

9/5/2013

THE INTERNATIONAL ADOPTION CLIFF:

DO CHILD HUMAN RIGHTS MATTER?

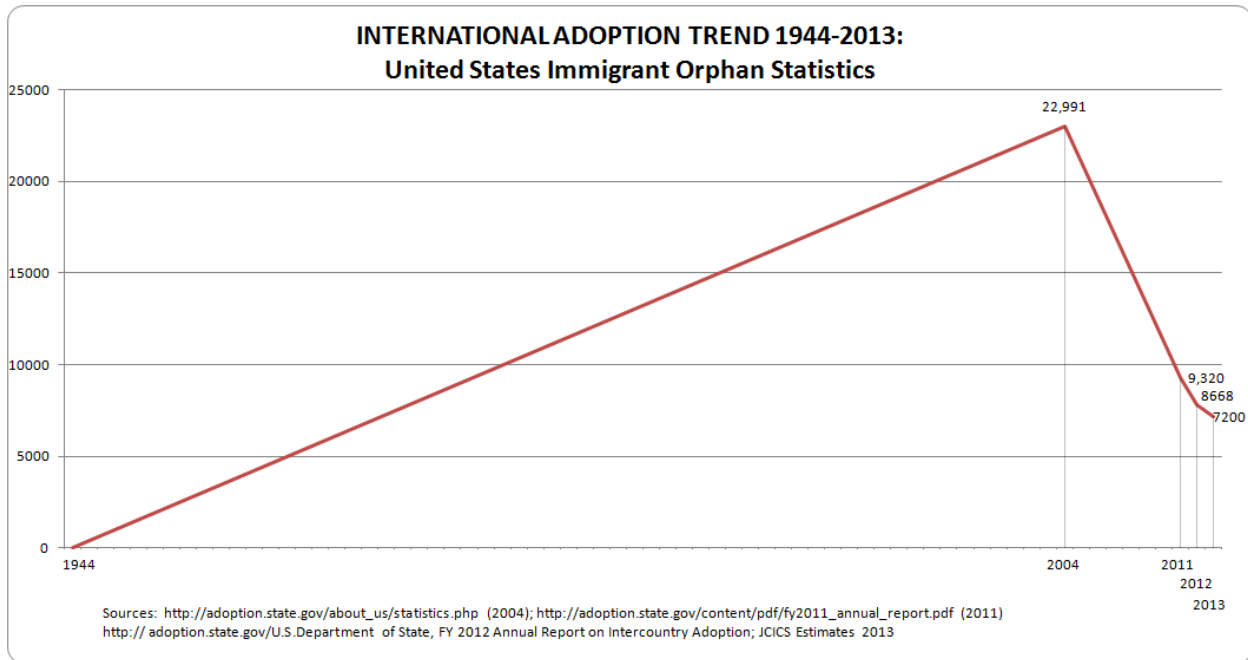
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INTRODUCTION

It is an honor to address this group on international adoption. You represent many important constituencies, and you include many people who have given extensive thought to the issues. You could make an important difference to international adoption policy. And the issues are important – enormously important to children.

The chart below illustrates the “International Adoption Cliff” that is part of my topic. It shows the numbers of international adoptions rising steadily until 2004, and then falling precipitously each of the years since.

¹ Professor of Law and Faculty Director of the Child Advocacy Program, Harvard Law School. This chapter is a slightly revised version of the author’s Plenary Speech at the opening of a conference on “Intercountry Adoption: Orphan Rescue or Child Trafficking?,” sponsored by the Herbert & Elinor Nootbar Inst. on Law, Religion & Ethics, Pepperdine University, February 8-9, 2013. For other of my work on international adoption see <http://www.law.harvard.edu/faculty/bartholet/pubs.php>. Documentation for the claims made in this chapter is contained in various of the articles cited on that website including in particular: Bartholet, *Intergenerational Justice for Children: Restructuring Adoption, Reproduction & Child Welfare Policy*, J. Law & Ethics of Human Rights (forthcoming 2013-14), [http://www.law.harvard.edu/faculty/bartholet/IA-IntgenerJusticeDraftArticle6-12-13%20\(2\).pdf](http://www.law.harvard.edu/faculty/bartholet/IA-IntgenerJusticeDraftArticle6-12-13%20(2).pdf); Bartholet and Smolin, *The Debate*, chapter in INTERCOUNTRY ADOPTION: POLICIES, PRACTICES, and OUTCOMES, 233 (Ashgate Publishing 2012); Bartholet, *Ratification by the United States of the Convention on the Rights of the Child: Pros and Cons from a Child's Rights Perspective*, 633 The ANNALS of Amer. Acad. Political and Social Science 80, Special Issue, *The Child as Citizen* (2011); Bartholet, *International Adoption: The Human Rights Position*, 1 Global Policy 91 (2010) ; Bartholet, *International Adoption: The Child's Story*, 24 Ga. St. U. L. Rev. 333 (2008); Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 Buff. Hum. Rts. L. Rev. 151 (2007).



International adoptions into the United States are projected to be down by two-thirds as of 2013. Worldwide such adoptions are down by roughly half as of 2012.

This represents a devastating human rights tragedy. It represents the destruction of tens of thousands of children’s lives, as a matter of deliberate government and NGO policy. Even the peak 2004 numbers represent the unnecessary destruction of children’s lives since with adoption-friendly regulation facilitating the placement of unparented children abroad we could easily have hundreds of thousands of international adoptions annually.

The other part of my topic is the question: “Do Child Human Rights Matter?” Apparently not to the policy-makers -- the United States and foreign governments, UNICEF and other NGOs – who have chosen to shut down international adoption. Do child human rights matter to us? Do they matter enough for us to take action?

THE CLIFF

I want to say more about why I characterize the International Adoption Cliff as a devastating child human rights tragedy, deliberately caused.

International adoption provides unparented children with nurturing homes – the kinds of homes they need in order to grow up capable of enjoying their other basic human rights. We know from the social science that international adoption works really well for children.²

The need for such homes is ever greater: The Cliff is not in response to the world taking better care of its children. Since 2004 the number of orphaned children has only increased, as has the number growing up in the institutions that are so destructive to children's life prospects. Today there are some 8-12 million growing up in institutions -- too many for any to have an accurate count. Even those arguing for allegedly better in-country alternatives to international adoption know that in the foreseeable future these alternatives won't provide nurturing homes for more than a small fraction of the world's unparented children.

The capacity of international adoption to provide the needed homes is enormous: The Cliff is not in response to any loss of interest on the part of prospective parents. They are begging for the opportunity to provide homes to the unparented. This is true even though the current international adoption regime involves long waiting periods, and huge costs in money and inconvenience. It is true even though most of the children available are at high risk for serious emotional and intellectual disabilities. Current regulation requires that most children be held in damaging institutions for 2-5 yrs or more before they can be placed in adoptive families.³ If we had regulation that facilitated rather than obstructed adoptive placement, regulation that encouraged prospective parents to step forward to parent, we could easily have many more millions of eager prospective parents than we do.

At its peak in 2004 international adoption provided worldwide more than 45,000 homes for children in desperate need.⁴ Facilitative regulation could easily multiply the number of children placed by factors of 10 or 100. International adoption magically transforms the lives of those placed from destitution to A-OK. Compared to other social programs I am aware of this is a truly unusually successful program. International adoption does this at essentially no cost to governments, no real cost. Of course there are some costs in maintaining the necessary bureaucracy involved. But these fade by comparison to the significant savings involved in reducing the number of children that governments are responsible for supporting, and reducing the costs imposed by children who graduate from institutions to live the lives of unemployment, homelessness, substance abuse and crime that characterize the lives of so many children denied appropriate parenting.

Why then the Cliff? You might think that policy-makers would embrace international adoption. But instead policy-makers targeted the high numbers of children placed as a problem, and

² See, e.g., Bartholet, *International Adoption: The Child's Story*, *supra* n. 1, at 347-48 and n. 27.

³ See, e.g., Bartholet, *Intergenerational Justice for Children*, *supra* n. 1, at 10 n. 31.

⁴ *Id* at 9, n. 30.

decided to cut down, and in the case of some countries entirely *shut* down, international adoption.⁵ It is this deliberate quality of the policy that makes the Cliff not just a tragedy but an evil. There are many tragedies in the world that are hard to prevent or solve. War and disease and natural disasters like earthquakes and tsunamis cause horrible levels of death and destruction, but it is hard to know how to prevent these things. There's an easy solution in international adoption for at least many tens of thousands, indeed hundreds of thousands, of children now relegated to the disaster of institutional life.⁶

The policy-makers responsible include first and foremost NGOs that describe themselves as the official friends of children – organizations like UNICEF and Save the Children. They target any country sending significant numbers of children into international adoptive homes, and call for “reforms,” which result in cutting down or shutting down such adoption. While UNICEF claims that it is not entirely against international adoption, this seems simply a public relations position. UNICEF never advocates for such adoption as even a partial solution for the unparented children of the world.⁷

Other policy-makers playing a negative role are national governments. Countries with millions of children languishing in institutions or on the streets often resist placing these children abroad because of nationalist pride and related reasons. They don't want to admit the apparent weakness involved in being unable to care for their children. China's cut-back in recent years seems largely attributable to its desire to assert its world power status. Developing nations often want to stand up to the colonialist powers of the world, and denying those powers children to adopt is one of the few ways that seems possible. This helps explain the recent “African Child Policy Forum,” where the many African nations represented reacted against the recent increase in international adoptions out of Africa by condemning such adoptions, announcing that they could take care of their children, and that they would make international adoption a “last, last resort.” This despite the many millions of unparented children in these nations, and their obviously limited capacity, given desperate poverty, the ravages of AIDS, and the chaos of war and other disasters, to provide all these children with nurturing permanent homes.⁸

Countries like the United States, which have functioned primarily as receiving countries, have also played a negative role in international adoption. Our leaders have generally focused on our own national interests, and on the risks to those interests that such adoption might involve. Claims that we are exploiting other nations by taking their children, claims that certain children

⁵ *Id* at 9-12.

⁶ *Id* at 10 and nn. 33-35.

⁷ *Id* at 11 and n. 38; Bartholet, *Ratification by the United States of the Convention on the Rights of the Child*, *supra* n. 1 at 96-97; Bartholet, *International Adoption: The Human Rights Position*, *supra* n. 1 at 92-93.

⁸ Bartholet, *Intergenerational Justice for Children*, *supra* n. 1, at 18-19 (recent developments in Africa).

might have been improperly paid for or certain birth mothers defrauded trigger defensive action. Our Department of State has sought to protect our national interests by shutting down adoption programs thought to put our reputation at risk. It has set as a standard that international adoption programs should involve “not a single ethical violation” – a standard that would shut down virtually any field of human endeavor to which it was applied. Imagine, for example, applying that standard to Wall Street! Since the needs of unparented children do not equate with advancing our national interests, our leaders have tended not to count them when they assess the balance of costs and benefits in determining international adoption policy.

Many claim, however, that the Cliff is motivated by good reasons, and that it represents the vindication rather than the violation of child human rights. They say that we need to keep children in their country of origin for their own sake, to protect their heritage rights, to protect them against the adoption abuses and corruption that steal them from their parents and from the land where they belong.

These claims represent outrageous hypocrisy -- claims made on behalf of children that people get away with only because children are unable to speak for themselves. Consider whether such claims would be tolerated if made on behalf of adults. What if Russia or China were to build a wall locking their adult citizens in, preventing emigration, and then try to justify this based on claims that these people would do better in-country enjoying their heritage rights? What if the United States were to try to justify its limitations on immigration based on claims that we wanted to save people from sacrificing their heritage rights? Could anyone make such arguments with a straight face? Could anyone hearing such arguments take them seriously?

These international adoption arguments can only be made because children are involved, and children can't speak for themselves, or act to escape their institutions, or to break down the various walls locking them into their situations as those adults locked in by the Iron Curtain walls of the past could at least try. So the East Berliners could at least try to breach the wall between East and West Berlin. If they were shot trying, at least the world realized that they wanted out and that the wall was not designed to provide for their protection. Since institutionalized children can't possibly act on their own, it is up to us to break down the walls that shut them in.

The recent Russian termination of international adoption into the United States is a positive only in this limited sense – it helps give the lie to the idea that shut-downs of international adoption are *ever* instituted to serve child interests. At least Russia's leaders made no such pretense; they admitted the shut-down was simply designed to punish the United States for its attempt to stand up for the human rights of an adult Russian prisoner. They admitted they were using their institutionalized children as pawns in an international power game. The only other justification offered had equally little to do with child interests. Russia's Child Rights

Commissioner stated: "I think any foreign adoption is bad for the country."⁹ Interesting, since he is of course officially in charge of protecting child rights not national interests.

I believe that all international adoption shut-downs are equally cynical, just not equally honest. All are designed to serve adult rather than child interests.

DO CHILD HUMAN RIGHTS MATTER? DOES ANYONE CARE ENOUGH TO ACT?

The United States Government cares, at least a little, when adult human rights are violated abroad.¹⁰ The United States Department of State has a Human Rights Bureau which maintains an Annual Human Rights Report on all the world's countries, a naming/shaming system with consequences for countries identified as violating human rights. This publication gets attention, which itself can have significant impact, leading to action. It generates extensive media coverage. It helps direct national and international attention to human rights violations, educating those who might have an influence, providing advocacy opportunities, and stimulating action. Listing in these Reports can also lead to imposition of the kinds of sanctions discussed below.

This Annual Human Rights Report cites countries for violations of *adult* rights that are comparable to those suffered by institutionalized children. Thus recent Reports cite Russia and Guatemala for arbitrary detention and harsh prison conditions involving adults.¹¹ Both countries are guilty of the arbitrary denial of liberty to children by shutting down international adoption, and the detention of children in institutions characterized by abusive, destructive conditions. This treatment of children violates human rights treaties like the Convention on the Rights of the Child and the International Covenant on Civil & Political Rights, as well as other international human rights law. But where are the Department of State Human Rights Bureau Reports that list, shame, and encourage sanctions for Russia and Guatemala for these human rights violations? Where are the Reports that list, shame, and encourage sanctions for other countries that shut down international adoption and institutionalize children?

The United States Government imposes legislative and administrative sanctions on certain countries identified as violating adult human rights. Such sanctions include, for example, the denial of trade, of aid, and of rights to travel and hold property in the United States, as well as restrictions on arms sales and military assistance. Indeed United States law actually *forbids* arms sales and foreign aid to nations identified as guilty of gross violations of human rights.

⁹ *New York Times*, Dec. 27, 2012, A12, col. 3.

¹⁰ See generally *Legislative/Executive Enforcement Against Foreign Violators*, chapter 10F of Henkin et al, HUMAN RIGHTS 1019 (2nd edition, Foundation Press, 2009).

¹¹ See Country Reports on Human Rights Practices for 2011, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?d>.

Such sanctions are imposed in connection with child human rights violations only on a limited basis in connection with certain discrete types of violations, specifically child trafficking for exploitative purposes, child labor, the use of children as soldiers. Our government does not impose such sanctions in response to the systematic denials of child rights represented by the imprisonment of unparented children in institutions, and the denial of permanent nurturing homes available in international adoption.

The United States Government seemed to care when *one* adult prisoner in Russia was denied his human rights in the form of needed medical care – Congress passed the Magnitsky Bill, sanctioning those deemed responsible by limiting certain travel and property ownership privileges in the United States.

But neither Congress, nor the White House, nor the Department of State seem to care about the systematic violation of the human rights of thousands on thousands of children that is involved in international adoption shut-downs. For example, they imposed no sanctions on Russia for its recent shut-down, which denied homes to the close to 1,000 children per year who had been coming into the United States for international adoption. They imposed no sanctions in previous years when Russia cut down by several thousand per year the number of children placed in the United States. They imposed no sanctions based on the 650,000 children Russia keeps in institutional or foster care. They imposed no sanctions on Guatemala related to its shut-down of international adoption which denies homes to close to 5,000 children per year – the number placed by Guatemala in the United States prior to the shut-down. These United States institutions have imposed no sanctions related to any of the 8-12 million children institutionalized worldwide.

This absence of human rights activism challenging international adoption shut-downs is hardly surprising given that the United States Government has itself acted to support such shut-downs. In recent years the United States has helped shut down the international adoption program from Guatemala, has helped limit the program from Ethiopia, and has taken similar action in many other countries. The United States Congress provides UNICEF with vital funding support every year, thus enabling what may be the single most powerful force hostile to international adoption. Senator Mary Landrieu stated at a recent Senate Committee hearing that last year **direct support by the United States Government for UNICEF totalled \$132 million.**¹²

¹² Senator Mary Landrieu questioning UNICEF representative Susan Bissell at Senate Appropriations Subcommittee on State, Foreign Operations, and Related Programs, United States Senate Committee on Appropriations, Review of United States Foreign Assistance for Children in Adversity, May 21, 2013. In addition, Sen. Landrieu said that the United States provided UNICEF annually many millions more for country-specific programs.

Reorienting United States policy to support child human rights, to challenge those shutting down international adoption, would require profound change. Are we willing to fight for that kind of change?

Could we demand that Congress, the White House, and the Department of State embrace international adoption as a way to serve the human rights of unparented children, and work to expand its potential to provide homes? Now these entities cooperate with others to impose ever-increasing restrictions on international adoption.

Could we demand that the Department of State's Human Rights Bureau include in its Annual Reports an analysis of the different nations' failures to meet the needs of unparented children, their institutionalization of children, their restrictions on international adoption that unnecessarily limit the homes it can provide? Could we demand that Congress and the Administration impose sanctions on nations that institutionalize children and deliberately deny them available homes?

Could we demand that Congress condition any future funding of UNICEF, any continuation of our \$132 million annual contribution,¹³ on a change in UNICEF policy to facilitate rather than impede international adoption?

We could. We should. But will we?

Together those of us in this room could change United States policy, and UNICEF policy, and other policy that is forcing international adoption over the Cliff, denying children needed homes.

I hope that we will. I hope that child human rights matter enough to inspire us all to action.

¹³ *Id.*