Inter-country Adoption and the Special Rights Fallacy

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INTERNATIONAL ADOPTION AND THE SPECIAL RIGHTS FALLACY

JAMES G. DWYER*

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International adoption is now a familiar phenomenon in the United States and elsewhere in the West. It first became a substantial practice following World War II, during which a great

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number of children were orphaned.\(^1\) Its popularity soared in the final decades of the twentieth century, as the number of infants available for domestic adoption in western countries plummeted.\(^2\) In the past decade, however, the number of international adoptions has declined dramatically, despite a steady increase in both the number of unparented children\(^3\) in poor countries and the number of people in developed countries wishing to adopt one or more of those children.\(^4\) This discrepancy has occurred primarily because

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\(^3\) I use ‘unparented children’ to mean children who should be available for adoption because both of their parents have died, abandoned them, or permanently relinquished custody and no kin or community members have taken over the role of raising them. For the most part, such children are either in state institutional or foster care or are living on the streets. But not all children living in orphanages or on streets fall into this category. For example, it is common in many countries for parents in impoverished regions to place their children in orphanages temporarily with the hope that one day they will become capable of resuming care for them. The UN Committee on the Rights of the Child has used the similar term “children without parental care.” See Hearst, supra note 1, at 332 (stating that this phrase was the focus of the UN Committee on the Rights of the Child’s September 16, 2005 meeting in Geneva, Switzerland).

\(^4\) See Elizabeth Bartholet, Professor of Law & Faculty Dir. of the Child Advocacy Program, Harvard Law Sch., The International Adoption Cliff: Do Child Human Rights Matter?, Plenary Speech at the Conference of the Herbert & Elinor Nootbar Institute on Law, Religion, and Ethics: Intercountry Adoption: Orphan Rescue or Child Trafficking? (Feb. 8–9, 2013) (forthcoming), available at http://www.law.harvard.edu/faculty/bartholet/pubs.php) (showing a two-thirds decline in adoptions into the United States from 2004 to 2013); id. (“Since 2004 the number of orphaned children has only increased, as has the number
many countries that have been major "sending countries" have imposed new procedural and substantive restrictions on foreign adoption or have foreclosed the practice altogether.\(^5\)

Procedural obstacles to adoption include a requirement that adoption applicants live in-country with the child for a period of time, such as six months or a year, which many potential adoptive parents cannot afford to do.\(^6\) A common substantive restriction is a requirement that children be held available for domestic adoption for some months or years before the adoption process may begin with foreign applicants,\(^7\) which all but ensures attachment problems for children.\(^8\) Less commonly, some states require that growing up in the institutions that are so destructive to children’s life prospects.”.

\(^5\) See Elizabeth Bartholet, *International Adoption: The Human Rights Position*, 1 **GLOBAL POL’Y** 91, 92 (2010) (citing recently-imposed restrictions in Russia and China); Meghan Collins Sullivan, *For Romania’s Orphans, Adoption is Still a Rarity*, NPR.ORG (Aug. 19, 2012, 4:39 PM), http://www.npr.org/2012/08/19/158924764/for-romanias-orphans-adoption-is-still-ararity (noting that Romania began forbidding foreign adoptions a decade ago). As discussed *infra*, some of these countries’ actions have come at the urging or insistence of international aid agencies and NGOs. See Bartholet, *supra* note 4 (noting that UNICEF has called for reforms in sending countries). Another contributing factor has been the U.S. Department of State’s imposition of a no-tolerance policy for adoption improprieties, refusing to cooperate with sending nations that cannot guarantee adherence to rules relating to, for example, payments to adoption intermediaries. *Id.* (manuscript at 5) (describing the U.S. State Department standard of “not a single ethical violation” applied to international adoption programs).

\(^6\) See, e.g., U.S. Dep’t of State, Belize, INTERCOUNTRY ADOPTION: BUREAU OF CONSULAR AFFAIRS (Jan. 2012), http://adoption.state.gov/country_information/country_specific_info.php?country-select=belize (stating that Belize requires adoptive parents to live in Belize for 12 months with the child, and that only a handful of Americans adopt children from Belize each year); U.S. Dep’t of State, Gambia, INTERCOUNTRY ADOPTION: BUREAU OF CONSULAR AFFAIRS (July 2012), http://adoption.state.gov/country_information/country_specific_info.php?country-select=gambia (noting that Gambia requires adoptive parents to be resident in the country for a minimum of six months prior to applying for adoption).


\(^8\) Such “holding period” policies are likely to cause many children to have no parents for the developmentally crucial first two years of life. Demand for adoption within sending countries is extremely low or non-existent. Ultimately, these holding period requirements cause many children never to be adopted at
adopteurs living abroad be citizens of the child’s country of origin, which amounts to de facto prohibition.9

Sending countries express a variety of justifications for making foreign adoption more difficult or impossible, which Part 5 of the Article will analyze in greater depth.10 Some of the proffered reasons are unassailable, and the real question is whether they are weighty enough to justify the restrictions or prohibition. For example, the possibility that adoption applicants are actually sex or slave-labor traffickers certainly could justify careful screening procedures and, if there were evidence of substantial trafficking via the international adoption process in a particular country, even a moratorium on out-of-country adoption placements in those countries until the problem can be adequately addressed.11 Other reasons for creating obstacles to foreign adoption are morally questionable, and some are patently illicit. For example, Russian legislation passed in late 2012 prohibiting Americans from adopting children in Russia was blatant political retaliation for an entirely unrelated action by the American government.12 Other

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9 See, e.g., U.S. Dep’t of State, Algeria, INTERCOUNTRY ADOPTION: BUREAU OF CONSULAR AFFAIRS (Nov. 2011), http://adoption.state.gov/country_information/country_specific_info.php?country-select=algeria (stating that Algeria only permits Algerian citizens to adopt); U.S. Dep’t of State, Bangladesh, INTERCOUNTRY ADOPTION: BUREAU OF CONSULAR AFFAIRS (Oct. 2013), http://adoption.state.gov/country_information/country_specific_info.php?country-select=bangladesh (explaining that Bangladesh only allows its own citizens to adopt).

10 The justification offered is, of course, not necessarily the actual reason for the state’s actions. Some countries restrict or foreclose foreign adoption simply because international aid organizations like UNICEF pressure them to do so. See infra Section V.

11 But see infra notes 162–66 and accompanying text (explaining why sex and labor-trafficking are actually not significantly connected to inter-country adoption).

frequently-expressed motivations are more directly connected to adoption but likewise treat unparented children in an instrumental fashion—such as protecting a nation’s dignity, resisting neocolonialism, or holding on to children as potential future workers.\textsuperscript{13} Still other justifications sound child-centered, but reasonable persons disagree about the validity, substantiality, and relative weight of the concerns. For example, some commentators express concern about children suffering from not growing up in the culture of their country of birth, or about parents being induced by offers of compensatory payment to relinquish their children for adoption.\textsuperscript{14}

All reasons that nations assert for creating obstacles and all specific practices that constitute obstacles should be subject to scrutiny and reasoned deliberation. This should occur within a morally appropriate normative framework—that is, with a clear and defensible idea of what rights and interests ought to determine state policy. Yet there has been little attention given to the foundational task of establishing such a framework. Debate

\textsuperscript{13} See Bartholet, supra note 5, at 92 (“In many ‘sending countries’ national pride has led to calls to stop selling, or giving away, ‘our most precious resources’, and to claims that the country should ‘take care of our own.’”); David M. Herszenhorn, In Russia, Ban on U.S. Adoptions Creates Rancor and Confusion, N.Y. TIMES, Jan. 15, 2013, http://www.nytimes.com/2013/01/16/world/europe/in-russia-ban-on-us-adoptions-creates-rancor-and-confusion.html (quoting a Russian politician who accused those opposed to the ban on adoption by Americans of wanting to “send our intelligence away to America”).

\textsuperscript{14} See, e.g., King, supra note 2, at 414 (emphasizing children’s supposed interest in growing up within the culture of their place of birth); David M. Smolin, Child Laundering and the Hague Convention on Intercountry Adoption: The Future and Past of Intercountry Adoption, 48 U. LOUISVILLE L. REV. 441, 444 (2010) (collecting evidence of what Smolin terms “child laundering”).
concerning state policies on foreign adoption has almost uniformly taken as given, and thus operated narrowly within, a flimsy normative framework resting on two poorly-drafted international conventions relating to children:¹⁵ the United Nations Convention on the Rights of the Child (CRC)¹⁶ and the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention).¹⁷ Both conventions contain provisions relating specifically to inter-country adoption, but the crucial language is opaque, and thus most of the debate concerning the provisions focuses on interpretation of that language.¹⁸ The most contentious debate has concerned what these two conventions dictate with respect to prioritizing placement options for unparented children as among domestic adoption, domestic foster care or guardianship, domestic institutional care, and transnational adoption.¹⁹

Because this debate operates almost entirely within the framework of these special children’s-rights documents, the reasoning tends to be sui generis. It implicitly supposes that the situation of unparented children is unlike that of any other persons and does not require support from any broader principles

¹⁵ See Hearst, supra note 1, at 335 (noting the importance of the two conventions); Richard Carlson, Seeking the Better Interests of Children with a New International Law of Adoption, 55 N.Y.L. SCH. L. REV. 733, 737 (2010–11) (“These two documents—the CRC and the Hague Convention—frame the debate . . . .”). In fact, the CRC has dominated international debates over child welfare more broadly for the past quarter century. See SARA DILLON, INTERNATIONAL CHILDREN’S RIGHTS 3 (2010) (“From the time of its promulgation in 1989, the UNCRC has provided the focal point for debate as to how contemporary societies should best protect and empower children.”).


¹⁸ See SIGNE HOWELL, THE KINNING OF FOREIGNERS: TRANSNATIONAL ADOPTION IN A GLOBAL PERSPECTIVE 170, 172 (2006) (noting that key provisions in both conventions were left “deliberately vague” in order to get past entrenched disagreements among groups of nations represented in the negotiations).

concerning state treatment of persons in general. The central thesis of this Article is that giving primacy to these child-specific conventions is a mistake, arising from what I call "The Special Rights Fallacy," because it facilitates subordination of children's welfare to politics, ideology, and the interests of other persons.\textsuperscript{20} I call for a reorientation of advocacy, analysis, and deliberation concerning inter-country adoption, placement priorities for unparented children, and movement of children more generally out of inhospitable environments and across national boundaries.

A few other scholars arguing in favor of freer inter-country adoption have invoked more general human rights conventions and principles—in particular, treaty provisions affirming a right to family life. These authors have thereby challenged the hegemony of the child-specific treaties.\textsuperscript{21} This Article explains why they are correct to shift focus away from the CRC and Hague Convention and why the most powerful legal strategy for inter-country adoption proponents is to put aside those child-specific conventions and to appeal instead to general international human rights laws. The Article further analyzes the relative strength of various general human rights bases for opposing restrictions on foreign adoption, concluding that the right to emigrate—which has been entirely ignored in the debate over inter-country adoption—is in fact the best vehicle for defending children's moral right to join families in other countries.

Part 1 below is conceptual; it explains why and how a limited focus on group-specific rights provisions, and even passage of such provisions in the first instance, can inadvertently make a targeted group worse off. This lesson is applicable not only to children but also to other groups such as women, racial or cultural minorities, and disabled persons for whom advocates have sought specialized rights enactments. I offer some guidance for determining when,

\textsuperscript{20} Cf. DILLON, supra note 15, at 3-4 ("[I]t is important to recognize the ubiquitousness of adult agendas in all theorizing about children. . . . Because children have a symbolic role within the lives of families, cultures and even global legal systems, they are very likely to be described in self-serving ways by adults."); HOWELL, supra note 18, at 14 ("[D]ue to a number of ideological resistances and complex bureaucracy, only a small minority of theoretically adoptable children are in fact transferred.").

\textsuperscript{21} See infra notes 68-72 and accompanying text (containing examples and explanation of why a right to family life is not a promising basis for legally forcing freer inter-country adoption policies and practices).
and to what extent, special rights are likely to be beneficial for any group.

Part 2 explains how the CRC and the Hague Convention exemplify the Special Rights Fallacy. This is because they enshrine what I will call the "Domestic Placement Preference Principle," which gives signatory nations cover for nearly any restrictions on inter-country adoption that they care to impose for any reason.

Part 3 identifies more general human rights norms that might better serve children whose best option, given current realities in their native country, is international adoption. I also discuss how these norms might better support advocacy for elimination of barriers to international adoption. In particular, the well-established basic human rights of all persons to leave their country of origin and change their nationality—rights that any adult could invoke against any restriction on emigration for purposes of family formation (e.g., marriage)—would, for several reasons, be a better starting point for challenging restrictions on inter-country adoption than the CRC, the Hague Convention, or any other general human right. Part 4 explains further why, as a matter of positive law, the international law documents embodying universal human rights, including the right to emigrate, have lexical priority over the conventions enumerating special rights for children. In short, universal human rights instruments legally trump the CRC and Hague Convention.

Part 4 examines diverse sources of interpretation of the human right to leave one's country of origin and identifies the few reasons for limiting emigration that are recognized as legitimate. The examination yields a set of principles that can form a new basis for assessing barriers to international adoption and for opposing policies that unjustifiably hold children captive to political aims and ideology or to the interests of others.

Finally, Part 5 applies these principles to critique commonly expressed reasons for restricting inter-country adoption, and to generate provisional conclusions as to which types of restrictions on such adoption are permissible and under what circumstances. It concludes that existing restrictive or prohibitive policies fail the test of legitimacy and therefore violate the general human right to emigrate that children share equally with adults. None of the

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22 Others call this preference the "Subsidiarity Principle," but use of that term leads to some confusion and offense, given that "subsidiarity" has a different meaning in political theory and in Catholic theology.
justifications that international agencies, NGOs, or national governments give for restricting the movement of children internationally for purposes of family formation would be legally or morally sufficient to justify restrictions on the emigration of adults. Moreover, no factual differences exist between adults seeking to emigrate for marriage and children whose best chance for survival and a nurturing family life lies in inter-country adoption to warrant a different conclusion.

The Article thus concludes by recommending that thwarted adoptive parents and bona fide child advocacy organizations file complaints with the United Nations Human Rights Committee in a representative capacity on behalf of the children harmed by barriers to international adoption, alleging a violation of the children’s human rights to leave their country of birth and to change their nationality. Even if unsuccessful in triggering Committee action, such complaints might change the terms and improve the quality of debate concerning inter-country adoption.

Nothing in this Article is intended to suggest that inter-country adoption is the answer to poverty, war, and other global problems that fall especially heavily on less-developed countries. I fully support other more systemic efforts to improve conditions in developing countries so that a larger number of parents can successfully raise their offspring themselves, or, alternatively, that good adoptive homes can become available within those countries for cases where parents may be deceased or otherwise irremediably unable to properly care for their children. Nevertheless, this Article focuses on the rights of individual children who are currently living in those less-developed countries, with the conditions that currently prevail, and who do not have families or a reasonable prospect of being adopted within those countries, but who could have the opportunity to become part of a nurturing family and to live in a safe and healthy environment through inter-country adoption. These children’s lives cannot be suspended pending efforts to improve conditions in their native country; they need nurturing parents now and are entitled to leave their native countries to obtain them, just as adults are entitled to leave their native countries to improve their life prospects.23

23 This Article also does not address immigration policy or the duty of developed nations to accept immigrants from poor countries generally, or of children for adoption purposes specifically. As mentioned in note 5, supra, the
1. **The Special Rights Fallacy**

We generally suppose that when a law is passed specifying rights for a particular group of people this must entail an improvement of their position. If a legislative body goes to the trouble of declaring that Group A has a right not to be treated in a certain way, then it must be that Group A has suffered from being treated in that way and now its members will be better off because they will no longer be treated in that way. Or if Group A will now have a positive right to a benefit of a particular kind, its members must have been denied that benefit in the past and now they will get it.

However, a supposition that special rights are always and unqualifiedly advantageous for those upon whom they are conferred would clearly be false. There is no logically necessary connection between receiving special rights and being better off than one was, or would be, without those rights. The connection could fail to exist in at least four types of cases:

1) When the special rights substitute for, yet are of less value substantively to the right-holder than, general rights previously enjoyed or otherwise available;

2) When enforcement of the special rights is relegated to a separate institution with weaker powers to compel compliance than are held by the institutions that enforce general rights;

3) When the thing the special rights guarantee is actually bad for the right-holders, and either the rights cannot be waived or the right-holders have no control over assertion of the right; and

4) When interpretation and enforcement of the special rights are left to persons or institutions that have interests or aims contrary to those of the right holder.

U.S. State Department has created obstacles to inter-country adoption of its own. But those policies ostensibly arise from the same concerns that sending countries express in support of their policies that are hostile to foreign adoption, and not from the usual immigration policy concerns. Our government wants to show sensitivity to sending countries' concerns. Eliminating or putting in better perspective the former set of concerns, as I aim to do in Parts IV and V, should persuade the State Department to remove the obstacles it has created.
Examples of all four exist in the history of marriage law. With respect to the first, there are marital rape laws. Historically, American states have had special laws dealing with marital rape, and insofar as they prohibit involuntary sex, one might view them as conferring rights on wives. However, those laws typically have made rape of one's wife a less serious offense than rape of a stranger. Therefore, the special right of wives, insofar as it supplants more general criminal prohibitions on rape, actually makes wives worse off. As to the second, insofar as the legal system has channeled reports of marital rape or other domestic violence into civil legal proceedings or into non-legal responses like counseling to the exclusion of a criminal law response, it has weakened whatever rights wives might be said to have had. It is difficult to find examples of the third type—that is, special "rights" that harm rather than help. But it is conceivable that during the coverture regime some would have characterized the legal authorization and societal encouragement of physical chastisement by husbands as a right that wives enjoyed to their husbands' assistance in helping them behave properly. As for the fourth type, because wives' separate identities disappeared as a legal matter under coverture, such that they could not bring suit on their own behalf, enforcement of their rights was left to their husbands, who in many contexts might have had interests or views contrary to those of their wives.

The danger that special rights might make their holders worse off relative to what would otherwise be the case is especially pronounced when the right holders do not participate in the process of creating the special rights, as was true with women and coverture law. Today international negotiation of conventions is

24 See Emily J. Sack, Is Domestic Violence a Crime?: Intimate Partner Rape as Allegory, 24 St. John's J. Legal Comment. 535, 556 (2010) (describing state laws that require a higher standard of proof to establish marital rape or provide for lower sentences if one is found guilty of marital rape). A contemporary example is the law of South Carolina. See S.C. Code Ann. §§ 16-3-615, 16-3-652, 16-3-658 (2012) (differentiating marital rape, which carries a potential sentence of ten years, from rape in the first degree, which carries a potential sentence of thirty years).


26 See id. at 675 (noting that traditionally women lost their separate legal identity upon marriage).
highly inclusive of autonomous adults; every affected group can have input. But when negotiations concern rights for incompetent persons, such as children, persons other than those having the special rights bestowed on them are in control, and there is little guarantee that they will be trustworthy proxies for the right holders. The danger is multiplied at the stage of implementing and interpreting rights.

American constitutional doctrine relating to children suggests some basic guidance as to when advocates for a particular group should pursue a special rights agenda. Unlike international law, U.S. federal law has just one fundamental-rights document, the Constitution, whose rights provisions apply to all persons. Thus, when minors or their advocates assert rights against certain state acts or omissions, they invoke the same rights that adults invoke for themselves. This has the advantage of establishing a starting point of rights equal to those of adults and imposing on the state the burden of explaining why children should possess those rights to a lesser extent than adults do. On the other hand, the U.S. Supreme Court has generally interpreted our Constitution as a negative-rights instrument, protective primarily of individual liberty against state interference, and not a positive-rights instrument creating entitlements to protections and benefits. Accordingly, it has rejected claims on behalf of children to state protection against violence within the home and a public school education of good quality. Children in America might benefit, then, from a constitutional amendment providing them with special rights related to the state’s child protection system or to education. But advocates for children should be skeptical of any proposal to add a constitutional amendment purporting to bestow special rights on children with respect to, for example, free speech or search and seizure.

Extrapolating to the international realm, advocates for vulnerable groups should consider, before pursuing or endorsing a special-rights convention for the group, whether existing general

27 See, e.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (holding that students’ conduct in school was protected by the First Amendment); In re Gault, 387 U.S. 1 (1967) (extending several procedural protections from the adult criminal context to juvenile delinquency cases).

human rights enactments contain provisions that could, if properly interpreted, give the group all that the advocates seek. If so, they might focus their efforts instead on developing a jurisprudence of those general rights provisions that is favorable to the group. Promoting a special rights convention is likely to be advantageous only when a group has special needs that universal human rights cannot protect. And in that situation, advocates should limit the scope of any group-specific document they promote to provisions needed to address the special needs.

2. crc and hague convention exemplify the special rights fallacy

All of the ways identified in Part 1 by which the special rights syllogism can be fallacious are true of the CRC and the Hague Convention. With the CRC, this goes beyond the adoption context. That convention on the whole has as much to say explicitly about rights of parents, and implicitly about rights of cultures and nations, to possess and control children as it has to say about the rights of children themselves. Moreover, an omnibus provision implies that interests of other people or of a nation collectively can properly factor into any and all decisions about children's lives, rather than requiring that decisions concerning matters at the core

29 See CRC, supra note 16, at art. 3(2) (requiring State parties to "take[e] into account the rights and duties of his or her parents"); id. at art. 5 ("States Parties shall 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 ... "); id. at art. 14(1) ("States Parties shall respect the right of the child to freedom of thought, conscience and religion."); id. at art. 14(2) ("States Parties shall respect the rights and duties of the parents ... to provide direction to the child in the exercise of his or her right ... "); id. at art. 18(1) ("Parents ... have the primary responsibility for the upbringing and development of the child."). In some instances, what is expressed in terms of children's rights appears designed at least as much to protect interests of parents, cultural groups, or nations. See, e.g., CRC at art. 7(1) ("The child shall ... have the right ... as far as possible ... to know and be cared for by his or her parents."); id. at art. 8(1) ("States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference."); id. at art. 9(1) ("States Parties shall ensure that a child shall not be separated from his or her parents against their will ... "); id. at art. 10(2) ("States Parties shall respect the right of the child and his or her parents to leave any country ... "). For a child-centered assessment of the pros and cons of the CRC, see generally Elizabeth 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 ANNALS OF AM. ACAD. POL. & SOC. SCI. 80 (2011).
of children's lives, such as who will raise them when their parents cannot, rest solely on their best interests.30

Such detractions from a singularly child-centered document reflect the fact that the Convention was a product of negotiation and compromise among adult representatives of nations with widely divergent agendas and different degrees of willingness to go down the road of recognizing children as bearers of rights.31 For example, Islamic nations were highly resistant to attributing to children a right to freedom of religion, and some African countries opposed any language that could be read to proscribe female genital alteration.32 And yet, the CRC was arguably unnecessary to the cause of gaining for children respect as right holders, given the comprehensive applicability of more general international human rights conventions and declarations, such as the International Convention on Civil and Political Rights (ICCPR) (conferring numerous negative rights on "everyone") and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (conferring numerous positive rights on "everyone"). Thus, on balance, the CRC might have been a strategic error on the part of advocates for children.

In the adoption context, advocates for policies and practices that facilitate international adoption for the sake of unparented children have complained about Article 21, which appears to establish a strong preference for placing unparented children in any domestic residential situation rather than permitting a foreign adoption. This Domestic Placement Preference Principle (DPP Principle) was included in the Convention at least in part out of

30 See CRC supra note 16, at art. 3(1) ("In all actions concerning children, . . . the best interests of the child shall be a primary consideration."). This is quite different from saying that children's interests shall be the sole consideration or even that children's interests shall be paramount or the primary consideration.

31 See TREVOR BUCK, INTERNATIONAL CHILD LAW 47-49 (2005) (noting the lengthy process of ratification); DILLON, supra note 15, at 14 (noting lack of enthusiasm among many countries when Poland proposed the CRC in 1978); id. at 15 (noting that the Working Group that drafted the CRC "operated on the basis of consensus" rather than majority vote, giving any participating country a de facto veto); id. at 16 (describing politically-driven obstructionism in the CRC drafting process); id. at 18-19 (identifying points of especially acute disagreement, as to which compromises had to be reached).

32 See HOWELL, supra note 18, at 169, 171-72 (arguing that the differences in culture and morals between member nations at the convention made it difficult to "articulate worldwide moral standards for the treatment of children").
consideration for the pride of developing countries, and also in part because of Islamic countries’ opposition to any language that might suggest an obligation to permit adoption, a practice not tolerated within Islam. Article 21(b) requires state parties to:

Recognize that inter-country adoption may be considered as an alternative means of child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin.

Against a backdrop of long-standing blanket prohibitions on foreign adoption in many developing countries, this provision might be seen as an effort to nudge such countries toward some acceptance of the practice by getting them to acknowledge that sometimes allowing a foreign adoption is the only humane thing to do. Interpreted in that way, it appears that the provision was intended to increase the practice of inter-country adoption. However, many read this provision as requiring that inter-country adoption be the last alternative considered, permissible only when there is no “suitable” place, institutional or otherwise, to house a child in the child’s country of origin. In other words, they treat

33 See id. at 161 (stating that many countries feel international adoption reflects poorly on their ability to look after their own abandoned children).

34 See Dillon, supra note 15, at 19 (noting that, in taking into account Islam’s ban on adoption, Article 21 of the treaty made clear that each nation does not have to set up a system of adoption).

35 See BUCK, supra note 31, at 154 (noting that the Committee has criticized Korea for not making international adoption a last resort); id. at 155 (stating that the travaux préparatoires for the CRC reflect the view that international adoption should be a last resort); Peter Thurnham, MP, Inter-country adoption: A view from the House of Commons, in INTER-COUNTRY ADOPTION: PRACTICAL EXPERIENCES, 138, 142 (Michael Humphrey and Heather Humphrey, eds., 1993) (reiterating that inter-country adoption is viewed as appropriate only where no other suitable alternative exists for the child); Carlson, supra note 15, at 736–37 (explaining that the CRC allows for inter-country adoption only when a child cannot find a suitable home anywhere else); Elizabeth Bartholet, International Adoption: Thoughts on the Human Rights Issues, 13 BUFF. HUM. RTS. L. REV. 151, 173 (2007) (stating that the Chair of the U.N. Committee on the Rights of the Child has interpreted “suitable” care in the state of origin to include foster care). See also Guidelines for the Alternative Care of Children, G.A. Res. 64/142, U.N. Doc. A/RES/64/142, at ¶ 11 (Feb. 24, 2010) (“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.”). But see id. ¶ 22 (“[A]lternative care for young children, especially those under the age of 3 years, should be provided in
the provision as intended to reduce the practice of inter-country adoption by committing state parties to making it a last resort.\footnote{Based on that latter interpretation, countries can defend extraordinarily restrictive policies concerning foreign adoption on the grounds that they are attempting to comply with the DPP Principle. In fact, UNICEF, citing the CRC, has pressured impoverished nations to enact, as a condition for receiving aid, laws relating to foreign adoption that come close to complete prohibition.\footnote{The DPP Principle has caused an inestimable number of children who could have been adopted to remain in orphanages, many in horrendous conditions, or to live on streets because there was no better domestic alternative for them.\footnote{This is an instance of family-based settings."}}; id. ¶ 23 (prescribing "an overall deinstitutionalization strategy"); Bartholet, supra note 5, at 98 (stating that some regional and national courts have concluded that the DPP Principle is subordinate to the CRC's paramount purpose to serve children's best interests.).}

\footnote{Cf. Elizabeth Bartholet, \textit{International Adoption: The Child's Story}, 24 GA. ST. U. L. REV. 333, 339 (2007) ("All this law [the CRC and Hague Convention] has tended to function generally to restrict rather than to facilitate international adoption.")}

\footnote{See Elizabeth Bartholet, "Bartholet Responds to Smolin" in \textit{The Debate, in INTERCOUNTRY ADOPTION: POLICIES, PRACTICES, AND OUTCOMES} 233, 247 (Judith L. Gibbons & Karen Smith Rotabi eds., 2012) (indicating that UNICEF benefits financially from getting impoverished countries to restrict foreign adoption); Bartholet, supra note 36, at 341–42 (stating that UNICEF has used its regulatory power to discourage inter-country adoption); Bartholet, supra note 5, at 92 (stating that "UNICEF calls for policy changes designed to limit international adoption to last-resort status" and noting that the Human Rights Consultative Committee opposed Madonna's adoption of a child from Malawi by "arguing that under the Convention on the Rights of the Child institutional care was preferred to international adoption"); id. at 93 (noting that UNICEF has called for elimination of private intermediaries, which in some countries play a crucial role in international adoption, and that “[s]uch foster care as now exists in poor countries is often quite terrible, ‘a euphemism for cottage industry-level institutionalization’"); Letter to Prime Minister Regarding Inter-Country Adoption from UNICEF Romania Media Center (February 6, 2004) reprinted in \textit{DILLON, supra note 15, at 507} ("[I]nternational adoption is to be considered as an exceptional measure and last resort ... ").}

\footnote{See Laurie Ahern et al., \textit{Mental Disability Rts. Int'l, HIDDEN SUFFERING: ROMANIA'S SEGREGATION AND ABUSE OF INFANTS AND CHILDREN WITH DISABILITIES} (2006), available at \url{www.crin.org/docs/mhri_rom.pdf} (describing institutions housing unparented children in Romania); Bartholet, supra note 5, at 93 (alluding to reports on orphanages in Vietnam, Guatemala, and Romania after those countries imposed moratoria on international adoption); Bartholet, supra note 5, at 95 (citing estimates that 8 million children are living in orphanages around the world and 100 million are living on the streets); \textit{Children in Residential Institutions Desperately Vulnerable to Abuse}, UNICEF PRESS CENTER (May 31, 2005),}
of the fourth problem with special rights for children—that is, that their interpretation and enforcement is left in the hands of public officials, governing institutions, and private organizations who purport to be agents for children, ostensibly promoting their welfare and enforcing their rights, but who in reality might serve other people and other aims and end up causing great harm to children.  

Another version of the DPP Principle has been read into the Hague Convention. That Convention begins in its preamble by "[r]ecognizing that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin." Article 4, which is more of a directive than is the preamble, states:

An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin . . . have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests.

The preamble language might be read to prioritize foreign adoption above domestic foster care or institutional care, if those do not provide a child with a "family," and thus to suggest a weaker DPP Principle than that of CRC Article 21. But intercountry adoption opponents and skeptics can plausibly maintain that at a minimum it requires giving priority to domestic adoption applicants, if there are or might be any who meet the minimalist standard of "suitable," regardless of whether a foreign placement would be better for a child.

Ordinaril, though, directive articles in a code have more weight than preamble language, so Article 4 should be controlling in assessing whether states' policies conform to the Hague Convention. Yet Article 4 is vague and ambiguous, particularly in
its use of the term "due consideration." Arguably it requires no more than that state parties give consideration contemporaneously in every case to both domestic applicants, if there are any at that moment, and foreign applicants. It would seem consistent with the terms of this provision for a state to choose foreign applicants over domestic applicants based simply on a finding that the inter-country adoption would be, all things considered, better for the child than a domestic adoption. On the other hand, Article 4 does not clearly require states to approve the best option for children. It appears to permit states to favor domestic adoption, and indeed domestic foster care or institutional care, if they wish to do so and even if that is not in children's best interests.41 In fact, the Hague Conference on Private International Law took that position in guidance it issued in 2008.42

Thus, Article 4 and other provisions in the Hague Convention43 collectively establish just this set of rules: 1) States may approve foreign adoptions when it is in a child's best interests, and 2) States must not approve foreign adoptions that are not in a child's best interests. What the Convention does not dictate is that state parties must permit international adoption when it is in children's best

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41 See Elizabeth Bartholet, The Hague Convention: Pros, Cons, and Potential 2 (Sept. 5, 2013) (forthcoming), available at http://www.law.harvard.edu/faculty/bartholet/pubs.php ("The Hague's negative impact is a result of the fact that policy makers have ignored its positive aspects, have misinterpreted it as more restrictive than it was intended to be . . . ."); Smolin, supra note 14, at 447–62 (stating that the Hague Convention was in fact aimed simply at trying to reduce the buying and stealing of children, not at establishing placement priorities).

42 See Bartholet, supra note 5, at 93 (explaining that UNICEF contends the Hague Convention supports its position that in country adoption and even permanent foster care is preferable to intercountry adoption). The U.S. State Department appears to interpret the Convention as requiring states to complete a search for domestic adopters before considering foreign applicants. See, e.g., U.S. Dept. of State, Georgia, supra note 7 ("[T]he Convention requires that Georgia attempt to place a child with a family in-country before determining that a child is eligible for intercountry adoption.").

43 Article 1 of the Convention contains the non-committal language: "The objects of the present Convention are . . . to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law . . . ." Convention on Protection of Children and Co-operation, supra note 40, at art. 1. That language could be read to say only that international adoption should not occur if it is not in a child's best interest or is contrary to the child's fundamental rights. It says at least that. It is debatable whether it commands that international adoptions must take place when that is in a child's best interests or suggests that children might have a fundamental right to be available for international adoption.
interests. It leaves states free to refuse foreign adoptions even when children would be far better off by being adopted internationally. In fact, the Hague Convention does not clearly commit state parties to allow foreign adoption at all in any circumstances.\(^{44}\)

In any event, UNICEF accords greater weight to the CRC provision regarding inter-country adoption, and that agency, because of its control over substantial U.N. aid money, drives policy in the least developed parts of the world—that is, in countries where there is likely to be the greatest number of children needing to be adopted.\(^{45}\) Moreover, whereas all nations of the world other than the United States and Somalia are parties to the CRC, most nations are not parties to the Hague Convention.\(^{46}\)

In short, although the CRC and the Hague Convention might in some ways have improved the lives of some children in some parts of the world,\(^{47}\) they have also arguably harmed many children in certain ways. Reasonable people can disagree about what those ways are, but no one can reasonably deny that creating special rights for children presents this danger—that is, that children might as a result have less protection than they would have in the absence of those special rights. This is true simply as a conceptual matter, as explained above.


\(^{45}\) See Bartholet, supra note 41, at 2 (“UNICEF, the UN Committee on the Rights of the Child, and others defer to the Convention on the Rights of the Child (CRC) in its preference for in-country foster care over out of country adoption.”); Bartholet, supra note 5, at 92-93 (stating that UNICEF disfavors intercountry adoption and supports the development of in-country adoption alternatives). See also BUCK, supra note 31, at 157 (reading the preamble to the Hague Convention as signaling that it is subordinate to, and should be interpreted consistent with, the CRC).


\(^{47}\) But see DILLON, supra note 15, at 6 ("[T]here seems to be no area of children's rights where solid improvement can be cited as a result of the UNCRC. . . . [A]ll negative indicators seem to be worsening, some dramatically so.")
With respect to inter-country adoption, any nation could justify any restriction on it simply by citing the CRC's preference for domestic placements. It is not clear, for example, that Russia has violated the CRC by shutting down adoption by Americans, even though it means many thousands of children, including many disabled children, will never have a family life. It is not clear that either the CRC or the Hague Convention provides a basis for condemning Eritrea for its recently-enacted policy of refusing to allow foreign adoption unless at least one adoptive parent is of Eritrean heritage and has completed national service, which is tantamount to not permitting foreign adoption at all. Or for its former policy of requiring non-citizen adoptive parents to live in Eritrea with the child for six months, a policy that helps explain why Americans adopted only four Eritrean children in 2010. Yet Eritrea is one of the most impoverished nations on earth and likely has tens of thousands of children orphaned by famine, disease, and violence. Its adoption policies force such children to live and die in miserable and dangerous circumstances despite the willingness of people in more developed countries to adopt them.

48 In theory, a party to the CRC would also need to give the U.N. Children’s Rights Committee some explanation as to why a particular restriction is consistent with treatment of children's welfare as “a primary consideration” in its decision making. See CRC, supra note 16, at art. 3 (committing signatory nations to making children’s best interests “a primary consideration” in matters affecting them). But that Committee is quite supportive of the DPP and so likely to be an easy audience for such an explanation. See sources cited supra note 35 (discussing various interpretations of DPP article 21(b)).

49 See Herszenhorn, supra note 13 ("Deputy Prime Minister Olga Golodets noted that Russia currently has a database of 128,000 orphans eligible for adoption but only about 18,000 prospective families willing to adopt . . . Alla V. Prozorova, an adoption facilitator . . . who has worked in the field of international adoptions for 14 years, said . . . ‘People who are involved in this problem—I mean even higher-level authorities—they know only Americans really volunteer to adopt special needs children . . . No Italian, no French, no Germans.’"). Russia is not a party to the Hague Convention.

50 See U.S. Dep’t of State, Eritrea, INTERCOUNTRY ADOPTION: BUREAU OF CONSULAR AFFAIRS (July 2013), http://adoption.state.gov/country_information/country_specific_info.php?country-select=eritrea (stating the requirements to adopt a child from Eritrea into the United States).

51 See id.

52 See Xan Rice, Eritrea ‘Like a Giant Prison’, Claims Human Rights Group, THE GUARDIAN (Apr. 16, 2009, 5:49 AM), http://www.theguardian.com/world/2009/apr/16/eritrea-africa-human-rights-refugees (stating that young people who are trying to flee the country are shot at the border and even if they are successful in escaping their parents will be made to suffer); 20 Poorest Countries in the World, THE RICHEST (May 27, 2012, 6:50 AM),
3. **General Human Rights Pertinent to Inter-country Adoption**

Supporters of international adoption should therefore step back and away from these special children's rights instruments and think about how more general human rights instruments apply to the plight of children who are living on streets or in orphanages in countries where there is little or no prospect for them to have a decent life in a permanent family. What seems to have escaped the notice of most scholars, diplomats, and advocates is that international and regional conventions conferring human rights on all persons can support arguments for state policies and practices more favorable to inter-country adoption. Nearly everyone's instinct is to look at the special conventions relating to children and to look no further. Yet if a similar predicament arose for any adults, we would look to general human rights instruments with confidence that we would find in them an adequate basis for ascribing to those adults a right comparable to what adoption proponents seek for children.

What would be a similar predicament? At issue for children in connection with international adoption is their ability to leave their country of origin to form a family relationship with individuals in another country who want to form that relationship and whose country is willing to let them immigrate for that purpose. This right is the same thing desired by any adults in Russia or Guatemala or China who want to leave their country of origin and go to the U.S. or the U.K. or Germany in order to marry citizens of those countries. Those other countries are open to their immigration for the purpose of forming a family relationship with a citizen, just as they have been open to immigration of adopted children. And if any of those sending countries blocked the departure of such adults seeking to enter into family relationships in any of those receiving countries, these adults could file

http://www.therichest.org/world/poorest-countries-in-the-world/ (including Eritrea as one of the twenty poorest countries in the world and explaining that its economic conditions have not improved in recent years).

Cf. Buck, supra note 31, at 47 (observing that the CRC “has established itself as the central international instrument on children’s rights”).

See Kerry Abrams, Immigration Law and the Regulation of Marriage, 91 MINN. L. REV. 1625, 1650–52 (2007) (stating that the annual number of fiancé visas approved by the Department of Homeland Security has been increasing and that the United States frequently allows immigration for the purposes of marriage).
complaints with the U.N.'s Human Rights Committee and with regional human rights adjudicative bodies. Absent compelling justification of a particular sort, the sending countries would be found in violation of treaty obligations and human rights. Which human rights?

3.1. The Right to Leave and Change Nationality

The Universal Declaration of Human Rights (UDHR), which begins with "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family . . . .", unqualifiedly states: "[e]everyone has the right to leave any country, including his own . . . ." Virtually identical language appears in the more binding ICCPR and in several regional treaties. One hundred sixty-seven of the world's one hundred ninety-five independent states are parties to the ICCPR, including nations that have severely limited or entirely prohibited foreign adoptions such as Guatemala, Eritrea, and Russia. The list of member countries also includes major adoption receiving countries such as the United States. The UDHR further proclaims: "[n]o one shall be

55 Universal Declaration of Human Rights, G.A. Res. 217 (III) A, preamble, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR] (emphasis added). See also id. at art. 1 ("All human beings are born free and equal in dignity and rights."); id. at art. 2 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind . . . .").

56 Id. at art. 13, ¶ 2 (emphasis added). Though on the surface merely a resolution without force of law, the UDHR is generally regarded as having acquired the status of customary international law, and the United Nations' General Assembly has stated that some of its provisions "constitute basic principles of international law." Lawrence O. Gostin & Benjamin E. Berkman, Pandemic Influenza: Ethics, Law, and the Public's Health, 59 ADMIN. L. REV. 121, 143 (2007) (internal quotation marks and citation omitted).

57 See International Covenant on Civil and Political Rights art. 12 ¶ 2, Dec. 19, 1966, 999 U.N.T.S. 171 ("Everyone shall be free to leave any country, including his own."); American Convention on Human Rights art. 22 ¶ 2, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 ("Every person has the right to leave any country freely, including his own."); Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 2 ¶ 2, Sept. 16, 1963, 7 I.L.M. 978, 979 ("Everyone shall be free to leave any country, including his own."). The CRC actually contains similar language, but attributes the right to children and parents in such a way as to suggest a jointly-exercised right was intended. See CRC, supra note 16, at art. 10 ("Parties shall respect the right of the child and his or her parents to leave any country, including their own. . . .").

58 See International Covenant on Civil and Political Rights (Signatories), UNITED NATIONS TREATY SERIES DATABASE, http://treaties.un.org/Pages/UNTSOnline.aspx?id=1 (select "Title Search" tab; then search "Match this phrase"
... denied the right to change his nationality.”  
Regional treaties contain similar pronouncements. These are more explicit and direct pronouncements of a right that lies at the core of what advocates for unparented children seek—namely, a right against the government of the children’s country of origin preventing them from leaving even when that is best for them. As reflected in the international tribunal proceedings discussed in Part 4 below, states infringe this right not only when they impose an outright prohibition on emigration but also when they create unwarranted practical obstacles to emigration.

This right of emigration is an especially strong one among human rights today, as evidenced by the relative rarity of its infringement with respect to adults in recent decades, despite the interest states might have in preventing the exit of their most talented citizens or their most vocal critics; the widespread condemnation of nations that have denied their citizens freedom to leave; and the fact that some countries assert the right of
emigration as an excuse for not acting more aggressively to prevent human trafficking.63 Indeed, political theorists view respect for the right of exit as a pre-condition for the very legitimacy and sovereignty of a nation.64 Invoking it as a basis for opposing any country's restrictions or prohibitions on adoption by foreigners therefore imposes a much more demanding burden of justification on such a country than does the CRC or the Hague Convention, as explained further below.

A related human right is one against arbitrary detention.65 This right is arguably an even stronger human right, generally treated as a “peremptory norm” from which derogation is impermissible.66 One could plausibly argue that foreclosing foreign adoption amounts to detention, at least for children with readily identifiable potential foreign adoptive parents and no prospect for joining a family domestically; the country's policy in effect causes them to remain in state custody rather than going to a home that awaits them. It seems unlikely, though, that any international body would view a state's inhibiting foreign adoption as detention. The prototypical form of detention is holding in a prison-like facility persons who otherwise could be and would be living freely in the community. Some legal authorities might regard that right as always inapt in the case of infants, given that young children must always be in someone's custody, and especially inapt in the case of


64 See Carter Dillard, The Primary Right, 29 PACE ENVTL. L. REV. 860, 865 (2012) (“[O]ne ought to be able to choose to consent or not consent to any and all political systems”).

65 UDHR, supra note 55, at art. 9 (“No one shall be subjected to arbitrary arrest, detention or exile.”).

66 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmts. d-i (1987); id. at § 102 cmt. k.
infants who lack private caregivers and who are therefore inevitably in state custody. Moreover, preventing emigration for adoption purposes, while legally authorizing placement of a child in any suitable and available home within the country, is conceptually much less restrictive than is de jure confinement of someone to an institution, even if as a practical matter refusing emigration means the person must remain in a state institution, because no other domestic residential placement is available. Analogously, if an adult were living in some country’s state-run homeless shelter, because she had no family in that country and no income, and had an opportunity to marry and live with someone in another country but was denied the freedom to emigrate, we would not characterize her situation as one of detention. We would simply say that her right to leave the country is being infringed. Violation of the right to emigrate seems the best way also to conceptualize the wrong done to children whose only or best opportunity for family life is in another country and who suffer loss of that opportunity because of their native country’s policies relating to foreign adoption per se.

The ICCPR does qualify the right to leave any country, authorizing restrictions on that right that “are necessary to protect national security, public order . . . , public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.” Such qualifications leave much room for interpretation—Part 4 below canvasses the interpretations that different tribunals and scholars have given to them. Nevertheless, they confine the range of possible justifications, whereas the CRC’s DPP Principle appears to allow for any justification, or no justification, to suffice for denying children the opportunity to emigrate in order to have a family.

Further, the ICCPR’s requirement that any restrictions be consistent with other rights embodied in it should mean that any restriction imposed on the exit of children presumptively must apply also to adults, because Article 2 of the ICCPR establishes a

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67 ICCPR, supra note 57, at art. 12 ¶ 3. The UDHR lists, as an additional potential justification for infringing the rights it pronounces, “meeting the just requirements of . . . the general welfare in a democratic society.” UDHR, supra note 55, at art. 29 ¶ 2. The drafters of the ICCPR, however, rejected that basis for denying the right to emigrate. Jeffrey Barist et al., Who May Leave: A Review of Soviet Practice Restricting Emigration on Grounds of Knowledge of “State Secrets” in Comparison with Standards of International Law and the Policies of Other States, 15 Hofstra L. Rev. 381, 388 (1987).
right to equal treatment for all persons. This requirement reinforces a further advantage that invoking general human rights documents will generally provide for those advocating on behalf of children—namely, that interpretation in any particular case of the content of the right and permissible infringements should be constrained by precedents and other official guidance covering a broad range of cases and involving a variety of right holders in a variety of situations. Interpretation is thus less likely to be *sui generis* than if a group-specific right were at issue.

3.2. Other General Human Rights

In addition to the direct protections of freedom to emigrate, numerous international instruments pronounce other types of rights for all humans that could form a less direct or more contingent basis for objecting to restrictive international adoption policies. For example, Elizabeth Bartholet has argued against such policies on the basis of a human right to family life, some version of which appears in the ICCPR, the UDHR, and a few regional treaties.

A 'right to family' on the surface might seem more apt in the context of adoption. But it supports international adoption only contingently, indirectly, and weakly. It is actually a quite

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68 Bartholet led an appeal to the Inter-American Commission on Human Rights, on the basis of provisions in the American Convention on Human Rights, for assistance in getting Latin American nations to reopen international adoption. The appeal rested in part on language in that Convention relating specifically to children, conferring on them a right to "special protection, care and aid," but it also cited the universally applicable "right of every person to a family." *Hearing on Human Rights of Unparented Children and Related International Adoption Policies*, Inter-Am. Comm'n H. R., 137th Ordinary Period of Sessions, (2009) (written testimony of Delegation), available at http://www.law.harvard.edu/programs/about/cap/ia/testimonyfullnov09.pdf. See also Paulo Barrozo, *Finding Home in the World: A Deontological Theory of the Right to be Adopted*, 55 N.Y.L. SCH. L. REV. 701, 704–05 (2010-11) (urging the right to family life as a normative basis for opposing restrictions on inter-country adoption). A 'right of children to special care' is a special right, and so invites *sui generis* interpretations. It is also phrased as a positive right, and so lacks the normative force negative rights carry. Additionally, it is quite vague, allowing a country to avoid a charge of violating the right by asserting any minimally plausible account of how that country is extending special care to children. The same is true of invocation of CRC's Article 3 provision committing signatory nations to making children's best interests "a primary consideration" in matters affecting them. CRC, *supra* note 16, at art. 3. In addition to being vague, the phrasing of Article 3 actually suggests countries should balance other primary considerations against children's welfare. *Id.*

69 See sources cited *infra* notes 70-71 and accompanying text.
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amorphous concept. One thing it might mean is an entitlement to form or join a family rather than remain alone or in an institution. But it is difficult to find a textual basis for children's having that right; human rights documents typically confer the right to form a family expressly just on adults.\textsuperscript{70} Moreover, as applied to unparented children, it would seem to be a minimalist conception, just guaranteeing some family to belong to. A country might plausibly defend prohibition of foreign adoption by claiming that it is seeking families domestically, thereby putting critics in the position of having to show that no families are available domestically for many or most unparented children or that the country's search efforts are irremediably inadequate. As such, the right does not support a direct facial attack on a strong in-country placement preference.

Moreover, the more common articulation and interpretation of a human right relating to family life makes it a protection of existing family relationships.\textsuperscript{71} Not only does that not support advocacy for more adoptions but in fact a government could invoke entitlement to such protection as a justification for fewer foreign adoptions. "Family" can include distant relatives, even unknown blood relatives if interpreted in a biological sense. As such, a country could invoke the right to protection of family life in support of a policy to scour the countryside indefinitely looking for any kin who might be willing to take custody of an

\textsuperscript{70} See, e.g., ICCPR, supra note 57, at art. 23 ¶ 2 ("The right of men and women of marriageable age to marry and to found a family shall be recognized."); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 12, Nov. 4, 1950, 213 U.N.T.S. 221 ("Men and women of marriageable age have the right to marry and to found a family . . . ."); American Declaration of the Rights and Duties of Man, supra note 60, at art. VI (applying to Latin American sending countries and announcing without any age qualification that "[e]very person has the right to establish a family . . . ."); UDHR, supra note 55, at art. 16 ¶ 1 ("Men and women of full age . . . have the right to marry and to found a family.").

\textsuperscript{71} See, e.g., ICCPR supra note 57, at art. 17 ¶ 1 ("No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence . . . ."); id. at art. 23 ¶ 1 ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."); European Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 70, at art. 8 ("Everyone has the right to respect for his private and family life, his home and his correspondence."); African Charter on Human and Peoples' Rights, supra note 60, at art. 18 ("The family shall be the natural unit and basis of society. It shall be protected by the State . . . ."); UDHR, supra note 55, at art. 12, 16(3) ("No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence . . . .").
institutionalized child, rather than permitting foreign non-kin to adopt a child.72

In addition to family-related human rights, international conventions establish rights relating to personal development and opportunity that could be relevant to the plight of unparented children in impoverished, war-torn, or otherwise inhospitable nations. The UDHR pronounces rights to "security of person" (Article 3), "the economic, social, and cultural rights indispensable for his dignity and the free development of his personality" (Article 22), and "education" (Article 26(1)). The ICESCR declares "the right of everyone to an adequate standard of living" (Article 11(1)), "the fundamental right of everyone to be free from hunger" (Article 11(2)), "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" (Article 12(1)), "the right of everyone to education" (Article 13(1)), and "the right of everyone . . . to enjoy the benefits of scientific progress" (Article 15(1)(b)). The CRC contains similar provisions pronouncing a right of children to have their basic needs met,73 but those provisions compete with the CRC's more specific DPP Principle in the context of adoption policy. Therefore, invoking the super-ordinate and more readily enforceable ICESCR rights should add greater weight to a basic-needs argument for international adoption.

These rights to basic goods, however, are positive rights—vaguely phrased and qualified by language providing that a state should undertake to provide the enumerated benefits and opportunities "to the maximum of its available resources, with a view to achieving progressively the full realization of the rights

72 See, e.g., David Smolin, “Smolin’s Position” in The Debate, supra note 37, at 239 (endorsing a strong DPP in part on the grounds that “as a matter of widespread cultural practice, human need, and fundamental rights, the family into which the child is born extends beyond the parents, and beyond the nuclear family, to include an inter-generational and extensive family group”).

73 See, e.g., CRC, supra note 16, at art. 6(2) (“States Parties shall ensure to the maximum extent possible the survival and development of the child.”); id. at art. 23(1) (“States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community.”); id. at art. 24(1) (“States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.”); id. at art. 27(1) (“States Parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.”); id. at art. 28(1) (“States Parties recognize the right of the child to education . . . ”).
recognized in the present Covenant."\textsuperscript{74} Moreover, the drafters and signatories of these pronouncements likely presupposed that such rights would be effectuated, if at all, by ensuring that everywhere in the world these goods exist for everyone, not by facilitating international migration. They might have supposed this simply because the only way its drafter could envision for any person to actually have these things would be for conditions to improve where that person currently lives.

Of course, the dream of hospitable social and economic conditions everywhere in the world will not come true in our lifetimes and, in the meantime, there is an alternative way to effectuate such rights for many people—namely, emigrating to a better place. Thus, an adult seeking to emigrate for marriage purposes, but whose native country inhibits her exit, might plausibly assert these economic and opportunity rights, as well as a right of emigration, if family-related emigration would dramatically transform her economic situation and opportunities for a fulfilling life. Those rights provisions could be interpreted as not merely assertions of positive right—that is, a right to assistance—but also as assertions of negative right—that is, a right against state obstruction of any person’s opportunities for a better life through migration.\textsuperscript{75} And because these human rights, like the more direct rights to leave one’s country and change one’s nationality, belong to “everyone,” not just adults, advocates for children who are living in inhospitable places could also invoke these provisions as bases for demanding that the governing authority in those places remove unwarranted restrictions on emigration for purposes of family formation.

Still, because the rights to exit and change nationality provide a more direct and clearly negative-rights basis than other general human rights for opposing restrictions on inter-country adoption, the remainder of the Article focuses primarily on them. Invoking some other rights could lend useful support to that core argument.


This support is less clear regarding the right to family life, because it might be, as explained above, a double-edged sword. But advocacy for freer inter-country adoption could gain much moral weight by reminding sending nations and international enforcement agencies of every person's human right to basic necessities for physical and cognitive development, a right that goes tragically yet avoidably unfulfilled for unparented children in many countries, and by arguing that refusing to allow children in state-operated institutions to leave the country effectively amounts to arbitrary detention.

3.3. Advantages of Invoking General Human Rights

Appeal to universal human rights presents numerous advantages over reliance on special-rights conventions, including those mentioned above. First, the general-rights documents clearly announce a strong right against restrictions on emigration, whereas neither the CRC nor the Hague Convention clearly confers on unparented children any right against state-imposed obstacles to their leaving their country of origin to join a family and live in more hospitable circumstances. Relatedly, the UDHR and ICCPR clearly create a presumption against restrictions on emigration and impose on the country of origin the burden of proving that any particular restriction is necessary to serve an enumerated legitimate aim. They implicitly declare to each state: “You do not own the people who live on your territory, and you need exceedingly compelling reason to stop them from leaving.” By contrast, the CRC and Hague Convention implicitly suppose that states have an entitlement to retain children, and they do not appear to demand any justification whatsoever, on the part of state parties, for restrictions on children’s emigration for adoption. They suggest a conception of the state as arrogant owner of unparented children, for whom it is supererogatory to listen to pleas made on behalf of these children that the state relinquish its hold on them so they can have a family—a conception well exemplified by Russia’s behavior in 2012.

Further, as noted above, invoking universal human rights creates a check against illicit *sui generis* reasoning about children, because interpretation of these rights occurs in a variety of settings.

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76 As noted above, the CRC does mention the right to leave a country, but appears to confer it on parents, or on children only when exiting with a parent, rather than on children individually.
INTER-COUNTRY ADOPTION

involving people of many sorts—including autonomous adults—and adjudicative bodies typically aim for consistent interpretation of rights provisions across contexts. Related to this point about generalizing interpretations and justifications, appeal to general human rights instruments can also put important empirical issues in a different light. For example, the DPP Principle cites an ostensibly child-centered justification: the supposed interest of children in growing up within the culture of their state or local community of origin. Invoking the right of everyone to leave his or her country of origin places this concern in a broader context and invites the question whether it is a sufficient reason to stop anyone and everyone from emigrating, as a matter of state restriction or individual self-determination. It would be implausible to say it is so with respect to any adult who wishes to leave his or her country in order to marry someone in the United States or Western Europe. International tribunals would undoubtedly reject as a justification for detaining such a person the paternalistic concern that the adult would suffer by separation from his or her culture. They would do so not only because of an aversion to paternalistic restrictions on autonomous adults (much of the world is not averse to such paternalism), but also because the concern is quite speculative and relatively insignificant when compared with the benefits many stand to gain by emigrating. Yet such a concern about deprivation of culture is arguably less significant in relation to infants and toddlers, who have little or no experience or awareness of the culture of their place of origin.

Another important advantage of invoking general human rights of the sort that the UDHR and the ICCPR contain is that there is more robust enforcement of those rights than there is of any rights or guidance that the children’s conventions contain.77 International law enforcement is, as a general matter, weaker than domestic law enforcement,78 and I am by no means suggesting that filing complaints with the HRC under the ICCPR would quickly eliminate obstacles to international adoption. But, the CRC is

77 Cf. Dillon, supra note 15, at 4 (“Nowhere is the gap between international ‘norm production’ and effective remedies more striking than in the case of children’s rights.”).

especially weak among international rights instruments. Its only compliance mechanism consists of state parties' reporting, every five years, to a supervising body—the Committee on the Rights of the Child—that has no authority to order any change in any country's practices, even if it were disposed to do so. The Committee can only "make suggestions" for improvement. The CRC reporting system is the equivalent of counseling for marital rape: every once in a while you check in with a supposed expert to let them know how you are doing, and to receive advice on how to do better. There is an appearance of addressing problems, but little reason to expect a change in behavior. And the only recourse for Hague Convention violations is for other parties to the Convention to refuse to do business, which is no recourse at all when the alleged violation is unwarranted restrictions on international adoption.

By contrast, the ICCPR and its Rules of Procedure not only mandate that countries report their compliance, but also authorize state parties to file complaints against other state parties for human rights violations and, pursuant to a widely-adopted Optional Protocol, authorize individuals or their proxies to file complaints against states with the HRC for human rights violations—including violations of the right to emigrate. The HRC issues

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80 See BUCK, supra note 31, at 49-51 (describing legal framework for the reporting process); DILLON, supra note 15, at 6 (discussing implementation mechanisms for UNCRC). At most, the Committee can ask. In fact, the Committee has in recent years discouraged countries from facilitating inter-country adoptions. See Elizabeth Bartholet, “Bartholet's Position” in The Debate, supra note 37, at 234-35.

81 CRC supra note 16, at art. 45(d). The Committee can ask for a study of any particular areas of concern by the U.N. Secretary-General, CRC Art. 45(c), but the Secretary-General would have no authority to take any coercive action based on perceived CRC violations.

82 See, e.g., U.S. Dep't of State, Guatemala, INTERCOUNTRY ADOPTION: BUREAU OF CONSULAR AFFAIRS (March 2013), http://adoption.state.gov/country_information/country_specific_info.php?country-select=guatemala (stating that Guatemala's adoption system is not in compliance with the Hague Convention and, as such, no new adoptions are permitted from that country).

condemnatory decisions and orders against countries it finds to have violated rights.\textsuperscript{84} The greatest procedural obstacle to bringing a complaint before the HRC would appear to be the ICCPR requirement of exhausting domestic remedies,\textsuperscript{85} but a child advocacy organization with sufficient resources might have the will and wherewithal for a preliminary navigation of the sending country’s administrative and judicial systems.\textsuperscript{86}

Finally, invoking the rights of children to leave any country and to change their nationality could trigger a profound attitudinal shift in the global community in a direction favorable to children. Such a claim would be jarring to the international adoption community, the international children’s rights community, and individual nations. It might disturb entrenched views among politically-driven bodies who now claim a monopoly on the authoritative interpretation of children’s rights, such as UNICEF, and the U.N. Children’s Rights Committee. Demoting the special-rights conventions in the policy framework of nations and international organizations should also serve children by

\begin{itemize}
\item violation “when it appears that the individual in question is unable to submit the communication personally,” which would certainly be true of babies, infants, and young children; ICCPR \textit{supra} note 57, at art. 40-41 (requiring countries to submit reports on the progress of the expansion of civil and political rights); \textit{Status of Participant Countries to the Optional Protocol to the International Covenant on Civil and Political Rights}, UN \textsc{TREATY COLLECTION}, \url{http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en} (listing 114 state parties to the Optional Protocol, including many actual and potential large sending countries). The United States is not a party to the Optional Protocol, but that is irrelevant to the susceptibility of a sending country to complaint before the HRC, even if initiated by U.S. citizens, so long as the complaint is filed in a representative capacity on behalf of children who are citizens of the country being charged and that country is a party to the Optional Protocol.
\item Some parents who were on the brink of taking children home from Russia—children with whom they already established a relationship when that country imposed a ban on American adoptions—filed complaints with the European Court of Human Rights. \textit{See} Sergei L. Loiko & Kim Murphy, \textit{Russian Adoption Ban Leaves U.S. Families in an Agonizing Limbo}, \textit{L.A. TIMES} (May 21, 2013), \url{available at www.latimes.com/la-fg-russian-adoptions-20130521-dto,0,395498.html} (revealing how some families have tried filing complaints with the Court). \textit{Cf.} Herszenhorn & Eckholm, \textit{supra} note 12 (“[T]he relationship between parents and children begins long before the children leave the orphanage.”).
\end{itemize}
reminding everyone that children are not an inferior species begging for charity, nor any nation’s possessions, but rather equal persons with the same moral claims that adults have to be free to pursue available opportunities for their betterment, uncompromised by others’ self-serving agendas. Tapping into universal human rights in this context should also inspire those working on other child welfare issues at the international level to consider always what additional and potentially more effective legal avenues might be open to them in general human rights documents. There could be a wholesale reorientation of international children’s rights practice and scholarship. The lesson could also extend to advocacy for other vulnerable populations that might be disserved by group-specific conventions.

In sum, there are numerous reasons why proponents of international adoption should break free from the special-rights framework that now dominates discourse and diplomacy, and should begin invoking more general human rights laws: 1) those laws contain a more explicit and direct normative basis for such advocacy—in particular, the right to leave any country and the right to change one’s nationality; 2) they clearly impose the burden of proof on sending nations to justify any restrictions on international adoption, rather than forcing proponents of international adoption to persuade such nations that lifting restrictions is the more humane thing to do; 3) they confine the range of permissible justifications to a few enumerated ones; 4) invoking more general human rights incorporates precedents and scholarly work interpreting those rights in a variety of contexts involving persons in various categories, thus avoiding the *sui generis* reasoning about children and international adoption that often results in compromising children’s wellbeing; 5) thinking about the right to migration for the purpose of forming family relationships at a higher level of generality puts common empirical assertions about children’s needs and about the quality of life in particular countries in a different and more objective light; 6) whereas the enforcement mechanism for the CRC and the Hague Convention are quite weak, and in particular do not allow for individual complaints in international tribunals, the more general human rights laws do offer the opportunity for private enforcement action in relatively effective institutions; and 7) asserting universal human rights on behalf of children should trigger a healthy attitude correction in the international community.
3.4. Choice of Law

The existence of both general-rights conventions and potentially conflicting special-rights conventions raises the question of which set is controlling. Is it even possible, as a matter of international law, to invoke general human rights law on a topic that is the subject of one or more specialized conventions? Does the specific trump the general, as one canon of statutory interpretation in American law provides for cases of conflicting statutes?87 In addition, because the CRC and the Hague Convention both came later in time than the more general conventions mentioned above, we must ask whether the later in time trumps or displaces the earlier.88

The straightforward answer to these questions is that the CRC and the Hague Convention themselves disavow any displacement of general, fundamental human rights. The CRC, in Article 41, states:

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in . . .

(b) International law in force for that State.

Article 1 of the Hague Convention sets forth as the first of the "objects of the present Convention" that party States will "ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law." Moreover, in both of these conventions, the language relied on by proponents of the DPP Principle actually does not speak of rights. The language in Article 21 of the CRC merely qualifies a command to party States that they consider international adoption. The language in the preamble to the Hague Convention qualifies a merely empirical statement about the possible child-welfare benefits of international adoption, and the language in Article 4 about placement within the State of origin merely requires "due consideration."

Any rational decision maker would therefore be hard-pressed to conclude that either the CRC or the Hague Convention

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87 See, e.g., Brown v. Commonwealth, 688 S.E. 2d 185, 192 (Va. 2010) (articulating the proposition that when two statutes dealing with the same subject matter are in conflict, the more specific prevails).

supplants children's fundamental rights to emigrate and change nationality or constrains those rights in any way. Parties to those conventions agreed to respect all of children's rights as previously set forth in international law in their decision making about intercountry adoption, and they did not purport to be withdrawing, diminishing, or reinterpreting children's basic human right to leave their country of birth.

In addition, the declarations and conventions containing the general rights pronouncements speak to whether and to what extent parties may derogate from their strictures.\textsuperscript{89} As noted above, the ICCPR authorizes derogation from the right of emigration in limited circumstances, and it further states:

\begin{quote}
Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.\textsuperscript{90}
\end{quote}

Assuming that "any act" would include entry into a subsequent convention, becoming a party to the ICCPR entailed a commitment to refrain from signing on to any other convention, or from interpreting any other convention to which one is a party, in such a way that would authorize denial of the right to emigrate in any circumstances in which the ICCPR would not permit such denial. This is consistent with the "Siracusa Principles," a U.N. human rights sub-commission's interpretation of the ICCPR's derogation provision.\textsuperscript{91} The Principles provide that "state limitations must be in accordance with the law; based on a legitimate objective; strictly necessary in a democratic society; the least restrictive and intrusive means available; and not arbitrary, unreasonable, or discriminatory."\textsuperscript{92} A party to the ICCPR would

\textsuperscript{89} I do not consider whether the \textit{jus cogens} principle applies, as the terms of the ICCPR itself suggest the right to emigrate is not a peremptory norm of international law.

\textsuperscript{90} ICCPR, \textit{supra} note 57, at art. 5(1).


\textsuperscript{92} Gostin & Berkman, \textit{supra} note 56, at 146.
also have to comply with its equal treatment stricture, and so would have to refrain from "any act" that withdraws an ICCPR right from some group on a discriminatory basis.

Finally, even if later, more specific conventions did displace earlier, more general human rights conventions to some degree, that degree must be limited to what the language of the later conventions clearly compels. Given the fundamental nature of the right to exit and the emphatic statements in the UDHR and the ICCPR as to their applicability to "everyone," a conservative approach is required in interpreting any provisions of the CRC or the Hague Convention that could derogate from that right for children. As explained above, the CRC and Hague Convention passages cited in support of the DPP Principle are quite vague and thus open to multiple interpretations, including interpretations that favor international adoption for any child for whom an equally good domestic adoption is not presently available. Those latter interpretations are compelled by a properly conservative approach to applying the language, in light of the strong presumption in favor of a right to emigrate that the UDHR and ICCPR create.

4. INTERPRETATIONS OF THE RIGHT TO EMIGRATE

The right of emigration has not received a great deal of attention in legal proceedings, international diplomacy, or legal scholarship. This lack of attention might be in part because denying adult citizens freedom to leave per se is uncommon. As discussed below, nations do have reasons to prefer that particular people not leave their territory. But they are more likely either to accept that they cannot prevent such persons from leaving or to hold such persons in a detention facility, rather than trying to prevent exit by denying a passport or refusing to let them board a plane or train, and in the latter case complaints are likely to rest on the right against unlawful detention. Another likely part of the explanation is that a far greater restriction on freedom of international migration is the limit on immigration that most countries impose. Immigration policies and state practices regarding refugees and asylum seekers receive enormous attention in public and scholarly discourse and in legal tribunals.

It is possible, though, to discern some prevailing views about the permissibility of specific reasons for denying freedom to emigrate and about the general standards by which to judge any
specific restrictions. Clues appear in the Siracusa Principles, in published decisions of international human rights tribunals and domestic courts, and in scholarly writing about the right to emigrate. This Part reviews those sources of interpretation. As an initial matter, though, it considers when the right should even come in to play for non-autonomous right holders who do not themselves decide that they want to emigrate.

4.1. Non-autonomous Persons’ Right to Emigrate

The ICCPR Rules of Procedure contemplate that a representative will assert rights on behalf of a right holder who "is unable to submit the communication personally." The Rules thereby confirm that the "everyone" upon whom the Convention bestows civil rights is not limited to autonomous persons, but rather really means everyone. The Convention and Rules say nothing further, however, about the circumstances in which someone may file a complaint on behalf of another person. Presumably the assumption was that it would happen when and only when that other person would have submitted the communication himself if able.

To guard against random applications for relief on behalf of incompetent persons, the HRC should therefore require a prima facie showing by a purported representative that a) the right holder’s situation is such that he or she likely would assert a particular right against particular state action if able to do so, and b) the purported representative is an appropriate agent for the right holder. The first requirement would call on the filer to present evidence that some state of affairs other than the status quo would be substantially better for the right holder and that it would be possible to secure that state of affairs but for the state action or policy alleged to violate a Convention right. The second requirement might be satisfied with evidence that the representative is a responsible party genuinely concerned with the welfare of the right holder and without conflict of interests.94

93 ROP, supra note 83, at R. 90.

94 Cf. S.P., D.P., & A.T. v. United Kingdom, App. No. 23715/94, 94 Eur. Comm’n H.R. Dec. & Rep 31 (1997) (approving petition on behalf of children that a lawyer filed on his own initiative, and stating that “[t]he Commission has examined whether other or more appropriate representation exists or is available, the nature of the links between Mr. Clements and the children, the object and scope of the application introduced on their behalf and whether there are any conflicts of interest”).
Because the country being charged with violating incompetent persons' right to emigrate has control over those persons, over access to them, and over information about their situation, no more than a prima facie showing should be required to initiate an HRC proceeding.

Thus, suppose some developing Country X were holding a great number of mentally disabled adults, abandoned by their families, in state-run institutional facilities of very poor quality. Suppose further that a private organization in highly-developed Country Y created a first-rate rehabilitative community for mentally disabled adults, one where patients lived in a family setting and received the best services and training known to mankind, and that it had plenty of room to welcome new residents. Suppose, finally, that the organization asked the proper authorities in Country X to permit a certain number of the mentally disabled adults there to emigrate to Country Y and enter into this facility, but Country X refused. Country X asserted concerns about the disabled adults' welfare, but observers believe the real reason for the refusal is that leaders thought accepting the offer would wound national pride, implying that Country X was not properly caring for its dependent citizens. If the organization then went to the HRC, and if it could make a prima facie showing of 1) the poor conditions in Country X's facility; 2) the possibility for a much better life in Country Y; and 3) its own bona fides, then the HRC should accept a complaint submitted by the organization as representative for the disabled adults, alleging a violation of the right to emigrate. For the rights of such adults to be at all meaningful, it must be possible for someone to assert their rights in their behalf, and their current legal custodian cannot be relied on to do so, because that custodian (the government of Country X) is the very party thought to be violating the individuals' rights. Accepting the petition would not be the end of the matter, of course; the HRC would then invite Country X to proffer a defense of its actions.

The same analysis should apply in the case of young children living in orphanages, other state facilities, or on streets in developing countries. Persons and organizations who can

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95 Older would-be adoptees' own expressed wishes might suffice to legitimate a complaint brought in their behalf by would-be adopters. I bracket here questions that would arise if adolescents asserted a right to emigrate even outside the adoption context, perhaps to escape from parental custody. When
demonstrate a genuine concern for their welfare should be able to act in a representative capacity for them, individually and/or as a class, and assert their right to leave the country to pursue available opportunities for a family life, education, and other basic goods. They should simply have to make a prima facie showing that current conditions and future prospects for the children are very poor in their country of origin, and that opportunities for a much better life are available to them elsewhere. This showing would shift the burden, as explained below, onto the state to justify any obstacles it has created to the children’s migration.

4.2. Interpreting Bases for Restricting the Right

The ICCPR specifies exclusive bases upon which it might be permissible to restrict any person’s right to leave his native country: “those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.” 96 There is not a great deal of guidance on the meaning of key terms in this statement, but I collect here what exists.

4.2.1. The Siracusa Principles

In 1984, a group of NGOs sponsored an international conference bringing together many of the most respected experts on international and human rights law, at which the experts drafted interpretations of the limitation and derogation provisions of the ICCPR. The resulting Siracusa Principles are widely viewed as authoritative.97 The Principles contain both general guidance for applying all exceptions to the Convention’s rights pronouncements and interpretations of each specific exception.

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96 ICCPR, supra note 57, at art. 12.

4.2.1.1. General guidance

The general guidance makes clear that exceptions to the Convention’s rights are disfavored:

- “No limitations or grounds for applying them to rights guaranteed by the Covenant are permitted other than those contained in the terms of the Covenant itself.”
- “All limitation clauses shall be interpreted strictly and in favour of the rights at issue.”
- “In applying a limitation, a State shall use no more restrictive means than are required for the achievement of the purpose of the limitation.”
- “Every limitation imposed shall be subject to the possibility of challenge to and remedy against its abusive application.” 98

The general guidance imposes on the state the burden of demonstrating the need for any restriction, rather than putting on the individual the burden of proving that a restriction is unreasonable:

- “The burden of justifying a limitation upon a right guaranteed under the Covenant lies with the State.”
- “Any assessment as to the necessity of a limitation shall be made on objective considerations.” 99

And the general guidance mandates that any restrictions be generally applicable rather than discriminatory:

- “No limitation on a right recognized by the Covenant shall discriminate contrary to article 2, paragraph 1 [‘without distinction of any kind’].”
- “No limitation on the exercise of human rights shall be made unless provided for by national law of general application…”
- “No limitation shall be applied in an arbitrary manner.” 100

Under these general guiding principles, any nation must be susceptible to being called to account to the HRC for any restriction it imposes on children’s freedom to emigrate, including any obstacles to international adoption. It must present objective evidence that the restriction is necessary to serve one of the few

98 Siracusa Principles, supra note 91.
99 Id.
100 Id.
exceptions that the Convention contains. It must show that it cannot protect the state interest embodied in the exception without restricting the right to emigrate. And it must apply the restriction evenhandedly to all citizens whenever doing so would serve that state interest, not just impose it on children arbitrarily.

4.2.1.2. Guidance on specific exceptions

Article 12 of the ICCPR recognizes just five possible bases upon which the right to emigrate might permissibly be restricted: national security, public order, public morals, public health, and the rights and freedoms of others. The drafters originally considered and then rejected additional bases, such as control of migrant workers and “the general welfare.”101 As to each exception the Convention does allow, the Siracusa Principles provide interpretive guidance.

Regarding national security, the Principles permit derogation only when necessary “to protect the existence of the nation, its territorial integrity or political independence against force or threat of force.” That exception clearly does not authorize restrictions on international adoption.

The Principles define “public order” to mean “the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded.” They qualify this by stating that public order necessarily entails respect for human rights, so a country signatory could not invoke “fundamental principles” that inherently entail denial of human rights to some people. The Principles state further with respect to public order that the term “shall be interpreted in the context of the purpose of the particular human right which is limited on this ground.” This guidance on the whole suggests that any state restricting the right of emigration would have to demonstrate, based on objective evidence, that doing so is necessary for the continued functioning of the society or to preserve fundamental, human-rights-respecting principles upon which the society is founded.102

It is wholly implausible, and certainly not supportable by objective evidence, to suggest that any society would cease to function if a tiny percentage of its children emigrate; indeed

101 See Barist et al., supra note 67, at 388–89 (detailing the original restrictions found in the ICCPR).

102 Cf. id. at 405 (stating that the ICCPR drafters substituted “public order” for “public safety,” on the assumption that the former was more restrictive).
emigration of orphaned children eases a burden on the society, and any threat emigration poses to a society would seem much greater in the case of able adults, particularly educated adults. A fundamental principle that "the state owns the people born on its territory" would not be respectful of human rights, and it is difficult to imagine what other fundamental principle upon which a society is founded is threatened by emigration of unparented infants. The social contract-related principle of "fair dealing," under which members of a society have a duty to reciprocate for benefits they have received, might be a principle upon which any society is founded, but it is generally understood to apply only so long as one remains within the same society and clearly would apply with greater force to adults seeking to emigrate than to infants.103

"Public morals" appears closely related to the idea of fundamental principles, and the Principles emphasize that with this potentially capacious grounds for exception the state must "demonstrate that the limitation in question is essential to the maintenance of respect for fundamental values of the community."104 They also reiterate that, as with an exception on any other specified basis, any restriction justified in public morals terms must be applied in a non-discriminatory way, and so would have to extend to both adults and children. As such, the points made above regarding public order would apply here as well.

Public health is a more promising basis for justifying restrictions on international adoption. The Principles state that it "may be invoked as a ground for limiting certain rights in order to allow a State to take measures dealing with a serious threat to the health of the population or individual members of the population."105 Sending countries are certainly permitted to take measures aimed at protecting the health and safety of children who might be adopted. And some nations have created obstacles to the emigration of adults avowedly on grounds of public health (in the case of quarantine) or individual safety (e.g., the Philippines' prohibition on international marriage brokers, discussed below). But pursuant to the general guidelines presented above, no state may simply toss out the word "trafficking" and thereby justify

104 Siracusa Principles, supra note 91.
105 Id.
severe restrictions on, or prohibition of, international adoption, as can and does occur within the CRC framework. A complaint against such sending-countries' policies before the HRC would force such a nation to present objective evidence that a) the danger to children is substantial, b) the state cannot address the danger by means short of denying the right to emigrate, c) the state applies the restriction no more broadly than is strictly necessary, and d) the state either applies the same restriction on emigration to adults who are in danger of trafficking or can rationally and convincingly explain the difference in the treatment of adults and children.

Finally, as to rights and freedoms of others, the Principles state that these may include rights and freedoms that do not arise from the ICCPR itself, but might instead derive from other sources. They qualify this, however, by saying the ICCPR itself is assumed "to protect the most fundamental rights and freedoms." The only other guidance is that a restriction on human rights "shall not be used to protect the State and its officials from public opinion or criticism." This last point suggests that no state could defend restrictions on international adoption on the grounds that the practice embarrasses the state or its leaders or exposes them to criticism.

A right of others that a country is more likely to invoke is that of birth parents to maintain a relationship with their children.

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107 Applying the non-discrimination principle is more complex in a context where the restriction is truly necessary to spare the right-holder from serious harm. Presumably if a state could satisfy a), b) and c), representatives would not have brought the challenge in the first place, or they would withdraw their complaint after the state made its child welfare case. Alternatively, the tribunal might dismiss on standing-type grounds a complaint that ultimately comes down to "you are protecting us but not others." On the other hand, the anti-discrimination rule and principle always serves as a useful check against sloppy empiricism or legal analysis.

108 Siracusa Principles, supra note 91.

109 Id.

110 Recognition of such a right is widespread, but not universal. See Howell, supra note 18, at 50-51 (discussing certain African tribes). For an argument on theoretical grounds against the belief that birth parents are entitled to be the legal
That right might justify obstacles to international adoption aimed at ensuring that no child ostensibly available for international adoption is actually wanted by his or her birth parents and has a substantial chance of being able safely to return to them within a reasonable period of time.\textsuperscript{111} Again, though, a complaint before the HRC would force a state to demonstrate a substantial empirical basis for this concern and that there is no way to address it except by the restrictions imposed, or in other words that the measures taken are the least restrictive way of addressing the concern. A substantial-risk requirement arises from the general aversion to restrictions, from the state's burden to prove necessity and compelling reason, and from the non-discrimination mandate, insofar as the HRC would undoubtedly impose a substantial-risk test in any situation involving adults, such as quarantine.

In sum, then, judging simply from the text of the ICCPR and the Siracusa Principles, the permitted bases for restricting the right to emigrate that could plausibly apply to international adoption are just children's safety and parents' rights. Invoking the ICCPR would force states to do something they currently appear to suppose they have no need to do—that is, present persuasive evidence of a sufficiently substantial problem and show that they cannot avoid the problem by policies that are less restrictive of international adoption. A less restrictive policy would include one that applies to a smaller group of children, if the evidence suggests the danger of injury to children or deprivation of parental rights exists only for an identifiable subset of all children as to whom international adoption is sought (e.g., those for whom adoption is sought other than through an official agency or properly licensed intermediary). Part 5 below addresses specific rationales for limits on inter-country adoption in more depth.

4.2.2. Adjudication of Obstacles to Exit

The U.N.'s Human Rights Committee adjudicates complaints about violations of the ICCPR. It has issued just a dozen or so decisions on the right to leave one's country. Most involved a
country’s denying a passport to a national living at home or abroad and then incurring a charge of violating ICCPR Article 12 because absence of a passport inhibits international travel. The HRC found a violation and upheld the complaint in all but one case in which the charged nation had in fact inhibited its national from moving across national borders. The typical apparent government motivation is political retribution against critics of the regime in power, and usually the native country does not even try to defend its actions. In none of its decisions did the Committee even entertain the idea that political opposition or published criticism of government could constitute a threat to national security, public order, or any other legitimate concern of the state.

The one decision that upheld a passport denial involved an adult citizen of Finland who had failed to report for compulsory

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military service when called.\textsuperscript{114} The Committee noted agreement by the Convention state parties, as reflected in the \textit{travaux preparatoires}, "that the right to leave the country could not be claimed \ldots in order to avoid such obligations as national service."\textsuperscript{115} It concluded that enforcing the nation's military service rules, by denying a passport if necessary to produce compliance, was "necessary for the protection of national security and public order," was non-discriminatory, and did not infringe any other rights under the Covenant.\textsuperscript{116} Presumably, the HRC would not find in the case of unparented babies and infants that states may justify holding them captive until adulthood by pointing to the expectation that they will one day serve in the military or otherwise fulfill some obligation to the state. A duty of military service arises, if at all, only for those who have reached adulthood after enjoying a nation's public benefits throughout their upbringing.

In one other case of special significance, the HRC found that Peru had violated a citizen's ICCPR right to emigrate by delaying for too long legal action prerequisite to his departure. The government had issued an arrest warrant against the man but then never arrested him and instead refused him permission to leave the country for the next seven years, citing the outstanding warrant for his arrest as the reason. The Committee stated:

\begin{quote}
Pursuant to paragraph 3 of article 12, the right to leave any country may be restricted, primarily, on grounds of national security and public order (ordre public). The Committee considers that pending judicial proceedings may justify restrictions on an individual's right to leave his country. But where the judicial proceedings are unduly delayed, a constraint upon the right to leave the country is thus not justified \ldots The Committee considers that this situation violates the author's rights under article 12, paragraph 2\ldots
\end{quote}


\textsuperscript{115} \textit{Id.} ¶ 8.3.

\textsuperscript{116} \textit{Id.} ¶ 8.4.

\textsuperscript{117} del Rio v. Peru, \textit{supra} note 112, ¶ 5.3.
An advocate for a child for whom the adoption process is unduly prolonged might cite this case as precedent for the broader principle that unjustified delay in legal or administrative proceedings can constitute a violation of Article 12, even if a government purports to be permitting international adoptions. This passage, like that in other decisions of the Committee, reaffirms that exceptions to the right to emigrate are extremely limited, and that the burden is on the state to demonstrate that an enumerated exception applies.118

4.2.3. Scholarly Writing

The right to emigrate has also received little attention from scholars. It is generally taken as a given, rather than analyzed in any depth, that denying any adults the freedom to emigrate patently violates their human rights, absent certain sorts of compelling circumstances. Scholars have accepted as sufficiently compelling a real threat of spreading deadly disease, but endorse quarantine only with due process protection against unnecessary denial of freedom.119 On the other hand, scholars have rejected as bases for denying the right to emigrate resource-type concerns, such as labor shortage120 or loss of the most well-educated or talented citizens (i.e., “brain drain” and “muscle drain”). Thus, in assessing how poor countries can respond to the “talent-for-citizenship exchange” that robs them of the payoff for investing in development of their star athletes come Olympics time, Ayelet Shachar writes:

Her home country may plead with her to stay or make promises to further invest in her development as an athlete, but as a cold legal matter, it cannot force her to stay. International law declarations and many domestic constitutions pronounce that individuals have a basic right to leave their country.121

118 See also Bwalya, supra note 113, ¶ 2.5 (discussing the case of a political activist declared a danger to national security, prompting restriction).


120 See, e.g., Huling, supra note 61, at 659 (discussing UDHR rules that protect individual rights by not allowing employers to keep workers’ passports).

What goes without saying is the insufficiency in the case of adults of certain reasons a country might have for blocking emigration such as protecting national pride, resisting neo-colonialism, hoping it will induce other nations to give more aid, concern that adult émigrés are being commodified, or preserving family-formation opportunities for those who remain in the country. There is, implicitly, regarding adults, complete rejection today of the notion that states own their citizens and are empowered to limit their freedom to serve aims of the state or interests of other persons.\textsuperscript{122}

5. **Applying the Right to Emigrate to Inter-country Adoption**

This final Part examines, in light of the guidance just rehearsed, common explanations or justifications for countries' imposing restrictions on international adoption. The analysis will show that appeal to general human rights simplifies the international adoption issue somewhat, by ruling out certain kinds of considerations. The issue remains complex, however, so the analysis here is meant to be preliminary, intended to begin a conversation within a new, general-human-rights normative framework. I do not attempt an exhaustive analysis of restrictions on international adoption. My aims in this Article are to argue for a new analytical and advocacy framework, as I have done in Parts 1 to 3; to identify principles that should guide application of the relevant general rights, as I have done in Part 4; and, in this Part, to demonstrate how this new framework changes the status and plausibility of common justifications for restrictions on international adoption. I will ask as to each potential justification whether the international community would accept it as sufficient to block the emigration of any adults, and in particular any adults

\textsuperscript{122} Cf. Ruth Rubio-Marin, *Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Emigrants*, 81 N.Y.U. L. Rev. 117, 122 (2006) ("Today ... the prevailing liberal ethos includes the subject's rights to leave the country and change nationality at least as long as there is another country willing to take the subject ... . . . [T]he general attitude towards those who have left is disinterest ... . . .").
seeking to emigrate for purposes of family formation. I begin the analysis with reasons having to do with supposed interests of the state, follow this with concerns about the rights or interests of persons other than the children who could be adopted, and end with justifications ostensibly resting on the children's welfare.

5.1. State Interests

5.1.1. National Pride

Russian President Putin gave indication that his support for the ban on American adoption of Russian-born children arose from his view that the practice is demeaning for Russia.\textsuperscript{123} South Korea has in recent years imposed a strong domestic placement preference, even though domestic adoption opportunities fall far short of need, in part because government leaders think it reflects poorly on the nation that native children must leave the country to find a home.\textsuperscript{124} Many observers of international adoption perceive this ego-protecting motivation as the dominant one behind imposition of restrictions in other countries as well.\textsuperscript{125}

This motivation falls into the category of patently illicit under the ICCPR right of emigration. It is clearly not within any of the ICCPR's enumerated bases for derogation. No country would attempt to justify refusing to allow women to leave for marriage purposes by asserting that their doing so constitutes an insult to the nation, even though that would seem even truer in the case of adult emigration. There is no shortage of potential husbands for women in the former Soviet Union, so the desire of hundreds of thousands of Russian women to find a husband abroad reflects

\textsuperscript{123} See Herszenhorn & Eckholm, supra note 12 ("'There are probably many places in the world where living standards are better than ours,' Mr. Putin said. 'So what? Shall we send all children there, or move there ourselves?'").


\textsuperscript{125} See, e.g., Howell, supra note 18, at 161, 171; John Triseliotis, "Inter-country Adoption: In Whose Best Interest?," in INTER-COUNTRY ADOPTION: PRACTICAL EXPERIENCES, supra note 35, 131 (stating that many in the Third World view inter-country adoptions as "confirming their inferiority and inadequacy"); Bartholet, supra note 36, at 374-75; Bartholet, supra note 4, at 4 (discussing China, the African Child Policy Forum, and the condemnation of international adoptions for reasons of national pride).
poorly on Russian men and on former Soviet states as nations, yet these states must permit the women to leave. Analogously, if a man forcibly holds his girlfriend captive because her departure to pursue better marriage prospects would wound his pride, his conduct is abuse, pure and simple, not commendable or even tolerable. Holding children hostage to protect national pride is no less a form of human abuse.

5.1.2. Neo-Colonialism

Some intercountry adoption critics complain that the practice is imperialistic. Shani King writes: “Little attention is paid in legal scholarship . . . to the argument that industrialized countries are exploiting developing countries and stealing their national resources, i.e., their healthy children.” Leaders of some third world countries have explained decisions to restrict or prohibit the practice in terms of protest against this modern-day form of exploitation and resource stealing. John Triseliotis reports that, for many in developing countries, inter-country adoptions “epitomize the exercise of influence and control by the more powerful nations who are seen as ‘robbing’ Third World countries of their children.” Extremists characterize it as genocide,


127 King, supra note 2, at 436. See also id. at 414 (tying intercountry adoption to “our imperialist orientation toward the world”).

128 See, e.g., Triseliotis, supra note 125, at 131 (linking adoption to a sense of self-righteousness); Yngvesson, supra note 19, at 216-17 (citing authorities in developing countries who refer to children as a nation’s resources). See also King, supra note 2, at 434-35 (providing other sources that document a concern about the appearance of imperialism motivating international agencies and national governments to adopt positions hostile to international adoption).

129 Triseliotis, supra note 125, at 131 (explaining intercountry adoption in terms of a need to “rescue” children). See also Hearst, supra note 1, at 333 (discussing view by some critics of transnational adoption that such practice is a global market for human beings).
destroying communities and cultures by removing the next generation. 130

Those leveling a neo-colonialism charge uniformly fail to explain how an exploitation charge could apply to countries or regions with a severe over-population problem and in circumstances where the conditions in which children live produce very bad outcomes for them and, in turn, for their society. None have offered any evidence that any sending countries or cultural communities have suffered from the departure of children from orphanages. On the contrary, there is ample evidence that sending countries benefit economically from international adoption, because it reduces their costs of caring for unparented children, injects foreign currency through adopters' travel expenses and fees paid to local agencies, and triggers voluntary contributions and purchases of local products by adopting parents and adopted children. 131 Ultimately, the imperialism charge collapses into assertion of national pride, dismissed above.

Moreover, the strategy of appealing to more general rights held by all, and demanding justifications that would apply to all, makes evident that this charge is also simply inapt and insufficient even if there were any empirical basis for it. A neo-colonial exploitation charge would be more plausible in regard to the practice of international marriage, that is, a charge that the practice principally consists of western men extracting a valuable "resource" (i.e., women) from poor countries. 132 Though a nation might well suffer from the mass departure of its healthy, educated women, especially a nation like China experiencing a serious shortfall of

130 Hearst, supra note 1, at 330 ("[M]any groups view the placement of children outside of their boundaries as tantamount to genocide.").

131 See Howell, supra note 18, at 182 (discussing fiscal burdens and benefits of adoption); Barbara Stark, Baby Girls From China in New York: A Thrice-Told Tale, 2003 UTAH L. REV. 1231, 1270 (2003) (pointing out that roughly a billion dollars goes each year from the U.S. to China as a result of adoptive parents buying cultural items to give to their adopted children); Cost to Adopt from China, FAMILIES THRU INTERNATIONAL ADOPTION (Sept. 17, 2013, 9:00 PM), http://www.ftia.org/china/costs.asp (advising prospective adopters that they will need to make a "donation" of over $5,000 to their child's orphanage and pay over $2,000 to Chinese officials, and that an adopting couple can expect to spend nearly $5,000 on living and traveling expenses while in China).

132 See Lilith, supra note 126, at 228-29 (maintaining that it is actually more common for the mail-order bride phenomenon to be viewed as exploitative neo-colonialism).
marriageable women, no one suggests that this is a reason to curtail the right of women to emigrate. Likewise, many people complain that “talent drain” harms poor countries, and some characterize it as neo-colonialist exploitation, yet no one launches an argument on this basis per se for denying the highly-educated and talented a right of emigration. Scholars take as given that poor countries would violate human rights by trying to hold their adult talent pool captive, absent a legitimate contractual obligation that locally-trained adults owe to their country. It would smack of commodifying and enslaving human beings. Within the general rights framework, supporters of international adoption can persuasively argue that it is no justification for violating any persons’ right to emigrate that a country views them as a valuable national or cultural-community resource. If it is not a justification in the case of adults, in whom a country is more likely already to have invested substantially, then it cannot be in the case of children.

5.2. Other Persons in Sending Countries

5.2.1. Children Left Behind

Related to the charge of exploitation is the complaint that international adoption changes the lives of only a tiny percentage of all needy children in sending countries, and not necessarily the very neediest, while doing nothing to help the children who are not adopted or the country more generally. In fact, some suggest

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134 See Shachar, supra note 121, at 2129 (discussing professional soccer leagues’ recruitment of young players).

135 See, e.g., Hearst, supra note 1, at 333 (alleging that transnational adoption harms efforts to improve support for local community based projects); Bergquist, supra note 126, at 349-50 (“[I]nternational adoption at best does not address precipitating social conditions, providing instead a short term and arguably minimal impact on the problem of homelessness and poverty for children. At worst, it allows countries to abdicate responsibility for enacting sociopolitical change to secure the well-being of all children . . . .”); King, supra note 2, at 425,
it "retards the growth of infrastructure within countries that could care for children in-country."\textsuperscript{136}

This complaint overlooks the just-mentioned ways in which international adoption does actually help those who remain in the sending country, in particular by lessening the number of children in state custody, thereby freeing up more of the sending country's resources for spending on support for parents and other family-preserving measures, and by triggering substantial infusion of foreign currency from adopters. In addition, this complaint suffers from implicitly suggesting that children who could leave should be kept hostage, to try to induce those who care about the suffering in poor countries to take action aimed at improving conditions in the sending country. The imagined causal chain of events from closing off adoption to greater foreign investment is difficult to draw, but even if it were clearer, this strategy would be morally indefensible and unsupported by any ICCPR exception. That becomes evident when we, again, situate adoption within the broader context of emigration. It could equally be said of a prohibition on any adults leaving a country that it might inspire other nations or wealthy individuals in other nations to provide aid to that country. But even if this speculation were the least bit realistic, no one would maintain that this is a valid and sufficient reason for a country's infringing adults' rights to leave their native country and change their nationality. Likewise, no one would contend that adults should be denied freedom to exit for marriage purposes because the best leave and the most unfortunate remain behind. It should be no more plausible to contend that a country should shut down foreign adoption because most adopters seek healthy infants and pass over special needs and older children.

\textsuperscript{428, 461} (complaining that international adoption fails to address some overarching issues for disadvantaged children).

\textsuperscript{136} King, \textit{supra} note 2, at 465 (suggesting that mandatory donations to countries could help assuage critics of international adoption). \textit{See also} Triseliotis, \textit{supra} note 125, at 132. David Smolin maintains that open inter-country adoption policies hurt older and special-needs children in orphanages because they are passed over in favor of healthy infants. Smolin, \textit{supra} note 72, at 242-43. He does not explain, however, how restrictions on international adoption help older or special-needs children get adopted. To the extent they result in raising the average age of adopted children, it would seem they do so only by forcing unparented children to wait longer to join an adoptive family. Smolin also asserts that inter-country adoption is almost always bad for older children, because it is so disorienting. \textit{id.} at 238-39, 240.
Some propose, as a way of addressing the supposed harm that international adoption inflicts on poor countries, that adopters and western governments pay a hefty tax for each international adoption, which sending countries would in theory use to improve family-preservation and domestic adoption efforts.¹³⁷ Most sending countries in effect already do this; the size of fees paid to state agencies and orphanages undoubtedly far exceeds any costs the sending country incurs in processing an adoption. Moreover, those who propose an adoption tax do not consider whether increasing the cost in this way would lower demand and therefore produce no net gain to the sending country and a profound loss for children who as a result are never adopted. They implicitly assume that westerners wishing to adopt have unlimited money to spend and that demand is inelastic, but we know that the current high cost already deters many people.¹³⁸

In addition, generalizing again makes the proposal unpalatable: would those who support an adoption tax also support an international marriage tax, by which countries that ‘supply’ brides for western men tax those men and/or their government, perhaps to fund employment for potential domestic husbands? There is in fact one example of a country imposing a tax on brides; Turkmenistan for some years required foreign men wanting to marry one of its women to pay a $50,000 fee, ostensibly as a demonstration of sincerity that would help prevent trafficking. Human rights organizations condemned the fee as a violation of women’s human rights, and in 2005 the country eliminated it.¹³⁹ Such a tax commodifies people, suggests that nations have some proprietary interest in the humans that live within their borders for which they must be compensated, and unjustifiably infringes individuals’ right to exit the country in order to pursue a better life. The proposal to tax inter-country adoption does all of these things with respect to children. It is another illustration of how sui generis thinking about children, encouraged by special-rights enactments,

¹³⁷ See, e.g., King, supra note 2, at 464-65 (stating that some states currently require donations be made to orphanages from which children are adopted).
¹³⁸ See Rachel J. Wechsler, Giving Every Child a Chance: The Need for Reform and Infrastructure in Intercountry Adoption Policy, 22 PACE INT’L L. REV. 1, 30 (2010) (explaining that costs for international adoption are prohibitively high for some couples).
¹³⁹ See generally Gulnoza Saidazimova, Turkmenistan: Marriage Gets Cheaper As Turkmenbashi Drops $50,000 Dollar Foreigners’ Fee, RADIO FREE EUROPE (Jan. 10, 2005, 10:00 PM), http://www.rferl.org/content/article/1059210.html.
leads to policies and ways of thinking no one would apply to adults.

5.2.2. Profiteering

Russia's ombudsman for children has defended that country's ban on adoption by Americans in part by charging that international adoptions are driven by adoption agencies' desire to make money, citing the fees that range between $30,000 and $50,000 that adopting parents typically pay. It is unclear whom this harms, other than adoptive parents who pay the fees and children who remain unparented because the high cost of adoption deters other would-be adopters. It is also unclear how those high fees could drive demand, which ultimately must come from would-be parents, rather than deterring it. There are well-documented reasons why westerners seek to adopt from other countries, and they do not include wanting to pay a lot of money or falling under the spell of adoption agency advertising.

Apart from the illogic of this objection, it simply would not stand up upon being generalized to cover formation across national borders of family bonds more generally. The proliferation of international dating Internet sites suggests there is much money to be made by charging fees to American and European men to meet online and communicate with women in former Soviet countries, Asia, and Latin America. Yet no country has enacted legislation to ban marriage of its citizens to Americans or deny the right to emigrate for marriage purposes, on the ground that these

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140 See generally Herszenhorn, supra note 12 (discussing Russian official's suggestion that international adoptions are driven by profit motives). Cf. D. Marianne Blair, Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers, 34 CAP. U. L. REV. 349, 352 (2005-2006) (“Prior to the 1990s, most international adoption agencies were philanthropic or missionary organizations. During the past twenty years, however, the number of international adoption agencies in the United States has more than doubled, and many facilitators are now private or for-profit companies and individual entrepreneurs.”).

141 Others maintain that both birth parents and adopted parents are exploited by the public and private agencies that control international adoption. See, e.g., Peter Selman, Adoption: A Cure for (too) Many Ills, in CROSS-CULTURAL APPROACHES TO ADOPTION, supra note 2, at 270 (stressing the need for regulation of intercountry adoption and higher ethical standards).

marriage agencies are driven by profit motives. The presence of market incentives for agencies to facilitate international family formation in and of itself provides no justification for infringing the right to emigrate.

5.2.3. Coercion of Parents

The more legitimate concern relating to money is that some parents are induced to relinquish their children to adoption intermediaries or agencies by proffered payments.\textsuperscript{143} This was among the concerns that motivated creation of the Hague Convention.\textsuperscript{144} There is debate about how substantial this concern is today. Proponents of international adoption contend that the concern rests on rumors or illogical extrapolation from a small number of documented cases, and that with millions of children already in orphanages or living on the streets because their parents died or abandoned them there is little incentive for anyone to buy or kidnap a child.\textsuperscript{145} Rather than wade into this empirical debate, I want to make some different points.

First, even if this is a prevalent practice, it could be viewed as parents exercising their rights rather than having them denied. There is some tension between treating monetary inducement as a basis for blocking adoptions and the standard assumption, which provides the primary normative foundation for conferral of parental rights, that parents know what is best for their children and try always to do what is best for them. It entails some suspect second-guessing of parents' difficult decisions to relinquish their

\textsuperscript{143} See Blair, supra note 140, at 355-65 (describing the practice of an adoption agency in Cambodia to induce parents to relinquish their babies by offering $50 and false promises of continuing contact).

\textsuperscript{144} See HOWELL, supra note 18, at 178-79, 218 (explaining that financial practices relating to adoptions in Guatemala, Romania, and elsewhere played a role in development of the Hague Convention). See also Wardle, supra note 44, at 122-23 (discussing influences on the Hague Convention, including questionable adoption methods in Romania).

\textsuperscript{145} See, e.g., Bartholet, supra note 5, at 96 (contending that preventing adoptions because of a small number of abuses is detrimental to children); Wardle, supra note 44, at 144 ("Establishing safeguards and procedures for stopping abuses existing in a small-but-sensational minority of international adoptions are explicit objectives of the HCIA; one way to achieve those objectives is to significantly reduce international adoptions, slowing them to a trickle of exactingly screened, perfectly comfortable adoptions."). See also Jini L. Roby & Stacey A Shaw, The African Orphan Crisis and International Adoption, 51 SOCIAL WORK 199, 200 (2006) ("[T]here are no documented cases of adoption trafficking into the United States from Africa.").
newborn or infant child, which might in fact be the best thing for that child and the rest of the family. This phenomenon is likely to occur precisely in places where existence is truly marginal, where parents fear for their children's survival. Some parents and older children in those countries might wonder how it is that they are better off as a result of their 'protectors' imposing cumbersome procedures designed to ensure that parents do not receive any money in the process of separating from their youngest offspring.146

Many would say this means the circumstances should change, so that no parents would feel compelled for the good of their family to "sell" their children.147 Instead of adopting children from a desperately poor nation, we in the West should pour aid money into the country to ensure that every family there can live a secure existence in a normal home environment. This response suffers from what I call the "Better World Fallacy," the reasoning that if a certain government policy (which could be, e.g., imprisoning people for dealing drugs, removing children from abusive parents, or any other law enforcement reaction to the dysfunctional behavior that poverty and injustice produce) would be unnecessary in a better world, then it should not exist in the actual world. When dire poverty, famine, slums, uncontrolled infectious diseases, civil war, child rape, and sex slavery no longer exist, perhaps we can refuse to allow biological parents to relinquish their children for international adoption. At present, however, it cannot suffice to tell a child who is dying of starvation along with her AIDS-infected parents, and who has been raped several times while walking the five-mile road to the water spigot, that the state

146 Cf. David M. Smolin, Intercountry Adoption and Poverty: A Human Rights Analysis, 36 CAP. U. L. REV. 413, 434 (2007) ("Should hungry or malnourished birth parents, and their remaining children, be turned away with nothing, solely to protect the purity of their consents?"). Smolin makes a strong case that when any birth parents in the most impoverished countries of the world propose to relinquish a child for adoption, they should be offered a sum of money sufficient to allow them to retain their children. He suggests that this cost be passed onto adoption applicants and speculates that it might amount to an additional three thousand dollars or so per adoption. He would still allow international adoption, but just require some greater effort to ensure poverty is not the only reason why parents give up their child. See generally id. The proposal is appealing and his reasoning forceful, but as explained above, there are normative and practical problems with imposing a tax on adopters, and if the money had to come from foreign government aid rather than from taxing adopters then the proposal would suffer from the Better World Fallacy.

147 See, e.g., King, supra note 2, at 434; Yngvesson, supra note 19, at 213.
did not permit her parents to place her for international adoption at birth because it was worried about their autonomy.\footnote{See Jonathan Todres, \textit{A Child Rights-Based Approach to Reconstruction in Haiti}, \textit{6 Intercultural Hum. Rts. L. Rev.} 43, 67 (2010) (discussing dangers children face in the poorest regions of the world).}

The 'child buying' reason for foreclosing foreign adoption also suffers from the usual problem with prohibiting people from engaging in highly-desired transactions for fear of harmful side effects—namely, that it drives up the price where the transactions remain legal and it gives rise to an illegal market where the law prohibits them. The concern about parental coercion should diminish the more open nations' policies become with respect to international adoption, because the natural over-supply of truly orphaned children would eliminate any financial incentive to approach parents who are living and who are capable of raising their children. Within a global framework, UNICEF's successful pressuring of some nations to curtail international adoption must make 'baby buying' more common in other nations that are more receptive to international adoption, because it thereby becomes more lucrative. Conversely, the most promising way to minimize coercion of parents might be to induce a change of policy in countries that have a great number of true orphans but currently prohibit international adoption.\footnote{Cf. Smolin, \textit{supra} note 14, at 469-70 (noting that many potential sending countries are closed to foreign adoption, including nearly all of Africa); Wardle, \textit{supra} note 44, at 116-17 (supplying data on the number of unparented children in developing countries).} Dramatically increasing the number of true orphans available for international adoption should reduce the price agencies and countries charge adopters and eliminate or at least reduce the incentive for anyone to offer parents money for relinquishing a child for adoption.\footnote{Cf. Smolin, \textit{supra} note 14, at 492 ("[S]o long as adoption fees and donations are large enough to provide a substantial incentive for child laundering, the system will be vulnerable.").}

In addition, generalizing the objection puts it in a much weaker light. Undoubtedly, the vast majority of women creating profiles on international marriage websites are motivated by their poor economic circumstances in their country of origin rather than by simply a desire for adventure or special attraction to American men. Would Russia be justified in prohibiting these Internet marriage brokers from operating in Russia or in refusing to permit its young women to emigrate for marriage purposes because of a
concern that they are motivated to forego relationships in Russia by the prospect of economic gain via international marriage? The reality is that they will likely have much better lives in many ways by emigrating and living in a western country, despite the psychological and emotional costs of separating from their parents, other family members, and friends. The legal system does not second-guess and override their decisions, even though the likelihood of a better life is probably not as great for adults through marriage as it is for children through adoption; the rate of domestic violence for ‘e-mail order brides’ is much higher than is the rate of maltreatment for international adoptees, and adjustment to a different culture, language, and way of life is undoubtedly more difficult for foreign brides than it is for internationally adopted infants.\textsuperscript{151}

In light of the extraordinarily high success rate for international adoptions,\textsuperscript{152} it appears that the real concern relating to money is not a child welfare concern, but rather a concern for the long-term happiness of biological parents in States of origin. But that supposition about parental suffering has not been documented, overlooks the suffering parents experience when their children languish in orphanages or starve before their eyes, and in and of itself cannot justify denying a right to children. Desperate parents themselves might be much better off in the long run by placing their child for adoption, as a result of knowing that their child is not suffering the same fate they have endured. And if in the process they also receive some money that might allow them to feed their other children or themselves, it is not clear that something wrong has occurred. Yes, it is horrible to think that any parents and children could be better off as a result of parents’ parting with their children. But there are many places in the world where horrible is the human condition, and shutting down international adoption is not going to change that, just as prohibiting international marriage would not change it. Adults are

\textsuperscript{151} See, e.g., Abrams, supra note 54, at 1653-54, 1660 (discussing international brides’ vulnerability to domestic violence); Kim, supra note 142, at 466-67, 474-75 (examining legislation passed in response to incidences of domestic violence with mail order brides); Wechsler, supra note 138, at 4 (describing improvement in quality of life for children adopted internationally).

\textsuperscript{152} See Stein et al., supra note 8, at 1431 (“For the vast majority of children who are adopted today, the prognosis is excellent. In cases in which the developmental-behavioral outcome is problematic, diagnostic consideration should be given to factors that are not related to the adoption history.”).
entitled to make this difficult choice for themselves, based on their assessment of what is best for them, and children should have the analogous right of having someone make this choice on their behalf, based on what is in their best interests.\textsuperscript{153}

The most compelling reason states have for imposing restrictions on international adoption might be the possibility that parents have not actually consented to relinquish their children. There is evidence that parents are sometimes defrauded into turning over their children for adoption—for example, by false promises that they can continue to have contact with their children or would continue to benefit financially from the child’s adoption.\textsuperscript{154} In those cases, an inference about the children’s welfare based on the parents’ choice is less tenable. This vulnerability to fraud does point to an additional problem with the children’s pre-adoption situation, though—that is, parents’ radical disempowerment, which must more generally diminish their ability to care for all their children. Nevertheless, the HRC might accept as legitimate any restrictions on international adoption truly necessary to avoid defrauding of parents. As noted above, the ICCPR lists protecting the rights of others among the permissible bases for restricting the right of emigration. If the Committee accepted that birth parents have some possessory right to their children regardless of whether that is in the children’s best interests, then it might find some restrictive adoption policies warranted in some countries.

However, pursuant to the Siracusa Principles, the burden would be on the country preventing children from emigrating to present persuasive evidence that this is a sufficiently frequent occurrence and that it cannot be stopped by other means. The state would have to employ the least restrictive means to preventing children from being taken from parents without the parents’ free and informed consent. A procedural fix should suffice; foreclosing foreign adoption altogether is grossly disproportionate. Whereas within the special-rights framework of the CRC and Hague

\textsuperscript{153} See generally Dwyer, supra note 95 (presenting a thorough theoretical analysis of children’s moral rights in connection with state decision making about their family relationships).

\textsuperscript{154} See Blair, supra note 140, at 357–58 (“Parents were sometimes told that they could visit their child at an orphanage in Cambodia, or that a rich family would raise their child in the United States and send the family money and photographs, and that the child could petition for the parents’ immigration to the United States . . . .”).
Convention, a country can simply cite the DPP Principle and give no further justification for shutting down inter-country adoption, a challenge brought on behalf of children under the ICCPR would force that country to present substantial evidence of a problem and the necessity of a complete shutdown to address it. The country would have to do this to overcome the strong presumption the ICCPR creates in favor of children’s having a right to leave the country to join a family, and against the legitimacy of the state’s creating obstacles to this. Notably, most countries that severely restrict or prohibit foreign adoptions, including Russia, have never claimed that this problem exists and underlies their policies.

5.3. Child Welfare Concerns

Certainly the ICCPR analysis must somehow uphold any restrictions on children’s right of emigration necessary to prevent adoptions that are not in their best interests, all things considered. I am by no means suggesting in this Article that inter-country adoption is the best option for every unparented child in poor countries. The HRC might sensibly read “best interests of non-autonomous right holders” into the public health exception, or it might permit a state to rebut representatives’ prima facie case for asserting children’s right to emigrate by demonstrating that their position is actually contrary to the children’s welfare, on the whole and all things considered. It would be nonsensical to allow proxy assertion of a right on behalf of children to produce a result that is actually worse for them than an available alternative. General rights also present the danger of harming non-autonomous holders.

Particular aspects of children’s wellbeing that receive attention include both red herrings and legitimate concerns. Even the legitimate concerns, however, are far from sufficient to justify categorically denying children without families the opportunity for international adoption. The reality is that international adoptees on the whole do very well, despite the special issues that arise for them. The exceptions are mostly children who incurred substantial developmental damage from their early experience in their country of birth, in which case they would almost certainly have fared even worse by remaining in their country of origin, where there are
unlikely to be special services and medical care for special-needs children.¹⁵⁵

5.3.1. Providing Children for Parents Rather Than Parents for Children

One of the oddest complaints about international adoption is that it has transformed from a practice done for charitable reasons, in reaction to the publicized plight of children orphaned by World War II, the Vietnam War, and the Korean War, to a practice serving the desires of adults in affluent nations who want to have children but are unable to procreate.¹⁵⁶ This simple story might reflect reality to some degree, but it is hardly a complete or entirely accurate account of adopting parents’ motivations.¹⁵⁷ It omits, for example, mention of the thousands of Americans who by choice adopt special-needs children and the thousands who adopt even though they already have biological offspring and could produce more if they wished.¹⁵⁸

The larger problem with this complaint, however, is the unexamined premise that it is worse in some way for people to adopt children when they truly desire a relationship with the children rather than solely because they feel sorry for the children. No one has argued explicitly that the supposedly self-interested motivation of modern-day adopters is itself sufficient reason to stop international adoption, but the purpose of alleging it is clearly to add to the reasons for viewing international adoption in a negative light.¹⁵⁹ Yet if we place international adoption into the

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¹⁵⁵ See, e.g., Howell, supra note 18, at 103–07 (showing that the vast majority of adopted children develop well); Triseliotis, supra note 125, at 124–27, 131.

¹⁵⁶ See, e.g., Smolin, supra note 72, at 242–43; Yngvesson, supra note 19, at 216; Bergquist, supra note 126, at 350 (alleging “a shift from a child-centered to parent-centered focus in adoption”).

¹⁵⁷ But see King, supra note 2, at 419–25 (telling a more complex historical story).

¹⁵⁸ See generally Herszenhorn, supra note 13. See also Wardle, supra note 44, at 115 (“[F]ew international transactions . . . compare with the selfless, charitable, and compassionate act of responsible adults taking stranger children from foreign countries and cultures into their homes, as members of their own families, and assuming the obligation to feed, clothe, house, teach, love, nurture and protect the children . . . .”).

¹⁵⁹ See, e.g., Selman, supra note 141, at 258, 260 (insinuating that gratifying childless couples has become the dominant motivation for international adoption, at the expense of children’s welfare); Triseliotis, supra note 125, at 119 (“[A] healthy motive is generally seen to be one that aims to provide a home for a needy child rather than a child for a home.”).
larger context of emigration for purpose of family formation, and we ask what justifications might suffice for infringing anyone’s right to leave their country of origin for that purpose, it immediately becomes apparent how ironic is this charge. No doubt, if one surveyed women who have come to the United States for marriage to American men and asked, “Would you rather that your husband married you because he really wanted a wife and fell in love with you, or instead because he felt sorry for you?” the uniform answer would be the former. A similar survey of adopted children would undoubtedly produce a similar result—that is, they would rather have been adopted because their parents really wanted to have a parent-child relationship rather than because their parents pitied them. The former motivation is more likely to coincide with parents’ having a very positive view of the child, as a blessing rather than a burden, and any child should prefer that. Adoption proponents can turn this story on its head, arguing that it is wonderful that the modern adopter truly wants a relationship with the child and is more likely than the adopters of old to make the child feel special and valued.

5.3.2. Trafficking

A clearly legitimate reason for imposing institutional requirements and procedural and substantive restrictions on adoption, whether domestic or international, would be the danger that people aiming to exploit children sexually or by slave labor might attempt to acquire victims through adoption, rather than, for example, kidnapping. Consistent with common usage in international human rights documents and U.S. Department of State publications, I use ‘trafficking’ to mean acquisition of children for exploitation.160 I treated separately above the topic of parents being induced by payments and/or fraud to relinquish their children for adoption, which some authors, for rhetorical purpose, confusingly conflate with trafficking.161


Trafficking in the exploitative sense is a large and deeply troubling practice. But this concern is a red herring in the adoption context, ironic even. Traffickers are exceedingly unlikely to use official adoption channels as the means for securing children for sex trade or slave labor, so imposing legal restrictions on official adoption will not diminish trafficking. In fact, there is no evidence of a significant connection between trafficking and international adoption. One might suppose that a westerner who is a child sex predator could conclude that a promising strategy for obtaining access to a child’s body is to go to a third world country and pose as an adoption applicant. But there is no evidence of this occurring, and it seems quite unlikely to succeed, given the natural suspicion, or in many countries legal preclusion, of adoption petitions filed by single men, and given the need to navigate the immigration process for bringing a child into a western country.

Moreover, this supposed justification for making international adoption more difficult or impossible is actually ironic because the more a country creates obstacles to parents’ placing their children with official adoption agencies the more likely desperate parents are to give their children (perhaps unwittingly) to traffickers. A father who concludes that he is unable to care for his child after the mother has died and who finds that no family or community member is available to foster the child would presumably prefer to place the child for adoption into a good family. However, if his country makes that impossible through approved agencies or intermediaries, the child will be at great risk of starvation, kidnapping, or being sold off to anyone who approaches the parent with a stack of currency and empty promises.

The foregoing points can be made within the special rights framework. What appeal to general rights adds is a requirement that any asserted justification apply equally in the case of adults. Trafficking is obviously a concern with adults as well, especially women, and actually much more common with adolescent girls and women than with little children. That very concern, coupled with a suspicion that some women are lured into slavery by the prospect of marrying a westerner, ostensibly led the Philippines to

162 See U.S. Dep’t of State, supra note 160, at 45.
prohibit the operation of for-profit international marriage brokers in that country. That action might suggest some support for the notion of restricting emigration even of adults for paternalistic reasons. However, the Philippines is alone in having such a prohibition. Guatemala, which shut down international adoption because of some reports of illicit payments and defrauding of parents in connection with true adoptions (i.e., not trafficking), is a major source of sex trafficking of women. Yet neither the Guatemalan nor American government has proposed as a remedy a prohibition on emigration of women from Guatemala; the response to this much more harmful practice toward adolescents and adults is instead to attempt to detect the illegal practice and prosecute wrongdoers. The Philippine law, moreover, is little enforced, is limited to restricting activities of certain businesses, and in no way inhibits the emigration of Filipinas who find foreign marriage partners by one of the innumerable other available means.

If the Philippine law did substantially diminish women's freedom to leave the country to pursue a better life, the human rights community would likely condemn the law. It would do so not just because there is consensus that women in desperate poverty must be free, as autonomous adults, to accept the risk that what looks like a real marriage prospect could turn out to be enslavement, even if it is irrational to do so. It would be so in large part because that risk of being trafficked is actually not high enough to make the decision to pursue international marriage irrational. In addition, under the ICCPR and the Siracusa

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164 See Roxanne Sims, *A Comparison of Laws in the Philippines [sic], the U.S.A., Taiwan, and Belarus to Regulate the Mail-Order Bride Industry*, 42 AKRON L. REV. 607, 616-17 (2009) ("The Philippines legislature intended for Republic Act No. 6955 to protect Filipino women from being sexually and economically exploited by international marriage brokers."). The law might well have been a self-interested reaction by male legislators to the exodus of women from the country to marry Western men.


166 See Lilith, *supra* note 126, at 227 ("In spite of changes in Philippine law intending to curb mail-order brides by banning organizations and advertisements which promote marriages between Filipinas and foreign nationals, the number of Filipina mail-order brides brought to U.S. increased steadily throughout the 1990s."); id. at 255 (quoting a Filipina woman: "There is nothing that can be done to stop us from giving our names to pen pal companies"); Sims, *supra* note 164, at 616-18 (describing limited effect of the Philippine law).
Principles, the state of origin would bear the burden of showing that prohibiting emigration is the least restrictive means of protecting women from exploitation. Prevailing rules and practice suggest that concern about trafficking is generally viewed as insufficient reason to deny any adults, even vulnerable ones, the right to emigrate, which in turn creates a presumption under the ICCPR that it is insufficient reason to deny children that right.

I will also note that, even if there were a substantial connection between trafficking of children for sex or labor and official adoption channels, the problem cannot logically justify particular types of restrictions that many countries have adopted. In particular, it does not justify any application of the DPP Principle—not a policy of prohibiting international adoption but allowing domestic adoption, not a policy of preferring domestic adoption or foster care to international adoption, and not a policy of holding children in orphanages for years to ensure domestic adoption possibilities are exhausted before making them available to foreigners. If there are sex predators who pose as adoption applicants, they are more likely to be residents of the third world country, and they are likely to prefer older children rather than babies. Moreover, larger organizations in the business of supplying children for sex tourism or factory labor, whether they are in the sending country or not, could undoubtedly easily hire locals to pose as adoption or foster care applicants, if they thought that were a more propitious way of getting children than going directly to impoverished parents.

5.3.3. Mistreatment of Children in Receiving Countries

Russian politicians have frequently cited as justification for restricting foreign adoptions incidents of serious harm or death to children adopted from Russia. Proponents of international adoption argue that it is irrational to condemn a practice involving tens of thousands of children annually on the grounds that a very

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small number of cases have gone badly.\textsuperscript{168} Critics respond that problems are more common than proponents think.\textsuperscript{169}

What critics have not done, though, is an evidence-based comparison of probabilities of maltreatment under the alternative placements that were available for the children who were adopted. To respond to reports of maltreatment, or simply to reports of adjustment difficulties, by foreclosing international adoption is nonsensical and irresponsible if that is still the available option with the best odds of a good life for children. What critics would need to show is that the very process of transferring a child from an orphanage to an adoptive placement in another country itself is more likely to damage the child than is some alternative, including remaining in the orphanage until adulthood, transferring to an adoptive or foster placement in the country of birth, being put out on the streets, and so on. Absent such demonstration, the strong presumption in favor of the right to emigrate under the ICCPR controls.

And, in fact, available evidence shows that the complete opposite is the reality, that the rates of maltreatment and harm are far greater in poor countries' non-parent-care systems than in adoptive homes in other countries.\textsuperscript{170} Especially in light of those comparative figures, the intuition of most people would undoubtedly be that taking a chance on becoming part of a family is a better choice than remaining in any institution or mercenary foster home, that joining a family in another country soon after

\textsuperscript{169} See, e.g., Smolin, supra note 14, at 474.
birth is preferable to waiting a couple of years in institutional care to see if any local family will step forward, and that joining a family in the United States or Sweden is even preferable to immediately joining a family in the country of one’s birth if the latter family is living in deep poverty or in a place that has no prospects for education and employment or is surrounded by violence.

Placing international adoption within the broader framework of transnational family formation suggests another comparison. We should ask how the rate of abuse toward adopted children compares to the rate of abuse by husbands against immigrant wives. Further, we should ask why no one proposes as the remedy for the perceived high rate of domestic violence toward immigrant brides that the sending countries simply prohibit the emigration of women for marriage or that the receiving countries deny them an entry visa. Instead, the law’s response is simply to elicit more information from the persons in receiving countries seeking to form a family relationship with a vulnerable person from a poor country through an intermediary—namely, requiring self-reporting and/or agency-conducted background checks, as is already done with adoption.171 Within a framework of rights shared by all persons, the potential for domestic abuse is placed in a more objective light. And the ICCPR requirement of non-discrimination presumptively precludes reliance on this concern as justification for restricting children’s right to leave their country of origin, if the same concern, with even stronger empirical foundation, would not justify restricting adults’ right of emigration.

5.3.4. Cultural Interests of Children

Another common objection to international adoption rests on children’s supposed interest in remaining within the culture of their state of origin or partaking in their “cultural heritage.”172


172 See, e.g., Smolin, supra note 72, at 242 (“Stripping a child of her identity and familial, community, and cultural heritage is a severe deprivation of rights, as the child generally has no choice in the matter and has her fundamental orientation to herself and the world altered without her consent.”); King, supra note 2, at 414, 466 (noting that in some countries intercountry adoptions are not permitted); Roby & Shaw, supra note 145, at 202–05 (emphasizing “the importance of racial and cultural identity for children in their adoption experience”).
Many claim this is the primary concern underwriting the DPP Principle.\textsuperscript{173} International adoption proponents point out the suspect metaphysical nature of such a claim, at least as applied to very young children, who are the most likely to be adopted. It seems to suppose that even if a child born in, for example, Korea is adopted and brought to the United States at the age of one, and spends the rest of his life living in the United States, that “his culture” is Korean culture.\textsuperscript{174} Such essentializing is normatively problematic and empirically suspect. An infant has little or no experience of culture, and to suppose that any child is per se harmed by moving away from his or her place of birth would damn every parent who has ever relocated from one country to another, or even from one sub-national region or province to another.

Elizabeth Bartholet refers to this cultural identity objection to international adoption as “the false romanticism surrounding birth and national heritage”\textsuperscript{175} and notes: “[s]cience provides no basis for believing that children are better off if raised in their community of origin.”\textsuperscript{176} In fact, studies involving interviews of international adoptees, which presumably are the best evidence of their experience, reveal that the vast majority feel little sense of loss and little desire to learn more about or visit their country of birth.\textsuperscript{177} It also appears that citizens of sending countries

\textsuperscript{173} See, e.g., Hearst, note 1, at 335-36 (arguing that children should have the right to access their culture of origin); Smolin, supra note 146, at 422 (“Under international law, adoption within the child’s birth country is clearly preferred over intercountry adoption. The basis of this preference is apparently related to the child’s identity rights.”) (footnote omitted).

\textsuperscript{174} See, e.g., Hearst, supra note 1, at 334.

\textsuperscript{175} Elizabeth Bartholet, Permanency Is Not Enough: Children Need the Nurturing Parents Found in International Adoption, 55 N.Y.L. Sch. L. Rev. 781, 785 (2011).

\textsuperscript{176} Bartholet, supra note 5, at 97 (citation omitted).

\textsuperscript{177} See, e.g., HOWELL, supra note 18, at 80, 111-21 (finding, based on interviews with adoptees returning to Norway from “motherland tours,” that most come back “fully confirmed in their Norwegianness”). Transracial adoptions raise a somewhat different concern about “fitting in” one’s adoptive family. That has been an issue in debates over adoption domestically within the United States. The concern arises in the United States mostly for black children raised by white adoptive parents. See Bergquist, supra note 126, at 348. This occurs only for a small percentage of international adoptive children. And though it is a genuine issue, a potential source of difficulty for adopted children, studies show that it is not so substantial a difficulty as to justify significant impediments to transracial adoptions. See id. (“Early adoption research documented the successful adaptation of minority children into their white middle class families, and more recent studies have indicated that these children do well in school, attach to their
themselves do not think people born there lose anything significant by separating from the country at an early age and being raised in a different culture; many express puzzlement with westerners’ preoccupation with “roots.”

Increasingly, international adopters have been encouraged to facilitate their children’s learning about their nation of origin and forming a positive impression of it, and that has become common practice. Some do not, and those who do cannot give a child an insider’s experience of the native country’s culture. But even so, there is little empirical support for the supposition that internationally adopted children commonly feel a great sense of loss if they do not have a strong connection to their native culture. Nor is there any factual basis for supposing that, for any children who do experience such a sense of loss, this is such a detriment to their wellbeing as to outweigh the improvements to their lives arising from the adoption. It certainly would not mean that their lives are devoid of any culture. Sara Dillon aptly states:

In order to be consistent with the international rights of children, legal regimes must reflect a hierarchy of human needs, with consistency and depth of care placed at the top

adoptive families, and have relatively few psychosocial or behavioral problems in comparison to their white peers.”) (footnotes omitted); Tanya M. Washington, Throwing Black Babies Out With the Bathwater: A Child-Centered Challenge to Same-Sex Adoption Bans, 6 HASTINGS RACE & POVERTY L. J. 1, 47-49 (2008-2009) (discussing Congressional finding that not being adopted is more harmful than any difficulty transracial placement might entail).

See, e.g., Howell, supra note 18, at 209 (Ethiopia); id. at 215 (China); id. at 220 (Romania).

See Howell, supra note 2, at 238 (showing that adoptive parents often take children on “roots” or “motherland tours”); Howell, supra note 18, at 32, 76–79 (describing pamphlets, associations among families, organized trips back to country of origin, etc.); Stark, supra note 131, at 1270–71 (discussing the tendency of white parents to make Chinese culture a part of their adopted Chinese children’s lives). But see Howell, supra note 18, at 74 (providing evidence that many Norwegian adoptive parents attempt to distance the child from the native culture, at least initially, in an effort to ensure the child’s full assimilation to a new home).

See Hearst, supra note 1, at 339 (explaining that it is difficult for adopted children to be exposed to their origin country in any meaningful way).

Cf. Howell, supra note 18, at 78–79 (noting the view of some observers that efforts to give children a community and cultural experience tied to their adoption from another country might serve interests of adoptive parents more than interests of the children); id. at 106 (describing adoptees who categorically reject the notion that they are incomplete unless they connect with the culture of their country of birth).
of the hierarchy. National legal regimes should not be constructed on the belief that complex relationships with cultural environments are the equivalent of the psychological problems that arise from long-term residence in institutional or other inadequate care.\textsuperscript{182}

Elizabeth Bartholet draws a similar analogy to adult emigration of the sort I have made throughout this Article, to put in proper perspective the concern about culture. She points out that "it would be laughable to argue that adults should be prevented from leaving their country of birth so they could enjoy their heritage rights."\textsuperscript{183} Invoking the more general human right to emigrate under the UDHR and the ICCPR gives that analogy legal purchase, insofar as those legal documents create a strong presumption that all persons possess the same rights, and so that any justification that would be inadequate in the case of adults must also be so in the case of children.

Further, thinking about cultural ties within this broader context gives us a clearer and more objective sense of its relative importance as an empirical matter, for then we can look to the decisions autonomous adults make as evidence of how they prioritize their various interests. Adults who have spent their entire lives thus far in their native land naturally are more wedded to the culture of that land than is an infant and have more of their identity bound up with it. Yet a large portion of them have decided that they nevertheless want to emigrate to a more advanced nation because the opportunities for a better life, including a better family life, are so much greater there that they outweigh any interest in remaining immersed in their native culture, language, and family life. In addition, pregnant foreign women by the thousands travel to the United States each year in the hope of giving birth here and thereby securing U.S. citizenship for their children, so that the children can upon reaching adulthood (or sooner) leave their native land and families and come to live in the United States.\textsuperscript{184} These phenomena ought to tell


\textsuperscript{183} Bartholet, \textit{supra} note 5, at 97.

us something about the relative importance of cultural heritage to human welfare. The cost-benefit analysis presumably tips even more so in favor of migration for infants, both because they have less to give up culturally and because they can more easily adapt to a new culture, language, and living situation.

Moreover, there would also be no purchase to moral exhortation directed at adults aiming to emigrate via marriage that they should prefer a domestic marriage, and so should not move to another country and form a family with someone there so long as there is any "suitable" spouse available to them in their home country. Many women in former Soviet Union countries who seek husbands in Western countries explain their choice largely in terms of having a low opinion of Russian men and perceiving little prospect for the kind of marriage they want in their native country.185 This view might be even more compelling if held by women in any Islamic countries where norms relating to family life are more intensely patriarchal. We would never suggest to these women that they ought, in order to avoid losing touch with their native culture or in order to fulfill some obligation to their native country, to settle for a merely suitable spouse at home rather than aiming higher by seeking a spouse abroad.

This leads to a further problem with the objection based on cultural heritage. If we were to survey adults seeking to leave the countries that are traditional or potential sending countries for adoption, and ask them what they think of life and culture in their home country, undoubtedly a great many of them, especially women, would portray their native culture negatively.186 We might reasonably assume there is some good in every national culture, but consider just the idea of America returning to its culture of two centuries ago and how unappealing that would be to the women of America today. Opponents of international

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186 Cf. Stark, supra note 131, at 1272-73 (noting that Americans who adopt Chinese girls and who endeavor to give their daughters a connection to Chinese culture tend to omit “the misogyny of traditional Chinese culture” and “Confucian ideas about family hierarchy and patriarchy”).
adoption who invoke children’s supposed cultural interests are astonishingly silent about the possibility that a particular country’s culture might actually have deeply troubling aspects to it. It is as if, for some critics of international adoption, the only country in the world whose culture is subject to criticism is the United States. That of every other country is unassailable, and only an arrogant imperialist would suggest that some cultures are best left behind. Meanwhile, in another part of the academy and in another realm of international human rights advocacy, Westerners are freely condemning many of these same countries for systematically violating their citizens’ human rights in ways that make life generally intolerable for many people—for example, by promoting subordination of women, by condoning violence toward women and sexual minorities, by mutilating girls’ genitals, by forcing ten-year old girls to marry old men and forcing ten year-old boys to fight in wars, by killing adherents to minority religions, by jailing political dissenters, and so on. All that critics of international adoption see in the cultures of poor countries, it seems, is folk tales, ceremonial dances, and colorful costumes. *Sui generis* thinking about children facilitates such myopic and surrealist romanticizing of life in the third world.

### 5.3.5. Kinship Ties

Some critics of international adoption maintain that international adoption entails a great loss for children insofar as it separates them from their biological kin and that sending countries should pursue the possibility of kin care for every child in an orphanage before approving an adoption by a foreigner. They would give kin placement categorical preference over international adoption with non-kin.

It is plausible to suppose that, all else being equal, children are better off being raised by extended family members when parents are unable to care for them. This position that international adoption should be put off for a child while agencies search for kin to take the child is problematic, however, for several reasons. One

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187 *See, e.g.*, Blaine Bookey, *Enforcing the Right to be Free from Sexual Violence and the Role of Lawyers in Post-Earthquake Haiti*, 14 CUNY L. Rev. 255, 259–63 (2011) (stating that sexual violence is common in Haiti); Todres, supra note 148, at 60–61 (offering evidence that children in Haiti experience a variety of human rights violations).

188 *See, e.g.*, Smolin, *supra* note 72, at 240–241; King, *supra* note 2, at 466.
downside is delay. Children need attachment figures in place as early as possible for their healthy development, so the longer they live in an institutional setting, the more they suffer developmentally. A foreign adoption also takes substantial time, but there is nearly complete certainty that at the end of the process permanency will have been achieved, whereas a domestic search is quite likely to end in failure.

Elizabeth Bartholet has proposed as a solution to the delay problem associated with seeking kin or other domestic placements that countries engage in a form of "concurrent planning," and she co-authored federal legislation that commits the United States to promoting this practice. Sending countries would search for a good domestic placement but at the same time complete as many steps as possible toward a foreign adoption, so that if a good domestic placement does not arise, the foreign adoption can go forward immediately. This approach might sound more costly for sending countries, but it is not necessarily so. If we assume that searches for domestic adopters or kin guardians usually fail, then the alternative to conducting both processes for each child concurrently is usually to do them both anyway but sequentially. Bartholet's concurrent planning proposal might actually lower countries' costs on the whole, because the sequential approach causes children to remain longer in state care before being available for foreign adoption, and that means both that the state must support most children for a longer period of time, and that some children who could have been adopted ultimately are not because they become too old while held in institutional limbo.

An additional problem with emphasis on kin placement is that nonparent kin can be as exploitative as child-labor traffickers, taking in a child not out of loving concern for the child's wellbeing but rather out of mercenary motivation (e.g., if they will receive payments to do so) and/or desire for free labor. The so-called

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189 See Dwyer, supra note 8, at 415-35.
190 Children in Families First Act of 2013, S. 1530, 113th Cong. (2013); Bartholet, supra note 35, at 193-94. In the domestic child protection context, "concurrent planning" has a different meaning, referring to simultaneously attempting rehabilitation of parents and preparing for a termination of parental rights and adoption should the rehabilitation efforts fail.
"foster-care system" in Haiti, for example, is known for turning orphans into relatives' indentured servants.\textsuperscript{191}

Further, connection to kin is, as a factual matter, even when a positive thing, only one variable in a child's overall wellbeing, and in many cases its possibility is outweighed by the quality of care particular kin are capable of providing (e.g., if they are living in abject poverty) and problems in the community or nation where the kin live (e.g., famine, war, disease, oppression). In fact, some studies of international adoptees suggest ties to biological family are much less important to them than DPP Principle supporters assert.\textsuperscript{192} They show that international adoptees who as adolescents return to their country of birth, typically at the urging of their adoptive parents, do not manifest great interest in tracking down birth parents or biological relatives.\textsuperscript{193} Moreover, even assuming this is an important experience or desire for them, there is no evidence that any conclude they would have been better off remaining in their country of birth and being raised among their biological kin. Adoptees become integrated into a kin network with their adoptive family, and that network of relationships is constitutive of their identity.\textsuperscript{194} At most, international adoptees might want at some point to know about their biological relatives and to make contact with them, and if they fail in their search they do not conclude that they were harmed by being adopted.

In any event, I have assumed in this article that the children in question are generally ones whose parents are deceased or have lost or relinquished custody and whose biological kin are not available to care for them—in other words, children whose only alternatives to international adoption even in theory are just domestic adoption or foster care by strangers and institutional placement. As to these children, whereas any of these alternatives might allow a child to grow up in a native culture, none inherently involve maintaining ties to extended biological family. Many cultures within developing countries have a tradition of communal care for children and child rearing by kin or biologically unrelated

\textsuperscript{191} See Carlson, supra note 15, at 762 ("In Haiti, what might pass for foster care is actually a form of indentured servitude."); Loney, supra note 167 (describing Haitian tradition of "restavek" as child slavery).

\textsuperscript{192} See HOWELL, supra note 18, at 111-21 (offering evidence that many adopted children are not concerned by biological ties to family).

\textsuperscript{193} Id. at 114.

\textsuperscript{194} See, e.g., Howell, supra note 2, at 232-33; HOWELL, supra note 18 at 74.
community members, but poverty, disease, war, and other tragedies have made it impossible for many communities to sustain this tradition.\textsuperscript{195} This insistence that a government agency pursue kin seems to presuppose that no one else has done so before the child ends up in an orphanage. Yet it seems more plausible to assume that any parents who bring their child to an orphanage have first exhausted other possibilities and that when parents have died, relatives were aware of this but concluded that they were unable to assume custody of the child.

5.3.6 Summary

None of the objections commonly leveled at international adoption suffice to deny the children of any country the right to leave for purposes of family formation. Concern about parents being defrauded might be pertinent under the ICCPR, but a country would have to document it and address it by the least restrictive means. Any other concerns that do not relate to the welfare of children awaiting adoption are impertinent. As to child welfare concerns, the only experiences that are clearly bad are trafficking or maltreatment by adoptive parents. As to those, sending countries bear the burden under the ICCPR of demonstrating that the problem is sufficiently pervasive to warrant some policy response and the burden of limiting that response to measures that constitute the least restrictive means of addressing those problems. Significantly, these child welfare concerns do not justify a rule prioritizing domestic placement of unparented children; such a rule will not inhibit trafficking in the exploitative sense and children currently in orphanages or living on streets are much more likely to incur harm if they remain in their native country. To give effect to children’s right of emigration, as with any other right they possess, entails a proxy decision on their behalf as to how to best serve their interests taking all relevant factors into consideration. Critics of international adoption have not demonstrated that international adoption is with any frequency an irrational proxy decision for children.

\textsuperscript{195} See, e.g., Roby & Shaw, supra note 145, at 200; Celia W. Dugger, Aid Gives Alternative to African Orphanages, N.Y. Times, Dec. 5, 2009, http://www.nytimes.com/2009/12/06/world/africa/06orphans.html (reporting that “children placed in institutions are often seen as the lucky ones” because families are often too poor to provide education or adequate food.).
With respect to several concerns, I have noted that they might be more significant in the case of older children. Compared to newborns and infants, older children are more likely to have psychological problems at the outset that could trigger maltreatment by adoptive parents and that could otherwise make the transition to a new situation difficult. They are also more likely to have a worldview and personal identity tied to their native country’s culture and more likely to suffer in the short term from changing linguistic environment. Further, they are more likely to know their biological extended family and to have established relationships with siblings. These differences could in theory support different policies for older children relative to the youngest, perhaps entailing more effort to secure a domestic placement for older children.\(^{196}\) Yet some common current state policies actually embody an opposite policy stance, such as those permitting only domestic adoptions for children until they reach a certain age. Were UNICEF and the Children’s Rights Committee truly concerned only about the wellbeing of children, they might pressure sending nations to favor expedited international adoption of babies and to favor domestic placement of some kind—when one is available—just with older children. Unfortunately for older children, the prospects for a domestic placement are also much worse than they are for infants, so limiting their options by imposing a stronger domestic placement preference, one that delays or forestalls adoption, is likely to be on balance harmful to them as well. For no child should such a preference result in remaining in institutional or foster care for a substantial period when a good adoptive placement is available.

6. CONCLUSION

It is time to start a new conversation about international adoption, putting aside the special children focused conventions and beginning instead with general human rights that children share with adults—most promisingly, the “right to leave any country.” This would establish a presumption that children should receive treatment comparable to that given adults in similar circumstances. And it would place squarely on countries where

\(^{196}\) Cf. Smolin, supra note 146, at 424 (“[I]n some instances, high quality foster care or institutional care might be superior to the extreme language, cultural, and educational transitions that intercountry adoption would require of school age children.”) (footnote omitted).
unparented children live the burden of justifying any obstacles they have created to children's emigration for purposes of family formation.

The cautionary lesson here about group-specific rights extends more broadly. Advocates for children and other vulnerable groups should guard against getting lost in the thicket of specialized conventions, constitutional amendments, or statutes. In fact, they should resist the lure of enacting special-rights laws in the first place; such enactments might initially represent a gain in some ways relative to the status quo, but they might represent a loss in other ways and might freeze the group in a subordinate position as the rights of others advance. Advocates should return repeatedly to universal rights instruments to mine them for support and potentially more effective procedures to redress human rights violations.