

1-1-2007

International Adoption: Thoughts on the Human Rights Issues

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INTERNATIONAL ADOPTION: THOUGHTS ON THE HUMAN RIGHTS ISSUES

*Elizabeth Bartholet*¹

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I. INTRODUCTION

Human rights issues are at the core of the current debate over international adoption. Many of us who support international adoption see it as serving the most fundamental human rights of the most helpless of humans

¹ Professor of Law, Harvard Law School. For other writings on international adoption by the author see: ELIZABETH BARTHOLET, *Adoption Among Nations*, in FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION 118 (Beacon Press 1999) (1993) [FAMILY BONDS]; Elizabeth Bartholet, *International Adoption*, in CHILDREN AND YOUTH IN ADOPTION, ORPHANAGES, AND FOSTER CARE 107 (Lori Askeland ed., 2005); Elizabeth Bartholet, *Beyond Biology: The Politics of Adoption and Reproduction*, 2 DUKE J. GENDER L. & POL'Y 5 (1995); Elizabeth Bartholet, *International Adoption: Current Status and Future Prospects*, 3 FUTURE CHILDREN 89 (1993); Elizabeth Bartholet, *International Adoption: Propriety, Prospects and Pragmatics*, 13 J. AM. ACAD. MATRIM. L. 181 (1996); Elizabeth Bartholet, *What's Wrong with Adoption Law?*, 4 INT'L J. CHILD. RTS. 263 (1996). The author has been deeply involved in issues related to international adoption since 1985, and draws on this experience as well as cited materials throughout this article.

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– the rights of children to the kind of family love and care that will enable them to grow up with a decent chance of living a healthy and fulfilling life. Many who oppose international adoption, however, argue that it violates the human rights of the children placed and of any birth parents that may exist, and serves only the interests of those who should be seen as having no rights – the adults who want to become parents.

Human rights activists in the international adoption arena have spoken with a relatively singular voice – a voice that is generally critical of international adoption, calling either for its abolition, or for restrictions that curtail its incidence in ways that I see as harmful to children, limiting their chances of being placed in nurturing homes with true families, and condemning even those who are placed eventually to unnecessary months and years in damaging institutions. This voice has had a powerful impact, in part because the international children’s rights organizations taking the negative view include such powerful ones as UNICEF and the U.N. Committee on the Rights of the Child. Also, opposition to international adoption that purports to be grounded in children’s human rights tends to be more politically palatable and thus persuasive, than arguments grounded in a country’s nationalist claims of ownership rights over its children, or nationalist pride in not appearing unable to care for its children. It is important for those who care about human rights and about children to think through their position on these issues, rather than simply accepting without question the notion that the children’s human rights establishment has a fix on the truth in this area.² The future of international adoption, and of many children, is at stake.

International adoption, involving the transfer of children for parenting purposes from one nation to another, presents an extreme form of what is often known as “stranger” adoption, by contrast to relative adoption. Relative adoption refers to situations in which a step parent adopts the child of his or her spouse, or a member of a child’s extended biological family adopts the child whose parents have died or become unable or unwilling to parent. Such adoptions are largely uncontroversial: children stay within the traditional biological family network, and the adoptive parents are generally thought of as acting in a generous, caring manner by taking on the responsibility for these children in need.

By contrast, in international adoption adoptive parents and children meet across lines of difference involving not just biology, but also socioeconomic class, race, ethnic and cultural heritage, and nationality. Typically

² See DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (Princeton University Press 2004) (summing up what the author sees as some of the harmful results and problematic biases of human rights activism in its institutionalized forms).

the adoptive parents are relatively privileged white people from one of the richer countries of the world, and typically they will be adopting a child born to a desperately poor birth mother belonging to one of the less privileged racial and ethnic groups in one of the poorer countries of the world. International adoption is characterized by controversy. Some see it as an extraordinarily positive form of adoption.³ It serves the fundamental need for family of some of the world's neediest children. The families formed demonstrate our human capacity to love those who are, in many senses, "other," in a world which is regularly torn apart by the hatred of alien others.⁴ But many see international adoption as one of the ultimate forms of human exploitation,⁵ with the rich, powerful and white taking children from poor, powerless members of racial and other minority groups, thus imposing on those who have little what many of us might think of as the ultimate loss.

International adoption has grown significantly over the last few decades, with many thousands of children now crossing national borders for adoption each year. International law as well as domestic law within the United States and some other countries have become in many ways more sympathetic to international adoption than they have been in past decades. But the controversy surrounding such adoption continues, and pro-adoption moves seem matched by moves in the opposite direction. In the past two years, adoptions from other countries into the U.S. have gone down in num-

³ See, e.g., *supra* note 1; Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*, 21 B.U. INTL L.J. 179 (2003) (taking the position that international adoption should be understood as a fundamental human right for children).

⁴ See AMARTYA SEN, *IDENTITY AND VIOLENCE: THE ILLUSION OF DESTINY* (2006) (arguing that conflict and violence are fostered by an inappropriate emphasis on ethnic, religious and national identity).

⁵ See, e.g., Twila L. Perry, *Transracial Adoption and Gentrification: An Essay on Race, Power, Family and Community*, 26 B.C. THIRD WORLD L.J. 25 (2006); Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101 (1998) (arguing that international adoption often results in the transfer of children from the least advantaged families to the most advantaged, while doing nothing to alleviate conditions in the children's birth countries); David M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 VAL. U.L. REV. 281 (2004) (claiming that international adoption systematically characterized by child selling and exploitation).

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ber for the first time since 1992.⁶ The general increase in numbers since 1992 and more generally since the mid-20th Century reflects to a significant degree the opening up of new countries willing to send some of their homeless children abroad for purposes of finding adoptive homes. However the typical pattern in the past has been for countries that do open up to close down again, either by prohibiting international adoption altogether, or by creating restrictions that limit the number of children placed and increase the waiting periods that those children who are placed spend in damaging institutions. This happens without regard to the fact that millions of children in these countries are growing up or dying in horribly inadequate orphanages or on the streets.

The 1993 Hague Convention on Inter-Country Adoption illustrates the conflict today in terms of directions for law reform. In many ways the Convention represents a step in the direction of legitimizing international adoption. Most of the countries involved in both sending and receiving children agreed to the terms of this Convention and many have ratified it, with more likely to do so soon. The Hague Convention recognizes international adoption as preferable for children as compared to any in-country placement other than adoption, by contrast to the earlier Convention on the Rights of the Child which prefers in-country foster care and other “suitable” institutional care to out-of-country adoption. However, the original goals of the Hague Convention included the idea of *facilitating* international adoption, and expediting the placement of children in need. International children’s human rights organizations succeeded in changing the focus of the Hague Convention negotiations so that this facilitation goal was eliminated and the thrust became more single-mindedly focused on preventing adoption abuses. In addition, the Hague Convention seems, to date, to have functioned in numerous instances to effectively close, not open, opportunities for adoption.⁷

UNICEF has played a major role in recent attempts to restrict international adoption.⁸ UNICEF’s official policy on international adoption makes clear its generally negative attitude to international adoption. The policy only grudgingly approves of such adoption, and places it low on the

⁶ Numbers of International Adoptions in the United States by Year, 1990-2006, available at http://travel.state.gov/family/adoption/stats/stats_451.html., See *infra* Appendix A [hereinafter App. A].

⁷ See *infra* notes 56-69 for text discussion of the Hague Convention.

⁸ See, e.g., Dillon, *supra* note, at 254 (“Despite protestations of neutrality, there is a basis to suspect that UNICEF has bought into and perpetuates the idea that intercountry adoption is essentially a vestige of colonialism.”); See also *id.* at 256 (discussing UNICEF’S efforts more generally).

hierarchy of alternatives for children in need of care, even if perhaps not quite as low as institutional care.⁹ It states in pertinent part:

For children who cannot be raised by their own families, an appropriate alternative family environment should be sought in preference to institutional care, which should be used only as a last resort and as a temporary measure. Inter-country adoption is one of a range of care options which may be open to children, and for individual children who cannot be placed in a permanent family setting in their countries of origin, it may indeed be the best solution.

UNICEF makes clear in this policy statement and in discussions of its significance that “permanent family” care in the form of foster care in-country is preferred to out-of-country adoption.¹⁰ Of course there is little to no foster care in most sending countries today, and even in countries like the U.S. where foster care is the primary placement for children in state care, it is rarely “permanent” even when it takes the form of kinship foster care. Another paragraph in this policy statement argues that the money involved in

⁹ See UNICEF’s position on intercountry adoption, “Inter-country adoption,” available at http://www.unicef.org/media/media_15011.html (last visited April 23, 2007).

¹⁰ *Id.* See also Presentation by Karin Landgren, Chief of Child Protection, UNICEF, New York, NY, at Conference “Promoting Children’s Interests: Preparation, Practice & Policy Reform,” co-sponsored by American Bar Association Center on Children and the Law and the Harvard Law School Child Advocacy Program, at Harvard Law School, at the Workshop Session on “International Adoption: Policies, Politics and the Pros & Cons,” April 14, 2007; Presentation by Alexandra Yuster, Senior Adviser, Child Protection, UNICEF, New York, NY, “Why Children are Homeless and Effective Responses – Socio-economic Factors,” at conference, “Looking Forward: A Global Response for Homeless Children,” Holt International Children’s Services, Eugene, Oregon, Oct. 19-21, 2006 (characterizing international adoption as a “valuable safety valve” for children after virtually all other options have been exhausted, including “fostering and adoption” in-country. See *infra* at notes 54 and 57 for the position of the Chair of the U.N. Committee on the Rights of the Child arguing that the Convention on the Rights of the Child and the Hague Convention should be similarly interpreted to preference in-country foster care over out-of-country adoptions, at least where permanent foster care is involved, which he seems to equate with most foster care. See also “UNICEF Says ‘No’ to Intercountry Adoption” (Jan. 5, 2005), available at <http://www.unicef.com.au/mediaCentre-Detail.asp?ReleaseID=587> (stating that international adoption should be seen as a last resort for tsunami victims, and considered only when growing up in an institution is the only option).

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international adoption, together with the lack of adequate regulation, has created an industry “where profit, rather than the best interests of children, takes centre stage,” and where “abuses include the sale and abduction of children, coercion of parents, and bribery, as well as trafficking to individuals whose intentions are to exploit rather than care for children.”¹¹ UNICEF has, in recent years, issued a variety of statements indicating that large numbers of adoptions from any particular country should be seen as an indication of problems, requiring restrictive action.¹² UNICEF has recently been promoting forms of adoption “reform” law in Guatemala which would likely close down such adoption significantly. Along with many others, UNICEF has for years claimed that Guatemalan adoptions are plagued by problems including illegal payments to birth mothers.¹³ However the extent of any illegal activity in Guatemala is subject to debate.¹⁴ Moreover Guatemala is one of the very few countries that have, in recent years, kept many babies pre-placement in decent foster care, rather than in damaging institutions, and one of the few that have placed them for adoption in infancy,

¹¹ See UNICEF, *supra* note 9; See also UNICEF, Innocenti Digest, “Intercountry Adoption,” compiled principally by Nigel Cantwell, Senior Project Officer at the UNICEF International Child Development Centre, described as responsible for advisory work on intercountry adoption for several UNICEF offices, Dec. 1998 (giving a negative picture of international adoption as characterized by abuses and improper financial pressure, and by trauma for children removed to another country, with abuses especially prevalent in private adoption).

¹² See e.g., UNICEF, GUIDANCE NOTE ON INTERCOUNTRY ADOPTION IN THE CEE/CIS/BALTICS REGION 4 (2003), available at http://www.unicef.org/ceecis/Guidance_note_Intercountry_adoption.pdf (arguing for very last resort status for international adoption, claiming that it involves significant abuses, and stating that an increase in intercountry adoption numbers in any country should be taken as indication of a problem.).

¹³ See, e.g., ILPEC GUATEMALA, ADOPTION AND THE RIGHTS OF THE CHILD IN GUATEMALA (2000), available at http://www.iss-ssi.org/Resource_Centre/Tronc_DI/ilpec-unicef_english_report_2000.pdf (study commissioned by UNICEF, conducted by Latin American Institute for Education and Communication (ILPEC), claiming that international adoption in Guatemala is characterized by rampant profiteering and baby buying); Marc Lacey, *Guatemala System Is Scrutinized as Americans Rush in to Adopt*, N. Y. TIMES, Nov. 5, 2006 at A1 (illustrating popular press assumptions that Guatemala is characterized by child trafficking).

¹⁴ See, e.g., FAMILIES WITHOUT BORDERS, UNICEF, GUATEMALAN ADOPTION, AND THE BEST INTERESTS OF THE CHILD: AN INFORMATIVE STUDY (2003), available at <http://www.familieswithoutborders.com/FWBstudyGuatemala.pdf> (report issued by coalition of prospective and already adoptive parents, refuting UNICEF claims as grossly misrepresentative of Guatemalan adoption situation).

conditions that are central to the children's prospects for healthy, normal development.¹⁵ Guatemala has also freed up significant numbers of children for placement, ranking second in 2006 for the number of children sent to the U.S. for adoption.¹⁶ The kinds of "reforms" being discussed would likely reduce to a small trickle the number of children being released for adoption, and require that those few so released be kept in damaging institutions for the two to three years minimum they are likely to wait.

The European Parliament was, in recent years, dominated by forces taking the position that international adoption was inherently a violation of children's human rights, and committed to making Eastern European countries agree to outlaw international adoption as a condition to joining the European Union.¹⁷ Romania, where ongoing poverty and dislocation resulting from the disastrous Ceausescu regime mean that vast numbers of children continue to be relegated to orphanages which deny them any decent life prospects, was induced by this pressure to enact in June of 2004, a law

¹⁵ On debate over what's happening in Guatemala. *See, e.g.*, D. Marianne Blair, *Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers*, 34 *CAP. U.L. REV.* 349, 366 (2005).

¹⁶ Countries Sending Largest Number of Children to the United States for International Adoption, by Year, 1990-2006, *available at* http://travel.state.gov/family/adoption/stats/stats_451.html. *See infra* Appendix B [hereinafter App.B]. The author has had extensive experience with the Guatemalan situation, including a trip to Guatemala in 2005 to give a keynote speech at a conference addressing the controversy over international adoption. Elizabeth Bartholet, Keynote Speech (at conference in Guatemala City, Guatemala, "In the Best Interests of Children: A Permanent Family") (Jan. 25, 2005).

¹⁷ *European parliamentarians break the Nicholson monopoly on international adoptions*, *BUCHAREST DAILY NEWS*, Mar. 8, 2006 [hereinafter *European parliamentarians*], *available at* <http://www.charlestannock.com/pressarticle.asp?ID=1190> (reporting on how the European Parliament's prior rapporteur on Romania, Baroness Emma Nicholson, had worked to make the EP's official position that Romania should ban international adoption, relying on unproven claims of adoption abuses; how the European commissioners had as a result pressured Romania into passing its new law banning such adoption; and how the current EP rapporteur on Romania, Pierre Moscovici, and many current members of the EP were now in favor of reversing the EP position, and urging Romania to open up international adoption again, based on disagreement with Nicholson's anti-international adoption philosophy, and on belief that such adoption was needed to serve children's needs). *See also* note 72, *infra*.

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eliminating international adoption altogether (except for adoption by a child's grandparents).¹⁸

Overall, as of 2003, *almost half of the forty nations that had made the top twenty list of nations sending children to the U.S. for adoption within the previous 15 years were either closed or effectively closed to intercountry adoption.*¹⁹

International adoption is not a panacea. It will never be more than a very partial solution for the problems of the homeless children of the world. There are millions on millions of those children. The best solution in any event would be to solve the problems of social and economic injustice that prevent so many birth parents from being able to raise their children themselves. But given the realities of today's world, and the existence of so many children who will not be raised by their birth parents, international adoption does provide a very good solution for virtually all of those homeless children lucky enough to get placed. In my view it also pushes us forward on a path to creating a more just world. At the moment, most of those who matter in determining the world's policies on international adoption see the issues differently.

II. HISTORY AND CURRENT TRENDS²⁰

International adoption is largely a phenomenon of the last half century, with the numbers of children from other countries coming into the U.S. rising over the years from negligible to some 22,884 in 2004, dropping slightly to 22,728 in 2005, and then dropping to 20,679 in 2006.²¹ See Table 1 illustrating the trend since 1990.

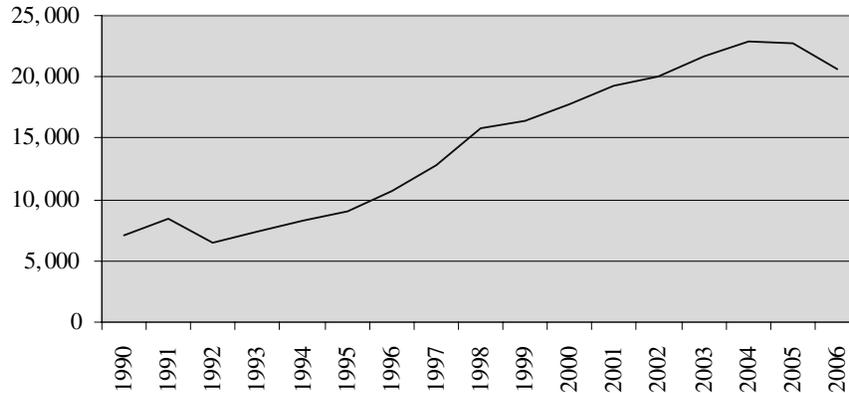
¹⁸ The law went into effect on January 1, 2005. See Testimony of Maura Harty, Asst. Secretary of State for Consular Affairs, Commission on Security and Cooperation in Europe (Helsinki Commission) (2005)[hereinafter *Harty Testimony*], available at http://travel.state.gov/law/legal/testimony/testimony_2635.html.

¹⁹ Ethica, The Statistics Tell the Story, <http://www.ethicanet.org/item.php?recordid=statistics> (last visited Mar. 14, 2007) (found that over past 15 years, of 40 top 20 countries of origin for U.S., 13 currently closed or effectively closed, an additional 4 closed reportedly temporarily, to investigate concerns or establish new procedures, with the total of 17 countries accounting for 43% of the 40).

²⁰ See generally Elizabeth Bartholet & Joan Heifetz Hollinger, *International Adoption: Overview*, in *ADOPTION LAW AND PRACTICE 10-1* (Joan Heifetz Hollinger, ed., 2006) [hereinafter *Overview*].

²¹ See App. A.

TABLE 1.



■ U.S. Department of State, *Immigrant Visas Issued to Orphans Coming to the U.S.*, available at http://travel.state.gov/family/adoption/stats/stats_451.html

The numbers and pattern of international adoptions have changed over the years in response to the changing political attitudes within both sending and receiving countries, and the international community as a whole, and not simply to the objective needs of children for homes or the desire of prospective parents for children. The poor countries of the world have long had an excess of children for whom they cannot adequately care – children doomed to grow up in grossly inadequate orphanages or on the streets. The rich countries have long had an excess of infertile adults who want to parent and a relatively limited number of homeless children. Yet there was virtually no matching of these children with these adults until after the Second World War. That war left the predictable deaths and devastation, and made the plight of parentless children in the vanquished countries visible to the world at a time when adoption was beginning to seem like a more viable option to childless adults in more privileged countries who were interested in parenting. Thus began the first wave of international adoptions.

In successive years different countries have decided whether or not to make their children available for adoption abroad based on some combination of (1) perceived needs of homeless children, often precipitated by war, poverty or other forms of social crisis, and (2) political attitudes, which can make international adoption unacceptable as a method of addressing children’s needs regardless of the extent of those needs and the degree of social crisis. The Korean War led to the opening up of South Korea for adoption in part because of war-created needs: orphaned and abandoned children, and children fathered by American soldiers who would face discrimination in Korean society, represented a need for homes. The govern-

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ment took an international adoption-friendly approach even after the crisis dissipated and the country became relatively well off economically, because it knew that it would be hard to place children in-country given the cultural bias for blood-related children. For years Korea was the source of most of the children coming into the U.S. for adoption, largely because it was one of relatively few countries that designed its international adoption system to facilitate the placement of children in need of homes with adults abroad who could provide them. But then South Korea began to limit the number of children released for adoption abroad. Political forces opposed to international adoption criticized the government for “selling” its children to foreigners, and shamed it in the press during the 1988 Seoul Olympics, changing the overall political dynamic surrounding international adoption.²² By 2006 Korea was only the fourth largest sending country to the U.S.²³

The complicated interplay between children’s needs and political attitudes is similarly illustrated by the history and trends involving other sending countries. The fall of the “Iron Curtain” and the dissolution of the former U.S.S.R. resulted in the opening up of China, Russia, and various new countries which were formerly part of the U.S.S.R. to international adoption. This was not because children’s needs for adoptive homes radically changed in these countries, but because it was suddenly acceptable to deal with the West. Over the years various of these countries have backed off from international adoption, restricting it significantly or altogether, sometimes in apparent reaction to particular adoption scandals, but generally for reasons that appear to relate to changes in political attitudes toward international adoption, and, in any event, *not* because they have figured out how to solve the problems of their homeless children’s needs in the absence of international adoption.

For example, China just recently instituted significant new restrictions on international adoption: prospective parents are disqualified if they are single, obese, older than 50, or fail to meet a range of other newly stringent criteria.²⁴ Yet China continues to have a major crisis in terms of children’s needs on its hands. China’s overpopulation problems, its one-

²² See R.C. Sarri, Y. Baik, M. Bombyk, *Goal Displacement and Dependency in South Korean—United States Intercountry Adoption*, 20 *Children and Youth Services Review* (1/2) 87-112; Curtis Kleem, *Airplane Trips and Organ Banks: Random Events and the Hague Convention on Intercountry Adoptions*, 28 *GA.J. INT’L & COMP L.* 319, 327-329 (Spring 2000).

²³ See App. B.

²⁴ U.S. Dept. of State, Requirements for Intercountry Adoption from the Republic of China to Take Effect on May 1, 2007 (Preliminary Version), http://www.travel.state.gov/family/adoption/intercountry/intercountry_3110.html (last visited Mar.

child policy, and societal attitudes regarding male and female roles, continue to produce the abandonment of many thousands of baby girls, filling the orphanages with girls in need of homes. Many suspect that baby girls are also being both aborted and killed after birth in large numbers, finding no other logical explanation for the now huge discrepancy between the number of boys as compared to girls showing up in the official census count.²⁵ China claimed in announcing its recent restrictions on international adoption that it is responding to an excess of prospective adoptive parents for the available children, but there is obviously no dearth of children in need of homes. The likely explanation in fact is some nationalistic concern at being seen as incapable of caring for its children which finds expression in these new restrictions purportedly designed to exclude those less fit to parent.

Russia enacted new rules a few years ago prohibiting children from being considered for adoption abroad until they had been held six months for purposes of in-country placement. There had been no major developments in Russia at the time providing any reason for thinking that there were in-country homes for more than a small fraction of the large number of children being held in Russian orphanages.

Romania, after the fall of Ceausescu in December 1989 and the resulting exposure to the world of the horrible orphanage conditions in which thousands of its children were living and dying, opened its doors to international adoption and sent large numbers of children abroad.²⁶ Romania closed those doors again at the end of 2000. It has allowed hardly any children out since. This does not reflect any change in Romanian children's needs. An influx of Western attention and resources has brought some modest improvement in the orphanages, but there are still thousands of children living in desperately inadequate orphanage conditions. The closing down of international adoption in 2000 was triggered by a UNICEF-sponsored expert mission, and concerns about payments allegedly made to

14, 2007). See also Pam Belluck & Jim Yardley, *China Tightens Adoption Rules for Foreigners*, N. Y. TIMES, Dec. 20, 2006, at A1.

²⁵ Beth Nonte Russell, *The Mystery of the Chinese Baby Shortage*, N. Y. TIMES, Jan. 23, 2007, at A19. See generally, Michelle Van Leeuwen, *The Politics of Adoptions Across Borders: Whose Interests Are Served? (A Look at the Emerging Market of Infants from China)*, 8 PAC. RIM L. & POL'Y J. 189 (1999).

²⁶ Rene Hoksbergen, Cor Van Dijkum, and Felicia Stoutjesdijk, *Experiences of Dutch Families Who Parent an Adopted Romanian Child*, 23 J. OF DEV. & BEHAV. PEDIATRICS 403 (2002) (finding that, as of 1989, 120,000-150,000 abandoned children lived in 600-800 orphanages, with approximately 10,000 institutionalized children placed in international adoption between 1990 and 2000).

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birth parents in connection with international adoption.²⁷ Opponents of international adoption called for a moratorium on international adoption, pending “reform” of the adoption system. While efforts to enforce rules against baby buying are appropriate, these so-called reform moves in Romania resulted in denying adoptive homes on an on-going basis to thousands of children abandoned in institutions for reasons which had nothing to do with any illicit payments to their birth parents.²⁸ More recently, as noted above, the country has shut down international adoption entirely, as a result of pressure imposed by the European Parliament in connection with Romania’s efforts to join the European Union. Now many are calling for Romania to eliminate this 2004 law and open up international adoption again. The U.S. Senate and the U.S. House of Representatives have each passed resolutions calling for amendment of Romanian law to allow international adoption by people other than grandparents.²⁹ Baroness Emma Nicholson, who as the European Parliament Rapporteur to Romania had led the charge to force Romania to pass the law eliminating international adoption, was succeeded by a new Rapporteur who rejects her philosophy and says that a majority of E.P. members do also. The new Rapporteur has called for reversing the E.P.’s position and urging Romania to open up international adoption again.³⁰ A 2006 report by the Council of Europe Commissioner for Human Rights states that international adoption should not be precluded as an option if accompanied by guarantees that abuses will be prevented.³¹ In the meantime homeless children in Romania continue to suffer. The 2004 law was supposed to usher in a new era in Romania in which institutionalization was abandoned, greater efforts were made to keep children with their biological parents, and those children who could not live in their original homes were placed in newly developed foster care. Some pro-

²⁷ See UNICEF Guidance Note, *supra* note 12; *Harty Testimony*, *supra* note 18.

²⁸ See BARTHOLET, FAMILY BONDS, *supra* note 1, at 155-56.

²⁹ See Congressional Coalition on Adoption Institute, *Senate Unanimously Passed Senate Resolution 359 Concerning the Government of Romania’s Ban on Intercountry Adoptions*, available at <http://www.ccaainstitute.org/detail.php?id=116> (last visited Mar. 14, 2007); *Congressional Resolution urges Romania to Amend Adoption Ban*, available at <http://usinfo.state/eur/Archive2006/Apr/11-918605.html>.

³⁰ See *European Parliamentarians*, *supra* note 17.

³¹ COUNCIL OF EUROPE, FOLLOW UP REPORT ON ROMANIA(2002-2005): ASSESSMENT OF THE PROGRESS MADE IN IMPLEMENTING THE RECOMMENDATIONS OF THE COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS (2006), available at <https://wcd.coe.int/ViewDoc.jsp?id=984009&BackColorInternet=99B5AD&BackColorIntranet+FABF45&BackColorLogged=FFC679>.

gress appears to have been made in this direction, but it is limited progress. Many thousands of infants and children continue to live in and be placed in institutions characterized by horrendous conditions, conditions documented in shocking detail in reports and videos.³²

While many poor countries in Latin America and Africa have had an extended family caretaking tradition which meant that orphaned children or others who could not be cared for by their parents were taken in by relatives, wars and other crises have created huge numbers of children for whom such family care is unavailable. Economic dislocation has resulted in many parents moving away from their extended families to cities in desperate attempts to find work, and then if the parents fall victim as they often do to the ravages of ongoing poverty the children are abandoned to the streets or to institutional care. The AIDS crisis has now so devastated the adult populations in many African countries that many millions of "AIDS orphans," some HIV positive themselves, have been left without any family care.³³ While Africa has in the past sent very few children abroad for adoption, the AIDS crisis there has created new pressures which have begun to increase the flow.³⁴ Impoverished Latin American countries have long been

³² See, e.g., MENTAL DISABILITY RIGHTS INTERNATIONAL, HIDDEN SUFFERING: ROMANIA'S SEGREGATIONS AND ABUSE OF INFANTS AND CHILDREN WITH DISABILITIES at iii-v, 1, 3, 4 (2006), <http://www.mdri.org/projects/romania/romania-May%209%20final.pdf> [hereinafter MDRI REPORT]; Charles Nelson and Eric Rosenthal, Romania's Homeless Children: Problems, Politics and Policies Related to Institutional Conditions, Foster Care, and International Adoption, Presentations at the Art of Social Change class at Harvard Law School (Oct. 19, 2006). The MDRI REPORT, while focusing on children with disabilities, documents the fact that even infants and children without disabilities continue to be sent to and kept in institutions, despite the new law forbidding placement of those 0-2 who are without disabilities in institutions. MDRI REPORT at 2-4. It also documents the horrific conditions characterizing many of these institutions, and the fact that even the new, smaller, and allegedly improved institutions function as devastatingly damaging places for children: "Romania's newer, cleaner, and smaller institutions continue to constitute a threat to children's right to life and protection from inhuman and degrading treatment. . . ." *Id.* at iv.

³³ As of 2003, there were an estimated 12.3 million AIDS orphans in Africa out of 43.4 million total orphans. UNAIDS, ET AL., CHILDREN ON THE BRINK 2004: A JOINT REPORT ON NEW ORPHANS ESTIMATES AND A FRAMEWORK FOR ACTION (2004), http://www.unicef.org/publications/files/cob_layout6-013.pdf.

³⁴ In both 2005 and 2006, three African nations appeared in the list of top 20 sending nations to the U.S. See App. B. See also Melissa Fay Greene, *What Will Become of Africa's AIDS Orphans?* N.Y. TIMES, Dec. 22, 2002, §6 (Magazine), at 50.

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sending some of their children abroad for adoption. Although the needs of their children have not significantly changed, many Latin American countries have significantly or totally shut down international adoption in recent years. Pressure from human rights groups and other critics, both inside and outside the countries, has been the catalyst for change.

While these countries, often termed "sending countries," have gone through the crises and political changes that have affected their international adoption policies, the more privileged "receiving countries" have gone through their own changes, resulting, generally, in an increased interest among prospective parents in adopting children from abroad. In the U.S. and elsewhere, prospective parents have found fewer infants available domestically to adopt because of an increase in the use of birth control and abortion, and a decrease in the stigma against single birth mothers keeping their babies to raise themselves. Also, as the stigma against adoption and mixed race families has lessened, prospective parents have become more comfortable doing international adoption, which typically involves white adults adopting children who look distinctively different.

There is now a large population of prospective international adoptive parents. The potential for placing very large numbers of children in need is significant given the estimates that in the U.S. alone, some one million have expressed interest in adopting, and some 6.1 million or 10% of the reproductive age population are infertile.³⁵ While international adoption will never provide homes for more than a small fraction of the millions on millions in need, it could provide many times the roughly 20,000 homes now provided in the U.S. and 10,000 total now provided in other receiving countries. However, it is not clear that the children will be allowed out.

III. RECENT LEGAL DEVELOPMENTS

The law regarding international adoption is overwhelmingly negative in the sense that it focuses almost entirely on the bad things that can happen when a child is transferred for adoption from one country to another, as opposed to the good things. It reflects the general negativity of all adoption law regarding the transfer of a child to adoptive parents, but adds a layer of additional negativity related to the particular issues involved in international adoption. Thus the law sometimes prohibits international adoption altogether. When international adoption is allowed, the law typi-

³⁵ See Martha Henry, *et al*, *Teaching Medical Students About Adoption and Foster Care*, 10 *ADOPTION QUARTERLY* 45, 46 (2006) (relying on data from Centers for Disease Control); *FAMILY BONDS*, *supra* note 1, at 29 (approximately 15% of couples who want to have children may not be able to produce their own biological children).

cally focuses on ensuring that children are not wrongfully removed from their birth parents, or wrongfully transferred to adoptive parents who are not fully fit. While these things are important, it is striking that the law almost never focuses on the bad things that happen when a child is denied international adoption, or on ensuring the good things that happen when a child is provided such adoption.

Thus the law consists largely of requirements to ensure that birth parents have properly and voluntarily relinquished their children, or have entirely and forever abandoned them, and that adoptive parents have been thoroughly screened for health, age, economic stability and a range of other factors thought to be important to parenting, and have been socialized to take the proper approach to their future child's heritage and culture. Other requirements try to ensure that children are kept in the country of origin even if they cannot return to their biological homes, rather than placed abroad. For example, restrictions might require that agencies search for in-country adoptive homes, for periods ranging from six months to two years, prior to considering adoptive placement abroad, or they might limit foreign adopters to older children or children with disabilities.

By contrast, there are almost no laws or policies that focus on the devastating damage to children's life prospects that come from spending months and years on the streets or in the kinds of institutional conditions that typify the world's orphanages. There are millions on millions of homeless children worldwide living and dying in these situations, and there are limited prospects in the near term for doing better by them in their home countries. Yet there are almost no laws or policies requiring that children in need, without parents or with absent parents, be identified and freed up for adoption if there is no reasonable likelihood that they will soon be able to live with their parents. There are almost no laws or policies limiting the time children are held in institutions before being either reunited with their birth parents or placed in adoptive homes.

Accordingly, the general legal picture is one in which the law places multiple barriers between children who need homes and the parents who might provide them. Recent developments indicate moves in somewhat divergent directions, some making international adoption more difficult to accomplish, and others making it somewhat less difficult. There is *no move*, however, to transform international adoption regulation to focus more significantly on the positive, so that for children who need adoptive homes, as many as possible are placed, as promptly as possible.

International adoption is governed by domestic law, law governing each country's particular affairs, of both the sending and the receiving countries, and international law, law agreed to by various countries to govern certain matters between those countries.

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Countries are understood to have jurisdiction to decide matters related to what are seen as “their children.” They can decide whether to allow adoption out of the country at all, and also the rules governing any adoptions they choose to allow. As noted above, there has been a pattern among countries that have allowed international adoptions during the past few decades to initially open up such adoptions with relatively few restrictive rules, and then after a period of time, to close down significantly. Sometimes countries restrict the children available, and sometimes they restrict the adults considered eligible to adopt. Sometimes countries place international adoption entirely under the control of a central state authority, outlawing private intermediaries, and sometimes countries eliminate such adoption altogether, either temporarily or permanently. “Sending countries’” decisions regarding their domestic laws and policies are made in response both to internal pressure, by, for example, political leaders and non-governmental organizations, and also to external pressure, by, for example, powerful international organizations like UNICEF, other international child and human rights non-governmental organizations (NGOs), other countries, and international law.

Countries also have jurisdiction to decide whether to allow their adults to adopt from abroad, bringing the children back home. “Receiving” countries are in a position to influence sending countries’ international adoption policies either to ease the path of international adoption or to restrict such adoption. The United States has long been the major receiving country in the world, with some two-thirds of all internationally adopted children coming to the U.S.³⁶ Government policy in the U.S. has been somewhat ambivalent towards sending countries with respect to their international adoption policies. Government officials tend to be sympathetic to the desires of prospective adopters within the U.S., and so, for example, occasionally political actors within the U.S. will try to exert influence abroad to persuade foreign entities to allow certain children to be released for adoption. This has often happened when particular children assigned to U.S. parents for adoption get stuck in the pipeline when the children’s home country declares a moratorium on adoption.

³⁶ International adoption *rates* in the U.S. (comparing adoptions to either population or to live births) are lower, however, than in several other countries, in particular Sweden and Norway. Presentation by Peter Selman, “The Movement of Children for Intercountry Adoption: A Demographic Perspective,” Session 527-International Migration – Macro, at XXIVth IUSSP General Population Conference, Salvador, Bahia, Brazil, Aug. 18-24, 2001.

At the same time, the U.S. government is enormously reluctant to give the appearance of wanting to expropriate other countries' children, and this concern appears to dominate its approach to sending countries. For example, when concerns are raised about "adoption scandals" involving alleged kidnapping or baby buying, the U.S. often takes steps to try to ensure that no children are given visas permitting them to leave the sending country for purposes of adoption in the U.S., without new assurances that the children were legally surrendered by their parents. The U.S. has introduced requirements in many sending countries for DNA testing to ensure that the adopted child is in fact the child of the alleged birth parent, along with other requirements designed to ensure that various laws of the sending country have been satisfied. The U.S. has recently been insisting that Guatemala change its laws and policies to deal with the allegations of baby selling that have long surrounded its international adoption practices.³⁷ And on occasions the U.S. has found certain countries' practices so problematic that it has declared a moratorium on allowing U.S. nationals to adopt in that country.³⁸ Other receiving countries often take similar action, refusing to deal with countries they see as being too lenient toward various adoption abuses. For example, as of December, 2006, five countries had refused to accede to Guatemala's accession to the Hague Convention because of concern about Guatemala's adoption policies.³⁹

Receiving countries' laws and policies are also important because they determine not only whether the country's nationals will be allowed to adopt from abroad at all, but also if they can, how hard or easy this will be.

³⁷ The U.S. is demanding that Guatemala change its policies to accord with the Hague Convention in hopes presumably that this would eliminate the alleged problems. See *The Hague Convention on International Adoptions: Before the Subcomm. on Afr., Global Hum. Rts. and Int'l Operations and the H. Comm. on Int'l Rel.*, 109th Cong. 10 (2006) [hereinafter Congressional Testimony] (testimony of Catherine M. Barry, Deputy Asst. Secretary, Overseas Citizens Services) (11/14/06); Department Of State, Frequently Asked Questions: Intercountry Adoptions and the Hague Convention: Guatemala, http://travel.state.gov/family/adoption/notices/notices_2859.html (last visited Mar. 12, 2007).

³⁸ See, e.g., Blair, *supra* note 15, at 356 (describing U.S. suspension of adoptions from Cambodia in Dec. 2001). See also Congressional Testimony, *supra* note 37, 3 (opening statement of Christopher H. Smith, Chairman, Subcomm. on Afr., Global Hum. Rts. and Int'l Operations) (noting that the United States has "serious concerns about things like baby selling and trafficking, abandonment and fraud" in the top four sending countries, China, Guatemala, Russia, and South Korea).

³⁹ See Guatemala Adoption Information and News, *available at* <http://www.guatadopt.com/archives/000107.html> (last visited April 25, 2007); Blair, *supra* note 15, at 368.

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Again, the general picture is one in which law plays a very negative, restrictive role. To accomplish an international adoption, a U.S. national must satisfy state law, federal immigration law, and the laws of the sending country. All of these laws will be focused almost entirely on making sure that no problematic adoption goes through, instead of focusing in addition on ensuring that adoptions likely to serve a child's interests go through as often and as efficiently as possible. Any given international adoption is likely to cost somewhere in the range of \$15,000 to \$40,000, and to involve a challenging emotional journey, inordinate paperwork, and years of commitment to accomplish.

Given this background reality, U.S. law related to international adoption has moved in recent years in directions somewhat more favorable to international adoption. A federal law entitled the Child Citizenship Act was passed in 2000, giving internationally adopted children automatic citizenship rights immediately upon adoption.⁴⁰ On return to the U.S., adoptive families can expect to receive proof of citizenship, automatically delivered to their home, within approximately a month of arrival.⁴¹ This law, on a practical level, was a major step forward. Previously international adoptive parents had to apply for citizenship for their children, one more bureaucratic hurdle that, if ignored, left the children vulnerable in their new life, as non-citizens. This new citizenship legislation also constituted a major symbolic step forward, giving those *adopted* abroad similar citizenship status with children *born* abroad to U.S. citizens, an important move toward recognizing the legitimacy of international adoption as a way to form one's family. Federal income tax law was amended effective 1996 to give tax credits for the first time for expenses for any adoption, including international adoption, for those falling within the income eligibility limits, with the amount of the credit increased from \$5,000 to \$10,000 per adoption, in 2002, and designed to increase slightly every year so that for 2007 the amount is \$11,390.⁴² Again, apart from the practical significance, this was a dramatic

⁴⁰ 8 U.S.C. §1431 (2000); 8 U.S.C. §1433 (2000 & Supp. 2003). *See also* Daniel Levy, *The Child Citizenship Act of 2000*, 6 *Bender's Immigr. Bull.* 291, 293-95 (MB ed., 2001).

⁴¹ *See* Congressional Testimony, *supra* note 37, 13 (testimony of Lori Scialabba, Associate Director, U.S. Citizenship and Immigration Services, U.S. Dept. of Homeland Sec).

⁴² *See* Laura P. Hampton, *The Aftermath of Adoption: The Economic Consequences—Support, Inheritances and Taxes*, in *ADOPTION LAW AND PRACTICE*, *supra* note 20, at §12.05(1)(c); I.R.C. 137 (West Supp. 2006). The eligibility limits are adjusted each year also; for 2007, the tax credit is reduced when adjusted gross income is \$170,820 and above, and is completely phased out when it is

move in the direction of reducing disparities in the treatment of adoption as compared to biologically related parenthood, which has always been heavily subsidized by tax and other policies.

Other legal developments in the U.S., although not directly related to international adoption, are changing the landscape in an adoption-friendly direction that may well prove relevant to international adoption's long-term prospects. Congress passed, in 1994, and strengthened, in 1996, a law called the Multiethnic Placement Act (MEPA),⁴³ prohibiting foster and adoption agencies receiving federal funds from using race as a factor in child placement. This law was designed to radically change the laws and policies of the fifty states, all of which had traditionally engaged in "race matching," placing children if at all possible with same-race foster and adoptive parents. MEPA constitutes a powerful rejection of the philosophy at the heart of efforts to restrict international adoption – the idea that children are best off if kept within their community of origin, and the related idea that racial and ethnic communities are best off when they keep "their" children within the group.

In 1997, Congress passed the Adoption and Safe Families Act (ASFA).⁴⁴ This law was designed to reduce the emphasis on keeping children with their family of origin, to place greater emphasis on children's interests in growing up in nurturing, permanent homes, and to ensure that if the family of origin could not provide that kind of home within a reasonable period of time, then children be moved to adoptive homes rather than held on an ongoing basis in foster or institutional settings.

ASFA like MEPA rejects ideas at the core of opposition to international adoption about the central importance of heritage and about the last resort status of adoption. ASFA also rejects a related policy of holding children in limbo with technical ties to their birth parents, rather than moving

\$210,820. IRS, Changes in 2007 Tax Code, *available at* <http://www.irs.gov/pub/irs-drop/rp-06-53.pdf>. Adoptions of certain "special needs" children, identified as hard to place, have generally been subsidized by the state and federal governments since 1980.

⁴³ See The Howard M. Metzenbaum Multiethnic Placement Act of 1994, 42 U.S.C. § 622(B)(9), 5115A, Pub. L. No. 103-382, §§ 551-554, 108 Stat. 4056, as amended by the Removal of Barriers to Interethnic Adoption Provisions of the Small Business Job Protection Act of 1996, 42 U.S.C. §§ 671, 674, 1996B, Pub. L. No. 104-188, § 1808, 110 Stat. 1903. SEE GENERALLY Elizabeth Bartholet, Commentary: Cultural Stereotypes Can and Do Die: It's time to Move on with Transracial Adoption, 34 J. AM. ACAD. PSYCHIATRY LAW 315-20 (2006).

⁴⁴ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 § 102 (amending Title IV of the Social Security Act, 42 U.S.C. 601 *et seq.*).

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them promptly on to available adoptive homes. This problem, while an issue within the U.S., exists in extreme form in most of the sending countries of the international adoption world. Children are held in orphanages for years at a time, technically tied to their birth parents and not free for adoption, even though they may see their parents rarely if ever and may have no prospect of returning to live with them. ASFA is one of those very rare adoption laws that actually focuses on the bad things that happen in the *absence* of adoption – namely the harm that comes to children when held in limbo, without permanent parents. If ASFA's spirit were to spread beyond our borders, it would help animate efforts to free increased numbers of children for adoption, and ease the barriers to international adoption so that more of them could be placed, and placed more promptly.

Finally, there are some very general developments in U.S. law in an adoption-friendly direction that bode well for international adoption also. Traditionally U.S. parentage law has accorded very significant weight to biology and been heavily biased against the kind of non-biologically linked parenting that is adoption.⁴⁵ But the recent trend has been in the direction of reducing the importance of biology as a factor in defining parentage. Increasing emphasis is being placed on established and/or intended *social* as opposed to biological parenting relationships, with these factors sometimes weighing equally with or even outweighing biology.⁴⁶ And there are indications that despite our traditional emphasis on adult rights over children's, we are moving, however slowly, in a child-friendly direction.⁴⁷

B. International Law

International law has moved somewhat in the direction of legitimating international adoption, and of providing general guidelines for its appropriate conduct, but it does little to *facilitate* such adoption. Consistent with the generally negative legal picture, even the most favorable international law of current times, the Hague Convention, in no way *requires* that countries recognize any rights in their children to receive a nurturing home abroad, even if none is available in the home state allow international adoption for children who cannot be placed in a home in their country of origin.

The first truly significant international documents recognizing international adoption were the 1986 U.N. Declaration on Social and Legal

⁴⁵ See generally, FAMILY BONDS, *supra* note 1.

⁴⁶ See Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN'S L.J. 323, 327-28 (2004).

⁴⁷ See Elizabeth Bartholet, *The Challenge of Children's Rights Advocacy: Problems and Progress in the Area of Child Abuse and Neglect*, 3:2 WHITTIER J. OF CHILD AND FAM. ADVOC. 215 (2004).

Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption, Nationally and Internationally,⁴⁸ and the 1989 U.N. Convention on the Rights of the Child.⁴⁹ However they stopped well short of fully legitimating such adoption.

The Convention on the Rights of the Child (CRC) is the more powerful document, ratified by every country in the world except the U.S. and Somalia.⁵⁰ It is seen as the ultimate expression to date of international support for children's human rights. It talks in powerful language in the *Preamble* of the child as one of the members of the human family entitled to fundamental human rights, and as entitled to special safeguards and care by virtue of immaturity. In Article 3 it proclaims that in all actions concerning children "the best interests of the child shall be a primary consideration."⁵¹ However in the key Articles dealing with children in need of care outside of their birth family, the Convention provides that countries are free to decide whether to allow adoption or not, and if they do allow it, whether to include international adoption or limit adoption to domestic only. Article 20 provides, with respect to children deprived of their family environment, that nations "shall in accordance with their national laws" ensure alternative care, and that such care "could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background."⁵²

Moreover, *Article 21 tells nations that might want to allow international adoption that they must treat it as lower on the hierarchy of choices than various in-country options that include but are not limited to in-country adoption*. Many believe, rightly or wrongly, that in-country adoption should be preferred to out-of-country adoption, but the CRC goes far beyond this, stating that nations "that recognize and/or permit" adoption, "shall: . . . (b) Recognize that inter-country adoption may be considered as

⁴⁸ G.A. Res. 41/85, Annex, U.N. GAOR, 41st Sess., Supp. No. 53, U.N. Doc. A/41/898 (Dec. 3, 1986).

⁴⁹ G.A. Res. 44/25, Annex, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989) [hereinafter CRC] (addressing the protection of children without families, adoption nationally and internationally, and the sale, trafficking, and abduction of children in articles 20, 21, and 35).

⁵⁰ Office of the High Commissioner for Human Rights, Status of Ratification of the Convention on the Rights of the Child, <http://www.unhcr.ch/html/menu2/6/crc/treaties/status-crc.htm> (last visited Mar. 12, 2007).

⁵¹ CRC, *supra* note 49, art. 3. §1.

⁵² *Id.* art. 20 §3

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an alternative means of child's care, *if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin.*"⁵³ This places international adoption lower on the hierarchy than in-country foster care, and apparently even lower than institutional care that might be deemed "suitable." The Chair of the U.N. Committee on the Rights of the Child has on various occasions indicated publicly that this language should be interpreted to require a preference for international adoption over institutional care since the latter cannot be considered appropriate for children. He has also said that the CRC requires that in-country foster care be preferred to out-of-country adoption if it is ongoing, "permanent," foster care, as compared to temporary care.⁵⁴ But at the same time he appeared to assume that virtually all foster care would be "permanent," which seems most unlikely. In the U.S., which has had significant experience over many decades with foster care, and far more resources than sending countries to support positive forms of foster care, it has typically not been permanent, even when children are placed with kinship foster parents, and it has typically been far inferior to adoption for children, as indicated by various measures of child development and adjustment in the available social science.⁵⁵

A dramatic step forward, in at least symbolic support for international adoption, was taken in 1993, when 66 countries, including most of the sending and receiving countries in the international adoption world, approved the Hague "Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption," generally referred to as the Hague Convention on Intercountry Adoption.⁵⁶ This constitutes the most significant legitimization of international adoption to date, apparently making such adoption a preferred option for children over institutional and foster care in their home countries, although indicating that adoption in-country should be preferred over adoption abroad. The Convention's *Preamble* recognizes that "the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness,

⁵³ *Id.* art. 21(b) (emphasis added).

⁵⁴ See e.g., Jacob E. Doek, Chairperson, U.N. Comm., Protecting Children Globally: Pros and Cons of Int'l Adoption; Presentation at the Child Advocacy Policy Workshop at Harvard Law School (Nov. 10, 2005).

⁵⁵ See ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* 81-97 (1999).

⁵⁶ Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M 1134, available at http://www.hcch.net/index_en.php?act=conventions.pdf&cid=69 [hereinafter Hague Convention].

love and understanding,” and that “*intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.*” This of course again fails to in any way *require* that nations recognize international adoption as an option for children. And it accords with the popular sentiment that in-country adoption should be at the top of the hierarchy of options for children who cannot be cared for by their birth parents. But it does at least seem to make international adoption next on line on the hierarchy. However the Chair of the U.N. Committee on the Rights of the Child has interpreted this language as consistent with his interpretation of the CRC, arguing that under the Hague a permanent foster family should count as a “permanent family” to be preferred over any international adoptive family.⁵⁷

The Hague Convention also includes some basic substantive rules designed to ensure that birth parents and their children are protected against wrongful attempts to separate them through, for example, use of financial payments to induce the surrender of parental rights, or coercion as in kidnapping. And it includes some basic procedural rules designed to ensure obedience to the substantive rules, such as requirements that each country create a Central Authority to implement the Convention. The Convention governs only those adoptions that take place between countries which have ratified it.⁵⁸ As of March, 2007, 71 countries had become parties to the Convention,⁵⁹ with more having indicated that they will become parties in the coming years.⁶⁰ The U.S. Senate has given its advice and consent authorizing U.S. ratification of the Convention, conditioned on laws and regulations being adopted to enable compliance with the Convention’s requirements.⁶¹ Basic enabling legislation entitled the Intercountry Adop-

⁵⁷ See Doek, *supra* note 54.

⁵⁸ See generally Dillon, *supra* note 3; Alexandra Maravel, *The U.S. Convention on the Rights of the Child and the Hague Conference on Private International Law: The Dynamics of Children’s Rights Through the Legal Strata*, 6 *TRANSNAT’L L. & CONTEMP. PROBS.* 309 (1996); Elizabeth J. Ryan, *For the Best Interests of the Children*, 29 *B.C. INT’L & COMP. L. REV.* 353 (2006).

⁵⁹ Hague Conference on International Law, Status of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, http://www.hcch.net/index_en.php?act=conventions.status&cid=69 (last visited Mar. 14, 2007).

⁶⁰ See U.S. Dept. of State, Hague Convention on Intercountry Adoption, Feb. 15, 2006, available at http://www.travel.state.gov/family/adoption_hague.html.

⁶¹ See generally Kathleen Sullivan, *Intercountry Adoption Act Becomes Law*, 5 *Bender’s Immigr. Bull.* 977 (MB ed., 2000).

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tion Act of 2000 has been enacted,⁶² and the necessary regulations issued, with the final ratification step now anticipated in late 2007.⁶³

The net impact of the Hague Convention may be favorable to international adoption for four primary reasons. First, in legitimating such adoption as a good option for children, it not only reflects widely shared international opinion, but is likely to reinforce such opinion, giving those in a position to influence policy more reason to shape it in an adoption-friendly way. Second, in reinforcing existing rules against baby-buying and other adoption abuses, it may help reduce the number of adoption scandals, which are not only problems in their own right but are also likely to trigger anti-adoption “reforms” that close down or drastically limit international adoption. Third, in emphasizing that international adoption law should serve children’s best interests, protect birth parent rights, and prohibit abusive practices, the Hague may improve the perception of such adoption in a world where many talk of it as equivalent to child trafficking. Finally, and for related reasons, the Convention will provide political cover for leaders in sending countries who think international adoption will serve their government’s and their country’s children’s interests, but might be afraid of anti-adoption forces’ charges that they are “selling” or otherwise exploiting these children, and wasting what are often termed these countries’ “most precious resources.” The Convention can be used to demonstrate that internationally adopted children will be protected against sale and exploitation, and that the world community approves of such adoption as a good option for children.

The Hague Convention will also likely stimulate changes in various receiving countries’ laws in a direction favorable to international adoption. This is notably true in the U.S. Most significant is the elimination for Convention adoptions of the so-called “orphan” requirement in U.S. Immigration law, which limits those children entitled to immediate entry upon adoption to those who have only a sole birth parent surrendering them for adoption.⁶⁴ Since virtually all countries allow couples who are not in a position to raise their children to surrender them for adoption, this restriction has limited the pool of children available for adoption who could find homes in the U.S. It has also caused crises in a number of individual adop-

⁶² Intercountry Adoption Act of 2000, Pub.L. No. 106-279, 114 Stat. 825, *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_public_laws&docid=f:publ279.106.pdf.

⁶³ See Hague Convention on Intercountry Adoption, *available at* <http://travel.state.gov/law/legal/testimony/testimony-3069.html> (last visited 5/1/2007).

⁶⁴ See 8 U.S.C.A. §1101 (West 2005 & Supp. 2006); 8 C.F.R. §204.3 (2006); Sullivan, *supra* note 61.

tion cases in which U.S. citizens unwittingly adopted abroad children who did not fit the orphan definition, only to find that although they were the legal parents of the adopted children, they could not bring them back into the U.S. The Intercountry Adoption Act of 2000, the Hague implementing legislation referred to above, amends the Immigration and Nationality Act to eliminate the orphan restriction for those adoptions conducted under and in accord with the Convention.⁶⁵ The Intercountry Adoption Act also should remove the need for parents who have adopted in courts abroad to re-adopt in their home state in the U.S. Parents have felt pressure to re-adopt because foreign decrees are not entitled to the “full faith and credit” from courts that an adoption decree issued by a U.S. court would be, and because they typically have needed a U.S. court decree to get their local U.S. birth registry to issue a new U.S. birth certificate. The Act implements the Hague requirement that adoption decrees issued by courts in the sending country in compliance with Hague requirements be recognized and given effect in the receiving country. Such decrees will accordingly be entitled to full faith and credit within the U.S., and should entitle adoptive parents to get a birth certificate issued by their local U.S. birth registry based solely on the foreign decree, without the parents having to go through a second U.S. adoption.⁶⁶

The Hague Convention may, however, turn out to have a net impact on international adoption that is negative, by creating additional barriers to such adoption. Some countries may ratify the Convention, but fail to take the bureaucratic steps necessary to make it effective, thus precluding themselves from engaging in international adoption. Anti-adoption forces may see attempts to implement the Convention as an opportunity to mount a battle to limit or close down international adoption, as has happened in Guatemala. Even if the Convention is implemented, the new bureaucratic hurdles it creates will likely increase the expense of international adoption for all prospective parents. This is predicted to be the case in the U.S.,⁶⁷ and it of course creates the risk that reduced numbers of prospective parents will

⁶⁵ See Congressional Testimony, *supra* note 37, 41, 15 (Scialabba stating that, once the Hague is effective in the U.S., the definition of a child that may be adopted will expand to include children living with two biological parents incapable of providing care, or a sole parent, regardless of whether that parent is the father or mother). See *generally* Sullivan, *supra* note 61.

⁶⁶ See Joan Hollinger, *Resisting Challenges to the Rule of Full Faith and Credit for Adoption Judgments*, 8 *Adoption Q.*, issue 3; 73, 84 (Oct. 2005).

⁶⁷ See Congressional Testimony, *supra* note 37, at 31 (Richard Klarberg, President & CEO, Council on Accreditation) (noting that U.S. adoption agency costs will go up as a result of Hague-related accreditation requirements).

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step forward, and accordingly reduced numbers of children will receive homes. Sadly, there is also always the risk that the new legal regimes put in place to accommodate the Convention's requirements will be unduly restrictive, leading to longer periods before placement for some children, and outright denial of placement for others. This unfortunately is the general record of "law reform" in the area of international adoption.

One obvious risk presented by the Hague is its requirement that each sending and receiving country create a Central Authority with overall responsibility for the regulation of international adoption. The Hague negotiations included many who foresaw the danger that if the state was given a monopoly over international adoption in any country there was a risk that such adoption would be unduly limited or effectively closed down, given government proclivity to regulate in a negative way. Many of us involved in those negotiations⁶⁸ fought to preserve the role of "private adoption." In the highly regulated world of international adoption no adoption is truly private, but many non-governmental agencies and intermediaries have traditionally operated to facilitate adoption. Typically they work to maximize the opportunities for prospective adoptive parents and children in need of homes to find each other. Critics of international adoption put down such non-state actors as motivated by greed, and serving the needs of adoptive parents at the expense of the best interests of children. But others, like myself, believe that such actors are essential to keep international adoption alive, and, accordingly, to truly serve the best interests of children, at least in the many countries in which state governments can be expected to use monopoly power over adoption to restrict or end the practice. In the context of the Hague negotiations, this debate was resolved somewhat ambivalently, but in a way which at least retains the possibility of private adoption. The Hague Convention does require each country to create a Central Authority, but then permits countries to authorize non-state actors to continue to play a major role in international adoption. This is the route that the U.S. has taken, and it seems likely that post-Hague, while international adoption will require a few more hoops and thus some greater expense, things will not change all that much within the U.S. as a result of the Hague. However many countries are likely to read the Hague's requirement for a Central Authority as equivalent to mandating state monopoly control over international adoption, and those hostile to international adoption are likely to promote this reading. This could effectively close down such adoption from

⁶⁸ The author served as a member of an advisory group to the U.S. Department of State in connection with its role in representing the U.S. in the Hague Convention negotiations.

those countries. Indeed there is already some evidence that this has been happening in various countries in Central and South America.⁶⁹

International law has moved generally in the direction of increased recognition of children's rights and interests, as has the domestic law of many countries. The U.N. Convention on the Rights of the Child is one sign of this movement. The new Constitution adopted by the Republic of South Africa, which provides robust protection for children's rights, is arguably significant of things to come elsewhere, as that Constitution embodies many of the progressive rights movements of recent years.⁷⁰

Many of us might think that this move should encourage the future facilitation of international adoption as an option for children in need of homes. Children's most fundamental interests are in being raised in a loving, nurturing manner, and can best be served by giving them the homes that often will only be available in international adoption. But many of the most powerful proponents of human rights think that international adoption should be reduced significantly from today's numbers and limited to at best extreme last resort status. And today it remains quite unclear what the future direction of law and policy governing international adoption will be.

IV. THE POLITICS AND THE POLICY PROS AND CONS⁷¹

There are three issues at the heart of the debate over international adoption. One has to do with the interests of existing children who need homes and could realistically be placed in international adoptive homes, but are unlikely to find in-country adoptive homes. Another has to do with the interests of the larger community, particularly in the sending country, and particularly including birth parents and homeless children with no prospects of international adoptive placement. The third has to do with adoption abuses such as baby buying and other violations of core adoption laws.

Opponents of international adoption range along a broad spectrum from those who believe that it is inherently a violation of human rights and should be entirely eliminated, such as Baroness Emma Nicholson, former

⁶⁹ See App. B. See also Congressional Testimony, *supra* note 37, 42 (Thomas DiFilipo, President & CEO, Joint Council on International Children's Services) ("In at least four Central and South American countries, centralization has contributed to the elimination of intercountry adoption as a viable option. . . ." citing a decrease in average annual adoption from 251 children to 0).

⁷⁰ See generally Barbara B. Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights into Constitutional Doctrine*, 2 U. PA. J. CONST. L. 1 (1999).

⁷¹ See BARTHOLET, FAMILY BONDS, *supra* note 1, at 150-63. See also other Barcholet writings cited *supra* note 1.

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Rapporteur to Romania for the European Parliament,⁷² to those who think it should be treated as a last resort, with the focus kept on improving in-country welfare services and on regulation designed to better ensure against adoption abuses. Supporters of international adoption range along a similarly broad spectrum, from those who think it should be treated as one of the best options for children who cannot expect to be reunited with their birth parents, to those who think that it should at least be kept open and be treated as a preferred option to institutional care in-country. Most of those who count themselves as supporters go along with the idea of a preference for in-country adoption over out-of-country adoption. Essentially all agree with the core adoption law principles ensuring that children made available for adoption have been properly separated from their birth parents, with those parents having consented to adoption without any coercion or payment, and ensuring also that the children are placed with appropriately screened adoptive parents.

I place myself at the most enthusiastic end of the spectrum of supporters. I find it overwhelmingly clear that international adoption serves the best interests of existing children in need of homes. I take seriously the arguments based on larger community interests, but think in the end that encouraging and facilitating international adoption does more to serve those interests than does restricting and closing down such adoption. And finally, in addressing adoption law abuses, I think we need to work to eliminate the abuses but keep the focus on the bigger picture – ensuring that as many children as possible receive permanent nurturing homes as early in life as

⁷² See Emma Nicholson, *Red Light on Human Traffic*, GUARDIAN UNLIMITED, July 1, 2004, available at <http://society.guardian.co.uk/adoption/comment/0,,1250913,00.html> (last visited March 13, 2007) (opposing international adoption, claiming with no substantiation that “[c]hildren exported abroad. . .are often subjected to paedophilia, child prostitution or domestic servitude”). Andrew Bainham, Fellow of Christ’s College, University of Cambridge, provided intellectual backing for Baroness Nicholson, serving as Special Adviser to her in her role as Rapporteur for Romania. He takes the position that for any of the modern European democracies, engaging in international adoption “amounts to a fundamental failure . . . to comply with the requirements of the European Convention [for the Protection of Human Rights and Fundamental Freedoms 1950],” together with the CRC, since international adoption constitutes an admission of failure to provide for their own children, and accordingly that no country should be allowed to join the EU so long as they were engaging in such adoption. See Andrew Bainham, *International Adoption from Romania – Why the Moratorium Should not Be Ended*, 15 CHILD & FAM. L.Q. 223 (2003); See also *European parliamentarians*, supra note 17, (discussing Nicholson’s position and its current rejection by many members of European Parliament, including her successor as Rapporteur to Romania).

possible. We have to avoid, as the saying goes, throwing the baby out with the bath water.

A. Interests of Existing Children In Need of Homes Who Could be Placed Internationally

Here the case for international adoption rests on the social science and the child development expertise that demonstrates how harmful it is to children to grow up on the streets or in institutions,⁷³ and how well children

⁷³ See, e.g., Charles H. Zeanah et al., *Designing Research to Study the Effects of Institutionalization on Brain and Behavioral Development: The Bucharest Early Intervention Project*, 15 DEV. & PSYCHOPATHOLOGY 885, 886-88 (2003), (summing up previous research on deleterious effects of institutional rearing, including recent research on many problems of children adopted out of institutions in Eastern Europe, Russia, and other countries, as well as ameliorating effects of early intervention. This article describes the Bucharest Early Intervention Project (BEIP), an ongoing randomized controlled trial of foster placement as an alternative to institutionalization designed to document scientifically both the effects of institutionalization and the degree of recovery that foster care can provide, and to assist the government of Romania in developing alternative forms of care beyond institutionalization. Research already produced by BEIP “Core Group” documents some of the damage Romanian children have suffered by virtue of institutionalization. See Peter J. Marshall & Nathan A. Fox and the BEIP Core Group, *A Comparison of the Electroencephalogram between Institutionalized and Community Children in Romania*, 16 J. COGNITIVE NEUROSCIENCE 1327 (2004); Susan W. Parker and Charles A. Nelson, *The Impact of Early Institutional Rearing on the Ability to Discriminate Facial Expressions of Emotion: An Event-Related Potential Study*, 76 CHILD DEV. 54 (2005); For other recent research see the St. Petersburg-USA Orphanage Research Team, *Characteristics of Children, Caregivers, and Orphanages For Young Children in St. Petersburg, Russian Federation*, 26 J. OF APP. DEV. PSYCHOL. 477 (2005) (giving comprehensive, empirical description of orphanage environments, describing most salient deficiencies as in social-emotional environment, and describing harmful impact on children, all consistent with reports on other countries’ orphanages); Bilge Yagmurlu et al., *The Role of Institutions and Home Contexts in Theory of Mind Development*, 26 J. APP. DEV. PSYCHOL. 521 (2005) (documenting harmful impact of institutionalization on “theory of mind” development of children in Turkey, relevant to social, cognitive and language development, and psychological adjustment, all related to deprivation of normal adult-child interaction, and all consistent with other research findings). See also MDRI REPORT, *supra* note 32, at 5, 20-21, nn 25-34; *Overview*, *supra* note 20, §§10-17, §10.03[1][c], at. 10-20 and notes. 36-37; Bartholet, *FAMILY BONDS*, *supra* note 1 at 150-51, 156-57.

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do when placed in international adoptive homes.⁷⁴ Children placed early in life in international adoptive homes are likely to do essentially as well in their families and in life as any children raised by their biological parents in those receiving countries. Children subjected to terrible experiences prior to adoptive placement, as many international adoptees have been, often show remarkable success in overcoming some of the damage done by these early experiences. By contrast, research on orphanages shows how devastatingly harmful institutional life is for children. Interestingly even the better institutions have proven incapable of providing the personal care that human children need to thrive physically and emotionally.⁷⁵ Research on children who started their early life in institutions demonstrates vividly the damage such institutions do even when the children are lucky enough to escape the institutions at relatively early ages.⁷⁶ Age at adoptive placement regularly shows up in adoption studies as the prime predictor of likelihood of successful life adjustment.

Opponents of international adoption argue that children are best served by remaining in their community of origin, where they can enjoy their racial, ethnic and national heritage. They argue that children are put at risk when placed with dissimilar adoptive parents in foreign countries, where they may be subject to ethnic and racial discrimination in addition to the basic loss of identity associated with their community of origin. But the opponents' claims are based on extreme romanticism, without any grounding in the available evidence and without support in common sense. Children doomed to grow up in orphanages or on the streets cannot expect to

⁷⁴ See Zeanah, *supra* note 73 (describing earlier research). A meta-analysis of research on international adoptees recently published in the Journal of the American Medical Association showed the adoptees generally well-adjusted with those living with their adoptive families for more than 12 years the best adjusted, and with preadoption adversity increasing the risk of problems. Femmie Juffer and Marinus H. van IJzendoorn, *Behavior Problems and Mental Health Referrals of International Adoptees*, 293 J.A.M.A. 2501 (2005). See also Bartholet, *FAMILY BONDS*, *supra* note 1, at 150-60; *Overview*, *supra* note 20, at 10-15 - 10-21.

⁷⁵ See, e.g., MDRI Report, *supra* note 32, at iv.

⁷⁶ Early results of the Bucharest Early Intervention Project, *supra* note 73, show that placement of the institutionalized Romanian children in specially designed, model foster care had ameliorating effects on their intellectual, emotional, psychiatric and brain development, with the length of time previously in the institution and the age at which removed to foster care factors in their functioning; U. Md. Press Release, *Institutionalized Children Benefit from Early Intervention* (Feb. 14, 2006); See also Charles Nelson, *Romania's Homeless Children*, *supra* note 32, Presentation on BEIP research results at the Art of Social Change class at Harvard Law School (Oct.19, 2006).

enjoy their cultural heritage in any meaningful way. And the real choice today for most existing homeless children in the countries of the world that are or might become sending countries, is between life – and often death – in orphanages or on the streets in their home country and, for a lucky few, life in an adoptive home abroad. Possibilities for adoption at home in the birth country are drastically limited by the poverty of the population and by attitudes toward adoption in most Asian and many other countries that are more blood-biased and otherwise discriminatory toward adoption than they are in the U.S.

Opponents argue that children might be placed in in-country foster care, and in that way benefit from remaining in their country and culture, as well as possibly still linked in some way with their birth family. But foster care does not exist to a significant degree in the sending countries and the poor countries of the world – overwhelmingly the homeless children of the world are living and dying in orphanages and on the streets. The U.S. is the country which has had the greatest experience with foster care – for many decades now the vast majority of the children committed to state care here have been living in foster care because it has been seen as so superior to institutional care. Even with the resources that the U.S. has to support foster care, it does not work especially well for children. Social science demonstrates clearly that while foster care works better for children than living in birth families characterized by child abuse and neglect, it does not work nearly as well as adoption.⁷⁷ It is extraordinarily unlikely that foster care will work better in countries that are desperately poor than it has in the U.S. Moreover the bottom line for children who might find adoptive homes abroad now, is that foster care, whether good or bad, rarely exists as an option.

⁷⁷ See BARTHOLET, *NOBODY'S CHILDREN*, *supra* note 55; The BEIP research, *supra* notes 73-74, 76 documenting the improvements in children's functioning when they are removed from Romanian institutions to foster care, is based on what Charles Nelson designates "super duper foster care"—foster care that he has designed and which is very significantly superior to the inadequate foster care typical of what exists in most sending countries. Charles Nelson presentation at Conference at Harvard Law School, Workshop Session on "International Adoption: Policies, Politics and the Pros and Cons," *supra* note 10 (April 14, 2007). And his work makes no claim that foster care is better for children than international adoption – the BEIP project he leads is operating in a legal and political situation in which international adoption is off the table and too hot to touch.

182 BUFFALO HUMAN RIGHTS LAW REVIEW Vol. 13*B. Larger Community Interests*

Here the arguments are more amorphous, social science provides no clear answers, and in the end one must simply make a complicated judgment call. Opponents of international adoption argue that international adoption constitutes a particularly vicious form of exploitation of the impoverished sending countries of the world by the richer countries of the world, and the loss of the poor countries' "most precious resources." I see international adoptive families, in which parents and children demonstrate the human capacity for love across lines of difference, as a positive force for good in a world torn apart by hatred based on racial, ethnic, and national differences. I also question how impoverished communities will in fact be in any way enriched by keeping these children in institutions or on the streets.

Opponents point out that international adoption is, at best, only a very partial solution, providing homes to only a small fraction of the children in need in any sending country. They argue that the funds spent on giving homes to the handful would be better spent improving conditions that would benefit the larger group of children in need. A related argument is that the governments of both sending and receiving countries should do more to change the conditions of poverty and the cultural attitudes that result in children being abandoned and surrendered for adoption, rather than making efforts to facilitate the transfer of such a limited number of children to adoptive parents. Opponents also argue that the huge amount of money involved in international adoption, much of which flows to adoption intermediaries and orphanage bureaucrats in the sending countries, creates pressure to keep the international adoption system going rather than to build up social welfare institutions which would better support birth parents, enabling them to keep their children.⁷⁸

These arguments raise hard issues. The history of the world has involved exploitation by the U.S. and some other receiving countries of the world, and it is understandable that many would see international adoption as a continuation of this pattern. Moreover, international adoption is unlikely ever to provide direct help for more than a limited number of children. Even if laws were changed to facilitate such adoption, it is unimaginable that it would ever begin to seriously address the needs for adequate nurturing of any significant percentage of the vast numbers of children in need. There are, after all, said to be some *100 million children with no available caregivers* – 65 million in Asia, 34 million in Africa, and

⁷⁸ See, e.g., Bainham, *supra* note 72; See also Karin Landgren, *supra* note 10.

8 million in Latin America and the Caribbean.⁷⁹ UNICEF estimates that at least 2.6 million children worldwide live in institutional care, noting that this is a significant under-estimate, since in some countries many institutions are not included in the reporting.⁸⁰ In any event, the better, more humane solution would be the elimination of the kind of poverty and injustice that produce so many desperately poor people who are unable to keep and raise the children that they bear.

The central question for me is whether international adoption impedes the goals of helping the larger group of children in need and of addressing global poverty and injustice. It is hard to know for sure. It *could* be that international adoption diverts energy and resources that would otherwise be devoted to these goals. But I see no evidence that this is the case, and I hear no claims by opponents that such evidence exists. Indeed I hear no developed arguments as to why this likely *would* be the case. Opponents instead tend simply to describe with outrage the picture of the rich American swooping in to carry the adoptive baby off to its new privileged life, paying the \$30,000 worth of adoption fees to various adoption agencies and other intermediaries, and they talk of all that that \$30,000 might mean if devoted to supporting birth parents or improving conditions in orphanages for the many children left behind. But the fact is that denying that prospective adoptive parent the opportunity to parent that child will not likely provide a substitute contribution of \$30,000 to the sending country's poor parents and children. It will much more likely result in that person deciding to pursue parenting through reproductive technology in the U.S. or simply giving up on parenting altogether. It's hard to see how closing down international adoption will likely work in any systematic way to help birth parents and children in poor countries.

It seems to me more likely that allowing international adoption will push us slightly forward on the path to improving conditions for parents and children and otherwise addressing poverty and social injustice in the poor and the sending countries of the world. And there is at least some evidence that this might be true. Anecdotal evidence indicates that many international adoptive parents emerge from their experience with a much greater sense of commitment to contribute to social services of various kinds in their children's sending countries. Many of them form new organizations dedicated to providing funds for children and child-oriented social services in those

⁷⁹ USAID, UNICEF, and UNAIDS, CHILDREN ON THE BRINK 2002: A JOINT REPORT ON ORPHAN ESTIMATES AND PROGRAM STRATEGIES at 22-24 (2002), available at http://www.dec.org/pdf_docs/PNACP860.pdf.

⁸⁰ See presentation by Yuster, *supra* note 10.

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countries.⁸¹ They will also likely be more supportive of efforts by their own government to contribute to foreign countries in need or to international organizations devoted to improving the lot of the world's children and addressing world poverty.

Sending country officials that witness foreign adoptive parents gratefully taking into their homes children of different racial and ethnic backgrounds seem likely to realize new potential for placing these children in adoptive homes in their own country. There is some indication that this has happened in South Korea.⁸² The exposure that international adoption brings may provide helpful pressure on sending country officials and on people in the richer countries of the world to improve conditions for children in orphanages and on the streets. International adoption has created a new consciousness throughout the world of China's one-child policy and of the related widespread killing and abandonment of baby girls. It has created awareness of the horrendous conditions in orphanages worldwide, as the media discovers and exposes the facts,⁸³ as parents discover the ongoing problems these children suffer related to orphanage life, and as social scientists document these problems.⁸⁴

International adoption often brings significant new funds to poor orphanages in sending countries. For example, in many countries international adoptive parents are required to pay fees or make contributions that are designed to go directly to improving conditions in the orphanages from which the children are placed for adoption. In China there has for some time been a \$3,000 to \$5,000 fee⁸⁵ required to be paid to the orphanages in

⁸¹ See, e.g., Laura Christianson, *International Adoption: Giving Back to Your Child's Country of Origin*, http://adoptionblogs.typepad.com/adoption/2004/11/international_a.html (encouraging readers to give back to countries from which they adopt).

⁸² Margaret Liu, *International Adoptions: An Overview*, 8 TEMP. INT'L & COMP. L.J. 187, 202-03 (1994)

⁸³ See, e.g., "The Dying Room," BBC Documentary, available at http://www.channel14.com/fourdocs/archive/the_dying_room_player.html. (documenting conditions in Chinese orphanages where infants left to die).

⁸⁴ See *supra* notes 73-76.

⁸⁵ U.S. Dept. of State, *Intercountry Adoption, China*, http://travel.state.gov/family/adoption/country/country_365.html (last visited Mar. 13, 2007) (noting the required \$3,000-5,000 donation to the institution where the adopted child was raised); Curtis Kleem, *Airplane Trips and Organ Banks: Random Events and the Hague Convention on Intercountry Adoptions*, 28 GA. J. INT'L & COMP. L. 319, 324 (2000) (discussing international adoption from China and the required donation); Van Leeuwen, *supra* note 25 at 200-01 ("With thousands of adoptions, more than ten million dollars was given directly to Chinese orphanages in 1996").

connection with every adoption. Given the 6500 children adopted into the U.S. from China in 2006 and the 7900 so adopted in 2005, and assuming a minimum \$3,000 contribution, this would have meant some \$19,500,000 total contributions to orphanages in 2006 and some \$23,700,000 in 2005. Many international adoption agencies provide support on an ongoing, systematic basis to a wide range of supportive services for children in sending countries who cannot be placed in adoptive homes. In addition, international adoption saves sending countries significant costs by relieving them of the burden of support for the children adopted. Opponents see all these kinds of contributions as creating problematic pressure to continue with international adoption rather than focusing on improving conditions in the sending country, but they fail to show how closing down such adoption produces any comparable contributions to actually improving those conditions.

In the end it's hard to know for sure what impact international adoption has on the larger goal of helping address global issues of poverty and injustice, but there are reasons to think that it does more good than harm. Given this, the fact that we *do know* that such adoption radically improves life prospects for virtually all those children who are placed, provides a powerful argument for expanding, rather than restricting, international adoption.

C. Adoption Abuses

Here there is dispute as to the *extent* of abuses and as to what to *do* about abuses, but not as to whether they are a bad thing and should be eliminated.⁸⁶ Opponents and supporters of international adoption agree that basic adoption law principles should apply: children should not be given to adoptive parents unless the birth parents have voluntarily relinquished or abandoned them; adoptive parents should raise children lovingly and not in any way exploit them. Universally applicable laws, including domestic law within sending and receiving countries, and international law such as the Hague Convention and the CRC, prohibit payments to birth parents and other practices that can fairly be characterized as baby buying or selling. They also prohibit any exploitation in connection with adoption, and provide for the screening of international adoptive parents to ensure that they will be appropriately nurturing parents.⁸⁷

⁸⁶ See generally Blair, *supra* note 15 (discussing the need to take international adoption abuses seriously both to address those abuses and to protect international adoption's ability to continue to serve the needs of homeless children).

⁸⁷ So, for example, baby-buying not only violates the laws of all sending and receiving countries, but also a variety of international laws. The CRC prohibits

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Opponents make some arguments that are simply absurd, but are nonetheless seriously problematic to international adoption because they are sometimes believed and thus give adoption an unjustified bad name. International adoption fits wonderfully well with a recent critique of the human rights establishment which describes how human rights activists paint the worlds as consisting entirely of “uncivilized deviants, baby seals, and knights errant.”⁸⁸ Opponents of international adoption, casting themselves as the knights errant, find many uncivilized deviants in this world. For example, some have claimed that adoption involves the murder of children for their organs so that the alleged adoptive parents can use the organs for their “own” children. Responsible agencies have investigated this rumor on numerous occasions, and have always rejected it as without any foundation.⁸⁹

More common are the claims that international adoption regularly involves the kidnapping and the purchase of children from birth parents. There is some proof that on some occasions kidnapping has occurred. To prevent such abuses, the U.S. now requires, in some countries, DNA testing to match alleged birth parents with the children surrendered for adoption. There is also good reason to believe that in some countries payments have on some occasions been made to birth mothers in connection with their decision to relinquish children for adoption. Many claim that this is common in Guatemala today, and this is a major argument made in connection with calls to pass new restrictions on adoption there.

It is impossible to say how extensive abuses such as kidnapping and the payments to birth parents are. However the opponents regularly make very misleading statements. For example, UNICEF regularly links under the same “child trafficking” nametag, what it calls “illicit adoption,” which presumably includes all forms of illegal adoption, with vicious forms of

“improper financial gain” and “the abduction of, the sale of or traffic in children. . . .” CRC, *supra* note 49, arts. 21(d), 35. An Optional Protocol to the CRC, with 103 states parties, requires contracting nations to criminalize the improper inducement of consent and to enact laws and institute programs to deter the sale of children. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, Annex II, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/RES/54/263, arts. 3, 9-10 (May 25, 2000). One of the major goals of the Hague Convention is to establish safeguards to prevent the abduction, sale, or trafficking of children, and many of its provisions are designed to further these goals, with other provisions designed to ensure against other abuses. Blair, *supra* note 15 at 383.

⁸⁸ See David Kennedy, *supra* note 2, at 14.

⁸⁹ Bartholet, FAMILY BONDS, *supra* note 1, at 153 (general discussion about mythical concerns of organ harvesting).

exploitation of children like kidnapping for the purposes of prostitution, slavery, killing for the removal of organs, and child military service.⁹⁰ Yet there is no evidence that even when international adoption involves some illegality it results in the kind of *exploitation* of children that these other “trafficking” practices systematically do. Any fair minded observer of international adoption would have to admit that the children overwhelmingly end up in adoptive families where they are loved and nurtured, and that they grow up doing as well as most children raised in those same receiving countries, as the research above in note 74 shows. Opponents also tend to equate all adoption with baby buying, citing the large amounts paid by adoptive parents, without regard to the fact that such payments may be and almost certainly generally are entirely legal, accounted for by the fees charged by agencies and other intermediaries authorized to receive payment for their services in connection with facilitating adoptions.

Opponents also ignore the distinction between payments made to birth parents which induce them to surrender children they would otherwise keep, and payments made to parents who would be surrendering in any event. The latter may be illegal, but the former is the problem at the core of the baby-buying prohibition. The idea is to prevent any form of coercion, including the proffer of money, having an influence on the decision whether to keep or surrender the child. It is an idea based on the felt value of enabling birth parents to keep their children, and children to grow up with those parents, if at all possible. It is extremely unlikely that much of this core form of baby buying is going on in the world. It is illegal everywhere, under a multitude of overlapping laws—laws of the sending country, laws of the receiving country, and international law.⁹¹ And overwhelmingly the reasons that birth parents in the sending countries of the world surrender their children for adoption have to do with extreme poverty and social devastation – they simply have no choice. They often will have had no choice in getting pregnant – no access to contraception is typical. They may have a job, if they are lucky, that they would lose if they had kept their child. They may have one or two children they are struggling to keep alive, and know they are incapable of supporting a third. It is entirely understandable that many of these birth parents might accept money if offered, or seek money if they know other birth parents are getting it in connection with surrendering their children. These birth mothers are in desperate need, and everyone else

⁹⁰ UNICEF, GUIDELINES ON THE PROTECTION OF CHILD VICTIMS OF TRAFFICKING, Provisional Version 2.1, Sept. 2006, p. 9; UNICEF, Combating Child Trafficking (2005), available at http://www.unicef.org/protection/files/IPU_combattingchildtrafficking_GB.pdf.

⁹¹ See *supra* note 87.

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involved in the adoption process, most of whom have no such dire need, are getting paid handsome fees. It may be that we should still make such payments illegal – it would be hard to draw a clear legal line between such payments and the kind of payments that would induce surrender, and you need a clear legal line if you are going to hold people criminally responsible as we do for baby buying. But we should not see such incidental payments, payments that accompany but do not motivate the relinquishment of a child, as a terrible evil to be avoided at all costs.

There are no doubt some number of birth parents in sending countries who are getting payments that indeed do function to persuade them to surrender children for adoption that otherwise they might have kept, and even to get pregnant in order to surrender the children born. The latter practice we call surrogacy and in the U.S. it is legal today in almost all states, with an enormous surrogacy industry primed to expand the practice as we move forward to the future. I myself would prohibit commercial surrogacy both here and abroad, and I also believe we should maintain the existing prohibition on payments to already-pregnant women designed to induce surrender of the child. However I think we need to acknowledge that such payments are not the ultimate evil that they are often assumed to be. They may on balance be wrong, but they need to be weighed against other evils as regulators decide how to shape policy on international adoption.

Opponents of international adoption *never weigh the evils on each side*. Instead they focus solely on the evils represented by adoption abuses, and then argue for restrictive regulation to address those evils. They don't consider the evils represented by failing to place children in international adoptive homes, and the good that comes from placing them. And opponents find a ready audience in policy-makers who, as discussed above, have traditionally regulated adoption in a way that focuses on the negatives that come from transferring children from one set of parents to another and not on the positives.

Adoption opponents and adoption policy-makers often respond to alleged adoption abuses by calling for a moratorium on adoption, either temporary or permanent. An example is Romania, where, as discussed above,⁹² after international adoption first opened up, it was closed down again in 2000 in reaction to baby buying allegations, and remained closed for years, essentially until it was permanently closed by the new law banning all international adoption except grandparent adoption. The evil represented by the fact that some number of impoverished Romanian birth parents accepted money incidental to the relinquishment of their children, with there likely being only a handful who were motivated by the money to

⁹² See *supra* notes 26-28 and accompanying text on Romania.

relinquish children they otherwise would have kept is *minuscule*, in my view, by comparison to the evil represented by the thousands of Romanian children condemned to live and die in horrible institutions, who could have had loving, nurturing adoptive homes.

Adoption opponents and policy-makers typically argue that if international adoption is to continue, the government in any given sending country should take over the adoption process, eliminating any private lawyers and other intermediaries. So do many others who see themselves as supportive of international adoption but focus on the importance of eliminating adoption abuses.⁹³ They see the state as more likely motivated to enforce the laws, and the private actors as more interested in facilitating adoption, and thus more ready to do what it takes to make it happen including making payments to birth parents. This tendency to look to the State – to government – as *the* way to solve human rights problems has been critiqued by Prof. David Kennedy in a recent book, *The Dark Sides of Virtue: Reassessing International Humanitarianism*:

The conflation of the law with the good encourages an understanding of international governance . . . that is systematically blind to the bad consequences of its own action. The difficulty the human rights movement has in thinking of itself in pragmatic rather than theological terms – in weighing and balancing the usefulness of its interventions . . . – is characteristic of international governance as a whole.⁹⁴

In the realm of child welfare, we often let private actors solve problems that occur when birth parents cannot care for children, and we often let them do this informally, without any state intervention. There is a powerful tradition in all countries of simply letting birth parents or others arrange for someone in the kinship or friendship group to take in children who need parenting care. The U.S.-sponsored Demographic and Health Surveys carried out in many developing and transition countries routinely show 10-20% of children under 15 living in households where their parents are not present, sometimes because they have been orphaned and sometimes – indeed the majority of time – because their parents simply cannot care for them.⁹⁵ Often these arrangements are characterized as informal adoption. In the U.S., in addition to such informal caretaking arrangements, “private” or “independent” adoption is also common – forms of official court-approved

⁹³ See, e.g., Blair, *supra* note 15.

⁹⁴ See Kennedy, *supra* note 2, at 31-32.

⁹⁵ Presentation by Yuster, *supra* note 10.

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adoption in which birth parents and adoptive parents are directly responsible for making the agreement to transfer the child, with the state role limited largely to ensuring that certain basic rules of the adoption game are satisfied, namely that no financial or other pressure has been put on the birth parents, and that the prospective adopters satisfy basic fitness criteria. There is no reason to think that children would be better off if the government in all these countries and in all the states throughout the U.S. intervened to control all these informal arrangements, and much reason to think that children would be far worse off. There is no significant move worldwide or within the U.S. to outlaw all these private arrangements, substituting state monopoly power. Yet in the world of international adoption it is common to assume that state monopoly power is the right answer.

In fact, our experience with international adoption helps demonstrate the danger with assuming that more state power will likely mean more protection for human rights. In many countries, state monopoly power over international adoption means that it grinds to a near or total halt. This has been the case in several countries in South and Central America, where as the state has taken over, adoptions dwindle to a small trickle, and children made available are no longer freed up as infants, but only after spending many months and typically at least two or three years in damaging institutions.⁹⁶

This is the battle that is now being fought in Guatemala, a country with some of the most international adoption-friendly rules of any country today. Guatemala releases significant numbers of children for international adoption – despite its relatively small size it is one of the major sending countries of the world, second in line after China as of 2006.⁹⁷ It places many of the children surrendered by their birth parents in foster care immediately after birth, and moves many of them to their adoptive family within six to eight months. This is almost unheard of in today's international adoption world, and it of course means that the children are spared the horrors of institutional life. These children have a good chance to develop normally, both physically and emotionally, in contrast to most international adoptees who, by virtue of spending most of their early infancy in institutions, are at high risk for developmental and ongoing problems. However adoption opponents and policy-makers have targeted Guatemala as the problem country of the day, focused as they are solely on adoption abuses. They ignore the fact that in calling for restrictive regulation, including a state monopoly over international adoption and the elimination of the private intermediaries who make foster care possible, they risk doing devastating harm to

⁹⁶ See *supra* note 69 and the accompanying text.

⁹⁷ See *supra* notes 13-16, and accompanying text on Guatemala.

thousands of Guatemalan children every year, condemning them to spend unnecessary months and years in damaging institutions, denying them any opportunity for a normal family life.

We do need to pay attention to adoption abuses. We should enforce the laws that already exist making them illegal. In some cases we may need to redesign laws to make them more effective. But we must keep in mind that the main thing children need is a permanent nurturing home, and that this is also the main thing most birth parents want for the children they can't raise themselves but must relinquish. We should avoid any action that, in the name of eliminating abuses, causes children more harm than good by reducing their chances to obtain a nurturing family.

V. REFORM DIRECTIONS FOR THE FUTURE

Those committed to human rights and to children's rights should focus on the *genuine* and *most significant needs* of children, parents, and communities, rather than engaging in false romanticism. They should also focus on the *genuine* and *most significant evils* that children face. Children need loving, nurturing parents to raise them. They need food and shelter and affection. They need protection from disease and disaster. Large numbers of children in the poorer countries of the world live in truly desperate circumstances. Those in orphanages spend their infancy having bottles jammed in their mouths as they are propped in the corners of their cribs. Left unattended for hours in between bottle-propping events, they learn that screaming their hearts out, or making other demands for human attention, is meaningless. Those familiar with orphanages say that one of the most horrifying things is the silence that characterizes so many because the children have learned not to bother to ask for attention.⁹⁸ Largely deprived of the human touch, human affection and human relationships as they grow up, children who survive physically are unlikely to develop emotionally and mentally in ways that will make it possible for them to relate meaningfully and happily to other human beings, or to learn or work in meaningful ways. The longer they spend in such orphanages, the less chance they will have at

⁹⁸ The MDRI REPORT, *supra* note 32 at 4, describes an institution for newborns in Romania as follows:

Children who do not receive attention when they cry learn to stop crying. During MDRI's visit, there was an eerie silence about the facility. Only one baby on the ground floor was crying — staff informed investigators that this child had been placed in the institution the day before. While about one-third of the babies were sleeping, two-thirds were awake but there were no sounds of cooing or babbling, normal developmental sounds of babies that age.

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anything resembling normal development. By contrast, those placed in international adoption live comparatively blessed lives, and have an opportunity to overcome even very significant deficits caused by early deprivation, with the age of placement overwhelmingly predictive of the chance for normal life.⁹⁹

Those who believe in children's human rights need to promote children's basic right to be liberated from the conditions under which they live in orphanages or on the street, and to grow up with parents who can provide the loving nurturing that is essential for human flourishing. We should place as many of these children as we can in adoptive homes, since adoption generally works better for children than other options, such as foster care. There may be instances in which foster care will work better, and of course there should be room for exceptions to the general rule, but the step taken by the Hague Convention to preference international adoption over in-country foster care as a general rule is a step in the right direction.¹⁰⁰

Should in-country adoption be preferred over out-of-country adoption? Almost all who discuss this say yes.¹⁰¹ However there is no evidence that in-country adoption works better for children. While almost everyone tends to assume that children should be placed with birth parents of similar cultural and ethnic background, the issue has been examined fairly extensively in the area of domestic transracial adoption within the U.S., and there is not a shred of evidence in the entire body of social science studies following transracial adoptees from infancy into adulthood, and comparing them with control group samples of adoptees placed with same-race parents, that any harm comes to children from being raised by parents of a different racial or ethnic background.¹⁰² One might still find an in-country preference appropriate, for a range of reasons including a belief that, despite the absence of evidence, children will still likely do best when matched with similar parents, or that in-country parents deserve a preference because of the history of exploitation their group or country may have suffered, or simply that it looks better to those suspicious of international adoption and will therefore help limit opposition. Some might find an in-country preference important to counter the risk that the foreign parents' likely comparative wealth will bias the process against the in-country parent.

⁹⁹ See *supra* notes 73, 74.

¹⁰⁰ See *supra* note 56-57 and accompanying text.

¹⁰¹ See, e.g. Blair, *supra* note 15 at 395-403 (discussing issues regarding in-country preference).

¹⁰² See Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PENN. L. REV. 1163, 1207-26 (1991); BARTHOLET, NOBODY'S CHILDREN, *supra* note 55, 126-28.

But the risk of any in-country preference is that it will function as another barrier to placement, delaying and perhaps entirely denying the chance for children to find an adoptive home. The overwhelming number of potential adoptive parents for children in poor countries will be in the more privileged countries of the world. If countries implement an in-country preference by a rule mandating an in-country search before the child can be placed internationally, there is a real danger that this will result not only in delaying adoption but in denying it altogether. This risk is made worse when the official rule prohibits international placement for a period of time, as some countries have provided. When Russia enacted its six-month waiting requirement, there was no realistic possibility of any but a tiny fraction of Russia's institutionalized children finding an in-country adoptive home during that six months. For almost all those children, the rule translates to a simple requirement that they spend an additional six months in damaging institutional care. Beyond that, it reduces the chances the child will ever be placed, both because older children are harder to place, and because risk-averse bureaucrats get the message from such rules that international adoption should be seen as a failure, a last resort that should be generally avoided. India recently adopted a rule requiring that 50% of adoptions be in-country,¹⁰³ effectively precluding adoption for vast numbers of children given the limited number of in-country adoption prospects. The history of race-matching policies in the U.S., which for many years gave a preference to placing black children with black as opposed to white prospective parents, is that such policies resulted in delaying and denying adoptive placement for many black children.¹⁰⁴ It is in large part because of recognition of this fact that Congress in the 1996 amendments to MEPA, eliminated *any preference* for placing children within their racial group.¹⁰⁵

Ideally, in my view, there should be no in-country adoption preference. Countries should simply place children as soon as possible in any available adoptive homes. But if countries institute such a preference, as under the Hague Convention they are required to (*supra* note 56), they should do so in a way designed to cause *no delay whatsoever* in placement for children. Concurrent planning is the term for the adoption program in-

¹⁰³ *Handling with Kid Gloves*, FIN. EXPRESS, July, 16, 2005, available at 2005 WLNR 11195769; Blair, *supra* note 15, at 374.

¹⁰⁴ See BARTHOLET, NOBODY'S CHILDREN, *supra* note 55, at 126; Bartholet, *Where Do Black Children Belong?*, *supra* note 102, at 1201-07.

¹⁰⁵ See *supra* note 43 and discussion of MEPA text; Bartholet, *Cultural Stereotypes Can and Do Die*, *Id.* (describing decisions by the agency with enforcement responsibility for MEPA, which make it crystal clear that race is to play no part in agency decision-making); BARTHOLET, NOBODY'S CHILDREN, *supra* note 55, at 130-31.

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side the U.S. that should serve as the model. In concurrent planning, adoption professionals work simultaneously to reunite children in foster care with their birth parents, while they work to prepare for adoption. At the point that a decision is reached not to reunite, the child can immediately move forward to adoption. Adapted to international adoption, this model would mean that adoption officials in the sending country would plan simultaneously for the international adoption, while they checked to see if any domestic placement would be possible, rather than planning the international adoption only after exhausting the possibility of domestic adoption.

All efforts should be made to avoid unnecessary delays in placement for children. Like Dr. Dana Johnson, a widely respected specialist in international adoption pediatrics, I think we should treat keeping children in institutions as an intolerable act of cruelty:

[P]utting a child in a long-term institution is an act of abuse. Children in institutional care have deteriorations in many things that we want to see children improve in during the earliest years of their life. . . . Their cognitive abilities are lower, their growth is terrible and their brain development is abnormal as well. . . . *A few days in an institution should be as long as children are asked to endure.*¹⁰⁶

Assuming that adoption, including international adoption, is made the priority option, policy makers then need to focus on certain key reforms. First they need to ensure that children who cannot realistically be cared for by their parents are freed for adoption as promptly as possible. UNICEF and others emphasize that most of the children in institutions worldwide are not technically orphans, as if this demonstrated that none of those non-orphans should be considered for adoption. But the reality is that almost all of these institutionalized non-orphans can expect to live out their youth or die in these institutions with few or no visits from their birth parents, unless they are made available for international adoption. Governments should be required to take action to either reunite these children with their birth parents where that can be done in a way that will be good for the child, or to move them promptly on to adoption. The ASFA legislation recently passed by the U.S. Congress¹⁰⁷ can serve as a model for other countries' domestic laws. ASFA provides that children can be held for no longer than 15 of the prior 22 months in foster or institutional care, before being moved either back to their birth parents or on to adoption. It provides for bypassing any efforts to pursue family preservation or family reunification in situations

¹⁰⁶ MDRI REPORT, *supra* note 32, at 21 (emphasis added).

¹⁰⁷ See *supra* note 44 and accompanying text.

where there is no good reason to think the child will ever again be able to live with his or her birth parents. It provides that reasonable efforts must be made *not only* to keep children with their birth parents, *but also* in appropriate cases to move them on to adoption. Most countries have no adequate system for identifying children in need of adoptive homes and freeing them from their biological parents so that they can be placed. Orphanages world wide are filled with children who grow up with no meaningful tie to their parents except the technical tie that means they cannot be placed with adoptive parents. The same is true for street children. Law reform efforts need to focus on creating systems for identifying and freeing up such children, and they need to create realistic methods of expediting the entire process for children, from birth to placement, so that children are moved to nurturing adoptive homes as early in life as possible. Ironically and tragically, much of what now goes under the name of "adoption reform" pushes in the exact opposite direction, as discussed above, with countries which have opened up international adoption and begun sending their children abroad for placement, then shutting down again, increasing rather than decreasing the bureaucratic barriers between orphanage children and adoptive placement. The net effect is that infant adoptions are almost unknown today in the international adoption world, although they used to occur frequently.

Second, policy makers in both sending and receiving countries need to facilitate the adoption process so that it better serves the needs of prospective adopters. The primary reason to do this is not because it will promote their interest in parenting, although that interest should be understood as perfectly legitimate, but because it will maximize the numbers of parents for the children in need. Bureaucratic barriers serve to drive prospective parents away, either away from parenting altogether, or into the world of reproductive technology, where they are seen as having rights to become parents by pretty much whatever means they choose, including the purchase of eggs, sperm, pregnancy and childbirth services, and where they will be producing new children, rather than giving homes to existing children in need.

Policy makers must also address the baby-buying and kidnapping problems that exist in the international adoption world. International adoption's opponents have grossly exaggerated the scope of these problems, using them deliberately to promote restrictive adoption rules to suit their larger anti-adoption agenda. But taking children from loving birth parents by applying improper financial or other pressures is deeply wrong. And it victimizes not only the particular children and parents involved, but the larger group of children and parents whose opportunities for legitimate international adoption are thwarted by the negative regulation that is so often triggered by adoption abuses.

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Finally, policy makers need to link their new adoption reform moves with efforts to improve conditions for the children who will not be adopted, and for their birth parents. International adoption's opponents are correct in arguing that it can never provide homes for all the children in need, and that we must address the problems of poverty and injustice that result in children being abandoned in large numbers in the poor countries of the world. International adoption provides a natural trigger for such reform efforts. Adoption agencies do a good deal now to socialize prospective international adoptive parents about the importance of raising their children with a sense of their cultural heritage. They could do more to socialize these parents about the importance of giving back to their children's birth country. Agencies and parents do a good deal to provide support for orphanages and other institutions serving poor children and their parents in sending countries. They could do more. Adoptive parents, agencies, and others in receiving countries become more aware of the problems in the sending countries of the world by virtue of the adoption process. With this knowledge, and with the privilege of caring for these children, comes new responsibility for the children left behind.

APPENDIX A: NUMBERS OF INTERNATIONAL ADOPTIONS IN THE
UNITED STATES, BY YEAR, 1990-2006

Year	International Adoptions
2006	20679
2005	22728
2004	22884
2003	21616
2002	20099
2001	19237
2000	17718
1999	16363
1998	15774
1997	12743
1996	10641
1995	8987
1994	8333
1993	7377
1992	6472
1991	8481
1990	7093

Source: U.S. Department of State, "IMMIGRANT VISAS ISSUED TO ORPHANS COMING TO THE U.S.," available at http://travel.state.gov/family/adoption/stats/stats_451.html.

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APPENDIX B: COUNTRIES SENDING LARGEST NUMBER OF CHILDREN TO THE UNITED STATES FOR INTERNATIONAL ADOPTION, BY YEAR, 1990-2006

FY 2006		FY 2005		FY 2004	
1	6,493 - CHINA (Mainland)	7,906 - CHINA (Mainland)	7,044 - CHINA (mainland)	5,865 - RUSSIA	5,865 - RUSSIA
2	4,135 - GUATEMALA	4,639 - RUSSIA	3,783 - GUATEMALA	3,264 - GUATEMALA	3,264 - GUATEMALA
3	3,706 - RUSSIA	3,783 - GUATEMALA	1,630 - S. KOREA	1,716 - S. KOREA	1,716 - S. KOREA
4	1,376 - S. KOREA	1,630 - S. KOREA	821 - UKRAINE	826 - KAZAKHSTAN	826 - KAZAKHSTAN
5	732 - ETHIOPIA	821 - UKRAINE	755 - KAZAKHSTAN	723 - UKRAINE	723 - UKRAINE
6	587 - KAZAKHSTAN	755 - KAZAKHSTAN	441 - ETHIOPIA	406 - INDIA	406 - INDIA
7	460 - UKRAINE	441 - ETHIOPIA	323 - INDIA	356 - HAITI	356 - HAITI
8	353 - LIBERIA	323 - INDIA	291 - COLOMBIA	289 - ETHIOPIA	289 - ETHIOPIA
9	344 - COLOMBIA	291 - COLOMBIA	271 - PHILIPPINES	287 - COLOMBIA	287 - COLOMBIA
10	320 - INDIA	271 - PHILIPPINES	234 - HAITI	202 - BELARUS	202 - BELARUS
11	309 - HAITI	234 - HAITI	183 - LIBERIA	196 - PHILIPPINES	196 - PHILIPPINES
12	245 - PHILIPPINES	183 - LIBERIA	141 - CHINA (Taiwan Born)	110 - BULGARIA	110 - BULGARIA
13	187 - CHINA (Taiwan Born)	141 - CHINA (Taiwan Born)	88 - MEXICO	102 - POLAND	102 - POLAND
14	163 - VIETNAM	88 - MEXICO	73 - POLAND	89 - MEXICO	89 - MEXICO
15	70 - MEXICO	73 - POLAND	72 - THAILAND	86 - LIBERIA	86 - LIBERIA
16	67 - POLAND	72 - THAILAND	66 - BRAZIL	73 - NEPAL	73 - NEPAL
17	66 - BRAZIL	66 - BRAZIL	65 - NIGERIA	71 - NIGERIA	71 - NIGERIA
18	66 - NEPAL	65 - NIGERIA	63 - JAMAICA	69 - THAILAND & BRAZIL	69 - THAILAND & BRAZIL
19	62 - NIGERIA	63 - JAMAICA	62 - NEPAL	57 - ROMANIA	57 - ROMANIA
20	56 - THAILAND	62 - NEPAL			

2007

INTERNATIONAL ADOPTION

199

FY 2001	
4,681	- CHINA (mainland)
4,279	- RUSSIA
1,870	- S - KOREA
1,609	- GUATEMALA
1,246	- UKRAINE
782	- ROMANIA
737	- VIETNAM
672	- KAZAKHSTAN
543	- INDIA
407	- COLOMBIA
297	- BULGARIA
266	- CAMBODIA
219	- PHILIPPINES
192	- HAITI
158	- ETHIOPIA
129	- BELARUS
86	- POLAND
74	- THAILAND
73	- MEXICO
51	- LIBERIA

FY 2002	
6,119	- CHINA (mainland)
4,939	- RUSSIA
2,419	- GUATEMALA
1,779	- S - KOREA
1,106	- UKRAINE
819	- KAZAKHSTAN
766	- VIETNAM
464	- INDIA
334	- COLOMBIA
260	- BULGARIA
285	- CAMBODIA
221	- PHILIPPINES
187	- HAITI
169	- BELARUS
168	- ROMANIA
105	- ETHIOPIA
101	- POLAND
67	- THAILAND
56	- GEORGIA
61	- MEXICO

FY 2003	
1	6,859 - CHINA (Mainland)
2	5,209 - RUSSIA
3	2,328 - GUATEMALA
4	1,790 - S. KOREA
5	825 - KAZAKHSTAN
6	702 - UKRAINE
7	472 - INDIA
8	382 - VIETNAM
9	272 - COLOMBIA
10	250 - HAITI
11	214 - PHILIPPINES
12	200 - ROMANIA
13	198 - BULGARIA
14	191 - BELARUS
15	135 - ETHIOPIA
16	128 - GEORGIA
17	124 - CAMBODIA
18	107 - CHINA-TAIWAN
19	97 - POLAND
20	72 - THAILAND

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FY 1998	
	4,491 - RUSSIA
	4,206 - CHINA
	1,829 - S - KOREA
	969 - GUATEMALA
	603 - VIETNAM
	478 - INDIA
	406 - ROMANIA
	249 - CAMBODIA
	236 - COLOMBIA
	200 - PHILIPPINES
	180 - UKRAINE
	168 - MEXICO
	151 - BULGARIA
	121 - HAITI
	96 - ETHIOPIA
	90 - BRAZIL
	84 - THAILAND
	77 - POLAND
	76 - LATVIA
	73 - BOLIVIA

FY 1999	
	4,348 - RUSSIA
	4,101 - CHINA
	2,008 - S - KOREA
	1,002 - GUATEMALA
	895 - ROMANIA
	709 - VIETNAM
	499 - INDIA
	323 - UKRAINE
	249 - CAMBODIA
	231 - COLOMBIA
	221 - BULGARIA
	195 - PHILIPPINES

FY 2000	
1	5,053 - CHINA (Mainland)
2	4,269 - RUSSIA
3	1,794 - S. KOREA
4	1,518 - GUATEMALA
5	1,119 - ROMANIA
6	724 - VIETNAM
7	659 - UKRAINE
8	503 - INDIA
9	402 - CAMBODIA
10	398 - KAZAKHSTAN
11	246 - COLUMBIA
12	214 - BULGARIA
13	173 - PHILIPPINES
14	131 - HAITI
15	106 - MEXICO
16	95 - ETHIOPIA
17	88 - THAILAND
18	83 - POLAND
19	79 - MOLDOVA
20	60 - BOLIVIA

2007

INTERNATIONAL ADOPTION

201

FY 1995	
	2,130 - CHINA
	1,896 - RUSSIA
	1,666 - KOREA
	449 - GUATEMALA
	371 - INDIA
	351 - PARAGUAY
	350 - COLOMBIA
	318 - VIETNAM
	298 - PHILIPPINES
	275 - ROMANIA
	146 - BRAZIL
	110 - BULGARIA
	98 - LITHUANIA
	90 - CHILE
	83 - MEXICO
	67 - ECUADOR
	63 - ETHIOPIA
	63 - JAPAN
	59 - LATVIA
	53 - THAILAND
	51 - GEORGIA

FY 1996	
	3,333 - CHINA
	2,454 - RUSSIA
	1,516 - KOREA
	555 - ROMANIA
	427 - GUATEMALA
	380 - INDIA
	354 - VIETNAM
	258 - PARAGUAY
	255 - COLOMBIA
	229 - PHILIPPINES
	163 - BULGARIA
	103 - BRAZIL
	82 - LATVIA
	78 - LITHUANIA
	77 - GEORGIA
	76 - MEXICO
	68 - HAITI
	64 - POLAND
	63 - CHILE
	55 - THAILAND
	51 - ECUADOR, HUNGARY

FY 1997	
1	3,816 - RUSSIA
2	3,597 - CHINA (Mainland)
3	1,654 - S. KOREA
4	788 - GUATEMALA
5	621 - ROMANIA
6	425 - VIETNAM
7	349 - INDIA
8	233 - COLOMBIA
9	163 - PHILIPPINES
10	152 - MEXICO
11	148 - BULGARIA
12	142 - HAITI
13	108 - LATVIA
14	91 - BRAZIL
15	82 - ETHIOPIA
16	78 - LITHUANIA
17	78 - POLAND
18	77 - BOLIVIA
19	72 - HUNGARY
20	66 - CAMBODIA

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FY 1992	
	1,840 - KOREA
	418 - GUATEMALA
	404 - COLOMBIA
	357 - PHILIPPINES
	352 - INDIA
	324 - RUSSIA
	309 - PERU
	249 - HONDURAS
	212 - PARAGUAY
	206 - CHINA
	179 - CHILE
	138 - BRAZIL
	121 - ROMANIA
	117 - EL SALVADOR
	109 - POLAND
	91 - BULGARIA
	91 - MEXICO
	86 - THAILAND
	73 - BOLIVIA
	68 - JAPAN
	64 - COSTA RICA

FY 1993	
	1,775 - KOREA
	746 - RUSSIA
	512 - GUATEMALA
	426 - COLOMBIA
	412 - PARAGUAY
	360 - PHILIPPINES
	331 - INDIA
	330 - CHINA
	273 - UKRAINE
	224 - PERU
	179 - HONDURAS
	161 - BRAZIL
	133 - BULGARIA
	124 - BOLIVIA
	110 - VIETNAM
	100 - ELSALVADOR
	97 - ROMANIA
	91 - MEXICO
	70 - POLAND
	69 - THAILAND
	64 - JAPAN

FY 1994	
1	1,795 - KOREA
2	1,530 - RUSSIA
3	787 - CHINA
4	483 - PARAGUAY
5	436 - GUATEMALA
6	412 - INDIA
7	351 - COLOMBIA
8	314 - PHILIPPINES
9	220 - VIETNAM
10	199 - ROMANIA
11	164 - UKRAINE
12	149 - BRAZIL
13	97 - BULGARIA
14	95 - LITHUANIA
15	94 - POLAND
16	85 - MEXICO
17	79 - CHILE
18	77 - HONDURAS
19	61 - HAITI
20	66 - ETHIOPIA
21	49 - JAPAN

2007

INTERNATIONAL ADOPTION

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FY 1991		FY 1990	
1	2,594 - ROMANIA		2,620 - KOREA
2	1,818 - KOREA		631 - COLOMBIA
3	705 - PERU		440 - PERU
4	521 - COLOMBIA		421 - PHILIPPINES
5	445 - INDIA		348 - INDIA
6	393 - PHILIPPINES		302 - CHILE
7	329 - GUATEMALA		282 - PARAGUAY
8	266 - CHILE		257 - GUATEMALA
9	234 - HONDURAS		228 - BRAZIL
10	190 - PARAGUAY		197 - HONDURAS
11	175 - BRAZIL		121 - ROMANIA
12	131 - THAILAND		112 - MEXICO
13	123 - EL SALVADOR		105 - COSTA RICA
14	97 - MEXICO		103 - EL SALVADOR
15	92 - POLAND		100 - THAILAND
16	87 - JAPAN		66 - POLAND
17	61 - CHINA		66 - TAIWAN
18	60 - CAMBODIA		64 - HAITI
19	56 - COSTA RICA		59 - ECUADOR
20	54 - TAIWAN		58 - DOMINICAN REP
21	50 - DOMINICAN REPUBLIC		57 - JAPAN

Source: U.S. Department of State, "IMMIGRANT VISAS ISSUED TO ORPHANS COMING TO THE U.S.," available at http://travel.state.gov/family/adoption/stats/stats_451.html.

