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Barbara Stark

*Maurice A. Deane School of Law at Hofstra University*

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# LOST BOYS AND FORGOTTEN GIRLS: INTERCOUNTRY ADOPTION, HUMAN RIGHTS, AND AFRICAN CHILDREN

BARBARA STARK\*

## INTRODUCTION

Everyone knows the story of the Lost Boys of Sudan,<sup>1</sup> thousands of children who lost their families and villages to brutal civil war, fleeing across East Africa to Kenya, where they survived in a desolate refugee camp. Their story spread, and several thousand of the Lost Boys were resettled in the United States. There, they asked their suburban foster families whether there were lions in the bush, learned how to use can openers and televisions, and saw snow.

While the Boys were lost — and then found — the Girls were forgotten. As a recent editorial in *Refugees*, a publication of the UN High Commissioner for Refugees (“UNHRC”),<sup>2</sup> notes: “[t]he story of the Lost Boys and Girls of Sudan neatly underlines the often differing problems and fortunes of refugee women and refugee men.”<sup>3</sup> The civil wars which have ravaged Africa for the past ten years<sup>4</sup> led to floods of refugee children. Guidelines promulgated by

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\* College of Law Faculty Scholar and Professor of Law, University of Tennessee College of Law. Cornell B.A., NYU J.D., Columbia LL.M. This paper was presented at the International Law Student Association Symposium on the Rights of the Child. I am deeply grateful to the students and to Professor Maria Frankowski for inviting me to participate, to my fellow panelists and the participants for their helpful comments, to the College of Law, the William W. Davis Faculty Development Fund, and ILSA for their generous financial support, and to Hannah Kim for extraordinary research assistance.

1. Sara Corbett, *The Lost Boys of Sudan; The Long, Long, Long Road to Fargo*, N.Y. TIMES, April 1, 2001, at 48 (describing “a group of roughly 10,000 boys who arrived in Kenya in 1992 . . . having been homeless and parentless for the better part of five years.”).

2. See generally, U.N. High Commissioner for Refugees (UNHCR), *Women: Seeking a Better Deal, The Lost Girls of Sudan*, 126 REFUGEES 2 (2002) [hereinafter UNHCR, *Women: Seeking a Better Deal*].

3. See generally UNHCR, REFUGEE CHILDREN: GUIDELINES ON PROTECTION AND CARE (1994) [hereinafter REFUGEE CHILDREN: GUIDELINES] (“It is UNHCR’s policy that children in an emergency context are not available for adoption. Any adoption of an unaccompanied child of concern to the High Commissioner must be determined as being in the child’s best interest and carried out in keeping with applicable national and international law.”).

4. Ibrahim Elbadawi & Nicholas Sambanis, *Why Are There So Many Civil Wars in Africa?: Understanding and Preventing Violent Conflict*, 9(3) J. AFR. ECON. 244, 244-45 (2000). TAISIER

the UNHCR<sup>5</sup> and the ICRC,<sup>6</sup> in conjunction with domestic adoption law, the African Charter on the Rights and Welfare of the Child ("African Charter"),<sup>7</sup> the Convention on the Rights of the Child ("CRC"),<sup>8</sup> and the asylum policies of the United States<sup>9</sup> can lead to a complicated and problematic resettlement

M. ALI & ROBERT O. MATTHEWS, CIVIL WARS IN AFRICA: ROOTS AND RESOLUTION 54-55 (1999). For an insightful analysis of the development of regional law to address and contain these wars, see Henry Richardson, *Humanitarian Intervention in Africa*, ASIL PROC. (2002).

5. See generally REFUGEE CHILDREN: GUIDELINES, *supra* note 3 (setting out UNHCR's policy that "children in an emergency context are not available for adoption. The adoption of an unaccompanied child of concern to the High Commissioner must be determined as being in the child's best interest and carried out in keeping with applicable national and international law."). UNHCR, UNHCR POLICY ON ADOPTION OF REFUGEE CHILDREN (1995) (repeating that since "most unaccompanied children are not orphans, what they need is suitable interim care with a view toward possible reunification with their families, not adoption."). WOMEN'S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, UNHCR POLICY ON REFUGEE WOMEN AND GUIDELINES ON THEIR PROTECTION: AN ASSESSMENT OF TEN YEARS OF IMPLEMENTATION (2002) (discussing the impact of gender equality mainstreaming on the UNHCR Guidelines, and setting out definitions of sexual and gender based violence. *Id.* at 15-16.).

6. See generally INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC), ICRC STATEMENT TO THE UNHCR GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION: REFUGEE CHILDREN I (2002) (defining "unaccompanied child" as "a child under 18 years of age or the legal age of majority who is separated from both parents and is not being cared for by a guardian or another adult who, by law or custom, is required to do so."). The ICRC has not taken legal responsibility for unaccompanied children. EVERETT M. RESSLER, NEIL BOOTHBY & DANIEL J. STEINBOCK, UNACCOMPANIED CHILDREN 269 (1988). Daniel Steinbock, *Unaccompanied Children in Comparative and International Law*, in UNACCOMPANIED CHILDREN, *infra* note 10 at 269.

7. African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990) (entered into force Nov. 29, 1999) [hereinafter African Charter]. For a cogent analysis of the African Commission established to "promote and protect" rights assured under the African Charter on Human and Peoples' Rights, see Julia Harrington, *The African Commission on Human and Peoples' Rights*, in 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 455 (Kelly D. Askin & Doreen M. Koenig eds., 2000) Commissioner Duarte has called for "an additional protocol to the African Charter, which deals specifically with women's human rights." *Id.* at 464. See generally B. G. Ramcharan, *The Travaux Préparatoires of the African Commission on Human and Peoples' Rights*, 13 Hum. RTS. L. J. 307 (1992).

8. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, Supp. No. 49, at 167, U.N. Doc. A/44/49 (1989) (entered into force Sept. 2, 1990) [hereinafter CRC].

9. Cf. CANADIAN IMMIGRATION AND REFUGEE BOARD, GUIDELINE 4: WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION UPDATE (Nov. 25, 1996), available at [http://www.cisr.gc.ca/en/aout/guidelines/women/index\\_e.html](http://www.cisr.gc.ca/en/aout/guidelines/women/index_e.html) (last visited on March, 3, 2003) (discussing asylum claims who "feared persecution as the consequence of failing to conform to, or for transgressing, certain gender discriminating religious or customary laws and practices in their country of origin. . . [which] may create conditions for the existence of a bold gender defined social group."). For the UK gender asylum guidelines, see Nathalia Berkowitz, *Immigration Appellate Authority: Asylum Gender Guidelines* (2000), available at <http://www.iaa.gov.uk/GenInfo/IAA-gender.htm> (last visited Apr. 30, 2003).

process for such children. The system works,<sup>10</sup> like too many child welfare regimes, in a patched-together, haphazard way. But it did work—at least for the Boys. For the Girls, however, the results have been disastrous.<sup>11</sup>

## I. ADOPTION

### A. *In the Refugee Camp*

Where did the Girls go? As the UN High Commissioner on Refugees reports, the Girls were taken into foster families as soon as they reached the refugee camp.<sup>12</sup> But their role in their new families is frequently that of “unpaid servants.”<sup>13</sup> They cook, clean, and gather firewood for their foster families.<sup>14</sup>

That is not their only value, nor the only reason they are taken in. Families get a bride-price for a ‘daughter’ and, according to the High Commissioner on Refugees, several of the Girls have been given by their foster families in

10. Cf. EVERETT N. WRESSLER, ET AL., UNACCOMPANIED CHILDREN: CARE AND PROTECTION IN WARS, NATURAL DISASTERS, AND REFUGEE MOVEMENTS 127 (1988) (noting that “In virtually all emergencies individuals and families have spontaneously provided assistance to children other than their own, even in the face of danger, scarcity, and risk . . . [I]n refugee and displaced person camps, families have adopted and cared for unaccompanied children.”).

11. Jacqueline Bhabha, *Internationalist Gatekeepers?: The Tensions Between Asylum Advocacy and Human Rights*, 15 HARV. HUM. RT. J. 155, 157 (2002) (noting that “a gender-based approach to rights has transformed thinking about what counts as rights violations, problematizing not only the simplistic division between public, state-induced harms and private domestically-caused problems, but also the very notion of the ‘political’.” Human rights discourse has thus been transformed to include questions related to gender-defined social mores, sexual orientation, and sexuality.”) *But see* Steinbock, *supra* note 6, at 213 (“In general, there is less need for the development of new legal theory or the creation of new legislation for unaccompanied children than there is for adherence to, and implementation of, existing legal standards.”).

12. Emmanuel Nyabera, *Man-eatin Lions, Crocodiles, Famine . . . The Lost Girls of Sudan*, 1, (126) REFUGEES 8 (2002) (“Following Sudanese cultural traditions, many of the girls were absorbed into foster homes and left to a very uncertain fate, overlooked and forgotten by the outside world.”).

13. Ishbel Matheson, *The Lost Girls’ of Sudan*, BBC NEWS, June 7, 2002, at 1 at <http://news.bbc.co.uk/1/hi/world/africa/2031286.stm> (last visited Apr. 15, 2003) (describing chores of 17 year old Grace Anyieth, “cooking, cleaning, washing, fetching water from the distant stand-pipe, looking after her guardians’ children. In other words, she is an unpaid servant.”)

14. *Id.* at 2-3 (noting that “although an estimated 3,000 [girls] arrived in Kakuma in 1992, most have simply vanished from official records . . . the boys and girls were separated as soon as they arrived. . . the boys were kept together as a group living in villages within the camp. According to Sudanese custom, the girls were placed with guardians who were supposed to protect them. But many foster parents, it seems, did not have the girls’ welfare at heart. In a place where poverty is rampant, young women are a valuable commodity. They can be sold off for a good bride-price.”).

arranged marriages,<sup>15</sup> in violation of the African Charter<sup>16</sup> and the Convention on the Elimination of All Forms of Discrimination Against Women (“Women’s Convention”).<sup>17</sup>

Are the girls being treated any worse than natural daughters? This is an important question since natural daughters are also expected to cook, clean, and collect firewood and may be given in arranged marriages. But the treatment of the Forgotten Girls, including a number of rapes in the camps, has been bad enough to alarm the UNHRC.<sup>18</sup> In fact, as young adolescents many of them have already become pregnant or given birth.<sup>19</sup> Once a girl has been raped, no Sudanese man will marry her. Once she has a child of her own, she is a lost woman, no longer a lost girl. Kofi Nable, head of the U.N. Refugee Agency in Kakuma, says that it is too late for the Forgotten Girls: “We have lost them . . . they are completely lost. They have lost that status of ‘Lost Girls’. Some of them are mothers. They are married . . . there’s nothing I can do or anyone else can do.”<sup>20</sup>

But until each of the Girls is accounted for, they should not be written off. Even if all of the Girls have become women, moreover, surely they are not the last group of orphaned African girls.<sup>21</sup> As used in the rest of this Article, accordingly, “Forgotten Girls” refers not only to those who might still be in

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15. Nyabera, *supra* note 12, at 8 (quoting a teenage Sudanese girl who “believes this will only be the first of repeated attempts to marry her off. Arranged marriages, after all, are big business. Her first suitor had offered her foster parents 50 cattle, which represents a huge sum in Sudan, as a dowry.”). *See also* Matheson, *supra* note 13, at 3 (According to Sudanese leader Gideon Kenyi, “The issue of dowries has become a priority [of those] who are owning the girls. They see the girls as a way of generating wealth by marrying them or giving them to someone rich.”).

16. African Charter, *supra* note 7, art. 21(2). *Cf.* Harrington, *supra* note 7, at 460 (observing that, “Article 29.7, [of the Banjul Charter] the duty to ‘preserve and strengthen positive African cultural values’ has drawn particular ire from women’s rights activists who raise fears that it ‘can be exploited to violate the rights of women in the name of preservation of African values.’”).

17. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, Supp. No. 21, at 193, U.N. Doc. A/RES/34/180 (Sept. 3, 1981) [hereinafter Women’s Convention or CEDAW]. Article 16(2) provides in pertinent part: “the betrothal and marriage of a child shall have no legal effect.” *Id.* art. 16(2). *See also* Annie Bunting, *Child Marriage*, in 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 669 (Kelly D. Askin and Dorean M. Koenig eds., 2000) (stating that the CRC does not explicitly bar child marriage, but the Committee on the Rights of the Child has noted that since legal marriage confers majority upon a girl, it deprives her of any benefits under the CRC.).

18. *See* Matheson, *supra* note 13.

19. *Id.*

20. *Id.* at 3.

21. *See* notes 73-74, *infra* (describing the AIDS orphans and the South African Constitutional Court decision allowing for intercountry adoption).

Kakuma, and childless, but those still to come, whether to this camp to or some other equally desolate place.<sup>22</sup>

### B. In Other Countries

In the United States, while many adoptions are by relatives (including step-parents), adoption is generally a two-step process. First, the child's relationship to her biological family is terminated, whether through the parents' surrender, abandonment, or a state finding of abuse or neglect. Second, the child is placed with a new family. Adoption is governed by state, rather than federal, law and every state requires screening of the new parents, including a home-study. After the child is placed, there is a period in which the adoption is provisional. At the end of this period, a final order of adoption is entered. An adopted child legally becomes part of her new parents' family and takes their names. Her relationship with her biological family is legally terminated.

In growing numbers of independent adoptions, however, the child's ties to the family of origin are not terminated. Rather, the birth mother may choose the child's new parents and maintain an ongoing relationship with the child. In conjunction with lower birth rates, and the growing social acceptance of single motherhood, this has dramatically decreased the number of children available for full legal adoption in the United States.

In Muslim countries, formal legal adoption is rare.<sup>23</sup> Rather, if a child's parents are unable to take care of her, a relative assumes responsibility for the child through an informal system known as *kalafah*.<sup>24</sup> The child keeps her

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22. Of course, the range of circumstances, as well as the different ages of the girls, require context-specific analyses. As Professor Woodhouse reminds us, 'nature' and 'nurture' are complex and intertwined:

[C]hildren, scientists tells us, are not blank slates. They arrive in the world with a lively genetic heritage and become active participants in construction or reconstruction of those internal frameworks that constitute identity. Although the role of biology is still under investigation, most studies agree that genetic heritage shapes not only physical appearance, but also personality. On the other hand, psychologists tell us that children begin to construct and enact their own 'personal identity' from a very early age, through attachments to caregivers and through interactions with their family environment . . . . They grow as individuals, but in relation to the people and cultures around them. A child's identity, moreover, is far from a static concept . . . children evolve and their needs change.

Barbara Bennett Woodhouse, "Are You My Mother?": *Conceptualizing Children's Identity Rights In Transracial Adoptions*, 2 DUKE J. GENDER L. & POL'Y 107, 111(1995).

23. But see Steinbock, *supra* note 6, at 240-41 (describing clear trend "in favor of legal recognition of adoption," even in Islamic states such as Bahrain, Kuwait, and Oman).

24. G. Parra-Aranguren, *Explanatory Report on the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, paras. 4 1-42, at <http://www.hcch.net/e/conventions/exp133e.html> (last visited Apr. 15, 2003) (Paragraph 42 describes arguments made by Egypt for the inclusion of the following: "Taking into account the other alternatives and forms

name and her ties to her biological family. A young girl may be sent to a childless aunt, for example, if her mother is already overburdened with childcare.<sup>25</sup> She may return to her family of origin when she reaches puberty, which may be as early as 9.<sup>26</sup> Children under the age of 7 are usually in the custody of their mothers under Islamic law, while older children are generally in the custody of their fathers.<sup>27</sup>

Even among non-Muslims in Africa, informal adoption is common. Under the African Charter,<sup>28</sup> such placements are the first choice for orphans or children whose parents cannot take care of them. There is a strong preference for keeping the child in her state of origin. If the child cannot be placed with relatives, placement with an unrelated family is the next option considered. If a child cannot be placed with a family within the state of origin, however, institutionalization is preferred over intercountry adoption under the African Charter.<sup>29</sup> Where the country of origin is no longer an option, as in the case of the Forgotten Girls, there is a strong preference for keeping the child among

of childcare, e.g. foster placement — *kafalah* as enshrined in Islamic law, and the need to promote international cooperation therein.” The Egyptian proposal was not considered for lack of support.). *But see* Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, G.A. Res. 41/85, U.N. GAOR, 95th plen. Mtg., U.N. Doc. A/RES/41/85 (1986) (mentioning *kafalah* and foster placement).

25. *See, e.g.,* Nahid Rachlin, *A Bitter Homecoming*, N.Y. TIMES MAG., Apr. 14, 2002 at 76 (describing her childhood up to the age of 9, when she was taken from the aunt who had raised her, and who she called “mother,” by her father who was a stranger to her).

26. *See id.* (explaining that “9 was the age for a girl to marry. My mother was only 9 when she wed my father, who was 29.”).

27. *See, e.g., Islamic Family Law: Possibilities of Reform Through Internal Initiatives Legal Systems: Malaysia*, EMORY LAW SCHOOL: ISLAMIC FAMILY LAW, at <http://www.law.emory.edu/IFL/index2.html> (last visited May 19, 2003) (noting that in Malaysia, a divorced woman has custody of boys until 7, girls until 9; in the Philippines, the mother has custody until the child is 7). *But see Islamic Family Law: Possibilities of Reform Through Internal Initiatives Legal Systems: Algeria*, EMORY LAW SCHOOL: ISLAMIC FAMILY LAW, at <http://www.law.emory.edu/IFL/legal/Algeria> (last visited May 19, 2003) (mother has custody of male until he reaches 16, unless she remarries, in which case, she retains custody until he is 10; mother has custody of daughter until she is 18, unless mother remarries and her new husband is not within the prohibited degree to daughter.).

28. *See* African Charter, *supra* note 7.

29. RESSLER, *supra* note 6, at 180.

In the case of refugees, the possibility of reunification with their families of origin is frequently an important consideration. Children who are removed from long-standing ‘substitute’ parents and returned to estranged biological parents or other relatives are thus subjected to two painful and potentially harmful separation experiences . . . differences in language and cultural practices can complicate the already difficult process of mutual adjustment between the child and his family. Children who are cared for within their own native milieu have a clear advantage over those who are sent to different countries.

those of her own ethnicity, background, religion, and language.<sup>30</sup> The older the girl, the stronger the preference.<sup>31</sup>

Intercountry adoption in Africa is a measure of last resort. That is, only if the child cannot be placed with relatives or a foster family or institutionalized will she be considered for intercountry adoption. Under the African Charter, intercountry adoption is further limited to those countries that are either signatories to the African Charter or to the CRC.<sup>32</sup> The UNHCR concurs, taking the position that "placing children in an adoptive family in another country . . . may be considered only if the child, in the words of the CRC, 'cannot in any suitable way be cared for' in the country where the refugee child lives."<sup>33</sup>

### C. Human Rights Law

International human rights law and international adoption law both govern intercountry adoptions, but they have very different functions and objectives.<sup>34</sup> Human rights law seeks to guide nation states. It provides a normative structure for domestic (national) law. Adoption law functions on another scale entirely. Its objective is to place otherwise parentless children in stable, loving homes. Human rights law, like the map of a continent, provides broad guidelines, an aerial view, appropriate for structuring state policies. For deciding the fate of individual children, in contrast, the smaller scale, more specific, local map of adoption law may be more useful.

Enforcement of the two bodies of law is also very different. The efficacy of international human rights law usually depends on the willingness of the state against which it is asserted to enforce it. Horizontal enforcement, that is, the enforcement of human rights by other states, has been far less effective in enforcing human rights than in enforcing other kinds of international law, such as trade laws. States are generally reluctant to criticize other states, because

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30. This is consistent with the CRC, *supra* note 8, art. 20(3) ("[D]ue regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.").

31. For a thoughtful examination of the "tasks involved in preparing an older child psychologically for adoption," see Vera I. Fahlberg, M.D., *Preparing Older Children for Adoption*, in *ADOPTION: INTERNATIONAL PERSPECTIVES* 103 (Euthymia D. Hibbs, Ph.D. ed., 1991).

32. African Charter, *supra* note 7, art. 24(b).

33. REFUGEE CHILDREN: GUIDELINES, *supra* note 3, at 2 (quoting CRC, *supra* note 8, art. 21(b). Cf. text accompanying *infra* (describing emphasis on "best interest of the child" in the Hague Convention). It should be noted that Kenya participated in the meetings of the Special Commission on Intercountry Adoption, although it is not a member of the Hague Conference. Parra-Aranguren, *supra* note 24, at 6.

34. For an early exploration of some of the tensions between national family laws and international law, see *THE FAMILY IN INTERNATIONAL LAW: SOME EMERGING PROBLEMS* (Richard Lillich ed., 1981).



they do not want to expose their own human rights practices to scrutiny. Where it exists, accordingly, domestic law is always the first and most promising avenue for human rights enforcement.

Adoption law, in contrast, is enforceable in national courts. In the U.S., adoptions that are legal in the country in which they are completed are generally recognized in the U.S. The recent passage of the Child Citizenship Act assures recognition of a child adopted abroad by American parents as an American citizen.<sup>35</sup> Thus, the child's rights under American adoption law would be enforceable in American courts.

International adoption law, in particular the Hague Convention on Intercountry Adoption,<sup>36</sup> sensibly recognizes both international human rights law and domestic adoption laws. Here, the reconciliation of the two bodies of law would be complicated by the Girls' status as refugees, stateless persons.<sup>37</sup> This means that there is no state from which they may demand human rights; rather, they are under the protection of the UNHCR, which has very limited resources. At the same time, because of their extreme vulnerability, refugee children have inspired some of the earliest and most ambitious intercountry adoption efforts,<sup>38</sup> as well as other "rescue" operations.<sup>39</sup> The dilemma is grounded in the harsh reality that, as Professor Steinbock notes, "removal from a crisis area separates the child from his family, community, and, often, his culture-vital sources of the bodily care, affection, intellectual stimulation, and

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35. See Child Citizenship Act of 2000, H.R. 2883, 106th Cong. (2000).

36. Hague Conference on Private International Law: Final Act of the 17th Session, including the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134 (1993) [hereinafter Hague Conference], available at <http://www.hcch.net/e/conventions/text33e.html> (last visited May 19, 2003). For a detailed analysis, see Richard R. Carlson, *The Emerging Law of Intercountry Adoptions: An Analysis of the Hague Conference on Intercountry Adoption*, 30 TULSA L. J. 243 (1994). For a succinct statement of the Convention's advantages, see U.S. Department of State, Bureau of Consular Affairs, *Hague Convention On Intercountry Adoption* (June 17, 2002), at <http://travel.state.gov> (last visited May 20, 2003).

37. See generally, Bhabba, *supra* note 11 (describing the "ambiguous position" occupied by asylum advocacy within the human rights movement).

38. For a description of the "earliest attempt to breach the national quota on behalf of [refugee children]," see Daniel J. Steinbock, *The Admission of Unaccompanied Children into the United States*, 7 YALE L. & POL'Y REV. 137, 146 (1989) [hereinafter Steinbock, *Admission of Unaccompanied Children*] (describing the Wagner-Rogers Children's Bill, which would have permitted 20,000 German children under 14 to enter the United States each year during 1939-40. The effort failed.).

39. See, e.g., *id.* at 153 (describing Operation Baby Lift, involved the removal of 1400 children from South Vietnam who were already in the adoption pipeline for adoption in the United States). Almost 1100 other children were also "rescued," some of whom were not in fact orphans. See, e.g., *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194 (9th Cir. 1975).

socialization necessary for healthy development."<sup>40</sup> Human rights law, in short, provides some useful guidelines, but no easy answers in this context.<sup>41</sup>

International adoption raises a broad range of human rights issues, including the reproductive rights of the biological parents, the right to culture of the adoptee<sup>42</sup> and the family rights of the adoptive parents. There is also the negative space of international adoption, that is, its impact on those who are not adopted. This includes the most vulnerable children in the world, such as the Forgotten Girls. The issue here is whether human rights law provides useful standards in this context, or whether the Girls would be better off relying on individualized determinations of the "best interest of the child" as required under international adoption law.

The question is further complicated by the legacy of colonialism and the often tense relations between sending and receiving countries. As international adoption experts Howard Alstein and Rita J. Simon point out: "[W]hat the West has generally viewed as charitable, humane, even noble behavior, developing countries have come to define as imperialistic, self-serving, and a return to a form of colonialism in which whites exploit and steal natural resources."<sup>43</sup>

40. Steinbock, *Admission of Unaccompanied Children*, *supra* note 38, at 170.

41. For a thoughtful inquiry into the ambiguity and complexities of the application of human rights norms, see Peter Rosenblum, *Teaching Human Rights: Ambivalent Activism, Multiple Discourses and Lingered Dilemmas*, 15 HARV. HUM. RTS. J. 301 (2002).

42. Legal recognition of the risks of legal adoption are relatively recent in the developed states. See, e.g., Graziella Caiani-Praturlon, S.W. *Inter-Country Adoption in European Legislation*, in ADOPTION: INTERNATIONAL PERSPECTIVES, *supra* note 31, at 208 (noting that, as of 1991, "only Norwegian legislation . . . places a condition on intercountry adoption: there must be the assurance that the 'adoption is not harmful to the minor because of the interruption in his links with his country of origin.' This is the only example of a law that stress an often undervalued aspect of adoption, that affects a minor who may be traumatized by a total change in environment.").

43. Howard Alstein & Rita J. Simon, *Introduction*, in INTERCOUNTRY ADOPTION: A MULTINATIONAL PERSPECTIVE 1, 5 (Howard Alstein & Rita J. Simon eds., 1991). As law professor Elizabeth Bartholet puts it, "It is argued that the practice is a new form of colonialism, with wealthy Westerners robbing poor countries of their children, and thus their resources . . . , however poor the country, they find the implication that they cannot care for their own children to be undignified and unacceptable." See ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* 159 (1993). See also Parra-Aranguren, *supra* note 24, para. 44 (As noted in the *Explanatory Report*, "Bolivia and Colombia stressed that the preference for placement with a family [under the Hague Convention] should not give the impression that states of origin were not able to take care of their children."). See generally Rosenblum, *supra* note 41 at 303 ("The language of human rights has a tendency to erase power differentials, cast issues in terms of absolutes, and create categories of victim and violator that reclaim racist and patriarchal hierarchies.")

## II. ALTERNATIVES

### A. *Resettlement in the U.S.*

#### 1. The Question of Status

The Lost Boys have found religious as well as secular sponsors all across the United States.<sup>44</sup> They are attending American high schools, learning computer skills, and trying to build lives in a strange new world.<sup>45</sup> The Girls have not gotten sponsors, in large part because their plight was unknown. They lost their status as an identifiable group almost as soon as they arrived at the refugee camp, being absorbed into families.<sup>46</sup>

Absent a group identity, and the group sponsorship which has resulted from that, the Girls' status would be that of unaccompanied aliens applying for asylum.<sup>47</sup> If the Girls came to the United States, they would join the approximately 14,000 children already languishing in detention centers across the United States.<sup>48</sup> Although the Unaccompanied Alien Child Protection Act of 2001 is supposed to expedite the determination of their status, and assure them of better living conditions while they wait, its implementation remains

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44. Corbett, *supra* note 1, at 3 (UNHCR, working with the U.S. State Department, recommended approximately 3,600 boys for resettlement in the U.S., 500 will be placed in foster homes and independent living apartments. The remaining 3,100 will be resettled as adults.). *See generally* Jan Linowitz & Neil Boothby, *Cross-cultural Placements*, in UNACCOMPANIED CHILDREN, *supra* note 10, at 181 (describing placement options including independent living or adoption).

45. Woodhouse, *supra* note 22, at 108 (noting that, "The very notion of preserving children's cultural or ethnic identities seems to conflict with liberal conceptions of parents' and children's individual rights, ideals of color-blind equality, and a peculiarly American kind of liberty embracing the freedom to reinvent oneself as a new citizen of a new world.").

46. Their membership in the 'social group' of unprotected young women does not currently constitute a ground for refugee status. *Cf.* UNHCR, *Women: Seeking a Better Deal*, *supra* note 2, at 10 (noting that in 1984 the European Parliament passed a resolution for Member States to consider women who violated religious or social taboos as a "particular social group for the purpose of determining whether they qualified for refugee status.").

47. For a description of categories of unaccompanied children in international immigration law, see Steinbock, *supra* note 6, at 253-54. For an excellent survey on the rights and status of unaccompanied children in comparative and international law, *see id.* at 209. *See generally* Bhabha, *supra* note 11.

48. As Professor Steinbock has observed, since World War II "several countries have set up special admissions categories for unaccompanied children . . . outside of normal immigrant or refugee quotas." Steinbock, *supra* note 6, at 254.

uneven.<sup>49</sup> To the extent that they relied on gender-specific claims, such as the fear of a forced marriage,<sup>50</sup> the likelihood of success is an open question.<sup>51</sup>

Professor Steinbock proposes the following criteria for the admission of unaccompanied children:

When the parents have preceded the child to the United States; (2) when the child's foster family or guardian is admitted; (3) when the refugee population of which the child is a member is brought as a group to the United States; or (4) when the child faces exceptional risks or harm by virtue of separation from his or her parents, or when acceptance is necessary to provide adequate age-appropriate care.<sup>52</sup>

As members of "a refugee population brought as a group to the U.S.,"<sup>53</sup> the Girls would presumably avoid the detention centers. Even if, like the Lost Boys, the Girls were able to proceed directly to new homes in the United States,<sup>54</sup> it is not obvious that this would always be in their best interest.<sup>55</sup> As a

49. Anastasia Bacigalupo, Note, *Detained, Dependent and Deprived of Rights: How the Unaccompanied Alien Child Protection Act of 2001 Will Impact Alien Children Apprehended by the Immigration and Naturalization Service*, WHITTIER J. CHILD & FAM. ADVOC. 151 (2002).

50. In *Abankwah v. INS*, 185 F.3d 18, 20 (2d Cir. 1999), the Second Circuit addressed forced marriage and forced female genital mutilation.

51. For contextualized analyses of gender in the Second Circuit, see Pamela Goldberg, *Analytical Approaches in Search of Consistent Application: A Comparative Analysis of the Second Circuit Decisions Addressing Gender in the Asylum Law Context*, 66 BROOK L. REV. 309 (2000). For a list of the casebooks and treatises on immigration law, asylum law, and refugee law that include discussions on gender-related persecution in the asylum context, see *id.* at 318 n.37. In the UNHCR Guidelines on the Protection of Refugee Women, paragraphs 54-61 suggest that claims made by women in connection with resistance to social norms may be considered "persecution on account of membership in a particular social group" under the Refugee Convention. Jamie Sergio Cerda, *The Draft Convention on the Rights of the Child: New Rights*, 12 HUMAN RIGHTS Q. 115, 118 (1990) (explaining the need for Art. 21's requirement that "all possible means of enabling the child to remain in his or her own social and national context have been exhausted" before placement outside of the country of origin can be considered in part as a means of assuring a determination of 'the best interests of the child.'").

52. Steinbock, *supra* note 6, at 255.

53. See *id.*

54. Steinbock, *Admission of Unaccompanied Children*, *supra* note 38, at 159.

([T]he selection and supervision of the children's living arrangements have an enormous impact on their subsequent adjustment and development . . . In practice, most of the children are sponsored through either the United States Catholic Conference of the Lutheran Immigration and Refugee Service and are placed in programs operated by local affiliates of these agencies; in a few states the children are placed through the public child welfare system. Placements include foster care, group care, independent living, or residential treatment.).

55. The "best interest of the child" is the principle standard of the Hague Convention. Its importance is also stressed in the CRC. See Linowitz & Boothby, *supra* note 44 at 181 (noting that

critics of transcultural adoption believe that the practice offers, at best, a short-term

practical matter, by emigrating to the U.S. the Girls would immediately improve their overall human rights situation, with one important caveat. International human rights law assures two types of rights, civil and political, on the one hand, and economic, social and cultural rights, on the other. The Girls would be in a stronger position with respect to both kinds of rights, even without taking into account the protections provided by domestic adoption law. The caveat is that they would lose the right to grow up in their own culture. For at least some of the Girls, this may well outweigh all of the benefits of repatriation in the United States.<sup>56</sup>

## 2. Human Rights in the U.S.

### a. Civil and Political Rights

By becoming American citizens, the Girls could expect to enjoy civil and political rights still unimaginable in most of Africa. In addition to the U.S. Constitution, and the rights to freedom of religion, expression, association, and political participation enshrined there, the United States has ratified the International Covenant on Civil and Political Rights ("ICCPR").<sup>57</sup> Because of reservations through which the U.S. qualifies its acceptance of the treaty by

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solution to the problems of homeless children; it ultimately provides neither long-term solutions to the struggles of developing nations nor permanent security to individual children. To the people of Third World countries, it reinforces the message that they are unable to care for their own children. For children adopted in western countries, it creates a situation in which they are likely to suffer confusion about their origins, personal histories, and places in their adoptive families.).

*But see* Elizabeth Bartholet, *Race Separatism in the Family: More on the Transracial Adoption Debate*, 2 DUKE J. GENDER L. & POL'Y 99, 143 (1995) [hereinafter Bartholet, *Race Separation*] (arguing that "The politics are similar to those involved in the debate about transracial adoption in this country. Children are said to belong with their 'roots' and in their communities of origin. Political forces in the 'sending' countries have been condemning in increasingly loud voices the practice of giving children to the imperialist North Americans and other foreigners.").

56. See Graziella Caiani-Praturlon, *S. W Inter-Country Adoption in European Legislation*, in ADOPTION: INTERNATIONAL PERSPECTIVES, *supra* note 31, at 208. See also Steinbock, *supra* note 6, at 171 (quoting Neil Boothby) (The Forgotten Girls, it should be recalled, have already lost their families, which many child development experts characterize as the ultimate trauma: "Studies of evacuated and non-evacuated children clearly suggest that separation from families during most emergencies was more traumatic than exposure to war, bombardments, and reduction in food rations."). For those Girls who have formed strong emotional attachments in the camp, accordingly, another separation might be devastating.

57. International Covenant on Civil and Political Rights, *adopted* December 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

exempting itself from certain provisions,<sup>58</sup> the Girls may be subject to the death penalty for crimes committed as juveniles, at least in theory. (No females have, in fact, been executed in the United States for crimes committed as juveniles.) The United States has also taken a reservation to the ICCPR's prohibition on 'hate speech.'<sup>59</sup> This means that in the United States, unlike Western Europe, the Girls may be subject to intentionally discriminatory speech, as long as it does not amount to incitement to violence.

## b. Economic Rights

### i. In General

While the United States has not ratified the International Covenant on Economic, Social and Cultural Rights ("ICESCR"),<sup>60</sup> the girls would be living in the world's wealthiest country.<sup>61</sup> They would be likely to enjoy a standard of living far better than the "adequate standard of living" set out in the ICESCR.<sup>62</sup> Even though the United States has not undertaken the obligations imposed by the ICESCR to assure health care and education,<sup>63</sup> similarly, they would be likely to enjoy a high standard of both. The caveat here is the single, overarching right that they would be conspicuously denied; that is, the right under the CRC (which the U.S. has not ratified) to grow up in their country of origin.

### ii. The Right to Culture in Particular

The "right to culture"<sup>64</sup> in international human rights law is considered a group right, typically claimed by an indigenous group or other ethnic minority within a larger society. While the parameters of the right to culture are not precise, it generally encompasses the right to "a way of life"— language, customs, music, celebrations, food, and rituals — customarily practiced by the group. In Sweden, for example, the right to culture of the indigenous Sami has

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58. U.S. Reservations, Understandings and Declarations to the ICCPR, 138 Cong. Rec. 54781-01 (1992) *reprinted in* LOUIS HENKIN ET AL., HUMAN RIGHTS 784-87 (1999) [hereinafter "U.S. RUDs"].

59. *Id.* at 1(1).

60. International Covenant on Economics, Social, and Cultural Rights, *adopted* December 16, 1966, 993 U.N.T.S. 4 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

61. Its GDP for 2001, was \$10,082 billion; the second-ranked China was \$5,560 billion. In per capita GDP, the U.S. (at \$31,880) is outranked only by Luxembourg (\$32,021) (1999). GeoHive, *Global Economy Data* (2003) (source World Bank), at <http://www.geohive.com/global/cgdpl.php> (last visited May 19, 2003).

62. ICESCR, *supra* note 60, art. 11.

63. *Id.* art. 12-13.

64. *Id.* art. 15 (ICESCR provides in pertinent part: "1. The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life.").

been recognized and linked to their traditional reliance on reindeer.<sup>65</sup> Thus, under Swedish law, the Sami are assured the land needed to sustain a herd and continue their traditional practices. Group rights are grounded in the recognition that the group's traditions offer the richest, most satisfying way of life for its members, as well as a sense of pride and identity which may be particularly important for those living within a majority culture that marginalizes them.<sup>66</sup> The right to culture is also crucial to the group's survival as a group, enabling it to maintain a distinct cultural identity and to resist pressure to assimilate.<sup>67</sup>

The CRC explicitly endorses these assumptions.<sup>68</sup> It assumes that it is better for a child to remain in her country of origin, even in an institution, than be sent to a foreign country where she will presumably be an ethnic minority.<sup>69</sup> This preference for institutionalization in the country of origin over intercountry adoption is echoed in the African Charter.<sup>70</sup> As Abdullahi An Na'im has observed, "If [western critics] encourage young girls to repudiate the integrity and cohesion of their own minority culture, how can the theorists then help to sustain the identity and human dignity of those women?"<sup>71</sup>

65. *Kitok v. Sweden*, Human Rights Committee, Communication No. 197/1985, U.N. Hum. Rts. Comm., 33d Sess., in Report of the Human Rights Committee, at 221 (July 27, 1988) (cited in HENKIN ET AL., *supra* note 58, at 452.).

66. For a rigorous and thought-provoking inquiry into the social and genetic construction of identity, see Woodhouse, *supra* note 22.

67. Yael Tamir, *Siding With the Underdogs*, in SUSAN MOLLER OLKIN ET AL., IS MULTICULTURALISM BAD FOR WOMEN? 47, 51 (2001) ("A great deal of paternalism is imbedded in the assumption that while . . . 'we' can repeatedly reinvent ourselves, our culture, our tradition . . . 'they' must adhere to known cultural patterns. These assumptions are particularly damaging for women who can improve their social status only by challenging traditional norms.").

68. CRC, *supra* note 8, art. 21(b).

69. *Id.* See also Twila Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Theory*, 10 YALE J.L. & FEMINISM 101, 134 (1998) ("A number of countries from which children of color come have a history of colonialism – military and economic domination by Western nations.").

70. CRC, *supra* note 8, art. 24(b) (Under Article 24(b), intercountry adoption is a last resort, considered only if the child cannot be placed in a foster or adoptive family or "in any suitable manner" including institutionalization be cared for in the country of origin.). African Charter, *supra* note 7, states adoption is further restricted under the African Charter to those states which have ratified the CRC or the African Charter. Only 137 African children were adopted by U.S. citizens between 1979 and 1987. Perry, *supra* note 69, at 130 n.110 (citing Rita Simon). See also Harrington, *supra* note 7, at 458 (noting that Article 17(3) of the African Charter provides in pertinent part that: "the promotion and protection of moral and traditional values recognized by the community shall be the duty of the State" . . . traditional values, not to mention practices, are among the greatest obstacles that women face in gaining equality."). But see Minister for Welfare and Population Development v. Fitzpatrick, Constitutional Court, *infra* note 74.

71. Abdullah An Na'im, *Promises We Should All Keep in Common Cause*, in IS MULTICULTURALISM BAD FOR WOMEN?, *supra* note 67. See generally Marie Aimée Héli-

The Hague Convention on Adoption, however, takes a different view.<sup>72</sup> Under the Hague Convention, placement with a family abroad is preferred over institutionalization.<sup>73</sup> In *Minister for Welfare and Population Development v. Fitzpatrick*,<sup>74</sup> the Constitutional Court of South Africa held that intercountry adoptions could not be barred under the South African Constitution. This decision has opened the door for intercountry adoption of AIDS orphans, healthy children who have lost their families to AIDS and would otherwise languish in underfunded orphanages.<sup>75</sup> This reflects the painful reality that in some cases, remaining in Africa may not be in the best interest of the child.<sup>76</sup> While this decision obviously has no extraterritorial impact, the South African Court is highly regarded and its decisions are studied not only throughout Africa, but throughout the world.

### 3. Transracial Adoption

Some of the Girls, along with other African orphans, might be adopted by African-Americans.<sup>77</sup> Because of the demographics of adoption in the U.S.,

Lucas, *Women Living Under Muslim Laws*, in *OURS BY RIGHT: WOMEN'S RIGHTS AS HUMAN RIGHTS* 52 (Joanna Kerr ed., 1993) ("exposing the myth of a homogenous Muslim world.").

72. See Hague Convention, *supra* note 36.

73. *Id.* para. 3. ("recognizing that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin."). Parra-Aranguren, *supra* note 24, at 9, para. 46 (noting that, "the idea . . . is that placement of a child in a family, including an intercountry adoption, is the best option among all forms of alternative care, in particular to be preferred over institutionalization.").

74. *Minister for Welfare and Population Development v. Fitzpatrick and Others*, Constitutional Court- CCT 08/00, 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (SA), 31 May 2000 (striking section 18(4)(f) of the Child Care Act 1983 prohibiting the adoption of a South African child by non- South Africans as inconsistent with the South African Constitution (sec. 28(2)) which requires that the best interests of a child are paramount in every matter concerning the child.).

75. See, e.g., Melissa Fay Greene, *What Will Become of Africa's AIDS Orphans?*, N.Y. TIMES MAG., Dec. 22, 2002, at 48 (describing orphanages filled with AIDS orphans, a reporter explains how she "found that there was one small thing she could do," i.e., she adopted an AIDS orphan.); Kofi A. Annan, *In Africa, AIDS Has a Woman's Face*, N.Y. TIMES, Dec. 29, 2002, at 9 (noting that 11 million African children have been orphaned by AIDS.).

76. The 'best interest of the child,' however, is as politically constructed here as it was in Nigeria in the 1960s. Cf. Howard Altstein & Rita J. Simon, *Introduction*, in *INTERCOUNTRY ADOPTION: A MULTINATIONAL PERSPECTIVE* 1, 3 (Howard Altstein & Rita J. Simon eds., 1991) (noting that "though the Nigerian civil war of the 1960s resulted in thousands of children being made orphans, Nigeria spurned all foreign adoption offers. African countries have not generally sanctioned the adoption of their children by foreigners.").

77. This arguably deprives African-American children waiting for homes with same-race parents of placements. As Professor Howe notes, however "African-Americans adopt at a higher rate than European Americans or Hispanic families." See Ruth-Arlene W. Howe, *Redefining the Transracial Adoption Controversy*, 2 DUKE J. GENDER L. & POL'Y 131, 155 (1995). While Professor Howe cites a survey indicating that "3,000,000 Black household heads were 'interested



however, the majority of these children are likely to be adopted by white couples or single white women.

Interracial adoption is permitted in every state in the U.S. Indeed, any effort to prohibit it would be subject to constitutional challenge as a violation of the Fourteenth Amendment equal protection guarantees.<sup>78</sup> But many agencies have been reluctant to place Black children with white parents.<sup>79</sup> The Association of Black Social Workers strongly opposed such placements for 30 years, on the grounds that they are not in the best interest of Black children.<sup>80</sup> As Twila Perry recently observed, "The researchers on transracial adoption are still virtually unanimous in their conclusion that it remains preferable for Black children to be placed with Black adoptive parents, if possible."<sup>81</sup>

James S. Bowen argues, for example, that white parents are unlikely to provide Black children with "Black survival skills", including:

several learned abilities: to ignore (racial) insults, to decipher the appropriateness of fighting back or submission, to emphasize Black strength, beauty and worth as a countermeasure to the denigration of Blackness in America . . . to evaluate objectively and subjectively the level of nepotistic

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in formally adopting a black child' [a] number [which] far exceeds the total number of black children legally free for adoption," she cites other factors which discourage Black prospective parents from adopting, including agency practices, and high fees which effectively preclude lower-income black families from applying. *Id.* at 158-59. See also Fahlberg, *supra* note 31 (noting problems in the adoption of older children).

78. See also Howe, *supra* note 77, at 76.

79. Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163 (1991). See also Nancy Dowd, Book Review, 107 HARV. L. REV. 913, 924 (1994) (noting that "feminists who insist that race and class must always be taken into account along with gender might argue that failure to do so is a serious drawback in Bartholet's overall analytical approach."). Kim Forde-Nazrui, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925 (1994).

80. "U.S. domestic transracial adoptions have been objected to since 1972 by the National Association of Black Social Workers on the grounds that "to deny black children their heritage and their identification as African-Americans . . . is to commit a form of genocide." RICHARD TESSLER ET AL., *WEST MEETS EAST; AMERICANS ADOPT CHINESE CHILDREN* 8 (1999). For a detailed discussion of the genesis of this position, see Howe, *supra* note 77, at 139 n.42.

81. Perry, *supra* note 69, at 126 n.85. Dowd, Book Review, *supra* note 79, at 924 (noting feminists' argument that Arace should be taken into account in placing racial minorities, based on evidence that same race placement benefits children even if cross race placements do not hurt them, and that such placement is vital to the group interests of racial minorities."); Susan R. Harris, *Race, Search, and My Baby-Self Reflections of a Trans racial Adoptee*, 9 56 (1997) (describing the painful isolation of an adoptee who is racially or culturally YALE J.L. & FEMINISM different from an overwhelmingly white community and the added dimension for African American transracial adoptees whose physical appearance marks them as members of a group which has been "historically exploited and oppressed").

advantage or same-group favoritism which precludes opportunities and advancement in education, employment and business.<sup>82</sup>

As Professor Derrick Bell has argued, moreover, because of the long and bitter history of slavery and racism in this country, discrimination against Blacks has been “*particularly* vicious.” Domestic transracial adoptions involving the adoption of Black children by white parents has been problematic.<sup>83</sup> As Black adoptee Susan Harris says, “I loved my parents, and I know that they loved me. I would not have traded them in for anyone, although I would have traded the all-white environment for an integrated one. And I know plenty of African-American transracial adoptees who feel the same.”<sup>84</sup>

In 1994, however, Congress enacted the Howard M. Metzenbaum Multiethnic Placement Act of 1994 (“MPA”).<sup>85</sup> As amended by the Interethnic Adoption Provisions of 1996,<sup>86</sup> any agency that receives federal financial assistance is prohibited from “delaying or denying a child’s foster care or adoptive placement on the basis of the child’s or the prospective parents’ race,

82. James S. Bowen, *Cultural Convergences and Divergences: The Nexus Between Putative Afro-American Family Values and the Best Interest of the Child*, J. FAM. L. 487, 510 (1988). But see Bartholet, *Race Separation*, *supra* note 55, at 102 (arguing that “[coping skills] kinds of arguments could also be applied to oppose integrated education and integrated marriage. If we think that black children can only develop appropriate coping skills and racial identities under the tutelage of black adults, then we should send them to schools with all black faculties.”).

83. Kai Jackson & Catherine E. McKinley, *Sisters: A Reunion Story*, in ADOPTION READER 191 (1995) (describing adoptee’s discovery that her biological father was white.). Cf. SECRETS & LIES (Twentieth Century Fox 1996) (Black adoptee in England discovers that her mother is white.).

84. Harris, *supra* note 81, at 9. See also Howe, *supra* note 77, at 160 (describing law school application by a young black man raised by white parents: “How can I be black when black cultural relations have forged so little of my persona? How can I be white when my skin dictates otherwise? How in truth am I to envision myself?”). Me K. Ando, *Living in Half-tones*, in ADOPTION READER, *supra* note 83, at 179-80 (describing confusion of Korean adoptee raised by Japanese woman and her German-Swedish husband: “I feel lucky to have been adopted by at least one parent of Asian decent. I can’t imagine having two white parents.”). But see JOAN HEIFETZ HOLLINGER ET AL., A GUIDE TO THE MULTIETHNIC PLACEMENT ACT OF 1994, AS AMENDED BY THE INTERETHNIC ADOPTION PROVISIONS ADOPTION PROVISIONS OF 1996 at 6 (1998) (noting that “[t]he few studies that track children into their twenties indicate that transracial adoptees are doing well, maintain solid relationships with their adoptive families, and may have higher educational attainments than same race adoptees.”).

85. Howard M. Metzenbaum Multiethnic Placement Act of 1994, PUB. L. NO. 103-382, §§ 551-54, 108 Stat. 3518, 4056-57 (1994) (codified at 42 U.S.C. § 5115 a (1994) [hereinafter MPA]. For a description of the controversies spawned by the MPA, see Woodhouse, *supra* note 22, at 120-22; HOLLINGER, ET AL., *supra* note 84 (noting that “courts have allowed race to be one among a number of factors that may appropriately be considered in making placement decisions, especially if sensitivity to the child’s racial identity and self-esteem is determined to be important for the well-being of a specific child.”).

86. Interethnic Adoption Provisions of 1996, PUB. L. NO. 104-188 § 1808, 110 STAT., 1903-1904 (1996).

color, or national origin.”<sup>87</sup> Thus, race would not bar the Girls’ placement in the U.S., although racism remains a factor to be taken into account. While recognizing “race” as an indeterminate concept, Professor Woodhouse,

reject[s] the notion that their indeterminacy forecloses discussion of race in child placement. My premise is that race and culture of origin, no matter how hard to define with satisfying logic, *do* matter to children and therefore *should* matter in adoption law. They may well be contingent and socially constructed, but children’s awareness of race and group identity indicate that they are ‘real’ for the purposes that matter her—the fostering and protection of children’s identity.<sup>88</sup>

The Girls would lose their foster families, their culture, language, religion, traditions, and friends. For some of them, however, these would not be major losses. First, as described previously, their role in their foster families is often that of unpaid servants.<sup>89</sup> Second, they may be “sold” for a bride-price.<sup>90</sup> Third, if they are ever repatriated to the Sudan, as women they would become second class citizens, since subordination on the basis of sex is legal in the Sudan and well-entrenched in domestic law. Fourth, the camps are dangerous.<sup>91</sup> Finally, those Girls who have been raped and are outcasts have no future in Africa.

#### *B. Improving Life in the Camps, Improving Life for African Women*

In the alternative, it can be argued that the most effective way to help the Girls would be to improve life in the camp at Kakuma not only for them, but for all of the women and girls there.<sup>92</sup> This approach also makes sense if “the factors militating for admission are not present.”<sup>93</sup> As Professor Steinbock suggests:

The U.S. response to children in crisis should involve foreign policy initiatives, including moral and political suasion and material aid, rather than admission of the children themselves . . . The plight of children in crisis, the most vulnerable and innocent of victims, is compelling, and the impulse to ‘save’ them by admitting them to the United States can be emotionally powerful. But

87. HOLLINGER ET AL., *supra* note 84, at 2.

88. Woodhouse, *supra* note 22, at 114.

89. See Matheson, *supra* note 13.

90. See *supra* text accompanying nn. 15-17.

91. As Professor Steinbock notes, “Unaccompanied children may be in danger even beyond the distorting effects refugee camp life can have on all children.” Steinbock, *Admission of Unaccompanied Children*, *supra* note 38, at 173. See generally WOMEN’S RIGHTS PROJECT & AFRICA WATCH, SEEKING REFUGE FINDING TERROR: THE WIDESPREAD RAPE OF SOMALI WOMEN REFUGEES IN NORTH EASTERN KENYA (1993).

92. Steinbock, *Admission of Unaccompanied Children*, *supra* note 38, at 140.

93. Steinbock, *supra* note 6, at 255.

not all children from areas in crisis can possibly be accepted, nor is removal to the United States always in their best interest.<sup>94</sup>

Alternatives depend on the particular needs in a specific context, but in general terms include the following. First, the safety and well-being of Girls could be made a priority. According to Dr. Pauline Riak of the Sudanese Women's Association, "Kakuma is a prison, where young women are especially vulnerable."<sup>95</sup> The Final Act of the Conference which adopted the 1951 Refugee Convention expressly urged states "to take the necessary measures for the protection . . . of refugees who are minor, in particular unaccompanied children and girls with special reference to guardianship and adoption."<sup>96</sup> Such efforts could draw on the already-promulgated guidelines of the UNHCR for Women Refugees.<sup>97</sup> Second, educational opportunities could be provided for the girls in the camps.<sup>98</sup>

As Professor Bartholet argues, however, intercountry adoption may raise consciousness in industrialized states about the needs of children in LDCs:

[T]here is simply no reason to believe that foreign adoption is inconsistent with [efforts to devote increased resources to more cost effective programs designed to promote the well-being of children in their native lands.] Indeed, quite the reverse: foreign adoption programs are likely to increase awareness in the U.S. and other receiving countries of the problems of children in the sending countries.<sup>99</sup>

Professor Bartholet assumes a charitable donor/donee relationship between the developed and developing states. This is quite distinguishable from the relationship between stateless refugees and an international community that has a duty under international law to at least sustain them. Given its well-documented failure to do so, however, it is difficult to argue that the Girls would be better off relying on "rights" (with no means of asserting them) than on the charity to which Professor Bartholet refers.

If the Girls were granted asylum in other African states, and become citizens of those states, very different issues would be raised by the possibility of adoption abroad. First, making children available for intercountry adoption

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94. Steinbock, *Admission of Unaccompanied Children*, *supra* note 38, at 138.

95. Matheson, *supra* note 13, at 4.

96. Steinbock *supra* note 6, at 260. *See also* UNHCR Executive Committee, Note on Family Reunification U.N. Doc. EC/SCP/17 (16 July 2002) (UN recommending that governments "take the necessary measures for the protection of the refugees' family, especially with a view to . . . (to) the protection of refugees who are minors, in particular, unaccompanied children and girls, with special reference to guardianship and adoption.").

97. *See* REFUGEE CHILDREN: GUIDELINES *supra* note 3.

98. *See* UNHCR, *Feature: Jolie Gives Refugee Girls a Shot at School in Kenya*, RELIEFWEB, Oct. 27, 2002, at 1, at <http://www.reliefweb.int/w/rwb.nsf/0/21d9415629278336c1256c53003030663?OpenDocument> (last visited May 19, 2003).

99. BARTHOLET, *supra* note 43, at 151.

could actually encourage families to abandon children.<sup>100</sup> Second, it could encourage the selective emigration of the healthiest children, and those most appealing to foreign adoptive parents. These may well be those most needed to rebuild their countries. There are many efforts, on many fronts, to improve life for African women.<sup>101</sup> Resourceful survivors, like the Forgotten Girls, may have a great deal to contribute to this process.

### Life in the United States versus Life in a Refugee Camp in Africa

	U.S.	Refugee Camp
Advantages	<ul style="list-style-type: none"> <li>-Higher standard of living</li> <li>-Better health care</li> <li>-More and better food</li> <li>-Education</li> <li>-De facto rights under Arts. 10,11,12,&amp;13 ICESCR (though U.S. is not a party)</li> <li>-U.S. Constitutional Rights</li> </ul>	<ul style="list-style-type: none"> <li>-Family</li> <li>-Culture</li> <li>-Language</li> <li>-Religion</li> <li>-Traditions</li> <li>-Friends</li> </ul>
Disadvantages	<ul style="list-style-type: none"> <li>-U.S. is <i>not</i> a party to CEDAW or CRC</li> <li>-New culture, language, religion, and traditions</li> <li>-Racial discrimination</li> </ul>	<ul style="list-style-type: none"> <li>-Unpaid servant</li> <li>-"Sold" for bride-price</li> <li>-If repatriated to Sudan, legally subordinate status</li> <li>-Camps are dangerous</li> </ul>

### III. THE CHOICE SHOULD BE THE GIRLS'

Even if resettlement in the U.S. were an option, accordingly, it may not be the choice for many of the Forgotten Girls.<sup>102</sup> The United States has not ratified the Woman's Convention or the Children's Convention. They would

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100. See *infra* note 108.

101. The African Commission appointed a Special Rapporteur on Women at its twenty-first session. Harrington, *supra* note 7, at 470.

102. See, e.g. RESSLER ET AL., *supra* note 10, at 122 ("In many past emergencies unaccompanied children required protection when well-intentioned interveners, acting only on their own authority and without having made an adequate assessment of each child's circumstances, attempted to carry the children away." The authors provide examples from the Nigerian civil war, Vietnamese refugee camps, and camps in Thailand).

have major adjustments, including adjustments that many of the Boys have found daunting.<sup>103</sup> These include not only cultural adjustments, but adjustments to a new diet and a new climate.<sup>104</sup> In addition, they would face adjustments regarding very different cultural conceptions of gender that the Boys have not had to confront, or not in the same way.<sup>105</sup> There is little empirical data on resettlement outcomes, and even less that is useful here.<sup>106</sup>

For those who are outcasts because of rape, however, resettlement might be an appealing option. A Girl's future in an arranged marriage may not be particularly promising either. According to UN statistics, she can expect to bear five children and her life expectancy will be dramatically lower.<sup>107</sup>

It may not be much of a choice,<sup>108</sup> but the choice should be the Girls'.<sup>109</sup> Western feminists may argue that it is better for them to live in the United

103. Recognition of the risks of legal adoption are relatively recent in the developed states. See, e.g., Caiani-Praturlon, *supra* note 56, at 208 (noting that, as of 1991, "only Norwegian legislation . . . places a condition on intercountry adoption: there must be the assurance that the 'adoption is not harmful to the minor because of the interruption in his links with his country of origin.' This is the only example of a law that stresses an often undervalued aspect of adoption, that affects a minor who may be traumatized by a total change in environment."). The African Charter explicitly provides that "due regard shall be paid to . . . the child's ethnic, religious, or linguistic background." African Charter, *supra* note 7, art. 25(3).

104. See Corbett, *supra* note 1 (describing three resettled Boys in Fargo, North Dakota sitting in ski jackets in their apartment, the thermostat up as high as it would go).

105. Cf. Altstein & Simon, *supra* note 76 (The role of women in the family in Muslim countries, for example, is very different from the role of women in the family in the U.S.). See, e.g., H  lie-Lucas, *supra* note 71, at 54 (noting that notwithstanding the diversity among the 500 million women presently living in Muslim countries, "it is striking to see that similarities tend to be confined to the private sphere, to the domain of the family, and that women in so many places are deprived of human rights and civil rights . . . within the frame of Muslim Personal Laws (also called Family Codes).").

106. Steinbock, *Admission of Unaccompanied Children*, *supra* note 38, at 174-75 (citations omitted) "The net effect of resettlement on unaccompanied refugee children is difficult to evaluate . . . some observers question how well Western child psychiatric concepts, which underlie most of the studies, can be applied to children from non-Western cultures. Furthermore, as Jan Linowitz and Neil Boothby write: 'Adjustment to a new culture is a complicated, personal process with no decisive endpoint; differences in adaptation are difficult to quantify.'").

107. U.N. Population Division, *World Population Prospects: The 2002 Revision Population Database* (2003), at <http://esa.un.org/unpp> (last visited May 19, 2003) (The life expectancy for women in Kenya is 49.9 years, the Sudan 58.4 years, and Africa (in general) is 52.1 years.). In the U.S., in contrast, life expectancy for women is 79.5 years. Maternal and Child Health Bureau, *Statistics on Life Expectancy* (2003), at [http://mchb.hrsa.org/whusa02/Page\\_26.htm](http://mchb.hrsa.org/whusa02/Page_26.htm) (last visited May 19, 2003).

108. See generally Julie Mertus & Pamela Goldberg, A Perspective on Women and International Human Rights After the Vienna Declaration: The Inside/Outside Construct, 26 N.Y.U. J. INT'L L. & POL 201, 204 (1994) (describing dilemmas of "women experiencing complex, interwoven oppressions.").

109. See, e.g., CRC, *supra* note 8, art. 12(1); African Charter, *supra* note 7, art. 7; Steinbock, *Admission of Unaccompanied Children*, *supra* note 38 at 180 (Because the Girls lost their

States, but they should be wary of cultural imperialism.<sup>110</sup> African nationalists may counter that the Girls belong to their people. Under well-established human rights law, however, the Girls belong to themselves.<sup>111</sup> The CRC expressly provides that: "States Parties . . . shall assure to the child who is capable of forming his own views the right to express his opinion freely in all matters, the wishes of the child being given weight in accordance with his age and maturity."<sup>112</sup> Article 12(2) explicitly extends this right to "all judicial or administrative proceedings affecting a child . . . capable of forming his own views, an opportunity shall be provided for the views of the child to be heard . . . and those views shall be taken into consideration by the competent authorities."<sup>113</sup>

### CONCLUSION

The traditional forces which have kept women invisible within the family hid the Girls, but the forces of globalization, including technology, human rights law, and growing feminist consciousness, eventually brought their story to public attention. They became the subject of a cover story of the magazine *Refugees*.<sup>114</sup> Their story illustrates both the growing importance of children's rights in an increasingly globalized world, and the increasingly visible inability of some children — especially girls — to benefit from it.

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families years ago, there is no risk here that "the child may be confronted with the dilemma of leaving her family or choosing resettlement in the U.S. Nor is there the related risk that the family would be encouraged to send her away to provide her with perceived advantages.").

110. Western feminists have been criticized for condemning cultural practices, such as female genital surgeries, without sufficiently taking the cultural context into account. *See, e.g.,* Hope Lewis, *Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1 (1995); Isabelle R. Gunning, *Arrogant Perception, World-Traveling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189 (1992).

111. CRC, *supra* note 8, art. 12(1). Steinbock, *supra* note 6, at 231, 233 (discussing the role of the child in decisions made in his best interest. The UNHCR Guidelines for the Promotion of Durable Solutions for Unaccompanied Minor Children in Southeast Asia (1982), similarly, specifically provides that "persons of 15 years of age or older are to be treated as adults. An unaccompanied minor child between the ages of 10 and 15 who is found to be of sufficient maturity to make an independent judgement shall also be treated as an adult with regard to the choice of a durable solution.").

112. CRC, *supra* note 8, art. 12(1).

113. *Id.* art. 12(2).

114. UNHCR, *Women: Seeking a Better Deal*, *supra* note 2.