
**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**

Sara Dillon*

I. INTRODUCTION: THE IDEOLOGICAL MORASS AT THE HEART OF INTERNATIONAL AND NATIONAL ADOPTION LAW.....	180
A. <i>Who will articulate a child’s right not to be institutionalized? How to articulate a child’s right to a family of his or her own?.....</i>	187
B. <i>Identifying Acceptable and Unacceptable Forms of Care</i>	191
II. THE INTERNATIONAL HUMAN RIGHTS PICTURE: THE HAGUE CONVENTION VS. THE CONVENTION ON THE RIGHTS OF THE CHILD	199
A. <i>A Basic Legal Question</i>	199
B. <i>The Hague Convention and its Relationship to the UNCRC.....</i>	202
III. CONCEPTUALIZING INTERCOUNTRY ADOPTION: CORRECTING MISPERCEPTIONS, BALANCING CAUTION AND FACILITATION	215
A. <i>Negative Rhetoric and the Human Rights Imperative: Intercountry Adoption Dismissed as a “Market”</i>	215
B. <i>The Group Rights Emphasis and Jurisdictional Questions</i>	221
C. <i>How Concepts Influence National Legal Regimes</i>	226
D. <i>Orphanage Worst Case Scenarios</i>	227
E. <i>Children Without Families as a Global Cohort: Complex Social, Economic, and Cultural Pressures</i>	232
IV. THE PSYCHOLOGICAL BASIS FOR A HUMAN RIGHTS APPROACH TO INTERCOUNTRY ADOPTION	235

* Associate Professor, Suffolk University Law School. Sara Dillon received her PhD from Stanford University in 1988 and her JD from Columbia University Law School in 1993. She is grateful for the research assistance of Anne Gates-Gurskiy, Elena Mamai, and William Strigler.

A.	<i>Is there a human rights imperative, or is it all a matter of viewpoint?</i>	235
B.	<i>Ideal Legal Regimes for Sending and Receiving Children: What These Would Have</i>	237
1.	Best Interests, Child Psychology, and International Human Rights	237
V.	CASE STUDIES IN CRISIS: BARRIERS TO ADOPTION ADVOCACY	243
A.	<i>Cambodia</i>	244
B.	<i>Vietnam</i>	247
C.	<i>Romania</i>	248
D.	<i>Guatemala</i>	251
VI.	CONCLUSIONS	252
A.	<i>Recommendations to the United States</i>	252
B.	<i>General Conclusions</i>	253
	AFTERWARD	256

I. INTRODUCTION: THE IDEOLOGICAL MORASS AT THE HEART OF INTERNATIONAL AND NATIONAL ADOPTION LAW

Popular conceptions of intercountry adoption are confused and confusing, despite the existence of an “adoption revolution.”¹ With the global imagination and non-governmental organizations (“NGOs”) devoted to child welfare divided over the necessity and propriety of transnational adoption, it is not surprising that the legal regimes, international and national, that make such adoption possible are in a similar state of confusion.² Have we attained global agreement, if not consensus, to facilitate

¹ This phrase was coined by Adam Pertman in his well-known book, *ADOPTION NATION: HOW THE ADOPTION REVOLUTION IS TRANSFORMING AMERICA* (2000) (referring to the situation in the United States, where millions of people are now directly involved in adoption in some manner). In fact, many European countries are now comfortable with (at least intercountry) adoption; Sweden has the highest per capita rate of adoption. Contrast the situation in Japan, where adoption remains unfamiliar and untried by most people. See Mary Jordan, *Japanese Couples’ Aversion to Child Adoption Changes Only Slowly*, WASH. POST SERVICE, June 29, 1999 at A1 (Twenty-five thousand children “who live in Japan’s 527 state-run or subsidized children’s homes do not really belong to any family. They arrive at these homes because they were abandoned, neglected or abused by their biological parents. And there they live as Japan’s invisible children, rarely discussed in public, and subtly discriminated against in private.”); see also Yukiko Terado, *Adoption and Child Welfare in Japan*, in *FAMILIES ACROSS FRONTIERS* 625, 627 (Nigel Lowe and Gillian Douglas, eds., 1996) (addressing the relatively underdeveloped state of law and practice on adoption in Japan).

² For just a tip of the iceberg of contention surrounding transcultural adoptions, see Alice Hearst, *Multiculturalism, Group Rights and the Adoption Conundrum*, 36 L. & SOC’Y REV. 489, 503 (2002) (“[C]hildren adopted across national, racial, and cultural boundaries have complicated identities that cannot be easily categorized.

intercountry adoption? Or have we decided to restrict intercountry adoption to certain narrowly defined situations? Or can we identify a broadly expressed preference to eliminate intercountry adoption altogether? Can there be meaningful international agreement on such a contentious topic? Does intercountry adoption contribute to the welfare of children, or add to their already great global suffering?³ Much writing on the subject reflects the inability to choose between these two highly conflicted notions of adoption.⁴ This article will argue that by making strenuous investments to eliminate the abuses characteristic of some intercountry adoption, more people and organizations involved in children's issues should feel free, and should be expected, to advocate for adoption as a method of giving a new life to children in dire need of families.⁵ Lack of

Consequently, it is particularly difficult to frame adoption law and policy in ways that respond adequately to the needs of children, their families, and the cultural groups who are interested in their welfare and belonging.”) See also Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 *YALE J.L. & FEMINISM* 101, 106 (1998) (“[A] feminist analysis of adoption must view adoption as more than an individual transaction in which one or two adults legally become the parent or parents of a particular child. . . . Adoption, like marriage, involves issues of hierarchy and power.”).

³ Professor Barbara Woodhouse notes a similar set of contentious and intractable issues in her essay on (primarily) domestic adoption and identity. She writes perceptively that “Many of the most volatile adoption issues are couched in terms of rights: the birth mother’s right to confidentiality; the adoptive parent’s right to be treated equally without regard to race, ethnicity, religion or sexual orientation; the rights of a racial, ethnic or national community to custody and control of children born into that community; the adult adoptee’s right to information about her origins; the right of unwed fathers to veto the birth mother’s decision, and so on, ad infinitum.” Barbara Woodhouse, “*Are You My Mother?: Conceptualizing Children’s Identity Rights in Transracial Adoptions*,” 2 *DUKE J. GENDER L. & POL’Y* 107, 108 (1995).

⁴ See *INTERCOUNTRY ADOPTION*, 4 *Innocenti Digest* (UNICEF ICDC, Florence 1999), at 11. UNICEF expresses proper concern that intercountry adoption remains “uniquely. . . a welfare measure for the child concerned . . . carried out in strict conformity with the child’s best interests and rights.” A “discussion site” included in the *Innocenti Digest* takes a highly skeptical approach to intercountry adoption, while acknowledging that “the great numbers of children placed in institutions and kept there for years is one of today’s most poignant tragedies.” Chantal Saclier, *Children and Adoption: Which Rights and Whose?*, in 4 *INNOCENTI DIGEST*, *supra*, at 12. Her sweeping statement that international adoptive parents are demanding only young children who bear a resemblance to the adoptive parents appears to be mainly anecdotal.

⁵ As the premier organization dedicated to the welfare of children, UNICEF is often accused by the adoption community of being hostile to intercountry adoption. UNICEF denies this, and those familiar with its policies claim that UNICEF supports intercountry adoption when there are no valid in-country alternatives. However, UNICEF’s precise sense of what constitutes a valid in-country alternative continues to elude this author.

legal clarity and of adoption infrastructure contributes to the exploitative reputation of intercountry adoption, which in turn creates a situation in which the necessity for such adoption is not plainly stated by those in the best position to affirm its worth.⁶

I will argue in this article that what is most urgently needed is data—hard facts—about how many children are in institutions (public and private orphanages) on a long-term basis, how and why they came to be there, as well as how many children are in alternative forms of groups care, how many are living on the streets with little or no family contact, and as a related matter, how many are working in the sex industry or are engaged in other forms of hazardous and unacceptable work.⁷ Much of what is said about international adoption is shrouded in mystery, ideology, and innuendo. What is said to be best for children is often a function of the speaker's or organization's pre-existing viewpoint. Even with the recent widespread acceptance of the principles of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption ("Hague Convention"), we cannot devise appropriate and just national or international legal regimes for international adoption unless we come to a better, clearer, more transparent understanding of which children should be, and must be, considered truly adoptable.⁸ The trend

⁶ Although difficult to document formally, the attitude of organizations such as Save the Children towards intercountry adoption has been quite negative in general, not just in regard to unethical practices associated with adoption. In a recent interview, the President of Save the Children, Charles MacCormack, stated that:

[A]t Save the Children, over seventy years of experience has taught us that, in general, it is much better for children to stay with their relatives, their families, in their own communities. And so when we find displaced children, we look for their relatives, and we look to place them in communities they're familiar with.

Interview by CNN with Charles MacCormack (May 23, 2003). In a 1994 interview, a representative of Save the Children, Alero Harrison, stated in even stronger terms: "For every child you take out there are a thousand more in dire need. What we ought to be doing is to improve the lot of children in their own country, rather than taking a handful out. . . . Intercountry adoption is always open to abuse." Sally Weale, *Public Praise Withers After Failed Adoptions*, GUARDIAN (London), Nov. 17, 1994, at 10. It should be pointed out that some of these same objections—that only a select group of people are helped, without reaching the more general difficulties—could be raised with regard to political asylum.

⁷ Clear information on children in institutions is hard to come by. It is possible to find statistics on child labor and on street children on various websites. See, e.g., Global March Against Child Labour, at <http://www.globalmarch.org/index.php> (featuring many tables on numbers of children performing different types of labor by country); see also Casa Alianza, at <http://www.casa-alianza.org/EN/index-en.shtml> (providing statistics on street children, especially in Latin America).

⁸ Important work is being done by Trish Maskew and her organization, Ethica, to publicize the need to purge the international adoption system of questionable ethical practices. See Trish Maskew, *Child Trafficking: Why Can't the Immigration Service Prove It*, at <http://www.ethicanet.org/insevidence.pdf> (June 6, 2003). Maskew notes:

in international law, in the human rights and other contexts, is for national political needs to give way to universal principles; this should be no less the case in the context of intercountry adoption.⁹

It is especially difficult to find out how many children are living out their childhoods in private and state-run orphanages. There are an estimated 600,000 institutionalized children in Russia¹⁰ and over a million in China.¹¹ Each country in the developing world has a network of orphanages housing many children.¹² In the industrialized West, the United States is particularly notorious for keeping foster children in a web of

Adoption agencies bear a solemn responsibility to ensure that their overseas employees or agents are trained in proper procedures and are expressly forbidden from paying birth parents for their children, or using money to induce families to relinquish their children. *It should be pointed out that inducement is not as likely to be an issue if adoption professionals do not go looking for children.*"

Id. (emphasis added).

⁹ See Ruti Teitel, *Symposium in Celebration of the Fiftieth Anniversary of the Universal Declaration of Human Rights*, 30 COLUM. HUM. RTS. L. REV. 285, 294 (1998) ("In the contemporary moment, international human rights norms have 'gone global,' their protection is envisioned as somehow autonomous, no longer bounded by international institutions or even the affected nation states.").

¹⁰ Kimberly A. Chadwick, *The Politics and Economics of International Adoption in Eastern Europe*, 5 J. INT'L. LEGAL STUD. 113, 116 (1999) ("An alarming 500,000 children are currently in Russian orphanages."); see also *Parents Abandon 20,000 Children in Russia Annually*, May 21, 2002, available at RosBusinessConsulting Database (quoting one Russian expert as saying that while the number of abandoned children had not changed in the past 20 years, the number of Russian adoptions had fallen significantly); Natalia Yezhova, *Number of Homeless Children in Russia Estimated at 5mln*, ITAR-TASS NEWS AGENCY, Nov. 16, 2000 (relating that there are now 720,000 children living in Russia without parents).

¹¹ Specialists in the field point out that the estimated number of children in Chinese child care institutions ranges from 50,000 to 4.5 million, and that the estimated number of institutions is around 1,000, although the true figures are extremely difficult to ascertain. See *China's Children: Adoption, Orphanages, and Children with Disabilities: Roundtable before the Congressional-Executive Commission on China*, 107th Cong. 1 (2002) [hereinafter, *Roundtable*] (statement of Nancy Robertson, President and CEO, The Grace Children's Foundation). It has been estimated that one million girls are abandoned every year in China, but accurate figures are nearly impossible to determine. See Mary H. Hansel, *China's One-Child Policy's Effects on Women and the Paradox of Persecution and Trafficking*, 11 S. CAL. REV. L. & WOMEN'S STUD. 369, 381 (2002).

¹² According to statistical data submitted to the Second International Conference in Stockholm on Children and Residential Care, in Uganda there are 88 residential institutions for 4,788 orphaned children; in Ukraine there are 102 residential homes, 91 orphanages and 47 child homes for 100,000 children; in the Serbian Republic there are 25 institution for 5,000 children deprived of parental care; in Russia there are 246 children's homes and 156 boarding homes for 110,900 orphaned children (excluding children in specialized institutions); and in the Philippines there are 197 residential

often impermanent and substandard substitute homes.¹³ Childhope and Casa Alianza, both advocacy groups for street children, agree that there are approximately 100 million street children worldwide, with 40 million in Latin America alone. According to estimates, approximately 25% of these children truly live on the streets and without meaningful family ties.¹⁴ In Asia alone, there are estimated to be hundreds of thousands of child prostitutes;¹⁵ in South Asia, literally millions of child bonded laborers.¹⁶ Even leaving out of account children who are killed through infanticide, or the matter of sex-selective abortions,¹⁷ it is clear that literally

care facilities catering to abandoned, neglected, and abused children. Reports available at http://www.children-strategies.org/country_reports.htm.

¹³ On the controversy surrounding the U.S. foster care system, in which some half a million children are enmeshed, see Martin Guggenheim, Commentary: The Foster Care Dilemma and What To Do About It: Is the Problem That Too Many Children Are Not Being Adopted Out of Foster Care or That Too Many Children Are Entering Foster Care?, 2 U. PA. J. CONST. L. 141, 143 (1999). A number of states, among them Florida, have been convulsed by stories of child abuse or neglect within the foster care system. A review of Nebraska's state foster care system showed significant failures. See Leslie Reed, *Foster Care System Fails Half the Time*, OMAHA WORLD HERALD, Dec. 24, 2002 at 1B. The article reported:

A significant portion of those [foster care] children languished in care for two years or more (49 percent), had been moved from one foster home to another at least four times (63 percent), had come back to foster care after being reunited with their parents (43 percent), or did not yet have a legally required plan to finding them a permanent home (42 percent).

Id.

¹⁴ Childhope, *Who are the world's street children?*, at <http://www.childhopeusa.com/kids/index.html> (n.d.).

¹⁵ There is great difficulty in determining exact figures of the numbers of children involved in prostitution; there is agreement, however, on the vast scale of the problem. See *New Report from UNICEF Shows Child Prostitution is on the Rise* (Minnesota Public Radio, Marketplace Morning Report, Dec. 13, 2001), available at LEXIS News Library, News File (noting that the Philippines is home to about 100,000 child prostitutes and India has an estimated 400,000 to 500,000); see also Laurie Nicole Robinson, *The Globalization of Female Child Prostitution: A Call for Reintegration and Recovery Measures via Article 39 of the United Nations Convention on the Rights of the Child*, 5 IND. J. GLOBAL LEG. STUD. 239, 239 (1997) ("Figures estimate that the child prostitution business employs approximately 1 million children in Asia, 1.5 to 2 million children in India, 100,000 children in the United States, and 500,000 children in Latin America. Statistics also estimate that in one year's time a child prostitute will service over 2,000 men.").

¹⁶ Zama Coursen-Neff, *Child Slaves Abandoned to India's Silk Industry*, HUMAN RIGHTS WATCH Jan. 23, 2003 (press release), at <http://hrw.org/press/2003/01/india012303.htm>; Zama Coursen-Neff, *For 15 Million in India, a Childhood of Slavery*, INT'L HERALD TRIBUNE, Jan. 31, 2003, available at <http://hrw.org/editorials/2003/india013103.htm>.

¹⁷ See Hansel, *supra* note 11, at 380 ("[In China] [g]irl babies who are not aborted are often killed shortly after birth. As of 1995, some fifteen million babies had already

millions of children will never be brought up in their biological families of origin, at least not until such time as social, economic, and cultural conditions giving rise to this state of affairs have been totally and truly transformed. In the meantime, the world has a massive and often underreported problem of genocidal significance. This article will argue that “children without families” must be seen as a cohort and their problems must be addressed in the near term and as a matter of urgency, in light of the psychological demands of childhood.

Intercountry adoption suffers from a great deal of bad press and association with other practices that are clearly illicit: child buying, trafficking for the sex industry, and sweat shops.¹⁸ Only facts, not ideology, will shed light on whether or not this harsh criticism is deserved. What is clear is that there is a substantial degree of corruption associated with international adoption in the absence of safeguards. Indeed, some would say there is no way to safeguard intercountry adoption against corruption and profiteering.¹⁹ Many seem to be opposed simply because they object to the idea of children being brought from poorer countries to wealthier ones.²⁰

been murdered since the introduction of the one-child policy.”). In her article, Hansel relies heavily on Penny Kane & Ching Y. Choi, *China's One Child Family Policy*, 319 BRIT. MED. J. 992 (1999).

¹⁸ The effect of this negative press is to place all adoption under a cloud of suspicion in the mind of the general reader. The following are just two examples of many:

The United Nations' children's help organization, UNICEF warned on Monday of the growing threat of criminal involvement in the trafficking of babies from the Third World to rich industrial nations. In a report released in Berlin, UNICEF said that between 1993 and 1997, the number of adopted babies from foreign countries registered for leading industrial nations grew from 16,000 to 23,000. . . . The UN organization believes that the growing demand from Western countries for children from the Third World reflects inadequate laws and poor state controls with the arrival of the Internet economy also helping to boost the business in babies.

UNICEF Warns of Growing Criminal Role in Baby Trafficking, DEUTSCHE PRESSE-AGENTUR, July 31, 2000. Note that this article makes no attempt to distinguish between ethical and unethical international adoption. See also *AIDS, Child Trafficking Major Problems in Asia-Pacific*, AGENCE FRANCE PRESS, May 7, 2003 (“Children are being trafficked for labour, sexual exploitation, forced marriage, begging and adoption.”).

¹⁹ A number of organizations dedicated to children's issues have articulated strongly anti-adoption positions. See, e.g., *20,000 Third World Children Adopted Yearly in Rich Countries*, AGENCE FRANCE PRESS, Apr. 6, 1992 (paraphrasing Nigel Cantwell, spokesperson for Defense for Children International in Geneva, as saying “the practice of international adoption had generated into a form of child trafficking in recent years, with many syndicates profiting in adoption deals.”).

²⁰ This controversy has recently burst onto the public consciousness with the article by Raymond Bonner, *A Challenge in India Snarls Foreign Adoptions*, N.Y. TIMES, June 23, 2003, at A3 (describing accusations by activist Gita Ramaswamy that babies

This article will discuss the legal confusion surrounding the relationship between the venerable and almost universally ratified United Nations Convention on the Rights of the Child (“UNCRC”) and the more recent Hague Convention on Intercountry Adoption.²¹ While the former is ambiguous on the question of whether children should be sent to other countries for purposes of adoption, the latter focuses on how to eliminate opportunities for corruption in intercountry adoption, and on how to create procedural protections for children and their birth families where the practice is followed.²² Both instruments leave a substantial degree of discretion to participating states. In this regard, neither instrument comes firmly to grips with the question of whether a country can validly decline intercountry adoption when the country maintains large numbers of children in institutions—children who are extremely unlikely ever to be reunited with birth families or to be adopted domestically.

This article proposes to trace the main contours of the intercountry adoption debate, taking into account the conflicting and passionately held political views on the subject, and to set out ideal national and international legal regimes for intercountry adoption in light of human rights principles. No one could suggest that intercountry adoption is a solution to larger social, economic or cultural issues, or that it can provide happy endings for the lives of all, or most, or even many children in non-family care, or in no system of care at all. However, this often-voiced criticism of the process fails to take into account that we place great value on international asylum for the politically persecuted, knowing full well that larger problems of persecution remain, and that most politically persecuted individuals will never gain asylum, or leave their countries. The question, in the adoption context, is whether we can successfully identify those children who will not be well cared for otherwise, and facilitate their exercise of a right to a family.²³

in the Indian state of Andhra Pradesh are being bought for the purpose of being adopted out to American parents. Locked in a legal battle with prospective adoptive mother Sharon Van Epps, Ms Ramaswamy is reported to have said that Ms. Van Epps had “faith in the power of the color of her skin, and the superpower status of her country.”).

²¹ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448 [hereinafter UNCRC]; Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134, 1139, *available at* <http://www.hcch.net/e> [hereinafter Hague Convention].

²² See discussion *infra* Part II.B.

²³ On this subject, Susan Soon-Keum Cox has said:

[I]t is . . . the fact that no adoptive parent wants to look at his or her child when they ask them the question, ‘why was I adopted,’ and not be able to say, ‘because if it were not for adoption you would not have had a family.’ I think that is the fundamental truth that every adopted child wants to know in their heart.

Roundtable, supra note 11, at 9 (statement by Susan Soon-Keum Cox, Vice President, Holt International Children’s Services).

A. *Who will articulate a child's right not to be institutionalized? How to articulate a child's right to a family of his or her own?*

One missing link in the heated debate over intercountry adoption is a clearly articulated right of children not to be institutionalized, assuming that there are genuine alternatives.²⁴ One such alternative is intercountry adoption. In the context of adoption, the rights of individual children have become enmeshed in discussions of the larger trends of history. Specifically, many organizations that work for children's interests tend to see the issue of intercountry adoption in the contexts of colonialism and imperialism, rather than in the context of children's rights per se. It is understandable that many have taken this view; however, there is no evading the fundamental principle that the rights of particular children exist apart and distinct from these political considerations.²⁵

At the outset, it should be stated that ethical intercountry adoption only includes adoption of those children who would have been in the system in any event, children who would have been abandoned and without family care even in the absence of a system of intercountry adoption.²⁶ The difficulty of identifying these children (those who would be in the

²⁴ The INNOCENTI DIGEST, *supra* note 4 at 11, acknowledges the pernicious effects of institutionalization, stating that “[i]ncreasingly, initiatives are being taken to promote or ensure the prevention of recourse to institutional placements wherever possible and to set up deinstitutionalization programmes for children already in this form of care.” However, intercountry adoption is far down the list of preferred outcomes for children without families, and it is unclear how unacceptable the in-country solution should be before intercountry adoption is appropriately considered. The *Digest* states, “Current international standards foresee intercountry adoption as a solution for selected children whose appropriate care cannot be ensured in their country of origin.” *Id.* However, it is very difficult to tell which children, in which situations, are indicated by this statement.

²⁵ Despite UNICEF's “mixed feelings” on intercountry adoption, its official position is that it is clearly opposed to the institutionalization of children. Although not on the subject of adoption per se, see UNICEF: Innocenti Research Centre, *Children in Institutions: The Beginning of the End?* (Apr. . 2003), for a discussion of deinstitutionalization in several countries. The report's introduction notes:

The concept of deprivation is used constantly in specialized studies describing the consequences of life in institutions to indicate the lack of affective and personal care suffered by institutionalized children. These children are submitted to collective routines and are unable to make use of sufficient spaces to allow the unique personality of each individual to be expressed, developed and tapped to the full.

Id. at vii. Deinstitutionalization is presented as part of a “collective . . . process of cultural transformation.” *Id.*

²⁶ Note the UNICEF view that “It is important not to confuse the concept of ‘adoptable children’ with that of ‘children currently in out-of-home care.’” Nigel Cantwell, *Intercountry Adoption: A Comment on the Number of ‘Adoptable’ Children and the Number of Persons Seeking to Adopt Internationally*, 5 JUDGES’ NEWSLETTER (HAGUE CONFERENCE ON PRIVATE INT’L LAW) 70, 71 (2003).

system in any event) with certainty is what I term the “adoptability conundrum.” What seems to be needed above all other interventions in this area is an empirically-oriented, rigorous, objective search to identify who is in the public or group child care systems of each country, how they got there, and what options are truly (not just in the realm of ideological speculation) available to them.²⁷

The profitability of intercountry adoption has probably tended in some jurisdictions to bring children into the system who would not otherwise have been there. Such corruption has had the perverse effect of threatening the reputation and viability of transnational adoption in a much more general sense.²⁸ This article will seek to address the distinction one might draw between genuine child trafficking and profiteering from adoption,²⁹ as well as the question of how we might tell whether children would have

²⁷ The real debate on intercountry adoption may be waiting to happen around the concept of adoptability; clearly, some of the people associated with child welfare organizations claim that there are relatively few truly “adoptable” children who should be in the intercountry adoption system. *See id.* at 72. Cantwell’s main point is that there are far fewer truly “adoptable” children than there are prospective adoptive parents. *Id.* Without apparent disapproval, he raises the example of Ukraine, where the authorities are said to be considering raising the age of children available for intercountry adoption to as high as seven years, apparently as part of a drive “to tackle various illicit acts and to ensure that parents relinquishing their children may reconsider their consent and continue to care for the child.” *Id.*

²⁸ Even strong supporters of intercountry adoption have legitimate concerns about how it is pursued. Note, for instance, the situation in Guatemala, where most international adoptions are handled by adoption attorneys who charge very high fees and deal directly with birth-mothers. Despite the high rate of adoptions from Guatemala, many children continue to languish in orphanages. *See* Latin American Institute for Education and Communication (ILPEC) Guatemala for UNICEF, *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. The report notes:

Despite the high figures of children delivered for adoption, those institutions which give refuge to orphans, abandoned children or child victims of abuse and mistreatment remain inundated. Some institutions house up to 300 children, condemned to live their whole lives there because they have been forgotten by their family, *or because the process of an abandonment sentence can last up to seven years*, or simply because those children older than 2 years of age generally have no possibilities of being adopted.

Id. at 17 (emphasis added).

²⁹ It would seem that it is possible to distinguish trafficking, bringing children into the adoption system who would not otherwise have been put into that system by their families of origin, and profiteering, a term that indicates officials and others taking portions of adoption fees in the course of what is otherwise a legal, normal adoption process involving finding families for children who would have been in the system even in the absence of the fees being paid.

been institutionalized and waiting, without a legal mechanism for intercountry adoption.³⁰

This article will also recognize the importance of jurisdictional issues, and will agree with the proposition that historically disadvantaged and dispossessed (generally non-majority) communities must maintain control over the placement of their children in alternative care settings.³¹ Especially where there is a history of assimilationist policies carried out against indigenous communities through the removal of children, there can be no question of mass adoption into majority communities. Such policies have undoubtedly constituted a form of genocide, and cannot be allowed to continue in the modern era.³² It is, however, important to distinguish such forms of exploitation from ethical intercountry adoption that takes place in order to provide a child with family life, assuming that the child would have been in the system (without the family of origin) in any case. Objective determination of whether a particular child would have been abandoned, neglected, or abused, and thus entitled to alternative care, even without the presence of the intercountry adoption mechanism, is the key and necessary precondition to ethical adoption advocacy. Once it is established that such children, as a cohort, *exist*, then it becomes part of their human rights, and an adult obligation, to ensure them the care of a family of their own. Pointing out abuses and exploitation in the intercountry adoption system does not relieve anyone of a responsibility to discover an answer to the moral and psychological dilemma posed by the widespread institutionalization of children.

The most important international legal instrument on children's rights, the UNCRC, both reflects and adds to the confusion surrounding the right of children to a home and family, especially where the only available means of obtaining these is intercountry adoption. While articulating the great importance of family and identity to a child, the Convention fudges

³⁰ It is absolutely crucial to note that baby selling and profiteering are not limited to international adoption. Many countries have domestic systems of baby selling, although ethical problems in intercountry adoption are far more likely to receive the attention of international child welfare bodies like UNICEF and Save the Children. See, e.g., Sachin Parashar, *The Hand That Robs the Cradle*, TIMES OF INDIA, July 12, 2003, at 3.

³¹ See discussion *infra* Part III.B.

³² The negative history of Native American and other indigenous peoples with regard to adoption is profoundly important, and will be discussed below. Sweeping statements about the exploitative nature of intercountry adoption in general, however, distort the truth and belie the complexity of contemporary adoption. See, e.g., Christine W. Gailey, *Race, Class and Gender in Intercountry Adoption in the USA*, in INTERCOUNTRY ADOPTION: DEVELOPMENTS, TRENDS AND PERSPECTIVES 295, 298 (Peter Selman ed., 2000) ("The history of intercountry adoption in the US cannot be dissociated from the history of US military operations. . . What is unusual about the US as a conquering state is the aftermath: often the US has attempted to assimilate or incorporate the 'enemy other.'").

the issue of whether in-country institutional care may be relied upon when no in-country alternative family exists for a child without his or her family of origin.³³ This lack of clarity reflects the great discomfort of human rights specialists to state directly that in-country institutional care is impermissible and violates the fundamental rights of small children.³⁴ Since there is little chance that most of these children will be adopted locally, if the drafters had acknowledged the unacceptability of institutional care, it would have amounted to a concession that intercountry adoption could provide at least a partial solution to widespread violations of children's rights.³⁵ Few in the international human rights community appear willing to draw this conclusion. Their motivations may be correct, but their conceptual framework and resulting conclusions are faulty.

The UNCRC is frequently described as the instrument that represented a revolution in international children's rights—the instrument that showed children as subjects of rights, as autonomous beings, as more than the possessions of their parents and of their cultures or nations.³⁶ Obvi-

³³ See discussion *infra* Part II.B.

³⁴ Regarding the difficulties surrounding the issue of intercountry adoption during the drafting of the UNCRC, see Cheetah Haysom, *Wednesday Women: Children in Need—Cheetah Haysom Reports on the Signing of the UN Convention on the Rights of the Child*, GUARDIAN (London), Jan. 31, 1990, available at LEXIS, News Library, News File (“Efforts to protect orphaned children's right to adoption were also problematic. The growing adoption of children from developing countries has led to trafficking, profiteering, exploitation and abuse. The Convention also took into account fierce opposition from the Islamic world, which considers adoption against its religious customs.”).

³⁵ The creation of a culture of adoption is a work in progress in some countries. The Indian authorities have made great efforts to encourage in-country adoptions in recent years. See, e.g., Snigdha Sen, *Girls in Great Demand for Adoption in Delhi*, ECONOMIC TIMES OF INDIA, Dec. 29, 2002, available at LEXIS, News Library, News File. Researcher Kay Johnson refutes the idea that Chinese people are uninterested in adoption. See Kay Johnson, *Politics of International and Domestic Adoption in China*, 36 LAW & SOC'Y REV. 379, 382 (2002) (finding that “adoption, viewed as a permanent and complete transfer of children into the adoptive family, was common in many rural areas [of China]”).

³⁶ The “group rights versus individual rights” debate is a heated one, but in many ways presents a false dichotomy. This article will argue that there are important caveats to the idea that there is a “global child,” whose rights must trump those of the group. The question is often one of jurisdiction rather than of whose rights are more significant; see discussion of the American Indian Child Welfare Act *infra* Part III.B. On the other hand, treating the family of origin as an ongoing factor in a child's life, even in cases of mistreatment, seems faulty. It makes good sense to ensure that all efforts are made to keep children within endangered cultures. However, rejecting the idea of adoption because of essentialist ideas about biological origin is less reconcilable with human rights standards. Furthermore, condemning objective “rights” as part of Anglo-American thinking is also a dubious proposition. See, e.g., Jennifer Nutt Carleton, *The Indian Child Welfare Act: A Study in the Codification of*

ously, the immaturity and vulnerability of the child require us to conceive of these rights in a more circumscribed fashion than would be the case with respect to adults. Nonetheless, the general principle is a valid one: children possess inalienable rights and they must be seen in terms of rights they deserve by virtue of their humanity and indeed by virtue of their vulnerability.³⁷

B. *Identifying Acceptable and Unacceptable Forms of Care*

At least with regard to the adoption issue, the UNCRC does not clarify what sort of care meets a human rights standard in the case of a child without a family.³⁸ If the UNCRC is stating that institutional care is a matter of national choice, and may be a valid method of childcare where intercountry adoption is not a preferred option of the state in question, this assumption must be queried as to its human rights foundation. Does this assumption not militate against the revolutionary conceptual nature of the Convention itself?³⁹

the Ethnic Best Interests of the Child, 81 MARQ. L. REV. 21, 38 (1997) (arguing that “unknown to American Indian culture is the characteristic termination of all ties with an original family in order to create a new set of attachments with a separate family”).

³⁷ See Woodhouse, *supra* note 3, at 117 (“Before the advent of children’s rights, children were seen as property or, at best, as possessing various ‘interests,’ but few, if any, so-called ‘rights.’”).

³⁸ The UNCRC’s preamble states 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.” UNCRC, *supra* note 21, at pmbl. Article 20 sets out as acceptable forms of “alternative care” for the family of origin “foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children.” *Id.* at art. 20. Article 21 states that States Parties should “[r]ecognize that inter-country adoption may be considered as an alternative means of child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin.” *Id.* at art. 21. The implication is that many and various forms of in-country care are preferred by the UN human rights system to the alternative of intercountry adoption.

³⁹ The Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally, which preceded and is reflected in the UNCRC, is at the root of this confusion. While its preamble states concern for “the large number of children who are abandoned or become orphans owing to violence, internal disturbance, armed conflicts, natural disasters, economic crises or social problems,” it is also eager to reassure states that the universal principles upon which it is drawing “do not impose on States such legal institutions as foster placement or adoption.” *Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally*, G.A. Res. 898, U.N. GAOR, 41st Sess., at 3 U.N. Doc. A/RES/41/85 (1987). As in the UNCRC, the particular state’s view on intercountry adoption—even on foster care itself—is paramount, and institutional care is not precluded. This is

The question of where to look for a source of rights is a difficult one in the intercountry adoption context. Having named children as the bearers of rights, it is to the nature of children that one must look in defining these rights. In this sense, the effects of certain care options must be examined quite apart from ideological or national analyses. It is my contention that only non-legal studies in the areas of child psychology and the measurable effects of institutionalization can really assist us in determining the degree to which the UNCRC is flawed, or at least inadequate, when it comes to adoption. The understanding gained will help us sort out the proper interpretive relationship between the UNCRC and the Hague Convention on Intercountry Adoption.

Of course, it may be asked, and is frequently asked, how a multicultural world can agree on a set of standards with regard to children's rights. The ideas of wealthy northern countries about the role of the child are likely to clash with deeply held ideas in the developing world.⁴⁰ It may be argued that what are termed international children's rights actually reflect the biases of a certain part of the world, and can in no way be considered universal.⁴¹ If there is, in fact, no globally valid basis for the foundational concepts of the UNCRC, efforts to amend the UNCRC in favor of greater "universalism" may be doomed from the start.⁴² It is possible to argue that the concept of universal human rights reflects the world as conceived by western liberals and as formulated at the level of the U.N. and other organizations and has little caché in many segments of human society.⁴³ However, even the most strident critic of universalism in the human rights context would concede that the psychology of small children varies little from culture to culture and, as with the law on tor-

difficult to reconcile with the idea that "[i]n all matters relating to the placement of a child outside the care of the child's own parents, the best interests of the child, particularly his or her need for affection and right to security and continuing care, should be the paramount consideration." *Id.* at art. 5.

⁴⁰ See William E. Myers, *The Right Rights? Child Labor in a Globalizing World*, 575 ANNALS AM. ACAD. POL. & SOC. SCI. 38, 41 (May 2001) (asking: "If children are raised by different methods to make their way in societies having different values, goals, and challenges, what is the legitimate basis for international children's rights standards such as those articulated in the CRC?").

⁴¹ *Id.* at 39-41.

⁴² See *id.* at 41 (discussing the work of Oxford anthropologist Jo Boyden, Myers writes that "Boyden contended that the ethnocentrism of industrialized countries, bolstered by their superior political and economic power, was unjustly dominating the international discourse on children's rights.").

⁴³ On the universal qualities of the UNCRC, see Rebecca Rios-Kohn, *The Convention on the Rights of the Child: Progress and Challenges*, 5 GEO. J. FIGHTING POVERTY 139, 141 (1998) ("The current global status of the Convention on the Rights of the Child is unique in international law. The treaty's importance has been attributed to the speed with which States universally accepted it and its comprehensive nature.").

ture, law relating to the needs of small children ought not take into account local variations.⁴⁴ It seems self-evident that it is inappropriate and damaging for the human child to grow up in an institution, without the benefit of his or her own family, whatever the longer-term benefits to the local culture of retaining “possession” of its own.⁴⁵

If there is such a thing as human psychology, I argue that cultural relativism cannot apply to issues such as the effect of institutionalization on the psychological development of small children. Although psychology obviously has a cultural dimension, it is primarily an individual matter—or a matter of the species. In the case of small children, psychological health and emotional development have a meaning and a reality quite distinct from questions of cultural autonomy and identity, even recognizing that there is a fairly broad range of normal in this context.⁴⁶ The inquiry into whether an orphanage can provide an adequate form of pro-

⁴⁴ See P'nina Shames, *Developing Brains: Building Attachment in Adopted Children*, at <http://www.bcadoptoin.com/articles/attachment/developbrain.html> (“Consider, then, that the developing brain is traumatized when there is an absence of stimulation, such as hearing language, being held or touched, seeing colours, or hearing music. The developing brain is deprived of the opportunity to fire those electrical impulses and develop dense networks of hard wiring for the specific functions that enable the growing infant to reach her full potential.”).

⁴⁵ On February 14, 2003, Dr. Seth Pollak of the Wisconsin International Adoption Research Program presented to the American Association for the Advancement of Science preliminary results of a study that examined five and six year olds who had resided in either Russian or Romanian orphanages from the first seven to forty one months of life. The orphanages in question had been described as having conditions from poor to appalling, with little stimulation or attention from care-givers. Research revealed sensory motor delays and deficits in the ability of the test group to pay attention to verbal information, suggesting the significance of early experience in the healthy development of the pre-frontal cortex and the cerebellum. The good news is that the brain retains the ability to adapt to a healthy environment despite early negative experiences. See Press Release, U. Wisconsin-Madison, Orphanage Experience Alters Brain Development (Feb. 17, 2003), available at <http://www.news.wisc.edu/releases/rint.msql?id=8291>. See also Martin H. Teicher, *Wounds That Time Won't Heal: The Neurobiology of Child Abuse*, 2 CEREBRUM: THE DANA FORUM ON BRAIN SCIENCE 50 (2000).

⁴⁶ On the effects of institutionalization on children, see Ronald S. Federici, *Raising the Post-Institutionalized Child: Risks, Challenges and Innovative Treatment*, <http://www.4adopting.com/essays22.htm>. Federici writes:

Infants and toddlers most certainly require a stable and secure parental-family unit and hierarchy, and an abundance of pure maternal and paternal physical and emotional experiences. Research provided by Cermak and Daunhauer (1997) have consistently shown ‘sensory defensiveness’ in the infant and toddler who has not been exposed to normal child rearing strategies. Therefore, many newly adoptive parents who have infants and toddlers may become shocked and overwhelmed when their affections are rejected as it should be emphasized that, even very young children who have been removed from institutional settings, can still be highly sensory and tactilely defensive and reject human contact because

tection for children in human rights terms has little to do with the important, though separate, debate on cultural relativity and human rights generally.⁴⁷ Similarly, while there may be vast and legitimate differences from region to region with respect to the validity of child labor at the margins, there can surely be no debate when it comes to extreme forms such as bonded labor.⁴⁸ As the ill effects of the phenomenon touch more directly on foundational aspects in the development of the human person, the debate over cultural relativity and human rights is increasingly part of a separate discussion, only tangentially related, if not entirely irrelevant.

As will be explored below, most of the rights-oriented writing on intercountry adoption concerns the problems of adoption-related trafficking and profiteering—terrible problems, to be sure.⁴⁹ Devoting resources

their preverbal and sensory-motor experiences do not allow for maternal comfort and nurturing to be so readily accepted.

Id.

⁴⁷ See Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89, 95-96 (1996). Higgins writes:

Opposing the various theories offered as justifications for the existence of universal human rights, cultural relativism reflects skepticism about the availability of universal norms. . . Generally speaking, however, cultural relativists are committed to one or both of the following premises: that knowledge and truth are culturally contingent, creating a barrier to cross-cultural understanding; and that all cultures are equally valid. . . [such that] human rights norms do not transcend cultural location and cannot be readily translated across cultures.

Id.

⁴⁸ Bonded labor is one of the “worst forms of child labour [sic],” according to article 3 of *C182, The International Labor Organization’s Convention on the Worst Forms of Child Labour*, which states that “the worst forms of child labour comprises [sic] (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict.” *C182 Worst Forms of Child Labour Convention*, Nov. 19, 2000, art. 3, ILO, 87th Sess., www.ilo.org/ilolex/cgi-lex/convde.pl?C182. On June 12, 2002, UNICEF issued a press release stating that “[a]larming child labour statistics require immediate attention at highest levels,” and that “[a]larmed by new figures that say one in six children work, including millions in slave-like forms of forced and bonded labour, UNICEF today called on all governments to move immediately and decisively to end the disturbing phenomenon.” Press Release, UNICEF, *Alarming Child Labour Statistics Require Immediate Attention at Highest Level* (June 12, 2002), *available at* <http://www.unicef.org/newsline/02pr38labour.htm>. It would be rare to see such language used to describe the problem of institutionalization of children.

⁴⁹ See, e.g., Jorge L. Carro, *Regulation of Intercountry Adoption: Can the Abuses Come to an End?*, 18 HASTINGS INT’L & COMP. L. REV. 121, 155 (1994) (“It is apparent that as long as demand for adoptable children increases, and the supply decreases, abuses in intercountry adoptions will abound. . . [E]fforts have been made at all levels to curb the abuses, but expectations of success cannot be very high.”). The consistent UN view is that intercountry adoption is too frequently resorted to despite the relatively small numbers of children involved, and that local community and

to address these problems, however, does not provide a rationale for failing to confront the global phenomenon of institutionalized children without families. One might even say that institutionalized children are more fortunate than street children, of whom there are estimated to be millions.⁵⁰ There is an obvious disproportion of concern—that is, far more concern over adoption profiteering than over the plight of children without families living in poor conditions.⁵¹

extended family solutions are preferable. While in theory this seems correct, there is virtually no public commentary on what percentage of children without families succeed in finding adequate local solutions. For the UNICEF position, see, for example, William M. Reilly, *UNICEF Warns of India Orphan Trafficking*, UNITED PRESS INT'L, Feb. 9, 2001, available at LEXIS, Nexis Library, News File. At the time of a major earthquake in India, a UNICEF representative stated:

Well-meaning people around the world might think international adoption is in the best interest of a child who has lost his or her parents, but adoption within the extended family or community is recognized as the first and best option both by Indian and international law.⁷ Adoption elsewhere within the country was the next best alternative.

Id. It is important to note that Reilly's article, consistent with a clear trend, does not go on to say that intercountry adoption would be a good alternative for those children for whom local adoption solutions are not found.

⁵⁰ Casa Alianza, *supra* note 7, states that "[a]n estimated 100 million children live and work on the streets in the developing world; 40 million in Latin America." Twenty-five percent of street children are believed to have no family links and to live on the streets full time. Most are addicted to inhalants and most are subjected to some form of terrible abuse, often by security services. Though some writers refer to the "family connections" maintained by these children as if that were a cause for hope, Casa Alianza reports that "[p]hysical, emotional and sexual abuse by parents—often by step-parents—are the most common reasons why children leave their families. Psychologists and social workers refer to the problem as 'family disintegration'—the breakdown of the nuclear family." *Id.* No one would suggest that these children are adoptable per se over a certain age; however, it seems that human rights principles demand early intervention to prevent children from appearing on the streets at all, whether or not they maintain nominal family bonds. The degree and types of sexual abuse described by Casa Alianza are almost inconceivably terrible.

⁵¹ This disproportion has been noted by Professor Elizabeth Bartholet of Harvard University, and this article is indebted to her observations over the past number of years in this respect. She has written:

The rules should ensure that the birth parents have voluntarily surrendered or abandoned their child, or have had their parental rights terminated for good reason. But it is patently absurd to talk as if the real dangers for children were the dangers that they might be taken from their birth parents for purposes of abuse and exploitation. Nonetheless, public discourse about international adoption focuses overwhelmingly on its alleged risks. . . There are, of course, some documented instances of kidnappings and of improper payments to birth parents. But there is no evidence that these practices are widespread, and it is quite unlikely that they are.

Elizabeth Bartholet, *International Adoption: Propriety, Prospects and Pragmatics*, 13 J. AM. ACAD. MATRIM. LAW. 181, 199 (1996).

It could be that some who write about intercountry adoption from the point of view of abuses in the existing system of adoption, without paying a corresponding attention to the evils of neglect and institutionalization, are engaged in a kind of wishful thinking: that if intercountry adoption and its abuses were stopped, then somehow the children would be less likely to exist in their present state (i.e., without adults “of their own”), there would be family reunification, and the children could lead successful lives in their country of origin, though if absolutely necessary adopted by their own nationals.⁵² I see no evidence to support making this causal link, and many critics of adoption fall short of providing evidence to this effect.

What seems to be most urgently required is a separation of the larger, longer-term social and economic problems that lead to children being abandoned, killed, or sold, and the more immediate problems of psychic damage caused by the institutionalized or homeless child’s condition. While it is completely appropriate to prescribe remedies for these problems in tandem, there is no valid argument for highlighting one at the expense of the other. Expressing commitment to investment in long-term solutions to the problem of abandonment has no logical corollary in disregarding the immediate matter of children presently in institutions, street children, children carrying out hazardous labor, child prostitution, or even infanticide and gender-selective abortions—these latter being aspects of the problem of “gendercide.”⁵³ As mentioned, intercountry

⁵² It is clearly unhelpful to idealize the situation on the ground in countries with many homeless children. It is easy to assert the idea that “traditional” arrangements will take care of everything, but this may prove to be untrue in social and historical situations. See, e.g., Mario Osava, *Rights-Brazil: A Million Abandoned Children Can’t Find Homes*, INTER PRESS SERVICE, Feb. 9, 2000. (“More than a million abandoned children in Brazil are living in institutions but any hopes for adoption are being obstructed by legal barriers, nationalism and prejudice, including racism, experts say.”). Osava’s report quotes experts as saying that children may be handed over after birth, but are not visited by parents for years. Nonetheless, the children are unadoptable because there are no legal rulings terminating parental rights. Illegal and/or informal adoptions account for 55 percent of all adoptions taking place in Brazil. Professor Lidia Dobrienskij Weber, who has researched the Brazilian situation extensively, is has said that “foreign adoptions have the advantage of fewer prejudices.” *Id.* at 1. Further, “her research shows that 85 percent of Brazilians polled would only want to adopt a child younger than 12 months, and that 72.5 percent would also only adopt a white child.” *Id.* at 3. It should be noted that certain US adoption agencies, including Holt International Children’s Services, place great emphasis on in-country family reunification projects. See the Holt International website at <http://www.holtintl.org/flash>, and note that in its description of its work in various countries, Holt emphasizes its service to families at risk.

⁵³ See Gendercide Watch, *Case Study: Female Infanticide*, http://gendercide.org/case_infanticide.html (presenting a study of female infanticide practices in India and China). The definition of female infanticide used here is “the intentional killing of

adoption will not solve these problems any more than international asylum law will tackle the problem of political persecution; but, from a human rights point of view, intercountry adoption can actually relieve the violation of the rights of certain children in the here and now, something that is of clear value to individual children.⁵⁴

One complicating factor is that what may start out as “ethical” adoption in any particular country—adoption that serves a real need of children without family care—may morph into unethical adoption.⁵⁵ There may be wide-scale profiteering from otherwise legitimate adoption, with officials up and down the ladder taking a share in the adoption-related profits. Far more perniciously, it may happen that rather than serving the needs of children who are waiting for families, the adoption system in any given country might begin to tailor the available children to the stated wishes of the would-be adoptive parents.⁵⁶ This evolution is more likely

baby girls due to the preference for male babies and from the low value associated with the birth of females.” *Id.*

⁵⁴ As long as a preference for in-country adoption, by relatives or non-relatives, is accepted and honored, the current controversy and upheaval surrounding intercountry adoption, which leads to restrictions and delays, seems completely unreasonable. See Stacie I. Strong, *Children's Rights in Intercountry Adoption: Towards a New Goal*, 13 B.U. INT'L L.J. 163, 164 (1995) Strong writes:

Each year, hundreds of thousands of children languish in foster or institutional care worldwide, while at the same time, thousands of adults . . . are denied children because of ‘shortages’. . . . The unfortunate truth is that many of the legal and societal norms now in place effectively prohibit needy children from finding suitable homes.

Id.

⁵⁵ A case in point is Romania, where thousands of children were in genuine need of homes and families, but where corruption became a dominant feature of the national adoption procedure. Elizabeth Bartholet argues that “[i]nternational adoption was mishandled in Romania. But the real scandal is not that some abuses occurred; it is that when would-be adopters presented themselves, there was no system in place to handle adoptions in a way that would have eased placement while preventing abuses.” ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* 156 (1993).

⁵⁶ It should be noted that United States law does not allow US citizens to adopt children who have been involved in any “child buying” scenario; however, the difficulty of proving this one way or the other is obvious, and will be discussed below. The relevant US law on the subject is found in the Immigration and Nationality Act, which states:

An orphan petition must be denied under this section if the prospective adoptive parent(s) or adoptive parents(s), or a person or entity working on their behalf, have given or will give money or other consideration either directly or indirectly to the child's parent(s), agent(s), other individual(s), or entity as payment for the child or as inducement to release the child. Nothing in this paragraph shall be regarded as precluding reasonable payment for necessary activities such as administrative, court, legal, translation, and/or medical services related to the adoption proceedings.

to take place where legal restraints on adoption do not exist, and where private adoption is allowed with little oversight or standardization.⁵⁷

Unfortunately, the transformation of ethical adoption into unethical adoption often leads to thoroughgoing and sweeping denunciation of intercountry adoption generally, even (or especially) by many involved in child welfare issues. Such hostility towards the idea of intercountry adoption could result in children without families being condemned to institutional life.⁵⁸ Thus, a clear balance must be struck—in conceptual and legal terms—between our concern for ethical procedures in adoption to avoid child trafficking, on the one hand, and the often overlooked fact of thousands of children without families waiting for a fair and humane international response to their isolation. While adoption is said to have undergone a “revolution” of openness and cultural acceptance in recent times, in global terms many issues related to adoption—how many children are in what institutions, and how they got there—remain shrouded in national mysteries. This fundamental disconnect is reflected in the legal confusion characteristic of international adoption, as most countries

8 C.F.R. § 204.3(i) (2003).

⁵⁷ Private or independent adoptions are controversial because their “prime movers” are private persons who locate children for adoption, and the concern is that these persons might be motivated primarily by financial considerations. On the fact that the Hague Convention has not outlawed independent adoptions, despite the wishes of some of the participants in its drafting, see Holly C. Kennard, *Curtailing the Sale and Trafficking of Children: A Discussion of the Hague Conference Convention in Respect of Intercountry Adoptions*, U. PA. J. INT’L BUS. L. 623, 636-637 (1994) (“The Convention’s coverage of independent adoption agents is problematic. . . . Given the already existing preference for using independent agents instead of licensed agencies because of their ability to hasten the process and circumvent bureaucratic red tape, it seems likely that independent agents may flourish even if they are acting pursuant to the Convention’s requirements.”).

⁵⁸ The idea that intercountry adoption is a “last resort” has been misused by international child welfare bodies, notably UNICEF. Although it is true that article 21 of the UNCRC sets out a hierarchy of solutions for children without their families of origin, a hierarchy clarified to some degree by the Hague Convention on Intercountry Adoption, the often-repeated phrase “last resort” is used disingenuously to imply a defective, inferior child welfare solution. For one example among many, see *Report on the In-House Capacity Building Workshop on Intercountry Adoption*, ICDC, Sept. 14-17, 1998, available at <http://www.zimaidas.co.zw/hae/webfiles/Electronic%20versions/Iccdadop.doc>, which outlines UNICEF’s in-house workshop on the subject of adoption. The report mentions that where abusive adoption practices have been identified, “UNICEF offices are faced with a continuous challenge of stating and/or defending the UNICEF position on intercountry adoption.” Under Lessons Learnt and Programming Implications, the report states that “[c]ontinuity is of paramount importance for children in need of alternative family care. Preference should be given to children staying in their countries. Intercountry adoption should be a last resort.” *Id.* This language could easily be replaced by a less pejorative phrase such as “third or fourth best in the hierarchy of possible solutions.”

appear uncertain of exactly what they are attempting to achieve in the construction of legal regimes for international adoption.

In conceptualizing intercountry adoption, the proper formulation of the problem would have to accept that the danger to the child in human rights terms is truly two-fold. First, where adoption is allowed and takes place, it is difficult to be sure that the child is not being “purchased” for adoption, when incentives for corruption are so great.⁵⁹ Second, when adoption does not take place, children without families to care for them are institutionalized, live as street children, and, especially in the case of female children, are killed or allowed to die. Much attention is paid to the first question, but such literature may leave unaddressed even more profound matters of life and death. Or, having dealt with the first issue, some writers appear to believe that the task is completed, and that the second question need not be addressed. Making intercountry adoption appear to be generally unpleasant, or morally corrupt, has the effect of cutting off discussion of this potentially (and literally) life-saving form of care.⁶⁰

II. THE INTERNATIONAL HUMAN RIGHTS PICTURE: THE HAGUE CONVENTION VS. THE CONVENTION ON THE RIGHTS OF THE CHILD

A. *A Basic Legal Question*

In approaching the problem of constructing an ideal national regime for intercountry adoption in light of human rights principles, a threshold question is whether or not institutionalization is a violation of the human rights of children, at least where alternatives (in the form of adoption) exist. This issue is not only a matter of whether children have a right to a

⁵⁹ Trish Maskew, *Child Trafficking: Why Can't the Immigration Service Prove It?* (June 6, 2003) (on file with author).

⁶⁰ There is a clearly discernible pattern of UN-related speeches and reports that (1) speak of international adoption and terrible forms of child abuse in the same context, and (2) fail to distinguish between ethical and unethical adoptions. The combined effect is to make international adoption appear generally immoral and illicit. See, e.g., Gustavo Capdevila, *Rights: Lucrative Market for Illegal Adoptions Fuels Abuse*, INTER PRESS SERVICE, Apr. 10, 2003, available at LEXIS, News Library, News File. Describing a then newly released report by the UN Commission on Human Rights special rapporteur on the sale of children, child prostitution and child pornography, he writes that “[a]lthough the rapporteur’s mandate does not encompass adoption, Petit said that it does come under his authority when it involves a child treated as the object of a commercial transaction, in other words, the sales of girls and boys. *Id.* The opening of the article gives a sense of how broadly the idea of “commercial transaction” is being construed, stating that “[a] growing industry dedicated to finding infant children to fill the demand for adoptions within a country or abroad generates millions of dollars of profits each year, representing the accumulation of the exorbitant sums paid by adoptive parents. *Id.*”

family, but whether they have a corresponding and additional right to be protected from the adverse psychological and social effects of institutionalization.⁶¹ Certainly no ideas of national pride or children as national “resources” could trump such a right, were it found to exist.⁶² While it is often argued that intercountry adoption itself is a violation of the rights of children, this would seem to be so only if there were child buying or trafficking involved, since in no sense could the right of a child to enjoy a particular culture be said to trump the more fundamental right to be loved and protected as an individual.⁶³ The right to a particular identity, based on the family and country or group of origin, could hardly be taken literally if the quality of care caused psychological damage, as non-family care almost inevitably does.⁶⁴

⁶¹ UNCRC, *supra* note 21, at art. 16. (“No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.”). As will be discussed, article 20 of the UNCRC only requires that the states parties provide “alternative care” when the child is “temporarily or permanently deprived of his or her family environment.” *Id.* at art. 20. There is no *actual right to a family* provided for in the UNCRC.

⁶² Though UNICEF takes a skeptical stance on international adoption, it is not an advocate for institutionalization, either. It is true that international opinion favors domestic adoption over international adoption, but scant attention is given to the problem of creating a domestic “culture of adoption,” or to eliminating issues of racism and class discrimination in the domestic adoption context. Whether efforts to substitute foster care for institutionalization on the one hand, and international adoption on the other, are working effectively is a matter that should be rigorously investigated.

⁶³ See Raymond Bonner, *supra* note 20, at A3 (describing persistent efforts by Indian activists to portray international adoption as a fundamental violation of children’s rights). For a compelling rebuttal to allegations made by the same Indian critics of international adoption in a prior UNICEF-commissioned report, see Julie Bailey, *Concerns about “The Lambadas: A Community Besieged, Report written by Gita Ramaswamy, published by UNICEF & Women Development & Child Welfare Department, Government of Andhra Pradesh (2002) (on file with author); see also Catherine Elton, Adoption vs. Trafficking in Guatemala, CHRISTIAN SCI. MONITOR, Oct. 17, 2000, at 1 (describing the bitter debate over whether or not current adoption practice in Guatemala is a valid means of child placement).*

⁶⁴ “States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.” UNCRC, *supra* note 21, at art. 8. It is noteworthy that the second paragraph of article 8 articulates an obligation by the state of “speedily re-establishing” the child’s identity, where that identity has been illegally taken away. *Id.* The UNCRC sets out no obligation to restore the child to family life where the family of origin is absent. It could also be argued that the UNCRC notion of “identity” is a narrow one, which does not take into account the fact that a sense of identity can be destroyed by the conditions of neglect prevalent in orphanage life.

The Hague Convention, if adopted and adhered to as widely as seems to be the case, can go far towards eliminating fears that corruption is destroying the fabric of intercountry adoption arrangements.⁶⁵ With effort, the corruption that has plagued transnational adoption can be largely removed, though this will require specific types of effort and global investment. My larger task in this article is to articulate the view that institutional care does violate international children's rights. At the same time, elimination of the corruption and profiteering that has plagued intercountry adoption is essential to living up to any conclusions drawn. Simply put, intercountry adoption cannot survive unless the spirit and letter of the Hague Convention are implemented globally.⁶⁶ In my view, this implementation will require targeted investment in an adoption infrastructure and the creation of a global agency to oversee the process. It will not occur of its own accord, piecemeal, national jurisdiction by national jurisdiction.⁶⁷

Assuming that institutional care does, in fact, violate children's rights, a more subtle difficulty is posed by the problem of how to consider in-country alternatives to intercountry adoption, such as group homes and foster homes. Clearly, such arrangements are improvements on traditional institutionalization; but, it is less clear whether they are adequate substitutes for having a family of one's own. Foster care has proven to be very problematic in the United States, where a lack of permanency and feelings of contingency have left many children with residual psychological damage.⁶⁸ Are financial incentives to promote foster care a valid way

⁶⁵ On the genesis of the Hague Convention, see Gonzalo Parra-Aranguren, *An Overview of the 1993 Hague Inter-Country Adoption Convention*, in *FAMILIES ACROSS FRONTIERS*, *supra* note 1, 565-576.

⁶⁶ See Lisa M. Katz, *Comment: A Modest Proposal? The Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, 9 *EMORY INT'L L. REV.* 283, 317 (1995) ("The Convention on Intercountry Adoption was created to eliminate trafficking and illegal standards. Safeguards in the Convention protect the children, the biological parents, and the public from abuses of the system."). The comment also points out, as have other articles, that the Hague Convention failed to take on the task of eliminating "private" adoptions. *Id.* at 314-315.

⁶⁷ It is undoubtedly difficult for countries with little in the way of governmental and administrative infrastructure to meet the costs of implementing the Hague Convention. It remains to be seen whether these countries will be successful in their stated aim to conform their national adoption laws to the Hague Convention requirements, notably by reducing or eliminating the influence of intermediaries and facilitators.

⁶⁸ See, e.g., Jill Chaifetz, *Listening to Foster Children in Accordance with the Law: The Failure to Serve Children in State Care*, 25 *N.Y.U. REV. L. & SOC. CHANGE* 1, 7 (1999) (writing of foster care in the United States that "[t]he human loss here is incalculable. Aside from the individual hurt, pain and loss experienced by tens of thousands of children in foster care, there are tangible, detrimental societal costs. Children who have grown up or left foster care fill the nation's jails, mental hospitals

to proceed? Romania offers the most dramatic example of a country engaged in large scale movement of children from institutions to foster care and group homes.⁶⁹ While praiseworthy, are these latter arrangements adequate in comparison to adoption?⁷⁰ In the case of Romania, it is largely the involvement of and funding by the European Union that has allowed such a shift to occur at all; in the case of many other countries, such alternatives are, in any case, not reasonably available on a major scale.⁷¹

B. *The Hague Convention and its Relationship to the UNCRC*

Most legal discussions of intercountry adoption begin with an analysis of the Hague Convention on Intercountry Adoption, since it is the principal international instrument purporting to set standards and define norms in this area.⁷² It is important to note that the Hague Convention is not a

and welfare rolls.”). She also points out that forty percent of New York’s foster children are over the age of ten. *Id.* at 13. With regard to the fate of the most troubled or violent foster children, see Richard Lezin Jones & Leslie Kaufman, *New Jersey Foster Children Lingering in Mental Wards*, N.Y. TIMES, June 30, 2003 at A1.

⁶⁹ See Jan Stojaspal, *Young Folks at Home: Ceausescu’s Monstrous Orphanages Begin to Disappear as Light and a Little Love Get In*, TIME, Nov. 11, 2002, available at LEXIS, News Library, News File (describing the “group home alternatives” being developed in Romania to replace the notorious orphanages). Holt International notes that “[f]oster care is now accepted throughout the country . . . [and] [m]any foster families go on to adopt these children. . . . [In 2000,] close to 30,000 children were living with relatives or foster families, up from around 12,000 in 1997.” *Holt International’s Response to the Moratorium on Intercountry Adoption in Romania*, at www.holtintl.org/romania/moratorium.pdf.

⁷⁰ For an optimistic perspective on the situation in Romania, see Phelim McAleer, *Orphans Give Romania Hope of Joining European Family: The Country Now Has an Envious Childcare System*, FIN. TIMES, Mar. 23, 2002, at 26 (describing a multifaceted approach to improving Romania’s national child care system).

⁷¹ The Baroness Emma Nicholson is quoted as saying that “naturally, the key partner [in the improvement of conditions for Romanian children] is the European Commission, through the PHARE EU fund for reconstruction in Eastern Europe programme, the teams of the commission in Brussels and Bucharest, determined to help Romanian children to resolve their problems.” See *European Parliament Approves New Negotiation Timetable, Funds for Romania*, BBC MONITORING INT’L REPTS., May 23, 2002, available at LEXIS, News Library, Wbms File. As to the limited extent of foster care in countries unable to create a large social safety net, see Namita Devidayal, *State Cuts Down Aid for Children’s Foster Care*, TIMES OF INDIA, October 2, 2002, available at 2002 WL 26793534 (explaining that the small program serving only forty children in the Indian state of Maharashtra, is to be cut further, to serve only twenty-eight children).

⁷² The Hague Convention has two principal objectives: (1) to recognize and validate the importance of intercountry adoption in certain circumstances; and (2) to set out procedures for the elimination of profiteering in adoption. Hague Convention, *supra* note 21.

human rights convention per se; it is an agreement on the standards to be observed where intercountry adoption occurs, and says relatively little on the issue of whether human rights law demands that intercountry adoption be available, at least as a second or third best option.⁷³ The Hague Convention does undoubtedly set the stage for tackling endemic problems of corruption and profiteering, as it seeks to eliminate the profit motive from adoption-related legal structures. In this sense, it represents an extremely important methodological consensus designed to save intercountry adoption from abuses too often associated with it, even if these abuses are frequently overstated by critics.⁷⁴

In one sense, the Hague Convention is itself the child of the U.N. Convention on the Rights of the Child, though a rebellious child, and one intent on going its own way.⁷⁵ Thus, before dealing with the challenges posed by the Hague Convention, it is necessary to analyze those features

⁷³ The Hague Convention is the creation of the Hague Conference on Private International Law. For an overview of it's the Conference's recent work, see Peter H. Pfund, *The Developing Jurisprudence of the Rights of the Child: Contributions of the Hague Conference on Private International Law*, 3 ILSA J. INT'L & COMP. L. 665 (1997). Pfund points out that the Hague Conference was established in 1893. He writes: "[b]efore the 1960s the Hague Conference's work was primarily aimed at preparing conventions setting out rules for determining which country's law would apply to various types of legal transactions an relationships and which country's authorities would have jurisdiction." *Id.* at 665. From 1980 onward, however, "the Hague Conference and its member states focused much of their attention on conventions providing for cooperation among party states for the purpose of protecting children, and children on the move from one country to another." *Id.* at 666.

⁷⁴ "Recognizing that prior attempts to end baby selling were unsuccessful, the Hague Conference on Private International Law formed a committee to review international adoptions. Among other objectives, the committee undertook the task of developing a workable international scheme to prevent baby selling." Jonathan G. Stein, *A Call to End Baby Selling: Why the Hague Convention on Intercountry Adoption Should be Modified to Include the Consent Provisions of the Uniform Adoption Act*, 24 T. JEFFERSON L. REV. 39, 73 (2001).

⁷⁵ It is impossible to be precise about the relationship between the two conventions, and clarifying language on adoption is clearly needed in the UNCRC, in the form of a specialized protocol. For some interesting comments on the complex relations between the two instruments, see Nicole Bartner Graff, *Intercountry Adoption and the Convention on the Rights of the Child: Can the Free Market in Children be Controlled?* 27 SYRACUSE J. INT'L L. & COM. 405, 425-426 (2000) Bartner writes:

The Hague Convention has clearly remedied the textual flaws of the CRC. The Hague Convention does not make the mistake of according the family unit superior rights to the child. It further makes intercountry adoption a viable and more readily reached option for child care placement. By placing this stamp of legitimization upon intercountry adoption, the Hague Convention created in itself the power to regulate and control the practice.

Id.

of the U.N. Convention on the Rights of the Child that anticipate the Hague Convention on Intercountry Adoption.

Many commentators have pointed out that the U.N. Convention on the Rights of the Child made children the separate and distinct subjects of international human rights.⁷⁶ The UNCRC makes clear that children have fundamental rights as children, irrespective, to some degree, of the wishes of their parents or caregivers, or of any state authority structure.⁷⁷ The near universal acceptance of the Convention shows the popularity of this concept, despite profound flaws in national implementation.⁷⁸

The UNCRC covers a wide range of rights, and reflects the principle set out in the Universal Declaration of Human Rights that “childhood [is] entitled to special care and assistance.”⁷⁹ A child is defined in the UNCRC as any person under the age of eighteen.⁸⁰ Under article 3, states parties must act in all respect in the best interest of the child when taking actions concerning children.⁸¹ Children are declared, in article 6, to have an “inherent right to life,” and article 7 requires them to be registered immediately after birth.⁸² Article 9 states that the child should not be separated from his or her parents against their will, unless such separa-

⁷⁶ See, e.g., Deirdre Fottrell, *One Step Forward or Two Steps Sideways? Assessing the First Decade of the Convention on the Rights of the Child*, in REVISITING CHILDREN'S RIGHTS: 10 YEARS OF THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD 1 (Deirdre Fottrell ed., 2000) (“The CRC is a significant legal and political achievement: It elevated the child to the status of an independent rights-holder and placed children’s issues at the centre of the mainstream human rights agenda. Indeed the Director of UNICEF welcomed it as ‘Magna Carta for children.’”).

⁷⁷ *Id.* at 4. Fottrell explains:

What is clear . . . is that the [UN]CRC alters considerably the character of rights which were previously considered appropriate for or relevant to children. Prior to the [UN]CRC, rights in general treaties applied in theory to both children and adults. However, in practice it was not uncommon for courts to severely limit or even deny outright the relevance of such rights to children simply by reference to their childhood status.

Id.

⁷⁸ *Id.* at 1 (“The [UN]CRC . . . achieved almost universal acceptance within eight years and today it is ratified by all but two States,” the United States and Somalia.). For a discussion of U.S. resistance to the UNCRC, see Alison Dundes Rentein, *United States Ratification of Human Rights Treaties: Who’s Afraid of the CRC? Objections to the Convention on the Rights of the Child*, 3 ILSA J. INT’L & COMP. L. 629, 635 (1997) (“Underlying all the [U.S.] objections is an interpretation of the CRC as an ‘anti parent’ and ‘anti family’ instrument.”).

⁷⁹ Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. Doc. A/810 (1948).

⁸⁰ UNCRC, *supra* note 21, at art. 1.

⁸¹ *Id.* at art. 3.

⁸² *Id.* at arts. 6, 7.

tion is necessary in the best interests of the child.⁸³ That situation would arise in the event of abuse or neglect of the child by his or her parents.

Provisions of the UNCRC that have been controversial with conservative American writers include: article 13, which ensures the right of the child to express views freely and to receive information to that end; article 14, which guarantees freedom of thought, conscience, and religion; and article 15, which ensures freedom of association.⁸⁴ There is no indication in the UNCRC that these provisions are meant to trump the rights of parents to exercise control over what their children see or hear, or with whom they associate, although the full implications of this section of the UNCRC are admittedly ambiguous. Article 19 calls on all states parties to take sufficient measures to protect children against abuse and neglect.⁸⁵

The UNCRC demands other important rights for children as well: protection for child refugees; rights for disabled children to participate in society; rights to adequate health care, at least to the degree of the attainable standard in a particular state party; the right to social benefits; and, the right to an education.⁸⁶ The UNCRC also seeks to protect children against economic exploitation⁸⁷ and against sexual abuse.⁸⁸ It calls for action against trafficking in children and for protection for children in armed conflict.⁸⁹ Article 40 deals with issues of juvenile justice.⁹⁰ The UNCRC is strikingly ambitious, and its genuine implementation in ratifying countries would lead to a world revolution in social organization.

But from the point of view of this article, the most significant, and certainly one of the most ambiguous, provisions of the UNCRC concerns the child's right to a certain standard of adult care when the family of origin cannot care for him or her. Article 20(1) states that when the child is deprived of the family environment, or when the child in its best interests

⁸³ *Id.* at art. 9.

⁸⁴ *Id.* at arts. 13-15. For an extreme example of hostility towards the UNCRC, see, Kevin Mark Smith, *The United Nations Convention on the Rights of the Child: The Sacrifice of American Children on the Altar of Third-World Activism*, 38 WASHBURN L.J. 111, 120-121 (1998). Smith asks:

If the UN's expressed intent is enforced, what is left for a parent to do if the State grants his five year old child the freedoms of expression, thought, religion, and association? . . . What once were acceptable responsibilities of parenting—such as controlling a child's offensive language or behavior, or insisting that one's child associate with well-mannered classmates, or giving a corrective spanking—will become forbidden practices.

Id.

⁸⁵ UNCRC, *supra* note 21, at art. 19.

⁸⁶ *Id.* at arts. 22, 23, 3, 26, 28.

⁸⁷ *Id.* at art. 32.

⁸⁸ *Id.* at art. 19.

⁸⁹ *Id.* at arts. 35, 38.

⁹⁰ *Id.* at art. 40.

cannot be allowed to remain in that environment, he or she “shall be entitled to special protection and assistance provided by the State.”⁹¹ Article 20(2) says that states parties must ensure “alternative care” in accordance with the relevant national law.⁹²

Article 20(3) elaborates on what that care could include, namely, “foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children.”⁹³ States are told that “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.”⁹⁴ Article 20 then suggests that it is a matter of national will, and not a human rights imperative, whether institutional care is chosen for the child for whom foster care or adoption is not available in the country of origin.⁹⁵ I would question whether this level of national discretion continues to represent a valid approach, given our understanding of human psychology and attachment theory, and in light of the Hague Convention coming into effect.⁹⁶

⁹¹ *Id.* at art. 20(1).

⁹² *Id.* at art. 20(2).

⁹³ *Id.* at art. 20(3). The following is at least one explanation of Muslim disapproval of adoption:

[P]rohibition of legal adoption in Islam does not deny orphans, foundlings, and poor or needy children of known or unknown lineal identity the right to be reared, educated, fed, protected, clothed, and loved as any other child with natural parents. However, the real lineal identity or paternity of the child has to be maintained, and undue rights (those reserved for one’s own children in the Shari’ah) should not be granted.

Atika Ghaffar, *Adoption in Islam*, at <http://www.iica.org/invitation/adoption/html> (n.d.). This passage obviously makes certain assumptions about the nature of “real” parenthood as being based on blood ties.

⁹⁴ UNCRC, *supra* note 21, at art. 20(3).

⁹⁵ *Id.* at art. 20 (“States Parties shall in accordance with their national laws ensure alternative care for [a child deprived of his or her family environment].”) Article 20 then presents a set of alternatives from which a state has discretion to select. *Id.*

⁹⁶ John Bowlby developed the theory of attachment, arguing that positive responses of the caregiver to a baby’s cues yield an emotional bond that establishes a secure base for the child to explore the world. JOHN BOWLBY, *ATTACHMENT AND LOSS, VOL. 1: ATTACHMENT* (Basic Books 1969). Researchers have since discovered that failure to attach is associated with significant impairment in social relationships, trust, and intimacy. The Diagnostic and Statistical Manual of Mental Disorders identifies a clinical disorder of attachment called “Reactive Attachment Disorder of Infancy or Early Childhood,” which is indicated by “markedly disturbed and developmentally inappropriate social relatedness in most contexts that begins before age 5 and is associated with grossly pathologic care.” *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV* 116 (Am. Psychiatric Ass’n 1994). See also ROBERT KAREN, *BECOMING ATTACHED: FIRST RELATIONSHIPS AND HOW THEY SHAPE OUR CAPACITY TO LOVE* (Oxford University Press, 1998); MARY D. SALTER AINSWORTH ET AL., *PATTERNS OF ATTACHMENT: A PSYCHOLOGICAL STUDY OF THE STRANGE SITUATION* (Lawrence Erlbaum Associates 1978).

Article 21 of the UNCRC addresses the situation of states parties that do allow adoption, and sets out standards to govern the adoption process. It states, sensibly, that the best interests of the child must be the paramount concern in the adoption system, ensuring that the competent national authorities have authorized the adoption, that the biological family has given informed consent to the adoption, and that those involved in the adoption process have not reaped improper financial gain.⁹⁷ Article 21(b) inserts a UNCRC preference for in-country care of virtually any “suitable” kind in lieu of intercountry adoption, by stating that parties shall “recognize that intercountry adoption may be considered as an alternative means of child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin.”⁹⁸

This article will try to determine what the human rights of children, as articulated most extensively in the UNCRC itself, demand regarding rights to family life, and regarding the right to avoid care in an institution. A more difficult question, as indicated above, is whether non-institutional forms of care, such as foster care and group home care, sufficiently recognize the human rights of children.⁹⁹ It seems fair to say that the UNCRC

⁹⁷ UNCRC, *supra* note 21, at art. 21.

⁹⁸ *Id.*

⁹⁹ UNICEF consistently articulates a strong preference for traditional forms of child care, including extended family care and informal community-based modes of care. UNICEF spokespersons almost always articulate this position when cautioning against intercountry adoption. This author respects and appreciates the value of such forms of care, and recognizes that intercountry adoption is not at the top of the list of preferred care options. However, there is a frustrating lack of specificity in many of these UNICEF pronouncements. How many children are not reached by these modes of care, and thus are in fact in need of intercountry adoption, is an urgent question which seems to be rarely addressed by global child welfare bodies. *See Few Orphans from Africa Adopted in US; AIDS, Civil War Produce Need for Homes, but Obstacles Persist*, HOUSTON CHRONICLE, Apr. 27, 2003, available at 2003 WL 3255328 (quoting UNICEF spokesperson Nigel Cantwell as relating that “the vast majority of African orphans are taken in by their extended families, and if the family becomes overwhelmed, the community pitches in.” Mr. Cantwell went on to repeat the familiar UNICEF refrain that “there is no culture of adoption as such” in those countries. The article then states, in non-attributed fashion, “not every country wants its children raised by foreigners, no matter how dire the circumstances.” Mr. Cantwell is then quoted as making the sweeping statement “African children are not No. 1 on the list of adoptive parents’ desires.”). *See also* Matthew Pinkney, *Baby Search Goes Global*, HERALD SUN (Melbourne), Aug. 20, 2001, available at LEXIS, Nexis Library, Hersun File (quoting UNICEF spokesperson Pam Garcia as stating that “adoption of foreign babies was only justified if local authorities had exhausted all other options.” These other options are “trying to find ways to keep a child with their immediate or extended family or finding a home in the local community, region or country of birth.”). Too often, it appears that unjustified fears of intercountry adoption lead to children ending up in institutions or on the streets, since most of the concern about

allows for intercountry adoption, but leaves states parties a great deal of discretion as to whether they wish to recognize intercountry adoption. The UNCRC does not preclude such a choice, but unquestionably discourages it by seeming to state a preference for in-country foster care or other “suitable” care, and therefore not relegating institutional care to a last preference.¹⁰⁰ To the extent that the UNCRC is the principal human rights instrument for children, and is almost universally ratified, it can be assumed to be extremely influential. In this sense, we must question whether this section of the UNCRC adequately addresses the human rights needs of children. The appropriate legal response to children without families should not be based on a political view, but rather on our knowledge of the psychological effects of institutionalization on young children.

In analyzing whether international human rights law “allows” the institutionalization of children without families, we must address the confusing intersection of the UNCRC and the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption. While not a human rights convention, the Hague Convention on Intercountry Adoption is undoubtedly a “best interests convention.” It addresses itself to the potential for corruption and profiteering in intercountry adoption, and places a burden on participating countries to root out such procedures and practices.¹⁰¹ In this light, it can be said that the Hague Convention is primarily an agreement on proper procedures

intercountry adoption is focused on the side of restrictions, with comparatively little attention paid to what happens if the children do not find suitable family-like care in the country of origin.

¹⁰⁰ Article 21 of the UNCRC, *supra* note 21, says that the States Parties “[r]ecognize that inter-country adoption may be considered as an alternative means of child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin.” There is a clear opposition between an emphasis on in-country solutions at all costs and a commitment to providing the child a family life if at all possible, including through intercountry adoption.

¹⁰¹ See, e.g., Holly Kennard, *Curtailing the Sale and Trafficking of Children: A Discussion of the Hague Convention in Respect of Intercountry Adoptions*, U. PA. J. INT’L BUS. L. 623, 635 (1994) (stating that, although the Hague Convention’s objective is to ensure that each country’s central authority curtails improper financial gain, in reality “several loopholes exist which make it uncertain whether the Convention will accomplish its objectives”); Peter H. Pfund, *Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation and Promise*, 28 FAM. L. Q. 53, 54 (1994) (“The overarching importance of the Convention lies in its endorsement of intercountry adoption when there is compliance with its internationally agreed minimum standards.”); Kristina Wilken, *Controlling Improper Financial Gain in International Adoptions*, 2 DUKE J. GENDER L. & POL’Y 85, 89 (1995) (“Participating States must comply with rigorous criteria before a child is considered ‘adoptable’ under the Convention.”).

for those countries choosing to maintain intercountry adoption programs. But what does the Hague Convention have to say about whether or not countries are free to refuse intercountry adoption when the only alternative is institutional care, or foster care? And what implications, if any, does the Hague Convention have for adoptions taking place in non-signatory countries?

Concluded in May 1993, the Hague Convention states in its preamble that the signatory parties “recognize 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.”¹⁰² It also states that for children who cannot remain with the family of origin, “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.”¹⁰³ This language *may* indicate the preferences or sensitivities of the Convention’s signatories, but does it reflect a human rights imperative? Article 1 states that the objectives of the Hague Convention are (1) to “establish safeguards to ensure that intercountry adoption takes place in the best interests of the child *and with respect to his or her fundamental rights as recognized in international law*,” and (2) to establish a system of co-operation among the contracting states to eliminate the possibility of trafficking and to secure the recognition of adoptions taking place in accordance with the procedural demands of the Hague Convention. In this context, “fundamental rights as recognized in international law” can be taken to refer to the right not to be adopted in an unethical or corrupt manner, as opposed to the right to be adopted by a family when there is no family life available to the child in the country of origin.¹⁰⁴

The right of a child not to be placed in a manner involving corruption is a very important one, but it should not be seen as a self-contained issue. It is a cause for frustration that so much writing on the subject suggests that intercountry adoption is inherently corrupt, and therefore must be eliminated, and the in-country alternatives made as humane as possible. In such a scenario, if there is continued neglect in institutional settings, that neglect is not considered to be an international human rights concern.¹⁰⁵ However, it is precisely in such a scenario that the most important human rights inquiry should begin.

¹⁰² Hague Convention, *supra* note 21, at pmb1.

¹⁰³ *Id.*

¹⁰⁴ This interpretation is inevitable, since there is no clearly articulated right to be adopted when no other viable family life is available.

¹⁰⁵ While there are many reports on the dangers of corruption in the international adoption system, there are strikingly few, if any, studies from official bodies such as UNICEF calling on countries to reduce their population of institutionalized children as a matter of urgency. It should be noted, and will be discussed below, that the European Parliament, through Member Baroness Nicholson, did call on Romania to

The Hague Convention's Chapter II, the section on "requirements for intercountry adoptions," is at the Convention's heart, and is constructed around an "only if" proposition: international adoptions may take place only if the country in question lives up to a number of requirements.¹⁰⁶ These requirements are vitally important, but are, again, silent as to the question of whether human rights law demands that adoption take place where there are no family placements available in the country of origin. Article 4 demands that intercountry adoption take place only where the competent authorities have established the adoptability of the child and have determined that intercountry adoption is in the child's best interests, that the birth family has given its consent, that consent has not been induced by the payment of money, and that, for older children, the child's point of view has been given due consideration. With regard to the obligation of the receiving state, article 5 demands that they determine the fitness of the adoptive parents and that the adoptive parents have received adequate counseling.¹⁰⁷

Pursuant to articles 6 and 7, each contracting state must designate a Central Authority to oversee the standards set out in the Hague Convention and to co-operate with the Central Authorities in other states.¹⁰⁸ Under articles 9, 10, and 11, Central Authorities may act directly or through accredited bodies, which shall themselves be not for profit entities staffed by persons of the highest ethical qualities.¹⁰⁹ The Hague Convention also sets out the proper procedures for completion of an

sharply reduce its population of children in orphanages, but decidedly not through reliance on international adoption.

¹⁰⁶ Hague Convention, *supra* note 21, at art. 4. Article 4 provides:

an adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin—(a) have established that the child is adoptable, (b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests *Id.*

¹⁰⁷ *Id.* at art. 5.

¹⁰⁸ *Id.* at arts. 6, 7.

¹⁰⁹ See Curtis Kleem, *Airplane Trips and Organ Banks: Random Events and the Hague Convention on Intercountry Adoptions*, 28 GA. J. INT'L & COMP. L. 319, 343 (2000). Kleem states:

[T]he [Hague] [C]onvention provides for three different types of rules to ensure that its provisions regarding child selling and abduction are followed. First, the convention clearly gives responsibilities to each agency to report any possible violations to the central authorities of their country. The central authorities are given the ultimate responsibility to ensure that the rules are followed and to cooperate with other central authorities to ensure adherence to the rules. Next, the convention requires that well-qualified and ethical individuals staff the central authorities and the accredited bodies. This should improve the chances that the goals of the convention will be pursued by these agencies.

Id.

international adoption and the legal effects of such an adoption in Chapters IV and V.¹¹⁰

In chapter VI, article 29, there is a prohibition against contact between birth parents and adoptive parents prior to the adoption,¹¹¹ clearly in order to minimize the opportunities for financial inducements to influence the birth parents. Article 30 requires that contracting states preserve information about the birth family.¹¹² Article 32 reiterates that “no one shall derive improper financial or other gain from an activity related to international adoption,” and that “only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid.”¹¹³

In its insistence on Central Authorities in all participating states, the Hague Convention makes a plea for regulation and oversight, based on a set of completely commonsensical principles. It attempts to eliminate possibilities for profiteering, thereby “rehabilitating” the intercountry adoption process. It would seem therefore a logical extension of the actual words of the Convention that there should be a global agency charged with keeping at least informal surveillance over the level and degree of adherence to its principles in participating countries. Both national centralization and the need for global oversight by a sympathetic but skeptical agency also imply investment. A sensible and efficient approach would be to use a portion of the fees for each adoption to assist poorer countries to fully implement the Hague Convention, and also to create a small, efficient, and highly specialized global agency to ensure the full functioning of the Convention.¹¹⁴

¹¹⁰ Hague Convention, *supra* note 21, at chap. IV, V. The procedural requirements seek to ensure that the Central Authorities in the receiving state are satisfied as to the suitability of the applicants to adopt and make appropriate reports to that effect. If allowed under national law, the Central Authority’s functions may be taken on by duly accredited bodies. Adoptions taking place in contracting states are to be recognized as valid in other contracting states. Recognition of an adoption includes recognition of the parental duties of the adoptive parents and the termination of the legal relationship between the child and previous parents, if adoption has such effects on the state where it was made. *Id.*

¹¹¹ Hague Convention, *supra* note 21, at art. 29

¹¹² *Id.* at art. 30.

¹¹³ *Id.* at art. 32. Despite these words, the Hague Convention has not succeeded in sorting out the vexing question of what “reasonable” costs are in the adoption context. Unless more concrete agreement is achieved on this issue, accusations that international adoption is a “business” will continue to be made.

¹¹⁴ Some national intercountry adoption programs have in fact taken a portion of adoption fees and put it towards the improvement of orphanage conditions for those who will never be adopted, or for those who are not yet adopted. During a roundtable before the Congressional-Executive Commission on China, Dr. Dana Johnson noted:

Until the early 1990s when international adoptions began directly infusing financial support, social welfare institutions in China were chronically underfunded. The influx of abandoned girls forced orphanage directors to balance the

From the point of view of this article, an outstanding issue is what the Hague Convention adds to our understanding of a child's right to a family, including, if necessary, an adoptive family created through intercountry adoption. There have been several interesting studies done on the nature of the relationship between the UNCRC and the Hague Convention on Intercountry Adoption, as examined below. However insightful, none of these seems able to provide the requisite legal clarity.

Professor Alexandra Maravel offers a very optimistic view of the interaction between the UNCRC and the standards articulated in the Hague Convention on Intercountry Adoption.¹¹⁵ She describes the Hague Convention as "an agent of implementation of UN norms in the parallel process model," a model in which the soft law of an international instrument becomes hard law implemented into national systems through the mediation of an "independent international instrument" such as the Hague Convention.¹¹⁶ Professor Maravel also points out that the issue of a "right to adoption" was controversial at the time of the drafting of the UNCRC and that states have remained divided on the validity of intercountry adoption.¹¹⁷

Professor Maravel develops an important and innovative way of looking at the potential contradictions between the two instruments, even if her approach does not ultimately provide as secure an answer as one would like. She writes that "the Hague Convention explicitly states that an intercountry adoption may take place after the competent authorities determine, after due consideration to possibilities in the State of origin, that intercountry adoption is in the child's best interest."¹¹⁸ She continues: "It thus implicitly rejects the hierarchy of alternative care in the UN Convention that places intercountry adoption after institutional care in the State of origin."¹¹⁹ She rightly, and very insightfully, declares that the Hague Convention takes the UNCRC notion of "identity rights" beyond "the confining limits of nationality."¹²⁰ But despite these clear contradictions between the two on a fairly fundamental point, she nevertheless sees the UNCRC as "setting goals," and the Hague Convention "provid[ing] a means to accomplish these goals."¹²¹

marginal existence of the majority of children in their care with the costly medical needs of a small number of children who were critically ill.

Roundtable, supra note 11, at 7 (statement of Dana Johnson, M.D., International Adoption Clinic, U. of Minn. Hospital, Minneapolis, Minn.).

¹¹⁵ See Alexandra Maravel, *Dynamics of Children's Rights through Legal Strata*, 6 TRANSNAT'L. L. & CONTEMP. PROBS. 309 (1996).

¹¹⁶ *Id.* at 312-313.

¹¹⁷ *Id.* at 313-314. See also Cynthia Price Cohen, *Introductory Note to Convention on the Rights of the Child*, 28 I.L.M. 1448, 1450 (1989).

¹¹⁸ Maravel, *supra* note 115, at 317.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 318.

¹²¹ *Id.* In Professor Maravel's words:

One would certainly like to agree with Professor Marvel's view that "we are witnessing cooperation, inspiration, complementary interaction, and a new momentum for revitalized recognition and enforcement of human rights," in the relationship between the UNCRC and the Hague Convention on Intercountry Adoption.¹²² In her conception of this relationship, "to the extent that the conventions of the Hague Conference implement UN Convention Rights, the evolution of Hague monitoring and enforcement mechanisms, in turn, act to enforce those rights."¹²³ It does seem clear that the Hague Convention makes concrete the right of any child to an ethical adoption, where the national law in the country of origin allows intercountry adoption. The Hague Convention strongly implies—though this might have been made clearer—that in-country institutional care and non-family care are not superior alternatives to intercountry adoption, and that identity rights go beyond the national culture. What remains ambiguous is how we can be sure that international human rights law demands that children should not be left to grow up in institutions or in foster care arrangements that do not truly provide a "family" environment. It must be recognized that the Hague Convention does not set down a corresponding list of demands designed to prevent children from languishing in orphanages. It does not state that countries should avoid creating unnecessary bureaucratic hurdles to adoption and does not call on states to be clear and expeditious in making the child available for intercountry adoption before institutionalization has caused real developmental damage.¹²⁴ In this sense, even the Hague Convention

The work of the Hague Conference in the field of intercountry adoption makes it possible for States to implement a regulatory system that reflects both the rights and ideals of the UN Convention and the practical realities that require consensus on a means as well as on an end. . . .By ratifying and implementing the Hague Convention, States begin the work of translating the rights of children into action in one legally, emotionally and practically difficult area of international relations.

Id. at 320.

¹²² *Id.* at 328.

¹²³ *Id.* at 327.

¹²⁴ The constantly shifting requirements and bureaucratic hurdles associated with intercountry adoption are well known. *See, e.g.,* Katz, *supra* note 66, at 288-89. Katz notes:

Even parents with the resources and desire to adopt internationally encounter problems and hindrances in the adoption process. . . . [T]he hassles of a bureaucratic maze have significant effects on the prospective parents, the child involved, and the overall procedure. Problems arise in obtaining visas, in completing all of the paperwork, and in the constantly changing laws of sending countries.

Id. Ethica has sent observations to the Romanian government on proposed new adoption laws for that country. The letter states in part:

Article 52(1) indicates that international adoption is allowed only if the child is over the age of 2. It is difficult to understand what the purpose of this prohibition would be, other than to assure that reasonable efforts have been made to pre-

emphasizes the dangers of unethical adoption over the dangers of no adoption at all, and fails to provide a proper balance between the two poles of this human rights dilemma.¹²⁵

Professor Richard Carlson deals with this dilemma very well, but takes the position that, in fact, the Hague Convention went very far in the “pro-adoption” direction, distinguishing itself clearly from the UNCRC view that various forms of in-country care, including institutionalization, are preferable to intercountry adoption.¹²⁶ Carlson recounts that in the negotiations leading up to the creation of the Hague Convention, there was controversy over the possibility that the Convention would attempt to create “a set of rules for determining when intercountry adoption is appropriate for a child.”¹²⁷ He explains that the sending and receiving

serve the original family and/or to pursue a placement with a Romanian family. However, Article 52 also provides for the expiration of all deadlines outlined in previous sections that ensure such measures are taken.

...

Articles 59 and 60 require that the adoptive family travel to Romania for an adjustment period of at least 30 consecutive days before a report can be created . . . regarding the attachment between the child and adoptive family. . . . After adding the necessary days for court proceedings, for which timelines do not appear to be stipulated, adoptive parents will be required to be in Romania for well over a month. . . . There is no evidence that prolonged periods of adjustment in the child’s country have any correlation to the long-term success of an adoption. Such requirements disqualify many adoptive parents who could otherwise provide loving homes for children in need.

Letter from Trish Maskew, President, Ethica, to Hon. Petru Serban Mihailescu, General Secretariat of the Government, Romania (Apr. 30, 2003), *available at* <http://www.ethicanet.org/RomanialawComments.pdf>.

¹²⁵ Even with regard to ensuring that opportunities for corruption are removed from the system, the Hague Convention is not perfect. It has already been pointed out that the Hague Convention does not outlaw private or independent adoptions, which has been a source of criticism. See Kennard, *supra* note 57, at 636 (Writing that “given the already existing preference for using independent adoption instead of licensed agencies because of their ability to hasten the process and circumvent red tape, it seems likely that independent agents may flourish even if they are acting pursuant to the Convention’s requirements.”). In addition, the Hague Convention does not spell out clearly what reasonable adoption costs would entail. Since the relatively high cost of adoption is also a frequent target of criticism, Hague Convention guidelines should be drawn up, detailing what kinds of costs are acceptable, how they should be accounted for, and how high is too high. Adoption costs are treated imprecisely in the Hague Convention; dealing with this problem more forthrightly could dispell some of the negative myths about intercountry adoption.

¹²⁶ See Richard R. Carlson, *The Emerging Law of Intercountry Adoptions: An Analysis of the Hague Conference on Intercountry Adoption*, 30 TULSA L.J. 243, 255 (1994) (“A common criticism in the US is that the Convention is not bold enough in encouraging intercountry adoption. However, to say that the Convention merely tilts in favor of intercountry adoption is to understate the importance of the Convention’s gains.”).

¹²⁷ *Id.* at 256.

countries were sharply divided on this point, with the receiving countries understandably more eager to establish a hierarchy of approaches in favor of intercountry adoption.¹²⁸

Professor Carlson sees the Hague Convention's preamble as a major achievement in that its final version "clearly favors intercountry adoption over all other alternatives except in-country adoption, and it encourages a more favorable and cooperative attitude toward intercountry adoption."¹²⁹ One can recognize the contribution made by the Hague Convention while respectfully suggesting that perhaps Professor Carlson is overstating the case when it comes to the relationship between the UNCRC and the Hague Convention. The Hague Convention leaves a good deal of discretion in the hands of national bureaucracies, and does not clearly address the human rights implications of institutionalization. Perhaps this lack of clarity merely reflects historical necessity and, as Professor Carlson suggests, the fact that stronger language might have made it impossible to achieve consensus on the Hague Convention at all.¹³⁰ Nevertheless, despite years of the Hague Convention's (admittedly pre-implementation) influence, national pride, delays, quotas, and other procedural hurdles still characterize programs for intercountry adoption.¹³¹

III. CONCEPTUALIZING INTERCOUNTRY ADOPTION: CORRECTING MISPERCEPTIONS, BALANCING CAUTION AND FACILITATION

A. *Negative Rhetoric and the Human Rights Imperative: Intercountry Adoption Dismissed as a "Market"*

There is a serious and persistent problem with respect to the manner in which international adoption is described in both journalism and aca-

¹²⁸ *Id.* at 256-257.

¹²⁹ *Id.* at 264. Other prominent commentators in this area have recognized this important feature of the Hague Convention. *See, e.g.,* Pfund, *Intercountry Adoption*, *supra* note 101, at 56 ("[T]he preamble recognizes that intercountry adoption may offer the advantage of a permanent family to a child, for whom a suitable family cannot be found in the child's State of Origin. This provision is an important, and possibly the first, clear intergovernmental endorsement of the process of intercountry adoption.").

¹³⁰ Professor Bartholet observes that the Hague Convention "represents a far more enthusiastic endorsement of international adoption as a good solution for children without parents than any previous international agreement." Bartholet, *International Adoption*, *supra* note 51, at 192. This is undoubtedly the case.

¹³¹ Professor Bartholet also makes the point that the Hague Convention could cut either way. On the one hand, it could be applied restrictively, making it more difficult to carry out an international adoption if authorities in particular countries focus "solely on the risks presented by adoption and not on the opportunities." On the positive side, since the Hague Convention seeks to eliminate fears of trafficking, she rightly suggests that these new safeguards might make it more acceptable for persons in the sending countries to promote intercountry adoption. *Id.* at 195.

demic writing, including legal academic writing.¹³² Perhaps due to the many and complex forms of hostility towards adoption, and particularly towards intercountry adoption, writers appear comfortable speaking of a “market” in children. Many are contemptuous of adoptive parents and describe them as craving some illicit prize, rather than as engaging in a beneficial and legitimate process to ensure a home for children without families.¹³³ Most articles on the subject describe astronomical sums “paid” for children without differentiating between legitimate costs of adoption and profiteering from adoption, and without explaining adequately the relationship of costs to the various means of adoption. Adoption costs rarely receive rational treatment in the press, and there is a strong and persistent undercurrent of opinion that costs taint the adoption itself. This creates an impression of adoptive parents, desperate to gain their undeserved prize, racing about paying huge sums in bags to “agents.”¹³⁴ This is a grotesque misrepresentation of most adoptions, but, as an intellectual phenomenon, demonstrates that for many writers there

¹³² For this kind of journalism at its most egregious, see Ann McElhinney, *As Another Baby Leaves the Country, ‘Say Goodbye Romania, Bye-Bye,’* IRISH TIMES, May 7, 2003, available at 2003 WL 20051595 (portraying international adoption out of Romania in the worst possible light, and stating that the United States wants the Romanian adoption ban lifted “because of pressure from wealthy Americans”). Some examples of the legal academic literature that portrays intercountry adoption in a poor light are indicated at note 175, *infra*.

¹³³ Some of this writing is relatively serious, some quite insubstantial. The common factor is a heavy reliance on the use of terms such as, “market in babies,” “desperate infertile couples,” and so forth. See generally Jorge Carro, *Regulation of Intercountry Adoption: Can the Abuses Come to an End?* 18 HASTINGS INT’L & COMP. L. REV. 121 (1994) (arguing that where the demand for adoptable children keeps rising, international attempts to control abuses will be of questionable efficacy); Nicole Bartner Graff, *Intercountry Adoption and the Convention on the Rights of the Child: Can the Free Market in Children be Controlled?* 27 SYRACUSE J. INT’L L. & COM. 405 (2000) (making a number of sweeping generalizations essentially equating most intercountry adoption with trafficking); Ryah Lilith, *Buying a Wife but Saving a Child: A Deconstruction of Popular Rhetoric and Legal Analysis of Mail Order Brides and Intercountry Adoptions*, 9 BUFF. WOMEN’S L.J. 225, 229 (2000/2001) (asserting that intercountry adopters believe themselves to be “saving” children, whereas they are in fact engaged in the moral equivalent of purchasing a mail order bride).

¹³⁴ The Romanian adoption situation was unusual. The orphanage situation was dire at the time of the fall of the Communist regime and attempts by many non-Romanians to adopt these children led to a wild and unregulated system that clearly needed urgent reform. Nevertheless, critics like Baroness Emma Nicholson employed anti-adoption rhetoric that not only overstated what took place in Romania, but also refused to acknowledge that for many children at the time, adoption was indeed life-saving. See, e.g., Kate Connolly, *Romania Lifts Lid on Babies for Sale Racket: Investigation Reveals Scandal of Infants Stolen from Mothers at Birth to Line Pockets of International Traffickers*, GUARDIAN, Oct. 31, 2001, available at 2001 WL 29778406 (quoting Lady Nicholson’s comment that “the country’s childcare system was corrupt

is little interest in separating out the beauties from the abuses of the adoption process.¹³⁵

Perhaps inevitably, adoption is a subject fraught with human emotion. Negative reactions to adoption make plain that human cultures have a tendency towards jealous possessiveness when it comes to “their” children.¹³⁶ Powerful resistance to children being taken from the group is evident, even when it is apparent that the fundamental rights of these children may be violated by leaving them where they are. At least one part of the human psyche views children as property of the group; seeing the children of the group taken away engenders feelings of helplessness and deep suspicion.¹³⁷

Professor Elizabeth Bartholet has done ground-breaking work in this area, and has accurately identified the nature of political resistance to intercountry adoption.¹³⁸ She notes that recent increases in the number of children adopted internationally have “collided” with a new hostility towards the phenomenon.¹³⁹ Professor Bartholet demonstrates the clear contradiction between an emphasis on the best interests of the child and the notion of children as the possession of their cultures or groups.¹⁴⁰ Certainly, the view of children as having distinct rights as individuals can-

‘from top to bottom.’” The article further states “Romanian children are regularly ‘sold’ through official channels for an average price of 35,000 British pounds.”).

¹³⁵ A search of UNICEF statements in the news and of news releases on the subject of international adoption reveals a pattern of the association of legitimate adoption with frightening or abusive practices, in a manner that could be confusing and misleading to people in the developing world. One article calls on UNICEF to carefully consider its policy of making statements on adoption that rely on innuendo and unsubstantiated or sensationalist claims in order to discourage international adoption. A higher standard of accountability by a UN body seems to be urgently needed. *See, e.g., India Told of Child Slavery*, ORLANDO SENTINEL, Feb. 10, 2001, available at 2001 WL 9164576 (“UNICEF . . . warned India on Friday that some foreign agencies seeking to adopt children orphaned by the recent killer earthquake could instead be child-slavery dealers.” and “UNICEF cautioned that bids from international adoption agencies should serve only as a last resort for the children, after extended families or other people in the community.”). Note that the meaning of “some foreign agencies” is left entirely undefined. Such statements cast a shadow over the activities of completely legitimate and ethical adoption agencies.

¹³⁶ One of the most extreme examples of this is found in the statement of Nanuli Shavardnadze, wife of Georgian President Eduard Shavardnadze, that foreign adoption is a “theft of the gene pool.” *See Alessandra Stanley, A Baby’s Death in Georgia Revives a Fight Over Foreign Adoptions*, N.Y. TIMES, Aug. 16, 1997, available at LEXIS, Nexis Library, News File.

¹³⁷ Kleem, *supra* note 109, at 325 (“[M]any sending countries, being generally poorer than receiving countries, feel international adoptions represent the most recent and the most heinous form of imperialism.”).

¹³⁸ *See* Bartholet, *International Adoption*, *supra* note 51, at 210.

¹³⁹ *Id.* at 184.

¹⁴⁰ *Id.*

not be reconciled with the right or power of the state to maintain them in institutions or other inadequate care environments.

That being said, this article recognizes that there have been many instances of dominant cultures adopting large numbers of children of subject people for plainly ideological reasons. Recent memories of mass removal of children from their cultures of origin on the basis of spurious rationales contribute to some forms of resistance to intercountry adoption, as will be discussed in more detail below. Such removals were unquestionably wrong and intolerable; but, upon rational reflection, they appear to have little relationship to most contemporary forms of intercountry and intercultural adoption. To this extent, some of the opposition to intercountry adoption is a projection of views on colonial and post-colonial domination.¹⁴¹ In this context, intercountry adoption is presented as the unfair acquisition by the dominant group of a resource belonging to the oppressed or dependant group.

Many writers, including journalists, make the implicit assumption that intercountry or intercultural adoption inherently partakes of a negative history, that assumptions of superiority that characterized many forms and modes of adoption in the past have simply evolved into contemporary adoption via a new ideological code: the need to “save” children from a terrible fate.¹⁴² But, growing up in an institution might well be a

¹⁴¹ See Kleem, *supra* note 109, at 325 (writing that “[t]he first area of pressure that sending countries may feel is that international adoptions reflect the newest form of imperialism,” and noting that one political view is that international adoption represents the control being exerted by powerful over weaker countries, and that the sending countries are often rocked by rumors that international adoption is a front for organ harvesting). See also William R. Long, *Adopting a Tougher Policy; Foreign Adoptions are being Curtailed in Many Latin American Countries*, L.A. TIMES, Apr. 16, 1994 available at LEXIS, Nexis Library, News File. The article quotes one adoption worker as explaining:

[T]he opposition [to international adoption] includes nationalists who resent North Americans taking away children of the fatherland; leftists who see adoptions by Americans as Yankee imperialism; underpaid bureaucrats and judges with power over adoption paperwork who envy babies taken from the bottom of the social scale to foreign countries where they will live in relative luxury; some who envy adoption lawyers with new cars and cellular telephones, and others who carry on a long tradition of dislike for foreigners.

Id.

¹⁴² The wildest of these critiques portray adoptive parents as do-gooders, deluded or otherwise, engaged in a destructive project. See, e.g., Lilith, *supra* note 133, at 262 (“While relying on religious or humanitarian sentiment may give some American adoptive parents a sense of justification or entitlement to acquire Chinese orphans, such rationales mask the reality of imperialism and commodification.”); Ann McElhinney, *Cashing in on the Baby “Rescue,”* IRISH TIMES, May 24, 2002, available at LEXIS, Nexis Library, News File. The article reports:

For many [Irish people] the help they brought [to Romania] was not enough and they became involved in ‘rescuing the orphans’ by adoption them. However,

terrible fate. Certain types of foster care, with its uncertainties, might be seen as a terrible fate.¹⁴³ Living on the streets is unquestionably a terrible fate.¹⁴⁴ We should confront the question of whether these assertions are just a matter of opinion and of point of view, or whether there are facts concerning human development that lead us to state with confidence that the outcome for some children, based on their environmental conditions, are good and positive, while others are not. This article maintains that child psychology allows us to identify good and bad, as well as better and best, in this context and, thus, can lead us towards the articulation of a child's right not to be left to grow up in an institution when true alternatives exist. In this regard, we must also confront a hierarchy of desirable modes of care, one that neither denigrates traditional or culturally specific forms that really work, nor overlooks or explains away the deprivations suffered in institutional environments.¹⁴⁵

these rescues unwittingly involved many Irish people in a baby trade. Most children were not orphans; they had parents and brothers and sisters and aunts and uncles and grandparents and these 'rescues' were mostly facilitated by large sums of money.

Id.

¹⁴³ It could be argued that institutionalization of young children is almost a form of torture, and at the very least bears some resemblance to incarceration, even recognizing that some orphanages are better than others. See DAVID BRODZINSKY & MARSHALL SCHECHTER, *THE PSYCHOLOGY OF ADOPTION* (1990) (showing that adoption is a far better option for children without families than foster care or institutionalization).

¹⁴⁴ For examples of the lives of street children see David Oliver Relin, *Lost to the Streets: Abandoned and Homeless Children*, SCHOLASTIC UPDATE, Jan. 25, 1991, available at LEXIS, Nexis Library, News File (describing abuse by police, drug use, prostitution and murder of street children in many countries around the world); *At Least 1,500 Brazilian Street Children Killed Yearly*, AGENCE FRANCE PRESS, Nov. 20, 1992, available at LEXIS, Nexis Library, News File (noting that 500,000 girls work as prostitutes in Brazil); Diego Ribadeneira, *Guatemalan Street Children in Battle for Survival*, BOSTON GLOBE, July 25, 1993, available at LEXIS, Nexis Library, News File (describing children for whom "sex is a business transaction," and who are "byproducts of a disintegrating society"); *Vietnamese PM Calls for Efforts to Help Street Kids*, AGENCE FRANCE PRESSE, Oct. 8, 1998 available at LEXIS, Nexis Library, News File (noting the "accelerating" problem of street children in Vietnam); Diego Cevallos, *Thousands of Street Children at High Risk of AIDS*, INTER PRESS SERVICE, Aug. 19, 2003, available at 2003 WL 6916310 (indicating that there are 20,000 street children in Mexico City); *1,300 Honduran Street Children Murdered Since 1998*, Inter-American Development Bank Says, EFE NEWS SERVICE, July 26, 2002, available at LEXIS, Nexis Library, News File (stating that "[m]ost Honduran street children use drugs, 60 percent suffer from depression, and six out of 100 'opt for suicide'").

¹⁴⁵ The institutional care of children does not provide adequate rehabilitation or protection of children without families. Since 1996, the rate of suicide among institutionalized children in Russia has risen 100%, with 2,756 child suicides in 1996 and 5,500 in 2002. Among the children who committed suicide in 2002, there were some as young as nine and five years old. Institutionalized children have higher rates

Paying proper attention to the fact that an astounding number of children are, in essence, left to fend for themselves psychologically is quite a different matter from following the discredited view that certain groups have lesser rights to deal with their own children because of some inherent cultural flaw. Leaving children in institutions, not to mention on the streets, is not dealing with children, and no idea of group rights allows us to do that. The challenge posed is not only to ensure physical survival or ethnic identity; the most fundamental of all questions is whether love and family care are provided to the child *in fact*. Adoption advocacy need not ignore the terrible history of child “theft” that has constituted a form of cultural genocide; there are great and important legacies of bitterness over the abuses of adoption, and these should be addressed in legal terms. However contentious a project, these two strands of the academic dialogue—a child’s right to family care and past abuses of adoption—need to be separated and clarified in order to do the least amount of harm to both groups and to individual rights. The bottom line in terms of children’s rights, however, must be that growing up in an institution or on the streets has little to do with pursuit of one’s cultural identity. One should also proceed with caution when advocating “family alternatives,” such as foster care, as a genuine substitute for adoption, but this is contextual and is ultimately an empirical question.

Most of the ideological objections to intercountry adoption, and indeed to adoption generally, set out important reservations. Sometimes, though, these critiques seem to involve an argument among adults about separate issues, leaving aside the very dangerous and cruel reality for many children.¹⁴⁶ Where adoption is part of a “hegemonic narrative,” then all legal interventions that involve transfer of parental rights are inherently unjust.¹⁴⁷ Whereas critics might argue that the rights of birth families are

of deviant behavior and involvement in crime. The number of teenagers in the system addicted to alcohol has risen, while the age of those using drugs has gone down. Very high numbers of such children have been convicted of crimes, both during and after their stays in the institutions. See Zoya Eroshok, *Ustroystvo Detei-sirot*, available at <http://www.nashi-deti.ru/ru/child> (last visited Dec. 12, 2003).

¹⁴⁶ It is clear that the subordinate status of women is a central factor in discrimination against girl children, and contributes to many children being abandoned or even killed. See, e.g., Kirsten Backstrom, *International Human Rights of the Child: Do They Protect the Female Child?* 30 GEO. WASH. J. INT’L L. & ECON. 541, 582 (1996/1997) (noting that the “destinies of both women and female children are inherently connected”). With regard to this article’s approach to intercountry adoption, however, this reality should be accepted as part of the social and political context, and improving the situation should be a long-term goal. The problems of abandoned children demand immediate attention. To this extent, though conceptually linked, the human rights of women and children must be dealt with separately.

¹⁴⁷ See generally Claudia Fonseca, *Inequality Near and Far: Adoption as Seen from the Brazilian Favelas*, 36 LAW & SOC’Y REV. 397 (2002) (making the point that certain traditional and extra-legal forms of alternative care relied upon by the poor and

devalued in the modern adoption process, it is equally dangerous in the intercountry adoption context for there to be direct contact between birth families and adoptive parents, a type of contact that the Hague Convention specifically disallows.¹⁴⁸ It seems unfair to say that emphasis on the striking numbers of children living in dangerous conditions without family support or involvement in many countries is tantamount to “playing on subliminal stereotypes concerning birth parents’ irresponsibility.”¹⁴⁹ The existence of children in institutions and on the streets is an empirical matter; they are there and they possess certain rights, irrespective of their class origin. Even open adoption is based on clearly defined legal relationships, as that is what child protection surely demands. There might well be some sacrifice of the complexity of possible relationships, in particular informal and traditional ones; but, children can hardly be protected in the modern world without such legal forms.

B. *The Group Rights Emphasis and Jurisdictional Questions*

What is clear is that, as will be outlined below, every study on the subject has shown that institutional life for young children leads to significant psychological damage.¹⁵⁰ Analogies to prison are not inappropriate. Data on children in institutions such as state-run orphanages represents the tip of an iceberg that includes children living on the street, in turn associated with high levels of substance abuse and prostitution, and children abandoned to die as infants. (The latter is particularly the case where social pressure exists to have male children.) Given the psychological damage children suffer in institutional care, any group rights approach that posits keeping children in institutions cannot be accepted. One must, however, accept that group rights might well lead to the creation of separate and

working class in Brazil are swept aside in favor of legalistic forms of modern adoption). While it seems a very good idea to support and regularize traditional forms of adoption, Fonseca’s objections to transferring parental rights does not take into account the terrible dilemma of children without family care, a situation she does not deny exists. *Id.*

¹⁴⁸ *Id.* at 420-427. Hague Convention, *supra* note 21, at art. 29.

¹⁴⁹ Fonseca, *supra* note 147, at 421.

¹⁵⁰ The problem of neglect in institutions and impermanence in foster care leads in many cases to attachment disorders. Modern attachment theory was first formally articulated by John Bowlby. Writing about children forced to spend time in institutional care for medical reasons, he states:

Should [the child’s] stay in hospital or residential nursery be prolonged and should he, as is usual, have the experience of becoming transiently attached to a series of nurses each of whom leaves and so repeats for him the experience of the original loss of his mother, he will in time act as if neither mothering nor contact with humans had much significance for him. After a series of upsets at losing several mother-figures to whom in turn he has given some trust and affection, he will gradually commit himself less and less to succeeding figures and in time will stop altogether attaching himself to anyone.

BOWLBY, *supra* note 96, at 28.

extraordinary measures to keep children without biological families within a particular group; however, as will be explained below, this may well be a matter of jurisdiction in placement decisions.¹⁵¹ A group rights approach is also undoubtedly most relevant in the case of endangered cultures characterized by small numbers of people and relatively large numbers of children historically taken out of the community. It is generally accepted that, even in such a situation, institutionalization is not an appropriate response to a child care crisis. Assumptions that “complex” webs of family-like care can work may also be overly optimistic.

Professor Lorie Graham has set out in masterful detail the tragic history of the placement of American Indian children in non-Indian settings, including in boarding schools and with non-Indian families, clearly demonstrating that this practice had its roots in a self-conscious policy of cultural destruction.¹⁵² Professor Graham traces the development of a theory of cultural assimilation that led to astonishing levels of non-tribal placement over a long period of time.¹⁵³ Implicit in Graham’s treatment is the fact that there was in the indigenous culture a viable alternative method of good care for children that did not have access to their families of origin, and that the dominant Euro-American culture refused to recognize the viability of this Native American method of child-raising. Rather than explore that alternative, a wide scale and grotesque assumption was made that children would be “better off” outside the tribe, leading not only to cultural alienation of the children concerned, but also quite literally threatening cultural extinction for the group.¹⁵⁴ There could be no more terrible instance of the abuse of the idea of adoption than this.

Graham’s argument seems fundamentally one of jurisdiction. Changes in U.S. law under the Indian Child Welfare Act were meant to ensure that tribal authorities maintained control over child placement in the event of a loss, for whatever reason, of one’s parents of origin.¹⁵⁵ Attempts to diminish the effects of the law by narrow interpretations of tribal membership threatened the very foundation of this federal law, as Graham demonstrates.¹⁵⁶ It should of course be noted that the Indian Child Welfare Act has its critics, especially among those who believe that its emphasis on group rights has not served children well.¹⁵⁷

¹⁵¹ Extraordinary measures are inevitably linked to the problem of cultural survival. When a culture is endangered and has suffered a history of removal of its children, ordinary considerations must be replaced by a set of well-defined measures that return control over the children to the group.

¹⁵² See Lorie Graham, “*The Past Never Vanishes: A Contextual Critique of the Existing Indian Family Doctrine*,” 23 AM. INDIAN L. REV. 1 (1998/1999).

¹⁵³ *Id.* at 10-23.

¹⁵⁴ *Id.* at 23-32.

¹⁵⁵ *Id.* at 32-4.

¹⁵⁶ *Id.* at 34-9.

¹⁵⁷ See, i.e., Randall Kennedy, *Race, Children, and Custody Battles: The Special Status of Native Americans*, in *INTERRACIAL INTIMACIES* 480, 488 (2003) (questioning

We should be uncomfortable with extrapolating Professor Graham's extremely compelling arguments onto the general situation of intercountry adoptions. While it is true that the Hague Convention states a proper preference for placement of children with adoptive parents in country if possible—this representing a kind of international consensus—the fact is that many thousands of children will never be placed with adoptive parents in their country of origin, because there are not enough families willing and able to adopt them. (Here I am not necessarily referring to formal, legal adoption.)¹⁵⁸ One applauds efforts to create a culture of adoption, but must recognize that there may be extreme forms of prejudice—racial, class, gender and age—against the inhabitants of orphanages.¹⁵⁹ It is certainly true that the UNCRC articulates an important right to identity, but this can hardly be taken so far as to suggest that remaining in institutional care in the country of origin is to be preferred to intercountry adoption, though this is what many appear to conclude.¹⁶⁰

many of the assumptions underlying the commonly held views as to the nature of the crisis affecting Indian children, and the creation of the Indian Child Welfare Act).

¹⁵⁸ On the continued emphasis on blood ties in Korea, see, for example, Louise Elliott, *Battling Pride and Prejudice; Overseas Adopted Koreans Fight Traditional Attitudes in Hopes of Acceptance*, KOREA HERALD, Aug. 30, 2002 available at LEXIS, Nexis Library, News File (making the point that domestic adoption in Korea is rare and the importance of lineage in Korea makes the Korean governments efforts to promote domestic adoption more difficult).

¹⁵⁹ India has exerted great efforts to create a culture of adoption among the general population. But, while reliable documentation is difficult to locate, in-country adoption is affected by traditional ideas of caste and skin color. John Zubrzycki, *Fertility Clinics in Demand as India's Population Soars*, THE AUSTRALIAN, Nov. 25, 1996 available at LEXIS, Nexis Library, News File (noting the secretary of the Centre for Voluntary Adoptions Resource Agency in New Delhi, Leila Baig's observation that although attitudes towards adoption are changing, "[t]here is a bias against adoption because most of the orphans we have are from the poorer sections of society and many people still harbour caste prejudices").

¹⁶⁰ The hostility of many international child welfare organizations towards intercountry adoptions is profound and should not be underestimated. See Sally Weale, *Public Prarie Withers After Failed Adoptions*, THE GUARDIAN, Nov. 17, 1994 (quoting a Save the Children representative as saying "for every child you take out there are a thousand more in dire need. What we ought to be doing is to improve the lot of children in their own country, rather than taking a handful out," and "it's something we just don't support. We consider that it's always best to support children within their own country. Intercountry adoption is always open to abuse."). Even more astonishing is the language used by Bruce Harris, Executive Director of Latin American programs at Casa Alianza, a well-known organization working with street children, who writes:

Last year was a bumper year for Guatemalan adoptions. . . . [Through adoption] we are not helping with education to reduce the growth of the population. We are not helping decrease the abject poverty. We are using our mighty dollar to take children away from their mothers, who love them, in order to fill our own emotional needs.

A real difficulty here is that, having articulated a kind of general right to grow up in the culture of origin, the *actual fate* of children coming of age on the streets or in institutions may become obscured. This is why an empirical approach is so important—not just anecdotal evidence about cultural confusion in the adolescent years, but empirical evidence about the permanent psychological damage associated with neglect in formative childhood years. This is not to suggest that any culture is more or less able to provide such support; but it is to suggest that some nations are not able at a particular time to provide viable forms of alternative care for children who will not be brought up by their families of origin.

The situation of Native American adoption described by Professor Graham is depressingly similar to the history of intercultural adoption in Australia and Canada: children taken from their indigenous birth families and communities en masse because of the majoritarian belief that the children would be “better off” in institutions or in adoptive families from the dominant culture. Over the course of the twentieth century, at least 100,000 children were taken from their aboriginal communities in Australia and either “adopted out” or placed in institutions.¹⁶¹ In such a context, it makes a great deal of sense to argue that:

[A]ny consideration of the best interests of a First Nations or Aboriginal child should involve a consideration both of the rights and interest of the child in his or her community and culture, and the rights and interests of the First Nations or Aboriginal community and culture in its children.¹⁶²

Where the offensive child welfare policy has been based on historical dominance, and the intention has been cultural assimilation, it is plain that jurisdiction needs to be firmly placed in the hands of the endangered community. The problem arises when concern for global inequality leads to the conclusion that all intercountry adoption involves exploitation, and that the best interests of children are served by remaining “at home,” even if being at home means institutional neglect, abuse, psychological damage, discrimination, and a complete inability to meaningfully enter into one’s cultural context. This is especially so where the culture in question is not endangered—for instance, a strong and vibrant country with a large population of abandoned children, a description that would fit many countries in the world today.

Bruce Harris, *Forum: Round 2*, AMERICAS.ORG ¶ 5 (Nov. 2000), at http://www.americas.org/News/Features/200011_Adoption/Forum2.asp. While many would agree with Harris that Guatemala needs stricter adoption policies, his accusation that North Americans are only interested in “‘easy’ babies that we can order like a pizza over the internet,” *Id.* at ¶ 6, seems misplaced and simplistic.

¹⁶¹ See *Regret but no Apologies for Aborigines*, BBC Online Network, at <http://news.bbc.co.uk/2/hi/asia-pacific/430512.stm> (Aug. 26, 1999).

¹⁶² Philip Lynch, *Keeping Them Home: The Best Interests of Indigenous Children and Communities and Australia*, 23 SYDNEY L. REV. 501, 535 (2001).

As it stands, some writers do not even attempt to differentiate between valid legal and ethical adoption and “trafficking,” as if they could only be one and the same thing.¹⁶³

This article asserts that it is possible to acknowledge the reality of postcolonial domination without allowing it to obscure the human rights of individual children, and children’s fundamental right to a home and family in particular. There is a collective duty to determine exactly what the rights of children are in this regard, and to determine whether cultural and national identification can, as a general matter, alter the nature of these rights, or whether they are basic and inalienable. In one sense, interest in issues of domination and inequality are quite compatible with support for intercountry adoption, since intervention on behalf of individual children is likely to involve a larger political desire to intervene with regard to underlying economic and social conditions in the country of origin.¹⁶⁴ (It should be noted, of course, that, even in the wealthiest countries, not all children can be cared for by their biological parents.)¹⁶⁵ Our concern for the exploitation and misuse of adoption must be reflected in national and international law. On the other hand, there is a grave danger of mystifying biology and culture of origin to such a degree that we are less able to perceive the nature of the danger of in-country neglect. An awareness of *this* danger must also be reflected in national and international law.

¹⁶³ See Steve Farrar, *Child Trade on Rise, Study Finds*, TIMES HIGHER EDUCATION SUPPLEMENT, Aug. 30, 2002 available at LEXIS, Nexis Library, News File (“[I]nternational trafficking of children for adoption has reached unprecedented levels and will continue to rise, an academic study says.”). The reader may assume that this quote refers to illegal adoption outside the normal channels, but in fact what is being described is the phenomenon of intercountry adoption.

¹⁶⁴ Elizabeth Bartholet has been a consistent advocate for the view that international and intercultural adoption may have positive effects in terms of contributing to a broader understanding of common human values. She writes: “Adoptive families are different in some interesting ways from families based on a blood link. Understanding the positive features of adoption could open up our minds to rethinking in important ways the meaning of parenting, family, and community.” BARTHOLET, FAMILY BONDS, *supra* note 55, at xxii.

¹⁶⁵ The United States has over half a million children in foster care. According to Jill Chaifetz:

More than 500,000 children are estimated to have been in foster care in the late 1970s. In the early 1980s, perhaps as an initial result of the passage of the federal Adoption Assistance and Child Welfare Act of 1980, the national foster care population declined to an estimated low of 275,000 in 1983. Today, it is generally estimated to have returned to or surpassed the 500,000 mark.

Jill Chaifetz, *Listening to Foster Children in Accordance with the Law: The Failure to Serve Children in State Care*, 25 N.Y.U. REV. L. & SOC. CHANGE 1, 2-3 (1999). In contrast, in the UK, “there are 48,000 children needing foster placements at anyone time.” Lesley Gibson, *The Mother of all Foster Mothers*, DAILY MAIL (London), July 22, 2003, at 25.

C. *How Concepts Influence National Legal Regimes*

It is clear from a survey of national adoption laws and procedures that instincts toward group rivalry have informed national approaches. Whereas many countries have attempted, bravely and in defiance of these instincts, to transcend fear in favor of the best interests of children, resistance is liable to rise up again at any moment, at the least provocation. In terms of the collective national psyche, it is often preferable to have orphans languishing in institutional care than to deal with rare and isolated problems arising with respect to a particular adoption.¹⁶⁶ In terms of national pride and sovereignty, no nation wants to be accused to being unable to care for its children; some nations would prefer to hide the problem, suffering the aggregate consequences of institutionalization, than to confront the matter openly, even if this means more receptiveness to intercountry adoption and larger numbers of adopted children.¹⁶⁷ In fact, many countries maintain legal regimes that equivocate between national pride (making it as difficult as possible to take children out of the country) and an honest sense that allowing children to find new homes, even outside the country, is the right thing to do.¹⁶⁸ As this article

¹⁶⁶ See Long, *supra* note 141 (describing how the development of collective anti-adoption myths can lead to the complete shutdown of international adoption programs in certain countries).

¹⁶⁷ See *Finding Babies Abroad; Adoption Odyssey; A Grueling Road for Prospective Parents*, THE RECORD, Apr. 7, 1996 available at LEXIS, Nexis Library, News File (noting that “the countries topping the list for foreign adoptions are always shifting as a result of scandal, changing internal regulations, the mood of the populace, and their global reputations.”).

¹⁶⁸ Countries like Russia and China have undoubtedly done their best to create an ethical, consistent, and fair legal regime for intercountry adoption. Although documentation is difficult to find, these countries, like others, have taken steps to ensure that the numbers of children leaving the country will not become too large. See, e.g., William L. Pierce, *Finding American Homes*, NAT’L REV. ONLINE (Oct. 24, 2002), at <http://www.nationalreview.com/comment-pierce102402.asp>. Pierce writes:

[T]he Russian Federation put in place a new requirement that most persons wishing to adopt needed to make two trips to the country. The change was implemented because Russian officials were concerned about children in orphanages being “advertised” on internet websites. . . . Russian officials responded by stopping the sharing of medical and other information [about children] with agencies and requiring parents to come to Russia to review medical and other information about children, and to select children. Prospective parents are then required to make a second trip to finish the process and adopt. In addition, Russian officials decided to limit the number of intercountry agencies that it would accredit to work on adoptions. The limit on U.S. agencies accredited to work in Russia undoubtedly helped depress what would have been higher numbers of placements.

Id. He also notes:

The People’s Republic of China . . . also took steps that had the effect of holding down adoption numbers. China also decided to limit the number of agencies that would be allowed to work on intercountry adoptions. That decision, along with

explores, no international instrument actually guides countries, sending or receiving, when it comes to what children's human rights require.

One purpose of this article is to attempt to examine, and to diminish the influence of, national pride as the basis for treatment of children without families. I posit the existence of a global child with universal rights, including the right to a family. Recent trends in human rights law and in the law of intercountry adoption confirm the need to facilitate the creation of legal regimes that allow children to escape from institutional care and, in turn, to escape from the developmental obstacles with which this form of care is associated.

Framing national and international legal structures for adoption depends on findings of fact. It is striking that transnational sharing of information about children without families is remarkably undeveloped. Are there large numbers of children without families and, more specifically, large numbers of children living on the streets, working in poor conditions (especially in the sex industry), or living in institutions? Do the countries where they live have the mechanisms to fundamentally improve the conditions under which these children live? These questions permit us to alter the focus of the current debate, and to provide a foundation for a proportional inquiry into the abuses of the intercountry adoption system—abuses which are of great importance, but which must be examined in light of the fact that many children might be without families and in dire circumstances in the absence of adoption profiteering. If it can be shown that these children become homeless *as a result of* profiteering, only then is it appropriate to speak of a “market” in intercountry adoption. If the children would be homeless in any event, then the obvious focus must be on the human rights imperative. That is, what does human rights law demand by way of a solution to the terrible conditions in which these children are living?

D. Orphanage Worst Case Scenarios

Russia and China are two of the countries from which large numbers of children are adopted to the United States and Europe. Each country has, in its own way, attempted to create ethical and child-protective systems to allow for such adoptions.¹⁶⁹ Objections to adoption from these countries

China's implementing of a rule that not more than five percent of all adoptions could be to single persons . . . helped keep adoptions from China lower than they otherwise would have been.

Id.

¹⁶⁹ See Adam Pertman, *Russia's Reforms Slow Flow of US Adoptions*, THE BOSTON GLOBE, May 2, 2000 at A1 (describing the adoption law reform overseen by then President-elect Putin and stating that the new laws were designed “to halt bribery, child-selling and other illegal activities allegedly occurring during the course of placing Russian orphans in US adoptive homes.”). See also *China Tightens Adoption Rules for Foreigners, Loosens Them for Chinese*, AGENCE FRANCE PRESSE,

would have to confront the “institutional history” of orphanage life in these two countries where, at least in the more extreme cases, deprivation and suffering have been endemic. In the 1990s, Human Rights Watch carried out detailed studies of human rights abuses in the system of state orphanage care in both countries. The purpose of these reports may not have been so much to castigate Russia or China, but rather to demonstrate the extreme difficulty of truly humane treatment in a vast network of orphanages in which state workers mind tens of thousands of abandoned and unwanted children.¹⁷⁰

The case of China is shocking; yet, the conditions of China’s abandoned girls and smaller number of boys (mainly with disabilities) grew naturally out of China’s attempts to enforce its one child policy. Human Rights Watch, relying on official statistics as well as word from the “inside,” reported death rates of staggering proportions for babies in China’s institutions.¹⁷¹ The children were not only neglected, but were, in effect, allowed to die from starvation and severe forms of neglect.¹⁷² Chinese law until recently disallowed Chinese couples from adopting these children, one assumes in order to prevent a back-door circumvention of its population control laws.¹⁷³ As recently as the early 1990s, mortality rates for infants at the Shanghai Children’s Welfare Institute were said by Human Rights Watch to be as high as 90%.¹⁷⁴ No one could fail to be moved by the images of children strapped for hours to potties, or left to

May 27, 1999 available at LEXIS, Nexis Library, News File (describing new rules requiring more extensive information on foreign adoptive parents, and describing new possibilities for Chinese people to adopt children from orphanages.).

¹⁷⁰ See Human Rights Watch, *Chinese Orphanages: A Follow-up* (Mar. 1996, Vol. 8, No 1 (C)), available at <http://www.hrw.org/summaries/s.china963.2.html>. See also Kay Johnson, *Commentary: Who Is to Blame for the High Death Rate in Orphanages?*, CHINAL RTS. FORUM, available at http://www.iso.hrichna.org/iso/article.adp?article_id=80&subcategory_id=17 (1996) (finding that Chinese children brought to orphanages by hospital authorities were already extremely ill, and that “orphanage[s] served as hospice[s],” and noting that the institution she visited neither had the funds nor the staff to provide intensive medical care.).

¹⁷¹ In its March 1996 Report, *Chinese Orphanages: A Follow-up*, *supra* note 170, Human Rights watch states that official statistics from 1989 revealed an average ratio of deaths to admissions in its orphanages of no less than 57.9% and an overall mortality rate nationwide of at least 24.7%. More specifically, the official statistics in the orphanage systems of Shaanxi, Guangxi, Henan and Fujian provinces reveal a death-to-admissions ratio exceeding 90% and an overall inmate mortality in the 60% to 70% range. *Id.*

¹⁷² *Id.*

¹⁷³ See generally Rachel A. Bouman, *China’s Attempt to Promote Domestic Adoption: How Does China’s One-Child Policy Affect Recent Revisions in China’s Adoption Law and Measure up to the Hague Convention?* 13 TRANSNAT’L LAW. 91 (2000).

¹⁷⁴ See Human Rights Watch, *Chinses Orphanages*, *supra* note 170.

die by themselves in rooms, aptly termed “dying rooms,” shown in a 1995 documentary of the same name.¹⁷⁵

Needless to say, the truth of these reports was vehemently denied by the Chinese authorities.¹⁷⁶ In the intervening years, researchers carrying out field work in China have described the complex reasons why children are abandoned there, the suffering of families, and the fact that many Chinese families would adopt many of these institutionalized children if given greater chances to do so. The picture is even more complex when one takes account of the fact that many of the recent improvements in orphanage life have come about as a direct result of the “orphanage donations” given in each foreign adoption by the adoptive families.¹⁷⁷ Even discounting some of the claims made by Human Rights Watch, the situation in China, the residual effects of which may be ongoing, was unspeakable. And, millions of baby girls in China appear to have literally disappeared from the face of the earth.¹⁷⁸

¹⁷⁵ THE DYING ROOMS (Lauderdale Productions, 1995). American researcher and China adoption expert Dr. Kay Johnson had a very different interpretation of the reasons for the high death rates in Chinese orphanages. She argues that there was no concerted policy by the Chinese authorities to allow the children to die, but rather the authorities were faced with the fact that many children were extremely ill by the time they arrived at the orphanages. Johnson, *Commentary*, *supra* note 170. Dr. Johnson is also well known for her work on the motivations for abandonment in China, and on the views of adoptive parents within China, many of whom, according to Johnson, are eagerly adopting baby girls.

¹⁷⁶ See *FACT SHEET 1- Orphanages in China* available at www.oneworld.org/news/partner_news/china_factsheet1.html (noting the Chinese government’s insistence that “[t]he welfare facilities in China provide orphans with adequate adoption, medical, and educational services until they reach adult age, when they are helped with employment and marriage”). See also Anthony Spaeth, *Life and Death in Shanghai: China Lashes Out at a Human Rights Report Alleging Widespread Abuse of Orphans*, TIME MAGAZINE, INTERNATIONAL EDITION, Jan. 22, 1996, available at LEXIS, Nexis Library, News File.

¹⁷⁷ There is little doubt that the mandatory “orphanage donation” given by foreign adoptive parents, combined with other foreign assistance to orphanages and renewed efforts by the Chinese authorities, have vastly improved the conditions of life for children in Chinese orphanages, although little is known about the situation in some child welfare institutions, especially in remote areas. See *Roundtable*, *supra* note 11, at 43 (statement of David Youtz, President, Families with Children from China of Greater New York). Youtz noted:

China has made great strides in addressing these [orphanage] problems [of the early 1990s]. They have been very successful at bringing new resources to orphanages. At many of the institutions we visited, the quality of care, physical infrastructure, toys and equipment, and other conditions have dramatically improved.

Id. He also testified that “[g]raft and irregularities in dealings with foreign adoptions have been extremely rare.” *Id.*

¹⁷⁸ Female infanticide and feticide are also widespread in India. See Jill McGivering, *India Targets Female Feticide*, BBC NEWS, at <http://news.bbc.co.uk/2/hi/>

Human Rights Watch has carried out similar studies of human rights abuses within the vast network of Russian orphanages.¹⁷⁹ Their report chronicles a tale of abuse, discrimination, neglect, and a near certainty that children who survived this system would end up involved in the criminal underworld. The slightest disabilities are sufficient to ensure that the children will be treated as sub-human and will be denied whatever stimulation might otherwise be available.¹⁸⁰ As with the case of the China report, this report should not be taken as an indictment of Russians working within the child welfare system, as many are dedicated and caring.¹⁸¹

south_asia/2765853.stm (Feb. 15, 2003) (describing new legal powers to crack down on the abuse of pre-natal screening and abortion of female fetuses in India. In the worst affected areas, the article states, “[f]igures have fallen to as low as fewer than eight girls for every 10 boys.”). See also Sampath Kumar, *Changing Views on Female Infanticide*, BBC NEWS, at http://news.bbc.co.uk/2/hi/south_asia/1703630.stm (Dec. 11, 2001) (describing efforts to create an awareness among villagers in Tamil Nadu state that infanticide should be stopped and reporting that local NGOs say baby girls are still being killed after birth, despite government programs to educate people against the practice); Satinder Bindra, *Grim Motives Behind Infant Killings*, CNN.com, July 7, 2003, available at LEXIS, Nexis Library, News File (stating that “[e]very year, thousands of baby girls are murdered by their own parents. Sociologists blame such killings on a widely held Indian belief that girls are an economic drain because families still have to pay expensive dowries at the time of their marriage.”).

¹⁷⁹ Human Rights Watch reported:

Russian institutions are bursting with abandoned children, who now total more than 600,000 children who are defined by the state as being ‘without parental care.’ During each of the last two years, more than 113,000 children have been abandoned, reflecting a breathtaking rise from 67,286 in 1992. Another 30,000 are reported to run away from troubled homes each year, clogging the urban railway stations and metros, sometimes ending up in shelters and orphanages.

Human Rights Watch, *Cruelty and Neglect in Russian Orphanages*, Ch. II (1998), available at www.hrw.org/reports98/russia2/Russ98d-03.htm.

¹⁸⁰ *Id.* (stating that while the “educable” children “generally attend regular . . . public schools . . . where they can earn a secondary school diploma” the children who are diagnosed as “having heavy physical and mental disabilities at the age of four . . . are committed to closed institutions which often resemble the Dickensian asylums of the nineteenth century. Those who reach the age of eighteen are then transferred to asylums where they remain for the duration of their lives.”).

¹⁸¹ There is no reason to think that only Russian and Chinese orphanages suffer from serious problems of deprivation. See Ramya Kannan, *Orphanages: Who Cares for Them?* THE HINDU, June 8, 1998, available at LEXIS, Nexis Library, News File (“The Government-run orphanage at Kosapet lacks adequate rooms for the children to sleep in. The two dingy rooms available are just enough to keep their meager belongings. Proposals for an additional dining hall and toilets for the children have not materialized ‘due to lack of funds.’”). Kannan continues that for orphanage children, life is “towering walls, Pavlovian bells that ring for food, small tin cases, three sets of wearable clothes and house matrons.” *Id.* Contrasting the children who maintain some degree of family contact with the complete orphans, Kannan writes of one abandoned child: “[t]he only reaction he shows is when the bell rings for lunch

Like China, Russia has made efforts to allow its children to be adopted out into permanent, loving homes.¹⁸² It is ironic, though, that rumors of abuse of adopted children periodically roil Russian politics, leading to new restrictions and difficulties placed in the way of would-be adoptive families.¹⁸³ There is virtually no evidence that adoptions carried out through legitimate North American or European adoption agencies have led to any significant child abuse or, even less plausible, to use of children for their organs.¹⁸⁴

There are such serious question marks hanging over the issue of the institutionalization of children, even in circumstances not as dire as those described in the Human Rights Watch reports on China and Russia, that this article calls for the International Red Cross to be allowed to inspect conditions at a representative and random sampling of orphanages around the world. The international child welfare bodies spend a great deal of time and effort on the subject of corruption in the adoption process; this article calls on them to also support independent visits and evaluations of the conditions inside orphanages worldwide. To the extent that intercountry adoption might assist in relieving some children from terrible institutional conditions, it should be supported.

and the other children have trooped down to the dining hall. He wails out of sheer instinct and stops only when the ayah brings him his plate." *Id.*

¹⁸² The Russian Ministry of Labor and Social Development has reported that the number of adoptions has risen slightly over the past few years. Of 23,000 Russian children adopted in 2001, nearly 6,000 were adopted by non-Russians. The most common type of placement for children without families is with a guardian (presumably relatives); nearly 68,000 children were placed under a guardian's care. *Ministerstva Truda i Sotsialnovo Razvitiya Russiskoy Federatsii, Dyeti i Popecheniye v Internatnixh Uchrezhdeniyaxh* (May 2003), available at <http://www.mintrud.ru/?type=docs&id=791>

¹⁸³ See Genine Babakian, *Foreign Adoption a Last Resort*, *MOSCOW TIMES*, Oct. 8, 1994, § 565 (explaining that adoption advocates in Russia faced "an uphill battle in parliament, where Duma members have politicized the issue with sensationalized accusations of baby trading. Many would like to ban the flow of children altogether, and sharply criticized a draft law that was introduced in the Duma . . . proposing new tighter regulations.").

¹⁸⁴ See BARTHOLET, *FAMILY BONDS*, *supra* note 55, at 153. The author notes: [P]ublic discourse about international adoption focuses overwhelmingly on its alleged risks and dangers. Some of the concerns that have been voiced have no basis whatsoever in fact. One notorious example is the 'baby parts' rumor, prevalent in recent years in a number of sending countries, which involves the claim that people from the United States and other receiving countries are adopting foreign children in order to kill them for their organs, which are then used in organ transplants. The claim is entirely unsubstantiated and has been repeatedly debunked, but it has received widespread circulation in the media of some fifty countries, has been taken seriously by a number of international human rights groups, and is apparently widely believed. *Id.* (citation omitted).

E. *Children Without Families as a Global Cohort: Complex Social, Economic, and Cultural Pressures*

Countries associated with providing children for adoption by persons in the developed world should be assured that the presence of these children is not a function of poverty alone, nor is it a sign or symptom of the inability of a developing country to take care of its own children.¹⁸⁵ Rather, the existence of children who are not adequately parented by biological parents is a worldwide phenomenon. Resistance to parenting a particular child at a particular time is also a worldwide phenomenon, and is not uniquely characteristic of the developing world.¹⁸⁶ One can be pro-choice while recognizing that abortion is often a response not just to genuine crisis, which it certainly often is, but also to a sense that a child is not wanted now, in this situation, at this time. There is little doubt that if safe and affordable abortion were more widely available, there would be fewer abandoned children.¹⁸⁷ There should be no split between feminists and adoption advocates since the long-term problems of women in the developing world and the needs of children, while linked in inevitable ways, may also be discussed separately for some purposes—notably, in the context of the problem of institutionalization of children.¹⁸⁸ It must

¹⁸⁵ Where purely economic circumstances are causing the child abandonment and the child would be kept were it not for the economic situation, family reunification measures are urgently needed and likely to be fruitful.

¹⁸⁶ To some extent, greater access to safe and affordable abortion masks this social fact in the developed world. Margaret Liu, states that “many people attribute the shortage [of adoptable children in the US] to medical technology, greater contraceptive use, the legality of abortion, and society’s increased acceptance of single parent families.” Margaret Liu, *International Adoptions: An Overview*, 8 TEMP. INT’L & COMP. L.J. 187, 190 (1994). Economic advantage does not lead naturally to impeccable or unambiguous human behavior. Regarding abortion safety in non-Western countries, see for example, *About Seven Million Abortions in India Every Year: Health Official*, AGENCE FRANCE PRESSE, Mar. 9, 2001 available at LEXIS, News Library, News File (quoting a health official as stating that more than 80% of Indian abortions are unsafe, and that a fifth of the 80,000 maternal deaths that occur globally because of unsafe abortions take place in India.).

¹⁸⁷ See Geetanjali Misra et al., *Poor Reproductive Health and Environmental Degradation: Outcomes of Women’s Low Status in India*, 6 COLO. J. INT’L ENVTL. L. & POL’Y 273, 276 (1995) (setting out the situation in India in extreme terms). The authors write:

Indian women lack control over their reproduction, sexuality, mobility, education, and political representation. They lack control over such decisions as whether to have children, how many to have, when to have them, and whether to terminate a pregnancy. They lack the freedom to decide when to have sex, with whom to have sex, whether to use contraceptives, and who should use the contraceptives.

Id.

¹⁸⁸ It could be considered paradoxical that despite the great resistance to the idea of children requiring an alternative family to their family of biological origin, abortion

also be borne in mind that even the wealthiest countries sometimes have significant levels of child abuse and neglect and, thus, also have children with a clear need for truly alternative parents—not just alternative caregivers.¹⁸⁹

Unfortunately, the matter of intercountry adoption tends to be cast in purely economic terms. Poor countries, the typical description goes, produce children they cannot pay for, leading to a situation where these children become the “possessions” of persons in wealthier countries. But the problem is not at all this simple, as the rate of abortion and the continued need for foster care within the wealthier states make plain. A great deal of writing on the subject spurns the view that adoption can be the happiest possible outcome for many children, even where unfortunate loopholes in a particular national legal system might continue to allow for profiteering and corruption. Rather, the issue is often presented as if adoption itself were exploitation, and this represents a thoroughly mistaken analysis. A wide range of phenomena in all parts of the world leads to the creation of children who are not wanted in the lives of particular biological parents at a particular time. The reasons are often economic at their root, but are not simply or purely economic. Biological parents from all walks of life, including biological parents in the highest economic brackets, may not be in a position to parent at a given time.

As acknowledged above, this is not to say that there have never been abuses of the concept of adoption. Any sort of forced group removal of children from homes on grounds of placing them in “preferred environments” is reprehensible. On the question of involuntary termination of parental rights, the greatest care must be taken no matter what form of alternative care is indicated.¹⁹⁰ Likewise, any form of coercion of birth mothers for the purpose of procuring children for adoption is to be condemned and eliminated. But it is vital to clarify that these perversions of the idea of adoption make up only a small part of the contemporary real-

is accepted as a perfectly viable solution. However, that discussion is outside the scope of this article.

¹⁸⁹ See Diane Carman, *Real Life Foster Care is a Tale of Horrors*, DENVER POST, Oct. 10, 2002 at B-01 (describing the traumatic effects on children of the impermanency of foster care, and the particular problems of Colorado’s foster care system). See also *Senators Heed ‘Call to Action,’ on Foster Care*, STATES NEWS SERVICE, June 12, 2003 (describing a press conference held to bring attention to foster care children waiting for permanent adoption placements); *Adopting in the US*, CHRISTIAN SCIENCE MONITOR, July 29, 2002, at 8 (“Tougher state rules are removing more and more children from abusive or otherwise unfit parents and swelling the ranks of those in foster care. But that system of providing a haven for a limited time has produced more roadblocks than roads out for those children.”).

¹⁹⁰ See, e.g., Cheryl A. DeMichele, *The Illinois Adoption Act: Should a Child’s Length of Time in Foster Care Measure Parental Unfitness?* 30 LOY. U. CHI. L.J. 727 (1999) (expressing concern over state moves to terminate parental rights more easily in order to allow for adoptions).

ity of adoption. This study is limited to an examination of transnational adoption, but the principles apply equally to domestic adoption, in the context of which there are many ethnic and communal sensitivities and many accusations of exploitation.¹⁹¹

It is troubling that a good deal of writing on the subject of international adoption implies that children are available for adoption precisely because someone is willing to “pay for” them. This implies that large numbers of children would not be institutionalized, and would be with their families of origin, were it not for unscrupulous parties preying on birth families in order to feed a “market.” In this regard, the market discourse often used to describe adoption is both misleading and destructive. There are homeless children by the hundreds of thousands all over the world. Much of the academic and non-academic writing on the subject suffers from a failure to pursue empirical approaches to such questions as: which children are homeless, for what set of reasons, and how their existence relates to those who might attempt to profiteer on the phenomenon of adoption. Drawing a distinction between profiteering and the artificial creation of a market in children is a primary task, one which has to be dealt with in light of international sociological reality. Assumptions about imperialism and exploitation and the relative merits of biological and adoptive families cannot possibly elicit an appropriate set of legal responses.

At the same time, the question of whether the children who really need homes are the children who are being adopted must be faced, and faced squarely, if intercountry adoption is to survive. The lack of centralized enforcement of adoption law in many countries may lead to a situation in which certain kinds of children (female infants in particular) “appear” in the system, since they are the most desirable from the point of view of would-be adoptive families. This problem can be minimized, if not completely eliminated, by a rigorous implementation of the Hague Convention regime, or at least something close. Centralized matching of children with adoptive families, on the Chinese model, would seem to offer the greatest hope for eliminating the distortion and perversion of the purposes of intercountry adoption. The premise of this article is that there are vast numbers of children who are genuinely in need of families, and that they are not part of a “market” driven by the demands of adoptive families.

¹⁹¹ There has been a long-running controversy in the United States over what role race should play in domestic adoption placements. See, e.g., Liana Nazaryan, *Interracial Adoption: Is a Colorblind Adoption a Good Idea in a Color Conscious Society?* 23 J. JUV. L. 100 (2002/2003) (expressing the view that race should not be overemphasized in adoption placements and providing information on private adoption in the United States and the role of money in the the U.S. process). The subject of race and domestic adoption is outside the scope of this article.

IV. THE PSYCHOLOGICAL BASIS FOR A HUMAN RIGHTS APPROACH
TO INTERCOUNTRY ADOPTION

A. *Is there a human rights imperative, or is it all a matter of
viewpoint?*

Our modern sense of human rights derives from the concept of a universal person, with certain needs held in common with all other persons.¹⁹² There are statistical indications that institutional life has a devastating effect on child development; our sense of the relationship between institutionalization and the human rights of children must derive from these observable facts. It does not take much medical imagination to understand that the international prohibition against torture is based on similar universal and irreducible human needs and characteristics. The same could be said about rights to health and to education, although these are more often honored in the breach.

This article takes the position that a right to one's own culture and to the possibility of enjoying that culture must first depend on sound psychological health. This writer argues against the idea that group rights to self-determination or to cultural autonomy create an adequate reason to allow children to languish in orphanages. Further, this article considers many of the adolescent identity issues that arise from adoption, especially into intercultural and interethnic families, to be of a secondary order compared to the foundational psychology of basic attachment and bonding theory involving the experiences of very young children.¹⁹³ This article compares the right not to be institutionalized with the right not to be tortured, not of course in the literal sense, but rather in that we can identify common negative effects on the human psyche—quite apart from cul-

¹⁹² See Melanne Andromecca Civic, *A Comparative Analysis of International and Chinese Human Rights Law—Universality versus Cultural Relativism*, 2 BUFF. JOUR. INT'L L. 285, 292 (1995/1996). Civic asserts:

[T]he internationalization of human rights means that the international community, through the United Nations system, has declared that human rights issues cross national boundaries and are valid international concerns. . . . A policy which fiercely protects the integrity of domestic sovereignty at the expense of human rights may result in harm to many individuals.

Id.

¹⁹³ Astonishingly, some critics of international adoption seem to believe that the emphasis on attachment disorders in discussions of institutionalized children is a manifestation of Western ethnocentrism. See Derek Kirton, *Intercountry Adoption in the U.K.: Towards an Ethical Foreign Policy?*, in INTERCOUNTRY ADOPTION: DEVELOPMENTS, TRENDS AND PERSPECTIVES 66, 78 (Peter Selman ed., 2000) (“Ethnocentricity is apparent in the ways in which ‘Western’ norms are used to interpret ‘the best interests of the child’. This applies not only to the particular elevation of attachment but also in interpretation of the (un)importance of religion and relationships with birth family.”). Certainly attachment disorders are universally observable and go to the heart of personality development in all human beings.

tural differences—which allow us to articulate an absolute prohibition on such treatment.

Obviously, there are “better” and “worse” orphanages.¹⁹⁴ But human rights law and the human rights community must face up to the general effects of living in a group setting without a family of one’s own before making assumptions about the relationship of intercountry adoption to group and cultural rights. There is a good deal of literature that calls for creative “group settings” as a substitute for domestic or international adoption; it would take a substantial amount of empirical data to convince this writer that these arrangements work as well as a family.¹⁹⁵

It is well recognized that older adoptive children tend to suffer from complex disorders and, in the worst cases, from attachment disorders that are extremely difficult to “cure,” requiring time and patience and usually professional intervention.¹⁹⁶ Adoptive parents have described a set of

¹⁹⁴ See *EU organization official likens Moldovan orphanages to Nazi camps* (Basapress news agency, Chisinau, in English, BBC Monitoring Kiev Unit, Jan. 21, 2000) (describing the comments of a visiting EU official, who said that the large number of orphanages and psychiatric hospitals he visited were “unacceptable and some even inhumane.” and who spoke of some “headmasters and chief physicians who are truly bothered to maintain better conditions while others pump everything into their pockets.”).

¹⁹⁵ No one could dispute that Romania’s moves to close its large orphanages are a positive change. It remains to be seen whether the new “dormitory-style institutions” and foster care arrangements promoted as substitutes can compare with actual family life. See, e.g., McAleer, *supra* note 70 at 1 (describing the changes in the adoption system in Romania). These changes stemmed from scathing EU criticism, led by the European Parliament’s rapporteur for Romania, Baroness Emma Nicholson, of both the old orphanage system and the new Romanian process of intercountry adoption. See Eugen Tomiuc, *Romania: Report Assails Nation over Treatment of Orphans*, Radio Free Europe, June 4, 2001, (quoting the Baroness stating: “There’s a market, a global market in children. Now, alas, Romania is one of the source countries.”).

¹⁹⁶ See Don Van Dyke et al., *Promoting a Healthy Tomorrow Here for Children Adopted from Abroad*, CONTEMPORARY PEDIATRICS (Feb. 2003), at <http://www.contemporariypediatrics.com>. The authors explain:

The attachment cycle begins when an infant experiences a need such as hunger, thirst, loneliness, or fear. The infant expresses the need by crying, smiling, or some other signal, and an adult intervenes. Once the need has been met, the child relaxes. This cycle, repeated throughout infancy, is crucial to a child’s sense of safety and trust, to development of a healthy personality and to higher level functioning.

Disruptions in the attachment cycle leave a child feeling unsafe and unnurtured. If basic survival needs are not met, the child won’t attain normal developmental milestones. Functions of the brain stem (respiration, heart rate, reflexes), mid-brain (hunger, sleep), limbic system (attention, self-regulation, and attachment behaviors), and cortex (learning, memory, and cause-and-effect thinking) are all affected.

Symptoms of attachment disorders may continue throughout a person’s lifetime.

Id.

characteristics now familiar as symptoms of childrens' failures to attach or to bond with a consistent primary caretaker during critical formative periods. This leads to a child's failure to trust the world, or adults, as reliable, and causes children to depend on themselves for care and comfort. This early disappointment with the world can come about whenever the caregiver is seen as not consistently responsive to the child's needs. Even in "better" orphanages, it is completely possible, indeed likely, that children will soon perceive that they are "sharing" the available adults.

Attachment disorders are psychological problems of the most fundamental kind; they make it all but impossible for an affected child to grow into a capable and well-adjusted human being. The suffering inflicted on institutionalized children is incalculable, since it involves a profound disappointment by the child in his or her immediate environment.¹⁹⁷ Any international system that continues to countenance mass institutionalization is untenable in human rights terms and should be the subject of urgent inquiry by international organizations devoted to child welfare. The lack of clarity in the language of the UNCRC must likewise be altered in the near term. A separate protocol on the subject of institutionalization and adoption, however politically challenging, should be drafted and debated.

B. *Ideal Legal Regimes for Sending and Receiving Children: What Characteristics These Would Have*

1. Best Interests, Child Psychology, and International Human Rights

In light of the foregoing discussion, we should be able to map out national regimes for transnational adoption—regimes that serve the twofold purpose of helping children exercise their human rights and rigorously wringing corruption from the system. While the "best interests of the child" is by now thoroughly familiar at every level in the discussion of children's rights and the law relating to children, what this phrase means in practice and in the international adoption context is a complex matter.¹⁹⁸ Often, the main players in this field are so concerned with political and diplomatic sensitivities that they are not in a position to advocate for clarity. As inter-agency competition becomes more intense, the likelihood that agencies will be able to point out where distortions arise is lessened. Best interests in national adoption law must rest on awareness of basic principles of child psychology, particularly in relation to neglect and

¹⁹⁷ See notes 182, 185, 186, *infra*.

¹⁹⁸ UNCRC article 3 states that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration," but it does not deal clearly with the issue of institutionalization. UNCRC, *supra* note 21, at art. 3.

under-stimulation in group care.¹⁹⁹ Best interests and children's rights must take into account the realities of child psychology, which are comparatively factual—not merely speculative—and neither philosophical nor ideological.²⁰⁰

Many writers on the subject refer to children as “resources” of a country; however, the requirement of treating each child as an individual with interests and a psyche militates against accepting this proposition in anything more than a poetic sense. Nonetheless, in terms of political discourse, this is a not uncommon theme worldwide. More serious issues arise when the criticism is raised that intercountry adoption takes children away from their “own” communities and cultures, and sends them off to live with strangers. As explained above, this approach misleadingly equates cultural identification with such core personality issues as a capacity for attachment. In order to be consistent with the international rights of children, legal regimes must reflect a hierarchy of human needs, with consistency and depth of care placed at the top of the hierarchy.

National legal regimes should not be constructed on the belief that complex relationships with cultural environments are the equivalent of the psychological problems that arise from long-term residence in institutional or other inadequate care.²⁰¹ Providing food, shelter, and even some degree of affection in institutional settings is simply not the equivalent of good parenting. One can only speculate on the influence exerted by the primary international organizations concerned with children's rights and interests, insofar as they appear to have frequently set themselves against

¹⁹⁹ See Sandra R. Kaler & B.J. Freeman, *Analysis of Environmental Deprivation: Cognitive and Social Development in Romanian Orphans*, 35 *J. CHILD PSYCHOL. & PSYCHIATRY* 769, 779 (1994), who explain:

While all children in this representative sample of Romanian orphans exhibited deficits in cognitive and social functioning, their greatest strengths were in peer social interaction. . . . Despite world-wide advances in health, education and technology, there exists a group of thousands of children struggling to survive on minimal physical, social and emotional support. Their profound deprivation and their severe developmental delays should serve to both shame and challenge individuals and governments interested in meeting the needs of children.

²⁰⁰ This writer accepts, and even embraces, the larger ideological questions that often arise in discussions of intercountry adoption, but argues that, when faced with the immediate issue of institutionalized children, living without families of their own, these larger questions must be seen as long-term problems to be settled among adults by political means.

²⁰¹ For an overview of problems associated with long-term institutional care, see Dana Johnson, *Medical and Developmental Sequelae of Early Childhood Institutionalization in International Adoptees From Romania and the Russian Federation*, in *EFFECTS OF EARLY ADVERSITY ON NEUROLOBEHAVIORAL DEVELOPMENT* 113, 114 (C. Nelson ed., 2000) (noting of these adoptees that “[n]o group illustrates better the concept,” which is the cornerstone of contemporary developmental neurobiology, “that the first few years of life determine,” our future well-being).

the concept of intercountry adoption, in favor of forms of in-country care that simply cannot compare with the advantages of "a family of one's own."²⁰² The fact that developing children will experience some confusion and upset over issues surrounding adoption and movement from one culture to another cannot be compared to the profoundly debilitating effects of life in an institution or even in foster care, where the fostering relationships are less than the total commitment of family members to one another.

While the relevant international laws and conventions set out a hierarchy which at least implies that institutional care is a poor alternative, the position of international law on the relative merits of adoption, including intercountry adoption, versus in-country foster care is less than clear. This has brought about a situation lacking a clear-cut, legally mandated hierarchy of solutions from best to worst. The fact that the existing law remains undefined on this critical point tends to transfer discretion to individual countries such that law-making is vulnerable to nationalistic political pressures, particularly in countries with larger numbers of "waiting" children.

National regimes should reflect a commitment to ensuring that children do not languish in institutional care for longer than it takes to determine that family reunification, other extended family alternatives, or in-country adoption are not going to happen. Paperwork certifying how the children came into care should be carried out for all children within national care systems, so that the possibility of international adoption in such circumstances would become available at the earliest feasible opportunity. Each national regime should contain both the Hague Convention's anti-corruption features, including a central agency to oversee adoptions, as well as simplification and facilitation features which must be seen as part of the human rights imperative outlined above.

It has been pointed out that in some countries where allegations of corruption have surfaced, full implementation of the Hague Convention procedures is difficult because of administrative costs and lack of a functioning government bureaucracy. In such situations, it may be easier for countries to follow the path of least resistance and allow "facilitators" to run the adoption system (an unsustainable solution), or to eliminate the international adoption system altogether as being impossible to control at the center.

It seems clear that the Hague Convention requires the establishment of a fund, perhaps based on a portion of adoption fees and disbursed wherever needed to pay for the meaningful implementation of the Hague

²⁰² See D. Frank et al., *Infants and Young Children in Orphanages: One View From Pediatrics and Child Psychiatry*, 97 PEDIATRICS 569 (1996) (presenting research that shows institutional living offers children fewer opportunities to learn or to practice new skills, fails to provide motivational conditions involving reinforcement or praise, and does not adapt to individual needs or differences.).

Convention. Without such funding, it is easy for countries to continue undesirable practices, which have the effect of discrediting international adoption generally. It should be noted that the China Center of Adoption Affairs (“CCAA”) and the Indian Central Adoption Resource Agency (“CARA”) accomplish a great deal of oversight and control with relatively small expenditure of resources. Adequate funding does not necessarily entail the creation of a cumbersome bureaucracy; rather, it could involve establishing a number of knowledgeable, incorruptible, and internationally credible persons in each sending country to make sure that the Hague Convention principles are observed by all participants in the system—a measure that would help enormously. Access to adoption from any particular country should be restricted to agencies willing to observe the spirit of the Hague Convention.²⁰³

One notes a strong push-pull effect in countries that have traditionally sent a large number of children out through intercountry adoption programs; the need to find families for these children is recognized while, at the same time, nationalistic impulses, fears of corruption and of damage to the national reputation continue to assert themselves. This leads to a profoundly ambiguous situation characterized by delay and costly and inefficient procedures, which in the aggregate amount to a kind of quota system, under which only a select group of children in need are allowed to be adopted internationally. These countries are understandably vulnerable to sensational stories of corruption in intercountry adoptions.²⁰⁴ The response to such embarrassment usually comes in the form of dubious procedural safeguards, including the “two trip” requirement, longer in-country periods for adoptive parents, and more rigorous attention to legal requirements that the children be offered to a certain number of prospective in-country adoptive parents. A more unified, globally consensual, and principled set of changes would eliminate the need for these piece-

²⁰³ Some adoption specialists argue that the proliferation of agencies and resultant inter-agency competition have exacerbated problems of corruption in the system. *See, e.g.,* Maskew, *supra* note 59 (in reference to corruption in the Cambodian adoption system, stating that “. . . the majority of people who work in adoption do so for the right reasons—to help children There are too many good agencies that are being placed in unworkable situations and even being run out of business by those who don’t do things ethically.”).

²⁰⁴ *See* Katz, *supra* note 66, at 291-92 (“[T]here is a high degree of xenophobia in intercountry adoptions. In some countries, rumors circulate claiming that the children are being adopted solely to be used as organ donors or in child sex rings.”). *See also* David Scanlan, *Stolen Children? A Child-Snatching Hysteria Sweeps the Country*, MACLEAN’S, Apr. 18, 1994, at 29 (describing rumors that swept Guatemala to the effect that children were being stolen for adoption and organ harvesting). This situation is not helped by ambiguous statements by representatives of international child welfare agencies. Child welfare officials often concede that they do not have any proof of the link between international adoption and organ harvesting.

meal reforms that have the tendency to allow children to be adopted in nontransparent, and even irrational, increments.

It is fairly obvious, though not provable in the strict sense, that many countries are not allowing as many adoptable children to be adopted as they could. More often than not, the process goes forward enveloped in layers of ambiguity. It is unclear to what degree sending countries are truly suspicious of the adopters and of their own officials, or even to what degree sending countries are supportive of or hostile to intercountry adoption. This article calls for concrete measures to eliminate some of this ambiguity and mystery from the system through a sort of “global negotiation” forum. To those familiar with social conditions in a country, it should be quite apparent whether a particular child is likely to be reunified with a family of origin, or to be adopted domestically. Where both are highly unlikely, the human rights imperative urged here requires us to find an out-of-country solution for that child in the form of adoption. Where national caution is manifest in a de facto quota system, tens of thousands of children could be arbitrarily forced to languish in inferior forms of care. On the other hand, failure to control the system can lead to thousands of newborns who might not actually require intercountry adoption at all to find their way into the system, at the expense of the children who more genuinely require adoption.

Receiving countries also set up roadblocks to the proliferation of intercountry adoption. Many European countries display resistance, if not downright hostility, to such adoptions.²⁰⁵ The cumbersome nature of procedures, characterized by official social workers holding a monopoly over home studies and evaluations, tremendous delays, and a hostile press, discourages adoptive parents.²⁰⁶ The United States is taking a very

²⁰⁵ Even in Sweden, which has the highest per capita rate of international adoption in the world, a government-appointed committee has recommended placing strict age limits on adoption eligibility. One can only imagine the outcry that would result if such recommendations were made with respect to biological parenting. *Sweden Mulls Banning Couples Older than 42 from Adopting*, AGENCE FRANCE PRESSE, June 16, 2003 (quoting a member of the Forum for Adopted Children stating that “adoption should not be a form of therapy for the adoptive parents.”). See *CYFs Manager Slammed as Anti-Adoption Website Quotes Upset Lobbyists*, SUNDAY STAR-TIMES (Auckland), May 18, 2003, at 11 (describing an incident in which New Zealand’s Child, Youth and Family adoption services manager stated that she was working to abolish adoption, specifically stating: “I discovered there are always more things to do (like working for adoption change altogether—doing away with it would be lovely).”).

²⁰⁶ While recent changes to United Kingdom law on international adoption have been broadly welcomed, publicity surrounding these changes has been presented in terms of “tightening up” and being “tougher” on adoptive parents. See, e.g., Julie Wheldon, *Adopting Foreign Children: Tougher Reforms in Place*, PRESS ASS’N, May 24, 2003, available at LEXIS, Nexis Library, Wires File (explaining that the new rules “would . . . make sure all adopters were properly assessed and approved as suitable to

long time to implement the Hague Convention, and there are mixed predictions concerning what the overall effect of implementation will be. The traditionally restrictive Immigration and Naturalization Service (“INS”) definition of “orphan” has received a good deal of attention.²⁰⁷ It seems that rigorous and even over the top screening in the receiving country, in the form of checks and home studies, is justified to give peace of mind to the sending countries.²⁰⁸ This is also true of the requirement to send post-

adopt and that no profit was made from the process”); *New Safeguards to Protect Intercountry Adoption Children*, M2 PRESSWIRE, May 27, 2003, available at LEXIS, Nexis Library, M2pw File (detailing “more stringent protections and restrictions” in the new UK laws). There is a long tradition of skepticism towards intercountry adoption among social workers in the UK and in Ireland. See, e.g., Kirton, *supra* note 193. Kirton’s article represents well the negative perspective on adoption based on larger political considerations. Out of many interesting rhetorical examples, note the following:

The ‘free market’ pressure can be seen most clearly in the USA, but is also present to a degree in the UK. The impetus comes from ensuring the ‘supply’ of children, and it is clear that those involved have no interest in removing the ‘need’ for ICA. . . . Beneath the child-centered language lies a hegemonic view that the children of other countries are ‘our children’, but the partiality of the liberal view becomes clearer when it is realized that they are only ‘our children’ when ‘we’ want to adopt them.”

Id. at 82.

²⁰⁷ Current U.S. law has been criticized for its restrictive definition of “orphan,” which limits the number of children considered adoptable under U.S. rules, even when they are available for adoption under the law of their country of origin:

Congress has severely and irrationally limited the scope of foreign adoption by granting entry only to foreign adoptees who fit a narrow definition of *orphan*. For an adoptee to qualify, both parents must have died or have abandoned the child, or there must be a demonstration that the ‘sole or surviving’ parent is unable to care for the child. Excluded are children who in some technical sense have two parents . . . even if those parents are demonstrably unable or unwilling to care for the child, and even if those parents want to surrender the child for adoption.

BARTHOLET, *FAMILY BONDS*, *supra* note 55, at 147 (citations omitted). U.S. implementation of the Hague Convention will amend the definition of adoptable child to allow a larger number of children to be adopted. On the other hand, some critical commentators have argued that use of the word “orphan” in U.S. statutory language has encouraged an impression among adoptive parents that the children they are adopting are truly “orphans”. See Norma McCorvey, *I AM ROE—MY LIFE*, *ROE V. WADE*, AND *FREEDOM OF CHOICE* (1994). However, there is no evidence to suggest that the INS definition of “orphan” status leads adoptive parents to believe that the children they are adopting are orphans in the literal sense.

²⁰⁸ However, whereas he checks on adoptive parents are very stringent, there are essentially no checks on biological parenting. Elizabeth Bartholet writes:

It was only when I sought to parent an already existing child produced by others that the government stepped in, asserting that I must understand that I had no rights whatsoever to engage in this form of parenting and that if I was even to be considered for the privilege, I must humble myself before the bureaucrats and demonstrate my fitness according to their rules. The theory is that the best interests of the child demand the screening of adoptive parents, but this makes

placement reports on internationally adopted children, which realistically takes into account the manner in which they have come to be in their new families. It is true that biological parents require no such screening, but this is simply a fact of life and reflects widely held ideas of child protection. This should not, however, extend to mystification of biological relations, or to the observable tendency to hold biological ties as absolute, even in the face of evidence that the relationship is a poor or failed one. However, the requirement of longer or multiple adoption trips does not serve the purpose of child welfare, and should be examined for its efficacy.

It appears that no country is willing to facilitate the adoption process while there is a risk of harming the national reputation. Negative publicity surrounding intercountry adoption has created an aura of the illicit, and each national jurisdiction currently operates in social and political isolation, despite the objectives of the Hague Convention. To break out of this state of affairs would require the creation of a truly impartial international body dedicated to examining the child welfare situation in each sending and receiving country. Such a body would have the credibility to respond to rumors or to other crises that might threaten particular programs. By combining advocacy and skepticism, such a body could be relied on by all sides to sort out the factual situation, and thereby to guarantee the full promise of the Hague Convention principles.

V. CASE STUDIES IN CRISIS: BARRIERS TO ADOPTION ADVOCACY

Recent months have seen a heightened sense of crisis in intercountry adoption—a proliferation of crises beyond the norm. A number of programs have been shut down, either voluntarily or involuntarily, largely due to suspicions that the national program in question had been so tainted by corrupt procedures that one could no longer be sure that the children offered for adoption were truly free for adoption in any ethical sense or, indeed, that the children most in need of adoptive families were the same as the ones being offered.²⁰⁹ This section will briefly address problems in Cambodia, in Vietnam, in Romania, and in Guatemala, and will attempt to outline what went wrong in these countries.

What seems clear is that, even as international adoption becomes more common and becomes part of the larger global culture, the reputation of the practice is under threat from a failure to rein in abuses. This failure makes it far more difficult to discuss adoption rationally from the point of view of child development and human rights. What follows are several

sense only if you think that there is something deeply suspect about parenting a child born to another.

BARTHOLET, *FAMILY BONDS*, *supra* note 55, at 69.

²⁰⁹ See Jeff D. Opdyke, *Adoption's New Geography: Changes in Global Rules Make Process Even Tougher, Costlier; Bolivia, Brazil May Open Up*, WALL ST. J., Oct. 14, 2003 at D1.

case studies of the most severe problems in intercountry adoption today. The difficulties described are to some degree common to all adoption programs. This discussion does not take account of the many national jurisdictions in which intercountry adoption procedures are entirely unknown or unused.²¹⁰ Where there is an absence of even minimal government infrastructure, adoption agencies are reluctant to get involved. Certain countries have also shown a traditional mistrust of, and refusal to take part in, intercountry adoption, even where children live in large numbers in substandard institutional accommodation or on the streets.

A. Cambodia

The story of adoption out of Cambodia is typical of what can happen when the process, including child matching, is dominated by private persons operating with little government oversight. Intercountry adoption of Cambodian children began to grow in the late 1990s. In addition to European adoptions, in the United States, applications to adopt Cambodian children “leapt from 249 in 1998 to about 100 a month in the summer of 2001.”²¹¹ The speed and ease with which parents could adopt from Cambodia, due to fast child referrals and very short trips to the country, made it certain that adoptive parents would find their way to the Cambodian programs in large numbers.²¹² By 2002, the U.S. INS had taken the unprecedented step of refusing to grant further visas to Cambodian children adopted by American parents, thereby effectively shutting down the Cambodian adoption system, at least in relation to the United States.²¹³ While it has been relatively common for a country in the throes of an

²¹⁰ A number of Latin American countries in the 1990s moved to end international adoptions due to accusations of corruption and baby selling. See, e.g., *Paraguay Suspends International Adoptions*, AGENCE FRANCE PRESS, Sept. 18, 1995. The U.S. State Department website indicates no visas issued to Paraguayan children in the succeeding years. Also note Mexico’s reluctance to become involved in international adoptions, in *Roadblocks to US adoptions; with tens of thousands of foreign kids being brought here, cultural, bureaucratic barriers keep Mexican children from reaping benefits*, Anna Gorman, LOS ANGELES TIMES, Dec. 26, 2002, at 16 (pointing out that Mexican officials “have been cautious about placing children in the United States, in part, because it has moved so slowly in implementing the Hague Convention on Intercountry Adoptions”).

²¹¹ Sara Corbett, *Baby Laundering: Where do Babies Come From?*, N.Y. TIMES MAGAZINE, June 16, 2002, at 44.

²¹² *Id.* at 46 (writing that Mary Lib Mooney, the director of the National Association of Ethical Adoption Professionals, “blames the large number of US agencies using freelance facilitators, who operate on commission, rather than salaried staff members to locate adoptable children in foreign countries for the cycle of corruption”). Facilitators had essentially free reign in Cambodia until the American moratorium on Cambodian adoptions. *Id.*

²¹³ See News Release, Immigration and Naturalization Service, INS Announces Suspension of Cambodian Adoptions and Offer of Parole in Certain Pending Cases

adoption scandal to shut down its own adoption system in order to rethink procedures and standards, this was the first time that the INS had itself declared a country's adoption system too unreliable—in essence, too corrupt—to be recognized.²¹⁴ To date, it remains unclear whether the INS had hard evidence of widespread child trafficking in the name of adoption.²¹⁵ The more likely interpretation is that it had become impossible to know whether the children made available for adoption were in fact abandoned by families unable to care for them, or were sought out, and in some cases purchased, by facilitators who dominated the Cambodian adoption scene.²¹⁶

Not surprising in a country with little in the way of functioning institutions, Cambodia has had no centralized government agency to deal with adoption and to ensure its ethical pursuit.²¹⁷ The system operated through facilitators dealing directly with orphanages, some of whom were very unclear as to the children's actual origins. In late 2001, accusations were raised by the non-governmental organization Licadho alleging that

(Dec. 21, 2001) at http://uscis.gov/graphics/publicaffairs/newsrels/camb_adopt.htm. The release reads:

Expressing particular concern about the adoption process in two countries, Immigration and Naturalization Commissioner James Ziglar today announced an immediate suspension of the processing of adoption petitions in Cambodia and a review of the adoption process in Vietnam. . . . “INS’ responsibility to determine that a child is truly an orphan must never be tainted by any action that results in the exploitation of innocent children by separating them from their biological families as a result of fraud, trafficking in human beings or other criminal activity.”

Id.

²¹⁴ Gina Bartin, *Many Families in Limbo after US Halts Cambodian Adoptions*, MILWAUKEE J. SENTINAL, June 4, 2002, available at LEXIS, News Library, News File (“On December 21, [2001], the INS suspended Cambodian adoptions, an unprecedented move.”).

²¹⁵ See Ethica, Inc., *Child Trafficking: Why Can't the Immigration Service Prove It?*, (June 6, 2003) available at www.ethicanet.org (posing the question of whether we are “asking the impossible when interpretation of the law demands both that INS protect the children and meet an improbable standard of evidence?”).

²¹⁶ There are conflicting views as to whether or not child trafficking was taking place in Cambodia. For some sense of how confusing the situation is, see Bill Bainbridge and Lon Nara, *Baby Traffic Witnesses Recant*, PHNOM PENH POST, Issue 11/06, Mar. 15-28, 2002 (describing how key witnesses in a baby trafficking case had withdrawn their testimony).

²¹⁷ The endemic corruption in Cambodian institutions is well known. See *Cambodian Men Rapped for Having Sex with Underage Girls*, KYODO NEWS INT'L, Aug. 26, 2002, available at 2002 WL 23806495 (noting former UN Human Rights Commissioner Mary Robinson's “concern over corruption and the ‘culture of impunity’” in Cambodia and quoting Robinson saying that she raised concerns “‘about corruption and the lack of accountability of the perpetrators of the trafficking, the corruption of the police and [her] fear of ‘Mafia’ elements behind the trafficking’”).

several birthmothers had their children taken from them, ostensibly for medical testing, and never returned.²¹⁸ These children were said to have been placed for international adoption.

In the ensuing months, adoptive parents who had been matched with children prior to the cessation of Cambodian adoptions maintained lonely vigils in Cambodia and in the United States, demanding answers from the U.S. government, though few answers were forthcoming.²¹⁹ Conflicting views were expressed as to whether or not there was any genuine evidence of child trafficking, and most conceded that there were few accusations relative to the total number of adoptions. Tragically, a number of Cambodian children became sick and even died during the months in which the INS claimed to be carrying forward its investigation of corruption in the Cambodian adoption system.

By all accounts, there are many street children and institutionalized children in Cambodia; almost no one would maintain that there are few adoptable children in that country. What occurred in Cambodia, however, was that it became impossible to tell whether the children most in need of homes were being adopted, or whether the system of facilitators began to actually generate children who would be more desirable from an adoption point of view. The combination of such accusations and the unregulated nature of the process seems to have led to the INS shutdown.

The moratorium has gone on longer than most would have predicted. There is little reliable news about what has taken place in the orphanages or regarding the child abandonment situation in Cambodia. Licadho's statements that the sending orphanages have not been receiving abandoned children during the moratorium is interesting, but ultimately not conclusive of anything, since children who were not going to be kept in the family of origin could have met other fates; one simply does not know.²²⁰ Having shut down Cambodian adoptions into the United States,

²¹⁸ See *Briefing Paper*, Cambodian League for the Promotion and Defense of Human Rights (Licadho), May 2002 (on file with author) (describing a system in which mothers are approached by "recruiters" to give up their children for adoption in return for a modest payment, as well as instances in which mothers have been tricked or coerced into giving up children). While explosive, Licadho's allegations were supported with specifics in only a small number of cases. Licadho itself stated that "It is impossible to precisely estimate the scope of abuses related to the adoption process," given the difficulties associated with knowing how and where to bring such complaints. *Id.*

²¹⁹ See *Half a World Away: Suspension of Cambodian Adoptions Leaves Families in Agonizing Limbo*, ABC NEWS, (Aug. 9, 2002), available at http://abcnews.go.com/sections/2020/DailyNews/2020_cambodiaupdate2_020809.html (last visited August 28, 2002).

²²⁰ The Cambodian human rights group Licadho has stated that "very few babies have been 'abandoned' since the suspension." E-mail from Cambodian League for the Promotion and Defense of Human Rights (June 4, 2003, 07:17:10 EST) (on file with author).

the U.S. authorities appear to have reacted, at best, with remarkable slowness. It is reported that Cambodia is currently drafting a new adoption law, with UNICEF's assistance.²²¹ At a minimum, the new program will have to be modeled on Hague Convention principles, with a much diminished role for facilitators.²²²

B. Vietnam

In many ways, the problems encountered in Vietnam reflect those of Cambodia, although the Vietnamese adoption program is older and better established, and the infrastructure of child welfare in Vietnam is more sophisticated. Nonetheless, Vietnam has had occasion over the past years to recognize that things were spiraling out of the authorities' control, and shut down its programs until the issues were addressed. In January of 2003, Vietnam again closed its borders to international adoption, to allow itself time to rewrite adoption laws in a manner that would reflect the Hague Convention principles.²²³ As in Cambodia, stories have surfaced in recent years that birthmothers were induced to give up children to persons involved in intercountry adoption for the payment of what in context would be a substantial amount of money.²²⁴ As is generally the case, the numbers alleged are small, and the details nearly impossible to verify. It is similarly difficult to determine whether children were making their way into the adoption system who would otherwise not have been there. Before declaring a halt to international adoption except where there exists a bilateral agreement with the receiving country, Vietnam also moved to add a requirement of "two trips" to Vietnam to adopt. New regulations mirror the worldwide trend towards centralization of the

²²¹ The most recent draft available to the public makes clear that Cambodia is planning to create a central governmental authority to handle dossiers by prospective adoptive parents. See *Draft Law on Inter-Country Adoption*, art. 29, available at <http://www.ethicanet.org/cambodialaw.pdf> (last updated 2003).

²²² See the sensible and balanced suggestion in Kelly M. Wittner, *Curbing Child-Trafficking in Intercountry Adoptions: Will International Treaties and Adoption Moratoriums Accomplish the Job In Cambodia?* 12 PAC. RIM L. & POL'Y J. 595 (2003).

²²³ See Tran Le Thuy, *Vietnam, Denmark Ink Child Adoption Pact*, SAIGON TIMES DAILY, May 27, 2003 available at LEXIS, Nexis Library, Gnw File (stating that the agreement signed between the two countries "is in line with the 1993 Hague Convention, of which Denmark is a member," and reporting that the Minister of Justice of Vietnam, Uong Chu Luu, stated "the signing of this pact would pave the way for Vietnam to join the convention," and "Vietnam will sign such bilateral agreements with several other countries to draw on experience before it joins the convention.").

²²⁴ See Didier Lauras, *Vietnam Rewrites the Rules to Clean Up the Adoption Trade*, AGENCE FRANCE PRESSE, Feb. 21, 2003, available at LEXIS, News Library, News File (describing the allegations of corruption that led Vietnam to take action to alter its system of international adoption).

adoption process, with government exerting more control and oversight.²²⁵ As of this writing, adoption from Vietnam remains closed to U.S. citizens, although work on some form of bilateral agreement acceptable to both sides is said to be ongoing.²²⁶

C. Romania

The case of Romania is perhaps the most notorious and complex of any in the annals of intercountry adoption. There is a vast amount of literature on the subject of the horrific conditions of child welfare in President Ceausescu's Romania. His government maintained a policy of maximizing the Romanian population, and therefore restricted access to birth control and to abortion. These restrictions led to a situation in which many unwanted children ended up in orphanages, where they were severely mistreated.²²⁷ In addition, Romanian medical authorities advocated "treatment" of these and other children with blood-based nutritional supplements, which led inevitably to the spread of HIV infection among the young inmates of these institutions.²²⁸ The unspeakable conditions revealed with the downfall of the Communist regime in 1991 brought hundreds of adoptive parents to Romania from a variety of

²²⁵ For example, a U.S. Department of State notice reported:

In July 2002, the Government of Vietnam issued a new decree on international adoptions that took effect on January 2, 2003. The decree imposes a number of new requirements on international adoptions, including the requirement that there be an agreement between Vietnam and other countries regarding international adoptions before such adoptions can take place. In light of this decree, the Department of State is actively discussing with the Government of Vietnam the conditions under which adoptions between our two countries can continue and lead to a possible memorandum of understanding.

U.S. Department of State, Bureau of Consular Affairs, Office of Children's Issues, *Important Notice: Expect Delays in Adoptions in Vietnam*, at <http://travel.state.gov/vietnamupdate.html> (Mar. 18, 2003).

²²⁶ *Id.*

²²⁷ See Phelim McAleer, *Romania Urged to Deal with Unwanted Babies*, FIN. TIMES (London), May 30, 2001, available at LEXIS, Nexis Library, Fintme File ("Elena Ceausescu's policy of forcing women to have at least four children, coupled with a decline in living standards, led to massive abandonment, with 100,000 children in institutions. After the revolution, many children were adopted by western couples, who paid large sums of money.").

²²⁸ See Donald G. McNeil, Jr., *Romania's AIDS Children: A Lifeline Lost*, N.Y. TIMES, Jan. 7, 2001, at A1 ("In the 1980s, Romanian children got blood transfusions not just for hemophilia, surgery and other reasons common in the West, but also as a sort of 'pick me up' for those anemic or undernourished." Because the blood supply became contaminated with AIDS in the mid 1980s, by 1990 at the time of Ceausescu's death, "tens of thousands of babies and children had been injected with HIV-positive blood.").

Western countries.²²⁹ Studies of the effects of this sort of institutionalization on Romanian children set a standard for our understanding of the psychological damage caused by institutional neglect.²³⁰

No sane person could deny that the children found in the Romanian orphanages were among the most damaged on earth. They were neglected, isolated, and in many cases dying, and their photographs were as haunting as those of Holocaust survivors at the liberation of the concentration camps. Yet, within a few short years, the Romanian adoption system was out of control, with many condemning the adoption of Romanian children by foreigners on the grounds that these were not really “orphans,” and were in fact being sold by their parents.²³¹ Predictably, after enormous publicity on the plight of Romania’s orphanage children brought many prospective adoptive parents to Romania, the virtually unregulated adoption system quickly turned into one characterized by highly unethical practices.

This state of affairs took on European implications, as forces in the European Parliament, notably Baroness Emma Nicholson, parliamentary rapporteur for Romania, demanded that Romania greatly improve its child welfare system in order to become eligible for European Union (“EU”) membership.²³² The story is complicated by the fact of Baroness

²²⁹ There is no doubt about the fact that the lack of regulation in Romania caused a free-for-all in adoptions after the fall of the Ceausescu regime. However, those opposed to Romanian adoption in general have adopted the extreme view that all adoption out of Romania was exploitative and market-driven, disregarding the fact that many Romanian children were in fact saved from the worst fate imaginable. See, e.g., McElhinney, *As Another Baby Leaves the Country*, *supra* note 132 (arguing that people who believed they were “rescuing” Romanian children from institutions were in fact helping to create a situation in which the money involved “condemned thousands more children to institutions and made reform of childcare almost impossible”).

²³⁰ Research has demonstrated that institutionalized children experience developmental delays and in some cases suffer irreversible psychological damage. Dr. Dana Johnson and his colleagues examined 65 children adopted from Romania and found that only 15% were physically healthy and developmentally normal. Dr. Johnson identified patterns of growth failure that are associated with prolonged deprivation and found that infants’ lengths, weights and head circumferences were all adversely affected by institutionalization. Dana E. Johnson et al., *The Health of Children Adopted From Romania*, 268 J. AM. MED. ASS’N 3446 (1992).

²³¹ The illegal sale of babies in Romania received extensive coverage in the mainstream press. Persons working for adoption agencies were accused of paying birth parents to sign away their parental rights and of approaching birth mothers while they were still in maternity wards. See *20/20 with Barbara Walters* (ABC television broadcast, Dec. 18, 2001).

²³² As the European Parliament’s rapporteur for Romania, Baroness Nicholson used unequivocal language linking restrictions on the Romanian international adoption system to its hopes of acceding to the EU. He stated that the European Parliament “considers that smooth development of the negotiations will necessarily

Nicholson's past role in Save the Children, and her apparent dislike of intercountry adoption generally.²³³ The Romanian government shut down its intercountry adoption process in 2001; it has not yet reopened, although new adoption laws have been regularly discussed since that time.²³⁴

In one sense, it seemed that Romania was being asked to eliminate its intercountry adoption mechanism in order to be considered "modern"

depend upon Romania's capacity to bring her child welfare fully inside the UN Convention for the Rights of the Child" and "believes that the continued involvement of international adoption associated agencies in the mainstream of government destabilizes reform." The Romanian government is called upon to create "a range of family focused residential options e.g. fostering, national adoptions, small group homes, de-institutionalization and international adoption as a special and exceptional last choice option only." The report also demands a two year suspension of international adoption, a suspension that continues to the present. Draft Report on Romania's Membership Application to the European Union and the State of Negotiations, EUR. PARL. DOC. (COM(2000)710) 9-10 (2001) available at <http://www.europarl.eu.int/meetdocs/committees/afet/20010618/433899en.pdf>.

²³³ Baroness Emma Nicholson, former head of Save the Children UK and now European Parliament rapporteur on child welfare, is notoriously hostile to intercountry adoption. She is the person most responsible for the current moratorium on Romanian adoptions, but her statements go well beyond the Romanian situation. See Ann Marie Hourihane, SUNDAY TRIBUNE (Ireland), January 5, 2003 (quoting the Baroness as saying that "the explosion of inter-country adoption which happened [since the 1980s] has been driven by the USA. There is a global movement of hundreds of thousands of children from country to country. Inter-country adoption has been hijacked by the child traffickers.") Baroness Nicholson reportedly believes that even children in war zones are better off staying where they are, because "follow up studies on intercountry adoption" show that intercountry adoptions are not a success. *Id.* She also believes that a child's language, culture and community "must be given priority over a foreign family, no matter how loving." *Id.* She points out the UNCRF's statement that "contrary to public sentiment, institutional care is no reason for inter-country adoption." *Id.* It is striking that the EU has allowed a person holding such extremely negative views of international adoption to occupy such a position of power and influence.

²³⁴ A U.S. Department of State notice reported:

The Romanian government has extended its moratorium on adoptions until new legislation governing adoption is implemented. The actual date of enactment and implementation of the new legislation cannot be predicted at this time.

The Romanian Adoption Committee (RAC) announced a one-year moratorium on inter-country adoption beginning June 21, 2001. That decision formalized a de facto suspension of international adoptions that had been in effect since Prime Minister Nastase's government took office in December 2000. The government has extended that moratorium numerous times, pending passage and implementation of new legislation intended to eliminate corruption from Romania's adoption system.

U.S. Department of State, Bureau of Consular Affairs, Office of Children's Issues, *Update on Romanian Moratorium on International Adoption*, at http://www.travel.state.gov/adoption_romania.html (June 2003).

enough for EU membership. What is particularly troubling about the Romanian adoption story is the fact that critics of the system as it existed up until the moratorium have refused to acknowledge that many of those adoptions were truly and literally life saving, were properly motivated, were ethically sound, and created loving families.[fn] The fact that the system was moving forward without the requisite control is deplorable and that a corrupt dynamic had set in demanded intervention; however, this should not lead to a conclusion that the adoptions did not bring about very positive changes for many children.²³⁵ The failure of those most closely concerned with the Romanian reforms to concede this beneficial aspect of intercountry adoption gives pause. Also, it remains to be seen whether the much-discussed Romanian foster care substitutes for institutional care will prove capable of providing a family-like standard of care.²³⁶ It is unlikely that family reunification, domestic adoption, and foster care will eliminate what had become endemic problems in Romania's child welfare system.

D. Guatemala

Guatemala has received a good deal of international attention lately due to its heavy reliance on private attorneys in the adoption process. Under its system, approximately 3,000 infants relinquished by birthmothers have been adopted abroad yearly, mostly to the United States.²³⁷ By contrast, it is very difficult to obtain clearances for children in orphanages that would allow them into the adoption system.²³⁸ Guatemala has announced its intention to implement the Hague Convention, although critics argue that Guatemala is too poor, and its governmental infrastructure too weak, to carry this out successfully.²³⁹ Like so many

²³⁵ The negative effects on children residing in Romanian orphanages are well known and have been widely studied. See, e.g., Sandra R. Kaler & B.J. Freeman, *Analysis of Environmental Deprivation: Cognitive and Social Development in Romanian Orphans*, 35 J. CHILD & ADOLESCENT PSYCHOL. & PSYCHIATRY 769 (1993).

²³⁶ See McAleer, *supra* note 70, at 26.

²³⁷ See Elton, *supra* note 63, at 1 (stating that Guatemala ranks fourth in the world for the number of babies provided for international adoptions).

²³⁸ See *id.* (quoting UNICEF representative Elizabeth Gibbons's statement that "one of the most tragic aspects of the adoption situation in Guatemala is that it is not the children who most need homes that are being adopted," since there are around 300 orphanages "overflowing" with children, whereas only 12% of children adopted abroad come from such institutions).

²³⁹ See *Important Notice on Guatemalan Adoptions*, US Department of State, Bureau of Consular Affairs, July 13, 2003, (stating that "under Hague Convention procedures, the Central Authority [of Guatemala] will now refer the children" and pointing out that "The Guatemalan Central Authority for Adoptions, part of the Solicitor General's Office (PGN), announced on March 19, 2003, that it will be to implement the Hague intercountry adoption convention, effective March 5, 2003). For

other countries, Guatemala has been plagued by anecdotal accusations of pressure placed on young and poor birthmothers to relinquish their babies for international adoption. The U.S. response to such charges, insistence that each child be DNA tested to ensure that it is in fact the birthmother placing the child, does not provide an adequate response. Scientific determination of the fact that it is “really” birthmothers offering the children for adoption, when financial incentives to relinquish children allegedly exist in the system, will certainly not satisfy critics of the Guatemalan adoption system.²⁴⁰ As with other countries, few doubt that there are many children in Guatemala who are in urgent need of family care. But as with Cambodia, there are concerns that the children in greatest need are not the children being adopted. If there were serious reforms in the system, centralizing control and diminishing the influence of private attorneys, the profile of children being adopted might change dramatically.²⁴¹

VI. CONCLUSIONS

A. *Recommendations to the United States*

The United States should move forward more quickly to implement the Hague Convention.²⁴² Tighter controls on the U.S. side could go far

more information on the controversy over this change, see Ethica’s *Position Paper on Guatemala*, available at <http://www.ethicanet.org/item.asp?recordid=guatemalappaper&pagestyle=default> (Feb. 2003) (explaining critics charge that private attorneys in Guatemala provide “much needed service to the children of Guatemala and many of the social services functions that the State fails to provide. They also express understandable concern over the difficulties in realistically implementing a central adoption system in a country which lacks the infrastructure and resources needed to function adequately.”).

²⁴⁰ UNICEF has been very active in drawing attention to these problems and in recommending changes. See, for example, the detailed report commissioned by UNICEF and prepared by the Latin American Institute for Education and Communication, *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 (2000).

²⁴¹ In correspondence with the author, Professor Bartholet has pointed out that there might be very positive aspects to allowing the system to be run by private attorneys. Otherwise, she argues, no adoptions might take place at all. E-mail from Elizabeth Bartholet, Professor of Law, Harvard Law School, to Sara Dillon (Aug. 7, 2003, 10:31) (on file with author).

²⁴² See U.S. State Department report, *Hague Convention on Intercountry Adoption*, at <http://travel.state.gov/hagueinfo2002.html> (June 2002) (explaining that the United States signed the Hague Convention in March of 1994, that in 2000, the Intercountry Adoption Act, P.L. 106-279, was signed into law, and that implementing regulations are expected to be finalized in 2004). For the text of the final draft of these regulations, see the Hague Adoption Standards Project Website, at <http://www.hague regs.org/Continue.htm> (last modified Dec. 7, 2001). Among other issues, the

towards discouraging abuses in the major sending countries. The United States should also, as it proceeds with Hague Convention implementation, treat every country as if it were part of the Hague system, and work out agreements with sending countries with the objective of controlling costs, of overseeing procedures, and of tracking down allegations of corruption.²⁴³ The United States should only undertake to shut down programs, as happened in Cambodia, in the most extreme cases, and every effort should be made to reopen more ethically sound programs in the most expeditious manner possible. As it now stands, would-be adoptive parents have many complaints about the lack of transparency and accountability on the part of U.S. authorities in these matters; the Cambodian example was a nightmare for those prospective adoptive parents caught up in it.²⁴⁴ Indeed, U.S. authorities have yet to adequately account for their behavior at the time of the Cambodian moratorium, and the rationale for the moratorium's prolonged continuance is also less than clear.

B. *General Conclusions*

Institutionalization is the worst possible solution to the problems of children without families of origin. In-country foster care may not prove to be greatly superior to the orphanage system; experience of foster care in the United States has certainly not proven to be an ideal solution to the problems of children without families. While there are many wonderful foster families, foster care's characteristic lack of permanency makes it an improper model of long-term child welfare. While many writers hostile to intercountry adoption on principle see in-country foster care as a viable alternative, this may be largely wishful thinking. "Extended family" care is also a solution that might work very well in some instances, but is clearly only relevant to certain situations. Determining in what situations such care would work is a matter of empirical investigation, not of political perspective.

Assuming that greater efforts can be put in place to eliminate the abuses and corruption in the intercountry adoption system, this form of

implementing regulations clarify the process by which U.S. agencies will be accredited to allow them to continue work in the international adoption field. *Id.*

²⁴³ It appears that the U.S. authorities are anxious to avoid the sort of difficulties that arose in the Cambodian context. To that end, they are pursuing a pilot program to "Adjudicate Orphan Status First." See Memorandum from William R. Yates, to Bureau of Citizenship and Immigration Services, The "Adjudicate Orphan Status First" Pilot Program at <http://www.bcis.gov/graphics/lawsregs/handbook/OrphanPilot.pdf> (June 4, 2003) (describing how the pilot program, to be carried out in Haiti, Honduras, the Philippines, Poland, and Sierra Leone, will allow U.S. authorities to investigate and determine the "orphan status" of children prior to adoptive parents obtaining legal custody).

²⁴⁴ See *supra* note 206.

adoption should no longer be seen in the light of global political relations, but instead should be approached as a cooperative international venture, whereby recognized and respected agencies find substitute families for as many children without families as possible, assuming genuine necessity. There is an urgent need for a global agency to carry out rigorous empirical studies on the question of how many children are in fact in need of families, where those children are, how they might best be helped, and how their needs fit in with potential adoptive families, in-country and abroad. It should be noted that many of the evils attributed to intercountry adopters alone—i.e., seeking a young infant to resemble the adoptive parents—may also be characteristic of in-country adoptive parents.²⁴⁵

Indeed, the matter of children without families is not simply one of rich and poor, of North and South, or of sending and receiving countries, though it is often described as such.²⁴⁶ The example of wealthier developed countries shows that children without families is a worldwide phenomenon; the reasons may vary according to social and cultural reality, but the *fact* of a cohort of children needing families is consistent. Despite much writing on the desirability of traditional, alternative, and complex forms of care and bonding, a small child in particular needs a family of his or her own, whatever form this family may take.

International human rights principles, applied in light of the demands of the human psyche, require a global regime to deal with children without families. The current piecemeal, politically confused and confusing, nationally-based, under- or wrongly regulated system has led to tens of thousands of children languishing in orphanages on the one hand, and charges of the artificial creation of a “market” in children on the other. A global agency such as UNICEF has the capacity to take on the task of providing oversight for the ethical adoption of children but it, like other agencies charged with the care of children, has frequently articulated an at best ambiguous, and at worst implicitly hostile, view of international adoption. 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. It is this author’s contention that a separate, objective, and specialized agency, acting under the Hague Convention principles, should be set up through a widely representative conference. The underlying ethos should, as mentioned above,

²⁴⁵ The idea that Americans primarily want healthy white babies for adoption is probably no more than a myth, and is at best a gross generalization. See Abraham McLaughlin, *Americans are Bringing Home Baby—Increasingly from Africa*, CHRISTIAN SCI. MONITOR, Dec. 4, 2003, available at <http://www.csmonitor.com/2003/1204/p01s03-woaf.htm> (describing the rapid increase in adoption from Ethiopia).

²⁴⁶ See Saclier, *supra* note 4, at 13 (writing that “neglect and abandonment of children are mainly the consequences of poverty and destitution.”). While no one could deny that poverty and destitution may play a crucial role in neglect and abandonment, there are in many cases more complex social factors at work as well.

reflect both advocacy of adoption and a healthy skepticism with regard to the possibilities for abuse.

The Hague Convention will never be broadly ratified and properly implemented unless there is a global fund to assist in the creation of national adoption departments or official agencies. A genuinely global regime, with the expertise and capacity to respond to national political furors on the subject of adoption, is necessary in order to bring an end to the uncertainty and uneven benefits to children. Individual countries should be relieved of the burden of devising their national adoption regimes in light of nationalistic passions and historical grievances. Clearly, the human rights dimension of, and basis of, the Hague Convention lacks clarity; its preamble's stated preference for adoption over other forms of in-country care such as foster care and institutional living is too feebly articulated to overcome the vast reservoir of prejudice against intercountry adoption.

This article has advocated for two momentous changes in the global approach to intercountry adoption. First, spearheaded by UN institutions, the UNCRC should make clear, in a separate protocol, its approval of intercountry adoption as a solution to the problems of at least some children without families, including a clear statement on human rights grounds against institutional living. Second, this article has called for independent and objective visits to orphanages by the International Red Cross or by a similar body, with a view to determining the full extent of the damage caused to children by institutionalization and group living around the world. As a guarantor that the dangers of exploitation and profiteering will not re-emerge in the face of such a global consensus, the Hague Convention should be allowed to live up to its true potential through a vigorous system of oversight and enforcement. It would be preferable to invest in a newly designated global agency, enjoying credibility on all sides, to exercise these surveillance powers.

This system of oversight need not involve the creation of a large and unwieldy bureaucracy, as even a small number of dedicated specialists in this field could accomplish a great deal. If intercountry adoption can intervene to improve the lives of even a portion of children currently in institutions, on the streets, in sweat shops, or working in the sex industry, then it is reprehensible for child welfare spokespersons not to try and bring this about as quickly and efficiently as possible. The trend represented by the Hague Convention makes clear that the incentives to corruption must be firmly and plainly dealt with; in the absence of corruption, there is no longer any excuse of sufficient weight to justify leaving children to languish without families when alternatives are available, whether in or out of the country of origin.

AFTERWORD: A PARABLE OF ACRIMONY

On April 28, 2003, a letter appeared in the *Weekly Standard* from Lawrence Lindsey, former economic advisor in the Bush administration, entitled "Don't Trust the International Bureaucrats to be Humanitarians."²⁴⁷ Mr. Lindsey expressed extreme displeasure at what he perceived to be U.N., and more specifically UNICEF, policy, that prevents children in conflict situations from being adopted out of country, even where the evidence suggests that there is no hope of family reunification or extended family care. He and his wife had made the acquaintance of two children he called Elizabeth and Benjamin (apparently not their original names), who had been orphaned during the Kosovo crisis. According to Mr. Lindsey, these children had no prospect of being adopted by extended family members, and he and his wife did everything they could to bring them to the United States, without success. Mr. Lindsey complained: "It is the official policy of UNICEF and the United Nations to permit no transnational adoption wherever the UN has jurisdiction." "This," he continued, "is the reality of UN 'humanitarianism.'"²⁴⁸

Carol Bellamy, the Executive Director of UNICEF, wrote back to Mr. Lindsey in order to "get the facts straight," and published the letter.²⁴⁹ She refuted his notion that UNICEF "runs orphanages" or tells countries how to approach the question of adoption. She pointed out that UNICEF, in common with many other governmental and non-governmental bodies, does embrace the idea that children should be kept in country for at least two years during times of upheaval and conflict, to ensure that they have not been permanently separated from whatever family members might eventually find them. She stated that UNICEF's preference was for the children to be cared for in the local community, as they have "the right to grow to adulthood within the culture and community of their birth." She vigorously defended UNICEF's work and explained that the civil administration in Kosovo at the time was in complete collapse.²⁵⁰

To that extent, her statements were predictable and sensible. But Ms. Bellamy also slipped in some other remarks that go to the heart of our current legal confusion over what should be done about the problem of children without families. "That brings us to 'Benjamin and Elizabeth,'" she wrote. "We do not sit in judgment of Mr. Lindsey's intentions, which

²⁴⁷ Lawrence B. Lindsey, *The U.N. vs. Adoption: Don't Trust the International Bureaucrats to be Humanitarians*, THE WEEKLY STANDARD, Apr. 28, 2003, at 22, 22. The author does not know Mr. Lindsey, and makes no assessment of the accuracy of his remarks.

²⁴⁸ *Id.* The author of this article takes no position on Mr. Lindsey's bona fides, but is merely reporting an exchange that came to her attention.

²⁴⁹ Carol Bellamy, *Correspondence: Kosovo Kids*, THE WEEKLY STANDARD, May 7, 2003, at 6, 6.

²⁵⁰ *Id.*

surely were grounded in genuine love and compassion. *But it is interesting that he still refers to them with made-up names, not as the human beings they are, but as props in his own story of frustration.*"²⁵¹ These are hard words, especially coming from the Executive Director of the most prominent international agency charged with the care of children. It is unclear whether these remarks indicate an institutional attitude against intercountry adoption, but the possibility must be examined. Intercountry adoption must obviously not be about "demand." At the same time, an accurate portrayal of international adoption, especially as presented by powerful and influential child welfare agencies, should not be one of selfish adults committing wrongful or harmful acts "in the name of" compassion. Until this ideological background is sorted out and is based on a far better system of fact-gathering, there is unlikely to be a sound and just legal regime created at a national or an international level.

²⁵¹ *Id.* (emphasis added).

