.e.* who is responsible and decides, for how long and how it should be conveyed, etc.), the recognition of a right to information and under what conditions (*e.g.* type, purpose and age for accessing information, etc.) or the limitations in place for protecting the privacy of different parties. These issues are beyond the scope of the handbook and are addressed in detail elsewhere⁹.

2.1 RIGHT TO SEARCH FOR INFORMATION: INTERNATIONAL AND REGIONAL PROVISIONS

2.1.1 INTERNATIONAL INSTRUMENTS AND BODIES

Various international human rights instruments arguably provide a clear legal basis for the right to information, although implementation and enforcement of this right is more equivocal – to date, there is little jurisprudence.

International Covenant on Civil and Political Rights¹⁰

The Human Rights Committee is a body of independent experts that monitors the implementation of the ICCPR¹¹. The Covenant, which is the basis for inter-State complaints, contains three articles that are potentially helpful for searching for abuses, especially in the family context¹². Neither of these contains a direct right to the information, but this might arguably be embedded in the right to the protection of family. In the individual complaints procedure, individuals who claim that their rights and freedoms under ICCPR been violated, may call the State

⁹ Jeannin, C and Dambach, M. 'Legal and practical considerations for research of origins – with a special focus on illegal adoptions and social media'. Nordic Adoption Council 18th Nordic Meeting, 12 – 14 September 2013, Tórshavn, Faroe Islands, Denmark; available upon request at: irc-cir@iss-ssi.org.

¹⁰ See: International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI) of 16 December 1966, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

¹¹ See: Human Rights Committee, <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx>.

¹² Articles 17 (freedom of/right to be protected against arbitrary and unlawful interference with the family), 23(1) (protection of the family as the natural and fundamental group unit of society) and 24 (every child has the right to protection as required by his status as a minor/registration immediately after birth/right to have a name).

in question to account for its actions if the State is party to the ICCPR and the Optional Protocol¹³. Unfortunately, a number of key States in ICA matters are not yet parties to the Protocol, such as the USA, China, the UK, India, Japan and many African countries.

Nevertheless, it may be possible to use the complaint procedure to force a State to investigate. In a complaint against Bosnia-Herzegovina in 2010, the complainants claimed a violation of their rights because the State did not provide information about the destiny of their family members in the Civil War¹⁴. The investigation concerned enforced disappearances, which constitute a crime against humanity¹⁵. So, in those cases where enforced disappearances enabled the children to be adopted, this could be a potential avenue to be investigated (see *International Convention for the Protection of All Persons from Enforced Disappearances* below).

Human Rights Council – Complaint procedure

The Human Rights Council (HRC) is an inter-governmental body within the United Nations system addressing situations of human rights violations¹⁶, which has a new complaint procedure to address consistent patterns of gross and reliably attested violations of all human rights¹⁷. All domestic remedies must have been exhausted and the complaint cannot be based only on reports disseminated by mass media¹⁸. Potentially, the same procedure as that before the Human Rights Committee applies, except that there must be proof this abuse is part of ‘a pattern of gross and reliably attested violations of human rights’. Given such a requirement, this procedure seems unsuited for victims of abuses in ICA.

However, this avenue may be possible where there is already evidence of several abuses linked to one country. It should be borne in mind when examining past cases before the HRC that the great majority are entitled ‘human rights situation in country X’, which shows that the cases concern mostly general situations of human rights violations and not specific ones¹⁹. The Council examines the situation of human rights in a country in all its aspects. Only two cases to date have concerned a more specific topic (‘situations of trade unions and human rights defenders in Iraq’, ‘situations of religious minorities in Iraq’) and these followed a general examination as well. It should likewise be noted that the procedure can be long: allegations are firstly screened on the admissibility criteria and, if they are not rejected, they are then transmitted to the State concerned²⁰. Only after two working groups have analysed the allegations may they be brought to the attention of the Council.

¹³ See: Optional Protocol to the International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI) of 16 December 1966, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx>; Office of the United Nations High Commissioner for Human Rights (2005). *Civil and Political Rights: The Human Rights Committee*. Geneva, Switzerland. <http://www.ohchr.org/Documents/Publications/FactSheet15rev1en.pdf>. 168 States are parties to the Covenant and 115 to the Protocol. Article 41 of the ICCPR mandates the Committee to consider inter-state complaints. Furthermore, the First Optional Protocol to the Covenant gives the Committee competence to examine individual complaints with regard to alleged violations of the Covenant by States parties to the Protocol.

¹⁴ Human Rights Committee – Jurisprudence, *Prutina, Zlataarac, Kozica, Čekić v. Bosnia and Herzegovina*, CCPR/C/107/D/1917/2009, 1918/2009, 1925/2009 and 1953/2010, <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/Jurisprudence.aspx>.

¹⁵ Working Group on Enforced or Involuntary Disappearances, General Comment – Enforced disappearances as a crime against humanity, A/HRC/13/31, 2009, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/177/04/PDF/G0917704.pdf?OpenElement>.

¹⁶ See: Human Rights Council, <http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx>.

¹⁷ See: Human Rights Council Complaint Procedure, <http://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx>.

¹⁸ Thus, in principle, due to illicit adoption practices, likely contraventions of the Universal Declaration of Human Rights may exist (*Infra* 399). Articles 12 and 16(13) contain the right of freedom from/to be protected against arbitrary interference with his family and the right to protection of the family as a natural and fundamental group unit of society (which correspond to Articles 17 and 23 of the ICCPR above).

¹⁹ See: Human Rights Council, List of situations referred to the Human Rights Council under the complaint procedure since 2006, <http://www.ohchr.org/Documents/HRBodies/HRCouncil/SituationsconsideredHRCJan2013.pdf>.

²⁰ See: Human Rights Council Complaint Procedure, Working Group on Communications, <http://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/WGCommunications.aspx>. The Working Group on Communications meets twice a year for a period of five working days to assess the admissibility and the merits of a communication.

Human Rights Council – Special Rapporteurs

Beside the complaint procedure, there are Special Procedures involving Special Rapporteurs on specific themes²¹. Of particular relevance are the Special Rapporteurs in the domain of trafficking in persons (especially women and children)²² and in the domain of sale of children, child prostitution, and pornography²³. The Rapporteurs on trafficking and sale can undertake country visits and send urgent appeals in cases of imminent or continuous human rights violations²⁴, which are of a humanitarian nature.

Turning to the Rapporteurs regarding the investigation of abuses could be a possibility for the victims, but strong doubts must already exist. Through the Rapporteur, the victims could put pressure on the State concerned, which might lead to investigation. However, the Rapporteurs have less possibilities to act on past abuses as opposed to current or very recent cases.

International Convention for the Protection of All Persons from Enforced Disappearances²⁵

Solutions for enforced disappearances committed before 2010

The UN Working Group on Enforced or Involuntary Disappearances has based its work on the implementation of the Declaration on the Protection of All Persons from Enforced Disappearances of 1992²⁶. The Working Group has been serving as a channel of communication between victims' family members/friends and concerned governments to assist those families to determine the fate or whereabouts of their family member who has disappeared. Relatives or human rights organisations acting on their behalf can submit a request for examination to the Working Group through specific procedure and communication forms²⁷ (e.g. urgent appeals within three months, general allegations, etc.), which will transmit the individual case to the concerned government. The latter is then requested to carry out investigations and to inform the Working Group on the outcomes. Internal procedures need not be exhausted for the Working Group to deal with an individual case (about 50,000 since its inception; currently 42,889 outstanding cases), to undertake country visits and to provide advisory services on request of governments. Due to its humanitarian character, the Working Group does not address the question of responsibility once the situation has been clarified. However, it is one means for birth families to seek assistance in clarifying their relative's fate²⁸.

Potential solutions for enforced disappearances committed after 2010

Since the entry into force of ICPPED on 23 December 2010, the Committee on Enforced Disappearances has been entrusted with the mandate to bring widespread and systematically practiced situations of enforced disappearances to the UN General Assembly (Art. 34). Adoptees and/or their birth family could benefit from the ICPPED safeguards, if their adoption took place in the aftermath of an 'enforced disappearance'²⁹. The ICPPED specifically foresees in its Article 25 that children who have been '*wrongfully removed*'; meaning '*who have been subjects of an enforced disappearance, whose parents have been or who were born during captivity*', fall under its scope. Thus, in addition, cases are included where children's documents attesting to their true identity have been falsified, concealed or destroyed. A system of cooperation for search, identification and localisation

²¹ See: Human Rights Council, Special Procedures of the Human Rights Council, <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>.

²² See: Special Rapporteur on trafficking in persons, especially women and children, <http://www.ohchr.org/EN/Issues/Trafficking/Pages/TraffickingIndex.aspx>.

²³ See: Special Rapporteur on the sale of children, child prostitution and child pornography, <http://www.ohchr.org/en/issues/children/pages/childrenindex.aspx>.

²⁴ See: Special Rapporteur on trafficking in persons, especially women and children, Individual complaints, <http://www.ohchr.org/EN/Issues/Trafficking/Pages/complaints.aspx>.

²⁵ See: International Convention for the Protection of All Persons from Enforced Disappearances, International Convention for the Protection of All Persons from Enforced Disappearance, General Assembly Resolution A/RES/61/177 of 20 December 2006, <http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx>.

²⁶ The Declaration is setting forth minimum standards for all Member States of the United Nations, <http://www.un.org/documents/ga/res/47/a47r133.htm>.

²⁷ Office of the United Nations High Commissioner for Human Rights (2009). *Enforced or Involuntary Disappearances*. Fact Sheet N°6/Rev. 3. Geneva, Switzerland, p. 23, <http://www.ohchr.org/Documents/Publications/FactSheet15rev1en.pdf>.

²⁸ A request to the Working Group has been sent to see if any of the 50,000 cases deals with adoption matters but with no response as of publication.

²⁹ An enforced disappearance is considered to be '*the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law*' (Art. 2 ICPPED).

of the concerned child and mutual legal assistance in criminal proceedings (Arts. 14-15) shall be installed to comply with States' obligation to take '*necessary measures to prevent and punish under criminal law*'. Referring to the best interests of the child, child victims of enforced disappearances have the right to the review of their adoption or placement. If necessary, these measures can even be annulled when 'originated in an enforced disappearance'³⁰. Due to the long-term and widespread nature of this human rights violation, the ICPPED provisions are also applicable to adults who have been victims of enforced disappearances as a child, given that the term of limitation begins when the disappearance ceases.

In order for the ICPPED provisions to be applicable, the State authority's involvement must, however, be demonstrated. As per Article 6, this could include if the State authority failed to take the necessary and reasonable measures to prevent, repress or investigate the commission of an enforced disappearance. This ICPPED mechanism is only applicable in cases of well-founded information on the commission of an enforced disappearance and where all available domestic remedies have been exhausted.

Convention on the Rights of the Child³¹ and its Optional Protocol on a communications procedure^{32 & 33}

The UNCRC contains many provisions that are relevant for the rights of victims of abuses in ICA. Article 7 contains the right to be registered immediately after birth and to know and be cared for by one's parents. Article 8 states that 'a child shall have the right to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity'. Article 9(1) provides the safeguard that a child not be separated from their parents against their will except when this is necessary to ensure the child's best interests. Article 16 affirms, in common with other instruments already mentioned, the protection of private and family life.

Such UNCRC provisions are clearly relevant to the situation of victims of abuses in ICA (see [Chapter 5: Political considerations](#), which explains how the drafting of Article 8 was largely the consequence of illegal adoptions in Argentina). Additionally, since its entry into force in April 2014³⁴, the OP3 now permits children or their representatives to bring communications (also called complaints) alleging violations of their rights by their State to the attention of the CRC. However, they must file their complaint within one year of the exhaustion of domestic remedies, and the OP3 must have entered into force in their State before the violation occurred. This procedure is known as the individual communications procedure before the CRC, which is quasi-judicial, and its outcome is a set of recommendations of the CRC to the State concerned. While these recommendations are not legally binding, the ratification of the OP3 means that States Parties have committed to applying its provisions and, therefore, involves an engagement in good faith to follow the recommendations.

In addition to the individual communications procedure, the OP3 establishes an inquiry procedure³⁵, which allows anyone – including people who are not directly a victim, or NGOs – to submit information to the CRC about grave or systematic violations of children's rights³⁶. If the CRC is concerned that grave or systematic violations

³⁰ *Supra* 27.

³¹ See: Convention on the Rights of the Child, General Assembly Resolution 44/25 of 20 November 1989, <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

³² See: Optional Protocol to the Convention on the Rights of the Child on a communications procedure, General Assembly Resolution A/RES/66/138 of 19 December 2011, <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>.

³³ This part was kindly edited by Anita Goh, Policy and Programme Manager at Child Rights Connect, who led the drafting and final acceptance of the OP3.

³⁴ See: Status of ratification/accession to the OP3 at <https://treaties.un.org/pages/viewdetails.aspx?src=treaty&msgid=no-iv-11-d&chapter=4&lang=en>.

³⁵ It is worth noting however that the inquiry procedure is an optional procedure, which means that States parties to the OP3 can opt out of this procedure at the time of signature, accession or ratification of the OP3. As of September 2015, only one State party – Andorra – has opted out of the inquiry procedure.

³⁶ Article 13 of the OP3; see also International Coalition for the OPCRC on a Communications Procedure, *Empower children to secure their rights – Frequently Asked Questions*, http://ratifyop3crc.org/wp-content/uploads/2014/04/CRC_OP3_leaflet_EN_A4_ChildRightsConnect.pdf and *Information Pack*, http://ratifyop3crc.org/wp-content/uploads/2014/06/CRC_OP3_info_pack_web.pdf

of children's rights are occurring, it can launch an inquiry on the matters brought to its attention, which may include a country visit and interviews with relevant actors in the country.

In terms of the application of the OP3 to illicit practices of adoption today, two main challenges have been identified.

First, individual communications or information submitted for the consideration of an inquiry procedure can only concern alleged violations of children's rights that occurred after the entry into force of the OP3 in the State concerned. Currently, most illicit practices will not meet this criterion. There is, however, one noteworthy exception to this rule: 'continuing violations', *i.e.* violations that occurred prior to the entry into force of the OP3 for the State party concerned but that continue after that date³⁷. Thus, if it can be argued that the violations linked to illicit practices of adoption continue to produce effects after the entry into force of the OP3 in the State concerned, it may be worth submitting a complaint to the CRC under the OP3.

Secondly, whilst the UNCRC is one of the most ratified international conventions (195 States)³⁸, the OP3 has, to date, been ratified by only 18 States. The application of the OP3 is therefore quite limited at this moment.

The 1993 Hague Convention on Protection and Co-operation in respect of Intercountry Adoption³⁹

The 1993 Hague Convention is a Private International Law instrument designed to ensure that ICAs respect the rights and best interests of the child, and to ensure the cooperation of States parties involved. A fundamental aim of the 1993 Hague Convention is to 'prevent the abduction, the sale of, or traffic in children' (Art. 1(b)). However, there is no provision for an oversight or complaint mechanism should this situation or other illicit practices arise⁴⁰ (see *Promising practice: Legal paths to justice in the Netherlands*).

As regards alleged abuses of adoptees from and to countries that are both parties to the 1993 Hague Convention, the latter potentially offers informal possibilities of action⁴¹. The provisions in question could arguably provide adoptees with the possibility of engaging their Central Authority (if it accepts such a responsibility and in accordance with domestic legislation) to cooperate with another Central Authority. A request made in accordance with Article 9(e) on potential abuses combined with the obligation in Article 8 could lead to investigation resulting in information (see *Promising practice: Belgium's authorities actively implement preventive measures to combat illegal adoptions* and *Promising practice: Australia's National Apology for forced adoptions*).

³⁷ Article 7 of the OP3.

³⁸ See: Status of ratification/acceptance/accesion/succession to the UNCRC, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

³⁹ See: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=69>.

⁴⁰ The 1996 Hague Convention may be more applicable. 'The SC encouraged States to consider ratification of, or accession to, the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (...) in view of its relevance in enhancing co-operation to protect children in many different situations, including following the breakdown of intercountry adoptions'. See: HCCH, Conclusions and Recommendations adopted by the Fourth Meeting of the Special Commission on the practical operation of the 1993 Hague Intercountry Adoption Convention, 2015, http://www.hcch.net/upload/wop/adop2015concl_en.pdf.

⁴¹ Article 8 obliges 'Central Authorities (to take), directly or through public authorities, all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention'. Article 7 provides a general obligation for the Central Authorities to cooperate. Likewise, Article 9(e) states that the Central Authorities should 'reply, in so far as is permitted by the law of their State, to justified requests from other Central Authorities or public authorities for information about a particular adoption situation'.

2.1.2 REGIONAL INSTRUMENTS AND BODIES

European Convention on Human Rights⁴²

The European Convention on Human Rights contains Articles 8 (right to respect for family life)⁴³ and article 13 (right to an effective remedy)⁴⁴ that are important in the context of abuses in ICA. The formulation of Article 8 is similar to that in the ICCPR and the Universal Declaration of Human Rights.

The European Court of Human Rights (ECtHR), set up in 1959, rules on individual or State applications alleging violations of the civil and political rights set out in this Convention. The ECtHR has explicitly held that the right to respect for private life contains the 'right to identity and personal development, and the right to establish and develop relationships with other human beings'⁴⁵, 'matters of relevance to personal development include details of a person's identity as a human being and the vital interest protected by the Convention in obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents'. This judgment also established that Article 8 might require States to take steps to protect the child's right to identity⁴⁶. A recent judgment reiterated this jurisprudence in the case of the official establishment of descent of a child⁴⁷.

The first case concerned a child that wanted to find out the identity of her mother and the circumstances of her birth and abandonment, whereas the mother had given birth to her under a special procedure which allowed her to remain anonymous. The second judgment concerned the legal recognition of the parent-child relationship. The case concerned a child who was born abroad through surrogacy, but with the sperm of the husband of the couple applying for recognition of parentage in their home country.

A handful of cases on abuse in ICA have been brought to the ECtHR⁴⁸, primarily where consent has been an issue, as well as others that could potentially provide some jurisprudence, a few of which are noted below. Despite such cases, it should be noted that the difficulty is that the investigation for abuses and origins must take place, in the great majority of the cases, in the country of origin. Cases of ICA abuses in African, Asian or American countries can naturally not be brought to the ECtHR. Likewise, domestic remedies must have been exhausted and the procedures before the ECtHR are quite long.

⁴² See: European Convention on Human Rights, http://www.echr.coe.int/Documents/Convention_ENG.pdf.

⁴³ Article 8(1) states that "[e]veryone has the right to respect for his private and family life, his home and his correspondence". Article 8(2) states that "[i]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

⁴⁴ Article 13 states that 'everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'.

⁴⁵ *Odièvre v France*, Application No. 42326/98, <http://hudoc.echr.coe.int/eng?i=001-65492#i%22languageisocode%22:%22ENG%22,%22appno%22:%2242326/98%22,%22documentcollectionid%22:%22GRANDCHAMBER%22,%22itemid%22:%22001-60935%22>.

⁴⁶ Kilkelly, U (2010). 'Protecting Children's Rights Under the ECHR: The Role of Positive Obligations'. *Northern Ireland Legal Quarterly*, Vol. 61, No. 3, p. 254, http://www.academia.edu/2262670/Protecting_Childrens_Rights_under_the_ECHR_The_Role_of_Positive_Obligations.

⁴⁷ *Mennesson v France*, Application No. 65192/11, http://hudoc.echr.coe.int/eng?i=001-145179*#i%22itemid%22:%22001-145179*%22.

⁴⁸ Research on case-law undertaken by Vito Bumbaca, Legal Officer at the ISS/IRC.

PINI AND OTHERS v ROMANIA⁴⁹

In *Pini v Romania*, it was decided that ‘in a relationship based on adoption it is important that the child’s interests should prevail over those of the parents’ (p. 237, para. 139). In this case, the adoption was finalised. However, the two girls adopted had not given their consent and did not wish to leave the institution that they were living in. Thus, the ECtHR ruled that the two girls would be able to remain in Romania as they had very few ties to their adoptive parents.

H v UNITED KINGDOM⁵⁰

In this case, the ECtHR ruled that there had been a breach of the ‘Convention by reason of the length of proceedings instituted by the applicant H, the mother, regarding her access to A, her child, a ward of court committed to the care of a local authority’. Had the British authorities acted more promptly, the court held that ‘the period during which “bonding” between A and her foster parents had been taking place would thus have been considerably reduced’. Moreover, the ECtHR held that the applicant’s case for regaining parental authority of A had been severely prejudiced as a result, and during this waiting time, A had not yet been placed for adoption. The ECtHR concluded that ‘[i]n these circumstances, it cannot, in the Court’s opinion, be excluded that a prompt conclusion of the proceedings might have resulted in a different outcome. To this extent the applicant may therefore be said to have suffered some loss of real opportunities, warranting monetary compensation’. Thus, the applicant was awarded non-pecuniary damages for GBP 12,000.

R v UNITED KINGDOM⁵¹

The applicant (mother) ‘alleged maladministration in that (a) there were shortcomings in the way in which the Authority assumed her parental rights in April 1981 and (b) the Authority failed subsequently to keep her informed of its intentions for her children’, which included being placed for adoption. In the ECtHR’s view, ‘what therefore has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will have been a failure to respect their family life and the interference resulting from the decision will not be capable of being regarded as “necessary” within the meaning of Article 8’. Furthermore, the ECtHR discerned ‘no reason – and none has been advanced by the Government – for not involving her more closely in the April 1981 decision. Indeed, it notes that the Local Ombudsman concluded that there had been maladministration, having regard to the shortcomings in the way in which the parental rights resolution was passed’. Thus, the ECtHR ruled that there was a violation of Article 8 of the ECHR.

⁴⁹ *Pini and Others v Romania*, Applications Nos. 78028/01 and 78030/01, <http://hudoc.echr.coe.int/eng/?i=001-61837>.

⁵⁰ *H v United Kingdom*, Application No. 9580/81, <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-57503&filename=001-57503.pdf&TID=ihkbhnlzk>.

⁵¹ *R v United Kingdom*, Application No. 10496/83, <http://echr.ketse.com/doc/10496.83-en-19870708/view/>.

ZORICA JOVANOVIĆ v SERBIA⁵²

In terms of adoptions within and from Europe, a recent case of relevance involves the claim raised by parents of origin in *Zorica Jovanović v. Serbia*. It concerned the alleged death of the healthy newborn son of Ms Jovanović in 1983 in a state hospital. The mother was never allowed to see the body of her child and suspected that he may still be alive and unlawfully given up for adoption. In this case, the ECtHR found a violation of Article 8 (right to respect for private and family life) because of the lack of information provided by Serbia on what happened to the son. Additionally, the Court held, under Article 46, that Serbia had to take measures to give credible answers about what had happened to each missing child and to provide parents with adequate compensation. If it is proven that the child was actually given up to adoption after a false declaration of his death, this case could be pertinent to addressing the situations of abuses in ICA we are concerned about. However, the problem remains that the ECtHR only has jurisdiction for the Member States of the Council of Europe and parties to the ECHR.

African Court on Human and Peoples' Rights

The ACtHPR is a continental court established by African countries. It complements and reinforces the functions of the African Commission. The ACtHPR was established by virtue of Article 1 of the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights adopted by Member States of the then Organisation of African Unity in 1998⁵³. Today, 27 African countries have ratified the Protocol to the African Charter. The ACtHPR has jurisdiction over all cases and disputes submitted to it concerning the application of the African Charter, the Protocol to the African Charter and any other relevant human rights instrument ratified by the States concerned⁵⁴.

According to the Protocol to the African Charter (Art. 5) and the Rules of Court (Rule 33), the ACtHPR may receive complaints and/or applications submitted to it either by the African Commission or State parties to the Protocol to the African Charter or African Intergovernmental Organisations. NGOs with observer status before the African Commission and individuals from States, which have made a declaration accepting the jurisdiction of the ACtHPR can also institute cases directly before the latter. But only seven countries have made such a declaration. The first judgment was delivered in 2009. As at September 2013, the Court had received 28 applications. It has finalised only 23 cases to this day. The African Commission also has a communications procedure.

⁵² *Zorica Jovanović v Serbia*, Application No. 21794/08, [http://hudoc.echr.coe.int/eng-press?i=003-4306525-5150999#{"itemid":\["003-4306525-5150999"\]}](http://hudoc.echr.coe.int/eng-press?i=003-4306525-5150999#{).

⁵³ See: African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5 of 27 June 1981, <http://www.african-court.org/en/images/documents/Sources%20of%20Law/Banjul%20Charter/charteang.pdf> and Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, <http://www.african-court.org/en/images/documents/Court/Court%20Establishment/africancourt-humanrights.pdf>.

⁵⁴ See: African Court on Human and Peoples' Rights, African Court in Brief, <http://www.african-court.org/en/index.php/about-the-court/brief-history>.

Inter-American Court of Human Rights

The Member States of the OAS adopted the American Convention on Human Rights⁵⁵ in November 1969; it entered into force in July 1978. To date, twenty-five American nations have ratified or adhered to the ACHR (but not the USA). Two authorities were created with competence to deal with human rights violations: the Inter-American Commission on Human Rights (1959) and the Inter-American Court of Human Rights (1979)⁵⁶. In recent years, several countries have been denounced by the IACtHR for not adequately handling cases of enforced disappearances due to a lack of investigations and failure to proceed with the criminal prosecution of government officials.

GELMAN v URUGUAY⁵⁷

Maria Macarena was born during the 'political' captivity of her mother, an Argentinian national, in Uruguay in the 1970s, and was raised under a false name by a Uruguayan policeman. The IACtHR concluded that there was both, a violation of Maria Macarena's rights (especially her right to identity and recognition of legal personality), but also violation of her biological grand-father's (plaintiff Juan Gelmán) rights to personal integrity and to family protection. According to the IACtHR, the abduction of children by governmental agents for the purpose of illegally placing the child in the care of another family, by modifying their identity and omitting to inform the biological family on their whereabouts, is qualified as a complex situation. It involves a succession of illicit acts and violations of rights designed to hinder the re-establishment of the bond between the abducted child and their family. It further concluded that the Argentinian State was responsible for arbitrary deprivation of the family environment and illicit retention and transfer to another country. Maria Macarena received material indemnisation (USD 5,000) for the expenses incurred in the search for her biological mother's whereabouts and as heir of her disappeared mother (USD 385,326). With regard to the non-pecuniary damages suffered, the IACtHR deemed it justified to assign USD 80,000 to Maria Macarena as well as USD 100,000 to her biological mother.

HERMANAS SERRANO CRUZ v EL SALVADOR⁵⁸

It is presumed that the Serrano Cruz siblings were abducted by the Salvadorian military during the armed conflict (1979-1992). The IACtHR could not explicitly recognise the responsibility of the State of El Salvador as the IACtHR's competence was only determined in 1995. However, the IACtHR foresaw several obligations for El Salvador, such as the compensation to the Serrano Cruz family, including free medical and psychological treatment, the establishment of a website listing disappeared children as well as a genetic database. The Government also established a National Commission on the search for disappeared children during the armed conflict.

⁵⁵ See: American Convention on Human Rights ('Pact of San José, Costa Rica'), http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm.

⁵⁶ See: Inter-American Commission on Human Rights, <http://www.oas.org/en/iachr/> and Inter-American Court of Human Rights, <http://www.corteidh.or.cr/index.php/en>.

⁵⁷ *Gelman v Uruguay*, Judgment of 24 February 2011 (Merits and Reparations), http://www.corteidh.or.cr/docs/casos/articulos/seriec_221_ing.pdf.

⁵⁸ *Serrano-Cruz Sisters v El Salvador*, Judgment of 1 March 2005 (Merits, Reparations and Costs), http://www.corteidh.or.cr/docs/casos/articulos/seriec_120_ing.pdf.

The jurisprudence of the IACtHR on cases of enforced disappearances is abundant and shows that solutions for such massive human rights violations exist at a regional level. To prevent such atrocities in the future, consideration should be given to the recommendations made by UNICEF in its 2011 report on disappeared children in Central America⁵⁹, among which, in particular:

- the inclusion of a definition for a 'disappeared child', which could include the cases of disappeared children for the purpose of their adoption;
- information mechanisms and awareness-raising campaigns;
- specific policies addressing this issue;
- national registers/databases on disappeared children;
- regional cooperation for ensuring an immediate investigation.

Finally, the IACtHR will be hearing a case of illegal adoptions in the near future. Indeed, the Inter-American Commission on Human Rights has submitted Case No. 12.896 relating to the *Hermanos Ramírez y familia* to the IACtHR in relation to a series of violations of the ACHR by Guatemala in their process of ICA⁶⁰.

2.2 LEGAL REMEDIES: INTERNATIONAL AND REGIONAL

2.2.1 INTERNATIONAL INSTRUMENTS

Compensation refers principally to criminal prosecution, but also civil compensation or family reunification, if possible.

United Nations Convention against Transnational Organised Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children⁶¹ and Council of Europe Convention on Action against Trafficking in Human Beings⁶²

The UN Protocol on Trafficking and the CoE Convention against Trafficking are analysed simultaneously to avoid repetitions. Both aim to prevent and combat trafficking in persons, with special regards to women and children, to protect and assist victims, and to promote cooperation among State parties. The question at hand is whether abuses preceding an adoption decision can be qualified as 'trafficking' as per the definition in Article 3 of the UN Protocol on Trafficking (Article 4 of the CoE Convention against Trafficking).

⁵⁹ International Centre for Missing and Exploited Children and UNICEF (2011). *Missing Children in Central America: Research of Practices and Legislation on Prevention and Recovery*, available at: http://www.icmec.org/wp-content/uploads/2015/10/Central_America_Missing_Children_Report_Final_.pdf.

⁶⁰ Press release: 'IACHR Takes Case involving Guatemala to the Inter-American Court', Organisation of American States, 22 February 2016; available at: http://www.oas.org/en/iachr/media_center/PReleases/2016/017.asp.

⁶¹ See: United Nations Convention against Transnational Organised Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, General Assembly Resolution 55/25 of 15 November 2000, <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>.

⁶² See: Council of Europe Convention on Action against Trafficking in Human Beings, https://www.coe.int/t/dghl/monitoring/trafficking/Docs/Convntn/CETS197_en.asp.

Trafficking in persons is generally regarded as a contemporary form of slavery, as a criminal act and a violation of human rights⁶³. The definition consists of three elements: activity, means and purpose⁶⁴. The problematic element revolves around the purpose, which is to be 'exploitation'. A difference can be made between trafficking *for* adoption (where adoption is the purpose) and trafficking *through* adoption (where adoption is the means)⁶⁵. Trafficking *through* adoption would imply that children are adopted to be exploited by the adoptive parents in the forms mentioned in the UN Protocol on Trafficking (sexual, labour, servitude, removal of organs), which is clearly extremely rare. It is trafficking *for* adoption that we are concerned about, where children are separated from their parents by whatever means with the purpose of gaining profit by making them available *for* adoption. The *Travaux Préparatoires* of the UN Protocol on Trafficking and the Explanatory Report on the CoE Convention against Trafficking show that both are in fact intended to cover only the case of trafficking *through* adoption⁶⁶. There are examples of abuses in the adoption process being treated as trafficking⁶⁷.

Some argue that either the purpose of exploitation is not a necessary element with regard to illegal adoptions as child trafficking (the illegal elements and the money involved make it trafficking *per se*) or that an illegal adoption is a form of exploitation (the fertility of birth parents is exploited and the child is exploited to fulfil the desire of the adoptive parents of having a child)⁶⁸. The view that illegal adoption as such can be characterised as trafficking can be based on the text of the UNCRC and its OPSC, as well as the 1993 Hague Convention, which do not appear to require exploitation as purpose. More in depth analysis of this debate on what constitutes trafficking in the ICA context is helpfully found in Rotabi's work.⁶⁹

If abuses in ICA could be defined as trafficking in persons, the mechanism of compensation for the victims would arguably be quite satisfactory. The UN Protocol on Trafficking as well as the CoE Convention against Trafficking contain provisions on prosecution, assistance, compensation, legal aid and repatriation⁷⁰. However, as we have seen, the official documents of the two texts do not include abuses in ICA/child laundering in the definition of trafficking, so reliance on this avenue is unlikely to be successful.

⁶³ De Witte, I (2012). *Illegal Adoption as Child Trafficking: The potential of the EU Anti-trafficking Directive in protecting children and their original family from abusive intercountry adoption*. MA Thesis, p. 47; available at: <http://www.againstchildtrafficking.org/wp-content/uploads/Illegal-Adoption-as-Child-Trafficking-lara-de-Witte.pdf>.

⁶⁴ *Ibid.*, p. 50; see also: United Nations Office on Drugs and Crime, Human Trafficking, <http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html>.

⁶⁵ *Ibid.*, p. 54; see also: Cantwell, N (2005). 'Is intercountry adoption linked with trafficking for exploitation?' in *ISS/IRC Monthly Review*, No. 11-12/2005, November-December 2005; available at: <http://www.iss-ssi.org/index.php/en/resources/training>

⁶⁶ *Supra* 63, pp. 50 and 51.

⁶⁷ See, for example, the cases of 'baby snatching' in Guatemala and the high numbers of intercountry adoptions in the country or the case of the Preet Mandir orphanage in India, which allegedly sourced children from poor families to sell them into intercountry adoptions.

⁶⁸ *Supra* 63, pp. 57 – 58; Smolin, D M (2007), 'Child Laundering as Exploitation', in *Vermont Law Review*, Vol. 32, No. 1, pp. 13 – 14; available at: http://works.bepress.com/david_smolin/6/.

⁶⁹ Rotabi, K S (2014). 'Force, fraud, and coercion: Bridging from knowledge in intercountry adoption to global surrogacy'. Report for Thematic Area 4 of the International Forum on Intercountry Adoption and Global Surrogacy. International Institute of Social Sciences, *ISS Working Paper Series / General Series*, Vol. 600, pp. 1 – 30; available at: <http://repub.eur.nl/pub/77403>.

⁷⁰ Compare Articles 6 and 8 of the UN Protocol; Articles 12, 15 and 16 of the CoE Convention.

Convention on the Rights of the Child and its Optional Protocol on the sale of children, child prostitution and child pornography⁷¹

Article 35 of the UNCRC contains an obligation for States parties 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*’. Likewise, the OPSC contains provisions against the sale of children, and explicitly concerning adoptions in the form of ‘improperly inducing consent as an intermediary in violation of *international instruments*’ (like the 1993 Hague Convention). Neither the UNCRC nor the 1993 Hague Convention makes a clear distinction between sale and trafficking⁷².

Unlike the UN Protocol on Trafficking and the CoE Convention against Trafficking discussed above, it appears clear that according to the UNCRC and its OPSC (as well as the 1993 Hague Convention), illegal adoption can be trafficking and/or sale – acts that must be punished as such under Criminal Law as long as there are illegal elements and money involved. It is noteworthy that the Special Rapporteur on the sale of children, child prostitution, and pornography has frequently brought up illegal adoption questions with her 2016 thematic report specifically focusing on this issue (including under ‘sale’)⁷³.

2.2.2 REGIONAL INSTRUMENTS

European Union Directive on preventing and combating trafficking in human beings and protecting its victims⁷⁴

Covering European countries, Directive 2011/36/EU concerns the prevention and criminal prosecution of trafficking in human beings and the protection of the rights of the victims. It also seeks to enhance cooperation between Member States in this matter and facilitate prosecution. Additionally, in legal proceedings, it establishes the victims’ rights to protection and compensation. It also puts emphasis on the child as a particularly vulnerable victim (Paras. 8, 22 and 23 of the Preamble).

The new definition of trafficking in human beings also covers forms of exploitation for purposes other than sexual exploitation or forced labour, such as the removal of organs, forced marriage or illegal adoption (Para. 11 of the Preamble of Directive 2011/36/EU). Unfortunately, the Directive does not clearly define illegal adoption or exploitation⁷⁵ even though they are apparently one of the constitutive elements of trafficking in human beings. It is therefore unclear what the term ‘illegal adoption’ is intended to cover, and in particular whether it would include illicit practices in adoptions which are legally executed⁷⁶. It is equally unclear whether illegal adoption is considered a form of exploitation, and thus to what extent it is in fact covered by Directive 2011/36/EU at all.

⁷¹ See: Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, General Assembly Resolution A/RES/54/263 of 25 May 2000, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx>.

⁷² *Supra* 63, pp. 54 and 55.

⁷³ Office of the High Commissioner for Human Rights, Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Najat Maalla M’jid, A/HRC/22/54, 24 December 2012, <http://www.ohchr.org/EN/Issues/Children/Pages/AnnualReports.aspx>.

⁷⁴ See: Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011L0036>.

⁷⁵ *Supra* 63.

⁷⁶ Directive 2011/36/EU uses the same definitions of ‘trafficking in human beings’ as the CoE Convention against Trafficking and the UN Protocol on Trafficking. There are only two differences in language: in its definition of ‘trafficking in human beings’, Directive 2011/36/EU includes not only recruitment, transportation, transfer, harbouring or receipt of persons, but also ‘the exchange or transfer of control over such persons’. In its definition of exploitation, Directive 2011/36/EU adds ‘begging, exploitation of criminal activities’. However, illegal adoption is mentioned only in the Preamble and not explicitly in the operative text of the Directive.

The outstanding issue is how the Member States will transpose Directive 2011/36/EU. Several EU Member States have legal provisions with regard to illegal adoption and child trafficking. Some countries included illegal adoption in the definition of child trafficking. There are also countries without (clear) provisions on illegal adoption and/or child trafficking. In sum, child trafficking and illegal adoption lack a uniform definition at Member State level.

Inter-American Convention on International Traffic in Minors⁷⁷

The IACITM, which dates from 1994, differs slightly in its formulation from the other anti-trafficking instruments presented above. Article 2 stipulates that it concerns children (under the age of 18 years) habitually resident or located in a State party who are abducted, removed or retained for unlawful purposes **or** by unlawful means. In the UN Protocol on Trafficking and the CoE Convention against Trafficking, the definition of trafficking refers to unlawful means **and** purposes, but in the IACITM (as, indeed, in the UNCRC), just one of those two elements is sufficient. The definition of 'unlawful means' and 'unlawful purposes' in the IACITM then resembles the definition given in the other two texts. Of special interest here: "[u]nlawful means" includes, among others, kidnapping, fraudulent or coerced consent, the giving or receipt of unlawful payments or benefits to achieve the consent of the parents, persons or institution having care of the child, or any other means unlawful in either the State of the minor's habitual residence or the State Party where the minor is located'. Illegal adoption, in the form of child laundering, for example, seems to fit perfectly into the definition in this case.

Furthermore the IACITM interestingly covers civil aspects of trafficking (Article 3), presumably thereby foreseeing civil compensation. Article 18 states clearly that 'adoptions and other similar legal proceedings performed in a State Party shall be subject to annulment if they had their origin or purpose in international traffic in minors'. The formulation of this article clearly provides additional support to the interpretation that cases of illegal adoption are protected under this treaty since it states that adoption may have '*its origin* in international traffic in minors'.

2.3 NATIONAL EXAMPLES: SEARCHING FOR ORIGINS AND LEGAL REMEDIES

The specific focus in this section is on State responses to illegal adoption practices, with examples from Spain, Argentina, Australia and the Netherlands. Responses in the first three countries concern domestic cases, from which important lessons can be gleaned. They can serve as promising practices in terms of the right to search for origins, what the implementation of this right implies, and what legal remedies may be considered. The examples from the Netherlands looks at legal remedies in ICA cases.

⁷⁷ See: Inter-American Convention on International Traffic in Minors, https://www.oas.org/dil/treaties_B-57_Inter-American_Convention_on_International_Traffic_in_Minors.htm.

PROMISING PRACTICE: SPAIN, THE SEARCH FOR ORIGINS AND LEGAL REMEDIES

In Spain, under Franco (1939-1975), babies born to members of the opposition were abducted and given to families loyal to Franco. Many people were involved in this ideological – and later purely lucrative – business: doctors, midwives, the Church and public officials⁷⁸. There were anything from 30,000 to 300,000 cases, according to the media⁷⁹. The response to these grave violations of the rights of the families deprived of their children and of the children deprived of their family was unsatisfactory. The Amnesty Law of 15 October 1977 contributed mainly to creating impunity for these crimes. A Law of Historical Memory was adopted in 2007 and officially condemned the crimes of the Franco regime, but did not cover the cases of the stolen children⁸⁰. In 2012, it was announced that a DNA database to track stolen babies had been established⁸¹. Many associations have been set up, sometimes by victims, as in the case of ANADIR⁸², which try to investigate the cases and trace the families. ANADIR has created a DNA database of parents searching for their children. In parallel, the government inaugurated a new office – *Servicio de información a los afectados por el posible robo de niños* – which provides assistance and a DNA database for the victims (parents and children). In 2013, an information service for possible victims of the abduction of newborn babies was set in place under the Ministry of Justice, providing assistance and a DNA database for the parents and children concerned⁸³. Spain has also established a documentation centre on historical memory⁸⁴.

In Spain, there were attempts by victims (associations of victims) to bring the cases to court⁸⁵. In 2008, Examining Magistrate Baltasar Garzón opened investigations into these and other alleged crimes committed under Franco⁸⁶, but he was suspended on the grounds that these investigations were contrary to the 1977 Amnesty Law. However, from the point of view of International Law, crimes against humanity cannot become statute-barred and the Amnesty Law must be without effect. From as early as 2008, the UN Human Rights Committee, in charge of monitoring compliance with the ICCPR, called on Spain to repeal the 1977 Amnesty Law.⁸⁷

⁷⁸ 'Les enfants volés d'Espagne', *France Inter*, 28 January 2014; available at: <http://www.franceinter.fr/emission-la-bas-si-jy-suis-les-enfants-voles-despagne>.

⁷⁹ *Ibid.*; 'Bébés volés en Espagne: l'Eglise critiquée', *Le Figaro*, 9 January 2014; available at: <http://www.lefigaro.fr/flash-actu/2014/01/09/97001-20140109FILWWW00705-bebes-voles-en-espagne-l-eglise-critiquee.php>; 'Spain's stolen babies and the families who lived a lie', *BBC*, 18 October 2011; available at: <http://www.bbc.com/news/magazine-15335899>; 'Stolen babies scandal haunts Spain', *CNN*, 26 April 2012; available at: <http://edition.cnn.com/2012/04/25/world/europe/wus-spain-stolen-babies/>.

⁸⁰ 'Les enfants volés d'Espagne', *Le Monde*, 23 December 2010, http://www.lemonde.fr/europe/article/2010/12/23/les-enfants-voles-d-espagne_1457005_3214.html.

⁸¹ 'Pious Demons: Spanish Baby-Snatching Victims Seek Answers and Justice', *Spiegel Online*, 19 July 2012; available at: <http://www.spiegel.de/international/europe/spain-investigates-probe-hundreds-of-alleged-baby-thefts-a-844948.html>.

⁸² ANADIR (*Asociación Nacional de Afectados por Adopciones Irregulares*) is an association for Spain's stolen children; its president, Antonio Barroso, is himself a victim, which he only found out in adulthood. See: 'Stolen babies scandal haunts Spain', *CNN*. *Supra* 79.

⁸³ See: Ministry of Justice, Spain, *Servicio de información a afectados por la posible sustracción de recién nacidos*, <http://www.mjusticia.gob.es/cs/Satellite/ca/1288777264442/DetalleInformacion.html#ofrece>.

⁸⁴ See: Ministry of Education, Culture and Sports, *Centro Documental de la Memoria Histórica*, <http://www.meecd.gob.es/cultura-meecd/areas-cultura/archivos/mc/archivos/cdmh/portada.html?jsessionid=B2D4B98EFB9C92A8CDD8B9D122C950C8>.

⁸⁵ *Supra* 80; 'Espagne: les enfants volés réclament justice', *Le Figaro*, 2 February 2012; available at: <http://www.lefigaro.fr/international/2012/02/02/01003-20120202ARTFIG00467-espagne-les-enfants-voles-reclament-justice.php>.

⁸⁶ 'Espagne: le juge Baltasar Garzón suspendu de ses fonctions', *Le Monde*, 14 May 2010; available at: http://www.lemonde.fr/europe/article/2010/05/14/espagne-le-juge-baltasar-garzon-suspendu-de-ses-fonctions_1351733_3214.html.

⁸⁷ Committee on the Rights of the Child, Concluding Observations: Spain, CCPR/C/ESP/CO/5, 5 January 2009, Para. 9, http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=ESP&Lang=EN; see also: Human Rights Watch, 'Spain: End Amnesty for Franco Era Atrocities – Prosecuting Judge who Challenged Amnesty Undermines Accountability', 19 March 2010; available at: <https://www.hrw.org/news/2010/03/19/spain-end-amnesty-franco-era-atrocities>.

PROMISING PRACTICE: ARGENTINA TAKES RESPONSIBILITY FOR FORCED DISAPPEARANCES

Professor Nieve Rubaja describes how the military dictatorship resulted in the forced disappearance of at least 30,000 citizens, many of whom were children later relinquished for adoption, and reviews the implications and consequences of this tragedy as well as the government's response.

The tragic situation experienced by Argentina during the years 1976 to 1983 – in which the military government installed a policy that entailed the forced disappearance of a considerable number of citizens, and a systematic plan for the abduction and wrongful appropriation of babies – resulted in dreadful consequences for society as a whole, and in particular for the direct victims and their relatives. The identity of the abducted babies and children was eliminated, in some cases through their registration as the children of the persons who had misappropriated them, in other cases, through adoptions with illicit elements from the beginning. As a consequence of these dramatic circumstances, the Argentinian State has had to undertake specific measures to put right the serious human rights violations that had occurred; at the same time, these terrible events have had an impact on the national mindset and, therefore, on legal policy relating to the concept of adoption.

RESTORING THE RIGHT TO IDENTITY AFTER THE 1976 – 1983 MILITARY GOVERNMENT

The legacy of the civil-military government that ruled in the Argentinian Republic between the years 1976 and 1983 was the forced disappearance of 30,000 citizens. This resulted in many children being abducted with their parents and in many women giving birth in captivity. Some of the children abducted with their parents and those born in captivity were abducted and wrongfully appropriated by persons close to the repressive apparatus of the time; some were sold, abandoned in public institutions and subsequently adopted; many others were registered as the children of the appropriating families. In all cases, their right to identity was seriously affected.

The civil association *Abuelas de Plaza de Mayo* was born from the search for 500 of these children by their grandmothers. It is a NGO, whose main goals include locating all the children abducted and disappeared by the political repression and returning them to their legitimate families⁸⁸. With this purpose in mind, reports and complaints have been submitted to domestic governmental and international authorities; furthermore, scientific investigations have been undertaken, with the support of geneticists, and a specific method has been developed to determine the parentage of a person despite the absence of their parents, with a probability of 99.9%. This procedure has been called the 'rate of grandmotherhood'.

Thanks to this initiative, in 1987 the National Database of Genetic Data (*Banco Nacional de Datos Genéticos, BNDG*) was created as an autonomous and self-governed body by Law No. 23.511. It is a systematic archive of genetic material and biological samples of relatives of persons who were abducted and disappeared during the Argentinian military dictatorship. The Database makes it possible to search for and identify sons and/or daughters of disappeared persons who were abducted with their parents or were born during their mothers' captivity, and helps the judiciary and/or specialised governmental bodies and NGOs in the genetic identification of the remains of victims of forced disappearances. The BNDG comprises the genetic samples of grandparents and other relatives – thanks to scientific progress in the 1990s with regards to DNA – and has undertaken thousands

⁸⁸ See: *Abuelas de Plaza de Mayo*, <http://www.abuelas.org.ar>.

of analyses on children likely to be the children of disappeared persons, and who may have been wrongfully appropriated. As a result of this process, 116 children had been identified by December 2014⁸⁹.

Furthermore, there have been attempts to foster society's interest in finding and restoring the identity of all these children – now adults – who, in general, have never been provided with information as to their background. Thus, posters, graffiti, slogans and advertisements have been produced with messages such as: 'Don't remain in doubt', 'My grandmother is looking for me, help her find me', 'Identity must not be imposed'⁹⁰.

Finally, faced with such a tragic situation that has mainly affected the right to identity of the children of disappeared persons, the creation of the BNDG turned out to be a promising practice. It emerged primarily from a movement that demanded the elucidation of crimes against humanity and the identification of the abducted grandchildren. Thus, the State has responded to society's demand for such a resource and, at the same time, the BNDG has been useful in continuously and permanently enforcing the right to identity of many of those who 'disappeared' as children, as well as their right to know their grandparents.

Case-law has also emerged in the framework of the alleged elimination of the identity of the child victims of abductions planned and carried out by the military government. Thus, a response was required in particular to those disputes submitted in the hope of putting into effect the right to know the truth in situations where the presumed children of the disappeared declined to subject themselves to DNA tests. Whether the aim was to identify, prosecute and sentence the perpetrators, or to fulfil the need of the grandparents to know and identify their grandchildren, there was, anyway, a clear public interest in knowing this truth⁹¹.

The development of case-law on this issue resulted in several criminal proceedings affirming the compulsory character of histocompatibility tests for presumed children of disappeared persons⁹². It was considered that the rights and psychological integrity of the presumed abducted children were safeguarded, inasmuch as the distress caused by the removal of a few cubic centimetres of blood was negligible compared to the higher interests of safeguarding the freedom of others, the protection of society and the prosecution of crimes. Furthermore, the psychological integrity of the potential biological grandparents was safeguarded, due to the fact that, after so many years – and with strong evidence that their grandchildren had been found – without this test, they could be denied the possibility of gaining certainty. Thus, the grandparents had a right to know, regardless of whether their grandchildren's parentage would be modified as a result⁹³. Subsequently, case-law started to adopt more moderate views, dropping physical coercion in favour of the mandatory obtention of such samples through the removal of a personal item belonging to the presumed abductee from their home in order to collect the DNA and compare it with the BNDG⁹⁴. The Supreme Court of Justice adopted this view and determined the constitutionality of obtaining DNA samples through the removal of personal objects from the domicile of the victim⁹⁵.

⁸⁹ See: Banco Nacional de Datos Genéticos, <http://www.bndg.gob.ar>.

⁹⁰ Herrera, M (2008). *El derecho a la identidad en la adopción*. Buenos Aires, Argentina, T II: Editorial Universidad, p. 265, in particular fn. 291.

⁹¹ The 'right to the truth' has been understood as meaning the one that arises in situations of mass and systematic violations of human rights, when the State is obliged to investigate, prosecute and sentence those who prove to be responsible, and to reveal to the victims and to society all that can be known on the events and the circumstances of these violations. *Ibid.*, p. 268. The Inter-American Commission on Human Rights has set some standards relating to this right in *Lucio Parada Cea, Héctor Joaquín Miranda Marroquín, Fausto García Funes, Andrés Hernández Carpio, José Catalino Meléndez and Carlos Antonio Martínez v El Salvador*, Case No. 10.480, Report No.1/99 of 27 January 1999; available at: <http://cidh.org/annualrep/98eng/Merits/ElSalvador%2010480.htm>.

⁹² Amongst these, *Incidente de apelación en autos V.S.E. s/ sustracción de menor*, Second Chamber of the Federal Criminal and Penitentiary Chamber, 4 July 2004, and *Barnes de Carlota, Estela en representación Asociación Abuelas de Plaza de Mayo s/denuncia*, Second Chamber of the Federal Chamber of San Martín, 30 September 2004.

⁹³ Kemelmajer de Carlucci, A (2005). 'El derecho de familia en la República Argentina en los inicios del siglo XXI. Su inexorable proceso de constitucionalización y de adecuación a los tratados internacionales de derechos humanos' in *Revista de Derecho Comparado, Derecho de Familia*, t. II, nro. 10, p. 35.

⁹⁴ As an example, *VW, CF*, Federal Criminal and Penitentiary Court No. 3 of La Plata, 31 August 2005. For further in-depth information on the development of case-law on this issue, see: Famá, MV (2009). *La filiación*. Buenos Aires, Argentina: Abeledo Perrot, p. 309.

⁹⁵ *G. R. de P., E. E. y otros s/sustracción de menores de 10 años*, Supreme Court of Justice of the Nation, 11 August 2009; notwithstanding the latter, the Court, on the same day, reiterated the view expressed previously in relation to the unconstitutionality of the mandatory removal of blood from an adult to determine their biological relations, *G. R. de P., E. E. y otros s/ sustracción de menores de 10 años*, Case No. 46/85, Decision G.1015.XXXVIII, Supreme Court of Justice of the Nation, 11 August 2009, and *Vázquez Ferrá, Evelyn K. s/ incidente de apelación*, Supreme Court of Justice of the Nation, 30 September 2003.

This way of proceeding has spawned case-law that facilitates searching for the true background and identity of the victims of the tragic events that occurred in our country during the above-mentioned period.

IMPLICATIONS OF THESE EVENTS FOR ARGENTINA'S LEGAL POLICY

THE RIGHT TO IDENTITY AND ADOPTION

These serious events have left their mark on the national mindset⁹⁶ and, therefore, have influenced legal policy relating to adoption, both domestic and intercountry. Major emphasis has henceforth been placed on the protection of the right to identity and knowledge of one's origins in this context.

It is worth mentioning, in this respect, that, during the drafting of the UNCRC, Argentina had introduced a proposal for what is now Article 8 of the treaty. It sought to ensure the child's right to preserve and, where necessary, recover their 'true and genuine personal, legal and family identity'. After debate, agreement was reached on a different formulation: placing the term 'including' before 'nationality, name and family relations', which are the elements of identity specified in the previous article (Article 7). Thus, it has been understood that other elements are not excluded from 'identity' even though they were not explicitly taken into account. In this way, the tragic events in Argentina found their reflection in the UNCRC through its Article 8.

This reality also had an impact internally, starting with the reform included in the Civil Code through Law No. 24.779 of 1997. This influence can be observed in Article 277(c), which covers the circumstances in which an adoption may be declared null and void. One such circumstance is where the adoption decision was founded on an illicit element, including the presumed or apparent abandonment of the child resulting from a criminal act of which they and/or their parents were victims. Furthermore, Articles 321(h) and 328 established the right to know one's origins in all adoptions and imposed the explicit commitment of the adopters to tell the adoptee about their biological background.

Argentina's new Civil and Commercial Code of the Nation⁹⁷ entered into force in August 2015. Amongst its core elements, it has acknowledged the constitutionalisation of Private Law and the progressive character of human rights. Thus, provisions in this direction have been incorporated into Articles 634(c) and 596.

Furthermore, it must be mentioned that regional human rights standards have had implications for legal policy as well as domestic case-law. One example is the 'Opinion on the right to identity', issued by the Inter-American Juridical Committee⁹⁸. Here, the Committee basically argued that, even though the ACHR does not state the right to identity as such, it does indeed include its constitutive elements. The Committee maintained that this treaty not only imposed an obligation to recognise and respect these rights, but also imposed a commitment to adopt legal and other measures that may be necessary to ensure them. The standards set in the case-law of the IACtHR relating to identity and the resulting responsibility of States to ensure the latter have also had an impact⁹⁹.

THE STATE'S STANCE ON INTERCOUNTRY ADOPTION

These tragic events have also had an impact on Argentina's stance relating to its clear rejection of ICA, and undoubtedly they have contributed, in a particular manner, to international public order¹⁰⁰.

⁹⁶ It is worth highlighting that, for example, on 5 January 2005, Law No. 26.001 was enacted and established that the 'National Day on the Right to Identity' would be celebrated on 22 October each year.

⁹⁷ Law No. 26994, 2014.

⁹⁸ 'Opinion on the right to identity', Inter-American Juridical Committee, Resolution CJI/doc. 276/07 rev. 1, 1 August 2007, Paras. 11.2 and 18.3.3; available at: http://www.oas.org/en/sla/ijc/docs/ijc_current_agenda_Right_to_Identity.pdf.

⁹⁹ In particular, *Fornerón and daughter v Argentina*, Judgment of 27 April 2012; *Gelman v Uruguay*, Judgment of 24 February 2011 and *Contreras et al. v El Salvador*, Judgment of 1 March 2005.

¹⁰⁰ By virtue of the impact of such events on the international public order, and given the stance of rejection of the concept of intercountry adoption – based, additionally, on the considerable number of Argentinian prospective adopters, Argentina has not ratified the 1993 Hague Convention, nor the 1984 Inter-American Convention on Conflict of Laws concerning the Adoption of Minors (<http://www.oas.org/juridico/english/treaties/b-48.html>).

When ratifying the UNCRC, Argentina issued a reservation relating to Articles 21(b), (c), (d) and (e), stating that these would not be in effect in its jurisdiction, based on the understanding that, in order to implement them, there should first be a strict legal mechanism of child protection relating to ICA, in order to prevent trafficking and sale of children¹⁰¹.

Moreover, with regards to the caution needed in approving a domestic adoption, Article 315 of the Civil Code required irrefutable and indubitable evidence of permanent residence in the country for a minimum period of five years prior to the guardianship request¹⁰². This provision was aimed at preventing foreigners, or even Argentinian citizens living abroad, from requesting the adoption of children in Argentina. Currently, Article 600 of the Civil and Commercial Code has made this requirement somewhat more flexible, by exempting persons of Argentinian nationality or naturalised in the country, based on the understanding that, in these circumstances, the right to identity of Argentinian children is safeguarded. Furthermore, amongst the provisions of International Private Law contained in the Civil and Commercial Code, exclusive Argentinian jurisdiction has been established to hear proceedings relating to the adoption of children living in Argentina (Article 2635). These provisions entail a prohibition on the possibility of Argentinian children being adopted internationally.

However, since 1971, aspects relating to the effects that adoptions undertaken abroad may have in the country have been regulated in domestic legislation. Furthermore, procedural provisions have been applied for the recognition and execution of foreign decisions, with a view to recognising adoptions that were granted abroad (Article 517 of the Civil and Commercial Procedural Code of the Nation and its respective provincial codes). This means that, while rejecting the possibility for Argentinian children to be adopted in order to reside abroad (outgoing adoptions), the country's legal policy has been favourable to, and protective of, adoptions declared abroad that intend to have effects or to be included in the Argentinian legal framework (incoming adoptions).

The practice in our country reflects an increasing number of cases, on which the cooperation of national judges has been requested, in order to issue certificates attesting the suitability of Argentinian residents to adopt abroad and, likewise, the recognition of adoptions granted abroad in relation to children who will reside in Argentina.

The provisions included in the new Civil and Commercial Code in relation to ICA comply with the national stance on this issue, though the level of protection and regulation of the matter has been optimised. Indeed, the relevant section¹⁰³ includes four articles: a) Article 2635 establishes the exclusive jurisdiction of Argentinian judges in relation to the adoption of children living in Argentina; for cases of revocation or annulment, it establishes the jurisdiction of the judges of the place where the adoption order is issued and those of the domicile of the adoptee; b) Article 2636 regulates the law applicable to the undertaking, effects, annulment or revocation of an adoption granted abroad; c) Article 2637 regulates the recognition or incorporation of foreign adoptions into the Republic through a system that is more open and appropriate, and which determines indirect jurisdiction – it establishes that the judges of the place of domicile of the adoptee will be considered competent to grant the adoption, or the judges of the State of the adopter if the latter could be recognised in the country of domicile of the adoptee¹⁰⁴ – and sets a standard for determining the international public order of these adoptions, which will focus on the best interests of the child in each case and the case's link to Argentina¹⁰⁵; and d) Article 2638 addresses the conversion of a simple adoption

¹⁰¹ Law No. 23849, 1990, Article 2.

¹⁰² This requirement was incorporated by Law No. 24.779, 1997.

¹⁰³ Book VI, Title IV, Chapter 3, Section 6°.

¹⁰⁴ It has been considered that this is a modality of the Theory of reference to the competent legal framework of Professor Piccone (Piccone, P (1986). 'La méthode de la référence à l'ordre juridique compétent en droit international privé' in *RCADI*, II, t. 197, pp. 229 and following) mentioned by Najurieta, MS. 'La codification du droit international privé dans la République argentine' in Fernández Arroyo, D *et al* (Dir.) (2014). *Codification du droit privé et évolution du droit de l'arbitrage, Journées franco-sudaméricaines de droit comparé, 3-4 octobre 2013*. Paris, France: Société de législation comparée, p. 80.

¹⁰⁵ This provision prevails over the difficulties that procedural legislation imposed for the recognition of adoptions declared abroad.

into a full adoption under the Argentinian legal framework. In addition, Article 2611 explicitly enshrines the duty of international cooperation in civil, commercial and labour matters.

As well as the protection granted through these provisions, they confer the power and duty of local judges to identify, on their territory, adoptions that could originate in an illicit act – given that, in these situations, the local judges are likely to be those of the current place of residence of the adoptee. Furthermore, the criterion that judges must comply with to assess the incorporation of adoptions granted abroad into the Argentinian legal framework focuses on the international public order, nuanced by the best interests of the child, which will have to be assessed in each particular case. Finally, the system requires that child trafficking be ruled out when granting an adoption, and that the adoption responds to the best interests of the child in each case.

Thus, it has been asserted that, even though Argentina has no intention of ratifying the 1993 Hague Convention, the provisions of the new Civil and Commercial Code allow for coordination between the domestic and the 1993 Hague Convention's systems, in particular in relation to the technique of certification of the adoptions, as established in Article 23 of the 1993 Hague Convention, except for ascertaining illicit acts that violate the rights of children¹⁰⁶. However, if Argentina was to consider becoming part of the 1993 Hague Convention's system, it would face no obstacle to function only as a receiving State – all the more given the provisions included in Articles 600 and 2635 of the Civil and Commercial Code – and not as a State of origin. This would be in line with the national stance on this issue and would allow the rights of children to be safeguarded – in particular Articles 20 and 21(a) of the UNCRC – as well as their best interests to be duly considered and access to information relating to their origins ensured.

CONCLUSIONS

The tragic events that occurred in Argentina when the military government ruled between 1976 and 1983 have implied the commission of crimes against humanity, whose consequences have had an impact on society as a whole, on the direct victims and on their relatives.

The Argentinian State has had to undertake specific initiatives to offer reparation for the serious violations of human rights involved. Among these, the creation of the BNDG and the development of relevant case-law have contributed to the search for the truth, to the restoration of the identity of the children of the disappeared – and, in many cases, to their return to, or renewed contact with, their legitimate families.

These events have had implications for Argentina's legal policy on domestic adoption and ICA. In all cases, the priority has been the protection of the best interests of the child, their right to identity, and the identification of any illicit element that could result in an illegal adoption.

Finally, the lessons learned have led the State to contribute actively to the reparation of the rights affected and the potential protection of similar rights for all members of society.

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¹⁰⁶ *Supra* 104, p. 81.

PROMISING PRACTICE: AUSTRALIA'S NATIONAL APOLOGY FOR FORCED ADOPTIONS

This contribution prepared by Damon Martin and Delphine Stadler is based on the historic recognition by the Australian Government of its failings towards unwed mothers by forcing the adoption of their children upon them.

BACKGROUND

Between 1950 and 1970, an estimated 150,000 unmarried mothers had their babies forcefully adopted through churches and women's hospitals¹⁰⁷. These practices took place in a very conservative and religious Australia influenced by a White Anglo-Saxon Protestant mentality, when social pressure and the stigma of being pregnant and unmarried reinforced the idea that the adoption of these babies would be in their best interests, so they would not be illegitimate children.

The young pregnant women were often sent to Women's Homes or religious institutions long before birth, where they received little support and adoption was presented as the only solution. If the mothers did not consent to the adoption, their signature could be obtained by fraudulent means. These unwed pregnant women were often coerced by family, social workers and hospital staff to place their babies for adoption. There are also reports that women were 'given large doses of drugs prior to and after the birth, often right up until they signed consent'¹⁰⁸.

The adoption practice during this period had two distinct features. One was to ensure the '*clean break theory*' where babies were taken from their mothers immediately after birth so the mothers could not get attached to their baby. The second feature was the '*closed adoption*' practice, which kept secret the identity of the biological mothers and sealed the adoption records. A birth certificate for the child would be produced with the names of the adoptive parents and the adopted child would frequently be raised as if born to these parents. These past practices had some deleterious effects for the child and their biological family, and contributed to making it extremely difficult for any search and reunion. Likewise, the future psychological impacts of these practices were profound, not understood, and completely set aside for years. The traumatic consequences identified included lifelong identity issues for adoptees and questions about their biological family, often with feelings of betrayal and deceit, as everyone in the extended family invariably knew about the adoption except for the adoptees themselves. Research and practice informed professionals and adoptive parents that '*closed adoptions*' often had a deep impact on the child and the mothers, so that over time their outlook on adoption and the practice began to change.

Also, 'in the latter half of the twentieth century, society became more accepting of young single mothers and children born out of wedlock and the stereotypes of women changed. The implementation of the 'Mother's Benefit' in Australia in 1973 was also significant, as it enabled a single woman with a child some financial security to raise her child on her own. As these social changes occurred, Australia's adoption practice also experienced dramatic change and moved to adoption being practiced in a spirit of openness'¹⁰⁹. Part of these changes included the adoptees' rights to access their birth information, and most Australian States and Territories¹¹⁰ enacted adoption information legislation as this was considered a right for adoptees and their biological family.

¹⁰⁷ 'O'Farrell to offer apology for years of forced adoptions', *The Sydney Morning Herald*, 21 August 2012; available at: <http://www.smh.com.au/nsw/ofarrell-to-offer-apology-for-years-of-forced-adoptions-20120820-24ins.html>.

¹⁰⁸ Cole, C A (2008), *Releasing the past: Mothers' stories of their stolen babies*. Yagoona, NSW, Australia: Sasko Veljanov, p. 4.

¹⁰⁹ Martin, D (2012). *The Right to Information for Donor Conceived People: Lessons Learnt from Adoption*. Melbourne, Australia: International Social Service Australia.

¹¹⁰ Australia is a federation consisting of six states and two territories.

PUBLIC AWARENESS ON PAST ADOPTION PRACTICES AND CALL FOR ACTION

As of the early 1980s, mothers began to raise their voice, and mothers' groups, such as ARMS (Victoria)¹¹¹, Origins¹¹² or Apology Alliance¹¹³, were created. In 1983, the Association for Adoptees¹¹⁴ was founded by three adoptees to assist others to find their biological parents. These groups and many individuals began lobbying to raise public awareness about past forced adoption practices and to reform the legislation so they could access their information. Many also thought it was vital that the government acknowledge and apologise for what had happened¹¹⁵. Even though the Freedom of Information Act entered into force in 1982, it was only after years of such lobbying, in 1991, that adoptees could access their records for the purpose of medical history.

For several years, the Australian Government considered what action should be taken and whether a national framework should be established to address the consequences for people affected by forced adoptions¹¹⁶. In 1998, New South Wales became the first state to launch an inquiry into adoption practices, more than 20 years after they ended. The responsible Committee analysed professional practices between 1950 and 1998 and defined what measures should be taken to support people experiencing distress due to such adoption practices. In its report¹¹⁷ released in 2000, the Committee underlined 20 recommendations, among them to: 'review legislation in order to facilitate access to origins for birth mothers and adoptees';

- 'provide financial assistance for counselling, training, research and writing on the impact of adoption';
- 'issue a public statement to acknowledge that past adoption practices were misguided and that unethical or unlawful practices may have occurred causing lasting suffering for many mothers, fathers, adoptees and their families';
- 'encourage other institutions involved in past adoption practices to issue a formal apology to the mothers, fathers, adoptees and their families who have suffered as a result of past adoption practices';
- 'provide funding to appropriate organisations or support groups for mothers to collect, collate, edit and publish comprehensive accounts of their adoption experiences';
- 'establish a research grants program for the purpose of investigating the effects of past adoption practice on mothers, and the issues surrounding the reunion process';
- 'establish a public education campaign on the effects of past adoption practices'.

¹¹¹ See: Association of Relinquishing Mothers Victoria (ARMS Vic): <http://armsvic.org.au/about-arms-vic/>.

¹¹² See: Origins Australia (Forced Adoption Support Network): <http://www.originsnsw.com>.

¹¹³ See: Apology Alliance Australia, <http://apologyalliance.com>.

¹¹⁴ See: Forced Adoptions History Project, History timeline, [http://forcedadoptions.nqa.gov.au/history?field_event_type_tid%5B%5D=40&field_event_type_tid%5B%5D=38&field_event_type_tid%5B%5D=36&field_event_type_tid%5B%5D=39#Association---for---Adoptees---\(AFA\)](http://forcedadoptions.nqa.gov.au/history?field_event_type_tid%5B%5D=40&field_event_type_tid%5B%5D=38&field_event_type_tid%5B%5D=36&field_event_type_tid%5B%5D=39#Association---for---Adoptees---(AFA)).

¹¹⁵ *Supra* 112 and 113.

¹¹⁶ Phillips, J (2013). 'National Forced Adoptions Apology'. *FlagPost*, Parliament of Australia; available at: http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2013/March/National_Forced_Adoptions_Apology.

¹¹⁷ *Releasing the Past: Adoption Practices 1950 – 1998 – Final Report*. Sydney, Australia: Standing Committee on Social Issues, Parliament of New South Wales, 8 December 2000, 245 pages; available at: http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=fhs/adoption/chapter1.htm.

More inquiries, research, studies and reports were requested by several Australian States and the Australian Federal Government in the aftermath of this first inquiry, in order to analyse past adoption practices and understand the devastating effects of these policies. All reports reached the same conclusion, calling for apologies from the State and Australian Governments, as well as financial compensation¹¹⁸ for past adoption policies¹¹⁹. Lobbying for a National Apology also increased, especially after Apologies by the Australian Government to the Stolen Generations in 2008 and to the Forgotten Australians and former Child Migrants in 2009, as well as the formal Apologies issued by several hospitals and faith-based organisations involved in past forced adoptions practices.

THE NATIONAL APOLOGY AND GOVERNMENT INITIATIVES

Between 2010 and 2013, a series of events led to the Australian Government's National Apology. In October 2010, Western Australia became the first state to formally apologise for past adoption policies and practices. Additionally, in November 2010, the Parliament of Australia referred an Inquiry to the Senate Standing Committee on Community Affairs¹²⁰. The report¹²¹, launched in February 2012, included 20 recommendations, several of which related to a National Apology and the creation of a national framework to address the consequences of past forced adoptions.

In June 2012, the Attorney-General announced that the Australian Government would offer a National Apology, and a 'Forced Adoption Apology Reference Group' was established in August 2012 to provide advice on the wording and timing of the National Apology.

Finally, in March 2013, at the Parliament House in Canberra, the Prime Minister apologised on behalf of the Australian Government in front of more than 800 people affected by forced adoption policies and practices¹²². The Prime Minister stated 'we say sorry to you, the mothers who were denied knowledge of your rights, which meant you could not provide informed consent. You were given false assurances. You were forced to endure the coercion and brutality of practices that were unethical, dishonest and in many cases illegal'¹²³.

Furthermore the Australian Government announced it would invest AUD 11.5 million to assist those affected by forced adoption practices, as part of its response to the recommendations in the Senate Inquiry report on the Commonwealth Contribution to Former Forced Adoption Policies and Practices. This funding was divided into three different priorities over a four-year period:

¹¹⁸ In 2012, a law firm announced that it was preparing a class action for about 100 women claiming they were forced to give up their babies during the 1960s-1970s at a number of institutions and hospitals. They asked for legal remedies including for psychological treatment. The law firm mentioned that many women were living in very poor circumstances due to the trauma and mental health problems encountered as a result of the adoption. ISS Australia tried to contact the law firm to gather more information about this class action, but with no success. See: 'Lawyers prepare class action over forced adoptions', *ABC News*, 4 July 2012; available at: <http://www.abc.net.au/news/2012-07-04/lawyers-prepare-class-action-over-forced-adoptions/4109662>.

¹¹⁹ *Supra* 107.

¹²⁰ *Supra* 116.

¹²¹ *Commonwealth Contribution to Former Forced Adoption Policies and Practices*. Canberra, Australia: Community Affairs References Committee, The Senate, Parliament of Australia, February 2012; available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2010-13/commcontribformerforcedadoption/report/index.

¹²² 'Gillard delivers apology to victims of forced adoption', *ABC News*, 31 March 2013; available at: <http://www.abc.net.au/news/2013-03-21/gillard-delivers-apology-to-victims-of-forced-adoption/4585972>.

¹²³ Full transcript of the speech available at: Attorney General's Department, National Apology for Forced Adoptions, <https://www.ag.gov.au/About/ForcedAdoptionsApology/Pages/default.aspx>.

- AUD 5 million to improve access to specialist support services, peer and professional counselling, and support records tracing for those affected by forced adoptions;
- AUD 5 million to mental health services (mental health support for people affected by forced adoptions, workforce training, develop guidelines/training material to support health professionals);
- AUD 1.5 million for a website to raise awareness on forced adoption issues, share forced adoption experiences and learn about the effects of forced adoptions.

The efforts to implement the activities provided within these three priorities are ongoing today. The Forced Adoptions History Project website¹²⁴ was launched on the National Apology's first anniversary in March 2014¹²⁵ with the aim to increase awareness and understanding of forced adoptions in Australia. The website includes a detailed timeline, gathers testimonies of people impacted by forced adoptions and gives information on the processes, state by state, for people interested in searching for their origins.

CONCLUSION

Adoption practice has changed significantly in Australia and learnt from its past mistakes. There is no longer societal pressure or stigma for being unmarried and pregnant; furthermore, the coercive tactics and pressure from professionals and social workers no longer exist. The veil of secrecy and closed records has ended, allowing Australia to embrace its new '*open adoption*' practice. '*Open adoption*' attempts to achieve stability for the child with their new family without withholding information about the child's biological family.

Adoption issues can be lifelong, and the repercussions of Australia's past forced adoption practice will continue to be felt by many individuals affected. It is therefore critical to learn from these mistakes and ensure they are not repeated, including in other practices of family formation, such as ICA¹²⁶, donor conception, surrogacy, guardianship and foster care.

In order to apply these lessons learned to ICA, it is important for '*countries of origin*' to implement systems that have the capacity to monitor individual cases, so all adoptions adhere to the standards and safeguards of the 1993 Hague Convention. This would hopefully eradicate individuals and criminal organisations who exploit the system for financial gain or other unlawful or unethical purposes.

Likewise it is vital for the '*countries of origin*' to ensure that mothers are not coerced into placing their child for adoption and that support is provided so the child has the opportunity to be brought up by their parents or extended family in the country of origin.

The '*closed adoption*' practice involving secrecy and no access to records had a profound impact on the identity of adoptees. It is imperative that intercountry adoptees' records are comprehensive in order to provide them with an accurate record of their family and medical history. This will allow intercountry adoptees to have a sense of their past and help them feel connected to significant people in their family of origin, culture and heritage.

¹²⁴ See: Forced Adoptions History Project, National Archives of Australia, <http://forcedadoptions.naa.gov.au>.

¹²⁵ See: Department of Social Services, Forced Adoption Practices: <https://www.dss.gov.au/our-responsibilities/families-and-children/programs-services/forced-adoption-practices>.

¹²⁶ Furthermore, the Australian Institute of Family Studies conducted the following: Kenny, P, Higgins, D, Soloff, C and Sweid, R (2012). *Past Adoption Experiences: National Research Study on the Service Response to Past Adoption Practices*. Melbourne, Victoria, Australia: Australian Institute of Family Studies; available at: <https://aifs.gov.au/publications/past-adoption-experiences> and Higgins, D, Kenny, P, Sweid, R and Ockenden, L (2014). *Forced adoption support services scoping study*. Melbourne, Victoria, Australia: Australian Institute of Family Studies; available at: <https://aifs.gov.au/publications/forced-adoption-support-services-scoping-study>; both identified several lessons learned from past adoption practices that could/should impact intercountry adoption practices and policies.

The above-mentioned issues are just a few examples of how the lessons learned from Australia's past forced adoption practice could inform ICA policies and practices worldwide. Thousands of children from other countries have been adopted by Australians over the past 40 years and adoption safeguards were probably not always respected, especially the ICAs arranged with countries that had not ratified the 1993 Hague Convention.

Whilst attitudes, processes and the laws have changed over the course of Australia's history of ICA, many intercountry adoptees in Australia will undoubtedly have been impacted by unethical or unlawful ICA practices, and will face difficulties when accessing their records and searching for their origins. Thus, it is likely they would benefit from specialised post-adoption services as their adoption involves the complexity of two countries (i.e. the 'country of origin' and the 'receiving' country), regulations and procedures.

The lessons learned from Australia's past forced adoption practices and the government initiatives implemented following the Apologies are highly relevant and could provide insight into some of the issues within previous and current ICA practice. Admittedly more research is necessary in order to analyse what support could be provided to Australians affected by ICA practice. Nonetheless, the Australian Government would do well to study ICA experiences, in light of its past forced adoption practices and the National Apology. It may also be deemed appropriate to formally apologise to those affected by past ICA practices and provide support programmes. These may include the Australian Government taking responsibility to implement post-adoption support services with 'countries of origin' and waive all associated costs that intercountry adoptees face when attempting to access their records and search for their biological family.

Finally, it is crucial to be aware of experiences and initiatives worldwide related to the consequences of unethical and illegal adoption practices, in order for these mistakes not to be repeated. These lessons can also inform other practices of family formation and could no doubt provide awareness, tools and guidance to professionals who encounter the growing number of intercountry adoptees¹²⁷ questioning their own adoption procedure and wishing to search for their origins.

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After studying Social Sciences at the University of Geneva, Delphine Stadler has been working for more than eight years with international and local NGOs on child protection issues in Switzerland, Kosovo and Brazil. She recently collaborated with the ISS/IRC, as a Children's Rights Officer within the Research and Publications Unit.

Additional governmental resources:

Australian Government response to the Senate Committee Inquiry, Attorney-General's Department; available at: <http://www.ag.gov.au/About/ForcedAdoptionsApology/Pages/AustralianGovernmentresponseToTheSenateCommitteeInquiry.aspx>

Forced Adoptions in Australia: Supporting people affected by forced adoptions, Fact sheet, Department of Social Services, May 2014; available at: https://www.dss.gov.au/sites/default/files/documents/05_2014/forced_adoptions_-_fact_sheet_final_30042014_2_2.pdf

Additional newspaper articles:

'Forced adoptions apology was PM at her finest', *The Sydney Morning Herald*, 22 March 2013; available at: <http://www.smh.com.au/federal-politics/political-news/forced-adoptions-apology-was-pm-at-her-finest-20130321-2giu5.html>

¹²⁷ ISS Australia is part of the worldwide ISS network. For over 50 years, ISS Australia has been providing a post-adoption and general family tracing and reunification service for those who wish to locate a family member who is thought to be overseas. This service includes international tracing and discreet outreach to family members, contact facilitation, facilitation of family reunion, emotional support and counselling, and referral to specialised services – where appropriate.

PROMISING PRACTICE: LEGAL PATHS TO JUSTICE IN THE NETHERLANDS

Laura Bosch provides this in-depth analysis of the various legal responses an individual can seek in response to an illegal adoption. Whilst the laws and case-law are applicable only in the Netherlands, similar provisions are likely to exist in other States, thus constituting a potential platform for legal action.

The option to 'legally' adopt a child has existed in the Netherlands since the introduction of the first adoption-related legislation in 1965. By 2015, more than 55,000 children had been adopted in the Netherlands. Whilst, in the 1950s and 1960s, adoptions mostly concerned growing numbers of Dutch children, these numbers dropped in the 1970s and 1980s as ICA rose 'explosively'¹²⁸. Most ICAs in the 1990s were from Colombia, whereas in the years 2000, the majority of children were from China. Adoption numbers are now slowly and steadily declining.

With the emergence of legal adoptions, questions have arisen in the Netherlands about potential illegal adoptions. Alleged baby smuggling for adoption in Brazil, Romania, China and other countries was reported in the national media. At the same time, the first adoptees reached majority and some started to question the way they were adopted. Some of these cases were dealt with in national courts using a multitude of legal procedures and with various legal outcomes.

This short article discusses the most common legal options available to address illegal aspects of adoption in the Netherlands. It is important to note, at the outset, that there is no definition of illegal adoption in law: when this term is used, a range of cases can fall within its scope. It could encompass, for example, a false birth registration at the local municipality, as well as coercion or undue inducement of birth parents for ICA. When discussing legal options, a distinction between Criminal Law (including adoption provisions), Family Law and Civil Law resources is made and, if possible, relevant jurisprudence/case-law is mentioned in the footnotes.

CRIMINAL LAW¹²⁹

Criminal Law cases may be instigated by the Public Prosecutor when a case of illegal adoption comes to light – for example, when adoptive parents try to legalise an initially illegal adoption or try to register the child at the local municipality and the civil servant informs the police. Alternatively, the illegally adopted person or any other civilian may file a criminal complaint regarding such crimes with the Police and/or Public Prosecutor. The laws regarding time limitations to press charges must be taken into consideration and may prevent legal action. The following criminal provisions can be applied:

¹²⁸ See: Centraal Bureau voor de Statistiek, <http://www.cbs.nl/nl-NL/menu/themas/veiligheid-recht/publicaties/artikelen/archief/2010/2010-3262-wm.htm>.

¹²⁹ The double criminality principle applies to all mentioned articles (Art. 5 of the Dutch Civil Code). Thus, Dutch citizens who commit these crimes abroad where this is a criminal fact too can be prosecuted in the Netherlands. Though, as soon as there is a component of the crime committed in the Netherlands, the crime can simply be prosecuted under Dutch law without meeting the doubly criminality principle. Human trafficking can be prosecuted even without double criminality, the active and passive nationality principle, and aliens with a domicile in the Netherlands can be prosecuted for trafficking. However, this is never used in cases of illegal adoption as there is no intention to exploit – even though this is debatable.

Falsifying documents (Articles 225, 226 and 227 of the Dutch Criminal Code)

The act of falsifying documents to be used as evidence for any fact with the intention to use the document as true is a criminal offence. Criminal intent to falsify the document has to be proven. This provision could be used, for example, in cases where a false birth certificate is or will be used in adoption procedures. All those who knowingly possessed and/or used a falsified document, can be prosecuted for a maximum penalty of six years imprisonment¹³⁰. Functioning as a *lex specialis*, Article 226 of the Dutch Criminal Code concerns the falsification of official documents by civil servants (seven years), and the crime of declaring false information for the production of official documents is covered by article 227 of the Dutch Criminal Code (six years)¹³¹. The deadline for prosecution for all offences is 12 years as of the day after the criminal offence was allegedly committed.

'Embezzlement' of civil status (Article 236 of the Dutch Criminal Code) [verduistering van staat]

This article protects the right of persons to have information about their origins and birth parents. For example, when somebody pretends to be the parent of another child or there is an exchange of babies at the hospital, there can be a criminal offence to 'embezzle' the civil status of *another* person. It is important to note that this criminal provision can only be used *after* civil procedures to challenge the civil status of a person have been successful (or otherwise exhausted). However, when the alleged perpetrator is simultaneously charged with other provisions like the above falsification of documents, other charges of the Public Prosecutor may be admissible¹³². The deadline for prosecution is 12 years, with a maximum sentence of imprisonment of six years.

Withdrawal from parental custody (Article 279 of the Dutch Criminal Code)

All children are placed under parental custody in the Netherlands. If a child is taken away from the parents with parental custody, this is a form of withdrawal from parental custody (also known as child kidnapping)¹³³. The kidnapping can be reported to the Police by anyone. These acts are punishable with maximum imprisonment for six years. The use of deceit, violence or threats, or the kidnapping of a child beneath the age of 12 years, constitutes an aggravating circumstance and raises the maximum penalty to nine years in prison.

Human trafficking (Article 273f of the Dutch Criminal Code), human kidnapping (Mensenroof, Article 278 of the Dutch Criminal Code) and sale of Children (not applicable).

The mere sale of children is not criminalised in the Netherlands as such. Furthermore, the legal provision on human trafficking is not deemed appropriate by legal scholars and the Public Prosecutor in cases of illegal adoption, as there is no intent of exploitation of the illegally adopted child, one of the elements of that legal provision¹³⁴. In response to this legal lacuna, and to protect children against commodification, in several cases a provision on human kidnapping, dating from 1886, has been applied with varying degrees of success.

¹³⁰ See, for example, ECLI:NL:RBZLY:2010:BL4061, Rechtbank Zwolle, 16 February 2010 (adoption from Sri Lanka with falsified governmental documents, and imprisonment of 189 days); and ECLI:NL:RBOBR:2013:BZ1174, Rechtbank Oost-Brabant, 12 February 2013 (illegal adoption from Morocco in 2005; falsification proven but, due to extensive delay, punishment no longer reasonable).

¹³¹ ECLI:NL:GHARL:2013:BZ7164, Gerechtshof Arnhem-Leeuwarden, 15 April 2013 (case of baby J; false information given to civil servant at birth registration, conditional imprisonment of eight months and community service for 240 hours). See also: 'Straf ouders voor verkopen baby J.', NOS, 14 May 2012; available at: <http://nos.nl/artikel/372908-straf-ouders-voor-verkopen-baby-j.html>.

¹³² ECLI:NL:RBLEE:2009:BJ8789, Rechtbank Leeuwarden, 29 September 2009 (illegal adoption from the Philippines; the Public Prosecutor neither exhausted the civil procedure nor issued the charge simultaneously – but directly – and therefore the charge was not admissible).

¹³³ See, for example: ECLI:NL:RBMID:2012:BY2679, Rechtbank Middelburg, 8 November 2012 (illegal adoption of a small girl from Turkey; however, withdrawal from parents not proven given that the suspect was under the impression the persons presenting themselves as the biological parents of the child were willing to relinquish the child).

¹³⁴ See, for example, the case of baby Donna, a Belgian baby sold to Dutch parents. See: 'Nederlandse pleegouders niet vervolgbaar in zaak baby Donna', Public Prosecution Service, January 2009; available at: <https://www.om.nl/actueel/nieuwsberichten/@26520/nederlandse/>. See also: National Rapporteur on Trafficking in Human Beings (2012). *Human trafficking for the purpose of the removal of organs and forced commercial surrogacy*. The Hague, The Netherlands: BNRM; available at: http://www.dutchrapporteur.nl/Images/human-trafficking-for-the-purpose-of-the-removal-of-organs-and-forced-commercial-surrogacy_tcm64-471941.pdf; and Boele-Woelki, K *et al.* (2011). *Draagmoederschap en illegale opnemng van kinderen*. The Hague, The Netherlands: WODC, Ministry of Security and Justice (a summary in English is available at: https://www.wodc.nl/images/1945-summary_tcm44-339843.pdf).

This provision was meant to protect Dutch citizens from being taken from the civilised European continent into a situation of slavery in an unknown territory. This is reflected in the legal wordings of the article criminalising the act of ‘a person’ who ‘takes another person over the borders of the European continent’, to ‘illegally’, ‘bring the person under the power of another person’ or ‘to transport him in a helpless position.’

This article had rarely been used since the 1950s until a case of illegal adoption from Brazil to the Netherlands was prosecuted¹³⁵. Due perhaps to the lack of other legal provisions, as mentioned beforehand, a charge of ‘human kidnapping’ was invoked. The court took the position that, since the baby was brought into Europe instead of being taken out of Europe, the article was not applicable. However, the Supreme Court found that, in this specific case, also persons who are brought to the Netherlands from abroad, may be in need of protection. This interpretation has led to an extensive broadening of the legislation, opening up the possibility to prosecute forms of illegal adoption into the Netherlands.

However, the element of ‘being transported in a helpless position’ has proven difficult to prove in cases of illegal adoption from mostly developing countries. As a helpless position is defined as ‘a situation endangering the life or health of the person’ the impression is often rather that the child has been taken out of a helpless situation when taken to the Netherlands for adoption¹³⁶. When successfully prosecuted the act of human kidnapping can be punished with a maximum penalty of 12 years imprisonment, with a deadline for prosecution of 20 years.

Adoption legislation and criminal proceedings

Our legislation regarding the adoption of foreign children (Placement for Adoption (Children of Foreign Nationality) Act, *WOBKA*) encompasses four different provisions that can be applied in criminal procedures.

Two provisions target prospective adoptive parents and are classified as misdemeanours. Adoption without the required authorisation document from our government (Article 2 of the *WOBKA*¹³⁷) may lead to a maximum fine of EUR 8,100 (Article 28 of the *WOBKA*). This article has been successfully used in prosecutions as it is easy to prove¹³⁸. Additionally, Article 8 of the *WOBKA* establishes five other requirements that need to be fulfilled, regarding limitations on the age of the child, medical reports, mediation by recognised adoption organisations, the document of relinquishment by the biological parents and the agreement of the foreign authorities. If not all requirements are met, a maximum fine of EUR 8,100 may be imposed (Article 28 of the *WOBKA*). It should be noted that a successful prosecution based on this article is challenging. For example, the verification of the document of relinquishment by the biological parents demands extensive international investigations, which rarely take place. The deadline for prosecution is three years, which, in most cases, will have already passed when an adult adoptee starts their search for origins and finds indications of an illicit practice.

¹³⁵ NJ 2000/460, LjN AB 2809, Supreme Court, 20 November 2001 (a baby from Brazil bought for adoption).

¹³⁶ *Supra* 132; since there is no situation of danger to the life or health of the child, there is no human kidnapping in the sense of ‘being transported in a helpless position’.

¹³⁷ van den Braak, J *et al.* (2004). *Evaluation of the Dutch adoption law (WOBKA)*. Woerden, The Netherlands: WODC, Adviesbureau Van Montfoort; available at: https://english.wodc.nl/onderzoeksdatabase/evaluatie-wet-opnemng-buitenlandse-kinderen-ter-adoptie-wobka.aspx?nav=ra&l=civiel_recht_en_civiel_proces&l=vergunninghouders.

¹³⁸ *Supra* 131; besides falsification, also successfully prosecuted for misdemeanour under Article 2 of *WOBKA*, and fined EUR 1,000. See also: ECLI:NL:RBROT:2012:BV9977, Rechtbank Rotterdam, 20 March 2012 (illegal adoption from Brazil without the necessary permission from the Dutch government, fined EUR 2,400 euros).

Adoption agencies can be specifically prosecuted under the adoption legislation. Article 15 prohibits the facilitation/mediation of ICA without the necessary permission of our government, and Article 20 of the *WOBKA* prohibits recognised adoption agencies facilitating an adoption for a couple without the necessary permission of the State. Both misdemeanours are punishable with a fine of EUR 8,100. The deadline for prosecution is three years. However, when either crime is committed for monetary gain, it can be prosecuted as a felony, where imprisonment for a maximum of six months is applicable and the deadline for prosecution is raised to six years.

FAMILY LAW

Family Law offers options to persons who have been illegally adopted, to alter their family status. No punitive action is provided for, but this may be a way for them to (re)build legal ties with their birth parents and extended family.

Determination or contesting of civil status (1:211 of the Dutch Civil Code)

When the civil status of a person as indicated on the birth certificate does not correspond to the civil status according to the law, it is possible for the person concerned to contest the existing civil status and request the court to determine their correct civil status. This is, for example, an option when a birth certificate indicates a mother or father other than the one that the law has attributed to a child. This legal instrument can only be used by the concerned individual or by their descendants under certain conditions¹³⁹. For underage children, this can be done through a guardian *ad litem*.

Annulment of the adoption (1:231 of the Dutch Civil Code)

At the request of the adopted person, an adoption can be annulled and former family ties will then be reinstated. This option is open only to adult adoptees and, in principle, can only be pursued between two and five years from the day of reaching the age of majority (thus, between 20-23 years old). However, these strict time limitations have been broadened through case-law with reference to Article 8 of the ECHR. Annulments requested by adoptees in their 40s have been accepted, and it is not that doubtful that any age limitation will henceforth be considered justified¹⁴⁰.

CIVIL LAW

Wrongful conduct (6:162 of the Dutch Civil Code) [onrechtmatige daad]

In common with many other countries, Dutch law contains a general legal provision for wrongful conduct. Wrongful conduct is an act that unfairly causes someone else to suffer loss or harm, resulting in a legal liability for the person who commits the wrongful act. The wrongful act may consist of a violation of a right, a legal obligation, or that which is proscribed by general acceptance though unwritten legal standards. Wrongful conduct can result in a liability and give rise to a claim for damages.

¹³⁹ ECLI:NL:HR:2013:BZ029, Hoge Raad, 12 April 2013 (a man who would like to establish family ties with his biological father is denied this opportunity as his birth certificate and legal status both indicate the same adoptive father); ECLI:NL:RBSGR:2007:BB3282, Rechtbank 's-Gravenhage, 10 September 2007 (birth registered under the name of a Dutch-Belarusian woman who was in a relationship with the (Dutch) biological father; two years later, the Belarusian biological mother and biological father – who had separated by then – together with the guardian *ad litem* request the correct determination of the child's civil status; the request of the guardian *ad litem* is granted, the birth certificate is changed); ECLI:NL:RBSHE:2009:BJ4904, Rechtbank Den Bosch, 10 August 2009 (the right to know one's origins/civil status trumps the secrecy obligation of a notary who may have confidential information about the descent of a person).

¹⁴⁰ ECLI:NL:RBZUT:2012:BW5204, Rechtbank Zutphen, 9 May 2012 (interesting ruling on the prevalence of the right of the child who was 'secretly given away' to establish family ties with their biological parents over the right of these biological parents to privacy and protection of – existing – family life); ECLI:NL:RBHAA:2012:BW5040, Rechtbank Haarlem, 3 May 2012 (request of 38-year-old adopted person for the annulment of the adoption is granted; the legal time limitations may be too stringent and not reflect the complex decision-making process that is necessary for the request of an annulment); ECLI:NL:RBSHE:2008:BN6040, Rechtbank 's Hertogenbosch, 10 June 2008.

Wrongful conduct and/or claims for damages can be initiated by individuals and may be directed at the State, institutions or other individuals, thus including private persons involved in the illegal adoption and/or adoptive parents.

This article allows for legal actions up to five years after the moment the person becomes aware of the fact that there has been a wrongful conduct that has had damaging consequences. The deadline for legal action can also be prolonged by sending a letter of liability.

In cases of illegal adoption, a claim for wrongful conduct can be based on one of the above-mentioned legal obligations and/or rights. Reference to provisions of the UNCRC with direct effect can also be used to bring a wrongful conduct claim. In the Netherlands, Article 7 of the UNCRC will be eligible in this respect, as the government has recognised this article as having direct effect.

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2.4 CONCLUDING REMARKS

International instruments arguably provide clear safeguards for searching for one's origins. However, implementation is more equivocal and is often based on non-binding provisions. An additional hurdle is that binding instruments are applicable only upon ratification, a date that has often come after the 'illegal' adoption occurred. International procedures are also invariably lengthy and require that domestic solutions first be exhausted. Likewise, while international and regional instruments provide for safeguards against 'trafficking of children for any purpose', as covered particularly by the OPSC mentioned above, this may be more challenging to apply in ICA matters.

There is a need to clearly define illegal adoptions as trafficking in persons which may lead to a better oversight of adoptions. This is necessary especially with respect to a stricter verification of the background of any child who is declared an orphan and of their documents. It might also lead to a prosecution of illegal adoption.

To date, no illegal adoption case has been processed successfully before a UN treaty body. It does, however, appear that regional bodies such as the IACtHR and the ECtHR provide some more promising possibilities – although, of course, their decisions are less far-reaching, being applicable only to one specific region. The 'successful' cases provide examples of what remedies could be considered, such as financial compensation, as well as other forms of restitution.

The specific promising practice examples of Argentina, Australia, the Netherlands and Spain, moreover, show how some States have actively responded to adoptions of an illegal nature. Lessons can be learned from countries such as these about possible legal remedies – criminal, civil and administrative – for the children concerned and their biological families.

Overall, however, this Chapter shows that the right to search for origins has to be made far more explicit in international, regional and domestic instruments – as do the grounds for prosecution and the potential penalties incurred when apparent illegalities in the adoption process are brought to light as a result of that search. Until that time, this publication provides multiple potential – psychosocial social and political – responses to illegal adoptions in the following chapters that exist today.

The use of ICA as a child protection measure solely in the child's best interests can only be guaranteed when there is an existing legal framework to ensure, among others, that if this does not occur, adequate measures are in place to prevent and remedy this situation.

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PSYCHOSOCIAL CONSIDERATIONS

Johanne Lemieux, a Canadian Social Worker and Psychotherapist, provides insights and resources for practitioners working with adopted persons affected by illegal adoptions.

3.1 INTRODUCTION

'We do not become what we want to be, we become whatever we think we are' – Maya Angelou¹⁴¹

As with all Western societies, in which adoption has been widely practised on a large scale, Quebec has its share of disturbing stories surrounding the practice of adoption both past and present. Whilst some cases are immoral but legal, others may be criminal.

These shattering revelations have led to the implementation of more ethical support and supervisory measures by focusing on the best interests of the child. The authorities have developed a range of legal and collective solutions to promote exposing the truth surrounding adoption so that past sufferings serve to avoid suffering in the future.

However despite the noble intentions of all the stakeholders who facilitate and support adopted people in their search for origins, what about the intimate psychological experience of the adopted person themselves? In the post-revelation period, how do they manage to assimilate disturbing information, whether it was solicited or not? As professionals, how can we better understand and support these people?

In the framework of my professional practice, I have had, and still have, the opportunity (I would even say the privilege) to accompany numerous adopted people in a number of situations concerning the revelation of disturbing information surrounding their adoption – both, domestic adoptions and ICAs. These people have taught me a great deal. They have allowed me to refine my understanding of the adoptive normality in the context of a search for origins and the impact of the information collected. They have, above all, pushed me to find appropriate and effective approaches to alleviate further suffering. As it is, indeed, suffering.

Fortunately, the vast majority of adopted people feel considerable satisfaction at finally having access to their real story, as painful as it may be. They say they feel relieved to have obtained a response to their needs, which are almost sensory, to see, touch and interact with their birth parents, and to finally have the missing pieces of THEIR story. This generally allows them to alleviate the feeling of injustice. However, we need to remain cautious: to finally be the holder of all the facts surrounding their birth, abandonment and adoption is not always a miracle cure. Sometimes, the opposite occurs. When there are disturbing – or even traumatic – revelations, there is a risk of shattering the emotional, cognitive and social identity that the adoptee has taken years to construct.

¹⁴¹ Maya Angelou (1928 – 2014) was a poet, writer and American activist.

Through four testimonies¹⁴², gathered in the confidential context of my practice, I will highlight the extent to which the adoptive normality assists our understanding of the psychological reactions of the adopted person following revelations of illegality. I will then offer a brief outline of a psychotherapeutic tool that I have called the 'ribbons of life to reattach'. In order to do so, I will answer the following three questions:

First question: In what way can the psychosocial characteristics of the adoptive normality – already present in the adopted person – colour their emotional reactions?

Second question: Is the revelation of an illegal adoption really more devastating than other disclosures, which are equally disturbing?

Third question: What psychotherapeutic approaches can help the adopted person to process and then psychologically integrate all this disturbing information in a constructive and meaningful way?

3.2 FIRST QUESTION: IN WHAT WAY CAN THE PSYCHOSOCIAL CHARACTERISTICS OF ADOPTIVE NORMALITY – ALREADY PRESENT IN THE ADOPTED PERSON – COLOUR THEIR EMOTIONAL REACTIONS?

To fully appreciate the specific issues of disturbing revelations during a search for origins, we need to understand that, in adoptive normality¹⁴³, the work¹⁴⁴ of self-construction is more complex at the beginning than for a non-adopted person. Here are four important elements of this adoptive normality:

3.2.1 THE UNIDENTIFIED MISSING OBJECT (UMO)

Whether in the literature of past centuries or in the testimonies of abandoned, neglected, displaced or orphaned children, the notion of a great inner void returns continually. An intangible existential vacuum that, at its origin, has a very real sensory and emotional emptiness. In adoptive parenting, we call this the void UMO: an unidentified missing object. There is a considerable risk that it will leave its mark: it is a very present absence.

Some adoptees are convinced that this feeling of emptiness would be automatically and totally alleviated if they had the opportunity to meet their mother or their birth family, and to know all the details surrounding their conception, birth, abandonment and adoption.

¹⁴² The stories are true, but to ensure confidentiality, the names and some details have been altered.

¹⁴³ In adoptive parentality, we call 'adoptive normality' all of the physical, emotional, cognitive and social challenges, which follow the particular life situation of the child before, during and after their adoption. This group of challenges constitutes a standard if compared to the normal challenges that are usual in all adopted people.

¹⁴⁴ Brodzinsky D M, Schechter, M D and Henig, R M (1993). *Being Adopted: The Lifelong Search for Self*. New York, USA: Anchor Books (First Edition).

THE ADOPTEE'S STORY: THE IMPACT OF AN IMMORAL ADOPTION¹⁴⁵

Despite what I had hoped, I have not completely filled my UMO by meeting my birth mother. Of course, I obtained many useful answers and the immense satisfaction to have before me a person who I resembled a great deal. I felt a certain relief when my birth mother revealed that she did not want to sign the adoption consent. She had tried everything to keep me. Disowned by her family because of her pregnancy outside marriage at the age of 16 in 1955, she finally gave into the pressure of the nuns, who told her that my chances of being adopted would decrease if I was no longer an infant.

Then, things became complicated. I was face to face with a 77-year-old woman who had the shameful and appealing eyes of the 16-year-old adolescent she had once been. She needed me to finally release her from her guilt. She had this very immature need for me to forgive her 'weakness'. In order not to hurt her, I had to make myself validate her perception of things: as if she was the only victim in this story. My suffering became secondary since I, at least, had had a nice, easy life. She also wanted me to share her anger against the nuns of the time and, ultimately, against my adoptive parents who had supposedly turned a blind eye to this injustice and had voluntarily deprived me of my language and culture.

Whilst I secretly hoped that my birth mother could fill the void inside me, I came away from this episode with a heavy feeling. Once again, in this whole story, I had to respond to the needs of others – as I have done for such a long time with my adoptive parents for fear of disappointing them.

Maria, 60 years, born in Quebec, adopted in Cuba and then brought up in Spain.

3.2.2 A PATCHWORK IDENTITY

Some adoptees never feel the need to know about their origins. Their birth parents are reduced to an abstraction for them and they do not feel any curiosity, or feelings towards them.

For others, however, the need to know becomes an obsession that can take on enormous proportions. As with the salmon which, after living all its adult life in the ocean, swims back up the river where it was born, these people spend an insane energy in the search for their origins. They are ready to destroy their 'fins' and use all their life-energy in order to satisfy this instinct to return to their roots (see the testimonies of [Anand Kaper](#), [Céline Giraud](#) and [Dida Guigan](#)) – even if they arrive in pieces!

To prevent their child from suffering too much, yesterday's adoptive parents and those of today have perhaps recounted a watered-down version of the abandonment of their child. It is therefore very important that the adoptive families are supported by professionals, especially in the context of a search for origins, as [Beatriz San Román](#) explains. However, when growing up, the adopted person will have access to various sources of information about adoption. This could be an article in the news about the abduction of children in Guatemala and Vietnam, a report on life in China showing that all little Chinese girls are not abandoned by their parents, without forgetting the new phenomenon of social networks, such as Facebook. Adoption professionals find themselves already dealing with cases of 'online reunions' – whether intentional or accidental – that are at best delicate and, at worst, very dramatic. The door is then wide open to questions on origins, on grey zones and on the meaning of their life path. Once again, professional support is absolutely necessary in the search for origins,

¹⁴⁵ In Quebec, there are resolutely immoral and ethically questionable stories. We are referring to practices that took place during a period that historians call the 'Great Darkness'; a time before 1960, when the Catholic moral order justified obtaining an adoption consent under the pressure of blame, shame and the threat of social ostracism, if a single mother wanted to keep her child; a period, during which Quebec became a destination of choice for thousands of American, European, South American of Polish origin, Irish or Italian couples who were looking for very young, white and Catholic babies.

and the use of family mediation is also recommended (see *Promising practices below*). Other adoptees can also find help from associations where they can share their experiences and work on their traumatic past. To this end, some promising practices have been developed by two adopted persons who, after discovering the illegal nature of their adoptions, set up associations of the type presented in the course of this Chapter through the testimonies of *Dida Guigan* and *Céline Giraud*.

THE ADOPTEE'S STORY: THE IMPACT OF A DISTURBING HISTORY¹⁴⁶

I have always known that I was adopted. My parents never hid anything from me. On the contrary, I was very proud to be wanted – chosen in a certain way – because they might well have refused my file when it was proposed. I always trusted my parents when they told me that they came to find me at four months of age at the orphanage where my very poor birth mother had brought me several days after my birth. I did not need to search for my origins, I had never had any need to do so.

It was whilst working on my integration project at the end of my fifth year of secondary school that I was inadvertently very shaken. In four clicks on Google, I found not only one article to read but also another and then dozens about UNICEF's report concerning the illegal trafficking in babies in Guatemala in the 1990s¹⁴⁷. As I had been born there in 1992, I experienced a veritable tidal wave of emotions reading stories of babies stolen and sold for thousands of dollars. Then came my doubts, my suspicions, my worst fears: What if my parents had lied to me? Did they pay a lawyer thousands of dollars to buy me? Was I in the orphanage with false papers without my parents realising it? Unless they did not really want to know.

It took me some weeks before daring to broach the subject with my mother. When she began to cry and gave me excuses, I was really afraid. Finally, explaining to me that she was sorry she had not discussed the subject with me, she assured me that before reading these articles, she and my father had never known about this illegality.

I wanted to believe it, but the doubt was now there. Was I abducted by force from my birth family, who was still looking for me? I felt guilty and self-centred that I had not pushed my search further. I was afraid to find myself in an even more complicated and distressing situation. I was paralysed, ripped apart, totally confused.

Marie-Soleil, 19 years old, born in Guatemala, adopted in Quebec

3.2.3 POOR SELF-ESTEEM: THE POISONED LEGACY OF SHAME

Good self-esteem – a belief that one is a precious, significant, kind human being who deserves their place in the sun – is a protection factor, a passport for a happy life. Thus, the adopted person is at high risk of thinking, unconsciously at first and then explicitly, that they do not amount to much since they did not succeed in convincing the birth parent that it was worth keeping them close forever. Within is a feeling of shame about their own destiny. It is already a complex task to fight against the original shame of not having had sufficient value.

Shame is the feeling of being something bad. Shame is one of the most intolerable and destructive human sentiments. It is a deep conviction that not only is one contemptible and evil, but that all those around us are

¹⁴⁶ For 25 years, in Quebec, the massive arrival of children through ICA – even though fully supported by organisations and even though adoption through direct and private contact was strictly forbidden – also involved several stories of disturbing revelations. In several situations, adoption agencies could have been passive victims in the trafficking of babies.

¹⁴⁷ See, for example, UNICEF Guatemala (2004). *Posición del Fondo de las Naciones Unidas para la Infancia sobre las adopciones en Guatemala*; available at: http://www.unicef.org/guatemala/spanish/media_2440.htm.

equally convinced of this. Shame is therefore the combination of the negative view one has about one's self and the perception that others also have this view. Shame becomes invasive when one has the impression of being despised and rejected for who we are. It is an emotion so unbearable that the human brain usually tries by all means not to go there.

Thus, the belief that the adopted person maintains about their own value determines, to a considerable extent, the choices they make in life. If they feel unworthy, they probably behave as if the world around them matches this view. If they feel great, they will make choices that match this idea of themselves.

THE ADOPTEE'S STORY: THE IMPACT OF SHAME IN AN UNETHICAL ADOPTION STORY¹⁴⁸

I had worked hard to heal myself of this shame inside me for having been abandoned. I must have been a disappointing and bad baby for my birth mother to abandon me in an orphanage. Yet, my parents always said to me that it was never the fault of the babies; that a baby cannot choose or influence an adult decision, and that my mother must have loved me enough to give me a better future.

It was some journalists who suggested I participate in an investigation that they were carrying out on the subject of improper adoptions in the Dominican Republic. Thus, with other adoptees, we were able to meet our birth families and to learn more.

In my case. I discovered too much... The most difficult thing to manage and to digest was not that my birth mother had received some money in exchange for her signature of consent to the adoption. Everybody involved in this investigation wanted me to express my indignation. They wanted me to become the flagship of their cause when I was silently living a real interior tragedy, but for other reasons.

The most traumatic for me was to discover that she had given me up for adoption, me, a little child of 13 months, and not her other children. She kept my brother, who was a baby, and my two older sisters. Her partner at the time had abandoned her after my birth because he did not acknowledge that he was my biological father. It seems he found that my skin was much too dark to be his daughter. My birth mother asked for forgiveness, justifying herself by saying that she simply wanted to survive and feed the other children, because, as a Haitian in the Dominican Republic, she was living there illegally.

This information shattered all that I had built about my origins and my background. I did not know what to do, I felt broken into a thousand pieces. I was ashamed. I was no longer worth anything.

Marie-Ange, 24 years old, of Haitian origin, born in the Dominican Republic, then adopted in Quebec

3.2.4 DIFFICULT ATTACHMENTS: THE EFFECTS OF EARLY RELATIONAL TRAUMA

Attachment has much more to do with a deep sense of trust than with love. Attachment is a reciprocal feeling of trust, security, permanence and commitment between a parent and a child. Children abandoned, then abandoned again before being adopted, all have a life trajectory interrupted by breaks and absences. Attachment bonds are shattered, broken and have disappeared, leaving invisible wounds. This is why all adopted children experience some difficulties with attachment at the moment of their placement for adoption.

¹⁴⁸ Despite the consolidation of practices and laws for more than 50 years, work on the discovery of illegal adoptions between Quebec and the Dominican Republic in the 1980s has recently been published.

For the adoptee, the fear of disappointing is stronger than the fear of being rejected and abandoned. They are convinced that they must have disappointed their birth parent for them to choose not to keep the child. As an adult, the adopted person remains very sensitive to actual or perceived situations of rejection and abandonment, and suffers for a long time from an acute sense of abandonment. Moments of separation, loss, absence, betrayal, and untruths are great emotional disturbances, because they reactivate a memory without conscious recollections. These trials can leave traces of a post-traumatic type, which are very likely to reactivate later in life.

The personal reactions of adopted people faced with the revelation of an immoral, unethical or even criminal adoption can reawaken these early traumas. Thus, the revelation of an illegal adoption can jeopardise all the bonds of security and trust with the adoptive parents. These revelations can return even as an adult, in the form of insecure attachments, which they arrived with as a child in the new family.

The adoptee's story: The impact of a criminal history¹⁴⁹

It was when I wanted to enrol at university in the middle of the 1970s that I discovered my birth certificate and had a four-fold shock. While my mother made a point, at each of my birthdays, of describing her experience of giving birth, my parents had to admit to me that I had been adopted. I had always adored my parents and I had had a happy childhood but, at this point, the bond of trust was shattered.

Still reeling from the first shock, and requesting my adoption papers, I learnt that I was not born in Saskatchewan but in Montreal, Quebec. There were not really any adoption papers because, with the help of a lawyer, a doctor had falsified a birth certificate indicating the name of my two adoptive parents as if my mother had really given birth in Montreal.

As if that was not enough, they justified this subterfuge to me, because at that time, the Catholic religious authorities refused to give a baby to a couple of Jewish faith. Third shock: I realised that I was not a 'true Jew of Polish origin, courageous descendant of a family who were victims of the Holocaust', but a man of French-Canadian origin, probably born to Catholic birth parents. As they wanted to break free from all the secrets and from their guilt at having hidden my story from me for so long, I finally learnt that my parents had not only paid more than CAD 2000 to a lawyer and a doctor, but that I had been bought in an illegal maternity home for the sum of CAD 1000.

Outraged, I quickly left the home and refused all contact with my parents for several months. I had always been wary in my personal relations; now, I could not trust anything or anyone. I was isolated, cut off from the world.

Despite my search, I did not get very clear answers apart from some newspaper articles, reports and university theses that confirmed this type of practice. Thanks to a genetic test from Ancestry.com, at least I know that I am indeed a French-Canadian and from Native American origin. It is at least something...

Leonard, 67 years old, born in Montreal, brought up in Saskatchewan

¹⁴⁹ In the 1950s, the Police and journalists discovered cases of sale, falsification of documents and the smuggling of children to the USA. While the vast majority of the adoptions of children born in Quebec and adopted abroad were carried out in accordance with the laws of the time, the influence of the Catholic clergy made it impossible for a couple of Jewish or Protestant faith to have a so-called 'Catholic' baby entrusted to them. Thus, with the complicity of lawyers and doctors, birth certificates were falsified in order to be able to move to other Canadian Provinces or the USA. To learn more, see the documentary: *Le berceau des anges*, <http://leberceaudesanges.seriesplus.com>.

3.3 SECOND QUESTION: IS THE REVELATION OF AN ILLEGAL ADOPTION REALLY MORE UPSETTING THAN OTHER EQUALLY DISTURBING DISCLOSURES?

No. It appears from the testimonies of adopted people that the discovery of illegal aspects in their adoptions does not automatically produce the strongest psychological reaction. The adoptees find themselves symbolically with new pieces of life resulting in ambivalent and contradictory emotions, whatever the nature of the revelations. Information on illicit aspects accompanies other discoveries that the adoptee is going to have to integrate, whether they are reassuring or disturbing.

The particular sensitivities of adopted people – whether the impression of an inner emptiness, the quest for building an identity, the shame of having been abandoned and the fear of rejection that makes their attachment relationships more complex – may also be reactivated through this revelation. Indeed, the adoptee may then feel more like an instrument in the tangled history of the other actors in their story. Many find themselves in a conflict of loyalty, which they rightly do not want in their lives any more. Some feel a sort of psychological pressure from members of their birth family, the adoptive family and even from other parties involved in the adoption. They are all waiting for a verdict and for the adoptee to clearly choose one camp or the other; as if they must explicitly determine who is guilty and who is the victim, who is good and who is bad; as if they must once again put aside their own needs in order not to disappoint, not to offend and not to be rejected once more. They are asking the adoptee to appease the injustices and the suffering of others, while above all they are trying to heal themselves.

To better support an adopted person caught up in this emotional and cognitive turmoil, the professional or caring third-party must be particularly sensitive in addressing these very personal and intimate issues. The adoptee must be able to focus on their own needs, to allow themselves to peacefully integrate their life-story, including the most difficult and most disturbing parts.

3.4 THIRD QUESTION: WHAT PSYCHOTHERAPEUTIC APPROACHES CAN HELP THE ADOPTED PERSON TO PROCESS, AND THEN PSYCHOLOGICALLY INTEGRATE ALL THE DISTURBING INFORMATION IN A CONSTRUCTIVE AND MEANINGFUL WAY?

According to humanistic psychology – the theory of attachment and knowledge of the treatment of post-traumatic shock, the more a person is able to understand how to integrate in a coherent and calm narrative all the pieces of their history, the more they function well and solidly, and are equipped to live in peace. Psychoanalysts speak of the integration of all the parts or states of the 'id'. For this to happen, all human beings must, among other things, ease the emotional disorder caused by difficult events and give sense to the significant attachment relationships of their life story. It is a life's work to build emotional security, to acquire cognitive skills, to build a social identity, and to develop talents in order to finally find a deep sense of satisfaction with life.

Traumatic events weaken this self-construction. As long as it is not assimilated, a traumatic event remains on the sidelines, encapsulated in a neurological no-man's-land. The brain cannot allay the disturbing images, the unpleasant feelings, or calm the emotions and intrusive thoughts. Despite the cognitive efforts, the person fails to register the past or find a useful sense of the present.

I have developed a very personal psychotherapeutic approach for accompanying adoptees, children, adolescents and adults struggling with a problem of integration, which I call: 'ribbons of life for reattachment'. It is a combination of the following psychotherapeutic approaches:

- the Eye Movement Desensitisation and Reprocessing therapy and the protocol of treatment for adults of Francine Shapiro¹⁵⁰;
- the EMDR protocol for young children of Joan Lovett¹⁵¹;
- the treatment of psychological poisonings and early traumas of Jacques Roques¹⁵²;
- the Lifespan Integration of Peggy Pace¹⁵³;
- the Impact Therapy of Ed Jacobs and Danie Beaulieu¹⁵⁴;
- all tied together with my own tools in adoptive parenting (Adopteparentalité): multi-coloured silk ribbons¹⁵⁵.

Step 1: Make a chronology of life

I begin by asking the person to write a chronology of their life for me¹⁵⁶. For each year, it must indicate a very comforting, positive and pleasant event but also a difficult event, a bad conscious memory that they have known for a long time or have just learnt about.

Step 2: Write each event on pieces of ribbon

The person then chooses a coloured ribbon to symbolise positive events, and another one for the very difficult events; for example, a blue ribbon for pleasant memories and a red ribbon for painful ones. The ribbons should be about 15 centimetres in length. A piece of ribbon represents a year of life. A person of 25 years will have 25 pieces of blue ribbon and 25 pieces of red ribbon. The year is written on each ribbon followed by a word, which evokes the memory.

As in all good recipes, the ribbons are set aside to be brought together later!

Step 3: Identify and treat post-traumatic aspects

From that list, the person then identifies events or information that cause the greatest turmoil¹⁵⁷. It is important to realise that disturbing revelations experienced in a quest for origins can cause post-traumatic syndromes. The person may experience manifestations of anxiety, disturbing thoughts and feelings, or recurrent nightmares causing distress, which can affect their usual way of functioning.

By definition, a traumatic event is not integrated, because the person's brain is not able to process the information correctly and sort it healthily into their 'database'. When they evoke this traumatism, emotionally intrusive and very disagreeable sensory disturbances conflict with the associated cognitive thoughts. An adopted woman told me, for example, that *'[a]s an adult, I understand that my birth mother had serious reasons for accepting money in exchange for her signature, but I cannot stop myself from also feeling hurt in my inner-most core and thinking it was my fault. If I had been cuter, quieter, easier, she would have chosen to keep me with her'*.

¹⁵⁰ Shapiro, F (2005). *The Breakthrough "Eye Movement" Therapy for Overcoming Anxiety, Stress, and Trauma*. New York, USA: Basic Books.

¹⁵¹ Lovett, J (2007). *Small Wonders: Healing Childhood Trauma With EMDR*. New York, USA: FreePress.

¹⁵² Roques, J (2004). *EMDR: une révolution thérapeutique*. Paris, France: Desclée-Bouwer/Méridienne.

¹⁵³ Pace, P (2014). *Lifespan Integration – Connecting Ego States Through Time*. USA: Eirene Imprint.

¹⁵⁴ Jacobs, E (2006). *Impact Therapy: The Courage to Counsel*. New York, USA: Routledge.

¹⁵⁵ Lemieux, J (2013). *La Normalité adoptive: Les clés pour accompagner l'enfant adopté*. Montreal, Canada: Québec-Amérique.

¹⁵⁶ *Supra* 153.

¹⁵⁷ It is the task of identifying targets and negative cognitions of the EMDR treatment protocol.

Step 4: Proceed to treatment targets in order to change negative cognitions into positive cognitions

The objective of EMDR treatment is to modify the negative cognition and soothe the physical and emotional disturbances. For example, the '*it is my fault*' pain, which the person feels in the stomach accompanied by sadness and anger, will be treated properly when they believe in the cognition that '*I was only a tiny baby and I had no responsibility for what happened to me*'. The pain in the stomach will be replaced by a sensation of calm and a positive emotion of soothing. The negative cognition '*I am a bad person to not take care of my birth family*' could become '*I am not responsible for caring for the sufferings of the world*'.

Step 5: Apply the classic Lifespan Integration protocol

This step consists in evoking, chronologically, an agreeable memory and a disturbing memory for each year of life. It is a sort of cognitive sweep – emotional and sensory. Without going into details, the therapist helps the person to focus, to rethink, to revisit numerous times the founding memories of their life. The person does it by closing their eyes, in a fully conscious state, and by being guided by the vocal instructions of the therapist.

The particularity of my approach is that, between each of the sweeps, I invite the person to look at and handle each of the ribbons. As it progresses, the adoptee is able to fuse the pleasant memories with an unpleasant memory from a precise year, they must assemble the two pieces from this precise year and knot them together, combining them in a parallel manner.

The ultimate objective is that, by the end of the process, the blue ribbon and the red ribbon for each of the years are one on top of the other. Then, each assemblage (comprising of a blue and a red ribbon) are attached, tied one after the other chronologically year by year. For some years the integration of certain memories will be more difficult than others. Patience and empathy are essential!

Step 6: The purpose of the exercise

When the person puts together the two ribbons for each of the years, they must, with the caring presence of the therapist, tie all the years together, always in a chronological order so as to ensure that they are physically and emotionally calm.

The final result will be a 'line of life', where the pleasant and unpleasant events will be integrated and attached chronologically. The ribbons, just like the story of the person, will form a coherent whole. The adoptee can then see it and handle it calmly without feeling invasive and unpleasant disturbances.

THE ADOPTEE'S STORY

It was at the end of this process of the 'ribbons of life for reattachment' that I really understood that my adoptive mother could not repair what had happened before my adoption, even with all the love in the world. It was not her fault, nor her responsibility. It was not the fault of my birth mother either, who became pregnant at 16 years old in a Quebec of the era of 'the Great Darkness'. Nor was it that of the nuns who, in accordance with the mentality of the time, were eager to find families for the abandoned children who were filling the nurseries. It was not my fault either, as a tiny newborn baby. None of my characteristics and none of my actions could have influenced what happened to me.

I understood, and really felt deep within me, that we were in fact four women united by a strange common destiny, at a given time, with the standards and customs of that time; a destiny where all four of us did the best we could with what we had. Some things did not happen at the time when they should have been arranged, that is all. I was finally at peace with all aspects of my story. I am left with this very long handiwork of ribbons. In my rare moments of doubt, I take it out of my jewellery box. It reassures me.

Louise, 63 years old, born and adopted in Quebec

3.5 CONCLUSION

Information on bio-psychosocial history, whether legitimate or illegal, is not the only factor influencing the identity construction of an adopted person. Nevertheless, this is still a major piece of the puzzle that an adopted person must put together to consolidate themselves as an individual.

My professional experience leads me to believe that the revelations of an illegal adoption do not produce emotional reactions, which are that different from disturbing revelations of other kinds. It is, however, essential that professionals take into account certain features of adoptive normality in order to better understand how the revelations about the story of an adopted person, whatever they are, can destabilise them.

Whatever the nature of these revelations, psychotherapeutic support must be aimed at relieving past and present traumas so that the adopted person can easily place these facts within their story.

I hope that the stories I have presented, as well as the tools that I use, encourage you (as an adoption professional) to show compassion and creativity in the search for innovative and caring approaches, as guardians of the resilience of the persons affected, and to raise your awareness as to the importance of gaining greater insight into adoptive normality in your practice.

Johanne Lemieux has been a Social Worker for 30 years and a Psychotherapist, working in Quebec, for the last 15 years. She specialises in domestic adoption and ICA, as well as in the treatment of attachment difficulties and post-traumatic stress disorder syndrome. She divides her time between clinical and psychotherapeutic interventions at her private practice at the Bureau de Consultation en Adoption de Québec and educating parents and professionals in Canada and Europe with the organisation Le monde est ailleurs. She is also a speaker, trainer and creator of the psychosocial approach ©Adopteparentalité and the author of several works on adoption. She can be contacted at bcaq@videotron.ca and/or see her Facebook profile.

PERSONAL TESTIMONY: THE IMPORTANCE OF BIRTH REGISTRATION

Adopted from India into the Netherlands, this testimony by Anand Kaper shows how the lack of birth registration – a fundamental breach of human rights – leads to frustrations and questionable adoption practices.

Every time the airplane touches Indian soil, I am home again. That feeling is getting stronger the more often I go. Each time, I walk through the crowded streets of 'Maximum City'¹⁵⁸ Mumbai, staring at all those people, I wonder whether I passed a member of my family. In the past few years, I have visited the orphanage I was adopted from many times. Over and over again, I have asked them for more information regarding my birth family. Until now, adoption records from the children's home remain undisclosed to me and other adoptees.

SEARCHING FOR THE TRUTH

According to my adoption papers, I was born in Habib Hospital, Dongri, Mumbai on 9 October 1976. The name of the hospital is mentioned in an affidavit from Shraddhanand Mahilashram, the children's home, to which I was relinquished after six days. In 2002, I visited Habib Hospital. I went through the birth records and found out there were two children born on 9 October 1976, a boy and a girl. According to what is stated in the affidavit, this information is presumably about me. I also found a name, and an address and more information regarding the woman who gave birth (my mother?) and the delivery of her child (me?).

¹⁵⁸ Mehta, S (2004). *Maximum City – Lost and Found*. New York, USA: Vintage.

Some years later, I went through this information again. I also visited the Brihan Mumbai Municipal Corporation office. I found out that the girl who was also born on that day had been registered by the hospital but the boy had not. According to Indian law, the registration of births and deaths is compulsory and should be reported to the competent registrars¹⁵⁹. Thus, why did they not register the boy's birth?

It appears the births of many adoptees are not registered, though they are born in hospitals or maternity homes. Thus, officially we do not exist. Then, how can we be adopted through a court order and a judge's verdict? Furthermore, how come we can leave the country with an Indian passport?

Based on extensive research and with some help from locals, I found a man who lives at the address I found in Habib Hospital. This old man told me he had three sisters but none of them delivered a child in 1976. According to his information, the address I found is correct in every detail but the name has to be fictional. He told me stories about a girl in his neighbourhood who became pregnant and of a family next door who had paying guests from all over India. If he told the truth, then tracing my mother is impossible. With this in mind, I realised I did not get any closer at all.

ABSENT VERITIES BEHIND OFFICIAL ADOPTION PAPERS

Back in Habib Hospital, I shared my experiences with the person in charge, Ms Razia. Even nowadays, women are admitted into the hospital without any identity checks, she replied. This means a woman who wants to deliver anonymously can still be admitted without revealing her real name. If any birth records are kept, then adoptees have to question whether this information is correct, and still, nothing is changing.

However, there is more¹⁶⁰. Habib Hospital is a Muslim Hospital. Amongst the birth records I found in Habib Hospital, it was also mentioned that my presumed mother belonged to the Muslim Khoja Community (Aga Khan Muslims). Since Indian law does not allow Muslims to adopt or a Muslim child to get adopted, there seemed to be no legal ground to have me adopted. I was relinquished at a Hindu ashram (Shraddhanand Mahilashram), which is probably the place where I was named Anand. Anand is a Hindu name, so it presumably was not the name my mother chose.

LACK OF SUPPORT FROM THE AUTHORITIES

I tried to get help from the Central Adoption Resource Authority (CARA) in Delhi. CARA is an autonomous body under the Ministry of Women and Child Development, and functions as the central body for the adoption of Indian children with a mandate to monitor and regulate domestic adoptions and ICAs. I contacted CARA for support in my birth family search, but, together with adoption agencies and other organisations, which are involved in adoption, they are not keen on adoptees who come with questions about their past.

Although CARA wants to help adoptees, they do not know how to help, for they are bound by their own guidelines. CARA has written guidelines on adoption¹⁶¹. In these guidelines, a brief paragraph is dedicated to the search for origins. However, the right of the adoptee to know their family comes after the right to privacy of the birth family.

¹⁵⁹ See: Registration of Births and Deaths Act, Act No. 18 of 1969, http://www.delhi.gov.in/wps/wcm/connect/DOIT_DES/des/home/facts+about+births+and+deaths+registration/registration+of+births+and+death+act+1969+delhi.

¹⁶⁰ Bhargava, V (2005). *Adoption in India: Policies and experiences*. New Delhi, India: SAGE Publications.

¹⁶¹ See: Guidelines Governing Adoption of Children, 2015, Central Adoption Resource Authority, <http://www.cara.nic.in/InnerContent.aspx?id=163#Guidelines%20-%202015>.

However, these guidelines are open to multiple interpretations. Whether or not the adoption agencies disclose information depends on how they interpret CARA's guidelines. Some agencies choose to disclose information, because of the guidelines. However, many agencies do not disclose information to adoptees, on the basis of the same guidelines. This difference in views and practices does not make it easier for adoptees.

CARA's guidelines – especially the paragraph on origins – do not comply with international conventions – such as the 1993 Hague Convention and the UNCRC. The terms of Article 30 of the 1993 Hague Convention suggest that adoptees should, in principle, have the right to receive full disclosure about their biological background¹⁶². CARA's guidelines are also used as an excuse by Indian authorities involved in adoption to keep all information inaccessible to adoptees. In the UNCRC, it is also stated that adoptees have the right, as far as possible, to know their biological parents¹⁶³.

FRUSTRATIONS AND RECOMMENDATIONS

In India, most of the people working in those adoption agencies that I visited are telling adoptees how to cope with an adoption: they still tell adoptees that we have to be happy, enjoy life, that we have been rescued, that we are very lucky to grow up in a loving family; do not look back, but look forward. This perspective on adoption is not shared only in India, but stories of other adoptees indicate this is a commonly-shared view all over the world. Our opinion and our feelings about our existential feelings of loss do not seem to be important.

CARA should establish a special department for the search of birth families. I am sure that, in the future, the numbers of searches for birth families undertaken by adoptees will increase. The Government of India is not ready for this: they do not have the manpower to cope and, most importantly, they still do not know how to deal with this issue.

As the former chairman of *Kiran* – the Dutch association for Indian adoptees – and as a present board member of United Adoptees International (UAI), I know many adoptees would like to search for their relatives. Most of them do not know where to begin. Searching should be encouraged, but we need help to do so. In 2015, I visited the Minister of Women and Child Development, Mrs Maneka Gandhi. During our conversation, it became clear she seemed to support adoptees in their birth family search. This seems to be an important step forward, which might lead to a policy change on the search for birth families.

In the meantime, with UAI, I will keep fighting for the rights and needs of adoptees; and I will raise my voice, because I do believe the voice of adoptees needs to be heard.

Anand Kaper is an Indian adoptee (born in 1976 in Mumbai, India) living in the Netherlands. He is a board member of United Adoptees International, a foundation based in The Netherlands, which works on the rights and needs of adult adoptees. Anand often travels to India to discuss the matter of adoptees with CARA, adoption agencies and other parties involved in adoptions. At the 3rd International Meet on Adoption (Delhi, 2013), he represented Indian adoptees in a speech, in which he focused on the rights and needs to search for birth families. He lives with an Indian adoptee, and is the father of two children.

¹⁶² See: Article 30 of the 1993 Hague Convention: '(1) The competent authorities of a Contracting State shall ensure that information held by them concerning the child's origin, in particular information concerning the identity of his or her parents, as well as the medical history, is preserved. (2) They shall ensure that the child or his or her representative has access to such information, under appropriate guidance, in so far as is permitted by the law of that State'.

¹⁶³ See: Article 7 of the UNCRC: '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'.

PERSONAL TESTIMONY: STOLEN FROM MY MOTHER IN PERU AND ADOPTED INTO FRANCE

In this contribution, Céline Giraud, President of La Voix des Adoptés, first describes her past and, secondly, how she responded to illegal practices by writing a book and establishing a network for adoptees in France.

Irregularities in adoption procedures are a phenomenon that has always existed and, in years to come, will tend to be increasingly known to adoptees themselves. In view of this situation, we must consider two points: how to help the adoptee and their family to manage this discovery and how to establish good practice solutions that are consistent with the respect for their rights and interests?

NATURAL QUESTIONS

Who am I? Where do I come from? Who is this person who carried me? Who are the people who perhaps supported her – or not? Do I look like her, him, them? Why? Why me?

For us, as adoptees, it is a healthy and natural step to reflect on our origins. At any age, and regardless of the loving relationship we have succeeded in creating with our adoptive family, this type of question and more can come along to intrigue, tantalise and disturb our wellbeing.

Each of us will react differently to these questions. While some adoptees decide to do nothing, for others, this will be the starting point of a real journey towards the search for origins – a long and often perilous journey that I have personally experienced.

I was born in Peru on 14 July 1980. My adoptive parents came to collect me themselves from Lima when I was only 16 days old. All the administrative procedures to return to France were carried out quite quickly and, in September 1980, I arrived in the Paris region. As a small child, I looked from afar at these origins, which fascinated and frightened me. 'Fear' because they demonstrated a clear difference from those of my parents whom I loved so much and whom I so wanted to look like; 'fascinated' because they represented for me a real mystery, an unknown part of me, which fed my imagination.

At the age of 20, I gave birth to little Lisa, a child who was very much wanted by her father and I. The same day, a whirlwind of questions threw me into a deep reflection on my own origins. I too came from a womb? I had never felt so close to this woman, my biological mother, than at that moment: the day when I became a mother myself. It was not until three years later that I transformed my questions into actions. I had a file in which my parents had taken care to keep everything. It is thanks to these papers that I was able to trace my birth mother in Callao, near Lima.

Unfortunately, the truth about my background disrupted the joy that should have been mine that day: I had not been abandoned, I had been stolen and a victim of child trafficking.

Very quickly, my biological mother told me an astonishing story.

She was 23 years old. At that time, as the mother of a little girl of three years, she found herself abandoned by my biological father and by her own family. Without employment or a home, she turned to a charitable association mandated to help single mothers. Everything was taken care of: prenatal checks, transport to the hospital, delivery... But the dream quickly turned into a nightmare. When she left me in the nursery to use the time to find lodgings, she realised, two weeks after my birth, that the people who had helped her had left with me and she never saw them again. Each attempt at contact ended in failure. The traffickers had moved without leaving an address. She only realised at that moment the extent of the deception. She filed a complaint but no one believed her.

One year later, she was contacted again by the police who arranged a meeting and asked her to identify her daughter, me, from 30 or so photos of babies. She recognised me and pointed me out. The police told her that they had just dismantled a child trafficking ring and that I had been adopted in France. I and 20 other children had departed for France and the Netherlands.

Followed the incarceration of the traffickers, a police investigation, legal proceedings, the trial... my biological mother followed the turn of events closely, which made newspaper headlines in Peru.

Four years later, the traffickers were judged. My biological mother was there, still hoping that they would announce that I would be repatriated to Peru. The Judges ruled: all the children would stay in their adoptive family. Each Peruvian family would be awarded financial compensation of PEN 50,000. My biological mother understood that she would never see me again; just as she would never see a single sol of the so-called 'compensation'.

As for my adoptive parents, they wanted to contact the approved adoption agency again, which they had used at the time. They sent a letter but never obtained a response.

Thus, I went to their premises in Paris. My parents were not invited to come along. The administrators of the association did not deny having been informed of this trafficking 23 years earlier. However, they wondered why I came to question them about it when I had 'all I needed to be happy'. I had asked that this truth be made available to the other adoptees, victims of the same trafficking, if one day they wanted to see their adoption file. It was a failed endeavour.

This multiplication of injustice, mixed with such incompetence in managing the 'afterwards' made me realise that behind the scenes in adoption, there was still much work to be completed.

We are never prepared to hear this; neither we, the adoptees, nor the adoptive parents who, believing they have raised a child supposedly abandoned by their family, find themselves 'accomplices' to their suffering.

Whilst all this did not destroy me, I decided that it would make me stronger.

First, I decided not to remain silent. The experiences of adoptees were rarely heard, no more than their concerns, their suffering or their emotions. I wanted us to be heard. For that reason, I co-founded *La Voix des Adoptés*.

PROMISING PRACTICE: *LA VOIX DES ADOPTÉS*, A PLACE FOR ADOPTEES TO SHARE EXPERIENCES, BE SUPPORTED AND LISTENED TO

La Voix des Adoptés was born in 2005, one year after my first journey to Peru. It spread to six large French towns (Paris, Lille, Rouen, Nantes, Lyon and Toulouse). It continues daily thanks to the work of around 30 volunteers, who organise and animate different activities.

The objective of the association is primarily to give a voice to adoptees. We follow four guidelines:

- The exchange and sharing of experiences amongst adoptees (and any others concerned with adoption);
- Collaboration with adoption professionals (work, reflection...);
- Support to adoptees in their search for origins;
- Raising awareness on the need for legal and ethical adoptions.

Very early, through contact with hundreds of adoptees, we realised that supporting them is a process that must be recognised as part of post-adoption follow-up.

The search for origins is always a real tidal wave of emotions. Starting with questions, which are in us all... and they are numerous! However, in the end, there are few people with whom this delicate and intimate subject can be broached. From speaking with parents, we know it is not an easy thing in all families. Access to information is not always simple in relation to all files, and it differs according to the country of origin, each with its own way of functioning. When one is born abroad, the problem of language is an additional challenge.

La Voix des Adoptés – by creating places for exchange, listening and sharing – engages in supporting adoptees who want to speak freely of their experience and on themes as varied as feelings of abandonment, difference, dialogue with their family, origins, parenting... The confrontation of different paths, each with its own history, is representative of the diversity characterising adoptees. At the same time, the feelings, emotions and worries that they have in common tend to bring them together in an undeniable way.

From time to time, it is not unusual to meet adoptees who have a file displaying irregularities. Sometimes, the adoptee does not realise this. Sometimes, the adoptee knows that there is something that is not right. At that specific moment, I always ask myself the same question: what tools do I have to help?

Today, after 10 years of the association's existence, and as many years in contact with adoptees, I can put forward two points from my experience:

- Adoptees affected by irregularities are increasingly numerous. This is logical because the first part of adoptees from the 30 glorious years' of adoption (late 1970s to the beginning of the years 2000) have reached adulthood and are searching for their origins. Thus, statistically, this is normal. The more adoptees are pursuing their origins, the more we discover 'irregular' cases.
- For proven cases of abuse, there is currently no proposal for accompanying the victims, no form of support and not even any legal recourse.

HOW SHOULD OUR ASSOCIATION DEAL WITH THIS SITUATION?

As, up to now, a solution to the problem does not exist, we are trying to find responses beforehand. From meetings that specifically consider the theme of the search for origins, it seems essential to look at where the adoptee is starting. Is it with an idealisation of their project? Have they already decided about the scenario, or have they developed their project? The experience of those who have already been there often helps those who are at the beginning of their search, to ask themselves the right questions and envisage follow-up with their feet firmly anchored in reality.

The most common danger is to only consider the positive. Even in cases where there is no abuse, we know that, because of our condition as an adoptee, the origin of the separation from our biological family will always have a tragic element. Origins are always painful and a wound that is dangerous to touch.

Thus, ongoing support during this project is carried out by means of preparation. Although it may not prevent unpleasant discoveries, it, at least, has the merit of having highlighted the possibility of their existence, even if only in a small way.

Irregularities can be numerous: abuse of the vulnerability of the biological mother (or family), creation of false documents, implication of an accredited adoption body or lawyer in charge of the adoption, lies, more or less admitted knowledge by adoptive parents of the theft of their adopted child, etc. Finally, regardless of the nature of these irregularities, this is not an adoption as such.

Adoption must have as the only beginning the clear consent of a couple or a woman (if she is alone) to abandon their child after the competent authorities of the country have tried to find placement solutions beforehand within the extended family or, if that is not possible, within the country of origin of the child (in accordance with the principle of subsidiarity). An adoption carried out within the rules of this principle also implies that the background of the child, when it is known, be transcribed in their file – we are not talking here of cases of children born '*sous X*' (anonymously) in France, for whom the procedure is different, or of abandoned children for whom no element of their background is known.

In an ideal world, what good practice would we want to see implemented in a case of proven abuse, which is discovered soon or a long time after the adoption took place?

LEGAL PERSPECTIVE

Firstly, it is time that the access to personal information (name of parents, context, place and date of birth...) and biographical data is made formally available to the adoptee and their adoptive family. It is important that all countries of origin cultivate a common thinking and operate on an equal footing.

The transparency of the procedure must be a priority.

In cases of proven abuse, it would be preferable for the facts to be spoken about. Even when this is upsetting, abuse exists and will exist in many adoption files. Subsequently, to acknowledge the status of 'victim' for the abused persons; certainly for the adoptee, but also for their adoptive family, if appropriate.

All this contributes to recognising a truth – a truth that does not leave our psyche, an undeniable truth.

Secondly, we must have a means of redress available. If the adoptee and their family wish to do so, they must be able to turn to the competent authorities to bring a case to court, to bring criminal prosecutions against those responsible and obtain compensation. There must therefore be the means to determine those who were responsible (intermediaries, social services, organisations...) (see *Legal considerations* (Chapter 1) and *Political considerations* (Chapter 5)).

The receiving country and the country of origin should have dedicated services that work together to coordinate the relevant files in accordance with their own legislation (see *Political considerations* (Chapter 5)).

Respect for our rights must take precedence over the legal vacuum that exists today.

PSYCHOLOGICAL PERSPECTIVE

Once such facts are discovered, free psychological support should be offered to the adoptee and adoptive parents. No one comes out of a search for origins unscathed. Even though it leads to happy reunions with the birth family, the 'afterwards' is often complicated to manage. The adoptee must deal with two families and often face questions from their own entourage. When an 'irregular' adoption is involved, it goes without saying that this is even more difficult. The place of each one is not obvious, doubts may creep in. If the family circle and relationships are solid, there are good chances that it will continue that way. Relationships may even be strengthened. However, if a certain fragility exists, there are high risks of disruption from the developments!

The adoptive parents – victims of abuse who discover this later on are tortured by a feeling of culpability as regards the biological family and may also feel ill at ease towards their child. Why did we not see anything?

One of the more disturbing cases is when the adoptee learns that the adoptive parents knew... Unfortunately, we must talk about it when this happens.

It is important to emphasise that, when the facts are discovered, we do not refer to the family background. However, talking to specialists about this issue could help support the adoptees and their family, as they are both victims in this type of abuse.

Psychological support must also be offered to the biological families, as they too are victims.

ETHICAL PERSPECTIVE

Several paths for other ethical solutions...

In the case of proven abuse discovered when the adoptee is still young, so that they are unaware of this, the truth should be kept in their file and remain at their disposal if one day they wish to consult it. The parents, although informed, would not necessarily be custodians of this information, in view of the risk that the child may find it and learn about it in a brutal way. If the adoptee subsequently expresses the wish to find out about their origins, this process should be undertaken very carefully.

When the truth is discovered later in life, the adoptee will be an adult and responsible for themselves. Nobody decides for the adoptee, they make their own choices. Resources must be put in place for the adoptee in order to provide support, answers and reparation but, obviously, the question of living with the biological or adoptive family does not arise.

What about situations of abuse discovered shortly after the adoption? This was the situation in my case since the trial of the traffickers took place only four years after my adoption. How must the different stakeholders act at every level? How are the adoptive and biological families supposed to behave? Because, at that point, a decision must be made for the adoptee who is still underage.

For this, we must count on the intelligence of the people around the child, who find themselves caught in a situation without precedent.

On the one hand, the biological family – victims of abuse who can reclaim their child and want them returned to them.

On the other hand, the adoptive family who have brought up the child for months or years, and to whom they are very attached.

In the centre, the child, often well integrated in the adoptive family, having found emotional and material stability, but whose rights have not been respected.

With whom should they go? With whom should they live? Who are their parents? In the eyes of justice, who are the parents?

So many questions, to which finding answers, will be challenging because we must face real situations of conscience, dilemmas and human issues that only justice can resolve. The good sense and willingness of each and every one to find the best interests of the child will be essential to reach a solution.

Because there is no standard response. Each case is unique.

And the period, within which the abuse is discovered, will be a determining factor.

In the worst case, the two families will split, putting the stability of the adopted child in danger.

In the best case, together, they can find the best solution for the child.

Justice must reflect on the right of the biological family, who will never recover their child. Is it morally correct to tell them that the decision not to return the child is final and that they must accept this without saying anything about it? Even though this would be for the good of the child, we are in a situation of unjust suffering for one family, who never decided anything and who are condemned to live without seeing their offspring grow up. A little respect, a little morality would already be an extraordinary advance.

In 2007, a journalist asked my adoptive mother the following question: 'If you had known that your daughter was a stolen child when you had already returned to France, what would you have done?'

To which she replied: 'If I had known, we would have returned Céline. Because I would never have been able to live happily as a mother knowing that her biological mother was suffering through her absence.'

The journalist then put the same question to my biological mother: 'What would you have done if the mother of Céline had returned her to you?' To which she replied: 'If her mother had sent her back to me... I think that I would not have taken her. I would not have wished my daughter to know the poverty her brothers and sisters lived in, I would not want her to experience the suffering we have lived through. Nobody can give me her first smile, her first steps, her first teeth... But I am sure that, with her parents, we would have found a solution to enable her to grow up in emotional and material stability and that I could see her grow up all the same.'

That day I realised that I had two mothers.

CONCLUSION

Faced with such a drama by the discovery of abuse and deviations in an adoption file, legal, psychological and, above all, ethical questions must be asked by all the stakeholders at different levels. In all cases, the first aim for a country is to be aware of how it must support the child, the adult and their families. Whether they are leaving or entering the country, it is the responsibility of different bodies to ensure the child's rights and to repair this tragedy, insofar as is possible. This can only be achieved by a willingness for reform and, in the case of ICA, countries of origin and receiving countries must cooperate extensively to determine the role of each. The adoptees – victims of the abuse – and their parents must have the possibility to obtain psychological support without charge in order to overcome this ordeal, together with the birth families in countries of origin.

Today, we must no longer close our eyes: in the coming years, thousands of adoptees across the world are going to discover the horror surrounding the context of their separation from their family of origin. We need to support them and put in place concrete solutions that respect their rights.

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PERSONAL TESTIMONY: BORN IN LEBANON AND ADOPTED AS AN 'ORPHAN'

Dida Guigan provides this testimony of her life-long search for the truth, and how she rebuilt her identity and established a NGO for others with a past in Lebanon.

I was born in Beirut in 1984 at the Rizk d'Achrafieh hospital.

At that time, ICA was expanding rapidly; historically, its development coincided with the establishment of the French Mandate a little after 1960. The religious sisters of Catholic institutions were the first to take responsibility for adoptions abroad. Some nuns were also midwives, and took children into care directly at the hospital. To date, the Lebanese State supports and legitimises private domestic adoption and ICA, which is under ecclesiastical control.

My birth is recorded at the Beirut hospital, but the registration of a birth certificate, required for obtaining an official document and Lebanese nationality, is non-existent. At the same time, a French-Swiss couple were informed of my birth via fax. The nuns at the hospital, with the support of the doctors, kept me and hid me in the basement of the building for about 10 days, the time it took for my new family to arrive.

I finally left the hospital with – as the doctors had suggested – a birth certificate, which stated that my adoptive parents were my biological parents. Thanks to this false document, my adoptive father became my official birth father before the French Consul in Beirut. We were in a time of war; the airport was closed and the only way to leave the country was through maritime transport between small ports in Lebanon and Cyprus – a form of trafficking in itself, according to my adoptive father. He says he forced the boatman to leave the coast quickly. From Cyprus, we flew to Switzerland.

From that time, I became Dida Guigan. My adoptive parents did not know that Dida was the nickname of their new friend, 'Big Dida', who was connected with the hospital and who had indirectly advised them of my birth. They believed it was a real name and the French Embassy thought that it was a typical Lebanese name. 'Big Dida' was the friend of a professional partner of my father. This associate had asked him to 'find a child'.

My father told me recently that an act of abandonment had been written, which my birth mother then withdrew shortly after having entrusted me. Even today, though I have had many discussions with my adoptive parents, I still do not understand how 'Big Dida' had been notified of my birth and why my ICA seems to have been planned before I was even born, nor how I could be declared an orphan. I only know that 'Big Dida' had good friends at Rizk hospital. Nobody knows any more about the actual context of my birth, the separation from my mother and my adoption.

Soon after, my parents decided to settle in Switzerland for professional reasons. My father ran a limited company in the food processing industry, and worked regularly with Arab countries. In Switzerland, my adoptive parents decided to start a legal process of adoption. They turned to a leading private lawyer to 'test' the waters, and acquaint themselves with Swiss procedures. After a period of six months, he gave my parents the green light. They subsequently submitted their request to the Commune of Grandvaux (Vaud).

I became a Swiss citizen in 1986. My French papers and the adoption application made by my parents in 1984, without prior approval, were not questioned¹⁶⁴; neither was the absence of a birth certificate from my biological mother, or the verification of the actual orphan status and an act of abandonment approved by a civil and secular State service. Due to this decision, I possess double nationality. My birth mother is therefore abandoned to a life without any right of contact or news about me. In fact, she shouldered the full responsibility and the hospital was exonerated from this process.

In 1988, my parents flew back to Beirut, telling me that they were going to bring me a surprise. I did not understand. I was going to spend the holidays with my aunt in the country while I waited for their return. Three weeks later, they presented me with Fadi, my first brother. He was born in the Geitaoui hospital, in the heart of Beirut, in the Phalangist neighbourhood¹⁶⁵. I am told his case seemed more complicated than mine. The child could not leave the hospital as quickly as I did. Thus, my adoptive mother decided to take the place of the birth mother in the same hospital. This was a risky affair. My adoptive parents received a first warning from a French Junior Consul, who refused to issue a visa for their second child. The First Consul was then contacted and made aware of the illegal nature of this adoption. For reasons that remain obscure, he relented and granted the papers, which my parents needed. Some of my father's friends supported the actions of my adoptive parents and managed to create the papers, which my brother needed for the Swiss authorities: they provided a Lebanese passport containing false names and a confirmation of abandonment by the birth mother. My adoptive mother informed me recently that the Swiss social services strongly discouraged my parents from resorting to this type of adoption. She said they did not fully acknowledge the relevance of these recommendations and, on their return with little Fadi, they managed to convince the authorities of their 'good intentions'. My baby brother also made the boat trip between the port of Jounieh and Cyprus before flying to Switzerland. My father told me that they had to hide Fadi during the journey. Nobody had to be aware that a baby was travelling with them. This information worries me even today. I wonder how we were able – myself at only 10 days old and Fadi at three weeks old – to remain silent at sea on board a little boat between Byblos and Cyprus while war was raging in Beirut.

¹⁶⁴ According to the excerpt of the letter of the *Service de protection de la jeunesse* (adoption authority), Lausanne, 1984.

¹⁶⁵ Drennan, D (2015). Article Notes on 'Child Lib', Wordpress: '*Local reaction to the National Liberation Movement is the Phalange, named after the Spanish fascists Party, which sought to maintain its power in the country, to remain neutral in the case of Israel, and to elaborate a clear distinction between what were mythological Phoenician roots of their presence in Lebanon, compared and contrasted to foreign interlopers and arrivistes. They were supported in this mythology and statecraft by the United States, Britain, and France, as witnessed in the 1958 occupation of the country by US Marines. Notably, this resulted in the attempted coup against president Chamoun, as well as the Battle of the Mountains. A side note: adoption started "legally" in Lebanon in 1956, at the behest of local French missionaries.*

In 1989, my parents went to collect their third surprise. This time, they went through a network they trusted. They thought that this channel was legal and less risky. The network was suggested by a friend of my father, a Swiss neighbour, who had also just adopted a baby from Lebanon. These lawyers proposed 'a complete service' to adoptive parents: custody of the child, birth certificate, letter of abandonment, Lebanese nationality and visa – everything that the receiving countries required. All that for the sum of USD 27,000 per child¹⁶⁶. Little Eli was in care – and born? – in a private house. He left with the nationality of his country of origin. A name for the mother, a birth certificate and a fictitious act of abandonment were provided as well. In 1990, it was our little sister Nayla who arrived, also from Lebanon, through the same channel as Eli. In 1992, we met the biological sister of Nayla by 'chance'. To the amazement of us all, the babies fought at their first meeting. We were puzzled by this unusual behaviour. In time, we realised that they resembled each other. Today, we are sure about this. They are twin sisters. They were separated before being given for adoption and sold at the same price to two different families because it is more difficult for couples 'in general' to take two children together. My adoptive parents still feel betrayed that they were not informed.

HOW THE DISCOVERY WAS MADE

I knew from a very young age that I had been adopted, that I came from Beirut, that Lebanon was a country at war and that my adoptive parents could not love me more if I had been their own child. I felt very special. During adolescence, I began to ask myself questions about the identity of my biological parents and the reasons for our separation. I obtained very few replies other than that my country had undergone a terrible war and that young girls who were mothers had a very difficult life. I was living a charade until the age of 16 years, when I felt a real need to uncover some information. When I was 18 years old, my adoptive parents shared with me the act of abandonment by my birth mother, which carried the seal of the hospital where they came to collect me. I discovered a birth date different from the one written on my Swiss and French passports, with a thumb print as the signature. Questions were going round in my head. This thumb print obsessed me over the following years. I compared my own thumbprint with this paper thousands of times. My adoptive father tried to understand. He offered me the services of a lawyer to investigate the letter and the identity of my birth mother. The results of the 'enquiry' told me that the paper was not official, that it was undoubtedly false or fabricated for the purpose; that, in any case, the Arabic was poor and the signatures dubious, that the thumbprint would not lead us anywhere. It could be anybody's thumb. That same year, my parents offered us – I, who was so insistent, and my brothers and sisters – our first journey to the land of our birth. An experience that would drastically change me.

At the age of 20 years, I decided to return to Beirut alone. I asked for an appointment with the Director of the hospital where my adoptive parents came to get me. I showed him the letter of abandonment by my birth mother and my new date of birth. The Director called me back three weeks later, promising me that he understood and wanted to help. At that longed-for meeting, he told me that my papers did not come from his hospital, that they were counterfeit, that no one from his establishment could have written this and that he was very sorry.

I thought then that everything was untrue, from beginning to end; that perhaps I was not even born in that hospital. My adoptive parents could not help me and they saw me becoming despondent. They began to realise the difficulties involved in a quest for identity and the importance of the right to origins.

Between the ages of 18 and 25 years, I used all my summer holidays from school and university to go to Beirut and expand my search. I checked nearly all the hospitals of the capital, as well as religious day-care centres and private houses, where I knew, through my brothers and sisters and from other adopted acquaintances, that other

¹⁶⁶ Workshop: 'The right to origins', Badael-Alternatives and The Legal Agenda, Beirut, 2014: 'International adoptions coming from Lebanon varied from USD 10,000 to 75,000. Since the war in Syria, some prices have reduced to USD 3,000'.

children had transited. I did not find anything. In Lebanon, few people understood my relentless efforts. Worse, they felt uncomfortable when I told them my story. Gradually, I became used to the customs of the country. I tried to understand their mentality¹⁶⁷.

One day, in Switzerland, when I was 22 years old, I had a premonition. It was stronger than me. I suspected that the Director of the hospital had not told me the truth. I was searching throughout Lebanon when the truth was perhaps much closer than they said. It became obvious. I was not going to let myself be defeated. I decided to return to the hospital. I did not tell anybody except my boyfriend at the time, who came with me. I took a hotel room close to the hospital and prepared myself for my return the following day. I will remember that night for the rest of my life. I did not sleep a wink. Above all, I was very frightened. The door of the room, the window, the night, the noises, everything seemed to smother me. I literally had an anxiety attack.

The next day, I got up knowing that I was going to discover something. I went into the Rizk Hospital very normally. I wanted to find out who was in charge of deliveries in 1984. I met the midwife, who was still working there in 2006! She was very uncomfortable with my request and sent me to the administrative basement of the building, informing me that 'these things' should not be requested and that I must inform the Director. There, being cautious, I pretended to look for a friend lost during the civil war who would have given birth here. A Lebanese friend, who understood the language and the social conventions of the country perfectly, came with us. The archivist listened to my 'false' history and simply opened the files. After four years of doubts and unsuccessful searches, with a click on the computer, this man found the relevant information given to my adoptive parents; my real date of birth, the name of my birth mother, the place, everything seemed to coincide with the famous 'false letter'. I had such an emotional reaction that the Archive employee realised my true identity. He closed the file, put it away in the drawer and insulted the person who accompanied me. The Director very quickly became aware of what had happened and summoned me to his office. He was ill at ease and worried that I would denounce him, so I decided to write a formal signed letter assuring him that I would keep this story confidential, and that I would only use the information for personal reasons and for my need for inner peace. Following this joint agreement, he called the different employees concerned in the hospital (midwife, doctors, archivist). They agreed on the way forward faced with such a request, probably the first inquiry based on the right to origins that they had been confronted with. They decided to give me only as much information as they judged useful to help with my search. They kept the complete file (to date, I have never had the right to consult it in its entirety)¹⁶⁸. They gave me half an A4 folder consisting of my birth certificate, my weight at birth, the address of my birth mother in 1984 and her phone number at that time.

I raced through the white and yellow pages and called a friend to help me follow up this line. Obviously, the phone number had not functioned for years and the address of the house was very vague. However, fortunately, the address and, particularly, the name of the family were still known by the Mayor of the district. After several days, I finally found the house. It was old and empty. But there were people around. I hardly dared approach them and, above all, I no longer dared to tell the truth, the real story, from fear that people would close up and lie to me again. The neighbours did not speak much French. In addition, my time in Beirut was coming to an end.

I decided to learn Arabic and I went back to Lebanon in 2008. Regularly and discreetly, I explored the area close to the house I had found two years earlier. It was there, finally, that I understood the words of an old neighbour, who muttered: 'I know who you are, how many times are you going to come here? How many of you are going to come back? You look a lot like her. She is no longer here. Nobody knows where she is. It is 30 years since she left. She was crazy, your mother. A prostitute who took drugs, she did not deserve you. Go back home'.

¹⁶⁷ Guigan, D, 'Why we need to know' in the chapter 'Understanding', Workshop: 'The right to origins', Badael-Alternatives and The Legal Agenda, Beirut, 2014.

¹⁶⁸ This non-access to my file makes the request for recognition of the relationship through my birth mother and for potential Lebanese nationality difficult.

I did not want to hear what she was saying, I was so happy to be in the right place and to finally look like someone. Not only was the address correct but the name was too. My mother had left her real name at the hospital! So it was not an anonymous birth. It did not seem like it in any case. It was a real hope.

The neighbours quickly gathered round us. Some told me that she left a long time ago, at least 26 years ago, perhaps to Switzerland or Sweden. I looked everywhere: Embassies, the Ministry of the Interior, the International Red Cross and marriage registers from different neighbouring churches. The name of my mother with her maiden name, given at my birth, did not appear anywhere; not in Switzerland, Lebanon or Sweden. I was at the point of giving up. I had given so much time and energy to try to reach my goal. It was eight years. For the first time, I wanted to give up. At the same time I was feeling unsure about my university course, I no longer knew where I was going, and then my boyfriend left me when I returned from this latest trip. Devastated, I decided to dedicate myself to my professional future and not to waste so much time on this story. I decided it was not good for me. My elusive past was not only too heavy for me to bear, but also too heavy for all the people around me.

I decided to fulfil a dream buried for years: to get into jazz school. I put all my energy into this. However, once I had started the course, my origins very quickly occupied me again. Finally, I decided to go and live in Beirut. I went there to learn the language and the music and, through them, to become closer to the culture; also perhaps to understand why my mother no longer lived there. At the age of 26 years, I left my studies, my family, my friends and Switzerland. I thought I would go for a period of six months maximum. I stayed in Lebanon for four years. It was finally through living there that my story began to circulate without me knowing it. A television team wanted to help me and thought they would be able to find my birth mother. Initially, I refused a meeting. Then, I realised that I would never reach my goal without help and support. I finally agreed to meet them. We became friends. They were my refuge in Beirut from all the tension I felt. I prepared a document that stipulated my right to refuse the broadcasting the programme until the final day and the right of ownership to my story. They accepted and resumed my search from the point where I had left off. They did what I had never dared to do alone: they contacted one of my supposed uncles to find out if my mother was still alive and, if so, to discover where she had gone¹⁶⁹.

THE EFFECTS OF DISCOVERY

In 2012, my mother was found and contacted by phone. At last. Initially, she denied my existence. The team did not tell me, but continued to see me and support me. Late one night, my mother called back. It was confirmed: my mother had been living in the Canton of Valais, Switzerland, for the last 27 years – an hour by train from the village where I had grown up. I was 27 and lived in Beirut at the time I learnt this.

I learnt that my mother had divorced at the time of my birth. Her first child, from her first marriage, had been taken from her by her ex-husband, so she hid the signs of her second pregnancy. She wanted to keep me. She was going to give birth in a well-known hospital and she knew she would be 'in good hands'. The hospital, however, aware of the absence of my father and her situation as a divorced woman, dissuaded her from bringing me up alone. My birth mother did not remember writing an act of abandonment, but recalled that she did actually sign a paper. Above all, she remembered being told that, in her situation, it was better to entrust the child to good people. Also, she could offer a wonderful present to a couple who 'needed' children. She was assured that she would have news of her baby, although she would not be told what happened to the child. Alone, faced with this pressure, she finally accepted and persuaded herself that it was for the best. Several days after our separation, she changed her mind, but learnt that she no longer had any rights regarding me. Soon after, she made a suicide attempt. This led to her being in a coma for several months. Today, she is still paying the price both physically and

¹⁶⁹ In Lebanon, in civil registration, citizens are registered by families under the same number. When a member is found, it is therefore less 'easy' to discover the identity of their relatives. Furthermore, I realised that many adoptees have the same 'false' number in their records.

psychologically. Later on, she met a Swiss man. They married and left Lebanon for my receiving country, where he could offer her another life and appropriate care. She carried the secret of this 'accident' alone until we found each other. Before we met, we decided to carry out a DNA test to be sure about our discovery. Both of us were very afraid about having any false hopes. The test was positive. A circle of torment, which had lasted 27 years, finally came to an end.

My first reaction, faced with this discovery, was an enormous sense of peace. I discovered that no one had wanted to abandon me, that my mother would have even preferred to die rather than live without me. This is extremely important for an adopted person searching for the truth¹⁷⁰. I am so glad that I did not believe the stories of poverty, war and crazy, drugged mothers who had abandoned their children.

My second reaction was a feeling of great sadness and injustice; anger at learning about the situation of women in the country of the Cedar tree; a reality that did not come from the war but from the culture and laws of Lebanon.

My third reaction was a need to understand how prospective adoptive parents, as well as social and political institutions, ignore any respect for human rights in order to obtain and circulate children 'at any price', without thinking about the mother who, herself, was in great need of support. Personally, I felt betrayed. I thought for a moment that everyone was lying to me, even my adoptive parents, who perhaps wanted to protect me. Despite the feeling of peace that it finally offered me, I felt that I was walking on a dangerous slope in terms of my psychological stability.

I also had a 'political revelation' which hit me hard. I often had the feeling that I had been culturally ripped from my country, not saved from a miserable fate as they had tried to make me believe. I often felt close to social classes much more marginal than those my adoptive parents came from. I realised how my vision of the world differed from that of my adoptive parents. I learnt that my birth mother and her family come from the south of Lebanon, that in 1982, following an Israeli invasion, they had to leave their green hills and find refuge in Beirut. I had the strange impression that my adoption was not just a private history but also the continuity of collective political upheavals¹⁷¹.

My fourth reaction was a feeling of responsibility towards my brothers and sisters, towards my biological mother, and even towards my adoptive parents. Today, my sister Nayla has been living in a psychiatric hospital for the past eight years. My other brother Eli is constantly going back and forth between drug use, 'in vain' attempts at emotional stability and criminal charges. Fadi, the most ordinary amongst us, votes for 'Ecopop'¹⁷² in Switzerland. My birth mother suffers not only from amnesia but from a terrible feeling of guilt. During the first days after we met each other, she only said to me 'I wanted to keep you, you know, do not blame me, do not blame me, do not blame me'. My adoptive parents feel they are the most helpless people in the world faced with the situation of my brothers and sisters, and they too are beginning to blame themselves.

My last reaction was a feeling of urgency to talk, to highlight our stories in order to help all those concerned by such a painful experience to move forward. I am convinced that my story is not unique, despite some media reporting it as such. I want to educate Lebanese civil society, Swiss social structures, Embassies of both receiving countries and countries of origin, adoptive parents, adoptees, associations engaged in the protection of the rights of the child and the family, and to take steps to stop the lies, so that no one can say 'we did not know' or 'say thankyou'¹⁷³ or 'it is because of the war'.

¹⁷⁰ Giraud, C (2008). *J'ai été volée à mes parents*. Paris, France: J'ai lu, p. 175.

¹⁷¹ I will not linger on this issue, which goes beyond the concerns of this contribution, but I strongly recommend the works of Daniel Drennan, another 'repatriated' adopted adult. Drennan, D (2012). 'Adoption: An economic and political crime', on Daniel Ibn Zayd, Wordpress, <http://www.danielibnzayd.wordpress.com>.

¹⁷² A citizen initiative aimed at reducing foreign immigration in Switzerland.

¹⁷³ Monestier, B (2005). *Dis merci ! Tu ne connais pas ta chance d'avoir été adoptée...* Paris, France: Anne Carrière.

PROMISING PRACTICE: THE IMPORTANCE OF SUPPORT, THE BIRTH OF BORN IN LEBANON

We need to have support that responds to individual needs and the different rhythms of each person. It is essential that, when facing their search, the adopted adult is not alone, regardless of their age, commitment or the rhythm needed for discovering their story and identity. We must give them an accessible story, and allow them a continuous link in time, whatever it involves. Adoptees of Lebanon, La Voix des Adoptés, or Children of the Cedars, can provide this first link¹⁷⁴.

With this in mind, I decided to create Born in Lebanon, as a complementary association to those already set up elsewhere: a NGO, based in Switzerland, which offers meetings between adopted people from Lebanon, who are in Switzerland, for a first discussion 'amongst us'; a sharing of experiences and mutual and professional support when a search begins; sharing information privately at first; cooperation and links with different persons/associations who try to engage with each other, not only in France but also in the Netherlands, the USA and elsewhere; above all, collaboration with support and listening spaces appropriate to our needs. An initial partnership was established in Switzerland with the association *Espace A*¹⁷⁵. Discussion groups, led by professionals, were organised. A request for cooperation on a project to digitise our archives has been sent to the religious superiors in the Achrafieh district. Born in Lebanon was created; a NGO without any professional ambition for itself, but with a particular concern in responding to adopted adults from Lebanon who want support.

PREPARE THE GROUND FOR AN ACCESSIBLE TRUTH

After several exchanges with people adopted from Lebanon, one of the greatest challenges in our searches is dealing with the lies and the things unsaid in the context of the Middle East. Many adoptees, after attempting a search, come back to their receiving country thinking that their files have disappeared during the war and that there is no way to reconnect with their origins. Indeed, this is what several ecclesiastical Courts tell them¹⁷⁶: all the documents say that the babies were born in the same orphanage, which burnt down during the war, and the archives no longer exist. Additionally, as our own experience showed, the hospitals are themselves ready to lie to ensure we never find out the truth. The stability of the adoptees is directly threatened when faced with such responses. To discover a difficult story at a social and personal, as well as at legal, level is painful. However, not to have access to the truth is much more devastating¹⁷⁷. In our case, not to know if we have really been 'abandoned', and not knowing if our families exist, greatly hinders any process of possible acceptance.

In this context, it is necessary to 'prepare the groundwork'. The adoptive parents, associations and private intermediaries have to clear the road before the adolescent or adult sets off alone. The right to origins is recognised by the UNCRC and, as such, applies to the adopted¹⁷⁸. Associations of adoptees are of great help in these areas and can take several forms¹⁷⁹. For Lebanon, the movements, which exist today, are of an informative nature (such as the work of Daniel Drennan via Wordpress¹⁸⁰), for 'practical' purposes to meet the wish for a family reconnection (through Adoptees of Lebanon), exchange of information (through Lebanese World or

¹⁷⁴ See: La Voix des Adoptés (France), <http://www.lavoixdesadoptes.com> and Children of the Cedars (The Netherlands), <http://www.childrenofthecedars.com>.

¹⁷⁵ See: Espace A, <http://www.espace-a.org>.

¹⁷⁶ Information available from Born in Lebanon.

¹⁷⁷ Excerpt from *Supra* 167.

¹⁷⁸ See: Article 7(1) of the UNCRC: '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' [emphasis added].

¹⁷⁹ Drennan, D, 'Adoption activism. Lebanon in a global context', Workshop: 'The right to origins', Badael-Alternatives and The Legal Agenda, Beirut, 2014.

¹⁸⁰ See: Daniel Ibn Zayd, <https://danielibnzayd.wordpress.com>.

Badael-Alternatives¹⁸¹), putting in contact and providing censuses (through Children of the Cedars¹⁸²), and support and meetings (through Born in Lebanon). It is important to help these associations gain credibility, to stay connected with them, and inform them when a process is completed in terms of establishing contact in a search or a strategy to deal with private or institutional bodies.

Through them and partnerships with governmental and non-governmental institutions that enable family reunification, the recognition of the right to origins, the offer of listening, and support platforms before, during and after the process of the discovery of origins, it is above all access to information that helps to prepare the groundwork. Together, these organisations should offer information at social, educational, religious and political levels. They should work with social authorities, NGOs, religious organisations, Embassies, lawyers, adoption intermediaries, private sector entities, guardians, foster homes, hospitals and networks of psychologists, many of whom have adoptees as patients, thereby ensuring that all the parties who have cooperated, or who currently follow us, in relation to our illegal adoptions, can be fully aware of their actions, so that these same bodies do not close their doors to us. They can then cooperate and give back to us what they have stolen: a true date of birth, a real name, our medical background, the history and culture of our community, the names of our birth parents, the real reasons for our premature separation¹⁸³.

At family level, associations of parents, social services and psychologists must develop the capacity to support the adoptive family and the couple who has adopted urgently; to return the time that adoptive parents often did not have in order to ask themselves the right questions; the grief of infertility that they rarely had the time to deal with¹⁸⁴; the validity of the system of full adoption which tends to cancel out the past of a child coming from somewhere else. Administrative gaps result in incomplete records, which can be devastating. In our case, Switzerland allowed four adoptions very close together. Did they really have time to evaluate the situation of each of these children? Had there been continuous monitoring? The State must be informed of these professional deficiencies and help us now to 'rewind the thread' in the other direction. Informative sessions for families and for the social, medical and psychiatric bodies that support families who have adopted should also be part of our respective agendas.

It is through working to obtain information and requesting cooperation that a path will open – and is in fact already opening – to encompass the difficulties, the uncertain past and the secrets, which adoptees from Lebanon, scattered across the world, carry with them, and for their birth families who, for the most part, remain invisible¹⁸⁵.

SHARED RESPONSIBILITIES

On Lebanese soil, absent fathers, moral and religious pressure, hospitals, nurseries, private lawyers, childbirth homes, the Ministry of the Interior, general security, all are responsible for the illicit nature of adoptions. On birth certificates where fathers are absent, the children are declared 'illegitimate'. The 1952 Law, which still has not been revised¹⁸⁶, then declares the children 'orphans' and grants them Lebanese nationality – a nationality given

¹⁸¹ See: Badael Alternatives, <http://badael-alternatives.org>.

¹⁸² See: Children of the Cedars, <http://www.childrenofthecedars.com>.

¹⁸³ *Supra* 167.

¹⁸⁴ 'According to the studies of Dr Jean-Vital de Monléon, 11% of adoptions across the world are identified as a result of humanitarian aims as opposed to 89% for reasons of infertility, congenital risk or celibacy'. Excerpt from Pierron, J, 'Adoption et Humanitaire. Notion de chance, de dette, culpabilité', a lecture organised by @adopte.ch, 2015. Dr J Pierron is a Korean adoptee and a member of La Voix des Adoptés. According to information by D Drennan, the religious laws of the 1960s in Lebanon specify that the adopting couple must have no children before adopting and must be at least 40 years old. In the majority of cases, this profile corresponds to an infertile couple. See: Drennan, D, 'Lebanon, 1975' on Daniel Ibn Zayd, Wordpress, <http://www.danielibnzayd.wordpress.com>.

¹⁸⁵ The need arises for an appeal to birth mothers on Lebanese soil alongside our own searches. Badael-Alternatives has foreseen such action since 2015. See: *Supra* 181.

¹⁸⁶ The right to official birth registration and a nationality for 'orphans' is ruled by the 1952 Lebanese Decree No. 15, Press doc, Badael-Alternatives, 2013.

through the mother's name and fictitious birth parents. In doing so, the right to an identity and to one's origins is being flouted, and false orphans are created. Several NGOs have exposed this and are already campaigning on Lebanese territory. An issue that not only concerns the children of unknown fathers, but also children from Palestinian refugee families, migrant workers, and, nowadays, from Syrian refugees. In this respect, for example, Lebanese Women's Right to Nationality and Full Citizenship, Act for the Disappeared and The Legal Agenda¹⁸⁷ are active civil and militant initiatives in Lebanon.

HEALING

In practice, the establishment of a team providing information, cooperation and 'healing' needs funds. I think that a first step towards such support could involve not only legal, social and psychological recognition of our illegal adoptions, but also financial.

Nowadays, an adoptee and their mother and birth family who are the victims of an illegal ICA, must pay an organisation to undertake a search, if it is possible, from their respective countries or bear the costs of travel, language courses and the legal services they choose. At the same time, they undertake therapeutic counselling, which is often essential and expensive. A solidarity fund should be anticipated for monitoring, and in preparation for the care of those individuals faced with discovering their illegal adoptions. I am thinking of the Swiss funds released this year for people who were separated from their families and placed in rural foster families, principally for the purpose of providing domestic workers¹⁸⁸. In 2015, Switzerland agreed to grant compensation to these foster children. It is a first recognition, a first hope of 'reconciliation' for the discovery of illegal placements. Could ICA be the second component of this recognition? The context here is international and obviously more complex, but it deserves the same level of attention. The receiving country and the country of origin are equally responsible, and we must have transparency and compensation. It is about rebalancing a system that serves, as it should have from the beginning, the mother, the birth family and the child.

CONCLUSION

In writing this contribution, I thought I knew all the circumstances of my adoption. After a recent dinner with my adoptive parents and my birth mother, I realise that the whole story is still not clear. Yet, I had begun to ask questions 12 years ago! What is the link between 'Big Dida' and the doctors at the Rizk hospital? Why would they not let my birth mother withdraw the abandonment? Who is my birth father and why was he absent? Is this lack of information really a consequence of the amnesia my birth mother suffers from, or is it that even a half truth is too heavy to tell me about? Personally, I now realise that the only answer, in order to reach peace and the truth in the face of these questions, is ongoing support (therapeutic, discussion groups, meetings) where the different persons affected in my story are invited to exchange and to talk to each other. Finally, it is the professionals who try to encourage my relatives to talk. That is a comfort.

In a social context, I am asking for further cooperation amongst the various bodies in place that are connected to our stories; that the wounds of those adopted through illicit channels are finally actually taken into consideration and recognised; that the workshops organised by these various associations do not serve only to reassure adoptive parents; that we have the courage to face up to the flaws in our respective systems and to examples of families devastated by their experiences¹⁸⁹, for the sole purpose of anticipating, moving forward and soothing.

¹⁸⁷ See: My nationality is a right for me and my family – Nationality campaign in Lebanon Jinsiyati, <https://nationalitycampaign.wordpress.com>; Act for the Disappeared, <http://www.actforthedisappeared.com>; The Legal Agenda, <http://english.legal-agenda.com>.

¹⁸⁸ *Engel*, a film by Muriel Jaquero, Switzerland, 2013.

¹⁸⁹ On this matter, see: Bromet-Camou, M and Perier, F (2008). *La désadoption. Une famille pour Hugo?* Paris, France: L'Harmattan.

At a legal level, I no longer want to speak only of the best interests of the child, but also of that of the biological mother, her family, the community of the child in the country of origin. In order for us to understand that the vulnerable mother is at the origin of our stories, that, in the majority of cases, she has been neither protected nor supported at the time of her pregnancy.

At a political level, I hope that, through our shared work of information, the receiving country and the country of origin can find common grounds for cooperation. I am convinced that these aspirations, which are already working for some, are possible, provided we give everybody – authorities or victims – the means to grow through our painful experiences.

Dida Guigan, founder of Born in Lebanon, and author of the music project and testimony Home, presented at Espace A in April 2015. See: <http://www.didaguigan.com>

The full text of this contribution (abbreviated for this publication by Emmanuelle Hazan) is available at: <http://www.borninlebanon.org> and <http://www.iss-ssi.org>

PROMISING PRACTICE: THE EXPERIENCE OF AFIN IN SPAIN

Beatriz San Román explains the role of professionals in working with adoptive families when they discover an illicit or illegal practice.

During the last decade, researchers and professionals in the Research Group AFIN have been dealing with an increasing number of Spanish families, who, having adopted internationally, suspect, sense or have signs or evidence that their adoptions were not legitimate. In this contribution, we will share our experience on this difficult topic with the hope of contributing to finding better support strategies for those affected.

Most of the adoptive families we have worked with initiated their process believing that adoption was an ideal solution both, for children without a family and for those who wished to have descendants, which was not possible 'naturally' for many. A mother explained: *'We wanted to have a child and adoption appeared to be an excellent option. We did not believe that genes were what made you a parent or a son/daughter, so why not adopt one of the millions of children who were languishing in orphanages? It seemed so logical...'*

It is worth highlighting that the wish to have a child is often experienced as imperative, necessary, and, therefore, the individuals absorbed in an adoption process face difficulties in recognising warning signs. Given that it is mandatory to use the services of an accredited body in most countries of origin, there is an idea that the procedure will therefore benefit from all the expected safeguards. Any signs of corruption or bad practice are minimised or ignored, with confidence that the Central Authorities (of which Spain has 23) supervise and control the work undertaken by these accredited bodies. Unfortunately, we now have sufficient information to convincingly confirm that the involvement of an accredited body has not always ensured that the procedure benefited from the necessary safeguards, and that the administrative authorities did not have sufficient oversight mechanisms to investigate and prevent the bad practices.

When, in some cases years after the adoption, families receive information that contradicts the story that is stated in the official file they were given, questions arise as to the legitimacy of the adoption. This situation is often a painful process of loss of innocence. At the same time, when looking into the decisions that they made at complex moments during the process, doubts sometimes arise as to whether they contributed, through their acts, to a business that had little to do with the child's best interests. These are extremely complex situations. Together with the disappointment and guilt, adoptive parents face the inequalities that shape the relationships between

countries, between ‘donor’ and ‘adoptive’ families, and the asymmetry of rights, options and capacity to choose of some women *vis-à-vis* others, depending on the place where they are living in the world.

Those of us who try to support them, sometimes also feel trapped by these vectors of inequality. The case described below illustrates this situation.

THE CASE OF BINA AND RAJU¹⁹⁰

In 2009, a well-known international NGO requested our help to contact the adoptive family of Raju, a child who had probably – as happened in many other adoptions undertaken in Nepal – been adopted without knowing that his birth mother had not given her consent. Despite this, she only wished to have news from her son and let him know that she had not abandoned him.

According to the information sent by the NGO, Bina (his first mother) was 14 years old when she gave birth to her only son, the result of an arranged marriage with a 33-year-old alcoholic, unemployed and violent man. These circumstances did not prevent her from accepting, caring for and supporting her son with the help of her family until she left her home and moved to the capital city with her son in order to avoid harassment and maltreatment. There, in order to work, she found a woman who managed a children’s home and offered to care for Raju in return for payment. Bina was to visit him once a week but, due to her job in the agricultural sector, she had to be away for three weeks, during which her son was adopted at the age of five years.

Six years later, having undertaken the pertinent checks and having ascertained the information relating to the family that had adopted Raju, the Central Authority in the region where the adoptive family was residing was contacted. As a reply, we received a disappointing letter, which stated that ‘the child had been adopted in accordance with Nepali and Spanish laws, that entailed the permanent severance with the family of origin, and created an irrevocable relationship with the adoptive family’, and that, therefore, contact between Bina and her son was not possible, as ‘it would entail significant harm *for his own interests and those of his family*’ [emphasis added by the author]. The administrative authority’s reply ended suggesting that Bina should send them a letter, to which Raju could have access if, when reaching adulthood, he was to be interested in ‘discovering more about his origins’.

Given this situation, a decision was made to directly contact Raju’s adoptive family. Wishing to protect Raju, his adoptive parents avoided the topic and did not even wish to receive Bina’s letter. Thus, the latter (together with the other documents gathered by the NGO) was archived in the files of the Central Authority. Maybe one day, when he is an adult, Raju will go there searching for information. By then, it could be too late for Bina, whose health, we have been told, is fragile.

The case of Bina and Raju serves to illustrate the difficulties to grant truth and justice to the persons affected by illegal adoptions, *i.e.* the adoptees, their families of origin and those who adopted them. The system of safeguards let them down at the time of the adoption and, again, years later, by using systems and legal principles. Terms such as ‘the best interests of the child’ or the law on sensitive data protection are used to justify a *de facto* situation, and dismiss the importance that a human right has been violated. When there is no judicial decision (which is extremely difficult to obtain in ICAs), the interests of involved individuals remain dependent on the interpretations of the law and the (good) will of those who have the power to apply them or to issue a decision as a result of the rights and responsibilities incumbent upon them¹⁹¹.

¹⁹⁰ Fictitious names.

¹⁹¹ Marre, D and San Román, B (2012). ‘El “interés superior de la niñez” en la adopción en España: entre la protección, los derechos y las interpretaciones’ in *Scripta Nova* – Revista electrónica de geografía y ciencias sociales, Vol. 16, pp. 395 – 399.

SUPPORTING THE AFFECTED FAMILIES

In other chapters of this publication, the support to adult adoptees who, in their search for their origins, unfortunately discover evidence of corruption in their proceedings, is addressed. Thus, we will focus here merely on the work undertaken with families when parents with adoptive children discover or suspect that their processes were not legitimate.

As mentioned above, the cases that we have dealt with in our professional practice belong, mostly, to two major groups: those who, once the adoption is finalised, receive information that contradicts what is stated on the official documents (sometimes through their own children, whose stories do not match what is mentioned in their files); and those who, when reviewing the decisions made during their adoption proceedings, suspect that they contributed somehow to a corrupt system. In both situations, the first step is to develop an environment for them to be heard and to reflect, in which those who consult do not feel judged but rather supported. Often, the ability to put suspicions, fears and anxieties into words – and to understand what or why this may have happened – entails a certain feeling of liberation. However, it also requires particular sensitivity from the professional who, in addition to offering support in the working out of consequent difficult feelings, has to assume a function of facilitating the verbalisation and putting into words questions and issues that may be particularly painful.

A second phase is to categorise the information that one actually holds about the suspicions, by exploring various possibilities. For the latter, anthropological knowledge is very helpful in order to help to take into account the cultural differences and to dismantle stereotypes. In general, once the process has started, they feel the need to 'know the truth', *i.e.* to research and clarify what really happened concretely in their case. This is not always possible and, in our experience, it appears that the difficulties vary from one country of origin to another. Thus, whilst, for example, in Ethiopia it is usually not difficult to reconnect with the family of origin, even in those cases in which the official documents state that they have died or have disappeared, in other places, such as Nepal, India, or China, the search may go on for years and still have no final outcome.

When adoptive parents have suspicions or signs about their processes not being in order but it is difficult to know what really happened, the situation becomes particularly complex. To be able to talk about it and to assume that there were moments, in which inadequate decisions were made, is a process that is similar to mourning, with phases of denial, anger, pain and sadness.

When children themselves are aware that their adoptions were not legitimate, we sometimes face important resistance to believing their stories. For the adoptive parents who have usually yearned for the adoption for years, the situation can be extremely disconcerting and painful. Often, the intermediary bodies and others voices from those close to them, presumably well-meaning, advise them to downplay what the children say, by referring to their 'great imagination' and adjustment difficulties. This is what happened to a nine-year-old girl who was adopted by a single Spanish lady. The girl insisted that the information in her file was wrong and that she felt kidnapped by that woman, who wanted to assume the role of her mother. As is easy to imagine, she refused to call her 'mum' and to establish any kind of affective relationship with her. The situation changed considerably when the woman who had adopted her decided to take the girl's side. They agreed that the girl would call her by her name and that, together, they would try to reconnect with her family in the country of origin. The search has not been easy, but both have managed to establish a positive relationship, and have accepted the fact that, while the situation that life has presented them with is complicated, they can face it together.

In our rather brief experience, the most common cases are those in which the consents of the birth mothers – and/or families – were obtained through deception and, in many cases, forged death certificates were issued to declare their children adoptable. They agreed to their children being adopted by families from other countries,

as a means to provide them with better opportunities, but believed that they would keep in touch, and that they would receive information about their children's situation and progress. This approach is in total conflict with the expectations of the adoptive families, in whose culture it is difficult to conceive the family in terms of a multi-kinship or multi-parental relationship¹⁹². Regardless of the particularities of each case, we believe that professional support must consist in helping to put order into the ideas, to gather as much information as possible, to work through emotions and feelings, and to make decisions that can be upheld, now and in the future, by respecting their characteristics and their timelines. It is necessary to make sure that they can analyse the situation from a wider perspective that gives priority to the rights and interests of their children and that include those of the family of origin.

When it is possible to reconnect with the family of origin, the first contacts between the families usually take place through letters and photographs and, in many cases, they continue this way for years. Sometimes, what is sent by the adoptive families gets no reply from the other party. However, through the persons involved in these transmissions (usually the workers of NGOs or of the institutions where the children lived during the transition from one family to another), we know that the letters and, in particular, the photographs have very high value for the relatives in the country of origin.

Sometimes, the adoptive parents decide to go there and visit the family of origin. Sometimes, they even establish a more open relationship via the phone, e-mail or social networks. After a first reconnection trip among adults, some return once or several times with their children. These are still new experiences, at least in Spain (where, until Law No. 26/2015, which amends the child and adolescent protection system approved on 28 July 2015, open adoptions or adoptions with contact were not addressed in the legislation, nor in institutional practice). However, as has been mentioned in studies undertaken in countries where adoptions with contact are common practice¹⁹³, when the adoptive families have worked beforehand on granting a place to the families of origin in their discourse and in their emotional world, the experiences appear to be positive. It is true that, after an initial idyllic phase, some adoptive families experience difficulties in preserving their enthusiasm with regards to a relationship that is marked by distance (not only geographic) and inequality. Even though it appears from their narratives that the visits and contacts are positive for their children, it is certainly true that it remains difficult to guess how they will experience and manage this relationship as times passes. We therefore need meticulous research to help us understand these experiences and how they are managed – and developed – by the persons involved. This is why, from January 2016, our research group intends to initiate a study, in which children and adolescents will be involved, as well as members of their families of origin with whom they have a relationship.

¹⁹² Cadoret, A (2004). 'Pluriparentesco y familia de referencia', in Marre, D and Bestard, J (Eds.). *La adopción y el acogimiento. Presente y perspectivas*. Barcelona, Spain: Universitat de Barcelona, pp. 273 – 283; Cadoret, A (2009). 'Parentesco y figuras maternas. El recurso a una gestante subrogada por una pareja gay', in *Revista de Antropología Social*, Vol. 18, pp. 67 – 82; Salazar, C (2004). 'Repensar la consanguinidad', in Marre, D and Bestard, J (eds.). *La adopción y el acogimiento. Presente y perspectivas*. Barcelona, Spain: Universitat de Barcelona, pp. 313 – 337; Olavarria, M^a E (Coord.) (2013). *Parentescos en plural*. Mexico City, Mexico: Universidad Autónoma Metropolitana, Porrúa.

¹⁹³ Berge, J M, Mendenhall, T J, Wrobel, G M, Grotevant, H D and McRoy, R G (2007). 'Adolescents feelings about openness in adoption: implications for adoption agencies', in *Child Welfare*, LXXXV(6), pp. 1011 – 1039; Ge, X, Natsuaki, M N, Martin, D M, Leve, L D, Neiderhiser, J M, Shaw, D S, Villareal, G, Scaramella, L, Reid, J and Reiss, D (2008). 'Bridging the divide: openness in adoption and postadoption psychosocial adjustment among birth and adoptive parents', in *Journal of Family Psychology*, 22(4), pp. 529 – 540; Grotevant, H D, Wrobel, G M, Von Korff, L, Skinner, B, Newell, J, Frieze, S and McRoy, R G (2008). 'Many Faces of Openness in Adoption: Perspectives of Adopted Adolescents and Their Parents', in *Adoption Quarterly*, 10(3-4), pp. 79 – 101; Mendenhall, T J, Berge, J M, Wrobel, G M, Grotevant, H D and McRoy, R G (2004). 'Adolescents' Satisfaction with Contact in Adoption', in *Child and Adolescent Social Work Journal*, 21(2), pp. 175 – 190; Neil, E C (2009). 'Post-Adoption Contact and Openness in Adoptive Parents' Minds: Consequences for Children's Development', in *British Journal of Social Work*, 39, pp. 5 – 23; Wolfgram, S M (2008). 'Openness in adoption: what we know so far – A critical review of the literature', in *Social Work*, 53(2), pp. 133 – 142.

A FAMILY MATTER

To recognise, in front of the children, that we made a mistake – even though, at the time, we did not know or could not see it – is an exercise of honesty, which acknowledges not only their right to know, but also the fact that we got it wrong, recognise this and want to repair it. It may seem that an unnecessary pain is being added, but family relationships based on sincerity, unconditional love and the recognition of mistakes are the strongest ones and transmit the best examples, whilst those based on concealment or mistrust are bound to fail.

Furthermore when there are clear indications or evidence of irregularities in the process itself, it is very likely that the adoptee, when mature or earlier, will sense or suspect it. As has already been mentioned, sometimes, the memories of the children themselves question the veracity of the information in their adoption files and/or the legitimacy of the procedure. In those cases, it is vital to make them feel that their parents are on their side, and that they do not downplay or disbelieve their accounts, but are willing to research and do everything possible to ascertain the truth.

Meetings with professionals to reflect on the best way to address the issue with the children may offer other perspectives and help to manage difficult feelings. When we ask adult victims of ‘irregular’ adoptions, they do not regret not having had a perfect family, but they do all appear to put emphasis on the need for dialogue and sharing information and, if applicable, the pain of having been concealed, spared or denied information. Even though the reactions, feelings and development of each person may be different and may have differing rhythms, insofar as the issue is faced as a family matter, our experience is that, while relationships within the families may at some point become tense and go through difficult situations, they come out stronger in the end, regardless of the final outcome of the search.

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Further reading

San Román, B, Grau, E and Barcons, N (2014). *Hablar de adopción también cuando es difícil*. Pamplona, Spain: CORA; available at: http://www.coraenlared.org/app/download/9982045398/GuiaCORA_HABLAR_DE_ADOPCION.pdf?t=1430736456. This guide was commissioned by Coordinadora de Asociaciones en defensa de la Adopción y el Acogimiento (CORA), the Spanish federation of associations of adoptive families and adoptees. In a direct and simple language, it reflects on how to address delicate topics relating to adoption in family communication, including certainty or suspicion of illegalities in the proceedings. It also includes a chapter on how to talk to children about news reports that link adoption to child trafficking.

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PROMISING PRACTICE: FAMILY MEDIATION

Jaime Ledesma del Busto provides an explanation of how international family mediation can be one effective means of bringing different parties together and opening communication lines.

The moment in which a person initiates an active search for the origins is the beginning of a very complex period in which the adoptee may discover 'surprises' relating to his own background – information that they had never imagined before.

This information which the adoptee was not aware of may sometimes be positive or irrelevant, but there is also a possibility that they may have to face unpleasant data or conflicting information. Similarly, other persons may also be affected by this information, in particular the biological mother/relative, family and friends or the adoptive parents and their family, which makes them feel that they are the accomplices of a fact of the past that there were not directly responsible for and which they were not even aware of.

When faced with a conflict of these dimensions – like in any other conflict in general – family mediation may be considered to be the most helpful and positive alternative to address it. Impartial and neutral and by relying on the willingness of all the direct participants in the adoption triangle (adoptee, biological family/family of origin, and in those cases in which this is requested also the remaining relatives through adoption, in particular the adoptive parents).

CURRENT SITUATION IN THE SEARCH FOR ORIGINS

The reality is that it remains complicated to undertake an adequate and professionalised search that would offer the responses to a whole range of possibilities, which may become increasingly complex. On the other hand our journey as professionals in this field is developing a wealth of experiences that are bringing us closer to better targeting the new cases of searches for origins that we are dealing with. Furthermore, we may add to the latter good tools that offer us greater opportunities for success, such as new technologies, sciences (DNA databanks, for example), globalisation and social networks; even though the latter are a risk in the absence professional support because it may be considered to be a shortcut that may become a double-edged sword.

In general, when an adoptee decides to initiate an active search for his origins, they face two important and obvious possibilities: **to find** or **not to find**. However, it is not that simple. Each of these two options entails various implications, which they may not have stopped to think about beforehand.

Let us focus on the most common ones:

When finding one's biological origins, the immediate possibilities that we may face are diverse:

- a. The process undertaken in the search for the biological origins is correct: this option in turn may be divided into other new possibilities:
 - *Success with the objective.* Everything takes place normally as expected.
 - *Failure with the objective.* The person(s) of origin cannot / do not wish to have any type of contact nor any exchange of information with the adoptee.
 - *Failure with the expectation.* It is not the story or kind of person that was expected to be found. One is not prepared to accept the adoptee and to include them in one's own identity.

b. The outcome of the search for biological origins is NOT correct:

- *Mistake in the search process.* Based on the available data, the wrong person is located.
- *Illicit adoption*

Non-transparent procedures

- *Negligence:* For example, there is a mistake or a lack of key documents in the file.
- *Abuse/business:* There is indeed confirmation that the adoptee was relinquished based on the required consents (the relinquishment by the biological mother) and apparently legally but there appear to be invoices of undue payments to intermediaries or unclear documents during the proceedings.

Child abduction (or so-called 'stolen children')

- Not only was there a means to make profit but there was also self-deception, duress or manipulation to obtain a baby from a biological mother (or relative). Their background has been amended to make him adoptable in a pseudo legal manner. Sometimes it is nearly impossible to locate the origins because any traces have been removed from the documents.

c. There are doubts as to the veracity of the biological origins:

- *There are no means to ascertain the truth* (the biological mother does not have full capacity to confirm this fact / denies having given birth in the past...).
- *There are doubts as to the version stated by the parties:* the account of the adoptive family and/or the documents that have been kept in the adoption file do not match coherently. (For example, the biological mother states that her baby died when she gave birth but there are inconsistencies in the documents that prove the opposite).

When one is unable to (physically) find one's biological origins

- a. There are no means to search for and locate them (or, for example, there is no identity information relating to the biological reference person in the adoption file).
- b. The biological mother/persons relating to one's origins are already deceased.

Other thousands of implications amongst the various possibilities may result from each of these options, depending on the motivation, expectations and needs of each of the actors that could be involved in a process of search for origins as complex as the latter.

The importance of a good preparation of the adoptee – and of the other persons involved in this search for origins – is therefore obvious in order to face each of these possibilities (and even be aware that there might be other possibilities that cannot be imagined).

This is particularly sensitive if the latter is also a form of illicit adoption; and even more unpleasant if there exists a possibility that it may have been some act of 'child theft'. Thus, what is best is to have professional support prior to, during and after this process of search for origins; not only for the adoptee, but also for the biological mother – or the person of origin – and the adoptive parents who are also affected when they discover that they participated without knowing it in an adoption in obscure circumstances.

FAMILY MEDIATION IN A SEARCH FOR ORIGINS

Through family mediation – as a voluntary and confidential process, with the support of an impartial and neutral professional – all participants are offered an environment of communication and progressive coming together, which facilitates considerably the process. Thus, the adoptee as well as the biological mother – or the other participants – will be able to integrate any new information into each of their own stories.

Before taking any step further in the search for origins, family mediation helps the adoptee to assess his motivations and expectations and to feel better prepared to receive diverse possible information. Similarly, this also applies to the other party who will also benefit from family mediation.

Should the family mediator encounter a background of illicit adoption, they will have to provide the information in a progressive manner by alleviating the potential impact it may have on each of them. To face a dramatic – or unwanted – story on one's own may cause deeper harm to that person, their family and the other party who is also an actor in this search process.

The process of family mediation will not be able to solve the injustice committed in the past but it will indeed be able to help integrate it in a calmer way, by becoming aware of the details progressively, by communicating through a filter that helps to control and process the emotions of each of the parties, and by preparing before moving forward to the next stage (exchanging letters, questions, replies, photographs...). The mediator will help them to adjust the rhythm of the process that each of them needs, and will rely on the coordination and support of other professionals, who must also participate, in parallel, in this process (therapy).

Should there be a wish to prepare a physical meeting and to maintain a potential relationship in the future, despite having discovered an unpleasant story, the mediator will facilitate the communication between them until the relationship is fluid and serene – or until both parties in the mediation request it voluntarily.

In the case of children, the search is even more complex. Whilst most professionals do not recommend initiating a search for origins until they have reached considerable maturity, there are circumstances in which the search is undertaken when the adoptee is still a child.

Moving forward in the research without the adoptee's preparation, consultation and consent must be avoided, given that they are the main owner of this story. If this search is undertaken and the family of origin has been located without the underage adoptee having previously been informed, this may entail considerable impact, some rejection and an important emotional gap.

When initiating such a search for origins is considered positive for the underage adoptee, professional support and advice must be provided, not only to protect mainly the adoptee, but also his family and persons from his biological background, who are being looked for. One of these professionals, amongst others must be the family mediator.

PROSPECTIVE LINES OF WORK

Based on the experience gained in the past few years, we can affirm that more preparation and training of the various professionals that may be involved in a search for origins is convenient. In addition to this *professional training*, it is important to develop a good multidisciplinary work team, which acts in coordination with the administrative authorities, trusting in the work of all of them, irrespective of the profession and nationality of each of them.

From the perspective of the administrative authorities, it is important that good advice is offered and that the latter is aimed at the requestor throughout this process, by cooperating with professionals and organisations that work in this field. It would also be desirable for private bodies, which were involved in adoptions proceedings in the past to cooperate in this process, by allowing access to the files of each requestor, thereby providing them with confidence.

In the case of intercountry adoptions, it would be very convenient if there could be a network of communication and work amongst counterparts from different nationalities, which are involved in such an important and complex process of family mediation for a search for origins, such as this general protocol.

Finally, family mediation will not be able to remedy the mistakes and offences that may arise around us, but it will indeed ensure company and preparation in order to facilitate communication and the integration of the story of the person who has decided to search for his origins (and of the person who, voluntarily, agrees to be involved in the latter), by alleviating the pain that may arise in some chapters of this fascinating journey towards the development of a more comprehensive identity.

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SOCIAL CONSIDERATIONS

Based on her decades of work in the field of adoption, Professor Karen Smith Rotabi, with inputs from Elizabeth Larsen, provides an overview of the social considerations to be examined in relation to illicit adoption cases.

ICA has been a controversial social practice since at least the ‘Vietnam Babylift’¹⁹⁴. With exponential growth in ICA, scandals have increasingly been a prominent feature in discourse amongst activists dedicated to ethical adoptions and child rights. While scandals have been well documented, including the methods and means of illicit adoptions¹⁹⁵, little is known about families of origin who have been exploited through acts of force, fraud and coercion.

The term ‘social considerations’, for the purpose of this Chapter, encompasses the various behaviours, responses and interactions of individuals as well as society in response to illegal adoptions. Social responses are wide ranging, covering basically responses that are not legal, political or psychosocial, as covered in other chapters. In particular, this Chapter incorporates the multiple dimensions of adoption fraud, including the social-political-economic/poverty context of fraud prior to the adoption, as well as the social-emotional issues that adoptees often experience as they search for answers and learn about their pasts.

To establish the major ideas related to illicit adoptions, it is important to note that there is a continuum of fraud that ranges from poor practices all the way over to abduction into adoption. On the latter issue, only one empirical study to date has involved in-depth interviews with mothers who have reported their child abducted into adoption¹⁹⁶. This case study, in combination with an in-depth investigation carried out by the International Commission against Impunity in Guatemala, provides ample evidence of serious and persistent problems driven by organised crime during the adoption boom in Guatemala (see *Promising practice: Guatemala and the criminal prosecution of human trafficking for illegal adoption purposes: Identification of strategies to fight impunity* in Chapter 5: Political considerations). Beyond these studies, there is essentially no rigorous empirical evidence about this group of mothers and their families who yearn to be reunited with their abducted child.

This fact is not to suggest that there are few such cases – ISS’s study *Investigating the grey zones of intercountry adoptions*¹⁹⁷, based on existing secondary sources clearly shows otherwise. However, it remains extremely difficult to reach these individuals as they live in fear and with traumatic experiences. Engaging them in research is very challenging on questions ranging from sampling issues to ethical research concerns about re-victimising the parents who have experienced force and coercion in the loss of their child. In the case of Guatemala, there

¹⁹⁴ Joe, B (1978). ‘In defense of intercountry adoption’, in *The Social Service Review*, 52(1), pp. 1 – 20; Bergquist, K J S (2012). ‘Implications of the Hague Convention on the humanitarian evacuation and ‘rescue’ of children’, in Gibbons J L and Rotabi K S (Eds.). *Intercountry Adoption: Policies, Practices and Outcomes*. Surrey, United Kingdom: Ashgate Press, pp. 43 – 54.

¹⁹⁵ Smolin, D M (2006). ‘Child laundering: How the intercountry adoption system legitimizes and incentivizes the practices of buying, trafficking, kidnapping, and stealing children’, in *Wayne Law Review*, 52, pp. 113 –200; available at: <http://law.bepress.com/expesso/eps/749/>; Rotabi, K S (2012). ‘Fraud in intercountry adoption: Child sales and abduction in Vietnam, Cambodia, and Guatemala’, in Gibbons J L and Rotabi K S (Eds.). *Intercountry Adoption: Policies, Practices and Outcomes*. Surrey, United Kingdom: Ashgate Press, pp. 67-76; *Supra* 69.

¹⁹⁶ Mónico, C (2013). *Implications of Child Abduction for Human Rights and Child Welfare Systems: A Constructivist Inquiry of the Lived Experience of Guatemalan Mothers Publically Reporting Child Abduction for Intercountry Adoption*. PhD dissertation; available from VCU Digital Archives, Electronic Theses and Dissertations, <http://scholarscompass.vcu.edu/cgi/viewcontent.cgi?article=4136&context=etd>.

¹⁹⁷ Fuentes, F, Boëchat, H and Northcott, F (2012). *Investigating the grey zones of intercountry adoptions*. Geneva, Switzerland: ISS/IRC, 142 pages.

is credible evidence that speaking out against those who abducted children is dangerous, as human rights defenders and the families they represent have received death threats, and at least two of these individuals were forced to live with bodyguards as they confronted those in the illicit chain of child sales into adoption¹⁹⁸.

Given such challenges faced by biological families, adoptees and adoptive families, this Chapter focuses on two specific social considerations. First, the array of professional assistance that is necessary for accompanying the different parties when searching for the truth. Second, the Chapter examines the various social responses to an illegal finding, breaking taboos through the media, social networks and advocacy campaigns. For example, the lessons learned from a Guatemalan search and reunion are presented as a promising practice in terms of media responses. Numerous other promising practices by other professionals are likewise presented.

4.1 SEARCHING FOR THE TRUTH WITH PROFESSIONAL ASSISTANCE

The dynamics of loss and questioning create a context for adoption search and reunion; seeking one's family of origin is not a new phenomenon among adoptees or for biological families seeking a relationship with their child. There has been a fascination with this particular aspect of post-adoption support work, as the media has followed cases with anticipation of love lost and emotional reunions. However, little is known about reunion in the case of illicit adoptions in the international context. Questions arise about how to support adoptees and their families as they seek information and potentially find each other, especially when the circumstances of the adoption were illicit. While trauma is an obvious issue in the worst cases, complicating matters are cross-cultural interactions, the need for language support in many cases, and expectations in light of the vast economic difference and families of origin living in poverty, as is the case for most ICAs.

One of the service sectors now operating as a follow-up to the ICA boom is private birth mother and family of origin investigators. These individual investigators seek information about the adoptee's past, beginning with the documentation available and expanding the net through an investigative process. Little is known about this entrepreneurial endeavour, and numerous risks of supplementary trauma can exist when trained social service professionals are not involved. The advantages of using trained professionals are manifold, in the country of origin for search and reunion case management (see *Promising practice: Search and Reunion Case Management Exemplar – Children Abducted During El Salvador's Civil War*), and in the receiving country (see *Promising practice: Raising awareness about false birth registration practices, known as the Brazil Baby Affair*), as well as resorting to a reputable accredited adoption body (see *Promising practice: How Accredited Adoption Bodies (AABs) in Sweden and Finland can assist in illicit adoption cases*).

It is therefore important to ensure that some surveillance and a minimum level of professionalism are required for individual investigators. The HCCH Guide to Good Practice No. 1, at Para. 221, notes that the French Community of Belgium 'has made a positive decree that their accredited bodies are responsible for ensuring that their foreign intermediaries and collaborators follow the principles of the Hague Convention'. The HCCH Guide to Good Practice No. 2, at Para. 42, further notes that 'the general principles of the 1993 Hague Convention apply to all entities or individuals involved in intercountry adoptions arranged under the Convention, whether they be Contracting States, Central Authorities, public authorities, accredited bodies or approved (non-accredited) persons or bodies or other intermediaries'¹⁹⁹.

¹⁹⁸ Cruz, N, Smolin, D, Dilworth, A, Rotabi, K S and DiFilipo, T (2011). 'Stolen children: Illegal practices in intercountry adoption and the need for reform'. Invited presentation for the Human Rights Impact Litigation Clinic of the American University Washington College of Law, Washington, DC, USA.

¹⁹⁹ The standards expected of persons working within the 1993 Hague Convention can be gleaned from Article 22(2), which states: '(a) meet the requirements of integrity, professional competence, experience and accountability of that State; (b) are qualified by their ethical standards and by training or experience to work in the field of intercountry adoption'.

PROMISING PRACTICE: AN EXAMPLE OF SEARCH AND REUNION CASE MANAGEMENT: CHILDREN ABDUCTED DURING EL SALVADOR'S CIVIL WAR

The *Asociación Pro-Búsqueda de Niñas y Niños Desaparecidos*²⁰⁰ (hereinafter, *Pro-Búsqueda*) is a small NGO dedicated to the search and reunion of adoptees and their biological families. The organisation has documented over 800 cases of disappeared children, nearly 400 of whom are adoptees living overseas²⁰¹. To achieve the goal of reuniting families, Pro-Búsqueda conducts a case management process that addresses the details of the reported abduction and the trauma of those separated: biological family members, adoptees, and sometimes even adoptive parents²⁰². A case management process is detailed by Mónico and Rotabi²⁰³ as a seven-stage approach, summarised briefly as follows.

When an individual or family comes forward requesting assistance, the organisation begins with (1) the case submission, most often initiated by the biological family. In this early phase of intervention, Pro-Búsqueda documents the facts of the actual child abduction. Then, (2) personal testimonies about the abduction are documented through recorded interviews. Next, (3) a contextual investigation is initiated, including the oral story, legal documents and other historical sources, when available. Once this step is completed, the next phase is (4) the follow-up on any leads in the case, with an emphasis on interviewing those individuals who witnessed the abduction or anyone else with direct knowledge of the case. The following stage (5) involves interviewing relevant authorities, often governmental civil servants, when indicated as needed due to the leads identified during interviews. The next step is (6) a report on the findings of the investigation that is provided to the party who instigated the investigation. If successful, (7) a family reunion is planned, including psychosocial services to prepare and set expectations with the family group for this highly emotional stage. Furthermore, post-reunion psychological services are provided to assist individuals and the family group. This is particularly important when considering the emotional nature of family reunions, especially family meetings intersecting with ICA and related trans-racial/cross-cultural family experiences²⁰⁴. Psychosocial services include language interpretation, given the barriers to communication. Many children who were adopted overseas are not fluent in Spanish, and many birth families do not speak the language now spoken by their adult children²⁰⁵.

It is important to note that Pro-Búsqueda was founded by human rights defenders, and today, they have employed professional social workers with training in case management. This is evidenced by an investigative process that includes admission, assessment, case analysis, interviews, and individual and family counselling to set expectations. In addition, intensive clinical social work services are provided as needed to those affected by loss and grief, especially during and after family reunion.

It is also important to note that some individuals and families receive good news while others receive news that may further traumatise them – some children and families of origin are simply not traceable due to disappearances during the conflict and chaos of the Civil War. Also, when the adoptee comes forward to look for their family, they may learn that there are no living immediate relatives, thereby making them the only family

²⁰⁰ See: Asociación Pro-Búsqueda de Niñas y Niños Desaparecidos, <http://www.probusqueda.org.sv>.

²⁰¹ Asociación Pro-Búsqueda de Niñas y Niños Desaparecidos (2002). *El día mas esperado – Buscando a los niños desaparecidos de El Salvador*. San Salvador, El Salvador: UCA Editors (2nd ed.).

²⁰² Alvarenga, E (2011). *Searching for the truth: Pro-Búsqueda visits Virginia Commonwealth University*. Richmond, VA, USA: Virginia Commonwealth University School of Social Work.

²⁰³ Mónico, C and Rotabi, K S (2012). 'Truth, reconciliation and searching for the disappeared children of civil war: El Salvador's search and reunion model defined', in Gibbons, J L and Rotabi, K S (Eds.). *Intercountry adoption: Policies, practices, and outcomes*. Surrey, United Kingdom: Ashgate Press, pp. 301 – 310.

²⁰⁴ Kirton, D, Feast, J and Howe D (2000). 'Searching, reunion and transracial adoption', in *Adoption and Fostering Journal*, 24 (3), pp. 6 – 18.

²⁰⁵ *Supra* 202.

survivor of the War. The clinical dimensions related to grief and loss – even when the investigation itself is successful – cannot be underestimated, and a skilled social worker or adoption counselling professional must be prepared to engage in intensive grief and loss intervention. Furthermore, families of origin may have their hopes dashed as their lost child cannot be found, and they have unique support needs in fully accepting their own loss many years after the child's abduction. Providing family support, in the context of trauma – and repeated trauma in some cases, in which old experiences are exposed and re-lived in the investigative process – requires critical clinical skills in grief, loss, and post-traumatic stress disorder. This set of skills cannot be underestimated and it is frequently absent in searches for families of origin in other countries.

PROMISING PRACTICE: RAISING AWARENESS ABOUT FALSE BIRTH REGISTRATION PRACTICES, KNOWN AS THE BRAZIL BABY AFFAIR

Patrick Noordoven, the Managing Director of the NGO Brazil Baby Affair²⁰⁶, describes his work advocating for the right to identity, especially in violations of ICA practices.

This contribution aspires to provide considerable insights into the human right to identity from an international human rights perspective. The insights put forward in this article attempt to contribute to the human rights debate about the fundamental importance of the UNCRC and three other treaties²⁰⁷ for ICA. From this perspective, this contribution focuses on human rights violations committed through false birth registration practices in Brazil for the purpose of ICA, known as the Brazil Baby Affair.

The human right to know one's origins and identity, in particular in cases of illegal deprivation of identity, are safeguarded in the UNCRC²⁰⁸ and the ECHR²⁰⁹ (see *Chapter 2: Legal considerations*), making State parties legally accountable for these human rights. Nonetheless, in order to prevent the illegal deprivation of identity, particularly through illicit practices in ICA, no provisions are stipulated in either the UNCRC or the 1993 Hague Convention to address this violation of human rights. Likewise, neither enforcement nor recovery of the right to identity is organised by means of any respective convention or its optional protocols. Institutionalised expertise, in the form of an international competent body, to deal with these issues, has yet to be established.

BIRTH REGISTRATION, CIVIL REGISTRATION, BIRTH CERTIFICATE AND THE RIGHT TO IDENTITY

Deprivation of the right to identity for the purpose of an illegal ICA – known within Brazil as *adoção à brasileira*²¹⁰ – is relatively easy to conduct by falsely declaring the birth of a baby during civil registration²¹¹. This kind of illegal adoption practice represents the main characterisation of the Brazil Baby Affair.²¹²

²⁰⁶ See: Brazil Baby Affair – Researching Informing Tracing, <http://www.brazilbabyaffair.org>.

²⁰⁷ ICCPR, ECHR and the 1993 Hague Convention.

²⁰⁸ See: Article 8 of the UNCRC.

²⁰⁹ See: Article 8 of the ECHR.

²¹⁰ 'As consequências do jeitinho brasileiro na adoção ilegal de crianças', Superior Tribunal de Justiça, (2014).

²¹¹ Presidente Deputado Arnaldo Jordy and Relatora Deputada Flávia Moraes, 'Comissão Parlamentar de Inquérito Destinada a Investigar o Tráfico de Pessoas no Brasil, Suas Causas, Consequências e Responsáveis no Período de 2003 a 2011, Compreendido na Vigência da Convenção de Palermo (Cpi – Tráfico De Pessoas No Brasil)', 127-128, Brasília, 2014; available at: <http://www2.camara.leg.br/camaranoticias/noticias/SEGURANCA/468351-CPI-DO-TRAFICO-DE-PESSOAS-APROVA-RELATORIO-FINAL.html>.

²¹² Bronkhorst, M and Oost, J (1984). 'Problemen rond interlandelijke adoptie. Kinderen op bestelling?', in *Algemeen Politieblad*, 3, p. 52.

Unfortunately, (inter)national human rights law does not allow for effective prevention of this human rights violation because it is not yet universally recognised that the right to birth registration, as put forward in article 24(2) of the ICCPR, includes a right to a birth certificate²¹³.

The right to birth registration, provided for by Article 7(1) of the UNCRC, essentially does not protect the right to identity. The benefits of birth registration, according to the CRC, in practice, depend on a birth certificate, which is issued upon civil registration. Hence, the provision of a birth certificate is conceived by the CRC as a fundamental component of a complete and veracious birth registration process²¹⁴. However, this process should be accompanied by establishing, implementing and enforcing proper checks and balances.

Thus, the right to birth registration, being of fundamental importance for civil registration and resulting in a birth certificate, should be based on a *certificate of birth registration* (e.g. issued by the hospital of birth) to safeguard the right to identity. The aim is to prevent the deprivation of the right to identity for the purpose of – illegal – ICA, and thereby the reoccurrence of the Brazil Baby Affair²¹⁵.

THE BRAZIL BABY AFFAIR

In 1981, the Dutch national Police started an international criminal investigation on illegal ICA practices from Brazil, liaising with, *inter alia*, West German, British, French and Spanish police authorities²¹⁶. The investigations, officially known as the Brazil Baby Affair²¹⁷, disclosed *de facto* illegal ICAs of Brazilian babies to several European countries and the USA. In most of the investigated Dutch cases, no ICA procedure was started and the ‘adoptive’ parents confessed to being guilty of acts, which constitute the violation of the human right to identity²¹⁸.

Due to the extraterritorial jurisdiction principle, they were prosecuted for crimes such as violation of Article 236 of the Dutch Criminal Code (*Verduistering van staat*), because they registered the Brazilian babies as their biological children. The intermediaries, through whom they acquired the Brazilian newborns, set up the deliberately false birth registration, as suggested by officials from the Embassy, Consulate or Chamber of Commerce²¹⁹. In this way, the ‘adoptive parents’ erased any reference to the baby’s original identity, intentionally depriving them of their identity by creating a false one.

²¹³ Gerber, P, Gargett, A and Castan, M (2011). ‘Does the right to birth registration include a right to a birth certificate?’, in *Netherlands Quarterly of Human Rights* 29.4, p. 435.

²¹⁴ *Ibid.*, p. 454 – 455.

²¹⁵ For further information on safeguarding the right to identity, see: Brazil Baby Affair, Position Paper: ‘Double Subsidiarity Principle and the Right to Identity’; available at: <http://www.brazilbabyaffair.org/publications-and-resources/papers/double-subsidiarity-principle/>.

²¹⁶ *Supra* 212, p. 54.

²¹⁷ J Oost, personal communication, 17 April 2013.

²¹⁸ *Supra* 212.

²¹⁹ ‘Illegale adoptie in Brazilië’, *Achter het nieuws*, 22 February 1982.

While the final recommendations of the 2014 Brazilian Parliamentary Commission on Trafficking of Persons qualify illegal adoption as trafficking of persons, the provisions have yet to be adopted and put into effect²²⁰. From a Criminal Law perspective, Articles 241 and 242 of the Brazilian Criminal Code specify respectively an inexistent birth registry²²¹ and a supposed birth²²². Article 238 specifies the sale of a child²²³, whereas Article 239 specifies sending a child abroad without observance of the legal formalities or with the purpose of financial gain²²⁴. Finally, Article 299 mentions false declarations²²⁵, which could be held against persons involved in false birth registration witness declarations.

The crux of the right to identity lies within the Law on Public Records, Chapter IV, relating to birth. Article 52 states who must declare birth and Paragraph 1 provides for a veracious birth registration process, which can be undertaken through the declaration of two witnesses who have seen the newborn²²⁶. Common practice in Brazil during the past several decades has been the delivery of births in hospitals. Nonetheless, falsely declaring, during the civil registration, that the newborn was born at home, without medical assistance, makes it possible to circumvent the necessity of birth registration, in order to obtain a birth certificate based on a false identity.

CONSEQUENCES OF THE BRAZIL BABY AFFAIR IN FAMILY TRACING WORK

The consequences of the shortcoming of appropriate provisions stipulated in the UNCRC, the 1993 Hague Convention and Brazilian domestic law, in respect of safeguarding the right to identity, have resulted in a lack of identity-defining knowledge for the Brazil Baby Affair adoptees. At the same time, the birth families are deprived of any information about the false identity of the Brazil Baby Affair adoptees, making it virtually impossible for both parties to search for one another. Brazil Baby Affair adoptees consequently do not hold any information concerning their place of birth, date of birth and names at birth. As a result, they also lack any ancestry and medical birth information due to their false identities.

In the absence of a legal ICA procedure and proof of the deprivation of identity, no accountability claims (e.g. requesting assistance to access the right to identity) may be submitted²²⁷. Because of the human rights violations committed by the intermediaries²²⁸ and the hospitals, where the births took place, responsible parties are reluctant to provide any form of cooperation to the Brazil Baby Affair adoptees, fearing self-incrimination. The only option these adoptees have left is to resort to the specialised family tracing assistance of the NGO Brazil Baby Affair.

As the NGO Brazil Baby Affair undertakes tracing work, multiple challenges are faced. No complete timeframe or total cost indication can be given to Brazil Baby Affair adoptees beforehand. Success in each individual family tracing case depends on many variables. It also differs widely from one hospital to another when it comes to accessing their archives – provided these still exist²²⁹ – and the region and number of possible birth hospitals that may be determined and narrowed down sufficiently to start a family tracing process. The right to privacy of

²²⁰ *Supra* 211.

²²¹ 'Registro de nascimento inexistente'.

²²² 'Parto suposto. Supressão ou alteração de direito inerente ao estado civil de recém-nascido'.

²²³ 'Prometer ou efetivar a entrega de filho ou pupilo a terceiro, mediante paga ou recompensa'.

²²⁴ 'Promover ou auxiliar a efetivação de ato destinado ao envio de criança ou adolescente para o exterior com inobservância das formalidades legais ou com o fito de obter lucro'.

²²⁵ 'Omitir, em documento público ou particular, declaração que dele devia constar, ou nele inserir ou fazer inserir declaração falsa ou diversa da que devia ser escrita, com o fim de prejudicar direito, criar obrigação ou alterar a verdade sobre fato juridicamente relevante'.

²²⁶ 'Quando o oficial tiver motivo para duvidar da declaração, poderá ir à casa do recém-nascido verificar a sua existência, ou exigir a atestação do medico ou parteira que tiver assistido o parto, ou o testemunho de duas pessoas que não forem os pais e tiverem visto o recém-nascido'.

²²⁷ In these cases, State authorities refer to the CA under the 1993 Hague Convention, which has neither legal competence nor professional expertise to deal with these matters.

²²⁸ Related research and case studies by Brazil Baby Affair disclose the involvement of (foreign) government officials (i.e. diplomats).

²²⁹ See: Article 8 of Resolution CFM No. 1.821/07.

hospital patients listed in medical archives infringes on the right to identity of the Brazil Baby Affair adoptees. In such cases, lawsuits aimed at accessing the right to identity are likely to inherently become part of these infringing rights situations. In some cases, a Brazil Baby Affair adoptee might actually have two officially registered identities. By establishing and accessing public information on the original identity, it is possible to locate the Brazil Baby Affair adoptee's birth family. For the birth families, especially for the birth mothers, it is possible to establish the false identity of the Brazil Baby Affair adoptee by accessing public civil registries, provided the false birth registration was effected in the same place as the one, in which the mother gave birth to her child, or if the false place of birth can be established.

In order to effectively initiate a Brazil Baby Affair family tracing process, adequate resources and support are required. In terms of support, Brazil is a relatively expensive country, facing complex administrative obstacles, and institutionalised support for individual family tracing cases is unavailable. In practice, without sufficient support of any kind from any responsible party, Brazil Baby Affair family tracing processes are unlikely to succeed. Thus, to achieve the best possible outcome in any Brazil Baby Affair family tracing process, it is of utmost importance to obtain the fundamental support of the Brazilian government. In order to achieve this, the NGO Brazil Baby Affair engages in vital advocacy work.

ADVOCACY WORK

The NGO's support to Brazil Baby Affair adoptees consists primarily of demanding comprehensive accountability, and attaining full and unconditional cooperation from all responsible State and non-State parties for the illegal adoptions from Brazil until 1999²³⁰. This principally encompasses advocating for full implementation of the UNCRC, with special emphasis on the child's 'right to know and be cared for by his or her parents', as far as possible, and the right not to be illegally deprived of one's identity. This corresponds to the NGO's vision that the deprivation of identity through false birth registration practices should never occur again.

To achieve this vision, the NGO strives for complete avoidance of any kind of illegal adoption practice through the recognition of the right to a birth certificate to be included in the human right for birth registration. The NGO advocates for the right to a birth certificate to be accompanied by safeguarding measures to ensure the authenticity of the registration (e.g. obligatory civil registration of birth within the hospital of birth). The NGO also aims to raise – local community – awareness, amongst others, through grass-roots projects, to prevent illegal – intercountry – adoption from happening again.

Lamentably, the Brazilian State is not concerned with the – reoccurrence of – the Brazil Baby Affair: according to Rodrigo Torres, from the Brazilian Secretariat for Human Rights, who was representing Brazil at the 70th session of the CRC on 21 and 22 September 2015 in Geneva, '[w]e do not have a specific policy to avoid babies being kidnapped in maternities. Unfortunately, this is not considered to be a priority for us'. The absence of the Brazilian Secretariat, throughout the 2015 Special Commission meeting on the practical operation of the 1993 Hague Convention held in The Hague – and during the session on 'Preventing and addressing illicit practices' – can be seen in this light.

The CRC and the Special Commission meetings on the practical operation of the 1993 Hague Convention form an exceptional opportunity for advocacy work and to share the NGO's questions and concerns regarding the right to identity. The NGO challenges the Brazilian State on two issues: (1) preventing violations of Article 8 of the UNCRC, in particular for the purpose of illegal domestic adoption and ICA; and (2) implementing measures to guarantee access to the right to identity for adults who were deprived of their identity.

²³⁰ The 1993 Hague Convention entered into force in Brazil on 1 December 1999.

Ultimately, the NGO advocates its vision universally, as stressed during its intervention at the 2015 Special Commission meeting, following the statement by Susan Jacobs, the United States Ambassador at the 2015 Special Commission meeting that ‘birth registration should be as complete as possible to know who the child is’:

Birth registration should be accompanied by adequate checks and balances in order to prevent false birth certificates from being issued, which were and still are being used in illegal domestic adoption and ICA practices.

Patrick Noordoven has a Bachelor’s Degree in Political History and International Relations, with specialisation in human rights. He has written his BA thesis on the United Nations Convention on the Rights of the Child. Patrick Noordoven, who holds Brazilian and Dutch nationality, is the full-time Managing Director of the NGO Brazil Baby Affair, a registered non-profit organisation, which he founded in 2014, and is headquartered in Zurich, Switzerland. He has over 15 years of experience in family tracing cases in Brazil, during which he has been helping others overcome the problems resulting from the deprivation of identity that comes with illegal adoption practices. During his investigation into his own illegal ICA, Patrick developed a determination to unveil the international scale, context and impact of the practice, as well as to support fellow victims around the world. To this end, he founded the international NGO Brazil Baby Affair.

The NGO Brazil Baby Affair was established specifically to provide assistance in family tracing requests from all victims of illegal ICAs through the Brazil Baby Affair. The NGO works with a worldwide team of dedicated experts who aspire to generate awareness about the Brazil Baby Affair through the organisation’s core activities of researching, informing and tracing of all cases in which Brazilians, mainly as newborns, were deprived of their identity, advocating for their human right to retrieve their identity.

PROMISING PRACTICE: HOW ACCREDITED ADOPTION BODIES IN SWEDEN AND FINLAND CAN ASSIST IN ILLICIT ADOPTION CASES

This contribution, by Birgitta Löwstedt of Adoptionscentrum (Sweden) and Suvi Korenius, Adoption Coordinator for the City of Helsinki, explains the vital role of professional AABs in conducting searches for origins and the challenges of interpreting information.

INTRODUCING SOME OF THE NORDIC ACCREDITED ADOPTION BODIES

*Adoptionscentrum*²³¹ is an AAB founded in Sweden in 1969. It is a non-governmental, non-profit, member-based organisation, with three main areas of activity: adoption mediation, international development cooperation and member services. The ‘Searching for roots’ section is a member service. The organisation has about 5,500 member families in Sweden; 27 professionals are employed at the office in Stockholm. The employees possess a broad range of skills, in areas such as psychology, social work, economics, education, children’s rights and languages. The ‘Searching for roots’ section handles approximately 200 cases yearly. The inquiries vary from just wanting to look into the adoption file to seeking a meeting with the biological family. Since 1969, 25,000 children from over 50 countries have been adopted to Sweden through *Adoptionscentrum*.

In Finland, the City of Helsinki²³² – the competent body/municipality – started to work with ICAs in 1985, and has facilitated about 600 adoptions from seven countries. Eight professionals are employed, three of whom are working with ICAs, and the remainder mainly on adoption counselling and domestic adoptions. *Interpedia*²³³ is an AAB founded in 1974, and which has carried out 2,200 adoptions from 13 countries since then. Five professionals are employed. The Social Worker and Adoption Coordinator is responsible for post-adoption services, but all the

²³¹ See: Adoptionscentrum, <http://www.adoptionscentrum.se>.

²³² See: Helsingin kaupunki, <http://www.hel.fi/www/Helsinki/fi/sosiaali-ja-terveyspalvelut/lapsiperheiden-palvelut/perheoikeudelliset-asiat/adoptio/>.

²³³ See: Interpedia, <https://interpedia.fi>.

members of the team take part in the work in practice. Save the Children Finland²³⁴ was founded in 1922, and has worked with ICAs since 1985, processing some 1,800 adoptions from 10 countries. It has six professionals in its ICA service work group, with an additional 25 social workers providing adoption and post-adoption counselling for domestic adoptions and ICAs.

COMMON NORDIC APPROACH TO POST-ADOPTION WORK AND 'SEARCHING FOR ORIGINS'

Our experiences and opinions as AABs in Denmark, Finland, Norway and Sweden very much coincide. We consider all post-adoption work to be as important – and sensitive – as the work before and during the adoption process itself. Every case is unique, just as every adoption case is unique, and there are many parties to take into consideration.

Every adoptee can have access to their background information in the adoption file. Additionally, in cooperation with the authorities and/or organisations in the countries of origin, AABs can assist adoptees in their search for their biological family. Some AABs provide support in arranging 'homeland tours', group tours, as well as individualised services for families or adoptees travelling by themselves. Cautious preparation of the programme is important, as are meetings before and after the trip. It is vital that a competent person accompanies the adoptees who are meeting with biological relatives.

A robust 'searching for origins' service must have the following key characteristics:

a) Preservation of background information

Keeping records of the story of each child is an absolute imperative. All efforts must be made to collect and preserve as much information as possible about the child's background – every detail is important. A copy of this should always be kept in the child's file/life book, while the original (or another copy) is given to the adoptive family. The more details there are, the better the chances for stronger bonding, and such information will help with future searches.

During the early years of ICA (from the 1960s to the 1980s – at least), unfortunately neither the professionals in the countries of origin, nor we, in the receiving countries, understood how significant and important it was to preserve and document all information in a safe way. *It was as though we thought that somehow the child's life started with the adoption!*

b) Professional interpretation of information

However, it is not only about finding the background information – you really have to understand what it stands for. What once was written, documented, interpreted and expressed – by a certain person at a specific moment in time, in a distinct society with its own political, legal and cultural context – is now supposed to be understood by another person, at a totally different moment in time, in a totally different society and context.

Additionally, the person who is expected to understand the information – the adoptee – is emotionally affected by the content and may well have their own expectations, which have an impact on the interpretation. You can not foresee how the adoptee will receive and digest the information given to them. If there is no information at all to be found, it might be very difficult for the adoptee to live with this fact. In some cases, there is a need for referral to specialised social workers and/or therapists, who can offer more in-depth counselling and assessment.

²³⁴ See: Pelastakaa Lapset – Rädda Barnen / Save the Children, <http://www.pelastakaalapset.fi>.

In the work on 'roots', we fortunately have almost never found 'illicit or illegal practices', but there is, more frequently, a discrepancy between the circumstances surrounding the child's adoption and what the biological mother/family later tells. This is already complicated and confusing enough for the adoptee and for the adoptive parents.

How can we help the adoptees to understand the biological mother, to understand what happened 15, 20 or 25 years ago with the perspective of the values and the culture that prevailed at that time? How can we make them understand the country and the society they were born in? How can we make them see all the positive and beautiful sides of their birth country, while at the same time giving them a realistic picture of the social reality that explains why they needed a new family in another country?

We, the professionals, must build bridges; bridges between countries and time periods and individuals; to weave a thread between *then* and *now*.

c) Professional assistance required to help with feelings of guilt

Social workers involved in 'root searching' can share many stories about birth parents carrying a strong feeling of guilt. It is by far the most common reaction when they get to know that their son/daughter is searching for them. 'Will he blame me? How can she ever forgive me?' Since the day they relinquished their child, they have been carrying this feeling of guilt. To be able to go on with their lives, to be able to live with themselves in spite of that guilt, they have 're-written' history somehow. It is easier to blame someone else than to live with the guilt.

It takes a lot of time, patience and trust to make the birth parent understand that they will only hurt the adoptee by telling a new and false story. The assessment includes encouraging the birth parents to tell the truth, tell exactly what happened – or you will cause a lot of turmoil and confusion and mistrust. And your child will experience a feeling of being 'abandoned' again.

It is very important that this assessment is offered by professionals with empathy, understanding and respect for the birth parent. We, the professionals in the receiving countries, must gently prepare the adoptees that this might happen to them, and explain why.

d) Quality 'searching for origins' services require comprehensive financing

A huge challenge for all AABs is the financing of the 'searching for roots' service. Receiving countries, countries of origin, Central Authorities together with AABs and other relevant stakeholders/authorities, should have a joint responsibility in this. AABs have the knowledge, experience and expertise, but lack the financial resources. Governments should budget for this and either provide the services or provide the AABs with resources to do so in their place (Articles 17 to 23 of the 1993 Hague Convention).

CASE 1: INDIVIDUAL CASE IN COUNTRY C

Anna was adopted at the beginning of the 1970s from Country C. According to the legislation in Country C at that point in time, it was almost impossible for a mother to relinquish her child for adoption. If you were extremely poor, an orphanage could – if very necessary – take care of your child for some time, but you could not sign a consent for adoption. Only orphaned or totally abandoned children could be adopted.

Anna's mother was not able or willing to take care of her. She went to the governmental orphanage accompanied by her sister (*i.e.* Anna's aunt). The two women stated they were friends of Anna's mother, but that she had sadly passed away after childbirth and there was no one there to take care of the child. Anna was admitted into the orphanage.

After some time, Anna was adopted to a Swedish family.

20 years later, Anna visited the orphanage together with her adoptive mother. They were told the story above, which was documented in the file at the orphanage. They accepted the story and returned to Sweden. They asked the orphanage to note down their address in Sweden – just in case someone would ever come and ask about Anna.

20 years after this (now 40 years after the adoption), Anna's biological sister Ruth turned up at the orphanage. By then the birth mother really had died and the aunt had told Ruth about Anna. Ruth asked the orphanage what happened to Anna and was informed that she had been adopted to Sweden – and she was given the address that Anna had left there 20 years earlier. She was also advised to contact the representative of the Swedish adoption organisation.

Ruth met with our representative Helena, who in turn contacted the social worker in our head office. We got in touch with Anna, who by now was happily married with three children. Her reaction was very strong. At first she was almost hostile – and suspicious. She had been told there were no known living relatives and that her mother had died when giving birth to her. 'Why should I believe this new story? Is this woman really my sister? Does someone have a 'hidden agenda' in all this?' Initially, she tried to ignore the whole situation, but after some time – and several conversations with *Adoptionscentrum's* social worker – she decided to explore the possibility that this might be true.

In the meantime, in Country C, our representative kept in touch with Ruth, to make sure she was really the sister and that there was indeed no 'hidden agenda'.

Finally, Anna decided she wanted a DNA test to be sure, and Ruth agreed to this. The result showed they were definitely sisters! Anna travelled to Country C, and since then, a very positive relationship has developed between them and their respective families.

Anna never accused her mother or aunt for doing what they did. She fully respects the decision of the birth mother and the aunt. She has had a very good life as an adoptee – and now her view is that she has got a new family in Country C.

CASE 2: COUNTRY X AND AAB ADVOCACY ROLE IN THE FACE OF WIDESPREAD ILLICIT PRACTICES

Adoptionscentrum started to work in Country X in the early 1970s. At that point in time, most adoptions from this country were privately arranged. Our programme officer understood, after some time, that private adopters secured their children through lawyers who paid off the biological families for relinquishing their children. She alerted the authorities about this situation.

Furthermore, according to the legislation in Country X, only children with a known biological relative who signed the consent to adoption in court could be adopted. This situation led to orphanages being overcrowded with abandoned children who had no known relatives. They were bound to stay 'forever' in these very poor facilities, with no 'gatekeeping' process whatsoever and no family reintegration measures in place. Many children died in these orphanages as they did not receive the treatment they needed.

In order to save the children's lives, a number of cases were processed with the help of persons who came to court, claimed they were the birth parent and signed the consents for the child to be adopted. The persons involved in this procedure were convinced it was in the best interests of the children. They received no money for their action, they did it to help the children get a family. When this became known to the authorities, they placed a ban on ICAs for two years. New legislation came into effect in 1979, since when all procedures have been undertaken differently.

In Country X, the situation was further complicated in that some birth parents – even those who truly were the birth parents – for some reason gave false information about their address and other contact details, naturally making any search all the more difficult. Adoptees who were brought to Sweden before the 'moratorium', started searching for their roots in the middle of the 1990s. As they had the name of the biological relative in the court order, they thought it was going to be a fairly straightforward process.

However, if they indeed managed to find the person in Country X whose name was in their court order, they were told the truth: that they were not really a relative but had signed the document in court to save the child's life and to give them a better future. On the other hand, some adoptees obtained information that the address and/or other contact details stated in the document had never existed or that such a person had never stayed there.

Either way, it caused considerable distress to the adoptees.

Adoptionscentrum, together with the Swedish government, intervened to support the adoptees. First, they provided emotional and psychosocial support when informing the adoptees of the background and the motives of their adoption, explaining the situation in Country X in the 1970s, the legislation that made it impossible for abandoned children to be adopted, and the horrifying situation in the orphanages. *Adoptionscentrum* received financial support from the government to establish, for a certain time, a special unit to offer psychosocial support to these adoptees. Likewise, as the authorities in Country X became aware of the situation, they now offer extra support to those adoptees who visit the country and were the victims of the practices before the new 1979 law.

GENERAL RECOMMENDATIONS FOR PROFESSIONALS:

1. **The adoptees themselves – only – shall apply for the search.** If the adoptee is younger than 18 years old, it is recommended that the adoptive parents (or another trusted person) are involved.
2. **It is essential that the adoptees themselves take the initiative at each step.** The professionals can never know exactly what the adoptee is asking for. Some adoptees are very determined from the start, but even so, it may take a long time before they move on to the next step.
3. Gently prepare the adoptee for this emotional process and make it clear from the beginning that **you cannot promise to find something or somebody**, but that you will do your best.
4. In the first conversation/meeting, find out **what the adoptee expects** and evaluate if there is a reasonable chance to assist in the case. For many, it is enough to know that there **is** a possibility to get help – and someone to talk to; someone who understands.
5. Ask the adoptees to put down in **writing the expectations** and questions they have regarding the background and the birth family – or any other issue relating to the adoption. The very fact of writing is an important element and has proven to be therapeutic.
6. Do not rush. **It takes time to digest sensitive information.** This ‘time factor’ can sometimes be a challenge. For example, if you find a relative in the birth country, this often gives hope for an early reunion. The adoptee might not be ready for this right now – and they must be given the time needed before the reunion takes place; or the birth family might not be ready – and then the adoptee must respect that.
7. Prepare the adoptee for the **expectations** they might meet **from the biological family**. Describe specific situations (*e.g.* expectations of continuous contact, financial contributions, etc.) and discuss the possible reactions and ways to respond to this.
8. Schedule a meeting with the adoptee following the meeting/contact with the biological family to discuss the experience and the emotions it has produced.
9. Guide the adoptees and their families about the risks – versus the advantages – of using **social media and new technologies** (in Finland, the AABs have jointly organised lectures on social media and post-adoption work).
10. **When there is conflicting information:**
 - **For the adoptee:** Explain the feeling of guilt that the biological relative probably has and why the mother/relative needed to create a ‘new story’ that she could live with. The truth can be too painful and even dangerous for her in the new situation she is now living in.
 - **For the biological mother/relative:** Gently, and with empathy, make her try to remember – and tell – the exact truth and help her to understand that any new or conflicting information will only cause harm and is even disrespectful towards the adoptee.

11. When there is an 'illicit practice':

- **For the adoptee:** Tell the truth or at least what you know as the truth. At the moment the decision (any decision) was made, we must believe it was made with the best interests of the child in mind – even if the administration/procedure was not in accordance with the book.
- **For the biological mother/relative:** Meet her respectfully and reassure her that we and/or the adoptee are not judging her for what happened. We understand she was desperate and a victim of the situation – but please tell the truth.

Birgitta Löwstedt, Senior Programme Officer and International Adviser at Adoptionscentrum, Sweden, has been working with ICAs and with 'roots' programmes for almost 30 years. The first 15 years mostly involved Latin American countries, and thereafter African countries. Birgitta was part of the Working Group, which drafted the HCCH Guide to Good Practice No. 2 (Accreditation and Adoption Accredited Bodies: General Principles) produced by the Permanent Bureau of the HCCH and, as representative of the Nordic Adoption Council, she participated in the 2010 and 2015 Special Commissions on the practical operation of the 1993 Hague Convention held in The Hague.

Suvi Korenius, Adoption Coordinator at the City of Helsinki, Finland, has been working with ICAs for eight years. Suvi has been responsible for all of the City of Helsinki's contacts in countries of origin as well as for the City's 'roots' programme for adoptees.

4.2 BREAKING MYTHS ABOUT ADOPTION THROUGH THE MEDIA, INCLUDING SOCIAL NETWORKS

The examination of adoption fraud, as contrasted against the popular view of child rescue, challenges world views and confronts old paradigms of ICA as a 'win-win solution' to 'orphanhood'. However, now some adoptees are learning that they were not actually 'orphans', and that they have or had one or two living parents, although circumstances vary widely. It should be noted that, as with families of origin, there is currently no empirical evidence of just how many adoptees have this experience, but there are significant enough numbers of individuals to warrant a closer look.

Aggressive advocacy through the media includes adoptees and adoptive parents themselves, who have questioned their own adoptions, some of whom have told startling stories of child sale and abduction²³⁵. Stories have appeared in various media, including the popular press, with titles such as 'Did I steal my daughter?' on *Mother Jones*²³⁶ and 'Adoption Inc: How Ethiopia's Industry Dupes Families and Bullies Activists'²³⁷, which appeared in the Pulitzer Center for Crisis Reporting. As a result, adoption ethics have entered public discourse while adoptees themselves are ageing and developing their identity as adolescents and adults.

Given the wide range of existing media channels, a number of effective strategies have been implemented at individual level, with compelling stories of the tragic realities. Some of these are highlighted below as promising practices, ranging from the use of the popular press by an adoptive mother (see *Personal testimony: Lessons learned by an adoptive mother/journalist about search and reunion in Guatemala*), the use of theatre to give voice to the grandmothers whose grandchildren were adopted illegally (see *Promising practice: Abuelas de Plaza de Mayo: Mass dissemination campaigns and theatre as cultural and artistic tools to establish their cause as a social issue*) as well as the use of blogs and authoring a book that focuses on reuniting families across borders (see *Personal testimony: Reuniting children with their biological families in a country of origin, when the parents have not provided their consent*).

²³⁵ *Supra* 196.

²³⁶ Larsen, E (2007). 'Did I steal my daughter?', on *Mother Jones*; available at: <http://www.motherjones.com/politics/2007/10/did-i-steal-my-daughter-tribulations-global-adoption>.

²³⁷ Joyce, K (2013). *The Child Catchers: Rescue, trafficking, and the new gospel of adoption*. New York, USA: Public Affairs.

Effective advocacy campaigns on a global level have likewise been instigated by ethical organisations such as the Schuster Institute for Investigative Journalism (see *Promising practice: Schuster Institute for Investigative Journalism, Brandeis University*), as well as policy agencies such as African Child Policy Forum (see *Promising practice: Influencing policies on intercountry adoption in Africa*).

Moreover, a number of individuals directly affected by illegal adoptions have courageously established advocacy organisations with substantial impact on how we, as society, come to terms with our responsibilities, in Korea (see *Personal testimony: Adopted as an orphan despite my living Korean parents*), in France (see *Promising practice: La Voix des Adoptés, a place for adoptees to share experiences, be supported and listened to* (Chapter 3)), in Switzerland/Lebanon (see *Promising practice: The importance of support, the birth of Born in Lebanon* (Chapter 3)), in the Netherlands/Brazil (see *Promising practice: Raising awareness about false birth registration practices, known as the Brazil Baby Affair*) and in Ireland (see *Promising practice: Adoption Rights Alliance and the Philomena Project in Ireland and the USA*).

PERSONAL TESTIMONY: LESSONS LEARNED BY AN ADOPTIVE MOTHER/JOURNALIST ABOUT SEARCH AND REUNION IN GUATEMALA

Elizabeth Larsen is the mother and journalist who wrote ‘*Did I Steal My Daughter?*’²³⁸, in which she publicly described the journey her family undertook for search and reunion. In a follow-up question and answer session, Larsen shared insights that are important for consideration when developing a search and reunion plan. She also shares insight into handling the press when discussing one’s case with the media.

1. What made you decide to search for your daughter’s family of origin?

In my work as a journalist, I had interviewed experts in domestic adoption and had access to longitudinal studies that show open adoptions are healthier for all members of the triad. That made intuitive sense to me, especially when it came to my daughter and her Guatemalan mother. We knew from my daughter’s foster mother that the adoption experience had been very painful for her, and we wanted her to know what happened to her daughter; and we did not want our daughter’s life before us to be an empty hole of non-(and possibly false) information. That said, we knew that the research on open adoption was done in the USA and might not apply to ICAs.

There was a lot of news at the time about corruption in Guatemalan adoptions. While verifying the legality of our daughter’s adoption was not our primary concern – we were more concerned about her Guatemalan mother. That was a factor in our decision to search.

2. What documents and other information did you have to aid in the search?

Our daughter’s adoption paperwork, which included a photocopy of her Guatemalan mother’s national identity card.

3. Do you have any recommendations on how to organise meetings with the biological family? Are there any pre-meeting preparation tips?

All our meetings with our daughter’s Guatemalan family are facilitated by our searcher and her staff. That has been extremely helpful when it comes to the language barrier. While I am not sure it is possible to prepare yourself emotionally for these meetings, our searcher and her staff recommend that the meetings take place

²³⁸ *Supra* 236.

somewhere that the kids can enjoy an activity, such as swimming or looking at animals in the zoo. I think this is excellent advice because it gives the kids an opportunity to dip in and out of the meeting, depending on what they can handle emotionally at the time. Also, I think it is important to know that you might not get all of your questions answered in the first meeting. This is first and foremost a relationship. Despite the intimate nature of this connection, it takes time to build trust.

4. What emotional support needs did you, as a parent, and your daughter have during this process of searching, especially when digesting some of the difficult information that you learned from your particular scenario?

My daughter was only two years old, so all of this happened in the background. I was doing psychoanalysis at the time and truly do not think I could have gotten through the process without it.

5. Did you seek professional support from a counsellor to help you during this process of discovery? If yes, do you recommend this for other families experiencing a similar reunion?

Yes; and yes, I would strongly recommend it. This is an intense and oftentimes fraught dynamic. In our case, there is a tremendous amount of love on all sides; but there is also an enormous amount of guilt, grief, and shame on the part of all the adults. My daughter is now 10 years old and has visited Guatemala three times. She has been so little that we have been able to normalise the situation, although she has, at times, cried and shut down emotionally immediately after the visits. I think working with a counsellor who specialises in adoption issues, would be helpful before and after the next visit.

6. How have you managed the vast economic difference between your family and your daughter's family of origin? Can you identify an ethical dilemma and how have you resolved the problem?

Where do I start? On the one hand, we would love to just write a check and magically make her financial problems go away. However, we also know that is not best practice when it comes to the ethics of these relationships, and the impact it could have if adoption were to become legal again and neighbours or friends could view ICA as a way to get financial support from someone in the USA. At first, we paid for our daughter's Guatemalan mother to go to beauty school, figuring that would help give her a leg up on her situation. She completed all the training but decided not to pursue that career and work instead as a salesclerk in a clothing store. We knew from the start that we could not be attached to the outcome of paying for her education, but we were disappointed at first. We also sent money every month and paid off a Visa debt once.

Like most families, we were heavily impacted by the recession, and that meant we had to make hard choices about the financial support we could offer our daughter's birthmother. This felt terrible, because, of course, we understand that in comparison we live like royalty. However, the financial crisis did give us an opportunity to step back and think more about how we wanted to proceed. In the end, we decided that what felt most ethical to us is to pay for our daughter's Guatemalan brother's education and that is it, although we include cash as a gift when we see her in person. I still wonder what our daughter will make of the situation when she gets older and sees the disparity. To offer no help, I think, would invite a lot of questions from her when she is older.

7. Now that you have used a family of origin searcher, do you have any recommendations on how to select such an investigator?

My strongest recommendation is to use someone who is a national of the country and comes highly recommended by other families. If someone reports even a so-so experience, move on.

8. As a journalist, do you have any recommendations on 'how to handle' the press when discussing your own story? How to make sure that you do not get taken advantage of in a sensational media portrayal of your case?

I have handled the press by telling the story from my perspective and by being the author of the stories. I have been pretty unsparing in the details, which may end up being an issue for my daughter when she is older. However, I do have a few rules: I do not tell anything that my daughter does not know and does not share with her classmates. That does not mean she knows all the little details of her adoption story (*i.e.* our interactions with lawyers and details that would be boring and too complex for a child her age).

That said, I have never written a story where I have been 100 percent happy with the headline, which is the one piece of the story I do not control and often do not learn about until I see it in print. My editors have all been generous and supportive, but there is a lack of understanding about the issues related to ICA that has led to headlines that can strike me as insensitive to the larger issues. For example, an essay that ran in *The New York Times* was called 'Untying a Birth Mother's Hands'. My editor was one of the most thoughtful and talented people I have ever worked with, and went over every word of that essay – several times. However, while I think the headline was meant as a compliment to my husband and me, it aggrandised us in a way that missed the mark. We did nothing noble here. We are just trying to make a painful situation better. On the other hand, I strongly resisted Mother Jones' headline 'Did I Steal My Daughter?' because it was so in-your-face and so controversial – my sensibility is more 'I-see-all-perspectives' ... but now, I think it is great. Sensational, yes. But you cannot get more honest.

I think if you decide to talk to the press, you are always opening yourself up to the possibility that your story will get sensationalised. My advice is to, first, do an online search to see what kinds of stories the journalist contacting you does. If they feel like they are ripped from the tabloids, that is not an option I would pursue. I also recommend that you not share information that you would not tell at a dinner party; and if a story turns out to be not exactly what you felt you signed on for, give yourself permission to be upset but know it is not the end of the world. I think adoptive parents can feel an enormous amount of pressure to be perfect. That is never possible, and certainly is not the case with my family and my decisions to write about our adoption experience. My daughter may resent that I have used her story in my work. I doubt it will be the only thing I have done wrong in my lifetime of being her mum. The best I can do at this point is to validate her feelings, whatever they may be.

4.3 CONCLUDING REMARKS

The social-political-economic context of illicit and illegal adoptions varies from country to country. However, there are similarities across countries of origin, such as the *need to know* as well as the challenges that adoptees and their families confront when dealing with the difficulties of their past, including trauma. This Chapter has been presented as a starting place for considering the importance of what we know about past search and reunion experiences. Furthermore, this Chapter underscores the importance of future research into the phenomenon, as little is known empirically about this important group of adoptees and their search and reunion experiences.

One case that may not be generalisable, but is nonetheless important, is Elizabeth Larsen's experience. This honest reflection on search and reunion is one that many others do not speak about so openly. However, her lessons learned and recommendations come from both the heart and head, as she pragmatically explores the issues at hand. Fundamentally, searching becomes a desire of many adoptees and their families of origin. Adequately preparing for the many dimensions of poverty and inequality, as well as the potential history of unethical or illicit practices, is essential for everyone involved in the search and reunion process. Each case is

unique and requesting assistance from skilled professionals, such as adoption social workers who understand family reunion work, is essential. Further, using searching assistance that is professional in both investigation and reunion activities is vital for safeguarding the emotional process of finding one's biological family and learning of their past.

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PROMISING PRACTICE: ABUELAS DE PLAZA DE MAYO: MASS DISSEMINATION CAMPAIGNS AND THEATRE AS CULTURAL AND ARTISTIC TOOLS TO ESTABLISH THEIR CAUSE AS A SOCIAL ISSUE

María Luisa Diz, with technical assistance from Irene Salvo Agoglia and Mara Tissera Luna, explains this innovative and creative response to mass illegal adoptions in Argentina.

SEARCH AND DISSEMINATION THROUGH ARTS, CULTURE AND MASS COMMUNICATION

In 1997, *Abuelas de Plaza de Mayo* celebrated its twentieth anniversary as an association. By then, 59 individuals – who were the children of disappeared persons and were abducted during the last Argentinian military dictatorship (1976-1983) – had had their identity restored and returned to their biological families. The children and grandchildren of those disappeared, on reaching adolescence, have participated actively in the search for their parents' story. They have worked in the defence of their political militancy. They have searched for their abducted peers through the staging of public productions and activities, which include cultural, artistic and media elements. In this context, 'when *Abuelas* became aware that the grandchildren had grown up, and that this entailed an opportunity to rely on them in the search for their identity, they changed the search methodology. It was no longer about searching for children, but about bringing young people closer to *Abuelas* through dissemination'²⁴⁰. Thus,

²³⁹ Gibbons, J L and Rotabi, K S (Eds.) (2013). *Intercountry Adoption, Policies, Practices, and Outcomes*. Burlington, VT, USA: Ashgate Publishing Company.

²⁴⁰ See: *Abuelas de Plaza de Mayo*, Difusión, <http://www.abuelas.org.ar/categoria-difusion/mensuario-1>.

they believed that bringing the grandchildren closer could be achieved through events and activities that would correspond to their reality, including their means of socialisation, cultural experiences, as well as the importance of their generational peers. For *Abuelas*, sports was a means of socialisation through which values are transmitted and exercised particularly among young people²⁴¹, and rockers ‘speak the same language as the grandchildren’²⁴². As an example, sports and music were considered as potential channels through which *Abuelas* could convey messages relating to their search and directed at their grandchildren. They could appeal to their fears and doubts, taking into account that these young people were now in a position to make their own decisions.

This change in the institutional search strategies was to mark a new phase in the association’s history. Thus, even though *Abuelas* continued to develop search strategies through public bodies, based on data and the complaints of citizens, they started to develop, in a planned and systematic manner, a series of dissemination campaigns. These included exhibitions, graphic and photographic showings, meetings, recitals, competitions (literary, photographic, choreographic, short films and architectural) and events; radio and TV spots; and audio-visual productions. Some were based on specific occasions, such as the anniversaries of the association. Moreover, talks, workshops, projects and educational materials, as well as conferences, seminars and academic and scientific materials on the criminal offence relating to the abduction of children and the process of restoration of identity, were also undertaken. Within this framework the association reached out to personalities linked to the cultural, artistic, educational and scientific sectors, as well as to show business and media, who agreed to participate actively in the organisation and undertaking of these campaigns. The obvious objective was to disseminate campaigns that would reach young people who had been born during the period of the dictatorship.

In 1997, *Abuelas* gave a press conference on their twentieth anniversary, during which they announced the launch of their first dissemination campaign, titled ‘¿Vos sabés quién sos?’ [Do you know who you are?]. This question, for the first time, was aimed directly at every young person, given the use of the second person singular, in order to generate doubt about their identity – and which included several activities within the framework of what they called the Week for Identity (21 – 24 November). In this conference, they also called upon the above-mentioned personalities who, through their respective professions, contributed to activities that made up this campaign. This call would result in the creation of cultural productions and groups, some of them short-lived and others longer-lasting: Sports, Rock, Music, Photography, Cinema, Dance, Architecture and Tango for Identity. Personalities from the theatrical world concluded this week of activities with a ‘Tribute from the Theatre to the *Abuelas de Plaza de Mayo*’, with the staging of a text titled ‘¿Vos sabés quién sos?’ – the same name as the dissemination campaign that *Abuelas* had launched that year.

As for the grandchildren, not only did they participate in the organisation and undertaking of these activities but they also progressively gained an increasingly lead role in the association. This was done by cooperating in the development of the new strategies for the search for their appropriated peers and the dissemination of *Abuelas*’ institutional activities, such as the *Mensuario de Abuelas*, which disseminates institutional information, workshops on the association’s interdisciplinary work at the Faculty of Psychology of the University of Buenos Aires. It also includes the project called the ‘*Archivo Biográfico Familiar de las Abuelas de Plaza de Mayo*’ [Biographical Family Archive of the Grandmothers of the *Plaza de Mayo*], created in 1998 with the objective of rebuilding the identity of the disappeared. This archive ‘gathers the stories of relatives, friends, colleagues and peers in militancy and captivity of the fathers and mothers who disappeared or were killed, in order to preserve them over time and ensure the right of every grandchild to know their origins and story’²⁴³.

²⁴¹ *Abuelas de Plaza de Mayo* (2007). *Historia de Abuelas. 30 años de búsqueda 1977-2007*. Buenos Aires, Argentina: *Abuelas de Plaza de Mayo*, p. 180.

²⁴² *Supra* 240.

²⁴³ See: *Abuelas de Plaza de Mayo*, Archivo Biográfico Familiar de las Abuelas de Plaza de Mayo, <http://www.abuelas.org.ar/abuelas/casa-la-identidad/archivo-biografico-familiar-60>.

THE STAGING OF THE ABDUCTION OF CHILDREN AND THE RESTITUTION OF IDENTITY

According to *Abuelas*, the process initiated with the 'Tribute from the Theatre to the *Abuelas de Plaza de Mayo*' was consolidated in 2000 with the release of the semi-staged show '*A propósito de la duda*' [About doubt]. This show is based on the testimonies of mothers, grandmothers, children, recovered grandchildren, but also of repressors. It is estimated that the show was seen by over 8,000 spectators²⁴⁴. A letter from the association of the *Abuelas de Plaza de Mayo*, signed by its President, Estela de Carlotto, and her Secretary at the time, Alba Lanzillotto, addressed to the 'Friends of Theatre4Identity' [*Teatro x la Identidad (TxI)*]²⁴⁵, stated that '*A propósito de la duda*' had contributed effectively to raising doubt in the minds of many young people with regards to identity given that, in 2000, they managed to ensure that six of the young people they were looking for recovered their identities²⁴⁶.

Patricia Zangaro, the author of this show, states that this production and others that would subsequently be part of the TxI series, contributed directly to many young people calling and coming to the headquarters of the association with doubts about their identity. Despite such appeals to the show, Patricia does not know how many of them indeed are part of the number of recovered grandchildren, which has increased over the last few years²⁴⁷.

According to *Abuelas*, the success of '*A propósito de la duda*' – which exceeded all expectations – drove the actors who participated in this show to issue a wider call to people from the theatre sector²⁴⁸. This is how TxI was created between the end of 2000 and the beginning of 2001 in the city of Buenos Aires, as a movement of theatre professionals who intended to put theatre to the service of the *Abuelas*' cause.

TxI has been organising series of theatre shows since 2001, in which it has staged shows that address the issues of abduction of children and the restitution of their identity, as well as those relating to social, cultural, gender, sexual, ethnic identities, etc. Furthermore, it has staged the testimonies of recovered grandchildren who, after the performance, have gone up on stage to tell their stories of abduction and restitution, creating catharsis among the audience. Similarly to the mass dissemination campaigns of *Abuelas*, TxI has brought together a significant number of show business personalities, who participate in TxI's series by reading, at the beginning of each performance, letters, texts and testimonies of recovered grandchildren and relatives of those disappeared or of the abducted children.

Given the impact of TxI's initial series from the theatre's perspective – according to *Abuelas*, over 40,000 spectators attended – and which, at institutional level, resulted in 63 young people coming to the association's headquarters with doubts as to their identity²⁴⁹, TxI's Board of Directors decided to undertake a second series in 2002. The number of spectators and consultations at the *Abuelas*' headquarters resulted in, among other things, TxI not only continuing over time but also expanding geographically, at national and international level.

²⁴⁴ 'Construimos un puente generacional maravilloso', *Página 12*, 6 December 2000; available at: <http://www.pagina12.com.ar/2000/00-12/00-12-06/pag25.htm>.

²⁴⁵ See: Teatro x la Identidad, <http://www.teatroxlaidentidad.net/index.php>.

²⁴⁶ Teatro x la Identidad's press archive, 2 January 2000.

²⁴⁷ Personal interview, Buenos Aires, 29 May 2013.

²⁴⁸ *Supra* 240.

²⁴⁹ *Ibid.* According to TxI's records, over 30,000 attended the initial series, and approximately 70 young people arrived at *Abuelas*' headquarters spontaneously to ask about their identity. See: *Supra* 245.

After the end of the initial series, Txl started to travel with some of its shows across the Buenos Aires metropolitan area, to some of the country's other provinces and abroad, and encouraged local theatre professionals to create their own Txl series and offices²⁵⁰. According to Anabella Valencia, a former member of Txl's Board of Directors, this strategy contributed directly to establishing the cause of *Abuelas* in other places where it was still unknown. Furthermore, after the performances, people would approach them with doubts relating to their identity or that of someone close to them, or who wished to report an abduction²⁵¹.

In 2012 and 2013, Txl gave itinerant shows at the institutions of the Armed and Security Forces, upon an order of the Minister of Defence at the time, Nilda Garré, not only to disseminate the cause of *Abuelas*, but also to cooperate with the search for the grandchildren. This activity responded to the fact that most of the children who were disappeared and abducted from their biological families during the dictatorship had been handed over to members of the armed forces. They were subsequently cared for and educated by the latter and, importantly, the average age of applicants to the armed forces being 30 years old, this corresponded to the potential approximate age of the grandchildren.

In 2013 and 2014, Txl's Board of Directors created the '*Banda x la Identidad*' [Band for Identity], aimed at putting on musical and theatre shows in some of the carnival parades in Buenos Aires which, according to Cristina Fridman – a member of Txl's Board of Directors – intended to reach out to the neighbourhoods and audience that do not go to the theatre²⁵². First, a member of Txl's Board of Directors would introduce Txl and the cause of *Abuelas*. An actor would then interpret some of the 'testimonial monologues', which represented the stories of abduction and return of the grandchildren; and, finally, the band would play four songs relating to the cause of *Abuelas* and the right to identity. According to Amancay Espíndola, a member of Txl's Board of Directors, after a few of the band's performances, people would approach them with doubts relating to their identity or with regard to someone they knew who might be the abducted son or daughter of a disappeared person²⁵³.

In 2013, the Txl Festival and Special Programme called '*Sólo faltas vos*' [You are the only one missing], which took place in an independent cultural hall in the city of Buenos Aires, in the presence of an audience, was broadcast live to the entire country through public television. According to Susana Cart, a member of Txl's Board of Directors, *Abuelas* told them that, an hour before the end of the show, the phones of the association started to ring and did not stop ringing for months²⁵⁴, which demonstrates the considerable impact of the broadcast. During the programme, the recovered grandchild Francisco Madariaga mentioned that, near to where he taught juggling, there was a Txl office and that, thanks to having known Txl, he approached *Abuelas*. This testimony arose as an authorised and legitimising voice to demonstrate Txl's functionality and effectiveness as an intermediary between *Abuelas* and the grandchildren that the latter is looking for.

²⁵⁰ To date, Txl offices have been created within the country, in Córdoba (2002), Mar del Plata (2002), San Miguel (2002), Tucumán (2002), Chaco (2004), Morón (2005), Quilmes (2006), Bariloche (2006), Zona Sur (2006), Rosario (2006) and Paraná (2007); as well as abroad, in Madrid (2007), Catalonia (2006), Venezuela (2009) and London (2011). However, not all these offices and their series have endured or taken place in an ongoing manner over time, as has occurred with the group in Buenos Aires.

²⁵¹ Personal interview, Buenos Aires, 4 December 2013.

²⁵² Personal interview, Buenos Aires, 25 June 2013.

²⁵³ Interview via Skype, Buenos Aires, 23 May 2013.

²⁵⁴ Personal interview, Buenos Aires, 17 April 2014.

CONCLUSIONS

These initiatives were launched during the period of economic, social and political crisis faced by Argentina in the mid-1990s and early-2000s and of a 'memory boom' with regards to its recent past. They have continued and been strengthened since 2003, within the context of the national government's political decision to treat, as a state matter, the causes of human rights bodies focusing on memory, truth and justice, including *Abuelas*, and the right of the young people who were abducted during the dictatorship, to know their origins.

According to *Abuelas*, of the approximately 500 abducted children, 116 have recovered their identity so far. Its search and dissemination strategies have involved cultural, artistic and media productions and activities, generated the activism of the recovered grandchildren, generated doubt in those young people born during the dictatorship, and brought the issues of child abduction and the right to identity to the attention of significant sectors of society.

Similarly, TxI – *Abuelas'* most emblematic artistic tool, which celebrated its fifteenth anniversary in 2015 – has learned how to present conflicts, as is typical in theatre, not only in relation to the substituted/restored identity of the grandchildren, but also as they affect human identity more generally.

María Luisa Diz has a Bachelor's degree in Communication Sciences and is undertaking her PhD in Social Sciences at the University of Buenos Aires. Her research focuses on the *Abuelas de Plaza de Mayo's* initiative 'Theatre4Identity', and, in particular, on how cultural expressions and performances have contributed to the struggle for the recognition of the right to identity of children abducted during the last military dictatorship. She is the General Coordinator of *Clepsidra*, an interdisciplinary journal on Memory Studies (*Centro de Investigaciones Sociales del Instituto de Desarrollo Económico y Social*). She has published articles in national and international journals, and has given presentations in scientific conferences. Irene Salvo Agoglia and Mara Tissera Luna are professionals of the Technical Team of the *Latin American Network for the Right to Live in a Family and Community (RELAF)*²⁵⁵.

PERSONAL TESTIMONY: REUNITING CHILDREN WITH THEIR BIOLOGICAL FAMILIES IN A COUNTRY OF ORIGIN, WHEN THE PARENTS HAVE NOT PROVIDED THEIR CONSENT

Julia Rollings, an adoptive mother, provides a testimony of her efforts to reintegrate her children into their Indian family. Her brave and inspiring story is captured in her novel *Love our Way*, her blog and in various documentaries²⁵⁶.

After our two eldest girls were born to me, we adopted a baby boy from Korea, a two-year-old boy with special needs from Taiwan, and two older boys (brothers) from India. In 1998, we welcomed our youngest children, a brother and sister from India, into our large Australian family. In 2006, the Director of our youngest children's orphanage was arrested, so we launched a private investigation to verify our children's history. We decided to search to confirm that our children had been legally and willingly relinquished for adoption. Instead, eight years after adopting them, we found out they had been trafficked.

²⁵⁵ See: Red Latinoamericana de Acogimiento Familiar, <http://www.relof.org>.

²⁵⁶ Rollings, J (2011). *Love our Way – A Mother's Story*. Australia: HarperCollins. See also: 'Stolen and Sold', *Foreign Correspondent*, 24 February 2009; available at: <http://www.abc.net.au/foreign/content/2009/s2493505.htm>; Towards a new ending..., <https://www.blogger.com/profile/13644979685784771163>; 'The Impact of Illegal Adoption on One Family', *EMK Press*, Tools and Resources for Adoptive Families and the Professionals Who Help Them, <http://www.emkpress.com/rollingsguide.html> and <http://www.emkpress.com/whytell.html>.

PRIVATE INVESTIGATION AND THE ILLEGAL DISCOVERY

The decision to investigate the circumstances of our children's adoption was a very difficult one. We had no idea what situation we might be walking into: had both parents died from the chronic illness we were told they suffered, maybe they did not want information or contact with their children, and what if our worst fears were realised and there had been illegal activity involved in their adoption? If that were the case, would we find another family demanding the return of our/their children? We had a happy, settled son and daughter who were dearly loved by everyone in our family, and we could not imagine losing them. But what if another mother or father had loved and lost them through criminal activity? How could we deny them the reassurance of information and contact with their missing children? *It was very difficult to decide whether to act or to sit with our concerns and do nothing, choosing to believe the story we had been told by their orphanage. However, if we did nothing, we would leave this mess for our children to sort out when they became adults. Adoption was our choice, not our children's, and we owed it to them to find out everything we could about their history.* We hoped to simply confirm that their adoption story was sad but truthful.

We sought legal opinion, which assured us that any potential legal process to force the return of our children would take years and would consider the best interests and wishes of the children as the most important factor.

Our investigation was launched by a friend in India and an adoption activist. They were able to travel to the town identified in documents as the birthplace of our children and started asking questions. It did not take long before they were directed to the area where our children's family had lived, and neighbours there well remembered the scandal.

We discovered that our children had not been willingly relinquished by both Indian parents, as we had been assured and as legal documents attested. Instead, they were taken from their mother while she slept and sold by their father.

DECIDING WHAT TO DO

Before we commenced the investigation, we decided to make contact with our children's first family if they were located. Our children, particularly our daughter, had been asking for information and contact for a few years. Although we never wavered from this decision, it took on a new meaning when we discovered their adoption had been done without their mother's knowledge or consent. Would she demand their return? Our son and daughter had no memories of life in India and, although they wanted to meet her, both sought reassurance that they could not be taken from our family. They were fearful someone might demand their return or that authorities may take legal action to force it. As parents, we were not willing to lose our children, but we were able to expand our family and share our children with their first mother, if she could be found. We decided we needed to do whatever we could to right the great wrong that had been done.

REUNITING FAMILIES ACROSS BORDERS

One afternoon, a few months after we learned their story and shared it with our children, we received a call from India. Our children's mother had walked into my friend's office that afternoon and a photo and e-mail were on their way. We crowded around our computer and watched her photo slowly download. It dispelled any doubts about whether we had found the right person, as she was a mirror image of our daughter. My friend translated her message, which thanked us for caring for the children so well and reassured us that she understood they were now our son and daughter. We established regular e-mail contact via my friend and exchanged photos.

In March 2007, I travelled to India to reunite our son Akil, aged 13 and daughter Sabila, aged 12, with their first mother. Our several months of e-mailed contact had built relationships and, although very nervous, we were delighted to be meeting at last in my friend's office. A few minutes into our first meeting, Akil, Sabila and I were invited to stay with the family. Sunama and her second husband Babu lived in a small windowless room less than 5 x 3 metres, with their five young children. They did not have a tap or toilet. The family did not speak or understand English but their welcome was warm and loving. We spent four days living with them. We adored the parents and their five gorgeous children, who welcomed us as part of their family.

CONTINUED SUPPORT TO OUR INDIAN FAMILY

Since that time we first met, we have remained in very close contact through my friend who lives in Chennai. The three older children had been living at a mosque because the parents did not have sufficient means to feed them. They have been home with their parents following our visit. Also, we provided support so that the children would start attending school and receive a quality education. The family was extremely poor, and we felt the best way to ensure future security was through education.

Things were looking promising and the family was happy with the improvements in their lives. I still felt much needed to be done. Their one-room windowless home was hopelessly inadequate for a family of seven. They have no plumbing, so no toilet, and water must be fetched from a well and carried to the house. But their housing situation was set aside for consideration at a later date while we dealt with more immediate concerns.

A few months after our visit, Babu had a severe stroke. He was hospitalised and on oxygen and nasal gastric feeding. He was totally paralysed and could not speak or swallow. All he was capable of doing was crying. Sunama was distraught but felt some comfort knowing my friend remained in close contact, and we promised we would make sure the family did not become destitute.

I thought that was as bad as things could get but then the hospital forced Sunama to take Babu home, only five days after this stroke. The situation was so far from the hopeful future we thought we were securing for this family. Our comfort in all this is that we made contact with the family when we did. Sunama has said this is her only source of strength. I am also grateful my children and I had the opportunity to meet and get to know Babu. He was a gentle, generous man who impressed me from the start with his compassion. In the first contact we made, via e-mail and a short video shot by my friend Vidya, we saw Babu cry alongside Sunama when she was given photos of our children. He welcomed them as his own and filled the void left by their own brutal Indian father. I found my thoughts were constantly with our family in India.

WHAT HAVE WE LEARNED?

When we adopted our younger children from India, we were not naive, inexperienced adoptive parents. We had already adopted two sons from India and were very involved in the ICA community. However, we trusted that the safeguards in place would protect everyone concerned, and that the children we adopted would be genuinely in need of a new family and legally free for adoption.

We have learned that it is certainly possible to go through the right channels, only pay legitimate fees and follow all the rules, yet still find yourself inadvertently dragged into the dark world of child trafficking. Since then, the Internet has become a great source of information, and prospective adoptive parents can now research the background and legitimacy of adoption agencies and programmes in a way we were not able to do.

We have also learned the importance of facing our fears and acting in the manner we would want to be treated. We reached out to our children's unknown mother, anxious but hoping and trusting that she would respond the same way. She welcomed us with love, and the relationship between our families has been a source of great happiness to all of us, especially the beloved two children we share.

EIGHT YEARS LATER...

We have travelled to India three times in the eight years since finding Sunama, and hope to return soon. Tragically, Babu died within a year of his stroke, and Sunama found herself a widow with five young children and no income. We continued to provide support to meet the family's immediate needs. After a couple of years, Sunama obtained work as a cook and was able to support herself while we focused on the children. We are grateful we had the opportunity and means to ensure Sunama's second family remained intact.

Her five younger children continue to attend a private, bilingual school. They are all good students and they take their studies seriously. A week ago, we received a letter from 17-year-old Farida, the oldest girl. She calls us 'Mummy' and 'Daddy', and tells us how much she loves and misses us all. We received drawings from all the children. Akil and Sabila have written letters and I am printing some recent photos to send to Sunama and their little brothers and sisters.

Importantly, Akil and Sabila have come through this journey emotionally intact and strong. They are now young adults of 20 and 21. Both are unequivocally supportive of the decision we made to uncover their history. Akil and Sabila have spoken publicly about their experiences, never denying the distress we all felt in learning they had been trafficked but also demonstrating that, with effort, commitment and courage, new futures can be created.

PROMISING PRACTICE: INFLUENCING POLICIES ON INTERCOUNTRY ADOPTION IN AFRICA

African Child Policy Forum (ACPF)²⁵⁷, the lead regional policy body on child protection measures, describes how they worked to change policies and the ‘worldwide’ approach to ICAs in Africa.

BACKGROUND AND PROBLEM STATEMENT

The number of ICAs of children from Africa had spiked in the early to mid-2000s²⁵⁸. Despite a reported decline towards the end of the decade, the numbers still remained unacceptably high in 2012, warranting the naming of Africa as the ‘new frontier’ for ICA. It was also evident, at this time, that the best interests, rights, and welfare of children were not always the primary consideration in the context of ICA²⁵⁹.

The high numbers of adoptions were largely attributable to social changes as well as the inadequacy and/or ineffectiveness of legal frameworks on ICA. Widespread extreme poverty and economic marginalisation, conflicts, and diseases – especially HIV – in many African countries dramatically raised the numbers of orphaned children and children in need of care in a family environment. Traditional alternative care practices that communities in Africa had depended on in the past were over-burdened and could no longer cope with the increasing numbers of children requiring care. As to the legal framework, only 14 African countries had ratified the 1993 Hague Convention at the time (May 2012). Those 14 States parties to the Convention had limited capacity for its implementation and enforcement. Consequently, the context in Africa was conducive to abusive ICA practices. The extent of the problem, the gaps in adoption systems and practices, and the concrete policy action that would redress the situation, so as to ensure that children’s protection and best interests were the primary consideration in the ICA process, were as yet not established.

It is against this backdrop that ACPF dedicated the 5th International Policy Conference²⁶⁰ to the subject of ICA in Africa. The Conference, which was titled ‘Intercountry Adoption: Alternatives and Controversies’, was held in May 2012. The Conference was the culmination of a complex and deliberate advocacy strategy that involved research, consultation and engagement of multiple actors, and which led to significant changes in policies on ICA from both the countries of origin in Africa and the receiving countries.

²⁵⁷ See: African Child Policy Forum, <http://www.africanchildforum.org/en/index.php/en/>.

²⁵⁸ In 2005, 45,298 children were adopted to countries in Europe and the USA.

²⁵⁹ African Child Policy Forum (2012). *Intercountry Adoption: An African Perspective*. Addis Ababa, Ethiopia: African Child Policy forum; available at: http://www.africanchildforum.org/clr/Harmonisation%20of%20Laws%20in%20Africa/Publications/supplementary-acpf-ica2_en.pdf.

²⁶⁰ The International Policy Conference on the African Child is a flagship initiative of ACPF, which provides a forum for child-rights actors, policy-makers and experts to debate key challenges facing children in Africa.

OBJECTIVES AND SCOPE

The Conference targeted policy makers and other key child-rights stakeholders with the aim of triggering policy change to protect children in Africa from inappropriate and abusive adoption practices, and to ensure that the interests and rights of children were given primary consideration in the ICA process. The Conference specifically aimed to:

- establish and document the extent of ICA in Africa, and the circumstances of children in the context of ICA, so as to inform debate amongst the key actors involved;
- influence changes in ICA policy both in African countries (of origin) and in the countries, which were 'receiving' adopted children;
- highlight the need for adopting policy and legal instruments to regulate ICA, *e.g.* regulations, guidelines, and criteria to guide the ICA process;
- advocate for more effective checks and balances to ensure that there are no gaps in ICA systems and processes;
- raise the awareness of States on the gravity and urgency of the consequences of non- regulation for children's protection, with a view to influencing national governments to take necessary action to put in place the necessary policy and legal frameworks and to bolster capacity to ensure their enforcement.

The 5th International Policy Conference on ICA not only provided up-to-date data and knowledge on the law and policy environment on ICA, but revealed the systemic risks in Africa's legal and regulatory framework on ICA. It highlighted the implications of ICA for the wellbeing of children, particularly girls, orphaned, and other vulnerable children. Children who are subject to ICA are drawn from generally vulnerable groups, such as orphaned or abandoned children, children born to young mothers or families affected by poverty. In Africa, both economic deprivation and the HIV epidemic tend to affect women to a greater extent. Social attitudes and cultural practices that undermine the status of girls exacerbate abuse of the rights of girl children, including in the context of alternative care and ICA.

ADVOCACY STRATEGY

At the time of the 5th International Policy Conference, the problem of child rights abuse in the context of ICA in Africa was urgent, in light of worrying trends (*i.e.* rapidly increasing numbers and the increasingly low mean age of the adopted children). It was also a source of growing concern among African governments, receiving countries and child rights organisations in terms of the impact of ICA on children in Africa. It was therefore imperative to create a forum that would enhance the visibility of the issue, trigger meaningful and urgent dialogue amongst policy makers, and advocate for deliberate measures that would reverse the problem.

Policy changes emanating from the International Policy Conference were brought about through a number of inter-related, deliberate, targeted and sequential events:

- **Recognising the problem, providing the evidence, and setting the agenda:** ACPF and its collaborating partners, specifically the AfricaWide Movement for Children (AMC)²⁶¹ – a network of over 100 African civil society organisations established by ACPF – identified ICA in Africa as an emerging challenge facing children in Africa. A regional consultative meeting on ICA organised by the AMC had been held on 22 – 23 June 2009 in Nairobi, Kenya, discussing advocacy strategies to combat abuses through ICA. Following the 2009 meeting, ACPF undertook further research in 2011 and 2012 in order to build the evidence base on the status of children who are adopted internationally, setting an advocacy and lobbying agenda for policy change.
- **Creating a platform for dialogue:** Through national consultations and the global conference, the International Policy Conference engaged all the actors in a policy dialogue. ACPF influenced policy change by engaging and persuading the relevant regional and national stakeholders through consultations and constructive dialogue. ACPF worked in cooperation with regional bodies, governments, African civil society organisations, African universities and research institutions as well as various international organisations, in promoting and protecting the rights and welfare of children deprived of a family environment in the context of ICA.
- **Strengthening alliances at pan-African level:** ACPF has also initiated and contributed to the establishment of regional advocacy networks, such as AMC. It has a wide breadth of expertise in child rights, including on child law, child protection, particularly of the most vulnerable children, and accountability to children. This expertise that is highly relevant to ICA.
- **Raising awareness:** ACPF used a diverse range of media to create greater awareness on ICA, including the development a documentary entitled ‘*An Uncertain Journey*’, an advocacy tool produced to draw attention to the *issue of ICA*.
- **Supporting policy change in specific African countries and in receiving countries.** Following the International Policy Conference, ACPF engaged with certain Governments and provided technical support for policy changes.
- **Institutionalising policy change and greater accountability at pan-African level:** In collaboration with the ACERWC, ACPF prepared *Guidelines for Action on Intercountry Adoption of Children in Africa*²⁶². The ACERWC endorsed the Guidelines, thereby heightening their potential to bring about synergy, standardisation and accountability across African countries.

ACTIVITIES

The following were the key milestones for the advocacy and lobby work on the 5th International Policy Conference:

- **Knowledge generation:** Comprehensive research on ICA was undertaken to examine the situation, identify challenges, and provide policy options to mitigate the problem. The background publications and academic papers prepared prior to the conference highlighted the legal and policy gaps that exposed children to abuse and exploitation, and also the policy options for ensuring that ICA is in the best interests of the child. Analysis of the findings of all these initiatives provided ACPF with solid evidence-based arguments to advocate for the establishment and/or strengthening of community-based mechanisms for caring for children deprived of a family environment. This research and analytical work was also key in defining the main advocacy message of the Conference: ‘ICA as a measure of last resort’.

²⁶¹ See: AfricaWide Movement for Children, <http://www.africawidemovement.org/en/>.

²⁶² African Child Policy Forum (2012). *Guidelines for Action on Intercountry Adoption of Children in Africa*; available at: http://www.africanchildinfo.net/index.php?option=com_sobi2&sobi2Task=sobi2Details&sobi2Id=1481&Itemid=&lang=en.

- **National consultations:** National consultations were held in Malawi, the Democratic Republic of Congo and Nigeria preceding the Conference, with the intention of reflecting on their different contexts and with input from policy-makers in different African countries. The consultations further provided a 'safe' opportunity for policy makers to deliberate on ICA, by providing country-specific insights into the gaps, challenges and the positive aspects of ICA. The consultations also outlined elements for inclusion in the *Guidelines for Action on Intercountry Adoption of Children in Africa*.
- **Creating a platform for policy dialogue:** The International Policy Conference provided a platform to engage policy-makers and experts from governments and non-governmental sectors, the media, and representatives from the private sector, research institutions and UN agencies on ICA. The Conference brought together over 500 people, including government officials from both receiving countries and countries of origin, members of ACERWC, and the AUC. An impressive delegation of nine Ministers from seven African countries, as well as other senior officials from different governmental sectors across the Continent, attended the meeting. High-level government officials from receiving countries, such as the USA, France and the Netherlands also attended the Conference.
- **Follow-up activities at national level for policy change** such as:
 - acting as an adviser to policy reform from both countries of origin and receiving countries, and
 - engaging with government on further research, as in the case of Ethiopia, where ACPF is partnering with the government, to undertake research on ICA in response to the concerns raised regarding ICA in Ethiopia.

COLLABORATION WITH NETWORKS AND PARTNERS

Whereas the International Policy Conference is primarily an ACPF initiative, ACPF called upon some of its partners to successfully mobilise support and a wider audience at the Conference. Collaborating with partners in the organisation of the Conference also broadened the perspectives and scope of participation, with the effect that there was a wide representation of child-rights actors from various parts of the Continent and the globe. ACPF engaged and consulted with experts in ICA including HCCH, UNICEF's Liaison Office to the AU and the United Nations Economic Commission for Africa, and ISS.

Senior government officials, representatives from civil society organisations, adoption agencies, and other local actors, such as the Justice and Legal System Research Institute attended the conference from Ethiopia. ACPF strategically engaged with the Justice and Legal System Research Institute in light of its mandate to undertake legal reform studies and research activities, with a view to strengthening the justice and legal system and building the capacity of organs in the administration of justice in Ethiopia. The Institute and ACPF are jointly working on a national assessment of the situation as a follow-up to the initial work on ICA.

ACCOUNTABILITY AND RESULTS

The following are considered to be the most strategic results of the 5th International Policy Conference:

- **Greater evidence base on ICA** that provided valuable reference and advocacy material. These included publications, as well as a documentary entitled '*An Uncertain Journey*'²⁶³. The documentary tells the personal story of Eva from Uganda, which is relevant to so many children across Africa. The documentary presented the complexity of ICA, and highlighted perspectives of the different actors, such as government officials, adoption agencies and parents.

²⁶³ The documentary 'An Uncertain Journey' received wide coverage and contributed to a deeper understanding of the issue of ICA. See: 'An Uncertain Journey', African Child Policy Forum, 2014, <https://www.youtube.com/watch?v=65CF4eed7zc>.

- **Building visibility, awareness and consensus:** The Conference engaged over 500 representatives, provided a highly effective platform to lobby and advocate for policy adoption and change in practice. The effectiveness of the advocacy and lobbying efforts through the Conference was enhanced by the breadth of representation, which extended globally, and the range of participants, who had varying but significant influence ranging from high-level government officials, private adoption agencies, representatives from receiving countries, the media, and practitioners operating in the system.
- **Endorsement of the pan-African Guidelines for Action on Intercountry Adoption of Children in Africa:** At regional level, the ACERWC endorsed the *Guidelines for Action on Intercountry Adoption of Children in Africa* that emerged from the Conference. The ACERWC's endorsement is instrumental since States parties are now requested to provide sufficient information including data and statistics on the number of children placed for ICA and the procedures undertaken to ensure that the adoptions are in the best interests of the child. The endorsement by the ACERWC catalysed policy change at national level, and encouraged States to put in place measures to implement the provisions of the ACRWC, the 1993 Hague Convention, and other child rights standards.
- **Greater commitment to regulating ICA in Ethiopia:** At national level, the Ethiopian Ministry of Women, Children and Youth Affairs appeared on television and radio shows to promote local adoption in Ethiopia. The Ministry's 2012 – 2013 Plan of Action included initiatives to set up systems that prepared the country for ratification of the 1993 Hague Convention, including activities focusing on regulation, monitoring, and research on the practice of ICA in the country. A research project on ICA in Ethiopia has already been commissioned and is being carried out jointly between the government and ACPF.
- **Changes in adoption policies of receiving countries:** As a result of the Conference, Australia closed its adoption programme in Ethiopia. Referring to the decision to close the programme, Attorney-General Nicola Roxon explained that: '*...The best interests and rights of children are the most important consideration for ICA programs.... children should grow up safe from harm, know their background and heritage, and not be separated from their parents against their will except where this is necessary for their best intereststhe Government has concluded that ... the program needs to be closed. This has been a tough decision, but a necessary one*²⁶⁴.
- **Greater commitment and work towards alternative care:** The Conference highlighted the importance of developing and supporting community-based mechanisms of care for children deprived of a family environment. If ICA is considered to be a last resort for children in need of a family environment, then efforts are needed to ensure that alternative care systems are supported and strengthened. ACPF is part of a number of initiatives, including the Better Care Network, which aim to achieve this.

The results are sustainable. The *Guidelines for Action on Intercountry Adoption of Children in Africa* were endorsed by the ACERWC, and are considered as a tool that will continue to guide African state practice on ICA in the long term. The follow-up initiatives in some countries, such as Ethiopia, have the potential to lead to policy and legislative reform that will regulate ICA for several years to come.

²⁶⁴ Attorney-General for Australia, Press Release, June 2012, mentioned in 'Ethiopia-Australia Intercountry Adoption Program closed', African Child Policy Forum, 29 June 2012; available at: http://www.africanchildinfo.net/index.php?option=com_content&view=article&id=1486:ethiopia-australia-intercountry-adoption-program-closed&catid=34:news&Itemid=84&lang=fr.

AFTER THE INTERNATIONAL POLICY CONFERENCE AND WORK NOW

The report of the deliberations of the International Policy Conference, as well as the *Guidelines for Action on Intercountry Adoption of Children in Africa* emanating from the Conference were widely disseminated through partners, meetings, ACPF's website and those of partners. ACPF's virtual information sharing and dissemination platform, the African Child Information Hub²⁶⁵, is also an important medium for sharing resources and experiences among its partners and target audience. The following are key initiatives that ACPF will focus on to ensure a greater impact of its advocacy work on ICA:

- Following the adoption of *the Guidelines for Action on Intercountry Adoption of Children in Africa*, governments are expected to report to the ACERWC on the measures taken to protect children in all ICAs. ACPF intends to review State party reports and ACERWC's Concluding Observations to determine compliance with this requirement in the reports, and the extent of the Committee's use of the Guidelines in its review of the reports;
- ACPF monitors law and policy reform efforts in Africa, including those related to ICA. As part of the data compilation process of ACPF's *African Report on Child Wellbeing*²⁶⁶, data on laws and policies on ICA is collected and analysed for a broader assessment of African governments' performance in relation to fulfilling their obligations to children;
- Based on the findings of the Conference, ACPF will undertake country-specific assessments of the legal, policy and administrative frameworks on ICA in order to determine their compatibility with the Guidelines, as well as with international and regional legal instruments;
- Through country consultations, ACPF will engage with governments to promote the ratification of the 1993 Hague Convention, and to advocate for effective local alternative care systems for children in order not to resort to ICA precipitously. ACPF will further offer technical assistance to governments and other key stakeholders on matters related to alternative care.

The African Child Policy Forum is an independent, not-for-profit, pan-African institution of policy, research and dialogue on the African child. ACPF's work is rights-based, inspired by universal values and informed by global experiences and knowledge; it is guided by the UNCRC, the African Charter, and other relevant regional and international human rights instruments. Specifically, ACPF aims to contribute to improved knowledge on children in Africa; to monitor and report progress; to identify policy options; to provide a platform for dialogue; to collaborate with governments, intergovernmental organisations and civil society in the development and implementation of effective pro-child policies and programmes; and to promote a common voice for children in and out of Africa.

²⁶⁵ See: African Child Information Hub, <http://www.africanchildinfo.net>.

²⁶⁶ See: African Child Policy Forum, African Report on Child Wellbeing, <http://www.africanchildforum.org/africanreport/>.

PROMISING PRACTICE: SCHUSTER INSTITUTE FOR INVESTIGATIVE JOURNALISM, BRANDEIS UNIVERSITY

E J Graff provides this contribution on the Schuster Institute for Investigative Journalism's work, which offers a model approach for journalists wanting to effectively and powerfully bring attention to the injustices of illicit practices in ICA.

The Schuster Institute for Investigative Journalism provides an outstanding example of how journalists can skilfully and commendably distil myths about ICAs using a combination of *modus operandi*, such as country case studies, journal commentaries, in-depth human stories, and solid research sources. ISS wholeheartedly recommends the exceptional work of the Institute, providing an exemplary approach for other journalists confronted with these issues.

Here is some of what you will find on the Institute's website:

'Over the past decades, hundreds of thousands of large-hearted Westerners – eager to fill out their families while helping a child in need – have adopted from poor and troubled countries. In many cases – especially in adoptions from China or former Soviet bloc countries – these adoptions were desperately needed, saving children from crippling lives in hard-hearted institutions. But too few Westerners are aware that in too many countries, there's a heartbreaking underside to international adoption. For decades, international adoption has been a Wild West, all but free of meaningful law, regulation, or oversight. Western adoption agencies, seeking to satisfy consumer demand, have poured millions of dollars of adoption fees into underdeveloped countries. Those dollars and Euros have, too often, induced the unscrupulous to buy, defraud, coerce, and sometimes even kidnap children away from families that loved and would have raised them to adulthood.

Since the fall of 2008, the Schuster Institute for Investigative Journalism has been releasing our reporting on aspects of this problem. Where did Westerners get the idea that the world was overflowing with healthy orphaned babies in need of new homes? How is a child with a living family transformed into a "paper orphan", adopted for someone else's profit? Whose lives have been scarred by corrupt adoptions? What US policy changes might prevent children from being wrongfully taken from their birth families, simultaneously helping to keep Americans from unwittingly creating an orphan instead of saving one?

This website (see below) offers a collection of the Schuster Institute's releases on ICA, as well as many of the source documents, independent research, government materials, and other resources that will help interested readers pursue the topic further if they wish.

Many publications, reporters, broadcasters and bloggers tell stories about what's right with international adoption. As an investigative reporting institute, we feel an obligation to speak for those whose stories have not been told. And so our Institute has been investigating what can happen when things go wrong, and why. We hope that this information will be useful to concerned citizens and policymakers.'

TIPS FOR JOURNALISTS

Suggested sources:

- Your nation's CA under the 1993 Hague Convention, *i.e.* the office that ensures compliance with the 1993 Hague Convention. The 1993 Hague Convention is the treaty that governs ICA, with an eye to preventing fraud and trafficking (in the USA, the CA is the State Department's Office of Children's Issues). Find out whether your country is a Hague Contracting State²⁶⁷, and if so, what entity is the CA²⁶⁸;
- The office of children's issues (or its equivalent) in whatever country of origin or receiving country related to the troubling adoption at stake;
- The Better Care Network²⁶⁹; BCN's staff is generally aware of what kinds of challenges each country of origin faces in issues related to ICA and institutional care;
- UNICEF's office in the problematic country; UNICEF is usually working to clean up a nation's adoptions and to get children out of institutional care, and may be willing to talk with you off the record;
- Reporters from the local newspapers or news broadcasters in the country of origin *or* in receiving countries from the troubling source:
 - Such newspapers as Guatemala's *Prensa Libre* and Cambodia's *Phnom Penh Post* did pioneering reporting on corrupt adoptions for years before other countries paid attention;
 - Reporters in a variety of receiving countries may have already investigated troubling adoptions from the same source. Often a troubling country of origin sends children to more than one Western nation. Sometimes outspoken victims of adoption fraud have become quasi-experts and can point you towards other sources.

²⁶⁷ See: Hague Conference on Private International Law, Status table, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=69>.

²⁶⁸ See: Hague Conference on Private International Law, Authorities, <https://www.hcch.net/en/instruments/conventions/authorities/?cid=69>.

²⁶⁹ See: Better Care Network, <http://www.bettercarenetwork.org>.

Signs that a country's adoptions have become problematic:

- When the numbers of adoptions from a particular country have suddenly increased dramatically in very little time, perhaps doubling each year;
- When a nation is sending abroad a steady supply of healthy infants and toddlers; most children in need of new overseas homes are older than five, have special medical needs, or have been traumatised in some way. Note that if the nation has become a trouble spot, even those older/special needs adoptions may be suspect;
- Most of the children available for adoption come from an ethnic minority that is looked down upon within the country.

E J Graff²⁷⁰ is a long-time journalist, whose comprehensive investigative reporting on malfeasance in ICA has been used to train international child protection workers and to pass a Federal law closing regulatory loopholes. In 2013, she returned to the Schuster Institute for Investigative Journalism as a Senior Consulting Editor. Since 2001, she has been a Resident Scholar at Brandeis University's Women's Studies Research Centre.

For further reading:

The Schuster Institute for Investigative Journalism, *Fraud and Corruption in International Adoptions*, <https://www.brandeis.edu/investigate/adoption/index.html>;

Graff, E J (2008). 'The Lie We Love', in *Foreign Policy*, 169 (November/December), pp. 59 – 66; available at: <http://www.brandeis.edu/investigate/adoption/docs/FPFinalTheLieWeLove.pdf>;

For ideas about fairer policy solutions: Graff, E J (2010). 'The Baby Business', in *Democracy – A Journal of Ideas*, No. 17; available at: <http://democracyjournal.org/magazine/17/the-baby-business/>;

'They Steal Babies, Don't They?'; *Pacific Standard*, 24 November 2014; available at: <http://www.psmag.com/politics-and-law/they-steal-babies-dont-they-international-adoption-schuster-institute-95027>;

For an outline of how adoptions go wrong: 'The orphan manufacturing chain'; The Schuster Institute for Investigative Journalism; available at: <https://www.brandeis.edu/investigate/adoption/orphanmanufacturingchain.html>;

'The Makeni Children'; *Slate*, 9 August 2011; available at: http://www.slate.com/articles/double_x/doublex/features/2011/the_makeni_children_that_was_the_last_time_we_ever_saw_these_children.html;

²⁷⁰ See: The Schuster Institute for Investigative Journalism, E J Graff, <http://www.brandeis.edu/investigate/about/fellows/graff.html>.

PERSONAL TESTIMONY: ADOPTED AS AN ORPHAN DESPITE MY LIVING KOREAN PARENTS

In this contribution, Jane Jeong Trenka, President of TRACK²⁷¹, gives her personal testimony and explains how she courageously responded to such illegal practices by setting up an effective advocacy group in Korea with a worldwide network of influence.

My older sister and I were sent from South Korea to the USA for adoption in September 1972. By Christmas of that same year, my Korean mother had already contacted my American family, even though the adoption was not meant to be an open ICA – my parents had thought they were adopting orphans whose mother had abandoned them shortly after my birth. Nonetheless, the adoption was legally finalised in the USA in August 1973. I discovered that my adoption was illegal, or at least fraudulent and unethical, when I was living in Korea in 2006.

I had originally applied for my Korean visa through the South Korean Consulate in Chicago, before I moved to Korea. When I applied for the original visa in 2004, I used my birth report record that had been given to me by my Korean mother, as I had been reunited already. This birth report listed my date of birth as 26 January 1972.

However, when I went to renew my visa in Korea in 2006, the visa officer noticed that my birthdate on my Korean birth report did not match the birthdate on my American passport. Thus, he did not allow me to renew my visa. I spent many hours in a frustrated panic at the immigration office, as I feared that I would have to leave the country. Of course, the immigration officer could not issue a visa to someone who, on paper, appeared to be two completely different people.

In order to solve the visa problem, I had to get my adoption paperwork from my Korean adoption agency. I had a skeleton set of papers that my adoptive parents had given me previously, but I had never seen many of the papers that I was newly sent from my adoption agency. Ironically, I had to get the permission of my Korean family in order to receive those newly sent papers; if my Korean mother had not found me before I was even legally adopted, I would not have been able to get those papers, either.

What I discovered through the papers was that information that should have prevented me from being adopted had been omitted or fabricated in order to facilitate my adoption. Moreover, I found out that even minor details that did not even matter as far as the legality of the adoption was concerned were fabricated. I was able to discern fact from fiction because I had been in continuous contact with my Korean mother since about 1988, and had built a relationship with my family through visits since 1996. While each detail of the fabrications is too lengthy to go into here, I will outline the main points:

- Fabrication of the birth report itself, to represent me as an orphan with no parents, siblings or extended family;
- Fabrications or omissions on the orphan birth report (*e.g.* given name in Chinese characters omitted, birthdate and clan fabricated, new citizenship fabricated as Dutch, etc.);
- Parental relinquishment and permission to go ahead with the process to emigrate for adoption fabricated on at least one, and maybe both sisters' papers, as shown by a comparison of signatures and stamps on my papers versus my sister's papers;

²⁷¹ See: Truth and Reconciliation for the Adoption Community of Korea (TRACK), <https://justicespeaking.wordpress.com>.

- At the time, a relinquishment document had no legal meaning under Korean law, yet agencies used such documents to process adoptions;
- I was living in my Korean parents' home until the day I was sent to the USA, *i.e.* I should have never been issued an orphan visa by the USA; the visa was obtained fraudulently;
- Social history as represented to my adoptive parents was fabricated (*i.e.* circumstances of supposed abandonment, father's occupation, physical appearance of mother, health condition of child, marital status of parents, etc.).

It is possible, of course, that my Korean family lied to me about these small details, such as my father's occupation. However, I do not see why they would. This naturally raises the question: 'Why would the adoption agency lie?'. I think that their motivation was to send children out of the country as fast as possible. They could spend less money caring for children while simultaneously collecting precious foreign currency by sending children quickly out of Korea. To facilitate this, the legal documents had to be fabricated. I can guess that small details, such as the occupation of the father or physical appearance of the mother, were fabricated because it was just too much of a bother to write accurate social histories in English. Because these social histories in English were needed to send children to foreign countries, it was probably easier for the agencies to just write down what they were capable of writing quickly in a foreign language. Indeed, we adoptees have noticed that many of our supposed social histories and descriptions of ourselves as children are remarkably similar. This is just my guess of why people bothered to fabricate even the smallest details.

PROMISING PRACTICE: SETTING UP AN ADVOCACY GROUP IN KOREA

In order to address unethical practices of the past and to ensure the rights of adoptees in the future, our group of internationally-adopted Koreans founded Truth and Reconciliation for the Adoption Community of Korea (TRACK) in 2007. Located in South Korea, we advocate full knowledge of past and present Korean adoption practices to protect the human rights of adult adoptees, children, and families. Our final goal is to create a truth and reconciliation commission about Korean adoption to address, at societal level, the illegalities and unethical practices that have affected an estimated 200,000 adoptees and their families.

PROCEDURE FOLLOWED

One of our first actions was to lodge a petition with the Ombudsman of Korea, which was later folded into the Anti-Corruption and Civil Rights Commission. It was this petition that propelled our group into seeking to revise the law governing ICAs from Korea. In addition to drawing attention to the problem of generally unsuccessful birth family searches, we listed the following as widespread abuses found in ICA from South Korea:

- Unclear relinquishment: Parents did not relinquish under their real names, a person other than the parent relinquished, only one parent relinquished, the child was relinquished for domestic adoption but not ICA, or the signature on the relinquishment form appeared to be forged;
- Kidnappings within the family, particularly by the paternal grandmother;

- Misrepresentation of the child's information to adoptive parents and Western adoption agency, such as age, social history, and medical history;
- Contradictions in the adoption file of the same child: contradictions have been found going from Korean-language records to Korean-language records (from Police to orphanage to agency, or intra-agency), as well as Korean-language records to English-language records (or other Western languages);
- Kidnapping by orphanage: The Korean parent came looking, but was told that the child was not there or had died;
- An 'orphan *hojuk*' (birth report record) was made to replace the child's real *hojuk*. The fake orphan *hojuk* was used for adoption;
- The child was recorded as having been sent to a different adoptive country than was in fact the case, and was therefore recorded as having gained the citizenship of the wrong country;
- The child was switched for another child, who was not able to be sent at the time the adoption was scheduled.

We were disappointed with the Commission's response to our petition. Instead of undertaking a full-scale investigation, it seemed that they asked the adoption agencies benign questions and simply accepted their responses.

We decided we wanted to sue the agencies. However, we could not do that because the statute of limitations had already expired for all of the adult adoptees; if we wanted to be heard in a Korean court, we should have brought our cases while we were still children.

Because we could not pursue litigation, we decided to work to change the adoption law so that future adoptions would be more transparent and ethical. During that process, we became aware of problems related to adoptions today, and then became the voices in society striving to solve some of those problems.

Together with the Gonggam Human Rights Law Foundation, we formed a coalition of NGOs to revise the law and found a legislator to sponsor our efforts. Our coalition included unwed mothers and families who had lost children to adoption. Unwed mothers were included because over 90% of those children sent for adoption abroad since the 1990s have been born to these mothers. The following key points were accepted and put into the adoption law²⁷² itself or into its regulations and related decrees:

- Priority placed on domestic adoption rather than ICA;
- Introduction of a seven-day waiting period before the child may be relinquished;
- Establishment of a court process;
- Semi-governmental body mandated to supervise agencies;
- Open records for all people adopted after 2012, and strengthened birth-family searches for those adopted before the enforcement.

²⁷² See: Act on Special Cases concerning Adoption, 2011, http://elaw.klri.re.kr/eng_service/lawView.do?hseq=26691&lang=ENG.

OBSTACLES OVERCOME: LANGUAGE, CULTURE, LACK OF RESOURCES

Without linguistic or cultural capacity, and with no social networks, the adoptees who have been active for the rights of adoptees, children, and unwed mothers have had to rely on the help of Korean nationals, many of whom had been involved in democratisation movements during the military dictatorship. TRACK's main supporters view the adoptees' involvement as democracy at work.

In Korea, our efforts to revise laws have been met with strong resistance by adoption agencies, pro-abandonment groups, and domestic adoptive parent groups. These groups are far larger and have more resources than we do. However, our wealth is our ability to access and understand information about international child-rights and adoption standards. With this information, we have been able, in most cases, to persuade Korean policy-makers that it is necessary to perform ethical adoptions when adoptions are necessary.

OBSTACLES OVERCOME: COMBATTING THE PROBLEM OF 'BABY BOXES'

Following the revision of the adoption law, a major obstacle to our push for more transparency in adoption has been misinterpretation of the law. These misunderstandings are actually related more to the family registration law than to the adoption law, but critics of the Special Adoption Law, who support child abandonment, have confused the function of each.

There has been a rush of anonymous child abandonment at one church in Seoul, which operates a 'baby box'. Supporters of the 'baby box' claim that unwed mothers cannot send their children for adoption under the new adoption-related law as it requires both a 'birth certificate and a relinquishment document' and the mothers do not want to report their children's births. They claim that the mothers would kill their children or abandon them on the streets if they could not put them in the 'baby box'. The children placed in the box are sent from the church to local orphanages after about a week. From local orphanages, domestic adoption and ICA options are considered for these children, who are registered under the guardianship of the State.

The 'baby box' supporters, adoption agencies, and domestic adoptive parents groups believe that the adoption law is the cause of anonymous child abandonment because court oversight has demanded real birth report records to be used. In reality, these reports were also a requirement under the old adoption law but were simply systematically fabricated in the past.

The family registration law, on the other hand, governs Korea's birth registration system, which is actually a reporting system. As of now, the full responsibility for reporting a child's birth is put on one person. There are no administrative cross-checks, such as cross-checking prenatal care records, and there is no registration by healthcare professionals. The loopholes in this law simplify, and therefore indirectly promote, abandonment. In our opinion, the family registration law, paired with tremendous media coverage of the 'baby box' portraying it as a viable, acceptable, and legal option – despite the fact that there is no legal basis for any anonymous child abandonment mechanism in Korea – has contributed to these abandonments, meaning hundreds of infants are shut away in orphanages each year.

Although the coalition of 'baby box' supporters, adoption agencies, and adoptive parents has continually tried to amend the adoption law, starting only a few months after it was enforced, they have not been able to do so. TRACK has actively lobbied against these pro-abandonment bodies, highlighting that the CRC has made recommendations against the use of 'baby boxes'²⁷³. We have lobbied both inside Korea and overseas for the

²⁷³ Committee on the Rights of the Child, Concluding Observations: Czech Republic, CRC/C/CZE/CO/3-4, 4 August 2011, <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.CZE.CO.3-4.doc>.

adoption of universal birth registration. We have talked with Korean NGOs, the national and local governments, foreign Embassies and UN human rights bodies about the lack of universal birth registration in Korea. Furthermore, although we had to scrap our plan to open a face-to-face counselling room directly across the street from the 'baby box', due to my own pregnancy and the withdrawal of support by a Buddhist group that did not want to collide with the Christians, we have participated actively in mass media and social media to spread accurate information.

Thus, instead of amending the adoption law to make anonymous abandonment more acceptable, the government amended the family registration law in May 2015 in order to introduce a 'basic' and 'detailed' family certificate to help protect privacy during job interviews, etc. This is particularly important for unwed mothers, divorced people and others with 'sensitive' information. The government then submitted another bill to the National Assembly in June 2015, which aims to protect privacy even more by tightening access to administrative systems that hold personal information. Furthermore, in July 2015, a bill was proposed by a National Assembly member that pointed out the problems in the birth reporting system and aimed to improve it by compelling hospitals to register births (and deaths). Although the details have not yet fully been worked out – the final form might be a combination of the old reporting system and a new hospital notification system – this is good news for us, since only a few years ago, the government was unwilling to even admit that there was a problem with the birth reporting system.

OBSTACLES OVERCOME: POOR ENFORCEMENT OF THE ADOPTION LAW

The issue of birth registration is tied to the ability to carry out a successful birth-family search, a central topic for adoptees because it relates to the human right to identity. In addition, when adoptees find their families of origin, it is only then that they can know if their adoption was truly legal or just legal on paper.

Sadly, the adoption law has been only a partial success regarding birth-family search. While the reunion rate is up from 2.7% from before the law was passed to 63% after the law was passed, many adoptees still report poor service from the adoption agencies and Korea Adoption Services – the semi-governmental organisation in between the private adoption agencies and the Ministry of Health and Welfare – when requesting family search. We believe this is due to deliberate misinterpretation by both, the adoption agencies and the workers at the Korea Adoption Services. We suspect that these bodies are reuniting only those adoptees, whose parents they can easily find right away, but they do not try hard enough for those whose parents are harder to find, or whose parents may be reluctant but would benefit from face-to-face counselling with a caring and qualified social worker. This failure of adoption-related bodies to fully implement the adoption law for family reunion is especially disappointing to the adoptees, since it is the only part of the law that deals with the people who most helped to change it – the adult adoptees.

Because of this, we adoptees and those elements of Korean civil society who support adoptee and child rights are working to amend the adoption law's regulations so there is no room for misinterpretation. Our coalition held a forum at the National Assembly in October 2015 to explain why revisions are needed. The forum was supported by law-makers from both of the two major parties. This followed on the heels of my testimony during the National Assembly audit of the Ministry of Health and Welfare in September 2015, which officially exposed tremendous problems with birth family search practices. At the time of this writing, in February 2016, our coalition is in talks with the Ministry of Health and Welfare to revise the Adoption Working Manual, which has room for improvement even under the existing law.

POSSIBLE RECOMMENDATIONS

We have been working within Korean society on internal factors contributing to illegal and unethical adoptions, and we have been active as an NGO communicating with global society about children's and unwed mothers' rights in South Korea. We partner with other global NGOs in Korea, as well as communicate with Embassies to share the latest news related to our issues. We also travel abroad to participate in conferences and report to international human rights mechanisms. UN bodies have made various recommendations that have helped us persuade policy-makers at home in Korea that reforms are needed. For example, the Office of the High Commissioner for Human Rights has consistently pointed out the necessity of universal birth registration in Korea, as well as the need to lift the country's reservation to Article 21(a) of the UNCRC, which states that informed consent must be given before a child is sent for adoption²⁷⁴.

In Korea, we have made changes to the adoption system by revealing past cases of unethical, fraudulent or illegal adoptions on the one hand, while, on the other hand, we have provided examples of how adoptions can be done ethically in the future by continually referencing Korea's international human rights treaty obligations. Through advocacy, working in coalition, hosting events, and providing information to officials, we have advocated for the following:

- increased transparency in the adoption process;
- issuance of US IR-3 visas for adoptees to prevent future deportations;
- separation of adoption agencies from unwed mothers' shelters;
- increased support for unwed mothers so they have a choice to raise their children;
- eradication of stigma against unwed mother families;
- privacy in the family registration system;
- universal birth registration;
- eradication of anonymous child abandonment and its positive promotion by means such as 'baby boxes' in society;
- eradication of 'illegal adoptions' (child-selling);
- improvement of the entire child welfare system.

So far, we have focused on a long-term approach to changing the entire society and the structures that make illegal adoptions possible. Because society has changed since we started, we might now be able to revisit the idea of truth and reconciliation for the victims of past illegal adoptions. In addition to truth and reconciliation movements over forced adoptions in countries such as Australia, we can take inspiration from other movements in South Korean society, which have, in recent years, accomplished or have attempted to do what we originally wanted to do. For instance, murderers and child molesters may now be tried under South Korean law, even if the statute of limitations has passed. In addition, a group of Korean comfort women for the American military have brought a suit against the South Korean government. These cases may potentially serve as models if we pursue litigation in the future. However, as our first step, we will likely have to ensure that a special law is passed in order to even be heard in courts.

In addition to the afore-mentioned court cases, South Korea has engaged in truth and reconciliation commissions over abuses of government power that occurred under the military dictatorship. As the vast majority of adoptions occurred during the military dictatorship, we hope that if one of these commissions is reinstated during a future presidential administration, our issue might be included. In the meantime, our task is to gather data so we are prepared in case a window of opportunity opens.

²⁷⁴ Human Rights Council, Report of the Working Group on the Universal Periodic Review, A/HRC/22/10, 12 December 2012, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/KRSession14.aspx>.

LESSONS LEARNED

1. Assess what the situation is locally and how you can contribute positively;
2. Partner with local NGOs and activists and try to work in their cultural style;
3. Understand yourself and your position;
4. Become an authority;
5. Work simultaneously locally and globally;
6. Monitor and report, monitor and report;
7. Expect one mountain after another;
8. Never quit.

A main factor that has made the adoption agencies so powerful in Korea is that they have single-mindedly carried out one mission over the last 60 years. Some of the people who work in adoption agencies and orphanages have been active for decades; child welfare tends to be a generational, family business in Korea. Civil servants, on the other hand, are rotated every two or three years. Thus, our role as a watchdog requires us to acquire as much institutional memory and experience as the adoption agencies. Ours is a long-term project – perhaps a life-time project. We will keep doing this work until Korea's adoption programme has been brought up to international standards for all children, which means that domestic adoptions are also ethical, and that the child welfare system prioritises family preservation over separation or adoption.

Jane Jeong Trenka is president of TRACK and holds a Master's degree in Public Policy from Seoul National University. Her two memoirs, *The Language of Blood* and *Fugitive Visions*, as well as a co-edited anthology, *Outsiders Within*²⁷⁵, have been published in English and Korean. For TRACK, Trenka works with Ross Oke, the group's International Coordinator in Seoul, and Tobias Hübinette, who resides in Sweden.

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POLITICAL CONSIDERATIONS

Nigel Cantwell, an international child protection professional, shares his insights into the multiple political factors that will likely have to be taken into account when dealing with illicit practices.

Illicit and otherwise unacceptable practices that come to light as a consequence of the search for an adoptee's origins are wide-ranging in nature and diverse in their cause. While the competent authorities of the State(s) involved clearly bear the ultimate responsibility for securing an outcome that will correspond best to the human rights of the adoptee, the kind of response required will therefore vary considerably according to the context and circumstances in which the practice occurred.

In practice, securing political commitment to order, carry out or facilitate investigations of alleged past illicit practices is often challenging. Among the many factors that can influence the likely success of such initiatives, and the amount of time and effort that will be required, the following stand out:

- The status of the petitioner: individual adoptee (still a child or having reached adulthood), individual adoptive parents, first parent, 'self-help' group, generic human rights organisation, etc.;
- Whether the petition concerns an individual case or a more general practice considered to apply to multiple adoptees;
- Where appropriate, the alleged role of the (first) parents and their current attitude;
- Whether the case(s) concern domestic or ICA;
- How much time has passed since the alleged illicit practices took place (i.e. would it be seen as an 'historical' case);
- The alleged or perceived role of the State or States concerned: negligence by omission or commission, active or passive complicity with others, or deliberate involvement (through policy or by State bodies, for example);
- Whether or not other third parties (institutions, private agencies, lawyers, individual intermediaries...) are alleged to have been involved, and if so whether it is alleged that they contravened or circumvented the criminal law as it stood at the time or administrative and procedural regulations that were in force;
- Any current legal provisions (relating notably to confidentiality of records and, in 'historical' cases, to prescription (limitation periods)) that may be presented as obstacles to pursuing the case.

Unfortunately – though unsurprisingly – the degree to which the competent authorities of a State demonstrate willingness to respond pro-actively and constructively to allegations or fears of malpractice often depends in good part on the extent to which they may have been directly implicated in the act, or can be assumed, at least, to have had knowledge of the existence or general risk of such malpractice without reacting effectively, if at all.

All is not gloom, however. Two very different examples (others are given elsewhere in this Chapter) can serve to illustrate that political will to act can be achieved.

In response to the 'disappeared' and forcibly adopted children of Argentina during the 1976-1983 military dictatorship – a practice brought to world attention by the courageous efforts of the Abuelas de Plaza de Mayo – the Argentinian delegation to the UN Working Group drafting the CRC in 1985 proposed an additional draft article to the treaty designed to ensure that children would be enabled to preserve or retrieve their identity

(see *Promising practice: Abuelas de Plaza de Mayo: Mass dissemination campaigns and theatre as cultural and artistic tools to establish their cause as a social issue*). This formed the basis of what is now Article 8 of the UNCRC: a fundamental provision for responding to illicit practices in adoption, and to which reference is made later in this introduction.

The other example is Australia's 2013 National Apology for Forced Adoptions. Its considerable substantive worth is mentioned below, but at this point there are two major aspects to highlight. First, the investigation that instigated the Apology led to self-examination by many non-State organisations and agencies, including faith-based bodies, and they recognised the role they had played, alongside that of the State itself, in creating 'forced adoptions'. Second, the Apology implicitly accepted that resistance at all levels, including political, to re-opening the "forced adoption" dossier had been considerable and long-lasting: '[t]o those who have fought for the truth to be heard, we hear you now. We acknowledge that many of you have suffered in silence for far too long.' (see *Promising practice: Australia's National Apology for forced adoptions*).

This is not just an admission, it should serve as an encouragement to all who are looking to secure political commitment to ensure that alleged malpractice in the sphere of adoption is seriously investigated and responded to.

5.1 CONFRONTING OBSTACLES

Over and above case-by-case challenges to be overcome, there are at least three 'general' obstacles to be faced when trying to secure cooperation to elucidate alleged illicit practices in this sphere.

Defence of the positive image of adoption

The benefits of adoption are grounded in the image of a parentless or unwanted child being given a stable home in a loving family environment. This image has survived despite the fact that most adopted children have not been either orphans or 'unwanted' (i.e. spontaneously, willingly, deliberately and definitively abandoned by their families).

There are considerable vested interests in keeping that image alive and accepted without question despite its shaky factual basis. As detailed later, those interests may be political, financial, ideological and/or professional but also, for example where certain adoptive parents are concerned, simply (and in the end understandably) self-protective in the form of denial.

It follows that initiatives that could, in themselves or in their consequences, discredit that image are likely to meet stiff resistance from a wide range of actors concerned. In some cases these constitute highly influential groups, through their overall position of power or their lobbying strength. This reality has to be reckoned with in developing strategies to counter that resistance.

Efforts to counter such images are at the heart of the work of Schuster Institute for Investigative Journalism, Brandeis University (see *Promising practice: Schuster Institute for Investigative Journalism, Brandeis University*).

'Sensitive' information

Very much linked with this question of 'image' is the difficulty in accessing even the most basic data on problems encountered once an adoption has been legally approved. Thus, for example, it is extraordinarily rare to find reliable data on the incidence of severe problems in, or breakdown of, the adoptive relationship, which in the most extreme cases may have resulted in the long-term placement of the child outside the family or the de facto or legalised termination of that relationship. This is frequently deemed to constitute 'sensitive' information, since it highlights 'failures' and thus might impact negatively on how adoption is perceived.

There is, not unnaturally, a similar (perhaps even enhanced) mistrust towards retrieving pertinent information on procedures and events prior to an adoption order having been made, in order to identify any illicit practices that may have been involved. Furthermore, particularly where very recent 'group' cases are concerned, an additional 'sensitive' factor is often invoked: how will children react if and when they are told or find out that the circumstances of their adoption might have been less clear than it seemed...

Such considerations may reinforce further the authorities' tendency to espouse, as far as possible, the approach of 'letting sleeping dogs lie', and thus to be less than receptive to requests for cooperation to elucidate the situation in question. Taking this line, however, is not only extremely frustrating for the adoptee but also may be detrimental to his or her development, as discussed in [Chapter 3: Psychosocial Considerations](#).

Prevailing legal context

The legal context in which the alleged misconduct took place may also have considerable bearing on the State's willingness to cooperate.

If the alleged practice ran counter to the law in force at the time, the response may be more forthcoming than if it was not the subject of a legal provision or was even enshrined in the law and/or in official policy.

It is also necessary to determine whether or not the law and/or policy in force at the time was in compliance with prevailing international standards and with any international obligations to which the State concerned had formally signified acceptance. Unless there is primary evidence of non-compliance in those regards, political will to take up the issue may be more difficult to secure.

Finally, States may hide behind past or current legislation governing confidentiality, particularly of adoption files. In principle, this should not be a relevant factor in most cases where there are well-founded concerns about illicit practices, however, since the request will not necessarily be for information that would identify the mother but only for potentially non-identifying information regarding the process that can serve to validate the concerns expressed.

While many States have not accepted full or partial responsibility for illicit practices, a number of encouraging legislative initiatives have been taken (e.g. in [Australia](#) and [Argentina](#) as examined in Chapter 2 and [Promising practice: The situation of Chile in the face of irregular circumstances in adoption](#), below). Likewise, the jurisprudence in the Netherlands is favourable in that it provides some avenues for potential arguments within national frameworks for better protecting children/adult adoptees affected by illegal adoptions (again, see [Chapter 2: Legal considerations](#)).

5.2 ISSUES REGARDING DOMESTIC ADOPTION

As regards domestic adoptions, the State's acceptance to investigate malpractice may imply an admission that the structures, procedures and/or oversight that the State had in place at the time of the alleged wrongdoing were inadequate. Governments and relevant governmental bodies are usually loath to face up to such criticism. Non-State organisations, institutions and agencies allegedly involved will likely be equally resistant, if not even more so: the fundamental stated goal of what are often 'charities' being the welfare of the children under their responsibility, acknowledgement of possible failures to do so might not only tarnish their past reputation but also thereby compromise their future resources, support and existence. If they are strong enough individually or collectively, they may be in a position to persuade the political authorities not to act, or to act in a way that will ensure that their reputation is not damaged. If their actions were in some way in collusion with the State, their efforts to that end will likely be facilitated.

With the passage of time, governments will nonetheless be able to distance themselves increasingly from the actions – or inaction – of their predecessors. Thus, Australia's 2013 National Apology concerned the forced removal and adoption of babies between 1950 and the mid-1970s (see *Promising practice: Australia's National Apology for forced adoptions*). In June 2015, Manitoba became the first Canadian Province to apologize for the mass adoption of aboriginal children into non-aboriginal families, which was acknowledged to have stripped children of their culture and identities. In many cases, children were forcibly removed from their homes and communities without the knowledge or consent of families, but this so-called 'Sixties Scoop' took place between 1960 and the mid-1980s. Ireland (see *Promising practice: Adoption Rights Alliance and the Philomena Project in Ireland and the USA*) has been under continuing pressure to take somewhat similar steps and to facilitate access to records, in many cases also dating back several decades, potentially relating to both domestic adoptions and ICAs. Successive governments have promised to legislate on this for the past 20 years, but have so far failed to deliver. Hopefully the authorities and agencies concerned will now concentrate their efforts on pro-actively identifying ways of moving forward constructively.

5.3 ISSUES REGARDING INTERCOUNTRY ADOPTION

Where ICAs are concerned, the potential obstacles are clearly doubled since counterpart actors in both countries may well have had roles to play.

5.3.1 COUNTRY OF ORIGIN

The authorities of the **country of origin** can play a variety of roles in relation to illicit practices. In the most egregious cases, such as Argentina (1976-1983), the State itself had spontaneously and deliberately instigated and carried out the illicit practice in question.

In other, more frequent cases, the State has required or knowingly tolerated procedures or actions that are known to carry a high risk for ethical adoptions – such as 'private' or 'independent' adoptions, access to listings of 'adoptable' children, unregulated "facilitators", and contributions or donations paid by prospective adopters or their agencies to 'orphanages' or directly to State coffers. In another scenario, the State may contend that the resources available were insufficient to process adoptions appropriately and thoroughly. In all such instances, it may prove difficult to secure meaningful cooperation from the authorities.

Furthermore the search for origins may bring to light illicit practices perpetrated by individuals or agencies in defiance of policies and laws enacted in the State – e.g. constraint, misrepresentation, falsification of documents or incitement/corruption. In these cases, there is greater likelihood of positive follow-up by the authorities.

The case of Guatemala (see *Promising practice: Guatemala and the criminal prosecution of human trafficking for illegal adoption purposes: Identification of strategies to fight impunity*) shows how with the help of UN agencies and other actors, a legal reform was possible and finally approved in 2007 (thanks to the UN, the Hague Conference, others), that would finally address the main irregularities in the adoption process until then. The International Commission against Impunity in Guatemala (CICIG's) report²⁷⁶ contributed to subsequently and further explaining how the range of irregularities operated in both legal frameworks.

²⁷⁶ International Commission against Impunity in Guatemala (2010). *Report on Players Involved in the Illegal Adoption Process in Guatemala since the entry into force of the Adoption Law (Decree 77-2007)*. Guatemala: CICIG; available at: http://www.cicig.org/uploads/documents/informes/INFOR-TEMA_DOC05_20101201_EN.pdf

Moreover, the Vietnamese example of how UNICEF effectively worked as a broker between the Government and receiving countries to bring about significant reforms provides another promising practice (see [Promising practice: The road to reform out of chaos in Vietnam](#)). Finally, the work of Terre des hommes in Nepal illustrates the important role of civil society in helping countries of origin address systemic illicit adoption practices in their country (see [Personal testimony: Paper orphans vindicated in Nepal](#)).

5.3.2 RECEIVING COUNTRY

The roles played by the **receiving country** are equally varied. In egregious cases such as that of Argentina noted above, the competent authorities of those countries to which the ‘disappeared’ children were sent will invariably have been complicit in the illicit adoption.

More usually, the receiving country will have been willing to comply with conditions set by the country of origin, and/or to accept realities therein, while knowing full well that they represented a high risk for the legitimacy of the adoptions concerned. But there are of course also cases where receiving countries have taken advantage of their position to pressure actual and potential countries of origin into allowing the removal of their children for adoption abroad, despite both countries being well aware that recognised safeguards for preventing illicit practices could not and would not be systematically respected. One of the notorious instances of such behaviour in recent decades is the unprecedented pressure exerted on Romania by several receiving countries in the 1990s, resulting in the exodus of thousands of children – most of them, in the end, directly from the care of their families – that the head of the country’s adoption authority qualified at the time as ‘a national tragedy’. More recently, the post-earthquake ‘evacuation for adoption’ of children from Haiti in 2010 was also the result of the much-weakened national authorities being ‘persuaded’ by certain receiving countries to allow the (unwarranted) rapid departure of children ‘already in the adoption process’, circumventing the already minimal safeguarding procedures in place.

It will be interesting to see what attitude will be espoused by receiving countries (and indeed by countries of origin) with regard to adoptees from Romania, Haiti and elsewhere who fear that their adoption was marked by illicit practices – including some for which it might be deemed that the authorities of those countries had direct responsibility. In terms of ‘group’ situations at least, there can be no clear prognosis on the basis of experience to date of how receiving countries have reacted to systematic illegal or unethical practices in various contexts. Some have halted adoptions from a given country while others have continued to process them, whereas the former group failed to halt adoptions from elsewhere while the latter did. The lack of a ‘common demarche’ is flagrant.

Clearly, efforts to secure the cooperation of all authorities concerned presents in principle a more complicated challenge for ICAs than for domestic adoptions. That said, and equally clearly, the responsibility of States to act expeditiously and effectively when presented with concerns about illicit practices is undeniable.

In this respect, the effort of the Working Group on illicit practices (see [Promising practice: HCCH continues its efforts to identify mechanisms for responding to illicit practices](#)) is one international effort to promote co-operation in these matters. The Netherlands CA and Belgium Francophone CA have also introduced a number of initiatives to address the challenges of addressing illegal practices (see [Promising practice: Dutch Child Protection Board raises awareness on how to address illicit practices](#) and [Promising practice: Belgium’s authorities actively implement preventative measures to combat illegal adoptions](#)). The role of lobbying groups is likewise vital for instigating and shaping State responses, as highlighted by the work of Adoption Rights Alliance and Philomena Project in Ireland and USA. (see [Promising practice: Adoption Rights Alliance and the Philomena Project in Ireland and the USA](#)).

5.4 ARE 'BEST INTERESTS' A RELEVANT CONSIDERATION?

As noted later on, the proper determination of children's best interests is of course a key element for deciding the most appropriate course of action for a child whose adoption has been shown to have involved illicit practices. But that is essentially the only role that the notion of 'best interests' has to play in relation to dealing with such practices.

Thus, there are no grounds for a State or any other party allegedly involved to refuse to carry out or assist the investigation of alleged illicit practices on the basis or pretext that, at the time of that alleged practice, the adoption was considered to be 'in the child's best interests'. The irrelevance of 'best interests' in this context holds both for individual cases and for group situations.

In this respect, it is highly instructive to note the approach taken in Australia's 2013 National Apology for Forced Adoptions mentioned above. The text recognises 'the policies and practices that forced the separation of mothers from their babies'; a system that 'subjected [mothers] to manipulation, mistreatment and malpractice'; the fact that mothers were 'denied knowledge of [their] rights, which meant [they] could not provide informed consent'; and 'practices that were unethical, dishonest and in many cases illegal'.

The National Apology pledges that, for the future, the 'focus will be on protecting the fundamental rights of children and on the importance of the child's right to know and be cared for by his or her parents'.

Over and above the substance itself, the striking feature of this text is that **nowhere – whether concerning the past, present or future – is reference made to the 'best interests of the child'**. What is in question is 'forced separation', 'manipulation', 'malpractice', 'lack of informed consent' and 'illegal practices', i.e. violations of rights.

In other words, 'best interests' explains nothing and excuses nothing. As a guide for those demanding action on illicit practices, as well as for States and other parties seeking to deliver credible responses to such demands, Australia's National Apology has probably not been bettered to date.

5.5 STATE RESPONSIBILITIES

Whatever form the refusal or procrastination by a State authority reluctant to proceed with investigation and potential redress may take, and whatever the reasons invoked for that stance, the letter and spirit of relevant international standards point to various responsibilities and obligations that cannot be ignored.

The obligation to investigate and prosecute, where appropriate in cooperation with others

Article 3.1(a)(ii) of the OPSC specifies that 'improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption' is a form of sale of children and thus a punishable act, as is 'complicity or participation' therein (Article 3.2).

The OPSC provides that (Article 6.1) 'States Parties shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings [...], including assistance in obtaining evidence at their disposal necessary for the proceedings', and (Article 10.1) that they 'also promote international cooperation and coordination between their authorities, national and international non-governmental organisations and international organisations.'

The obligation to re-establish identity

Under the terms of the UNCRC (Article 8.2), '[w]here a child is illegally deprived of some or all of the elements of his or her identity [including nationality, name and family relations], States Parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity.'

The obligation to determine the child's best interests

In those cases where the adoptee concerned is still a minor, recognition that illicit practice resulted in the unlawful modification of a child's identity and identification of his/her birth family will require a decision as to that child's future status and care. In accordance with **UNCRC Article 3.1**, a full determination of the best interests of that child must be ordered and carried out by the State within whose jurisdiction the child is habitually resident (or, in certain cases, present at the time), in principle in cooperation with the State of origin in the case of an intercountry adoption.

That best interests determination should take into account the criteria set out by the CRC in its General Comment No. 14²⁷⁷. It should notably inform any decision as to the maintenance of the child in his/her adoptive family, the possible return to the care of the first family, or any other possible outcome.

As regards ICAs, two provisions of the **1993 Hague Convention** may also be relevant: 'recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child' (Article 24); and 'A competent authority which finds that any provision of the Convention has not been respected [...] shall immediately inform the Central Authority of its State. This Central Authority shall be responsible for ensuring that appropriate measures are taken' (Article 33).

In this regard, the Permanent Bureau of the HCCH has noted the importance of cooperation between the two CAs involved and identified a number of pertinent questions to ask when an illicit practice has been discovered (see *Promising practice: HCCH continues its efforts to identify mechanisms for responding to illicit practices*)

The obligation to protect the interests of birth families

The primary focus of this handbook is on the rights of adoptees. However, respecting the rights of birth families is equally important, as demonstrated by Marlène Hofstetter (see *Personal testimony: The position of the biological family in the adoption triangle*).

5.6 CONCLUDING REMARKS

The role of the State in any adoption process is clear. Even for 'private' and otherwise insufficiently supervised and regulated adoptions, there will invariably come a point where some form of State involvement is inevitable (e.g. granting identity documents or nationality). And from that role comes responsibility, including towards adoptees or relevant others who discover disquieting information about how an adoption came about and was legalised.

It is true that the active cooperation of the State in following up such concerns may depend on a number of factors including the status of the claimant, the strategy employed, the legal context and the final objective being pursued.

Each situation is different, and there is no one strategy to be taken on board. The examples in this Chapter nonetheless point to a variety of initiatives that have so far proved more or less successful in obtaining the level of political commitment required. Other possibilities – one might think of suggesting the CRC takes up the issue when reviewing the Periodic Report of the State concerned, for example – have seemingly yet to be tried.

²⁷⁷ See also: Cantwell, N (2014). The Best Interests of the Child in Intercountry Adoption. *Innocenti Insight*, Florence, Italy: UNICEF Office of Research; available at: http://www.unicef-irc.org/publications/pdf/unicef%20best%20interest%20document_web_re-supply.pdf

However, securing the State's cooperation is unfortunately not just a question of convincing the pertinent authorities of the reasonable grounds for intervention. For reasons mentioned in this introduction, ensuring political commitment often boils down less to the merit of substantive arguments and much more to overcoming sometimes high levels of political resistance, fuelled in part by resistance from other parties involved. It is this, in particular, that in political terms frequently constitutes the main obstacle to be confronted.

Nigel Cantwell is an Independent Consultant on child protection policies who has been working on issues related to the protection of children's rights in intercountry adoption for over 25 years. He founded Defence for Children International (DCI) in 1979, served as coordinator of the group of non-governmental organisations that helped to shape the UNCRC, and participated on DCI's behalf in the drafting of the 1993 Hague Convention. He has been UNICEF's delegate to all sessions of the Special Commission responsible for reviewing the practical operation of that treaty, as well as to expert meetings on specific aspects of the issue organized by the Permanent Bureau of the Hague Conference. He has undertaken many field assessments of adoption systems for or in cooperation with UNICEF and ISS, notably in Ghana, Guatemala, Haiti, Moldova, Kazakhstan, Kyrgyzstan, Romania, Sierra Leone and Viet Nam, and with ISS for the Organisation for Economic Co-operation and Development (OECD) in Ukraine.

His publications on the subject of intercountry adoption include notably:

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PERSONAL TESTIMONY: THE POSITION OF THE BIOLOGICAL FAMILIES IN THE ADOPTION TRIANGLE

Based on her long experience as Head of Adoption at Terre des hommes, this contribution by Dr Marlène Hofstetter focuses on political considerations concerning the 'rights' of birth families.

THE CHILD'S ADOPTABILITY

An important stage in the adoption procedure is the declaration of the child's adoptability. It is incumbent on the authorities of the country of origin to ensure that the child has not been a victim of trafficking and that consent has been expressed in due form (Article 4 of the 1993 Hague Convention). However, abuses are common and, depending on the country of origin, they may take various forms.

In Haiti, until two years ago, full adoption did not exist and the law stated that *the obligation to provide maintenance continued to exist between the adoptee and the biological family; the latter was responsible for providing maintenance only if the adopter failed to do so*²⁷⁸. On the pretext that the children would come back to take care of them once they were adults, hundreds of biological families consented to the adoption of their child, without suspecting that they would never see them again. In Nepal, the situation is different. Many families living in the mountains in very remote areas send their children to the Kathmandu valley in order for them to have a good education. As they are unable to visit their children due to the distance and the lack of resources, the directors of the institutions are free to initiate an abandonment procedure. They publish a photograph of the child in the official newspaper, stating that the child has been found on the streets and requesting that anyone able to identify

²⁷⁸ Décret du 4 avril 1974 sur l'adoption [Decree on adoption of 4 April 1974].

them comes forward. If nobody appears within a few weeks – which is almost always the case – the director of the children's home may obtain the authorities' approval for adoption for the child. Hundreds of children have been adopted in this way, without the consent of their biological parents who have been presented with the *fait accompli*, even though their identity and that of the child were known. It is also worth mentioning the practices in Guatemala, where 'snatchers' located young destitute women who were alone and pregnant, offering them medical and social care during their pregnancy and the birth, on condition that they abandon their child upon birth and paying them a small sum of money in some cases; although, in some cases, children were literally abducted from their biological parents for adoption.

The actors in each country have developed their own stratagem to find 'adoptable' children depending on their social reality and the country's laws and procedures. They take advantage of the biological parents' poverty and distress, as well as the indulgence of the authorities, which often have neither the means nor the will to act or, in the worst cases, are themselves involved in the trafficking by partially benefitting from the gain.

All receiving countries have ratified the 1993 Hague Convention, and are therefore expected to apply its principles, even in non-Contracting States, such as some of the above-mentioned countries that are, or were, known for their problematic procedures, legal gaps and illegal practices²⁷⁹. Yet, it has sometimes taken years for receiving countries to react and to assume their responsibilities by suspending adoptions from these States – when the decision did not come from the countries of origin themselves. Still today, as regards Ethiopia and Russia for example, the authorities adopt an innocent approach with regards to the problems that arise, and indeed appear to be the very last to be informed of the abuses that occur in these countries. The assessments and questions about the in-country situations are left to the NGOs, media and persons affected. Receiving countries therefore become the accomplices of poor practices by hiding behind the child's adoptability as confirmed by the authorities of the country of origin. This approach of 'allowing it to happen' omits all potential misappropriations, including of the duped biological parents. It is claimed that the latter do not exist even though it is well-known that only a very low percentage of those children entrusted for adoption are orphans (15% according to a study in Nepal²⁸⁰).

THE 'RIGHTS' OF THE BIOLOGICAL PARENTS

Biological parents do not receive the attention they deserve, as they are not protected under International Law. Moreover, they are ignored by the political decision-makers and often considered a nuisance. Poor, inadequately informed or not informed at all, and often illiterate, they do not have the means to stand up for their rights, whether in the countries of origin or in the receiving countries. Indeed, birth parents who make contact after the adoption in receiving countries are ignored or, even worse, are considered a risk for the relationship between the adoptive parents and the child.

²⁷⁹ See: HCCH (2010). Conclusions and Recommendations adopted at the Special Commission on the practical operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (17-25 June 2010). Paras. 12, 36 and 37; available at: https://assets.hcch.net/upload/wop/adop2010concl_e.pdf.

²⁸⁰ UNICEF and Terre des hommes (2008). *Adopting the Rights of the Child – A study on intercountry adoption and its influence on child protection in Nepal*; available at: http://www.childtrafficking.com/Docs/adopting_rights_child_unicef29_08.pdf.

The story of Samira²⁸¹ is a striking example. She spoke to Terre des hommes in Nepal during the above-mentioned study: Samira was forced to marry a man 18 years older than her when she was not even 14 years old. He was an alcoholic and violent, and physically and mentally assaulted and abused her. She sometimes returned to her parents' home searching for shelter, but they reminded her of her duties as a spouse and sent her back to her husband. Soon, she became pregnant, but did not realise what was happening to her for some time. Her family finally realised to what extent Samira was ill-treated and decided to care for her and for her son Raju²⁸² after his birth. Several months later, Samira's husband abducted Raju in order for Samira to go back home and it took Samira's family many weeks to find him. In order to avoid this happening again, Samira moved to Kathmandu. She found a job, but needed a place for Raju. A woman offered to care for him in a children's home.

Samira had to travel outside of Kathmandu for work and, sometimes, she could not visit Raju for two or three weeks. When returning from one of these trips, Raju had disappeared. Samira was told that he was taken abroad. Samira contacted several people and organisations, looking for help to find her son. By placing pressure on the children's home, Terre des hommes finally obtained the name and address of the adoptive family, who was living in a European country. At the time, Samira no longer wanted her son to come back to live with her, knowing that he had been away for too long. Her strongest wish was – and still is – to have news from him and to see him once again. With the help of Terre des hommes, Samira wrote her story directed at Raju's adoptive parents, whilst requesting their understanding about her request.

Terre des hommes contacted the Central and local authorities of the country involved, but they refused to communicate with the adoptive family, stating that such information could upset the parents and disrupt the relationship with their son. They accepted to put Samira's letter in the adoption file, stating that it would be handed over to Raju after his 18th birthday, if he wanted to consult his file. Raju was eight years old when his letter was submitted to the authorities.

Terre des hommes finally also informed the adoptive parents twice in writing, requesting them to contact the organisation in order to share important information about their son. The request was undertaken via an association of adoptive parents, which would be able to take on the follow-up, if relevant. They never came forward and Samira is still desperately waiting for some sign of life from her son.

This is not the only failure experienced by Terre des hommes when trying to bring adoptive and birth families closer; it is rather common. In another European country, an adoptive family even threatened to submit a complaint if they continued to be 'disturbed'. Adoptive families, adoption agencies, as well as the authorities prepared to face the existence of a biological family are an exception (Belgium is one of them), yet these families often only request some news about their children. The authorities hide behind the law, asserting that a full adoption is irrevocable and that the parental bonds no longer exist (in legal terms), as if the child had fallen from the sky... Such behaviour is all the more appalling when the adoption resulted from the children having been abducted from their parents without their consent.

The best interests of the child is also an argument that is often raised in order not to respond to the request of the biological parents, on the pretext that the new parent-child relationship should not be disrupted and that the priority is to 'protect' the child who would not be able to understand their story... However, might the real reason not rather lie with the best interests of the adoptive parents, confronted with a reality that they have so far concealed from the child, with doubts about the legitimacy of their adoption procedure, and refusing to acknowledge the child's story and experience?

²⁸¹ The name has been changed.

²⁸² The name has been changed.

There is no minimum age for children to know the truth about their adoption and to know that they have parents in their country of origin, who love them and think of them. It is ridiculous to set the age of 18 years for adoptees to be able to consult their file. Questions arise much earlier (from the age of three or four years) and children have the right to receive answers. It is the language used that is important, depending on the child's level of understanding and maturity.

It is quite possible that most adoptive parents did not know, at the time of the adoption, that the birth family was still alive, but to ignore the truth, after having been made aware of their existence, is an unhealthy reaction. Children know intuitively when something is concealed from them, in particular in relation to their adoption. Parents establish a taboo that prevents the child from asking questions in relation to their story, the circumstances of their abandonment or their birth family. A child wanting to know more will have to wait until he or she is 18 years old, like Raju, to consult the file. Let us imagine Raju, who one day will discover that his mother has been waiting for 10 or 12 years for news from him, that she may have died since and that his parents knew about her and did not tell him. Will he not feel betrayed, deceived and deprived of his story? How can he still trust his adoptive parents, whom he was 'forced' to trust after having been 'abandoned'?

It is also worth mentioning that adoptive children, with memories of their life in Nepal and, in particular, of their biological family, often carry a burden of responsibility with regards to their adoption. They feel guilty that they left their siblings or parents who might need their help – like the boy, adopted at the age of six, who was worried about his little sister not being able to find her way to school without him. For these children, knowing about the existence of their family who remained in the country is a huge relief, as this means that the adults are aware of the situation and are taking care of it.

THE RESPONSIBILITY OF THE RECEIVING COUNTRIES

Whether in relation to the illegal adoptions in Nepal or elsewhere, the responsibility of the receiving countries is strongly engaged, and their refusal to cooperate when the truth is fully exposed is unacceptable. They are the ones that decide which countries they wish to work with, accredit the adoption bodies and grant the suitability certificates to the adoptive parents for a specific country. They do so even when the latter's reputation is poor and when there may be serious doubts as to the 'informed consents' obtained. In principle, they would rather respond to the demands of the adopters than to the needs of the children. This gap has existed for a long time, but it has intensified with the decrease in the number of adoptable children. Prospective parents are sent to countries with risks, without measuring the consequences, as long as they find what they are looking for...

Such an approach disregards the needs of children to know their origins and the existence of their biological parents, who may have been deprived of their parental rights as a result of questionable and/or illegal procedures. How many children suffer and will still suffer from a taboo established by the adoptive parents, the accredited adoption bodies and the authorities due to an incomplete procedure that prevents them from knowing their origins, while biological parents are desperately trying to obtain news about them? As for the accredited adoption bodies and the authorities, few of them accept some form of responsibility, even when they played an important role in the adoption procedure.

The abduction, sale and trafficking of children or violations of the rights of the biological parents cannot be eradicated without the establishment of an ethical, structured and transparent adoption system in the receiving countries.

Marlène Hofstetter was in charge of the Intercountry Adoption Department of the NGO Terre des hommes in Switzerland for over 25 years. She was active on both 'sides', the receiving countries as well as the countries of origin. On the one hand, she supervised the adoption procedures carried out by her organisation as an accredited adoption body. On the other hand, she shared her expertise with countries of origin, assessing child protection and adoption systems, supporting legal and practical reforms and training professionals. She has been an independent expert since 2014.

PERSONAL TESTIMONY: PAPER ORPHANS VINDICATED IN NEPAL

Joseph Aguetant describes how effective and coordinated advocacy steered by Terre des hommes led to sustainable change for children in Nepal – primarily via a documentary film and its launch at a high profile international forum. In spite of threats from orphanages and the risk of expulsion from Nepal, the ‘Paper Orphans’ experience vindicated his position that children should be, as a priority, protected in families and in their own communities. It laid bare the inner contradictions and vested interests of a flourishing adoption industry.

As any humanitarian worker obsessed with sustainability (which is politically correct for ‘leaving a legacy’), I find it encouraging that the Government of Nepal declared a suspension of ICA shortly after the first devastating earthquake on 25 April 2015. Many feared that Nepal could have followed the calamitous Haitian example, downplaying or ignoring dozens of illegal adoption cases that were brought to light in the last few years. Opening the flood gates for ‘orphans’ to leave the country and adoption money to flow in would have been relatively easy. Instead, child welfare authorities keep insisting on efforts to reunite separated children with their relatives or extended family. Family preservation was given first priority and institutionalisation discouraged.

Do not get me wrong. There is no such thing as a perfect ICA system and the Nepali one is still far from meeting international standards. However, having spent years fighting illegal adoptions in Nepal, it feels good to see improvements in the long-term. The question is: how did the country transform itself from openly ‘promoting children’s homes’ and recommending an ‘increase in the number of orphanages’²⁸³ in 2004 to promoting family preservation and even closing down rogue orphanages 10 years later? From widespread adoption trafficking to developing local solutions, such as kinship, foster care and domestic adoption? From a booming orphanage industry to a public outcry against institutionalisation of children and ‘voluntourism’²⁸⁴?

One possible answer: sustained, long-term advocacy and coalition-building. But how was this done concretely? Are certain communication and advocacy strategies more effective in achieving change? What were the advocacy products used to highlight illegal adoptions and thus change government policy? What could have been done better to achieve a quicker and more profound impact?

While it is delicate to attribute impact to an event or a series of actions, a recognised tipping point was the making and projection of a film on ICA at the Special Commission on the practical operation of the 1993 Hague Convention at The Hague in the summer of 2010. This happened at a time when the Government of Nepal was denying illegal adoptions were occurring. It claimed that the 2008 regulations had created ‘a system of accountability and transparency’²⁸⁵.

²⁸³ His Majesty’s Government of Nepal (2004). 2005-2015 National Plan of Action for Children; available at: <http://www.ccwb.gov.np/uploads/userfiles/resources/Nepali/other/National%20Plan%20of%20Action.pdf>.

²⁸⁴ Punaks, M and Feit, K (2014). ‘Orphanage voluntourism in Nepal and its links to the displacement and unnecessary institutionalization of children’, in *Institutionalised Children Explorations and Beyond*, Vol. 1, No. 2, pp. 179–192.

²⁸⁵ Letter from Nepal’s Embassy in Belgium to the Permanent Bureau of the HCCH, 15 June 2010.

THE MAKING OF 'PAPER ORPHANS'²⁸⁶

When I arrived in Nepal, I was warned that the adoption system was deeply flawed and so entrenched that it would be impossible to tackle at central level. As I was searching for solutions, the 'aha moment' came from the field. Families from remote Mid-western districts approached Terre des hommes, claiming that their children had gone 'to Kathmandu or the USA' and that they had no news whatsoever. The mothers were crying and the fathers very agitated. Maybe some of them were involved too. We started digging deeper and deeper and found many more such cases. It was not just a few isolated families, but a deeply entrenched practice of sending out children for better education, usually through a middle man. A persistent rumour was that 1,500 children were missing from a single district alone, Humla.

The title, 'paper orphan', came naturally as we wanted to put children at the centre while being explicit about the means used to traffic them. The phrase was later defined as 'a child who has at least one living parent, but for whom official-looking paperwork has been fraudulently created to give the impression that he or she is an orphan and, therefore, suitable for adoption or other forms of financial or material support that will profit a trafficker or orphanage manager'²⁸⁷.

Brainstorming ways forward

Upon return from one of those poignant field trips in Humla and Jumla, I asked for some help and advice from colleagues, and we agreed to launch an advocacy project aimed at denouncing illegal adoptions. Almost immediately, we decided that the project should offer constructive alternatives, such as family support and preservation, kinship, foster care and domestic adoption, and not only denounce malpractice. The idea of a documentary film quickly formed and it received the blessing of Marie Ange Sylvain, the film director who helped reveal the 1982-1984 Ethiopian famine to the world.

The initial intuition was to put the viewer in the shoes of a family who had lost a child to illegal adoption, and to try to understand the perspective of a child who had been placed into an orphanage and then adopted. We wanted the viewer to feel all the emotions a family goes through when losing a child (not knowing if they did the right thing when they sent them to a big city to study), and all the emotions and pain a child suffers when discovering that their identity was stolen and a new one fabricated. Some discovered that their status of orphan was fake (they had parents) but also that their name and age, as indicated on the paperwork, was erroneous.

The endeavour required a conscious effort to systematically collect and analyse cases. According to these records, at least 91 children were directly affected by irregularities in adoption procedures up to mid-2011. Equally importantly, it meant hiring and investing in competent and compassionate staff who left no stone unturned to collect cases, trace missing children and, where possible, return the children to their families and provide family-based alternative care.

²⁸⁶ 'Paper Orphans' (2010); available on YouTube in four parts at: <https://www.youtube.com/watch?v=1B5QjFFxAu4> (Part 1).

²⁸⁷ Punaks, M and Feit, K (2015). 'The Paradox of Orphanage Volunteering, Combating child trafficking through ethical voluntourism'. Eugene, OR, USA: Next Generation Nepal; available at: <http://www.nextgenerationnepal.org/File/The-Paradox-of-Orphanage-Volunteering.pdf>.

Collaborative efforts

While a pioneer in many ways, Terre des hommes worked alongside great organisations acting on the entire alternative care problem or a segment thereof: Hope for Himalayan Kids, Next Generation Nepal, The Himalayan Innovative Society, Umbrella Foundation and more recently ACR-Int. It is noteworthy that the director and founder of ACR-Int., Jurgen Conings, later produced a film which he also called 'Paper Orphans'²⁸⁸. Far from being a copyright issue, it was living proof that the movement continued. The term 'paper orphan' is now commonly used in Nepal, as shown in a recent report by Next Generation Nepal²⁸⁹. UNICEF and a few Embassies and Consulates, chiefly Germany, Switzerland and France, played a key role in the coalition.

In hindsight, I am convinced that the informal coalition we set up was the main success factor. In fact a certain moral legitimacy could be obtained by putting together local NGOs, UN agencies, international NGOs and adoptive parents. National governments could not have addressed cross-border issues as effectively or as legitimately as this group.²⁹⁰

KEYS TO SUCCESS

While it infuriated the orphanage industry and some Government quarters at the time, the film was praised by viewers from Nepal and abroad. Michele Thoren Bond, Deputy Assistant Secretary for Overseas Citizens Services, US Department of State, said, on 17 June 2010: 'The film had a huge impact on all delegations, including mine. This is a very moving film. We support your efforts in support of ethical adoption reform in Nepal. The US Department of State strongly discourages prospective adoptive parents from choosing adoption in Nepal because of grave concerns about the reliability of Nepal's adoption system and the accuracy of the information in children's official files'. The film was deemed 'fantastic' by Hans Van Loon (Secretary General of the Hague Conference on Private International Law), and William Duncan, his Deputy, noted, on 17 June 2010, that: "'Paper Orphans" is balanced, moving, and portrays the dilemma, almost a tragedy, faced by birth and adoptive families. This is done in a very sensitive way'²⁹¹.

²⁸⁸ 'Paper Orphans' (2013); available at: <http://topdocumentaryfilms.com/paper-orphans/>.

²⁸⁹ *Supra* 287.

²⁹⁰ 'As discussions continue about democracy and accountability in global decision-making, it becomes increasingly clear that NGOs have a vital role to play'. Paul, J A (2000). 'NGOs and Global Policy Making'. Global Policy Forum; available at: <https://www.globalpolicy.org/empire/31611-ngos-and-global-policy-making.html>.

²⁹¹ Comments on 'Paper Orphans', November 2010.

Ingredients included:

- a preliminary research and reference document: *Adopting the Rights of the Child*²⁹². It published striking figures on the number of orphanages in the country and the proportion of children in their care who still had living parents. It helped mobilise international and national media around the issue of illegal adoptions;
- extensive and invaluable technical support from Marlène Hofstetter, Head of the Adoption Department at Terre des hommes Foundation (Lausanne, Switzerland) and Jeffrey Klinke (PEAR Nepal);
- the involvement of UNICEF, who signed joint statements, co-funded the research piece and were interviewed in the film;
- long-term financial commitment (the Terre des hommes delegation budgeted advocacy-related work for four years in a row);
- the involvement of Embassies and Consulates (invited to a pre-launch, during which they could offer comments and influence the final cut);
- the involvement of the Permanent Bureau of the HCCH, especially its then Secretary, Ms. Jennifer Degeling, who invited the film to be projected in The Hague;
- strong artistic input by a gifted film director and communicator, Marie Ange Sylvain. It was essential to recruit a professional company, ImageArk, and to trust their expertise. We wanted to make a beautiful film, not only to reflect Nepal as an amazing country from an aesthetic point of view, but also to show how beautiful and dignified Nepali families were in caring for, and in some cases grieving for, their lost children. Being a gifted film director and very close to the theme of adoption (Marie Ange and her husband Valdemar adopted their daughter from Cambodia), she was able to give a disproportionate amount of energy, time and talent to the film;
- not only denouncing but proposing alternatives. It was important for all actors to 'save face' and to show that Nepal could offer some good practices too. A Terre des hommes project called 'Mala' showed that it was possible to put in place foster families (41 families in four Mid-western districts) and place children in their care (27 children at that time).

CHALLENGE: ARE LOCAL FAMILIES UNFIT FOR PURPOSE?

'Paper Orphans' was mainly challenged by individual orphanages, orphanage networks and US adoption agencies. At one stage, a notice was posted on a Ministry's website indicating that the film was illegal. Credible rumours reached me that my visa would not be renewed.

With support from Embassies and some perseverance, all of these obstacles were overcome. My organisation could not do without a complete and detailed risk assessment. It took stock of the vulnerability, threats and risks and concluded that, in spite of all these, the organisation should go ahead and launch the film.

Advocacy is never an end in itself. From 2011 onwards, as all countries suspended the adoption of Nepali children documented as 'abandoned, and the Government solicited Terre des hommes to write an alternative care policy, denunciation could stop. It was time for praising Government officials that had taken the right decision and for collaborative efforts to write the future pages for the children of Nepal.

²⁹² *Supra* 280.

Out of the numerous articles criticising or praising ‘Paper Orphans’ at the peak of media frenzy, one stands out vividly. It is an opinion piece in which the author, an adoptive father working in Nepal, held that ICA should not be suspended as children could find love abroad, whereas in Nepal they could not: ‘[I]nternational adoptive parents can offer infinitely better material support and, above all, love’, he wrote. The author was sceptical of domestic adoption: ‘[...] what about the all-important issue of love? Many Nepalis will tell you that a child that is adopted into a [Nepali] family has a very high chance of being treated as a domestic servant who is expected to work in return for food and board (and be glad of it) rather than being treated as a true son or daughter. This is in marked contrast with what is available overseas’.

I was shocked by this public statement. Apart from a particularly obnoxious display of Western arrogance (as if no child abuse was taking place there), I felt that it was totally unfair. How could this person declare Nepali families as unfit for purpose?²⁹³ The author also confused informal placement arrangements (which are unmonitored and often result in child labour) with formal family placements, which only take place once the foster or adoptive family has been professionally vetted.

The ‘Paper Orphans’ experience (added to the fact that almost all receiving countries suspending adoptions cited the film as a primary source) vindicated our position and laid bare the inner contradictions and vested interests of a flourishing adoption industry.

Of course, many things could have been done better: building an even broader coalition and sustaining it, providing a higher technical input on the Government’s alternative care to parental care policy. As usual, funding is difficult to obtain in this field and the challenge remains to fund alternative care options such as domestic adoption (only 35 children were adopted domestically in 2012 and the number has dropped by 40% since 2011).

In the same way as they united in the face of adversity to respond to earthquakes, Nepali people will continue to provide and improve on alternative care to children without parental care. A coalition of like-minded NGOs and officials has been built. The road is arduous but Nepali families have, needless to say, no short supply of love to offer.

Joseph Aguetant is currently the Country Representative for Terre des hommes Foundation in Palestine and Israel, based in Jerusalem. Educated in Public International Law and Political Science at the University of Paris and more recently at the University of Geneva (Certificate of Advanced Studies: Modern Management for Non Profit Organisations, 2011), Joseph has worked in New York City, USA, The Netherlands, Myanmar/Burma, Thailand, Switzerland, Sudan, Chad, Nepal, Romania for international non-profit organisations including UNICEF, the International Criminal Tribunal for the former Yugoslavia, the UN High Commissioner for Refugees, the International Rescue Committee and Terre des hommes.

Note: ‘The views and opinions expressed herein are those of the author and do not necessarily reflect the views of his employer’.

²⁹³ The author eventually apologised in a personal e-mail: ‘Had I known what was going on behind the scenes in the orphan business I would have been more discrete and professional’.

PROMISING PRACTICE: HCCH CONTINUES ITS EFFORTS TO IDENTIFY MECHANISMS FOR RESPONDING TO ILLICIT PRACTICES

In this contribution, Laura Martínez-Mora and Hannah Baker present some of the efforts of the HCCH in pinpointing potential responses to illicit practices, and the work undertaken to identify practical tools with States parties to the 1993 Hague Convention.

The 2015 Fourth meeting of the Special Commission on the practical operation of the 1993 Hague Convention held a session on how to prevent and address illicit practices in ICA. In order to prepare for the discussion, the Permanent Bureau of the HCCH prepared a factsheet on this topic, which included some ideas for the way forward, both as a means to prevent but also to respond to illicit practices²⁹⁴. Regarding the ways to respond, the following suggestions were made:

1. PREVENTING ILLICIT PRACTICES

Having effective laws in place and implementing them

- Adopt laws (both specific to adoption and broader) addressing the protection of children, the sale of children, child laundering, and child trafficking;
- Monitor and enforce compliance with those laws (e.g. this might take place through CAs, other authorities and the judicial process);
- Establish penalties, including fines or imprisonment, as well as suspension or revocation of the accreditation of AABs or persons, or their dissolution;
- Prohibit private and independent adoptions.

Adopting effective safeguards

- Ensure that proper consents are given and that the child has been determined to be adoptable as established by the 1993 Hague Convention and internal legislation;
- Properly verify the identity of those persons taking part in the adoption procedure;
- Properly scrutinise the documentation;
- More effectively screen and train prospective adoptive parents;
- Effectively regulate (accreditation and authorisation) and supervise AABs;
- Ensure transparency and accountability regarding costs;
- Ensure transparency and professionalism in relation to the matching process;
- Control the use of guardianship arrangements, and other measures, so that they are not used to circumvent the ICA process;
- Properly apply the subsidiarity principle;
- Cooperate more closely with other States;

²⁹⁴ See: HCCH (2015). Fact Sheet No. 3 for the 2015 Special Commission meeting: 'Preventing and Addressing Illicit Practices in Intercountry Adoption'; available at: https://assets.hcch.net/upload/wop/factsheet_illicit_en.pdf. The HCCH website (<https://www.hcch.net/en/home>) includes further information on illicit practices and other aspects of ICA.

- Open an ICA programme only if satisfied that the partner country has appropriate safeguards and regularly review programmes to ensure ongoing compliance with the 1993 Hague Convention;
- Apply the standards and safeguards of the 1993 Hague Convention to ICA arrangements with non-Contracting States;
- Work cooperatively with concerned NGOs, experts and professionals.

2. RESPONDING TO ILLICIT PRACTICES

More effective cooperation between States in responding to illicit practices

- Ensure that the governments in *both* States (receiving State and State of origin) are able to identify illicit practices when they occur, and that systems are in place such that these practices are brought to their attention;
- Encourage other actors in the ICA process to report information about illicit practices to governments;
- Ensure that the governments in *both* States have the political will and capacity to cooperate, investigate and respond to illicit practices.

Taking effective action when illicit practices occur

Where appropriate, taking into account, among other things, the seriousness of the illicit activity and the stage of the adoption process, which has been reached:

- Consider, if the adoption process is ongoing, whether it should be halted;
- If the adoption decision has already been issued, consider whether to refuse to recognise the adoption. However, non-recognition of the adoption would be an extreme sanction for very exceptional cases, for example, where there has been a violation of fundamental rights of the birth family;
- Report the matter to the appropriate authorities for investigation and possible prosecution;
- Impose new restrictions on accredited bodies, requiring that they take corrective actions, or consider the suspension or revocation of the accreditation of such bodies;
- Ensure that appropriate sanctions are taken towards the persons involved in malpractices;
- Restrict, suspend or close country programmes;
- Provide services and supportive programmes to victims;
- Change ICA processes in response to the vulnerabilities revealed through discovery and investigation of illicit practices.

It is recommended that this guidance on responding to illicit practices be made widely available, for example, through the websites of CAs, accredited bodies, adoptees' associations and any other bodies working on ICA issues. Prospective adoptive parents should receive this information as part of their counselling and preparation for an ICA.

Finally, as recommended by the 2015 Special Commission on the practical operation of the 1993 Hague Convention, a frank and open dialogue on this topic, the sharing of good practices, and cooperation and coordination between States are all key elements in preventing and addressing illicit practices. The HCCH Working Group on Preventing and Addressing Illicit Practices will be a mechanism to implement relevant recommendations.

Laura Martínez-Mora is the Principal Legal Officer at the HCCH in charge of the work on the 1993 Hague Convention. She also undertakes work on the Parentage/Surrogacy Project. Laura is a Lawyer specialised in children's rights and has extensive experience in providing legal and technical assistance as well as in drafting documentation on adoption matters. Prior to joining the HCCH, she worked, among others, for ISS and UNICEF.

Hannah Baker is the Senior Legal Officer at HCCH undertaking work on the 1993 Hague Convention and the Parentage/Surrogacy Project. She has extensive experience in International Family Law, having previously worked at HCCH on the 1980 and 1996 Hague Conventions. Prior to her time at HCCH, Hannah worked as a Barrister in London practising in Family Law. She remains a door tenant at Queen Elizabeth Building in London.

PROMISING PRACTICE: WORKING GROUP ON PREVENTING AND ADDRESSING ILLICIT PRACTICES IN INTERCOUNTRY ADOPTION

The Australian CA describes how CAs and other stakeholders formed a Working Group on illicit practices – an encouraging development as united forces have better impact. It also presents its protocol for families in this situation.

FORMATION OF THE WORKING GROUP

Preceding the 2010 Special Commission on the practical operation of the 1993 Hague Convention, Australia developed a Protocol for Responding to Allegations of Child Trafficking in Intercountry Adoption²⁹⁵ to provide adoptive parents and adoptees with information on how concerns about abduction, sale or trafficking of children in ICA will be managed by Australian authorities. The Protocol was discussed at the Special Commission.

At the 2010 Special Commission on the practical operation of the 1993 Hague Convention, Australia sponsored a special day on the abduction, sale of and traffic in children and their illicit procurement in the context of ICA. In addition to raising awareness as to the nature and extent of these issues, a major objective for Australia was to seek agreement for further work on enhancing safeguards and developing procedures for how countries should manage trafficking allegations, if they arise within a particular country or programme.

Successful lobbying by Australia and other like-minded countries resulted in the Special Commission recommending the establishment of an informal Working Group, coordinated by Australia, to consider the development of more effective and practical forms of cooperation between States to prevent and address illicit practices in ICA cases²⁹⁶.

The Working Group²⁹⁷ was made up of receiving States, States of origin, the HCCH and NGOs. The members of the group were officials from the CAs of the Philippines, the Netherlands, Denmark, the USA, Canada, Chile and representatives from the Nordic Adoption Council, Terre des hommes, the Permanent Bureau of the HCCH and ISS.

TASK OF THE WORKING GROUP

The Working Group agreed that a practical, tangible outcome should be achieved. It was decided that the Working Group would prepare a paper setting out principles for preventing and addressing specific instances of abuse. These principles would then serve as a point of reference for developing practical and effective cooperative measures to prevent instances of abuse and set up measures to resolve situations where illicit practices have already occurred.

²⁹⁵ See: Attorney-General's Department (2015). Protocol for Responding to Allegations of Child Trafficking in Intercountry Adoption – Information to assist adoptive families and adoptees; available at: <https://www.ag.gov.au/FamiliesAndMarriage/IntercountryAdoption/Documents/Protocolforrespondingtoallegationsofchildtraffickinginintercountryadoption.pdf>.

²⁹⁶ *Supra* 279, Para. 2.

²⁹⁷ For further information on its activities and results, see: HCCH, Working Group to develop a common approach to preventing and addressing illicit practices in intercountry adoption cases, <https://www.hcch.net/en/publications-and-studies/details4/?pid=6309>.

As coordinator of the Group, Australia facilitated discussion and took the lead in drafting initial documents for discussion and comment. Group members provided comments, draft inputs and insights during the process. The diverse membership of the Working Group, bringing together countries of origin, receiving countries, and international children right's experts, was an advantage when framing the paper. The Working Group was able to draw on the practical experience and knowledge of the Working Group's membership when drafting both, the principles and the supporting cooperative measures.

OUTCOME OF THE WORKING GROUP

The finalised version of the *Discussion Paper: Co-operation between Central Authorities to develop a common approach to preventing and addressing illicit practices in intercountry adoption cases* was published on the HCCH's website in October 2012²⁹⁸.

The Discussion Paper set out principles and cooperative measures to prevent and address illicit practices in individual ICA cases:

1. Cooperation and information sharing to prevent illicit practices in ICA cases (*e.g.* sharing of information, reporting and monitoring and assistance to States of origin);
2. Preventing undue pressure on States of origin (*e.g.* avoiding competition or pressure between States, between accredited bodies and educating prospective adoptive parents);
3. Cooperation to address and respond to specific cases of illicit practices.

RESUMPTION OF THE WORKING GROUP

The 2015 Special Commission on the practical operation of the 1993 Hague Convention recommended that the Working Group resume its work²⁹⁹.

²⁹⁸ *Supra* 294.

²⁹⁹ See: HCCH (2015). Conclusions and Recommendations adopted by the Fourth Meeting of the Special Commission on the practical operation of the 1993 Hague Intercountry Adoption Convention. Para. 45; available at: https://assets.hcch.net/upload/wop/adop2015concl_en.pdf.

PROMISING PRACTICE: DUTCH CHILD PROTECTION BOARD RAISES AWARENESS ON HOW TO ADDRESS ILLICIT PRACTICES

Marjolein Kroon, Policy Officer, provides a brief description of one way the Dutch authorities seek to address illicit practices.

The Dutch Child Protection Board has 17 regional departments. Seven of them have specialised adoption teams responsible not only for screening prospective adoptive parents, but also for related issues such as abandoned children or questions relating to children's origins.

The Child Protection Board states that cases of illegal adoption are rare, and, when they do occur, can vary in circumstances. For that reason, it is quite difficult to draft a protocol for dealing with them. However, the Board is aware of the need to ensure that its employees are able to ask appropriate questions, as well as to know which steps to take.

QUESTIONS TO BE COVERED WHEN ILLEGAL ADOPTION IS SUSPECTED

The Board suggests answering the following questions:

- What is the habitual residence of the prospective parents?
- If in the Netherlands, did they follow the legal adoption procedure?
- If in another country, did they follow the legal procedure of that country?
- Is a legal birth certificate available?
- Has the child been formally available for adoption?
- Has it become clear that alternatives for adoption in the country of origin have been thoroughly examined?
- Have the authorities in the country of origin approved the adoption?

Depending on the answers to these questions, the Child Protection Board provides internal advice to its staff about how to proceed.

OPPORTUNITIES UNDER THE 1996 HAGUE CONVENTION

In addition to internal training, and as stated at the 2015 Special Commission on the practical operation of the 1993 Hague Convention, the CA of the Netherlands believes that the 1996 Hague Convention is one mechanism for promoting collaboration between States that find themselves in this situation of illicit practices or adoption breakdown³⁰⁰.

³⁰⁰ *Ibid.*, Paras. 20, 46 and 47.

PROMISING PRACTICE: BELGIUM'S AUTHORITIES ACTIVELY IMPLEMENT PREVENTIVE MEASURES TO COMBAT ILLEGAL ADOPTIONS

Didier Dehou, Director of the CA in Belgium's French Community, describes the multiple efforts to address illicit practices by working with AABs and closely supervising activities in countries of origin.

In order to be truly effective, the fight against illicit practices in adoption must be carried out in a preventive manner. The responsibility of the CA in a receiving country will be measured, in this respect, in the light of the measures that it has taken – or not taken – before any adoption procedure: in particular, supervision of this procedure and the means whereby partnerships in the countries of origin are established.

Whereas the prohibition of individual ('private') procedures should be self-evident in relation to non-relative adoptions, the supervision of an adoption procedure by an accredited intermediary (AAB) is only the first – and insufficient by itself – step in tackling the issue of illicit practices.

What is also required is the promotion of specialised and accredited child protection services that are controlled by public child protection authorities as being the only structures that may act as intermediaries in the adoption. The added-value offered by this type of service is reliance on professional ethics as well as ensuring a solid basis for implementing a child protection measure.

Monitoring the activities of these child protection services should include an individual approach (*i.e.* in relation to every single adoption procedure) as well as a more structural approach. Investing in structural oversight enables the CA to be better placed to monitor individual cases.

INVESTING IN THE STRUCTURAL OVERSIGHT OF THE ACTIVITIES OF CHILD PROTECTION SERVICES

In Belgium's French Community, a practice set in place about 10 years ago involves the CA undertaking joint missions with one of its AABs in order to assess new partnership opportunities in a country of origin. Joint missions have been undertaken in Bulgaria, the Democratic Republic of Congo, Haiti, Ivory Coast, Kazakhstan, Morocco, Niger, the Russian Federation and Togo.

This type of joint mission offers several benefits:

- The CA of the receiving country introduces itself to its counterpart in the country of origin as the authority in charge of the administrative supervision of the AAB, and therefore vouches for this AAB, its selection of local partners and the quality of its prospective interventions. This guarantee must, however, be constantly reviewed through periodic contacts with the AAB's local partners (in particular in the framework of a new mission or a visit to Belgium). Thus, the AAB no longer appears as a simple private Belgian association, but rather as a service, which benefits from the support, and is subject to the robust supervision, of the Belgian public authorities. The AAB gains legitimacy and credibility from this arrangement.

- The CA of the receiving country undertakes the preliminary research regarding a potential partnership. The CA of Belgium's French Community therefore meets with all the actors involved in the adoption process, including at the relinquishment and abandonment phase (several central and decentralised administrative and judicial authorities, social workers in the field, the social services in maternity wards, infant care homes and children's homes...) in order to understand the path followed by a child, who may one day be considered for ICA. This results in a better understanding of the child protection system in the country of origin and of its links with adoption. Moreover, there is an equal sharing of knowledge between the CA and the AAB. During such missions, the AAB is therefore involved in a broad approach to adoption, strengthening their understanding of various problems linked to adoption and its ethical basis.
- The CA of the receiving country can immediately identify any delicate issues. On that basis, where necessary, it can develop a *modus operandi* with its partner in the country of origin that would enable them to cooperate while meeting their respective obligations. This *modus operandi* often includes a provision relating to the regulation of the adoption requests that the AAB will be authorised to submit to the country of origin's CA. The *modus operandi* is never cast in stone; it can be adjusted by mutual consent in the light of the experience of either side or any changes in the conditions or context of ICA.

BETTER IDENTIFYING THE NEEDS OF THE CHILD

This work undertaken beforehand in cooperation with its AABs not only enables the Belgian CA to oversee the structural aspects of the new cooperation, but also facilitates oversight of each prospective adoption. Belgian legislation obliges the CA to exercise control over each adoption procedure from a very early stage: before a matching proposal can be communicated to the applicants, the accredited body must first request the agreement of the CA. This agreement will come after the Authority has examined the child's file (as it stands at this stage of the procedure) in terms of the latter's legal and administrative adoptability and of their psycho-emotional and medical situation. This examination makes it possible to clarify, as far as possible, the child's story and their need to benefit from an ICA. If necessary, this clarification is undertaken with the help of the authorities in the country of origin and/or the AAB's local partners.

LESSONS LEARNT

No receiving country is obliged to set up some form of cooperation unconditionally with a country of origin, nor to let its AABs do so. Such cooperation should only be initiated once the receiving country's CA has previously researched the needs of the country of origin in question (are there any needs in terms of ICA, what are the needs in quantitative and qualitative terms, what added-value can we offer to this country of origin?) as well as the feasibility of potential cooperation in the light of the requirements of the 1993 Hague Convention (what are the safeguards with regards to the children's background, the establishment of their adoptability, the positive development of the proceedings, the reliability of various local actors?). This preventive task must be undertaken in tandem with the CA or the competent authorities in the country of origin, in particular in relation to the assessment of the needs and the necessity to regulate, quantitatively, the prospective activities of the accredited bodies.

It is also incumbent on the CA of the receiving country to ensure the permanent follow-up of the authorisations that it grants to its AABs to work in each country of origin. How? First, by providing for oversight mechanisms over each adoption procedure as far upstream as possible (and in any case, before the adoption is declared in the country of origin). Second, by ensuring the long-term quality of the partnerships established by the AABs in the country of origin (through assessment of these partnerships when in contact with the local authorities and periodic meetings with the AABs' local partners).

In Belgium, the malfunctioning of an AAB (or of one of its local partners, for which the AAB is directly responsible) in the country of origin may result in sanctions (withdrawal of the authorisation to work in this country or withdrawal of the accreditation). However, it is worth mentioning that no sanction of this type has been imposed in Belgium's French Community since 1998.

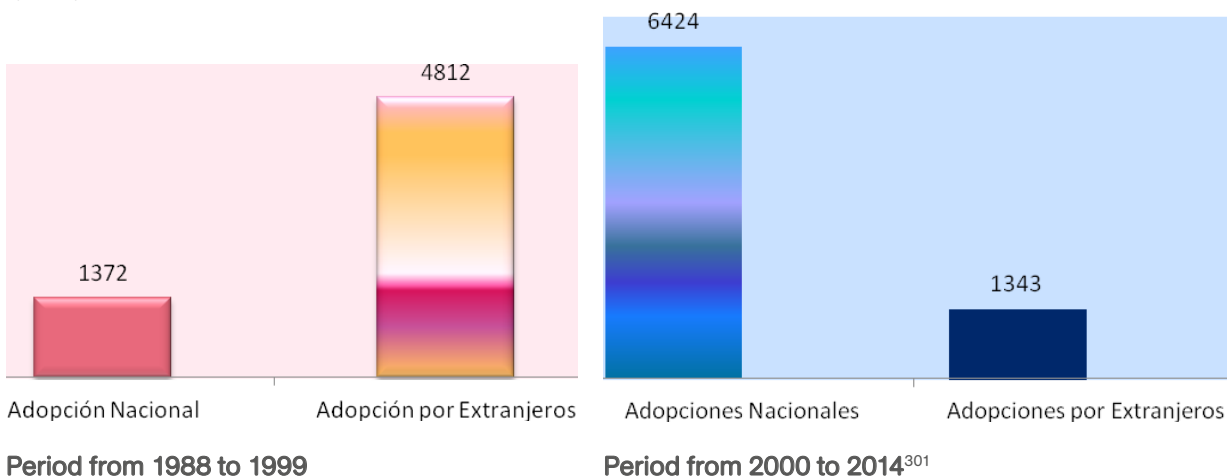
Didier Dehou was born in 1959. He is a Sociologist, has been a civil servant in the field of child protection since 1984 (initially in juvenile justice, then in adoption). Since 1997, he has been the Head of the competent authority and, subsequently, of the CA in Belgium's French Community.

PROMISING PRACTICE: THE SITUATION OF CHILE IN THE FACE OF IRREGULAR CIRCUMSTANCES IN ADOPTION

María Fernanda Galleguillos Pizarro, Head of the Adoption Department at the Servicio Nacional de Menores in Chile, describes how a country of origin has addressed illegal adoptions.

When the Law on Adoption No. 19.620 entered into force, Chile took an important step forward in this field. Until October 1999, our country had the Law on Adoption No. 18.793 (from 1988 to 1999), which provided for two types of adoption – simple and full adoption – in addition to a procedure that enabled children to leave the country for adoption purposes.

Given the lack of adequate regulation of ICA and networks of intermediaries engaged in obtaining children for profit, this fostered a situation of child trafficking. Children would randomly leave Chile for adoption purposes to the country of residence of adoptive families with no adequate follow-up. The statistics from this period are quite pertinent.



This chart clearly shows the high number of adoptions by foreigners – far higher than the number of domestic adoptions. This situation changed considerably with the entry into force of the current Law on Adoption No. 19.620 in October 1999, which provides for the principle of subsidiarity of ICA. Indeed, the results shown in the other table are inversely proportional, as 83% of all adoptions during this period relate to domestic adoption and only 17% to adoptions by families who reside abroad.

However, as mentioned initially, this reality was very different a couple of decades ago. In fact, during the 1970s and 1980s, Chile became one of the countries in the region, which, most manifestly, experienced an increasing demand for children for adoption purposes, mainly coming from the USA and some European countries. At the same time, domestic legislation had not addressed ICA and therefore did not regulate it.

At the time, only a couple of concepts applicable exclusively to domestic adoption were regulated. However, the concept that was incorporated into our legal framework in 1934 was a contractual adoption that did not sever the child’s biological parentage. This therefore did not respond to the expectations of the families who wished to conceal their child’s adoptive origins.

³⁰¹ *Translator’s Note:* On both charts, the left column represents domestic adoptions and the right column represents adoptions by foreigners.

It was only in 1965 that so-called 'legitimate adoptions' were regulated. This terminated the child's parentage in relation to their family of origin, thereby establishing its absolute secrecy. This occurred by ordering the destruction of any background information that would make it possible to trace the child's biological parentage. Despite the latter, and given the requirements and the long and tedious procedure established in law for its undertaking, in practice, irregular or openly criminal acts were resorted to. This included the practice of 'assumption of birth' – through which proof of birth was granted to the alleged mother – or the theft of identity – through which the child was registered as one's own. Many of these cases are currently being examined in our country as 'irregular adoptions', despite the fact that no formal adoption process actually took place.

On the other hand, very often, prospective adoptive parents residing abroad would be able to receive children for adoption via an authorisation process for the child to leave the country. This process involved the biological mother and/or father submitting an application before a notary, or via a judicial procedure, which entrusted the child's personal care to these interested families, thereby authorising the child to leave the country. This occurred without any legally-determined procedure, counselling for the parents or even follow-up.

This is how networks of intermediaries who engaged in obtaining the relinquishment of children – mainly babies – spread across the country, in order to respond particularly to the demand of foreign families who paid high amounts of money. Unfortunately, in a considerable number of cases, the parents were deceived or their situation of vulnerability was exploited.

Given this situation, domestic legislation progressively covered the regulation of ICA. This resulted in ICA becoming considered only when they could not live in their family of origin, and for various reasons, could not find a family in their country of origin – all within a regulatory framework that would ensure their best interests and the rights of all the parties involved.

As a response to the children – most of them babies – who were indiscriminately leaving the country due to the lack of regulation that existed at the time, Law No. 18.703 came into force in 1988 and replaced the former 'legitimate adoption' with the so-called 'full adoption', which incorporated into our legal framework a procedure for children to be able to leave the country for adoption purposes abroad.

For the first time, this law granted functions – only in relation to ICA – to a public body, the *Servicio Nacional de Menores* (SENAME). The law stated that SENAME should receive all requests relating to children leaving the country for adoption purposes together with the documentation required by law, in order to submit it to the competent Children's Court. Moreover, SENAME had the authority to provide technical opinion as to whether or not it considered leaving the country to be advisable (the latter would be binding upon the Court). Given that most requests for children to leave the country related to babies who could have been adopted by families who resided in our country, the professional opinions as to the inappropriateness of the requests were issued. Despite SENAME demonstrating on technical grounds contraindications or potential irregularities identified in the background information that was submitted, these were not validated given that these procedures were centralised in those Courts, which were inclined to the children leaving the country.

In many cases, these requests were in fact submitted by the networks of intermediaries themselves, which had operated in the past. Many irregularities as to their *modus operandi* for obtaining children still remained, in order to respond to the demands of many families who resided abroad, who wished to adopt Chilean children, and who would now subject themselves to the procedure for the children to be able to leave the country in accordance with Law No. 18.703.

In general, it is possible to say that the situation reached extreme conditions, which called for the beginning of several inquiries at judicial level, as well as criminal proceedings initiated on the basis of violation of Article 49 of Law No. 18.703, which would sanction the person, who would, *'through breach of trust, ruse, simulation, assumption of identity or civil status, or any other false personal condition, or through any other similar form of deception, obtain the relinquishment of a child for him or herself, for a third party or for the child to be able to leave the country for adoption purposes...'*. However, it was very difficult to prove the existence of any of these circumstances constituting a criminal offence, given that actions were usually undertaken under the protection of the lack of existing regulation.

In this context, and thanks to the work undertaken by several organisations working in the field of adoption and in accordance with the current Law on Adoption No. 19.620, it was finally possible to progressively reduce the number of children leaving the country, and therefore increase domestic adoption, which has now reached the numbers stated above.

Even though, over the last few decades, the SENAME has been recognised for its good practices and the transparency of its procedures, in April 2014, our system was affected by about 10 publicised cases of 'irregular adoptions' undertaken between the years 1975 and 1983, led by the priest Gerardo Joannon. During this period, even though the concept of adoption did not exist, there were indeed criminal practices of 'assumption of birth' or theft of identity.

The news drew the attention of all the media and the events that happened over three decades ago were an incumbent issue on all Chilean citizens. This situation generated a need for the SENAME to intervene in these cases, by submitting the relevant complaints to the Courts.

Finally, the Judiciary recognised that Gerardo Joannon had indeed committed crimes, by providing evidence of the offences of assumption of birth, theft of civil status and forgery of public and private documents, which were committed between the years 1975 and 1983. However, criminal responsibility had expired in accordance with the law and no sanctions could therefore be imposed.

Even though the proceedings in this Court were finalised, SENAME has open cases in relation to similar actions that affected vulnerable women. Some of them continue to be investigated in various Courts across the country and prescription (limitation periods) cannot be declared in these cases, given that what is being invoked are child abduction offences, which have a permanent nature.

Here, the issue is not the decision of a Court. It is the law that states that prescription (limitation periods) are applicable to the crimes Joannon is charged for. This approach, from the point of view of the victims and society in general, is not sufficient. Legislation must be generated that would condemn those who committed serious crimes, such as these, which are discovered many years later, and cause such deep pain to the victims.

Beyond the criminal sanctions that could be imposed in those cases that involve the priest Joannon, this shows us that, in such sensitive issues as those affecting children, there must be much stricter legislation. Where there is child trafficking, there cannot be any prescription (limitation periods). These are violations of the human rights of children and their parents, given that these children have been deprived of their right to grow up in their own family, which is why these must be imprescriptible with a requirement to apply effective sanctions.

We have five cases, in relation to which the SENAME has submitted a complaint or petition for the violation of Article 49 of former Law No. 18.703, which was in force from 1988 to October 1999, or of Article 41 of current Law No. 19.620, which replicates the above-mentioned law. However, after a lengthy process, in which several individuals involved, lawyers, social workers and 'private carers' were maintained in custody for some time, no condemnatory sentences were achieved because of the difficulty of proving the intentional acts as required by law. As an example, we may mention an emblematic case, initiated in 1997; however, in 2009, the Court of First Instance sentenced the accused – a lawyer and three 'private carers' – to imprisonment for a period of eight years, to a fine and other secondary sanctions. However, the sentence was appealed and in 2013, the competent Court of Appeal revoked the sentence and absolved the defendants.

What solved these cases – which almost put an end to the child trafficking that used to take place in our country – were the provisions of the law currently in force in matters of adoption, which limited the intervention in adoption programmes to the SENAME and to bodies accredited by the latter, in order to prevent the intervention of private individuals in this field. In addition, when Chile ratified the 1993 Hague Convention, it was possible to include additional safeguards relating to the requests coming from receiving countries that were also Contracting States to the 1993 Hague Convention.

María Fernanda Galleguillos Pizarro, Head of the Adoption Department at the SENAME in Chile, has considerable experience in the social field. In parallel to her Social Work studies, she has attended many courses on various topics, such as social projects, the attachment theory, parental skills, etc. Within the Adoption Department at SENAME, she has coordinated various projects with the following main achievements: the creations of the web system for the sub-programme on search for origins, the creation of the early detection system, joint research on searches for origins and the profile of mothers in conflict with their motherhood, and, finally, the coordination of the technical guidelines for the sub-programme on the assessment of applicants and their preparation as an adoptive family.

PROMISING PRACTICE: GUATEMALA AND THE CRIMINAL PROSECUTION OF HUMAN TRAFFICKING FOR ILLEGAL ADOPTION PURPOSES: IDENTIFICATION OF STRATEGIES TO FIGHT IMPUNITY

Carolina Pimentel provides a first hand description of how Guatemala, with the support of UN agencies and other actors, sought to deal with criminal aspects of illegal adoptions, entrenched in the country for more than a decade.

INTRODUCTION

From the internal armed conflict onwards (mainly in the 1980s), the increase in the number of ICAs of Guatemalan children responded mainly to the interest of adoptive parents in finding a newborn child, which generated a strong demand and resulted in the establishment of networks organising child trafficking for illicit adoptions.

The impunity, from which the perpetrators benefited, resulted mainly from the difficulty in prosecuting the offence of human trafficking. There was a lack of capacity to prove intent, *i.e.* to demonstrate that the act entailed the exploitation of the adopted children and the biological mothers who, in most cases, were in situations of vulnerability, primarily due to conditions of poverty and lack of access to education, information and other services. This vulnerability was strongly taken advantage of by agencies working on both domestic adoption and ICA, as well as by recruiters or, as they were commonly known in Guatemala, '*jaladores*' [snatchers]. They used this condition of fragility to buy children and convince the mothers that they should relinquish their children for adoption by means of deception or threats, knowing that they would have little or no access to justice in case of denunciation.

BACKGROUND

For 36 years, Guatemala suffered from an internal armed conflict, which considerably contributed to a lack of credibility of its state bodies, a lack of trust in the authorities, the commission of serious human rights violations without any form of accountability and, in general, the lack of capacity and willingness of the State to investigate most crimes, in particular those linked to the armed conflict.

It is well known that, during the armed conflict, in particular during the 1980s, which was the most critical period, when many children of insurgents were left orphaned and were adopted³⁰² domestically and internationally³⁰³ without any kind of oversight³⁰⁴, including through private channels. This practice was also very common under other dictatorial regimes or armed conflicts, such as in Cambodia, Argentina and Spain.

Given the exceptional circumstances of the 1980s, Guatemalan legislation became very permissive in order to facilitate adoption proceedings. The authorities decided that the most appropriate way of responding to the

³⁰² 'En los expedientes que recogen información sustantiva sobre casos de niños dados en adopción, se encuentran datos que refieren a miembros tanto del Ejército como de la Policía Nacional, en el traslado de niños'. Secretaría de la Paz (SERPAZ) (2009). *Las Adopciones y los derechos humanos de la niñez guatemalteca, 1977-1989*. Guatemala: SERPAZ.

³⁰³ Several universities and organisations in the USA brought this situation to light and a study by Brandeis University even stated that Guatemala was the country in the world with the highest risk of adopting an abducted child, or whose adoption was undertaken illegally through the use of forged documents. See: The Schuster Institute for Investigative Journalism, Adoption: Guatemala, <https://www.brandeis.edu/investigate/adoption/guatemala.html>. See also: Graff, E J (2008). 'The Lie We Love', in *Foreign Policy*, 169 (November/December), pp. 59 – 66; available at: <http://www.brandeis.edu/investigate/adoption/docs/FPFinalTheLieWeLove.pdf>.

³⁰⁴ Comisión de Esclarecimiento Histórico (CEH) (1999). *Guatemala, Memoria del Silencio. Conclusiones y recomendaciones*. Guatemala: Oficina de Servicios para Proyectos de las Naciones Unidas, Para. 24; available at: http://www.undp.org/content/dam/guatemala/docs/publications/UNDP_gt_PrevyRecu_MemoriadelSilencio.pdf.

supply and demand was to privatise the adoption process and to grant notaries the absolute power to undertake adoption proceedings. The only state oversight was an endorsement by the Office of the Attorney-General of the Nation (*Procuraduría General de la Nación*, PGN), which undertook no verification.

After 2003, with the adoption of the Law on the Comprehensive Protection of Children and Adolescents (*Ley de Protección Integral de la Niñez y Adolescencia*, Law PINA or Decree No. 27-2003), the PGN was given a more pertinent role as protector and legal representative of children subject to child protection proceedings before the Courts for Children and Adolescents, in addition to being in charge of verifying the adoption proceedings undertaken by notaries.

That said, judicial intervention only occurred in those proceedings relating to children declared abandoned, a situation which, in the years 2002-2006, became a method used by organised criminal groups undertaking illegal adoptions, known as 'child laundering'. In the great majority of cases, where children were 'relinquished', private procedures were undertaken via notaries.

Between 1977 and 2007, 99% of all adoptions were undertaken via notaries³⁰⁵, and by 2006, 95% of these were ICAs³⁰⁶, many concerning children who could not or should not have been the subject of a domestic adoption or ICA order.

As a result of the privatisation of adoptions, the fees charged increased over time, so that adoption became a lucrative business for those involved, in particular the notaries. Thousands of women, mostly indigenous, were deceived, threatened, pressured and/or convinced into relinquishing their children for adoption.

Given the lack of adequate oversight, siblings were adopted separately by families who were totally unaware of the existence of brothers or sisters, children's origins were invented, they were placed in private children's homes or with carers, and were sometimes abused or maintained in conditions of malnutrition. Some prospective adoptive families were extorted by the carers and/or notaries, who requested money for medication and food.

The true orphans and older children would remain in children's homes for years until reaching adulthood, as the demand increasingly focused on babies and toddlers.

The adoption of a Guatemalan child could cost up to USD 80,000, shared among international adoption agencies, social workers in the country of origin and the receiving country, civil servants, carers and notaries³⁰⁷.

As the years passed, the number of complaints relating to child theft and abduction increased considerably. However, most of these were not investigated since the mothers were not in a position to engage with the criminal process. Nonetheless, at community level, child theft and smuggling was increasingly stigmatised, and reached a point where, in 2006, 60% of the lynchings in indigenous communities were related to child theft³⁰⁸. Other cases of less radical corporal punishments were also identified, similarly symptomatic of community outrage in the face of the mass theft of children for adoption, and the lack of intervention of the Guatemalan authorities in response to the situation.

³⁰⁵ Statistics reflect that only 10% of all adoptions relating to Guatemalan children related to abandoned children.

³⁰⁶ Casa Alianza, COPREDEH, Fundación Myrna Mack, Fundación Sobrevivientes, Movimiento social por la Niñez y la Adolescencia, ODHAG and Secretaría de Bienestar Social de la Presidencia de la República (2007). *Adopciones en Guatemala ¿Protección o mercado?*. Guatemala: Casa Alianza; available at: <https://www.brandeis.edu/investigate/adoption/docs/InformeAdopcionesFundacionMyrnaMack.pdf>.

³⁰⁷ According to the US Department of State, between 1999 and 2014, over 29,000 Guatemalan children were adopted to the USA alone. See: US Department of State, Statistics, Guatemala: <https://travel.state.gov/content/adoptionabroad/en/about-us/statistics.html>.

³⁰⁸ *Supra* 276, p. 5.

In the end, all European countries and Canada prohibited their citizens from adopting Guatemalan children until Guatemala ratified and implemented the 1993 Hague Convention³⁰⁹, given the serious concerns as to how many of the children had become 'adoptable'.

Indeed, according to the investigations undertaken by the International Commission against Impunity in Guatemala (CICIG), 500 children are recorded as having left the country between 2003 and 2009 for ICA, without their background having been legally ascertained.

THE CRIMINAL PROSECUTION OF ILLEGAL ADOPTIONS AS A FORM OF HUMAN TRAFFICKING: CHALLENGES AND RESULTS

By the beginning of this century, the hotels in Guatemala's capital city were full of foreign families who had come to search for and meet their adopted newborns. The business included an adoption plan, a tour of the town of Antigua and accommodation in luxury hotels in the country's most expensive area.

This led to the strengthening of networks offering financial favours, mainly to the mothers, abductors or '*jaladores*', in exchange for children for adoption. These networks were powerful enough to ensure impunity through initiatives aimed at preserving the status quo. They were therefore able to continue undertaking illegal proceedings, taking advantage of scant oversight, limited legislation, the corruption of civil servants and support from the authorities and members of state bodies. This is how, throughout those years, these networks managed to consolidate their clandestine schemes and parallel structures with the acquiescence or direct participation of state actors in illegal adoption proceedings.

By 2005, Guatemala was considered one of the countries with most irregularities in adoption proceedings in the world³¹⁰. The situation generated so much concern internationally³¹¹ that, during the last years of that system, Guatemala was visited by a delegation from the HCCH, members of the CRC, and by the United Nations Special Rapporteur on the sale of children, child prostitution and child pornography.

The judicial system had neither the experience, nor the knowledge, required to address this problem. However, against all odds, and thanks to pressure imposed by international organisations and some European countries, the State of Guatemala decided to ratify the 1993 Hague Convention in 2002, and to implement it through an Adoption Law in 2007. The latter was to provide for respecting the principles of adoptability, subsidiarity, free-of-charge, etc., and for more adequate processes of investigation and oversight. It also foresaw the creation of the National Adoption Council (*Consejo Nacional de Adopciones*, CNA), designated as the CA, as an autonomous body decentralised from the central government, in order to ensure impartiality and specialisation in administrative adoption proceedings. This legislation, however, envisaged a period of transition, and many abuses occurred during that period, mainly due to the 'need' to continue providing a certain number of adoptable children, despite a change in the law.

Based on the new Law, emphasis was placed on the need to have adequate procedures in place to search for and establish the origins of the children destined to be declared adoptable. Similarly, the need for coordinated institutional efforts was identified (mainly between the PGN and the CNA) in order to adequately document the children and the proceedings, given that the information currently available was incomplete and many files were in the hands of the notaries.

³⁰⁹ Information provided by UNICEF Guatemala.

³¹⁰ *Supra* 276, pp. 23 and 44.

³¹¹ Inter-American Commission on Human Rights (2001). Fifth Report on the Situation of Human Rights in Guatemala. OEA/Ser.L/V/II.111, Doc. 21 rev.; available at: <http://www.cidh.org/countryrep/guate01eng/TOC.htm>.

With the entry into force of the Adoption Law in 2007, many mothers decided to come forward to file criminal complaints relating to the abduction of their children, hoping that the new legislation would enable them to secure the children's return. The complaints evidenced state corruption in adoption proceedings, which included the use of forged documents, assumptions of births (*i.e.* proof of birth granted to the alleged mother, rather than to the biological mother), modified DNA tests, child laundering and other criminal acts.

The Office of the Public Prosecutor did not have the technical capacity to investigate this type of crimes, the *modus operandi* of these structures was not fully known, and ICA was not classified as a form of human trafficking. The investigation focused mainly on minor offences and treating each offence separately – for example, forged documents, amendments to civil records, the assumption of birth, etc.

Nor was there any coordination between the bodies in charge of the investigation in child protection and criminal proceedings, and even less communication between the judges in charge of children and adolescents' issues (who sometimes even took advantage of the situation to gain benefits through child laundering) and criminal judges who were not aware of gender and/or child-related issues.

Soon after the adoption of the 2003 Law PINA, the offence of human trafficking for illegal adoption purposes was included in the Criminal Code. However, the main challenge was to secure recognition that the illegal adoption phenomenon in Guatemala was a human trafficking offence and that the latter entailed the creation of organised structures to undertake the various acts that would constitute the offence.

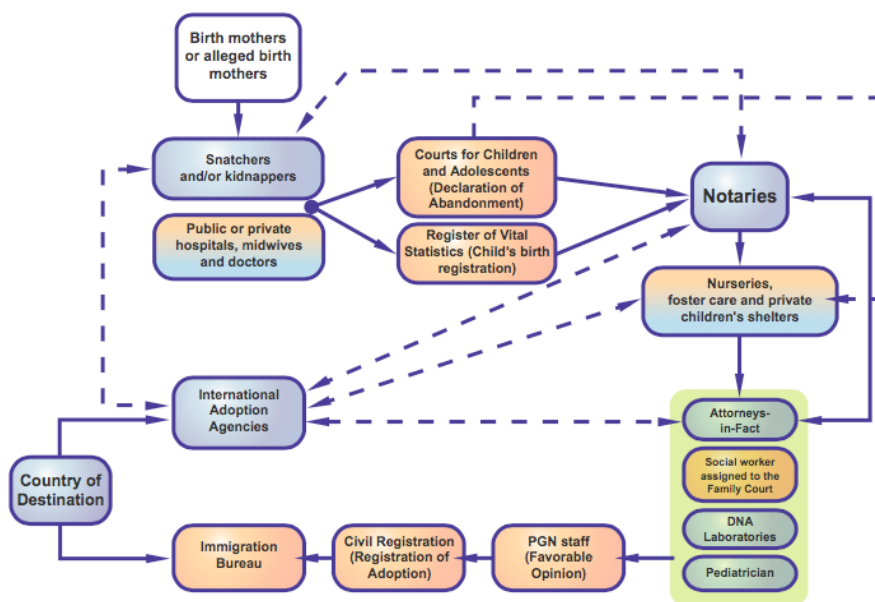
The illegal acts committed to undertake adoption proceedings, most of them of an international character, were one form of human trafficking categorised in the Guatemalan Criminal Code (Article 194), as well as in the current offences of 'illegal adoption' (Article 241 Bis) and 'illegal adoption procedure' (Article 241 Ter) included in the Law against Sexual Violence and Human Trafficking (Decree No. 9-2009). Currently, the offence of human trafficking is also included in the Law against Organised Crime:

'The following has committed an offence of human trafficking: whoever *promotes, induces, facilitates, finances, collaborates or participates* in the recruitment, transportation, transfer, care or reception of one or more persons through threats, the use of force or other forms of duress, abduction, fraud, deception, abuse of power, kidnapping or, in a situation of vulnerability, the granting or reception of payments or benefits to obtain the consent of a person who has authority over another, *for purposes of sexual exploitation, begging, forced labour or services, forced marriage, illegal adoption, slavery or similar practices.*'

Each person involved in the organised criminal network or structure had a role in the promotion, inducement, facilitation, financing, collaboration or participation in the offence, and it was therefore relevant to have the tools that would support the bodies in charge of the investigation to demonstrate the existence of an organised criminal structure. Thus, it was necessary to train civil servants – previously in charge only of offences relating to child abuse, domestic violence, etc. – on the investigation of organised criminal networks undertaking human trafficking for illegal adoption purposes, which included a *modus operandi* that included the participation of various actors, including civil servants and contacts abroad. Furthermore, as the investigation progressed, it became necessary to professionalise the tools for organising the information and to include financial investigations to evidence money laundering, illegal enrichment and corruption.

The CICIG started to operate at the end of 2008. It was created through an agreement between the Government of Guatemala and the UN, aimed at supporting the bodies in charge of investigations to dismantle illegal structures and clandestine security schemes that were embedded in the state bodies and generated impunity. This international effort also intended to reduce corruption and increase the credibility of the institutions, which had been left very weak and lacking any legitimacy following the armed conflict. There was no doubt that the structures undertaking illegal adoptions were within CICIG’s mandate of investigation. With the support of CICIG, the Office of the Public Prosecutor managed to draft sophisticated investigation plans that identified all the actors involved and the various *modus operandi*, thereby identifying the network in the following way³¹²:

Network Involved In Irregular Adoptions



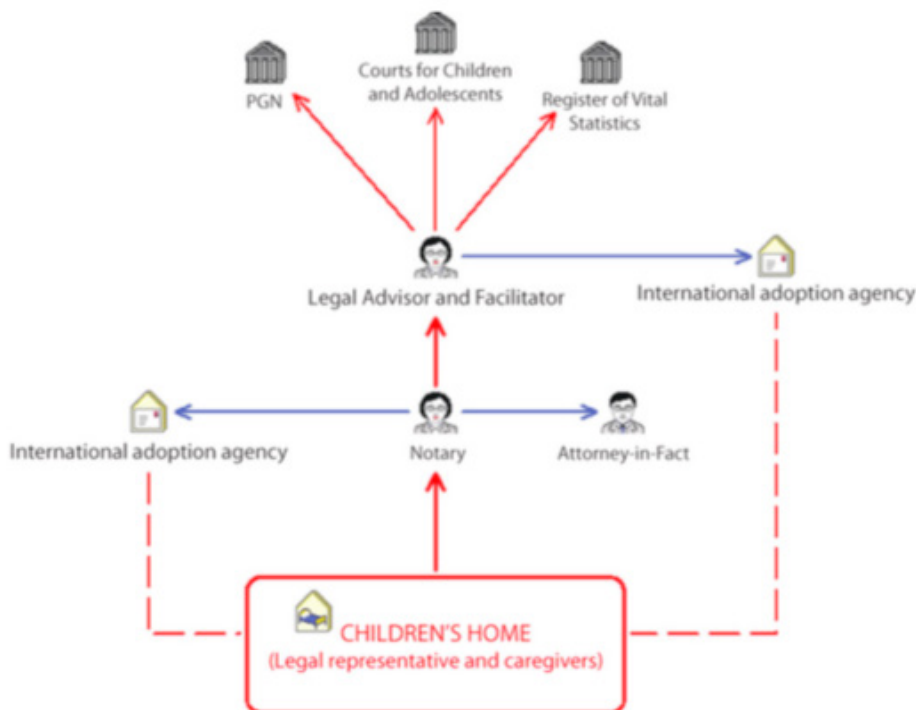
Through investigation techniques such as the analysis of phone numbers, expert opinions on documents, DNA tests and other forensic medical tests, psychological and social work studies, analysis of bank transfers, location of passports and identity documents and an adequate system of witness protection, the Office of the Public Prosecutor, together with CICIG, managed to document high-impact cases. This exercise generated an important precedent in the fight against impunity in cases of illegal adoption in Guatemala.

It is important to recognise that the Office of the Public Prosecutor had already made progress in the investigation of child abduction cases or cases relating to false documents, sentencing the lowest operators in the chain of the organised criminal network. However, the most important operators – such as the lawyers, civil servants and judges – remained subject to impunity.

By 2011, the Office of the Public Prosecutor and CICIG managed to establish the existence of a criminal organisation undertaking human trafficking for illegal adoption purposes – which was linked to the children’s home known as ‘*Asociación Civil Primavera*’ – in which lawyers and notaries, civil registrars, civil servants of the

³¹² *Supra* 276, p. 33.

PGN and a judge, amongst others, were acting in collusion³¹³. On 24 October 2011, a Criminal Court sentenced Alma Beatriz Valle de Mejía, the Lawyer of the *Asociación Primavera*, to 21 years and four months of imprisonment and disqualification from the exercise of her profession during this period, for the offences of human trafficking, use of forged documents and illicit association. The same Court sentenced Enriqueta Francisca Noriega Cano, representative of the *Asociación Primavera*, to 16 years of imprisonment for the offences of human trafficking, use of forged documents and illicit association. A diagram representing the structure and *modus operandi* of *Asociación Primavera* is provided below³¹⁴:



On 18 June 2015, a Court for Higher Risk Sentences sentenced eight persons to between three and 18 years of imprisonment, including lawyer Susana Luarca Saracho and the former children's judge Mario Fernando Peralta Castañeda, for their participation in the illegal adoption of a Guatemala girl³¹⁵. The network linked to the *Asociación Primavera* used 'child laundering' as its main method, presenting abducted children before the judge (also sentenced) in order to be declared abandoned, and therefore able to undertake adoption proceedings without the need for DNA tests or documents that would evidence the parentage with the child's biological parents. This also involved forging their identity, thereby violating the basic rights of Guatemalan children.

³¹³ For further information on this case, see: CICIG, Caso Primavera (Causa 01080-2009-00470), <http://www.cicig.org/index.php?page=01080-2009-00470>; and CICIG, Convictions in proceedings supported by CICIG, <http://www.cicig.org/uploads/documents/2013/SENT-20131018-01-EN.pdf>.

³¹⁴ *Supra* 276, p. 40.

³¹⁵ See: CICIG, Comunicado de Prensa 025: Tribunal condena a ocho personas en caso de adopción irregular, 18 June 2015; <http://www.cicig.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=601&cntnt01returnid=67>.

GOOD PRACTICES

- The identification of *modus operandi*, – the development of investigation plans, the use of forensic tests and financial studies, as well as the training of civil servants and the willingness of the Office of the Public Prosecutor, enabled an important precedent to be set in the fight against impunity, not only in Guatemala but worldwide.
- Through the experience of Guatemala, the foundation has been laid for developing investigation techniques that can dismantle human trafficking networks undertaking illegal adoptions worldwide, and an example of intolerance with regards to the practice of the sale of children for adoption, mainly internationally, has been established.
- Jointly, the efforts of the Office of the Public Prosecutor were strengthened by the support of entities linked to the protection of children and adolescents, such as the CNA and the PGN.
- The need to develop protocols for robust investigations on the child's background was identified for use by the multidisciplinary teams of the CNA and PGN.
- Recognition by the judiciary of the need to have investigations with evidence when determining the child's background.
- With the support of CICIG, an Interinstitutional Round Table was established whose objective, in addition to supporting the documentation of cases, was to optimise resources and efforts in the establishment of specialised protocols and tools for the search for the children's backgrounds and their identification and reintegration into their biological families, in those cases in which this was considered to be in their best interests.
- The setting-up of multidisciplinary groups of social workers, lawyers, psychologists, experts in documentation and police officers. The results were positive and provided social and specialised content to the criminal investigations.

While some challenges are still pending, mainly in relation to certain receiving countries, the Guatemalan case has managed to uncover local and international corruption networks and to lay the foundations for other countries in the region and the world to promote ratification of the 1993 Hague Convention and, in that way, to set clear standards to prevent child trafficking. Thus, more transparent ICA procedures have been achieved, and a message has been sent to the perpetrators that their acts will not remain unpunished forever.

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³¹⁶ *Supra* 276.

PROMISING PRACTICE: THE ROAD TO REFORM OUT OF CHAOS IN VIETNAM

Jesper Morch, former UNICEF Representative in Vietnam and elsewhere, explains how an independent and trusted organisation can work in a country facing multiple occurrences of illegal adoptions by galvanising a common approach between governments as well as other stakeholders.

Throughout my more than three decades with UNICEF, adoption in general and illegal adoption in particular were always important concerns of mine; perhaps because I am the father of an adopted child from Indonesia; certainly because of all the misery and suffering I have seen children subjected to because of poor, harmful and often illegal practices in the many countries I have worked in.

When I arrived in Vietnam in July 2005, I was aware that Vietnamese children were set up for ICA in greater numbers than almost any other country in the world. I was soon to find out that whatever systems were in place were weak and precarious. More than 10,000 Vietnamese children had been adopted worldwide in the 1990s. ICAs from Vietnam were processed through bilateral agreement. Fourteen countries, mostly from Northern America and Western Europe, had signed agreements with Vietnam, and some 100 adoption service agencies from these countries had been authorised to work on ICA in the country. In the absence of a proper domestic legal framework on adoption and with the lack of clear national guidelines on adoption, practices were somewhat chaotic. The bilateral agreements catered to recipient country requirements more than the best interests of the Vietnamese child. Rumours abounded of illegal practices but there was little or no systematic research and it was difficult to take action based on anecdotal evidence. The more we got involved and the more we heard, however, the more credible were stories of children being lured away from their biological parents and quite literally passed on at a price from Vietnamese orphanages to Western adoption service agencies; certainly not in massive numbers, but in sufficient numbers to cause major concern and the realisation that every case of such illegal adoption represents a human tragedy for the many involved parties.

The rumours, the stories, piecemeal research and the emerging consensus that something was not right, perhaps even terribly wrong, led some countries to suspend the adoption of Vietnamese children. Unfortunately, other countries stood ready to increase the number of children adopted from Vietnam.

A UNITED FRONT TO TACKLE THE GRAVE SITUATION

In the midst of this situation and at a time when colleagues in UNICEF Vietnam and I had become increasingly concerned, we were approached by 14 Embassies requesting UNICEF to get formally involved. We accepted with the proviso that certain principles be embraced by all.

The first was that we would establish a tripartite partnership between the Embassies of the affected countries, the UN represented by UNICEF and the Government of Vietnam, with the Government being *primo inter pares*. With everybody concerned as members of the group, we would be able to achieve unity of action and have a forum for debate of anything we might disagree on.

The second had to do with seniority. Given the complexity of the issue, the political sensitivity in Vietnam as well as in the receiving countries, it was important from time to time to be able to convene the senior-most officials at the level of Ambassadors, Ministers and Vice-Ministers. In my capacity as UNICEF Representative, I agreed to chair the group and act as its convener. This, in turn, would allow my UNICEF colleagues and me to represent the group in discussions with the Ministry of Justice and other Government institutions, provide coordination and leadership to the group and convene senior meetings when required.

The third was to acknowledge the urgent importance of a common understanding on the real situation of ICA in Vietnam. While everybody agreed on the importance of a common understanding, it was slightly more tricky to get agreement on how to secure it. Eventually, the UNICEF position prevailed. On behalf of the group, the Ministry of Justice and UNICEF contracted ISS to conduct an Assessment of the Adoption System in Vietnam.

The report³¹⁷ confirmed most of our worst fears. It was fair and balanced. It was also quite critical of both central and local government as well governments and adoption service agencies of receiving countries. It was controversial, but it was not surprising, and while painful for many if not most, it gave the group what it had asked for. Eventually, it became embraced by all and its 11 recommendations to reform the adoption system in Vietnam turned into a main advocacy tool for reform in Vietnam. The process was now spearheaded by the Government itself, primarily the Ministry of Justice, with strong support from UNICEF and the bilaterals.

A BRIGHTER FUTURE

The events described took place between 2008 and 2010. When Vietnam ratified the 1993 Hague Convention in 2012, it stood well prepared to implement the stipulations it had agreed to. Vietnam now has bilateral agreements on child adoption with 13 countries. 28 AABs have licences for operation in Vietnam, down from around 100 in 2008. Two thirds of all adoption cases today are children with special needs. While I left Vietnam in 2010 and have been unable to follow all developments since, I am told by my former colleagues that the illegal adoptions of the recent past are in fact exactly that: in the past. Training, monitoring and the child adoption data system should ensure that it stays there, in the past.

LESSONS LEARNED

How was it done? For the readers of this handbook, I think a few out of the many factors deserve to be highlighted:

1. Order out of chaos. We got all the protagonists, all the interested parties, into one group and hammered out all disagreements inside the group. Many of those were frankly between receiving countries with divergent views on what was best for the Vietnamese child.
2. Evidence. You cannot work with rumour, innuendo and anecdote. You need solid and irrefutable data. It is fundamental to make it your priority.
3. Honest broker. An organisation like UNICEF can be important because of its relatively good name. We tend to be the friend of all and the enemy of none, and we are not considered to have vested interests.
4. Convening power. When an organisation like UNICEF builds a platform for all to stand on, it becomes difficult to say no and opt out.
5. The buffer effect. Because of UNICEF's perceived impartiality, we can be effective patrons and promoters of difficult, sensitive and even controversial research, findings and recommendations.
6. Leadership. The Office of the UNICEF Representative is often well enough regarded that the direct and active involvement of the UNICEF Representative can propel an issue into the highest levels of government and diplomatic circles.

Jesper Morch was born in Denmark in 1953. He is married to Dutch Edith Morch Binnema and has three children, Michael Christopher, Casper and Sebastian. Jesper started his career as a School Teacher and he joined UNICEF in 1982 as a Development Education Officer. He spent 31 years with UNICEF living and working in Indonesia, Tanzania, South Africa, Somalia, Vietnam and Mozambique. For the last 15 years of his career, he was Country Representative of the organisation. He retired from UNICEF in March 2013 and now lives in Maputo³¹⁸.

³¹⁷ International Social Service (2009). *Adoption from Viet Nam. Findings and recommendations of an assessment*. Geneva, Switzerland: ISS; available at: http://www.unicef.org/vietnam/Eng_Adoption_report.pdf.

³¹⁸ For further information on Jesper Morch, see: UNICEF, UNICEF staff, 'Jesper Morch: 'The luckiest staff member in UNICEF'', http://www.unicef.org/people/people_10357.html.

PROMISING PRACTICE: ADOPTION RIGHTS ALLIANCE AND THE PHILOMENA PROJECT IN IRELAND AND THE USA

Susan Lohan, Co-founder, Claire McGettrick, Co-founder, Angela Murphy, Co-founder, Mari Steed, US Coordinator and Edel Byrne, Northern Ireland Coordinator, discuss how they established an advocacy hub for ethical adoptions in Ireland and the USA.

Adoption Rights Alliance (ARA)³¹⁹ is a purely voluntary advocacy organisation based in Ireland, Northern Ireland and the USA. ARA was set up in 2009, on foot of a former organisation, AdoptionIreland (AI), which had been a registered company and, as such, did have a formal board and limited grant funding through the Irish government. Under that aegis, AI was primarily engaged in legislative advocacy on adoptee identity rights, provided support and resources for Irish-born adopted people in tracing their families, and counselling and peer support for those affected by adoption. That organisation folded in 2007, and several of those formerly with AI founded ARA and formed its nucleus. Among them, Mari Steed and Claire McGettrick also both co-founded and serve with Justice for Magdalenes Research (JFMR)³²⁰, whose same core ethos and approach to advocacy is adapted and used by ARA.

With a handful of individuals and no financial aid, ARA currently advocates for equal human and civil rights for those affected by Ireland's closed secret adoption system, as well as trying to inform best current and future policy for children adopted in and to Ireland.

IRELAND'S CLOSED SECRET ADOPTION SYSTEM

Since the formation of the Free State in 1922, Ireland had an *ad hoc* system of child fostering/boarding out that ran as a rare adjunct to religious-run/State-funded industrial schools, residential care institutions and mother-baby homes. Yet, several mother-baby homes, most founded in the mid-1920s to 1930s, began secretly exporting children from Ireland to the USA and other nations. This occurred even though no formal adoption existed in Ireland until the 1952 Adoption Act. From 1950 until about 1972 (the period when the Irish Department of Foreign Affairs officially tracked visas/passports), some 2,000 were largely sent to American homes, and a handful to other countries. Further collation of records by ARA indicate this export began as early as the late 1930s and extended even beyond 1972, when Ireland amended its Adoption Act, making it illegal for any but Irish nationals or permanent residents to adopt Irish children³²¹.

³¹⁹ See: Adoption Rights Alliance, <http://www.adoptionrightsalliance.com>.

³²⁰ See: Justice for Magdalenes Research, <http://www.magdalenelaundries.com>. The campaign seeks justice for survivors of Ireland's Magdalene Laundries and has been very helpful to ARA's work (see: JFMR, Public Disclosure: Justice for Magdalene's survivor ethos – a statement on survivors in the media, http://www.magdalenelaundries.com/public_disclosure.htm).

³²¹ Milotte, M (1997). *Banished Babies*. Co. Dublin, Ireland: New Island, Updated and expanded Edition in 2012.

In Ireland, from the inception of legal adoption, it is estimated that over 50,000 children were adopted domestically. A further 25 to 30,000 were boarded-out or fostered prior to the 1952 Act. It is therefore safe to say that adoption has affected some 100,000 Irish citizens, including more than 2,000 sent abroad.

Up until the late 1950s, most prospective adoptive couples were not vetted. Requirements at the time by Irish placing agencies for couples (in Ireland or outside) were primarily adequate financial means (bank balances had to be provided), that they were in good standing as Catholics, and that they had provided medical proof that they had not 'shirked the natural duties associated with marriage', (*i.e.* had tried to have children by natural means). These demands, along with the Irish-US scheme, were architected by the Archbishop of Dublin, John Charles McQuaid, and Irish President, Eamon De Valera. After some grave concerns were raised by US Catholic Charities, vetting procedures were improved in the late 1950s, and American couples, at least, were vetted by local US Catholic Charities branches, although the Irish placing agencies were still very much in charge of the babies sent.

De Valera had notions of a pure and moral Ireland, along with the iron rule of the Roman Catholic Church in Ireland, and saw bastardy as a stain on the nation's character. As such, entire generations of Irish women and children were 'othered', marginalised, trafficked abroad and locked inside religious-run institutions. The State effectively abrogated its duty to its citizens to the Church and barely inspected these institutions. Among the more harsh systems of incarceration were the industrial schools, where clerical sexual and physical abuse were rampant; Magdalene Laundries, where women 'othered' by society for a variety of arcane reasons were subjected to enslavement, torture and abusive conditions; and the mother-baby homes, where the stigma of unwed motherhood was kept confined and women had no say or options in the care or parenting of their own children.

Government responses to the closed secret adoption system

In recent years, the extreme nature of these institutions has been thrust into the public arena. In the late 1990s, a statutory Commission of Inquiry was launched by the Irish government to investigate the abuses in Irish industrial schools and residential institutions. Despite public outcry that this investigation should cover the whole gamut of Irish incarcerative institutions (Magdalene Laundries, mother-baby homes), the State focused solely on what was to become the Residential Institutions Redress Act in 2002, and four damning reports were issued – Ryan, Murphy, Cloyne and Ferns³²² – chronicling a harrowing narrative of abuse. Part of the initial Inquiry was to also

³²² Murphy, F D, Buckley, H and Joyce, L (2005). *The Ferns Report*, presented to the Minister for Health and Children. Dublin, Ireland: Government Publications; available at: <http://www.bishop-accountability.org/ferns.htm>; Commission to Inquire into Child Abuse (2009). *Report (Ryan Report)*, Vols. I-V. Dublin, Ireland: Government Publications; available at: <http://www.childabusecommission.ie/rpt/pdfs/>; Commission of Investigation (2009). *Report into the Catholic Archdiocese of Dublin (Murphy Report)*. Dublin, Ireland: Government Publications; available at: <http://www.dacoi.ie>; Commission of Investigation (2010). *Report into the Catholic Diocese of Cloyne*. Dublin, Ireland: Government Publication; available at: <http://www.justice.ie/en/JELR/Pages/Cloyne-Rpt>.

cover vaccine and other medical trials conducted in some of these institutions, as well as in identified mother-baby homes on children earmarked for adoption. However, this segment of the inquiry was shut down in 2003 by court order, after two of the vaccine trials principal researchers filed court orders.

In 2011, ARA's sister organisations, Justice for Magdalenes Research, through successive submissions to the Irish Human Rights Commission, Amnesty International and the UN Committee Against Torture, were finally successful in bringing about an investigation (albeit not statutory, as recommended by the UN) into the Magdalene Laundries. In February 2013, Prime Minister Enda Kenny issued a formal State apology to Magdalene survivors and a modest (but not fully restorative) justice scheme was devised to bring some relief to this now elderly population³²³.

In 2014, the State finally announced the formation of a statutory Commission of Inquiry to investigate the mother-baby homes and matters relating to them. Given all these historic abuses, and given its experiences with JFMR and the lack of will consistently shown by the Irish State to provide anything but an 'Irish solution to an Irish problem', ARA has every intention of making as robust a submission to the Commission of Inquiry into Mother and Baby Homes³²⁴ as possible. As per its Terms of Reference, the Commission will prepare a report on, among other things, 'the extent to which the child's welfare and protection were considered in practices relating to their placement in Ireland or abroad' as well as whether the mother's consent for adoption was 'full, free and informed'. Again, this is in line with the methodology used by JFMR with the Magdalene Laundries campaign. ARA believes it is crucial to establish an independent submission and archival holding of testimonies, evidence, and documentation so that no attempts to whitewash anyone's experience can occur.

ARA and the Philomena Project

When the film 'Philomena'³²⁵ broke and became a worldwide success, ARA was offered the generous opportunity to partner with The Philomena Project³²⁶, with an eye towards helping ARA accomplish its goals. Because ARA's official Irish charity status has not yet been finalised, a US-based 501(3)(c) called New Venture Fund was selected to accept donations through The Philomena Project. Once ARA has achieved formal charity status, New Venture will release this funding. This should be the seed for our comprehensive submission to the Commission of Inquiry, to build an accurate historical archive of adoption history and practice in Ireland. It should also enable us to work more effectively to change Ireland's current adoption records/identity laws, as well as to advocate more effectively for child-focused care and family preservation wherever possible.

³²³ See: Department of the Taoiseach, Taoiseach's statement on Magdalene Report, 19 February 2013; available at: http://www.taoiseach.ie/eng/News/Taoiseach's_Speeches/TAOISEACH'S_STATEMENT_ON.html.

³²⁴ See: Mother and Baby Homes Commission of Investigation, <http://www.mbhcoi.ie/MBH.nsf/page/index-en>.

³²⁵ 'Philomena' (2013). This film recounts how Philomena Lee, an Irish mother, sought to trace her forcibly adopted son for half a century.

³²⁶ See: The Philomena Project, <http://thephilomenaproject.org>.

ARA advocacy via governmental submissions

ARA and JFMR submitted a comprehensive briefing in June 2014 to inform the Terms of Reference for the Commission of Inquiry into Mother and Baby Homes. In a meeting with the Minister concerned, ARA and JFMR, along with others, suggested that the Commission of Inquiry should focus on the issue of children born out of wedlock in Ireland since 1922 rather than institutions *per se*. Communicated in that meeting and in the joint submission is the understanding that this issue gives rise to six distinct fields of inquiry:

- i. infant mortality rates;
- ii. adoption practices;
- iii. vaccine trials and medical experimentation;
- iv. forced labour and incarceration of unmarried girls and women, who gave birth to babies or were seen to be 'at risk' of becoming mothers;
- v. conditions in the institutions, including neglect, denial of adequate medical care and cruel punishment of unmarried mothers and their infants and children; and
- vi. burials of unmarried mothers and their children, who remained in recarceral institutions.

ARA also submitted a briefing note to the Commission of Inquiry in January 2015, expressing its concern regarding the Commission's limited Terms of Reference³²⁷.

Advocacy via social media

ARA is not currently in a position to provide direct, peer-to-peer support or to assist with tracing. However, it does currently maintain a private, closed Facebook group (soon to be migrated to a more secure, private forum on its website), which helps fill the gap of peer support and connecting people with resources to find families, their identity and answer other questions. The group currently has over 1,300 participants. ARA has, however, successfully used its Facebook and Twitter platforms to educate, inform and motivate concerned members of the Irish and wider public on adoption issues in Ireland. Many lessons have been learned from the use of social media (see below).

CURRENT AND FUTURE POLICY REFORM

Intercountry adoption

ICA is obviously the main factor in Ireland today, with Ireland as a receiving country. ARA's Co-founder, Susan Lohan, is one of only two adopted persons to date to be appointed (in 2003) to a Sub-Committee within the Adoption Authority of Ireland (AAI). However, at that time, her views (born of first-hand experience and reflective of the historical mistakes made in adoption policy) were at minimum never taken seriously, and at worst, outright rejected by the overwhelmingly pro-adoption Committee members (mostly adoptive parents and social workers). Since Ireland's ratification of the 1993 Hague Convention, ARA is at last seeing a much more child-centred approach from the AAI. It is now more willing to be informed by ARA's long experience, both as adoptees and advocates, whose work has been taken seriously at all levels. Still, that attitude is not pervasive throughout the Irish government, and unfortunately an adult-centred culture persists, with heavy lobbying on the part of prospective adopters, despite our country's ratification of the 1993 Hague Convention.

³²⁷ See: Adoption Rights Alliance, Briefing Note on the Terms of Reference of the 'Commission of Investigation into Mother and Baby Homes and Related Matters', 27 January 2015; available at: http://www.adoptionrightsalliance.com/Adoption%20Rights%20Alliance_Briefing%20Note%20Re%20ToR_28-01-15.pdf.

Surrogacy

Tangential issues, such as assisted human reproduction, have now also come into play. ARA obviously feels there are arguments to be made and good, ethical policies to be developed to safeguard the well-being and identity rights of children conceived in this manner. ARA submitted a number of amendments, which were not considered, to the recent Children and Family Relationships Bill, passed by the Irish *Oireachtas* (Parliament) in March 2015. Our most serious concerns were in the following areas: (a) the lack of retrospective rights for those born before the enactment of this legislation; (b) the lack of information provided while the child is growing up; and (c) the information sought from the donor at the time of donation is wholly insufficient. We particularly welcomed that the ‘best interests’ principle was to be enshrined in Irish legislation; however, some aspects of this Bill threaten to undermine that principle³²⁸.

RECOMMENDATIONS AND/OR LESSONS LEARNED

Perhaps one of the most important lessons learnt in both the JFMR and ARA experience is that bigger is not always better. Working with a handful of dedicated, well-versed professionals, academics and activists can often reap greater rewards than much larger NGOs, even with little or no funding. It has allowed ARA – and JFMR – to operate transparently and ethically. We do not claim to serve as an umbrella or representative group, nor have any official membership beyond our five identified representatives, but merely to champion rights for all adopted people. We follow a strict ethos of ‘do no harm’, and stay focused on political activism as opposed to providing support (with the exception of the self-identifying Facebook peer support group). We have also learned to be meticulous researchers, archivists and historians. This is our history and narrative – and as such, we have a vested interest in insuring its accuracy and that our work is beyond reproach.

We have learned that there is certainly no ‘one voice’ or viewpoint within the adoption community – adopted people’s experiences are as diverse as they themselves. So we respect the individuality of each adoptee’s narrative and, insofar as the Facebook group is concerned, give wide berth to all of those viewpoints and voices. In addition, we do believe the adopted adult’s voice is the most important, yet the one most often overlooked or unheard. We have learned, however, that social media can be an imperfect platform for this type of engagement and does not always provide the safest of forums to vent sensitive issues, even on private, closed groups. To that end, we are currently building a more secure online forum hosted on our website, where we can vet new participants more carefully, and easily weed out those who would seek to cause disruption, disrespect or harm others.

Our experience has also taught us that there are certainly those who would exploit or attempt to capitalise on the issues, the Inquiry, or possible restorative justice. Whether they seek to curry favour with the government, boost their own egos or profit financially, we seek to avoid associations with such individuals at all cost. This means we do not engage, provoke, attack or otherwise publicly call out such individuals. Keeping our own counsel and avoiding such altercations have won us credibility with similar organisations as well as members of the government.

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³²⁸ See: Adoption Rights Alliance, Adoption Rights Alliance Briefing Note on the Children and Family Relationships Bill 2015, 11 March 2015; available at: http://www.adoptionrightsalliance.com/ARA%20Briefing%20Note_Children%20&%20Family%20Relationships%20Bill.pdf.

FUTURE CONSIDERATIONS

This Chapter focuses on the potential lessons to be learned from illegal adoptions and how they might be useful in broaching issues such as international surrogacy arrangements.

An estimated 20,000 children are born through surrogacy annually and numbers are increasing. Surrogacy – the practice by which a woman (the surrogate mother) becomes pregnant and gives birth to a child based on an agreement to give the child to another person (the intended parents) after the birth and using either the genetic material of one or both intended parents or donors (gestational or traditional surrogacy) – remains a particularly complex issue. The complexities augment in cases of international surrogacy arrangements (ISAs), where the surrogate mother is a habitual resident of a country other than that of the intended parents.

Whilst ISAs is clearly different to ICA, in that it is not a child protection measure, there are similarities between the two practices. In both cases, inadequate regulations give rise to harmful and questionable practices. Parallel questions arise: for example, surrounding informed consent, exploitation of birth mothers, denial of the child's right to an identity and parentage and rejection of the child after birth. Likewise, issues concerning costs and financial transactions may exist. Moreover, similarly to ICA, ISAs often occurs in 'countries of origin' that are economically disadvantaged, meaning that commercialisation offers opportunities for huge and unmonitored gains. Whilst a detailed analysis of these issues is beyond the scope this handbook, this Chapter offers some insight to the child's right to preserve their identity (see *Knowledge of their origins for children born through surrogacy: Respect for the right to the preservation of their identity* below).

Similarly, as in the late 1980s and early 1990s, there were calls for regulation of ICA based on human right perspectives; there are similar demands today, concerning ISAs. ISS understands all arguments that call for regulation of ISAs and other artificial reproductive technology practices in cross-border contexts (see, for example, *International surrogacy rights and the needs of surrogate mothers* below). Notwithstanding these arguments, ISS as a network most naturally aligns itself with reasoning linked to children's rights and places this as the overarching right governing our work. In particular, the UNCRC and its OPSC – as recently developed by Smolin³²⁹ (see *Surrogacy as the sale of children: Applying lessons learned from adoption to the regulation of the surrogacy industry's global marketing of children* below).

In the context of the OPSC – where Article 2a defines 'sale of children' to mean '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 CRC has made a number of helpful observations as to possible applications to ISAs. There are clear recommendations to prevent the sale of children in situations where surrogacy is not properly regulated.

For instance, in its Concluding Observations to India in 2014³³⁰, where, under the adoption section, at Paragraph 57, the CRC states that '[c]ommercial use of surrogacy, which is not properly regulated, is widespread, leading to the sale of children and the violation of children's rights'. This was followed with a recommendation at Paragraph 58 that the State '(d) [e]nsure that the Assisted Reproductive Technology (Regulation) Bill, 2013, or other subsequent legislation contain provisions which define, regulate and monitor surrogacy arrangements and criminalises the sale of children for the purpose of illegal adoption, including the misuse of surrogacy. The State party should ensure that action is taken against all those who have engaged in illegal adoptions'. Likewise, in its

³²⁹ Smolin, D (2016). 'Surrogacy as the sale of children: Applying lessons learned from adoption to the regulation of the surrogacy industry's global marketing of children', in *Pepperdine Law Review*, 43, pp. 265 – 341; available at http://works.bepress.com/david_smolin/.

³³⁰ Committee on the Rights of the Child, Concluding Observations: India, CRC/C/IND/CO/3-4, 7 July 2014, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fIND%2fCO%2f3-4&Lang=en.

Concluding Observations to the USA in 2013³³¹, in the adoption section, at Paragraph 29b, the Committee stated that ‘the absence of federal legislation with regard to surrogacy, which if not clearly regulated, amounts to sale of children’. Thus, for ISS, the need for regulation of ISAs and other artificial reproductive technology practices in cross-border contexts is most convincingly embedded in the rights of children to be protected from being sold.

To this end, ISS, with a group of experts, is in the process of developing ‘Principles for a better protection of children’s rights in cross-border reproductive arrangements, in particular international surrogacy’, given the lack of regulation in this field and consequent breaches of human rights. Whilst ISS believes that this initiative would certainly support the development of a potential international instrument on ISAs (at the HCCH), as well as the development of recommendations or opinions in this regard (such as a General Comment by the CRC or the work undertaken at the European Parliament), its priority action is to set the basic principles now that could support any of these initiatives.

6.1 KNOWLEDGE OF THEIR ORIGINS FOR CHILDREN BORN THROUGH SURROGACY: RESPECT FOR THE RIGHT TO THE PRESERVATION OF THEIR IDENTITY³³²

In recent years, lively arguments have taken place against surrogacy, which have been the subject of heated and divided debates. Among the burning issues raised by this practice of reproduction is the problem of the knowledge of their origins for children born through surrogacy, together with the question of respect for their identity.

Surrogacy is a technique of medically assisted reproduction. It is characterised by the presence of a surrogate mother who is defined, for example, under Swiss law as ‘a woman who accepts to carry a child conceived through a method of medically assisted reproduction, and to hand the child over permanently to a third party after delivery’³³³.

The number of stakeholders in this process of creating a child can vary from three to five persons. The intended parents as initiators of the parental project involve a third party, the surrogate mother, to carry their child, but this can also involve an oocyte (egg) donation, a sperm donation or both. The genetic, biological and legal parentage of the child is also multiple as a result of the decomposition of the process of reproduction and the break in the line of kinship³³⁴. Motherhood is divided ‘between three components previously inseparable. The biological mother (or ovarian), the gestation mother (or uterine) and the social mother’³³⁵.

³³¹ Committee on the Rights of the Child, Concluding Observations (OPSC): United States of America, CRC/C/OPSC/USA/CO/2, 2 July 2013, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fOPSC%2fUSA%2fCO%2f2&Lang=en.

³³² This contribution was written by Lorène Métal. It is based on an excerpt of the author’s thesis for her Master’s degree: Métal, L (2015). *The right to the preservation of the identity of children born from surrogacy*. Centre interfacultaire en droits de l’enfant, Université de Genève.

³³³ See: *Loi fédérale sur la procréation médicalement assistée* (LPMA), 18 December 1998, RS 810.11.

³³⁴ Prieur, N (2007). ‘La transmission de l’origine dans les nouvelles formes de filiation’, in *Cahiers critiques de thérapie familiale et de pratiques de réseaux*, 1 (38), pp. 175 – 191; available at: <https://www.cairn.info/revue-cahiers-critiques-de-therapie-familiale-2007-1-page-175.htm>.

³³⁵ Ruffieux, G (2014). ‘Retour sur une question controversée : le sort des enfants nés d’une mère porteuse à l’étranger’, in *Revue des Droits et Libertés Fondamentaux*, Chron. n°7; available at: <http://www.revuedlf.com/personnes-famille/retour-sur-une-question-controversee-le-sort-des-enfants-nes-dune-mere-porteuse-a-letranger-article-2/>.

KNOWLEDGE OF ORIGINS AND MULTIPLE PARENTAGE: A SIMILAR SITUATION TO THAT OF ADOPTED PERSONS

This multiplicity of parentage can raise questions similar to those of adopted people in terms of relationships and knowledge of origins³³⁶. The question of the knowledge of origins for children born to surrogate mothers is not strictly regulated³³⁷. They may face a veritable information void in terms of their genetic and biological origins (*i.e.* no knowledge of the gamete donors or of the surrogate mother).

For these children, the causes of difficulty to access their origins can be numerous: the anonymity of gamete donors in certain countries; the use of a surrogate mother from a distant nation and the absence of legal or administrative records on the use of a third party; the silence of the intended parents.

The global dimension of surrogacy and the emerging reproduction tourism are also problem factors in the knowledge of, or the search for, the origins of the children. By manipulating jurisdiction and creating legal loopholes, reproduction tourism helps to create a grey area which is detrimental to the official monitoring and development of written evidence regarding the circumstances of the birth of the child. In these situations, parents may also be tempted to keep quiet about the use of a surrogate mother or gamete donation. Due to the circumvention of the law of a country or the dubious ethical and moral circumstances in which the surrogacy took place, essential information relative to the child's birth may not be provided to them.

Strong evidence from generations of adoptees³³⁸ and from case law³³⁹ demonstrates the importance of knowledge of different parental links and origins to enable an individual to construct their identity³⁴⁰. It has been shown that what is left unsaid, or a lack of information about fundamental elements of the history of the individual, can impede the development of their identity. Thus, children born from a surrogate mother, as with all adopted persons, want 'not to be deprived of access to their own history. That it is not erased'³⁴¹. To protect the building of a sense of identity for these individuals, it is clearly necessary and urgent to take measures to allow them, at the appropriate moment, to have access to their origins and to know their story, in order to enable them to find their own personal stability.

SURROGACY: PROMISING PRACTICE IDEAS AND THE BRIDGE WITH ADOPTION

By considering the history of adoption, it is possible to learn from actions taken, from mistakes and from promising practices developed in the past³⁴². By creating bridges between the two fields, ideas and measures implemented in the sphere of adoption, which ensure children have access to their origins, can be adapted for children born through surrogacy. These promising practices tend to provide a caring framework, so the children can have the means to analyse their past.

There are several promising practices that ensure that the search and knowledge of origins for children born through surrogate motherhood will be possible:

³³⁶ However, a major difference exists between adoption and surrogacy: adoption is a protection measure for the child, in accordance with Article 21 of the UNCRC, and places the interests of the child at the heart of the process; surrogacy, however, does not belong to this category.

³³⁷ At international level.

³³⁸ Testimonies are expressed, notably, through specialised organisations, such as Espace A, Switzerland, <http://www.espace-a.org/>; through websites and the forum *La Voix des Adoptés*, France, <http://www.lavoixdesadoptes.com/index.php>; or books, publications and films, for example: Jung (2006, 2007, 2013). *Couleur de peau: miel* (Tomes 1, 2 et 3). Belgium: Soleil Productions (Coll. Quadrants Astrolabe); *Couleur de peau: miel* [Approved for adoption; Documentary and autobiographical animated film] (2009).

³³⁹ European Court of Human Rights: *Jäggi v Switzerland*, Application No. 58757/00; *Menesson v France*, Supra 47.

³⁴⁰ Mathieu, G (2014). *Le secret des origines en droit de la filiation*. Waterloo, Belgium: Wolters Kluwer.

³⁴¹ Théry, I (2009). 'L'anonymat des dons d'engendrement est-il vraiment « éthique »?', in *Esprit* 5, pp. 133 – 164.

³⁴² Cahn, N (2011). 'Old Lessons for a New World: Applying Adoption Research and Experience to Art', in *Journal of the American Academy of Matrimonial Lawyers*, Vol. 24; available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1776191.

A national register

One of the first promising practices concerns the very controversial issue of the anonymity of gamete donors (sperm or oocytes). This practice – still carried out in numerous countries – is in blatant opposition to the right to know one's origins³⁴³. Denounced by many intellectuals³⁴⁴ and associations for children born of donors³⁴⁵, this prevents these individuals from having access to their genetic origins, which are considered so important in Western societies. A promising practice would be the establishment of a national register or an official obligation for clinics to keep such a register³⁴⁶, which could then be consulted at any time upon a request by the family or the child themselves. This practice has already been put into place in some countries: for example, The Netherlands and Switzerland³⁴⁷, and respects the right of the child to know their genetic origins. Ideally, the information held in these registers should contain not only the child's birth certificate, but also important information concerning the circumstances of their birth³⁴⁸. For children born from surrogacy, this information could, for example, provide details on the surrogate mother herself, her nationality and living conditions, meetings between the parents and the surrogate mother, etc.

Knowledge of biological origins

A second area concerns the knowledge of biological origins. Here, the tracing of the link with the surrogate mother is emphasised. It is a fact that a special relationship develops between mother and child during pregnancy. According to Hodgkin and Newell, knowledge of the circumstances of a child's birth also falls within the field of knowledge of origins³⁴⁹. The framework of the arrangement between the surrogate mother and the intended parents, and monitoring of the gestational period, are important to ensure good conditions, together with the transmission of essential information. Several promising practices could be implemented in relation to this:

- A legal and administrative record of the resort to a surrogate mother should be guaranteed. This official acknowledgement ensures that the initial period of life is not underestimated or obliterated, but recognises its importance in the life of the individual.
- An official register containing information about the surrogate mother should be established in order to allow the child to access important information. The creation of this register could be inspired by the registers established in adoption procedures.

³⁴³ Articles 7 and 8 of the UNCRC.

³⁴⁴ Notably: *Supra* 334 and 341. The writings of Mr Lévy-Soussan on the different dimensions of parenthood are also a very illuminating study on genetic origins and their relation to other dimensions of parentage: Lévy-Soussan, P (2002). 'Travail de filiation et adoption', in *Revue Française de Psychanalyse*, 1 (Vol. 66), pp. 41 – 69; available at: <https://www.cairn.info/revue-francaise-de-psychanalyse-2002-1-page-41.htm>; Lévy-Soussan, P (2007). 'Famille, sens, contre-sens, non sens', in *Champ psy*, 3 (Vol. 47), pp. 47 – 60; available at: <https://www.cairn.info/revue-champ-psychosomatique-2007-3-page-47.htm>.

³⁴⁵ For example, the organisation PMAnonyme, which brings together children born from medically assisted reproduction and campaigns for an access to origins, <http://pmanonyme.asso.fr/>.

³⁴⁶ In the field of adoption, an increasing number of CAs are responsible for collecting and conserving information relating to the origins of individuals and for supporting them in the search for their origins. In some countries, the Civil Registration authorities, certain Court archives and many approved adoption agencies can also hold and maintain this information. *Supra* 9.

³⁴⁷ In the Netherlands, Fiom/ISS Netherlands has developed a DNA database as one means of protecting the rights of donor conceived children to know their origins. In Switzerland, since 1992, the Constitution envisages that 'all persons have access to their ancestry' (Article 119, Para. 2, Sub-Para. G). This provision aimed at transparency and access to genetic information was initially foreseen for persons born from medically assisted reproduction but was straightaway extended through case law to all persons. *Supra* 340, pp. 252 – 267.

³⁴⁸ *Supra* 9.

³⁴⁹ Hodgkin, R and Newell, P (2002). *The Implementation Handbook for the Convention on the Rights of the Child*. New York, USA: UNICEF.

- Another idea aimed at providing the child with information on the circumstances of their birth, and thereby granting attention to their identity needs, is the creation of a book or letter that the surrogate mother could fill in during the course of her pregnancy and give to the child at the time of birth. Less formal, this promising practice would be effective in tangibly conveying the link between the surrogate mother and the child over time³⁵⁰.

Support to the intended parents

The third element of a promising practice is the level of support for the intended parents.

Official oversight of the practices of clinics and organisations involved in surrogacy is essential in order to avoid possible abuses. A system of accredited bodies similar to that developed in the field of adoption would be a promising practice³⁵¹.

In order to ensure that the intended parents feel comfortable with the transmission of the origins of their child, it is important that a framework is put into place. Indeed, the risk is to engage in dubious and non-ethical surrogacy practices that will lead to them hiding essential information from the child.

Monitoring the pathway of intended parents could therefore create a favourable environment that facilitates the transmission of information to the child about this period. Asking questions beforehand demonstrates real attention to the identity needs of the child, and is a positive step towards establishing solid bases for building their identity. Here, it is possible to draw on modules of preparation and support for prospective parents implemented in the field of adoption. For example, systematic ongoing support is foreseen for the prospective parents throughout the process in order to assist them in their reflections and questions³⁵². Preparatory courses that provide educational tools for the prospective parents are also established³⁵³. In the case of surrogacy, such training could, for example, give keys to understanding identity building and the dimensions of kinship, to allow parents to address this issue more easily with their child, and to ensure they have the responses to potential identity questions, which they may have to face. Finally, the establishment of organisations, which promote family dialogue³⁵⁴, and are ready to support individuals born from surrogacy, who are searching for their origins, will be a promising practice for the future. They will surely be necessary in view of current practices.

Surrogacy is expanding rapidly, it is essential to consider the consequences that this practice can have on building the identity of children born through this method. The voices and experiences of adoptees provide an excellent opportunity to understand and act in the interests of children whilst keeping in mind that knowledge of origins is essential. Thus, it is not too late to both adapt existing practices and put in place promising practices to ensure a solid foundation for building the identity of children born from surrogacy.

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³⁵⁰ This practice could be based on the 'later life letter' or the 'life story book' already used in the field of adoption. These writings are intended to give a detailed account to the child about the beginnings of their life and to pass on a message through time. For a guide to good practices with guidelines on the 'later life letter', which gives advice on the different ways to write such texts, see: Moffat, F (2012). *Writing a later life letter, Good Practice Guide*. London, United Kingdom: BAAF; Moffat, F (2013). 'Writing a 'later life letter': A post-adoptive support tool – very useful in the meeting and discovery of oneself', in *ISS/IRC Monthly Review*, No. 172, p. 4.

³⁵¹ Hague Conference on Private International Law (2012). *Accreditation and Adoption Accredited Bodies: General Principles and Guide to Good Practice No 2*. Bristol, United Kingdom: Family Law – A publishing imprint of Jordan Publishing Limited; available at: <https://assets.hcch.net/upload/adoguide2en.pdf>.

³⁵² ISS/IRC (2015). 'The preparation of prospective adoptive parents: Is it attuned to the development of intercountry adoption?', in *ISS/IRC Monthly Review*, No. 191, p. 1.

³⁵³ ISS/IRC (2013) 'Russia: New legislation introduced requiring the compulsory training of prospective adoptive parents', in *ISS/IRC Monthly Review*, No. 171, p. 5.

³⁵⁴ Based on existing organisations specialising in adoption, such as: Espace A, <http://www.espace-a.org>; La Voix des Adoptés, <http://lavoixdesadoptes.com/index.php>.

6.2 SURROGACY AS THE SALE OF CHILDREN: APPLYING LESSONS LEARNED FROM ADOPTION TO THE REGULATION OF THE SURROGACY INDUSTRY'S GLOBAL MARKETING OF CHILDREN

In this adapted abstract of his paper³⁵⁵ on this question, David Smolin argues that the way surrogacy is generally practised today means that it must be considered in law as a form of 'sale of children'.

Most surrogacy arrangements, as currently practiced, constitute the 'sale of children' under International Law, and hence should not be legally legitimated. Realistically, most surrogacy practice is associated with a self-described 'industry' marketing babies for purposes of family formation, often in the context of ISAs. Despite this global marketing of babies, surrogacy proponents maintain they merely provide services as opposed to selling children. For example, surrogacy proponents argue that gestational surrogates are 'never mothers', because they are genetically unrelated to the child, and hence are merely providing gestational services and are not being paid to transfer custodial rights. Yet, many 'intended contractual parents' are also genetically unrelated, and within the context of Assisted Reproductive Technology, parentage generally does not follow genetics, due to the widespread sale of human gametes. Even pro-surrogacy regimens, such as that of California, normally acknowledge genetically unrelated birth mothers as the legal mother at birth, in the absence of a pre-embryo transfer surrogacy contract. Hence, even in jurisdictions with pro-surrogacy legal regimes, it is the surrogacy contracts that render surrogates as non-parents, rather than the mere status of being genetically unrelated to the infants they gestate and birth. These surrogacy contracts explicitly or implicitly include the agreement to transfer exclusive *de jure* and *de facto* parental and custodial rights in exchange for monetary consideration – a sale of both, children and of gestational services. The agreement of the surrogates to legally cooperate with the processes, by which the intended contractual parents become the legal parents, and to physically hand over custody of the children, is of the essence of those surrogacy contracts, and a part of the legal consideration for which the surrogates are paid.

Similarly, surrogacy industry proponents argue that because surrogacy contracts are entered into prior to embryo transfer, they do not constitute the sale of children. Yet, pre-production sale of goods is a commonplace, and core norms against human trafficking and the sale of human beings cannot be evaded merely through the timing of contracting. Certainly, making contracts for the transfer of children prior to conception, in exchange for monetary consideration, still constitutes the illicit sale of children. For example, illicit 'baby farming', in which women are impregnated for the purpose of selling the children to families, would not become legal by making the contracts pre-conception. Thus, it is particularly ironic that California's pro-surrogacy regimen regards a surrogacy contract entered into after embryo transfer to constitute the illicit sale of children, while trying to avoid the obvious conclusion that equivalent contracts entered into before embryo transfer are also the sale of children. The fact that the surrogacy industry relies on such ludicrous rationalisations to avoid acknowledging the sale of children inherent to their industry underscores the industry's complicity in the systematic sale of children.

Norms against the sale of children and human trafficking target the role of intermediaries in the transfer of physical custody and/or legal rights of human beings, and hence it is the industry intermediaries who are most guilty of the sale of children in the context of surrogacy. Legal enforcement of the norms against the sale of children should particularly target these intermediaries, and States should not legally legitimate the industry's illicit practices.

³⁵⁵ *Supra* 329.

Comparison with adoption is useful in revealing the hidden hypocrisy of the surrogacy industry. Surrogacy industry proponents claim to reflect a progressive acceptance of new means of family formation, but in fact advocate for a retrograde and pseudo-traditionalist set of legal rules that cut off significant rights of surrogates and surrogate-born persons to information, autonomy, and relationship. Thus, pro-surrogacy regimes, such as California, strip birth parents of protections found in the adoption context, such as the ban on binding pre-birth contracts for relinquishing children, and indeed, the legal status of being the mother at birth. Similarly, California strips those born through surrogacy of rights increasingly honoured in adoption, such as access at adulthood to information about origins. California's surrogacy code mandates original birth certificates that do not even record the woman who literally gave birth to the child, leaving no accurate original birth certificate for the surrogate-born adult to discover. In a context where birth parents and adoptees are gaining new rights in the context of adoption, surrogacy proponents seek to build an industry, which empowers intended contractual parents and profit-seeking intermediaries at the expense of the rights of surrogates and surrogate-born persons.

The implication of these considerations is that a legal and ethical analysis of surrogacy should begin with the sale of children issue, rather than with the parentage and citizenship issues that arise after birth. Even when it is necessary, in the best interests of children, to allow surrogate-born children to establish parentage relationships with intended contractual parents, governments should be working cooperatively to legally enforce the prohibitions of the sale of children against the surrogacy industry intermediaries, who are systemically profiting from the sale of children. The industry should be targeted for legal sanctions that strip them of the profit that motivates them. In addition, even when intended contractual parents obtain parentage status, the rights of surrogate-created children to information and relationship with others involved in their creation should be honoured. Hence, granting intended contractual parents some degree of parentage status after illicit commercial surrogacy arrangements does not require making that status exclusive, nor does it require cutting the children off from information about their origins. Finally, whatever adjustments are made in individual cases to provide for the best interests of surrogate-born children should not create a pathway toward legitimating in law or practice the systemic sale of children through surrogacy.

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6.3 INTERNATIONAL SURROGACY RIGHTS AND THE NEEDS OF SURROGATE MOTHERS³⁵⁶

When considering vulnerabilities related to both ICA and commercial global surrogacy arrangements, the natural question is *what* are the similarities and differences for the mothers – both birth mothers and surrogate mothers. While there are some significant differences in the two practices, one cannot underestimate the complex emotional experience entailed in adoption and surrogacy. Regardless of circumstances of conception, motherhood is a deeply profound experience for virtually all women, and the decision to relinquish or transfer a child through a legal agreement strikes most outsiders as simply abnormal.

The reasons underlying each activity are varied, and some women report greater emotional strain than others³⁵⁷. Furthermore, in the case of most commercial global surrogacy arrangements, the children are conceived via in vitro fertilisation. Today, these pregnancies are quite frequently gestational pregnancies; thus, the infant is *not* genetically linked to the surrogate mother. The exception is traditional surrogacy arrangements (in which the surrogate mother's ovum is used), but this form of surrogacy is far less frequent in commercial global surrogacy. In fact, traditional surrogacy is far less frequent in commercial global surrogacy, and is actually banned in India³⁵⁸.

Once one removes the question of genetic linkage, similarities are more along emotional lines and, empirically speaking, little is actually known about the long-term emotional and mental health consequences of commercial global surrogacy for surrogate mothers. However, more is known about birth mothers in adoption, and their loss can be and often is profound³⁵⁹. The experience often requires aftercare, and best practices include counselling in the decision-making process as well as follow-up care. In reality, mothers in both adoption and commercial global surrogacy often receive insufficient support, especially in aftercare³⁶⁰. Quite simply, once the 'transaction' is completed, the birth or surrogate mother is largely forgotten as a new family is formed. That which is celebrated by one family represents loss to a mother (and potentially larger family group), and frequently the 'receiving' family lives in relative wealth as compared to the mother in question, especially in the case of India and other low-resource countries. As we consider the rights and needs of surrogate mothers, the experience of loss as well as the needs expressed by these women clearly cannot be ignored.

The *rights and needs* of surrogate mothers is a complex discussion. The popular press has repeatedly highlighted the reality that thousands of women are involved in commercial global surrogacy arrangements around the world with little regulation. Ethical implications have been considered and cautions have been made as the industry rages on³⁶¹. Quite simply, it is a billion dollar industry whose impact is profound for all involved³⁶².

³⁵⁶ This contribution was written by Karen Smith Rotabi and Lopamudra Goswami.

³⁵⁷ Pande, A (2014). *Wombs in labor: Transnational commercial surrogacy in India*. New York, USA: Columbia University Press; Scherman, R, Misca, G, Rotabi, K S and Selman, P F (in press). 'Parallels between international adoption and global surrogacy: What the field of surrogacy can learn from adoption', in *Adoption & Fostering*; Wiley, W O and Baden, A L (2005). 'Birth Parents in Adoption: Research, Practice, and Counseling Psychology', in *The Counseling Psychologist* 33(1), pp. 13 – 50; available at: <http://tcp.sagepub.com/content/33/1/13.abstract>.

³⁵⁸ Bromfield, N F and Rotabi, K S (2014). Global surrogacy, exploitation, human rights and international private law: A pragmatic stance and policy recommendations, in *Global Social Welfare: Research, Policy and Practice*, pp. 123 – 135; available at: <http://link.springer.com/article/10.1007%2Fs40609-014-0019-4>.

³⁵⁹ Grotevant, H D, McRoy, R G, Wrobel, G M and Ayers-Lopez, S (2013) 'Contact between adoptive and birth families: perspectives from the Minnesota/Texas adoption project', in *Child Development Perspectives*, 7(3), pp. 193 –198; available at: <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3743089/>; Roby, J and Matsumura, S (2002). 'If I give you my child, aren't we family? A study of birthmothers participating in Marshall Islands – US adoptions', in *Adoption Quarterly*, 5(4), pp. 7 – 31; available at: http://www.tandfonline.com/doi/abs/10.1300/J145v05n04_02; Wiley, W O and Baden, A L (2005). *Supra* 357.

³⁶⁰ Pande, A (2014). *Supra* 357; and Wiley, W O and Baden, A L (2005). *Supra* 357.

³⁶¹ Palattiyil, G B, Blyth, E, Sidhva, D and Balakrishnan, G (2010). 'Globalization and cross-border reproductive services. Ethical implications of surrogacy in India for social work', in *International Social Work*, 53(5), pp. 686 – 700; available at: http://www.iss.nl/fileadmin/ASSETS/iss/Guests/Adoption_surrogacy/Publications/Eric_Blyth_pub.pdf.

³⁶² *Supra* 358.

This Chapter focuses on the rights and needs of surrogate mothers in commercial global surrogacy.

We offer a way of thinking about the phenomenon considering human rights principles, specific declarations of human rights, and movements in developing new International Private Law as a response to commercial global surrogacy. Research evidence about surrogate mothers will also be presented because it is critically important, at this juncture, to integrate the voices of surrogate mothers into any discussion about rights. As authors, we *do not* want to contribute to any further discussion ‘about’ women and their needs without the *voices* of those most affected by the practice of commercial global surrogacy. While others have drawn conclusions without surrogate mothers’ input, as authors, we proceed with caution in recognising women’s abilities to identify their problems, needs, and decisions in commercial global surrogacy.

We begin with human rights and then look at what *we know* about the surrogate mothers engaged in commercial global surrogacy. Then, we consider rights as related directly to commercial global surrogacy and regulatory solutions. In this Chapter, we focus on surrogate mothers living in poverty in low-resource countries – they are the most vulnerable to human rights violations. Indian women are our focal population, as their human rights are very much in jeopardy in a country known for extreme poverty, inadequate justice systems in terms of human rights abuses and access to legal services for poor and marginalised people, and inadequate opportunity for work in a country where unemployment and underemployment are chronic problems³⁶³.

SURROGACY AS ‘WORK’

As authors, we recognise that there is a great deal of controversy about surrogacy being framed as *work* and there are moral arguments against such a conception³⁶⁴. However, research evidence is clear that many surrogate mothers in India view themselves to be engaged in an occupation or the *work* of commercial global surrogacy³⁶⁵.

A Pande³⁶⁶ carried out seminal research in Gujarat, India and found that surrogate mothers are required to view themselves as ‘both a worker-producer and a mother-reproducer’. In their own personal narratives about their surrogate motherhood, the women interviewed clearly view their work as legitimate, albeit work with obvious emotional burdens in the short and long-term. We will consider the emotional issues and address the related rights later in this Chapter. We now turn to the human rights of surrogate mothers.

HUMAN RIGHTS APPLICATION TO COMMERCIAL GLOBAL SURROGACY

The Universal Declaration of Human Rights, proclaimed at the end of World War II, considers motherhood as a vulnerability that must be protected. Developed in the late 1940s, the definition of family was conventional and the concept of surrogacy was not even an idea in this era. CEDAW provides a framework that refers directly to rights of maternity. Article 4 identifies that ‘States are allowed to adopt special measures aimed at protecting maternity’. It should be noted that this international instrument was drafted with the intent of protecting rights, such as maternity leave from work and other discrimination issues related to motherhood. There is no reference to the

³⁶³ ‘Unemployment rate up at 4.9% in FY 14: Labour Ministry’, *Press Trust of India*, 7 January 2015; available at: <http://profit.ndtv.com/news/economy/article-unemployment-rate-up-at-4-9-in-fy14-labour-ministry-724040>.

³⁶⁴ Cheney, K E (2014). ‘Executive summary of the International Forum on Intercountry Adoption and Global Surrogacy’. *ISS Working Paper Series / General Series*, Vol. 596, pp. 1 – 40; available at: http://www.iss.nl/news_events/iss_news/detail/article/69824-wps-596-601-papers-of-the-international-forum-on-intercountry-adoption-and-global-surrogacy/; *Supra* 69.

³⁶⁵ Pande, A (2014). *Supra* 357.

³⁶⁶ *Ibid.*, p. 64.

rights of women engaged in the *work* that is the ‘occupation of maternity’ – commercial global surrogacy was not even remotely a conception when CEDAW was passed in 1979³⁶⁷. Now, at this critical juncture, new dimensions of *work* and human rights interface with advanced reproduction technologies, leaving critical questions about exploitation of surrogate mothers and the potential for global regulation³⁶⁸.

EVIDENCE: INDIAN SURROGATE MOTHERS AND THEIR VIEWS ON ‘WORK’

In our own study in Gujarat, India, like A Pande³⁶⁹, we found that women reported their choice to participate in surrogacy as *work* to be the result of limited employment opportunities in the context of extreme poverty. Moving from the *work* premise to rights includes the right to a safe workplace and also the *consent* to engage in the workplace. The issue of workplace safety is relatively low risk as the surrogate mothers receive good quality health care and other amenities, including adequate nutrition, in order to ensure that a healthy infant is the result of the transaction. Issues of safety of medical procedures (including hormone injections for in vitro fertilisation processes), labour and delivery, as well as other risks, are of concern³⁷⁰. However, the reality is that this *work* is not more dangerous than many forms of labour that are available to these particular women living in poverty in India.

It should be noted that poor women working in India often deal with the reality of long transportation times to workplaces where there are limited or no safe passage ways, and rape is a serious risk. Also, there are long work hours (10-12-hour shifts) in settings such as textile factories where their health is compromised (*e.g.* lung and other health issues due to chemical exposures, etc.). Further, these women engaged in such work also do not have any medical benefits. Since most of them lack the resources to pay for childcare, they often end up bringing their children to the unsafe environments of their work sites. Accidents in these cases are quite common and usually go unreported. Women also work in places with very minimal or no sanitation, leading them to choose between either skipping work or contracting diseases related to these unsafe environments. Finally, the unfortunate reality of most Indian communities, as mentioned previously, is chronic unemployment, which has been a push factor for exploitation, including human trafficking and, specifically, women and girls being coerced into a range of activities related to the sex industry.

Quite a few women in our study mentioned how engaging in surrogacy has been a better way to earn money in that short duration of time. Some had been earning an average of USD 30 a month and going from that to earning USD 5,000 – 7,000 for one pregnancy³⁷¹ was an exponential growth in income unavailable in any other venture. They even stated that, instead of working in the fields under extreme weather conditions, this money gave them an opportunity to start their own entrepreneurial ventures like a sewing business, buying an auto-rickshaw for their husbands to drive, opening a beauty salon and so forth. Some even mentioned how it gave them a sense of confidence after being trained in various crafts during their stay in the surrogacy hostels. Their status in their family also seems to rise as they bring financial resources and thus economic stability. Quite a few were even willing to agree to more surrogate pregnancies than stipulated by the clinics as they see surrogacy as the only avenue through which they can improve their financial condition.

³⁶⁷ Gena Corea wrote *The mother machine: Reproductive technologies from artificial insemination to artificial wombs* in 1985. While she presented a very detailed discussion, she did not anticipate globalisation and the neoliberal environment that has fueled commercial global surrogacy. One may argue that it was essentially impossible to anticipate the growth and opportunity related to commercial global surrogacy.

³⁶⁸ *Supra* 358; Cheney, K E (2014). *Supra* 364; HCCH (2012). *A preliminary report on the issues arising from international surrogacy arrangements*. The Hague, The Netherlands: HCCH; Pande, A (2014). *Supra* 357; *Supra* 69.

³⁶⁹ Pande, A (2014). *Supra* 357.

³⁷⁰ *Supra* 358.

³⁷¹ SAMA – Resource Group for Women and Health (2012). *Birthing a market: A study on commercial surrogacy*. New Delhi, India: SAMA; available at: <http://www.samawomenshealth.org/publication/birthing-market-%E2%80%98commercial-surrogacy-india>.

In a surrogate mother's decision-making process to participate in commercial global surrogacy, a cost-benefit analysis is clearly at play; these women factor in (1) the opportunity of a large sum earned for nine months of work versus (2) the inconvenience, health risks, as well as the physical and emotional pain and other risks related to commercial global surrogacy.

The obvious 'benefit' in the equation is income. When asked what the surrogate mothers plan to spend their earnings on, most frequently purchasing a house and educating their children was the response. For example, one surrogate mother said:

'I did not have a house before. To build a house I told my husband that I wanted to be a surrogate. Our salaries were less so we could not have built a house with that. My husband did not agree with this, but I told him that I will definitely go for it. I said only if I become a surrogate will the house be built, otherwise it would not. And if anything is remaining I will keep some for my child for his education. That is how I decided. Later my husband and I were on the same page.'

This quote not only underscores poverty and need, but also illustrates the negotiations that take place with husbands and/or other family members, who also stand to benefit from the commercial global surrogacy income.

Like A Pande, we found that most of the surrogate mothers identified some emotional turmoil that resulted from their experience, and this is one of the greatest 'costs' of commercial global surrogacy in the cost-benefit analysis. As children are almost always removed from the surrogate mother immediately after birth, this critical moment can be quite difficult for obvious reasons. When asked about 'how it felt to hand over the infant', one mother, who gave birth to twins, said:

'I did not feel good because I kept them in my belly for nine months. When they took them away, I cried a lot. I felt like I was giving away my own children and I regretted it a lot. I went back home and could not eat anything, I was crying a lot. Then my husband explained that those were their babies and of course they will take them away. Madam also told me that they were not my kids. So like that slowly I forgot about it.'

In line with A Pande's results³⁷², we found that surrogate women most often expressed a desire to stay in contact with the child born of the surrogacy arrangement. At the very least, they desired information about the wellbeing of the child. The best-case scenario is actually some sort of relationship with the child. This particular aspect of commercial global surrogacy is entirely outside of the surrogate mother's control because, fundamentally, the decision to participate in an ongoing relationship hinges on the intended parents' desire/willingness to do so, and to ensure that communication is maintained. While outside of our research question, it appears that some intended parents view the surrogate mother as having a kind of familial relationship, and they engage with her in a manner that honours her contribution to the family. Others, in contrast, simply see the surrogate mother as a *worker*, and any further relationship is quickly terminated upon delivery³⁷³.

³⁷² Pande, A (2014). *Supra* 357.

³⁷³ *Ibid.*

IF COMMERCIAL GLOBAL SURROGACY IS FRAMED AS ‘WORK’, THEN REGULATION IS ESSENTIAL

Framing commercial global surrogacy as work allows for a regulatory approach to socially protect those vulnerable in the transaction, in order to ensure health and safety measures. It is important to note that health and safety measures certainly extend beyond the mother, specifically to the foetus/infant. However, due to the brief nature of this Chapter, we are focusing here only on the rights of surrogate mothers.

To date, there are *no* international laws protecting the parties to global surrogacy arrangements; surrogate mothers are not protected in any comprehensive and global legal framework. In India, an attempt has been made to develop a legal framework, dating back to 2005³⁷⁴. There have even been attempts to abolish commercial global surrogacy in India, including the issue being raised at the Indian Supreme Court level in October 2015³⁷⁵. However, at this point, there is no regulation of the practice in India even though thousands of infants have been born under commercial global surrogacy arrangements. These children are now citizens of dozens of countries around the world. Due to the sheer number of infants conceived, and the fact that commercial global surrogacy is a billion dollar business, we assert that regulation is essential to protect the surrogate mother-worker.

Rights, regulations and our recommendations

In this brief Chapter, we can focus on just a few issues, and we encourage the reader to refer to the many different sources available on this issue³⁷⁶. We frame our ‘rights’ concerns along with recommendations for regulation. Our focus is on (1) informed consent, (2) the rights to health care during and *after* labour and delivery, and (3) long-term emotional wellbeing of the surrogate mother.

1. Informed consent

Entering into a surrogacy arrangement requires informed consent to the medical procedures, as well as the emotional implications of carrying a child to term and then handing over the infant to the intended parents. Not unlike adoption, the informed consent process is challenging and unbiased counselling is essential. However, for women living in poverty, the process is quite challenging. For example, legal documents – often written in a language other than the first or native language of the surrogate mother – are difficult to understand. This is particularly true when the complicated technologies required for commercial global surrogacy are presented along with health implications, including medical risks. Information includes the routine use of hormone injections, information on *how* embryo transfer is accomplished, and other necessary procedures for a successful pregnancy.

It should be noted that one significant difference between adoption and surrogacy arrangements is the fact that, in commercial global surrogacy, a woman must consent to the child’s transfer prior to the pregnancy. This is in complete contrast to (ethical) adoption, where the birth mother consents after the experience of pregnancy, labour and delivery. This difference cannot be underestimated, and one must ask if informed *consent* is truly possible – that is with a woman’s complete knowledge of what she is legally agreeing to³⁷⁷.

³⁷⁴ ‘Need to regulate Indian surrogacy industry’; Press Information Office, Government of India, 13 May 2011; available at: <http://pib.nic.in/newsite/efeatures.aspx?relid=72127>.

³⁷⁵ ‘India wants to ban birth surrogacy to foreigners’, *The New York Times*, 28 October 2015; available at: <http://www.nytimes.com/2015/10/29/world/asia/india-wants-to-ban-birth-surrogacy-for-foreigners.html>.

³⁷⁶ Among the many sources available, we suggest, just to name a few: *Supra* 358; Cheney, K E (2014). *Supra* 364; Karandikar, S, Gezinski, L B, Carter, J R and Kalonga, M (2014). ‘Economic necessity or noble cause? A qualitative study exploring motivations for gestational surrogacy in Gujarat, India’, in *Affilia*, 29(2), pp. 224 – 236; available at: <http://off.sagepub.com/content/early/2014/01/08/0886109913516455>; Pande, A (2014). *Supra* 357; *Supra* 371; and *Supra* 69.

³⁷⁷ Personal communication with David Smolin, August 2014.

In order to proceed with fairness, the recommended strategy rests on the need to have in place guidelines for consent that are culturally sensitive to women in the Global South, particularly those living in poverty and in collectivist societies. Issues of education and literacy must be accounted for – documents must be understandable and treated with care when ensuring that a woman fully comprehends the risks of commercial global surrogacy. An impartial counsellor must be involved as both an educator and a witness, and they *must* be trained for this difficult work. Professionals trained and licensed in social work (when possible)³⁷⁸ should be engaged in this task, and they should be employed independently of surrogacy clinics and lawyers involved in commercial global surrogacy arrangements. All consent processes must be sensitive to force, fraud, and coercion, and take account of the reality that sometimes women are coerced by their family members, meaning their free will and self-determination is impossible in this circumstance. Consent processes must underscore, in counselling and education, the importance of full knowledge of the process, including emotional loss and options for follow-up care.

2. The rights to health care

Because the health and safety of the surrogate mother is of utmost concern for the clinic health care providers during pregnancy, there is little evidence of consistent problems during this phase of the surrogacy arrangement. Fundamentally, clinics facilitating the surrogacy process have a vested interest in providing the finest care during pregnancy in order to produce the healthy infant.

However, concerns have been raised about post-delivery health care, especially since caesarean section delivery is a common commercial global surrogacy practice. There have been cases of labour and delivery complications, and some women have not received appropriate aftercare. Sadly, there have been some deaths due to medical complications that could have been prevented if long-term health care was provided³⁷⁹. However, the commercial global surrogacy arrangement essentially ends as of labour and delivery of the infant, whereas health implications extend to include risk of infection (incision care) and other problems.

One recommended strategy to address this issue is the provision of health insurance for the surrogate mother to cover needs for an appropriate amount of time following labour and delivery; for example, a health care policy that allows for follow-up care up to six months or a year. However, at this juncture, such protection and care is not being provided as a requirement of the service agreement.

3. Long-term emotional wellbeing

To date, there is no research study that investigates the long-term emotional cost of commercial global surrogacy on women living in poverty. As we stated previously, without a doubt, many women do experience deep emotional pain and there is frequently no systematic follow-up mental health care. In considering the emotional cost and consequences of commercial global surrogacy, the idea of relationship break and relationship continuity is important, as indicated by one of the Gujarat respondents in our study.

'I did not want to give them away, but it is their babies so I had to give them away. I cried a lot. I went to drop them off at the airport as well. I kept them for three months. Now they also send me pictures of them. They are very nice. I never felt like they were not my kids. But then you sign an agreement, and they belong to them so we have to give them away. They give us the money and we give them the baby. We should give them away with a smile and not be upset. You feel upset, of course, but you have to give them away, you sign in the agreement. You have nothing but just lending your womb. Like how you take a house for rent, similarly our womb was taken for rent. They make us sign like this in the agreement. It is theirs so we have to give away. We will forget slowly. If we cannot, then they will send me more pictures and I get happy looking at those pictures.'

³⁷⁸ There is no licensing of social work in India, and this is a limitation in this recommendation.

³⁷⁹ *Supra* 358.

As we stated early in our introduction to this topic, the loss can be – and often is – profound for women who experience commercial global surrogacy. As a result, surrogate mothers in India consistently express the desire for a long-term relationship with the child born of commercial global surrogacy³⁸⁰, not unlike open adoption (see [Chapter 2: Legal considerations](#) and [Chapter 3: Psychosocial considerations](#)). Because maintaining communication between the surrogate mother and the intended family/child is highly valued, we make the following recommendations.

The intended parent(s) must be clear about the cessation of the financial arrangement and the importance of the relationship being based on the mutual desire to remain connected emotionally. If the surrogate mother continues to expect money in the ongoing relationship, then this motivation can undermine relationship quality and harm the child as they begin to understand the complexity of their conception and the vast financial inequalities. If money must be discussed, due to circumstances of poverty, then it should be done so in a manner that is sensitive to the risks and vulnerabilities of the women and children.

If there is a true intention of maintaining long-term contact, then all of those in the surrogacy triad should be counselled, at least once, about the importance of keeping expectations realistic and manageable. Failure to counsel about expectations and limitations of such a relationship sets the stage for ambiguity in a relationship that is already challenging to negotiate. If there is no intention to maintain contact, then the surrogate mother should be informed of this fact in the consent process.

Finally, as authors, we believe that most surrogate mothers in India and other low-resource settings need more mental health care. We approach this assertion as a belief, one that is morally right, because there is currently insufficient research evidence to define the dimensions of care in terms of depression, trauma, and other adjustment issues. However, quite simply, the right thing to do is to provide long-term mental health services for the surrogate mother's voluntary participation. Furthermore, our assertion is particularly problematic, as settings characterised by poverty typically do not have adequate mental health resources. However, this is an area in which the surrogacy clinics can and should provide comprehensive aftercare.

International Private Law to regulate commercial global surrogacy

Because we frame this discourse as the work of surrogate mothers, it is important to note that international labour laws are silent about commercial global surrogacy practices. Equally, international human trafficking law is not currently framed in a manner that captures commercial global surrogacy as an area of concern. Commercial global surrogacy, as currently defined, is based on the premise that a service is being purchased. Without a doubt, this is an area of debate, but application of human trafficking law is a misfit in terms of regulatory control.

That said, commercial global surrogacy has entered the discourse about the importance of International Private Law for harmonising international standards of protection. The HCCH³⁸¹ has considered the issue, especially framed within their active engagement in regulating ICA (see [Chapter 2: Legal considerations](#)). However, to date, no such law has been drafted and the movement today is more oriented to parentage more broadly rather than a specific law focused on commercial global surrogacy. The reasons for a lack of movement forward with a commercial global surrogacy-specific law are complex, but a lack of political will to truly regulate the practice, on the part of countries, such as the USA and India, certainly come into play. At this point, the future of International Law to protect those who are vulnerable in commercial global surrogacy is uncertain.

³⁸⁰ Pande, A (2014). *Supra* 357.

³⁸¹ HCCH (2012). *Supra* 368.

CONCLUDING THOUGHTS: REFLECTIONS AS WOMEN RESEARCHERS

This research has been an opportunity for us, as researchers, to consider rights and responsibilities not only through our personal lens – as women of privilege – but also through the lens of women living in poverty in India. We began with our own emotional response to the practice as disturbing and we commenced with objective research. In this step, we made a commitment to the fact that it is critically important to depend upon the evidence when speaking of the rights of others – especially in the case of vulnerable Indian women and their families living in extreme poverty and their unique needs related to health and safety. Furthermore, we recognised that any legitimate advocacy approach requires taking full account of the views, perspectives, and *voices* of the surrogate mothers.

Here we have shared some of the quotes from women we interviewed in India to underscore our findings regarding commercial global surrogacy and the positioning of the activity as *work*. In accepting this conception, we were left with no choice but to suggest regulation as the way forward, with a pragmatic approach to recommendations.

Again, coming from a very personal place, this position was essential as we interviewed women, recorded their experiences and opinions, and analysed these data. As a deeply moving experience, it was quite something for us to see how, despite the circumstances of poverty, these women could still look at this whole experience as an opportunity to give and not as a means of being exploited³⁸². For some, it meant giving a childless couple the hope and reality of family life realised. These women also mentioned how they looked at it quite objectively with regards to keeping themselves healthy, looking after themselves and also optimising time spent in the hostels learning new skills and crafts. Life post the surrogacy process, as reported by all the women we interviewed, has been much better than what they could have envisioned for themselves otherwise. Hearing these stories was very moving and the reality of poverty, from the perspectives of women in India, was important to our understanding of commercial global surrogacy and its complexities of experience.

Finally, we are of the opinion that, without regulation, and especially if the practice is abolished in countries such as India, the practice will move underground. If that happens, criminal networks will emerge, most likely the same networks as those engaged in human trafficking. For us, that vulnerability is unthinkable, and the rights that we have focused upon here will seem minor in comparison to the human rights abuses that will emerge with organised criminals controlling supply as demand for healthy infants continues. For without any doubt, demand will indeed continue, and it will sustain greed that often capitalises on the circumstances of women with limited opportunities and living in the exploitative reality of poverty.

³⁸² The larger study indicated that some women saw their engagement in surrogacy as altruistic and those results are found in the forthcoming book Rotabi, K S, Bunkers, K M, Bromfield, N F (forthcoming). *From Intercountry Adoption to Global Surrogacy: A Human Rights History and New Fertility Frontiers*. Surrey, United Kingdom: Ashgate Press.

AFTERWORD

This Chapter has been written without taking account of the women who act as surrogate mothers in the USA. The conclusions that we have drawn are still relevant for their situation, although the vulnerabilities of women in the USA are quite different from those of surrogate mothers in low-resource countries. India is just one of those countries and little is known about women in Ukraine and Mexico and other countries where commercial global surrogacy is also taking place. Differences in the practice, especially contrasting women in the USA with women elsewhere, is a critically important point that cannot be underestimated. The limited discourse here stems from the need to capture the complexities in a relatively brief book Chapter.

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³⁸³ *Supra* 239.

CONCLUDING CONSIDERATIONS

David M Smolin draws together the various contributions throughout this handbook, and provides new insights as to how professionals can address illegal adoptions based on his extensive work on this topic.

This impressive volume of diverse and significant writings on illicit adoption practices constitutes a significant step forward in international discourse on adoption and children's rights. Modern international discourse on adoption is properly grounded in children's rights and yet has struggled to frankly engage illicit adoption practices, due to the legal, psychosocial, social and political sensitivity of the topic. An early highlight was Hans van Loon's 1990 Report on intercountry adoption, which addressed illicit adoption practices directly and with keen analysis and insight³⁸⁴. The van Loon Report was a foundational part of the preparatory materials for the 1993 Hague Convention³⁸⁵, and indeed the Convention itself forthrightly addressed the problem of illicit adoption practices³⁸⁶. However, this direct tone was often lost in succeeding decades. The 2010 and 2015 Special Commissions on the practical operation of the 1993 Hague Convention courageously moved to re-open discussion of illicit adoption practices but, at such a diplomatic venue, it was difficult to be too specific³⁸⁷. ISS's 2012 publication on the grey zones of ICA was significant in validating widespread concerns with illicit practices, in a context where many in the adoption community were choosing to doubt the multiplying reports of abusive practices³⁸⁸. This professional handbook moves beyond documentation to address *responding to* illicit adoption practices, which presupposes that illicit adoption practices are a serious enough issue to merit significant response. The international community shows, by this handbook, that it is ready to directly engage the question of how to respond to wrongs and abuses done in the name of adoption, whereas often, in the recent past, there was not even a willingness to admit that such wrongs and abuses existed to any significant degree.

It is not possible in this concluding Chapter to summarise all of the numerous important contributions in this handbook. Instead, this concluding Chapter aims to provide useful contexts and recommendations for addressing illicit adoption practices, while taking account of many of the excellent contributions within this professional handbook.

7.1 FOUR CONTEXTS FOR UNDERSTANDING AND RESPONDING TO ILLICIT ADOPTION PRACTICES

7.1.1 FIRST CONTEXT: ADOPTION AS A CONTESTED AND PARADOXICAL PRACTICE

Illicit adoption practices occur within the paradoxical posture of adoption itself. As a matter of practice, adoption globally is comparatively rare and concentrated primarily within relatively few nations³⁸⁹. International child rights standards are neutral toward adoption, and do not require adoption to be implemented by national systems³⁹⁰.

³⁸⁴ van Loon, J H A (1990). *Report on Intercountry Adoption* (Prel. Doc. No 1). The Hague, The Netherlands: HCCH; available at: <https://www.hcch.net/en/publications-and-studies/details4/?pid=918>.

³⁸⁵ See: 1993 Hague Convention; Smolin, D M (2010). 'Child Laundering and the Hague Convention on Intercountry Adoption: The Future and Past of Intercountry Adoption', in *University of Louisville Law Review*, 48, 441, pp. 452 – 461; available at: http://works.bepress.com/david_smolin/.

³⁸⁶ Preamble and Article 1 of the 1993 Hague Convention.

³⁸⁷ See: HCCH, Special Commission meetings, <https://www.hcch.net/en/instruments/conventions/publications1?dtid=57&cid=69>.

³⁸⁸ *Supra* 7.

³⁸⁹ United Nations – Department of Economic and Social Affairs – Population Division (2009). *Child Adoption: Trends and Policies*. New York, USA: United Nations (ST/ESA/SER.A/292); available at: http://www.un.org/esa/population/publications/adoption2010/child_adoption.pdf.

³⁹⁰ Articles 20 and 21 of the UNCRC.

Many nations and cultures are legally and/or culturally opposed to adoption, and especially to the full severance models of adoption that have tended to predominate in international discussions of adoption³⁹¹.

Ironically, despite this paradoxical posture, adoption in some societies has often been viewed sentimentally, as an entirely good and even praiseworthy act, which brings only benefit to a child. Unfortunately, naive views of adoption contribute to the prevalence and misunderstanding of illicit adoption practices.

Adoption, particularly of the ‘full adoption’, full severance model, has significant relational, rights, and emotional costs. In order to gain a family, the child must lose a family. In order to gain a family, the child must lose their original identity.

Some may argue that the child is an ‘orphan’ who has already lost a family, apart from the adoption, and hence, that adoption itself is all gain, the loss having already occurred. This would be a profound misunderstanding of adoption practice.

First, most children who are adopted are so-called ‘social’, rather than literal, orphans (see *Chapter 5: Political considerations*). Their parents are living but, for various reasons, feel unable, or are adjudged unwilling or unsuitable, to take on their parenting responsibilities. In addition, even literal orphans usually have living relatives. Hence, it is the decision to proceed to an adoption that usually causes the state to fully sever the child’s relationship with their living parents and other relatives. Further, even for children with no living parents or relatives, there is an identity, name, and multi-generational heritage available to them from their original family. Thus, even for a literal orphan, it is often not until adoption that the child is stripped of their original identity. Thus, it is adoption that causes this loss of identity, both for children with living parents or family members, and for children without known living relatives.

By contrast, there are interventions for children out of parental care that do not involve full severance. Simple adoption, various forms of customary and informal family-based care, the Islamic practice of *kafalah*, guardianship, foster care, and other options provide family life to children without removing the child’s original identity, and without legally severing the child’s relationship with their family of origin³⁹². These alternatives to full adoption highlight the losses and tragic choices involved in the full adoption model, thereby raising questions about the desirability of such a model.

In response, one can critique simple adoption, guardianship, and similar options by noting that the adoptee may not be fully incorporated into the new family and, thus, may not fully enjoy all of the benefits and lifelong security (‘permanency’) provided in full adoption. Some means of family-based care short of full adoption have subjected children to a second class, or even servant class, status within families. Full adoption has been the means, by which many children have been fully integrated into non-related families, being treated as equal members of the family in terms not only of material and legal benefits but also lifelong love, care, and identity. This raises the issue of whether the gains involved in full adoption outweigh the potentially life-long losses to the adoptee of their original identity and family connections.

Domestic legal systems generally have not yet clearly developed forms of adoption that combine, for the benefit of the child, the most positive aspects of full adoption with the most positive aspects of simple adoption, *kafalah*, guardianship, etc. Why could the law not fully incorporate the adoptee into the adoptive family for purposes of inheritance, custodial rights, and family life, without requiring the full severance of the child’s relationship with their original family? It may be beneficial to look for models from customary and informal kinds of adoption

³⁹¹ Högbäck, R (2014). ‘Intercountry Adoption, Countries of Origin, and Biological Families’, in *ISS Working Paper Series / General Series*, Vol. 598, pp. 1- 19; available at: <http://repub.eur.nl/pub/77406>.

³⁹² Articles 20 and 21 of the UNCRC; Guidelines for the Alternative Care of Children, A/RES/64/142, 24 February 2010 (adopted by the General Assembly on 18 December 2009); available at: http://www.unicef.org/protection/alternative_care_Guidelines-English.pdf; and *Supra* 391.

and care, which often reflect an ‘additive rather than ‘subtractive’ view of family life that permits the child to be simultaneously within multiple family units. Indeed, research indicates that such additive models of family life are common in multiple regions of the world³⁹³. Such practices belie the necessity of full severance for the best interests of children, by envisioning family relations in a more fluid, and perhaps more realistic, manner. These practices suggest how adoption could be practiced without the central legal fiction – and hence lie – of full adoption, that a human being can be rendered ‘unrelated’ to their parents, siblings and entire family line through the magic of the law.

Increasing practice and recognition within full adoption systems of both open adoption and the legitimacy of search and reunion is an implicit acknowledgment that, even when the law renders a child legally unrelated to their original family, the underlying psychological realities are quite different (see *Chapter 3: Psychosocial considerations*). ‘Birth mothers’ are mothers regardless of what the law may say. Similarly, even within full adoption systems, laws can be crafted to retain for the adoptee inheritance rights from their original family within specified circumstances, as illustrated by current versions of the Uniform Probate Code in the USA³⁹⁴. However, these are incomplete and inconsistent developments that, so far, lack conceptual coherence and even full legal force. For example, the promises of open adoption made to original parents are often legally unenforceable, and, even when theoretically enforceable, may provide first parents with only difficult and incomplete legal options. ‘Open’ adoption in practice is therefore often left subject to the whim of the adoptive parents, when undertaken within a legal framework of full severance that still regards the original parents as legal strangers to their child. Open adoption has become the predominate form of infant relinquishment adoption in some domestic adoption contexts, and represents positive gains for the adoption triad members, but it needs to be given a more secure legal status³⁹⁵.

One context of illicit adoption practice is therefore a mixed verdict on adoption itself. Since adoption itself causes a loss of the child’s identity rights, as defined by International Law, adoption can be viewed under domestic law as either permissible or impermissible³⁹⁶. Thus, in some States, to speak of illegal adoptions would have to include the fact that adoption itself is not legal. Hence, where there is no legal mechanism for the change of identity at the heart of full adoption, an attempt to alter a child’s identity in the manner of full adoption would most likely involve circumventing or violating the law.

On the other hand, Human Rights Law permits States to practice full adoption, despite the loss of identity rights, so long as certain minimum criteria and procedures are followed³⁹⁷. Thus, in States that do practice full adoption, it becomes necessary to define the circumstances and processes, under which it is permissible for the State to sanction and cause the loss of identity rights intrinsic to the legal conception of full adoption.

In addition, States that practice full adoption must be particularly vigilant about illicit adoption practices, for the corollary emphases on privacy and secrecy and full severance make those systems particularly vulnerable to illicit practices. Various forms of illicit practices, such as child laundering, and the use of pressure tactics against single parents, can hide within the secret spaces and closed-record environment provided in full severance adoption systems, including ICA systems that frequently maintain severance and secrecy whatever the underlying adoption systems of the nations involved (see *Chapter 2: Legal considerations*; *Chapter 3: Psychosocial considerations*;

³⁹³ *Supra* 391.

³⁹⁴ Section 2-119 of the Uniform Probate Code, <http://www.uniformlaws.org/Act.aspx?title=Probate%20Code>. The UPC is an influential model code; each state in the USA decides which parts of the UPC, if any, to enact.

³⁹⁵ Siegel, D and Smith, S (2012). *Openness in Adoption*. From Secrecy and Stigma to Knowledge and Connections. New York, USA: Evan B Donaldson Adoption Institute; available at: http://adoptioninstitute.org/old/publications/2012_03_OpennessInAdoption.pdf; Minnesota/Texas Adoption Research Project, <http://www.psych.umass.edu/adoption/>; Child Welfare Information Gateway (2014). *Postadoption Contact Agreements Between Birth and Adoptive Parents*. Washington, USA: Child Welfare Information Gateway; available at: <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/cooperative/>.

³⁹⁶ Articles 7, 8, 9, 20 and 21 of the UNCRC; and *Supra* 277.

³⁹⁷ UNCRC; 1993 Hague Convention; Guidelines.

Chapter 4: Social considerations and *Chapter 5: Political considerations*). The fact that full severance models of adoption are based on a legal fiction or lie, can unfortunately open the door to fictitious consents and other lies, which ultimately undermine the legitimacy of such systems.

7.1.2 SECOND CONTEXT: INTERNATIONAL STANDARDS AND HISTORICAL FORMS OF ADOPTION

Current international standards on adoption, which are based on modern conceptions of children's rights and human rights, are relatively new, still developing, and frankly at odds with the majority of historical adoption practice. Hence, there is surprisingly little experience in many societies in building adoption and child rights systems that accord with current international standards, and there is no past golden age, to which we can appeal as precedent or model. Thus, in trying to construct adoption systems in conformity with international standards, we are usually trying to create something new, which is in significant tension with historical and even present practices within each nation and society.

7.1.2a International standards

Contemporary international standards for adoption are built upon the 1989 UNCRC, the 1993 Hague Convention and the 2009 Guidelines³⁹⁸. As the dates associated with these documents indicate, this is an evolving body of law that is being developed, harmonised, and applied by state actors in cooperation with significant international actors, such as UNICEF, the HCCH, ISS and various international and national NGOs. These standards are grounded in broader human rights norms, which were themselves developed primarily after World War II³⁹⁹. The developing standards of human rights in general, and children's human rights in particular, place adoption within the context of concern for children out of parental care, and hence in need of 'alternative care', as well as concern for 'orphans and vulnerable children'.

Significant principles of these developing international standards include best interests, subsidiarity, poverty alleviation, informed consent, anti-profiteering, and acceptance of single parenting, which often are at odds with historical practices. These principles are inter-related and therefore often overlap in their application. As the following summary and later historical summary indicate, these standards are generally contrary to most historical adoption practices:

- **Best interests:** 'The best interests of the child shall be the paramount consideration' in adoption⁴⁰⁰. Hence, adoption should be centred on the needs of the child, rather than on the desire of adults to parent. A necessary corollary is that there is no right to adopt, for that would imply a right to someone else's child, regardless of the child's best interests and rights, and regardless of the rights of the original family. This standard, as demonstrated below, is in sharp contrast to most of the history of adoption, which was centred on the needs of adoptive families, and often involved the adoption of adults and adolescents.

³⁹⁸ *Ibid.*

³⁹⁹ The foundational documents of the modern human rights era include the 1948 Universal Declaration of Human Rights and the two 1966 International Covenants; see: Universal Declaration of Human Rights, General Assembly Resolution 217 (III) of 10 December 1948, <http://www.un.org/en/universal-declaration-human-rights/>; International Covenant on Economic, Social and Cultural Rights, General Assembly Resolution 2200A (XXI) of 16 December 1966, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>; and *Supra* 10.

⁴⁰⁰ Article 21 of the UNCRC; Article 1a of the 1993 Hague Convention; and *Supra* 277.

- **Subsidiarity:** Adoption is only considered when the child cannot, or in their best interests, should not, remain in or be returned to their family or ‘when appropriate, other close family members’⁴⁰¹. Hence, priority is given first to interventions that will preserve the child’s original family relationships. Further, under the subsidiarity principle, ICA should only be considered when appropriate domestic options are not available⁴⁰². Since subsidiarity as a principle is derived from the best interests principle, it is also contrary to most of the history of adoption, for which the best interests of children were peripheral or irrelevant⁴⁰³.
- **Poverty alleviation:** ‘Financial and material poverty, or conditions directly and uniquely imputable to such poverty’ should be seen as ‘a signal for the need to provide appropriate support to the family’, and do not justify the removal of a child from parental care⁴⁰⁴. Hence, poverty is not a ground for adoptive placements. This principle is contrary to most historical practice, as, frequently, legal systems regarded an inability to fulfil the parental duty of support for minor children as a proper ground for removal, termination of parental rights, and adoption. In addition, in many nations today, poverty, and even extreme poverty, is so common that human rights duties to alleviate poverty are in practice not fulfilled⁴⁰⁵.
- **Informed consent:** Consents for adoption must be ‘informed’, not induced by ‘payment or compensation of any kind’, and as to the mother, given only after the birth of the child⁴⁰⁶. Hence, consents obtained by force, fraud or funds are illicit and invalid⁴⁰⁷. The principle of informed consent of both fathers and mothers is contrary to historical contexts, where mothers had no real legal rights to their children, unmarried fathers and/or mothers lacked parental rights, and also those where a father’s parental rights were essentially inalienable⁴⁰⁸.
- **Anti-profiteering:** The anti-profiteering principle, under which all payments made for services or fees must be reasonable in accordance with the services rendered, and may not involve improper financial or other gain⁴⁰⁹. Thus, although there are necessarily financial aspects of adoption, these must be closely regulated and transparent in order to ensure that the best interests of the child, rather than financial incentives for intermediaries or governments, remain paramount⁴¹⁰. Since the anti-profiteering principle again reinforces the best interests of the child, and assumes prohibitions on the sale of human beings, it is contrary to historical systems, in which children were transferred for a myriad of reasons for the benefits of adults.

⁴⁰¹ Paragraph 3 of the Guidelines.

⁴⁰² Articles 20 and 21 of the UNCRC; 1993 Hague Convention; and *Supra* 277, pp. 31 – 35.

⁴⁰³ *Supra* 389, p. 13.

⁴⁰⁴ Paragraph 15 of the Guidelines.

⁴⁰⁵ *Supra* 391; Smolin, D (2007). ‘Intercountry Adoption and Poverty: A Human Rights Analysis’, in *Capital University Law Review*, 36, p. 413; available at: http://works.bepress.com/david_smolin/; *Supra* 277, pp. 72 – 73; and O’Halloran, K (2015). *The Politics of Adoption. International Perspectives on Law, Policy and Practice*. Series: Ius Gentium: Comparative Perspectives on Law and Justice, Vol. 41. The Netherlands: Springer Netherlands (3rd ed.), pp. 10 – 14.

⁴⁰⁶ Article 4(c) of the 1993 Hague Convention.

⁴⁰⁷ Smolin, D (2006). *Supra* 195.

⁴⁰⁸ Keating, J (2009). *A Child for Keeps, The History of Adoption in England, 1918 – 1945*. London, United Kingdom: Palgrave Macmillan, 28, pp. 30 – 38; O’Halloran, K (2015). *Supra* 405, pp. 13 – 14.

⁴⁰⁹ Articles 4, 8 and 32 of the 1993 Hague Convention.

⁴¹⁰ See: HCCH, Experts Group on the Financial Aspects of Intercountry Adoption, <https://www.hcch.net/en/publications-and-studies/details4/?pid=6310>.

- **Legitimacy of parenting by single and/or unwed parents:** The single parenting principle recognises the legitimacy of single parenting and parenting without marriage, and therefore rejects unmarried parenthood as a ground for forcing or pressuring unwed mothers and/or fathers to relinquish for adoption. Indeed, '[s]pecial attention should be paid (...) 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'⁴¹¹. This principle permits States to have a policy valuing marriage as a foundational social structure and preferred context for parenting children. For example, States may rationally believe that children benefit best from the coordinated, cooperative, and stable involvement of both parents, and that this is most likely to occur when the parents are married⁴¹². Nonetheless, States promoting traditional family structures cannot accomplish that end by infringing the parental rights of single and unwed parents, or by stripping children of their identity and relational rights in respect of their birth parents, based merely on marital status or single parenthood. This principle is, of course, contrary to historical practices in many nations where single motherhood was deemed a sufficient reason for removing the child, leading, for example, to the 'baby-scoop' era in the 20th century (see *Chapter 2: Legal considerations*; *Chapter 5: Political considerations* and *Chapter 7.1.2c: Common Law's late development of adoption* and *the baby-scoop era* below).

7.1.2b Historical contexts: Ancient roots and Civil Law systems

Full adoption has roots in Roman law (see *Chapter 1: Introductory considerations*). However, adoption in ancient Greece and Rome was unrelated to the needs of orphans or vulnerable children, but instead was a legal device for the benefit of the adoptive father and patriarchal family line. Adoption was a means for rich families – and, in particular, even for the Roman Caesars – to choose an heir to inherit the property or office of the father and continue the family line. In order to pick a suitable heir with known characteristics, young men, often adults, rather than babies or young children, were selected. In addition, often relatives of the adoptive father – step-children, nephews/great-nephews, or sons-in-law – were chosen. While some such adoptions were 'full' in the sense of completely transferring the adopted young man from one paternal line to another for inheritance purposes, they were not 'full' in the modern sense of being secret and cutting off personal contact between the adoptee and their original family. For the adopted young man, adoption generally involved a social promotion and, hence, an honour, as well as significant superior inheritance rights. Given the age of the adoptee, his adoption was no 'secret'. Indeed, adoptees kept a form of their original family name as a part of their new name, and could maintain social and personal relationships with their original family. Thus, the very different context of full adoption in the ancient Roman context lent it a completely different meaning to that of modern full adoption, for there was neither secrecy nor shame involved, and adoption typically had nothing to do with providing family life for an orphan or young child⁴¹³,

H Boéchat notes that the adoption of underage persons was not even permitted in Switzerland until 1907, and in France until 1923 (see *Chapter 1: Introductory considerations*). This indicates the influence of ancient Western conceptions of adoption until relatively recently in some Civil Law jurisdictions, whose law has developed from Roman Law. In addition, some Civil Law jurisdictions, such as France, provide both full and simple forms of adoption, as simple adoption also has its roots in Roman Law⁴¹⁴. Hence, the modern emphasis on adoption as centred in the best interests of children is contrary to the legal roots of adoption in the many nations with legal roots in Roman law, including, especially, Civil Law jurisdictions.

⁴¹¹ Paragraph 36 of the Guidelines.

⁴¹² See, e.g.: Browning, D (2006). 'The United Nations Convention on the Rights of the Child: Should it be Ratified and Why?', in *Emory International Law Review*, 20, 157, pp. 163-64; available at: http://csrlr.law.emory.edu/fileadmin/media/PDFs/Journal_Articles_and_Book_Chapters/20.EILR.Browning.The_United_Nations_Convention_on_the_Rights_of_the_child.pdf.

⁴¹³ *Supra* 389, pp. 1 – 17; Smolin, D (2012). 'Of Orphans and Adoptions, Parents and the Poor', in *Regent Journal of International Law*, 8, 267, pp. 287 – 295; available at: http://works.bepress.com/david_smolin/.

⁴¹⁴ O'Halloran, K (2015). *Supra* 405, p. 526; Smolin, D (2012). *Ibid.*, pp. 290 – 291; and *Supra* 389, p. 7.

7.1.2c Common Law's late development of adoption and the baby-scoop era

The English Common Law tradition was spread through the wide reach of the British Empire and subsequent Commonwealth of Nations. Many nations around the world derived their current legal system significantly from this Common Law. Common Law jurisdictions include the United Kingdom, Ireland, Canada, the USA, Australia and New Zealand. Common Law also has influence beyond the Western world due to the history of colonisation in India (India, Pakistan and Bangladesh), other parts of Asia (e.g. Malaysia) and Africa (e.g. Kenya, Ghana, Malawi, Nigeria and Zambia). Hence, several billion people worldwide live in jurisdictions influenced to various degrees by the Common Law tradition. The substance of Common Law obviously interacts in complex ways with local legal traditions, and has its own pattern of development in each nation. Common Law was historically influenced by Roman Law, but to a lesser degree than Civil Law⁴¹⁵.

Thus, it is significant that adoption, in today's full adoption sense of a change of legal identity, was unknown in Common Law. Instead, the emphasis of Common Law, at least for marital children, was centred on the inalienability of paternal rights. Thus, Great Britain did not enact a general adoption statute until 1926⁴¹⁶. The USA acted somewhat earlier, with its first general adoption statute originating in Massachusetts in 1851, sometimes viewed as the first modern adoption statute in the world⁴¹⁷.

In Common Law jurisdictions, the relatively recent creation of general adoption statutes and accompanying judicial and administrative practices was influenced by a primary focus on the perceived problems of the single or unwed mother in the 20th century. There was an increasing perception of unwed motherhood as a problem needing resolution, with an intensification of negative views of unwed mothers in some nations in the period from about 1945 to 1975. Negative viewpoints of unwed mothers, influenced by eugenics, psychiatry and social work, stereotyped unwed mothers as unfit parents and their children as suffering from the social stigma of 'illegitimacy' and from inherited negative moral characteristics. These viewpoints resulted in the law increasingly closing adoption records even to adult adoptees. The creation of new 'birth certificates' showing adoptive parents as birth parents, along with the closing of the original birth certificates, adoption court decrees and adoption agency records, even to adult adoptees, led to the norm of 'as if' adoption, *i.e.* the pretence that it was 'as if' the child had been born to their adoptive parents. This legal fiction that the child was only the child of their adoptive parents and not of their original parents became a social reality for many. The practice of race-matching for adoption and the power of adoption agencies, public and private, and other intermediaries augmented the separation between adoption triad members, further contributing to 'as if' adoption as a social as well as legal reality. Birth searches and reunions became viewed by some as a virtually illicit or immoral activity that defied the social understandings of 'as if' adoption. At the same time, the legal requirement of 'voluntary' relinquishment for adoption was sometimes fictional as well, as many birth mothers faced overwhelming pressures and little real choice but to acquiesce to an adoption (see *Chapter 2: Legal considerations* and *Chapter 5: Political considerations*)⁴¹⁸.

The resulting 'baby scoop era' of infant relinquishment adoptions in the English-speaking Common Law nations of the United Kingdom, the USA, Canada, Australia, New Zealand and Ireland, crystallised an inherently controversial source for contemporary views of modern adoption. While each nation had its own particular story, the elements in common are inherently problematic by contemporary standards. Adoption practice was built

⁴¹⁵ See: Encyclopaedia Britannica, Common law, <http://global.britannica.com/topic/common-law>; Commonwealth Network, The legal sector in the Commonwealth, <http://www.commonwealthofnations.org/sectors/business/legal/>.

⁴¹⁶ *Supra* 408, pp. 25, 113 – 117.

⁴¹⁷ *Supra* 389, p. 13.

⁴¹⁸ See, e.g.: Carp, W (1998). *Family Matters: Secrecy and Disclosure in the History of Adoption*. Cambridge, MA, USA: Harvard University Press; Kunzel, R (1993). *Fallen Women, Problem Girls, Unmarried Mothers and the Professionalization of Social Work, 1890 – 1945*. New Haven, CT, USA: Yale University Press; Fessler, A (2006). *The Girls Who Went Away: The Hidden History of Women Who Surrendered Children for Adoption in the Decades Before Roe v. Wade*. New York, USA: Penguin Books; Samuels, E (2001). 'The Idea of Adoption', in *Rutgers Law Review*, Vol. 53, p. 367; available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=275730; Samuels, E (2013). 'Surrender and Subordination: Birth Mothers and Adoption Law Reform', in *Michigan Journal of Gender and Law*, Vol. 20, p. 33; available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2233400; *Supra* 277, p. 7; and Keating, J (2009). *Supra* 408, pp. 30 – 39.

upon the legal and social denigration of unmarried birth mothers and birth fathers, and the wholesale denial of identity rights to adoptees. Much that passed for legitimate adoption practice of that day would be regarded as illicit and unethical today. The baby-scoop era has become a kind of open wound for the adoption community. The reigning viewpoint that adoption in such instances is a ‘win-win-win’ – the birth mother escaping the shame and stigma of unwed birth and motherhood, the child escaping the stigma of illegitimacy, and the (often infertile) adoptive parents receiving a child – has given way to embarrassment as to the attitudes, means and ends of that adoption system (see *Chapter 2: Legal considerations* and *Chapter 5: Political considerations*)⁴¹⁹.

Interestingly, a similar Flemish scandal around large-scale forced adoptions in Belgium has recently emerged, as the government and parliament of Flanders, as well as the Roman Catholic Bishops of the region, in November 2015, issued apologies for forced adoptions that occurred from the 1950s to 1980s. There are plans to assist in the tracing of family members through setting in place a DNA database, archival research in church records and agency assistance⁴²⁰. The Flemish scandal confirms that the wrongful practices associated with the baby-scoop era were not restricted to English-speaking or Common Law nations.

7.1.2d Selected non-Western histories

A quick review of three selected non-Western adoption histories indicates that they often shared the ancient Roman focus on the needs of adoptive families for heirs, rather than being focused on the best interests of children or the needs of orphans and vulnerable children.

For example, Hindu adoption had a primary object of continuing lineage and securing a son to perform funeral rites. Adoption was, hence, primarily a ‘parent-orientated practice’, often involving biological parents giving their child to an adoptive couple who were ‘usually some kith or kin’⁴²¹. Hence, traditional adoptions were private arrangements taking place primarily within extended families. Providing for abandoned or orphaned children was not a primary consideration; instead, adoption primarily concerned the need of parents for a son, who was usually taken from within the extended family or social group⁴²². While the adoptee received inheritance rights and family name, this was necessary to the goals of the adoptive parents of having an heir who could continue the family name and perform religious rites. Hence, the Hindu Adoption and Maintenance Act of 1956, which altered and unified pre-existing customary Hindu forms of adoption, does not allow those with a surviving Hindu son, son’s son, or son’s son’s son to adopt another son⁴²³.

Japan has a long history of adult adoption of young men, which focuses on securing lineage or other benefits for the adopter, and social promotion for the adoptee. Indeed, adult adoption still predominates in contemporary Japan, with over 90% of some 81,000 adoptions in Japan in 2011 being adoptions of young men in their 20s and 30s. This primary focus on adult adoption continues in Japan despite a significant number of children living in residential care who are only rarely adopted⁴²⁴. Thus, contemporary adoption practice in Japan continues the frequent historical disregard for the needs of orphans and vulnerable children.

Historical Chinese adoption practices cover an immense reach of time and, thus, there is some inevitable diversity of law and practice. Nonetheless, in summary, it can be stated that formal adoption in China traditionally served the needs of family continuity. The laws governing family continuity could involve potentially different rules for the transmission, respectively, of (1) titles, ranks, and dignitaries; (2) the duty to continue sacrifices to the ancestors, and (3) property. In general, succession of property and the duty of sacrifice to ancestors were

⁴¹⁹ *Ibid.*

⁴²⁰ ‘Flemish government issues apology for forced adoptions’, *Flanders Today*, 25 November 2015; available at: <http://www.flanderstoday.eu/politics/flemish-government-issues-apology-forced-adoptions>; ‘Flemish bishops apologize for forced adoptions’, *CatholicCulture.org*, 25 November 2015; available at: <https://www.catholicculture.org/news/headlines/index.cfm?storyid=26798>.

⁴²¹ Bajpai, A (2003). *Child Rights in India. Law, Policy, and Practice*. New York, USA: Oxford University Press, p. 35.

⁴²² *Ibid.*; Bhargava, V (2005). *Adoption in India. Policies and experiences*. New Delhi, India: SAGE Publishing, pp. 25 – 26.

⁴²³ *Supra* 421, pp. 42 – 45.

⁴²⁴ O’Halloran, K (2015). *Supra* 405, pp. 637 – 681.

joined. The need for adoption therefore arose for those without worthy sons to fulfil the various aspects of family continuity and to serve as the successor of the father. The lack of a son could also be a significant issue for old-age support, as biological sons had a very strong cultural and legal duty to support their parents in their old-age. Adoption, of course, therefore also involved benefit to the adoptee, in the form of inheritance and succession, in a manner somewhat analogous to being the beneficiary of a will. Under these circumstances, the circumscribed rules governing the choice of adoptees are understandable. There was, at times, an order of succession of who should be adopted in the absence of a son, and conflicts could develop if the next in line was skipped in favour of another relative, whom the adopters preferred. In general, there was a requirement of adopting within the clan. Given the place of adoption as a form of family continuity and inheritance, the adoption of adults would have been common. The expectations around adoption were therefore so closely tied to issues of inheritance and succession within a Confucian patriarchal structure as to be virtually unrelated to the needs of unrelated orphans and vulnerable children⁴²⁵. There is evidence of ‘informal circulation of children among kin and friends’ in China, which likely served the needs of both vulnerable young children and families to at least some degree, but these customary practices apparently have occurred largely outside of, or even contrary to, official Chinese law⁴²⁶.

Another traditional Chinese practice involved the adoption or fostering of underage girls (usually under 10 years old) for the purpose of marrying sons and becoming future daughters-in-law [*t'ung-yang-his*]. This practice was intended to save the adoptive family the costs of a bride price and wedding expenses, while serving the needs of the patriarchal, patrilineal family for succession and stability. Being adopted as a young child for purposes of marrying your, in effect, foster or adoptive brother, obviously is a practice quite different in purpose and intent than contemporary approaches to full adoption, which would generally forbid adoptive siblings from marrying. In addition, the girls involved generally were not orphans, but were sold or transferred by their birth families into the arrangement, which also saved the birth family from child-rearing expenses⁴²⁷.

7.1.2e Adoption as a means of genocide

The 1948 Genocide Convention defines ‘genocide’ to include ‘[f]orcibly transferring children’ from one group to another, with the ‘intent to destroy, in whole or in part, a national, ethnical, racial or religious group’⁴²⁸. Unfortunately, it is clear that adoption and adoption-like practices have been used as a means of genocide.

One of the most obvious examples of adoption as a means of genocide related to Nazi Germany forcibly removing children from their families and nations with a purpose of re-making them into Germans, often through placing them for adoption into German families. For example, Hitler implemented an intentional policy of genocide against the Polish people, as he sought ‘living space’ for the German people within Poland. It is estimated that more than two million Polish Christians were murdered, in addition to the estimated three million Polish Jews killed as a part of the Nazi genocidal programme against Jews. Polish priests, teachers, and intellectuals were especially targeted, with an intention to reduce the remaining Polish population to essentially slave labourers. Polish children were forbidden to receive anything more than a rudimentary elementary education. The majority of books in school and scientific libraries were destroyed. Within the context of these genocidal activities, children who met detailed criteria for being sufficiently ‘Aryan’ were selected for Germanisation. Those selected would be forcibly transferred to institutions to teach them German, and then transferred to adoptive German families. Estimates of the number of Polish children forcibly taken for Germanisation vary widely, from 20,000 to 200,000. The limited post-war efforts to remedy these crimes were

⁴²⁵ MacCormack, G (1990). *Traditional Chinese Penal Law*. Edinburgh, United Kingdom: Edinburgh University Press, pp. 259 – 268; Huang, P (2001). *Code, Custom, and Legal Practice in China. The Qing and the Republic Compared*. Series: Law, Society, and Culture in China. Palo Alto, CA, USA: Stanford University Press, pp. 144 – 154.

⁴²⁶ *Supra* 391, p. 4 (citing the research of Kay Ann Johnson).

⁴²⁷ Lee, J and Feng, W (1999). *One Quarter of Humanity: Malthusian Mythology and Chinese Realities 1700 – 2000*. Cambridge, MA, USA: Harvard University Press, pp. 76 – 78.

⁴²⁸ See: Convention on the Prevention and Punishment of the Crime of Genocide, General Assembly Resolution of 9 December 1948, <https://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf>.

sometimes stymied by the unwillingness of some of the children to accept that they were anything but German. Nazi Germany conducted similar practices of forcible taking and Germanisation in other Central and Eastern European contexts, such as the Soviet Union, Ukraine, Slovenia, etc.⁴²⁹.

Another possible example of the use of adoption as a means of genocide occurred in the context of indigenous peoples, particular in the contexts of the USA, Canada and Australia. The use of the term 'genocide' to describe these governmental policies of forced assimilation and removal of children is controversial. A part of that debate stems from the distinction between the more limited concept of genocide found in the Genocide Convention, requiring the forcible transfer of children from one group to another, and the broader concept of genocide espoused by Lemkin and others, which includes cultural genocide, including preventing the victimised group from passing on their language and culture to the next generation⁴³⁰. In Australia, Canada and the USA, the forcible removal of indigenous children to specialised boarding schools was intended to 'take the Indian out of the child' by removing the children from their native language and culture, and forcibly inculcating them with the dominant language and culture of the State. In Australia, the removed children are called the 'stolen generations'⁴³¹. In 2008, Prime Minister Kevin Rudd of Australia officially apologised for the removal of Aboriginal and Torres Strait Islander children from their families and communities⁴³². In 2008, Prime Minister Stephen Harper of Canada apologised for the Canadian practices of forcible removal of children and placement in Indian residential schools, which deliberately suppressed the language and culture of the aboriginal children, as well as often subjecting the children to emotional, physical and sexual abuse and neglect⁴³³.

Within these contexts of cultural genocide, foster care and adoption were sometimes an additional means of enforced assimilation, in Australia, Canada and the USA. Hence, in 2015, the Canadian Province of Manitoba became the first Canadian province to apologise for the '1960s scoop' of forcible removal and adoption of indigenous children (see *Chapter 5: Political considerations*)⁴³⁴. The USA responded to the 'alarmingly high percentage of Indian families ... broken up by the removal, often unwarranted, of their children' with the 1978 Indian Child Welfare Act⁴³⁵.

This negative legacy continues to this day, making it difficult to separate out when state power is being used properly or improperly in regard to interventions regarding alleged child neglect or abuse of indigenous children. While the official policies of enforced assimilation no longer exist, the wounds of the not-so-distant past make it difficult to assess whether social services are acting properly with respect to indigenous peoples, and whether social services properly evaluate what may be differing cultural parental practices⁴³⁶.

⁴²⁹ Rubinstein, W D (2004). *Genocide*. New York, USA: Routledge; GlobalSecurity.org, 'Genocide of Poles During World War II', available at: <http://www.globalsecurity.org/military/world/war/ww2/poland-genocide.htm>.

⁴³⁰ Lemkin, R (1944). *Axis Rule in Occupied Europe*. Washington, DC, USA: Carnegie Endowment for International Peace, pp. 79 – 90; Kuper, L (1981). *Genocide: Its Political Use in the Twentieth Century*. Harmondsworth, United Kingdom: Penguin.

⁴³¹ *Supra* 277, pp. 7 – 8; 'Still taking 'Indian' out of the child?', *Winnipeg Free Press*, 31 May 2015; available at: <http://www.winnipegfreepress.com/opinion/editorials/Still-taking-Indian-out-of-the-child-305619961.html>.

⁴³² See: Australian Government, Apology to Australia's Indigenous peoples, <http://www.australia.gov.au/about-australia/our-country/our-people/apology-to-australians-indigenous-peoples>.

⁴³³ See: Government of Canada, Indigenous and Northern Affairs, Statement of apology to former students of Indian Residential Schools, <https://www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649>.

⁴³⁴ 'Manitoba formally apologizes for mass adoption of aboriginal children', *The Globe and Mail*, 19 June 2015; available at: <http://www.theglobeandmail.com/news/national/manitoba-to-apologize-to-aboriginal-adoptees-thursday/article25012979/>; 'Indigenous children removed from homes in the 1960s begin to heal', *The Star*, 2 November 2015; available at: <http://www.thestar.com/news/canada/2015/11/02/indigenous-children-removed-from-homes-in-the-1960s-just-now-beginning-to-heal.html>; Bourassa, C (2010). *Summary Review of the Manitoba Child Welfare System for the Saskatchewan Child Welfare Review Report*. Saskatchewan Child Welfare Review Panel. Markham, ON, Canada: Infinity Consulting; available at: <http://www.publications.gov.sk.ca/details.cfm?p=7311>.

⁴³⁵ Indian Child Welfare Act (1978), http://www.nicwa.org/Indian_Child_Welfare_Act/ICWA.pdf; 'Native Americans Expose the Adoption Era and Repair Its Devastation', *Indian Country Today Media Network.com*, 6 December 2011; available at: <http://indiancountrytodaymedianetwork.com/2011/12/06/native-americans-expose-adoption-era-and-repair-its-devastation-65966>.

⁴³⁶ 'Another stolen generation: How Australia still wrecks Aboriginal families', *The Guardian*, 21 March 2014; available at: <http://www.theguardian.com/commentisfree/2014/mar/21/john-pilger-indigenous-australian-families>; 'Incentives And Cultural Bias Fuel Foster System', *NPR*, 25 October 2011; available at: <http://www.npr.org/2011/10/25/141662357/incentives-and-cultural-bias-fuel-foster-system>; The Lakota Law Project Report, 'Feds Sue South Dakota For Racism', <https://lakotalawproject.wordpress.com/2015/11/05/feds-sue-south-dakota-for-racism/>.

7.1.2f Adoption as a tool of political retaliation by authoritarian regimes

Large-scale forcible taking and adoption of children by authoritarian or military regimes as a tool of retaliation against political opposition occurred in the 20th century in Argentina, El Salvador and the German Democratic Republic. This handbook highlights the context and reality of these abusive practices in Argentina (see [Chapter 2: Legal considerations](#) and [Chapter 4: Social considerations](#)), Chile (see [Chapter 5: Political considerations](#)) and El Salvador (see [Chapter 4: Social considerations](#)), along with vigorous efforts to mobilise around remedies for the after-effects of these horrific acts⁴³⁷.

The context of these actions in Argentina was the forced disappearance of approximately 30,000 people during the military dictatorship of 1976 – 1983. These ‘disappearances’ were a means the military junta used to silence perceived opposition, with the victims subjected to secret detention, torture and death. Children were sometimes abducted with their parents or born to mothers in captivity. Many such children ended up being adopted or given to families connected or allied to the military or security forces. The famous civil association *Abuelas de Plaza de Mayo* has involved the grandmothers in a tireless search for these abducted children, many of whom are presumably unaware of their true origins, having accepted the identity provided by their abductors. There are an estimated 500 such missing children of the disappeared, with 116 successfully identified by December 2014 (see [Chapter 2: Legal considerations](#) and [Chapter 4: Social considerations](#)).

The context of the wrongful taking and placements of children in El Salvador was military rule and the civil war of 1979 – 1992. As in Argentina, this was an extremely violent period involving summary executions and many deaths and disappearances. Chapter 4 of this handbook highlights the work of the *Asociación Pro-Búsqueda de Niñas y Niños Desaparecidos*, which has documented over 800 cases of disappeared children and located nearly 400, who were adoptees living overseas. In 2013, the San Salvador offices of *Pro-Búsqueda* were reportedly attacked and case files destroyed, indicating continued resistance to their work of search and reunion⁴³⁸.

Similarly, during the years of Communist rule in the German Democratic Republic, the children of dissidents, those who sought to leave or those perceived as political enemies of the State, were often seized by the government and then placed for adoption with families perceived to be loyal to the regime. An estimated 2,000 families were impacted. Reports indicate that some of those seeking to find answers and trace their lost family members have been met with continued resistance or indifference⁴³⁹. Reports of extensive sexual, physical and emotional abuse in children’s reformatories or homes, into which some children were placed because of their parents’ opposition to the regime, also seem to have been inadequately addressed in modern Germany⁴⁴⁰.

⁴³⁷ In regard to East Germany, see: ‘The legacy of forced adoptions’, *The Guardian*, 22 August 2010; available at: <http://www.theguardian.com/world/2010/aug/22/germany-cold-war-forced-adoptions>; ‘Files Show East Germans Forced Adoptions’, *The New York Times*, 24 May 1991; available at: <http://www.nytimes.com/1991/05/24/world/files-show-east-germans-forced-adoptions.html>; ‘Reunited But Still Torn Adoptions Split E. German Families’, *Philly.com/The Inquirer*, 24 June 1991; available at: http://articles.philly.com/1991-06-24/news/25785884_1_jeannette-young-parents-ota; ‘Dictator’s wife defiant over forced adoptions’, *The Independent*, 9 November 2009; available at: <http://www.independent.co.uk/news/world/europe/dictators-wife-defiant-over-forced-adoptions-1817710.html>.

⁴³⁸ ‘Case Records of Children ‘Disappeared’ Into Adoption Destroyed in El Salvador Attack’, *Rewire*, 25 November 2013; available at: <https://rewire.news/article/2013/11/25/case-records-of-children-disappeared-into-adoption-destroyed-in-el-salvador-attack/>.

⁴³⁹ *Supra* 437.

⁴⁴⁰ ‘Second Class Victims: East German Children’s Home Prisoners Ignored’, *Spiegel Online*, 25 February 2011; available at: <http://www.spiegel.de/international/germany/second-class-victims-east-german-children-s-home-prisoners-ignored-a-747216-2.html>.

7.1.2g Empty graves and stolen babies

In Spain, there have been allegations of very large numbers of children being wrongfully declared dead or stillborn in Spanish hospitals, and then secretly given or sold to other families. Estimates vary from 30,000 to 300,000 children. These systemic wrongs began during the dictatorship of Francisco Franco (1936 – 1975) and then allegedly continued as late as the 1990s. Some of this activity was ideological, involving the taking of children from those opposed to Franco and giving them into families loyal to him. Networks of doctors, midwives, public officials, clergy and members of religious orders seem to have carried out these wrongful removals and transfers of children. A profit motive seems to have developed over time, as some children were sold, and children were also taken from families without any particular political reasoning. The reasons for removing children therefore extended beyond taking the children of political opponents, to a broader taking of babies from families targeted for various reasons as deficient. Unfortunately, there has been relatively little investigation or accountability for such large-scale wrongs, with *Chapter 2: Legal considerations* of this handbook speaking in terms of ‘impunity’ and describing the response as ‘unsatisfactory’ (see *Promising practice: Spain, the search for origins and legal remedies* in Chapter 2: Legal considerations)⁴⁴¹.

7.1.2h Intercountry adoption scandals across the globe

There is not space here to reiterate the extensive analysis and documentation of systemic illicit practices in the modern era of ICA. Significant international recognition of illicit ICA practices is contained in ISS’s 2012 report *Investigating the grey zones of intercountry adoption*⁴⁴², the attention to the issue given at the 2010 and 2015 Special Commissions on the practical operation of the 1993 Hague Convention⁴⁴³, the ongoing work of the HCCH Expert Group on the Financial Aspects of Intercountry Adoption, and the HCCH Working Group on Preventing and Addressing Illicit Practices in Intercountry Adoption⁴⁴⁴. The following incomplete regional listings of abusive ICA practices demonstrate that illicit practices have occurred in diverse regions of the globe throughout the modern era of ICA. Truly, no region of the world can be in a position to lay the blame for these difficulties primarily on another region, for virtually all regions of the world – even if not all individual nations – have been significantly impacted. In addition, almost all significant receiving States have experienced the embarrassing situation of finding themselves involved in adoptions impacted by abusive practices. It is also notable that, frequently, illicit practices in ICA lead to closures and moratoria, which block even legitimate adoptions from occurring. This summary indicates periods of difficulty and does not attempt to discuss various reform efforts that often followed.

Southeast Asia: The Cambodian adoption scandals of 1998 to 2001, involving baby-buying and child laundering, led the U.S. government to close adoptions from Cambodia in December 2001, and also led to criminal convictions⁴⁴⁵. Both, *Chapter 5: Political considerations* of this handbook and ISS’s 2009 report *Adoption from Viet Nam. Findings and recommendations of an assessment*, indicated that ICA from Vietnam became seriously dysfunctional, out of accord with international standards in fundamental ways, demand-driven, and subject to extensive document fraud. This led to the shutdown of Vietnamese adoptions by certain receiving States⁴⁴⁶.

⁴⁴¹ ‘Spain’s stolen babies and the families who lived a lie’, *BBC. Supra* 79; ‘This World – Spain’s Stolen Babies’, BBC Productions, 25 October 2011; available at: https://www.youtube.com/watch?v=eJJ7Pp_Zvs.

⁴⁴² *Supra* 7.

⁴⁴³ See: HCCH, Special Commission meetings, <https://www.hcch.net/en/instruments/conventions/publications/?dtid=57&cid=69>.

⁴⁴⁴ See: HCCH, Experts Group on the Financial Aspects of Intercountry Adoption, <https://www.hcch.net/en/publications-and-studies/details4/?pid=6310>; and HCCH, Working Group to develop a common approach to preventing and addressing illicit practices in intercountry adoption cases, <https://www.hcch.net/en/publications-and-studies/details4/?pid=6309>.

⁴⁴⁵ Smolin, D (2006). *Supra* 195, pp. 135 – 146; Maskew, T (2005). ‘Child Trafficking and Intercountry Adoption: The Cambodian Experience’, in *Cumberland Law Review*, 35, p. 619; available at: <https://www.brandeis.edu/investigate/adoption/docs/MaskewChildTraffickingCambodia.pdf>; Fleas Biting, US ICE Agent: What Really Happened in Cambodian Adoption; available at: <http://fleasbiting.blogspot.mx/2015/07/us-ice-agent-what-really-happened-in.html>.

⁴⁴⁶ *Supra* 317.

South Asia: *Chapter 5: Political considerations* of this handbook focuses on significant illicit practices, including child laundering, which led many States to close adoptions from Nepal. *Chapter 3: Psychosocial considerations* and *Chapter 4: Social considerations* of this handbook discuss significant difficulties with adoptions from India. Indeed, there have been significant ICA scandals involving systemic illicit practices, such as child laundering, in various locations in India, including Pune, Andhra Pradesh and Chennai, with ICA from Andhra Pradesh closed by that state's government in 2001⁴⁴⁷.

East Asia: South Korea and China have both been leading countries of origin for specific periods, and each has been viewed at times as a model programme. However, *Chapter 4: Social considerations* in this handbook is reflective of a much larger literature documenting serious irregularities with South Korean adoptions. In addition, for decades, South Korean adoptions have been built upon a cultural and legal environment making it very difficult for single women to keep and mother their children⁴⁴⁸. Chinese adoptions since 2005 have been subject to significant reporting of illicit practices, including baby-buying, coercive removal of children by population control officials, and falsifications of documents and histories⁴⁴⁹.

Latin America: Latin American adoptions (see *Chapter 2: Legal considerations* in relation to *Argentina*, *Chapter 3: Psychosocial considerations* in relation to *Peru*, *Chapter 4: Social considerations* in relation to *Argentina* and *Brazil*, and *Chapter 5: Political considerations* in relation to *Chile*) were of special concern as to abusive adoption practices, including child laundering, baby-buying and/or child trafficking, at the time when the 1993 Hague Convention was being planned and drafted, as revealed by the preparatory materials⁴⁵⁰. As well documented within this handbook, Guatemala's decision not to implement the 1993 Hague Convention reforms applied elsewhere in the region led to extreme difficulties, including large-scale falsification of documents, child laundering, kidnapping and baby-buying, which ultimately led to the closing of Guatemalan adoptions (see *Chapter 5: Political considerations*)⁴⁵¹.

Africa: *Chapter 4: Social considerations* of this handbook documents African concerns with a recent period of increasing ICAs. Indeed, substantial reports indicate that sharp increases in ICAs from Ethiopia, Uganda and the Democratic Republic of Congo occasioned significant abusive adoption practices, including child laundering, falsification of documents and illicit profiteering⁴⁵². This led the Democratic Republic of Congo to issue a moratorium on granting exit visas for children with ICA orders⁴⁵³.

⁴⁴⁷ Smolin, D (2006). *Supra* 195, pp. 146 – 158; Smolin, D M (2010). *Supra* 385, pp. 486 – 493; Smolin, D (2005). 'The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals', in *Seton Hall Law Review*, 35, p. 403; available at: http://works.bepress.com/david_smolin/.

⁴⁴⁸ Smolin, D M (2010). *Supra* 385, pp. 480 – 482 (in particular sources cited in fn. 205 – 208).

⁴⁴⁹ Stuy, B (2014). 'Open Secret: Cash and Coercion in China's International Adoption Program', in *Cumberland Law Review*, 44, p. 355; available at: http://works.bepress.com/david_smolin/15/; Smolin, D (2011). 'The Missing Girls of China: Population, Policy, Culture, Gender, Abortion, Abandonment, and Adoption in East-Asian Perspective', in *Cumberland Law Review*, 41, p. 1, pp. 46 – 65; available at: http://works.bepress.com/david_smolin/.

⁴⁵⁰ Smolin, D M (2010). *Supra* 385, pp. 452 – 461 and 484 – 486.

⁴⁵¹ *Ibid.*, pp. 467 – 469 and 476 – 480.

⁴⁵² 'They Steal Babies, Don't They?'; *Pacific Standard*, 24 November 2014; available at: <http://www.psmag.com/politics-and-law/they-steal-babies-dont-they-international-adoption-schuster-institute-95027>; Schuster Institute for Investigative Journalism, Officials Review International Adoption in Ethiopia, <http://www.brandeis.edu/investigate/adoption/ethiopia-adoptionFOIAs.html>; Bunkers, K M, Rotabi, K S, Mezmur, B D (2012), 'Ethiopia at a Critical Juncture in Intercountry Adoption and Traditional Care Practices', in Gibbons J L and Rotabi K S (Eds.). *Intercountry Adoption: Policies, Practices and Outcomes*. Surrey, United Kingdom: Ashgate Press, pp. 133 – 142; 'Exclusive: Fraud and deceit at the heart of Uganda adoptions to United States', *Reuters*, 28 May 2015, available at: <http://www.reuters.com/article/us-uganda-adoptions-idUSKBN0OD2NP20150528>; Riley, M (2015). 'An Imbalance of Justice: Birth Mothers in Uganda', in Ballard, R L, Goodno, N H, Cochran, R F, Milbrandt, J A (Eds.). *The Intercountry Adoption Debate*. Newcastle Upon Tyne, United Kingdom: Cambridge Scholars Publishing, pp. 618 – 626; Parents for Ethical Adoption Reform (PEAR), PEAR Advisory Alert for DRC, 17 June 2015, <http://pear-now.blogspot.mx/2015/06/pear-advisory-alert-for-drc.html>.

⁴⁵³ Parents for Ethical Adoption Reform (PEAR). *Ibid.*

Central and Eastern Europe: Adoptions from Central and Eastern Europe also have a tumultuous history, particularly in Romania, Bulgaria, Russia and Ukraine, which sometimes has been exacerbated by a particularly poor quality of large-scale institutional care with tragic results for children and families. Adoptions from this region have often been distorted by corruption and profiteering, with little regard for the best interests of children. Since a significant proportion of Central and Eastern European adoptions are particularly high risk placements of older children seriously traumatised by both families of origin and poor quality institutional care, it is unfortunate that there has not been proper attention to matching of generally special needs children with families truly equipped to meet those children's needs. These poor practices have led many intercountry adoptive placements to fail, as children are placed into homes unable to meet their specific needs⁴⁵⁴.

Other: Marshall Islands and Samoan adoptions were clearly subject to child laundering and misleading of families of origin as to the nature of adoption, which for Samoan adoptions led to the relatively rare event of federal criminal convictions in the U.S.A⁴⁵⁵. **Haitian** adoptions were subject to reports of abusive practices even before the extensive international controversy attending the large-scale increase in adoptions from Haiti subsequent to the natural disaster, contrary to usual international standards⁴⁵⁶. **Lebanese** adoptions were also subject to illicit practices during the Civil War (see *Chapter 3: Psychosocial considerations*). It is surprising that the **USA**, despite being statistically the leading receiving State, is also a significant country of origin for ICA. This raises the question of whether the subsidiarity principle is being properly applied in these adoptions. This concern is exacerbated by the apparent inability of the USA to accurately track outgoing cases, as there is a severe discrepancy between the reports of the USA and those of receiving States as to the numbers involved⁴⁵⁷.

⁴⁵⁴ Smolin, D M (2010). *Supra* 385; pp. 473 – 476; Cantwell, N, Lammerant, I, Martinez-Mora, L (2005). *Assessment of the Adoption System in Ukraine*. Kyiv, Ukraine: OSCE; available at: <http://www.osce.org/ukraine/75897?download=true>; Fleas Biting, Europe: Bulgarian Mothers Tricked into Selling Babies, <http://fleasbiting.blogspot.com/search/label/Bulgaria>; Nedelcu, C and Groza, V (2012). 'Child Welfare in Romania: Contexts and Processes', in Gibbons J L and Rotabi K S (Eds.). *Intercountry Adoption: Policies, Practices and Outcomes*. Surrey, United Kingdom: Ashgate Press, pp. 91 – 102.

⁴⁵⁵ Roby, J L and Maskew, T (2012). 'Human Rights Considerations in Intercountry Adoption: The Children and Families of Cambodia and Marshall Islands', in Gibbons J L and Rotabi K S (Eds.). *Intercountry Adoption: Policies, Practices and Outcomes*. Surrey, United Kingdom: Ashgate Press, pp. 55-66; The Schuster Institute for Investigative Journalism, News Reports of Adoption Irregularities in the Marshall Islands, <http://www.brandeis.edu/investigate/adoption/marshallislands.html>; The Schuster Institute for Investigative Journalism, Adoption: Samoa, <https://www.brandeis.edu/investigate/adoption/samoa.html>; *USA v Focus on Children et al*, Indictment, United States District Court – District of Utah Northern Division, 1:07-CR-00019, <http://www.hjnews.com/multimedia/documents/FOCIndictment.pdf>; US Department of Justice, Statement on Focus on Children case, https://www.brandeis.edu/investigate/adoption/docs/Statement_on_FocusOnChildren.pdf.

⁴⁵⁶ *Supra* 8; Fleas Biting, Haiti: Officials Rescue and Return to Their Parents 50 Trafficked Children; 100 Others Await Rescue, <http://fleasbiting.blogspot.com/search/label/Haiti>.

⁴⁵⁷ Naughton, D (2012). 'Exiting or Going Forth? An Overview of USA Outgoing Adoptions', in Gibbons J L and Rotabi K S (Eds.). *Intercountry Adoption: Policies, Practices and Outcomes*. Surrey, United Kingdom: Ashgate Press, pp. 161 – 171; Smolin, D (2013). 'The Corrupting Influence of the United States on a Vulnerable Intercountry Adoption System: A Guide for Stakeholders, Hague and Non-Hague Nations, NGOs, and Concerned Parties' in *Utah Law Review*, No. 4/2013, p. 1065, pp. 1117 – 1119; available at: http://works.bepress.com/david_smolin/.

7.1.3 THIRD CONTEXT: THE INHERENT PARADOX OF CREATING HUMAN-RIGHTS COMPATIBLE ADOPTION SYSTEMS WITHIN CONTEXTS OF EXTENSIVE DISCRIMINATION AND DEPRIVATION OF RIGHTS

Adoption – and particularly full severance forms of adoption – naturally feeds on the vulnerabilities created by discrimination and rights deprivation, as human beings under positive conditions of life usually do not agree to hand over their children to intermediaries and strangers without retaining rights in continued relationship, information and contact. Hence, adoption is usually most relevant under circumstances of the greatest deprivations of human rights, making it particularly difficult and paradoxical to establish adoption practices in conformity with human rights norms. Indeed, there can be something perverse – and unrealistic – about expecting to be able to construct adoption systems in conformity with human rights norms amidst populations otherwise suffering extensively from discrimination and rights deprivations. It may be unrealistic to expect governments known for systemic forms of corruption impacting many service and regulatory functions to operate adoption systems without significant corruption⁴⁵⁸.

This problem is particularly egregious for ICA, which opens up vulnerable populations in developing nations, already subjected to extreme poverty and various forms of discrimination, to the demand for children emanating from developed nations where domestic infant adoption has been sharply reduced as empowered families of origin and single mothers increasingly opt out of adoption. These systems of ICA are also subject to abuses occasioned by extreme inequalities within many developing nations, creating opportunities for local intermediaries skilled at reassuring receiving nation officials while simultaneously profiting from exploiting vulnerable populations⁴⁵⁹.

7.1.4 FOURTH CONTEXT: ILLICIT ADOPTION PRACTICES AS THE ‘PERFECT CRIME’

Many illegal adoptions are ‘perfect crimes’ in the sense that they are particularly difficult to discover and prosecute. Illicit adoption practices often are successful in manipulating, and even conscripting, victims into silence and acquiescence; indeed, sometimes victims actively advocate for or protect the illicit practices as a way of protecting their own lives and relationships. Illicit adoption practices often effectively enlist victims in their own victimisation in such a way that they may feel they are partly responsible for it. Illicit adoption practices also sometimes successfully enlist government officials as co-conspirators; even when government officials had no involvement, they may be reluctant to investigate what amounts to their own regulatory failures (see [Chapter 5: Political considerations](#))⁴⁶⁰.

Child laundering is a specific form of illicit adoption practice that is often particularly effective in escaping detection and prosecution. Child laundering involves obtaining children illicitly through force, fraud or funds, and then supplying false paperwork that identifies the child as a properly relinquished or abandoned child. The ‘paper orphan’ is then processed and placed through the official ICA system, with the adoptive parents usually having no knowledge of the irregularities. Adoptees placed as very young children are apt to accept their adoptive parents and lack sufficient knowledge and information as to their wrongful removal from their original family (see [Chapter 3: Psychosocial considerations in relation to Lebanon](#), [Chapter 4: Social considerations in relation to Brazil](#) and [Chapter 5: Political considerations in relation to Nepal](#)). Child laundering therefore frequently conscripts victims into accepting their own victimisation as legitimate or at least irremediable, hence providing a false impression of them being victimless crimes. Child laundering schemes usually prey upon birth families that are powerless and without effective redress within their own societies, and may involve fraudulent promises and payments that lead

⁴⁵⁸ *Supra* 391; Smolin, D (2015). ‘Can the Center Hold? The Vulnerabilities of the Official Legal Regimen for Intercountry Adoption’, in Ballard, R L, Goodno, N H, Cochran, R F, Milbrandt, J A (Eds.). *The Intercountry Adoption Debate*. Newcastle Upon Tyne, United Kingdom: Cambridge Scholars Publishing, pp. 245, 266 – 268; available at: http://works.bepress.com/david_smolin/.

⁴⁵⁹ *Ibid*.

⁴⁶⁰ Smolin, D (2006). *Supra* 195; Smolin, D (2005). *Supra* 447.

them into participating in their own victimisation. Child laundering enables wrongs, such as kidnapping, the sale of children or human trafficking, to acquire legal and social markers and documentation of legitimacy such that, even when discovered, authorities respond based on those markers of legitimacy while largely ignoring the underlying crimes⁴⁶¹.

Those taken illicitly from their birth families and then placed into adoptive families, whether through child laundering or the abuse of adoption as a means of genocide or political retaliation, may have very mixed or even negative reactions to efforts to inform them or re-connect them to their birth families. These difficulties have been seen, for example, in regard to the Polish children stolen by Nazis and placed into German families, and there have been similar difficulties in efforts to rectify wrongs in Argentina and Spain (see *Chapter 2: Legal considerations*). Illicit adoption practices therefore can be unfortunately successful in conscripting adoptees into lives, families and accepted histories that they understandably do not want to challenge or undermine⁴⁶². On the other hand, some victimised in these fashions are willing to engage with such tragic information, and some adoptees take the initiative in birth searches and overcome extreme obstacles to finding the truth. Indeed, several contributions in *Chapter 3: Psychosocial considerations* and *Chapter 4: Social considerations* as well as *Chapter 5: Political considerations* in this handbook are authored by adoptees who have worked actively against illicit practices and on behalf of adoptees seeking access to accurate information about their origins.

Chapter 3: Psychosocial considerations, based on the experience in Spain, recounts the unfortunately all too familiar story of an adoptive family seemingly resistant to receiving information indicating that their adoptive child had been placed from Nepal without the consent of the mother – an instance of child laundering. Despite the fact that many adoptive families seem unwilling to confront this kind of information, other adoptive parents faced with this trauma respond in a very different way, and ultimately become advocates against illicit practices. Indeed, *Chapter 4: Social considerations*, as well as this concluding Chapter, are authored by adoptive parents who have faced this kind of revelation; in the USA, PEAR, an organisation of adoptive parents, vigorously advocates against illicit practices⁴⁶³.

Unfortunately, a lack of biological parents' voices is common at many adoption-related events, and is reflective of the powerlessness of so many birth parents, the deep trauma, to which so many have been subjected, and the unfortunate effectiveness of illicit adoption schemes at manipulating and silencing birth parents. No less regrettably, birth families are often made to feel responsible for their own victimisation in such a fashion that disables many from being effective advocates against their own victimisation. While there are certainly significant and effective biological family advocates and organisations, the relative lack of such voices in many settings is reflective of the pernicious success of illicit adoption schemes in disabling so many victims from effective self-advocacy.

⁴⁶¹ *Ibid.*

⁴⁶² See, for example: *Supra* 429, 437 – 441 and accompanying text; 'Children of the Dirty War. Argentina's stolen orphans', *The New Yorker*, 19 March 2012; available at: <http://www.newyorker.com/magazine/2012/03/19/children-of-the-dirty-war> (many of Argentina's potentially stolen children refused DNA testing, remaining loyal to the only parents they had ever known).

⁴⁶³ Parents for Ethical Adoption Reform, Mission, <http://www.pear-reform.org>.

7.2 FOUR RECOMMENDATIONS FOR EFFECTIVE RESPONSES TO ILLICIT ADOPTION PRACTICES

7.2.1 FIRST RECOMMENDATION: INVESTIGATE INDIVIDUAL ADOPTIONS AND ADOPTION SYSTEMS AS SOON AS POSSIBLE WHENEVER THERE ARE INDICATIONS OF ILLICIT PRACTICES

There is no convenient time to investigate suspected illicit adoption practices.

Before a child arrives in the receiving State, many are reluctant to investigate, lest it ultimately prevent an adoption that might have some irregularities but, from some points of view, could nonetheless be justified. There is also a generalised reluctance to investigate an existing adoption programme, lest such investigation cause insult to government or agency personnel that leads to children not being placed or to a programme being closed.

After a child arrives in the receiving State, there is also a reluctance to investigate, based on the fear that the adoptive parents will be forced to return the child to their biological family and original nation. It is said too that the decision to investigate is a part of the broader issue of origins, which should be left up to the adoptee. The adoptee, it is sometimes presumed, should not be even asked to consider this option until they are sufficiently mature to evaluate the implications. This can lead to the viewpoint that investigations and searches for origins should be deferred at least until adulthood, and then only occur at the initiative of the adoptee. This deferral is seen as protecting both the adoptee and the integrity of the adoptive family.

Of course, some adoptees do not choose to confront issues of origin, to the degree of attempting a search, until they are well into their 20s, or even decades later. This difficulty may be complicated by the feeling that a search for origins is somehow a betrayal or undermining of the adoptive family. However, by the time that the adoptee attains adulthood, or is ready to search, several decades may have passed since the child has left the country of origin, and the trail in the search for origins may be very difficult to follow. Those who were involved in mediating the adoption may have died or at least relocated. Biological family members also may have died or relocated. At this point, one is left with the argument that one should simply let the past alone, rather than dig into what are, by now, long-ago buried secrets.

With all due respect to all of these often sincere and well-considered arguments for deferring investigations, these kinds of approaches misunderstand illicit adoption practices. Illicit adoption practices frequently constitute serious crimes, profound violations of human rights, and some of the most despicable acts known to humanity. Illicit practices often involve premeditated schemes to prey upon the vulnerability of the poor or socially outcast, in order to take their children from them. Needlessly and deliberately taking a child from their mother, father, siblings, and extended family, for profit or out of disdain for people of a different ethnic, cultural or religious group or lower social class, is all too common in our histories, but should no longer be tolerated. I would ask those who counsel deferring investigations to imagine that their own child has disappeared from a boarding school or summer camp, and being told that, because they 'consented' to have the child live away from home, they are in no position to question the child's disappearance. A middle-class parent residing in a developed nation would not agree that their kidnapped child's 'placement' into an adoptive home half a world away means that they have to accept decades of separation and simply hope that someday their adult child might seek them out. A kidnapping remains a kidnapping, even when it is 'laundered' into a seemingly legitimate adoption through the legal system. Every day is an eternity of pain when your child has been wrongfully taken from you, and you do not even know your child's fate.

Unfortunately, tens of thousands of children have been adopted from contexts where it is reasonably well-established that a significant proportion of the adoptions involved serious misconduct, such as child laundering or the sale of a child ([see above](#)). Rationally, all of the adoptions falling into these categories should be immediately investigated. Upon investigation, many will likely prove to be legitimate adoptions, and the investigation will remove a cloud of doubt that can undermine the adoptive relationships. However, where there may be heartbroken birth families seeking and weeping for their stolen children, investigation should not wait until the adoptee has grown up and come to the point of feeling comfortable with initiating a birth search.

The disagreement on this point comes in part from viewing birth searches as, essentially, a form of assistance to adoptees, with a primary focus on the adoptee's needs in terms of identity development and emotional processing. While this is indeed the context, in which many birth searches occur, this confuses the impetus for *investigation* with that of birth search. While investigation logically includes a birth search, an investigation must pursue justice as well as assist the individuals involved. In addition, an investigation should equally consider the needs of biological family members as potential victims of a crime, as well as the needs of adoptees as victims (see the personal testimonies of [C Giraud](#) in *Chapter 3: Psychosocial considerations* and of [M Hofstetter](#) in *Chapter 5: Political considerations*).

Of course, there remains the fundamental difficulty of who will pursue all of the needed investigations of illicit adoption practices, including the various historical situations addressed above. In an ideal world, governments would be more active, and indeed sometimes governments have been effective in investigating illicit adoption practices. Unfortunately, however, often governments refuse to investigate such matters, or do so only in a perfunctory, ineffective manner. Sometimes, it is small, specialist organisations devoted to specific issues, such as the disappeared children of Argentina or El Salvador, that are most effective in such investigations (see [Chapter 2: Legal considerations](#) and [Chapter 4: Social considerations](#)). The extensive investigation by CICIG in Guatemala offers another positive model of investigation (see [Chapter 5: Political considerations](#)). Sometimes, an organisation like ISS can provide a very helpful investigation of a particular overall situation, even if that does not focus on the investigation of particular adoptions (see, for example, ISS's report [Adoption from Viet Nam. Findings and recommendations of an assessment](#) mentioned in *Chapter 5: Political considerations*). Often, the media play a critically important role in investigations, as well as in spurring others to investigate, as discussed by the Schuster Institute for Investigative Journalism in [Chapter 4: Social considerations](#). Of course, surprisingly often, it is left to adoption triad members themselves – adoptive parents, adoptees and birth families – to take the initiative on investigations, enlisting whatever kind of help is available (see [Chapter 3: Psychosocial considerations](#) and [Chapter 4: Social considerations](#)).

7.2.2 SECOND RECOMMENDATION: MEDIATE AND BALANCE THE OFTEN CONFLICTING NEEDS AND DESIRES OF ADOPTION TRIAD MEMBERS, AND THE INTERESTS OF JUSTICE, WITHOUT RECAPITULATING THE INEQUALITIES AND INJUSTICE INVOLVED IN THE ORIGINAL ILLICIT PRACTICES

Effective responses to individual cases of illicit adoption practices must mediate and balance the often conflicting needs and desires of victims, as well as the public interest, in responding to criminal and illicit conduct and preventing future victimisation (see [Chapter 3: Psychosocial considerations](#)).

The conflicts between victimised adoption triad members can be painful and overwhelming. Adoptees are often concentrated on a journey of identity and discovery as they seek to work out potentially conflicting loyalties and personal affiliations. Birth families can be overwhelmed by loss and by hopes and expectations associated with reunion. Adoptive families can also be victims of illicit adoption practices, as they may have had no knowledge of the wrongs, and they have unknowingly based their family life on falsified information and even crimes. Reunions where there has been no significant illicit practice are difficult enough to navigate, as many of the

dynamics of loss, conflicting needs and expectations, evolving identity, and feelings of threat, exist in both legal and illegal adoptions. Adding the layer of significant illicit practices, particularly where the illicit practice created an unnecessary and illegal separation of the child from the birth family, adds extreme complication to an already potent mix (see *Chapter 3: Psychosocial considerations*).

In many ICAs and some domestic adoptions, cultural, religious and linguistic differences between the adoptee and the birth family further complicate reunions. It can be very difficult for the adoptee to communicate effectively with the birth family, even if translators are provided to overcome the communication gap. Since cultural and religious differences include different ways of understanding and practising family life, these differences can undermine attempts to re-integrate the adoptee into their biological family.

Unfortunately, sometimes the dynamics of reunion can replicate the inequalities, and even injustice, associated with illicit adoption practices. Intercountry adoptees in developed nations who return to their countries of origin, often have advantages of wealth and education and connection, as compared to their families of origin. Although adoptees may feel more powerless than privileged, they may be quite privileged as compared to the situation of their biological family members. In addition, the service provider for reunions may view the adoptee as the primary client whose wishes and needs are paramount, again underscoring the power imbalance between developed nation adoptee and developing nation birth family (see *Chapter 3: Psychosocial considerations*).

In view of the complexities involved in reunions, with or without illicit practices, many urge professional mediation and assistance. Certainly, it could be extremely helpful to have competent assistance. However, there needs to be much more discussion of how those who assist in reunions address the elements of justice involved. There also needs to be much more discussion of whether those assisting consider the adoptee their client, but not equally so the biological family, leaving the birth family once again disadvantaged. Also, as a practical matter, there is often no person or persons available to assist who possess the relevant competencies, including sufficient cultural and linguistic capacities. In addition, there is the problem of who pays the costs of such assistance, which has not always been resolved in a way that makes such assistance truly practical. Hence, assistance should be made available so far as possible, but should not be a prerequisite, for otherwise it will create yet another barrier to investigation and reunion.

Equally sensitive is the debt to justice, particularly in instances of illicit practices. Often those involved in reunions avoid informing or involving the authorities, which is particularly understandable when official corruption was involved in the adoption. There can be a legitimate fear of reprisal against vulnerable family members if justice is pursued against wrongdoers, in societies where the wrongdoers are well connected to government or particularly powerful. It may be unfair to expect traumatised individuals to bear the frustration and reprisals that those who seek justice, may experience. Some will, of course; indeed, some will become the activists highlighted in the section below, whose work is well represented throughout this handbook. However, we have to expect that many adoption triad members, who make the challenging journey to retrieving the truth and hopefully achieving reunion, will seek to do so privately, out of the public and governmental eye.

7.2.3 THIRD RECOMMENDATION: LEGITIMISE AND FACILITATE THE WORK OF ACTIVISTS

Effective responses to illicit adoption practices often depend on the initiative of charismatic individuals and small activist groups willing to advocate for recognition of abusive adoption practices, justice for victims and systemic reform. These individuals and groups are often drawn from the ranks of adoption triad members victimised by illicit practices. These individuals and groups work to mobilise previously silenced or conscripted victims, create alliances for addressing illicit issues, and overcome the inertia and resistance frequently present in governments, adoption agencies, adoption triad members and broader society. It is important to publicise, legitimise and facilitate the work of such individuals and organisations in order to effectively combat illicit practices, for often without such individuals and groups even large-scale abuses may never be addressed.

It is one of the strengths of this handbook that it does publicise and help legitimate so many such individuals and organisations, as reflected in *Chapter 2: Legal considerations*, *Chapter 3: Psychosocial considerations*, *Chapter 4: Social considerations* and *Chapter 5: Political considerations*. As indicated in those Chapters, often the work of these individuals and groups is focused on a specific set of abusive practices that occurred at a certain time and place, such as the baby-scoop era in Australia, ICAs from South Korea, or Ireland's cruel historical treatment of single pregnant women and mothers. This singular focus is often required to obtain recognition and response to those wrongs.

It can be awkward for mainstream international organisations, larger NGOs and governments to interact with such singularly-focused activists. Activists can appear uncompromising, divisive even among themselves, and overly critical. Their particular focus on a single set of wrongs can appear to make them over-generalise, to view all of a broader category (such as adoption, politics or religion) through the lens of the particular injustice and trauma, with which they are wrestling. Yet, it is important to remember that, without such singular focus, impunity often reigns. Thus, activists confronting unaddressed injustice may regard calls for 'balance' and 'patience' as yet another stalling, 'deny till we die' tactic⁴⁶⁴.

There are stark differences in the effectiveness of activists, and of course many individuals and organisations fail to positively impact their chosen cause. Accountability is important for activists, but it is normally the innate accountability of positive results. Hence, the call to engage with activists, in a world of limited resources, often requires some degree of selectivity, which hopefully is based on effectiveness and competence rather than pliability. Effective engagement with activists by governments, international organisations and larger NGOs requires a complex set of political and relational skills, but in the end is essential to the broader project of responding effectively to illicit adoption practices.

7.2.4 FOURTH RECOMMENDATION: CREATE SUSTAINED OVERSIGHT AND RESPONSE BY INTERNATIONAL ORGANISATIONS AND NGOS

Institutionalising effective responses to illicit practices can be facilitated by international organisations and larger NGOs with the reputation and capacity to provide accuracy and legitimacy. Such efforts to date, while sometimes effective, have been sporadic and episodic. Positive examples in this handbook include Terre des Hommes' engagement with child laundering in Nepal (see *Chapter 5: Political considerations*), UNICEF's involvement in responding to illicit adoption practices in Vietnam (see *Chapter 5: Political considerations*), and the CICIG, formed by agreement between the Guatemalan government and the United Nations (see *Chapter 5: Political considerations*), among others. Of course, this handbook in itself is a positive instance of work by a major international organisation, ISS, in response to illicit practices.

Despite these and other positive actions, there generally has not been a consistent set of responses to illicit adoption practices by international organisations and major NGOs. This is important since there is no organised or consistent mechanism of oversight to identify and respond to illicit adoption practices. Appropriate stress has been laid upon the particular role of the HCCH and the 1993 Hague Convention, but of course these do not create any international regulatory mechanisms. The attorneys and staff of the Permanent Bureau of the HCCH are remarkably talented and keenly competent, but they have severe capacity limitations of three kinds. First, the staffing of the HCCH devoted to ICA is actually minimal and quite inadequate. Second, the structure of the HCCH as an intergovernmental organisation means that it is difficult for the HCCH to act or speak in any way that might perturb any Member States, as the organisation tends to act by process of consensus among its 79 Member States (and the European Union). Third, the 1993 Hague Convention does not provide the HCCH with any regulatory authority over individual adoptions, but instead is designed to create a system based on cooperation

⁴⁶⁴ 'Adopted US Woman Condemns Ireland's Records Cover-Up', The Circular, 7 March 2014, <http://thecircular.org/un-demand-vatican-release-irelands-secret-adoption-records/>.

between States of origin and receiving States. Despite these limitations, the HCCH has very helpfully moved to place the topic of illicit practices within the mainstream of international discourse, and occasionally has been able to highlight particular situations in which illicit practices have become a significant problem. Nonetheless, it would be a misunderstanding of the structure of the organisation and of the 1993 Hague Convention to expect the HCCH to ever constitute the primary response to particular sets of illicit practices.

In this context, it is necessary to think about how to build capacity within existing international organisations and NGOs to create a more sustained and systemic response to illicit practices in adoption, whether intercountry or domestic. While not being at the level of an international system of regulation, this would supplement existing legal and political responses (see *Chapter 2: Legal considerations* and *Chapter 5: Political considerations*) with a more systemic international effort to identify, and even investigate and analyse, significant forms of illicit adoption practices.

There are likely to be significant problems with funding any such expanded efforts. With the numbers of ICAs in significant decline⁴⁶⁵, while surrogacy and other forms of assisted reproductive technologies are on the rise and attracting significant international attention⁴⁶⁶, there is likely to be less interest and funding for adoption-related work in future years. In addition, domestic adoption of children, apart from step-parent adoption, remains primarily concentrated in a relatively small number of nations, and remains only a modest global response to the much larger problems of children without parental care⁴⁶⁷. While the number of people impacted by adoption is significant, the proportion of children in need who are impacted by adoption is very modest. Hence, it is rational to be shifting efforts away from, rather than toward, adoption-related work.

Nonetheless, there are, as *Chapter 1: Introductory and historical considerations* of this handbook notes, significant reasons to strengthen efforts regarding illicit adoption practices. The children from the boom years of ICA are growing up, and many are interested in their origins; unfortunately, large numbers of children were adopted from adoption systems known to have been deeply compromised by illicit practices. In addition, the work of search and reunion is significant for many decades after an era of abusive practices, such as occurred in the baby-scoop era, in Irish mistreatment of single mothers, in regard to the disappeared children of Argentina and El Salvador, etc. (see above).

The issue, then, is how to increase capacity regarding illicit adoption practices at a time when adoption itself is likely to be receiving less funding and attention. Along with continued reliance on local activists and organisations who often require relatively modest funding, as proposed in the third recommendation of this Conclusion (see above), I would also propose that the larger international organisations and NGOs expand capacity by working in coordination and conjunction with academic centres and universities. There is growing academic interest worldwide in children's rights, and professors, staff, and students at those centres can often either provide their own sources of funding, or at least assist with comparatively modest funding. More pro-active coordination between international organisations, the larger NGOs and academic centres could significantly improve current efforts to monitor and respond to illicit practices.

⁴⁶⁵ HCCH, Special Commission of June 2015, 'Twenty years of the Hague Convention: a Statistical Review', Presentation by Peter Selman, <https://www.hcch.net/en/publications-and-studies/details4/?pid=6161&dtid=57>; Selman, P (2015). 'Global Trends in Intercountry Adoption: 2003 – 2013', in Ballard, R L, Goodno, N H, Cochran, R F, Milbrandt, J A (Eds.). *The Intercountry Adoption Debate*. Newcastle Upon Tyne, United Kingdom: Cambridge Scholars Publishing, pp. 5 – 48.

⁴⁶⁶ See, e.g.: HCCH, The Parentage and Surrogacy Project, The private International Law issues surrounding the status of children, including issues arising from international surrogacy arrangements, <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>.

⁴⁶⁷ *Supra* 389.

7.3 BY WAY OF CONCLUSION

Professionals, governments, NGOs, adoption triad members, activists and others now have in this handbook a diverse and useful set of perspectives and models on responding to illegal adoptions. The unifying message of the handbook is the profound, long-term human cost of illegal adoptions, which needlessly tear children away from their families while creating substitute family bonds on a cracked foundation of exploitation and lies. This handbook describes the legal, psychosocial, social and political obstacles to effective response, and yet still models diverse instances of active and even heroic response working to overcome those obstacles. Thus, there is no excuse given for mere passivity in the face of injustice and exploitation. On the contrary, because this handbook allows so many to speak not only of the problems but also of the impact that well-grounded initiatives can have, it constitutes a clear call to work for justice and healing. The pathway forward is clear for those with the will, skill and courage to confront the many legacies of illegal adoptions with compassion and a passion for justice.

Even as attention turns somewhat from adoption to other forms of family formation, such as surrogacy, it will be important to bear in mind that the many forms of illicit and unethical adoption practices have impacted innumerable families and individuals in ways that are only beginning to be addressed. Hence, it is necessary to maintain significant focus on the impacts of seemingly long ago illegal adoption practices, which still cast long shadows over the lives of their victims decades later. At the same time, this handbook, by briefly addressing emerging issues regarding surrogacy (see *Chapter 6: Future considerations*), constitutes a stern reminder of the need to respond appropriately to the growing popularity of surrogacy and assisted reproductive technologies as emerging forms of family formation. Unfortunately, there is clear evidence that the surrogacy and assisted reproductive technologies movements are failing to learn the appropriate lessons from the history of adoption, and are, in their current practices, reproducing the profound mistakes made in regard to adoption. Indeed, the surrogacy movement, in particular, is building an industry around the demand for healthy infants, making babies into products and placing profit and contract ahead of the rights of children and so-called 'surrogates'. Ironically, this industry is gaining success in persuading some jurisdictions to legalise commercial practices as to surrogacy which, in the context of adoption, would clearly be crimes.

Unless we react effectively and urgently to the initiatives of this emerging industry, our descendants will be writing handbooks on responding to the tragic consequences of commercial surrogacy, generations from now.

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Published by:
International Social Service
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1201 Geneva, Switzerland

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www.iss-ssi.org

ISBN 978-2-9700976-7-9

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