

---

# Moving Babies: Globalization, Markets and Transnational Adoption

JACQUELINE BHABHA

---

*Sometimes I feel like a motherless child...*

*"Poor parents see foreign adoption as one of the few ways to give their children a decent life."<sup>1</sup>*

## INTRODUCTION

The commercially-fueled movement of persons across borders dates back centuries to practices of slavery and indenture. It is neither new, nor news. But there is a new form of transnational transport of human beings that is news, attracting increasing headlines and causing concern across countries and continents—the growing market in babies. Not a week passes without a feature on the profit-driven transfer of babies across borders in some corner of the world—be it Albania, India, Cambodia, Korea, or Guatemala.<sup>2</sup> Romania's flouting of a moratorium on out-of-country adoptions is even threatening its accession to the European Union.<sup>3</sup>

---

*Babies have become big business, commodities openly exchanged in many marketplaces.*

---

Denunciatory accounts of the racketeering in baby sales sit side by side with sobering statistics of the escalating numbers of foreign adoptions. Forceful calls

---

*Jacqueline Bhabha is the Executive Director of the University Committee on Human Rights Studies at Harvard University. She would like to thank Molly Curren for superb research assistance and is grateful for very helpful feedback to participants in the "Globalization and Illegal Migration" Workshop at the University of British Columbia, Vancouver and the Fellows and Affiliates Workshop at the Carr Center for Human Rights Policy at the Kennedy School of Government, Harvard University.*

---

for the absolute proscription of baby selling contrast with a passionate defense of transnational adoption and skepticism about the extent of abuses involved.<sup>4</sup> The field is sharply polarized, with well-intentioned, thoughtful advocates on both sides.<sup>5</sup>

Babies have become big business, commodities openly exchanged in many marketplaces. This growing market in babies is a relatively new form of commodification of human beings. It shares many features with the more widely recognized market of trafficking in persons, particularly women and children. To be

---

*This growing market in babies is a relatively new form of commodification of human beings.*

---

sure, the scales of the two phenomena are quite different, and the demand factors fueling the markets contrast sharply. But these trades in humans are not as unrelated as they are assumed to be. They are both significant aspects of globalization—instances of cross-border commerce that are sustained by economic and social inequalities between

the north and south, and the east and west. Consequently, the legal and policy initiatives required to address the problems created by these markets are connected. Yet these connections have not been made, largely because there is resistance to equating the well-intentioned process of transnational adoption with the abusive phenomenon of trafficking. Overcoming this reticence is important and could lead to useful insights for the regulation of the baby market. It could also help reframe strategies for tackling trafficking in persons.

#### TRAFFICKING AND THE BABY MARKET: THE COMMONALITIES

Novelty aside, the baby market shares several of the key features of trafficking in adults and children. It involves the non-consensual, globalized, and commercially-mediated transport of individuals accompanied by strangers across continents, typically from poor, developing countries to rich, developed destinations.<sup>6</sup> Also like the market for children and adults, the baby market has been immeasurably enhanced by advances in global information technology, as the Internet functions to match demand and supply.<sup>7</sup> The baby market reflects a crisis in family relations and economics: the inability of birth families to sustain all their members and the inability of the modern, Western family to meet all its reproductive needs. The market in babies encompasses a range of morally diverse situations, from mutually advantageous—if exploitative—agreements, to abusive, consumerist objectification. As a constantly evolving, sophisticated transnational network, it poses serious challenges for law enforcement and defies national policing capabilities.

Like trafficking, transnational adoption is driven by demand, not supply—

---

the market strength of potential consumers or customers drives the expansion and differentiation of the trade, even though the availability of ample supplies exists independently.<sup>8</sup> As Guatemala's prosecutor for crimes against women and children—engaged in investigating 110 cases of adoption irregularity—explains, "The money tempts everyone."<sup>9</sup> Price is, as with all markets, a relevant factor. The executive director of the Adoption Council of Ontario, for example, attributes China's popularity as a baby source partly to the fact that its international adoption program "carries a relatively low price tag."<sup>10</sup>

And, like trafficking, the baby market raises complex ethical dilemmas. Some forms of commercially organized transport of women, though coercive and exploitative, are consciously chosen exit strategies selected by sex workers or other young women seeking to improve their economic prospects. For example, one study maintains that "marriage migration is one of the best options for a girl who wants to leave China."<sup>11</sup> Similarly, many situations where babies are transferred transnationally under market arrangements are mutually advantageous, motivated as much by genuine concern for the best interests of the disadvantaged child—from both the birth and adoptive parents—as by the desire for a given shape and size of family. Baby selling may be one element in a chain of exchanges prompted by intolerable living conditions or societal pressures that result in enduring improvements to the exchangee's (adopted child/trafficked person) life. In the best cases, babies who would face extreme hardship and poverty throughout their lives are accepted into loving homes by prosperous parents who, despite differences in appearance and background, may establish life-long successful parent-child relationships.

There is no clear line separating coercion from consent, and abuse from individual advantage, though the extremes on the

continuum differ dramatically.<sup>12</sup> The difficulty lies in distinguishing clearly between a coercive threat and a consensually accepted offer. This requires the identification of a subjective boundary, or a baseline of expectations for each individual, where exchange occurring beyond these bounds would be a threat and anything above it, an offer. For people in dire poverty, for example, the possibility of selling their baby may seem like an offer worth consenting to, rather than a coercive alternative to continuing destitution.<sup>13</sup>

To be sure, the balance between ultimately positive and negative outcomes may be quite different between trafficking and adoption, as is the degree to which exploitative intent underwrites the two different markets. Trafficking is primarily fueled by a demand for slave-like labor—whether for domestic or industrial/commercial work—or paid sex, and by the huge profits that this trade produces for the

---

*Like trafficking,  
transnational adoption  
is driven by demand,  
not supply...*

---

transporters or intermediaries. By contrast, transnational adoption is largely driven by birth parents' death, absence, or incapacity—financial or otherwise—and by adoptive parents' desire to raise a child out of genuine concern for the child's well being. In the latter case, the possibility of significant financial gain by middle persons is a by-product of geographical inequalities in supply and of bureaucratic complications produced by protective regulatory frameworks. But the two markets are not as separate as has been traditionally thought, and, most worryingly, the overlaps may be increasing in scope and significance. "Predatory globalization," to borrow Richard Falk's term,<sup>14</sup> characterizes aspects of both markets.

### TRANSNATIONAL ADOPTION: THE DILEMMAS

From a policy and rights advocacy perspective, transnational adoption—like interracial adoption domestically—raises many challenging questions. Given the potentially positive outcome of transnational adoption for both adopter and birth mother, and particularly given the stakes involved for adoptees facing lives of destitution, the policy imperative is to regulate, not eliminate, the market. This contrasts sharply with the agenda for trafficking. The challenge, however, is to determine how regulation should best be effected and, in particular, how improvements in home country conditions should be factored into international regulation.

The current system established under the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption,

---

*[The Hague Convention]... does not adequately address the problem of corruption, scarcity, and coercion in the country of origin, or the structural problems that generate the market in transnational adoption.*

---

devised under the auspices of the Hague Conference on Private International Law, establishes a cooperative framework between sending and receiving countries. It attempts to balance national and international alternatives for appropriate childcare, and to distribute regulatory responsibility for the child's adoptability and the adopter's suitability between adoption origin and destination countries. But it does not adequately address the problem of corruption, scarcity, and coercion in the country of origin, or the structural problems that generate the market in transnational adoption.

By effectively obliterating the role and position of birth parents, the Convention also does not reflect modern thinking on the inclusion of birth parents in the adoption process and in the child's life following adoption. In short, several key current dilemmas in transnational adoption are avoided, rather than tackled, by the regulatory international framework.

---

---

The questions about commercial rewards and the proliferation of the market system go to the heart of one aspect of the problem. Though its transnational nature raises the financial stakes and potential rewards, the problem of financial incentives is not confined to the transnational situation. Since surrogate mothers can be financially rewarded for giving birth to babies under contract, one might ask why birth mothers who are unable to support a child, or compelled to relinquish a child for cultural or social reasons, should not be similarly compensated. Clearly, such financial input, apart from tangibly acknowledging the birth mother's contribution to the adoption process, would improve the life circumstances of other members of the birth family.

But the mere suggestion that there should be any system of monetary rewards for relinquishing a baby raises the specter of baby selling and the problem of identifying the ethical distinction between surrogacy and adoption. It is not clear how this distinction should be marked in law.<sup>15</sup> Morally, economically, and emotionally, surrogate mothers and birth mothers are often in very analogous situations. They are burdened by overwhelming family responsibilities and economic pressures, and may calculate that the interests of existing children are best served by surrendering their newborn. If financial rewards are unconscionable, the question arises as to what better social alternative exists. Given the dramatic gulf between the economic status of birth and adoptive parents, there is a serious risk that, by banning compensation and failing to advance an alternative acknowledgement of the birth mother's presence and contribution, public policy perpetuates her virtual obliteration. The need to separate from a child should not result in complete erasure of the tie.<sup>16</sup> Policy alternatives to financial reward need to be explored.

---

*Morally, economically,  
and emotionally, surrogate  
mothers and birth mothers  
are often in very analogous  
situations.*

---

Another issue is that international adoptees are frequently described as orphans, even though this is increasingly not the case.<sup>17</sup> International adoption historically surged in the aftermath of war to address the needs of actual orphans, as occurred after World War II and the Vietnam War. Today, however, parental destitution and social and political pressure, rather than death or disappearance, appear to be the prime factors motivating relinquishment.<sup>18</sup> Most notably, China's One Child Policy and the country's cultural preference for males have increased the availability of baby girls in Chinese orphanages. There is considerable anecdotal evidence to suggest that many Chinese women "abandon" their newborn girls in front of village police stations, in railway or bus stations, or in other crowded public places, to ensure that they will be found promptly and will qualify for adoption.

---

Much less information exists on the circumstances of the birth mothers themselves and whether they voluntarily relinquish their babies, or succumb to marital or parental pressure to do so. According to one study of over 600 families who had adopted or abandoned Chinese-born children, the vast majority of abandoning parents were married and from rural areas, almost 90 percent of abandoned babies were female, and “birthmothers frequently expressed emotional pain and remorse for the act.”<sup>19</sup> However, since government policy is the overwhelming reason for abandonment, mechanisms for documenting and tracing the birth mother’s identity—while potentially reassuring for mother and (in later life) child—would be pointless since anonymity is essential for the success of the adoptive transaction. The effective invisibility of birth parents fuels the fiction of consent and effectively blots out other considerations. But, it may bolster the viability of transnational adoption as a secure and permanent family solution. In Guatemala, where no indigenous tradition of adoption exists, the dramatic explosion of 300 private foster homes (as opposed to four state orphanages) evidences the impact of private money on the development of a market.<sup>20</sup> The economic and political realities underpinning the supply of babies cannot be overlooked by well-intentioned denunciations of commodification.

Current forms of immigration and citizenship law complement this market-based approach to transnational adoption. Adoptive parents are full-

---

*[I]nternational adoptees are frequently described as orphans, even though this is increasingly not the case.*

---

fledged legal parents, entitled increasingly to pass on citizenship to their adoptive children without delay, thus securing the child’s legal immigration status—a necessary condition of family union and permanency. Many adopters are professional single women, “forging new territory in the changing landscape of the American

family.”<sup>21</sup> Birth parents, by contrast, are separated from their children by the gulf of dramatically inferior economic resources and different access to valuable immigration and citizenship benefits. Typically, they are citizens of states that require visas for travel, entry, and visits, indeed for any type of cross-border access. Their birthparent status does not entitle them to any privileged access in terms of family reunion. In this sense, the “clean break” approach, increasingly under challenge in contemporary domestic adoption, has not been modified at all in the transnational arena.<sup>22</sup>

Whereas cultural sensitivity might be the mantra of the moment, encouraging adoptive families to provide truthful information to their children as early as possible and to facilitate contact with the adoptee’s birth “culture,” this new openness does not extend to recognizing the transnational birth parent’s right to access or contact, nor to a privileged immigration status that would facilitate such

---

access. Perhaps such considerations, if acted upon and translated into legal rights, would compromise the well being of tens of thousands of babies adopted transnationally every year by jeopardizing adoption, as fixed certainties of identity, belonging, and ownership that are associated with parenting might be unsettled. But the complexities of parenting in an age of global inequality, gender disparity, and changing family structures would be acknowledged. So far, public policy ignores these complexities in favor of adoptive parents and developed state immigration control. Addressing them could well diminish the availability of adoptive homes for some very deprived and institutionalized children. The dilemma is acute.

---

*Current forms of immigration and citizenship law complement this market-based approach to transnational adoption.*

---

### THE BABY MARKET

The baby market is highly differentiated by race, nationality, gender, quality of service, and physical appearance, as well as the intended use of the baby. Mexican babies, for example, are often rented by smugglers so that Central Americans crossing the U.S. border can pose as bona fide families. In China, trafficked babies are gender segregated; the boys tend to be sold on the domestic market to couples anxious for a male heir (a pernicious aspect of the dramatic rise of a market economy in China), while girls are most often put on the international market and sold to Western couples or single mothers unable to have biological children.<sup>23</sup> Russia has overtaken Guatemala and India as the primary source of babies sold to the U.S., alternating over the last five years between first and second place with China. Sometimes the differentiation within the baby market is even more specific than simply nationality—white babies are often more desirable: “I know one with blonde hair, green eyes, very beautiful, you will love her. The price? Pounds 70.”<sup>24</sup>

The commercialization and exploitation of transnational adoption is only one side of the story. It neglects a diametrically opposed set of issues. Much of the impetus for transnational adoption comes from prospective parents, dedicated to making a contribution to the lives of some of the world’s most deprived children. Concern among proadoption advocates focuses, legitimately, on the urgency of facilitating good child care for this population and the serious damage done by those who seek to put hurdles and barriers in the way of those committed to this task. The situation in China’s state orphanages, as described in a 1996 Human Rights Watch report, written and published after the organization came into possession of a large archive of confidential orphanage documents, graphically con-

veys the urgency of the situation:

When we were small, four or five years old, they kept us tied to chairs for part of the day. The child-care workers didn't want us running around freely. We were tied down between lunch and dinner, from 2:00 to 4:30 in the afternoon...Some of the child-care workers would tie us up before bedtime as well, from around 6:30 to 9:00 at night. In the Children's Section they didn't tie us to our beds, though only in the Disabled Section...They had a lot of ways to punish you. Sometimes they would make a kid stand with the top of his head against a wall for a whole morning or evening. Or they would scald your butt with hot water—really hot! Or not give you anything to eat...<sup>25</sup>

But torture is only part of the picture. According to Human Rights Watch Asia, the likelihood of survival beyond one year for a newly admitted orphan in China's welfare institutions nationwide was less than 50 percent in 1989. In the Shanghai Children's Welfare Institute, one of the most prominent specialized orphanages in the country, "the brutal treatment of orphans..., which included deliberate starvation, torture, and sexual assault, continued over a period of many years and led to the unnatural deaths of well over 1,000 children between 1986 and 1992 alone."<sup>26</sup>

These cases are compelling. Were they to constitute the major source of transnational adoptees, the issues surrounding the baby market would be quite different. But, it is clear that the child's urgent need is not the primary factor driving transnational adoption (though it is, to be sure, for a minority of adopting parents). The low rate of adoption for the huge and rapidly growing population of babies and children orphaned by the AIDS pandemic in Africa is the clearest indication of this. "Though it is not explicitly U.S. policy to exclude HIV positive adopted children, and these children generally respond rapidly to the onset of medical treatment in America, the immigration paperwork is more complicated, and few families step forward for these youngsters."<sup>27</sup> Of the 16,369 transnational adoptions in the U.S. in 1999, only 103 were from Ethiopia, a country with an estimated one million AIDS orphans. In 2002, Ethiopia was the African country from which most orphans were adopted into the U.S., but they only numbered 105—sixteenth in the listing of top adoption countries of origin (in contrast to approximately 5,000 from both Russia and China). While it is true that in the early 1990s Ethiopia did not feature at all in the top 20 countries of origin of orphans adopted into the U.S., and it has every year since 1997, the growth has hardly been spectacular (never reaching 200 children per year). Russia, by contrast, which also did not feature in the top 20 countries of origin until 1992, was at the top of the list in 1998 and 1999, and has been a close second to China since then.<sup>28</sup>

Though adoption in developed countries is still primarily a domestic affair (only one-sixth of U.S. adoptions are intercountry), a market approach domi-

---

---

nates even there. In the U.S., there are more desirable babies, more desirable parents, and more desirable homes. In the transnational context, however, the cash nexus is much clearer. Often neither the birth nor the adoptive parents are aware of the exploitative transactions that respectively follow or precede their contact with the baby.

Nevertheless, it is the reality of the complementary needs of both sets of parents' circumstances that fuels the business. In growing sections of the developing world, babies risk being commodified to satisfy a Western market where the child has become, literally, "priceless." As Viviana Zelizer brilliantly argues, Western childhood has been transformed from a working part of the family, where the child was an economic unit that contributed to the household's productivity, to a priceless object—"economically worthless," but "emotionally priceless." She demonstrates how, in a 50-year period from the end of the nineteenth century, the "social valuation of children change[d]... dramatically... and, paradoxically, how the market price of an economically useless child far surpassed the monetary value of a nineteenth-century useful child," to the point where, already in the U.S. in the 1930s, "childless couples were paying large sums of money to purchase a black market baby."<sup>29</sup> Today, this is even more the case.

#### CHALLENGES TO THE "AS-IF" MODEL OF THE FAMILY

Domestic adoption, first established in the U.S. in the 1920s and 1930s, reached its height in the 1950s and 1960s.<sup>30</sup> At this stage adoption was based on the "as-if" model; that is, the adoptive family was constructed to be as similar to a biological family as possible, with a "clean break" from the birth family, secrecy about the baby's origins, sealed records, and a changed birth certificate. Of course, this "as-if" model of adoption depended on a reasonable physical resemblance between baby and adoptive parents. Gradually, as parents began to adopt children of different races and backgrounds than their own, either by choice or necessity, the "as-if" model gave way to a "difference" model that acknowledged that the adoptive family was not a replica of the biological one. Indeed, the whole concept of "the family" was challenged, paving the way for other challenges to follow, and reflecting the increase in step-families, single parent families, and unmarried and gay parent families.<sup>31</sup> The development of a "difference" model of adoption allowed for a challenge to the "clean break" approach and to the practice of obliterating the birth mother's presence.

The significant rise in mixed-race families, as a result both of interracial marriage and transnational adoptions, also poses a fundamental challenge to the "as-if" notion of adoption. Physical likeness may reduce the hostility or novelty factor that transnational adoptees encounter, but it does not necessarily resolve deeper identity issues about belonging and origin. According to the 2000 U.S.

---

Census, more than one in six adopted children are of a different race than their parents. The first-ever profile of adopted children in the U.S. reports that 1.6 million children in the U.S. under 18 are in adoptive families—and of these, 13 percent were born abroad.<sup>32</sup> As a Swedish adoptee of Ethiopian origin has said:

The people who only see my color don't see all of me...When I try to gather together all the bits of myself, I easily lose myself...When I walk by a mirror I see something exotic that I barely recognize from TV, newspapers, and books. Sometimes it makes me happy, sometimes sad, and sometimes astonished. But most often the reflection in the mirror evokes questions that have no simple answers. I have tried to absorb the black but then I have difficulty holding onto the Swedish. I have tried to absorb the 'Swedish' but then I haven't understood what I see in the mirror.<sup>33</sup>

Such issues of identity demonstrate that the gap between domestic and transnational practice is hard to justify. Traces of the former relationship cannot be simply obliterated by a "clean break" without the risk of doing severe injustice to at least one of the parties. Transracial and, increasingly, international adoptions have pushed this dynamic further and further.<sup>34</sup>

Recognition of the complexity within mixed-race families, which can be complicated by the entrance of a transnational adoptee, should prompt reconsideration of the current balance of immigration and citizenship rights within transnational adoption. It might lead to a re-evaluation of current understandings of what is indeed in the best interests of the child. As indicated above, this question raises the more fundamental question about how to resolve potential conflicts between the rights of the birth parents and the child: parental anonymity comes at the expense of the child's knowledge, but parental access complicates the clean break and transforms the understanding of the family.

#### THE DIFFERENT INTERNATIONAL LAW APPROACHES TO TRANSNATIONAL ADOPTION

One way of tackling these questions is to relate them to the contrasting approaches used in the two leading international treaties. The 1989 UN Convention on the Rights of the Child (CRC) consolidates prior international adoption law, but also introduces some new elements. It was formulated after the seminal Indian case of *Lakshmi Kant Pandey v. Union of India and Others*.<sup>35</sup> This 1984 Indian Supreme Court case represented the first detailed legal analysis of the issues raised by the growing practice of transnational adoption. Reflecting concern about the expanding baby market and attendant malpractice, it paved the way for the gradual evolution of a future transnational adoption framework. The following examples highlight the sorts of practices and concerns fueling this

---

---

new regulatory approach.

One case concerns an all too common occurrence in rural South Asia, which eventually went to court. Two young Indian sisters, found alone and distraught on the streets of Bombay, were sent to a remand home and eventually declared destitute. A Swedish couple was granted guardianship of the children and, after a successful court petition, they were given permission to take the children to Sweden, where in due course they were legally adopted and granted citizenship. Six months later, the birth mother, a laborer from a village some distance from Bombay, made a court application seeking custody of the girls. This was the outcome of two years of searching for her daughters, who were nowhere to be found one evening when she returned home late. She filed a missing persons report at the local police station the following morning, but this was never connected to the girls who were found on the streets of Bombay the following day. Eventually, the mother's quest resulted in proceedings seeking directions that the girls be returned to her or, as an interim measure, that the girls be brought from Sweden to Bombay to meet their birth parents.

The Indian court held that the birth mother's claim was "totally untenable," and that it would not best serve the interests or welfare of the girls to grant any of the relief sought by the birth mother. The court held that "only in exceptional cases, where it was established that the adoption was secured by fraud or misrepresentation, and the fraud or misrepresentation was at the instance of the adopter," should the adoption be set aside or ignored.<sup>36</sup> Enabling the birth mother to visit the girls in Sweden was not considered an option. The court, having given consideration to the circumstances in the home country, decided that "in spite of the sympathy one might feel for the natural mother, the effect of removing the girls...from the care and control of their adoptive parents would lead to disastrous consequences."<sup>37</sup>

A different example of abusive adoption practice and inadequate regulation concerns cases of baby theft for political reasons. These are the circumstances surrounding the Argentine and Salvadoran children who "disappeared" during the dictatorships of the 1980s and early 1990s, often abducted after their parents were arrested or murdered and then placed in orphanages and given up for adoption. Many of these children were ultimately adopted in good faith by transnational parents who were unaware of their antecedents. In recent years, several human rights organizations have addressed this issue and the complex conflict of interest problems to which it gives rise.<sup>38</sup> In essence, the tension is between the powerful moral and political claims of the birth families to trace and reestablish contact with children stolen from them decades earlier, and the legal and emotional claims of adoptive parents. Frequently, though not always, the tension also exists regarding adopted children whom resist disruption of their family life once they are discovered by their birth parents. Navigating the complex contending

---

rights claims presents a challenge.

In *Lakshmi Kant Pandey*, the plaintiff questioned the appropriateness of existing procedures and demanded that the relevant statutory bodies carry out their obligations of oversight and control more vigilantly, as well as assist the Indian Supreme Court in formulating appropriate principles and norms. In a prescient judgment, the Court laid down several mandatory new requirements for the conduct of transnational adoptions, including: that each foreign adoptive parent/couple had to be sponsored by a recognized transnational adoption

---

*[U]nder the CRC,  
transnational adoption  
is a last resort option.*

---

agency; that a list of recognized child welfare agencies be drawn up by the government in the country of origin; that where the child was destitute or abandoned, the receiving orphanage attempt to trace the birth parents and obtain their consent to the adoption going ahead; that each recognized

adoption agency was required to maintain a detailed register of all children to be given up for adoption and to prepare a report on each child to assist the court in deciding whether it would be in the child's interests to be adopted, as well as assist the prospective parents in deciding whether or not to adopt a particular child; and, that a Central Adoption Resource Agency, with regional branches, be established to act as a clearing house for all transnational adoptions.<sup>39</sup>

This case provided the conceptual framework for future normative developments at the international level. Thus, the Convention on the Rights of the Child established a partnership between sending and receiving countries, and addressed the growing concern about transnational incidents of baby selling and other abuses, by clearly prioritizing domestic over transnational placements: "States Parties...shall...recognize that intercountry adoption may be considered as an alternative means of child care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin."<sup>40</sup> Therefore, under the CRC, transnational adoption is a last resort option.

The Hague Convention on Intercountry Adoption pursues a somewhat different approach, emphasizing complementarity over ranking between birth and receiving countries. Instead of mandating a clear preference for the adoption in the country of origin, it promotes a consensual model of transnational collaboration and division of labor. The market aspect of international adoption, though amply acknowledged in statements in the preamble, is overshadowed by a focus on the life-improving possibilities that international adoption affords adoptees. So, the CRC's emphasis on the primacy of domestic placement is replaced by a weaker reference to the unavailability of a "suitable family" in the home country and the obligation to merely give "due consideration" to adoption within the state of

origin.<sup>41</sup> In practice, this approach has paved the way for widespread perception of equivalence in domestic and international placement destinations.

But, concern about the ambiguity of the transnational adoptee's identity remains, and the traces of origin linger. Despite the emphasis on complementarity and moral equivalence, transnational adoption legislation includes cultural linkages and reference to the "child's ethnic, religious and cultural background."<sup>42</sup> Parents of transnationally-adopted children frequently emphasize the links to the child's country of origin in a search for closure or authenticity, through education, travel, and associational activities. Ideologically, therefore, the "clean break," though clear with respect to birth parents that are cut out of the picture, is qualified by gestures of respect to culture and recognition of the importance of ties.

The precise significance of this form of "return" tourism is unclear.<sup>43</sup> Children, adopted at or shortly after birth and brought up in a developed country, are not really "returning" to a "home" culture, but rather encountering a reified and essentialized construct. Such travel can emphasize the adoptee's sense of displacement and hybridity, rather than confirming any feeling of belonging. In reality, the circumstances of transnational adoptees seem to resemble those of second-generation immigrants brought up since childhood in developed states, with hyphenated identities and a sense of belonging within the immigrant communities in which they have lived. For many, it may be that the country of origin is a distant, foreign land, not "home" in any meaningful sense.<sup>44</sup>

---

*The international legal approach to baby adoption emphasizes regulation, rather than reduction, in the global market.*

---

#### THE INTERNATIONAL APPROACHES TO ADULT AND BABY MARKETS

The international legal approach to baby adoption emphasizes regulation, rather than reduction, in the global market. Though there is a general acknowledgement that remaining within one's family of origin is the optimal situation for a child, there is no more specific impetus to curb or limit the amount of transnational adoption. Nor is there a motivation to encourage adoption of the most needy, rather than the most apparently appealing, babies.<sup>45</sup> Adoption of AIDS orphans should clearly be encouraged, but the same is not true of children whose birth mothers have been forced by social factors and political policies to give up their children. In practice, the demand-driven market basis of transnational adoption privileges the latter group over the former.

This approach to the baby market contrasts with the international stance toward the adult migration market, where social and political considerations are

---

not made and reduction of permanent adult migration is considered desirable, especially in the context of undocumented migration. Some developed states, such as the UK, Italy, and Spain even proposed at the June 2002 EU summit in Seville that developing countries that failed to collaborate with stringent immigration controls and to curb the numbers of undocumented migrants leaving their territories, should be targeted with suspension of aid. Blame for trafficking and smuggling in persons was thus squarely placed on the governments of the sending countries themselves (but not on the organized trafficking networks in developing countries). Though ultimately unsuccessful, these retaliatory views imply that the causes of human trafficking originate only in the south, rather than being driven by demand in the north.

By contrast, in the transnational adoption arena, the factors that fuel the industry, such as the baby market, gross gender disparities, and discrimination against families with multiple births in China, are glossed over as purely internal, domestic concerns. Calls by developed states for social and cultural change in the birth countries to minimize the pressures on birth mothers to separate from children are effectively non-existent. Attention has been focused exclusively on the question of corruption and bribery of birth parents.<sup>46</sup>

One might counter that steps have been taken to curb the baby market. The United Nations has officially condemned baby selling and, since 1994, has appointed a Special Rapporteur on the Sale of Children, Child Prostitution and Pornography, as well as opened for ratification an Optional Protocol to the Convention on the Rights of the Child concerning the sale of children, child prostitution, and child pornography. Moreover, there is some attempt to address the root causes of poverty and destitution through the transnational adoption system. One policy used by individual adoption agencies and orphanages is to demand contributions over and above the fees charged for specific adoption transactions as donations to the institution.<sup>47</sup> However, these monetary contributions have a very limited impact on official government policy, and there is always a complex and delicate tradeoff since excessive financial burdens would deter adopters. Better policy options exist to regulate transnational adoption.

## CONCLUSION

The “clean break” approach to adoption has gradually given way to an approach which acknowledges that the “baggage of birth” cannot be obliterated. But this recognition takes very different forms in the domestic and the transnational spheres. In the domestic sphere, there are signs of a move toward more open adoption, where adoptive children increasingly have access to birth parents’ details. In some cases, this results in contact between adoptee and birth mother, while in others it results in the option of knowledge about birth circumstances

---

---

and origins for the inquiring adoptee. Thus, access to information about birth parents is increasingly considered an adoptee's right in the domestic sphere.

In the transnational sphere, however, this change of approach to adoption is much less discernible or consistent. The move away from the "clean break" approach is focused on adoptive parents, who are pressured to develop links to the child's culture of origin, to maintain ties to racially similar adoptees in the adoptive country, and to explore the consequences of mixed heritage with the child. However, in many countries of adoptee origin, such as China and Guatemala, mechanisms for accessing birth parent details still do not exist because, given prevailing legal and social norms, anonymity is critical for the success of the transaction.

This difference in approach between domestic and transnational adoption stems from pragmatic, rather than normative, considerations. Pressures on adoptive children to discover their origins are likely, if anything, to be greater in the transnational than in the domestic context, and there is no *prima facie* reason why the hopes of birth parents for some information about their children should be less acute than those of their Western counterparts. Acknowledgement of the importance and enduring presence of birth ties and of cultural heritage in the transnational context would reduce nationalist or racialized denunciations of transnational adoption as a new form of cultural imperialism. These campaigns, just like their earlier counterparts in the domestic adoption context, draw on embedded ideas about the primacy of blood ties, the prior claim of a racial, regional, or national group to raise "its own children," and a sense of ownership of children as an important resource for the motherland.<sup>48</sup> It is in this spirit that, at varying times, countries as different in their political systems as Romania, South Korea, and India have denounced foreign adoptions and defended state ownership of the nation's children.

But this ownership approach, which sees children as a form of state property, whether as an asset or a responsibility, leads back to the commodification of persons that underlies trafficking in persons. The parallels between the two phenomena suggest several possible policy implications. Policymakers and legislators in the transnational adoption arena might usefully borrow from the trafficking context the idea of investment in root causes, in education, and in addressing the possibility of changing gender roles and opportunities. The development of these factors over time are crucial to the advancement of the social position of birth mothers, the resource base of poor families, and the likelihood of greater emancipation from unwanted child birth. This is not to suggest that such changes are simple to achieve, or that they should be raised as matters of international diplomacy or policy. The preponderance of baby girls in Chinese orphanages reflects government population policy and gender roles that are deeply entrenched in Chinese society; international pressure to modify them might be counterproduc-

---

tive in the short term. But ignoring the human cost of these policies in the process of streamlining transnational adoption is even more problematic. Ultimately, collaboration between domestic and international constituencies committed to gender justice and democratic change will be the way forward.<sup>49</sup> ■

## NOTES

- 1 Chris Hammond, director of a British association of government and nonprofit adoption agencies, quoted in Jordana P. Simov, "The Effects of Intercountry Adoptions on Biological Parents' Rights" *Loy. L.A. Int'l & Comp. L. Rev.* 22 (1999): 251, note 42.
- 2 The story of the poverty stricken Albanian family that exchanged the youngest of their seven children for a TV from a childless Italian couple, was front page news: Sophie Arie, "I gave away son so he could escape squalor: Albanian mother denies selling her child to couple," *The Guardian*, October 14, 2003, 19; "After Rukkbai...gave birth to her fifth daughter, a woman from a nearby village came and offered her 1,100 rupees—roughly \$20—for the girl...The same woman from the nearby village also bought other newborns from families here. But she was only a link in the chain. For a small amount...she passed the baby to others. Eventually they were taken to orphanages and then adopted, almost all by Westerners; See Raymond Bonner, "For Poor Families, Selling Baby Girls was Economic Boon," *New York Times*, June 23, 2003, A3; Mark Baker, "Babies for Sale: no warranty—In Cambodia, corruption and lax regulations mean it's easy to get a child quickly. The problem is, many of them aren't abandoned, they're sold," *Sydney Morning Herald*, December 16, 2003, 1; "South Korea is Australia's No. 1 source of babies for adoption. Why is the country sending so many of its infants overseas?" See Shane Green, "The Seoul providers," *Sydney Morning Herald*, December 17, 2003, 3; and "They said my baby would go to a family in the United States and have a better life" recalled Mendoza, 17. "When I told them I wanted to keep him, they said, 'If you don't sign, we'll kill you.'" Letta Taylor, "Robbing the Cradle: Adoptions under fire in Guatemala," *Newsday*, October 26, 2003, 6.
- 3 Dale Fuchs, "Romania:Adoption Dispute with Europeans", *New York Times*, February 5, 2004, A6.
- 4 See, for example, Report of the Special Rapporteur on the sale of children, child prostitution, and child pornography, Ms Ofelia Calcetas-Santos, E/CN.4/1999/71, 29 January 1999; Elizabeth Bartholet, *Family Bonds: Adoption, Infertility, and the New World of Child Production* (Boston: Beacon Press, 1999).
- 5 The work of Barbara Yngvesson stands out as being particularly thoughtful and nuanced. See, among others, "Un niño de cualquier color: race and nation in inter-country adoption, in Jane Jenson and Boaventura de Sousa Santos, eds. *Globalizing Institutions: Case Studies in Innovation and Regulation* (Aldershot: Ashgate, 2000), 169.
- 6 Of course in the case of transnational adoption, the "strangers" are the adoptive parents, but they are still strangers at the time of transport. I am grateful to Michael Blake for helpful discussions about this definition.
- 7 The internet has even been used to rally support against restrictive adoptive rules: in Guatemala, the locus of extensive adoption profiteering, 400 "adoption attorneys" opposing the introduction of more stringent adoption controls galvanized support from adoptive parents on line. Hugh Dellios and Bonnie Miller Rubin, "Guatemala grapples with black market for adopted babies," *Chicago Tribune*, October 4, 2003, 3. [Hereafter Dellios and Rubin]
- 8 The population of Romanian or Chinese orphanages did not expand because of the adoption market, but because of government policies. But supply did not produce the surge in transnational adoption, demand did. I am grateful to Debora Spar for this point.
- 9 Dellios and Rubin.
- 10 Sue Ferguson, "A New Community Comes of Age: As the First Chinese adoptees reach puberty, researchers are taking stock," *Canadian Business and Current Affairs*, February 24, 2003, 1.
- 11 Diana Lary, *Minnan Migrations: The People of Southern Fujian On the Move, Past and Present* (Vancouver: University of British Columbia, 2003), 20. The sale of organs, coercive and consented to in the same way, is another example of this choice of what is perceived as a lesser evil.
- 12 Indeed, paradoxical as it seems, one can think of coercion and consent going together in many of the situations reviewed in this paper.
- 13 I owe these observations to Michael Blake, and am grateful to him for illuminating exchanges on these questions.
- 14 Richard Falk, *Predatory Globalization: A Critique* (Cambridge: Polity Press, 1999), 1-10.
- 15 Martha Field suggests that both surrogate and birth mothers should always have the option of retaining their

- children at or following birth, despite contrary contractual arrangements. See Martha A. Field, *Surrogate Motherhood: The Legal and Human Issues* (Cambridge: Harvard University Press, 1988), 151.
- 16 Mothers have always had to separate from children, for differing lengths of time and in differing circumstances; yet only some separations are socially stigmatized, and this varies by the class and status of the birth mother—nannies and boarding school are acceptable, relinquishment for adoption is not. See Carol Sanger, "Separating from Children," *Columbia Law Review* 96 (2) (1996): 375-518.
  - 17 Indeed, under U.S. immigration law, a child can only immigrate to the U.S. if he or she is "an orphan," defined as "a foreign child who does not have any parents because of the death or disappearance of, abandonment or desertion by, separation from or loss of, both parents. An orphan can also be a foreign-born child with a sole or surviving parent who is unable to provide for the child's basic needs, and who has, in writing, irrevocably released the child for emigration and adoption." See U.S. Citizenship and Immigration Services, "Adjudicate Orphan Status First Pilot Program," < [http://uscis.gov/graphics/services/orphan\\_pilot.html](http://uscis.gov/graphics/services/orphan_pilot.html)> (accessed April 11, 2004).
  - 18 This term is preferred to the more common term "surrender," which as Barbara Melosh points out, suggests defeat. See Melosh, *Strangers and Kin: The American Way of Adoption* (Cambridge, MA: Harvard University Press, 2002), viii. Also note that there are certainly quite significant differences between countries of origin, and little work has been done to document the circumstances of birth mothers.
  - 19 Kay Johnson, Huang Bangham, and Wang Liao, "Infant Abandonment and Adoption in China," *Population and Development Review* 24(3) (1998): 469-510, 474.
  - 20 Dellios and Rubin.
  - 21 The U.S. recently changed its laws to enable children adopted overseas by U.S. citizens to get their citizenship automatically, within 45 days of entering the U.S., rather than requiring adoptive parents to comply with additional qualifying procedures after the child entered. See the 2000 Child Citizenship Act.; Marilyn Gardner, "One + One makes a family," *Christian Science Monitor*, March 23, 2003, 15. [hereafter Gardner]
  - 22 This is true for each of the top twenty countries of origin of "orphans" adopted in the U.S. in 2002. See State Department, "Immigrant Visas Issued to Orphans coming to the U.S.," <[http://travel.state.gov/orphan\\_numbers.html](http://travel.state.gov/orphan_numbers.html)> (accessed December 3, 2003); See also Mary Lyndon Shanley, *Making Babies, Making Families* (Boston: Beacon Press, 2001), 19.
  - 23 Jane Perlez, "With U.S. Busy, China is Romping with Neighbors," *New York Times*, December 3, 2003, A1; See also *BBC News*, "Baby Smugglers Sentenced to Death," <<http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/asia-pacific/3251266.stm>> (accessed December 1, 2003).
  - 24 Michael Leidig, "A trade that no one seems prepared to admit exists," *Sunday Telegraph*, November 30, 2003, 22.
  - 25 Human Rights Watch/Asia, *Death by Default: A Policy of Fatal Neglect in China's State Orphanages* (New York: Human Rights Watch, 1996), 140-141. [hereafter Death by Default]
  - 26 Death by Default, 1, 4. Since this report was published, there are suggestions the Chinese government has been paying greater attention to the care of orphans and abandoned children (though international human rights organizations are no longer allowed access to Chinese orphanages, so information is limited). According to news reports, though child care workers say "orphanages are still overcrowded, understaffed and underfunded," conditions appear to be improving "from central heating and more beds to better care." Martin Fackler, "China Improves Care of abandoned children," February 3, 2001, < [www.canoe.com/CNEWSFeatures0102/02\\_child-ap/html](http://www.canoe.com/CNEWSFeatures0102/02_child-ap/html)> (accessed February 25, 2004).
  - 27 Melissa Fay Greene, "What Will Become of African's AIDS Orphans?" *New York Times Magazine* Sunday

