

**FOCUS ON ADOPTION: Conference: “In the Best Interests of Children: A Permanent Family” Guatemala City, Guatemala – Jan 20-21, ’05**

**Elizabeth Bartholet:<sup>1</sup> Keynote, Jan 20, ’05: “Defining the Best Interests of the Child”**

**THANKS**

For inviting me: an important conference designed to address some of the important differences of opinion on both sides of the international adoption divide.

For being here – all on both sides of the divide care about the best interests of the child (BIC) – my hope is that we can work through our differences so can work together actually to promote BIC

**INTRODUCTION**

My talk will be about areas of agreement and disagreement, especially the latter – can we work through these areas of disagreement??

Agreement generally on BIC as key

Disagreement on role of international adoption (IA)

– whether it is positive/negative for children

– even those who agree some form of IA good for kids disagree on what form, what are appropriate laws

**AGREEMENT: MORE SPECIFICS on what I think we all agree on:**

*Long-Term Goals: Solving Social Injustice so Families aren’t Disrupted* – so more kids can grow up with birth parents

–Those of us who believe in IA still recognize it’s a solution to what’s often tragic – family disruption through poverty, war, related disruption

–We applaud with others the recent announcement by UN Taskforce calling on rich countries to take concrete action to solve world poverty – to reduce extreme poverty by one-half by 2015, and eliminate entirely by 2025.

*Short-Term Realities: Families are Disrupted* – many kids of today will not grow up with birth parents

–Their real-world alternatives are:

–State care: orphanages typically, and here in Guatemala often group homes and foster care that are better than the typical orphanages of the world but still far from ideal

–No care: on their own on the street

–Alternative families in adoption

–Better for children given these real-world options to be in adoptive homes

–Need also to help those kids who won’t be placed in adoptive homes, as many will not be.

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**Net on Agreement:**

–Long term should work to achieve social justice

–Short term should help kids now: ideally by placing them in adoptive homes; for those who can't be so placed by improving the conditions in which they live.

– And realistically should also be able to agree: Adoptive families will be way more available through IA than Domestic Adoption; way more kids will get adoptive homes if IA an option; because the poverty that results in family disruption also limits numbers of adoptive homes

**DISAGREEMENT: WHAT ROLE IA PLAYS & HOW IT SHOULD BE REGULATED**

Here want to take seriously the critique of IA – Look at main concerns of opponents/critics

These main concerns fall again into Short-Term and Long-Term Categories

*(1) Short-Term BIC Concerns*

These have to do with whether kids will be better or worse off if placed in IA.

None of these concerns should serious people, seriously concerned with BIC, take seriously

*(A) Organ-stealing Rumor:* idea that IA may be used to facilitate kid murder for organs to be used in other kids

–Not true

–Never any evidence indicating was true in any single instance

–Rumors have been nonetheless investigated on multiple occasions by UN and conclusion has every time been that there was no truth to the rumors

–Some may genuinely believe the rumors nonetheless, which is sad; But clear others are deliberately fomenting the rumors, knowing their falsity; None should be fooled by this anti-adoption tactic.

*(B) Kidnapping, Baby-Buying:* idea that IA may involve kids whose birth parents have not genuinely consented but instead the kids have been stolen or the birth parents pressured by \$ offers

–Here true that in some instances these things have happened - a tiny part of larger picture but still very unfortunate, as all again can agree.

–Laws exist to prevent but have in past on some occasions been broken

–Answer is to enforce the laws; Answer is what now have in place in Guatemala, e.g. significant protections through DNA testing to ensure that actual birth mother is one who gave consent

–Answer is *not* to close down IA – Answer is not to injure the large number of kids who could get homes through entirely legitimate adoption as have in past

–Closing down IA would be what we in U.S. might call “throwing out the baby with the bath water.” For example, an analogy would be to respond to child abuse by birth parents – which exists – by saying must take kids away from all birth parents, must stop any kids from going home from hospital with birth parents, and put all these kids in orphanages. No, of course not, in that context we say we must simply enforce the laws against abuse by birth parents.

–I can cite the Hague Report as evidence, as Exhibit A here: those studying IA in putting together Hague Convention on Intercountry Adoption thought about the kidnapping/baby-buying issue, recognized that some such had occurred on occasion, and concluded that the solution was *not* to close down IA but actually to facilitate IA – they concluded that some of reasons that such illicit activity as occurred did occur was because restrictive regulation put so many irrational barriers in the way of IA that it encouraged people to avoid the legal IA system altogether; they concluded that it was adoption-friendly, facilitative regulation in the IA area , as against new restrictive regulation, that would operate to reduce illicit activity.

*(C) Heritage and Identity Issues:* Idea that kids placed out of country will suffer by virtue of the loss of national and cultural heritage, and will grow up with confused identities

–Must start analysis by recognizing that the real choice for most kids in Guatemala who can’t be raised by birth parents is between some home and no home – most will only get a true home and family and parents in international adoption; alternative for most will not be domestic adoption but orphanage or the street.

–Once so recognize then obvious that IA serves BIC; nothing to the Heritage & Identity issues if focus on BIC – Kids growing up in orphanages and on the street are not likely to develop any healthy sense of identity or heritage.

–Know this from common sense: human kids need nurturing homes with parents

–Know this from Developmental Psychology

–Know this from empirical research: all of it:

–All shows age at time of adoptive placement key to successful adjustment

–None shows any harm to kids from transracial adoption (TRA) or IA

–All show IA works: kids do well, especially well if placed early

–By contrast research on orphanages shows:

–Orphanages are a terrible place for kids to grow up: if we are honest we know this – none of us I wager would allow one of our own kids to spend one unnecessary day in the typical orphanages of the world: kids in orphanages typically either die in those orphanages, or grow up damaged and unprepared for happy, productive lives;

–Kids so lucky as ever to be released for adoption fare much much worse than those released in infancy; a high %age will have major difficulties in attachment, major problems in adjusting so can live happy, productive lives;

–Guatamalan institutional care is, like that in the U.S., better than that in most of the world, but it is still not nearly as good as a true home.

–Finally, internationally adopted kids are not growing up *without* any sense of heritage: the IA world of today is one which provides adoptive parents with powerful socializing about the importance of bringing up their children with respect for their country of origin and their cultural heritage.

**Net on Short-Term BIC concerns: IA serves the best interests of the children placed. There should be no doubt on this.**

*(2) Long-Term and Larger Community Concerns both for Children and for Adults in Guatemala*

These are the only concerns, in my view, that serious people should take seriously

The Argument, rarely articulated, would go like this:

- Families shouldn't be broken up by poverty and related social injustice
- We should address the problems that result in family break-up and IA doesn't do that – at best it arguably “rescues” a handful of kids, at best it's a band-aid operation.
- The \$ spent on IA would do more good if spent on improving social conditions for the masses of kids who will never be adopted, and for their parents and the country generally.

This is an important argument – if I believed that IA was in any way counter-productive to the interests of the larger group of kids and adults in Guatemala, I would agree that we should close it down.

But I don't believe it – in fact I believe that IA furthers the goals of addressing the broad issues of social injustice and is in no way counter to those goals.

Closing down IA is not likely to trigger social reform, and there is no evidence that it has ever functioned this way. It is simply likely to lock a generation of kids into orphanages and other inadequate situations, dooming their chances in life.

By contrast, keeping IA open means bringing thousands of foreigners into Guatemala, making them aware of the conditions in which many children live in orphanages and on the streets. True these foreigners will adopt only a handful of those kids in need, but:

- They will contribute resources to the country, its child welfare system, its orphanages, through the fees paid during their stay, and through the kinds of programs that adoption agencies typically start in sending countries.
- They will go back to their home countries newly aware of needs in Guatemala. Many of them will contribute on an ongoing basis through adoptive parent organizations and otherwise to orphanages and agencies committed to helping the poor children of Guatemala.
- These adoptive parents and their children, these new families with their international identities, will almost certainly be far more supportive than the norm in populace of government policies in the U.S. that are more generous to the children's country of origin and its peoples.

I am not saying that IA will be magically transformative. But it *pushes in the right direction* in terms of the long-term goal which we all share – that of solving the problems of social injustice that result in family break-up.

**Net in terms of the Long-Term and Larger Community Concerns: IA not only provides extraordinary help for those kids placed, but is likely also to help those kids not placed as well as to push in the direction of larger social justice goals.**

**PRACTICAL IMPLICATIONS – WHAT DOES IT MEAN IF YOU CONCLUDE WITH ME THAT IA IS APPROPRIATE BECAUSE IT BOTH SERVES THE BIC IN SHORT-TERM AND FURTHERS OUR LONG TERM SOCIAL JUSTICE GOALS??**

What types of laws/regulations are needed regarding IA? Another U.S. expression: “The Devil is in the Details.” The issue is not so simple as making a decision not to outlaw IA – you can eliminate IA as effectively by regulation that purports to allow it – you can kill IA as effectively *unofficially* as officially. So we need to pay intense attention to the details of any proposed regulation. This is a moment of great risk in Guatemala. Many are talking of “adoption reform” and in the adoption world what typically passes for “reform” equates with risk.

Key Principles I urge upon you:

(1) *Focus on the positive and not the negative in IA:*

–Typically adoption regulation focuses only on the negative – on “protecting” against all the alleged risks in adoption, protecting against improper separation from birth parents, and from country of birth, and against improper selection of new parents.

--So we get endless legal rules about whether kids are appropriately freed for adoption and whether adopters are appropriately screened for fitness.

--Such rules are important, but should not be the only focus, because this negative focus will result not in BIC but its opposite, in a series of barriers to adoption so significant that they deny kids what in fact they most need, loving permanent homes early in life. ***For most kids the key negative is not getting a home.*** The tragedy of most adoption “reform” is that it tends to hurt kids by denying them the opportunity for a home.

–Focus on the positive would mean, e.g.:

–Systematic Identification of kids in need of homes & Freeing up for Adoption: no country does this adequately in a proactive way.

–Expediting Adoption:

–Avoid those Negative rules which insist on delay, on e.g. holding periods for a search for same-country adoptive families; imposition of this kind of delay should be a crime – we would think so if *our* child were held; even if we conclude that we should have a same-country adoption preference we should do it via the equivalent of what in the U.S. we call “Concurrent

Planning” so that kids aren’t delayed in placement when no in-country home is available as typically it won’t be. Here it’s important to note that Jakob Doek, Chair of the UN Committee on the Rights of the Child, took a major step forward in announcing at the end of a recent conference that: “The institution is the worst possible option for an orphaned or abandoned child, thus other options, such as foster care, domestic adoption and international adoption, must be considered simultaneously.”<sup>2</sup>

–Create: incentives to expedite; penalties for undue delay in placement. We can look here for models to: (1) The U.S. 1997 ASFA (Adoption and Safe Families Act) which requires that kids be moved out of foster care when they have spent 15 of the prior 22 months there, provides states with financial rewards for increasing the number of adoptions out of foster care, and gives a nod of approval to concurrent planning; and (2) an interesting Texas state law that eliminated race matching in adoptive placement, and then provided an incentive for social workers to obey the law by threatening them with discipline for any violations.

## *(2) Beware the State*

We’re used to thinking of the State as Protector of BIC but the reality is that the State is often the unwitting enemy. The State tends to focus on the Negative not the Positive. The energy for adoption typically comes from private persons – birth mothers who want kids to have homes and the adopters who want to parent, along with the intermediaries who facilitate connecting the kids with the prospective parents.

It is far too easy for all to join forces in condemning “profiteers” – the lawyers and other intermediaries who make a profit. Too easy to think that we will solve problems in the adoption arena by putting everything in the hands of the State. Experience tells us this won’t work to help children:

- Within the U.S. state-run adoption systems have regularly condemned kids to long delays in adoption, locking kids into inadequate foster and institutional care. I have seen this personally in my work over the last couple of decades in the area of race matching and transracial adoption as well as other areas.
- In one sending country after another, state take-over of the adoption system has been a disaster for children: in one country after another it has meant that instead of children being adopted as infants by the thousands, adoption has been reduced to a trickle and those children released for adoption are released only after damaging months and years in

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<sup>2</sup>Press statement issued by International Advocates for Children Nov. 1, 2004, regarding Symposium on New Tools for Understanding and Enforcing the Human Rights of Orphaned and Abandoned Children, held Oct. 20-22, 2004, hosted by International Advocates for Children with co-presenter Center for Adoption Research at the Univ. Of Massachusetts Medical School, Atlanta GA.

orphanages. Sadly this has been the recent experience in a number of Central and South American countries subjected to “adoption reform.”

–This issue came up in the Hague Convention negotiations and those concerned with children’s genuine interests concluded that the private adoption option should be preserved for just these reasons.

## CONCLUSION

First I want to add to the Introduction given me the information that I am starting at Harvard Law School something we are calling the Child Advocacy Program or CAP. International adoption will be one of the areas on which we will focus, and I hope to work with many of you in this connection. Also I know that much of what I have said today has been general and conclusory in form, and I want to refer any of you who are interested to my website where you will be able to download various of my articles on these topics: [www.law.harvard.edu/faculty/bartholet](http://www.law.harvard.edu/faculty/bartholet).

My hope is that Guatemala will continue to move with what I see as the wave of history. It’s a slow-moving and erratic wave, which occasionally crashes back upon us, but yes I do see it as moving essentially in one direction.

Recent decades have witnessed increasing recognition of children’s rights, *and* of IA as an important means to the end of furthering children’s most fundamental right – the right to grow up in a nurturing home. Some examples:

–The UN Convention on the Rights of the Child: This provided important recognition by all the countries of the world – unfortunately excepting the U.S. which has failed to ratify it – of the priority that should be given to children’s rights, *and* of the importance of the child’s right to a family. The Preamble to that Convention states: “The child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.”

–South Africa’s recent Constitution: This Constitution, probably the most progressive in the world, recognizes the child’s affirmative right to be guaranteed by the state the right to grow up in a nurturing home. Also, one of South Africa’s first post-apartheid acts was to eliminate the ban on transracial adoption – rejecting the idea that is also at the heart of restrictions on IA that kids belong with and should be kept in their racial or ethnic or national group of origin. This move is paralleled in the U.S. by the passage of the Multiethnic Placement Act (MEPA), banning any preference for placing children in same-race foster or adoptive families in recognition of the same principle and of the limited significance of racial or other such distinctions between what are in the end all members of the human race.

–The 1993 Hague Convention on Intercountry Adoption: this is the 1<sup>st</sup> international law document recognizing IA as preferable for children to any in-country solution other than adoption – IA as preferable to any in-country institutional care. It represents agreement by most

of the sending and receiving countries of the world on this principle. A giant step forward for IA.

This *is* the move of history. Guatemala should take pride in the position of leadership that it now holds. Guatemala is arguably the best – certainly it is one of the best – of the sending countries in terms of its treatment of kids in need of homes and its related IA regulation. I am outraged to hear that Guatemala is being told by various forces that it needs to “reform” so that it can achieve “international standards.” Those standards are what are condemning thousands on thousands of kids to life and death in the intolerable conditions typical of the world’s orphanages. Those standards mean that countries from which kids used to be regularly released for adoption in infancy, before they had suffered permanent damage from orphanage life, are now released only in tiny numbers and even then only after years of damaging delay. It is Guatemala that should be looked to by others as a model for reform:

- Guatemala protects the right of birth parents and children to stay together if at all possible.
- But if that is not possible, Guatemala protects the child’s right to move on to a family with minimal damage.

It is my hope that:

- Guatemala will maintain its position of leadership.

- Guatemala will work to improve its adoption system by focusing yet more than it does at present on the positive potential in adoption.

- Guatemala will avoid the pitfalls that so many Central and South American countries have fallen into in their attempts at adoption reform.

It is my profound belief that if Guatemala were to do these things, this would benefit not only the children placed in adoptive homes, but also the larger community of kids and adults in Guatemala, both short and long term.