

**INTER-AMERICAN COMMISSION ON HUMAN RIGHTS  
ORGANIZATION OF AMERICAN STATES**

**HEARING ON HUMAN RIGHTS OF UNPARENTED CHILDREN AND  
RELATED INTERNATIONAL ADOPTION POLICIES  
137<sup>TH</sup> ORDINARY PERIOD OF SESSIONS, NOVEMBER 6, 2009**

**WRITTEN TESTIMONY OF DELEGATION**

**Elizabeth Bartholet: Introduction: Significance of Hearing and Outline of Testimony:**

Thank you for this opportunity to present regarding the Human Rights of Unparented Children in Guatemala, Honduras and Peru.

Your decision to hear the particular Human Rights issues we address is of enormous significance. Many who talk about Human Rights in this context focus on very different issues, namely the Human Rights of Parents, and the Sovereignty Rights of States. When they address Child Rights they focus on Heritage rights to grow up in the family and country of birth.

We assert that Children's most fundamental Human Rights are to live and to grow up in a nurturing family so they can fulfill their human potential. These rights have been largely ignored in the debate surrounding Unparented Children and related International Adoption policies. We argue that Unparented Children have a right to be placed in families, either their original families, or if that is not feasible, then in the first available permanent nurturing families. This includes the right to be placed in International Adoption if that is where families are available. We argue that children have a related right to be liberated from the conditions characterizing orphanages and most foster care.

Paulo Barrozo will be presenting on the governing human rights law principles that makes the Child's best interests and the Child's right to grow up in a permanent nurturing family central.

Karen Bos will be presenting on the science demonstrating how essential nurturing parenting is for infants to develop basic mental, physical and emotional capacities, and how destructive institutions are of infants' potential for normal development.

Elizabeth Bartholet will conclude with a description of Human Rights violations suffered by Unparented Children in Guatemala, Honduras, and Peru, and our Request for Remedies.

## **Paulo Barrozo: Governing Human Rights Law**

### *1. The Human Rights of the Child*

The Inter-American human rights system is the global leader in the area of the rights of the child. Under this system “children are subjects entitled to rights, not only objects of protection.”<sup>1</sup>

The system’s foundational document, the American Declaration of the Rights and Duties of Man, declared in its *consideranda* that the principal objective of juridical and political institutions in the Americas was the protection of essential rights, creating the concrete conditions of their enjoyment. Article 6 of the Declaration codified the right of every person to a family and the necessary protection therefore. Article 7 recognized children’s entitlement to special protection, care and aid. Article 18, the linchpin of the Declaration, affirmed that every person was an independent and full-fledged subject of rights.

The American Convention on Human Rights led the system into a new phase of greater clarity and depth of commitment to the human rights of children. The Convention predicates human rights upon human personality and inherent human dignity, regardless of age. Article 5 enshrines every person’s right to physical, mental, and moral integrity. Article 17 recognizes the centrality of family in human experience. Article 19 extends to every child the right to positive measures of protection required by her or his condition. The scope of these measures has been defined by the Inter-American Court of Human Rights, and interpreted in light of the provisions of the Convention on the Rights of the Child, to include special protection for children deprived of a family environment, and to guarantee their survival and healthy development.<sup>2</sup>

Articles 15 and 16 of the Protocol of San Salvador<sup>3</sup> reinforced the States’ obligations in these areas, including that of enforcing the right of every child to grow under the protection and responsibility of families. The Riyadh Guideline 14 demands that placement of unparented children replicate “a stable and settled family environment.”

These are not merely abstract rights and principles. This Commission and the Court have brought them to life in landmark reports and opinions. Taken together, this body of jurisprudence on the human rights of the child plots a consistent trajectory of evolution. We ask the Commission today to further this trajectory by clarifying that these rights apply fully to the silent minority of unparented children in the Americas.

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<sup>1</sup> IACtHR, *Advisory Opinion OC-17/2002*, Judgment of August 28 2002, requested by the IACHR, paragraph 1 of the dispositive part of the Court’s Opinion.

<sup>2</sup> IACtRH, *Case of the “Street Children” v. Guatemala*, Judgment of November 19 1999, paragraph 196. The Court has reasoned that “the ultimate objective of protection of children in international instruments is the harmonious development of their personality and the enjoyment of their recognized rights.” IACtHR, *Advisory Opinion OC-17/2002*, paragraph 53.

<sup>3</sup> Applicable as treaty-based law to Guatemala and Peru and as expression of *jus cogens* of the American peoples to Honduras as well.

The social, medical, and developmental sciences demonstrate that membership in a nurturing family is a necessary condition for healthy physical and mental development. The sciences show the destructive and lasting effects institutions have on children. And the sciences demonstrate that foster care is generally far inferior to adoption.

Science demonstrates why the right to live in a nurturing family is a fundamental right of the child. Because the effects of institutionalization generally prevent children from fully enjoying most other rights later in life, the human right to grow in a family is a pre-condition for the enjoyment of most other human rights. Deprived of the right to grow in a nurturing family, children may not create and develop a project of life or seek out a meaning for their own existence.<sup>4</sup>

Unparented children are the most discrete and insular minority of any country. Until they find a nurturing family, their predicament is one of crushing “vulnerability and dependence”<sup>5</sup> upon their respective States. The suffering, regimentation, and isolation of institutionalized children often lead to spiritual death if not the complete obliteration of the child.<sup>6</sup>

## *2. Comissive and Omissive Violations*

(A) The evidence indicates that Guatemala, Honduras, and Peru have failed, in violation of article 19 of the Convention, to proactively identify and promote adoptive family placement of children who cannot and will not be reunified with their birth families. This has left unparented children in those countries at “serious risk for their development and even for their life,”<sup>7</sup> implicating the States in comissive and omissive “double-aggression” of their fundamental human rights.<sup>8</sup>

Scientific evidence supports the conclusion that no other single non-genetic factor in times of peace is more mentally and physically disabling than extended institutionalization in infancy. Those who survive early institutionalization often end up institutionalized as adolescents and adults. By their action and inaction States prominently contribute to this brutal orphanage-to-asylum pipeline.

Since for children who cannot and will not be raised by their birth parents adoption into a new family will generally be the only fully adequate way to provide their fundamental human right to a nurturing family, the States’ actions and omissions in relation to adoption have great potential

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<sup>4</sup> IACtRH, *Case of the “Street Children,”* Joint Concurring Opinion of Judges A. A. Cançado Trindade and A. Abreu-Burelli, paragraph 2.

<sup>5</sup> Cf. the Commission’s arguments transcribed in the IACtHR, *Case of the “Juvenile Reeducation Institute v. Paraguay,* Judgment of September 2 2004, paragraph 136.

<sup>6</sup> IACtRH, *Case of the “Street Children,”* Joint Concurring Opinion of Judges A. A. Cançado Trindade and A. Abreu-Burelli, paragraph 9.

<sup>7</sup> IACtRH, *Case of the “Street Children,”* paragraph 180.

<sup>8</sup> IACtRH, *Case of the “Street Children,”* paragraph 191.

for violation of the human rights of the child. A non-exhaustive list of general human rights violations includes the following.

(B) Comissive violations:

- (i) Policies and measures which restrict ethical domestic and international adoptions of unparented children constitute *prima facie* human rights violations.
- (ii) Policies and measures which make international adoption subsidiary to domestic institutionalization and typical domestic foster-care constitute *prima facie* human rights violations.
- (iii) States' preferences for domestic over international adoption which result in lengthier institutionalization constitute *prima facie* human rights violations.
- (iv) States' preferences for keeping children in-country based on States' sovereign control over population resources constitute commodification of children in direct violation of their fundamental human rights, inherent human dignity, and juridical personality.

(C) Omissive violations:

- (i) States' failures to adopt policies to consistently and aggressively promote the adoption of unparented children constitute *prima facie* human rights violations.
- (ii) States' failures to promptly identify children who cannot and will not be reunified with birth families and to legally free unparented children for domestic and international adoption constitute *prima facie* human rights violations.

**Karen Bos: The Science on the Human Infant's Need for Nurturing Parenting, and the Destructive Impact of Institutions.**

It has been known for over 50 years that children raised in institutions are at great risk for serious mental and physical health problems. We now have proof based on controlled social science studies that these developmental problems are directly caused by institutional rearing. We also now have scientific evidence of the damage to brain development produced by institutional care, damage which in turn results in long-term developmental problems. Today I will discuss the current scientific evidence for how institutional care is harmful for brain development.

Why is it that institutional care is bad for child development? Let me begin by describing what characterizes life in an institution. Children raised in an institution experience severe isolation and regimentation, with little access to caregivers (see slides 2-5); and older children often suffer physical and sexual abuse.

We know that experience plays a powerful role in shaping brain development after birth. Normal brain development depends on experiences that should be common to all children. These experiences include:

- a) sensory stimulation;
- b) access to a caregiver who is responsive to and consistently cares for the child;
- c) adequate nutrition;
- d) an environment that is low in so-called “toxic” stress.

Many children living in institutions lack some or all of these elemental requirements for development.

Why *specifically* are such conditions so bad for the brain? One reason is that inadequate input leads to under-development of some brain circuits and the mis-wiring of others. Accordingly, such children experience a range of problems due to “errors” in brain development.

*Early experience* often exerts an especially strong influence in terms of later brain development. This influential period of time is referred to as a *sensitive period*. The first few years of life are the most critical in terms of laying a strong foundation for later brain development. Indeed, in some aspects of brain functioning, stimulation must occur during a certain stage of development or the brain will never develop normally. Thus it may be difficult or impossible to recover from the impact of early institutional care, even after removal from this setting.

Accordingly, while any time spent in institutional care is destructive, time spent in early infancy is the most destructive. Children who spend their first two years of life in an institution are at high risk of serious disabilities in later life. And of course, the longer children spend in institutions, the worse off they will be.

Next I want to talk about some of the specific deficits that children raised in institutions experience. Children raised in institutions are known to experience a range of problems, including impairments in physical, cognitive, language, and social-emotional functioning. Specifically, these children often show growth stunting, impaired intellectual development, language delays, attachment problems, depression and anxiety, aggressive behavior problems, and inattention/hyperactivity. As one example, to illustrate the impact of institutional care on physical growth alone, one estimate is that institutionalized children fall behind one month of growth for every 2.6 months in a Romanian orphanage, 3.0 months in a Chinese orphanage, and 3.4 months in a Russian orphanage (see slide 6). By these calculations, a ten year old child who has lived in a Romanian institution his whole life would be expected to be the height of an average six year old. Here are some pictures of children raised in institutions in Romania that demonstrate this growth stunting (slide 7).

Cognitive development provides another striking example of the negative outcomes of institutional care as well as the positive outcomes of removing children from such care to nurturing family-like care. A study that I am involved with in Romania has found that children raised in institutions have an average IQ in the range of borderline mental retardation (see slide 8). When these children are removed from institutional care and placed into very high quality foster care, cognitive function improves, although it is still lower than children of similar demographics who were raised in their families from birth (see slide 9). This improvement is the

greatest for the children who are youngest when removed from the institution, especially if the child is younger than two years.

Recent research has allowed us to see some of the specific damage to the brain that institutional care causes. For example, neuro-imaging studies such as MRIs and EEGs have shown that institutionalized children have lower levels of brain activity in different important regions and a reduction in the connections between brain areas that are essential to normal brain functioning (see slide 10).

In summary, institutional care has long been known to lead to impairments in physical, cognitive, language, and social-emotional development. Recent science has confirmed in fairly dramatic ways that the origin of these deficits is in compromised brain development and further underscore the need for family placement from early infancy on, rather than institutional care, to give abandoned children an opportunity for normal development.

### **Elizabeth Bartholet: Human Rights Violations Suffered by Unparented Children in Guatemala, Honduras, and Peru, and Request for Remedies**

#### *1. The Situation of Unparented Children in These Countries, and Related Human Rights Violations*

Extreme poverty, civil unrest, war, and widespread illness have resulted in large numbers of children being orphaned, abandoned, or surrendered by their parents to institutional care. Limited welfare support exists to enable poor and single parents to raise their children.

International Adoption functioned in the past to place many thousands of children per year from these three countries in permanent nurturing homes, with many placed as young infants, giving them a good chance for normal development. International Adoption has now been largely shut down in these countries, reducing the total number of children placed in the United States to less than 1% of the number placed in the peak placement years. Placement for even those relatively few children typically occurs only after lengthy, damaging periods in institutional care. There continue to be very few domestic adoptive homes available in these countries, nowhere near enough for the children in need. Almost no domestic homes exist for older children or children with disabilities.

The many thousands of children per year who could have been placed in permanent nurturing families abroad are now almost certainly languishing in institutions or on the streets. Our information is that growing numbers of children are now crowding the existing institutions, and new institutions are being built.

Many of the children in institutions are orphaned, or have been abandoned. While many others have biological parents who can be identified, very few of these children will ever be sent home to live with those parents, either because of inadequate welfare support, or because of parental

unfitness. Yet there is no adequate system to identify children who should be freed for adoption.

Conditions in these institutions vary, but social, medical and developmental sciences demonstrate that even so-called “good” institutions are destructive for infants and children. The institutions in poor countries like Guatemala, Honduras, and Peru, are generally extremely limited in staff and other resources. Children who spend any significant number of months there are at extreme risk for future mental, physical and emotional problems.<sup>9</sup>

We recognize that abuses such as kidnapping and baby-buying occur, and we condemn these practices. But we urge the Commission to reject the kind of policy responses that many including the U.S. have encouraged, and that these three countries have adopted -- moratoria on International Adoption, restrictive regulations that require holding children while searches for in-country homes are conducted, and prohibitions on the private intermediaries that often function as the lifeblood of such adoption. These policies simply punish unparented children by denying them adoptive homes. We urge you to embrace instead policy responses which punish those who violate the laws against kidnapping and baby-buying by enforcing and where needed strengthening such laws. See the *International Adoption Policy Statement* attached, endorsed by many leading human and child rights experts and organizations.

## 2. Request for Remedies

(A) Considering the “victimization, human suffering, and rehabilitation of the victims,”<sup>10</sup> we respectfully request that the Commission issue a decision recognizing that under governing international and human rights law:

- (i) children’s best interests should be the guiding principle in matters related to Unparented Children, and should take precedence over State Sovereignty interests.<sup>11</sup>
- (ii) The most fundamental rights of the child are to live and to grow up in a permanent nurturing family;<sup>12</sup>
- (iii) Adoption, whether domestic or international, generally serves children’s interests in nurturing family care better than foster care or other “substitute family” care, and should be expanded to serve the needs of more children;
- (iv) Institutionalization deprives children of their liberty and subjects them to other

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<sup>9</sup> Extensive documentation of the problems suffered by children in institutions, the role played by International Adoption in providing permanent nurturing homes for such children, and recent severe restrictions on such adoption, is contained in Bartholet, “International Adoption: Thoughts on the Human Rights Issues,” 13 *Buff. Hum. Rts. L. Rev.* 151 (2007), [http://www.law.harvard.edu/faculty/bartholet/PUB\\_BUF\\_IA\\_2007.pdf](http://www.law.harvard.edu/faculty/bartholet/PUB_BUF_IA_2007.pdf), and “International Adoption: The Human Rights Position,” 1 *Global Policy* \_\_\_\_ (forthcoming 2010), <http://www.law.harvard.edu/faculty/bartholet/IA-GIPol72409.pdf>.

<sup>10</sup> IACtRH, *Case of the “Street Children” v. Guatemala*, Judgement of May 26, 2001. Separate Opinion of Judge A.A. Cancado Trindade, paragraph 3.

<sup>11</sup> IACtHR, *Advisory Opinion OC-17/2002*, paragraph 2 of the dispositive part of the Court’s Opinion (“children’s development and full enjoyment of their rights must be considered the guiding principles”).

<sup>12</sup> IACtHR, *Advisory Opinion OC-17/2002*, paragraph 4 of the dispositive part of the Court’s Opinion (“the family is the primary context for children’s development and exercise of their rights”).

- violations of their human rights;
- (v) States must take action to ensure children's rights to true family care from the earliest point in life possible;
  - (vi) Preferences for in-country placement which delay or deny adoptive placement, or which relegate children to institutional care, typical foster care or street life, violate children's human rights;
  - (vii) States must develop adequate systems for identifying all children in need of parental care, determining whether they can and should be returned to their biological parents, and if not, then terminating parental rights and placing children promptly in adoptive homes, whether domestic or international;
  - (viii) States must include International Adoption among the options for Unparented Children, and design systems implementing such adoption so as to expedite placement and minimize the damage children suffer in state care awaiting placement.
  - (ix) Adoption abuses should be addressed through enforcement and where needed strengthening of laws against kidnapping and baby-buying, not through restrictions on International Adoption such as in-country holding periods, or the prohibition of private intermediaries.

(B) We respectfully request that the Commission ask the Rapporteur on the Rights of the Child to conduct a special Investigation of the situation of Unparented Children in Guatemala, Honduras, and Peru, and issue a Report on the resulting findings, together with related Recommendations and Orders. An Investigation focused on the Human Rights problems of Unparented Children would be a hugely significant step, bringing desperately needed light to the issues. Many now dispute the facts, making claims that there are limited numbers of children in need, that "permanent foster care" can provide adequate nurturing, that domestic adoption can provide any needed adoptive homes. We believe these claims are false, but the Commission's Investigation and Report would provide proof of important facts now disputed. Similarly there is dispute about the impact of shutting down International Adoption, and whether it is more likely to stimulate domestic reforms helpful for children, or to harm children as we believe the facts show. And we need more specific information about the number of children held in institutions, the length of time they are held, the conditions in which they live, and the harm they suffer. We need more specific information about the parental status of children held in institutions, the need for systems identifying those who should be freed for adoption, the nature of current adoption regulation, and the need for adoption reform ensuring that as many children in need of homes as possible be placed as early in life as possible.

(C) We respectfully request that the Commission ask the Rapporteurs for each country in the Americas to include these Unparented Children issues in their regular inquiries and reports and recommend, as needed, hearings, Special Investigations and Reports by the Rapporteur on the Rights of the Child, and the prosecution of particular cases before the Inter-American Court of Human Rights. While the egregious violations of children's rights in Guatemala, Honduras, and Peru warrant the targeted Investigation and Report we call for, these problems constitute part of a larger pattern sadly typical of many other countries in the Americas. The United States is part of this pattern, having played an important role recently in shutting down International Adoption in

Guatemala, and imposing its own three-month waiting period before children can be placed for adoption outside the United States.

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We recognize that Guatemala, Honduras and Peru have an honorable tradition of commitment to the human rights of vulnerable persons. Should the States seek a friendly settlement of the human rights violations here charged, we would consider it a privilege to work with them toward legal and policy reform.

*Attachments:*

- A. *Slides for Karen Bos Testimony*
- B. *International Adoption Policy Statement endorsed by various Human Rights and Child Rights experts and organizations,*  
*<http://www.law.harvard.edu/programs/about/cap/ia/iapolicystatement.pdf>*

Respectfully Submitted,

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# The Effects of Institutional Care on Brain and Behavioral Development

What characterizes life in an  
institution?

# ...isolation



# ....regimentation



# ...little access to caregivers



## Effect of orphanage confinement on growth

- Institutionalized children fall behind one month of growth for every:
  - **2.6 months** in a Romanian orphanage
  - **3.0 months** in a Chinese orphanage
  - **3.4 months** in a Russian orphanage



11 year old girl

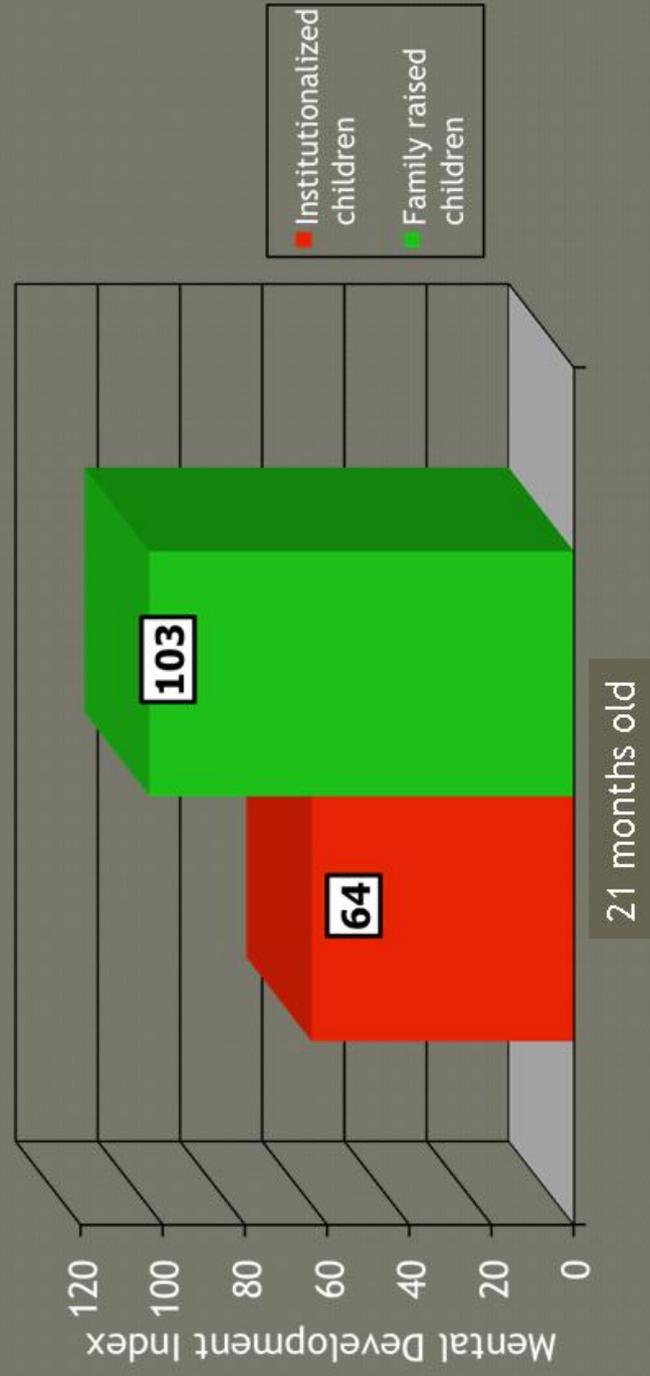


14 year old girl

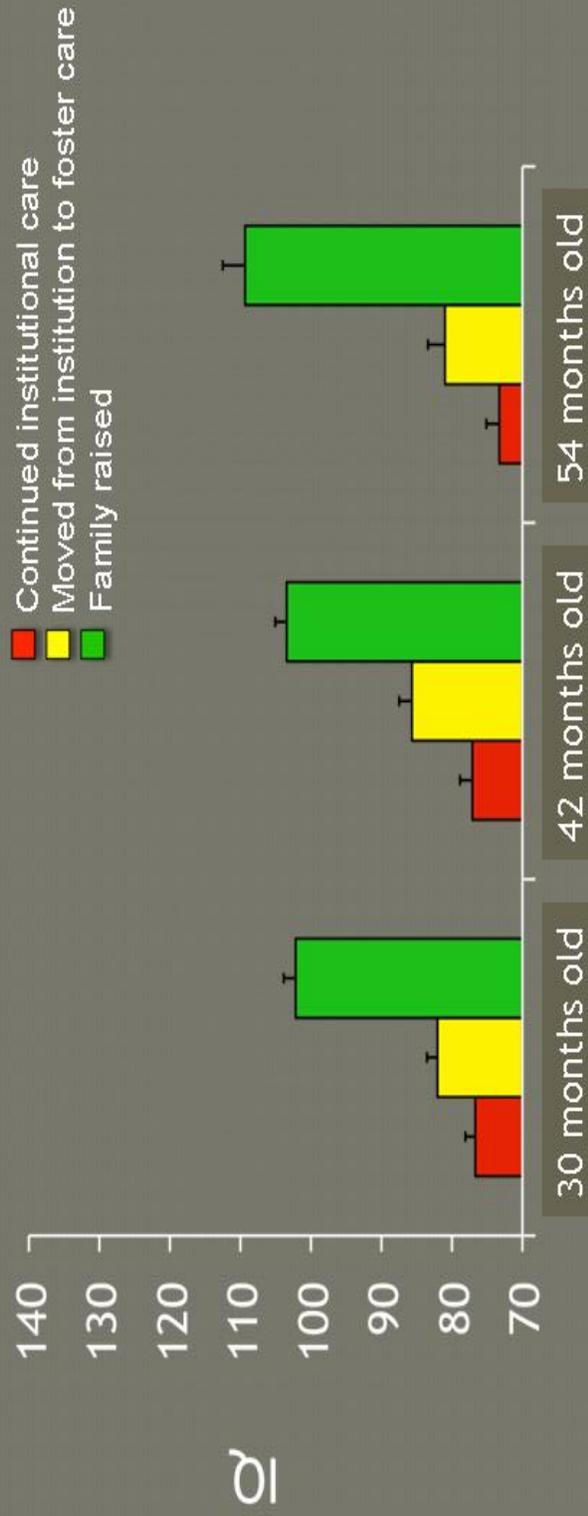


17 year old girl

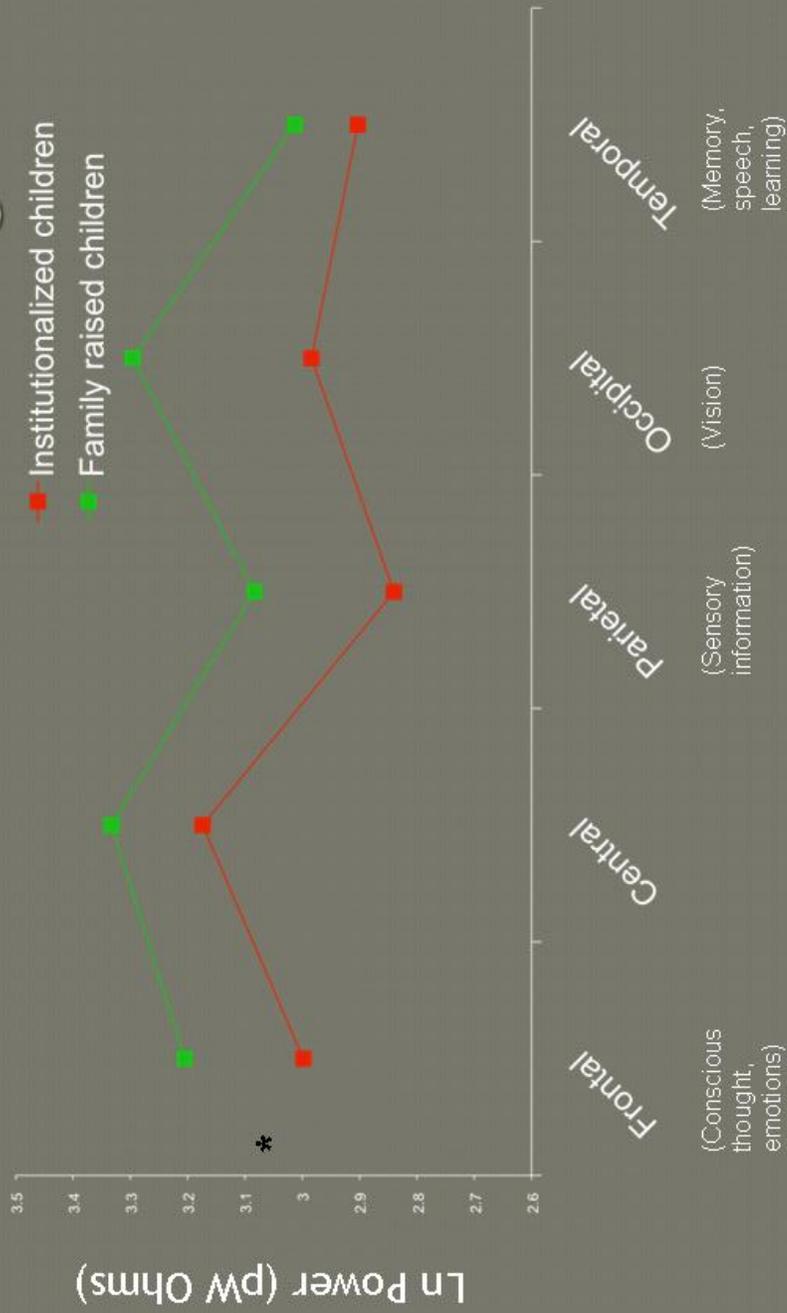
# Cognitive development



# Cognitive development



# Brain activity across different brain regions



## **ATTACHMENT B**

### **INTERNATIONAL ADOPTION POLICY STATEMENT & SUPPORTING REPORT**

#### **Policy Statement**

International Adoption should be an integral part of a comprehensive strategy to address the problems of unparented children, together with the development of better temporary care for children pending permanent placement, the development of in-country adoption and other truly permanent nurturing placement options, and the provision of social services to parents so that they can keep and nurture their children.

International Adoption is consistent with other positive social responses to the problems of unparented children, bringing new resources into poor countries to support such efforts, and developing new awareness of and concern for the plight of poor children and poor communities worldwide.

Adoption, whether domestic or international, generally serves children's interests better than any form of state-sponsored care, whether that be foster care or institutionalization, although there will always be exceptions to this general rule, including for example situations in which placement of a child in a permanent, nurturing kinship foster care situation will be preferable for that specific child to adoption.

Children whose original parents cannot provide permanent nurturing care should generally be placed as soon as possible in a permanent adoptive home, whether domestic or international.

Efforts should be made to identify in a timely way all unparented children and to promptly free for adoption all children who cannot or should not be reunited with their birth parents in the near future, and for whom there is no other preferable permanent parenting solution immediately available.

Children free for adoption should be placed as soon as possible in appropriately screened adoptive homes, whether domestic or international: no children should be held whether in foster care or institutions for any period of time for the purpose of placing them in-country; any in-country preference should be implemented through a concurrent planning strategy, planning simultaneously for both domestic and international adoption, and preferring domestic adoption only if it will involve no delay in placement for the child.

International Adoption should not be made more difficult for parents to accomplish than domestic adoption; given the inherent difficulties posed by adopting in a different

country, efforts should be made to coordinate the adoption systems and related laws and policies of sending and receiving countries to reduce these inherent difficulties and make the international adoption process more comparable to the domestic process from the viewpoint of adoptive parents.

Adoption abuses, such as kidnapping and baby selling (defined as payments to birth parents designed to induce them to surrender their child and their parenting rights), should be dealt with by enforcing the laws prohibiting such practices, and where needed developing new laws and policies to discourage such practices, without unduly restricting the placement of unparented children in domestic or international adoption, and without unduly limiting the private agencies and other adoption intermediaries that facilitate such adoption.

## Report

### Background<sup>13</sup>

International adoption has grown dramatically over the decades since World War II, and developed important recognition as a method of serving the needs of unparented children worldwide. Adoption research has demonstrated that adoption, whether domestic or international, generally serves children's interests far better than foster care or institutionalization. Indeed, when children are placed in adoptive homes at an early age they do roughly as well as children raised by non-troubled birth families. While concerns have been raised about whether placement across racial and national lines poses risks for children, the research has failed to demonstrate evidence of such risks. At the same time social science research has demonstrated the severe harm to children done by time spent in the kinds of institutions in which unparented children worldwide are generally held. And the developing science of early brain development has provided dramatic new evidence of the fact that infants' and young children's brains do not develop in the ways they need to in order to enable normal intellectual and emotional growth when the children are deprived of nurturing parenting relationships, as they are when they live in institutions. The Hague Convention on Intercountry Adoption provides new legal legitimization of international adoption, providing for the first time

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<sup>13</sup> Documentation for various claims made in this Report is contained in, e.g.: Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 BUFF. HUM. RIGHTS L. REV. 151 (2007); Elizabeth Bartholet, *International Adoption: The Child's Story*, 24 GEORGIA ST. UNIV. L. REV. 333 (2008); Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*, 21 B.U. INT'L. L.J. 179 (2003). Competing views on the policy and legal issues are contained in, e.g.: Andrew Bainham, *International Adoption from Romania – Why the Moratorium Should Not Be Ended*, 15 CHILD & FAM. L.Q. 223 (2003); Twila L. Perry, *Transracial Adoption and Gentrification: An Essay on Race, Power, Family and Community*, 26 B.C. THIRD WORLD L.J. 25 (2006); David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping, and Stealing Children*, 52 WAYNE L. REV. 113 (2006); David M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 VAL. U. L. REV. 281 (2004).

in any international law document that such adoption should be preferred to any in-country placement except for in-country adoption.<sup>14</sup>

However, international adoption has been under attack in recent years, and is at a crisis moment now, with the numbers of such adoptions into the U.S. down these last three years in dramatic contrast to the steady growth over the previous six decades. Powerful political forces have aligned against international adoption, and have had an impact on the laws and policies of both sending and receiving countries. As new countries open up to international adoption and begin to release their unparented children to adoption abroad, they tend to close down again either partially or totally as the result of newly restrictive regulation. Romania was forced to close down international adoption as a condition for gaining entry to the European Union. Guatemala has just been closed down, pending development of a new regulatory regime which may transform the country which had been known for releasing unusually large numbers of children at early ages, in healthy shape, with good prospects for normal development, into a country which releases at best only a small handful of children, after having kept them for two to three years or more in damaging institutions. China has recently passed restrictions which limit significantly the parents considered eligible for adopting. Yet the needs of unparented children in these countries and worldwide for the nurturing homes that international adoption provides have not diminished. Indeed it seems clear, given among other developments the terrifying numbers of newly orphaned children produced by the AIDS disaster, the needs have escalated.

This is a key moment in history for international adoption, with the potential for movement either in the direction of expanding the potential of international adoption to serve the needs of unparented children, or of closing it down. There are increasing numbers of prospective parents interested in such adoption, and the potential exists for expanding by a significant factor the number of homes for unparented children. There is an impressive body of evidence documenting the benefits for children of placing them in adoptive homes rather than leaving them in institutional care. There are many people, both in sending and receiving countries who care about children and believe based on their own common sense and life experience that what children most need is the kind of early nurturing parenting that adoption provides. But there are very few organizations with expertise in the world of law and policy committed to promoting international adoption as part of a general strategy to serve the needs of unparented children.

## **Recommendations**

*1. Address the Needs of Unparented Children by Prioritizing Adoption, Whether Domestic or International, Over Placement Options Like Foster Care and Institutionalization*

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<sup>14</sup> This is in contrast to Article 21 of the Convention on the Rights of the Child (CRC). For the CRC and Hague Convention provisions specific to international adoption, and views as to their appropriate interpretation, see Bartholet, *supra* n. 1, 13 BUFF. HUMAN RIGHTS L. REV. at 170-73; Dillon, *supra* n. 1.

Many millions of children are now growing up in institutions or on the streets in the sending countries of the world; a very small proportion of the children surrendered by or removed from birth parents in these countries are in foster care. The Hague Convention indicates that international adoption should be seen as preferable to all in-country alternatives except for adoption. However some, including UNICEF, argue for a preference for in-country foster care over international adoption. Some argue for mandated holding periods during which children must be kept in-country before they can be placed internationally, and several countries have established such holding periods.

This Policy Statement makes adoption the priority over other placement options, and emphasizes the importance of prompt adoptive placement. It urges that procedures be created to identify and free up children in need of adoptive homes, and it rejects holding periods that would require delay in adoptive placement.<sup>15</sup>

The case for this Policy Statement rests on the biological science, the social science, and the child development expertise that demonstrates how harmful it is to children to grow up on the streets or in institutions,<sup>16</sup> and how well children do when placed in international adoptive homes.<sup>17</sup> Children placed early in life in international adoptive homes are likely to do essentially as well in their families and in life as any children raised by their biological parents in those receiving countries. Children subjected to terrible experiences prior to adoptive placement, as

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<sup>15</sup> Hague Convention Article 4(b) provides that international adoption can take place only after “due consideration” to the possibility of domestic placement. U.S. post-Hague regulations require “reasonable efforts” to find placements for U.S. children within the U.S. before placing them abroad, and a two-month holding period subject to certain exceptions. See Barholet, *supra* n. 1, 24 GEORGIA ST. UNIV. LAW. REV. at 361-62, nn. 53-54. This Policy Statement says that any preference for in-country adoption should be implemented through a concurrent planning strategy, preferring domestic adoption only if it will involve no delay in placement.

<sup>16</sup> See, e.g., Charles H. Zeanah et al., *Designing Research to Study the Effects of Institutionalization on Brain and Behavioral Development: The Bucharest Early Intervention Project*, 15 DEV. & PSYCHOPATHOLOGY 885, 886-88 (2003) (summing up previous research on deleterious effects of institutional rearing, including recent research on the many problems of children adopted out of institutions in Eastern Europe, Russia, and other countries, as well as ameliorating effects of early intervention); Peter J. Marshall & Nathan A. Fox and the BEIP Core Group, *A Comparison of the Electroencephalogram between Institutionalized and Community Children in Romania*, 16 J. COGNITIVE NEUROSCIENCE 1327 (2004); Susan W. Parker and Charles A. Nelson, *The Impact of Early Institutional Rearing on the Ability to Discriminate Facial Expressions of Emotion: An Event-Related Potential Study*, 76 CHILD DEV. 54 (2005). For other recent research see the St. Petersburg-USA Orphanage Research Team, *Characteristics of Children, Caregivers, and Orphanages For Young Children in St. Petersburg, Russian Federation*, 26 J. OF APP. DEV. PSYCHOL. 477 (2005) (giving comprehensive, empirical description of orphanage environments, describing most salient deficiencies such as social-emotional environment, and describing harmful impact on children, all consistent with reports on other countries’ orphanages). See also Elizabeth Barholet & Joan Heifetz Hollinger, *International Adoption: Overview*, in ADOPTION LAW AND PRACTICE (Joan Heifetz Hollinger, ed., 2006) [hereafter *Overview*], §10.03[1][c], at 10-15-10-21 and notes 27-41; Barholet, *FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION* (Beacon Press 1999) (1993) [hereafter *FAMILY BONDS*] at 150-51, 156-57.

<sup>17</sup> See, e.g., Zeanah, *supra* n. 4 (describing earlier research). A meta-analysis of research on international adoptees recently published in the Journal of the American Medical Association showed the adoptees generally well-adjusted with those living with their adoptive families for more than 12 years the best adjusted, and with preadoption adversity increasing the risk of problems. Femmie Juffer and Marinus H. van IJzendoorn, *Behavior Problems and Mental Health Referrals of International Adoptees*, 293 J.A.M.A. 2501 (2005). See also Barholet, *FAMILY BONDS*, *supra* n. 4 at 150-60; *Overview*, *supra* n. 4, at 10-15 - 10-21.

many international adoptees have been, often show remarkable success in overcoming some of the damage done by these early experiences. By contrast, research on orphanages shows how devastatingly harmful institutional life is for children. Interestingly even the better institutions have proven incapable of providing the personal care that human children need to thrive physically and emotionally. Research on children who started their early life in institutions demonstrates vividly the damage such institutions do even when the children are lucky enough to escape the institutions at relatively early ages. Age at adoptive placement regularly shows up in adoption studies as the prime predictor of likelihood of successful life adjustment.<sup>18</sup>

Opponents of international adoption argue that children are best served by remaining in their community of origin, where they can enjoy their racial, ethnic and national heritage. But the opponents' claims are based on extreme romanticism, without any grounding in the available evidence and without support in common sense. Children doomed to grow up in orphanages or on the streets cannot expect to enjoy their cultural heritage in any meaningful way. And the real choice today for most existing homeless children in most of the countries of the world that are or might become sending countries, is between life – and often death – in orphanages or on the streets in their home country and, for a lucky few, life in an adoptive home abroad. Possibilities for adoption at home in the birth country are drastically limited by the poverty of the population and by attitudes toward adoption in most Asian and many other countries that are more blood-biased and otherwise discriminatory toward adoption than is the U.S.

Opponents argue that children might be placed in in-country foster care, and in that way benefit from remaining in their country and culture, as well as possibly still linked in some way with their birth family. But foster care does not exist to a significant degree in the sending countries and the poor countries of the world – overwhelmingly the homeless children of the world are living and dying in orphanages and on the streets. The U.S. is the country which has had the greatest experience with foster care – for many decades now the vast majority of the children committed to state care here have been living in foster care because it has been seen as so superior to institutional care. Even with the resources that the U.S. has to support foster care, it does not work especially well for children. Social science demonstrates clearly that while foster care works better for children than living in birth families characterized by child abuse and neglect, it does not work nearly as well as adoption.<sup>19</sup> It is extraordinarily unlikely that foster care will work better in countries that are desperately poor than it has in the U.S. Moreover the bottom line for children who might find adoptive homes abroad now is that foster care, whether good or bad, rarely exists as an option.

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<sup>18</sup> Early results of the Bucharest Early Intervention Project, *supra* n. 4, show that placement of the institutionalized Romanian children in specially designed, model foster care had ameliorating effects on their intellectual, emotional, psychiatric and brain development, with the length of time previously in the institution and the age at which removed to foster care factors in their functioning. U. Md. Press Release, *Institutionalized Children Benefit from Early Intervention* (Feb. 14, 2006).

<sup>19</sup> See BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* 81-97 (Beacon Press 1999).

This Policy Statement is consistent with action taken in recent decades by the Congress in enacting the Multiethnic Placement Act (MEPA) as amended in 1996, and in enacting the Adoption and Safe Families Act of 1997 (ASFA). MEPA constitutes a powerful rejection of the philosophy at the heart of efforts to restrict international adoption – the idea that children must at all costs be kept within their community of origin, and the related idea that racial and ethnic communities are necessarily benefited by keeping “their” children within the group. ASFA similarly rejects ideas at the core of opposition to international adoption about the absolute priority of birth heritage as compared to other interests, and related ideas about the last resort status of adoption. ASFA also rejects the idea of holding in limbo children who have only technical ties to their birth parents, rather than moving promptly to terminate such ties so the children can be placed in adoptive homes.

*2. Promote International Adoption as part of a Comprehensive Strategy to Address the Needs of Unparented Children that Includes Social Welfare Support for Birth Families and the Improvement of Conditions for Unparented Children Who Cannot Be Placed in Adoption*

International adoption now serves some 40,000 children per year, out of the many millions worldwide in need of homes. We need to develop better foster care and institutional solutions for children in-country than now exist, to serve the needs of the many millions who will never be adopted even in a world in which the numbers of adoptions were significantly increased. We also need to do more to improve social welfare services designed to enable birth parents to raise their children themselves.

This Policy Statement argues that international adoption should be an integral part of a comprehensive strategy to address the problems of unparented children, and to increase social welfare support for birth parents. It argues further that there is no inconsistency between international adoption and other initiatives designed to help unparented children and their birth parents.

International adoption brings significant new funds into poor sending countries, funds that can be used for and often are specifically directed to the improvement of institutional conditions and the creation of foster care alternatives. It also relieves sending countries of the cost of supporting the children adopted. It helps develop new consciousness about adoption as a positive parenting option in sending countries which may make it easier to encourage adults in those countries to consider adoption. It helps develop new consciousness among those in privileged nations about the needs of poor children in sending countries and seems likely to foster attitudes supportive of a wide range of governmental and private initiatives to do more to address those needs.

*3. Address Adoption Abuses by Enforcing Existing Laws and Policies Prohibiting Such Abuses as Baby Selling and Kidnapping and Penalizing Those Committing Abuses, Rather than by Restricting Legitimate International Adoption and Penalizing Unparented Children by Denying Them Adoptive Homes*

Layers of overlapping laws and regulations forbid adoption abuses involving any kind of exploitation of birth parents or of children that could take place in connection with the transfer of children to adoptive parents in another country. Nonetheless we know that some number of abuses take place. Payments sometime get made to birth parents in connection with their decision to surrender children, in violation of the laws prohibiting baby selling. Occasionally there is evidence that birth parents have been induced to surrender by some form of fraudulent misrepresentation, and even that children have been kidnapped to be placed in adoption.

A common response to allegations of adoption abuses is to first “temporarily” shut down international adoption in the country at issue, and then to call for regulation of an additionally restrictive kind, with the new restrictions often eliminating the private agencies and intermediaries that tend to function as the lifeblood of international adoption. Half of the top sending countries in the last couple of decades have officially or effectively shut down international adoption as the result of claimed adoption abuses. Many countries in South America have eliminated private intermediaries in recent years in response to claims regarding adoption abuses, and the numbers of children placed in adoption have plummeted as a result. Guatemala has recently been shut down at least temporarily in response to claims regarding baby selling, and many powerful forces have called for eliminating private intermediaries in any future international adoption system that Guatemala might institute.

This Policy Statement asserts that the appropriate response to adoption abuses is to enforce the laws prohibiting such practices, and where needed to develop new laws and policies to discourage such practices, without unduly restricting the placement of unparented children in international adoption, and without unduly limiting the private agencies and other adoption intermediaries that facilitate such adoption.

All laws are at risk of being violated on occasion, and typically we respond to violation problems by gearing up enforcement efforts. We should do the same in this area. Temporary or permanent shut downs of international adoption simply penalize the children waiting for adoptive homes, locking them into damaging institutions, when we should be penalizing those breaking the laws. Calling for new restrictions that would eliminate private intermediaries sounds reasonable to many, but the fact is that in many parts of the world a government monopoly over all aspects of international adoption means that such adoption will either be closed down altogether or so stringently limited that only a relatively few children will ever be placed, and those few will likely be placed only after spending unnecessary years in damaging institutions. It is for these reasons that the U.S. State Department fought to ensure that the Hague Convention would permit the continuation of private adoption, as it does.

## **Conclusion**

International adoption has been shown to work well for children, providing the nurturing homes they need to thrive in their present and future lives. The children who might be placed in international adoptive homes generally have no other good options. Typically they will live or die on the streets or in institutions, and institutions are no place for children. Dr. Dana Johnson,

a widely respected specialist in international adoption pediatrics, has appropriately condemned the practice of relegating children to institutions as follows:

[P]utting a child in a long-term institution is an act of abuse. Children in institutional care have deteriorations in many things that we want to see children improve in during the earliest years of their life. . . . Their cognitive abilities are lower, their growth is terrible and their brain development is abnormal as well. . . . *A few days in an institution should be as long as children are asked to endure.*<sup>20</sup>

The world is now insisting that many many children spend many months and years of their lives in institutions, despite the fact that millions of prospective parents are ready and eager to step forward to adopt them. Powerful forces are aligned to make the laws and policies governing international adoption ever more restrictive, eliminating international adoption altogether or limiting it to very last resort status. Relying on the best that science and social science has to offer, we hope to mobilize the many unorganized people who believe, along with the experts, that what children most need is a nurturing home as early in life as possible, and to take action to promote laws and policies which will better serve children's interests.

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<sup>20</sup> MENTAL DISABILITY RIGHTS INTERNATIONAL, HIDDEN SUFFERING: ROMANIA'S SEGREGATIONS AND ABUSE OF INFANTS AND CHILDREN WITH DISABILITIES at 21 (2006), <http://www.mdri.org/projects/romania/romania-May%209%20final.pdf>.

Listed below are the organizations and individuals endorsing the International Adoption Policy Statement.

**Organizational Endorsements:**

- The American Academy of Adoption Attorneys, May 2008
- Harvard Law School Child Advocacy Program, May 2008
- The Center for Adoption Policy, June 2008
- National Council For Adoption, April 2009
- University of San Diego Children's Advocacy Institute, May 2009
- University of San Francisco - School of Law Child Advocacy Clinic, May 2009

**Individual Endorsements:**

Law School Faculty Members in Human Rights, Child Rights, Civil Rights, and Family Law, and Related Legal Professionals  
(As of June 12, 2009):

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