A Child’s Right to a Family versus A State’s Discretion to Institutionalize the Child

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Introduction

A child’s best chance for a fulfilled and happy life begins in a family environment. Family life is no guarantee of a good life, but the alternatives to family are often grim. For many of the millions of children who lose their families because of parental death, poverty or other causes, the alternatives to family are institutionalization at best and servitude, human trafficking or homelessness at worst. Institutionalization—placement in a non-family facility or group home—might offer adequate material support but is unlikely to provide family-quality emotional nurture and interpersonal bonding, and material support in some institutions, especially those in

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2 The number of millions of “orphans” is naturally speculative, depending on the definition of “orphan” and the uncertain availability of reliable statistics in many regions of the world. Counting only “double orphans” (who have lost both parents) in nations for which for which figures are available, some recent estimates put the number at about 10 million, but the real number of children who lack a “family environment” for any of a multitude of reasons is likely to be much, much higher. See generally, Richard Carlson, Seeking the Better Interests of Children, 55 N.Y. Law School Rev. 733 (2010).

Many of these orphans, plus many other children who do not qualify as “orphans,” live in institutions and not with families. UNICEF estimates that in central and eastern Europe alone about half a million children live in large scale residential institutions, and that at least three hundred thousand children live in institutions in the Middle East and Africa live in institutions. UNICEF, Children Without Parental Care (updated March 22, 2011), at www.unicef.org/protection/57929_58004.html [hereinafter UNICEF]. But UNICEF cautions that “these numbers may be significantly underestimated.” Id. By some other estimates, the total number of children living in institutions worldwide ranges between 8 and 12 million. Elizabeth Bartholet, Intergenerational Justice: for Children: Restructuring Adoption, Reproduction and Child Welfare Policy, 8 Law & Ethics Hum. Rts. 103, 104 (2014) [hereinafter Bartholet, Intergenerational Justice].

regions of poverty or social crisis, is dismal. Moreover, even the best institutions provide care and support only during a child’s residency. Children released from institutions as teenagers or young adults often lack the life-long family support, attachment and identity enjoyed by children raised by families. If a young child has lost his or her original family, a properly matched substitute family is usually a far better way to provide for the child’s emotional and psychological development and continuing need for identity and support. By any statistical measure of outcomes for children, a typical substitute family placement transcends the best institutional settings.

Thus, one might be surprised to discover that international law still approves institutionalization for many children who might well benefit from family placement. International law suffers schizophrenia when it comes to children without functional families. The principal relevant statement of international law, the United Nations Convention on the Rights of the Child (the “CRC”) adopts a “child’s best interests” standard and extolls the virtues

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7 See citations in note 6.

of child rearing in a “family environment,” implicitly endorsing the widely held views of child
development experts.  But other provisions of the CRC grant discretion to a state to favor non-
family institutionalization or policies likely to lead to institutionalization even when substitute
family placement is possible and would be beneficial to a child.

Granting a state broad discretion to institutionalize children cannot be squared with a
“child’s best interests,” the “family environment” ideal or modern child development theory.
Upholding a child’s best interests and the right to “family” would require every state to promote
or at least allow placement of qualified “orphans” in qualified substitute families whenever
such placement is practical and beneficial for a child. Deciding whether family placement is
possible and consistent with a particular child’s best interests demands a degree of discretion on
the part of responsible officials, but the discretion granted by the CRC is much broader and
leaves signatory states with discretion to pursue or continue child welfare policies that lead
inevitably to institutionalization and discourage family placement regardless of the age or
circumstances of any child.

9 See Guidelines, supra note 8, par. 1, 2, 12, and 22 (interpreting the CRC and referring to “the predominant
opinion of experts” regarding a family setting for alternative care for children younger than three).

10 The term “orphan” lacks a universal legal definition. See Sarah Dillon, The Missing Link: A Social Orphan
UNICEF has used the terms “orphan” and “double orphan” for purposes of collecting statistics about children who
lack acting parents and who may be in need of special state services. UNICEF, Children on the Brink (2004),
available online at http://www.unicef.org/publications/cob_layout6-013.pdf. See also Carlson, supra note 2, at
769-771. The term “orphan” is sometimes used as a substitute for “adoptable child” by advocates or opponents of
adoption, particularly intercountry adoption, or it used as a likely starting point for identifying children in need of
other social welfare services, including institutionalization. See Carlson, supra note 2, at 769-771. In American
tradition, law and culture, the term “orphan” applies to any minor child who has at least one deceased parent. Id.
U.S. immigration law defines a child as an “orphan” if the child has suffered the “death or disappearance of,
abandonment or desertion by, or separation or loss from, both parents,” (emphasis added), or because “the sole or
surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for
emigration and adoption.” 8 U.S.C. § 1101(b)(1)(f). The term “orphan” is sometimes used as a substitute for
“adoptable child” by advocates or opponents of adoption, particularly intercountry adoption, or it used as a likely
starting point for identifying children in need of other social welfare services, including institutionalization. Carlson,
supra note 2, at 769-771.
International law’s failure to clearly and forcefully declare a state’s duty to arrange or allow substitute family placement is especially important in nations with developing family law systems where institutionalization remains a predominant means of child placement. The CRC is not only a law, it also purports to be an important statement of universal values and aspirations to inspire public officials and motivate reform. If national leaders and lawmakers look to the CRC for values and aspirations, they will find support for institutionalization and little reason to promote family placement. Moreover, at least one important international organization, UNICEF, once relied on the CRC as a reason to make its grants and other support for local child welfare programs conditional on restrictions against adoption.11 While UNICEF appears recently to have adopted a more favorable view toward adoption,12 the effect of the CRC on UNICEF’s internal struggle over adoption is an example of the CRC’s real impact on the actual implementation of child welfare policy.

The CRC’s endorsement of institutionalization despite its “family environment policy” is not the result of any oversight or drafting error. The contradiction is intentional. It is explicit in at least one article of the CRC, and it is exacerbated by the operation of a series of other provisions. In articles 20 and 21, the CRC quite clearly relieves states of any obligation to recognize or permit a legal process for formal substitute family placement, such as adoption, and it authorizes institutionalization.13 The General Assembly’s non-binding Guidelines14 interpreting the CRC do urge states to move toward “family-based settings” for children younger

11 James Dwyer, Inter-Country Adoption and the Special Rights Fallacy, 35 U. PA. J. INT’L L. 189, 204 (2013). These restrictions relate mainly to a particular kind of adoption—intercountry adoption—but the practical effect in some nations is to foreclose adoption of any sort for many children free for adoption and otherwise abandoned to institutions.

12 See text accompanying notes 213 – 225, infra.

13 See CRC, supra note 8, arts. 20 and 21. See also text accompanying notes 60-62, infra.

14 See Guidelines, supra note 8.
than three\textsuperscript{15} and away from “large” institutions for children of any age,\textsuperscript{16} but the Guidelines still allow for institutionalization in small facilities and condone policies likely to perpetuate institutionalization in one form or another for all age groups of children.\textsuperscript{17} Finally, the CRC and related instruments of international law include a rule of preference, widely referred to as a rule of “subsidiarity,” that encourages states to block any family placement that would lead to the removal of a child from his or her community or nation of origin, irrespective of the child’s lack of opportunity for local family placement or meaningful attachment to the community.\textsuperscript{18} The total effect of these provisions of the CRC and Guidelines is to encourage institutionalization or policies that lead to institutionalization of children who need alternative care and would likely benefit most from substitute family placement.

Why would public officials choose institutionalization over family placement as a matter of policy, and why would international law condone such a choice? The CRC’s allowance for institutionalization is not likely because of the expected costs or burdens of a family placement system. A duty to provide family placement—including establishment of a reliable system to arrange and supervise placement—is no more difficult or expensive than other duties imposed by the CRC, such as the duties to provide education\textsuperscript{19} or health care.\textsuperscript{20} Moreover,

\textsuperscript{15} Guidelines, \textit{supra} note 8, pars 21, 22.
\textsuperscript{16} \textit{Id.} par. 23, and text accompanying notes 62-158, \textit{infra}. The Guidelines do not offer a definition or means for distinguishing “large” institutions from “small group” care.
\textsuperscript{17} See section I.B.3.c, \textit{infra}.
\textsuperscript{18} See CRC, \textit{supra} note 8, art. 20, par. 3, and art. 21(b). See also section I.B.3, \textit{infra}.
\textsuperscript{19} See CRC, \textit{supra} note 8, art. 28.
\textsuperscript{20} \textit{Id.} arts. 24, 25.
institutionalization is *more* expensive to the state, more dangerous to children, and more likely to lead to expensive social costs because of the ill health and developmental effects of institutions.\(^{21}\)

Nor is the CRC’s permissive view toward institutionalization explained by the impracticality of eliminating all institutionalization. Of course, rejection of institutionalization in every situation would be impractical. Substitute family placement is not always possible or desirable. Even if all states facilitated substitute family placement, some children would likely remain in institutions because of widespread shortages of parents seeking placements.\(^{22}\) Older children are especially difficult to place, more likely to find it difficult to bond with new families, and less likely to benefit from family placement.\(^{23}\) Still, an *opportunity* for family placement is important whenever such placement is possible and beneficial, especially for very young children. While no law can guarantee the availability of substitute family placement or a child’s amenability to family placement, states can grant the possibility of family placement and encourage it where possible.

Finally, the contradiction between international law’s “family environment” ideal and its denial of family placement also cannot be explained by doubts about the value of family placement for children. True, some critics are skeptical about the importance of early family placement despite overwhelming empirical evidence.\(^{24}\) However, the drafters of the CRC did not dispute the importance of a family setting for children, and the drafters of the Guidelines

\(\text{\textsuperscript{21}}\) The public’s ongoing institutional caretaking costs are necessarily greater than the cost of family placement because adoptive parents, rather than institutions, bear the costs of caretaking after an adoption or similar family placement. *See also* note 6, *supra*, regarding the social costs of institutionalization.

\(\text{\textsuperscript{22}}\) Even in the U.S. where the law is supportive of family placement and positively seeks to avoid institutionalization, there remain about 58,000 children in institutions, including group homes. Children’s Bureau, U.S. Dept. of health and Human Services, *The AFCARS Report* (Nov. 2013).


\(\text{\textsuperscript{24}}\) *See* Carlson, *supra* note 2, at 750-53, summarizing the arguments of these critics.
embraced modern scientific theory in favor of the family setting in even stronger terms. In other words, doubts about the science of child development are no longer part of the official international legal debate.

Nothing on the face of the CRC or related international laws offers a principled explanation for the contradiction between a “family environment” policy and an authorization for institutionalization. Unexplained internal conflict of this scale within a law is often a compromise between otherwise irreconcilable political or cultural forces, persistent biases of major participants, or fear of sacrifice or inconvenience necessary to achieve a worthy goal. All three of these explanations are at play in the case of the international law of child placement. Political or cultural conflict over family placement has two components. One is residual doubt about “adoption” or other substitute family placement in nations that lack a law, culture or tradition of formal, substitute family placement between “strangers.” The other is the

25 For example, the Guidelines, supra note 8, state that “[d]ecisions regarding children in alternative care … should have due regard for the importance of ensuring children a stable home and of meeting their basic need for safe and continuous attachment to their caregivers, with permanency generally being a key goal.” Id., par. 12. Later, the Guidelines add that “[i]n accordance with the predominant opinion of experts, alternative care for young children, especially those under the age of 3 years, should be provided in family-based settings.” Id. par. 22.


Even within the U.S. some participants in the debate still argue against adoption, although these commentators appear to be a very small minority who not necessarily favor institutionalization but who decry the potential for abuse in adoption and worry that these abuses cannot be restrained. See Carlson, supra note 2, at 741-760, describing the arguments of these commentators.

27 By “stranger” adoption or family placement I mean the matching of children with previously unrelated adoptive parents. The adopters in such adoptions in the U.S. are generally unacquainted with the child before the placement (unless they were previously the “foster” parents for the same child), which is normally arranged by an independent agency, although some U.S. jurisdictions do allow for prospective adopters and birth parents to find
tendency of many participants to equate proposed pro-family placement policies with an effort to promote intercountry adoption and to create rights mainly for foreign adopters and the agencies that serve such adopters.

In fact, a tortured debate over intercountry adoption has upstaged the more general debate over family placement, and it has exacerbated suspicions between “sending nations” (from which children in intercountry adoption originate) and “receiving nations” (to which children in intercountry adoption emigrate). Substitute family placement would likely involve local family placement more often than intercountry adoption if international law strongly pursued pro-family placement policies, but fear of intercountry adoption has encouraged continued opposition to such policies in international law.

The purpose of this article is to expose international law’s contradiction, explain its origin and persistence, and propose a path to overcome the contradiction. Part One describes the contradiction: International law declares a child’s right to a family, but denies the right to some children by allowing institutionalization even when family placement is possible and desirable. Part Two explores possible causes of the contradiction, including above all the widespread fear of intercountry placement. Finally, Part Three proposes an approach for overcoming fear and moving toward a more rational international law for family placement.

themselves by other means, such as by advertisement. See, e.g., https://www.adoptimist.com (a website for connecting prospective adopters with birth parents).
I. A Child’s Right to a Family Under International Law

International law declares that children—especially young children—have a right to be raised in a “family environment.” However, in this context, “family environment” means the household of the child’s original family. If the child’s original family fails for any of a variety of reasons, the child’s international legal right to a family environment is at an end, because the child has no right to any opportunity for substitute family placement. This limitation on a child’s right to be raised in a family environment is the result of a major disagreement about the proper role of substitute family placement in international law.

The international law of “alternative” child placement—including not only substitute family placement but also institutional placement—is the product of four major statements of international law: (1) the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children of 1986 (the “1986 Declaration”); (2) the Convention on the Rights of the Child of 1989 (the “CRC”); (3) the Guidelines for Alternative Care of Children of 2009 (the “Guidelines”), which are designed to interpret and fulfill the CRC; and (4) The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption of 1998 (“The Hague Convention”). Each of these statements of law serves a somewhat different purpose with respect to the situation of children, but each reaffirms the same basic contradiction:

29 See CRC, supra note 8.
30 See Guidelines, supra note 8.
A child should be raised in a family environment, but if the original family fails, the state should have the discretion to institutionalize the child and deny a substitute family environment.

A. The 1986 Declaration

The United Nations General Assembly first addressed the matter of substitute family placement in its 1986 Declaration. Of all the major statements of international law, the 1986 Declaration is the most directly and specifically concerned with the matter of substitute family placement. The Declaration begins by affirming that “the child shall, wherever possible, grow up in the care and under the responsibility of his parents and, in any case, in an atmosphere of affection and of moral and material security.”32 Achieving this ideal sometimes requires alternative child placement because of “the large number of children who are abandoned or become orphans owing to violence, internal disturbance, armed conflicts, natural disasters, economic crises or social problems.”33 The Declaration recognizes that various forms of substitute family placement are valid means of providing care for such children,34 and the principal purpose of the Declaration is to establish minimum rules for such placement. Thus, it directs states to adopt rules for their chosen systems of placement—including but not limited to

32 Declaration, supra note 28, third paragraph of Preamble and arts. 1-4.

33 Id. fourth paragraph of Preamble.

34 Id. sixth paragraph of Preamble.
adoption, foster care and Kafalah\(^{35}\)—to assure that such systems are guided by the “best interests of the child”\(^{36}\) and provide protection for parents, substitute parents, and above all, children.\(^{37}\)

But while the 1986 Declaration requires rules for substitute family placement, it does not require a state to arrange or allow family placement under any circumstances. In fact, the Declaration specifically denies any implication of a state’s duty to arrange or allow for any form of substitute family placement. The duties it describes apply only to the extent a state has elected to create a system of formal, substitute family placement, and only with respect to the particular form of family placement the state has authorized.\(^{38}\) Moreover, the 1986 Declaration allows that “if necessary,” a state may assign children to “an appropriate institution.”\(^{39}\) Since member states have no obligation to facilitate, permit or even recognize family placement, the “necessity” of institutionalization is ultimately a matter of state discretion and policy. The drafters of the 1986 Declaration were not concerned with and did not address obvious questions about criteria for determining whether an institution is “appropriate” for a particular child or for children in general. However, standards for institutions for the care of children are addressed in the U.N.’s Guidelines, discussed below.

**B. The Convention on the Rights of the Child (CRC) and the Guidelines**

1. **Overview**

\(^{35}\) Kafalah is an Islamic concept sometimes described as equating with open or “simple” adoption. See Faisal Kutty, *Islamic Law, Adoption and Kafalah*, Jurist, Nov. 6, 2012, jurist.org/forum/2012/11/faisal-kutty-adoption-kafalah.php. See also Harroudj v. France (European Commission on Human Rights, April 10, 2012), online at sim.law.uu.nl/sim/caselaw/Hof.nsf/1d4d0dd240bfee7e1c12568490035df05/9822050b81747d25c1257a8500506a55?OpenDocument. Two important features of Kafalah are that, in contrast with adoption, the adoptive child does not take the family name of the substitute parents, and does not acquire inheritance rights. UNICEF International Child Development Centre, *INNOCENTI DIGEST 4*, *Intercountry Adoption*, p. 3 (1998).

\(^{36}\) Declaration, *supra* note 28, fifth and sixth paragraphs of Preamble and art. 5.

\(^{37}\) *Id.* arts. 6-24.

\(^{38}\) *Id.* seventh and ninth paragraphs of Preamble.

\(^{39}\) *Id.* art. 4.
The 1986 Declaration was followed by a much broader statement of children’s rights—the CRC\[^{40}\] to be ratified or accepted by nations submitting to its principles.\[^{41}\] The United States is one of a few nations that have not ratified or otherwise accepted the CRC, but Congress’s resistance to the CRC does not appear to be based on any objection relevant to rules on child placement, except to the extent coherent rules for child placement might generate additional domestic support for the CRC.\[^{42}\]

Provisions relating to alternative placement for children constitute a relatively short part of the CRC, which addresses a much broader range of children’s rights, including the rights to health, education and general well-being. However, the CRC’s alternative placement rules are among the most controversial and disappointing of its provisions because they repeat the 1986 Declaration’s condonation of institutionalization without an opportunity for substitute family placement. In the Western world at least, these provisions have generated an overflow of scholarly criticism.\[^{43}\] The CRC’s alternative placement provisions are interpreted by the UN General Assembly’s nonbinding Guidelines,\[^{44}\] adopted two decades. Thus, the following summary and evaluation of the CRC includes a comparison of its provisions with the corresponding provisions of the Guidelines.

\[^{40}\]CRC, supra note 8.

\[^{41}\]Over 190 nations have ratified or otherwise accepted the CRC as of this date. See United Nations, Databases, Convention on the Rights of the Child, Status, online at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

\[^{42}\]Opponents of U.S. ratification of the CRC have not necessarily coalesced around any particular argument. Some believe the CRC would undermine U.S. sovereignty. Others believe it would upset U.S. principles of federalism by purporting to usurp the states’ dominant role in family law. Still others fear the CRC would infringe on rights of parents to manage their children’s education. Why Won’t America Ratify the Convention on Children’s Rights, THE ECONOMIST, (Oct. 6, 2013) online version at http://www.economist.com/blogs/economist-explains/2013/10/economist-explains-2

\[^{43}\]For a summary and analysis of the academic debate surrounding intercountry adoption, see Carlson, Seeking the Better Interests, supra note 2, at pp.736-772.

\[^{44}\]Guidelines, supra note 8, Preamble par. 3.
2. The Importance of a Family Setting Under the CRC

“Family” is a core value of the CRC. The CRC’s Preamble declares that a family environment is normally in a child’s best interests because a family normally provides “an atmosphere of happiness, love and understanding.” A child’s family, properly functioning, is the “natural environment for the growth and well-being” and the best setting for the child’s “full and harmonious development of … personality.”

Not all families are able to supply “happiness, love and understanding” or to provide an atmosphere for “growth and well-being,” and a child might be entirely without living, capable or willing parents or extended family. Some families might be incapable of caring for a child and might even be dangerous to a child. Later provisions of the CRC deal with a state’s obligations for alternative placement for a child without an adequately functioning family.

A family environment is not only a core value, it is “the fundamental group of society” upon which the state is built. Strong, protective and nurturing families are the foundation for an effective state and the principal vessel through which nutrition, health, education and other material and social benefits are delivered to children. Indeed, the placement of this observation in the CRC’s Preamble attests to the central importance of family in achieving any of the CRC’s many goals. Later provisions of the CRC confirm the view that the family is a key agent through which the state undertakes to promote the rights the CRC declares. Thus, the family “should be

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45 CRC, supra note 8, Preamble.
46 Id.
47 Id.
48 Id. The Guidelines reaffirm that the family is “the fundamental group of society and the natural environment for the growth, well-being and protection of children.” Guidelines, supra note 8, at par. 3.
afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.”

Many of the articles that follow and declare specific rights of children are based on family or are best enjoyed by a child living with a family. A child has a right, “as far as possible” “to know and be cared for by his or her parents.” The state must “respect a child’s right to preserve his or her identity, including … family relations as recognized by law,” and the state must “ensure that a child shall not be separated from his or her parents against their will” except when necessary for the best interests of the child,” as when parents and other adult members of the family fail or are unable to provide the minimal and essential elements of parenting. A child enjoys the right to “freedom of thought, conscience and religion,” but parents have “rights and duties ... to provide direction to the child in the exercise” of this right. The state must protect the child against “unlawful interference” with his or her family life, such as by kidnapping or human trafficking. A child in need has a right to the state’s material support, but this support is to be delivered to the child’s parents or caregivers, at least in part to assure that children of distressed and impoverished families can continue to live with and receive care by their parents rather than in non-family residential shelters.

In sum, the CRC envisions families headed by parents or parent substitutes (such as legal guardians) as the essential link between children’s rights and the ability of children to enjoy their

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49 Id.
50 CRC, supra note 8, art. 7.
51 Id. art. 8.
52 Id. art. 9.
53 Id. art. 14.
54 Id. art. 16.
55 Id. art. 27.
rights. Indeed, parents—and not the state or any other party—bear the “primary responsibility for the upbringing and development of the child (emphasis added).”

But parents are not absolutely sovereign. There are limits to parental discretion in managing the care and supervision of their children. Parents—as well as the state—must fulfill their duties to children according to a “child’s best interests.” The “best interests” standard appears to have its origin in Anglo-American family law where its application has been persistently problematic, but at the very least this standard suggests that the interpretation and application of the CRC should be guided by a child’s interests and not the mere convenience, economic gain or political agenda of parents, the state or other parties. Parents also bear the “primary” duty to fulfill a child’s right to a family environment and “conditions of living necessary for the child’s development.”

One might say that the CRC’s least controversial rule is that a child should be raised by at least one parent in a family environment. Fashioning rules to solve the problems of children without minimally functioning families presents a much greater challenge. As the Guidelines observe, “children with inadequate or no parental care are at special risk.” An early draft of the CRC evidently recognized a state’s duty to facilitate substitute family placement such as

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56 Id. art. 18. See also article 27: “The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development.”

57 Id. arts. 3, 9, 18, 27.

58 Id.


60 CRC, supra note 8, art. 27. See also arts. 9, 18.

61 Id. par. 4.
adoption as one option for such children. However, the final version of the CRC took a different position. The proposed state duty to “facilitate” adoption or other family placement dropped from the text, and the CRC reaffirmed the rule established by the 1986 Declaration: For children without properly functioning families, a state owes a duty of “alternative care” that “could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children.” While institutionalization is advised only when “necessary,” a state can make institutionalization “necessary” by not allowing, encouraging or facilitating substitute family placement.

One might argue that there are measures other than substitute family placement for avoiding or reducing the necessity of institutionalization of children “at special risk.” Indeed, the CRC proclaims a number of other state duties that, at first glance, seem designed to prevent institutionalization. On closer inspection, however, the additional rights and duties the CRC declares are unlikely to have much impact on institutionalization. In fact, the CRC’s overall approach, which also omits some much needed state duties for protecting children, assures that significant numbers of children are destined for institutions in any state guided by the CRC in its child welfare policies. Children might be at risk for any of several entirely different reasons, and the actual impact of the CRC’s alternative placement rules and other provisions varies with the nature of a child’s situation. In general, one can identify four different situations putting children at risk. The CRC’s approach for each situation is evaluated below.

3. CRC Measures for Protecting Children “at Risk”

a. Supporting Children by Enforcing Parental Duties

62 INNOCENTI DIGEST, supra note 35, at p. 5.
63 CRC, supra note 8, art. 20 (emphasis added).
One group of children at risk are those who reside with only one caregiving parent who lacks sufficient resources but who could be an adequate parent if another non-cohabiting parent provided support. The situation of a single caregiving parent with marginal or less material means certainly raises the risk that a child will be without adequate support, because that parent must struggle to earn resources and cannot easily work and provide caregiving at the same time. An extended family can be helpful but is not always helpful. One solution that can reduce the need for the child’s alternative placement is enforcement of an absentee parent’s support obligation. The CRC offers tepid support for this approach. Article 18 recognizes that both parents bear the duty to provide “conditions of living necessary for the child’s development,” and it urges states to use “best efforts” to ensure that both parents share this duty. But a stipulation that a state owes only “best efforts” excuses a state’s failure in the face of some indefinite degree of difficulty.

Article 18’s adoption of a “best efforts” standard of duty for this situation is noteworthy. International laws like the CRC are widely regarded as “soft” law. They exhort but do not not

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64 The CRC requires states to take appropriate measures to assure that working parents access to child care services. CRC supra note 8, art. 18, par. 3. However, neither the CRC nor any law can guarantee the needed resources for such services, especially in impoverished regions of the world.

65See Bartholet, Intergenerational Justice, supra note 2, at 108, regarding the widespread fragmentation and failure of extended families around the world. See also Dillon, Making Legal Regimes, supra note 26, at 195 & n. 50; Lynn Wardle, Parentlessness: Adoption Problems, Paradigms, Policies and Parameters, 4 WHITTIER J. CHILD & FAM. ADVOC. 323 (2005).

66CRC, supra note 8, arts. 9, 18, 27.

67Id. art. 18.

68 It is not clear what the CRC would allow as “best efforts.” For purposes of international commercial law, Article 5.4 of the UNIDROIT Principles of International Commercial Contracts compares a duty to achieve a specific result with the duty of best efforts as follows: “To the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result.” However, “To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances.” UNIDROIT Principles of International Commercial Contracts (2004), online at http://www.unidroit.org/english/presentation/main.htm. See also Yaron Gottlieb, Combatting Maritime Piracy: Inter-Disciplinary Cooperation and Information Sharing, 46 CASE W. RES. J. INT'L L. 303, 332 (2013) (defining “best efforts” as “sincere, concerted and proactive efforts”).

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command in a legally enforceable sense in most nations. Thus, to say that a state owes only “best efforts” with respect to any duty under the CRC arguably subtracts nothing from that duty. But of all the provisions of the CRC, only Article 18 is expressly limited to a “best efforts” standard, and only a few others are qualified in any similar way. In this regard, the CRC is the converse of the usual approach in international law. “Best efforts” standards typically protect economically weak nations from bearing the full cost of seemingly exorbitant duties of providing a generous material standard of living for their residents. In contrast, the CRC requires states to provide medical care, education, “social insurance,” without such qualification, which makes the limitation of Article 18 duties even more striking.

Thus, the mere “best efforts” standard of Article 18 suggests the drafters anticipated some special problem in requiring states to implement any process to uphold the duties of both parents, especially those living in separate households. This problem has little to do with economic resources of a state because the ultimate support duty recognized by Article 18 is owed by a “parent,” not the state, and a parent’s support duty is routinely based on that parent’s actual

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70 CRC article 27(4) imposes a higher duty on states to recover “maintenance” from parents or persons having financial responsibility for a child, but this obligation appears to apply only to the collection of an indebtedness already assessed against a person deemed to have a legally enforceable support obligation. CRC *supra* note 8, art. 27. This Article 27 obligation should not be confused with the more fundamental state duty to hold parents financially and legally accountable in the first instance.

71 For example, a state’s obligation to assure a child’s “adequate” standard of living, even when the parents lack such necessary resources, is measured “in accordance with national conditions and within [a state’s] means.” *Id.* art. 27(3).


73 CRC *supra* note 8, art. 24.

74 *Id.* arts. 24, 28.

75 *Id.* art. 26.
A parent with no resources at all might owe nothing. Moreover, while “parent” is among the most important terms of the CRC and is essential to determining who owes a parental duty, the term is not defined in the CRC. The drafters likely were unable to agree on a complete and universal definition of “parent.” Does “parent” include non-marital fathers or various categories of parents not cohabiting with their children? Perhaps the drafters anticipated strong local resistance to a broad, complete and universal definition. In fact, the extent to which local cultural notions of family, parentage and extra-marital relations may complicate extension of parental duties of support should not be underestimated. Even within the U.S., some jurisdictions resisted recognition of non-marital fathers until the U.S. Supreme Court overcame the states’ usual predominance over matters of “family” by declaring the denial of non-marital paternity a violation of equal protection in violation of the U.S. Constitution. Other nations may not have the advantage of national law overcoming local resistance, or of political will to overcome tradition or self-interest of lawmakers or some of their constituents.

Even when local or national law does recognize non-marital paternity, the limitations of enforcement systems, collection procedures, actual resources of non-custodial parents and reporting or discovery of a parent’s actual resources will certainly prevent universal realization of parental support. In the U.S., for example, despite relatively strong child support laws, less than two thirds of court-ordered child support obligations are actually paid on a timely basis. Thus, while wider recognition of parental status and duties may lift some single caregivers and

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their children out of severe poverty, many children in such households will remain unsupported. For these children, avoidance of the necessity of alternative placement requires other measures.

**b. Supporting Children by Delivery of State or Community Resources**

Another possible measure to avoid the necessity of institutionalization or alternative placement is direct support by the state or local community, paid out of state or community resources. The CRC adopts this strategy for a second group of children at risk: Children of otherwise capable caregiving parents who lack their own sufficient resources and cannot be expected to gain sufficient support from an absentee parent. When parent-caregivers lack resources to support a child for no reason other than poverty, the CRC directs the state to provide “material assistance … particularly with regard to nutrition, clothing and housing” and “appropriate” child-rearing assistance and services to the parents.79

Not surprisingly, the obligation to support a child by the provision of state resources is another one of the CRC’s qualified duties. When parents lack necessary resources, the state should assure the child’s “adequate” standard of living measured “in accordance with national conditions and within [national] means.”80 Of course, if a state lacks sufficient public resources or will to provide significant support to impoverished parents, there will be times when the state cannot assure an “adequate” standard of living for a child except by alternative placement in what might be an institution.81 Considering such a state’s lack of funding to aid families, its institutions for children are also likely to be underfunded.

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79 CRC, *supra* note 8, arts. 18, 27, para. 3.
80 *Id.* art. 27(3).
81 The CRC recognizes that a state must sometimes assume custody of children on grounds of “neglect,” which can be a natural outcome of severe poverty. *Id.* art. 9(1).
If public resources are available, state or community support can best avoid alternative placement by delivering support in cash or “in kind” directly to caregiving parents. “In kind” support can include not only food, family shelter and medical assistance but also child day care facilities for parents who must work in income-producing jobs. Support delivered directly to otherwise capable parents prevents the necessity of alternative placement. Support provided through long term residential institutions for children will have the opposite effect: It will promote institutionalization because severely impoverished but otherwise capable parents may find they must voluntarily commit even very young children to institutions that might be superior in material resources but inferior for nurturing.

Thus, the goal of preserving and protecting a child’s family would seem to require a preference and substantial provision for direct family aid that parents can receive without separation from their child. In the United States, this idea is reflected in a widely followed rule that the state cannot take protective custody of a child on grounds of the parent’s failure to provide material support if the failure is because of financial inability, unless the parent has received an offer of material assistance (such as emergency housing) but has rejected the offer. Nothing like this rule is to be found in any express provision of the CRC, but the 2009 Guidelines appear to point toward a similar policy. First, the Guidelines provide that “Financial and material poverty … should never be the only justification for the removal of a child from parental care [or] for receiving a child into alternative care … but should be seen as a signal for the need to provide appropriate support to the family.” Later, the Guidelines explain that states

82 See Id., art. 18, par. 3; Guidelines, supra note 8, par. 38.
84 Guidelines, supra note 8, par. 15 (emphasis added).
should “ensure that their actions do not inadvertently encourage family separation by providing services and benefits to children alone rather than to families,” and that voluntary relinquishment “should be prevented by… [e]nsuring that all households have access to basic food and medical supplies and other services” and “[l]imiting the development of residential care … to those situations where it is absolutely necessary.”

The phrase “voluntary relinquishment” within this direct aid provision is both important and troubling. At first glance, the Guidelines’ recommendation for direct aid suggests something similar to the American “aid offered and rejected” rule but different in proposing direct aid only in connection with the problem of voluntary relinquishment. The “aid offered and rejected rule” is a parent’s defense against the state’s investigation and action against the parent for involuntary removal of custody. Whatever the state’s obligation to offer direct support under any other circumstances, the state’s duty is an imperative condition for state interference with the parent-child relationship. The Guidelines, on the other hand, describe a direct aid rule designed at least in part to discourage a parent’s voluntary relinquishment when the state has taken no action against the parent. In other words, a parent offers to relinquish a child and triggers the state’s obligation to offer direct material support.

The Guidelines’ description of direct aid as a response to an offer to relinquish is one piece of a broader theme of preventing voluntary relinquishment. It also comports with a likely situation in many states that must rely on desperate parents to identify themselves because the state lacks resources to distribute aid more generally, has limited means for proactive information-gathering about children at risk, and has a weak system for intervening and taking

85 Id. pars. 155, 156.
86 See pp. 25-36, infra.
protective custody. Under these circumstances, a confrontation between a parent and the state is much more likely to be initiated by the parent than by the state. But if this aspect of the Guidelines were ever implemented in a real setting, it is also likely that some parents desiring aid would simply “game” the system by ritually offering their children. Parents who are tempted to engage in this strategy for seeking aid might also identify themselves to traffickers, who sometimes offer “aid” and false promises to parents in exchange for the unregulated custody of their children. 87

In any event, it is unlikely that this aspect of the Guidelines can or will be implemented on a wide scale in regions of severe poverty. As the CRC concedes, a state’s obligation to provide family aid under any set of rules is measured according to national “conditions” and “means.” 88 In much of the world the necessary resources and the political will to provide direct support to parents cannot be taken for granted. 89 In fact, local politics nearly anywhere might persuade authorities to provide material assistance only to residential child care facilities, not directly to parents, out of a common belief that money should be trusted and delivered only to institutions accountable to the state, and not to individuals. 90 States that offer aid only to children

87 See, e.g., Jason Overdorff, “Indian Child Trafficking on the Rise,” SALON (May 5, 2013), online at http://www.salon.com/2013/05/05/child_trafficking_in_india_on_the_rise_partner/.

88 CRC art. 27(3).

89 The Organization for Economic Development and Cooperation (OECD) collects statistics on national expenditures by a limited number of nations for family services, but the national statistics it does present show huge disparities between nations with respect to resources available and actually allocated to family services, even when the poorest nations are omitted (because they are not members of the OECD). In 2011, the United States spent about $356 per person in the general category of “family” services. During the same year, Ireland spent $1,670 and Sweden spent $1,518 per person. In much less wealthy nations, public funding for family services is much less. Mexico spent $184.50 and Turkey spent $4.20 per person. See Organization for Economic Development and Cooperation, StatExtracts, online at http://stats.oecd.org/Index.aspx?DataSetCode=SOCX_AGG.

in residential facilities will not be violating the CRC or the nonbinding Guidelines as long as residential facilities are not “large institutions” discouraged by the Guidelines.

Thus, even under the CRC’s or Guidelines’ approach, institutionalization in some form will continue to be “necessary” and appropriate for some children to receive sufficient material support even when severely impoverished parents remain attached to their children, do not really wish to relinquish them, and have done nothing to deserve involuntary termination. Institutionalization—whether in large or small facilities—might actually be more expensive than direct support for in-home family care, but a popular fear of the costs of family welfare and a preference for institutionalized care for the children of poor families lingers in many communities. Not surprisingly, this remains exactly the situation for many children in many regions of the world. They are in institutions, but not necessarily completely without families. Moreover, considering that the families of such children are desperately poor, the opportunity for regular, quality contact between these children and their families might be small unless the state can afford the exorbitant cost of a residential care facility in every community and neighborhood. And if parents must rely on intermediaries to assure the placement of their child in a qualified but distant institution, the risk of interception by traffickers is exacerbated.

In any event, parents who voluntarily commit their children to institutions as a means of providing sufficient material support are not assured their children’s lives will be much better

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91 CRC, supra note 8, art. 20, para. 3.
92 See Hughes, supra note 4.
than in an impoverished family home. Institutions are frequently of very low quality, and many children placed in institutions around the world go missing, perhaps because they have run away to live on the streets, or because corrupt officials have sold them into circumstances that can be far worse than growing up in a severely impoverished home.  

**c. Protecting Children Relinquished Voluntarily by their Parents**

Parents who cannot provide adequately for their children and who lack direct support from the state have an alternative to involuntary institutionalization. They can voluntarily relinquish their children for formal or informal “family” placement in the hope of a better life for their children. Children voluntarily relinquished by parents to alternative settings constitute a third group of children at risk needing state protection. Considering a severely impoverished parent’s alternatives, a well-planned and supervised decision to relinquish her child voluntarily for permanent or long term family placement might be the right decision, or at least a reasonable one properly within a parent’s discretion. Relinquishment is not necessarily misguided, irresponsible or immoral. Relinquishment might actually be an act of care and love if a parent knows she cannot function as a parent, cannot rely on extended family, understands the alternatives and believes for good reason that placement with a substitute family offers the best chance for her child. Even relinquishment in desperate circumstances it is not necessarily involuntary or the product of less than intelligent free will, and it can be in the best interests of both child and parent if the placement is a good one.  

A child’s prospects are best, and

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95 See *In re Surrender of Minor Children*, 181 N.E.2d 836 (Mass. 1962), for an explanation of the usual western view that “circumstances” making relinquishment necessitous do not constitute coercion or render a relinquishment “involuntary.”
placement is more likely in the child’s best interests, if the placement is with a substitute family and not with an institution.\textsuperscript{96}

Informal relinquishment to a substitute family or family-like setting of some sort appears to occur on a very large scale in poor communities in undeveloped or developing nations, although not in circumstances amenable to the collection of reliable statistics. The Guidelines acknowledge that “in most countries, the majority of children without parental care are looked after informally by relatives or others.”\textsuperscript{97} However, informal placement by private arrangement, outside the reach of protective state regulation and supervision,\textsuperscript{98} increases the risk of misplacement, such as delivery into human trafficking, child labor, domestic servitude, or caretakers who simply lack basic qualifications for parenting.\textsuperscript{99} In Haiti alone, parents relinquish well over one hundred thousand children—perhaps 8 percent of Haitian children between 5 and 17—into “restavek” arrangements, which are a local form of domestic servitude.\textsuperscript{100} In other nations informal placement has been a conduit into sex trafficking.\textsuperscript{101}

Considering that unregulated informal relinquishment can leave a child in a situation worse than the circumstances that motivated the relinquishment, and that informal

\begin{itemize}
\item \textsuperscript{96} See notes 3-7, supra.
\item \textsuperscript{97} Guidelines, supra note 8, par. 18.
\item \textsuperscript{98} The Guidelines define “informal” placement as “any private arrangement provided in a family environment, whereby the child is looked after on an ongoing or indefinite basis by relatives or friends (informal kinship care) or by others in their individual capacity, at the initiative of the child, his/her parents or other person without this arrangement having been ordered by an administrative or judicial authority or a duly accredited body.” \textit{Id.} par. 29(b)(i). \textit{See also} Claudia Fonseca, \textit{Inequality Near and Far: Adoption As See from the Brazilian Favelas}, 36 LAW & SOC’Y REV. 397, 402 (2002) (describing the informal “circulation” of children among families in Brazil).
\item \textsuperscript{99} Garima Tiwari, \textit{Children as Victims of Trafficking in India}, A CONTRARIO (May 27, 2013), online at http://acontrarioicl.com/2013/05/27/children-as-victims-of-trafficking-in-india/.
\item \textsuperscript{100} Jim Loney, \textit{Haiti “Restavek” Tradition Called Child Slavery} (Feb. 12, 2010), Reuters.com, available online at http://www.reuters.com/article/2010/02/18/us-quake-haiti-restaveks-idUSTRE61H3F920100218.
\end{itemize}
relinquishment sometimes endangers the “rights of the child,” the CRC says very little about this matter.\textsuperscript{102} Article 35 urges states to take “appropriate measures” to prevent “the sale of or traffic in children for any purpose or in any form,”\textsuperscript{103} and Article 36 requires states to “protect the child against all other forms of exploitation.”\textsuperscript{104} However, these obvious but ultimately unhelpful CRC provisions fail to recognize any connection between exploitation and informal and unsupervised placement, or to identify any “appropriate measures” other than a very long term goal of redistribution of wealth and improved material welfare for families.

Regulating or supervising very large numbers of informal relinquishments that are by definition outside the realm of state supervision is likely to be especially challenging. The Guidelines state a very general goal of placing informal relinquishment under minimal state supervision,\textsuperscript{105} implicitly conceding both the need for and practical impediments to supervising such relinquishments.\textsuperscript{106} The Guidelines’ single concrete recommendation to protect children in this situation, in paragraph 56, is that states should encourage the parties to “formalize” their substitute family placements “after a suitable lapse of time” if formalization is in the best interests of the child and the placement is likely to continue in the foreseeable future.\textsuperscript{107}

Paragraph 56 does not explain what it should mean to “formalize” such a relationship. In the U.S., the range of formalization runs a gamut from private, revocable appointment of a

\textsuperscript{102} The CRC’s lack of interest in substitute family placement is exhibited by fact that four of five subparts of Article 21, the CRC’s principal provision for formal family placement, are devoted exclusively to regulating inter-country adoption between nations that have already approved adoption—which the CRC neither endorses nor condemns. CRC, supra note 8, art. 21.

\textsuperscript{103} Id. art. 35.

\textsuperscript{104} Id. art. 36.

\textsuperscript{105} Guidelines, supra note 8, pars. 18, 56, 69, 76-79.

\textsuperscript{106} See id. par. 27, which specifies that informal placement is not subject to any rule or recommendation stated for other forms of placement, except where expressly provided.

\textsuperscript{107} Id. par. 56.
“managing conservator” to permanent and irrevocable adoption by judicial order. The Guidelines failure to describe the different ways a state might enable parties to “formalize” their relationship is an important and obvious omission, but entirely consistent with the Guidelines’ persistent avoidance of any substantive discussion of adoption or other variations of substitute family placement.

In any event, Paragraph 56, which is the only paragraph of the Guidelines that might be interpreted to favor permanent substitute family placement, applies only one subset of children relinquished voluntarily by their parents. A rule that a state need only “encourage and enable” parties to “formalize” a relationship the parties have already created is a solution only for parties that found and matched themselves without the aid of the state or its licensed agencies and without the state’s supervision or oversight. While the Guidelines are probably correct that such voluntary relinquishments represent a “majority” of all transfers of custody, not all voluntary relinquishments are to relatives or neighbors. Some, as the Guidelines concede, are to “others.” Moreover, a child’s relatives, neighbors and “others” are not necessarily qualified to be caregivers—hence the significant problem of misplacement and child trafficking.

The Guidelines nonchalance with regard to informal substitute family placement might be because such placements are unavoidable and in a magnitude of numbers that makes the task of developing safeguards especially challenging. Still, the task is not so much more challenging than establishing other rights enumerated in the CRC. At the very least, international law could promote a process for safe, formal voluntary relinquishment and matching in substitute family settings under state supervision. However, in stark contrast with the Guidelines’ indifference toward informal relinquishment to relatives and “others,” the Guidelines’ attitude toward formal, state supervised relinquishment is clearly adverse, and ironic. For a parent whose situation has
led her to pursue a voluntary transfer of custody, a formal substitute family placement might be more attractive than a potentially dangerous informal placement. One might have expected the CRC or the Guidelines to encourage the development of such a process. However, the CRC neither requires nor recommends adoption or any similar substitute family placement process based on formal relinquishment. Instead, the CRC declares that if “adoption” is allowed the state must assure that “the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary.”\textsuperscript{108} In this rule alone, the CRC demands much more of relinquishment for “adoption” than for informal relinquishment. However, since the CRC does not actually recommend any process for formal relinquishment, it gives no further attention to this matter\textsuperscript{109} and leaves to individual states to determine whose consent is required for a relinquishment, what constitutes “informed consent,” or what purpose counseling should serve.

The Guidelines devote somewhat more attention to relinquishment, but in some ways are even less helpful than the CRC with respect to formal relinquishment because the Guidelines’ approach is counterproductive. For example, the Guidelines appear to conflate any formal “relinquishment” with “abandonment,” implying that formal relinquishment in particular is a neglectful rejection of a child rather than a parent’s thoughtful and loving placement of the child with the child’s best interests at the heart of the decision.\textsuperscript{110} To the extent relinquishment by any means is stigmatized—and the Guidelines actually promote this stigma—one might expect parents to choose private, informal relinquishment over a potentially humiliating formal

\textsuperscript{108} CRC, \textit{supra} note 8, art. 21(a).

\textsuperscript{109} The CRC does include some additional rules for the regulation of \textit{intercountry} adoptions, \textit{id.} art. 21(a), but these rules do not address the fundamental requirements of adoption.

\textsuperscript{110} Guidelines, \textit{supra} note 8, pars. 5, 32 and 34.
relinquishment. Even worse, a parent deterred from making a formal voluntary relinquishment may be more inclined to abandon a child in ways that are not in the child’s interests and that can even be fatal to the child.111

The Guidelines’ do take an important step forward in recognizing the necessity of a formal relinquishment option if a “public or private agency or facility is approached by a parent or legal guardian wishing to relinquish a child permanently.”112 However, this advance is undermined by the Guidelines’ tone, sounded by the implication that relinquishment is abandonment and also by the nature of the procedure the Guidelines describe. The Guidelines urge counseling for a relinquishing parent, but not neutral counseling. The function of counseling in the view of the Guidelines is to persuade a parent that she is wrong.113 If the parent remains firm in her decision, the function of the counselor is to determine whether “there are other family members who wish to take permanent responsibility for the child, and whether such arrangements would be in the best interests of the child.”114 Exploring the possibility of placement with the extended “family”115 is a worthy requirement, but the Guidelines suggest that it is the counselor alone, and not the parent, who should make this decision regardless of the mental capacity of the parent. If the counselor determines that extended family placement is “not possible” or “not in the best interests of the child,” the agency or facility should undertake “to

111 A number of nations have discovered that laws that discourage and humiliate parents who seek to make a voluntary relinquishment, especially for adoption, can have the effect of increasing the number of unsafe abandonments. See, e.g., Sook Kim, Abandoned Babies: The Backlash of Korea’s Special Adoption Act, 24 Wash. Int’l L.J. 709 (2015) (describing the situation in Korea). See also, Gabrielle Tetrault-Faber, Moscow Mulls Introduction of Baby-Boxes for Unwanted Newborns, THE MOSCOW TIMES (March 15, 2015), online at http://www.themoscowtimes.com/article/moscow-mulls-introduction-of-baby-boxes-for-unwanted-newborns/517438.html (describing efforts in Russia to provide a less humiliating process for relinquishment in order to curb the dangerous and often fatal practice of abandonment of infants).

112 Guidelines, supra note 8, par. 44.

113 Id.

114 Id.

115 The Guidelines take no position on the role or rights of a non-marital father or members of his family.
find a permanent family placement within a reasonable period."\textsuperscript{116} However, a parent wishing to avoid a potentially humiliating formal placement process or hoping to exercise control over the placement might well choose to avoid the formal placement system by entertaining offers from the potentially more dangerous informal placement system, or even worse, by abandoning the child in dangerous conditions.\textsuperscript{117}

The Guidelines’ indifference toward unsupervised, informal relinquishment on the one hand and its much greater concern for formal relinquishment on the other is rational only as part of a policy against adoption or similarly formal permanent substitute family placement, which necessarily requires a formal relinquishment. The Guidelines do not make this connection explicit, and one might well wonder why the drafters of the Guidelines would be set against such placement despite agreement with the goal of a “family setting” for children. The answer, as set forth in Part Two of this article, is fear of intercountry adoption.

If, despite a state’s discouragement, a parent nevertheless pursues formal relinquishment and the counselor affirms that relinquishment is in the child’s best interests, the Guidelines require the state’s effort to arrange a substitute family placement within a “reasonable period.”\textsuperscript{118} This placement will not necessarily be an adoption or anything functionally equivalent to an “adoption,” and it might be a form of placement quite different from what the relinquishing parent expected or intended. Indeed, the lack of any right of the parent to be part of a plan for the child’s placement might tend to deter her from working with or through the state. Under the CRC and even the Guidelines, a state arranged “family placement” remains an extremely vague concept. As noted earlier, the CRC clearly does not require or recommend an “adoption”

\textsuperscript{116} Id.
\textsuperscript{117} See note 111, supra.
\textsuperscript{118} Guidelines, supra note 8, par. 44.
alternative in connection with voluntary relinquishment. Adoption is simply only one example of a larger class of undefined alternative placement settings that include institutionalization.\footnote{See CRC, supra note 8, art. 20(3).} The Guidelines prefer some form of “family placement,” when necessary and urge the eventual elimination of large institutions,\footnote{Guidelines, supra note 8, par. 23.} but allow for smaller residential facilities.

The Guidelines avoid the question of what qualifies as “family placement” and are unclear whether small residential facilities might qualify.\footnote{Later, in addressing placement after involuntary placement due to parental incapacity, the Guidelines ask states to ‘envisage’ adoption or similar “definitive” family placements such as kafala. \textit{Id.} par. 161.} This hesitation in the face of an important issue might be partly attributable to the Guidelines’ stated concession to “cultural, economic, gender and religious differences and practices.”\footnote{\textit{Id.} par. 18.} Again, however, an additional unstated reason for avoiding clarity is an aversion to rules or policies that might support, recommend or require adoption, which might in turn lead to “intercountry adoption.”\footnote{See Part Two of this article, \textit{infra}.} The Guidelines come close to endorsing permanent substitute family placement only in connection with involuntary termination of parental rights, addressed in subpart d below, when intercountry adoption is particularly unlikely.

One form of family placement the Guidelines do define is “foster care.” Foster care is a process in which “children are placed by a competent authority for the purpose of alternative care in the domestic environment of a family other than the children’s own family that has been selected, qualified, approved and supervised for providing such care.”\footnote{\textit{Id.} par. 29(i).} In contrast with the Guidelines’ lack of enthusiasm for adoption, the Guidelines urge measures to promote the
development of a sufficient “pool” of screened, trained and legally empowered foster caregivers. Foster care is more family-like and might actually be less expensive than “suitable” institutionalization. However, the Guidelines fail to acknowledge two important realities. The first is that the state generally must pay foster parents a fee sufficient at least to cover the basic living expenses of a foster child. However, states with the greatest numbers of children in need are also likely to be the least likely to find resources to spare for recruiting, training, compensating and supervising foster parents on a scale necessary to avoid institutionalization. In contrast with adoptive parents who provide financing to the adoption system by payment of various fees, foster parents must receive financing from the foster care system.

A second reality is that foster care lacks the permanency and stability of adoption. Adoption results in a legally complete and permanent family that is no more subject to dissolution or termination than any other parent-child relationship. In contrast, foster placement is a relationship of indefinite duration, possibly very short term and at the will of the state or the foster parents and in some cases continuously subject to challenge by the child’s birth parents. The fact that foster families are not legally complete and permanent families can be a

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125 Id. par. 118-122.
128 See, e.g., Tex. Fam. Code §162.017 (“An order of adoption creates the parent-child relationship between the adoptive parent and the child for all purposes”).
129 See Declaration, supra note 28, art. 11 (foster care is “temporary,” and does not preclude a parent’s reunification with her child); Meredith Ragany & Lindsey Wallace, Adoption and Foster Care, 14 GEO. J. GENDER & L. 281, 288-89 (2013).
hindrance to the parties’ ability to form solid attachments, and the self-defensive measure of the foster parents or foster child might be to avoid such attachments from the very outset.130 It is for these reasons that children in the U.S. are placed in foster care mainly in the context of “dependency proceedings” in which the state has taken involuntary custody pending a final determination of parental capacity.131 Adoption is not possible unless and until such proceedings result in a final judgment of parental incapacity, which could take many months, or even a few years.132 Foster care is the best solution for a child’s care during this time because foster care is, by definition, temporary and without prejudice to a future reunification of the original family. Foster care is also the most likely placement for children for whom no adoptive parents are available.133

To the extent the Guidelines promote formalized foster care but nothing functionally equivalent to adoption in the case of voluntary relinquishment, the Guidelines reverse the order of family placements described above, without much logic. Voluntary relinquishment requires no ongoing judicial or administrative proceeding to evaluate a parent’s capacity or to monitor a parent’s efforts toward rehabilitation. The placement need not account for the possibility of the state’s eventual decision to return custody to the parent. Thus, if a parent voluntarily relinquishes her child, the question whether a substitute family placement will be permanent or non-permanent should depend mainly on the relinquishing parent’s well-counseled and voluntary decision. If the parent seeks a new permanent family setting for her child, if “permanency” is the

130 Id. at 308-310. See also Elizabeth Bartholet, NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE 81-97 (1999).


132 See generally Meredith Ragany, Lindsey Wallace, supra note 128, at 282-301.

133 Id. See also ADOPTION AND FOSTER CARE ANALYSIS & REPORTING SYSTEM, REPORT NO. 21.
Guidelines’ goal for the resolution of a child’s placement, and if such placement should be as soon as “reasonably possible” and especially during the child’s first three years of the child’s life, the placement should not be in a form that is, by definition, not permanent. Moreover, there is no reason for the state to continue to bear the cost of paid foster care if the child is free for permanent family placement and qualified, financially capable adoptive parents are willing to assume the cost of parenting. Favoring a system of paid foster caregivers and discouraging adoption needlessly taxes the resources of the state and increases the risk that public resources will be stretched, leaving many children without any “family placement” at all.

It is possible that the Guidelines contemplate or at least permit a form of foster care that is truly permanent, approximating adoption, but perhaps without some of the features of adoption. Perhaps the Guidelines intend that the “pool” of trained, supervised and likely compensated foster parents states must create will provide real permanency and the essential nurturing aspects of family life, but without complete termination of the original parent-child relationship or creation of a new legal parent-child relation. Whether this model of foster care is what the Guidelines really intend is important, but the Guidelines offer no confirmation of this interpretation. More importantly, if the Guidelines intend the creation of a new form of “permanent” foster care, the Guidelines do not identify what features make permanent foster care superior to adoption, and they offer no explanation why that foster care is to be encouraged, but adoption is not.

There are, however, three possible advantages proponents might have imagined for the foster care system described above. The first is that such a system, if it works, is more likely to provide family care for all children in need without regard to age, race, ethnic background or
disability. Adoption, in contrast, typically involves varying degrees of discrimination on the part of prospective adopters, who are more likely to seek healthy children as young as possible and often of matching race.\(^{134}\) But there is no reason to believe that adoption and foster care cannot exist side by side, as they do in the United States. Indeed, allowing adoption for some children relieves the state of the cost of supporting adopted children, making the foster care system less burdensome and more likely to succeed.

A second advantage proponents of foster care may have envisioned is that the “pool” of foster parents will be members of or close to the community of the child’s original family and will share the same culture.\(^{135}\) Preserving the child’s link to his or her original community may be especially important for older children who have developed an attachment to the original community and culture. However, in the case of infants or children younger than two or three, the imagined benefits of preserving a child’s culture are mainly for the community. The child’s interest in a nurturing family, be it of any culture, can outweigh any alleged reason to restrain the child’s placement out of the community. Children are not born with an inherent connection to any particular culture, and for very young children a “child’s best interests” approach should give less weight to the culture of the birth parents than to the importance of enabling the child’s formation of a new family identity and attachment. Indeed, the Guidelines expressly recognize that that the primary goal for a child younger than three should be placement in a permanent and stable family setting, because it is at this early age that a child can most easily form his or her principle sense of identity and family belonging. If a qualified adoptive placement is available for a very young child, rejecting adoption in favor of foster care for no reason other than to


\(^{135}\) See Carlson, *Seeking the Better Interests*, supra note 2, at 746-47.
prevent the child’s departure from the community cannot be squared with the CRC’s or Guidelines’ avowed “children’s best interests” policies.

One more potential advantage for foster care is that, unlike U.S. style adoption, it does not require complete termination of the original parent-child relationship. Moreover, assuming the state can recruit qualified foster parents within or close to the community of the child’s original family, any potential benefit of continued legal or social links between the child and at least one birth parent might best be preserved through foster care. On the other hand, the situation of relinquishing parents and their children will not always favor substantial continuing contact. A relinquishing parent might prefer not to maintain links with her child for any of a variety of reasons, including the stigma of non-marital birth and relinquishment, or because her own community is beset by social or economic dysfunction. In some situations, maintaining contact between the child and birth parent can also undermine the substitute parents’ efforts to manage the child’s life, and a birth parent’s right or ability to intervene or to regain custody presents a threat that undermines the family’s sense of security and violates the goal of permanency. But to the extent the original and substitute parents seek or are willing to accept a relationship somewhere between the extremes of exclusive substitute family versus a continuing partnership of families, modified or “open” adoption might present the best of all options, assuring the substitute parents and child the security of permanency while preserving the possibility of future contact and correspondence between the child and the original parent. The Guidelines, however, suggest a strictly one track model—foster care--by avoiding any clear endorsement of the adoption or similar permanent substitute family model.

d. Protecting Children by Involuntary Termination of Parents Lacking Capacity
The CRC and Guidelines recognize a fourth category of children at risk: Those who are abused or neglected by their parents or whose parents are incapacitated in other ways that prevent them from functioning as parents regardless of the availability of material support.\textsuperscript{136} The CRC and especially the Guidelines devote substantial attention to problems of abuse, neglect, separation by incarceration an similar causes, and other incapacity.\textsuperscript{137} For purposes of this discussion all of these forms of seriously inadequate parenting or non-parenting can be described as problems of temporary (and curable) or permanent incapacity. Problems of parental incapacity and the provision of alternative care for children of incapacitated parents are among the principal topics of the Guidelines.

The foremost goal of the CRC and the Guidelines is, as it should be, family preservation. If protection of a child requires removing the child from the parents’ custody on grounds of incapacity, the removal should be for the shortest duration reasonably possible under the circumstances,\textsuperscript{138} and removal should be combined with a plan for parental rehabilitation and eventual “reintegration” of the family.\textsuperscript{139} In this regard, the Guidelines follow the model for child “dependency” proceedings found widely in the U.S. or other developed nations in cases of parental incapacity. In such proceedings the state is authorized to take temporary physical custody or at least partial management of a child’s situation if there is cause to believe the child

\textsuperscript{136} CRC, supra note 8, arts. 19, 20; Guidelines, supra note 8, par. 4. Incapacity might be mental or emotional, or it might be by reason of incarceration or similar involuntary causes. Physical disability, standing alone, should not be grounds for involuntary transfer of custody, because physically disabled parents can still fulfill important aspects of their roles as emotional and intellectual caregivers, provided other support is available for the physical work of parenting. See National Council on Disability, Rocking the Cradle: Ensuring the Rights of Disabled Parents and Their Children, Ch, 12 (2012), available online at http://www.ncd.gov/publications/2012/Sep272012/Ch12.

\textsuperscript{137} See, e.g., CRC, supra note 8, arts. 9, 12, 19, 20, 24, 25, 28(a), 32; Guidelines, supra note 8, pars. 14, 32-35, 39-43, 46-48.

\textsuperscript{138} Guidelines, supra note 8, pars. 2(b), 14.

\textsuperscript{139} Id. pars. 2(a), 11, 49-52, 61-63.
will be seriously at risk if left in the care of the child’s parents or other caretakers.\textsuperscript{140} In case of an emergency or pre-hearing seizure of custody by the state, the state can continue its custody or management of a child based on sufficient evidence of cause presented at a post seizure hearing, pending a more complete investigation and final hearing on allegations of abuse, neglect or other incapacity.\textsuperscript{141} If authorities determine that the parents are responsible for abuse or neglect or are otherwise incapacitated, but their incapacity is curable, the state might continue custody until the parents’ successful completion of parenting classes, drug or alcohol rehabilitation or other conditions of family reunification.\textsuperscript{142}

Not all parents are willing or able to be rehabilitated, and not all parental incapacities can be cured. In some cases long term or permanent placement with other members of the extended family is possible.\textsuperscript{143} If not, child welfare authorities can proceed with a plan for long term alternative custody outside the extended family.\textsuperscript{144} In the U.S., the plan for very young children is likely to involve placement with a new adoptive family, which will require legal termination of the original parent-child relationship.\textsuperscript{145} The Guidelines agree with this approach in part. The Guidelines state that for a young child “especially … under the age of 3 years,” the “key goal” should be “continuous attachment” to caregivers, and “permanency” in “a family-based” setting,\textsuperscript{146} though not necessarily by western-style adoption. The Guidelines also recommend


\textsuperscript{141} See Kandel, \textit{supra} note 139, at 322, 325, 328-335. See also Guidelines, \textit{supra} note 8, par. 40.

\textsuperscript{142} See Kandel, \textit{supra} note 139, at 329; CRC, \textit{supra} note 8, art. 19(2); Guidelines, \textit{supra} note 8, par. 49.

\textsuperscript{143} Placement within the extended family is the preferred solution. Kandel, \textit{supra} note 139, at 325; Guidelines, \textit{supra} note 8, par. 3.

\textsuperscript{144} See Guidelines, \textit{supra} note 8, par. 50, 61-63.

\textsuperscript{145} See Kandel, \textit{supra} note 139, at 329-336.

\textsuperscript{146} Guidelines, \textit{supra} note 8, pars.12, 22.
avoidance of placement in “large” institutions, especially in the case of young children, and urge
states to begin steps toward the progressive elimination of “large” institutions.147

The Guidelines acknowledge the danger children face when their parents lack capacity, and they recognize the importance of finding a new family setting for such children, but they shrink from making the powerful pro-family placement recommendation that should naturally follow. This avoidance might be in part because the Guidelines are designed to interpret the CRC, not amend the CRC. Thus, the Guidelines cannot forcefully advocate the reduction of all institutions in favor of family placement, because the CRC clearly allows for institutions148 and, as noted earlier, the CRC’s drafters omitted a declaration that a state has any duty to facilitate family placement.149 “Foster placement, kafalah of Islamic law, and adoption” are only examples of the types of alternative care a state “could” provide for children in need, and institutionalization is one more.150 Again, a state can make institutionalization “necessary” simply by failing to create, promote or authorize sufficient family placement alternatives to institutionalization. Even under the Guidelines, institutionalization is still an appropriate state policy as long as institutionalization is not in “large” institutions.

One might argue that the Guidelines are still some small progress, but in some respects the Guidelines actually make matters worse by seeking to confine options for incapacitated or borderline incapacitated parents. In particular, the Guidelines would strongly discourage such parents from voluntary relinquishment.

147 Id. par. 23.
148 CRC, supra note 8, art. 20 (emphasis added).
149 See text accompanying notes 62-63, supra.
150 CRC, supra note 8, art. 20.
As noted earlier, both the CRC and Guidelines discourage formal voluntary relinquishment.\(^\text{151}\) The CRC is the less severe of the two in this respect. Its disregard for voluntary relinquishment is signaled mainly by silence. The CRC scarcely addresses or recognizes voluntary relinquishment.\(^\text{152}\) Its description of alternative placement of children is entirely in the context of a discussion of involuntarily termination. Article 19 declares a state’s duty to protect a child from “physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”\(^\text{153}\) This rule is immediately followed by Article 20, which addresses the needs of a child “temporarily or permanently deprived of his or her family environment,” or who “cannot be allowed to remain in that environment.”\(^\text{154}\) The state’s duty to provide “alternative care” is for the protection of such children.\(^\text{155}\) Missing from this discussion of problems of parental incapacity is any indication that voluntary relinquishment might be part of the solution. The Guidelines suggest that this omission is not a matter of mere indifference. The Guidelines principle reason for discussing voluntary relinquishment in any context is to make clear that such relinquishments should be discouraged, and that the process for such relinquishments should be humiliating.\(^\text{156}\)

Requiring or emphasizing involuntary termination as the main conduit to alternative placement in the case of living parents is likely to increase the number of children subject to

\(^{151}\) See text accompanying notes 112-117, supra.

\(^{152}\) Article 21, which requires due counseling for and “consent” of “persons concerned” before a child’s adoption, is nearest to addressing the issue of voluntary relinquishment, but this article only applies in “States Parties that recognize and/or permit the system of adoption. CRC, supra note 8, art. 21.

\(^{153}\) Id. art. 19(1).

\(^{154}\) Id. art. 20(1).

\(^{155}\) Id. art. 20(2).

\(^{156}\) See text accompanying notes 112-117, supra.
indefinite institutionalization. By strongly discouraging formal, voluntary relinquishment, the
Guidelines imply that no parent can responsibly relinquish her child voluntarily, completely and
permanently, even if the relinquishment is for the purpose of a substitute family placement.157
But even if this false proposition is accepted, it leads to significant practical problems for any
system of involuntary termination for reasons of parental incapacity. To the extent a state
requires a definitive finding of parental unfitness as a condition of a child’s placement in a
substitute family, the courses of action available to the parties in such a case are needlessly
confined. For a parent on the brink of incapacity because of any of a multitude of problems,
voluntary relinquishment may be her last and best exercise of control and responsibility over her
child’s care and future. Such a parent might relinquish her child for adoption with a genuine
regard for the child’s best interests even if she has not yet been charged with incapacity or the
charges against her are disputable.

A system that strongly discourages, stigmatizes and impedes formal, voluntary
relinquishment might delay the inevitable and expose the child to needless risk, delay the child’s
attachment to a substitute family, and rob the parent of her voice in her child’s welfare and
destiny.158 Denying or discouraging voluntary relinquishment also deprives the state of the
opportunity to avoid the cost, burden and delay of involuntary termination proceedings when
parents would voluntarily relinquish their children, and exposes such parents to unnecessary
humiliation and needless expense. Not surprisingly, many states have discovered that if parents

157 The Guidelines take this position even though they also acknowledge that informal relinquishment occurs on
a very large scale, and they offer little advice on whether or how to address this phenomenon. See text
accompanying notes 97-107, supra.

158 The concept of a negotiated relinquishment in the face of potential incapacity is clearly built into the law in
some jurisdictions. See, e.g., Tex. Fam. Code §161.2061 (while Texas does not normally allow for “open”
adoptions in which a relinquishing parent retains any rights to future contact or visitation with a child, a court may
decree an open adoption in a proceeding negotiated and arranged by the state).
fear the formal voluntary relinquishment or involuntary termination process, they are more likely to secretly abandon their children under circumstances that are extremely hazardous to the child.159

The CRC’s and Guidelines’ emphasis on involuntary termination as the principal path to alternative placement, especially in cases of parental incapacity, will also tend to confine substitute family placement to those situations where substitute family placement is least likely to be practical or of much benefit to the child. While the Guidelines acknowledge the importance of early placement in a family, early placement is often difficult to accomplish if the state must first provide a fair and final termination hearing for the original parents. As the CRC and Guidelines recognize, involuntary deprivation of custody is an extreme measure requiring the basic elements of due process.160 In the U.S., state action seizing custody of children or terminating the parent-child relationship is regarded as approximating serious criminal prosecution or punishment.161 Except in case of very serious abuse or neglect, parents typically enjoy a substantial period of opportunity to redeem themselves during these proceedings. Even if they fail to redeem themselves, they enjoy the opportunity for successive appeals. Thus, a child assigned to temporary protective custody under these circumstances might remain in temporary custody for a very long time.162 As time goes on, the child is less likely to be adopted because

159 See note 111, supra.
160 CRC, supra note 8, art. 9; Guidelines, supra note 8, pars. 47, 57, 66.
162 See Kandel, supra note 139, at 328-29.
adoptive parents generally seek younger, not older children. Moreover, a delayed placement increases the risk of a failure to bond with a new family.\textsuperscript{163}

Children separated from their original families in involuntary termination proceedings are nevertheless frequently adopted—at least in the United States—and their adoptions often succeed.\textsuperscript{164} The CRC and Guidelines are at least correct in allowing permanent substitute family placement as one part of the solution for such children. The irony is that the CRC and Guidelines come closest to endorsing adoption only when its value and availability are most limited.

3. The CRC Rule of “Subsidiarity” for Adoption

As little as the CRC or Guidelines say about adoption or other permanent family placement models, they do convey one theory of adoption law that has become the centerpiece of nearly any discussion about the international law of adoption: adoption is subject to a rule of “subsidiarity” or domestic placement preference. In brief, the theory of “subsidiarity” in adoption is that a state should deny any adoption that would result in a child’s placement out of a child’s immediate community or especially beyond state borders if a “suitable” alternative placement, including an institution, is available in the child’s original community.\textsuperscript{165}

“Subsidiarity,” which usually describes an organizational principle allocating authority and responsibility to an organization’s smallest and most localized unit whenever practical, is a misnomer in connection with the CRC’s limited rules on adoption. The CRC does not allocate

\begin{footnotes}
\item[163] See Adoption Disruption and Dissolution, supra note 23, at 5 (each additional year of a child’s age at time of adoption increases risk of adoption disruption or dissolution by six percent).
\item[164] See generally id.
\end{footnotes}
organizational responsibility except to the extent it envisions a hierarchy of responsibility and preference for a child’s care beginning with the child’s original family and moving progressively downward to the extended family, local community, cultural or ethnic group, state and finally international community.

The principal of subsidiarity in adoption first became part of international law in the Declaration of 1986, and was reaffirmed by the CRC. Subsidiarity is stated as part of a general policy and as a specific rule for alternative placement. As a matter of policy the CRC directs states to give “due regard” for the “desirability of continuity in a child's upbringing and to the child’s ethnic, religious, cultural and linguistic background.” The Guidelines are somewhat more expansive about this policy, stating that “[a]ll 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.” In order to achieve a goal of local placement, the Guidelines envision the recruitment of sufficient numbers of paid foster caregivers within each community to provide a ready pool of caregivers able to maintain each child’s ties to original family, community and culture.

The CRC states a specific rule of subsidiarity in article 21(b), particularly with regard to intercountry adoption. Article 21(b) allows intercountry adoption as a means of placement “if

166 Declaration, supra note 28, art. 17.
167 CRC, supra note 8, art. 21.
168 Id. art. 20, par. 3.
169 Guidelines, supra note 8, par. 11.
170 Id. par. 119. For a discussion and criticism of this plan, see text accompanying notes 124-135, supra.
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.” 171 Since the CRC defines suitable alternative placement to include a “suitable institution,” 172 Article 21 supports and might even command a state’s preference for local institutionalization over intercountry adoption. 173 The Guidelines allow for institutionalization as long as the institutions are not “large.” 174

Some aspects of this idea of subsidiary make sense if subsidiarity is interpreted in the context of and qualified by modern child development theory. Thus, a rule requiring “due regard” for “continuity” of a child’s culture properly requires an accounting for an older child’s actual current achievement of a certain cultural identity, the disruption of which could be unsettling and potentially damaging for a child. Subsidiarity also makes sense when the alternative placement is temporary or indefinite. Thus, the Guidelines’ recommendation for the recruitment of local foster caregivers is especially appropriate foster care where there is still a possibility of the original family’s reunification.

However, in the case of infants or very young children for whom permanent substitute family placement is an appropriate goal, cultural identity and community connections are of much less importance. A preference for local family placement can be consistent with children’s best interests, especially if local family placement is quickly available. Retaining a child in an institution for months or years in the hope of local placement that is not immediately available is not consistent with the child’s best interests. 175 Unfortunately, neither the CRC nor the

171 CRC, supra note 8, art. 21 (emphasis added).
172 Id. art. 20(3).
173 UNICEF clearly takes this view. See INNOCENTI DIGEST, supra note 35, at p. 5.
174 Guidelines supra note 8, par. 23.
175 See notes 4 and 163, supra.
Guidelines address these distinctions or the risk of delay caused by a local family placement preference.

A more disturbing version of subsidiarity allows or even requires a state to place a child in a “suitable” institution if local family placement is not possible, even if family placement outside the community is possible and the child is too young to have an emotional or psychological connection to the local community. This restrictive view of subsidiarity is based mainly on Article 21’s arguable requirement of suitable institutionalization if the only available family placement would be out-of-country. This view finds additional support in CRC Article 8, which states that “States Parties undertake to respect the right of the child to preserve his or her identity, including nationality….” However, a state that fails to authorize, facilitate or encourage permanent family placement can create a situation in which “suitable” institutionalization is nearly always the only option for children. Under the restrictive view, out-of-community family placement is a measure of the last resort for a child for whom there is no “suitable” local placement of any sort—not even a “suitable” local institution.

In reality, this theory of subsidiarity is only partly about preservation of a child’s cultural origin and ties to a particular local community or extended family. A more important motivation for the most restrictive versions of the theory has been to allay concerns of developing nations and certain ideological camps about intercountry adoption in particular. Thus, “subsidiarity”

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177 See Katz, supra note 176, at 303-304; Dwyer, supra note 11, at 203-204.

178 For a summary of the arguments and parties, see Carlson, Seeking the Better Interests, supra note 2, at pp. 746-752.
is widely interpreted to discourage or even bar child placement across national boundaries in particular as long as the state or other parties can provide a “suitable” institution. The Guidelines, despite their avowed preference for family settings and their discouragement of “large” institutions, allow for institutions that are not “large.”

The restrictive subsidiarity theory appears to have had real consequences for children around the world. Based in part on this theory, UNICEF once discouraged national child welfare policies that might allow substitute family placements outside the boundaries of a child’s nation of origin. The restrictive view of subsidiarity is also a useful justification for policies in many countries that restrict adoption or fail to take steps to facilitate adoption as a means of preventing intercountry adoption.

C. The Hague Convention on Intercountry Adoption

A fourth instrument that contributes to the international law of adoption is The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. The scope of The Hague Convention is particularly limited. It establishes rules for adoption across national boundaries but is important only to nations that have created a system or law for adoption, that permit out-of-country placement, and that have ratified or accepted the Convention

179 See note 176, supra.
180 Guidelines, supra note 8, par. 23.
181 Dwyer, supra note 11, at pp. 202-205, 207.
182 Id. at 207-208.
183 Hague Convention, supra note 31.
(about ninety nations including the United States as of today). The Hague Convention fills a gap left by the United Nations’ indifference toward adoption. Many nations do authorize adoption, and the number of adoptions across the borders of such nations—intercountry adoptions—had grown significantly by the nineteen nineties when The Hague Conference endeavored to draft a convention resolving issues of jurisdiction, choice of law, approval of intermediaries, and various procedural rules for intercountry cases.

The Hague Convention followed the CRC by a few years and its supporters faced a dilemma with respect to the CRC’s subsidiarity principle. One the one hand, there was widespread discontent with the concept of subsidiarity, especially within the community of interested parties from the United States and other “receiving nations.” Nevertheless, The Hague Conference could not purport to supersede the U.N.’s CRC or the CRC’s rules of child placement, and any convention regarding intercountry adoption would necessarily require the support and participation of “sending nations” to have much practical effect. Representatives of many then current or potential sending nations worried about the implications of intercountry adoption, for reasons discussed in Part Two of this article.


185 Carlson, The Emerging Law, supra note 184, at 244-49, 250-55.

186 By “receiving nations” I mean nations that are predominantly the nations of the adopters and the destinations for children emigrating as a result of intercountry adoption.

187 “Sending nations” are nations that are mainly nations of origin in any intercountry adoption. For a statistical analysis and identification of receiving states versus states of origin, see Selman, P. (2013) Key Tables for Intercountry Adoption: Receiving States 2003-2012 ;States of Origin 2003-2011, available on request from the author at pfselman@yahoo.co.uk or on the Hague web-site at http://www.hcch.net/upload/selmanstats33.pdf.

188 See Carlson, The Emerging Law, supra note 184, at 255-261. For a summary and analysis of many of the arguments against intercountry adoption see Carlson, Seeking the Better Interests, supra note 2.
The drafters of The Hague Convention ultimately fashioned a modified version of subsidiarity with a more favorable view of adoption. The Hague Convention clearly endorses adoption over institutionalization in most cases, but “suitable” local family placement, including local foster family care, still trumps intercountry adoption. The Hague Convention’s endorsement of adoption is not as powerful as one might expect given its purpose of facilitating intercountry adoption. In particular, The Hague Convention fails to speak clearly to the issues of what constitutes suitable local family placement or when efforts at local adoption should be abandoned in favor of intercountry adoption. The Hague’s Convention’s failure to speak more clearly about these matters left the door open for signatory states to restrict intercountry adoption despite shortages of domestic family placement opportunities.

II. The Source of the Contradiction: Intercountry Adoption Angst

The international legal documents described above declare a child’s right to a family but deny the right to children who lack functioning families and are likely to be institutionalized unless they are placed with substitute families. The CRC and Guidelines in particular promote policies that are likely to perpetuate institutionalization beyond the scale that would be necessary if children had a right to the opportunity for permanent substitute family placement. Relocating institutionalized children to smaller facilities and moving some of them into foster care, as recommended by the Guidelines, might well reduce the harm done to children, but these actions are far from the best that can be done if, as the CRC and Guidelines agree, a stable and

189 Id. at 261-65.
permanent family is the ideal environment for children. If substitute family placement is possible, why deny children the right to that opportunity?

Neither the CRC nor the Guidelines offer principled or practical explanations for the contradiction between their pro-family policies and their condonation of institutionalization. The foremost argument of principle one might imagine is that substitute family placement is not really in the best interests of children. However, whatever following that argument may have in some quarters, the CRC and Guidelines purport to accept the science of child psychology and development, and science provides strong support for family placement over institutionalization. The CRC and Guidelines reflect awareness of this very aspect of modern child development theory. The CRC makes the concept of a “family environment” a core principle, and the Guidelines speak of the “importance of ensuring children a stable home and of meeting their basic need for safe and continuous attachment to their caregivers, with permanency generally being a key goal.” Neither document explains any reason to oppose permanent family placement, other than by failing to declare the right.

Arguments against a right to substitute family placement can be found elsewhere, outside the text of the CRC or the Guidelines. However, the arguments against a right to family placement in international law are generally not against family placement as a matter of principle. Instead, they target intercountry adoption in particular and stem from a fear that a right of family placement will require state support for intercountry adoption. Indeed, a debate

192 See notes 10, 25, supra.
193 See notes 3-6, supra.
194 See text accompanying notes 45-56, supra.
195 Guidelines, supra note 8, par. 12.
over intercountry adoption has dominated nearly any discussion about a “right” to substitute family placement.

By the time of proceedings leading to the 1986 Declaration and the CRC, international children’s rights specialists were acutely aware of the phenomena of intercountry adoption, which was mainly viewed positively in “receiving” nations\textsuperscript{196} but often viewed with worry in “sending” nations\textsuperscript{197}. To be sure, the debate over intercountry adoption was not strictly between receiving nations and sending nations. Academics within the United States and other receiving nations argued the issue from both sides\textsuperscript{198}. Even in the U.S., some critics labelled intercountry adoption a form of “human trafficking.”\textsuperscript{199} Both real and imagined corruption such as the alleged kidnapping or sale of children for intercountry adoption were widely reported in some “sending” nations, particularly in Latin America\textsuperscript{200}. Fear of intercountry adoption was exacerbated by a Cold War-era rumor circulated by the Soviet media and a few Latin American journalists that American adoptive parents were acquiring children to harvest their organs for transplant procedures\textsuperscript{201}.

All of these arguments, concerns and rumors targeted \textit{intercountry} adoption in particular on the premises that adoption is a cultural phenomenon of western developed nations or that the great advantage in wealth enjoyed by prospective adoptive parents in receiving nations was


\textsuperscript{198} See Carlson, \textit{Seeking the Better Interests}, supra note 2, at 736-771.


\textsuperscript{200} Raymond, supra note 199, at 239-242.

\textsuperscript{201} Id. at 242-47.
corrupting child placement in sending nations and cultivating an international black market for the sale of children. Thus, from the beginning, the debate over an international law of child placement has been almost exclusively a debate about intercountry adoption. In U.S. legal journals, for example, nearly any article addressing or debating adoption as an international law topic has been about intercountry adoption. It is not surprising in retrospect that the early effort to include a CRC provision for a state duty to facilitate “adoption” was rejected, not because of opposition to adoption in principle but because of fear of promoting even more “intercountry adoption.”

Admittedly, some arguments against intercountry adoption could be reframed as arguments against adoption in general. The most important argument critics have asserted is that the wealth of adopters and the fees they pay breed corruption and lead to the “commodification” of children. Adoption might be corrupted in a number of ways. If adopters or placement intermediaries pay fees directly to birth parents, the transaction is essentially the sale of the right to a child. Such a transaction might not be in the best interests of that particular child if it reduces the placement to an auction determined mainly by the price, attractiveness of the child, and willingness and ability of adopters to pay. A direct fee might also induce a birth mother to relinquish her child in a moment of desperation or depression later regretted. Even if the transfer of custody is, in all other respects, an improvement in living conditions for the child, the payment of the fee to the birth parent—especially in an auction-like system—is likely to be

202 INNOCENTI DIGEST, supra note 35; Smolin, Intercountry Adoption, supra note 199; David M. Smolin, The Two Faces of Intercountry Adoption: The Significance of the Adoption Scandals, 35 SETON HALL L. REV. 403 (2005).

203 For a demonstration of this phenomena, see the “international adoption” section in Nancy Levit, Children’s Interests: An Annotated Bibliography, 25 J. AM. ACAD. MATRIM. L. 533, 534-38 (2013).

204 See text accompanying notes 62-63, supra.

205 Carlson, Seeking the Better Interests, supra note 2, at 741-46.
unhealthy to the future adoptive parent-child relationship and might also encourage an unhealthy gestation and relinquishment of children for monetary gain.

Corruption is a real risk, but not just in intercountry adoption. In fact, intercountry adoption might be safer in some respects than intra-state adoption because it involves an extra layer of safeguards against corruption. The intercountry process is subject to separate oversight by two states, not one. What makes intercountry adoption arguably more risky is the disparity in wealth between sending and receiving nations and the potentially corrupting impact of fees collected by local service providers from affluent foreign adopters. But disparities in wealth and opportunity exist within any nation. Even for adoptions strictly within the United States or other “wealthy” nations, corruption is possible in the absence of safeguards.206

Considering the millions of unplaced children who become homeless207 and the substantial global market for unplaced children sought by human traffickers for illicit purposes,208 the better cure for corruption is improvement, not abandonment of the adoption system. Within the U.S. and other nations that favor adoption, a century of experience, systemic reform and social awareness have substantially eradicated corruption. The keys to a safe system are the proper identification of children in real need of placement, assessment of adoptive parents, counseling and education of all the parties, and a matching process that deters corruption and financial inducements.

If it seems nevertheless that children are “commodified” because of the steep fees adoptive parents pay for screening, counseling, matching and legal processing, the solution is reform

206 See Carlson, Seeking the Better Interests, supra note 2, at 768-69.
207 See note 2, supra.
208 See notes 99-101, supra.
leading to more, not less adoption. Adoption’s critics often decry “market” forces and high “prices” that corrupt and “commercialize” child placement, but the global child placement system is the antithesis of a commodities market. If children were commodities and child placement was governed by typical market forces, the commodity in question should be very cheap. There are millions of potentially adoptable children, but currently only a few tens of thousands of potential adopters. Under these circumstances the “price” of a “commodity” should be very close to zero. In fact, the price for adoption—especially intercountry adoption—is tens of thousands of dollars, which exceeds the financial means of most middle class prospective parents. Overzealous restrictions, political or cultural resistance, or neglect of institutions necessary for safe, supervised adoption are barriers separating children from prospective substitute families. Moreover, misguided regulation in one state can lead to new problems in another. When authorities in one state restrict or prohibit intercountry adoption, potential adopters seek new opportunities in new but frequently ill-prepared states. Thus, adoption is increasingly diverted to regions where the danger of corruption is worst. And when children in overly-restrictive states cannot be adopted despite their need, they are exposed to the

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209 Carlson, Seeking the Better Interests, supra note 2, at 769-771. At the peak of intercountry adoption, the total number of such adoptions to and from all nations still did not exceed 50,000 per year. Lynn D. Wardle & Travis Robertson, supra note 191, at 216. While millions of potential parents in the U.S. experience an interest in adoption at some point in their lives, a very small fraction take steps toward domestic or intercountry adoption. See Centers for Disease Control, Adoption Experiences of Women and Men and Demand for Children to Adopt by Women 18–44 Years of Age in the United States, 2002, VITAL AND HEALTH STATISTICS, Series 23, No. 27, p. 1 (Aug. 2014). Of course, persons who might consider adoption have a growing number of alternatives in alternative reproductive technology.


211 See Dwyer, supra note 11, at 191-92, 238.

even greater danger of institutionalization or a real “commodities market”—human trafficking for child labor and illegal trades.\textsuperscript{213}

Other arguments of principle frequently asserted against a child’s right to permanent substitute family placement are based on nationalism, fear of a child’s loss of “heritage,” or fear of the consequences of inter-racial or inter-ethnic family placement. These arguments are substantially summarized and addressed elsewhere.\textsuperscript{214} All are asserted mainly to oppose intercountry adoption in particular. Of these arguments, the appeal for preserving a child’s heritage receives some support from the CRC and Guidelines,\textsuperscript{215} although prevention of family placement for the sake of preserving a child’s connection with his or her birth parents’ culture will often not be in a young child’s best interests if it results in the child’s institutionalization. In any event, the argument for preserving heritage, and other arguments against interracial or inter-ethnic placement are not necessarily targeted only at intercountry adoption. They simply have their most obvious relevance to intercountry adoption. A similar nationalist argument for preservation of the state’s child “resources”—placing alleged national interests above children’s interests—is strictly against placement out-of-country. It is no objection at all against in-country adoption.

If these arguments are mainly directed against intercountry adoption or even out-of-community family placement, why has international law resisted even a right to permanent substitute family placement within a community or state? The most likely explanation is that the proponents of these arguments fear that the lack of a supportive local culture or demand for adoption in some states will lead to an exodus of large numbers of children to other nations,\textsuperscript{213} See notes 99-101, supra.\textsuperscript{214} See Carlson, Seeking the Better Interests, supra note 2, at 747-763.\textsuperscript{215} CRC. supra note 8, art. 20(3); Guidelines, supra note 8, par. 58, 62.
especially to North America and Europe.\textsuperscript{216} Considering that reported intercountry adoptions numbered just over 40,000 in the peak year,\textsuperscript{217} such fears are exaggerated insofar as a significant demographic “loss” to sending nations. The potential effect of intercountry adoption on any single nation’s population of young people may seem significant because adoption affects a narrow and distinct group—institutionalized children—and the impact within just that group might seem large, especially to the officials who manage institutions for children. Moreover, intercountry adoption tends to flow out of a limited number of permissive states during any particular era, depending on which states have accepted adoption by foreigners and which have moved to shut down or restrict such adoptions. If barriers to intercountry adoption were reduced in a greater number of nations, the actual effect within any single nation would likely be small—though still meaningful to those children placed out of institutions and into families. Nevertheless, the specter of very large-scale intercountry adoption, however improbable, appears to be a major reason for continuing opposition to family placement and continuing support for institutionalization, whatever the health or developmental cost to children or the social costs of retaining children by institutionalizing them.

The arguments of principle against a child’s right to family placement are therefore not really about adoption or its cognates in general but about intercountry adoption in particular. But what about \textit{practical} arguments that may grant the virtue of family placement in general but doubt that a right to family placement could be implemented as a matter of international law?


\textsuperscript{217} Lynn D. Wardle & Travis Robertson, \textit{supra} note 191, at 216.
One imaginable practical argument is that developing nations cannot be expected to bear the cost of institutions necessary for a safe and equitable family placement system.

On reflection, however, “cost” cannot explain international law’s failure to offer goals and guidance for family placement. Admittedly, the cost of a well-functioning family placement system might seem substantial at first glance.\textsuperscript{218} The costs include legal and factual evaluations of the original parents’ situation, the child’s situation, the adoptive parents’ qualifications and the propriety of the placement in light of the norms international law might establish. These evaluations require a well-functioning administrative and legal system staffed by educated lawyers, social workers and other professionals. The costs also include a competent and adequately staffed law enforcement system, resistant to corruption, to prevent illegal practices such as the “sale” of children or bribery of child welfare officials. Admittedly, these costs should excuse any state’s delay in the complete fulfillment of every child’s right’s right to a family.

Still, the cost of making family placement possible does not explain international law’s failure to declare a goal. First, there is no reason to believe that the cost of fair and equitable family placement would exceed the cost of the CRC’s or Guidelines’ other demands for the protection of children and families. The costs of protecting children against abuse or providing due process for parents in involuntary termination proceedings is likely to be much higher,  

\textsuperscript{218} In many states that permit intercountry adoption, the cost of intercountry adoption has indeed become exorbitant, but many of these costs are because some states have used intercountry adoption to generate local revenue, or perhaps to deter greater numbers of intercountry adoptions, by imposing arbitrary, unnecessary and expensive procedural requirements for foreign adopters. \textit{See} Lynn D. Wardle & Travis Robertson, supra note 191, at 224-25. \textit{See also} Bureau of Consular Affairs, \textit{Annual Report on Intercountry Adoption}, supra note 210 (showing a very wide range in costs from a mere $250 to a high of over $28,000, with the implication that very high costs are not inherent in the administration of a Convention-compliant system).

Moreover, these costs are unlikely to be the same costs local adopters would experience. For example, local adopters need not travel long distances and remain in foreign lands for substantial periods of time to establish their qualifications. Moreover, a child’s right to family placement under international law would strengthen the argument for eliminating unnecessary costs for foreign adopters, particularly when there is a shortage of local adopters.
because the cost of such measures falls entirely on the state and frequently requires difficult investigations of alleged harm to children that may include medical and psychological examination and continued monitoring and services for families the state seeks to preserve. Second, if a state actually fulfilled the CRC’s and Guidelines’ demands by creating the necessary tribunals, facilities and staff of professionals, it would necessarily have established the same institutions and staff needed to serve a family placement system. Any additional expense required for family placement professionals and tribunals could be covered largely if not entirely by fees adoptive couples typically pay for adoption services. Third, the cost of a true substitute family placement system based on the adoption model would certainly be much less expensive than the Guidelines’ proposed cadre of carefully selected, trained, supervised and paid foster caregivers. In contrast with foster caregivers, adoptive parents or other permanent substitute parents generally pay fees to cover the cost of placement, receive little or no state financial support, and completely relieve the state of the continuing financial burden of supporting children.

Finally, cost is seldom a barrier to the international community’s pronouncement of long term goals and aspirations. The CRC declares extraordinarily burdensome duties for developing states, including duties to provide material support, education and medical care for children.\footnote{CRC, supra note 8, arts. 24-28.} It might seem useless to declare such goals knowing that many states are far from able to achieve them. Still, international law can set targets and priorities for national leaders, establish standards for evaluating their achievements, frame political and educational dialogue within each nation, and define missions for important international organizations such as UNICEF. In the case of goals that require special attention to law and process, recognition of a goal can promote
productive discussion about what laws, processes, institutions and personnel are required. In the case of substitute family placement, for example, recognizing the goal would be the first step toward developing international norms for voluntary relinquishment, involuntary relinquishment, safeguards against corruption and mistake, the character of the matching process, the qualifications of the adopters, and the range of legal effects of the placement.

Fear of costs is not the only imaginable practical reason for opposition to a right to family placement. Another is that the number of children in need of such placement is likely to far exceed the number of prospective parents seeking a placement. In other words, many states will fail to achieve the goal even if they adopt laws and create institutions for family placement because success also depends on the interest of qualified parents in accepting placements. Parentage—especially adoptive parentage—cannot be commanded. But this explanation, if it were really asserted, suffers from the same flaw as an explanation based on costs. The difficulty or unlikelihood of fulfilling a right for all children has not deterred and should not deter international law-making bodies from establishing goals that set direction and promote the discussion and exploration of means. A cultural resistance to family placement outside the extended family is not necessarily fixed. Nor are practices like adoption inherent cultural attributes that either can or cannot exist within any particular state’s borders. The U.S. is widely known for its strong pro-adoption culture today, but a law of adoption scarcely existed a century ago.\footnote{Carlson, Transnational Adoption, supra note 184, at 321-23.} Until the late twentieth century adoption continued to suffer a social stigma in the U.S., reflected in the efforts of adoption agencies and many adoptive parents to preserve the secrecy of a child’s adoptive origins.\footnote{Id. at 323.} The movement toward broad social acceptance of adoption and the

\footnote{Carlson, Transnational Adoption, supra note 184, at 321-23.}
\footnote{Id. at 323.}
evolution of laws and institutions for a modern due process of adoption is largely because of the promotion of adoption by organizations and individuals committed to the goal of a widely-favored, fair and accessible process.

Suppose, however, that a culture cannot be changed or that parental interest cannot be stimulated sufficiently to provide parents for all children who would benefit from family placement. Even the best laws and institutions cannot assure that every child in need of alternative care will be placed with a qualified family. Many children might remain in institutions. However, the same observation can be made of any other right the CRC or international law declares. Not all children receive an adequate education or medical care even though international law declares they have a right to these things. The international recognition of a right can be worthy if it leads to any significant increase in the number of persons who enjoy that right, even if fulfillment of the right is not complete and universal.

Part of an unmet need for family placements can be satisfied by intercountry of children because of imbalances between nations with respect to prospective adoptive parents and children in need of placement. Intercountry adoption is unlikely to satisfy more than a part of the world’s need for family placement. Still, the fact that intercountry adoption is likely to be an important part of the solution reconnects the matter of intercountry adoption to any debate about an international right to family. For many states, an obligation to provide an opportunity for family placement would compel an allowance for adoption by parents from other nations.

The international legal community’s angst over intercountry adoption has been on full display in the governing policies of UNICEF. Until recently, UNICEF’s position on substitute
family placement of any sort was neutral at best\textsuperscript{222} and excluded adoption as any part of its child welfare policy.\textsuperscript{223} UNICEF consistently missed opportunities to promote adoption or even foster care in a series of public statements concerned mainly with the quality of institutions. Nearly any of UNICEF’s statements relevant to adoption were to encourage vigilance against illicit adoption and “trafficking” and frequently implied that adoption was a form of trafficking.\textsuperscript{224}

UNICEF’s resistance to adoption reached its apex within a few years of the CRC and The Hague Convention, when UNICEF issued a special report addressing intercountry adoption in particular. In this report UNICEF opined that while intercountry adoption had its origins as a “humanitarian” measure, it was now dominated by the “language of economics” and was no longer the “purely child welfare measure it was intended to be.”\textsuperscript{225} UNICEF rightly cited real instances of abusive practices in some nations with weak legal and regulatory institutions, including payment of money by “brokers” to mothers in exchange for their relinquishments.\textsuperscript{226} Unfortunately, UNICEF’s report also reiterated some unsubstantiated and ultimately debunked

\begin{footnotesize}
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\item \textsuperscript{222} See Dillon, \textit{Making Legal Regimes}, supra note 26, at 198 & n. 58 (2003).
\item \textsuperscript{224} See, e.g., \textit{INNOCENTI DIGEST} note 35.
\item \textsuperscript{225} \textit{INNOCENTI DIGEST}, \textit{supra} note 35, at p. 3. Adoption has in fact sometimes been described in market terms, but mainly by opponents of adoption—including UNICEF—that have deployed the language of economics to imply that adoption is amoral or immoral. See Carlson, \textit{Seeking the Better Interests}, \textit{supra} note 2, at 741-46.
\item \textsuperscript{226} \textit{Id.} at pp. 6-7.
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rumors circulated by opponents of intercountry adoption. UNICEF’s report also evinced fear and distrust of advocates for intercountry adoption. It warned of “major financial interests” and a “lobby” for intercountry adoption that treated children as “commodities.” Among the “abuses” UNICEF attributed to the “lobby” were “attempts to persuade the competent national authorities to release more children for adoption or to make exceptions to certain laws or procedures in specific cases.” UNICEF described one U.S. adoption agency’s collection and delivery of medical supplies, clothing and toys for foreign orphanages as one of the “illegal” means of obtaining children.

Yet UNICEF’s 1998 report was not consistently against intercountry adoption. In fact, parts of the report suggested that UNICEF was already somewhat conflicted about intercountry adoption. While the report seemed initially to condemn intercountry adoption as a matter of principle, subsequent parts approved international efforts to improve the process and eliminate corruption and abuse. For example, UNICEF applauded The Hague Convention for its achievements in creating a safer environment for intercountry adoption. In the end, however, UNICEF’s 1998 article tilted in favor of institutionalization by failing to support any form of a child’s right to family placement, by affirming that states owe no duty to facilitate family placement, and by embracing the strict version of the subsidiarity.

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227 For example, UNICEF referred to the “dramatic” situation of Romania and the “abuses and trafficking that were taking place.” INNOCENTI DIGEST, supra note 35, at p. 4. For a further description and rebuttal of the rumors on which these allegations were based, see Carlson, Seeking the Better Interests, supra note 2, at pp. 741-43.

228 INNOCENTI DIGEST, supra note 35, at 3.

229 Id. at 6.

230 Id.

231 For a description of “strict” subsidiarity in adoption, see pp. 44-48, supra.
Sixteen years later, UNICEF reversed its position with respect to intercountry adoption, particularly with regard to strict subsidiarity. In a brief 2014 press release, UNICEF appeared for the first time to clearly favor family placement including intercountry adoption over institutionalization:232

The Convention on the Rights of the Child, which guides UNICEF’s work, clearly states that every child has the right to grow up in a family environment…. [F]amilies needing assistance to care for their children have a right to receive it. When, despite this assistance, a child’s family is unavailable, unable or unwilling to care for her/him, then appropriate and stable family-based solutions should be sought to enable the child to grow up in a loving, caring and supportive environment.

Intercountry adoption is among the range of stable care options. For individual children who cannot be cared for in a family setting in their country of origin, intercountry adoption may be the best permanent solution.

UNICEF supports intercountry adoption, when pursued in conformity with the standards and principles of the 1993 Hague Convention on Protection of Children and Co-operation in Respect of intercountry Adoptions.”233

In sum, UNICEF’s new position rejects strict subsidiarity. A state should favor family placement over institutionalization even if doing so means intercountry adoption. This endorsement of intercountry adoption has two important qualifications. First, UNICEF’s position appears to allow a state to prefer local family placement over intercountry placement. Second, UNICEF’s endorsement of intercountry adoption is limited to intercountry adoption

233 Id. (emphasis added).
within the framework of The Hague Convention. However, this qualification does not necessarily mean a policy *against* intercountry adoption in countries that have not accepted the Convention—an important matter because many intercountry adoptions do involve non-Convention states.\(^\text{234}\)

UNICEF’s 2014 press release might serve as a first step toward recognition of an international right to family placement. UNICEF does not make international law, but it is one of the most important interpreters of the law, and its interpretations and policies affect the administration of important child welfare programs around the world. On the other hand, the particularity with which UNICEF’s new policy addresses intercountry adoption is the latest example how the subject of intercountry adoption dominates any discussion about an international law of family placement.

**III. Overcoming Opposition and Establishing a Child’s Right to Family Placement**

Nearly three decades after the CRC declared the right of children to be raised in a family setting, the reality is that children without functioning families lack a right in international law to the opportunity for substitute family placement even within their own communities. Of course, substitute family placement is possible everywhere in some form and not prohibited by international or national law, at least if one includes widely-practiced informal family placement. One might argue that there is freedom to adopt and be adopted, at least informally, and thus a “right.” But as the authors of the CRC and the Guidelines clearly recognized, some rights cannot be widely and safely enjoyed without affirmative state action. Many children cannot enjoy a right to security, minimum material support, education and medical care unless the state takes

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\(^{234}\) Bureau of Consular Affairs, *Annual Report on Intercountry Adoption*, supra note 210, listing Convention and non-Convention sending nations in intercountry adoptions involving the U.S.as a receiving state, and showing that the leading sending state is now Ethiopia, a non-Convention state.
action to make these things possible, and states can deliver these things most effectively to children who reside in a “family environment,” not in an institution. Similarly, children without families need more than the freedom to seek or be subject to family placement. The state must take affirmative action to cause what children cannot do for themselves. Moreover, the state must assure that family placement is safe for the parties, particularly for the child, and that the placement is of sort that offers the child the benefits of attachment, continuity and permanency.

International law should prod states to do more by expressly declaring the right to family placement and by specifying particular actions necessary or appropriate to effectuate that right. Current international law provides nothing of the kind, except for CRC’s and The Hague Convention’s special rules for intercountry adoption and the Guidelines’ impractical and inadequate recommendations for foster care. A clear right to family placement that includes affirmative duties of the state remains the missing link for achieving the CRC’s stated goal of a “family environment.”

Creating such a law is likely to be a complex undertaking, beginning with defusing opposition to substitute family placement, which in reality is fear of intercountry adoption. Nearly any discussion about adoption or family placement as a matter of international law during the last quarter of a century has been mainly a discussion about intercountry adoption, as if the only purpose of a right to family placement would be to allow adoption by foreigners. Excessive attention to intercountry adoption has become an undue distraction from larger issues in family placement. Even worse, excessive attention to intercountry adoption has provoked a backlash against arguments for family placement of any kind. Thus, the first step to achieving a consensus for an international law of family placement is to loosen the tie between adoption in general and intercountry adoption in particular.
Loosening the tie does not mean a severance. It might be a simple matter of changing the tone and manner of advocacy. For practical reasons, intercountry adoption is likely to remain part of the discussion about and solution to global imbalances in the numbers of children needing families and the number of prospective parents ready to adopt them. However, intercountry adoption must be viewed as one means and not the end.

Opponents have feared the reverse: that intercountry adoption is the goal and that focusing on a child’s interests in family placement is insincere rhetoric for achieving the interests of foreign adopters and agencies.235 The fear is fed by ideological biases and frequent politicization of adoption by regional or national figures pursuing interests other than the best interests of children.236 But adoption advocates are not entirely without responsibility in creating an appearance that their goals are mainly to serve the interests of “receiving” nations and their citizens rather than the broader interests of children. To be sure, the special attention devoted to intercountry adoption thus far has been understandable. In nations such as the U.S., a significant portion of adoptions between unrelated children and adopters are now intercountry adoptions.237 Most children who are likely to benefit from adoption live in countries where the odds of being adopted locally are very small, unless they are adopted by foreigners. Thus, adoption advocates have devoted considerable effort to improve opportunities, laws and procedures for intercountry adoption. Intercountry adoption is an unusually complex form of adoption with a special need for international rules for choice of law, allocation of state responsibility and regulation of

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235 See, e.g., INOCENTI DIGEST, supra note 35. See also Carlson, supra note 2, at 746-760 (describing arguments of opponents of intercountry adoption).

236 See, e.g., Anna Jane High, Pondering the Politicization of Intercountry Adoption, Russia’s Ban on America’s “Forever Families,” 22 CARDOZO J. INT’L & COMP. L. 497 (214) (describing Russia’s action in prohibiting intercountry adoptions of Russian children by Americans).

adoption agencies. Thus, The Hague Convention and implementing domestic legislation—which deal exclusively with intercountry adoption—were early priorities among international family lawyers.238 Finally, many adoption advocates were drawn to the subject either by personal experiences leading to their status as parents by intercountry adoption or because of their professional association with child welfare organizations closely involved with intercountry adoption. They were naturally intrigued by the potential good to be accomplished by more intercountry adoption in a properly structured environment. From the point of view of adoption’s skeptics, however, the fascination with intercountry adoption has seemed to confirm that advocacy for intercountry adoption is part of a self-serving agenda of North American and European nations to satisfy the needs of their own prospective parents. 239

Going forward, advocacy for adoption should shift from concentration on intercountry adoption to a broader concern for family placement in general and the creation of local institutions to promote, facilitate and oversee family placement, whether in country or out-of-country. A shift in focus is entirely appropriate given the legal and structural reforms already achieved for intercountry adoption through The Hague Convention and supporting domestic laws and institutions. This is not to say that it is unnecessary to take further steps to make intercountry adoption even safer for children, their birth parents and adopters. For example, some nations that have signed or accepted the Convention have acted contrarily the spirit of the Convention by erecting unnecessarily high barriers for intercountry adoption, possibly for no reason other than to raise revenue.240 On the other hand, many intercountry adoptions still occur outside The Hague Convention and are subject to less rigorous safeguards, and it is in mainly in

238 See Carlson, The Emerging Law, supra note 184.
239 See, e.g., INNOCENTI DIGEST, supra note 35, at. 7, 12.
240 See note 218, supra.
adoptions outside the reach of the Convention that reported scandals have occurred. Legal and institutional progress should continue for intercountry adoption just as it does for domestic adoption within the U.S. and other “receiving” nations. The more important and difficult challenges for the future, however, lie in building a law that encourages family placement as a child welfare practice within each state.

Advocates for adoption should also acknowledge more clearly the limited role of intercountry adoption within the future global practice of family placement. One of the usual arguments in favor of intercountry adoption has been that it offers significant benefits to nations with large numbers of children without functional families. The benefits are profound for any individual child who might otherwise have spent his or her childhood in an institution. However, outsized perceptions of the scale of intercountry adoption have hurt the cause of adoption more than they have helped. The implication that poorer nations might be relieved of a large population of needy children feeds nationalist fears that adoption will lead to the loss of a major part of the next generation. In truth, intercountry adoption is a fly on the demographic scale. It is hugely important to the individuals involved and might seem to have a particularly noticeable impact in a nation that is suddenly in the focus of intercountry adoption. However, there is

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The Convention applies to adoptions between approximately 90 nations including the United States. See The Hague Convention on Private International Law, Status Table for the Convention for Protection of Children and Cooperation in Respect of Intercountry Adoption, at http://www.hcch.net/index_en.php?act=conventions.status&cid=69 (last visited on April 24, 2014). However, most intercountry adoptions involving the United States now involve children adopted from non-Convention nations, in part because many Convention states have now severely restricted intercountry adoption. See Bureau of Consular Affairs, ANNUAL REPORT ON INTERCOUNTRY ADOPTION, supra note 210

little reason to believe that intercountry adoption alone could serve the needs of more than a few
tens of thousands per year out of the millions of children without functional families. Instead,
intercountry adoption is more likely to act as a bridge to the future for nations that have not yet
developed their own culture of adoption, and as an ongoing gap-filler for global imbalances. In
the long run, much more can be accomplished for children worldwide by building a foundation
for family placement everywhere and not just in today’s limited number of “receiving” nations.

A law addressing the wider problems of a right to substitute family placement, including
especially placement within a community or state of birth, will require attention to at least four
major problem areas. First, what is the extent of a state’s duty to provide for family placement?
Second, when is a child suitably eligible for substitute family placement? Third, what measures
are necessary to assure that placement is safe for the child and the new substitute family? Fourth,
what is the ongoing effect of such a placement with respect to the family status and rights of the
parties?

The solution to the first problem, describing a state’s duty to provide for family
placement, involves more than a simple declaration of a child’s right to family placement or a
state’s duty to provide such placement. A child has a “right” to family placement only if the
child’s first family has failed and the child is suitably eligible for adoption, which naturally
involves the second major problem area, described below. Moreover, no state can guarantee a
child’s placement. Even if the child’s need is indisputable, placement requires a willing set of
adoptive parents, but willing adoptive parents are often in short supply, particularly for so-called
“hard to place” children, such as older children or children with disabilities. Thus, a state can
only offer an opportunity for family placement for children in need. A child’s right to an
opportunity for family placement requires both negative and affirmative duties of the state. The
state must not interfere with or prohibit family placement, except as a solution to the other problems described below, such as determining whether a child really is in need and is suitably eligible for family placement. The state’s affirmative duties include enacting laws and either creating or fostering institutions necessary to addressing each of the major problem areas described below.

A possible negative state duty destined to be controversial is a duty not to prevent or delay a child’s family placement by restrictions or discrimination against out-of-community or intercountry adoption, especially in the case of infants and very young children. Because of the inevitable shortage of prospective adopters in many countries, some rule allowing for intercountry adoption under certain circumstances is important to achieving an effective right to the opportunity for child placement. Yet any variation of such a rule is likely to stir the same opposition that rises generally against intercountry adoption. The solution, as noted above, lies in the proper characterization of the role of intercountry adoption. The right to family placement is a child’s right, not a prospective parent’s right. A state that prefers its resident adopters over foreign adopters does not violate any party’s right as long as a child is suitably placed with a family without unreasonable delay. If local placement is not possible within a time frame that serves the best interests of the child, the child’s right to an opportunity for family placement would demand that the state allow placement with foreign parents.

And intercountry adoption is not just a gap-filler. Observers in “sending” nations have often observed that intercountry adoption inspires greater local interest in and support for domestic adoption. Foreign adopters often develop a connection with the orphanages and

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communities from which their children originated, supplying much needed donations and other support. Because foreign adopters pay fees for legal, judicial, administrative and social services, they supply some and perhaps a very substantial part of the financial resources necessary to build the infrastructure for a larger and better developed family placement system.

The second major problem area—determining when a child is suitably eligible for substitute family placement—is likely to be equally vexing. There are at least four categories of children who might be in need of family placement: Children whose parents are deceased, children whose parents lack capacity and might be “terminated” by state action, children who are lost or separated from their parents under circumstances making reunification unlikely, and children voluntarily relinquished by their parents for the purpose of alternative care including substitute family placement. Any one of these categories poses its own set of difficulties worthy of substantial investigation and exposition.

Consider, for example, the problem of voluntary relinquishment. For reasons discussed earlier, international law should acknowledge that a parent might voluntarily and intelligently relinquish his or her child for substitute family placement, and that such relinquishment might be appropriate and in the best interests of the child. The Guidelines’ current treatment of the topic of voluntary relinquishment is neither realistic nor useful. Given that parents will sometimes relinquish their children regardless of any law or state policy, and given that supervised relinquishment can be in a child’s and parent’s best interests, the appropriate function of an international law of family placement should be to describe safeguards against the hazards of unsupervised and informal relinquishment.

244 See Carlson, supra note 2, at 754-55.
245 See pages 25-35, supra.
246 Id.
For example, the “purchase” of children or financial inducement to relinquish is widely condemned, but a mere prohibition is insufficient. Laws prohibiting financial inducements frequently fail to address a related set of questions, such as whether the same rule applies to an offer of medical care, maternity care and temporary shelter during pregnancy. Moreover, effective institutions to supervise the relinquishment and placement process and guard against improper payments are essential to assure compliance with a rule against purchase.

Acknowledging the possibility of voluntary relinquishment may also require attention to other difficult subjects including a state’s duty to assure adequate investigation of, services to and counseling for parents who are considering the relinquishment of their children. And perhaps most vexing of all, what are the rights of parties other than the mother—especially a non-marital father, grandparents or extended family members—to consent to, intervene in or veto a prospective relinquishment? This list of problems in determining a relinquished child’s eligibility for placement is not exclusive, and of course there are still more issues to confront in determining the eligibility of children lost or separated from their parents or in need of protection from incapacitated parents.

The third problem area for investigation—identifying and describing measures to assure that placement is safe for the child and the new substitute family—includes issues nearly as important and controversial as the first problem area. Assuring the safety of the placement from the child’s point of view has at least three components: (1) supervising or regulating the matching process, such as by licensing and regulating the intermediaries who arrange adoptions; (2) assuring that the adopters are “qualified” in the sense that they are suitable parents; and (3) providing counseling and training for the adopters to assure their preparation for the usual demands of parentage plus special demands for any particular adoption, such as interethnic,
interracial or intercountry adoption. The first of these components—regulating the matching process—is likely to be among the most difficult because it includes problems still unresolved in many jurisdictions with a long history of adoption. For example, should placement be arranged exclusively by the state or by licensed non-governmental organizations? Or is “direct” or independent placement by the relinquishing parent to the adopters without an intermediary ever an appropriate means of placement? Supervising the placement process does not necessarily preclude all direct placement. For some birth parents, a right to direct placement—especially with relatives or other members of the near community—is a valued means of preserving a family connection or of exercising a final measure of control over the child’s future.

With respect to the last major problem area—describing the ongoing effect of family placement—international law should establish minimum standards for achieving the most important features of child rearing in a “family setting.” The minimum model need not fulfill all the features of the traditional U.S. “adoption” model, in which the adopters become the legal parents of the child for every purpose under the law and to the complete exclusion of the child’s original family. Even in the U.S., the traditional model is now subject to variation and exception. For example, it is no longer universally true in the U.S. that stranger adoption marks a complete cessation of relations between the child and the birth family.

The essential features of family placement include a requirement that placement should be for the purpose of child rearing in the usual sense and not for other purposes, such as domestic service or economic gain or compensation beyond a provision in some cases for support for part

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247 By “stranger adoption” I mean adoption involving birth parents and children who were not acquainted with or related to the adopters before the placement.

of the material cost of child rearing, especially in the case of children with disabilities.\textsuperscript{249} The Guidelines suggest two more essential requirements: “continuity” and “permanency.”\textsuperscript{250} As used in the Guidelines, the term “continuity” suggests that family placement should provide a child with a sense of stability and protection that comes from being part of a family providing continued, unconditional nurture, support and support. “Permanency” suggests that the new, substitute family unit will be equally or nearly as secure as any non-adoptive family unit against disruption by outside intervention, and that resulting family connection and identity can and likely will be life-long. These features of family placement are necessary to assure that the child and the adopters can achieve a level of mutual attachment that makes families the ideal setting for child rearing.

\textbf{Conclusion}

International law declares a child’s right to be raised in a family environment but denies that right to children whose first families have failed, and it grants states discretion to institutionalize. The result, as the law stands, is state discretion to institutionalize children against their best interests. The contradiction persists despite growing recognition—even in bodies with authority to write and interpret international law—that institutionalization is harmful to children and that substitute family placement provides a far superior chance for a child’s healthy development.

\textsuperscript{249} In other words, permanent family placement should be distinguished from paid caregiving in which the caregivers receive a fee for the service of acting as a parent. While such fee arrangements common to foster care are often necessary for temporary caregiving or for the placement of children who cannot be placed in permanent, substitute families, these arrangements should not be confused with placement with substitute parents who have accepted placement solely to be parents and without an expectation of compensation for parental services.

\textsuperscript{250} Guidelines, supra note 8, pars. 60, 158.
To resolve the contradiction, international law should forcefully declare what is widely acknowledged: children who lack functioning families have a right to the opportunity to placement in substitute families. The Guidelines, for all their shortcomings, are some evidence of readiness for this next step in international law. There is, of course, still no guarantee that international law-making bodies could achieve consensus on more than very general and basic principles associated with this right in the near term. The actual measures necessary for a right to family placement are likely to be contentious. Those who have vigorously opposed adoption in the past because of their suspicion of intercountry adoption might renew their objections with equal force. Thus, promotion of a right to family placement will require a more careful approach to what is essential to family placement from the child’s point of view, and a more careful articulation of the role of intercountry adoption in fulfilling the rights of children in need of family placement. The goal is a child’s right to family placement in general. Intercountry adoption is but one means. It is not the goal.