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International Adoption: The Human Rights Position

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Recommended Citation
Bartholet, Elizabeth, "International Adoption: The Human Rights Position" (2009). *Harvard Law School Faculty Scholarship Series.* Paper 28.
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Draft 7/24/2009

INTERNATIONAL ADOPTION: THE HUMAN RIGHTS POSITION

by Elizabeth Bartholet*

This is the pre-peer-reviewed version of the article "International Adoption, The Human Rights Position," which will be published in final form in Global Policy, Issue 1, January, 2010.

Abstract

International adoption is under siege, with the number of children placed dropping each of the last several years, and many countries imposing severe new restrictions. Key forces mounting the attack claim the child human rights mantle, arguing that such adoption denies heritage rights, and often involves abusive practices. Many nations assert rights to hold onto the children born within their borders, and others support these demands citing subsidiarity principles. But children's most basic human rights, at the heart of the true meaning of subsidiarity, are to grow up in the families that will often be found only in international adoption. These rights should trump any conflicting state sovereignty claims.

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I. Introduction

I flew from Boston, Massachusetts, to Lima, Peru, in 1985 to adopt the four-month-old who became Christopher, and flew back in 1987 to adopt the one-month-old who became Michael. I counted myself from the first moments they were put into my arms as extraordinarily lucky to be their parent.

But I still wondered at the policies that made it so hard to adopt. I spent three months in Lima for each adoption, enduring the most challenging experiences of my life. I nursed each child through terrifying illnesses, and agonized through endless sessions with police, social workers and courts. I fought off mysterious threats to remove the children who had become mine in every way except the law, threats that hung over us until the day we flew home.

I realized then that only a tiny fraction of those who might want to adopt a child from Peru would be able to. Few would have the kind of job I did, allowing an extended leave. Few would be able to deal with all the other difficulties of accomplishing a Peruvian adoption.

I also began to learn how many children needed parents. Daily I would hear about those newly orphaned by the Shining Path terrorists. On visits to an orphanage, I saw babies crowding the nurseries, toddlers and older kids playing and fighting in the bleak yard, with its broken tricycles and swings. No system seemed to exist for terminating parental rights so children could be adopted, yet few of these children ever received a visit from a parent or other relative. The city's child welfare agency regularly told those who inquired about adoption that there were no

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children available.

I have spent much of the 25 years since these adoptions studying the needs of unparented children worldwide, and the role of international adoption. This has simply intensified my initial conviction that there is something terribly wrong with policies that lock children into orphanages, away from prospective parents.

For a period during this time, some more adoption-friendly policies developed. The Hague Convention on Intercountry Adoption was promulgated, preferring such adoption to in-country foster and institutional care (Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993; Bartholet, 2007b, pp. 172-77). The numbers of international adoptions rose, reaching up to 45,000 worldwide (Selman, 2009; Paulsen & Merighi, 2009, p. 3). Some countries which had not allowed their children to be placed abroad opened up, including Russia, China, and countries in Eastern Europe and Africa. Adoption became less stigmatized, so that more people chose it as a way of having children.

However now the world has reversed direction. The numbers of international adoptions have dropped dramatically. Many countries that had newly begun placing children abroad have closed again. Many have instituted restrictions requiring that children be held for long periods to explore in-country placement options, before any placement abroad. It is now almost unheard of for children to be placed internationally as the young infants that Christopher and Michael were**.** Indeed it is extremely rare for children under the age of one to be placed. Yet all familiar with

developmental psychology and social science research know that keeping infants in institutional care for more than a few months puts them at enormous risk for lifelong damage, even if they are ultimately adopted, with the risk increased proportionately with the length of stay (Bartholet, 2007a, pp. 346-48).

The organizations leading the attack on international adoption describe themselves as child human rights organizations. But human rights activism in its institutionalized form has often played a perverse role (Kennedy, 2004). Children's most fundamental human rights are to be raised in the families that are often available only internationally.

II. The Crisis in International Adoption

A. International Adoption Under Siege

UNICEF and many other international children's organizations promote the idea that unparented children should be kept at almost all costs in their country of origin. While UNICEF agrees in principle that children should not be institutionalized, it presses for the development of alternatives to international adoption – support for poor parents, foster care, and in-country adoption. UNICEF says that it is not entirely opposed to international adoption, but clearly wants to limit it to last-resort status. As international adoptions began to expand, UNICEF focused increasingly on its alleged problems, claiming that adoption abuses involving baby buying, fraud, and kidnapping were widespread. And UNICEF has called increasingly for policy

changes designed to limit international adoption (Bartholet, 2007b, pp. 154-57).

In many 'sending countries' national pride has led to calls to stop selling, or giving away, 'our most precious resources,' and to claims that the country should 'take care of our own.' 'Receiving countries' have been responsive to these attacks (Bartholet, 2007b, p. 167). They have nothing to gain and much to lose if they look like they are taking children from unwilling countries, or tolerating adoption abuses.

The media reflect and exacerbate the hostility to international adoption, featuring stories of baby buying and kidnapping. One article receiving extensive media coverage, 'The Lie We Love,' rejects the 'myth' that such adoption provides homes to children in need, claiming that there are virtually no unparented young children, and that adoption abroad results in 'babies in many countries ... being systematically bought, coerced, and stolen away from their birth families' (Graff, 2008, p. 60).[i]

B. Impact of the Attacks on International Adoption

These attacks have had an impact. After six decades of steadily rising, international adoptions into the U.S., the world's major receiving country, have been down each year since the 2004 peak of 22,884 (U.S. Department of State, 2008; Bartholet, 2007b, pp. 158-59). Some project that by 2010 the number will fall to less than half that number (DiFilipo, 2009). Worldwide, such adoptions are dropping at a similar rate.

Several countries known for horrendous orphanage conditions, or huge orphanage populations, have closed down or severely limited international adoption. Romania's orphanages were brought to the world's consciousness at the time of former dictator Ceausescu's fall. Seasoned journalists were in tears as they reported on children tied to their cribs, children who had never learned to walk or talk because they had lived in their cribs without any human interaction, children dying from AIDS contracted in the orphanage. Post-Ceausescu, international adoption placed thousands of Romanian children per year for several years. But Romania recently legislated an end to such adoption, in response to demands they do so in order to join the European Union (Bartholet, 2007b, pp. 161-63). Russia, with huge numbers of institutionalized children, instituted a requirement that children be held six months prior to placement abroad, despite the limited number of in-country homes. China instituted new rules limiting the eligibility of international adoptive parents, claiming there was no longer much need for foreign adoptive homes, despite the millions of abandoned baby girls (Bartholet, 2007b, pp. 160-61).

Several countries that used to release significant numbers of children as early infants, have shut down or severely restricted international adoption. Guatemala was one of the major sending countries, despite its small size, placing many children at 4-6 months of age, with excellent prospects for healthy development. Then UNICEF and others called for a moratorium, based on alleged adoption abuses. Guatemala is now closed, with any future international adoption system likely to be very limited (Bartholet, 2007b, pp. 156-57, 190-91).

C. Positions Taken by International Adoption Critics

Some argue that international adoption is an inherent violation of human rights, depriving children of their heritage birthright. Andrew Bainham took this position as academic adviser to the European Parliament in connection with Romania's admission to the Union, arguing that international adoption violated heritage rights under international law (Bainham, 2003). David Smolin, another academic critic, argues that international adoption is inherently exploitative, because poverty leads many birth parents to surrender their children (Smolin, 2004).

UNICEF makes a point of saying, at least publicly, that it is not entirely against such adoption. Along with most other critics, UNICEF focuses on adoption abuses, and argues for regulatory 'reform' to ensure against baby buying and fraud, and provide preferences for in-country placement.

However UNICEF actions and policies reveal that it sees almost no legitimate role for international adoption. One UNICEF policy paper targets any country placing significant numbers of children abroad as a problem, requiring adoption reform (Bartholet, 2007b, pp. 154-57).

Dozens of self-styled child human rights organizations opposed Madonna's two adoptions from Malawi, although there was no alternative for the children involved except continued life in an orphanage. Sixty-seven such organizations filed amicus briefs in court opposing the first

adoption. The Human Rights Consultative Committee, a network of 85 such organizations, issued a statement opposing the second adoption, arguing that under the Convention on the Rights of the Child, institutional care was preferred to international adoption (Pound Pup Legacy, 2009). The high profile Save the Children also opposed this adoption.

Moreover UNICEF and other critics have pushed for policies which would effectively eliminate international adoption. They call for closing down adoption programs in response to alleged abuses. They call for eliminating the private intermediaries that are in many countries the lifeblood of adoption. They argue that international adoption must be 'subsidiary' to various in-country options, regardless of whether those options exist. Thus UNICEF's official position is that international adoption should be considered only after in-country adoption and 'permanent' family or foster care are found unavailable. And many argue that children should be held for six months or longer while in-country solutions are pursued.

The Hague Conference on Private International Law issued a guide for interpreting the Hague Convention on Intercountry Adoption, which endorses UNICEF's claims that in-country 'permanent' family or foster care should be preferred to international adoption (Guide to Good Practice, 2008, pp. 29-30). Yet the Hague Convention had been generally understood to take an important step in the direction of validating international adoption by making it the preferred option over foster care.

UNICEF and other international adoption critics also promote family preservation, family

reunification, and kinship care, as preferable to international adoption. They want to create and expand social welfare support for poor families so that more children can be kept within the original kinship group.

D. Threats to International Adoption and to Children

If arguments that international adoption is inherently wrong prevail, such adoption would be eliminated. However few press these arguments.

The real threat to international adoption and to children is posed by UNICEF and others who claim they are not against international adoption, but simply for regulatory reform. Arguments against 'abuses,' and for children's heritage rights sound reasonable to many.

But the UNICEF positions would if accepted radically limit children's opportunities for finding nurturing homes. Moratoria closing down international adoption programs in particular countries end such adoption entirely, and while moratoria are often initially described as temporary, they may end up being permanent. Even if eventually lifted, children will meantime have been denied adoptive homes. Thus in Guatemala, the current moratorium is denying homes to thousands per year.

Regulation prohibiting private intermediaries has been the deathknell for international adoption in many countries, as those promoting this 'reform' well know. Critics find receptive audiences with their talk of eliminating the greedy lawyers and others who make a living arranging such

adoption. But private intermediaries are generally more eager than government bureaucrats to make matches between the parties who want adoption to happen – parties that include birth as well as adoptive parents (Myers, 2009, p. 782). Pursuant to pressure from UNICEF and others, many countries in South and Central America have banned private intermediaries, and have as a result largely eliminated international adoption. These countries include Paraguay, Chile, Bolivia, Peru, Ecuador, Honduras, and El Salvador. Instead of placing thousands of children per year, they now place only a handful, and then only after the children have spent long periods in damaging orphanages. Guatemala has responded to similar pressure by enacting legislation eliminating private intermediaries in any future international adoptions.

Preferences for in-country solutions over international adoption deny or at best delay the good homes that are typically only available in such adoption. There are limited prospects for adoption in the poor countries which predominate as sending countries. Desperately poor people are generally not in a position to volunteer for parenting through adoption. Poor countries are often devastated by war, disease, and related chaotic conditions which make adoption additionally unlikely. Many Asian countries are characterized by a powerful bias for blood-linked parenting which discourages adoption. Many sending countries contain minority race groups which suffer severe discrimination, making it hard to place the group's children with more privileged groups within these countries. It is the relatively wealthy countries of the western world that have large numbers of eager prospective adoptive parents.

A six-month holding period for in-country adoptive home searches, when there are few in-

country homes available, will thus generally at best delay placement. This means condemning children who could have been placed internationally to live additional time in destructive orphanages. And it reduces prospects for finding international homes, since it is always easier to place younger, less damaged children.

Preferences for what UNICEF calls permanent family or foster care are similarly dangerous. UNICEF's argument is that such care could preserve children's birth and national heritage links. But foster care doesn't exist as a meaningful option in most sending countries – unparented children are instead relegated to orphanages. UNICEF wants foster care expanded, but denying children adoptive homes now because in the future foster care might exist is unfair to existing children. Nor is there any reason to believe that poor countries will be able to build a nurturing permanent foster care system. Such foster care as now exists in poor countries is often quite terrible, 'a euphemism for cottage-industry-level institutionalization, ... parentless children in a small-scale orphanage run by a small staff of under-resourced adults' (Wardle, 2005, p. 341). Foster care in the U.S., with all its resources, is notorious for bouncing children from one home to another. While critics of international adoption talk of building foster care far superior to that in the U.S., they fail to explain how this could be accomplished. Existing social science evidence indicates that foster care would not serve children's interests nearly as well as international adoption (Bartholet, 1999, pp. 96-97).

Positions favoring family preservation, family reunification, and kinship care over international adoption are similarly dangerous. It will be a long time before the poor countries at issue create

adequate welfare support, employment and other systems enabling parents to raise all the children they produce. In today's world, family preservation and reunification efforts will be necessarily limited. Kin who have not already stepped forward are not likely to provide placements. Children removed because of maltreatment are likely to do better in adoption than if reunified with their parents (Bartholet, 1999, pp. 81-110, 154-59, 176-204).

We should of course work to improve social welfare systems in poor countries and, more broadly, to address the terrible poverty and chaos characterizing the lives of those whose children end up in institutions and on the streets. But change, at best, will not happen in time to provide homes for the children now living in those institutions and on those streets.

Nor is there evidence that denying children homes in international adoption helps solve the larger social problems at issue. While there are no good studies systematically examining the results of recent moratoria, anecdotal evidence indicates that they may simply cause more suffering. Reports indicate drastic increases in the number of abandoned children, and ongoing horrendous conditions in orphanages, in Vietnam, Guatemala, and Romania in the wake of their moratoria (Center for Adoption Policy, 2009; Worthington, 2009, pp. 568-83). An advertisement published by 33 NGOs denounced conditions in Romanian orphanages:

> Abandoned babies are often confined to steel cribs 23+ hours a day for months or years. Without normal stimuli, without the ability to crawl, play, interact or be loved, they suffer immense, often irreversible psychological and physical damage.

(Mitchell, 2009)

If the critics of international adoption prevail, the results will be disastrous for the many tens of thousands of children who could be placed yearly. Such adoption will be limited to last-resort status, with a relative handful of children released, and this only after damaging periods in orphanages.

III. Why the International Adoption Critics Are Wrong

A. Accepted Human Rights Principles Require that Children's Best Interests Govern

Core international human rights law proclaims that children's best interests should be the guiding principle in matters related to children and adoption. For example, Article 3 of the Convention on the Rights of the Child (CRC) provides generally that 'the best interest of the child shall be a primary consideration,' and Article 21 provides that in adoption it shall be 'the paramount consideration'.[ii] Article 1 of the Hague Convention on Intercountry Adoption provides that 'intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law.' Courts in South Africa, India, and Malawi have concluded that the CRC and related international human rights law make children's best interests determinative in cases involving international adoption.[iii] UNICEF and other critics of international adoption generally agree that children's best interests should govern, and thus focus their criticism on claims that children are injured by adoption abuses and by the loss

of heritage rights involved in out-of-country placement.

If we take seriously the proposition that children's best interests must govern, there should be no dispute about how to resolve the central policy issues in international adoption.

B. International Adoption Serves Children's Most Basic Human Rights

Human beings need parental care for a prolonged period to survive physically and to develop mentally and emotionally. Even the best institutions fail to provide the kind of care that infants and young children need (Bartholet, 2007a, p. 346 and n. 25; 347-480).

Key international laws proclaim the centrality of children's human rights to grow up in a family. The CRC Preamble describes the family as 'the natural environment for the growth and well-being of ... children.' The CRC and the Hague Convention on Intercountry Adoption include in their Preambles 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, love and understanding....'

The CRC also provides that member states must give children who cannot be raised by their original parents adequate substitute care, and protect children against the conditions characteristic of institutional care. It says that an unparented child 'shall be entitled to special protection and assistance,' 'alternative care' (Article 20), and 'such protection and care as is

necessary for his or her well-being' (Article 3). It says that 'every child has the inherent right to life,' and to 'survival and development' (Article 6). It grants children affirmative rights to health, a standard of living adequate for appropriate development, and education (Articles 24, 27, and 28). It requires states to 'protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation' (Article 19). It provides that 'no child shall be subjected to torture or other cruel, inhuman or degrading treatment,' nor 'deprived of his or her liberty unlawfully or arbitrarily' (Article 37).

Accordingly, core human rights principles support the proposition that children have a right to be raised by parents who can provide true family care. Unparented children have a right to be placed in international adoption if that is where homes are available. They have a right to be liberated from the conditions characterizing orphanages, street life, and most foster care (Dillon, 2003; Bartholet, 2007b; Wardle, 2005, pp. 353-60).

Courts have recognized these principles in decisions involving international adoption. Justice Bhagwati in a 1984 case in India found a right to international adoption despite the absence of statutory recognition of such adoption, relying on international human rights law and related provisions in the Indian Constitution. He reasoned:

> [C]hildren need special protection because of their tender age and physique, mental immaturity and incapacity to look after themselves. That is why there is a growing realization in every part of the globe that children must be brought up in an atmosphere of

> love and affection and under the tender care and attention of parents so that they may be able to attain full emotional intellectual and spiritual stability and maturity....
>
> ... Every child has a right to love and be loved and to grow up in an atmosphere of love and affection and of moral and material security and this is possible only if the child is brought up in a family.... [I]f for any reason it is not possible for the biological parents or other near relative to look after the child ..., the next best alternative would be to find adoptive parents....
>
> ... [I]f it is not possible to provide them in India decent family life where they can grow up under the loving care and attention of parents..., there is no reason why such children should not be allowed to be given in adoption to foreign parents.
> (Lakshmi Kant Pandey v. Union of India, 1984, pp. 474, 476)

The Malawi High Court, in upholding Madonna's first adoption despite the residence requirement read by some to forbid international adoption, also relied on international human rights law, both the CRC and the African Charter on the Rights and Welfare of the Children. It granted her adoption of David Banda based on finding that Madonna offered the true home that was unavailable in Malawi:

> The reality of the situation in Malawi is that a lot of children are in dire situation of material deprivation characterized by poverty, lack of access to essential nutrition, lack of

> access to education, lack of access to proper sanitation and lack of access to adequate health care. This is the inescapable reality in Malawi as in most third world countries. And to argue that we will soon find adequate solutions for all our deprived children is to assert a shameless and insolent lie.
>
> The infant in the instant case was among our many materially deprived children whose only remaining parent was forced, because of his circumstances, to place him at an orphanage.... In seeking to adopt the infant the petitioners are not therefore in the way of any permanent domestic solution for the infant.
> (Adoption case No. 2, 2008, p. 16)

The Malawi Supreme Court of Appeal granting Madonna's second adoption, involving 'Mercy' James, relied on similar international human rights law:

> We do not think that under [Malawi law] inter country adoption is a last resort alternative.... [S]ince the case of infant CJ surfaced itself there has not been a single family in Malawi that has come forward to adopt infant CJ neither have there been any attempt by anybody to place infant CJ in a foster family.... [T]here are only two options. She can either stay in Kondanani Orphanage and have no family life at all or she can be adopted by the Appellant and grow in a family.... In our Judgment the welfare of infant CJ will be better taken care of by having her adopted by the foreign parent rather than for her to grow up in an orphanage where she will have no family life, no love and affection

of parents. (In Re: CJ A Female Infant, 2009, pp. 24-25)

The Constitutional Court of South Africa stated in a 2007 decision by Justice Sachs approving an international adoption, that the CRC 'seems to accept the notion that "[e]nsuring that a child grows up in a loving, permanent home is the ultimate form of care a country can bestow upon a child" even if that result is achieved through an inter-country adoption' (A.D. & Another v. D.W. & Others, 2008, pp. 200).

International adoption is about placing tens of thousands of infants and young children who need homes with people who want to provide them. There are many millions of children worldwide who need homes because they have been orphaned, abandoned, or removed. They are destined to live either in orphanages or on the streets if they are not adopted internationally. Estimates indicate that there are 143 million orphaned children (Joint U.N. Programme, 2004, p. 7). There are over 8 million living in orphanages (The Secretary-General, 2006, p. 16), and some 100 million street children with no available caregivers (Mitchell, 2009; Bartholet, 2007b, pp. 182-83).

UNICEF and other critics of international adoption say that only a small percentage of orphanage children are true orphans in the sense that both parents are dead, arguing that only these should be considered appropriate for adoption. But those whose parents are not dead have either been removed for maltreatment or abandoned. The overwhelming majority have no meaningful relationship with their parents, and no likelihood of ever returning home. It is in the interests of

these children, and of the birth parents who love them, to be placed in adoption.

UNICEF and others also say that most orphanage children are older and suffer disabilities, whereas prospective adopters prefer healthy infants. But many infants are placed in orphanages. It is restrictive adoption policies and the conditions of orphanage life that produce so many older children with disabilities. And while prospective adopters generally prefer healthy infants, many are interested in adopting older children with significant disabilities.

At their peak in 2004, international adoptions reached up to 45,000. This is a small number by comparison to those in need of homes. But the homes make a huge difference for those placed. And the number could easily be multiplied many times if we developed policies facilitating rather than restricting placement. Surveys show that significant percentages of adults in privileged countries are interested in adopting. Some 9.9 million of 'ever married' women in the U.S. alone have considered adoption, and only one percent of these adopt in a given year (Wardle, 2005, pp. 345-46).

The contrast between the homes international adoption offers, and orphanage or street life, is so extreme as to make unnecessary any debate as to what best serves children's human rights. Most orphanages are terrible places, where children learn not to cry because crying brings no response. A recent article describes a typical institution for children under three in Bulgaria:

> It is the smell that [first] assaults you – filthy nappies, unwashed babies, rotting flesh.

> Then you are hit by the silence, an eerie, unnatural silence, the silence of babies who have given up hope of ever being consoled, cuddled or comforted. It is the dreadful quiet of starving, neglected, unloved children waiting to die.... The children in this particular wing have no human contact. They are fed lying on their backs, and have their nappies changed only when there happens to be a supply of new ones. Not one single word is uttered to them, so none of them is able to talk. This is how they live, and this is how they die.... These children are Europe's guilty secret, hidden away from the world (Monckton, 2009).

Studies document how destructive orphanage conditions are, even in the better orphanages, producing lifelong emotional and intellectual damage even for many of those children lucky enough to be eventually adopted. Developmental psychologists explain how essential nurturing human interaction is for infants to develop normally. The new science of early brain development demonstrates in dramatic color slides how differently the brains of children raised for two years in an orphanage look as compared to the brains of children raised with parents (Bartholet, 2007a, pp. 346-48). The World Health Organization recommends that even 'when high-quality institutions are used as an emergency measure ... the length of stay should be no more than 3 months' (Browne et al., 2004, p. 11).

Street children often die early, and those that live suffer maltreatment, disease, exploitation for sex, labor and child soldiering, and trafficking for sex and forced labor in other countries (Wardle, 2005, pp. 325-31). International adoption provides the only hope for a loving and

nurturing home for most children in need, as discussed above. And international adoption produces good homes that work well for children. Studies show that those placed in early infancy do essentially as well as non-adopted children. For children who have suffered terrible damage by virtue of wartime trauma or orphanage life, the studies show international adoption does much to overcome deficits, enabling many to live essentially normal lives.

And the expenses for international adoption are paid by adoptive parents. Neither sending nor receiving countries need divert significant resources to finance such adoption. Sending countries are relieved of the costs of institutionalization for all those placed, freeing up resources to serve the needs of other children. International adoption also produces significant additional resources for poor countries and their people. Adoptive parents pay fees to agencies and orphanages, some of which go to improve orphanage conditions. China charges an orphanage fee for each adoption of $3000-5000. Given the 7900 children adopted into the U.S. from China in 2005, and assuming the minimum $3000 fee, this meant $23,700,000 to improve orphanage conditions (Bartholet, 2007b, 184-85).

Some critics of international adoption have argued for a systematic tax on such adoption, charging adoptive parents an extra few thousand dollars per adoption to support family preservation in sending countries (Smolin, 2007, p. 445; King, 2009, pp. 464-65). But this would limit the chances for children to get adoptive homes, since raising the price of adoption will deter potential adopters.

In any event, there is ample evidence that the experience of adopting children from other countries triggers significant voluntary contributions by individuals and agencies to improve conditions in sending countries, in the absence of any such tax. And the exposure international adoption brings creates new consciousness about these countries' problems more broadly, and thus the potential for a wide range of helpful action by individuals and governments (Bartholet, 2007a, pp. 350-52).

One example among thousands of the productive interaction between international adoption and broader reform, is the work of Dr. Jane Aronson, whose understanding of the problems suffered by orphanage children began with her work as a pediatrician for international adoptive families. Dr. Aronson has worked on her own and with one of her adoptive parents, Angelina Jolie, to develop and fund several organizations that serve the needs of more than 10,000 children worldwide, building foster care, and improving orphanage conditions. Her 'Orphan Rangers' provides visits to orphanage children who would otherwise experience no loving human contact. (Worldwide Orphans Foundation, 2009; http://www.wwo.org).

The Malawi Supreme Court that approved Madonna's second adoption recognized the interaction between her two adoptions and the many millions she had donated to improve conditions for other poor children in Malawi. It noted, in concluding that she satisfied Malawi's residence requirement:

> [T]he Appellant is not a mere sojourner in this country but has a targeted long term

> presence aimed at ameliorating the lives of more disadvantaged children in Malawi.... [S]he is not here only to adopt infant CJ but to also implement her long term ideas of investing in the improvement of more children's lives with her projects in Malawi. In our view it is clear that ... [she] was at the time of this application resident in Malawi (In Re: CJ A Female Infant, 2009, p. 23).

C. Adoption Abuses Don't Justify Limiting International Adoption

Adoption abuses exist, as in every area abuses of the legal system exist. But there is no persuasive evidence that adoption abuses are extensive.

Nor is there reason to think that they *would* be extensive. Critics claim that adoption facilitators are wrongfully taking babies by paying money to induce birth parents to surrender their children, and even by kidnapping. The sad truth is that even if there were many intermediaries capable of such crimes – and these are crimes everywhere – there is no real need to buy or kidnap children, since there are so many millions of desperate, impoverished birth parents incapable of caring for their children, and so many millions of orphaned and abandoned children. Law reform oriented to facilitating lawful adoption would do much to reduce such adoption abuses as exist. The Hague Conference Report providing the rationale for the Hague Convention on Intercountry Adoption made this very point, finding that then-existing difficulties created pressure for corrupt practices that would not exist in more effective systems for matching children with prospective parents (Hague Conference on Private International Law, 1990, p. 188).

Better enforcement of laws prohibiting adoption abuses is the obvious additional answer. When parents violate laws prohibiting child maltreatment, we don't shut down the system that sends newborns home with their parents. We call for better enforcement of laws prohibiting maltreatment.

International adoption critics argue that it is naive to think that adoption laws can be enforced in certain countries, given corruption and limited capacities for governance. But even if adoption abuses occur on more than an occasional basis, and even if eliminating them would be hard, shutting down international adoption is wrong. Zero tolerance for adoption abuses may sound good but it will hurt children. The evils involved in such abuses must be weighed against the far more significant evils involved in denying children homes.

The situation in Guatemala helps illustrate. Claims that adoption intermediaries were giving birth mothers payments in connection with their surrender of babies helped shut down international adoption. But there is no good evidence that these payments were used to induce mothers to give up children they would have kept but for the payment. Instead it seems likely that given their desperate poverty and limited access to birth control, virtually all mothers given such payments would have surrendered regardless. Payments for anything except expenses are illegal, and probably should be since it would be hard to know when any such payment influenced the surrender decision, and thus hard to draw the line between lawful payment and unlawful baby selling. But there is no terrible evil in a poor birth parent who would in any event

surrender a child being given funds which will help her survive along with any other children she may have. Shutting down international adoption programs in Guatemala deprives thousands of children per year of the chance to grow up in nurturing homes, rather than life-destroying orphanages. That's an evil that should count for more.

Baby buying is generally not thought of as a serious evil in today's world in other contexts. Commercial surrogacy is the institution in which true baby buying takes place systematically. Surrogacy contracts specify that the woman who provides pregnancy and childbirth services, and often her egg as well, will receive money in exchange for turning over the baby born, and terminating her parental rights. Commercial surrogacy is flourishing in the United States and many other countries, and international commercial surrogacy is spreading rapidly, as those who want to become parents turn to poor countries for surrogates who will charge low prices. Some of the countries which have shut down or significantly restricted international adoption are now engaged in the rapidly expanding international surrogacy business. Private lawyers who used to arrange international adoption from Guatemala are now earning a living arranging for Guatemalan women to get pregnant in order to surrender for a fee their babies and their parenting rights. India, which has significantly restricted international adoption, including by requiring that 50% of all adoptions be in-country (Dohle, 2008, p. 131), is engaged in a booming international surrogacy business, and is on the verge of regularizing it through facilitating legislation (Smerdon, 2008, p. 15; Gentleman, 2008). Russia, which has also significantly restricted international adoption, is enthusiastically embracing international surrogacy (Lee, 2009, p. 284). UNICEF and other critics of baby buying in the international adoption context,

are interestingly silent about international surrogacy.

C. Concepts of Nationalism and Heritage Don't Justify Limiting International Adoption

International adoption critics act as if the important rights at stake are those of national governments, and the often arbitrary lines separating countries are of overwhelming significance, marking each child as necessarily 'belonging' to the country of its birth. This translates into policy preferences for virtually all in-country options as compared to out-of-country adoption, and into mandatory holding periods which delay and often entirely deny such adoption.

But children's fundamental human rights to grow up in a nurturing family should trump nation state rights to hold onto children. Moreover, keeping unparented children in their countries of origin does nothing to actually strengthen the economic and political situation of poor countries and their people. It is simply a symbolic way for the powerless to stand up to the powerful, for countries formerly victimized by colonialism to make an anti-colonialist statement. And it exploits the least powerful of all, the children of the poorest groups in these countries. Ironically these are often the children of the indigenous groups which were the primary victims of colonialism, while often the rulers in countries that decide to hold onto these children in symbolic defiance of former colonial powers, are the descendants of the colonial invaders.

International adoption critics say that they promote in-country solutions because this serves children's heritage rights. But this is retrograde thinking that ill-serves children's real needs.

Children are not defined in some essentialist way by the particular geographical spot where they happened to be born. Social science provides no basis for believing that children are better off if raised in their community of origin (Bartholet, 2007a, pp. 360-61). Nor does common sense. Had Barack Obama been born in Kenya instead of in Kansas, would we view him as deprived of his Kenyan heritage by virtue of being raised in the U.S.? Was he deprived of his Kansas heritage by virtue of being raised in Hawaii and, for a period, Indonesia? Is he deprived or enriched by virtue of his complex national, racial and ethnic heritage? His testimony, as revealed in books and speeches, indicates that he feels enriched, and empowered to act more effectively in all his public roles including his current presidency.

We live in a world increasingly defined by globalization, with adults eager to cross national boundaries for economic and other opportunities. Some 1.6 million per year immigrate to the U.S. alone, and immigrants constitute 12.5% of the total population in the U.S.

In this world it would be laughable to argue that adults should be prevented from leaving their country of birth because of their heritage rights. It would be thought outrageous for nations to lock adults behind walled boundaries because they constituted 'precious resources.' Heritage and state sovereignty claims can only be made in the context of international adoption because children are involved, and children are peculiarly incapable of protesting on their own behalf.

If we truly mean to honor children's rights, we must abandon such talk and treat children as members of the global community, entitled to have their most fundamental human rights

honored, wherever in the world that can best take place.

It is understandable that UNICEF and others promote nation state rights to hold onto "their" children, and that many countries join in demanding these rights. UNICEF was created in a post-colonial era in which nationalism was an important value. And countries that have emerged from a history of colonialist oppression, can easily see adoptions by foreigners as a modern version of colonialist exploitation.

Also, international law pays tribute to the power of nation states over their children. Both the CRC and the Hague Convention allow countries to deny adoption altogether. The CRC prefers in-country options that include foster and other 'suitable' care, over out-of-country adoption (Article 21(B)). The Hague Convention prefers in-country to out-of-country adoption (Preamble; Article 4). These 'subsidiarity' provisions defer to state sovereignty rights over their human child resources.

Interestingly the first major international recognition of the rights of the child showed no such deference to state sovereignty, but made child rights truly primary. In 1924 the League of Nations endorsed the Declaration of the Rights of the Child, providing:

> ... [M]en and women of all nations, recognizing that mankind owes to the child the best that it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed:

> I. The Child must be given the means requisite for its normal development, both materially and spiritually;
>
> II. The child that is hungry must be fed; the child that is sick must be helped; ... and the orphan and the waif must be sheltered and succoured;
>
> III. The child must be the first to receive relief in times of distress;
>
> IV. The child must be put in a position to earn a livelihood and must be protected against every form of exploitation (Declaration of Geneva, 1924, p. 43).

The CRC and Hague Convention subsidiarity provisions are understandable given that the Conventions represent agreements between nations. But they are troubling, and they provide the primary basis for arguments that anti-international adoption positions are consistent with children's human rights.

However these subsidiarity provisions are inconsistent with the core principles endorsed in these same Conventions and elsewhere in human rights law, which make the child's best interest primary, and proclaim the child's right to grow up in a nurturing family fundamental.

Several court decisions in international adoption cases have confronted this inconsistency, and concluded that the child's best interests and right to family trump the subsidiarity provisions. Two South African decisions found that national regulations prohibiting out-of-country adoption violated international human rights law, as well as the South African Constitution's endorsement of children's rights, and accordingly approved the adoptions at issue (Minister of Welfare and

Population Development v. Fitzpatrick and Others, 2000; A.D. & Another v. D.W. & Others, 2008). They found that 'the subsidiarity principle itself must be seen as subsidiary to the paramountcy principle,' the principle making the child's best interest paramount (A.D. & Another v. D.W. & Others, 2008, p. 204).[iv]

The Malawi decisions approving Madonna's adoptions despite the residency requirement read by many to prohibit international adoption, found that residence had to be interpreted in light of the best interests principle, which it found trumped subsidiarity provisions under international human rights law. In so ruling, the court in the second case, involving 'Mercy,' stated:

> Colonialism and colonial outposts in their original format are things of the past. A new international legal order has taken root. Globalization and the global village with all its legal ramifications is now what preoccupies legal minds…. Residence ... is no longer tied to the notion of permanence as a deciding factor.... It has for some time now been the law that a man may have more than one place in which he resides…. We do not think that under [Malawi law] inter country adoption is a last resort alternative.... [B]y her lifestyle [Madonna] is herself a child of the world.... (In Re: CJ A Female Infant, 2009, pp. 21, 24, 26).

The original understanding of the subsidiarity principle has been perverted by those who use it to oppose international adoption. Subsidiarity is designed to serve individual human rights not promote state sovereignty. Subsidiarity principles require that children be brought up if possible

in their first and most intimate community, their family of origin, because the child's most fundamental needs are served in a family community. If children cannot be brought up in the family of origin, subsidiarity demands that they be placed in another family so they can enjoy that same sense of intimate community (Carozza, 2003, p. 38).

The United States has in recent decades taken important steps to jettison old ideas that children belong in some essentialist way to their groups of origin. The federal Multiethnic Placement Act[v] rejected the idea that black children belonged to the black community, and so should be kept in black foster care or placed in black adoptive families, in preference to transracial placement. The Act vindicates children's rights to be placed in the earliest available permanent nurturing home, regardless of race. The Adoption and Safe Families Act[vi] rejected the idea that children necessarily belonged to their birth parents, regardless of fitness to parent. The Act vindicates children's rights to be raised in a permanent nurturing home, reducing the priority on family preservation and reunification, limiting time in foster care, and expediting adoptive placement. There is also increasing support in the U.S. for the idea that children have a *constitutional* right to nurturing parenting, and thus to adoption when it represents the most likely route to such parenting (Woodhouse, 2005; Dwyer, 2009; In re John Doe and James Doe, 2008).

IV. The Way Forward: An International Adoption Policy Statement

In the face of the current crisis in international adoption, leading human and child rights experts

have developed and endorsed a policy statement supporting the principle that children's most basic rights are to grow up in the true family that is often available only in international adoption. It states that such adoption 'should be an integral part of a comprehensive strategy to address the problems of unparented children.' It recognizes such adoption as preferable to foster and institutional care, and rejects all holding periods in favor of placing children who cannot be raised by their birth parents as soon as possible, whether in or out of country. It calls for addressing adoption abuses by enforcing and where needed strengthening laws governing misconduct, rather than eliminating private adoption intermediaries or otherwise restricting international adoption.

This policy statement was endorsed as of June, 2009, by over 130 legal academics specializing in human and child rights, and by six child rights and adoption policy organizations (www.law.harvard.edu/programs/about/cap/). The Human Rights Center of the powerful American Bar Association (ABA) developed a related resolution supporting international adoption which was formally adopted by the ABA in August, 2008. These developments demonstrate that the organizations which have opposed international adoption using child rights rhetoric have no lock on the child human rights position.

This policy statement is consistent with both the CRC and the Hague Convention, if those are interpreted to make central the child's best interests and fundamental human rights. It is consistent with the Hague Convention's preference for in-country over out-of-country adoption: the statement simply provides that any such preference be implemented through a strategy which

does not result in delaying placement. And the Hague Convention specifically allows for private intermediaries, so long as they operate under the aegis of a Central Authority.

V. Conclusion

Those who care about children should act now to preserve and promote international adoption. It represents the best option for existing unparented children. It serves the interests of birth parents who care about the children they cannot raise. It brings new resources into poor sending countries to help improve conditions for the children left behind. It represents the way forward to a world in which we recognize children as citizens of a global community with basic human rights entitlements, a world in which we recognize adults in that community as having responsibilities to all its members.

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[ii] G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, UN Doc. A/44/49 (1989). See also African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* 29 November 1999 (Article 4 providing generally that best interests of

child shall be the *primary* consideration, and Article 24 providing that in adoption best interests of child shall be the *paramount* consideration).

[iii] See A.D. & Another v. D.W. & Others 2008 (3) SA 183 (CC) (S. Afr.); Lakshmi Kant Pandey vs. Union of India, A.I.R. 1984 (S.C.) 469; In Re: CJ A Female Infant of C/o P.O.Box 30871, Chichiri, Blantyre 3 (Msca Adoption Appeal No. 28 of 2009) [2009] MWSC 1 (12 June 2009); Adoption case No. 2 of 2006 in the matter of the Adoption of Children Act (CAP.26:01) and in the matter of David Banda (a male infant) (Malawi High Court) (28 May 2008).

[iv] This decision like the Malawi decisions had to contend with subsidiarity language in the African Charter on the Rights and Welfare of the Child even more extreme than the CRC: 'States Parties ... shall recognize that inter-country adoption ... may, *as the last resort*, be considered ..., 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.' (emphasis added) (Article 24(b)).

[v] Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, Pt. E, Subpt.1, 108 Stat. 4056 (1994), amended by Small Business Job Protection Act of 1996, Pub. L. 104-188, 110 Stat. 1755 (1996) (current version at 42 U.S.C. 1996(b) (2000)).

[vi] Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C.).