

January 2015

## Time for a Truth-Based Policy: Humanitarian Access to Children Living Without Family Care

Sara Dillon

Follow this and additional works at: <https://scholarship.law.ufl.edu/fjil>



Part of the [Law Commons](#)

---

### Recommended Citation

Dillon, Sara (2015) "Time for a Truth-Based Policy: Humanitarian Access to Children Living Without Family Care," *Florida Journal of International Law*: Vol. 27 : Iss. 1 , Article 2.

Available at: <https://scholarship.law.ufl.edu/fjil/vol27/iss1/2>

This Article is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Journal of International Law by an authorized editor of UF Law Scholarship Repository. For more information, please contact [kaleita@law.ufl.edu](mailto:kaleita@law.ufl.edu).

## TIME FOR A TRUTH-BASED POLICY: HUMANITARIAN ACCESS TO CHILDREN LIVING WITHOUT FAMILY CARE

Sara Dillon\*

I.	SOCIAL ORPHANS AND THE DANGEROUS POLICY OF INVISIBILITY .....	23
A.	<i>Human Rights Watch and a Renewed Foray into the World of Children Living Out of Family Care</i> .....	23
B.	<i>The Concept of International Access</i> .....	27
C.	<i>The Special Dangers of Being Hidden</i> .....	28
D.	<i>Conventional Understandings of “Humanitarian Access”</i> .....	30
E.	<i>About “Social orphans” and Their Situation</i> .....	33
II.	THE INTERNATIONAL LAW REGARDING POPULATIONS IN STATE CARE .....	38
A.	<i>Common Vulnerabilities</i> .....	38
B.	<i>The Concept of Children in Especially Difficult Circumstances</i> .....	43
C.	<i>Borrowing from Existing International Law</i> .....	50
III.	THE STRUGGLE TO RECONCILE “CHILDREN’S RIGHTS” AND ORPHANS’ RIGHTS .....	52
A.	<i>The “Criminal” Sarah Ferguson</i> .....	52
B.	<i>Reluctant State Accountability</i> .....	59

### I. SOCIAL ORPHANS AND THE DANGEROUS POLICY OF INVISIBILITY<sup>1</sup>

#### A. *Human Rights Watch and a Renewed Foray into the World of Children Living Out of Family Care*

In Spring 2014, Human Rights Watch published a report on approximately 40,000 children who live in institutional care in Japan.<sup>2</sup>

---

\* Professor of Law, Suffolk University Law School.

1. The term social orphan has evolved to include all children living without adequate parental care, even in situations where one or more parent is in fact alive. The concept of social orphanhood is based on a child-focused approach that places emphasis on psycho-social problems caused from lack of care, support and protection commensurate with the child’s needs.

2. Human Rights Watch, *Without Dreams: Children in Alternative Care in Japan* (2014) [hereinafter *Without Dreams*].

The report provided an unvarnished account of the fact that it is often the wishes of Japanese biological parents that keep children trapped in orphanages, insofar as national law allows these parents to exercise parental rights long after having ceased to act in any meaningful parental role of care-giving.<sup>3</sup> For those who follow the law and politics of the “social orphan” debate, this report was of the utmost importance. After publishing path-breaking reports on children living in institutions in Russia and China in the mid-1990s, Human Rights Watch had mostly gone silent on the issue of children living out of family care and institutionalized children.<sup>4</sup> This may have been in part due to the fact that the topic is so politically contentious, and that identifying such children implies some action to be taken on their behalf—a subject that inevitably proves controversial.

The 2014 report emphasizes the fact that when parents in Japan are found unwilling or unable to care for their children, the main mode of alternative care available is institutional care.<sup>5</sup> Japanese orphanages bear little resemblance the Soviet style orphanages of popular imagination—nevertheless, life in the Japanese child welfare institution creates a separate population, isolated and deprived, with few routes out of the system into normal life.<sup>6</sup> National law has little to say on the issue of terminating parental rights in a way that might allow the children to establish alternative legal ties with a new family.<sup>7</sup>

It is worth noting that the report takes as a major theme the fact that Japan does not have enough “foster care.”<sup>8</sup> Insofar as foster care in the United States and Britain (nations which rely heavily on foster care for children who come apart from their original families) is notoriously unsuccessful for the children who become trapped in that system, it is strange that Human Rights Watch takes “foster care” as the appropriate alternative to what it is critiquing in Japan.<sup>9</sup> One must at least recognize,

---

3. *Id.* at 58.

4. See Human Rights Watch, *Abandoned to the State: Cruelty and Neglect in Russian Orphanages* (1998) [hereinafter *Abandoned to the State*]; Human Rights Watch, *Death by Default: A Policy of Fatal Neglect in China's State Orphanages* (1996).

5. *Without Dreams*, *supra* note 2, at 2.

6. *Id.* at 5–6.

7. *Id.* at 23.

8. This is the pervasive theme throughout the *Without Dreams* report. *Id.*

9. See, e.g., Marcia Robinson Lowry & Sara Bartosz, *Why Children Still Need a Lawyer*, 41 U. MICH. J.L. REF. 199 (2007) (describing the poor record of states in the United States to provide care and protection to foster children); Sharon Balmer, *From Poverty to Abuse and Back Again: The Failure of the Legal and Social Services Communities to Protect Foster Children*, 32 FORDHAM URB. L.J. 935 (2005) (describing the abuse and neglect often suffered by U.S. foster children); Miriam C. Meyer-Thompson, *Wanted: Forever Home Achieving Permanent Outcomes for Nevada's Foster Children*, 14 NEV. L.J. 268 (2013) (a case study of endemic problems in foster care in the state of Nevada); see also Amelia Gentleman, *Children in Care: How Britain is Failing Its Most Vulnerable*, GUARDIAN, Apr. 19, 2009 (describing the poor life outcomes for

though, that in this recent report on Japan, Human Rights Watch has done the difficult work that so many other human rights and child rights bodies have failed to do. That is, they have gone into orphanages, taken the measure of conditions, conducted interviews, and emerged with a sense of the interaction of law and social reality, in order to inform the world that a large population of children are living, virtually hidden from view, in a set of child welfare institutions that are detrimental to the psychological health and future prospects of these children.<sup>10</sup>

By contrast, much of the existing writing on children living out of family care is vague and aspirational—perhaps intentionally so. It is premised on the idea that family reunification is almost always possible, and seems often not to be reality-based.<sup>11</sup> It is frequently unclear on numbers and life conditions, and avoids drawing conclusions as to the flaws in national laws and policies on parental rights. Much of the expert writing makes reference to “family-like” alternatives and group homes—without including much detailed discussion as to how these institutions work out.<sup>12</sup> The almost universal call is for more foster care—despite the grotesque failure of foster care in countries where it has been applied in large numbers. Underlying some of this lack of forthrightness in dealing with the social orphan problem is the fact that international adoption is disliked and discouraged by so many of the major child welfare bodies. To acknowledge the existence of these children is to suggest that something effective must be done on their behalf—and there is a strong interest on the part of many child rights commentators to ensure that international adoption is not a significant part of the mix.<sup>13</sup>

---

children who have experienced impermanency in British foster care).

10. *Without Dreams*, *supra* note 2.

11. See U.N. Gen. Assembly, *Guidelines for the Alternative Care of Children*, U.N. Doc. A/RES/64/142 (Feb. 24, 2010). The Guidelines fail to provide much clarity with regard to how states should achieve genuine permanency for children living out of family care, especially in cases where family reunification proves difficult.

12. See, e.g., *Child Protection from Violence, Exploitation and Abuse, Children Without Parental Care*, UNICEF (Mar. 22, 2011), [http://www.unicef.org/protection/57929\\_58004.html](http://www.unicef.org/protection/57929_58004.html).

UNICEF endorses the Guidelines for the Alternative Care of Children, adopted by the U.N. General Assembly in 2009. The Guidelines encourage efforts to maintain children with their families, where possible. When this is not in the child’s best interests, the state is responsible for protecting the rights of the child and ensuring appropriate alternative care: kinship care, foster care, other forms of family-based or family-like care, residential care or supervised independent living arrangements.

*Id.* UNICEF decries reliance on institutional care and calls for alternatives that are “stable and safe.”

13. Groups like Save the Children have been consistently hostile to the expansion of international adoption, for instance. Their official stance does not call for its abolition, but their

It is clear that the Human Rights Watch report on Japanese orphanages in essence hesitates at the prescriptive dimension—it calls for non-institutional placements for children; it clearly implies that original parents should not have the right to veto preferable alternatives for children—but its frame of reference is that foster care is a public good.<sup>14</sup> While there may be forms of “super” foster care (permanent in nature, ongoing, predictable and stable, and as close as one could get to an actual family without this being formalized in law) in some parts of the world, most foster care systems have rates of “outcomes” failure that are at least equal to institutional care.<sup>15</sup> Both systems suffer from failures in attachment, high rates of abuse, and poor life outcomes for the children who grow up in them.

However, at least the recent report on Japan has had the effect of bringing the issue of orphanages back into the mainstream of human rights analysis. After many years of reticence on the issue, Human Rights Watch has invested its considerable prestige in the problem of children caught in situations of inadequate alternative care. It is especially interesting that Japan was the chosen jurisdiction for this analysis—in that the Japanese orphanages are likely among the “best” of their kind anywhere, and also as Japan is a very wealthy country, a place where many might assume the problem of social orphanhood hardly exists.<sup>16</sup> As explained above, Human Rights Watch presents foster care as the most feasible remedy for Japan’s orphanage dilemma, though deinstitutionalizing children only to put them in foster care is a very dubious proposition.

The principal contribution made by the Human Rights Watch report is that children in hidden orphanages have become, once again, the subject of human rights investigation. It is true that the organization Disability Rights International has been carrying out investigative work in institutions for the past number of years.<sup>17</sup> Although the title of the

---

statements are uniformly skeptical at best. They also try to debunk the idea that all children who seem like “orphans” really are orphans. *See, e.g.,* Ann Bawden, *Save the Children Claims most ‘Orphans’ have Living Parent*, GUARDIAN, Nov. 23, 2009, available at <http://www.theguardian.com/society/2009/nov/24/save-the-children-orphans-report>.

14. *See generally Without Dreams*, *supra* note 2.

15. *See, e.g., New Reports Show Massachusetts Failing to Protect Children in Foster Care*, CHILDREN’S RIGHTS (Aug. 23, 2012), <http://www.childrensrighs.org/press-release/new-reports-show-massachusetts-failing-to-protect-children-in-foster-care> (stating that “A massive review of Massachusetts foster care shows that nearly one in five children who have been in state care for at least two years have suffered confirmed abuse or neglect . . .”).

16. *See Without Dreams*, *supra* note 2, at 4.

17. *See Join our Worldwide Campaign to End the Institutionalization of Children. . . !*, DISABILITY RTS. INT’L (2015), <http://www.disabilityrightsintl.org/learn-about-the-worldwide-campaign-to-end-the-institutionalization-of-children/>. What is striking about the work of DRI is its reliance on entering institutions to visually document abuses—a very different approach from

organization implies that its concerns are focused on disability rights, the group's idea of disability is a very broad one, and includes the manner in which institutional life tends to compound and even create disability. But among the largest human rights organizations, there has been little attention paid to children living out of family care. It is to be hoped that the Human Rights Watch Report will reignite a dialogue on this subject, by encouraging the international community to involve itself in the lives of children living out of family care, on the basis of fact and reality, rather than child welfare clichés.

### *B. The Concept of International Access*

The importance of access pervades all discussions of international law, implicitly and explicitly. Both international humanitarian law and international human rights law depend largely on access to affected populations by outside observers.<sup>18</sup> These central branches of international law depend upon challenging the monopoly enjoyed by national governments to absolute control of territory hosting these disadvantaged. In times of conflict, populations cut off from international aid will die outside the awareness of the international community; refugees will remain vulnerable to all types of abuse in the absence of appropriate services; prisoners are notoriously subject to abuse and neglect, as well as victimization by outbreaks of diseases like TB and HIV/AIDS; similarly, children living in institutions must be seen by the outside world, or risk suffering permanent neglect by those charged with their care.

In recent months, the extraordinary shooting down of a Malaysian airliner with almost 300 innocent people on board has presented an unusually dramatic example of the problem of access.<sup>19</sup> While all aspects of this incident shocked the conscience of the world, a particularly painful development came when access to the crash site was blocked by pro-

---

academic or theoretical descriptions of abuse.

18. See Justin A. Fraterman, *Criminalizing Humanitarian Relief: Are US Material Support for Terrorism Laws Compatible with International Humanitarian Law?*, 46 N.Y.U. J. INT'L L. & POL. 399 (2014); Ved P. Nanda, *The Future Under International Law of the Responsibility to Protect After Libya and Syria*, 21 MICH. ST. INT'L L. REV. 1 (2013); Michael A. Stein & Janet E. Lord, *Enabling Refugee and IDP Law and Policy: Implications of the UN Convention on the Rights of Persons with Disabilities*, 28 ARIZ. J. INT'L & COMP. L. 401 (2011). Though focused on very different issues, each of these articles makes the point that humanitarian access to vulnerable populations is an important component of international human rights and humanitarian law.

19. See Laura Spark-Smith & Ingrid Formanek, *MH17 Crash: Investigators Must Have Full Access, Malaysian PM Says*, CNN (July 26, 2014), <http://www.cnn.com/2014/07/26/world/europe/ukraine-malaysia-airlines-crash/>; see also Yantoultra Ngui, *Malaysia, Dutch PMs to Discuss Access to Plane Crash Site*, REUTERS (July 26, 2014), <http://www.reuters.com/article/2014/07/26/ukraine-crisis-airplane-malaysia-idUSL4N0Q105X20140726>.

Russian rebels operating in the area. Evidence of this potential war crime was thus kept from the knowledge of the international community, as well as the national government most directly concerned—that of the Netherlands—and, by extension, the families of the passengers killed in this horrible way.<sup>20</sup> On a daily basis, teams of investigators sought access to the crash field, but were repeatedly kept out—either by armed guards, or by the intensity of the fighting that continued all around the area. As time passed, and the conditions of the bodies and other evidence inevitably began to deteriorate, it became clear that it might prove impossible to determine exactly what had happened and how the passengers had died. Blocking access certainly had as one of its objectives the motive of hiding incriminating evidence of a war crime from the international community. The brazenness of the act was matched by the brazenness of the attempt to keep evidence hidden. Whatever success international law enjoys in the modern world obviously depends most directly on access to what is likely difficult, embarrassing and damaging to national governments and other organized groups.

### C. *The Special Dangers of Being Hidden*

Among the world's many vulnerable populations, social orphans are perhaps the most hidden.<sup>21</sup> It is this quality of general invisibility that makes objective advocacy on their behalf by those on the “outside” so imperative. Not only are social orphans at high risk of becoming street children, sex workers, or criminal detainees, they also tend to be shielded from outside access and scrutiny by the governments of the countries in which they live.<sup>22</sup> It is difficult to know to what extent this veiling represents conscious national policy; it would seem rather to be the natural inclination of governments to avoid dealing with the difficult social and political questions surrounding the world's enormous

20. See *Eastern Ukraine: UN Rights Chief Says Downing of Plane May be 'War Crime', Urges Probe*, U.N. NEWS CENTRE (July 28, 2014), <http://www.un.org/apps/news/story.asp?NewsID=48360#.VM1GmmjF-H4>.

21. See Sara Dillon, *The Missing Link: A Social Orphan Protocol to the United Nations Convention on the Rights of the Child*, 1 HUM. RTS. & GLOBALIZATION L. REV. 39, 66 (2008).

22. Laura A. Martin, “*The Universal Language is not Violence. It's Love.*” *The Pavlis Murder and Why Russia Changed the Russian Family Code and Policy on Foreign Adoptions*, 26 PENN ST. INT'L L. REV. 709, 710 (2007–2008). See also Elizabeth Mosima, *Cameroon: Orphanages with Hidden Faces*, ALL AFRICA (Sept. 16, 2009), <http://allafrica.com/stories/200909160377.html>; Patrick E. Tyler, *Television; In China's Orphanages, A War of Perception*, N.Y. TIMES (Jan. 21, 1996), <http://www.nytimes.com/1996/01/21/movies/television-in-china-s-orphanages-a-war-of-perception.html>; Dan Burke, *Restoring the Face of Need*, NAT'L CATH. REG. (Feb. 11, 2013), <http://www.ncregister.com/blog/dan-burke/restoring-the-face-of-need>; Simon Shuster, *Why has Moscow Passed a Bill to Ban U.S. Adoptions of Russian Orphans*, TIME (Dec. 20, 2012), <http://world.time.com/2012/12/20/why-has-moscow-passed-a-law-to-ban-u-s-adopti-on-of-russian-orphans>.

population of social orphans.

These difficult questions include: To what extent should society invest in trying to reunite these children with their original families? How successful are such programs? At what point should the rights of original family members be terminated? How can domestic (in country) adoption be promoted? What other forms of permanency are genuinely adequate substitutes for family life? What is the proper role for international adoption efforts? This Article will suggest that attempts to answer these questions should be based unequivocally on a recognition of the core need of human children for permanent, intensive care and protection.<sup>23</sup> Attempts to address the social orphan problem “flexibly,” on the social or cultural plane, must yield to the irrefutable requirement for attachment-providing life circumstances.<sup>24</sup>

The problems posed by social orphans are so intractable that many governments simply avoid grappling with the reality of the situation. Thus, the easiest course of action may be to declare “progress” on the child welfare front, while continuing to hide social orphans in institutions, in foster care, or simply by ignoring them until they are grown up.<sup>25</sup> A consequence of this policy failure is that there is little in the way of clear, objective documentation of the lives of social orphans.<sup>26</sup> Where and how they live are politically charged issues, and access to the children is consistently denied to outsiders.<sup>27</sup> This Article presents the argument that

---

23. Recent research has made it abundantly clear that the human child requires consistent and committed interactions with caring adults in order to flourish. To place young children in care that does not provide that level of care must be considered a violation of child rights. See, e.g., *The Science of Neglect*, THE BUCHAREST EARLY INTERVENTION PROJECT (2014), <http://www.bucharestearlyinterventionproject.org>. See also *The Science of Neglect: The Persistent Absence of Responsive Care Disrupts the Developing Brain*, NATIONAL SCIENTIFIC COUNCIL ON THE DEVELOPING CHILD (2012), [http://developingchild.harvard.edu/resources/reports\\_and\\_working\\_papers/working\\_papers/wp12](http://developingchild.harvard.edu/resources/reports_and_working_papers/working_papers/wp12) (explaining that ongoing disruption or significant absence of caregiver responsiveness leads to a range of adverse consequences in children).

24. See, e.g., Samantha L. Wilson, *Attachment Disorders: Review and Current Status*, 135 J. PSYCHOL.: INTERDISC. & APPLIED 37 (2001) (providing a summary of the modern history of the concept of attachment and the secure parent-child relationship).

25. See James W. Yoxall, *Disparities Among the Orphans of China*, 29 SOUTHEAST REV. ASIAN STUD. 248, 249 (2007). See also Clifford J. Levy, *A Russian Orphanage Offers Love and Care, but Few Ways Out*, N.Y. TIMES (May 4, 2010), [http://www.nytimes.com/2010/05/04/world/europe/04adopt.html?\\_r=0](http://www.nytimes.com/2010/05/04/world/europe/04adopt.html?_r=0) (“In recent years, the Russian government has repeatedly pledged to bolster efforts to help families stay together, to increase the number of children who are adopted and to expand foster care. But it has not had notable success.”); Sophia Kishkovsky, *World Briefing—Europe—Russia—Children Now as Deprived as After War*, N.Y. TIMES (June 2, 2005), <http://query.nytimes.com/gst/fullpage.html?res=9A02E3D81638F931A35755C0A9639C8B63>.

26. *Without Dreams*, *supra* note 2, at 62.

27. Kim Zigfeld, *The End of Reset: Russian Orphans Get the Shaft*, AM. THINKER (Dec. 28, 2012), [http://www.americanthinker.com/articles/2012/12/the\\_end\\_of\\_reset\\_russian\\_orphans\\_get\\_the\\_shaft.html](http://www.americanthinker.com/articles/2012/12/the_end_of_reset_russian_orphans_get_the_shaft.html).



there should be a clear international law principle of humanitarian access to children living out of family care, especially institutionalized children, for the purpose of bringing international attention to their life situations and assisting in the development of a coherent “orphan policy.”<sup>28</sup> National governments should be placed on notice that to shield children from expert scrutiny is itself a violation of the rights of those children.

#### D. Conventional Understandings of “Humanitarian Access”

Humanitarian access is normally associated with life-sustaining aid brought in by relief groups to populations during crises caused by armed conflict.<sup>29</sup> It is a concept normally used to pressure reluctant governments (or non-governmental actors) to allow contact with endangered populations by international aid workers. As an international principle, it also extends to outside access to prisoners,<sup>30</sup> political detainees,<sup>31</sup> and refugees.<sup>32</sup> However, institutionalized children and other children living

---

28. See Felix Schwendimann, *The Legal Framework of Humanitarian Access in Armed Conflict*, 93 INT’L REV. RED CROSS 993, 994 n.1 (2011) (stating that the author understands humanitarian access “as a precondition for effective humanitarian assistance. . . .”); *id.* at 997 (“The issue of access for humanitarian actors becomes acute when the state is unwilling or unable to live up fully to its legal responsibility to ensure the basic needs of affected populations in times of armed conflict. . . .”); *id.* (“Offers of humanitarian relief cannot be considered as foreign intervention in the receiving state’s internal affairs insofar as the principles of humanity, impartiality, and non-discrimination are respected.”).

29. See, e.g., Swiss Federal Department of Foreign Affairs, *Humanitarian Access in Situations of Armed Conflict: Handbook on the Normative Framework* (2011), [http://www.cdint.org/documents/PAIV\\_111118\\_Humanitarian%20Access\\_Handbook\\_mit\\_Inhalt.pdf](http://www.cdint.org/documents/PAIV_111118_Humanitarian%20Access_Handbook_mit_Inhalt.pdf); Jaap Doek, *The International Legal Framework for the Protection of Children in Armed Conflict*, U.N. INST. FOR DISARMAMENT RESEARCH (2011), <http://www.unidir.org/pdf/articles/pdf-art3138.pdf>; Yoram Dinstein, *The Right to Humanitarian Assistance*, 53 NAVAL WAR C. REV. 77 (2000).

30. Cuba has allowed the U.N. Committee Against Torture to visit Cuba to assess the people that complained about arbitrary arrests. The visit will also allow an independent international agency to travel everywhere prisoners are held and report. *Cuba to Allow Visit by U.N. Torture Official*, FOX NEWS LATINO (June 1, 2012), <http://latino.foxnews.com/latino/politics/2012/06/01/cuba-to-allow-visit-by-un-torture-official>.

31. The International Committee of the Red Cross acquired a unique mandate under the Geneva Conventions, giving it access to places of detention to assess the condition of those deprived of their freedom. ICRC makes detailed and confidential recommendations to the detaining authorities and on occasion assists in improving facilities. Medical staff form part of ICRC visiting teams and visits continue on a regular basis. ICRC visits to people deprived of their freedom cover some 70 countries and reach almost 500,000 detainees each year. IHL also extends special consideration to women, who are to be protected from sexual abuse, and children, whose special needs must be taken into account by combatants. IHL protects refugees, internally displaced people and those who have gone missing as a result of armed conflict. *Persons Protected Under IHL*, ICRC PROTECTED PERSONS (Oct. 21, 2010), <http://www.icrc.org/eng/war-and-law/protected-persons/overview-protected-persons.htm>.

32. See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, art. 126; Geneva Convention Relative to the Protection of Civilian Persons in Time

out of parental care are also at extreme risk, and are equally in need of an objective assessment of their life conditions.<sup>33</sup> There has been a notable failure to extend the notion of humanitarian access to children living out of family care, even though these children sustain medical and psychological damage from a variety of influences in their environments. By placing social orphans within the confines of “child welfare policy” or “family law,” both international law specialists and national governments lack full awareness of the dangers experienced by hundreds of thousands of children.<sup>34</sup> Ironically, those who seek access to institutionalized children are likely to be accused of violating laws that ostensibly “protect” social orphans from outside scrutiny.

The medical and psychological research is clear on the fact that human children can only reach their full potential under conditions of relative stability and “permanency.”<sup>35</sup> The goal of such permanency is not merely to provide children from marginal backgrounds with enhanced economic prosperity or even life opportunities in the usual sense, but rather consistent and engaged care from one or more adults.<sup>36</sup> It can be said that permanency is a necessary precondition to psychic health; in the absence

---

of War, Aug. 12, 1949, 6 U.S.T. 3516, art. 76, 143; *Customary International Humanitarian Rule: Rule 124 ICRC Access to Persons Deprived of Their Liberty*, INTERNATIONAL COMMITTEE OF THE RED CROSS (2015), [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule124](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule124).

33. Displaced persons and other victims of conflict are entitled to international protection and assistance where it is not available from their own national authorities. Under the Convention, the Guiding Principles on Internal Displacement, and other international human rights instruments, UNICEF works to meet the survival, protection and development needs of displaced children in over 40 countries. *UNICEF in Emergencies: Displaced Children*, UNICEF (Apr. 21, 2003), [http://www.unicef.org/emergencies/index\\_displacedchildren.html](http://www.unicef.org/emergencies/index_displacedchildren.html).

34. See generally NANCY FREYMOND & GARY CAMERON, *TOWARDS POSITIVE SYSTEMS OF CHILD AND FAMILY WELFARE* 3–26 (2006).

35. Placement stability is important to children caught up in the child welfare system. Much discussed in recent years is permanency planning, which develops and implements methods that increase the likelihood that children will move out of substitute care and into permanent family homes. Northern California Training Academy, *Placement Stability in Child Welfare Services: Issues, Concerns, Outcomes and Future Directions Literature Review*, UC DAVIS CENTER FOR HUMAN SERVICES (Aug. 2008), <http://www.childsworld.ca.gov/res/pdf/PlacementStability.pdf>; Kim MacLean, *The Impact of Institutionalization on Child Development* 15 DEV. & PSYCHOL. 853 (2003).

36. Seth D. Pollak, *Mechanisms Linking Early Experience and the Emergence of Emotion*, 17 CURRENT DIRECTIONS PSYCHOL. SCI. 370 (2008); Charles A. Nelson III et al., *Cognitive Recovery in Socially Deprived Young Children: The Bucharest Early Intervention Project*, 318 SCIENCE 1937 (2007); Alison B. Wismer Fries et al., *Early Experience in Humans is Associated with Changes in Neuropeptides Critical for Regulating Social Behavior*, 102 PROC. OF THE NAT'L ACADEMY OF SCIENCES OF THE U.S. 47, 17237 (2005); Dana E. Johnson, *Medical and Developmental Sequelae of Early Childhood Institutionalization in Eastern European Adoptees*, 31 MINN. SYMPOSIA ON CHILD PSYCHOL. 113 (2000); Dana E. Johnson & Kathryn Dole, *International Adoptions: Implications for Early Intervention*, 11 INFANTS & YOUNG CHILD 34 (1999).

of this, human “attachment” fails to occur, thus in one sense shutting down systems of physical and cognitive development.<sup>37</sup> Attachment and bonding are not some ideal states of happiness or contentment; rather, they are the building blocks of mental development, without which the lives of human beings are severely distorted.<sup>38</sup> Where there is inadequate recognition of this fact, children endure the most severe consequences. When they are hidden, they are also denied the benefit of advocacy on their behalf.<sup>39</sup>

Every day spent in an institutional setting is antithetical to the proper development of emotional and cognitive life in a child.<sup>40</sup> Yet, ironically, no human rights doctrine insists that the placement of social orphans within institutions, or in other negative settings characterized by inadequate care, should be scrutinized by objective outsiders, on behalf of the international community.<sup>41</sup> The traditional focus of aid

37. See *supra* text accompanying notes 7 & 8; Theodore P. Cross & Christina Bruhn, *Delivery of Mental Health Services for a State's Population of Children in Foster Care: A Comparison of Illinois and National Data*, 5 ILL. CHILD WELFARE 67 (2009–2010); Thomas G. O'Connor et al., *Attachment Disturbances and Disorders in Children Exposed to Early Severe Deprivation*, 20 INFANT MENTAL HEALTH J. 10–29 (1999); Jenny Castle et al., *Effects of Qualities of Early Institutional Care on Cognitive Attainment*, 69 AM. J. ORTHOPSYCHIATRY 424–37 (1999).

38. Reactive Attachment Disorder (RAD) is a complex psychiatric syndrome that affects children who have been subjected to inadequate care-giving. RAD commonly affects children who have had severe disruptions in their early relationships including abuse, neglect, or frequent changes in their primary caregiver. The physical, emotional and social problems that result often persist as the child grows older. These include detached and unresponsive behavior, difficulty being comforted, inhibition or hesitancy in social interactions, and preoccupied or defiant behavior, among other problems. See Anne L. Glowinski, *Reactive Attachment Disorder: An Evolving Entity*, 50 J. AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY 210–12 (2011); Gail Horner, *Reactive Attachment Disorder*, 22 J. PEDIATRIC HEALTH CARE 234–39 (2008); James R. Corbin, *Reactive Attachment Disorder: A Biopsychosocial Social Disturbance of Attachment*, 24 CHILD ADOLESCENT SOC. WORK J. 539–52 (2007).

39. Jenna Holtz, *Child Welfare in Crisis: A Focus on Eastern Europe*, 14 CHI.-KENT J. INT'L & COMP. L. 1 (2014) (providing a case study of bureaucratic neglect and indifference toward institutionalized children in Eastern Europe).

40. See David Howe & Sheila Fearnley, *Disorders of Attachment in Adopted and Fostered Children: Recognition and Treatment*, 8 CLINICAL CHILD PSYCHOL. & PSYCHIATRY 369–87 (2003); John J. Sigal et al., *Unwanted Infants: Psychological and Physical Consequences of Inadequate Orphanage Care 50 Years Later*, 73 AM. J. ORTHOPSYCHIATRY 3–12 (2003); Sandra R. Kaler & B.J. Freeman, *Analysis of Environmental Deprivation: Cognitive and Social Development in Romanian Orphans*, 35 J. CHILD PSYCHOL. & PSYCHIATRY 769–81 (1994).

41. See, e.g., UNICEF-Media Centre, Cambodia, *What is UNICEF's Position on Orphanages, Group Homes, or Residential Care for Children, and on Adoption of Children for Whom Family- or Extended Family-Based Care is Not an Option?*, at [www.unicef.org/cambodia/12681\\_23295.html](http://www.unicef.org/cambodia/12681_23295.html). UNICEF and other child welfare bodies are strongly opposed to institutionalization of children, and argue that children can usually be returned to their families. However, nothing in the Convention on the Rights of the Child or the position papers of child welfare groups call for regular visits by outside experts to institutions in order to determine which children do not enjoy that option.

organizations in providing food and medical care—while vital—fails to encompass this dimension of permanency and child development. Because the presence of social orphans necessarily implicates complex social problems, it is hardly to be expected that most national governments will, without outside prompting, rush to promote the interests of this group living *sub-silentio* at the margins of society.

Most children's rights specialists would agree that institutional care is "to be avoided" for social orphans,<sup>42</sup> but the implications of this stance are often ambiguous. It is a simple matter to express a preference for "community-based" or "family-like" care, but this phrase is non-specific. The idea that children in non-family care should be provided with expert and specialized assessment mechanisms seems far from the traditional human rights radar screen.<sup>43</sup> There is little doubt about the fact that many national governments would be embarrassed by the revelations that would ensue from such scrutiny. On the other hand, it is widely accepted that "blame and shame" is a primary method of human rights "enforcement," and perhaps the most prevalent at present.<sup>44</sup> This is an area where blame and shame could have the most beneficial effect.

#### E. About "Social Orphans" and Their Situation

While the term "social orphan" is not universally accepted, it is useful in capturing the characteristics common to all children who lack appropriate levels of care and protection.<sup>45</sup> Social orphans are children

---

42. See Staci Perlman & John W. Fantuzzo, *Predicting Risk of Placement: A Population-Based Study of Out-of-Home Placement, Child Maltreatment, and Emergency Housing*, 4 J. SOC'Y FOR SOC. WORK & RES. 99–113 (2013); Sandra Bass et al., *Children, Families, and Foster Care: Analysis and Recommendations*, 14 FUTURE OF CHILD. 4–29 (2004).

43. U.N. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, art. 25:

States parties recognize the right of a child who has been placed by the competent authorities for the purpose of care, protection or treatment of his or her physical or mental health to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

44. Andrew K. Woods, *A Behavioral Approach to Human Rights*, 51 HARV. INT'L L.J. 51, 76–79 (describing how human rights law relies on a blame and shame methodology, by bringing shame to the violators of rights).

45. This term is sometimes objected to because many of the children included in the "social orphan" category have living parents. It may be argued that this term excludes awareness of those living parents. However, the term is useful, in that it indicates all children who are not receiving the care of those parents, for whatever set of reasons. From the child's point of view, where there is no active family care, they are experiencing social orphanhood. The reasons may be "social," but the deprivation is still unmistakable. See World Bank OVC Core Definitions, [info.worldbank.org/etools/docs/Library/162495/howknow/definitions.htm](http://info.worldbank.org/etools/docs/Library/162495/howknow/definitions.htm). See also UNICEF, *Moldova: Hope for Marina, A Social Orphan* (2005), available at [www.unicef.org/ceeis/reallives.3407.html](http://www.unicef.org/ceeis/reallives.3407.html) (stating that "more than 70 percent of the more than 14,000 children living in residential care in

who have come apart from their original families, and who tend to live in state-run or other group care, at least while they are small.<sup>46</sup> Some have disabilities; many are made disabled through the type of confinement in which they are forced to live.<sup>47</sup> For a number of reasons, they present a thorny political challenge to governments in the states they inhabit. First, governments are unsure what to do about the fractured relationship between children who are victims of abuse and neglect and their families of origin.<sup>48</sup> It is one thing to remove the child from the home in which

---

Moldova have parents and are so-called ‘social orphans.’”).

46. The “social” part of the phrase “social orphan” refers to the fact that social and socioeconomic conditions have often contributed to the breakdown of the family, and thus to the “unparented” condition of the social orphan. Orphan is of course a term that refers to the parentless child. Social orphan has come into use because it refers to children who may well have living parents, but for whom adequate care and protection is not being provided by that set of parents. Many object to the use of the term “orphan” to describe children who have living parents, as it implies that they are available for adoption or other alternative family situations. Each and every conceptual step in this matter is fraught with controversy, in that how to craft national policy regarding the rights of original parents of children who find themselves living as “social orphans” is a politically charged issue. See Dillon, *supra* note 21 at 39–40. See also Sun, *Abandoned and Neglected: The Life of a Social Orphan*, SUN REGOS NEWS (Aug. 9, 2013), available at [sunregosint.org/abandoned-and-neglected-the-life-of-a-social-orphan/](http://sunregosint.org/abandoned-and-neglected-the-life-of-a-social-orphan/).

[A] social orphan is a child that has at least one living parent, but has either been abandoned by this parent, has run away from home . . . or they have been removed from their home because the government deems it an unsafe environment. Unlike some countries where the number of children orphaned remains high because of war and diseases, many children in Russia are abandoned because of social issues that corrupt families.

*Id.* Indeed, most foster children should also be included under the social orphan rubric. See, e.g., Joseph J. Doyle, Jr., *Causal Effects of Foster Care: An Instrumental-Variables Approach*, 35 CHILD. & YOUTH SERVS. REV. 1143, 1143 (2013) (writing that “Former foster children are far more likely than are others to drop out of school, be imprisoned, enter the homeless population, join welfare, or experience substance abuse problems.”). Sharon Baimer, *From Poverty to Abuse and Back Again: The Failure of the Legal and Social Service Communities to Protect Foster Children*, 32 FORDHAM URB. L.J. 935, 937–38 (2005); Joseph S. Jackson & Lauren G. Fasig, *The Parentless Child’s Right to a Permanent Family*, 46 WAKE FOREST L. REV. 1 (2011) (arguing that the hundreds of American children in foster care are harmed by a lack of permanency and stability).

47. MENTAL DISABILITY RIGHTS INTERNATIONAL (Now called Disability Rights International, but not at the time of this report), HIDDEN SUFFERING: ROMANIA’S SEGREGATION AND ABUSE OF INFANTS AND CHILDREN WITH DISABILITIES (2006) [hereinafter HIDDEN SUFFERING] (stating that “in February 2006, MDRI found 65 infants—with and without disabilities—in an institution for children in the city of Timisoara. Staffing is so low that the children never leave their cribs. These children are becoming psychologically and developmentally disabled as a result of this placement.”), available at [www.disabilityrightsintl.org/wordpress/wp-content/uploads/Romania-May9-final-with-photos.pdf](http://www.disabilityrightsintl.org/wordpress/wp-content/uploads/Romania-May9-final-with-photos.pdf).

48. See Susie Morgan, *The Adoption and Safe Families Act: An Interview with Senator Mary Landrieu*, 46 LA BAR J. 482 (1999) (setting out the main features of what was then the new

they are believed to be in danger; it is quite another to permanently alter the legal tie between parent and child. Not surprisingly, these families are often socially disadvantaged to begin with, and governments do not relish the charge that they are robbing disadvantaged families of their principal human resource.<sup>49</sup>

Second, once children are legally separate from the family of origin, logic would dictate that they should be allowed to find an alternative family. Virtually all studies of the medical and psychological effects of living out of family care indicate that there are long lasting adverse effects on children from lack of consistency and permanency.<sup>50</sup> Yet national governments are reluctant to promote adoption, let alone international adoption.<sup>51</sup> The United Nations and several prominent child welfare bodies continue to act in ways that discourage international adoption, whether they admit to outright opposition or not.<sup>52</sup> Domestic adoption is

---

legislation intended to either reunite children with their families or find them new families). In the United States, the Adoption and Safe Families Act of 1997 (ASFA) addresses the development and well-being of children who have experienced maltreatment. The legislation mandates the maintenance of children safely in their own homes, the return of children to their families when possible, and the provision of services to families that promote their ability to meet the needs of their children. Adoption and Safe Families Act, 42 U.S.C. § 679(b) (1997). However, a recent national evaluation of public child welfare systems indicated that no state had conformed with these mandates. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, FEDERAL CHILD AND FAMILY SERVICES REVIEWS: AGGREGATE REPORT (2011), available at [http://www.acf.hhs.gov/sites/default/files/cb/fcfsr\\_report.pdf](http://www.acf.hhs.gov/sites/default/files/cb/fcfsr_report.pdf).

49. Lisa R. Pruitt & Janet L. Wallace, *Judging Parents, Judging Place: Poverty, Rurality and Termination of Parental Rights*, 77 MO. L. REV. 95 (2012); Kames W. Clause, In RE Daniel C.: *Reunification Efforts and the Termination of Parental Rights*, 37 ME. L. REV. 2; Helen Sigmond, *Involuntary Termination of Parental Rights: The Need for Clear and Convincing Evidence*, 29 AM. U. L. REV. 771 (1980); Kendra Huard Fershee, *The Parent Trap: The Unconstitutional Practice of Severing Parental Rights Without Due Process of Law*, 30 GA. ST. U. L. REV. 639, 643–45 (2014) (outlining serious constitutional problems with overzealous termination of parental rights).

50. See Nelson III et al., *supra* note 36; Fries et al., *supra* note 36; Johnson, *supra* note 36; Johnson & Dole, *supra* note 36. Children in institutions have developmental problems such as attachment, acculturation and social integration difficulties as institutions do not provide the developmental support that continuity of care would provide. John Williamson & Aaron Greenberg, *Families, Not Orphanages*, BETTER CARE NETWORK (Sept. 2010).

51. Will Englund & Tara Bahrapour, *Russia's Ban on U.S. Adoptions Devastates American Families*, WASH. POST, Dec. 27, 2012; Joan Heifetz Hollinger & Naomi Cahn, *Forming Families by Law: Adoption in America Today*, 36 HUMAN RTS. 16, 19 (2009); Sonia Harris-Short, *Making and Breaking Family Life: Adoption, the State, and Human Rights*, 35 J.L. & SOC'Y 28–51 (2008).

52. See Richard Carlson, *Seeking the Better Interests of Children with A New International Law of Adoption*, 55 N.Y.L. SCH. L. REV. 733, 737 (2011); see also Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption, May 1, 1995, 1870 U.N.T.S. 167, arts. 20, 21(b); James G. Dwyer, *Inter-Country Adoption and the Special Rights Fallacy*, 35 U. PA. J. INT'L L. 189 (2013) (describing the varied governmental motivations for restricting international adoption).

problematic in countries where there has been no tradition of welcoming children without any blood tie into the family.<sup>53</sup> The U.N. position is that children are best served in their native countries.<sup>54</sup> However, measured in terms of life outcomes, it is difficult to see the logic of that position for social orphans, at least from a human rights perspective.

It is important to note that children lose the protective care of their original families for a wide variety of reasons, and these reasons are region specific.<sup>55</sup> While “poverty” may provide a convenient catch-all explanation for the social orphan phenomenon, poverty *alone* rarely captures the dynamic of child abandonment or state intervention in the family to prevent abuse or neglect.<sup>56</sup> Family structure, marital status and its cultural meanings, medical crises, substance abuse and citizen views

---

53. For example, adoption is prohibited in Islamic law because it is believed to deprive the child of his inalienable right to a relationship of lineage to his or her father. See Masoud Rajabi-Ardeshiri, *The Rights of the Child in the Islamic Context: The Challenges of the Local and the Global*, 17 INT’L J. CHILDREN’S RTS. 475–89 (2009); Alice Richards, *Bombs and Babies: The Intercountry Adoption of Afghanistan and Iraq’s War Orphans*, 25 J. AM. ACAD. MATRIM. LAW. 399, 409–11 (2013) (explaining that under Islamic law ideas, the original blood tie between baby and parents cannot be severed by adoption); Catherine Bitzan, *Our Most Precious Resource: How South Korea is Poised to Change the Landscape of International Adoption*, 17 MINN. J. INT’L L. 121, 126 (2008) (describing persistent Korean cultural reluctance to accept adoption and the strong cultural emphasis on blood ties).

54. See Carrie Rankin, *Romania’s New Child Protection Legislation: Change in Intercountry Adoption Law Results in a Human Rights Violation*, 34 SYRACUSE J. INT’L L. & COM. 259, 269–70 (2006) (detailing UNICEF’s influence in encouraging Romania to eliminate intercountry adoption in favor of domestic solutions to child welfare problems). UNICEF, 2005 GUIDELINES ON THE PROTECTION OF CHILD VICTIMS OF TRAFFICKING, Provisional Version 2.1. Scott Christian, *Intercountry Adoption*, 1 UNIV. FOR PEACE L. REV. 52, 56. UNICEF’s position on Inter-country adoption, [http://www.unicef.org/media/media\\_41918.html](http://www.unicef.org/media/media_41918.html).

55. There are few detailed works on the issue of family breakdown and the “production” of social orphanhood. Across the regions of the world, for reasons that are as various as the regions themselves, social conditions create a vast cohort of social orphans. A recent work on the relationship between the state and the vulnerable family in Russia is found in Elena Khlinovskaya ROCKHILL’S, *LOST TO THE STATE: FAMILY DISCONTINUITY, SOCIAL ORPHANHOOD AND RESIDENTIAL CARE IN THE RUSSIAN FAR EAST* (2010). The book is valuable because it traces the typical route by which families are induced to surrender children to the state, and state motivations in institutionalizing children.

56. Williamson & Greenberg, *supra* note 50. Case studies in Sri Lanka, Bulgaria, and Moldova found that poverty is a major underlying cause of children being put into institutional care. See Kay Johnson, *Politics of International and Domestic Adoption in China*, 36 L. & SOC’Y REV. 379, 380 (2002) (noting the fact that social and cultural factors led China and Korea to seek out solutions through international adoption, and that “poverty alone cannot explain the need to seek adoptive families abroad”); Samantha Callan et al., *The State of the Nation: Family Breakdown*, Centre for Social Justice, 69 (Dec. 2006); Ernest W. Burgess, *Economic, Cultural, and Social Factors in Family Breakdown*, 24 AM. J. ORTHOPSYCHIATRY 462 (1954); James G. Dwyer, *The Child Protection Pretense: States’ Continued Consignment of Newborn Babies to Unfit Parents*, 93 MINN. L. REV. 407, 472–74 (2008) (arguing that factors leading to foster placement go far beyond poverty alone).

of the state role all play into the reality of family disintegration.<sup>57</sup> While the dangers to children living out of family care have common elements across cultures, the grounds for family disintegration are generally marked by specific social forces.<sup>58</sup> While providing effective services for family preservation is inevitably challenging, rapid urbanization and loss of extended family ties may prove devastating to family reunification efforts.<sup>59</sup> Each region must be understood and studied in its own terms; a prescription for avoiding family breakdown that might be successful in one region cannot simply be imposed out of hand on another.

An official commitment to family reunification is also far from delivery of that solution in reality. In some States, parental rights are interfered with by the State on a regular basis;<sup>60</sup> in others, the loss of parental care by social orphans is of a more *ad hoc* and chaotic character.<sup>61</sup> In each instance, there will be some relationship of national law and policy to wider cultural structures and meanings. The reason for family breakdown will also influence the potential of families to be reunified through targeted state investments. In addition, the type of alternative facilities in which children find themselves run the gamut from old style orphanages through the more ambiguous “boarding schools,” where there is more of an expectation that parents will retain a legal and emotional tie, albeit on a part time basis.<sup>62</sup> It does appear that

---

57. See Callan et al., *supra* note 56; Burgess, *supra* note 56.

58. Such forces include the death of one or both parents, which in Africa, for example, is most commonly from AIDS. In Central and Eastern Europe, a child with a disability is 46 times more likely to be institutionalized than a child without disabilities. See Patrice L. Engle et al., *The Situation for Children Without Parental Care and Strategies for Policy Change*, 76 MONOGRAPHS OF THE SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT 192–93 (2011).

59. Other problems include lack of documentation and case tracking, and no case planning. These challenges and deficiencies result in children remaining in alternative care indefinitely and often permanently. *Id.*

60. Formal termination of parental rights is especially common in Russia. See, e.g., Victoria Schmidt, *Orphan Care in Russia*, 7 SOC. WORK & SOC’Y INT’L ONLINE J. (2009) (indicating a high level of state interference in family life and termination of parental rights in Russia), available at [www.socwork.net/sws/article/view/441/347](http://www.socwork.net/sws/article/view/441/347). Some of these cases have resulted in the court transferring custody to the noncustodial parent. Edward B. Borris, *Parental Alienation: Interference with Parental Rights of Non-Custodial Parent as Grounds for Modification of Child Custody Divorce Litigation*, CANADIAN CHILDREN’S RIGHTS COUNCIL (Jan. 1997), [http://www.canadiancrc.com/Parental\\_Alienation\\_Syndrome\\_Canada/Divorce\\_Litigation\\_Interference\\_Noncustodial\\_Parent\\_Grounds\\_for\\_Modification\\_Child\\_Custody\\_JAN97.aspx](http://www.canadiancrc.com/Parental_Alienation_Syndrome_Canada/Divorce_Litigation_Interference_Noncustodial_Parent_Grounds_for_Modification_Child_Custody_JAN97.aspx).

61. The Romanian government’s response to the problem of child abandonment in the early post-1989 period, for example, was built on the premise that such an issue was a temporary consequence of the Communist government’s policy in favor of population growth. Not accounting for the possibility that child abandonment would continue at high rates, Romania did not develop long-term measures to prevent or reduce the problem. Irina Tomescu-Dubrow, *Children Deprived of Parental Care as a Persisting Social Problem in Romania: Postcommunist Transformation and Institutional Inefficiency*, 35 INT’L J. SOC. 58–59 (2005).

62. Engle et al., *supra* note 58; David Smolin, *Of Orphans and Adoption, Parents and the*



virtually all legal and political cultures show enormous reluctance to severing the biological family tie, even in the face of many years of parental absence.<sup>63</sup>

## II. THE INTERNATIONAL LAW REGARDING POPULATIONS IN STATE CARE

### A. Common Vulnerabilities

At this point in the development of international law, it may seem self-evident that there should be expert access to all vulnerable populations in state care, or otherwise living outside normal protective structures and within the control or at least influence of the state—prisoners of war, criminal defendants and detainees,<sup>64</sup> and refugees,<sup>65</sup> for example. These

---

*Poor, Exploitation and Rescue: A Scriptural and Theological Critique of the Evangelical Christian Adoption and Orphan Care Movement*, 8 REGENT J. INT'L L. 267, 322–23 (2012) (making the point that “in some nations, it is customary for poor parents to use institutions as in essence boarding schools for the poor, without abandoning or relinquishing them.”).

63. *Without Dreams*, *supra* note 2; Dillon, *supra* note 21 (on strengthening families by providing them support economically and emotionally. Promoting familial care through extended relatives is preferred over foster care); NPR, *For Romania's Orphans, Adoption is Still a Rarity* (Aug. 19, 2012) [hereinafter *For Romania's Orphans*] (explaining that “in Romania, to be considered “adoptable,” a child’s biological parents must be deceased or indicate that they have no interest in having a relationship with the child. But beyond this, all relatives as distant as siblings of grandparents also must sign away rights to the child.”), available at [www.npr.org/2012/08/19/158924764/for-romaniash-orphans-adoption-is-still-a-rarity](http://www.npr.org/2012/08/19/158924764/for-romaniash-orphans-adoption-is-still-a-rarity).

64. The International Committee of the Red Cross (ICRC) is given a mandate for certain interventions by the Geneva Conventions and the ICRC Statute. Delegates have “permission to go to all places where protected persons are, particularly to places of internment, detention and work. They shall have access to all premises occupied by protected persons and shall be able to interview them without witnesses.” Basic Principles for the Treatment of Prisoners, G.A. Res. 45/111 (Dec. 14, 1990). The same applies to prisoners of war. Standard Minimum Rules for the Treatment of Prisoners, *adopted* by the First U.N. Congress on the Prevention of Crime and the Treatment of Offenders, 1955, and approved by ECOSOC Res. 663 (July 31, 1957 & May 13, 1977). Note the consternation of the U.N. Special Rapporteur on torture or other cruel, inhuman or degrading treatment or punishment after being denied prison access while conducting an investigation in the Gambia. U.N. Human Rights, Office of the High Commissioner for Human Rights, *The Gambia: UN Human Rights Team Prevented from Completing Torture and Killing Investigations*, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15267&LangID=E>. For more criticisms of policies denying access to displaced people, see Joshua Hersh, *Syria Humanitarian Access A Growing Concern for Aid Groups*, HUFFINGTON POST (Nov. 9, 2013), available at [http://www.huffingtonpost.com/2013/11/09/syria-humanitarian-access\\_n\\_4247049.html?utm\\_hp\\_ref=politics&ir=Politics](http://www.huffingtonpost.com/2013/11/09/syria-humanitarian-access_n_4247049.html?utm_hp_ref=politics&ir=Politics) (noting that in October 2013 the Security Council of the United Nations issued a presidential statement calling on all sides to let humanitarian aid reach victims).

65. The U.N. High Commissioner for Refugees (UNHCR) is responsible for monitoring the fairness of procedures that grant refugee status, for making sure that appropriate measures are taken to secure refugee camps, and for coordinating the relief that will guarantee humane living

situations all have in common that the populations concerned lack autonomy and control over their environments, and are thus deserving of outside attention. They are unconnected to mainstream society and at the margins of the state. The rationale for this access has two aspects: one, to allow for the provision of essential aid; and two, to facilitate assessment of conditions of care.

The basis for a doctrine of access is that the actions of the state must be scrutinized and the temptation to abuse and/or neglect curtailed through objective outside observation and reporting.<sup>66</sup> No explanation is needed as to why “secret prisons” are dangerous in human rights terms.<sup>67</sup> It would obviously be naïve to assume that the state always has the best interests of such populations at heart, and few would dispute that access by outsiders tends to provide some protective cover to the vulnerable.<sup>68</sup> This concept becomes more complicated when the target population is made up of children.<sup>69</sup> As children have an inherent need for protection that goes beyond any especially difficult circumstance,<sup>70</sup> it is common for

---

conditions for refugees. In coordination with NGOs, the UNHCR provides material assistance and protection to refugees. See FRANCOISE BOUCHET-SAULNIER, *THE PRACTICAL GUIDE TO HUMANITARIAN LAW* 372 (2007).

66. Recognizing the need to strengthen international human rights monitoring and protection, the Human Rights Council has been tasked with conducting for all states a peer review system, the Universal Periodic Review (UPR), in respect of their human rights obligations and commitments. The cycle for review is four years and is based on review documents prepared by the state, treaty bodies, Special Procedures of the OHCHR, and NGOs. See Mominah Usmani, *Restrictions on Humanitarian Aid in Darfur: The Role of the International Criminal Court*, 36 GA. J. INT’L & COMP. L. 257, 258–60 (2007) (treating denial of access to vulnerable populations as an international crime); Steven Freeland, *Child Soldiers and International Crimes—How Should International Law Be Applied?*, 3 NEW ZEALAND J. PUB. & INT’L L. 303, 306 (2005) (on the need for humanitarian access to vulnerable and exploited children).

67. See Vanessa Gera, *CIA Secret Prison: Polish Leaders Break Silence About Black Site*, HUFFINGTON POST, Mar. 31, 2012, [http://www.huffingtonpost.com/2012/03/31/cia-secret-prison-polish-\\_n\\_1393385.html](http://www.huffingtonpost.com/2012/03/31/cia-secret-prison-polish-_n_1393385.html). Michael Schmidt, *Report Says Secret Jails, Run by Iraq, Stay Open*, N.Y. TIMES, Feb. 1, 2011.

68. In reality, U.N. investigators and NGOs have often been met with hostility, especially those appointed to monitor and investigate specific human rights violations in particular countries.

69. The child’s protection is therefore primarily provided by the family. Reports on the true conditions in child welfare institutions could shame authorities as has happened in other contexts. See, e.g., Amnesty International, USA: California Authorities Urged to End Shocking Conditions in Prison Isolation Units, Sept. 27, 2012, *available at* [www.amnesty.org/en/articles/news/2012/09/usa-california-authorities-urged-end-shocking-conditions-prison-isolation-units/](http://www.amnesty.org/en/articles/news/2012/09/usa-california-authorities-urged-end-shocking-conditions-prison-isolation-units/) (providing vivid detail of the extreme conditions endured by prisoners living in isolation). With regard to the child welfare context, see Human Rights Watch, *Russia: Children with Disabilities Face Violence, Neglect*, Sept. 15, 2014 (along with its recent report on Japanese orphanages, Human Rights Watch also returned to Russian orphanages to detail the appalling conditions disabled Russian children must survive), *available at* <http://www.hrw.org/news/2014/09/15/russia-children-disabilities-face-violence-neglect>.

70. Children have unique requirements so as to be able to develop normally, both physically and mentally. *Id.* at 28.

national governments to justify their own inadequate treatment of children by asserting the need to “defend” children from outsiders in general.<sup>71</sup> In this scenario, *access itself* comes to be seen as exploitation, rather than as an antidote to exploitation and abuse. As is so often the case in the realm of international children’s rights, it becomes difficult to distinguish the abuser from the defender of rights. This is especially so when it comes to identifying the rights of children living out of parental care, often in state care.<sup>72</sup>

Humanitarian access comes into play in connection with the rights of at-risk populations to whom access is sought by NGOs and other public interest bodies, bodies whose task it is to deliver life-saving supplies of food, medicine or expert advice.<sup>73</sup> Confusion arises where the act of delivering humanitarian assistance is itself denounced as a violation of the law. This can occur in a variety of situations—notably where the act of delivering aid is characterized as contributing to the violation of immigration laws or assisting terrorist acts.<sup>74</sup> The motives of both the provider of aid and the target population are likely to be impugned where official policy is under threat, and humanitarian access is therefore not in the territorial government’s immediate political interest.

The source of a right to humanitarian assistance is generally located within the tradition of international humanitarian law. Its classical formulation relates to access by the Red Cross or other internationally recognized organizations to affected populations during armed conflict.<sup>75</sup> However, we do not confine our understanding of humanitarian access to

71. See Economic and Social Council, Overview: Children in Especially Difficult Circumstances, E/ICEF/1986/L.6 (Feb. 28, 1986) (describing the circumstances that make some groups of children especially vulnerable, including children who do not enjoy family protection. This term has been commonplace in the field of children’s rights). *Supra* note 46.

72. *Supra* notes 68–70; *infra* note 153.

73. The Red Cross provides international services to vulnerable communities in the area of disaster response and building safe communities. See Red Cross, <http://www.redcross.org/what-we-do/international-services>. “Despite the immense security challenges, the United Nations and humanitarian partners have managed to scale up and reach areas where people need help, including food for 1.5 million people in September and health assistance to 60,000 people including emergency care for the wounded,” said the Under-Secretary-General for Humanitarian Affairs, Valerie Amos. *On Eve of Proposed Truce in Syria, UN Ready to Provide Humanitarian Aid to Thousands of Families*, U.N. NEWS CENTRE (Oct. 25, 2012), <http://www.un.org/apps/news/story.asp?NewsID=43381&Cr=syria&Cr1=#.UIm9DGipWAQ>; *infra* note 153.

74. See, e.g., Maria Lorena Cook, ‘Humanitarian Aid is Never a Crime’: Humanitarianism and Illegality in Migrant Advocacy, 45 L. & SOC’Y REV. 561 (2011) (describing the way in which “humanitarian activists” working with illegal immigrants invoke the idea of a “higher law” in order to continue their work).

75. See ICRC, HANDBOOK OF THE INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT (13th ed. 1994); Jean-Philippe Lavoyer, *Implementation of International Humanitarian Law and the Role of the International Committee of the Red Cross*, in INTERNATIONAL HUMANITARIAN LAW 213–25 (John Carey et al. eds., 2004).

persons caught up in armed conflict; the principle is easily extended to refugee populations and political detainees.<sup>76</sup> The fact of armed conflict is not a *necessary* element; rather, any set of circumstances or policies leading to populations being put at risk for disease or abuse should give rise to a sense of humanitarian imperative.<sup>77</sup> In essence, humanitarian access is meant to provide objective outside observation and assistance to those who would otherwise enjoy little or no protection whatsoever.<sup>78</sup>

It will likely be argued that children in state care do not qualify for such access, as no one outside their national state has any clear right to know of their whereabouts and life circumstances. Arguments may be made with respect to the state's sovereign rights (both protective and possessory) over the national resource represented by the younger generation.<sup>79</sup> Outside interference may be seen as a danger to the children, rather than a form of vital assistance. Yet it is difficult to articulate any coherent difference between the precarious situation of children in state care (including all children out of family care) and that of prisoners, for instance. Both populations are maintained to some extent within the national legal order; both are under the jurisdiction of the national authorities.<sup>80</sup> Their vulnerability creates a special situation, subjecting them to particular dangers and requiring outside scrutiny.<sup>81</sup>

---

76. See Amnesty Int'l, *Refugees: Human Rights Have No Borders*, AI Index ACT 34/003/1997 (Mar. 19, 1997); Alice Edwards, *Refugees, and the Right to "Enjoy" Asylum*, 17 INT'L J. REFUGEE L. 293–330 (2005); A. Aeschliman, *Protection of Detainees: The ICRC Behind the Bars*, 857 INT'L REV. RED CROSS 83–122 (2005); Edouard Delaplace & Matt Pollard, *Visits by Human Rights Mechanisms as a Means of Greater Protection for Persons Deprived of Their Liberty*, 857 INT'L REV. RED CROSS 69–82 (2005).

77. See Gareth Evans et al., *The Responsibility to Protect – Report of the International Commission on Intervention and State Sovereignty* (2001), available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf>; Bosko Jakovljevic, *International Disaster Relief Law*, 34 ISRAEL Y.B. ON HUM. RTS. 251 (2004).

78. See Stanislas E. Nahlik, *A Brief Outline of International Humanitarian Law*, 241 INT'L REV. RED CROSS 187–226 (1998); Robert Kolb, *Note on Humanitarian Intervention*, 849 INT'L REV. RED CROSS 119–34 (2002).

79. Generally, governments are responsible for ensuring respect for the rights of children. Enforcement of these rights depends on governments adopting legislation to formally implement them. BOUCHET-SAULNIER, *supra* note 65, at 33.

80. Children must be provided special protection at all times, not limited only to times of conflict, during which international humanitarian law, as it is traditionally understood and practiced, gives children not only general protection as civilian persons taking no part in hostilities, but also special protection as particularly vulnerable individuals. The 1949 Geneva Conventions and Protocols establish that “children shall be the object of special respect and shall be protected against any form of indecent assault. The parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.” Protocol Additional to the Geneva Conventions of Aug. 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts, art. 77.1, June 8, 1977, 1125 U.N.T.S. 3.

81. U.N. personnel and humanitarian staff are at particular risk in serving the vulnerable populations. Claude Bruderlein & Pierre Gassmann, *Managing Security Tasks in Hazardous*

A serious difficulty one faces in trying to apply a doctrine of humanitarian access to children in institutions concerns the question of exactly who should gain access to these children, and for what specific purpose. Obviously, not everyone with a curiosity about institutional conditions or child welfare policy should have access to children in care. At the most obvious level, an access doctrine would be based on the need for a professional assessment of how the institution is treating the children—in addition to issues of physical comfort, the provision to these children of affection, consistent care giving and adequate social stimulation. Long-term planning for the placement of the children would have to be examined. It is doubtful that the Red Cross would take on this specific task, as it is outside their normal remit and very focused on psychosocial matters, above and beyond physical ones.<sup>82</sup> With the notable exception of the recent report on Japanese orphanages, NGOs such as Human Rights Watch had largely ceased to investigate child welfare institutions by the late 1990s.<sup>83</sup> The United Nations, in particular a specialized agency like UNICEF, would be the most obvious choice for such missions, except for the problematic positions historically taken by UNICEF on issues of permanency and intercountry adoption.<sup>84</sup> It would be necessary for an objective, expert body to have a purely neutral position on international adoption, as it may prove important in some national contexts for adoption to be a strong part of an overall human rights-based child welfare reform.

Some NGOs have taken as their special focus the issue of institutionalized persons, including children. As described above,

---

*Missions: the Challenges of Securing United Nations Access to Vulnerable Groups*, 19 HARV. HUM. RTS. J. (2006).

82. See Red Cross, *supra* note 73.

83. See generally Amnesty Int'l, *The Tears of Orphans – No Future Without Human Rights*, AFR/54/02/95 (Jan. 1, 1995); Human Rights Watch, *Death By Default: A Policy of Fatal Neglect in China's State Orphanages* (Jan. 1, 1996); Human Rights Watch, *Chinese Orphanages: A Follow Up* (Mar. 1, 1996); *Abandoned to the State*, *supra* note 4.

84. The Convention on the Rights of the Child (CRC) recognizes the family as the natural environment for children and requires the state to provide support and assistance to ensure that families are able to care for their children. Article 20 also makes specific reference to children outside of parental care and their right to special protection and assistance as well as the role of the state in providing alternative care for children lacking parental care. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3. art. 20. The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption prioritizes maintaining the biological family first, then extended family care, domestic adoption, and intercountry adoption only when all other domestic care options have been deemed not in the child's best interest. Group or institutional care can be an option but only if a full assessment concludes that such an option is best for a specific child and not the default option. Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, at 33.

Disability Rights International has carried out investigations in institutions around the world, in Romania, Mexico, Serbia and many other countries.<sup>85</sup> It is important to note that DRI has relied extensively on the technique of quiet, if not literally unlawful, access. A common denominator in all revelations concerning children in institutional care is that the “reality” of day to day life within the walls of the institution differs markedly from official reporting on the subject. DRI has gained broad recognition for the courage it has shown in disregarding official objections, and going to the source of human rights violations—namely, behind the closed doors of the institutions themselves.<sup>86</sup>

### B. *The Concept of Children in Especially Difficult Circumstances*<sup>87</sup>

I have argued in this Article that humanitarian access is not limited to

85.

In the United States, children with autism and other mental disabilities living at a residential school in Massachusetts are being given electric shocks as a form of “behavior modification.” [We] found children with autism in Paraguay and Uruguay locked in cages. In Romania, we found teenagers with both mental and physical disabilities hidden away in an adult psychiatric institution—near death from intentional starvation. Some of the teens weighed less than 30 pounds. In almost all institutions with children, we find them rocking back and forth, chewing their fingers or hands or gouging at their eyes or hitting themselves—all attempts to feel something rather than nothing and a reaction to total sensory deprivation and a lack of human love or contact.

DISABILITY RIGHTS INTERNATIONAL, THE WORLDWIDE CAMPAIGN TO END THE INSTITUTIONALIZATION OF CHILDREN, <http://www.disabilityrightsintl.org/learn-about-the-world-wide-campaign-to-end-the-institutionalization-of-children/>.

86. DISABILITY RIGHTS INTERNATIONAL, *BEHIND CLOSED DOORS: HUMAN RIGHTS ABUSES IN THE PSYCHIATRIC FACILITIES, ORPHANAGES AND REHABILITATION CENTERS OF TURKEY* (2005); *HIDDEN SUFFERING*, *supra* note 47.

87. See, e.g., Judith Ennew, *Difficult Circumstances: Some Reflections on “Street Children” in Africa*, 13 CHILD., YOUTH & ENV'TS 7 (2003), at <http://www.streetchildrenresources.org/wp-content/uploads/2013/01/reflections-on-street-children-africa.pdf>.

[I]n the mid 1980s UNICEF coined another category, Children in Especially Difficult Circumstances, which is now in use throughout the world, with the acronym CEDC . . . entering some languages as a word. Although originally established as a group term to include refugees, children with disabilities, children affected by organized violence and unaccompanied children in disasters, as well as street children and working children, CEDC now seems to be almost synonymous with “street children” in many settings.

*Id.* UNICEF and other child welfare bodies have identified certain groups of children as “children in extreme circumstances” (CEC), “children in dire circumstances” (CDC), “children in adversity,” “orphans and vulnerable children” (OVC), and/or “children in extremely difficult circumstances” (CEDC).

a set list of “crises”—relating to armed conflict and children.<sup>88</sup> At present, however, displaced children, refugees, children caught up in armed conflict, children left behind in natural disasters tend to represent the current outer limits of the topic.<sup>89</sup> Humanitarian access is least controversial when there are definite physical goods to be delivered to a population—along the lines of food, clothing, shelter.<sup>90</sup> It becomes more tenuous when the reasons for the vulnerability derive from social and economic complexities, rather than armed conflict or some other issue clearly on the radar of the “international community.”<sup>91</sup> There is a solid factual basis for concern over the fates of children living outside of parental care, whose life outcomes are often abysmal.<sup>92</sup> Some international child welfare bodies seem content not to know how many social orphans are in any given country, as well as where and how they live, beyond mere generalities. Children who live out of parental care and who are entrusted to the state are in as much danger as children in the more familiar situations of vulnerability, such as those living in refugee camps, for instance.<sup>93</sup>

---

88. See BOUCHET-SAULNIER, *supra* note 65.

89. See, e.g., INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW (Oma Ben-Naftali ed. 2011); DANIEL THURER, INTERNATIONAL HUMANITARIAN LAW: THEORY, PRACTICE, CONTEXT (2012); SEARCHING FOR A ‘PRINCIPLE OF HUMANITY’ IN INTERNATIONAL HUMANITARIAN LAW (Kjetil Mujezinovic Larsen et al. eds., 2013).

90. *Id.*

91. Human Rights and Armed Conflict, Icelandic Human Rights Center, <http://www.humanrights.is/the-human-rightsproject/humanrightscasesandmaterials/humanrightsconceptsidesandfora/humanrightsinrelationtoothertopics/humanrightsandarmedconflict/>.

92. Save the Children Fund, *infra* note 166. See also University of Pittsburgh, Office of Child Development, *Understanding Institutionalized Children: Developmental Issues, Intervention and Policy Implications* (2012) (setting out the core impacts of orphanage life on child development), available at [www.ocd.pitt.edu/Default.aspx?webPageID=283&ParentPageid=5](http://www.ocd.pitt.edu/Default.aspx?webPageID=283&ParentPageid=5); National Coalition for Child Protection Reform, *The Evidence is In: Foster Care Versus Keeping Families Together: The Definitive Studies* (2009) [hereinafter *The Evidence is In*], available at [nccpr.info/the-evidence-is-in-foster-care-vs-keeping-families-together-the-definitive-studies/](http://nccpr.info/the-evidence-is-in-foster-care-vs-keeping-families-together-the-definitive-studies/).

93. Children without parental care are an extremely vulnerable population group. They often enter a cycle of marginalization, discrimination, abuse, and exploitation. Children who have grown up in alternative care also often face an abrupt entry into adulthood with highly increased risks of poverty, homelessness, alcoholism, drug use, violence and abuse, and sexual and criminal exploitation. See, e.g., Megan Gunnar, *Effects of Early Deprivation: Findings From Orphanage-Reared Infants and Children*, in HANDBOOK OF DEVELOPMENTAL COGNITIVE NEUROSCIENCE 617–29 (C.A. Nelson & M. Luciana eds., 2001); Katherine Kortenkamp & Jennifer Ehrle Macomber, *The Well-Being of Children Involved with the Child Welfare System: A National Overview*, in NEW FEDERALISM: NATIONAL SURVEY OF AMERICA’S FAMILIES 2002 (Urb. Inst., Ser. No. B-43, 2002); MacLean, *supra* note 35, at 854–85; Nigel Cantwell, *The Challenges of Out-of-Home Care*, 105 EARLY CHILDHOOD MATTERS 4–15 (Dec. 2005); St. Petersburg-USA Orphanage Research Team, *The Effects of Early Social-Emotional and Relationship Experience on the Development of Young Children*, in 72 MONOGRAPH ON THE SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT (2008).

This Article has already pointed out the negative effects on physical and psychological development of children in institutional care; these effects are broadly recognized.<sup>94</sup> Human attachment is a developmental process of basic importance to successful existence, certainly as vital as education, and in many ways more vital. Living in group settings with inconsistent care givers creates long term traumatic effects that are difficult to ameliorate in later years.<sup>95</sup> Institutional life, including ordinary foster care, is based on a process that runs counter to the way in which the human brain develops.<sup>96</sup> However, because the child's problems become embedded in the narrative of family difficulties, it is often the case that cause and effect are skewed, and there is a failure by commentators to recognize the trauma as resulting from the lack of attachment and lack of permanency.<sup>97</sup>

Historically, every system that has relied upon large scale institutionalization of children has discovered that serious abuses have resulted.<sup>98</sup> It seems impossible to place children in non-family care for a prolonged period without there being heightened risk of sexual and physical abuse, as well as emotional neglect.<sup>99</sup> As a formula, institutional

---

94. Nelson III et al., *supra* note 36.

95. A large number of caregivers limits the development of stable relationships between children and caregivers. By the time of their third birthday, many institutionalized children have had as many as 50 or more different caregivers. St. Petersburg-USA Orphanage Research Team, *supra* note 93.

96. James Sengendo & Janet Nambi, *The Psychological Effect of Orphanhood: A Study of Orphans in Rakai District*, 7 HEALTH TRANSITION REV. SUPP. 105 (1997). Vlad Tarko, *The Psychological Difficulties of Orphans* (Feb. 20, 2006), <http://news.softpedia.com/news/The-Psychological-Difficulties-of-Orphans-18378.shtml>.

97. See, e.g., Thomas G. O'Connor et al., *Attachment Disturbances and Disorders in Children Exposed to Early Severe Deprivation*, 20 INFANT MENTAL HEALTH J. 10–29 (1999); Charles H. Zeanah et al., *Attachment in Institutionalized and Community Children in Romania*, 76 CHILD DEVELOPMENT 1015–28 (2005).

98. See Spark-Smith & Formanek, *supra* note 19. See also Linda Delaine, *The Plight of Russian Orphans*, RUSSIAN LIFE (May 1, 2000), <http://www.russianlife.com/blog/plight-orphans>. Martin Nunn, *Orphanage Children Unprotected from Abuse, Neglect*. KYIV POST, Feb. 11, 2011.

99. KATHLEEN DALY, REDRESSING INSTITUTIONAL ABUSE OF CHILDREN (2014) (examining major instances of institutional child abuse in Canada and Australia); France 24, *Beaten for Turning on the TV: Video Shows Abuse of Egypt's Orphans*, May 8, 2014, <http://observers.france24.com/content/20140805-orphans-egypt-beaten-turning-television>; Agence France-Presse, *Widespread Sexual Abuse Uncovered at Indian Orphanages*, RAWSTORY.COM (July 11, 2012) (indicating the lack of public oversight for India's many orphanages), available at <http://www.rawstory.com/rs/2012/07/widespread-sexual-abuse-uncovered-at-indian-orphanages/>; Tom Kelly, *Revealed: Six Decades of 'Ritual' Child Abuse: Catholic Schools and Orphanages Damned in Report* (May 21, 2009), DAILYMAIL.COM, <http://www.dailymail.co.uk/news/article-1184828/Revealed-decades-ritual-child-abuse-Catholic-schools-orphanages-damned-report.html>; Human Rights Watch, *Russia: Children with Disabilities Face Violence, Neglect* (Sept. 15, 2014), <http://www.hrw.org/news/2014/09/15/russia-children-disabilities-face-violence-neglect>; Associated Press, *Tales of Foster Care Abuse in Texas Sound 'Like Prison'* (July 24, 2004), <http://kxan.com/2014/07/24/house-committee-scrutinizing-texas-foster-care>; Children's



care is inadequate to the needs of the child. Historically, there are abundant negative examples of orphanage abuse—in Ireland,<sup>100</sup> Australia,<sup>101</sup> Canada,<sup>102</sup> and other countries. Russian statistics have long indicated a close link between an orphanage upbringing and later criminality, sex work, life on the streets and suicide. It should not be surprising to learn that adolescents act out in self destructive ways as they age out of the institution.<sup>103</sup> Because of the denial of access that is the main subject of this Article, these strikingly negative outcomes form a silent crisis. As children are further moved from the traditional orphanage into more diffuse forms of care, such as foster care and group homes, it may become even harder to know of their whereabouts and well-being.<sup>104</sup> Access and assessment could encourage national governments and the international community to address this cluster of problems, in a manner that would ensure that children living out of family care could no longer

---

Rights, New Reports Show Massachusetts Failing to Protect Children in Foster Care (Aug. 23, 2012), *available at* <http://www.childrensrights.org/press-release>.

100. *Supra* note 36. Children were beaten, raped and humiliated for decades. *Report Reveals Decades of Child Abuse in Irish Institutions*, CNN WORLD (May 20, 2009), [http://articles.cnn.com/2009-05-20/world/ireland.catholic.report.abuse\\_1\\_sexual-abuse-child-abuse-five-volume-report?\\_s=PM:WORLD](http://articles.cnn.com/2009-05-20/world/ireland.catholic.report.abuse_1_sexual-abuse-child-abuse-five-volume-report?_s=PM:WORLD); Blog article of Noel Walsh who was a victim of abuse from the St Joseph's Orphanage, *Victim of Abuse in St. Joseph's Orphanage, Kilkenny Requests Public Enquiry* (Dec. 22, 2011), <http://vaticancrimesinireland.blogspot.com/2011/12/victim-of-abuse-in-st-josephs-orphanage.html>.

101. Approximately 500,000 children were placed in institutional care, many of whom experienced neglect and abuse. *Forgotten Australians*, ST. LIBR. OF VICTORIA (Nov. 6, 2012), <http://guides.slv.vic.gov.au/content.php?pid=55757&sid=490236>. Author and orphan witnessed sexual abuse in an institution in Castledare run by the Christian Brothers. Margaret Burin, *The Bush Orphanage: A Story of a Forgotten Child*, ABC BALLARAT (Feb. 18, 2011), <http://www.abc.net.au/local/audio/2011/02/18/3142765.htm>.

102. There are up to 45,000 children in Canada who could be classified as social orphans. In Vancouver, roughly 75% of the city's street young people use crystal meth (meth), a dangerous psycho-stimulant drug. HIV and Hepatitis C infections have reportedly been on the rise among Canada's street children as the use of injection drugs increases. SOS Children's Village, Canada, <http://www.soschildrensvillages.ca/where-we-help/americas/canada/pages/default.aspx>.

103. See iOrphan, Orphan Facts and Statistics (n.d.), [www.iOrphan.org/russian\\_orphans/](http://www.iOrphan.org/russian_orphans/) (providing a brief summary of the negative outcomes for children who have spent time in Russian orphanages). See also Yulia Latynina, *Child Abuse in Russia is Routine*, MOSCOW TIMES (Dec. 26, 2012) (pointing out that "According to various estimates, 50 to 95 percent of children who grow up in Russian orphanages become drug addicts or alcoholics or commit suicide."), *available at* [www.themoscowtimes.com/opinion/article/child-abuse-in-russia-is-routine/473633.html](http://www.themoscowtimes.com/opinion/article/child-abuse-in-russia-is-routine/473633.html); Tim Whewell, BBC News Europe, *Russia: Are Efforts to Help Thousands of 'Abandoned' Children Being Resisted?* (Apr. 2, 2013) (explaining that corruption and self-interest on the part of those who live off the child welfare system has prevented the shutting down of Russian state orphanages), *available at* [222.bbc.com/news/world-europe-21994332](http://www.bbc.com/news/world-europe-21994332).

104. ABC News, *Who's Looking for Foster Care's Lost Children?* (June 4, 2006) (indicating how commonplace it is for teens in the foster care system to simply go missing), *available at* [abcnews.go.com/WNT/FosterCare/story?id=2038588](http://abcnews.go.com/WNT/FosterCare/story?id=2038588).

be overlooked by policymakers.<sup>105</sup>

Foster care in the United States leads to very poor life prospects for the children caught up in that system. It is unequivocally not a “family like” arrangement; it does not provide permanency and calm for children, but instead leaves them psychologically in between.<sup>106</sup> A large proportion of U.S. prison inmates are former foster children.<sup>107</sup> Multiple moves from one foster care situation to another is a familiar story in the United States. Some have called for an end to foster care, stating that it is better to take the risk of abuse and neglect in the original home, rather than condemn the child to instability and trauma in foster care.<sup>108</sup> Foster care does not supply a genuine alternative “home” and thus, the foster child continues to long for home in a way that leads predictably to a range of negative life outcomes.<sup>109</sup>

It should not be the case that the subject of social orphans is so highly

105. See Agence France-Presse, *Widespread Sexual Abuse Uncovered at Indian Orphanages*, THE RAW STORY (July 11, 2012, 12:44 ET), <http://www.rawstory.com/rs/2012/07/11/widespread-sexual-abuse-uncovered-at-indian-orphanages/>; Anita Nair, *B'lore Shamed by Abuse; 41 Kids Rescued from City Orphanage*, ONE INDIA (Mar. 1, 2012, 11:35 IST), <http://news.oneindia.in/2012/03/01/blore-shamed-with-abuse-41-kids-rescued-from-orphanage.html>; Jitendra Garanyak, *Torture and Sexual Abuse on Rise in Odisha Orphanages*, SUN. INDIAN (June 23, 2012, 13:01), <http://www.thesundayindian.com/en/story/torture-and-sexual-abuse-on-rise-in-odisha-orphanages/14/36727/>.

106. Ramesh Kasarabada, *Fostering the Human Rights of Youth in Foster Care: Defining Reasonable Efforts to Improve Consequences of Aging Out*, 17 CUNY L. REV. 145, 148 (2013) (noting that “youth aging out of foster care experience high rates of homelessness, incarceration and underemployment; they are likely to become entrenched in poverty”).

107. NPR, Report: Foster Kids Face Tough Times After Age 18, Apr. 7, 2010 (noting that “A major report out Wednesday says that many former foster kids have a tough time out on their own. When they age out of the system, they’re more likely to end up in jail, homeless or pregnant. They’re also less likely to have a job or go to college.”), available at <http://www.npr.org/templates/story/storyId=125594259>; Mark E. Courtney et al., Report: The Midwest Evaluation of the Adult Functioning of Former Foster Youth, (Chapin Hill, Univ. of Chic. 2011), <http://www.chapinhill.org/research/report/midwest-evaluation-adult-functioning-former-foster-youth>; Sara McCarthy & Mark Gladstone, *State Survey of California Prisoners: What Percentage of the State’s Polled Prison Inmates were Once Foster Children*, POLICY MATTERS: CALIF. SENATE OFF. OF RES. (Dec. 2011) (noting a strong correlation between time spent in foster care and involvement in the criminal justice system), available at [http://www.sor.gov/office3.com/vertical/Sites/%7B3BDD1595-792B-4D20-8D44-626EF05648C7%7D/uploads/Foster\\_Care\\_PDF\\_12-8-11.pdf](http://www.sor.gov/office3.com/vertical/Sites/%7B3BDD1595-792B-4D20-8D44-626EF05648C7%7D/uploads/Foster_Care_PDF_12-8-11.pdf).

108. See *The Evidence is In*, supra note 92; Congressional Coalition on Adoption Institute, Facts and Statistics 2011, available at [www.ccaainstitute.org/index.php?option=com\\_content&view=category&layout=blog&id=25&Itemid=43](http://www.ccaainstitute.org/index.php?option=com_content&view=category&layout=blog&id=25&Itemid=43).

109. See Sandra Bass et al., *Children, Families and Foster Care: Analysis and Recommendations*, 14 FUTURE OF CHILD. 1 (2004). Children bounce between different foster homes, and the system is not equipped to assess each child’s needs and specific family conditions. *Id.* Children go through horrific forms of abuse in foster care with no one aware of the problems. *Id.* at 6. There is a lack of coordination in the agencies involved and a lack of funding to take care of the 540,000 plus children in the system. *Id.*

politicized. Where there has been attention paid to the “orphan question,” advocates have often found themselves in the uncomfortable position of identifying a vulnerable population of children for whom there is no readily available remedy, given the limitation of their national environments.<sup>110</sup> It is at that point that child rights advocates divide into separate camps. One argument is that children should almost always receive the services available in their home countries, even where life prospects are severely constricted.<sup>111</sup> Another is that children should be placed in the best possible family environments, regardless of geographical location, always, of course, giving some preference to an in-country remedy.<sup>112</sup>

Even where a state acknowledges that there are large numbers of children detached from their original families, it is extremely difficult to devise a solution to the problem. There are the rights of the original family to consider.<sup>113</sup> What about situations in which original parents resist the termination of their rights? What about a lack of domestic adoptive parents in situations where parental rights have been terminated? What about the problem of the politicization of international adoption? The contemporary discourse of “rights” sits uneasily with the concept of involuntary termination of parental rights,<sup>114</sup> yet anything less

---

110. Perlman & Fantuzzo, *supra* note 42, at 108.

111. See Hague Conference on Private International Law, Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption, May 29, 1993, 32 I.L.M. 1136. The Hague Convention on the Protection of Children and Co-Operation in Respect of Inter-country Adoption established safeguards for children. *Id.* art. I. The Guide to Good Practice on the implementation of this Convention highlights the principle of “subsidiarity,” which

means that States Party to the Convention recognise that a child should be raised by his or her birth family or extended family whenever possible. If that is not possible or practicable, other forms of permanent family care in the country of origin should be considered. Only after due consideration has been given to national solutions should intercountry adoption be considered, and then only if it is in the child’s best interests.

HAGUE CONFERENCE ON PRIVATE INT’L LAW, THE IMPLEMENTATION AND OPERATION OF THE 1993 HAGUE INTERCOUNTRY ADOPTION CONVENTION: GUIDE TO GOOD PRACTICE 29 (2008).

112. BOUCHET-SAULNIER, *supra* note 65, at 33.

113. U.N. Convention on the Rights of the Child, Article 9(1) and Article 16(1) relate to keeping children and their families together. U.N. Convention on the Rights of the Child, Sept. 2, 1990, 28 I.L.M. 1448. In the United States, if the child is in foster care for more than 15–22 months, states are supposed to terminate the parental rights. Bass et al., *supra* note 109, at 7. In 2001, 126,000 children were legally separated from their parents. *Id.*

114. See Child Welfare Information Gateway, *Grounds for Involuntary Termination of Parental Rights* (2013), available at <https://www.childwelfare.gov/pubPDFs/groundtermin.pdf>. Every state in the United States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands has a statute providing for the termination of parental rights by a court. *Id.* at 1. Termination may be voluntary or involuntary.

than an expeditious determination of these issues may leave children to languish in ambiguous care settings, causing further psychological damage. At its core, this Article has argued that we frequently lack even the most basic knowledge of where the children are, how they live and how they are being damaged.<sup>115</sup> Every time a hidden camera reveals their whereabouts and the adverse effects of severe neglect, the international community reacts in surprise and horror, while the home country angrily denies the facts.<sup>116</sup> This all too familiar paradigm is likely to endure.

A troublesome aspect of the social orphan crisis is that it lacks any reliable mechanisms to address it. Institutional care, foster care, and other forms of group living for minors is bound by a closed system in which state social work staff have exclusive access.<sup>117</sup> When cases go to a formal review in court, advocates may be appointed for the children. However, the entire system of out-of-family care seems to rest on a flawed concept: that children can be “placed” somewhere while the state makes prolonged attempts to restore the original family situation, or does nothing in the hope that this might happen on its own.<sup>118</sup> In cases where this is truly attainable, reunification is the most desirable outcome. The social orphan problem exists because that often does not occur. While foster care—a system that seems to fall between family care and traditional institutional care—may be the easiest solution, in that it removes pressure on the state to take a definitive stand regarding the child’s situation, it is also a form of care that is increasingly seen as a profound danger to the developing child.<sup>119</sup>

---

*Id.* Birth parents who wish to place their children for adoption may voluntarily relinquish their rights. *Id.* When addressing whether parental rights should be terminated involuntarily, most states require that a court find clear and convincing evidence that the parent is unfit and determine whether severing the parent-child relationship is in the child’s best interest. *Id.* at 2.

115. Emilio Godoy, *Mexico’s Orphanages—Black Holes for Children*, INER PRESS SERV. (Aug. 18, 2014) (Point out the lack of regulation of and information on homes for children across Mexico), available at [www.ipsnews.net/2014/08/mexicos-orphanages-black-holes-for-children/](http://www.ipsnews.net/2014/08/mexicos-orphanages-black-holes-for-children/).

116. See generally *Bulgaria’s Abandoned Children* (BBC television broadcast 2007), available at <https://www.youtube.com/watch?v=UQZ-ERQczj8>.

117. See Counterpart International, *Groundbreaking Film Documents Armenia’s Hidden Children* (2015) (another example of how it takes hidden camera work to bring institutionalized children to light), available at [program.counterpart.org/Armenia/?page\\_id=5760](http://program.counterpart.org/Armenia/?page_id=5760).

118. For Romania’s Orphans, *supra* note 63.

119. See Committee on Early Childhood, Adoption and Dependant Care, *Developmental Issues for Young Children in Foster Care*, 106 PEDIATRICS 5, 1145–50 (2000); Sylvia H. Oswald et al., *History of Maltreatment and Mental Health Problems in Foster Children: A Review of the Literature*, 35 J. PEDIATRIC PSYCHOL. 462–72 (2010). See generally Catherine R. Lawrence, *The Impact of Foster Care on Development*, 18 DEV. & PSYCHOPATHOLOGY 57–76 (2006). For example, in the United States youth are aging out of foster care system ill equipped to establish successful lives. See Delilah Bruskas, *Children in Foster Care: A Vulnerable Population at Risk*, 21 J. CHILD. & ADOLESCENT PSYCHIATRIC NURSING 2 (2008); Barton Allen & James Vacca, *Frequent Moving has a Negative Effect on the School Achievement of Foster Children, Makes the Case for Reform*, 32 CHILDREN AND YOUTH SERVICES REV. 829–32 (2010). Adults who were once

### C. Borrowing from Existing International Law

The U.N. Convention on the Rights of the Child has little to offer children living out of family care, at least where their interests transcend the interests and wishes of their state of origin.<sup>120</sup> Not surprisingly, the question of adoption raised its head during the negotiations surrounding Articles 20 and 21 of the Convention, with some delegations unhappy with the idea of having the Convention appear to enshrine any support for international adoption in particular.<sup>121</sup> Similarly, the law and practice that has grown up around these articles, while improving on the original vague vision, remain mired in ambiguity.<sup>122</sup> Nowhere has there been general acknowledgement that there should be humanitarian access to institutionalized children. In no sense has the international community demanded that states account for and assess the conditions of children in state care or other alternative care. We simply do not know how many orphanages there are in provincial China or India, nor how many institutionalized children across Central Asia—to name just a few examples.<sup>123</sup> Virtually every country has either a network of child welfare

---

part of the system are found to have double the rate of mental illness and are three times more likely to live in poverty.

120. See U.N. Convention on the Rights of the Child, Sept. 2, 1990, 28 I.L.M. 1448 (article 6(1) and (2) on the right to life and survival of the children; article 9(1) requiring states to ensure that children not be involuntarily separated from parents, except according to a judicial process when the separation is in the child's best interests; article 16(1) on respect for privacy and family life of the child; article 19(1) requiring states to protect children against all forms of violence and mistreatment while in the care of any person; article 22(1) on special protection for child refugees; article 24(1) requiring states to provide the highest attainable level of healthcare for the child, and article 28(1) on the child's right to education).

121. See Mariela Neagu, *The Uncomfortable Place of Inter-Country Adoption in the Human Rights Arena*, OXFORD HUM. RTS. HUB (Dec. 12, 2014) (pointing out that the original draft of the UNCRC was positive toward international adoption, but that the positive language was dropped after resistance from certain states that did not recognize the practice), [available at ohrh.law.ox.ac.uk/the-uncomfortable-place-of-inter-country-adoption-in-the-human-rights-arena/](http://ohrh.law.ox.ac.uk/the-uncomfortable-place-of-inter-country-adoption-in-the-human-rights-arena/).

122. See D. Marianne Brower Blair, *Admonitions or Accountability?: U.S. Implementation of the Hague Adoption Convention Requirements for the Collection and Disclosure of Medical and Social History of Transnationally Adopted Children*, 40 CAP. U. L. REV. 325 (2012). The Hague Adoption Convention provides a framework for international adoption practices for the 85 nations that are currently contracting states. *Id.* at 326. The Convention itself mandates the collection, preservation, and confidentiality of medical and social history in general terms and leaves specific standards and enforcement mechanisms to each contracting nation. *Id.*

123. See, e.g., Sintha Chiumia, *Sorting Face from Fiction, Factsheet: How Many Orphans Are There in South Africa?*, AFRICA CHECK (2014) (speculating that by 2015, there could be as many as 5 million), [africacheck.org/factsheets/factsheet-how-many-orphans-are-there-in-south-africa/](http://africacheck.org/factsheets/factsheet-how-many-orphans-are-there-in-south-africa/); see also Anna Jane High, *China's Orphan Welfare System: Laws, Policies and Filled Gaps*, 8 U. PA. E. ASIAN L. REV. 127, 147–50 (2013) (describing the complex system of public and private orphanages across China); Himanshi Dhawan, *Unregistered Children's Homes, Orphanages to Attract Penal Provisions*, TIMES OF INDIA (Feb. 22, 2012) (describing scandals over child abuse in India's unregulated orphanage sector), [available at timesofindia.indiatimes.com/](http://timesofindia.indiatimes.com/).

institutions or a large population of children in foster care.<sup>124</sup> Only a small number of very wealthy European states lack a true social orphan population.<sup>125</sup> Discussion of the world's social orphans remains discouragingly abstract.

Yet it is possible to apply existing international law concepts to children living out of family care, in order to advocate for their right to outside access. A strong argument can be made that children in high risk situations that involve loss of original family should be treated within a similar kind of conceptual framework as the disabled.<sup>126</sup> It is common knowledge that placement in an institution predisposes a child to physical and cognitive disabilities that may have lifelong effects.<sup>127</sup> Children who are otherwise not "disabled" in the usual sense are in a short time rendered disabled by their early experiences living out of family care.<sup>128</sup>

Refugee law may also be relevant by analogy.<sup>129</sup> There is no reason why concepts relating to refugees and unaccompanied minors should not be applied to children living out of family care.<sup>130</sup> Everything that is true of refugees is true of social orphans, except perhaps the refugee's long-distance removal from the original home place.<sup>131</sup> Vulnerability to

---

co/india/Unregistered-childrens-homes-orphanages-to-attract-penal-provisions/articleshow/11983295.cms. There are approximately 9–15 million estimated orphans in China.

124. SOS, Children's Villages, USA, Children's Statistics, at <http://www.sos-usa.org/our-impact/childrens-statistics>.

125. Although there are many fewer social orphans in Europe, the financial crisis has seen a rise in child abandonment even in the wealthier European states. See Barbie Latza Nadeau, *Europe's Growing Crisis of Abandoned Babies*, DAILY BEAST (July 11, 2012), available at [www.thedailybeast.com/articles/2012/07/11/Europe-s-growing-crisis-of-abandoned-babies.html](http://www.thedailybeast.com/articles/2012/07/11/Europe-s-growing-crisis-of-abandoned-babies.html).

126. See U.N. Convention on the Rights of Persons with Disabilities, May 3, 2008, 46 I.L.M.

127. See *Without Dreams*, *supra* note 2, at 37; Katherine Hermenau et al., *Childhood Adversity, Mental Ill-Health and Aggressive Behavior in an African Orphanage: Changes in Response to Trauma-focused Therapy and the Implementation of a New Instructional System*, 5 CHILD & ADOLESCENT PSYCHIATRY & MENTAL HEALTH 29 (2011), available at <http://www.capmh.com/content/5/1/29>.

128. Dana Johnson, *Adopting an Institutionalized Child: What are the Risks?*, NAT'L COUNCIL FOR ADOPTION (2010), [https://www.adoptioncouncil.org/images/stories/Adopting\\_an\\_Institutionalized\\_Child\\_What\\_are\\_the\\_Risks\\_by\\_Dr.\\_Dana\\_Johnson.pdf](https://www.adoptioncouncil.org/images/stories/Adopting_an_Institutionalized_Child_What_are_the_Risks_by_Dr._Dana_Johnson.pdf). Johnson notes that children being adopted from an orphanage will likely have problems that will affect their ability to integrate into their new family. *Id.* It will take time for previously institutionalized children to progress but nutrition and a stimulating environment will help them improve. *Id.*

129. See U.N. Convention and Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267. U.N. High Commissioner for Refugees has five main global priority issues relating to children: (1) separation from families and caregivers (2) sexual exploitation, abuse and violence (3) military recruitment (4) education (5) specific concerns of adolescents. *Id.*

130. See generally Siobhan Mullally, *Separated Children in Ireland: Responding to 'Terrible Wrongs'*, 23 INT'L J. REFUGEE L. 4 632 (2011).

131. Fiona Martin & Jennifer Curran, *Separated Children: A Comparison of the Treatment of Separate Child Refugees Entering Australia and Canada*, 19 INT'L J. REFUGEE L. 440, 440–41 (2007).

exploitation, detachment from the community, and the urgent need to be reunited with a family group are all equally characteristic of social orphans and institutionalized children.<sup>132</sup>

### III. THE STRUGGLE TO RECONCILE “CHILDREN’S RIGHTS” AND ORPHANS’ RIGHTS

#### A. The “Criminal” Sarah Ferguson

In light of such serious social and political difficulties, the official response to the phenomenon of social orphans is often to do nothing, to avoid adopting any clear policy, and to place the social orphan population out of public view. This Article has argued that it is the very process of confinement and hiding that places children in grave and unusual danger. Without family support, they are at the mercy of institutions whose practices and conditions are largely unknown. As they grow, they may be at the mercy of street life and exploitative or coercive situations.<sup>133</sup> The real ability of the state to provide adequate alternative forms of care is highly questionable. The United Nations and other bodies have encouraged foster care and so-called “family like care” as an alternative to the traditional institution, although it is well known that foster care, ostensibly “family-like,” creates a variety of severe problems as well.<sup>134</sup>

---

132. See U.N. High Commissioner for Refugees, *Refugee Children: Guidelines on Protection and Care* (1994) (describing the special vulnerability of child refugees), available at [www.unicef.org/violencestudy/pdf/refugee\\_children\\_guidelines\\_on\\_protection\\_and\\_care.pdf](http://www.unicef.org/violencestudy/pdf/refugee_children_guidelines_on_protection_and_care.pdf).

133. See U.S. Department of State, *Zambia: Country Reports on Human Rights Practice* (2003), available at <http://www.state.gov/j/drl/rls/hrrpt/2003/27759.htm>. During 2003, government figures estimate that there are as many as 800,000 orphans under age 15 in Zambia. *Id.* Due to the increase in HIV/AIDS in adults and lack of care, children are being orphaned and then turn to living on the streets. *Id.* See also Mary L. Plummer et al., *Beginning Street Life: Factors Contributing to Children Working and Living on the Streets of Khartoum, Sudan*, 29 CHILD. & YOUTH SERVS. REV. 1520, 1521 (2007). Street children are then vulnerable to commercial sexual exploitation. U.S. Department of Labor *Zambia, Incidence and Nature of Child Labor* (2006), available at <http://www.dol.gov/ilab/media/reports/child-labor/findings/tda2006/Zambia.pdf>; G.A. Res. 16/12, at 3, U.N. Doc. A/HRC/RES/16/12 (Mar. 24, 2011).

134. Note the intense focus by child welfare bodies and NGOs on the dangers of trafficking in children after natural disasters, such as the Haitian earthquake. While UNICEF and other groups imply that they are the only bodies capable of supervising family reunification, it is doubtful that all or even most of the displaced children are returned to warm and safe family environments in the wake of these disasters. See David Crary, NBC News, *Haiti Orphans at Center of Adoption Tug of War*, Apr. 11, 2010, available at [http://www.nbcnews.com/id/36395689/ns/world\\_news-haiti/t/haiti-orphans-center-adoption-tug-war/#.VQB1Jk10y70](http://www.nbcnews.com/id/36395689/ns/world_news-haiti/t/haiti-orphans-center-adoption-tug-war/#.VQB1Jk10y70). See also AlJazeera, *Cambodia’s Orphan Business* (June 27, 2012) (relating the view of UNICEF and other child welfare groups that “voluntourism” in orphanages actually causes children to be separated from their families), available at [www.aljazeera.com/programmes/peopleandpower/2012/05/201252243030438171.html](http://www.aljazeera.com/programmes/peopleandpower/2012/05/201252243030438171.html). This often repeated argument that voluntourism is a cause of child separation

In Russia, for instance, many children have been moved out of large-scale institutions into state-funded foster care, the quality of which may be poorly monitored and the risks of which have not yet been acknowledged.<sup>135</sup> There is no established doctrine of international expert access to children living out of family care.<sup>136</sup> No nation is required to account accurately for this population; there is no concerted effort by human rights groups to count and assess these children.<sup>137</sup> In a sense, misleading undercounting would be far worse than no counting at all, as it might induce a sense of complacency around the problem of social orphans.<sup>138</sup>

Ironically, those who attempt to gain access to social orphans without the knowledge of national officials are often accused of “violating the rights” of the children.<sup>139</sup> Even when the purpose of this access is aimed solely at better understanding the developmental problems of children in care, officials work to prevent that access.<sup>140</sup> Over the past few decades,

---

from families is difficult to verify.

135. *Dresser v. Cradle of Hope Adoption Ctr., Inc.*, 358 F. Supp. 2d 620 (E.D. Mich. 2005). Adoptive parents brought action for themselves and on behalf of their adopted Russian-born son alleging that adoption agency and travel agency affiliated with it misrepresented state of child’s health and failed to timely deliver child’s medical records. *Id.* at 622–23. Defendants moved for summary judgment. *Id.* at 623. Russian orphanages are:

underfunded, understaffed and over populated with children. Roughly 230,000 children are residents of the state orphanage system with over 650,000 in some form of state care. Itar-Tass has reported that some 90 percent of children in orphanages are not true orphans as they do have living parents. Due to poor conditions, inadequate nutrition and insufficient emotional care, many of these children are underdeveloped mentally and physically. The older the child and the longer he/she is in the system, the greater the emotional and, often, physical problems become. Disease passed on by the birth mother is frequent. In one orphanage in central Russia, all but one out of a group of 30 children had syphilis.

Linda Delaine, *The Plight of Russia’s Orphans*, RUSSIAN LIFE (May 1, 2000), <http://www.russianlife.com/blog/plight-orphans/>.

136. See BOUCHET-SAULNIER, *supra* note 65; THURER, *supra* note 89.

137. The Committee on the Rights of the Child does ask that these stats be reported by states, but there is no investigative role for the United Nations. Committee on the Rights of the Child, Day of General Discussion, Children Without Parental Care, ¶¶ 681–82 (noting lack of adequate data on these children and asking states to strengthen their data gathering capacity, CRC/C/153 Mar. 17, 2006).

138. See generally *Building China’s Child Welfare System*, UNICEF (May 30, 2011), [http://www.unicef.org/eapro/media\\_16123.html](http://www.unicef.org/eapro/media_16123.html) (supporting the proposition that China is well on its way to creating a national child-welfare system); Janice Neilson, *Another View of China’s Child-Welfare Institutions*, SEATTLE TIMES, (Jan. 22, 1996), <http://community.seattletimes.Nwsourc.com/archive/?date=19960122&slug=2310098>.

139. See Dillon, *supra* note 21.

140. See Andrea Mazzarino, CNN, Russia Must Rethink Orphanage System, Oct. 17, 2014 (describing the difficulty any outsider has in gaining access to orphanages in Russia), *available*



most of the information we have about social orphans has come about through the determination of a small group of researchers and investigators to find out where and how these children are living, generally without the consent of national governments.<sup>141</sup> Documenting these life conditions has come to be seen as an illicit activity, in some cases even a criminal endeavor. In the most extreme case, the state actually prosecutes the outside visitors in the name of protecting the “rights,” in particular the privacy rights, of institutionalized children. Under such a scenario, the children apparently have only a right to be kept hidden, a counterintuitive proposition.<sup>142</sup>

As an example, several years ago Turkey took the extraordinary step of commencing a criminal prosecution against Sarah Ferguson, a member of the British royal family, for her role in the clandestine filming of children in several of Turkey’s institutions housing the disabled.<sup>143</sup> The filming was necessarily secret, as these institutionalized children, like so many others, were kept apart from the outside world, with no record of the conditions under which they lived.<sup>144</sup> This “shielding” policy takes a variety of forms, and is never clearly articulated as policy, but is widely—if implicitly—followed in many countries.<sup>145</sup> Actual images of institutionalized populations, especially children, have generally come to

---

at [www.cnn.com/2014/10/17/opinion/mazzarino-russia-orphans/](http://www.cnn.com/2014/10/17/opinion/mazzarino-russia-orphans/).

141. *The Dying Rooms*, *infra* note 146; Rogers, *infra* note 146. *But see also* True Vision, *Return to the Dying Rooms* (BBC 1995) (describing the manner in which this ground-breaking film uncovered severe orphanage abuses), available at [truevision.com/films/details/57/the-dying-rooms-return-to-the-dying-rooms](http://truevision.com/films/details/57/the-dying-rooms-return-to-the-dying-rooms); Disability Rights International (formerly Mental Disability Rights International), *Behind Closed Doors*, *infra* note 158, at 35–36 (regarding the lack of transparency and monitoring); Craig S. Smith, *Romania’s Orphans Face Widespread Abuse, Group Says*, N.Y. TIMES (May 10, 2006) (describing the still dire conditions in Romania’s child welfare institutions), available at [www.nytimes.com/2006/05/10/world/europe/10romania.html?\\_r=0](http://www.nytimes.com/2006/05/10/world/europe/10romania.html?_r=0); *Bulgaria’s Abandoned Children*, *infra* note 146 (investigating the shocking conditions of orphanages in Bulgaria for disabled children); *Ukraine’s Forgotten Children* (True Vision 2012) (produced by journalist Kat Blewett) (showing the conditions of Ukrainian children abandoned to state care), available at [truevision.com/films/details/133/ukraines-forgotten-children](http://truevision.com/films/details/133/ukraines-forgotten-children).

142. Much of the writing on prospective adoptive parents and faith-based orphan advocates is inflammatory and accusatory. *See, e.g.,* Kathryn Joyce, ‘The Child Catchers’: Evangelicals and the Fake-Orphan Racket, DAILY BEAST (Apr. 24, 2013), available at [www.thedailybeast.com/witw/articles/3013/04/24/kathryn-joyce-s-the-child-catchers-inside-the-shadowy-world-of-adoption-trafficking.html](http://www.thedailybeast.com/witw/articles/3013/04/24/kathryn-joyce-s-the-child-catchers-inside-the-shadowy-world-of-adoption-trafficking.html).

143. A court in Ankara accused Sarah Ferguson with criminal invasion of privacy for the film *Duchess and Daughters: Their Secret Mission. Out-of-Court Settlement for Duchess?*, ITV (May 5, 2012), <http://www.itv.com/news/meridian/2012-05-05/out-of-court-settlement-for-duchess/>; *Turkish Court Hearing in Duchess of York Secret Filming Case*, BBC (May 4, 2012), <http://www.bbc.com/news/uk-17956643>.

144. *See* Ben Dowell, *Turkish Government Angered by ITV Orphanage Report*, GUARDIAN, Nov. 4, 2008, <http://www.theguardian.com/media/2008/nov/04/turkey-orphanages-itv>.

145. *Without Dreams*, *supra* note 2.

light as a result of this type of secret filming.<sup>146</sup>

The allegations against Sarah Ferguson were that she had violated the privacy rights of these children, an offense in the Turkish penal code, and subject to a maximum penalty of 22 years in prison.<sup>147</sup> So earnest was Turkey in this matter that they made a formal request to the United Kingdom for her extradition to Turkey; a request which, not surprisingly, the United Kingdom refused to honor.<sup>148</sup> The prosecution went ahead in absentia, and Sarah Ferguson was reported to be seeking an out of court “settlement.”<sup>149</sup> Her lawyer made the argument that she knew little about the “facts” of the situation, and was only trying to help. Because the Turkish government chose to engage in the aggressive act of criminal prosecution, it put Sarah Ferguson in the inevitable position of defending

---

146. See the film that first brought international attention to life in Chinese orphanages of the 1990s. *Documentary: The Dying Rooms* (Lauderdale Prods. 1995) [hereinafter *The Dying Rooms*]. See also, e.g., *Documentary: Children of the Secret State* (Hardcash team 2001) (indicating that there are an estimated 200,000 orphaned street children in North Korea looking to survive by going into the mud and gutters to look for food while being ignored by adults and the state). *Documentary: Bulgaria's Abandoned Children* (BBC 2007), <http://topdocumentaryfilms.com/bulgarias-abandoned-children> [hereinafter *Bulgaria's Abandoned Children*]; HIDDEN SUFFERING, *supra* note 47. See also Chris Rogers, BBC News, *What Became of Romania's Neglected Orphans?* (Dec. 22, 2009) (describing the still deprived atmosphere in Romanian Child welfare institutions 20 years after the end of Communism in that country), available at <http://news.bbc.co.uk/2/hi/europe/8425001.stm>.

147. Section 9 of the Turkish Penal Code outlines the Offenses Against Privacy and Secrecy of Life. Turkish Penal Cr. Code Law Nr. 5237 § 9 (passed on Sept. 26, 2004). Article 134 specifically deals with the audio-visual recordings relating to the private lives of individuals. *Id.* art. 134. The Ankara court accused Sarah Ferguson of going against the law in acquiring footage and violating the privacy of five children. Rebecca English & Jack Doyle, *Turkey Wants to Put Fergie in Court Over Orphanage Footage*, DAILY MAIL (Jan. 13, 2012), <http://www.dailymail.co.uk/news/article-2085796/Duchess-York-faces-22-years-Turkish-prison-secret-film-childrens-orphanage.html>. The offense has a maximum term of 22½ years in prison. *Id.* Turkey moved ahead with charges against Sarah Ferguson and England did not grant Turkey's extradition request. Charlotte Edwards & Owen Matthews, *Turkey Brings Criminal Charges Against Sarah Ferguson*, DAILY BEAST, Jan. 13, 2012 (explaining that the charges brought by Turkey carry a maximum prison term of 22½ years upon conviction), available at [www.thedailybeast.com/articles/2012/01/13/turkey-has-brought-criminal-charges-against-sarah-ferguson.html](http://www.thedailybeast.com/articles/2012/01/13/turkey-has-brought-criminal-charges-against-sarah-ferguson.html). On May 5, 2012, the Ankara Second Criminal Court heard opening remarks for the trial against Sarah Ferguson. *Sarah Ferguson Tried in Absentia*. INDEPENDENT, May 5, 2012, <http://www.independent.co.uk/news/world/europe/sarah-ferguson-tried-in-absentia-in-turkey-7717269.html>.

148. See Michael Holden, *No Ferguson Extradition over Turkey Film: UK Source*, REUTERS (Jan. 13, 2012), <http://www.reuters.com/article/2012/01/13/us-turkey-ferguson-orphanage-idUSTRE80C0PY20120113>.

149. As of September 25, 2012, due to a change in Turkish law regarding crimes committed through the media, there are reduced prison terms, which means Sarah Ferguson now only faces five years in prison subject to postponement unless she becomes a repeat offender in Turkey. Selcan Hacaglu, *Sarah Ferguson Trial in Turkey May Be Suspended, Haberturk Says*, BLOOMBERG (Sept. 25, 2012), <http://www.bloomberg.com/news/2012-09-25/sarah-ferguson-trial-in-turkey-may-be-suspended-haberturk-says.html>. The attorney for Sarah Ferguson sought an out of court settlement. *Id.*

her actions, here against the worst possible charges: the allegation that she had actually violated the internationally protected rights of those she went to Turkey to help.<sup>150</sup>

It is clear that the British television film crew would never have received permission to enter the Turkish orphanage; the international community would never have known about the life conditions of the children; and the actual violation of rights would have continued unabated.<sup>151</sup> In other analogous contexts—such as attempts to ascertain the life conditions of prisoners and other detainees, as well as vulnerable groups such as refugees—there is no commonly recognized argument that national governments are free to withhold their “permission” and to deny access to representatives of the international community.<sup>152</sup> It is generally accepted that such access for the purpose of verifying that the population is safe and reasonably well treated, as well as for delivery of crucial aid, is appropriate and necessary.<sup>153</sup> There are no grounds for absolute trust in national governments when it comes to vulnerable populations, especially those living in confinement.<sup>154</sup> Ironically, by adding criminal prosecution to the mix, Turkey made it impossible for Sarah Ferguson to acknowledge her intended advocacy, and forced her to tone down all criticism. The prosecution had the effect of making Sarah Ferguson, through her lawyers, describe her own orphanage visit as somehow accidental or naïve.<sup>155</sup>

In fact, the ITV crew that went to film in the orphanages did so because they had heard reports that there was serious mistreatment going on within the institution.<sup>156</sup> Although mistreatment of one form or another

---

150. See *Duchess Defends Undercover Visit*, BBC (Nov. 6, 2008), [http://news.bbc.co.uk/2/hi/uk\\_news/7711780.stm](http://news.bbc.co.uk/2/hi/uk_news/7711780.stm).

151. According to the report, children inside the Saray institution were found tied to their beds or left in cots all day. See *Duchess Accused of Turkey ‘Smear,’* BBC (Nov. 4, 2008), [http://news.bbc.co.uk/2/hi/uk\\_news/7708878.stm](http://news.bbc.co.uk/2/hi/uk_news/7708878.stm). One child was discovered crawling along the corridor to feel the sun on his face because he was not allowed outside. *Id.*

152. The right of humanitarian and relief organizations to have access to vulnerable groups, including the wounded or sick, detainees, refugees, and prisoners should not be prohibited by states. If states choose to limit the right of access, they must respect certain minimum guarantees. This right is an essential element of humanitarian action that must not be infringed. See BOUCHET-SAULNIER, *supra* note 65, at 401.

153. Protection reflects all measures necessary to enable vulnerable populations to enjoy the rights and assistance foreseen for them by international human rights principles and conventions. With this in mind, humanitarian organizations monitor respect for the rules of protection established by international humanitarian law for the benefit of vulnerable populations and individuals. *Id.* at 348.

154. HUMAN RIGHTS WATCH, ABANDONED BY THE STATE: VIOLENCE, NEGLECT AND ISOLATION OF CHILDREN WITH DISABILITIES IN RUSSIAN ORPHANAGES, Sept. 15, 2014 [hereinafter ABANDONED BY THE STATE], available at [www.hrw.org/reports/2014/09/15/abandoned-state](http://www.hrw.org/reports/2014/09/15/abandoned-state).

155. See Burgess, *supra* note 56.

156. In 2005, Star TV reported shocking footage of orphans in Ankara, Turkey being

is generally endemic to child welfare institutions, ITV did not choose the institutions it visited arbitrarily.<sup>157</sup> The well respected Disability Rights International group had also researched Turkish institutions in detail and ITV maintained connections with human rights groups that specialized in uncovering abuses in group living situations.<sup>158</sup>

To the extent that Sarah Ferguson and the British film crew uncovered indisputably alarming images of children tied to beds and severely neglected, it would seem that the Turkish charges of criminality were perversely aimed at the bearers of bad news. Far from acknowledging the state's own role in the abusive conditions, the Turkish authorities argued that this was a very difficult population of children to deal with effectively, because of the nature of their disabilities.<sup>159</sup> There appeared to be little overt reaction by international child welfare bodies such as UNICEF to what the film crew had found. On the one hand, child welfare groups maintain a theoretical opposition to placing children in institutions unnecessarily.<sup>160</sup> On the other hand, there is scarcely any human rights

---

neglected and abused. Amberin Zaman, *Turkey Shocked by TV Footage of Child Abuse*, L.A. TIMES (Oct. 28, 2005), <http://articles.latimes.com/2005/oct/28/world/fg-turkey28>. Saray, the institute that Sarah Ferguson filmed was also featured in the 2005 report. *Id.* Children at the Saray institute had plastic bottles duct taped around their hands so they would not scratch or bite themselves. *Id.*

157. Ben Dowell, *Turkish Government Angered by ITV Orphanage Report*, GUARDIAN, Nov. 4, 2008 (with ITV quoted as saying that "this is a valid area of public interest at a time when the UK government is endorsing the accession of Turkey into the European Union, a process which is conditioned in part on Turkey improving its human rights record with children."), available at [www.theguardian.com/media/2008/nov/04/turkey-orphanages-itv](http://www.theguardian.com/media/2008/nov/04/turkey-orphanages-itv).

158. Disability Rights International is the leading human rights organization advocating for the rights of children and adults and adults with disabilities. MyPhilanthropedia.org, Disability Rights International, Summary, at [www.myphilanthropedia.org/top-nonprofits/national/people-with-disabilities/2013/disability-rights-international](http://www.myphilanthropedia.org/top-nonprofits/national/people-with-disabilities/2013/disability-rights-international). The DRI has brought attention to human rights violations in twenty-two countries. *Id.* In 2005, the organization released a report of the findings of a two-year investigation in Turkey which exposed the human rights abuses perpetrated against children and adults in psychiatric institutions, rehabilitation centers, and orphanages. Disability Rights Int'l, *Behind Closed Doors: Human Rights Abuses in the Psychiatric Facilities, Orphanages and Rehabilitation Centers of Turkey* (Sept. 28, 2005) [hereinafter *Behind Closed Doors*], <http://www.disabilityrightsintl.org/wordpress/wp-content/uploads/turkey-final-9-26-05.pdf>. One such institution was Saray, the very place visited by Sarah Ferguson and the ITV crew. *Id.* The report detailed major abuses suffered by individuals within the walls of the institutions and out of the public view. *Id.* Investigators observed bedridden children emaciated from starvation, children whose arms, legs and spines became contorted and atrophied from lack of activity or physical therapy, and children who had resorted to self-abuse as a result of living without loving caretakers or any form of stimulation. *Id.*

159. See also MacLean, *supra* note 35 (on the idea that "disability" is a fluid concept in the context of institutionalization because institutionalization can actually create disabilities).

160. The Guidelines for the Alternative Care of Children, adopted by the U.N. General Assembly in 2009, specifically state opposition to placing children in institutions unnecessarily: "The use of residential care should be limited to cases where such a setting is specifically appropriate, necessary and constructive for the individual child concerned and in his/her best

doctrine that would place an obligation on the Turkish—or any other—state to account publicly for the conditions in which institutionalized children are living.<sup>161</sup> To that extent, Turkey could react with apparently righteous anger to Sarah Ferguson's documentary as a violation of children's "rights to privacy."<sup>162</sup>

Sarah Ferguson had participated in a mission to secretly film children in Turkish institutions for the clear purpose of exposing hidden conditions within those institutions.<sup>163</sup> The film crew's mission had no agenda apart from that. As with prisons or other sites of detention, states are ultimately responsible for the living conditions in child care facilities, and most clearly so in the case of those run by the states themselves. When children cease to be in family care, they often come under the protection of the state.<sup>164</sup> From the traditional orphanage, through group homes and foster

---

interests." G.A. Res. 64/142, ¶¶ 21 & 23, U.N. Doc. A/RES/64/142 (Dec. 18, 2009). The Guidelines go further in encouraging deinstitutionalization by states:

While recognizing that residential care facilities and family-based care complement each other in meeting the needs of children, where large residential care facilities (institutions) remain, alternatives should be developed in the context of an overall deinstitutionalization strategy, with precise goals and objectives, which will allow for their progressive elimination. To this end, States should establish care standards to ensure the quality and conditions that are conducive to the child's development, such as individualized and small-group care, and should evaluate existing facilities against these standards. Decisions regarding the establishment of, or permission to establish, new residential care facilities, whether public or private, should take full account of this deinstitutionalization objective and strategy.

*Id.* ¶ 23.

161. The Republic of Turkey reserves the right to interpret and apply the provisions of articles 17 (dissemination of information through mass media), 29 (education) and 30 (ethnic, religious or linguistic minorities or persons of indigenous origin freedom) of the U.N. Convention on the Rights of the Child according to the letter and the spirit of the Constitution of the Republic of Turkey and those of the Treaty of Lausanne of July 24, 1923. See U.N. Treaty Collection, [treaties.un.org/Pages/ViewDetails.aspx?mtdsg\\_no=IV-11&chapter=4&lang=en#Endbec](http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en#Endbec)

162. Charlotte Edwardes & Owen Matthews, *Turkey Brings Criminal Charges Against Sarah Ferguson*, DAILY BEAST (Jan. 13, 2012), available at [www.thedailybeast.com/articles/2012/01/13/turkey-has-brought-criminal-charges-against-sarah-ferguson.html](http://www.thedailybeast.com/articles/2012/01/13/turkey-has-brought-criminal-charges-against-sarah-ferguson.html).

163. The purpose of the project was to document the conditions inside state-run institutions for unwanted and disabled children in Turkey and Romania. Chris Rogers, *Fergie Undercover: The Duchess of York Bluffs Her Way into Orphanages in Turkey*, MAIL ONLINE (Nov. 2, 2008), <http://www.dailymail.co.uk/femail/article-1082355/Fergie-undercover-The-Duchess-York-bluffs-way-orphanages-Turkey.html>. The Duchess visited the Saray Institution and Zeytinburnu Rehabilitation Centre in Turkey as well as Marin Pazon in Romania. *Id.* They found children and teenagers tied to their cribs or bed. *Id.*

164. U.N. Convention on the Rights of the Child states in relevant part:

(1) A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that

care, the state should be required to account for its treatment of children living out of family care.<sup>165</sup> It bears repeating that no generally recognized body, governmental or non-governmental, appears to have taken on the role of visiting institutionalized children and reporting on the conditions under which they are living. At a minimum, it would have been appropriate for a United Nations or other expert group to follow up on the ITV incident with a visit to this and other institutions in Turkey.

### B. Reluctant State Accountability

We have established that states do not face any clearly defined demand to count and assess the life conditions of social orphans within their borders.<sup>166</sup> On the other hand, they are supposed to offer special care

---

environment, shall be entitled to special protection and assistance provided by the State. (2) States Parties shall in accordance with their national laws ensure alternative care for such a child. (3) Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due 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.

U.N. Convention on the Rights of the Child, G.A. Res. 44/25, art. 20 (Sept. 2, 1990). Additionally, Convention on the Rights of Persons with Disabilities states in relevant part:

(4) States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents. (5) States Parties shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.

U.N. Secretariat, U.N. Convention on the Rights of Persons with Disabilities, Article 23 Respect for Home and the Family (4)–(5). U.N. Convention on the Rights of the Child, *supra*.

165. See, e.g., Marcia Robinson Lowry & Sara Bartosz, *Why Children Still Need a Lawyer*, 41 U. MICH. J.L. REFORM 199, 200–02 (2007) (pointing out that the U.S. child welfare system is generally unaccountable for children in care); see also Jacquelyn D. Greene, *Children's Rights: An Empty Promise for New York State's Most Vulnerable Youth*, 12 N.Y. CITY L. REV. 447 (describing how child welfare policies serve the interests of adults, not children). See also Anna Jane High, *China's Orphan Welfare System: Laws, Policies and Filled Gaps*, 8 E. ASIA L. REV. 127, 147–50 (2013) (noting the legally and socially ambiguous status of Chinese orphans and the challenge of obtaining reliable data on their whereabouts).

166. Without any defined obligation to acknowledge and report on the situation of children living outside of parental care, governments are even more unlikely to draw attention to the issue of social orphans which carries with it potential negative publicity. Even an exact number of children in institutional care is impossible to calculate. UNICEF, PROGRESS FOR CHILDREN: A REPORT CARD ON CHILD PROTECTION (No. 8), at 19, U.N. Sales No. E.09.XX.14 (2009). Based on

and protection for children living out of family care, and should be accountable for the quality of placement of children in institutions.<sup>167</sup> Surviving in this ambiguous legal space, social orphans in state care are cut off from independent observers. In the realm of social orphans, the idea of children as national possessions remains especially strong.<sup>168</sup>

Turkey accused both Sarah Ferguson and the television crew she travelled with of trying to embarrass Turkey, including in its bid to join the European Union.<sup>169</sup> Its accusation of a child rights violation turned the issue of criminality upside down and deflected criticism away from the neglect and abuse perpetrated by the state against its own institutionalized and disabled children. It is not uncommon that national governments turn potential criticism of their own inadequate treatment of vulnerable children against others: those who seek access for purposes of accountability or to provide services; those who run orphanages; those who show any interest in the humanitarian aspect of unparented children's lives.<sup>170</sup> "Privacy," by contrast, is an individual right with little relevance to the circumstances of this and similar cases. Here, the larger purpose of the ITV visit to the orphanage was of course to undo the pernicious effect of "privacy" in denying access to children who are unable to advocate for themselves. The secret filming of institutions is in fact a well-established means of gaining knowledge about a largely hidden and forgotten population of children.<sup>171</sup>

---

government data reported between 2001 and 2007, UNICEF estimated in 2009 that the number of children living in institutional care is over 2 million. *Id.* However, this estimate is likely to be too low because governments have an incentive to underestimate overall numbers to insulate themselves from critics and to appear compliant with children's rights. *Id.* Save the Children estimated in 2009 that 8 million children reside in institutions, 4 times as many as the UNICEF estimate. Save the Children Fund, *Keeping Children Out of Harmful Institutions: Why We Should Be Investing in Family Based Care* (2009) (stating that the United Nations estimates that up to 8 million children around the world are living in care institutions. However, the actual number is likely to be far higher, owing to chronic gaps in information"), available at [www.savethechildren.org/uk/sites/default/files/docs/Keeping\\_the\\_Children\\_Out\\_of\\_Harmful\\_Institutions\\_Final\\_20.1.09\\_1.pdf](http://www.savethechildren.org/uk/sites/default/files/docs/Keeping_the_Children_Out_of_Harmful_Institutions_Final_20.1.09_1.pdf).

167. U.N. Convention on the Rights of the Child, *supra* note 164, ¶¶ 20, 23.

168. *Andrea Roberts, Russian Ban on U.S. Adoption Turns Children into Pawns*, WASH. TIMES (Dec. 28, 2012), <http://www.washingtontimes.com/news/2013/jan/8/russian-ban-on-us-adoption-turns-children-into-paw/>.

169. See Callan et al., *supra* note 56; Burgess, *supra* note 56.

170. See Katie Jay, *NGO Campaign to De-Institutionalize Children: Heroic or Misguided?*, CHRON. OF SOC. CHANGE (Dec. 25, 2014), available at <http://chronicleofsocialchange.org/opinion/ngo-campaign-to-deinstitutionalize-children-heroic-or-misguided/8986> (arguing that UNICEF is correct that children do not belong in institutions but that UNICEF fails to track children after orphanages close).

171. See Adoption Doctors, *Institutional Autism, Secondary to Orphanage Living Conditions*, Mar. 22, 2012 (stating that "As a defense mechanism, in order to maintain the child's own inner wellbeing, neglected children generally shut out all environmental and interpersonal contact that could cause them harm. There is sometimes a component of learned helplessness. It

Most commitments made by national governments to “clear out” national orphanages are implausible because of a lack of viable and readily available alternatives.<sup>172</sup> Despite claims of progress on the child welfare front, it is worth asking whether it is appreciably easier for experts to gain access to child welfare institutions in a country such as China than it was decades ago. The answer would seem to be a resounding no, as entering orphanages and similar institutions is at best difficult and complicated without the highest level of permission being granted. It is apparent that restricting access to this degree has some national policy basis apart from honoring “the right to privacy.”

Some warnings against orphanage tourism are broadly stated and appear to be aimed at cautioning those who would be inclined to visit

---

is this type of behavior that often gets labeled as institutional autism.”), available at [www.adoptiondoctors.com/articles/institutional-autism-secondary-to-orphanage-living-conditions/](http://www.adoptiondoctors.com/articles/institutional-autism-secondary-to-orphanage-living-conditions/). Beginning in the 1990s with the film *The Dying Rooms*, international film crews have sought access to the heavily guarded spaces of orphanages and “child welfare” institutions. *The Dying Rooms*, *supra* note 146. In China, there had been rumors circulating of extremely high death rates for institutionalized baby girls, a phenomenon seemingly confirmed by the film crew, to the loud protests of the Chinese government. *Id.* Other examples of information obtained with great difficulty is the work of Human Rights Watch in Russia. *Abandoned to the State*, *supra* note 4. While the NGO Disability Rights International states that it does not engage in hidden camera work per se, it certainly gains access to institutions without going through the mechanisms of national government bureaucracies. *ABANDONED BY THE STATE*, *supra* note 154. Even some random Youtube postings show countries with populations of abandoned children experiencing excruciating levels of abuse and neglect, either by design or through ignorance. In most cases, national authorities protest these intrusions into the private sphere of children—as if the children are in the gravest danger from those with hidden cameras. See *HIDDEN SUFFERING*, *supra* note 47.

At every institution we visited, we attempted to be as thorough as we could in understanding the human rights situation of people living or receiving treatment at the facility. We asked to visit all parts of the institutions . . . . During each site visit, MDRI teams brought a video camera to record observations. To the extent that we could, we took photographs in each institution. It is our experience that photo and video documentation is tremendously helpful in corroborating our observations and helping the public to understand the reality of life in an institution. We are sensitive to the concerns of individuals depicted in photographs, for whom placement in an institution may constitute a massive violation of their privacy . . . . We generally find that people within institutions are amenable or eager to have their photographs taken.

*Id.* at vii–viii; see also Luke Dale-Harris, *Why Does Abuse Persist in Romania?*, *NEW INTERNATIONALIST MAG.*, Nov. 1, 2013 (noting that where video exposes hidden populations in state care, the authorities have “directed the blame back to ngos.”), available at [newint.org/features/2013/11/01/abuse-romania/](http://newint.org/features/2013/11/01/abuse-romania/).

172. Institutions, such as orphanages, are too often the first and only option for countries. Even though most countries recognize that orphanages are not in the best interests of children, institutionalization is a policy response that is difficult to change. *Abandoned to the State*, *supra* note 4, *ABANDONED BY THE STATE*, *supra* note 154; Engle et al., *supra* note 58, at 190; Jay, *supra* note 170.



orphanages out of humanitarian motives. While there are certainly those who profit from children in their care, and present a false version of reality to visitors for their own financial gain, journalists write uninformed and poorly researched articles railing against the evils of visiting orphanages. Not only are there allegations that unscrupulous persons are taking advantage of the children, which is certainly in some cases true, but also—inexplicably—that it is bad for the children to be visited and played with. Taken together, there is a broad inclination on the part of national governments and child welfare bodies to restrict access by “unapproved” persons to children within institutions.<sup>173</sup> This approach contrasts sharply with what the international community demands in regard to prisoners and other detainees, as well as refugees and other vulnerable groups of people.<sup>174</sup> The current message to the international community on social orphans seems to be, Stay away! Leave it to national governments, leave it to the “experts,” and let us hope for the best. This Article has argued that the current policy of cloistering social orphans is profoundly dangerous, and yet broadly accepted. The lack of access by professionals who could relay the plight of these children to the outside world has not yet been framed in human rights

---

173. Another example of this problem is seen in the 2012 visit to the United States by the Russian children’s rights ombudsman, Pavel Astakhov; specifically, his high profile appearance at the gate of a ranch for behaviorally challenged adoptees in Montana, a place Astakhov called “a trash can for unwanted children.” See Nicholas Nehamas, *Russian Official Says Montana Ranch Abuses Adoptees*, LATITUDE NEWS (2012), available at [www.latitudenews.com/story/pavel-astakhov-criticizes-ranch-for-kids-montana-adoption-russia/](http://www.latitudenews.com/story/pavel-astakhov-criticizes-ranch-for-kids-montana-adoption-russia/); Kirit Radia & Colleen Curry, *Russian Officials Want Access to Ranch Where They Claim U.S. Parents Reportedly ‘Dump Unwanted Kids,’* ABC News (Sept. 22, 2012), available at [abcnews.go.com/international/Russian-officials-entry-ranch-claim-us-parents-dump/story?id=17292132](http://abcnews.go.com/international/Russian-officials-entry-ranch-claim-us-parents-dump/story?id=17292132). U.S.-Russian relations, in particular the inter-country adoption relationship, were strained by a number of tragic incidents in recent years, notably the death of more than fifteen Russian children in their adoptive U.S. homes, and the return to Russia of a young boy adopted by a single woman in the American south. See Diane Clehane, *U.S. Mother Who ‘Returned’ Her Adopted Son to Russia Ordered to Pay Child Support*, FORBES (May 31, 2012) (describing several high profile instances of child abuse by U.S. families who had adopted children from Russia), available at [www.forbes.com/sites/dianeclehane/2012/05/31/u-s-mother-who-returned-her-adopted-son-to-russia-ordered-to-pay-child-support/](http://www.forbes.com/sites/dianeclehane/2012/05/31/u-s-mother-who-returned-her-adopted-son-to-russia-ordered-to-pay-child-support/). Despite these extremely unfortunate events, Mr. Astakhov was surely aware of the high rates of abuse and neglect of children in Russia, as well as the very negative circumstances of Russian social orphans, many of whom end up dead, incarcerated, or with serious substance abuse problems after spending time in Russian orphanages. *Id.* Although no outside body had been given access to Russian child welfare institutions, Astrakhov made this theatrical appearance outside the “Ranch for Kids,” demanding entry and access to the Russian children who had been sent there by adoptive parents desperate to find some new way of coping with their behavior. *Id.*

174. It is gratifying that in recent months, Human Rights Watch has returned to the issue of orphans’ rights. Contrast this with premier human rights body Amnesty International, which regularly reports on violations of children’s rights, but tends to avoid some of the difficult orphan-related questions. See Amnesty International homepage, [www.amnesty.org/en/search?q=children&p=2](http://www.amnesty.org/en/search?q=children&p=2).

terms—a process one dares to hope the Human Rights Watch report on Japanese social orphans might inspire.

