

THE SALE OF CHILDREN AND ILLEGAL ADOPTION

NIGEL CANTWELL



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COLOPHON

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ABOUT THE AUTHOR

Nigel Cantwell first became concerned about illegalities in intercountry adoption in the 1980s when he was working with Defence for Children International (DCI) and coordinating the inputs of the NGO Group on the Convention on the Rights of the Child into the drafting of that treaty. As of 1990 he represented DCI in the drafting sessions of what would become the 1993 Hague Convention on intercountry adoption. It was in that same year that serious concerns about adoptions from Romania began to be expressed and, at the request of UNICEF and with a colleague from International Social Service (ISS) he undertook a first mission to that country designed to assist the Authorities to respond to the situation. Since then, and in addition to returning to Romania many times as a consultant on this issue, he has undertaken assessment missions on adoption systems in a wide range of countries, at the request of UNICEF and often as a consultant for ISS, including: Albania, Armenia, Azerbaijan, Ghana, Guatemala, Haiti, India, Kazakhstan, Kyrgyzstan, Moldova, Sierra Leone and Vietnam, as well as Ukraine for the OSCE. He has been UNICEF delegate to all meetings to date of the Special Commission on the practical operation of the 1993 Hague Convention, as well as to expert groups on specific aspects of the topic convened by the Hague Conference on Private International Law. He has authored many articles on the protection of children's rights in alternative care and adoption, including "Adoption and children: a human rights perspective" (2011), an Issue Paper published by the Council of Europe's Commissioner for Human Rights. His most recent major publication on the question is "The best interests of the child in intercountry adoption" (2014) published by the UNICEF Office of Research.

ABBREVIATIONS

AAB	Accredited Adoption Body
CRIA	Child Rights Impact Assessment
CRC	Convention on the Rights of the Child
DCI	Defence for Children International
DRC	Democratic Republic of Congo
HCCH	Hague Conference on Private International Law
HTG	Haitian Gourde
ICTJ	International Centre for Transitional Justice
ISS	International Social Service
MFoF	Family Law and Parental Support Authority of Sweden
MIA	The Swedish Intercountry Adoptions Authority
OHCHR	Office of the High Commissioner for Human Rights
OPSC	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
OSCE	Organisation for Security and Co-operation in Europe
TDH	Terre des Hommes
UNICEF	United Nations Children's Fund
UNMIL	United Nations Mission in Liberia
UNRIC	United Nations Regional Information Centre

PART 1: INTRODUCTION TO THE STUDY

1.A. BACKGROUND AND PURPOSE OF THIS STUDY

Illicit practices in relation to the adoption of children have been a serious concern for many decades, particularly – though not solely – with regard to those involving the transfer of children abroad (intercountry adoption). The 1980s saw a phenomenal increase in allegations of malpractice and the realisation that the legal and human rights framework for intercountry adoption was wholly inadequate to prevent children being “legally adopted” as a result of illegalities at various stages in the adoption process.

These concerns came to inspire in particular the emphasis, in international standards, on protecting the rights of children for whom intercountry adoption might be envisaged or is already under way. This is the clear thrust of the 1989 Convention on the Rights of the Child (CRC) (Art 21) and of the 1993 Hague Convention that was developed to set in place procedures and mechanisms designed to achieve the levels and forms of protection prescribed in the CRC.

It was in that context that the mandate of a Special Rapporteur was originally created by the UN Commission on Human Rights in 1990 (Resolution 1990/68) “to consider matters relating to the sale of children, child prostitution and child pornography,

including the problem of the adoption of children for commercial purposes.”

When it renewed this mandate in 2008, the UN Human Rights Council (Resolution 7/13) gave a more precise orientation for its objectives, viz.: “to continue the analysis of the root causes of the sale of children, child prostitution and child pornography, addressing all the contributing factors, especially the demand factor” and “to identify and make concrete recommendations on combating and preventing new patterns of sale of children.”

In 2016, the current UN Special Rapporteur on the sale of children, child prostitution and child pornography, Maud de Boer Buquicchio, commissioned a research paper on “illegal adoptions”, both domestic and intercountry, to inform the thematic report on this subject that she would be presenting to the 34th session of the Human Rights Council in March 2017. The present publication is an adapted version of that research paper. Its main focus is on illegal intercountry adoptions. It seeks to pinpoint in particular the systemic factors that create the conditions in which illegal adoptions can thrive and to propose effective responses on the part of all actors, with special attention to preventive approaches.

1.B. METHODOLOGY

The study is essentially grounded in:

- an analytical review of problems and issues relating to “illegal adoptions” recorded in existing literature (academic papers, reports from various governmental and non-governmental sources and, to a limited extent and where necessary, media sources);
- responses to questions posed in short surveys developed specifically for this study and addressed in particular to the Central Authorities of 12 selected receiving countries and to European accredited adoption bodies (AABs, more commonly known as “adoption agencies”) that are members of the EurAdopt umbrella body;
- experience from field assessments on alternative care and adoption systems carried out by the author in a dozen countries on all continents, particularly though not solely since 2005, as well as relevant literature he has produced or to which he has contributed.

This methodology implies that the considerations in this study are based more especially on concrete examples of the issues involved. This means that certain countries where experience has been particularly fraught are unavoidably mentioned more frequently than others. Reference to specific countries is therefore indicative and exemplary: the intention is not to single out countries as such but to highlight problems that their experience has exposed. The fact that a country is, or is not, mentioned in relation to any

given issue should consequently not be interpreted as reflecting its relative achievements or weaknesses with regard to that issue or on a wider child protection plan.

1.C. CONCEPTS AND SCOPE OF THE STUDY

The study responds to the broad interpretation of “sale of children” established in the mandate of the Special Rapporteur, as noted in section I above, which includes but also goes beyond acts explicitly covered in the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OPSC) (see 1.C.ii).

The key elements of that mandate in this regard involve the analysis of the root causes of the sale of children for adoption and the factors that enable the phenomenon to persist. The explicit mention in the mandate of the need to address “demand factors” is significant. It demonstrates the importance to be attached to approaching the question of “sale” more especially from the standpoint of “purchase” - or procurement - and the profiteering that this implies. The scope and focus of this study fully reflects that perspective.

1.C.i. “ADOPTION”, “ILLEGAL ADOPTION” AND “ILLICIT PRACTICES”

The predominant form of **adoption** – called “full adoption” – involves a judicial or otherwise legalised decision permanently transferring filiation

from a child's birth family to that of the adopting parents, and cutting all ties with the birth family.¹ The contemporary view of adoption is as one of a range of possible measures available to public child protection systems.² It is designed to cater to children whose birth family will never be able to care for them in the future because of, in particular, death, abandonment, relinquishment or withdrawal of parental responsibility. The decision to grant an adoption order is to be grounded notably in assessments carried out by child protection and social work professionals. Among the requirements for decision-making are: an attestation of the child's legal and psycho-social adoptability (including free and informed consent of primary caregivers); an assessment and determination of the child's best interests; and the certified fitness of the prospective adopters to care for that particular child.

A **domestic adoption** is one carried out between adoptive parents and a child who are "habitually resident" in a given country, even if they are of different nationalities. An **intercountry adoption** occurs when the adoptive parents are "habitually resident" in a country other than that of the child (and intend transferring the child to that country), even if they are of the same nationality.

For the purposes of this study and consonant with HCCH terminology,³ "illegal adoptions" are consequently those that, while having been legalised by the competent judicial or administrative

authority, are the outcome of "**illicit practices**". This latter term refers to acts that violate the rights of the child and/or contravene recognised international safeguards. Such practices may occur at any stage of the adoption process: from the separation of the child from his/her caregiver up to and including the actual granting of the adoption order itself. They range from abduction, coercion and misrepresentation to the falsification of documents, sale, trafficking, or otherwise fraudulent methods to facilitate an adoption, regardless of the benefit obtained (financial gain or other).⁴

1.C.ii. "SALE OF CHILDREN" AND "ILLEGAL ADOPTIONS"

Illicit practices that result in illegal adoptions thus include "**sale of children**", which is itself intimately linked with those other practices. According to OPSC, 2(a), "sale of children" means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration. In line with OPSC, 3.1.a.ii, this is to include, but by no means be limited to: "[i]mproperly inducing consent, as an intermediary, for the adoption of a child [...] in violation of applicable international legal instruments on adoption." By logical extension, this can be taken also to mean deliberately avoiding or preventing necessary consents being given. But the ramifications of the concept clearly go far beyond issues of consent: they concern all subsequent phases of a normal adoption procedure

where the child in question is unduly inducted into and "transferred" through the system with the aim of securing a legalised adoption despite the illicit practices involved.

While the sale of children and trafficking in children are clearly related as "illicit practices", they are dealt with as distinct phenomena in international law. The two elements common to both concepts are the "transfer" of a child and the role played by financial or other benefits in securing that transfer. The key element that distinguishes "sale" from "trafficking", according to the way the latter is dealt with in the principal international instrument on the question, is the fact that the end purpose of the latter is to be "exploitation" whereas no condition of purpose is set for acts that constitute sale.⁵

The sale of children for illegal adoptions exists almost solely because there is a level of effective demand (see "Demand and supply" under 4.C.i. below) for bringing a child into a family that far outstrips the "natural" supply of children for whom this has been deemed to constitute an appropriate, necessary and legally-justifiable response. As a result, and as is well-documented, children become to all intents and purposes a desirable commodity in themselves.

1.C.iii. SCOPE AND FOCUS OF THE STUDY

The study concentrates more especially on illegal intercountry adoptions. While illegal domestic (national) and intercountry adoptions share some characteristics, most differ as a direct or indirect consequence of the cross-border factor and are consequently subject to distinct international law provisions. Illicit practices would also appear to be far less common – though by no means absent – in domestic adoptions than at the intercountry level.

In this study, the transactions involved in the sale of children and related illicit practices are approached, more especially, from a "procurement" angle. This means that the emphasis is placed more on the "purchase" side of the transaction.⁶ Taking this angle enables us to view the issues at stake as revolving more around responses to the "pull factor" of demand than simply to tackle criminal acts in the context of an otherwise purportedly functional system that is "fit for purpose". In other words, the basic problem is not one of how to further tighten up laws and regulations, improve processes and increase effective repression of criminal activity in countries of origin. The basic problem is that children who do not or should not need to be adopted, in-country or abroad, have been and are being brought into the adoption process through a wide range of

⁵ The 2000 (Palermo) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children uses the following definition of trafficking in persons: "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control of another person, for the purpose of exploitation...".

⁶ The working definition of "sale of children" adopted by a previous Special Rapporteur on the sale of children, child prostitution and child pornography was "the transfer of a child from one party (including biological parents, guardians and institutions) to another, for whatever purpose, in exchange for financial or other reward or compensation." (Report submitted by Mr. Vítit Muntarbhorn, Special Rapporteur, in accordance with Commission on Human Rights resolution 1993/82, ([http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.1994.84.E.n?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.1994.84.E.n?Opendocument)), However, this must not be read as implying that the original provider of the child necessarily receives "compensation". That provider may be the victim of coercion, manipulation or fraud to enable the procurer to secure financial benefit through the subsequent onward "sale" of the child.

¹ Virtually all adoptions involving illicit practices are "full", either as of the initial adoption order or, in the case of a minority of intercountry adoptions, as a result of transformation once the child is in the receiving country.

² In the USA in particular, however, the decision-making and facilitation roles of actors in the private sector remain significant or even preponderant vis-à-vis the "public" system. See, for example Smolin (2013).

³ HCCH (2008): "Illegal adoption: an adoption resulting from abuses, such as abduction, the sale of, traffic in, and other illegal or illicit activities against children."

⁴ Definition based notably on HCCH (2012b)

unethical, illicit or outright criminal ways purely in response to demand.

Indeed, the primary focus of this study concerns **systemic violations** of the child's right to be protected from being sold as part of the adoption process. Individual and isolated instances of the sale of children are obviously to be combatted forcefully through law enforcement and the criminal justice system. However, the most significant and by far the most troubling aspects of the sale of children as it affects adoption are engendered by the legislation, policies and actions of States concerned. For various reasons that are reviewed in this study, States may variously ignore, consciously fail to address, tolerate, condone, promote or even require practices that create the conditions in which the sale of children flourishes.

The study also takes account of responses to allegations of prior illegality, whether brought to light later by the adoptee, the adoptive parents, the first parents or a third party.

The study makes no attempt to estimate overall numbers or proportions of illegal adoptions, either at country or global level. As for any illicit or clandestine activity, reliable figures as to its incidence are notoriously difficult to establish. In the specific case of illegal adoption, moreover, the outcome of the illicit activities involved is the same "legalised status" as that of adoptions carried out with due probity. Once that status is conferred, it becomes extremely difficult, or even impossible, in a comprehensive manner and after the event, to investigate which cases were justified and which may have involved illicit activity.

Certain acts and measures are deliberately excluded from the scope of this study.

This is the case for the practice of **kafala of Islamic Law**, which is a distinct form of alternative care for a child, as evidenced by its explicit mention in the CRC (article 20(3)), and is not covered by the 1993 Hague Convention. The only exception to this exclusion relates to "intercountry adoptions" resulting from the transformation of a kafala decision in the child's country of origin into an adoption order in the receiving country (see "Converting kafala guardianship into an adoption" under 6.C.vii.d. below).

Also excluded from this study are most acts involving the **illegal movement of children across borders**, albeit with the stated or purported purpose of securing their adoption in another country, when no such order is made. It therefore does not cover situations such as the much publicised transfer of children from Haiti to the Dominican Republic by a non-State group following the 2010 earthquake, or the "Arche de Noé" affair of 2007 when an attempt was made to move 103 children from Chad to France for subsequent adoption. In contrast, when such acts result in an adoption order actually being made - such as in the case of some 40 Rwandan children transferred to Italy following the 1994 genocide - they fall within the scope of this study.

Surrogacy arrangements also fall outside the scope of this study. The phenomenon is clearly distinct from adoption in both its nature and its ramifications. The international community - including the Hague Conference on Private

International Law - has therefore decided to broach the problem of surrogacy through the possible development of completely separate norms and principles to those governing adoption (HCCH, 2017).

Recourse to commercial surrogacy arrangements is nonetheless closely linked to the subject-matter of this study in two ways: its growth in recent years is in part the result of the decreasing availability of "adoptable" children (especially babies and toddlers) and it can constitute a form of sale of children, especially (but not only) in countries where regulation is inadequate, inappropriate or non-existent.

In that regard, Smolin (2016) argues that the claim that procreation through surrogacy is somehow a "right" undermines international norms on the sale of children: "Nations that wish to accommodate the practice of surrogacy, domestic or international, are bound under international law to prohibit the sale of children and hence must regulate surrogacy practice to the degree necessary to avoid the illicit sale of children" (p. 265).

Finally, an important concern that bridges the gap between surrogacy and adoption stems from cases where application is made to adopt a child born as a result of surrogacy arrangements. These might be construed as attempts to legitimise the sale of children through commercial surrogacy, and the HCCH Special Commission has clearly stated that it is "inappropriate" to use the 1993 Hague Convention to regularise international surrogacy (HCCH, 2010a, p. 4).

PART 2: THE INTERNATIONAL LEGAL FRAMEWORK

2.A. INTERNATIONAL INSTRUMENTS

2.A.i. ADOPTION STANDARDS

The Convention on the Rights of the Child provides in Article 20 that “a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.” The care envisaged in the Convention can include, inter alia, foster placement, *kafala* of Islamic law, adoption or placement in a “suitable” institution.

CRC Article 21 establishes the best interest of the child as the paramount consideration in all matters related to adoption. It further requires “that the adoption of a child is authorized only by competent authorities [...], in accordance with applicable law and procedures”, “that the adoption is permissible in view of the child’s status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption”. In respect to intercountry adoption, the Convention stipulates that the latter should only take place if no suitable national alternative care solution can be found, and notably prohibits improper financial gain for those involved.

The 1993 Hague Convention builds on this rights framework in order to “establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law”. The safeguards are designed, inter alia, to prevent the abduction, sale and or trafficking of children.

2.A.ii. STANDARDS CRIMINALISING SPECIFIC ILLICIT ACTIVITIES WHICH LEAD TO ILLEGAL ADOPTIONS

The child’s right to be protected from sale and illegal adoptions is abundantly clear from the Convention on the Rights of the Child itself (notably arts. 21 and 35). That said, illegal adoptions jeopardise respect for – and often quite simply violate – other relevant provisions in the treaty. These include:

- Art 7.1: the right of the child, as far as possible, to know and be cared for by his or her parents;
- Art 8: the right of the child to preserve his or her identity, including nationality, name and family relations without unlawful interference and, if illegally deprived of some or all elements of his or her identity, to have that identity re-established;⁷
- Art 9.1: the right of the child not to be separated from his or her

parents against their will, except when competent authorities determine that such separation is necessary for the best interests of the child;

- Art 12: the right of a child who is capable of forming his or her own views to express those views freely in all matters affecting the child [and] in particular to be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child.

In addition, account should be taken of CRC Art 39: the State’s obligation to take all appropriate measures to promote the physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation or abuse...

The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OPSC) provides in Article 3 that States must “ensure that all persons involved in the adoption of a child act in conformity with applicable international legal instruments.” In the context of intercountry adoption, this clearly includes CRC Article 21, mentioned above, which prohibits improper financial gain for those involved in it.

The OPSC also provides in Article 3 that in the context of the sale of children “improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption” must be criminalised both domestically and transnationally.

The 1993 Hague Convention is more comprehensive and its Articles 8 and 32 set out detailed prohibitions in relation to improper financial or other gain and practices contrary to the Convention.

The emphasis placed on improper financial or other gain in international legal instruments indicates that corruption at any stage of the whole process, including with a view to obtaining consent or to bypassing it, not only violates the best interest of the child but can lead or be linked to serious crimes such as the abduction, sale or trafficking of a child.

It can be noted that the now defunct Working Group on Contemporary Forms of Slavery considered sale of children and illegal adoption as a modern-day form of slavery. This is particularly significant because the interpretative notes on Article 3 of the 2000 (Palermo) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children state that illegal adoption falls within the scope of the Protocol when it amounts to a practice similar to slavery. Furthermore, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised” and the slave trade means and includes “all acts of disposal by sale or exchange of a person acquired with a view to being sold or exchanged”.

⁷ In the context of this study, it is particularly worthwhile recalling the origins of this article. It stems from a proposal that the delegation of Argentina submitted to the Working Group drafting the Convention in 1985, precisely in the light of the illegal adoptions that had affected many children of the “disappeared” in that country during the military dictatorship, 1976-1983 (see also 2.B.i.b. below)

2.B. KEY PRINCIPLES GOVERNING ADOPTION

As is the case for all situations, the entire panoply of the human rights of children must be taken into account in adoption decisions, in the prevention of illegal adoptions and in responding to allegations of illicit practices. In the sphere of intercountry adoption, the additional procedural safeguards set out in the 1993 Hague Convention provide vital means and grounds for ensuring the probity of the measure.

At the same time, there are three key principles and norms contained in the relevant international instruments that underline the decision-making and protections to be respected as regards adoption: best interests of the child; the subsidiarity principle; and the prohibition of improper gain. While they are key, however, all three are still the subject of debate, to a greater or lesser degree, as to their interpretation and consequent implementation. This section attempts to analyse and clarify – if not resolve – the contentious issues involved in each, with special reference to their implications for combating illegal adoptions.

2.B.i. BEST INTERESTS OF THE CHILD AS THE PARAMOUNT CONSIDERATION⁸

The concept of the “best interests of the child” pre-dates by several decades the granting of the full range of human rights to children through the CRC. In the pre-CRC era, it served as the basic criterion – however vague, subjective and dependent on prevailing attitudes – for determining what measures should be

taken for the “well-being” of the child. As such, in the field of adoption it was used to justify, among other things, what we would now see as egregious violations of children’s rights, including mass domestic programmes of “forced adoption”.

While today decisions based on best interests are to be made in principle within the limits set by all other rights in the CRC, there is still cause for serious concern over the manner in which this notion is used, abused and manipulated. The concern is particularly great as regards intercountry adoption, and this for a number of reasons.

The first stems from the enhanced importance given to the best interests of the child in relation to adoption, where it is to be “the paramount consideration”, not just “a primary consideration”, in all decision-making. It is obviously not the fact that the child’s situation, needs and wishes must take precedence over the interests of any other party that is contested or doubted. The problem lies in placing an essentially undefined principle, with no established criteria or procedure for determining those “best interests”, as the prime condition to be satisfied if an adoption is to take place.

To some extent, the problem was alleviated by the Committee on the Rights of the Child’s 2013 General Comment on the best interests of the child, which proposes a “Child Rights Impact Assessment” (CRIA) to inform decisions (Committee on the Rights of the Child, 2013b). However, a fully-fledged best-interests assessment exercise requires substantial and qualified human resources, whereas child

protection services in most countries of origin are already severely under-resourced and over-stretched. In practice, therefore, the feasibility of a best-interests assessment prior to each adoption is anything but guaranteed. As a result, and to the extent that best interests are considered at all, they risk continuing to be viewed from a dangerously subjective standpoint.

The “vagueness” or flexibility of the concept of best interests is of course deliberate and understandable: to take account of a wide range of situations and, importantly, of different perceptions that will prevail according to the socio-cultural context in which those interests are being assessed. This poses special problems in the sphere of intercountry adoptions where two, usually very different, socio-cultural contexts “meet”. While actors in a receiving country may believe that formal adoption by one of its citizens represents the best interests of a given child, that child’s family and community, and their representatives, may hold a very different view. Clearly it is the responsibility of the country of origin to determine whether or not it is in the best interests of one of its children to be adopted abroad but in practice, as underlined at a Pan-African Conference on Intercountry Adoption in 2012, the influence of receiving countries on a child’s “adoptability” undeniably holds sway in many instances (ACPF, 2012a).

2.B.i.a. BEST INTERESTS OF THE CHILD AND POVERTY

A good indication of that influence – and its highly questionable foundations – lies in the abundant reference by receiving country actors to the “poverty” of a child’s

family as demonstrating that the best interests of that child justify adoption abroad. A typical example is: “[children] are available for international adoption for many reasons. This is most often due to their birth families inability to parent based on poverty. Poverty worldwide creates the need for international adoption, but it is not the only reason” (Children’s House International, n.d.).

Smolin (2007) notes that removing the children of poor parents “exploits the vulnerability of those deprived of their basic human right to an adequate standard of living, and uses this deprivation of rights as justification for further deprivation of rights: the rights of parents to retain the care and custody of their children”(p. 437).

The CRC reaffirms that children themselves have the right to an adequate standard of living, and their parents to support to that end (article 18(2)). But in addition to calls for family poverty no longer to be viewed as constituting grounds for adoption,⁹ the 2009 Guidelines for the Alternative Care of Children, take an uncompromising stand on this question for the first time in an international instrument, stating:

Financial and material poverty, or conditions directly and uniquely imputable to such poverty, should never be the only justification for the removal of a child from parental care, for receiving a child into alternative care, or for preventing his/her reintegration, but should be seen as a signal for the need to provide appropriate support to the family (UN General Assembly, 2010, p. 4).

⁸ For a full discussion on the concept and its application to intercountry adoption, see Cantwell (2014).

⁹ See for example Fuentes et al. (2012), p. 20, and Committee on the Rights of the Child (2005), para. 54(c).

Clearly, the reasoning behind this provision makes it even less acceptable to countenance the definitive severance of ties and removal of a child from a family for adoption on the sole grounds of that family's poverty and invoking "the best interests of the child" as the motive. As is so often the case, there is a deliberate or naïve confusion made here between "best interests" and the idea that a child will inevitably be "better off" in less straightened material circumstances.

Successfully invoking "best interests" considerations on the grounds of poverty has created fertile ground for the sale of children and illegal adoptions. If financially vulnerable parents are persuaded that the best interests of their child means that he or she must be relinquished, and prospective adopters simultaneously convince themselves that they are somehow "saving" that same child, the basic conditions are assured for stimulating and enabling the procurement of children for adoption.

2.B.i.b.
BEST INTERESTS OF THE CHILD ONCE AN ILLEGAL ADOPTION HAS BEEN COMPLETED
Reference to the best interests of children who are known to have been adopted illegally, or regarding whom illegal adoption is feared, takes place in two main contexts.

First, and constructively, the principle of the best interests of the child must underpin decisions on the child's future when illegality has been established. In the case of the children of the "disappeared" in Argentina and who were placed for adoption with national

or foreign families, and were traced only several years later, applying this principle led to case-by-case consideration of the most appropriate course of action. Necessarily, this involved counselling and consulting with the child to ascertain his or her wishes. In some cases, for example, this led to the child remaining in the care of the adoptive family but having contact with members of the family of origin.

The danger, however, is that the "best interests" of young children who have been victims of illegal intercountry adoptions will almost automatically be seen to dictate that the child should remain with the adoptive parents, even when the latter played a conscious role in the illegal process. The Dutch Central Authority states that, "[w]hen an illicit practice really has been identified, the Child Protection Board will weigh what is in the best interests of the child: to stay with his/her 'adoptive parents' despite their illegal actions, or being placed with a foster family, [even if] the 'adoptive parents' can be good parents" (Dutch Central Authority, 2016).¹⁰

It is also worth noting that "best-interests"-based arguments are sometimes put forward to justify non-intervention when allegations of illegal adoptions are made. These are of two main kinds.

The first comes into play when concerns that illegal adoptions have taken place – especially from a specific named country of origin – are raised publicly. It is then sometimes argued by adoptive parents in particular that "the best interests" of the children who have been adopted from that country will be jeopardised by the

anxieties they may have on learning of the possibility that illicit practices were involved in their adoption.

The second kind is used more commonly by competent authorities and other bodies that are reluctant to carry out or assist the investigation of historical, large-scale cases of alleged illegal adoptions. Here, the argument put forward often maintains that, at the time of the alleged malpractice, the adoption was considered to be in the child's best interests.

In the above instances where there is an attitude of "let sleeping dogs lie", the underlying message is that there are mitigating circumstances surrounding illicit acts designed to ensure adoption because adoption is a positive practice that, in the end, will be in the best interests of the child. Clearly, efforts to respond to and combat illegal adoptions cannot take account of such an approach.¹¹

2.B.ii. **SUBSIDIARITY PRINCIPLE**

The "subsidiarity principle" is invoked to determine the order in which consideration is to be given to various possibilities for caring for a child when his or her family is unable or unwilling to do so, or when the child's effective protection is deemed to require removal from its care. While international standards do not make explicit reference to this principle, they enshrine it implicitly in three different and important ways.

First, they prioritise enabling children to remain in, or return to, their family, with any necessary support, before envisaging their temporary or permanent placement elsewhere. It is important to emphasise that the term "family" covers not just parental care but also kinship arrangements.

Second, they privilege family-based care settings over residential placements should alternative care arrangements be demonstrably necessary. Where there is deemed to be no possibility for the child ever to return to the care of his or her family, adoption may be envisaged in appropriate cases.

Third, and of special note in the context of this study, the "subsidiarity principle" serves as one basis for deciding whether or not intercountry adoption is necessary and "in the best interests of" a child, as opposed to any appropriate in-country solution that can be made available. Intercountry adoption should only be approved if "the child cannot be placed in a foster or adoptive family or cannot in any suitable manner be cared for in the child's country of origin." (UN CRC, 1989, art. 21(b)). Consideration of intercountry adoption possibilities is thus to be "subsidiary" to appropriate forms of in-country care, which need to be envisaged and examined first.

It is important to note that the subsidiarity principle is to be applied in conjunction with that of the best interests of the child and, of course, against the background of the child's overall human rights. Worthy of

¹¹ Note that Australia's 2013 National Apology for Forced Adoptions recognised "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". It did not attempt to justify any of these acts by referring to the best interests of the child.

¹⁰ The Central Authority also notes that "the Public Prosecutor will investigate whether punishment is possible/desirable."

special concern about potential disregard for subsidiarity is the adoption abroad of babies and toddlers, which has been a prevalent phenomenon from a number of countries of origin with experience of illegal adoptions. A report issued by the Swedish Central Authority, for example, states that “In situations where very young children are subject to intercountry adoption, [the Central Authority] finds it reasonable to question whether there has been sufficient time to investigate the child’s background and the possibilities of national adoption” (Swedish Intercountry Adoptions Authority, 2015, p. 41).

There has also been debate over the extent to which the subsidiarity principle is respected by countries that receive foreign adoptees yet send considerable numbers of their own children for adoption abroad. A notable example here is the USA.¹² Certain European receiving countries have expressed concerns about the way, and the reasons why, the children in question enter the intercountry adoption channel: the US Central Authority itself states that “the majority involves infants” (US Department of State, 2014a, p. 7), despite the high level of unsatisfied “demand” within the USA for such children.

The problem of special relevance for the present study relates to the deliberate by-passing of the subsidiarity principle in order to procure children for intercountry adoption due to the financial rewards that this can generate. It is therefore itself one element in the third key principle examined here, regarding improper financial gain.

2.B.iii. PROHIBITION OF IMPROPER FINANCIAL OR OTHER GAIN

Interestingly, the explicit prohibition of “improper financial gain” in the CRC applies only to intercountry adoption (CRC, 1989, art. 21(d)). According to the HCCH, improper financial or other gain (1993 Hague Convention, arts. 8 and 32(1)) refers to “an amount of money or other material gain that is not justifiable because it is not in accordance with ethical practices and standards, including national and international legislation, and/or is not reasonable in relation to the service rendered. The usual meaning of improper is dishonest or morally wrong” (HCCH, 2012c, p. 2). The HCCH states that, “[i]n the area of intercountry adoption, improper financial or other gain [often] results in [...] improper influence on decisions regarding a child’s adoption” (HCCH, 2014c, p. 2).

The question of improper financial gain has usually been looked on in terms of preventing actors involved in the adoption process from profiting unduly from their interventions. Essentially, this may result either from their charging unduly high rates for legitimate and necessary services they provide or from providing services grounded in illicit or criminal activities.

This is however only part of the problem. Governments of some States of origin themselves also take advantage of intercountry adoption to secure funds – usually from prospective adopters and/or agencies – that are unrelated to services provided for the adoption, e.g. in the

form of “contributions demanded by the State of origin” as well as “unreasonable” costs, development aid, expenses and fees charged. They may allow third parties – e.g. intermediaries, lawyers and care facilities – to charge what “the market” will bear, and in some cases they act as direct channels for securing and passing on “unreasonable” sums, particularly to residential centres.

The authorities of receiving States become complicit in such “improper financial gain” by acquiescing to these demands in order to ensure that their citizens can access children for adoption from that country. As noted by the HCCH:

“The problems surrounding the financial aspects of intercountry adoption, including those arising from contributions, co-operation projects and donations, directly affect children, biological families and prospective adoptive parents, as well as the reputation and legitimacy of intercountry adoption as an option among the possibilities for alternative care. Improper financial or other gain is often linked with, in particular, the procurement of children for adoption. In its worst form, this may involve the abduction, the sale of, or traffic in children for intercountry adoption, especially where the safeguards of the [1993 Hague] Convention are not in place” (HCCH, 2015b, p.1).

The HCCH also deplores the fact that “[m]any States have a reactive approach to financial malpractice and abuse in intercountry adoption and tend to wait

until problems are pervasive (often resulting in scandal at the global level, including in the media) before addressing them” (HCCH, 2015b, p. 3).

What is less commonly underscored, and that the present study will therefore focus on more particularly, is how the authorities of countries involved in intercountry adoptions, whether countries of origin or receiving countries, actively enable improper financial gain to take place and, in many instances, are very directly implicated in turning intercountry adoption into what the HCCH terms “a market around adoption” (HCCH, 2014c, p. 15).

¹² There is, however, disturbingly poor data on numbers of “outgoing” adoptions from the USA, with only voluntary reporting to the US Central Authority. Thus, the latter’s 2014 Annual Report “only addresses outgoing adoption reported to the Department. We suspect that a number of outgoing adoptions have not been reported [...]” Grounds for that “suspicion” are clear: for example, a total of 96 such cases were reported in 2014, whereas Canada alone records 123 adoptions from the US that year.

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BOX 1: METHODS USED TO SECURE ILLEGAL ADOPTIONS

There are innumerable ways in which a child for whom adoption was not envisaged, required and/or legally foreseeable becomes “adoptable” and “available” to prospective parents. They range from abduction and production to procurement and laundering. Two or more may be used in combination in any given case. They invariably involve “improper financial gain” at the very least.

The following is a non-exclusive but already disturbingly long list of methods employed to procure children for intercountry adoption.¹³ Some apply to domestic adoptions as well. Documented examples of most feature at appropriate points in subsequent parts of this study. They include:

- Abducting babies by a variety of methods, including organised kidnapping, for the purpose of placing them for adoption;
- Remunerated pregnancy, with the agreed outcome being the child’s placement for adoption (also known as “baby farming”);
- Ultimatum (e.g. provision of pre-natal care on condition of surrendering the child for adoption);
- Falsely informing the mother that her baby was stillborn or died shortly after birth, thereby enabling the baby to be introduced into the adoption system;
- Identifying vulnerable mothers - from poor families, marginalised ethnic minorities, unwed or single - and inducing them to give up their babies (consent obtained by fraud or duress). Pressure may be exerted before the birth, at the maternity clinic or hospital, or in the adoption agency, which may house the mother until delivery;
- Improper payments or gifts to family members, intermediaries, officials, or others;
- Other improper inducements to obtain the consent of the biological parents or family;
- Providing misleading information to the biological parent(s) on the consequences of adoption to obtain their consent. This includes assuring them, or allowing them to believe, that they will be able to maintain links with, or receive news of, the child after the adoption, or that the child will return on reaching adulthood;
- “Prospecting” for children by visiting villages/communities and suggesting that families in difficulty give up a child for adoption;

- Active “recruitment” into residential care destined to result in adoption abroad;
- Transfer or removal from an alternative care setting without consent (tantamount to abduction);
- Fraud, such as misrepresentation of identity and obtaining children from biological families through false representations;
- Forgery / falsification of documents;
- Bypassing consent by falsely ensuring that the child is designated as “abandoned”;
- Child laundering,¹⁴ whereby children are obtained illicitly by force, fraud or funds, false documents of adoptability are created, and the child is then processed for intercountry adoption;
- Bypassing the matching system in order to enable prospective adopters to select a child; this may involve, for example, requiring or accepting payments in return for giving access to a “special listing” of children considered for adoption, or processing without question a “request” made by prospective adopters or their agency;
- “Reserving” certain adoptable children for intercountry rather than domestic adoption or other appropriate domestic solutions for their care;
- Providing false information to prospective adopters, e.g. regarding the child’s status or age, or the process to be followed and costs involved;
- Bypassing the intercountry adoption process, e.g. by removing a child from the state of origin through guardianship arrangements or other means;
- Securing decisions by bribery (including the obtention of unjustified attestations of handicap or serious illness to ensure placement for intercountry rather than domestic adoption, pronouncement of adoptability, consent of facility director, a matching decision by the competent person or body, the agreement of a judge to waive certain prescribed conditions for foreign adopters or simply to issue the adoption order without question...).

¹³ This non-exclusive listing is a compilation of methods identified by HCCCH and/or ISS, as well as those brought to light as a result of field assessments.

¹⁴ This concept was first used by Smolin (2010).

PART 3: ILLEGAL DOMESTIC ADOPTIONS

3.A. BACKGROUND TO THE SYSTEMATIC SALE OR ILLEGAL DOMESTIC ADOPTION OF CHILDREN

Adoption as a domestic practice has a long history which has seen considerable variations in its forms and purpose, both in time and in space - including periods when in fact only adults could be adopted. As recorded by Van Loon (1993), however, it was in the USA in 1851 that full adoption of children was first recognised in a domestic legislation. Legalised full adoption took the best part of a century to be accepted elsewhere - e.g. England in 1926 (though initially without conferring inheritance rights) and France in 1939. These then colonial powers introduced the measure into many countries under their control. Uruguay was the first country in Latin America to legislate on full adoption, in 1945. Portugal only did so in 1966 (Van Loon, 1993).

Adoption was at first - and indeed remains so in many communities today - a secret affair, with adopters and adoptees being the subject of societal discrimination. Original documents were thus destroyed, making it difficult now to ascertain the extent to which practices that would currently be termed “illicit” may have been involved. According to Van Loon, it was only as of the 1960s that adoption began to be seen, policy-wise, “within the

framework of family and child protection and welfare” (Van Loon, 1993, p. 215).

At the present time, national policies towards adoption differ greatly, as do laws and regulations governing requirements and procedures. Thus, for example, adoption of children from the care system has been very actively encouraged in recent years in England where, between April 2014 and March 2015, fully 5,330 children were adopted from that system (Adoption UK, 2017). This compares with France, with a larger population, where just 894 “wards of the State” were placed for adoption in 2013 (Enfance & Familles d’Adoption, 2016). In Germany, while 3,793 domestic adoptions were carried out in that same year, some 70% of these concerned intra-familial/step-parent adoptions (HCCH, 2014b). The total figure for domestic adoptions in Switzerland in 2014 was only 160, but even then 80% of these were intra-familial (HCCH, 2014d).

Similar wide differences apply to domestic adoptions in countries that also send significant numbers of children for adoption abroad, although regrettably few make the relevant statistics readily available.

Some such countries have a relatively robust domestic adoption programme involving higher numbers of children than those adopted abroad. Thus, in 2013, domestic adoptions in Thailand

numbered 2,303, compared with 344 intercountry adoptions, although only 26 of these concerned children were already in the alternative care system (HCCH, 2013b). In that year, Bulgaria carried out 705 domestic adoptions from its care system while 407 of its children were adopted abroad (HCCH, 2014a), and the corresponding figures for the Dominican Republic were 34 and 21 (HCCH, 2013a). Although its 2009 figure for intercountry adoption (1,600) outstrips that for domestic adoption (1,153), Colombia also makes significant use of the measure (HCCH, 2009), and Peru showed a similar characteristic (145 intercountry adoptions for 101 domestic) (HCCH, 2010b).

In many other countries of origin, in contrast, domestic adoption is rare. Thus, while Madagascar carried out 20 domestic adoptions in 2015, 16 of those were intra-familial and it processed 76 intercountry adoptions that same year (HCCH, 2015a). Indeed, in most countries of sub-Saharan Africa, and many in Asia, legalised full adoption remains almost unknown and often alien to the community’s outlook on family and child care, although there are indications of a latent demand for adoptable children in some.

Domestic adoptions, and problems related to them, have generally been given far less attention than intercountry adoptions. It seems to have been assumed that, without the cross-border factor, probity can be quite easily ensured. This approach is reflected in the pre-Hague CRC (Art 21(c)) which enjoins States to “ensure that the child concerned by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption,” whereas in many

cases the reference point today should no doubt rather be standards governing intercountry adoptions. The details of such “safeguards and standards” for domestic adoption are not homogenised or codified internationally, moreover, making it more difficult to determine which are to be reformed. That said, and while there is considerably less easily accessible information regarding illicit practices in domestic adoption, this section looks briefly at two forms of illegal domestic adoptions:

- Historical cases that have on-going importance for determining the nature and effectiveness of responses to mass violations of the domestic adoption system.
- Current practices that require review and appropriate action.

3.B. ILLEGAL DOMESTIC ADOPTIONS AS PART OF LARGE SCALE PAST ABUSES

Historical cases of large-scale programmes of forced adoption during the 20th century, carried out under deliberate State policies or with the complicity of the State, are still of direct current relevance. Several decades on, many victims of such abuses are still seeking to trace family ties and demanding redress. States’ commitment to ensuring such transitional justice has varied considerably, in terms of both timely responsiveness and the efficacy of the measures proposed.

Three main types of context can be identified in which States developed policies and programmes for the removal

of children *en masse* from the care of their mothers. The first concerns attempts by the State to suppress opposition, meaning that babies and young children were removed from the care of parents considered to be unsuitable on ideological grounds. The second is a “moral” response to the situation of children born out of wedlock and whose mothers were therefore deemed unfit to care for them. The third involves the removal of children on “cultural” grounds, targeting ethnic minority communities and more especially First Nations.

It seems unlikely, but by no means impossible, that similar initiatives be carried out in the future. The main issue at stake today for these historical cases, therefore, is the way that States have subsequently reacted to demands that they respond effectively to the documented or alleged rights violations that had occurred. The following gives a brief overview of selected historical cases according to the typology set out above.

3.B.i. IDEOLOGICALLY-MOTIVATED ILLEGAL ADOPTIONS

During the military dictatorship in **Argentina** (1976-1983), an estimated 500 babies of political opponents were “disappeared”, labelled “NN” (*ningún nombre* = “nameless”) and placed for adoption with sympathisers of the government, in some cases in neighbouring countries. Already in 1977, the grandmothers of these children formed an association to protest the phenomenon and search for the children; this group was the forerunner of the *Abuelas de Plaza de Mayo* association which is still active in tracing illegally adopted

grandchildren – some 120 have been located to date. The democratic regime that followed the dictatorship was quick to recognise the need to preserve and re-establish children’s identity – in 1984 it proposed the basis of what was to become Article 8 of the CRC, and in 1987 it set up the National Database of Genetic Data.

Under the Francoist regime in **Spain** (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 officials” (Baglietto, Cantwell & Dambach, 2016, p. 29). The number of cases is unknown; estimates vary from 30,000 to 300,000 cases. An effective response to identify victims and trace families was hindered by the 1997 Amnesty Law of 15 October 1977 which essentially created impunity for these crimes for a long period. However, non-governmental efforts finally led to the establishment of a DNA database of parents searching for their children, and the government has now put in place a dedicated “information service” for parents and children who believe they were victims of the practice.

3.B.ii. MORAL ATTITUDES LEADING TO ILLEGAL ADOPTIONS

An estimated 130,000 babies born to unwed mothers in **Australia** were abruptly removed from their care shortly after birth (the “clean break” approach) and placed for adoption throughout the third quarter of the 20th Century. This corresponded to a government policy sanctioned by churches and charities (Australian

Senate - Community Affairs References Committee, 2012). After decades of effort by non-governmental bodies, a National Apology for Forced Adoptions was adopted by the Senate and House of Representatives in 2013.

Non-governmental bodies in **Ireland** have been waging a long battle with the authorities to investigate the forced and illegal adoption of children of unmarried mothers that took place as of the 1950s, and to facilitate access to records. According to the Adoption Rights Alliance, adoption agencies and mother-and-baby homes run by religious orders, as well as the adoption authorities themselves, were among those complicit in the scheme. Up to 10,000 children may have been involved – a government official has spoken of “at least several thousand illegally adopted people; we might never know the total number because of the lack of a paper trail” (Adoption Rights Alliance, 2015, p. 2). It is claimed that some 2,000 of them were illegally adopted abroad, more especially to the USA. It was only in 2015 that an investigatory commission was set up, although there are concerns that its terms of reference (Mother and Baby Homes Commission of Investigation, 2015) may be too limited to capture most of the alleged illegal acts (Sentinel Human Rights Defenders, 2015).

Similar concerns have been raised in **Belgium (Flemish Community)** where a group of victims set up an association, “Mater Matuta”, in 2014, claiming that up to 30,000 births in Belgium between the 1950s and the 1980s may have resulted in illegal adoptions. At the end of 2014, the Flemish Minister for the Family established a parliamentary commission

of enquiry which submitted a report in May 2015 describing the various ways in which illegal adoptions were carried out in that period, involving a range of scenarios, from “organised abandonment” to “forced adoptions”, sometimes involving the sale of the babies. The report points to the direct implication of religious institutions and adoption services, as well as medical staff and civil servants. On 24 November 2015, the Flemish Parliament apologised for its tardiness in investigating the issue. On the same day, Flemish bishops publicly recognised the role of religious institutions in the practice, which the Secretary General of the Conference of Belgian Bishops was reportedly still denying one year previously, declaring that that the adoptions were not “forced” but a “choice” made by the mothers. Consequent to the findings of the enquiry, the Flemish Authorities announced that a DNA databank was being set up with a view to creating a “filiation centre” to assist those seeking to trace their biological parents or children (D’Yvoire, 2015; Vaillant, 2015).

3.B.iii. “CULTURALLY”-MOTIVATED ILLEGAL ADOPTIONS

The so-called “Sixties Scoop” took place in Canada between 1960 and the mid-1980s. It involved 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. According to Origins Canada, the Department of Indian Affairs has records of 11,132 status Indian children adopted between the years of

1960 and 1990, but it is believed that the real number may be as high as 20,000 (Indigenous Adoptees, 2017). In June 2015, Manitoba became the first Canadian Province to apologise for this practice. At the time of writing, a class action lawsuit at federal level regarding loss of cultural identity as an actionable wrong, first launched in 2010, is due to be heard (Sixties Scoop, 2017).

3.B.iv. RESPONDING TO LARGE-SCALE ABUSES OF DOMESTIC ADOPTION

These examples of historical cases of systematic illegal domestic adoptions demonstrate that governments and relevant governmental bodies have tended to resist for many years – sometimes decades – attempts to secure the investigation of concerns over the State’s complicity by commission or omission, as well as consequent demands for reparation and for facilitated opportunities to search for origins. Unless there is recognition of general human rights violations under a previous regime (as in the case of Argentina), only with the passage of time do governments seem to feel able to distance themselves sufficiently from the actions – or inaction – of their predecessors and thus possibly to envisage effective responses.

When still in existence and operation, non-State organisations, institutions and agencies allegedly involved in historical cases have usually demonstrated resistance, fearing that acknowledgement of past failures could compromise their future. In some cases they have had sufficient individual or collective influence to persuade the authorities not to act, or to act in a way that will ensure that their

reputation is not damaged, especially if collusion of the State was involved.

From a transitional justice perspective, in the aftermath of all major historical cases of abuses committed on a systematic basis within different contexts, victims have worked together to secure States’ recognition of their right to see the perpetrators punished, to know the truth, to receive reparations and to be guaranteed that this will not be repeated (ICTJ, 2017).

According to the International Centre for Transitional Justice (ICTJ), “because systemic human rights violations affect not just the direct victims, but society as a whole, in addition to satisfying these obligations, States have duties to guarantee that the violations will not recur, and therefore, a special duty to reform institutions that were either involved in or incapable of preventing the abuses” (ICTJ, 2017). In the case of intercountry adoptions, this obligation concerns both countries of origin and receiving countries. Recognition, reconciliation and the fight against impunity not only contribute to regaining trust between groups and state institutions but also, crucially, help victims to deal with the past and States to pursue effective responses in the search of origins, reunification, identity, etc.

Any attempt to deal with massive abuses and systematic practices from a transitional justice perspective must aim to end and combat the structures that allowed this practice to start in the first place, by sending a strong message to all victims, perpetrators and society in general that this type of abuses will never again be tolerated.

3.C. CURRENT MANIFESTATIONS OF ILLEGAL DOMESTIC ADOPTION

Over and above criminal acts committed by individuals or groups, the significant issue in relation to current concerns about illegal domestic adoptions – as indeed about intercountry adoptions – revolves around the extent to which the competent authorities are prepared to tackle the “enabling environment” for such acts as well as to respond appropriately when they occur. Six very different examples are given here to illustrate very different facets of this question.

Nanou (2011) conducted a study on the situation in **Greece**, where domestic adoption can be processed through state institutions or by private agreement. The long delays involved in the “public” process allegedly incite prospective adopters to choose the private route where, according to the study, “financial gain and exchange are commonplace.” The study contends that “the legal framework concerning private adoptions is weak and allows for practices that are not only barely legal but also even immoral. The de-facto operation of a kind of adoption market, with clear vested financial interests for professionals as well as for birth parents represents a ‘dark side’ of this process. Large sums of money paid to professionals encourage corruption.” The study suggests that corrupt practices have become endemic in the Greek adoption system and to some extent are normalised and accepted at all levels (Nanou, 2011).

A 2013 report concerning **Poland** noted that it is legal for a pregnant woman to advertise the fact that she will give up her

baby in return for her medical expenses and other costs being paid. After the birth, the mother allegedly declares to the civil registry office that the “client” is the biological father and then relinquishes custody of the child in court. According to the report, only a quarter of the adoptions in Poland in 2005 were mediated by adoption centres, because the “legal” process is considered too long and too demanding. The report quotes the Polish Commissioner for Children’s Rights as criticising the law allowing the biological mother to search for potential adopters, which “encourages the development of underground adoption through online ads and illegal mediators” (“Illegal Adoptions in Poland”, 2013).

In **China**, UNRIC has reported that there is a “thriving black market in children”, some of whom are “bought or kidnapped” and then sold to orphanages that in turn put them up for adoption, either domestically or abroad. The report notes that, in 2011, 370 persons were arrested in relation to this black market, thereby avoiding 89 children being sold. The solution to the problem of reducing demand for abducted children was seen to lie in obliging adopters to go through official channels, without proof of which they would be denied recognition as legal guardians (United Nations Regional Information Centre for Western Europe, n.d.).

Responding to questions from the Committee on the Rights of the Child in 2007, the representative of **France** referred to a case where Bulgarian mothers had been paid by French intermediaries and adoptive parents to adopt their children. He noted that, in this case, “22 babies

had been sold in a fraudulent adoption scheme. The lead members of the criminal network that had organized the sale of the babies had been imprisoned, and the families that had bought the babies in question had also received symbolic sentences. The judges had decided to leave the babies in the custody of their adoptive families, following an investigation into each child's circumstances and well-being" (Committee on the Rights of the Child, 2007, para. 32). This case exemplifies the difficulty of responding to illegal adoptions after the event, when "the best interests of the child" may seem to dictate that the "legality" of the "illegality" simply be reaffirmed.

In the USA, the issue of the "rehoming" of adopted children has raised concerns in recent years. According to a memorandum issued by the federal Children's Bureau, "rehoming" involves initiatives taken by adoptive families "to 'advertise' and facilitate placements of their [adopted] children with nonrelative strangers [...] outside the purview of the courts or public child welfare agencies" (Administration for Children and Families, 2014, p. 1). The memorandum does not seek to have the act itself outlawed, no doubt because the practice is in fact akin to a normal "private adoption" (which at some point will have to pass through a protective judicial procedure) which is acceptable in the USA. At the same time, this practice reportedly does not usually involve any significant financial transaction.

As a final example, in 2014, the Office of the General Prosecutor of **Kazakhstan** revealed that children were being sold from maternity wards into adoption by Kazakh nationals. It reported 457 cases

of domestic adoption by individuals who were not enrolled in the central database for adoption (General Prosecutor's Office of the Republic of Kazakhstan, n.d.). According to UNICEF, 44 cases of the sale of children were recorded as crimes against children (UNICEF Kazakhstan, 2016).

These examples of current situations of concern show the diversity of potential problems that may need to be tackled in relation to illegal domestic adoptions, from the system itself to the inadequate implementation of that system. They also demonstrate the complexity of responding appropriately to honour the human rights of the child after the event. With some exceptions, States globally have so far demonstrated reluctance to react adequately to those criminal acts that are uncovered, and appear to have paid little attention to countering the "enabling environment" provided by certain systems or by lacunae in the practical operation of otherwise potentially positive systems.

States that recognise and/or permit adoption should ensure that there is a single recognised process for completing an adoption and should in particular prohibit independent ("private") adoptions.

Adoptees and first (birth) parents expressing concerns about the circumstances of an adoption should benefit from a procedure and system that enables their concerns to be duly heard and examined. This procedure and system should provide for ultimate redress and reparation, where appropriate.

PART 4: ILLEGAL INTERCOUNTRY ADOPTIONS

4.A. BACKGROUND TO THE SYSTEMATIC SALE OR ILLEGAL INTERCOUNTRY ADOPTION OF CHILDREN

As of the 1970s, while figures for domestic adoptions plummeted in most European countries,¹⁵ the steady growth in annual numbers of intercountry adoptions was matched by an equally steady growth in expressions of concern about how and why many (or most, in the case of some countries of origin) of the children concerned were coming to be adopted abroad. From the Vietnam “baby-lift” in the mid-Seventies to the more recent recognition of systemic and serious irregularities underlying adoptions from countries such as Cambodia, Ethiopia, Guatemala, Haiti, Liberia and Nepal, and via the massive rights violations that characterised many of the initiatives to adopt from Romania and certain other “countries in transition” in the Nineties, the file of documented abuses of the adoption system grew unrelentingly and substantially thicker every year.

The Report produced by Van Loon (1990) in preparation for the drafting of the 1993 Hague Convention spoke of the “extensive networks” involved in illegal adoptions at that time: “In some countries lawyers and notaries, social workers (even in

some cases those appointed by the courts), hospitals, doctors, children’s institutes, sometimes turned into complete ‘baby farms’, and others work together to obtain children and make profit out of the despair of parents, in particular women, in difficult situations, sometimes by deceiving them” (In: Smolin, 2010, p. 454).

A now well-documented¹⁶ and egregious example of this problem was that of Guatemala. Under the legislation in place, certification of the “abandonment” of a child was subject to a lengthy court procedure whereas “relinquishment” could simply be announced to, and certified by, a notary public who was then able to identify prospective adopters for that child. When intercountry adoptions began from Guatemala, it was therefore this latter procedure that was privileged (whether or not the “relinquishment” was genuine), to such an extent that it was used to process 98% of all adoptions from Guatemala which therefore took place outside any safeguarding procedure. As Smolin (2010) notes, “Guatemala’s notary system operated through private attorneys, who were paid US\$15,000-20,000 per adoption by United States adoptive parents. The rise of Guatemala as a sending country was a classic case of an adoption system fueled by inordinately

large amounts of money...” (p. 468-9). He continues: “The stark decline in intercountry adoptions from Guatemala [as of 2008] can be attributed to the inevitable collapse of a system broadly viewed as corrupt, money-driven, and rife with child trafficking” (2010: 477). At that time, this was also clearly the view of the US Department of State (now its Central Authority) which, in March 2007, advised that “we cannot recommend adoption from Guatemala at this time. . . . [A]dopting a child in a system that is based on a conflict of interests, that is rampant with fraud, and that unduly enriches facilitators is a very uncertain proposition with potential serious life-long consequences” (In: Smolin, 2010, p. 478). Ironically, it was in that very same year that adoptions from Guatemala to the USA peaked, at no less than 4,726 (US Department of State, 2016c).

As will be discussed more widely later in the present study, this response of the US Department of State neatly encapsulates two key problems in tackling illegal adoptions. First, while the receiving country may acknowledge the high risk of adopting from a given country of origin, it is prepared to allow such adoptions by its citizens to continue once it has issued a warning in that regard. Second, receiving countries do not act in unison: all other major receiving countries had long before ended their cooperation with Guatemala (see “Moratoria” at 4.B.ii below), precisely because of such serious concerns, but the major one among them was still processing adoptions from that country, alone and on a large scale, for several years more.

At international level, attempts were being made to respond to those problems

and to improve regulation. These efforts have reflected a change in attitude on the part of law-makers. The first European and Hague Conventions on intercountry adoption in the Sixties focused more especially on applicable law and mutual recognition of such adoptions by the contracting States, and not on tackling wider child protection issues (European Convention on the Adoption of Children, 1967; Hague Convention on Jurisdiction, applicable law and recognition of decrees relating to adoptions, 1965). The draft proposal for a Convention on the Rights of the Child, presented by Poland in 1979, talked simply of the need to “facilitate” adoptions; by the time the final text of the treaty was approved in 1989, the approach had changed completely, with emphasis placed on ensuring the protection and best interests of the child (UN CRC, 1989, art. 21). Similarly, and building on the CRC, the 1993 Hague Convention is essentially directed at safeguarding the rights of the child and preventing abduction, sale and trafficking – aims that are explicitly set out in its Article 1. Even the title of this Convention was changed from its draft version. Instead of talking only of “cooperation”, it now reads in full: “Protection of Children and Cooperation in Respect of Intercountry Adoption”.

At present (November 2017) 98 States Parties, including every significant receiving country, have ratified or acceded to the 1993 Hague Convention. However, as the present study demonstrates, this has not resolved many of the basic problems relating to illegal adoptions, not least because a significant proportion of all intercountry adoptions have continued to take place outside its regulatory framework (see “Recourse to

¹⁵ In Switzerland, for example, they fell from over 1,000 in 1980 to 192 in 2008; and in the Netherlands from 1,209 in 1970 to 25 in 1980, and then to just 25 in 2008.

¹⁶ See for example CICIG (2010).

non-Hague countries of origin” under 4.C.v. below).

In recent years, the global adoption landscape has shifted massively. And as with any major transformation, adjustment to the new – and indeed still fluid – situation creates its own, similarly new, challenges. Unfortunately, these do not necessarily resolve and replace those that were already there: in many cases they simply constitute at best modified versions of pre-existing problems, at worst additional issues to be tackled in an already substantial and challenging list.

In general, the problems and challenges for effective protection have long been identified.¹⁷ The fact that they nonetheless persist, however, indicates that efforts to tackle them may not only have been insufficient in their force but also insufficiently comprehensive and strategically misdirected.

The main emphasis of efforts to date has been tighter regulation and standardisation of procedures and mechanisms, and the integration of stricter norms in legislation. This has been done, however, without any serious attempt to change certain historical and fundamental components of the system itself, and the “environment” in which it operates, that foster practices involving, or tantamount to, the sale of children into adoption. That is why the present study focuses mainly on these factors rather than on increased regulation, law enforcement and the criminal justice system.

4.B. MORATORIA: INDICATIONS OF FAILURE TO PREVENT ILLEGAL INTER- COUNTRY ADOPTIONS

One response to the problems resorted to by both countries of origin and receiving countries has been the provisional suspension of intercountry adoptions – often known as a moratorium.

Arguably, moratoria provide – at least in the long run and sometimes with hindsight – one of the better hard indicators available of the significance of illegal intercountry adoptions as a phenomenon, of failure to prevent them, and thus of the best interests of the child as “the paramount consideration” having given way to other considerations when approving intercountry adoptions.

4.B.i. MORATORIA IMPOSED BY COUNTRIES OF ORIGIN

Not all moratoria imposed by countries of origin themselves are necessarily a reflection of widespread illicit practices.

In the relatively rare instances when it is directed at one or more specified receiving countries, a moratorium is invariably politically motivated and therefore falls outside the scope of this study.¹⁸

In most cases, countries of origin suspend intercountry adoptions to all receiving countries. Sometimes, the suspension is explained solely by the need for revamping the system, notably

with a view to bringing it into line with the requirements of the 1993 Hague Convention. Thus, at the time of writing, Senegal has had a moratorium in place to that end since December 2011 following its accession to the treaty, and Benin suspended intercountry adoptions as of May 2014 in order to set in place structures and procedures that will enable its accession.

In other cases, preparing for Hague accession may be linked with concerns over illicit practices as the reason for imposing a moratorium. Ghana, for example, decided to make preparations for acceding to the 1993 Hague Convention, requiring a suspension of intercountry adoptions that became effective in March 2013. In August of that year, it was also noted that “the temporary suspension of child adoption was to protect the interest of the vulnerable” and “became necessary following the discovery of a worrying trend in the adoption of children which is detrimental to their welfare” (Ghana News Agency, 2013).

In many instances, however, countries of origin have deemed it impossible to ensure probity in the intercountry adoption of their children under prevailing conditions and in the face of, notably, pressure from receiving countries. Their responses take various forms and have an ostensibly temporary or longer-term effect.

To first give a historical perspective of the significance of this issue, it can be noted that, during the period between 1991 and 2007, no less than 10 of the 19 countries of origin in Central and Eastern Europe and Central Asia were obliged to resort

to a moratorium – and in four cases on two separate occasions (UNICEF, 2009, p. 8). In all but two cases, the decision was prompted by serious concerns over widespread illicit practices spawned by pressure from receiving countries. At least one other country in the region (Kyrgyzstan) has taken similar steps since that time (in 2009). Indeed, in 2005, Romania converted its third moratorium – decreed in 2001 in preparation for joining the European Union because of unrelenting pressure from certain receiving countries to provide children for adoption – into a standing prohibition of intercountry adoption by non-nationals.

In a similar vein, the phenomenon of illegal adoptions from Argentina in the 1980s led that country to impose a minimum 5-year residence requirement on adopters of its children; as a result it has not felt it necessary or appropriate to become a party to the 1993 Hague Convention. Paraguay, faced with the same phenomenon but having nonetheless ratified that treaty in 1998, decided to apply strictly the principle of subsidiarity thereafter, and since that time has apparently seen no need to process any intercountry adoptions.

Since the turn of the century, several African countries have also felt it necessary to suspend intercountry adoptions in order to attempt to resolve serious malpractice. Lesotho did so in 2007, for a period of 18 months, after evidence came to light of illicit practices. The following year, Togo suspended intercountry adoptions when it was discovered that, inter alia, declarations of adoptability had not been subject to adequate background checks and children

¹⁷ See also, for example, Commissioner for Human Rights (2011), prepared by this author for the Council of Europe’s Commissioner for Human Rights, and the Commissioner’s recommendations on the subject.

¹⁸ In such cases, a moratorium may reflect a wider diplomatic conflict. If any alleged malpractice is involved, this is invariably limited to concerns expressed about how adopted children are faring in the receiving country – including non-compliance with reporting requirements as to the child’s well being in the adoptive family, as well as reports of serious abuse or neglect – rather than about illicit activities prior to the adoption.

had been wrongly placed for intercountry adoption. In early 2009, Liberia suspended intercountry adoptions, in good part in response to a 2007 report by the UN Mission in the country (UNMIL) that confirmed long-standing allegations of illegal overseas adoptions being carried out through orphanages, as well as to the recommendations of a Special Commission on Adoption set up in 2008 (ACPF, 2012b, p. 13).

A more recent example from Africa is that of Kenya. In November 2014, the Kenyan Cabinet approved “an indefinite moratorium on inter-country adoption of Kenyan children by foreigners.” Its statement reportedly noted that Kenyan law does not define child sale, child procuring, child trade and child laundering as part of child trafficking, which “has in effect put Kenyan children at high risk as it creates a loophole for fraudulent, vested interests, masquerading through ownership of children homes, adoption agencies and legal firms representing children, and adopters, to engage in the unscrupulous business of human trafficking under the guise of charity” (Mathenge & Otiento, 2014).

For its part, Nepal – in fact already under an almost complete moratorium set in place by receiving countries – announced on 26 May 2015 that, until further notice, it was prohibiting all adoptions, whether domestic or intercountry, in order to allow for the reunification of families separated by the earthquake that had hit the country four weeks previously, and to avoid any child trafficking (Swiss Central Authority, 2016b).

An unusual response, but with a similar effect, was implemented by the Democratic Republic of Congo (DRC) when it was faced with a sudden vertiginous rise in the level of intercountry adoption applications caused by “the uncontrolled influx of prospective adopters and intermediaries (whether accredited or not) [into] a country of origin that was insufficiently prepared to manage so many intercountry adoptions (inappropriate legislation, lack of organisational and human resources. Malfunctioning and illicit financial dealings quickly surfaced...” (Direction de l’Adoption - ACC, 2015, author’s translation). While DRC courts have – intriguingly – continued to issue adoption certificates, the competent authorities have generally refused to grant exit visas to the children concerned since September 2013, although pressure from receiving countries has gradually led to more and more cases being approved as of November 2015.

4.B.ii. MORATORIA IMPOSED BY RECEIVING COUNTRIES

For their part, receiving countries may decide to impose moratoria on specific countries of origin in the light of evidence that systematic or widespread irregularities have been taking place. Moratoria in such circumstances therefore constitute an implicit admission of their failure to ensure that intercountry adoptions take place solely in the best interests of the child and in conformity with relevant international standards.

From information made available, the major countries of origin from which intercountry adoptions were, in 2016,

officially subject to moratoria imposed by several receiving countries on the grounds of illicit practices are Cambodia, Ethiopia, Guatemala, Haiti and Nepal.

Cambodia: the USA suspended the processing of adoptions from Cambodia in December 2001, in response to “numerous concerns related to fraud in Cambodia, as well as the lack of sufficient local legal frameworks and other safeguards to protect the children’s best interests. [...] Based on the existing issues of fraud and irregularity in Cambodia, the Department of State (DOS) has reconfirmed the suspension of adoptions under the Hague process in Cambodia” (US Department of State, 2009). Several other countries followed suit, including Belgium, France, Luxembourg and the Netherlands. Apparently the last to do so was the United Kingdom in 2004, “in response to evidence that the safeguards in the Cambodian adoption system were insufficient to prevent children being adopted without proper consents being given by their birth parents and improper financial gain being made by individuals involved in the adoption process.” Among the specific areas of concern mentioned were “the systematic falsification of Cambodian official documents related to the adoption of children” and “the procurement of children for intercountry adoption by facilitators, including by coercion and by paying birth mothers to give up their children” (Department for Education, 2010, p. 3). All these suspensions were still in place in 2016 despite Cambodia’s accession to the 1993 Hague Convention in 2007.

Ethiopia: several countries have suspended adoptions from Ethiopia

in recent years. One such is Australia, which halted its programme already in June 2012 stating, inter alia, that it “could no longer be confident that the program would continue to operate in a way that protected the best interests of Ethiopian children” (Australian Central Authority, 2016). Switzerland followed suit, as of August 2014, notably in light of “fraudulent practices by actors involved in child protection, linked to the absence of consent on the part of biological parents and the falsification of documents” (Swiss Central Authority, 2016a). France imposed a moratorium as of April 2016, considering, “in agreement with the local authorities, that the legal and ethical security of procedures was no longer assured” (French Central Authority, 2016).

Guatemala: The Netherlands suspended adoptions from Guatemala as of February 2001 “because of trafficking and sale of children” (Dutch Central Authority, 2016). The UK introduced a suspension of adoptions from Guatemala in 2007, which is still in force, citing “evidence demonstrating that: there are insufficient safeguards in the Guatemalan adoption system to prevent children being adopted without proper consents being given and improper financial gain being made by individuals in the adoption process. In particular that: there is a trade in babies being sold for overseas adoption; and mothers being paid, or otherwise encouraged, to give up children for adoption” (Department for Education, 2010). Switzerland also has a long-standing moratorium in place regarding Guatemala.

Haiti: In view of the serious and long-standing concerns over illegal

adoptions from Haiti, a number of receiving countries decided many years ago not to develop or continue adoption programmes with that country. Significantly, no Scandinavian country has recently had such a programme – Denmark had a very limited programme (an average of 2 children per year from 2000-2004) but has processed no adoption from the country since that time. Italy’s sole agency authorised to process adoptions from Haiti decided to halt its programme in 2007 because of the problems, and Spain suspended Haitian adoptions that same year, citing lack of guarantees and of a reliable competent authority.

Following a short suspension in the wake of the January 2010 earthquake, the Haitian Authorities indicated that new intercountry adoption applications were being accepted again as of April. The UK then indicated, in October that same year, that it would not process adoptions from that country. It motivated its decision by noting that “the government authorities in Haiti that normally deal with child protection and are responsible for the administration of intercountry adoptions are not in a position to ensure that the correct processes are being followed. There are indications that the disaster has made a system which was already inadequate worse” (UK Government, n.d.)(see also section on post disaster situations at 5.B. below).

Nepal: In an unprecedented move, all major receiving countries decided, in 2010, to halt the adoption of all Nepalese children who had been declared “abandoned” – which was the case for the vast majority – in light of widespread

fraud being found regarding, in particular, the declaration of adoptability of children being proposed for intercountry adoption.

Other countries of origin are currently subject to suspension by at least one receiving country because of concerns over the probity of adoptions. These include:

India: applications to adopt Indian children were placed “on hold” by Australia as of October 2010 following allegations of complicity in illegal adoption practice on the part of the competent authorities, and this suspension remains in place given that the Australian Authorities are not yet satisfied that safeguards to protect children in India are functioning effectively (Australian Central Authority, 2016).

Uganda: the Netherlands suspended adoptions from Uganda in June 2012 citing an inadequate relinquishment procedure combined with an inadequate system of counselling the biological parents (Dutch Central Authority, 2016). In addition to demonstrating that illegal adoptions are still very much a concern, the clear and very significant conclusion from the above is that, with the notable exception of the response to Nepal, suspension decisions are unilateral, uncoordinated and often belated. This reflects a troubling lack of common understanding or volition on the part of receiving countries as to what the protection of children’s human rights demands in the sphere of intercountry adoption. The ramifications of this lack of consensus for the sale of children and other illicit practices underlying illegal adoptions are discussed later in this study.

4.C. CURRENT CONDITIONS FOR A “PERFECT STORM” IN INTER-COUNTRY ADOPTION

As David Smolin puts it in his Foreword to the “Grey Zones” study, “a large proportion of intercountry adoptions [...] arise in circumstances where there have been severe violations of the rights of both children and adults, due to poverty and/or discrimination based on disability, gender, race, or ethnic group. Thus, where children’s rights and human rights are respected and successfully implemented, there are very few children legitimately in need of adoption. Further, while adoption is theoretically a means to ameliorate rights deprivations and to implement the best interests of the child, as actually practiced it easily becomes driven by the desire of adults for children, and by financial incentives. Thus, there is a severe temptation to create systems which use intercountry adoption to address problems such as poverty and discrimination, when from a child rights and human rights perspective it should be mandatory instead to remedy the underlying rights and equality violations” (Fuentes, Boéchat, & Northcott, 2012, p. 3).

A sizeable majority of significant countries of origin are now parties to the 1993 Hague Convention. On acceding to the treaty, and seeking to comply with the obligations it sets out, these countries generally take measures that directly or indirectly reduce recourse to intercountry adoption for their children, including the more systematic application of the subsidiarity principle. As their number has grown, therefore, so the number of “adoptable” children has

fallen. Sometimes this has led to a drastic reduction in intercountry adoption numbers, as in the cases of China and Madagascar, for example.

The downturn of worldwide intercountry adoption numbers began as of 2004; from their peak of 45,383 in that year, they steadily fell to just 12,000 in 2015, representing a drop of over 75% (Selman, 2017). This sustained and massive decline has progressively led to an “intercountry adoption landscape” for which no one – prospective adopters, agencies and Central Authorities – was in the slightest prepared. That is in good part why the present situation is one of high risk for illegal adoptions.

It may seem paradoxical that a decline in intercountry adoption numbers – and thus of the numerical significance and overall impact of the measure – should be cause for special concern today in terms of illicit practices. There are, however, several reasons for considering that we now need to confront the multi-faceted conditions of a “perfect storm” as regards illegal adoptions – both despite and because of the decline in the number of children being adopted abroad.

The five following phenomena, developed in more detail later in the study, can be highlighted among those reasons.

4.C.i. “DEMAND” AND “SUPPLY”

Effective demand involves not just harbouring a wish but having simultaneously the desire, means, willingness and opportunity to secure something under given conditions. The demand for adoption from

abroad is increasingly inhibited in its “effective” form by its final component, “opportunity”, because of the decline in the number of “adoptable” children. That frustrated demand is therefore forced to become “latent”, but when an opportunity arises it will be expressed.

The increasingly limited legal “supply” of children for adoption abroad sets the scene for attempts in countries of origin (though in liaison with actors in receiving countries) to provide that missing link of “opportunity”. This is a context where illegal adoptions can flourish if effective action is not taken.

4.C.ii. AGENCIES FIGHTING FOR SURVIVAL

Non-State bodies have always played, historically and rather uniquely, a pivotal role in this “public child protection measure” (HCCH, 2012a). Most are dependent to a greater or lesser extent on income derived from fees paid by prospective adopters. It follows that, when “opportunities” for intercountry adoption decline, those that are most dependent on such fees are fighting for survival – indeed several have had to disband because of the current context. There is a clear risk that the “survivors” may be drawn into seeking children for their clients at (almost) all costs. The head of one adoption agency has indeed expressed his concern that the most professional and ethical agencies might be among the first to disappear because they would not be willing to take that course (Gudim, 2014).

Another effect of agencies being increasingly poorly-resourced may be that they are unable to provide a desirable level of professional service and support

including, with specific reference to the subject of this study, adequate responses to concerns over suspected illegal adoptions. This issue is all the more important in relation to the increasingly prevalent adoption of “children with special needs” (see below). Arranging the adoption of these children requires appropriate professional expertise and experience either within or immediately available to the agency as a vital component of that agency’s task as a service provider.

4.C.iii. INCREASING FEES AND COSTS

Because of the above and for other reasons linked essentially to the growing disconnect between “supply” and “demand”, the overall cost of an intercountry adoption that agencies charge to prospective adopters has steadily increased – including the part thereof to be disbursed in the country of origin. Some countries of origin are indeed taking advantage of the situation by setting increasingly burdensome financial conditions for adopting their children.

This is clearly an additional reason for financially-motivated actors to take advantage of the system, either by inserting a procured child into that system or by “cloning”, influencing or exploiting the system at various stages.

4.C.iv. PRIORITY TO CHILDREN WITH “SPECIAL NEEDS”

More and more countries of origin are giving priority for intercountry adoption to children designated as having “special needs”. This terminology has different precise interpretations from one country to another. It usually refers to disabilities

and other medical conditions (minor, correctable, more severe, specified or not), age (above 5 years or an older threshold) and sibling groups (of at least two or three).

In the context of the present study, the only relevant consideration concerns the possible effects of these policies on the likely incidence of illegal adoptions. This impact must not be under-estimated. Most prospective adopters are understandably looking for young healthy children. When no such children are “available”, some are clearly persuaded, reasonably or not, to adopt children with “special needs”. As regards the remainder, however, two responses of particular concern have been observed as a result of incentives to “enable” intercountry adoptions by all means.

One such response is to provide access, upon payment of an additional “unofficial fee”, to a select list of children without special needs or with other characteristics that may correspond better to the desires of the prospective adopters. The other is to secure a medical certificate that unwarrantedly attests to a child’s “special needs” so that he or she may be “prioritised” for intercountry adoption – in some cases including because the child will be rejected for domestic adoption on that basis.

What is at stake in this regard can be illustrated by statistics for intercountry adoptions into France for 2015: every single adoption from Brazil (20/20), Chile (8/8) and Ukraine (5/5) was designated as “special needs”, as were almost all from Vietnam (98/108) (Ministère des Affaires Étrangères, 2015a, p. 19).

4.C.v. RECOURSE TO NON-HAGUE COUNTRIES OF ORIGIN

While all major receiving countries today are parties to the 1993 Hague Convention, this is not the case for all currently significant countries of origin. In response to the pressure created by the increasingly unsatisfied expectations of prospective adopters, Central Authorities in a number of receiving countries have at different moments strengthened efforts to develop adoptions from non-Hague countries of origin where regulations and procedures may be less strict.

Although non-Hague adoptions seem overall to be gradually declining as a percentage of the total, even today they still account for more than a third of the annual totals to many receiving countries: the French-speaking region of Belgium reports approximately 40%, France 37.7%, and the USA 35.5% (Belgian Central Authority, 2016; Ministère des Affaires Étrangères, 2015; US Department of State, 2015b). Sweden reports a proportion of “about one-third” (Swedish Central Authority, 2016). Figures for the Netherlands, however, show a lower percentage, with a fall from 33% in 2011 to just 23% in 2015 (Dutch Central Authority, 2016).

Taking advantage of arranging adoptions from countries that do not wish or are unable to commit to the 1993 Hague Convention clearly involves enhanced risks in terms of illegal adoptions.

PART 5: RECOGNISING AND TACKLING THE “ENABLING ENVIRONMENT” FOR ILLEGAL ADOPTIONS

To the extent that they have been recognised at all, illicit acts leading to illegal adoptions – such as those listed in Box 1 – have too often been viewed and treated essentially as ad hoc or organised criminal activities committed by individuals or groups. As a result, responses to widespread problems of these kinds have largely failed to re-establish confidence in the intercountry adoption process after such problems were discovered.

What has not been tackled – with sufficient candour, vigour and political will, at least – is the fact that former and current State policies – on both the “receiving” and “origin” sides – enable and even condone or promote these acts. In many cases, States themselves are the direct beneficiaries of “unreasonable” financial conditions imposed. Moreover, as long as it is accepted that the cost of legal adoptions is in the realm of tens of thousands of dollars, it is almost inevitable that sums of that ilk will prove irresistible to those willing to procure children for intercountry adoption under conditions better able to meet “demand”, whatever the system and safeguards in place.

Under those conditions, the apparent inability of several countries of origin to

put in place appropriate legislation and credible systems and procedures to satisfy Hague requirements takes on a new light. The long-standing reluctance or refusal of some countries of origin to accede to the 1993 Hague Convention similarly raises questions as to who may be benefitting from the non-compliant system in place. But it also brings to the fore another question: how far are receiving countries prepared to go, individually and collectively, in making their vital contribution towards eliminating the sale of children and associated illicit practices that distort the whole purpose of adoption and have plagued intercountry adoption in particular?

The focus of responses so far has been on legislation, structures and procedures to “contain” the problems associated with current practice. From now on, it has to be the elimination of the root causes of those same problems: “effective demand” that is allowed to outstrip “natural supply”, and the illogical and unusual financial implications of being willing to care for a child through adoption.

This part of the study examines the factors behind those situations where illicit practices constitute a special challenge.

5.A. FACTORS INCREASING GENERAL VULNERABILITY

Conditions in most countries of origin render certain groups of their population particularly vulnerable to the initiatives of those seeking to procure children for adoption. These conditions are many and vary considerably in nature. Not all apply to every country of origin. The following are some key examples of conditions that can constitute an enabling environment for illegal adoptions.

- **vulnerability and marginalisation of given groups such as ethnic minorities**
- **discrimination towards single/unwed mothers**
- **vulnerability due to poverty**
The Guidelines for the Alternative Care of Children specify that financial and material poverty alone, or conditions directly and uniquely imputable to poverty, can never be invoked as sufficient justification for placing or receiving a child in alternative care (and logically all the more so where adoption is concerned) (UN General Assembly, 2010). Poverty rather than “orphanhood” is nonetheless still cited as the main reason for which children come into care and “require” adoption.
- **lacunae in birth registration/civil registry systems**
In many countries of origin, birth registration rates are extremely low (e.g. Liberia 4%, Ethiopia 7%, and Uganda 30%) (UNICEF, 2013). Even where rates are higher (e.g. Cambodia 66%, Haiti 80%), a significant proportion of children – invariably those in marginalised or underprivileged groups – are made even more vulnerable to sale and illicit practices

because they have no officialised identity.

- **legislation facilitating relinquishment or abandonment**
It is interesting that, as noted previously, the legislation of Guatemala – which has a very high birth registration rate of 97% – made the recognition of abandonment far more difficult than that of relinquishment, leading to “relinquishment” being the preferred channel for securing illegal adoptions (UNICEF, 2013). In contrast, Nepal, which has the much lower rate of 42% (and just 36% in rural areas) makes it easier to secure a certificate of abandonment than one of relinquishment, so the problem of illegal adoptions from that country have been linked almost entirely to false declarations of abandonment.
- **Inadequate protection system**
Prevention of family breakdown through, for example, formal support systems and the promotion of informal kinship care arrangements is often lacking, meaning that families in difficulty are often easily persuaded to relinquish their child. Equally, child protection staff are too few in number and under-resourced (in terms of both salary and the means to conduct their work) to systematically safeguard children’s rights in relation to alternative care and adoption. These problems are reflected in the words of former EurAdopt Chairperson Maria Doré: “Intercountry adoption may be a desirable outcome when the child protection system in the country of origin is working properly” (Doré, 2016). This is a telling statement on behalf of the community of adoption agencies. It is precisely from countries

where those services are weak that an increasing proportion of children adopted abroad are coming. As a result, there is a heightened risk that necessary safeguards will not be in place and that children will be placed for adoption unjustifiably and through illicit practices.

- **adoption is an unfamiliar practice**
In many societies – especially, but not only, in Africa and Asia – the concept of formal full adoption is unknown or barely known in practice, even when it figures in the national legislation. The word “adoption” – to the extent that it even exists in a language – may be used as the equivalent of care by kith or kin. This has two key ramifications. First, in these societies, intercountry adoption clearly cannot be made subsidiary only to domestic adoption as such. Second, the definitive and total rupture of family relations that intercountry adoption implies is inconceivable to families in these communities, so they are more easily manipulated into accepting or consenting to a measure whose consequences they cannot fully grasp.
- **domestic adoption is not facilitated or prioritised over intercountry adoption**
Even in countries where adoption is more familiar, there are often no serious attempts to promote and facilitate it domestically. Although the fees and costs will usually be only a fraction of those set for intercountry adoption – which itself leads to children being “reserved” for the lucrative intercountry path – they can still be prohibitive for almost all the country’s citizens. The adoption process may also be complicated and burdensome, involving for example

multiple trips to the capital or elsewhere. This clearly discourages many potential domestic adopters, leaving the children concerned to be “available” for adoption abroad.

- **the alternative care system relies essentially on privately-run residential facilities**
The link between the risk of illegal adoptions and the reliance on privately-owned residential facilities as the only or main available form of formal alternative care for children has long been demonstrated in many countries including Cambodia, Ethiopia, Haiti, Liberia and Nepal. A senior official in Uganda notes, for example, “a number of unethical practices linked to the establishment and operation of children’s and baby’s homes, and the process of adoption [including] a deliberate recruitment of children from within the community into child care institutions with prospects of financial gain through adoption and legal guardianship; and relinquishment of parental responsibility under false/pretentious circumstances” (Karooor Okurut, 2014). When the State is not the main provider or financier of alternative care, it will likely not have the resources to ensure necessary monitoring and inspection of the privately-run facilities either. In Uganda, the number of the latter rocketed from just 36 in 1993 to 560 officially known facilities in 2015, with upwards of 200 others in operation “off the radar” (Kyagulanyi, 2016). The problem can be compounded when facilities are – as is often the case – funded by foreign bodies, often with links to intercountry adoption.

- **a poorly paid and under-resourced civil service**
When civil servants – including law enforcement officials and the judiciary – receive poor remuneration and work under difficult material and logistical conditions, the risk of corruption grows considerably. This can result in “unofficial fees” for “expediting” the issuance of documents, for example, or in payments for their falsification or for blindly rubber-stamping papers at different steps of the adoption process, as evidenced in many countries in the past, including Cambodia and Kazakhstan.

The glaring problem is that too often, even in its “legal” form, intercountry adoption mediation has actually taken advantage of conditions such as these, rather than recognising and addressing them. This makes it all the easier for those involved in illicit practices to do likewise and thus to “melt” almost seamlessly into the adoption process.

The final, and special, factor considered here is the question of adoptions in emergency or post-emergency situations, and it indeed clearly highlights how conditions of vulnerability may be used to the advantage of illicit practices in adoption.

5.B. SALE OR ILLEGAL ADOPTION IN ARMED CONFLICT AND NATURAL DISASTERS

In recent decades, virtually unanimous agreement has developed in the international child protection community that a moratorium should be placed

on adoptions, both domestic and intercountry, in the immediate aftermath of emergency situations.

There are two key reasons for this stance. First, children often become separated from their families and communities as a result of such events, and might therefore unwarrantedly be seen as “adoptable” before necessary and feasible tracing efforts have been carried out and exhausted. Second, the capacity and influence of competent authorities are frequently diminished – sometimes severely so – in such circumstances: rule of law cannot be assured, vital documents and archives may have been destroyed, and a wide variety of largely unsupervised actors may be operating.

The response to the devastating December 2004 tsunami seemed to confirm that consensus. The Authorities of the main affected countries immediately barred the cross-border movement of children. Intergovernmental organisations such as UNICEF and the HCCH joined with concerned non-governmental bodies such as ISS and Save the Children in issuing strong statements against any attempt to remove children for adoption abroad. Several receiving States made it known that they would not process any applications to adopt children from the countries in question.

Just five years later, however, reactions to the January 2010 earthquake in Haiti demonstrated the clear limits to willingness to maintain that consensus in practice. As a result, even minimum safeguards against illegal adoptions were abandoned.¹⁹

¹⁹ For a full descriptive analysis of adoptions from post-earthquake Haiti, see: Dambach & Baglietto (2010)

When the earthquake occurred, unlike the countries affected by the tsunami, Haiti was already a very significant country of origin for intercountry adoptions. As of 2008, it had become, for example, by far the most important country of origin for French adopters. In addition, the annual number of intercountry adoptions had bucked the worldwide trend of decline after 2004 (overall figures for Haiti that year were 1,082, and rose to 1,205 in 2009). Consequently, there were many hundreds of adoptions at some stage of the process when the earthquake struck.

This buoyant situation is in good part explained by the fact that, at the time, Haiti was not party to the 1993 Hague Convention, a fact which allowed it to maintain an adoption system and process that was widely recognised as, at best, wholly inadequate for preventing illegal adoptions.²⁰

It was therefore against this dual background of high “effective demand” and a system that had undeniably long been “tolerating” illegal adoptions that, in the immediate aftermath of the earthquake, several receiving countries presented their desire to “expedite adoptions” to the severely weakened Haitian Authorities. While the latter set conditions for intercountry adoptions that were tantamount to the temporary suspension of “new cases”, they agreed to two provisional measures – with, in practice, regrettable implications. The first was a presidential announcement that “only children for whom the intercountry adoption process had been engaged, i.e. a regular adoption procedure, may be considered for intercountry

adoption”. This was considered to be more a statement to appease the international community than a decision with intrinsic juridical value in Haiti. In particular, the term “process... engaged” (“*processus... entamé*” in the original French-language document) was vague enough to be interpreted in some quarters to include, for example, children deemed to be “adoptable” but not having been matched with adoptive parents, let alone with an adoption order from the court.

The second was the requirement that the Prime Minister sign off on all intercountry adoptions. In no way could this be seen as an effective child protection safeguard, all the more so where hundreds of adoptions were being “submitted for approval” within a matter of weeks of the disaster.

What followed was the “emergency” transfer abroad of hundreds of children whose adoptions were “expedited”, not in the sense of the process being speeded up but in that of the normal legal procedures and safeguards being circumvented. Within less than a month of the disaster, at least 450 children had been the subject of “expedited” transfer abroad. Neither the Haitian Authorities nor those of the receiving countries were able to verify the true family status of those children – an essential step given the incidence of manipulation, fraud and undue payments that characterised adoptions from Haiti at that time.

It will never be possible to determine what proportion of the “expedited” adoptions resulted from the sale of children or other illicit practices. However, since

the system in place in “normal” times before the earthquake in no way fulfilled international standards, disregarding even the minimal protections it provided was more than questionable.

In an earlier case, the Rwandan Authorities sought the return from Italy of a group of 41 children who had been “evacuated”, without parental or family consent, from the country in the wake of the 1994 genocide and were adopted by families in a northern Italian town in 2000. It was found that the adoptions had taken place without due procedures being followed, and notably without the consent of family members (virtually all the children had at least one parent or close relative willing and able to look after them) and the Rwandan Authorities (Human Rights Watch, 2003).

In light of all the above, it was therefore some consolation to see that Nepal – already the subject of a general moratorium on intercountry adoptions imposed by receiving countries – announced on 26 May 2015, four weeks after the earthquake that had hit the country, that it was prohibiting all adoptions, whether domestic or intercountry, until further notice. The reasons given were to enable the reunification of families separated by the earthquake and to avoid any child trafficking.

5.C. ENABLING FACTORS THAT EXACERBATE ILLEGAL INTERCOUNTRY ADOPTIONS

Whatever efforts may be made to mitigate, rather than take advantage of, the various

features of an “enabling environment” for illegal adoptions, described above, they are frequently thwarted by deliberate acts that actually tend to reinforce that environment and magnify its enabling effects in favour of illicit practices.

The following are examples of such acts which variously involve, ignore, tolerate, explicitly permit, encourage or impose practices that perpetuate or accentuate a context favourable to illegal adoption.

5.C.i. INITIATIVES TAKEN AND PRESSURE EXERTED BY ACTORS IN RECEIVING COUNTRIES

To the knowledge of the author, over the past four decades there are no documented cases of a potential or actual State of origin spontaneously requesting the adoption of its children abroad – on the contrary, many countries of origin have expressed concern at the pressure to which they have been subjected to make children available for this. It follows that the development of intercountry adoption has in principle taken place solely at the initiative of actors in receiving countries.

One example of this, which is similar to the experience of many countries worldwide, is the way that intercountry adoption began and went on to develop in Cambodia.

In June 1987, eight years after the ousting of the Khmer Rouge regime, the Cambodian Council of Ministers issued a decision allowing the adoption of infants and children abroad (SSR, 1987). This seems to have been mainly a response to requests – whatever their validity – made by staff members of international

²⁰ See for example the UK statement regarding a moratorium at 4.B.ii above.

organisations who were working in Cambodia and who, on ending their mission, wished to return home with an adopted child.

These “individual adoptions” continued discreetly at first. In 1990, it was reported that “the intercountry adoption of children is now apparently being allowed from Cambodia. The country has no legislation on this practice, and it is feared that certain development aid agencies are encouraging the Cambodian authorities to use their services for out-of-country placements. Case-by-case authorisation is reportedly given by the Council of Ministers without there being any proper system for safeguarding the rights and interests of the children” (DCI, 1990, p. 19).

However, the 1989 law on marriage and family had set the basis for regulating adoption, and this came into being through a Council of Ministers document issued in March 1991 (Council of Ministers, 1991). The document specified the conditions for adoption by foreign citizens (Committee on the Rights of the Child, 1998, para. 113), but by August that same year, the Government of Cambodia had reportedly “frozen” intercountry adoptions (US Department of State, n.d.).

At a regional meeting in April 1992, the then Deputy Minister for Foreign Affairs of Cambodia stated: “We receive more and more requests regarding intercountry adoption. There have been 87 such adoptions authorised to date, the majority going to the USA,²¹ with France as the second biggest receiving country. One US-based agency wanted to take out 20 or

30 children, but we refused. We are not absolutely against intercountry adoption under appropriate conditions, but there is reluctance to engage in it. The population of Cambodia has fallen to 8 million and we need our children for the country’s future” (Visalo, 1992, p. 24).

According to the Cambodian Authorities, 163 “orphans” were adopted by foreigners between 1987 and 1994 (Committee on the Rights of the Child, 1998, para. 115) – thus, apparently, some 76 between April 1992 and December 1994, despite the reported moratorium (see above). The Government admitted that “[a]doption in Cambodia is not yet well organized. In particular, internal domestic procedures are not clear and the system of information on adoptive families and adopted children is not efficient. The State is considering the advisability of amending the law and formalities pertaining to adoption” (Committee on the Rights of the Child, 1998, para. 117).

After a short apparent lull, “in 1997, there [was] strong interest in child adoption from Cambodia [by] people from France, America, Canada, Australia and Germany” (Cambodia Central Authority for Inter-country Adoption, n.d.). Indeed, a significant increase in adoption numbers was noted as of that year, a fact partly attributed to “transferred demand” resulting from the 1996 suspension of intercountry adoptions from neighbouring Vietnam. “In 1998 international adoptions from Cambodia, including adoptions to the United States, increased dramatically. Over a four year period (1996-2000) [annual] adoptions to the U.S. increased from 30 to

402 (Bureau of Consular Affairs). These adoptions occurred haphazardly, were generally unregulated and children came into care without the protection of proper legal procedures” (Holt International, 2005, p. 4). A total of 319 went to France from 1995 through 1999 (French Central Authority, 2016).

When Romania was envisaging the prohibition of intercountry adoption after the turn of the century, the then head of the Italian Central Authority stated that the new law would “not be a problem for Italian families, who will go elsewhere to secure an adoption” (Cavallo, 2004).

The Authorities of certain receiving countries often take it upon themselves to make a direct pitch for more children to be made available for adoption, through official missions to countries of origin that might respond positively. At one point (in 2004), for example, the French Minister for the Family travelled to Vietnam and China to meet his counterparts with the explicit aim of fulfilling the “humanist ambition” of doubling the number of intercountry adoptions to France (“Un plan pour doubler”, 2004). In FY 2015, the Special Advisor for Children’s Issues at the US Central Authority travelled to 15 countries “to support the Department of State’s efforts regarding intercountry adoption” (US Department of State, 2015a). The perception of initiatives such as these will understandably be that they are placing pressure on the countries concerned.

5.C.ii. RECOURSE TO NON-HAGUE STATES OF ORIGIN

As noted previously, as a result of the decline in the number of children placed

for adoption in countries of origin that are parties to the 1993 Hague Convention, actors in receiving countries seek children for adoption from non-Hague countries. The ramifications of such initiatives in terms of the risk of inducing illegal adoptions are considerable and serious.

- INHERENT DANGERS

The greatest danger in most cases stems from the very reasons for which the country in question is not a State party to the 1993 Hague Convention. Questions posed by the Swedish Central Authority are pertinent here: “Is it because its legislation and administration fall short of the fundamental principles of the Convention? Is there something in the Convention that the country is negative towards and does not want to adhere to?” (Swedish Intercountry Adoptions Authority, 2015, p. 42). To which can be added, in particular, “Does the non-Hague status quo in a country of origin serve the financial interests of certain groups or persons involved in intercountry adoptions?”

The resistance to Guatemala’s accession came notably from lawyers, and to that of Haiti from the crèches and other parties, for example. That resistance was grounded essentially in the desire of those concerned to retain the privileged position and income from which they were able to benefit outside the Hague framework. Proposals to allow Ukraine to accede to the Convention have been presented by the Authorities at least three times to the Rada (Parliament) but have so far been forcefully and successfully opposed on each occasion.

Whatever the reasons for non-accession, the system in place in a non-Hague

²¹ According to the data of the US Department of State, 60 intercountry adoptions from Cambodia to the USA were recorded in 1991, but none was recorded in either 1990 or 1992.

country of origin is therefore unlikely to be able to provide the full panoply of necessary and adequate protections.²² As many examples in the present study show clearly, in such circumstances the risk of child procurement and illegal adoptions is very high. As also described elsewhere in this study, the already high general risk becomes to all intents and purposes a certainty if the number of submitted and successful applications to adopt is allowed to surge rapidly.

- BILATERAL AGREEMENTS WITH NON-HAGUE COUNTRIES

Receiving countries have often sought to mitigate these risks by drawing up bilateral agreements with non-Hague countries, and in some cases the latter have also requested or required accords of that kind. Experience has shown, however, that such agreements may fail to set adequate and comprehensive standards, dissuade accession to Hague, and tend to “cement” cooperation on a relatively long-term basis regardless of need.

In 2015, the Swedish Central Authority (formerly MIA) carried out a thorough analysis of the potential positive and negative ramifications of drawing up tailored agreements with non-Hague States. In its report on that exercise, MIA (now MFoF) notes that it “shares the concerns that have been expressed regarding the disadvantages of entering into agreements with non-Hague countries. Agreements with non-Hague countries may expose the child and its rights to risk. Only if very good reasons are presented should such agreements be considered. And if they are,

they should correspond to the fundamental principles of the Hague Convention so as to attain the ‘Hague standard’ for the adoptions. Agreements that do not correspond to or indeed work against these principles; for example, by including requirements of financial assistance to the State of origin, must not be concluded” (Swedish Intercountry Adoptions Authority, 2015, p. 33).

The MIA report points out the “real risk of bilateral agreements cementing a partnership between countries. This may result in a country of origin experiencing pressure to put up children for adoption. If this risks resulting in biological parents not receiving the support they would otherwise have gotten in order to be able to keep their children, or that the principle of subsidiarity is not taken seriously enough in the country of origin [...] this entails risks for the rights of the child and the biological parents. [...] If the purpose of agreements is purely to meet “the demand for children” in the receiving countries, this is very serious. According to MIA’s assessment, this represents a clear threat to the rights of the child as well as its biological parents’ rights” (Swedish Intercountry Adoptions Authority, 2015, p. 41).

The report also pinpoints “a risk that States that are not party to the Hague Convention will fail to accede if they can instead cooperate within the framework of bilateral agreements adapted to the conditions in their own country. However, there is a danger that the agreements do not assure the child, the biological

parents and adoptive parents the same protection as the provisions of the Hague Convention. There is also a risk that such agreements will not be comprehensive or detailed enough to cover all the prerequisites for the adoption procedure to meet the required standard. [...] Sweden and other receiving countries that have acceded to the Hague Convention have an ethical obligation to ensure children from non-Hague countries the same legal protection as children from Hague countries. This is in line with the recommendation of the 2000 Special Commission in The Hague to apply the same standards and safeguards to adoptions from both Hague countries and non-Hague countries” (Swedish Intercountry Adoptions Authority, 2015, p. 42).

Finally, the case of Ireland is noteworthy in that its 2010 Adoption Act prohibits adoptions from non-Hague countries of origin unless a bilateral agreement is in place. No such agreement is operative at present, and therefore only one (pipeline) non-Hague case was processed in 2015 out of a total of 85 that year (Irish Central Authority, 2016).

5.C.iii. RELATIONSHIPS BETWEEN CARE FACILITIES AND ADOPTION AGENCIES

Any adoption system that requires, creates or allows a special relationship between an adoption agency and a child care facility – even one that ostensibly may not involve a financial element – issues an open invitation to egregious malpractice. The risk is even higher when adoption agencies have arrangements or agreements with specific care facilities and/or are the main or only source of

funding for those facilities. This was borne out in Ethiopia, for example, where ISS noted with concern already in 2010 that “there was information suggesting that there were an increasing number of unaccredited orphanages and transition homes, usually operated by international agencies from which children can be directly adopted” (Fuentes et al., 2012, p. 92).

Prior to acceding to the 1993 Hague Convention in 2013, and as in a number of other countries – including, but by no means limited to, Liberia and Vietnam – Haiti had in place a system that allied privileged direct working relationships between agencies and “crèches”, money transfers and the attribution of unusual powers to the private childcare facilities involved. The unsurprising result was a sanctioned system of illegal adoptions. Thus, for example, three US agencies boasted an arrangement with a specific “crèche” that, according to the website of one of them, was “able to expedite the adoption process” for a fee of US\$ 16,000 “compared to the standard US\$8,000 to US\$9,600 the other orphanages in Haiti charge. However, because this particular orphanage is able to expedite the adoption process, cases are usually completed in 12 to 14 months rather than the normal 18 to 24 month timeline” (WIAA, n.d.). Now, there is no mention of expedited adoptions but that agency’s “foreign fee” for an adoption from Haiti varies from US\$ 13,000 to US\$ 15,000 “depending on orphanage” (WIAA, n.d.), even though the Haitian Central Authority charges a large compulsory flat sum for child care during the adoption process (see under next section).

²² According to both the Australian and Swedish Central Authorities, exceptions here can validly be made for South Korea – which has signed the 1993 Hague Convention and is preparing ratification – and Taiwan where procedures are deemed to be Hague-compatible but the country is prevented from becoming a State party to the treaty in light of its international diplomatic status. (Communications of June 2016 on file with the author)

Other financial arrangements between agencies and residential facilities are discussed in the section below in the overall context of payments for child care.

5.C.iv. FINANCIAL TRANSACTIONS IN “LEGAL” INTERCOUNTRY ADOPTIONS

According to research conducted by the Donaldson Adoption Institute in the USA, “more than two thirds of the adoption community believe privilege and money distort adoption” (The Donaldson Adoption Institute, 2016). This section of the study looks at probably the most significant way that the “enabling environment” for illegal adoptions is fostered by decisions and acts of both countries of origin and receiving countries. It concerns their attitude to the way that money is involved in a “legal” intercountry adoption. Overall, it aims to demonstrate three things in particular:

- that countries of origin - both Hague and non-Hague - variously require, invite or accept substantial amounts of money from prospective adopters and/or their agencies that are not justified by services connected with the adoption process but will inevitably or very probably influence that process
- that receiving countries - all of which are Hague - are often prepared to accept, or to find ways that allow them to accept, such conditions in order to enable their citizens to adopt from a given country
- that - and of particular importance in the context of the present study - the substantial amounts of money thus “agreed” for a “legal” intercountry adoption in the country of origin are such that third parties are strongly

incited to profit to an equal degree from those arrangements through the procurement of children for “illegal” intercountry adoption

The clear exposition of the arguments in this section is challenging. Many of the relevant issues overlap and terminology used by information sources is not necessarily consistent. However, the attempt is made here to deal with them, *grosso modo*, under four basic categories:

- payments to an official body in the guise of “development” or “humanitarian” aid
- payments to a residential facility for the care of the child awaiting adoption or as general support for that facility
- payments to professionals involved in the adoption process, whether by law or by “necessity”
- payments that are known to be required but are not codified

5.C.iv.a. PAYMENTS TO AN OFFICIAL BODY IN THE GUISE OF “DEVELOPMENT” OR “HUMANITARIAN” AID

The HCCH Guide to Good Practice No 1 notes that development/humanitarian support to countries of origin “should not be offered or sought in a manner which compromises the integrity of the intercountry adoption process, or creates a dependency on income deriving from intercountry adoption. In addition, decisions concerning the placement of children for intercountry adoption should not be influenced by levels of payment or contribution. These should have no bearing on the possibility of a child being made available, nor in the age, health or any characteristic of the child to be

adopted”. In its Concluding Observations to Spain, for example, the Committee on the Rights of the Child recommended that the intercountry adoption process be clearly differentiated from any aid programme in countries of origin (Committee on the Rights of the Child, 2010). The Committee thereby emphasised the underlying risk of corruption and other illicit activities that can develop when there are such programmes in conjunction with intercountry adoption.

The Australian Central Authority notes that the primary concern leading to its suspension of adoptions from Ethiopia (a non-Hague country) was “the linking of community development projects to the referral of children to the program.” It notes “stronger demands [made] for community development assistance to be delivered in the region from which children would have been adopted. This made it increasingly difficult for the Australian Government to ensure such assistance would be delivered in a way that maintained an appropriate separation between the program and children referred to it for intercountry adoption. Such separation was needed in order to avoid the unintentional effect of encouraging communities to relinquish children for adoption” (Australian Central Authority, 2016). A EurAdopt agency regrets that, to continue working on adoptions from Ethiopia, it “feels bound to contribute to development projects involving local authorities and orphanages requested by the Authorities” (EurAdopt, 2016). US agency Wasatch, for example, charges prospective adopters US\$ 1,500 for “Humanitarian Aid” under its Ethiopia programme (WIAA, 2016).

The listing of current (2016) fees charged for adoptions from Haiti by one of the US accredited agencies includes an item called “humanitarian aid account” to which US\$ 1,500 are due from prospective adopters (All Blessings International, n.d.).²³ There is no equivalent item or cost in the official “Table of Costs of Adoption” issued by the Haitian Central Authority, so the question must be raised as to why an additional “humanitarian aid” fee should be charged and who is to be the beneficiary.

The current situation regarding Vietnam is disturbing because the country is now a State party to the 1993 Hague Convention. Moreover, the new requirements now in place are all the more preoccupying in light of that country’s pre-Hague experience in the first decade of this century.

A major report prepared by ISS for UNICEF in 2009, and co-published with the Vietnamese Ministry of Justice, clearly established that one of the major factors underpinning the sale of children into intercountry adoption, and analogous illicit practices, in Vietnam in the 2006-2009 era concerned “the systems and regulations [...] in place regarding financial issues and arrangements with agencies” (International Social Service, 2009, p. 44).

At that time, agencies were required to contribute substantial sums as “humanitarian aid” in order to have the right to mediate adoptions from Vietnam (which was not then party to the 1993 Hague Convention). These sums also determined the number of adoptions

²³ This “humanitarian aid” is on top of the sum of US\$ 6,200 for “child care” that is effectively an officially required payment.

that each agency could mediate. Each prospective adopter from Ireland, for example, had to pay no less than US\$ 8,000 (raised to US\$ 9,000 in 2008) as “humanitarian aid”. The amount of this “contribution” was negotiated (and renegotiated) directly between the Irish agency and the authorities of the Vietnamese Province from which it was mediating the adoptions. There was no written record of the discussions or decisions from those meetings; the money was essentially handed over in cash, hence immediately becoming untraceable.

In 2008-2009, Ireland was among the three receiving States (the others were Sweden and the USA) that suspended adoptions from Vietnam. In so doing, Ireland denounced in particular the financial requirements imposed by Vietnam on prospective adopters and their agencies, demanding “a total separation” between intercountry adoption activities and “aid”. Since Vietnam’s accession to the 1993 Hague Convention and its own ratification of the treaty, Ireland has re-established cooperation. The same agency has been accredited and approved to mediate adoptions from that country. The agency is permitted, by the Irish Central Authority, to charge every adopter € 2,840 for “development aid” (Adoption Authority of Ireland, 2016). To justify its decision to allow this, the Irish Central Authority states that “there can be no direct connection between the development aid and the adoption of a specific child” and “if an accredited body has a project with a particular VN Province, applicants using the accredited body will not receive a proposed placement from that province” (Adoption Authority of Ireland, 2016). This justification obviously fails to address

the key fact that prospective adopters will certainly receive a child from somewhere if they provide the “development aid” demanded and, even more significantly, that they certainly will not if they refuse. In other parlance, that would be known as purchasing children.

For its part, Sweden agreed to re-establish cooperation with Vietnam in 2013, without signing a bilateral agreement. The two countries also agreed that “if an adoption organization provides a development/humanitarian support program, it must be separated from adoption intermediation” (Swedish Central Authority, 2014). Swedish agencies are legally prohibited from providing development aid and humanitarian assistance if this is linked to the adoption process. The “development aid” requirement of the Vietnamese Authorities can be met by the Swedish accredited agency for Vietnam, however, since it has long been implementing international development cooperation projects there through a foundation that is part of that same agency (Adoptions Centrum, n.d.). While this formally constitutes “separation from adoption mediation” as such, it still links the provision of aid to the overall right to engage in mediating the adoption of children from Vietnam.

Concerns as to the present system in Vietnam relate not only to “development aid”, however, but also to payments to residential facilities for children (see below).

5.C.iv.b. PAYMENTS TO A RESIDENTIAL FACILITY FOR THE CARE OF THE CHILD AWAITING ADOPTION OR AS GENERAL SUPPORT FOR THAT FACILITY

Several EurAdopt agencies and several Central Authorities have expressed serious concerns in particular about “expected” payments made to children’s residential facilities in Vietnam. These concerns seem to focus mainly on facilities caring for children designated as having special needs, whose possible adoption is in principle prioritised and is dealt with at Provincial level (the Vietnamese Central Authority deals directly with matching the relatively few “healthy” children now deemed to require adoption abroad).

According to one Central Authority, since “orphanages” in Vietnam are in a direct working relationship with specific agencies from different countries, they will propose a child on condition that the agency undertakes to donate a negotiated sum (EurAdopt, 2016). One EurAdopt agency regrets not only that this “maintenance fee” is not a fixed amount but also that the sums negotiated are too high in relation to level of services provided and cost of living; in addition it claims that no invoices or receipts are given (EurAdopt, 2016). The same agency states that there are facilitators, not foreseen by the law, that work informally and directly with these residential centres (and not with the agencies). Another EurAdopt agency states that Vietnam “gives points” to agencies according to the size of the “donation” that determine how many children can be adopted.

The above-mentioned Central Authority

states that the agreed amount depends on the degree of competition among the agencies for the child concerned, hence there is in addition an incentive to include particularly-prized “healthy” children unwarrantedly on the prioritised listing of children with special needs. In some cases the negotiated amount is reportedly as high as US\$ 12,000. Some agencies are said to be disguising these transactions as “care costs” for the child between the moment of matching and the granting of the adoption order.

The current Law on Adoption allows for “donations” to care facilities, and the Vietnamese Central Authority’s position is reportedly that, under those conditions, it is therefore not mandated to intervene. In fact, the provisions of a Decree implementing that Law foresee that “domestic, foreign individuals, organisations encouraged to provide humanitarian aid [...] do not request the care centres to give children for adoption; the care centres do not commit to give children for adoption because they received humanitarian aid” (Socialist Republic of Vietnam, 2011, art. 4). The same text appears to prohibit foreign adoption agencies authorised to operate in Vietnam providing direct assistance to care centres authorised to allow children to be adopted overseas.²⁴ In terms of the issues raised by actors in receiving countries, however, certain interpretations of these provisions – and lack of hard evidence that they are contravened – may indeed be used to argue against intervention.

A number of Central Authorities of receiving countries (including

²⁴ This is the author’s understanding of the English version of the Law, provided by the US Central Authority.

Belgium, France and Switzerland) have been attempting to set a “reasonable” maximum amount for such development/humanitarian aid to Vietnam that might be considered ethical in the circumstances (Swiss Central Authority, 2016a). This move seeks only to mitigate the most egregious forms of competition, however, rather than to question the very principle of such aid being a condition for securing an “adoptable” child. The US Central Authority notes that, “as a policy matter, we have encouraged countries of origin to eliminate the practice of requiring contributions” (US Central Authority, 2016), but again this unfortunately does not translate into a refusal to accept their being paid when required.

Here we are once more faced with a situation of totally diverging views on the part of receiving countries (see also “transnational cooperation” under 7.B below), with the result that highly questionable policies and practices developed or tolerated by a country of origin are not contested effectively. In the case of Vietnam, one contributor to this study notes that, alongside the receiving countries that recognise the problem and are making some effort to contain it at least, other receiving countries are variously:

- a) denying the existence of problems by making an artificial distinction between adoption and cooperation (whereas in practice the two are often intimately linked)
- b) similarly denying the existence of problems of this kind, but more especially due lack of awareness and inability to monitor the activities of the agencies under their responsibility

- c) simply leaving their agencies to compete with their peers.²⁵

One EurAdopt agency expresses concern about Ethiopia, where it ended its programme in 2015. It complains that the authorities encouraged support for institutions and organisations taking care of children, but with no clear guidelines as to what amounts would be “reasonable”. The agency says that “this resulted in a very unhealthy ‘competition’ where those who donated the highest amounts of support in practice got most children for intercountry adoption” (EurAdopt, 2016).

Over half of the in-country cost of an adoption from Haiti is a “contribution required by the Central Authority for the care of the related child”, a sum of approx. US\$ 6,100 (at the exchange rate current in August 2014 when it was set in HTG) that it invoices on behalf of the children’s facility in question (IBESR, 2014). This sum – for an unspecified period of care – can be compared to the amount that children’s facilities previously invoiced directly as “care costs” in the pre-Hague era, i.e. from US\$ 300 to US\$ 550 or more per month for the “matched” child until the adoption process was completed. These amounts were already seen as unduly high given the cost of living in Haiti, in addition to clearly inciting such facilities to continue to operate more especially as a conduit for intercountry adoption.

Stuy has noted that, in China at the beginning of this century, “the large cash donation of US\$ 3,000 (increased to US\$ 5,000 in 2009) received from international families made the program attractive to orphanage directors; the

more children an orphanage adopts internationally, the more revenue the orphanage receives” (Stuy, 2014, p. 359). Since that time, the sums involved have increased even further, thus making involvement in adoptions even more of an attractive proposition for those “orphanage” directors.

Thus, according to Holt, its US\$ 15,000 Adoption Program Fee for China currently includes a “mandatory US\$ 5,700+ orphanage donation required by the central authority [which] covers the care of your child prior to adoption” as well as “costs for personnel, administrative overhead, training and education (both in the US and China) [and] child welfare projects in China (Holt International, n.d.). A EurAdopt member agency reports that agencies are formally requested to pay to “orphanages” adoption fees of approximately € 6,600 for each intercountry adoption procedure, and that – thereby confirming the information from Holt above – they are also asked to implement cooperation projects in the framework of “one-to-one” agreements with “orphanages” (referring to the arrangement whereby an agency is paired with a specific orphanage) (EurAdopt, 2016). Another EurAdopt member implicitly confirms an additional aspect of Holt’s information by specifying that its “one-to-one” agreement with an “orphanage” foresees “support through equipment, training, capacity-building aimed at empowering the staff” (EurAdopt, 2016).

China’s “one-to-one” programme also provokes concerns among Central Authorities of certain receiving countries. One goes so far as to qualify it as “very alarming”, viewing it as “against the

Hague Convention and almost like child trafficking. There is a big risk that the number of adoptable children is increasing when countries pay more.”²⁶ For its part, the Swedish Central Authority notes that it is “not possible for a Swedish adoption organisation to participate in a so-called one-to-one project” because the link between the assistance and the adoption process is too close (Swedish Central Authority, 2016).

It is against this background that a particularly positive initiative has been taken by the US Central Authority. In 2016, it published proposed regulatory changes for public consultation, among which was a provision dealing directly with the issue of “care costs”. The proposed amendment aimed “to prohibit accredited agencies or approved persons from charging prospective adoptive parents to care for a child prior to completion of the intercountry adoption process” (US Department of State, 2016b). The US Central Authority motivated its proposal as follows:

“In recent years, accredited agencies and approved persons have begun charging prospective adoptive parents monthly support fees for children where the intercountry adoption process is not complete. In some cases, these fees are significantly higher than the normal costs associated with the care of children in the foreign country. Where institutions can collect large fees for the care of a particular child, an incentive may be created to recruit children into institutions, while also providing a disincentive for expeditious processing of an adoption” (US Department of State, 2016b).

²⁵ Communication on file with the author - anonymity requested

²⁶ Communication on file with the author - anonymity requested.

It may not prove possible, in light of the results of the consultation, to effect this change in relation to US requirements. Whatever the outcome, however, this very clear recognition on the part of the Central Authority of a receiving country of the unacceptable consequences of underwriting “care costs” in this manner both vindicates concerns that have been raised and provides a springboard for future concerted action to eliminate this factor that spawns illegal adoptions.

5.C.iv.c.
PAYMENTS TO PROFESSIONALS INVOLVED IN THE ADOPTION PROCESS, WHETHER BY LAW OR BY “NECESSITY”

In many countries the adoption process is such that, without the services of a lawyer, it is difficult to navigate. In some cases, the involvement of a lawyer is obligatory. Concerns about payments made to professionals indeed focus invariably on members of the legal profession.

As part of its overall fee, the Haitian Central Authority requires agencies (and thus prospective adopters) to pay approx. € 1,600 for the services of a lawyer for each case (IBESR, 2014). One EurAdopt agency expresses concern at the fee charged by lawyers in Kenya (prior to suspension of adoptions) which it quotes at about € 3,000 (EurAdopt, 2016). According to one source, hiring lawyers to deal with intercountry adoption and guardianship cases has been essential in practice in Uganda, and they have been charging as much as US\$ 40,000 (Kyagulanyi, 2016).

5.C.iv.d.
PAYMENTS THAT ARE KNOWN TO BE REQUIRED BUT ARE NOT CODIFIED

The somewhat cavalier attitude that may

be taken by receiving countries in the face of blatantly unethical practices on the part of actors in countries of origin is typified by the following statement by the US competent authorities in 2007. Instead of prohibiting adoptions from Kyrgyzstan on the grounds that, among other documented problems at that time, fees were not transparent and the risk of implication in illicit practices was therefore high, they simply informed prospective US adopters as follows:

“The Kyrgyz government does not officially charge any adoption fees. There are, however, ‘unofficial fees’ that are paid to the Ministry of Education, the courts, the adoption committee and to obtain a new birth certificate and a passport for the child. These fees amount to approximately \$6,000 to \$8,500 per child” (US Department of State, 2007).

In sum, it was considered perfectly acceptable to inform prospective adopters that they would pay very substantial but unspecified sums to State entities that did “not officially charge any adoption fees”, in order to secure a child for adoption from their country. Under such conditions, arguing that serious efforts were being made at that time to combat the sale of children and illicit practices for the purposes of intercountry adoption would seem to be questionable.

PART 6: KEY FINDINGS

INTRODUCTION

We can have no way of knowing how many children have been or are being adopted as a result of illicit acts. To begin with, as for any clandestine or illicit activity, reliable figures are naturally difficult to establish. Second, since all the children concerned finally receive “legal” adoption papers, they quickly blend in with those whose adoption was carried out in a regular fashion. Third, there is a conspiracy of silence since it is not generally in the interest of the parties to suspected illegal actions – be they prospective or actual adopters, agencies, intermediaries, professionals, officials or even in some instances Central Authorities – to denounce the practices. Birth parents are the notable exception, at least in those cases where their child has been abducted or placed for adoption without their informed consent, but at the same time they are the least likely to be in a position to file a complaint.

Throughout this study there are specific issues raised and indications of how they need to be tackled. As this study demonstrates, however, the achievement and effectiveness of any and all measures to address them will be fundamentally compromised unless, at a minimum, primary and secondary legislation are reviewed to ensure that, by commission or omission, they do not contribute to the creation or maintenance of an “enabling environment” for illegal adoptions.

Preventing and combating illegal adoptions therefore requires removing at least the main factor underlying the “enabling environment” wherein illegal adoptions are spawned, viz. the acceptance that the exchange of large amounts of money is a necessary and justifiable aspect of intercountry adoption.

6.A. FINANCIAL INCENTIVES

Financial incentives, such as exorbitant adoption fees, should be eliminated.

No development or humanitarian aid requirement, incitement or request should be made of any receiving country, agency or individual when this is in any way linked to an authorisation to carry out adoptions in general, adoptions from given locations or facilities, or specific adoptions.

There should be no requirement, request or tolerance for payments to be made by agencies or prospective adopters directly or indirectly to residential care facilities, in any form, for any reason or at any stage, prior to, during or following the adoption, including “care costs” for a child between matching and the issuance of an adoption order.

For their part, **receiving countries** should consequently refuse to authorise

adoptions from any country of origin that requires contributions and/or donations to be made to any entity, facility or person in the country of origin, where such contributions and/or donations determine whether or not adoptions may be carried out. This should include but not be limited to payments for development or humanitarian aid, support to residential care facilities, and “care costs”. Agencies and prospective adopters should be explicitly prohibited from agreeing to make such payments.

6.B. MAL-FUNCTIONING ALTERNATIVE CARE SYSTEMS

The way in which the child protection and alternative care systems are used, organised, resourced and monitored clearly has a very considerable impact on any implication of those systems in illicit practices leading to illegal adoptions.

Illegal adoptions have taken place from countries with very different alternative care systems, including those that are fully, or almost fully, State-run. As this study has noted, however, alternative care provision that relies primarily on privately-run residential facilities – particularly but not only those funded by foreign sources – constitutes a major risk for the occurrence of illegal adoptions. This is all the more so given that States where such arrangements are prevalent are invariably not in a position to exercise necessary oversight (including obligations regarding registration, authorisation and inspection) to ensure

adherence to international standards, and notably those set out in the 2009 Guidelines for the Alternative Care of Children.²⁷

These Guidelines emphasise the importance of applying the “necessity principle”, i.e. making certain that a child is neither proposed nor accepted into alternative care unless there is no other viable alternative. As noted previously, “poverty” as such is not an acceptable reason for resorting to formal alternative care. In addition the Guidelines prohibit the “recruitment” of children for placements in alternative care settings, and place strict limitations on the objectives of providers.

The Guidelines also demand adherence to the “suitability principle”. This means ensuring that, when it is determined that a child indeed requires alternative care, the placement will be in a setting that protects and promotes the human rights of children in general and that corresponds to the needs, circumstances, characteristics and wishes of the individual child at that time.

Integrating the orientations provided by the Guidelines would go some way to avoiding alternative care being used as a conduit for illegal adoptions.

²⁷ For the full text and an in-depth analysis of the implementation of these Guidelines, see Cantwell N., Davidson J., Elsley S., Milligan I., and Quinn N. (2012).

6.C. LACK OF EFFECTIVE CONTROL OF THE ADOPTION PROCESS

6.C.i. PROHIBITION OF UNSUPERVISED/DIRECT ADOPTIONS (“ADOPTIONS INDIVIDUELLES”)

A study produced specifically to inform the drafting of the 1993 Hague Convention set out starkly the disturbing risks of illicit practices when intercountry adoptions are initiated and processed without the support and oversight of competent authorities or accredited adoption bodies (Defence for Children International, Terre des Hommes & International Social Service, 1991). In line with those findings, adoptions variously known as “independent”, “private” or “individual” are deemed incompatible with that Convention and should be prohibited (HCCH, 2010a, no. 1(g), 22-24).

Clearly, tolerating independent adoptions while acknowledging the risk they entail for the legality of each adoption is a wholly inadequate response. For example, prior to prohibiting independent adoptions as of July 2014 (US Central Authority, 2016), the USA had permitted them from non-Hague countries, simply warning prospective adopters that they risked becoming involved in illicit dealings. Thus, in a 2011 notice on its website concerning Haiti, the US Central Authority noted “a recent increase in US citizens seeking to pursue adoptions in Haiti through independent agents instead of licensed adoption providers. While these “private” adoptions are currently permissible in Haiti, prospective adoptive

parents should be aware of the risks associated with not utilizing experienced, licensed agencies. [...] Prospective adoptive parents pursuing an independent adoption may place their trust in private facilitators engaging in unethical or illegal practices in Haiti (US Department of State, 2011).

Even with that new rule in place, however, “US citizens who currently reside in Ethiopia and have done so for two years are eligible to complete a private adoption” (US Department of State, 2013).

In addition to the USA, many other receiving States have now prohibited all such adoptions, whether or not the country of origin involved is bound by the 1993 Hague Convention: Belgium, Ireland, Italy and the Netherlands are among the receiving countries to have done so.²⁸ Others, such as Finland and Sweden, have placed very restrictive conditions on recourse to this process. Thus Finland, for example, notes that its 2012 Adoption Act “tightened the conditions for adoption. The purpose is to prevent risks associated with independent adoptions, such as child trafficking. The aim is also to ensure that a child actually requires international adoption” (Valvira, 2013a).

Some receiving States nonetheless still permit independent adoptions when they are carried out from countries of origin that are not parties to the 1993 Hague Convention and that also allow them. Foremost among them is France where in 2010 they constituted no less than 41% of total intercountry adoptions to that country and still represented 25% in

2015 (Ministère des Affaires Étrangères, 2010; French Central Authority, 2016). Here again, it is of concern to note that such adoptions can be carried out by French citizens even when specific and severe risks are officially acknowledged. In relation to Lebanon, for example, the French Central Authority notes that “the existence of fraudulent practices and child trafficking, regularly reported in the past, led the two French agencies accredited for Lebanon to cease working in this country [...] Prospective adopters should therefore remain vigilant regarding the choice of their local agent” (Ministère des Affaires Étrangères, 2017, author’s translation).

This kind of approach is disturbing on two fronts as regards combating illegal adoptions. Allowing a practice that is widely recognised as involving a high risk of illicit practice is in itself questionable. But the fact that it necessarily concerns non-Hague countries of origin, where procedures and systems are likely to fall below international standards, is especially worrying. It may also well act as a spur to those seeking to adopt “at any cost” to turn their attention to such non-Hague countries, which runs squarely counter to objectives to ensure compliance with those standards.

6.C.ii. INADEQUATE VETTING AND MONITORING OF ACCREDITED BODIES (AGENCIES)

While allowing non-State bodies (private initiatives) to continue to play key roles in mediating intercountry adoptions, the 1993 Hague Convention requires that agencies concerned be accredited by the receiving country and, in turn, approved by the country of origin to operate in that country.

Attitudes towards the accreditation of adoption agencies vary wildly – and disturbingly – among receiving States. In the Nordic countries – which count among the higher per capita rates of ICAs – there is a clear policy of accrediting a small number of bodies that demonstrably have the resources to provide professional services and can be monitored effectively: Denmark has one accredited body, and Finland, Norway and Sweden each have three. At the other end of the spectrum, the USA currently has no less than 184 accredited bodies of all shapes and sizes (Council on Accreditation, 2017). For its part, France lies somewhere in between, with 32 such “bodies”, some of which are approved to mediate adoptions from just one country and in reality carry out very few ICAs each year – two of them completed just one adoption each in 2015, for example (Ministère des Affaires Étrangères, 2015b).

Accreditation is therefore no guarantee of professionalism: bodies with vastly different levels of expertise and resources are allowed to operate, and indications of unprofessional and questionable practices and approaches may not be followed up. This includes information given on agencies’ own websites.

One among many possible examples of this concerns a Hague-accredited US agency that was one of the 19 approved by Haiti’s Central Authority in 2013 (after its accession to the 1993 Hague Convention) to thenceforth mediate intercountry adoptions from that country. This agency in fact has a long history of “adoption mediation” from Haiti, and one that seems to have fitted well with the previous climate that fostered the “development of

²⁸ Communications from the respective Central Authorities, on file with the author, except for Italy (see Commissione per le Adozioni Internazionali, 2011)

commercial adoption and illicit practices” and where “private bodies and institutions [had] free rein” (Hofstetter & Freire, 2005, author’s translation). In 2010, the agency stated on its website:

“WIA works with an orphanage in Haiti that is able to expedite the adoption process. However, the fees paid to this orphanage are more costly than the standard orphanage costs and are \$16,000 compared to the standard \$8,000 to \$9,600 the other orphanages in Haiti charge. However, because this particular orphanage is able to expedite the adoption process, cases are usually completed in 12 to 14 months rather than the normal 18 to 24 month timeline” (WIAA, 2010).

This was a direct incitation to circumvent the “normal” process – which was already recognised at the time as dangerously inadequate – for an unexplained and vastly higher fee. While this message no longer figures on its website, a barely less disquieting message is now relayed by this accredited agency. Its current website (April 2016) states:

“[a] family will apply to Wasatch and indicate the gender and age of child they wish to adopt, [...]. Once approved by our agency the family will prepare a home study and a dossier, once the dossier is completed, the agency rep will write a cover letter to the dossier requesting the age and gender of child the family wishes to adopt, our agency will also request that the child come from one of our partner orphanages” (WIAA, n.d.).

In other words, the agency proposes to find a child according to the specifications of the prospective adopters and from

a residential facility with which it cooperates. This “child for a family” approach flies directly in the face of the provisions of the 1993 Hague Convention, and “special relationships” between agencies and residential facilities are known to be high-risk situations. Together, these two factors typify the kind of conditions that can easily lead to sale of children and illegal adoptions.

Strangely, however, those conditions do not appear to be at variance with legal requirements. Indeed, under Haiti’s 2013 adoption law, prospective adoptive parents are obliged to adopt from a crèche/orphanage licensed and rated a “green light” facility by IBESR (the Haitian Central Authority) and with which their accredited agency works. While neither adoption agencies nor crèche/orphanage directors are allowed to match prospective adoptive parents with specific children, IBESR “may take a proposal from a crèche director under advisement”, although the final matching decision is up to IBESR alone (US Department of State, 2016a).

As is so often the case, there are many worrying aspects involved here, but in terms of agency ethics and professionalism this example brings to light two problems in particular: the agency offers to identify a child according to the prospective adopters’ wishes, and it inaccurately states that it will “request” that the child come from a partnering facility whereas this is in fact compulsory.

6.C.iii. FAILURE TO RESTRICT THE NUMBER OF ADOPTION AGENCIES WORKING IN OR WITH A GIVEN STATE OF ORIGIN

As noted by Fuentes et al. (2012), “[i]t is [...] incumbent upon receiving countries to regulate the number of adoption accredited bodies wanting to engage in intercountry adoptions in countries of origin, in order to limit the number of adoptions and to coincide with the number of legally adoptable children available” (Fuentes et al., 2012, p. 30). In addition, when a given State of origin in turn authorises too many accredited agencies to operate within its borders, this has been shown on many occasions to create an unhealthy climate of competition for “adoptable” children, and to make the effective monitoring of their activities almost impossible. For its part, the Committee on the Rights of the Child has recommended that the number of accredited agencies be limited and that their fees for various services be monitored (Committee on the Rights of the Child, 2013a; 2014a; 2014b; 2015b).

At the beginning of 2010, more than 70 foreign agencies were operating in Ethiopia. Among them were 22 US agencies licensed by the Ethiopian Government, 15 of which had been established since 2005 (Fuentes et al., 2012, p. 92). These 15 agencies had in fact been set up specifically to mediate adoptions from Ethiopia in order to take advantage of the “adoption boom” that was under way in the country at that time. In reality, this “boom” involved substantial numbers of illegal adoptions, finally leading certain receiving countries – including Australia, France and

Switzerland – to suspend their adoption programmes there, and the Ethiopian Authorities to take a somewhat stricter line. The Australian Central Authority describes one of the several factors behind the Australian decision as follows:

“The growing number of non-government adoption agencies operating in Ethiopia, and the closure of orphanages due to greater government scrutiny, led to increased competition for referral of children to intercountry adoption programs. A competitive environment such as this is not always conducive to ethical adoption practices” (Australian Central Authority, 2016).

In Vietnam, in mid-2008, the year that adoptions from the country peaked at 1,747, a total of 68 agencies were authorised to work on intercountry adoptions there – from Canada (3), France (9), Italy (8), Denmark (2), Ireland (1), Spain (4), Sweden (4), Switzerland (1) and USA (42) (Fuentes et al., 2012, p. 92). This large number was seen as a contributing factor to the problem of illegal adoptions that led the USA, Sweden and Ireland to suspend intercountry adoption from the country in 2008-9. Yet, even now, Vietnam authorises 37 agencies from 14 countries to operate, for a total number of adoptions that stood at 484 in 2014, giving an average of just one adoption per agency per month (HCCH, 2015c).

The Central Authority of one receiving country has expressed concern that “there are so many foreign AABs operating in [Bulgaria] and the number of intercountry adoptions is increasing all the time.”²⁹

²⁹ Communication on file with the author – anonymity requested.

Indeed, after a fall in numbers after 2004 (from 395 in that year to 100 in 2007), annual intercountry adoptions from Bulgaria have since bucked the global downward trend, rising consistently to reach 472 in 2014 (HCCH, 2014a). Bulgaria – which ratified the 1993 Hague Convention in 2002 – has in fact accredited no less than 35 agencies based in the country to mediate adoptions to specified receiving countries that total 26 (HCCH, n.d.). The number of receiving countries for which each agency is approved ranges from just one to 18. One of the two agencies approved for 18 receiving countries, for example, is itself partnering with fully 10 US agencies as well as three in both France and Italy (Vesta, 2012). It may be felt that the resulting web of agency activities could be extremely difficult to monitor effectively, and that this web may be unnecessarily vast and complex to deal with some 500 adoptions annually.

Appropriate reaction to the evidence-based risks of accrediting unduly numerous agencies seems to be difficult to secure. By 2009, some 45 adoption agencies had programmes in Haiti, including 24 US-based and 11 French. When applying its accreditation procedure in preparation for the entry into force of the 1993 Hague Convention the following year, Haiti in 2013 decided to accredit large numbers again, including 19 for the USA and 12 for France. Haiti ostensibly sought to mitigate the potential “competitive” ramifications of this approach by setting annual quotas for each country and each agency. This measure may seem appealing at first sight as an effective barrier to competition, but quotas have a number of negative ramifications in addition to being highly

questionable from the standpoint of children’s rights and of the primacy of the “best interests of the child” in adoption matters (see further discussion on quotas below under VIII.D: “Restricting the transmission of applications to adopt”). If Hague principles are to apply, there is a clear and vital joint responsibility at play that is far from being respected at present. On the one hand, receiving countries must limit the number of bodies accredited to work with any given country, on the basis of a realistic assessment of the overall number of children who might require adoption abroad. On the other hand, countries of origin must take it upon themselves to deny approval to any such accredited agencies when their number goes beyond the objective needs. Failure to set such limitations not only brings with it risks such as those described above but also invites the simple and fundamental question – why would one not do so? To this, on the basis of experience to date, the only possible answer invariably lies more in the monetary domain than in the protection and promotion of children’s human rights.

6.C.iv. UNLIMITED NUMBERS OF ‘APPROVED’ PROSPECTIVE ADOPTERS

It is clearly both undesirable and dangerous to issue “fitness to adopt” certificates to unlimited numbers of prospective adopters when the number of children likely to be adopted from abroad is significantly smaller. It is not only the cause of understandable frustration among prospective adopters but also – importantly in the context of this study – contributes to creating a level of unsatisfied demand that can lead some prospective adopters to consider options

that may involve illicit practices. In some receiving countries, it can also fuel public calls for greater efforts on the part of the authorities of receiving countries to unwarrantedly identify more sources of “adoptable” children in a pro-active manner, generally in countries of origin that are not Hague-compliant.

Consequently, monitoring the numbers in order to take appropriate corrective action when necessary should be of Central Authorities for combating illegal adoptions. Not all receiving countries are able to provide data on the number of their citizens who have been approved for intercountry adoption, however – among them are, at their respective federal levels, Switzerland and the USA.

From the standpoint of a country of origin, the uncontrolled approval of prospective adopters can translate into phenomenal backlogs. In China, for example, from where adoptions had plummeted from a peak of 14,487 in 2005 to just 5,012 four years later (Selman, 2015), the number of prospective adopters on its “waiting list” had hit no less than 30,000 by the end of 2009 (Chinese & UK Central Authorities, 2009), implying an average wait of at least five years at that time for those staying the course. In the event, the potential waiting time increased year on year thereafter, since annual adoptions continued to fall in number, reaching just 2,764 in 2014 (Selman, 2015, op. cit.). In addition to thereby creating the above-mentioned risks associated with frustrated demand, this situation demonstrates why China and similarly-placed countries of origin are able – if the receiving countries so allow – to require prospective adopters

and their agencies to pay substantial sums for the right to adopt its children (see “payments to a residential facility” at VII.D above), with the high risk that this involves for illicit practices.

Historically, as well as today, France appears to have by far the largest gap between the number of approvals to adopt and that of children actually being adopted (although we do not know, notably, the situation in the USA). In 2004, when annual intercountry adoptions to France were running at over 4,000, some 25,000 prospective adopters reportedly held valid authorisations. Ten years on (2014), annual adoption figures had fallen by almost 75% (to 1,069) but there were still 17,568 persons approved to adopt, a fall of just 30% (French Central Authority, 2016). The astonishing 17::1 ratio may explain in part why the proportion of “independent” adoptions by French citizens is comparatively still so high (25%), as well as the initiatives that the French Authorities have taken to promote intercountry adoption from certain countries of origin.

Several countries are at the other end of the scale. Ireland, for example, has made a conscious effort to balance the numbers since ratifying the 1993 Hague Convention in 2010. As a result, the ratio between “Declarations of Eligibility and Suitability” granted and incoming adoptions stood at 1::1 in 2015, as opposed to more than 2::1 in 2010 (Irish Central Authority, 2016). Similarly, Australia’s corresponding ratio for mid-2014 to mid-2015 was also 1::1, but had in fact been negative (more adoptions than approvals) in the two preceding years (Australian Central Authority, 2016), with the difference presumably accounted for

by previously approved adopters. The Netherlands too have had a 1:1 ratio since 2013 (Dutch Central Authority, 2016). Finland's ratio was only slightly higher in 2015 (1.3:1) (Finnish Central Authority, 2016), representing a fall from 2012, moreover, when it stood at 1.7:1 (Valvira, 2013b).

Receiving countries that report higher ratios include Sweden which nonetheless notes that the number of "consents" to prospective adopters fell from 1,800 in 2005 to 800 in 2015, almost in line with the decline in adoption figures (from 941 to 336), and giving a ratio of 2.5:1 (Swedish Central Authority, 2016). While federal figures are not available, a survey by Switzerland's French-speaking cantons and Ticino in 2012 found that valid approvals compared to effective adoptions stood at the relatively high ratio of 4:1, unchanged from 2007 (Swiss Central Authority, 2016a).

Overall, therefore, there does seem to be increasing awareness of the need to limit the number of approvals of prospective adopters.

6.C.v. UNRESTRICTED TRANSMISSION OF APPLICATIONS TO ADOPT TO SENDING COUNTRIES

There have been notorious instances (but regrettably too poorly documented to be cited here) in the past where the authorities of receiving countries have transmitted the files of prospective adopters to countries of origin with the explicit or implicit instruction that children be identified and made available

for adoption by the applicants. This is indeed the wrong way around.

ISS has long argued for what it terms "reversing the flow of files". This means that applications to adopt should only be sent to the authorities of a country of origin in response to a request from those same authorities to propose prospective adopters who are deemed to be appropriate for a given child in need of adoption. In that vein, Sweden notes that nowadays, in most matching cases, the State of origin "asks the organisation in the receiving State if there is a possibility for them to find parents for a specific child" (Dutch Central Authority, 2016).

One of the most appalling examples of what might be termed the "direct transmission of files" was the spontaneous arrival en masse of individuals and self-styled "agencies" in Romania in 1990-1991 who, without compunction, exerted unrelenting pressure on the Romanian authorities to allocate a child to them. They did so face to face and often aided and abetted by their own governments.³⁰ The present study describes not dissimilar examples from more recent years, such as the uncontrolled rush to adopt from Ethiopia and from the Democratic Republic of Congo (see also the sub-section on "preventing rapid increases" below).

The overall level of pressure from "spontaneous" applications has certainly fallen, in large part due to increasing adherence to the 1993 Hague Convention, since that pressure is more especially confined to non-Hague countries of

origin. However, the consequence of the thus-suppressed expression of "effective demand" reflected by such initiatives is increasingly found, inter alia, in reactive "quotas" set by countries of origin in an attempt to stem or filter that demand.

6.C.v.a. SETTING QUOTAS: THE WRONG RESPONSE

The universal and systematic implementation of the "reversal of the flow of files" – the only logical approach to intercountry adoption from the standpoint of children's human rights – would preclude the need for quotas. Their imposition is based on the arbitrary pre-determination of the number of children to be "freed" for intercountry adoption, to given countries, and sometimes to each agency. The paramount consideration to be afforded to the best interests of the child is substantially jeopardised.

There is some credence to the argument that an overall quota can represent the number of cases that the country of origin feels able to manage properly in light of the resources available. It is also argued that establishing a quota per receiving country prevents competition, as does a sub-quota per accredited agency. However, this approach implicitly accepts the view that the task to be taken on by countries of origin is to deal with "effective demand" exerted by actors in receiving countries, rather than to ensure the most suitable placement for those children who may require adoption abroad.

As regards illegal adoptions, the negative ramifications of quotas go further. Agencies may try to ensure that the children within their respective quotas correspond best to the desires of the

prospective adopters they represent. As alleged in relation to Vietnam and elsewhere, this may involve securing the issuance of false medical certificates attesting to an illness or disability. In addition, if the real need to resort to intercountry adoption falls below the established and projected level in a given year or period, receiving countries and their agencies will be tempted to nonetheless request their "total" or even to take steps to identify more children who, by some means, might be declared adoptable abroad.

"Reversing the flow of files", in contrast, still allows the country of origin to determine its capacity – and to possibly adjust this over time according to need – but then to invite submission of appropriate applications rather than distributing "adoptable" children equitably among countries and agencies.

6.C.vi. ALLOWING RAPID INCREASES IN THE NUMBER OF ADOPTIONS FROM A COUNTRY OF ORIGIN

In response to the pressure created by the increasingly unsatisfied expectations of prospective adopters, Central Authorities in a number of receiving countries have at different moments strengthened efforts to develop adoptions from non-Hague countries of origin where regulations and procedures may be less strict. This occurred at the turn of the century, for example, in relation to "countries, such as Cambodia, Nepal, and Vietnam, that rise significantly for a time, only to be brought down by significant scandal, usually related to corruption, profiteering, and child laundering" (Smolin, 2010, p. 471). Smolin has characterised elsewhere this

³⁰ The author witnessed these encounters first-hand as of February 1991, inter alia at the Romanian Committee for Adoptions itself, as a member of UNICEF-supported missions, and went on to work closely with the Romanian Authorities for several years in their efforts to remedy the situation.

phenomenon as “slash and burn” practices (2013) involving vertiginous increases in ICAs from the countries concerned for a period until it is seen necessary to take measures to establish a semblance of order (moratorium, refusal of exit visas, quotas...). Smolin noted in 2010 that “there are already indications that Ethiopian adoptions, as they have risen sharply in number,³¹ have increasingly been subject to abusive adoption practices. Ethiopia may be poised to be the next illustration of the cycle of abuse, whereby nations with rapidly increasing numbers are beset with abusive adoption practices, corruption, and scandal, eventually followed by shutdowns” (Smolin, 2010, p. 483). There are many examples of situations where a sudden and sustained surge in applications to adopt has resulted in countries of origin quickly becoming unable to cope with the “demand”, resulting initially in an unprotected adoption process and, invariably, at length closure or severe restrictions on intercountry adoption.

Among the most recent examples is the Democratic Republic of Congo (DRC) where the number of intercountry adoptions from rose from just 12 in 2005 to at least 555 in 2013. As noted previously, this development predictably, rapidly and comprehensively overwhelmed the capacity of the DRC Authorities to apply appropriate and necessary safeguards when processing applications and legalising adoptions. The DRC was not (and is not) a party to the 1993 Hague Convention and it issued no official request for receiving countries to adopt its children. Those receiving countries therefore had, at the very least, a moral

obligation as parties to that Convention to apply its basic principles³² and, in particular, either to prevent their citizens and agencies from creating a situation where illegal adoptions were bound to occur or to assist the DRC Authorities in stemming the flow. Instead, when the granting of exit visas for Congolese adoptees was suspended due to clear irregularities, they complained on behalf of their citizens that adoption judgements (including those made on the basis of illicit practices) were not being respected and that the best interests of the children concerned were being ignored.

6.C.vii. ALLOWING METHODS THAT AVOID THE ‘NORMAL’ ADOPTION PROCEDURE

There are many instances where it has been possible, more or less legally, to avoid normal procedures for adopting abroad. In most cases this has involved undertaking a “domestic” adoption in the country of origin, but there have also been examples of other methods.

6.C.vii.a. “EXPATRIATE” ADOPTIONS

The Australian Central Authority reports that, in the 3-year period July 2012 to June 2015, no less than 300 adoption-specific visas were issued for children from at least 36 countries whose Australian adoptive parents had lived overseas for at least one year, with the adoption having been processed by an overseas agency or authority. The Authority also notes that it “may not be aware of additional expatriate adoptions occurring overseas including where no visa can be obtained to bring the child to Australia (for example, because

the adoptive parents have not lived overseas for twelve months or more)” (Australian Central Authority, 2016).

The Dutch Central Authority notes “concerns about adoptive parents who do not follow the legal way to adopt a child from abroad.” It mentions cases where the adoptive parents live abroad for a short time, arrange an adoption according to local law, and are mentioned as the parents on the birth certificate (Dutch Central Authority, 2016).

Another Central Authority has expressed a similar concern about States that “continue to deal with certain intercountry adoptions as if they were domestic adoptions, with special criteria when one or both adopters are nationals of that country, even if they live abroad.”³³

6.C.vii.b. “RELATIVE” ADOPTIONS

Special procedures relating to the adoption of a relative in the country of origin often provide potential opportunities for circumventing established protections. Finland, for example, can only recognise a foreign adoption for applicants habitually resident in the country if they have received prior permission to adopt, making it impossible in principle to travel abroad in order to adopt a child independently. However, the Central Authority notes that “relative adoptions” do not have to be processed through an accredited body. The Central Authority states that sometimes Finnish citizens with a foreign background see this as an

opportunity to avoid the costs and time involved in an intercountry adoption, with the result that a “relative child suddenly arises somewhere.” The Finnish Adoption Board, which grants permission for adoptions, received about 25 applications relating to “relative adoptions” in the period 2012-2016, but refused all but three as being unjustified (Finnish Central Authority, 2016).

6.C.vii.c. ADOPTION VIA LEGAL GUARDIANSHIP

In Uganda,³⁴ foreigners had been obliged to reside in the country for three years before they could adopt. New laws introduced in 2007 allowed foreigners to be granted “legal guardianship” of children who could then be taken abroad and formally adopted in the receiving country. As a result, adoptions from Uganda to the USA, for example, rose from less than 20 per year prior to that change to over 200 per year as of 2011, making Uganda the fifth most significant country for adoptions to the USA in 2015 (US Department of State, 2015a). In Financial Year 2015, almost all intercountry adoptions from Uganda to the USA (196 out of 202) were carried out in this way, with finalisation in the USA (US Department of State, 2015b).

The risks involved in this possibility were considerable, since the safeguards in place for deciding on guardianship were far less strict than those relating to adoption. In May 2016, however, the Children Act was considerably amended, henceforth limiting applications for legal guardianship to Ugandan citizens with at

³³ Communication of June 2016 on file with the author - anonymity requested.

³⁴ Overall concerns about adoptions from this country were detailed in a Thomson Reuters Foundation investigation in 2015 (Esslemont & Migiro, 2015) and dealt with in a study on adoption and legal guardianship practices in Uganda prepared by Dr. Hope Among (Among, 2014).

³¹ Intercountry adoptions from Ethiopia soared from 415 in 2003 to 4,390 in 2009 (source: AICAN, n.d.)

³² In accordance with HCCH (2010a)

least three months continuous residence in the country. At the same time, it reduced the residency requirement for foreign prospective adopters from three years to one (US Department of State, 2016d).

6.C.vii.d.

CONVERTING KAFALA GUARDIANSHIP INTO AN ADOPTION

Kafala is a form of guardianship practised in countries of Islamic Law. It is not considered a form of adoption since it does not create family ties between the child and the guardians. The artificial creation of such ties is considered to be impossible under Islamic Law, meaning in addition that adoption itself is outlawed in almost all such countries. While the exact rules differ from country to country, a common feature of *kafala* is that the guardians must be of the Moslem faith.

Intercountry *kafala* decisions appear to be relatively infrequent and, by definition, do not come within the scope of the 1993 Hague Convention. However, “receiving countries” – their Central Authorities, other competent authorities and courts – take different attitudes towards the possibility of converting a *kafala* decision into an adoption when this question arises.

Thus, in France, for example, the Central Authority does not deal with such cases and jurisprudence to date demonstrates unwillingness to convert *kafala* decisions into even simple adoptions, since the latter would not be recognised in the child’s country of origin (Ministère des Affaires Étrangères, n.d.). In contrast, the US Central Authority provides guidance and information explicitly for persons seeking to obtain guardianship under *kafala* in order to adopt the child later

under US law, e.g.: “If you have obtained a *kafala* guardianship certificate in Morocco for the purpose of adopting your child in the United States, you will first need to apply for a new birth certificate for your child. Your name will be added to the new birth certificate” (US Department of State, 2014b).

This path is seemingly used quite often: visas for Moroccan children to be adopted in the USA totalled 224 for the period 2010-2015, the vast majority for children aged 2 years and younger (181, or 80%) (US Department of State, 2016c). Furthermore, the US Central Authority notes for Morocco:

“There is no adoption fee per se. Prospective adoptive parents customarily make donations to orphanages to benefit other children who are not adopted. Since these are donations, they may be given at any stage but are typically given at the end of the *kafala* process. They range from US\$500 to a few thousand US dollars. Some orphanages, at no charge, help the prospective adoptive parents with paperwork and through the *kafala* process, and the donation amount may reflect the role the orphanage played in helping the prospective adoptive parents through the process” (US Department of State, 2014b).

Whether or not the process itself of converting *kafala* into adoption once outside the country of origin might be questioned in terms of its legality, arrangements such as the one described above bear an uncanny resemblance to practices of serious concern in relation to “illegal adoptions”.

PART 7. RECOMMENDATIONS TO REDRESS ILLEGAL ADOPTIONS

7.A RESPOND TO VIOLATIONS

7.A.i. REPORTING AND REFERRAL

Receiving countries should have in place a protocol or known and recognised procedure that responds effectively and pro-actively to concerns expressed about the circumstances of an intercountry adoption once it has taken place. One example of such a pro-active response is Australia's Protocol for Responding to Allegations of Child Trafficking in Intercountry Adoption. This Protocol is designed to give adoptive parents and adoptees information about how the Australian Authorities will respond to concerns they may have related to abduction, sale and trafficking in their intercountry adoption. The Protocol also provides that the Australian Central Authority will consider any broader implications of credible concerns, to determine whether cooperation with the country of origin should be suspended or terminated (Australian Central Authority, 2016). The Australian Central Authority reports "a small number of cases of concern relating to alleged abduction, sale and trafficking of children subsequently adopted to Australia" but that these "relate to adoptions that occurred over ten years ago." Similarly, Switzerland states that

occasional allegations are made about illicit practices but generally concern adoptions that took place back in the 1970s or 1980s (Swiss Central Authority, 2016).

Kazakhstan provides an example of a response by a country of origin. In 2014, its General Prosecutor's Office conducted an investigation into the inaccuracy of data on children adopted abroad, and found a discrepancy of 673 children undercounted (General Prosecutor's Office of the Republic of Kazakhstan, 2014). It launched an investigation into possible sale of children for intercountry adoption, an initiative that the Committee on the Rights of the Child urged Kazakhstan to pursue (Committee on the Rights of the Child, 2015a). UNICEF also reports that a number of court rulings on intercountry adoptions were reviewed by the General Prosecutor's Office, such as cases where biological parents claimed their rights, and the original rulings were reversed (UNICEF Kazakhstan, 2016).

7.A.ii. INVESTIGATIONS, PROSECUTIONS, SANCTIONS AND REDRESS FOR VICTIMS

7.A.ii.a. THE IMPACT OF INVESTIGATIONS, PROSECUTIONS AND SANCTIONS

The impact of law enforcement on illegal

adoptions can only be partial, not least because so many manifestations of the phenomenon are currently not in fact prohibited by law, and indeed are often encouraged or even required by legally binding texts (the law itself, government regulations and policies, bilateral agreements, etc.).

But several other important factors anyway limit the justification for relying too much on ensuring the rule of law, even in cases where individual criminal acts are suspected.

First and foremost among them is the fact that, for an investigation to be launched and prosecution to be pursued, an allegation or complaint must first be registered. As Smolin notes, however, the parties directly involved in an adoption are generally either not in a position to file a complaint or have no interest in doing so:

"Most original family members and vulnerable/adopted children are too powerless to stem the tide of abusive adoption practices, and are not positioned to effectively protest after the fact. Most adoptive parents have identified their interests with those of their national adoption agencies; the combined voices of most adoptive parents and adoption agencies seem to have been focused on keeping intercountry adoption open and maximizing the numbers of adoptions, in part through downplaying the extent of abusive practices" (Smolin, 2014, p. 359).

Obviously, professionals and staff of residential facilities who are implicated

in some way in the procurement of children for adoption will also only rarely denounce illicit practices. As a result, what is tantamount to a degree of relative impunity for perpetrators is created which, combined with the size of the potential profits to be gained, encourages them to run the risk of detection.

Over the years, several ad hoc instances of individuals being prosecuted for illicit activities in connection with adoption have nonetheless been recorded, in both receiving countries and countries of origin.

The Central Authorities of most receiving countries that responded to a survey for this study³⁵ do not, however, report any current or recent cases being the subject of a criminal investigation or prosecuted before their country's courts. Indeed, in their replies both Australia and the USA explicitly note significant improvements in frameworks for intercountry adoption in countries of origin over the past ten years. That said, since the beginning of the century, the USA in particular has taken legal action against certain of its citizens involved in arranging illegal adoptions from, for example, Cambodia and Guatemala.

Countries of origin have also prosecuted individuals for involvement in illegal adoptions. In Vietnam, for example, the Nam Dinh Province People's Court in 2009 handed down custodial sentences to 16 persons convicted of having received bribes and falsified the documents of 266 babies between 2005 and 2008 to meet foreign demand for adoptees. Guatemala

³⁵ Australia, Belgium (French Community), Canada (Québec), Finland, France, Germany, Ireland, Netherlands, Sweden, Switzerland and the USA.

has prosecuted, among others, the owners of residential facilities involved in illegal adoption networks.

As indicated by experience in Kyrgyzstan, however, prosecutions may have a very limited impact on the overall phenomenon of sale of children into illegal intercountry adoption.³⁶ After a steady rise in the number of intercountry adoptions in the preceding years, in 2008 the Kyrgyz General Prosecutor's Office found serious irregularities and corrupt practices in the intercountry adoption system, including false certificates of disability that would ensure the children concerned be made available for adoption abroad (see also "priority for children with 'special needs'" at 4.C.iv. above). Investigations eventually led to 197 criminal prosecutions and the dismissal of several judges and government officials who had been involved in decision-making on the cases in question. As a result, a moratorium on intercountry adoptions was put in place in 2009; it lasted until 2012. With a view to reopening intercountry adoptions thereafter, eleven foreign agencies were accredited, but the accreditation regulations were found to leave room for corruption, leading to the arrest and imprisonment of the Minister concerned. By this time, a databank of children eligible for adoption abroad had been set in place.³⁷ Early in 2013, the Parliamentary Anti-Corruption Committee decided to review the cases of all children in that databank and found that more than 20% of them (55 out of 241) were not adoptable at all, let alone abroad. The following year, a further serious irregularity was uncovered

when the Italian Authorities pressured Kyrgyzstan to finalise the cases of children who had been identified for adoption by Italian families. A review of these cases revealed that all documents had been fabricated, including the forging of signatures of Kyrgyz Government officials. At the time of writing, the representative of the Italian agency concerned is under arrest and the investigation is on-going.

In the context and within the limitations of this study, it was manifestly impossible to garner comprehensive data on successful prosecutions for illicit practices linked to the sale of children for intercountry adoption. However, when set against the scale on which documented illegal adoptions have taken place, it appears clear that the number of cases leading to prosecution is minimal, thus vindicating perpetrators' impression of virtual impunity. The Kyrgyzstan example tends to show, moreover, that even when responsible action is taken, it is unlikely to deter others.

At the same time, the actions in question are individual and recognised as criminal. To a certain extent, their importance can be considered as secondary in terms of the main thrust of efforts to combat illegal adoptions. This study contends that the fundamental problems lie in the overall "environment" in which intercountry adoptions are allowed or forced to take place by the authorities of both countries of origin and receiving countries. While individual criminal acts obviously need to be countered, effective efforts to do so cannot be envisaged without acknowledging the ways in which current

systems not only facilitate and encourage those acts but also accept "legal" measures that foster illegal adoptions.

7.A.ii.b. SEARCHING FOR IDENTITY, ROOTS AND THE TRUTH

In addition to responding in a timely and effective manner to allegations of illegality in an adoption, the competent authorities must provide all possible support for redress, including actively facilitating adoptees' search for the truth and for their origins.

The growing number of adoptees who at some point – as adolescents, young adults or even later in life – feel the need to learn about their origins is well documented. Their search may or may not be linked with suspicions or concerns about the legality of their adoption. This question is one of the main issues taken up by self-help groups of intercountry adoptees in particular, such as TRACK (Truth and Reconciliation for the Adoption Community of Korea) (Justice Speaking, 2016).

In its recent publication on responding to illegal adoptions (Baglietto et al., 2016), ISS provides telling accounts of the experience of adoptees when trying to establish the truth behind their "abandonment" and adoption, as well as examples both of obstacles placed in their path and of elements of good practice on the part of the competent authorities and other responsible bodies. The examples given in this study of current responses to the "search for the truth" as a result of historical cases involving governmental and non-State actors also underscore this chequered pattern of denial, resistance, acknowledgement and assistance.

Gradually efforts are being made to facilitate the search process. Thus, for example, an Adoption Manual has been developed (in Korean only for the moment) by the Korean Adoption Service and the Ministry of Health and Welfare which, inter alia, describes the steps to take for conducting a birth family search (Justice Speaking, 2016). However, overall, it seems that such initiatives are still far too rare.

7.B INTERNATIONAL AND TRANSNATIONAL COOPERATION

7.B.i. GLOBAL

At the 2010 Special Commission on the practical operation of the 1993 Hague Convention, Australia sponsored a full day of debate on the abduction, sale or and traffic in children and their illicit procurement in the context of intercountry adoption. Contracting States subsequently set up working groups on two issues of direct and special relevance to the question of sale of children and illegal adoptions. One is reviewing the financial aspects of intercountry adoption, and to date it has in particular produced an extensive "Note" identifying problems and proposing responses in this regard (HCCH, 2014c). The second is seeking to develop a common approach to preventing and addressing illicit practices in intercountry adoption cases. This group has prepared a discussion paper that deals with, among other matters, the guiding principles of cooperation and information-sharing to prevent illicit practices, preventing undue pressure on States of origin, and cooperation to

³⁶ This paragraph is based on information provided for the study by UNICEF-Kyrgyzstan (document on file with the author)
³⁷ By that time too, the Kyrgyz Parliament had approved a decree (29 June 2012) allowing for accession to the 1993 Hague Convention, and Kyrgyzstan finally notified its accession in July 2016.

address and respond to specific cases of illicit practices (HCCH, 2012b).

Initiatives such as these among States parties to the 1993 Hague Convention show the extent to which, in principle, the problem of child procurement for intercountry adoption is recognised, despite the existence and wide acceptance of this treaty. There nonetheless remains a need for political will to get to grips with certain of the fundamental and sensitive challenges pinpointed in the present study, particularly concerning the overall financial context in which intercountry adoption operates and which spawns illicit practices.

7.B.ii. NORTH-NORTH

The diversity of attitudes among receiving countries towards the legitimacy of adoptions from a given country (especially, but not only, when the latter is a non-Hague country) has been highlighted regularly. In recent years, it has been particularly noticeable with regard to decisions on whether or not to suspend adoptions from, for example, Guatemala, Haiti, Ethiopia, Cambodia and Vietnam. The consensus around suspending adoptions from Nepal demonstrates that a common front is feasible, but so far this is a unique situation. The US Central Authority indeed notes that “it would be very helpful if there were greater coordination between receiving countries both in terms of information about country practices and toward a more coordinated approach to countries of origin about practice concerns” (US Central Authority, 2016). On the one hand, the “mixed messages” to the country of origin that result from the lack of a unified response clearly

hamper many efforts to move that country towards effective Hague compliance. No less important, however, is the legitimate question raised as to the real motivations of receiving countries that allow adoptions to continue when one or more of their peers has determined that the probity of such adoptions is seriously jeopardised.

7.B.iii. NORTH-SOUTH

Overall, cooperation to date between receiving countries and countries of origin has regrettably tended to raise more questions than to provide answers in terms of combatting unwarranted intercountry adoptions and hence illicit practices leading to illegal adoptions.

Receiving countries may offer technical and other assistance designed to help a country achieve compliance with international standards, opening the way to accession to the 1993 Hague Convention. However, this tends to be in response to critical situations rather than to avoid such situations coming about in the first place. Furthermore, the assistance offered may not be carried out in a coordinated manner but, on the contrary, be more an attempt to gain special favour with the authorities of a country of origin with a view to securing preferential treatment for mediating intercountry adoptions in the future.

Invitations to officials from countries of origin have also been extended by certain receiving countries, sometimes in the form of “study tours”. In some cases at least, these events have clearly been aimed more especially at rewarding past cooperation on intercountry adoption, or convincing the officials concerned of

the desirability of allocating children for adoption to the receiving country in question. Such initiatives are therefore arguably the exact opposite of the kind of cooperation required to combat sale of children and illegal adoptions.

7.B.iv. SOUTH-SOUTH

There have been encouraging instances of South-South cooperation to improve intercountry adoption systems and procedures. One example is the support offered by the Colombian Central Authority to the competent authorities in Haiti following the 2010 earthquake. To the knowledge of this author, however, no such cooperative arrangements have specifically sought to tackle directly and specifically an avowed problem of illegal adoptions.

PART 8: CONCLUDING REMARKS

Illegal adoptions constitute serious violations of the human rights of children, ranging from the arbitrary deprivation of identity to exploitation through sale. Clearly, a major factor behind illegal adoptions is the level of financial advantage that can be obtained from the procurement of children for adoption. But legal adoption too, in most cases, requires the disbursement of sums similar to those that prospective adopters – especially foreigners – are required and prepared to pay to adopt. The financial implications of illicit practices can consequently go unnoticed, as can the acts themselves.

There is a widespread perception that this financial advantage can be put down essentially to criminals or unethical professionals flouting the law. This is certainly the case for many, and the commission of illicit and/or criminal acts clearly needs to be combatted as such.

But this study has sought to highlight in particular a more fundamental and highly disturbing issue whose significance is generally underplayed or sidelined. That issue concerns the systemic, government-sanctioned practices that variously ignore, tolerate, allow, promote or require conditions or actions that themselves constitute, or are a spawning ground for, illegal adoptions. Through law, policy and practice, States enable the procurement of children in order to bring them unwarrantedly

into the adoption process, especially for intercountry adoption.

The illicit or unethical practices that child procurement requires produce financial rewards that unscrupulous individuals and bodies consider sufficient when weighed against any potential risks they may run. However, a key reason for this lies in the fact that a thoroughly legal adoption is itself artificially made to be unduly expensive. Under these conditions, as Smolin has noted, “multiplying levels of bureaucracy, review, and institutional actors do not prevent or effectively limit child laundering, so long as the financial incentives for such child laundering remain. Thus, so long as adoption fees and donations are large enough to provide a substantial incentive for child laundering, the system will be vulnerable” (Smolin, 2010: 492).

Adoption – particularly but not only in its intercountry form – is currently the only measure with an officially “child protection” objective that requires the active disbursement of funds by those who are to provide that protection. This is essentially due to the fact that much of the adoption process is left in “non-State” hands and, implicitly or explicitly, it is accepted by all parties concerned that the level of “effective demand” to adopt is such that such payments can be required. Thus, whereas foster-carers may receive an allowance and/or a salary, and residential

care providers will receive subsidies or donations, those who adopt can expect to pay large sums for the “privilege”.

This fact reflects first and foremost the reality that adoption has been allowed to metamorphose from a child-centred practice to one that responds more to the desires and needs of prospective adoptive parents. If it were child-centred, the authorities of all countries concerned would be actively investing in finding suitable adopters for the child in question. As it is, receiving countries are usually prepared to leave it to the “non-State” sector to recruit adopters for a considerable fee, and many countries of origin are no less happy to allow, enable or require substantial payments by adopters or their agencies as a condition for placing the country’s children in their care.

This is not only a totally illogical and detrimental approach to a “public measure of child protection” and to the promotion and protection of the human rights of the child, but it is of course fertile ground for the procurement of children, sale and other illicit acts that give rise to illegal adoptions.

It is therefore vital that, while increasing efforts to strengthen safeguards and to identify and prosecute individual perpetrators, both receiving States and States of origin recognise and address effectively the systemic problems involved.

Equally, States must respond in a timely and effective manner to allegations of illicit practices and illegal adoptions, and in particular must recognise and address the human rights of the victims of such acts to access the truth about their situation and secure appropriate redress.

Finally, efforts to identify, prevent and combat the factors and systems that lead to illegal adoptions must not be branded as “anti-adoption” or disparaged as giving undue importance to the issue. “Keeping the image of intercountry adoption clean” cannot be achieved by glossing over problems. It can only be achieved by ensuring that, whenever there is recourse to adoption, it is truly a protection measure for the child concerned, is one that upholds the requirement that the child’s best interests be the paramount determining factor, notably by respecting his or her human rights.

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