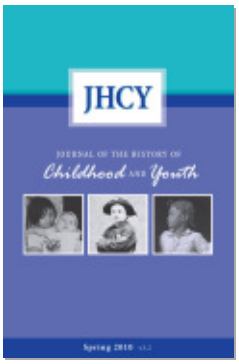
# Between Restavek and Relocation: Children and Communities in Transnational Adoption

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# Contemporary Children

“Girl with kite and dog” (1917) by Ethel M’Clellan Plummer (1888-1936). Library of Congress, Prints & Photographs Division, LC-USZ62-89024.

ALICE HEARST

# BETWEEN RESTAVEK AND RELOCATION: CHILDREN AND COMMUNITIES IN TRANSNATIONAL ADOPTION[1]

## INTRODUCTION

The January 12, 2010, earthquake in Haiti created a child welfare emergency of the first order. Prior to that natural disaster, tens of thousands of Haitian children lived on the streets in desperate need; the earthquake dramatically worsened the situation for these children and many others. With the nation's infrastructure in tatters and the provision of aid delayed, pictures of needy, frightened and injured children saturated the international media.

Moved by these stories and photographs, droves of well-meaning people came forward to express their willingness to adopt orphaned children, just as they had following the 2004 Indonesian tsunami. In response, governmental agencies and international aid organizations serving children issued clear directives emphasizing the need to move cautiously to insure the reunification of children and families where possible. Scandal erupted, however, when a group of U.S. citizens acting under the aegis of a newly created non-profit organization, the New Life Children's Refuge, were apprehended moving thirty-three children across the border to an alleged orphanage in the Dominican Republic.[2] As that story unfolded, disturbing facts came to light: the children were, in fact, not orphans; the group's leader, Laura Silsby, had been experiencing financial difficulties and thus may have been as interested in the monetary rewards associated with placing children as in providing adoptive homes; and one of the group's putative legal advisors, Jorge Puello, was already under investigation in connection with sex trafficking charges in El Salvador.[3]

The story of the New Life Children's Refuge was not the only one to feed concerns about corruption and coercion in the international adoption arena. Just days after the earthquake, Governor James Rendell of Pennsylvania obtained permission to airlift fifty-two supposed orphans from Haiti under a U.S. State

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Department directive authorizing expedited procedures for transferring children whose adoptions had been in process prior to the quake. But twelve of the children who arrived in Pennsylvania had not been subject to adoption proceedings prior to the earthquake; indeed, shortly after their arrival, it became clear that they may not have been orphans, had no adoptive families waiting, and had been removed from Haiti without proper clearance. Admitting that he was uncertain whether authorization to remove the children had been secured before seeking permission to retrieve the children, Governor Rendell said, "[I]f you had seen the faces of those children as we loaded them onto the airplane, you wouldn't have asked a lot of questions, either."[4]

The stories emerging from Haiti underscore problems that have long swirled around the practice of transnational adoption (TNA). Today, between thirty and forty thousand children per year are adopted transnationally in the West, typically half of those into families in the U.S.[5] This global transfer of children from poor families in the developing world to wealthier families in the West generates bitter disputes. Advocates of transnational adoption argue that providing stable, loving homes for children is a humane response to global dislocation and poverty. After all, they argue, the number of children placed through transnational adoption is vanishingly small compared to the number of children who lack parental care across the globe, and providing even a few children with families who love and care for them is a compelling justification.[6] Opponents label the practice a virulent new form of imperialism that drapes the exploitation of children, families and communities in the soothing imagery of a United Colors of Benetton fashion shoot. The practice, they argue, commodifies children and amplifies race, class and gender inequalities on a global scale.[7]

This essay seeks to steer a middle ground: properly regulated, transnational adoption may be one part of a solution to the problem of children without parents. At the same time, there are a number of creative community based solutions which, with their "institutional" overtones, are often unfairly discounted in the clamor over creating "real" families for children. This essay first briefly reviews the broad outlines of the arguments for and against TNA, noting that those arguments rarely address either the specific interests of children themselves in connecting with their communities and cultures of origin or the interests of such communities themselves. Arguing that cultural belonging matters both for children and the communities from which they originate, it explores emerging discourses of rights to identity in international convenants and declarations. It also looks at the Hague Convention on Intercountry Adoption to determine whether these two classes of interests are addressed in the regulatory regime contemplated in that Convention.

## THE DIVIDED CONVERSATION AROUND TNA

Transnational adoption is often viewed by the communities from which children originate as a cover for more nefarious problems: those communities worry that children placed in adoption are in actuality being trafficked into the global sex industry and other forms of slavery, or that children are being used to supply a demand for body parts in medical transplants for people in the developed world. It is easy for adoption advocates to dismiss such concerns as unfounded or simply lurid. These concerns, however, cannot be easily denied, because there are hard truths embedded among the more spectacular claims. Transnational adoption is a booming business that invites abuses; it is a sprawling and largely unregulated practice in communities and countries that often lack the bureaucratic infrastructure to eliminate abusive practices.

Even when a legitimate organization is arranging adoptive placements, communities whose children need care may still see the process as painful and exploitive. In its rush to provide "forever families" for children in need, transnational adoption is often insensitive to the concerns of such communities, who may experience the transfer of children as real injuries, particularly when the sending nation or the community within that nation is already at the bottom of a global social and economic hierarchy. These communities frequently express concern that proposals for local care (including domestic adoption) are given little or no credence by privileged Westerners imposing their own views of the appropriate environment for childrearing.

The practice may also be insufficiently attentive to the interests of children themselves in keeping or creating connections to a community of origin. TNA has often proceeded on the premise that love will always be enough to insure that children's needs are met as they are transferred among cultures and nations without adequate focus on how children negotiate their identities as they mature. Children's questions about—and, possibly, need for connections to—a community of origin or an extended kinship network within that community may wax and wane over the course of their lives, and their interests deserve careful attention.

At an international level, the conversation over TNA proceeds along two distinct tracks. The first, largely articulated by families seeking children and the agencies and organizations facilitating the adoptive process, is directed toward expanding the opportunities for adoption on a global scale. The second, emanating from international aid organizations providing large scale services to children and often sending countries or communities themselves, tends to endorse TNA as an option of the last resort, to be considered only when

alternatives that would keep children anchored in their communities of origin are limited. A quick review of the most commonly articulated arguments for and against TNA will help to put that debate into context.

Adoption proponents are generally motivated by genuine humanitarian concerns and the belief that children available for adoption internationally are likely to have few life chances without adoption. While it is not a panacea for the problem of caring for children without parental care globally, supporters assert that far from drawing attention away from problems of poverty and global inequality, transnational adoption brings those concerns into the public eye and may generate more and better support for programs that address those problems.

In any event, supporters take the position that if adoption can save at least a few children from living their lives in institutions or under conditions of inhumane neglect or abuse, it is justifiable. Harvard law professor Elizabeth Bartholet, for example, asserts that children's needs for permanent family placement should trump all other concerns. While there is a need to provide resources for impoverished families in their countries of origin, she argues, there is a more compelling moral imperative to provide immediate homes for children who need them. Indeed, she suggests that efforts by the human rights community to shift the focus from the plight of the individual child to the plight of disadvantaged communities and families is a disingenuous ploy to disguise naked grabs for power in which children become pawns: "[O]pposition to international adoption that purports to be grounded in children's human rights tends to be more politically palatable, and thus persuasive, than arguments grounded in a country's nationalist claims of ownership rights over its children or nationalist pride in not appearing unable to care for its children."[8]

While supporters recognize that exploitation can occur within the TNA universe, they are reluctant to view the disclosure of particular scandals as systemic problems generated by the structure of TNA itself, seeing them instead as isolated and sporadic. Far from considering adoption practices as driven by market considerations, they see the system as providing care for children, in a system where the supply of children who need care far outstrips the demand. Moreover, they point out that community based care can be a euphemism for systems that are highly exploitive on their own terms. In Haiti, for example, children in need of care have traditionally been dealt with through a system denominated "restavek"—from the French terms "reste avec", meaning "stay with." This system of informal foster care entails the placement of a child, often by his or her parents, with an individual or a family who agrees to meet the child's subsistence needs and place the child in school in exchange for the

child's labor. In reality, the system results in virtual child enslavement, as there is no regulatory oversight and children have no rights.[9]

Proponents thus assert that any move to limit or slow transnational placements undercuts the child's rights to a secure family. A more extensive international regulatory regime, such as that created by the 1993 Hague Convention on Intercountry Adoption, they suggest, can limit extortionate fees and curb coercive and inappropriate adoptive practices. At the same time, they express concern that imposing extensive regulatory requirements may simply delay placements for children whose needs are immediate and compelling.[10]

Opponents of TNA, on the other hand, argue that supporters vastly overstate the numbers of children available for adoption internationally—at least, those children who are likely to be attractive to potential adoptive parents. There are relatively few healthy infants, they argue, languishing in institutions and in need of parents: healthy infants can often be readily placed with adoptive families in their own countries. Indeed, for the most part, children placed in adoption find their way into the system through private, rather than institutional, avenues. While many children may be in institutional care, they also point out, that fact should not always be taken as a sign that children have been abandoned or lack families. Just as with institutional care in the United States during the nineteenth century—and with foster care today—parental surrender of children to institutions or alternative care is often a temporary placement for children. Even if the children are in longer term placement, they may be part of a sibling group within the institution or maintain connections to family members outside of the institutional setting. Most children in long-term institutional care, opponents argue, are older, ill, or have other disabilities that make them distinctly unadoptable.

Many opponents of the practice of TNA see it as a disturbing confirmation of Western privilege. Even if adoptive parents are not particularly well-off in their home countries, their resources typically far outstrip the resources of potential adoptive families in a child's home country, which means that families in the communities from which children originate are unlikely to be considered in the competitive adoption market. On this reading, TNA devalues parenting by persons in sending nations in general, who are more likely than not to be persons of color or single mothers or otherwise disadvantaged both on the world stage and within their own nations. While many parties involved in TNA pay lip service to the idea of eliminating corruption, there is relatively little organized effort on the part of developed (or receiving) states to push for changes that might lessen the pressure on birth mothers to surrender their children.[11]

In the end, neither side is decisively right or wrong. Adoption advocates err when they fail to recognize how the money that flows through the practice of

TNA itself opens the door to coercion and abuse. Furthermore, they are often wholly unconcerned with the impact that the practice can have upon the psyche of communities whose children are moved into a global diaspora, affecting both how that community perceives itself and how it is perceived by outsiders. Advocates of TNA often dismiss proposals for community based care, including institutional care, without a deep understanding of what such options entail. Opponents, on the other hand, err in suggesting that community based care should preeminently be privileged over adoption. This position often underestimates the extent to which already overburdened and impoverished communities can cope with the needs of large populations of children deprived of parental care and who may be vulnerable to abuse in poorly regulated, and typically unsubsidized, systems of kinship or informal foster care. It may also overestimate the extent to which transnational placement actually threatens the cohesion of such communities. Finally, neither side is, at present, particularly attentive to the ways in which the needs of children themselves for connection to—or separation from—a community of origin may emerge over the course of a child's life.

## THE IMPORTANCE OF BELONGING FOR CHILDREN

Over the last twenty years, claims for recognition and belonging have shifted into the register of rights for both vulnerable communities and children. Children can now conceivably assert interests in identity and belonging under various provisions of the Convention on the Rights of the Child, which recognizes children's rights to preserve their identities, families and nationalities. In addition, a variety of international conventions and declarations articulate the rights of members of ethnic, racial, religious and linguistic minorities as well as aboriginal groups to cultural accommodation and protection, arguably including a right to maintain connections with community members. Both sets of claims raise issues that may importantly shape transnational adoption in the future.

As with the practice of transnational adoption in general, the idea of recognizing identity rights in these procedures engenders dispute. Critics of transnational placement may now argue that TNA violates the *rights* of the child to a family and community of origin, while proponents draw on many of those same provisions to argue that transnational placement furthers the *rights* of children to family and nurture. Increasingly, cultural communities have claimed that the removal of children violates their rights to self-determination, cultural identity and protection, while those opposed to allowing a community to weigh in on a child's adoptive placement argue that communities as such cannot hold and exercise rights.

Before turning to the international rights declarations, covenants and conventions discussed below, however, it is worth considering how belonging matters for children and communities affected by TNA. In conversations about belonging and group rights writ large, children rarely make an appearance because they are presumptively nested in families who are themselves nested in communities. The existence of this "family"—whether a single parent, a nuclear family, or an extended kinship arrangement—obviates the need to think separately about children in two ways. First, the family is assumed to be best positioned to protect and advance a child's interests, which are, of course, assumed to be congruent with those of the family. Second, families are presumed to be loyal to the identity groups in which they are rooted and to the nations in which they are located.[12]

When family boundaries are stable, those assumptions may be largely correct. But when those boundaries are breached and children are removed or separated from their families and communities for adoption, those assumptions are tossed into the air and what constitutes "belonging" becomes a point of contestation. Indeed, because children ordinarily find themselves subject to adoption or foster care because the family or community has "failed", issues of belonging can be particularly acute.

For children adopted transnationally, especially children whose racial or ethnic identity differs from that of their adoptive families, studies such as that recently issued by the Evan B. Donaldson Adoption Institute, discussed below, suggest that it is important to facilitate the understanding of the families, communities and cultures they have left behind. These children often feel the push and pull of belonging along several axes. As anthropologist Barbara Yngvesson has observed, adoptees are situated within two distinct narratives of belonging and return. The first portrays them as "found" babies for whom adoption provides secure belonging, erasing their former "nowhere-ness." The other narrative, according to Yngvesson, is one of connection to the place of origin: identity is "associated with a root . . . of belonging that is inside the child . . . and unchanging," a root of belonging that is "outside" of the child in the sense that it is located in some distant place, but "is assumed to tie her to others whom she is like (as defined by skin color, hair texture, facial features, and so forth)."[13] Sara Dorow, a Canadian sociologist, has written a compelling ethnography of the adoption of Chinese girls by American parents which points out that the global transfer of children raises three "impossible contradictions" of identity and belonging: the child is at once both a commodity to be exchanged and an object of care and compassion; she both belongs and does not belong to her biological and adopted families; and she is both a citizen and forever alien.[14]

One response to these complexities of belonging for transnationally adopted children, therefore, has centered on opening avenues that allow the child to gain some perspective on the community or culture from which he has been removed and allow the adoptive family to understand the ambiguities of belonging for the child. That concern has been directed primarily at facilitating the adjustment of children to new adoptive families and communities by providing a bridge back to the child's community, and sometimes family, of origin. Providing a child with information about his origins is now widely recognized as essential to promoting the child's adjustment and self-esteem.

This imperative to create connections for the child has begun to attract the attention of both sending countries and distinct cultural communities located within those countries. As a result, sending countries are now imposing more stringent standards to insure that parents understand the challenges of adopting transnationally. Indeed, the Hague Convention, discussed below, now specifically requires that adoptive parents be counseled about the particular needs of transnationally adopted children. The effort to ensure that children will be able to learn about their origins can arise at several points in the adoption process—from the pre-placement evaluation process to post-placement efforts by agencies and adoptive parents on behalf of children.[15]

As a matter of course, many adoptive parents take extraordinary steps to introduce children to their cultures of origin as they mature, whether or not such a connection is imposed as condition of the adoption itself. Parents may enroll the children in classes designed to introduce them to their cultures of origin while others work to introduce children to those communities through books, visits to museums and cultural events, or even 'culture camps.' Some may participate in 'roots trips' which allow children to visit their communities of origin and, in some cases, reconnect with their biological families.

These efforts raise complicated questions about cultural authenticity and belonging. Because culture is a lived experience, it can be difficult to expose a child to a different culture in a way that meaningfully connects that child to her origins. Any exposure may be simply connecting to a "museum" culture that cannot impart the nuances of distinct cultural values and belonging; regardless of how conscientious parents might be, it is virtually impossible for someone from one culture to transmit another one, especially when that other culture is shorn of context.[16] Over time, too, children's own agency in shaping their understanding of their origins and experiences may make such efforts feel brittle.[17]

Roots trips can have unexpected and unpredictable results, as anthropologist Barbara Yngvesson has demonstrated. She notes that these trips rarely produce a seamless whole for children: "[The] trips reveal the precariousness of 'I am,'

the simultaneous fascination and terror evoked by what might have been and a longing for the safety of home", revealing what has been both lost and gained in the process of moving transnationally by uncovering the "interruptions, contradictions and breaks in creating the child's identity."[18] While some adoptees may feel moments of closure, Yngvesson finds that "the moments of clarity are typically that—moments—in a process of self-constitution that is ongoing, painful, and turbulent, challenging any sense of a stable ground of belonging."[19] For some children, meeting members of a biological family or spending time in a community of origin may feel like a homecoming, while others find themselves uncomfortably situated between worlds of poverty and plenty, between profoundly and irreconcilably contrasting value systems, and between different ethnic or racial groups in both their adoptive and original families.

Under these circumstances, some children may feel distinctly burdened by the obligation to "be" a member of a culture in which they have not grown up. Other children may appreciate such efforts as a corrective for feelings of loss, although they are unlikely to feel as if they belong to the community of origin. As Yngvesson notes, few of the adoptive children she studied reported feeling "completed" by the return to roots. Rather, she notes, these trips uncover "a kind of chaos, shaking up families in the world that created international adoption and that international adoption hoped to create."[20] Many adoptees are more ambivalent about tracing their origins than their adoptive parents, according to Yngvesson, who may have difficulty with the dissonance of having a child who once "belonged" somewhere else.

At the same time, there is increasing evidence that transnationally adopted children need to be able to learn about their origins in greater depth than has previously been recognized, and in forms that may mitigate objections about how these reprocessed cultures are presented to children. In November, 2009, the Evan B. Donaldson Adoption Institute issued a report entitled "Beyond Culture Camp: Promoting Healthy Identity in Adoption," the most extensive study of transnational adoptees' identity to date. The report

> reflect[s] the need to go "beyond culture camp" to provide children with ongoing experiences and relationships that promote positive racial (and adoptive) identity development. Our respondents valued cultural celebrations and other opportunities to learn about their origins, but such singular events appear insufficient. Instead, the research points to a need to move beyond strategies that promote cultural socialization to experiences that promote racial and cultural identification and comfort. Part of this work is to expand understanding of the importance of learning about one's origins, whether by traveling to a birth country or by seeking out biological relatives. . . .[21]

This report echoes the findings of numerous earlier studies indicating that a "child's loss of earlier relationships, along with all traces of their pre-adoption identity, is widely recognized as potentially damaging to some children."[22]

## THE IMPORTANCE OF BELONGING FOR COMMUNITIES

While the conversations about creating connections and opening understanding for children have become more sophisticated in recent years, there has been little in the way of extended discussions about TNA and communities of origin. Among transnationally adopted children, the search for origins is often about finding one's 'lost' cultural community as much as it may be about finding severed kinship ties. Moreover, the community itself has interests that deserve serious consideration—and not because understanding such claims is required by some notion of political correctness. Sending communities, both national and sub-national, often experience the transfer of children as genuine losses: protecting cultural cohesion is, at its very heart, about the transmission of values over time. The loss can be felt even more acutely as it becomes clear that children transferred in TNA often have families and kinship networks who could conceivably provide care with more direct forms of assistance.

As noted, creating connections among children and their communities of origin has been largely uni-directional, running from adoptees and/or their adoptive families to the communities of origin. Orchestrating re-connections in that manner leaves the communities themselves on the outside. Under such circumstances, the child's return to a community of origin can be as unsettling to the community as it is to the child. The child comes back as a stranger who may have grown up believing that this community failed him, and the community may in turn feel that its own integrity is brought into question. It is thus not surprising that many communities have sought a larger role in directing the placement of children.

Increasingly, these losses are described as violations of human rights, especially among historically marginalized communities. Article 6 of the 1993 Draft Declaration on Indigenous Rights, for example, declared that "[i]ndigenous peoples have the collective right . . . to full guarantees against genocide or any other act of violence, *including the removal of indigenous children from their families and communities under any pretext.*"[23] In the final Declaration, approved in 2007, that language has been slightly softened to state that "Indigenous peoples . . . shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group."[24]

The concern noted earlier that children will receive only a shallow understanding of their culture of origin when it is imparted by outsiders takes on an

added twist when voiced by a community of origin. Such cultural groups worry about the domestication of their cultures, which, they argue, are often represented in forms that drain them of their potency as a challenge to dominant ways of understanding the world. Efforts to acquaint children with their cultures of origin are, on this account, simply a way to police and contain children's otherness, assuring assimilation while celebrating a domesticated difference.

Sending countries are often presumed to be too poor, disorganized or corrupt to provide care for dependent children, when in fact there may be families within that nation or cultural group fully able and willing to adopt the child. Painting nations and communities as too stressed to care for needy children has specific political ramifications for those groups, who fall further in international esteem. Supporters of transnational adoption sometimes glibly assume that any adopted child will be better off in the West than in their own communities, creating a narrative that diverts attention away from more complicated structural explanations of children's neediness and the developed world's role in creating and perpetuating inequality.

## EMERGING HUMAN RIGHTS DISCOURSES AND CHILDREN

The idea that children have a cognizable set of "identity rights" to remain within or, at the very least, be provided with access to, their cultures of origin under various international human rights instruments has gained currency in recent years. The starting point is the Convention on the Rights of the Child.[25] Adopted by the United Nations in 1989, and ratified by 194 nations to date, the CRC articulates a wide array of political, economic, social, and cultural rights for children. All of those specific rights, however, are tempered by the overarching principle, set forth in Article 3, directing that the best interests of the child be primary in all actions undertaken by States or private persons on behalf of the child.

While the CRC has broad international support and obligates signatory States to enact laws that further its provisions, a number of States have ratified the CRC with reservations of particular importance for issues of belonging and identity, by declaring that the rights of the child shall not be interpreted in ways that violate a State's specific religious or cultural values or that otherwise require States to recognize rights that go beyond those articulated in national constitutions and laws. For example, some Muslim countries interpret the Qu'ran's prohibition on adoption strictly, while others interpret Sha'ria law more expansively and allow children to acquire full rights of filiation through the adoption process.[26] These differences inevitably raise questions about transnational adoption, as they implicate issues of both ethnic and religious continuity.

Protecting children's personal, familial, ethnic, and national identities is a theme that crops up repeatedly in the Convention. The Preamble, for example, nods to the importance of cultural belonging when it declares that its provisions should be implemented taking "due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child."[27] Article 5 similarly instructs signatory States to respect

> the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom . . . to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the . . . Convention.[28]

As British legal scholar Geraldine van Bueren has pointed out, international law must be able to accommodate a variety of family and community forms, which is complicated when the Convention tries to articulate universal rights standards for children. Because the definition of the family itself varies from culture to culture, and may be regarded as communal in some places, Van Bueren points out, the drafters of the CRC tried to incorporate a definition that recognized local and customary child care practices.[29] Part of the reason for obligating signatory States to respect such a broadly defined family was to afford children a variety of sources of protection, as in many communities, the obligation to care for children extends by custom beyond the nuclear family, and thus might be read to disfavor transnational placement. As noted earlier in conjunction with the restavek system in Haiti, however, those traditional methods of providing care for children may not be particularly effective in communities faced with large numbers of children in need, which poses problems if the CRC's articulation of rights is to be considered binding.

Article 8 expressly recognizes the child's right to national and familial identity; legal scholar G.A. Stewart has argued that this Article also implicitly protects personal and communal identity.[30] Article 30 affirms the rights of children belonging to ethnic, religious, or linguistic minorities, as well as indigenous children, "in community with other members of his or her group, to enjoy his or her own culture."[31] Article 9 protects a child from arbitrary separation from his or her parents, and Article 12 guarantees the child a right of access to information.

Articles 20 and 21 of the CRC are of particular importance for thinking about children's rights in the adoptive context. The former obligates the State to provide "special protection and assistance," including alternate care, to any child "temporarily or permanently deprived of his or her family environment,

or in whose own best interests cannot be allowed to remain in that environment," where the alternate care might include "foster placement, kafalah of Islamic law, adoption or, if necessary, placement in suitable institutions for the care of children."[32] Critically, Article 20 continues: "When considering solutions, *due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background*."[33]

Article 21 specifically addresses adoption:

> States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall: . . .
>
> (b) 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.[34]

This language contains some ambiguity. In one line of analysis, the Convention might be read to severely restrict transnational adoption, because it violates the child's basic right to remain connected to his or her family and community of origin. At best, they argue, it might be viewed as endorsing transnational adoption only as a last resort, lagging even behind institutional placement in the child's country of origin, because of the directive in the Convention itself that "intercountry adoption may be considered . . . if the child . . . cannot *in any suitable manner* be cared for in the child's country of origin."[35]

In fact, as initially worded in a 1982 draft of the CRC, Section 20 contained only the language that States should facilitate adoption and foster care when alternative care for children was necessary; the more restrictive language contained in the final draft, as legal scholar Sonia Harris-Short has noted, was added after delegates from a number of countries objected to foregrounding adoption over other forms of communal and extended family care.[36] These interpretations place primary emphasis on providing on-site services to needy children, thus retaining the child's links to his or her family, and his or her national, ethnic, or religious culture of origin.

UNICEF itself has taken the position that transnational placement is appropriate in some cases:

> [E]very child has the right to know and be cared for by his or her own parents, whenever possible. . . . UNICEF believes that families needing support to care for their children should receive it, and that alternative means of caring for a child should only be considered when, despite this assistance, a child's family is unavailable, unable or unwilling to care for him or her.

> For children who cannot be raised by their own families, an appropriate alternative family environment should be sought in preference to institutional care which should be used only as a last resort and as a temporary measure. Inter-country adoption is one of a range of care options which may be open to children, and for individual children who cannot be placed in a permanent family setting in their countries of origin, it may indeed be the best solution.[37]

Thus, the Convention may be read as neutral toward or even as endorsing transnational adoption as one among several options for caring for children without parents. The 1986 Declaration that preceded the CRC, for example, appeared to set up a preference for permanently placing a child with a family, while designating institutional care only as a last resort. Legal scholar Sara Dillon has argued that the 1986 Declaration endorsed transnational adoption over institutional or other care, and that the changes in the final version moved to a neutral position on the issue. She argues further that the focus on providing "suitable care" in the current Convention is an implicit endorsement of family over institutional placement, even if the familial care must be obtained across international boundaries.[38]

Casting transnational adoption as a strategy of last resort commands the greatest weight in contemporary discussions of caring for dependent children in the international human rights community. In fact, the African Charter on the Rights and Welfare of the Child expressly disapproves of transnational adoption. Article 24 provides that "inter-country adoption in those States that have ratified or adhered to the International Convention on the Rights of the Child or this Charter, may, as the last resort, be considered as an alternative means of a child's care. . . ."[39] The American Convention on Human Rights, created under the aegis of the Organization of American States, does not contain specific provisions relating to children, but has endorsed the principles contained in the CRC.[40]

In 2006, the UN Committee for the Rights of the Child created a working group to develop international standards for protecting children without parental care. After several years of work and wide ranging consultation by the working group, the United Nations General Assembly passed a resolution approving the "Guidelines for the Alternative Care of Children" on November 20, 2009, concurrent with the twentieth anniversary of the adoption of the Convention on the Rights of the Child.[41] The Guidelines are clearly oriented to keeping families together, emphasizing that poverty alone should never provide a reason to separate a child from her parents; they direct nations to put programs into place that will allow families to care for their own children in their own communities. If those efforts are unsuccessful, the Guidelines support finding

other appropriate resolutions, including adoption or kafalah under Islamic law, and directing States, in Sections 2(b) and 6, to identify and provide "the most suitable forms of alternative care . . . under conditions that promote the child's full and harmonious development . . . taking into account the full and personal development of [children's] rights in their family, social and cultural environment and their status as subjects of rights, both at the time of the determination and in the longer term."[42] Section 10 provides that

> All decisions concerning alternative care should take full account of the desirability, in principle, of maintaining the child as close as possible to his/her habitual place of residence, in order to facilitate contact and potential reintegration with his/her family and to minimize disruption of his/her educational, cultural and social life.[43]

While the Guidelines do not apply to children once they have been placed with adoptive parents pursuant to a final adoption order, they do apply to "pre-adoption or probationary placement of a child with the prospective adoptive parents, as far as they are compatible with requirements governing such placements as stipulated in other relevant international instruments," and specifically bind "all public and private entities and all persons involved in arrangements for a child to be sent for care to a country other than his/her country of habitual residence . . . for medical treatment, temporary hosting, respite care or *any other reason*."[44]

The Guidelines favor family or community based care over institutional options, embodying the common presumption that institutional care will always be inferior to family care. They specifically denounce institutional care for children under the age of three, creating an exception, however, for very young children who may be attached to siblings placed in institutional care. To that extent, the Guidelines support the position of proponents of transnational adoption, articulated earlier, that a child has a right to a secure, loving family, which right should trump all other concerns.

But that conclusion is not the only one that may be drawn. The Guidelines overwhelmingly argue for providing support for families at risk and emphasize that decisions about children's placement must evaluate a host of concerns—such as maintaining ties with siblings and kinship networks—to determine what will best serve a particular child's best interests. The decision must always be contextual, based upon a specific child's circumstances.

## EMERGING HUMAN RIGHTS DISCOURSES AND COMMUNITIES

The Guidelines just discussed are constructed upon a rights framework: they provide strategies for enforcing a child's rights under the CRC. As a rights

document, however, the CRC does not stand alone. There are now a multitude of rights declarations and covenants that affect debates about transnational adoption and place the child's rights in conversation with the rights of the communities from which they originate. Numerous ethnic, racial and religious communities are now drawing upon the language of rights to assert the importance of belonging and identity. Only one, the Declaration on the Rights of Indigenous Peoples, mentioned above, speaks specifically to concerns about the placement of children. The remaining declarations and covenants give no specific guidance for dealing with conflicts over group membership, cultural belonging and children, but all have the potential to significantly alter the landscape of transnational adoption.

The Declaration on the Rights of Indigenous Peoples contains language with the potential for significantly limiting the placement of indigenous children outside of their cultural communities. The Preamble, for example, declares that "indigenous families and communities [have the right] to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child," and continues in Article 7, as previously noted, by stating that indigenous peoples "shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group."[45] Article 8 imposes an obligation on States to

> provide effective mechanisms for prevention of, and redress for (*a*) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; [and] (*c*) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights; [or] (*d*) Any form of forced assimilation or integration.[46]

Article 33 grants indigenous peoples "the right to determine their own identity or membership in accordance with their customs and traditions . . . [and to] determine the structures and to select the membership of their institutions in accordance with their own procedures."[47]

Taken together, these provisions suggest the erection of significant roadblocks to the adoption of indigenous children in the transnational arena, although, as with the CRC, there is room for conflicting interpretations. Unlike the language of the Draft Declaration on the Rights of Indigenous Persons, the final Declaration appears to speak to the systematic, large-scale effort to erase indigenous groups that blot the histories of Canada, Australia, New Zealand and the United States, rather than the removal and adoptive placement of individual children because of abandonment or need.

At the same time, these provisions of the Declaration drag a difficult history in their wake. While these provisions might arguably be interpreted narrowly to prevent only the large scale transfer of children with the specific intent to eradicate a population, indigenous children continue to be particularly at risk of removal from their parents across the globe. Even in the piecemeal world of contemporary adoption, indigenous children tend to be over-represented and their adoption outside of the community continues to be seen as an assault on indigenous groups. The Declaration's strong endorsement of principles of self-determination for indigenous peoples presumptively challenges the transnational placement of indigenous children, at least unless such a placement is made by the community itself.

There is some movement at the international level to expand the definition of indigenous peoples to include a variety of minority groups. While that expansion has been resisted by both indigenous groups and by various states, numerous sub-national minority groups are increasingly demanding greater state protection for fragile communities.[48] The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities speaks about the need for self-determination and accommodation in terms roughly similar to those in the Declaration on the Rights of Indigenous Persons.[49] The latter Declaration begins by asserting that "States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity."[50] Article 2 recognizes the right of individuals belonging to such groups "to enjoy their own culture" and grants such individuals, in common with others, "the right to participate effectively in cultural, religious, social, economic and public life;" it also confers a right "to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live," and "to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group . . . as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties."[51]

It can be argued, of course, that invoking this language to limit a practice such as transnational adoption is beyond the meaning of this Declaration, which is intended to protect members of minority populations from directly discriminatory actions and to permit such fragile communities and their members to live in accordance with the dictates of their own cultures. But the language is not so limited. Read against the general reluctance to endorse transnational adoption in the human rights community, such protection might

be interpreted to require States to protect the children of minority communities from removal.

The 'right to culture' is difficult to conceptualize: it is an individual right with a collective dimension, meaning that although the individual has the right to enjoy his cultural identity, that right is dependent on the ability of the group to maintain some cohesion and integrity. Commentary on the Covenant noted that Article 27 was intended to ensure that States take positive steps to protect the cultural and religious identities of minority communities.[52]

Understanding precisely what actions States might take and how a community's boundaries might be delineated raises difficult questions that will have to be addressed if such rights are to be recognized in the future. For the moment, however, it is worth noting that such rights claims exist and that similar declarations of rights may be found in regional human rights documents. Article 5 of the Framework Convention for the Protection of National Minorities of the Council of Europe, for example, provides that its members shall

> undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage. . . . Without prejudice to measures taken in pursuance of their general integration policy, the Parties shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation.[53]

The UNESCO Declaration on Cultural Diversity articulates strong support for facilitating the continued cohesion of cultural groups in its support for the concept of cultural rights defined in other documents.[54]

As noted, strictly interpreting cultural rights in the context of transnational adoption is likely to generate difficult problems on many levels in the future, not least because the boundaries of cultural communities are flexible and identities are fluid. The emphasis on preserving the cultural integrity of communities expressed in each document, however, suggests that at least some formal consideration of cultural identity and the impact of the loss of a child upon the child's community of origin should be considered during the adoptive process.

## THE HAGUE CONVENTION AND PRIVATE LAW

The Hague Convention on Intercountry Adoption was introduced in 1993, following close upon the 1989 promulgation of the Convention on the Rights of the Child.[55] The Convention was intended to establish uniform standards

governing transnational adoption and to regularize procedures from nation to nation. It is not a human rights document, but the Preamble states that its primary purpose is to assure that "intercountry adoptions take place in the best interests of the child and with respect to his or her fundamental rights as recognized in international law." It further notes that while children "should grow up in a family environment" and that nations should accord priority to keeping families together, transnational placement 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."[56] The Preamble privileges domestic over transnational adoption but does not suggest that transnational adoption should be an option only of the last resort. At the same time, it stops short of taking the position sometimes asserted by adoption proponents that children have a right to be placed transnationally if no domestic family placement is possible. Indeed, the Hague Convention neither endorses nor condemns the practice of transnational placement per se. Its purpose, rather, is to ensure that when States choose to allow transnational adoption, the practice is sufficiently regulated and transparent to prevent exploitive practices. Thus, the key provisions of the Convention obligate each nation engaged in transnational adoption to create a central authority with power to regulate the entire adoption process and to reconcile the domestic requirements of sending and receiving nations. The Convention contains a number of substantive provisions to limit the unlawful separation of children and their biological parents, imposing duties on sending countries, for example, to ensure that parents have fully and freely surrendered a child for adoption and have not been induced to do so through unscrupulous financial incentives.

The Convention garnered widespread support in the decade following its enactment, although the most prominent sending nations, China, Russia and Guatemala, did not immediately ratify the treaty, and the United States, the largest receiving nation, only ratified the Convention in 2007. To date, it is difficult to determine how effective the Convention has been in meeting its goals of regularizing the adoption process and reducing abusive practices. Legal scholar David Smolin has argued that the Convention does not truly represent a comprehensive approach to transnational practices; while it attempts to prohibit trafficking, it falls far short in doing so.[57]

Leaving aside those questions, however, it is worth examining how the Convention deals with issues of cultural identity and belonging. On some counts, the Convention is more explicit than the CRC in obligating States to be sensitive to the issue of cultural belonging by requiring that the child's cultural background be considered in adoptive placements. On the other hand,

it is less emphatic than the human rights documents in that it grants no right to an adoptee—and certainly no right or voice to the community from which the child originates—to maintain connections to that culture of origin. Article 5 requires that prospective adoptive parents receive appropriate counseling to prepare them for the special circumstances attendant on adopting a child transnationally, transculturally and, often, transracially. Article 16 requires receiving countries to prepare reports on potential adoptive parents that evaluate the ability of those parents to "undertake an intercountry adoption as well as [accommodate] the characteristics of children for whom they would be qualified to care," while, conversely, Article 17 requires sending countries to "give due consideration to the child's upbringing and to his or her ethnic, religious and cultural background" and, in light of that information, to determine whether a particular placement will serve a child's best interests. Article 30 requires that records relating to the child's background and history be preserved, with the idea that the child may later be allowed access to that information (according to the laws of the receiving country).[58] The Convention does not require receiving states to otherwise insure that adoptive parents will be attentive to the child's cultural, religious or ethnic background, although follow-up reporting requirements imposed by sending nations could potentially become a vehicle to securing such assurances.

Presently, the Hague Convention leaves issues related to cultural identity largely unaddressed. Adoption scholar Jena Martin has pointed out that the Convention gives little notice to considerations of culture, "dismiss[ing] the importance of culture as a defining informative part of the child's identity."[59] As she notes, the Convention tends to defer to Western concepts of culture and Western standards in structuring the transnational adoption process. For example,

> in Western cultures, adoption is not just the placement of children in a new prospective home, but also the termination of parental rights by the biological parents. In contrast, . . . [some] non-Western states have a more fluid notion of adoption: rather than a choice of one family over the other, adoption represents a cooperative effort whereby both families are involved in the care of the children. . . . The Hague Convention, while allowing some national divergence, primarily tracks the Westernized version.[60]

At the moment, much of the value of the Convention appears to lie in its impact on adoptive parents: if a sending country asserts that the requirements of the Hague Convention have been met, an adoptive parent can assume that a child has been properly released for adoption. It is likely to be some time,

however, before the Convention can be fully implemented, as many sending nations simply lack the governmental infrastructure to oversee the process. Moreover, the Convention does little to address the structural problems that lead many parents in poor countries to release their children in the first place, nor does it provide any mechanism by which a community can suggest options other than transnational placement for children in need.

## CULTURE MATTERS

Belonging and cultural identity matters in the transnational adoption universe. It matters to adopted children, whose belonging reaches both backward and forward across national boundaries. Equally importantly, it matters deeply for affected communities, whose interests in maintaining connections to children are often dismissed altogether. Neither the human rights instruments nor the Hague Convention provide explicit guidance about how these issues of belonging should be addressed.

Creating a set of options to create a more culturally sensitive transnational adoption and child care regime requires careful consideration of a number of issues, including the resources that a community has available to devote to the care of its children, the position of the child in shaping his or her identity over time, and the array of community settings available for meeting children's needs in addition to transnational placement opportunities. Jena Martin, for example, has suggested creating a more flexible framework that would allow each side in the adoption universe to define what issues are most important in making placement decisions, rather than bypassing concerns expressed by communities. She believes that such negotiations between sending and receiving countries could produce acceptable compromises around issues of culture and belonging.[61] Even Sara Dillon, a strong proponent of transnational adoption, has conceded that for historically marginalized communities whose children have been systematically removed through adoption, the fairest way to deal with issues of adoption may be to provide communities with the authority to make placements themselves.[62] Without entering into a jurisdictional fight, however, procedures that solicit a community's voice could go a long way to easing the pain of seeing children moved transnationally and providing continuity and connections for the child.

There is also a need to bring more openness to discussing a wide range of community based care options. In many impoverished nations, placing needy children with extended family can create risks for the child because of the additional financial burden that such an assumption of care can entail. These problems can often be mitigated by providing limited stipends to families who

assume that care, for example, as some aid organizations have suggested. In addition, it is important not to paint all 'institutional' responses as inadequate. The *New York Times*, for example, recently reported on an innovative program at the Berega Orphanage in Tanzania that illustrates why a broader outlook on institutional and other forms of community based care may be appropriate.[63] Tanzania has high rates of maternal mortality, which means many infants are left without adequate care. The orphanage recruits a young woman from an orphaned infant's extended family to provide care for the child during that fragile infancy. The program has seen marked success, as the young woman develop ties to the children and care for them when they return to the extended family with the child. In addition, the young women develop communities of support and often receive educational and other training that creates security once they leave the institution.

The conversation around transnational adoption today is too often polarized and inattentive to the range of concerns that bear on the well-being of all parties affected by the adoption. Recognizing rights to cultural cohesion for communities from which children are adopted and the identity rights of children themselves holds the potential for creating a broader discussions about the range of responses that should be considered in creating care options for children, and, ultimately, in designing effective strategic interventions for children in need and equitable adoption policies.

## NOTES

1. An earlier version of this essay appeared in Martha Albertson Fineman and Karen Worthington, *What is Right for Children? The Competing Paradigms of Religion and Human Rights* (Surrey, England: Ashgate Publishing, 2009) 329–346.

2. Ginger Thompson, "Case Stokes Haiti's Fear for Children, and Itself," *New York Times*, Feb. 2, 2010.

3. Marc Lacy and Ian Urbina, "Church Adviser May Face Warrant," *New York Times,* Feb. 13, 2010.

4. Ginger Thompson, "Questions Surface After Haitian Airlift," *New York Times*, Feb. 23, 2010.

5. The U.S. Department of State's children's issues website indicates that over twelve thousand children were adopted in the United States in 2009, down from a high of almost twenty-three thousand in 2004. Office of Children's Issues, U.S. Department of State, *Total Adoptions to the United States*, http://adoption.state.gov/news/total_chart.html.

6. Advocates of transnational adoption are many and their views vary; most readily recognize shortcomings in the present system. They hail from all walks of life, from adoptive parents to professionals working with nations and agencies in the adoption process. TNA is also a fertile field for academic writing. Among the most prominent scholarly voices in what may be loosely termed the 'pro-adoption' camp are Harvard law professor Elizabeth Bartholet and Suffolk University legal scholar Sara Dillon. See, Elizabeth Bartholet, *Family*

*Bonds: Adoption and the Politics of Parenting* (New York: Houghton Mifflin Co., 1993); 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," *Boston University International Law Journal* 21 (2003): 179–257.

7. Voices in opposition to transnational adoption are as varied as those of proponents, as noted above; few are opposed to all adoptions in every form under any circumstance, and many recognize that adoption is one among many responses that should be considered when dealing with needy children. Among the most prominent voices are legal scholar David Smolin, "Intercountry Adoption as Child Trafficking," *Valparaiso University Law Review* 39, no. 2 (2004): 281–325 and journalist E.J. Graff, a senior researcher at Brandeis University's Schuster Center for Investigative Journalism. E.J. Graff, "The Lie We Love," *Foreign Policy*, Oct. 15, 2008. http://www.foreignpolicy.com/articles/2008/10/15/the_lie_we_love.

8. Elizabeth Bartholet, "International Adoption: Thoughts on Human Rights Issues," *Buffalo Human Rights Law Review* 13 (2007): 151–205, 151.

9. A needy child may enter the system in a variety of other ways if parents are not available, all informal. Brent and Craig Renaud, "The Lost Children of Haiti," *New York Times*, Feb. 25, 2010, http://video.nytimes.com/video/2010/02/25/world/americas/1247467176636/the-lost-children-of-haiti.html.

10. See, e.g., Elizabeth Bartholet, "Put Children's Safety First," in "Haiti's Children and the Adoption Question: Room for Debate," *New York Times*, Feb. 1, 2010, http://roomfordebate.blogs.nytimes.com/2010/02/01/haitis-children-and-the-adoption-question/?scp=1-b&sq=+adoption+smolin&st=nyt.

11. Graff, "The Lie We Love;" David Smolin, "A False Dilemma" in "Haiti's Children and the Adoption Question: Room for Debate," *New York Times*, Feb. 1, 2010, http://roomfordebate.blogs.nytimes.com/2010/02/01/haitis-children-and-the-adoption-question/?scp=1-b&sq=+adoption+smolin&st=nyt.

12. In most nations, families may move their children from community to community without limitation, which raises interesting issues about efforts to enforce or maintain communal connections and whether a biological parent may choose to surrender a child for adoption outside of a community without the community's consent if communal 'rights' to connect to a child are recognized. While a detailed discussion is not possible here, it is an issue that has already arisen in the United States under the Indian Child Welfare Act. See also, Mary Lyndon Shanley, *Making Babies/Making Families: What Matters Most in an Age of Reproductive Technologies, Surrogacy, Adoption and Same-Sex and Unwed Parents* (Boston: Beacon Press, 2002).

13. Barbara Yngvesson, "'Going Home': Adoption, Loss of Bearings and the Mythology of Roots," *Social Text* 21, no. 174 (2003): 1–27, 8.

14. Sara K. Dorow, *Transnational Adoption: A Cultural Economy of Race, Gender and Kinship* (New York: New York University Press, 2006), 16–23.

15. When such requirements are imposed during the pre-placement process, it may not appear to be problematic. Imposed as an ongoing requirement, however, may be viewed as an interference with parent's rights to rear their children as they see fit, which raises interesting problems that are beyond the scope of the discussion here.

16. See, Jacqueline Bhabha, "Moving Babies: Globalization, Markets and Transnational Adoption," *Fletcher Forum of World Affairs* 28, no. 2 (2004): 181–197; Jena Martin, "The Good, the Bad and the Ugly: A New Way of Looking at the Intercountry Adoption Debate," *University of California-Davis Journal of International Law and Policy* 13 (2007): 173–216.

17. Derek Kirton, *Race, Ethnicity and Adoption* (Philadelphia: Open University Press, 2000).

18. Yngvesson, "Going Home," 9.

19. Yngvesson, "Going Home," 21.

20. Yngvesson, "Going Home," 18.

21. Hollee McGinnis, Susan Livingston Smith, Scott D. Ryan and Jeanne A. Howard, *Beyond Culture Camp: Promoting Healthy Identity Formation in Adoption* (New York: Evan B. Donaldson Adoption Institute, 2009), 8. http://www.adoptioninstitute.org/research/2009_11_culture_camp.php

22. Ya'ir Ronen, "Redefining the Child's Right to Identity," *International Journal of Family Law* 18, no. 2 (2004): 144–177, 147.

23. *Draft Declaration on the Rights of Indigenous Peoples*, art. 6, (emphasis added), http://www.unhchr.ch/Huridocda/Huridoca.nsf/%28Symbol%29/E.CN.4.SUB.2.RES.1994.45.En?Opendocument (1994).

24. *United Nations Declaration on the Rights of Indigenous Peoples*, art. 7, A/RES/61/295, http://www.un.org/esa/socdev/unpfii/en/drip.html (2007).

25. *Convention on the Rights of the Child*, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N.Doc. A/44/49 (1989), entered into force September 2, 1990, http://www2.ohchr.org/english/law/crc.htm.

26. Reservations by Country, *Convention on the Rights of the Child,* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en. The Qu'ran imposes an obligation, known as *kafalah*, to voluntarily care for orphaned and abandoned children. Kafalah endows the caregiver with parental authority and obligates that caregiver to maintain the child, while preserving the exclusivity of the caregiver's family bonds and the child's own family status at the same time.

27. *Convention on the Rights of the Child,* Preamble.

28. *Convention on the Rights of the Child,* art.5.

29. Geraldine Van Bueren, *The International Law on the Rights of the Child* (The Hague: Martinus Nijhoff Publishers, 1998).

30. George A.Stewart, "Interpreting the Child's Right to Identity in the U.N. Convention on the Rights of the Child," *Family Law Quarterly* 26 (1992): 221–33; see also Samantha Besson, "Enforcing the Child's Right to Know Her Origins: Contrasting Approaches under the Convention on the Rights of the Child and the European Convention on Human Rights," *International Journal of Law, Policy and the Family* (2007), published online April 17, 2007, doi:10.1093/lawfam/ebm003, http://lawfam.oxfordjournals.org/cgi/content/abstract/ebm003v1.

31. *Convention on the Rights of the Child,* art. 30.

32. *Convention on the Rights of the Child,* art. 20.

33. *Convention on the Rights of the Child,* art. 20 (emphasis added).

34. *Convention on the Rights of the Child,* art. 21.

35. *Convention on the Rights of the Child,* art.21(b).

36. Samantha Harris-Short, "Listening to the Other: The Convention on the Rights of the Child." *Melbourne Journal of International Law* 2, no.2 (2001): 304–351.

37. "UNICEF'S Position on Intercountry Adoption", http://www.unicef.org/media/media_41918.html (accessed December 8, 2009).

38. Dillon, "Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles," 223.

39. *African Charter on the Rights and Welfare of the Child*, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999, http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf

40. *American Convention on Human Rights*, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm.

41. *U.N. Guidelines for the Alternative Care of Children,* Nov. 2009, http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/11/L.13.

42. *UN Guidelines,* sec. 2(b) and sec. 6.

43. *UN Guidelines,* sec. 10.

44. *UN Guidelines*, sec. 29(b) and sec. 136.

45. *Declaration on the Rights of Indigenous Peoples,* Preamble and art. 7.

46. *Declaration on the Rights of Indigenous Peoples,* art. 8.

47. *Declaration on the Rights of Indigenous Peoples*, art. 33.

48. S. James Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 2004).

49. *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities,* G.A. res. 47/135, annex, 47 U.N. GAOR Supp. (No. 49) at 210, U.N. Doc. A/47/49 (1993).

50. *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*, Preamble.

51. *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities,* art.2.

52. Alex Conte, Scott Davidson and Richard Burchill, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (Burlington: Ashgate Publishing Ltd. 2004), 187.

53. *Framework Convention for the Protection of National Minorities* (1998) CETS no.: 157, http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=157&CL=ENG.

54. *UNESCO Universal Declaration on Cultural Diversity* (2001), http://unesdoc.unesco.org/images/0012/001271/127160m.pdf.

55. *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, done May 29, 1993, Miscellaneous No. 40 (1994), http://www.hcch.net/index_en.php?act=conventions.text&cid=69.

56. *Hague Convention*, Preamble.

57. Smolin, "Intercountry Adoption as Child Trafficking."

58. *Hague Convention,* art.5, art. 16, art. 17, art. 30.

59. Martin, "The Good, the Bad and the Ugly," 204.

60. Martin, "The Good, the Bad and the Ugly," 205–206.

61. Martin, "The Good, the Bad and the Ugly," 214–216.

62. Dillon, "Making Legal Regimes for Intercountry Adoptions Reflect Human Rights Principles," 221–222.

63. Denise Grady, "Fragile Tanzanian Orphans Get Help After Mothers Die," *New York Times*, June 24, 2009, http://www.nytimes.com/2009/06/25/world/africa/25orphan.html?scp=1&sq=tanzania%20aunt%20children%20orphan&st=cse.