

**INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
ORGANIZATION OF AMERICAN STATES**

**HEARING ON HUMAN RIGHTS OF UNPARENTED CHILDREN AND
RELATED INTERNATIONAL ADOPTION POLICIES
137TH ORDINARY PERIOD OF SESSIONS, NOVEMBER 6, 2009**

WRITTEN TESTIMONY OF DELEGATION

Elizabeth Bartholet: Introduction: Significance of Hearing and Outline of Testimony:

Thank you for this opportunity to present regarding the Human Rights of Unparented Children in Guatemala, Honduras and Peru.

Your decision to hear the particular Human Rights issues we address is of enormous significance. Many who talk about Human Rights in this context focus on very different issues, namely the Human Rights of Parents, and the Sovereignty Rights of States. When they address Child Rights they focus on Heritage rights to grow up in the family and country of birth.

We assert that Children's most fundamental Human Rights are to live and to grow up in a nurturing family so they can fulfill their human potential. These rights have been largely ignored in the debate surrounding Unparented Children and related International Adoption policies. We argue that Unparented Children have a right to be placed in families, either their original families, or if that is not feasible, then in the first available permanent nurturing families. This includes the right to be placed in International Adoption if that is where families are available. We argue that children have a related right to be liberated from the conditions characterizing orphanages and most foster care.

Paulo Barrozo will be presenting on the governing human rights law principles that makes the Child's best interests and the Child's right to grow up in a permanent nurturing family central.

Karen Bos will be presenting on the science demonstrating how essential nurturing parenting is for infants to develop basic mental, physical and emotional capacities, and how destructive institutions are of infants' potential for normal development.

Elizabeth Bartholet will conclude with a description of Human Rights violations suffered by Unparented Children in Guatemala, Honduras, and Peru, and our Request for Remedies.

Paulo Barrozo: Governing Human Rights Law

1. The Human Rights of the Child

The Inter-American human rights system is the global leader in the area of the rights of the child. Under this system “children are subjects entitled to rights, not only objects of protection.”¹

The system’s foundational document, the American Declaration of the Rights and Duties of Man, declared in its *consideranda* that the principal objective of juridical and political institutions in the Americas was the protection of essential rights, creating the concrete conditions of their enjoyment. Article 6 of the Declaration codified the right of every person to a family and the necessary protection therefore. Article 7 recognized children’s entitlement to special protection, care and aid. Article 18, the linchpin of the Declaration, affirmed that every person was an independent and full-fledged subject of rights.

The American Convention on Human Rights led the system into a new phase of greater clarity and depth of commitment to the human rights of children. The Convention predicates human rights upon human personality and inherent human dignity, regardless of age. Article 5 enshrines every person’s right to physical, mental, and moral integrity. Article 17 recognizes the centrality of family in human experience. Article 19 extends to every child the right to positive measures of protection required by her or his condition. The scope of these measures has been defined by the Inter-American Court of Human Rights, and interpreted in light of the provisions of the Convention on the Rights of the Child, to include special protection for children deprived of a family environment, and to guarantee their survival and healthy development.²

Articles 15 and 16 of the Protocol of San Salvador³ reinforced the States’ obligations in these areas, including that of enforcing the right of every child to grow under the protection and responsibility of families. The Riyadh Guideline 14 demands that placement of unparented children replicate “a stable and settled family environment.”

These are not merely abstract rights and principles. This Commission and the Court have brought them to life in landmark reports and opinions. Taken together, this body of jurisprudence on the human rights of the child plots a consistent trajectory of evolution. We ask the Commission today to further this trajectory by clarifying that these rights apply fully to the silent minority of unparented children in the Americas.

¹ IACtHR, *Advisory Opinion OC-17/2002*, Judgment of August 28 2002, requested by the IACHR, paragraph 1 of the dispositive part of the Court’s Opinion.

² IACtRH, *Case of the “Street Children” v. Guatemala*, Judgment of November 19 1999, paragraph 196. The Court has reasoned that “the ultimate objective of protection of children in international instruments is the harmonious development of their personality and the enjoyment of their recognized rights.” IACtHR, *Advisory Opinion OC-17/2002*, paragraph 53.

³ Applicable as treaty-based law to Guatemala and Peru and as expression of *jus cogens* of the American peoples to Honduras as well.

The social, medical, and developmental sciences demonstrate that membership in a nurturing family is a necessary condition for healthy physical and mental development. The sciences show the destructive and lasting effects institutions have on children. And the sciences demonstrate that foster care is generally far inferior to adoption.

Science demonstrates why the right to live in a nurturing family is a fundamental right of the child. Because the effects of institutionalization generally prevent children from fully enjoying most other rights later in life, the human right to grow in a family is a pre-condition for the enjoyment of most other human rights. Deprived of the right to grow in a nurturing family, children may not create and develop a project of life or seek out a meaning for their own existence.⁴

Unparented children are the most discrete and insular minority of any country. Until they find a nurturing family, their predicament is one of crushing “vulnerability and dependence”⁵ upon their respective States. The suffering, regimentation, and isolation of institutionalized children often lead to spiritual death if not the complete obliteration of the child.⁶

2. Comissive and Omissive Violations

(A) The evidence indicates that Guatemala, Honduras, and Peru have failed, in violation of article 19 of the Convention, to proactively identify and promote adoptive family placement of children who cannot and will not be reunified with their birth families. This has left unparented children in those countries at “serious risk for their development and even for their life,”⁷ implicating the States in comissive and omissive “double-aggression” of their fundamental human rights.⁸

Scientific evidence supports the conclusion that no other single non-genetic factor in times of peace is more mentally and physically disabling than extended institutionalization in infancy. Those who survive early institutionalization often end up institutionalized as adolescents and adults. By their action and inaction States prominently contribute to this brutal orphanage-to-asylum pipeline.

Since for children who cannot and will not be raised by their birth parents adoption into a new family will generally be the only fully adequate way to provide their fundamental human right to a nurturing family, the States’ actions and omissions in relation to adoption have great potential

⁴ IACtRH, *Case of the “Street Children,”* Joint Concurring Opinion of Judges A. A. Cançado Trindade and A. Abreu-Burelli, paragraph 2.

⁵ Cf. the Commission’s arguments transcribed in the IACtHR, *Case of the “Juvenile Reeducation Institute v. Paraguay,* Judgment of September 2 2004, paragraph 136.

⁶ IACtRH, *Case of the “Street Children,”* Joint Concurring Opinion of Judges A. A. Cançado Trindade and A. Abreu-Burelli, paragraph 9.

⁷ IACtRH, *Case of the “Street Children,”* paragraph 180.

⁸ IACtRH, *Case of the “Street Children,”* paragraph 191.

for violation of the human rights of the child. A non-exhaustive list of general human rights violations includes the following.

(B) Comissive violations:

- (i) Policies and measures which restrict ethical domestic and international adoptions of unparented children constitute *prima facie* human rights violations.
- (ii) Policies and measures which make international adoption subsidiary to domestic institutionalization and typical domestic foster-care constitute *prima facie* human rights violations.
- (iii) States' preferences for domestic over international adoption which result in lengthier institutionalization constitute *prima facie* human rights violations.
- (iv) States' preferences for keeping children in-country based on States' sovereign control over population resources constitute commodification of children in direct violation of their fundamental human rights, inherent human dignity, and juridical personality.

(C) Omissive violations:

- (i) States' failures to adopt policies to consistently and aggressively promote the adoption of unparented children constitute *prima facie* human rights violations.
- (ii) States' failures to promptly identify children who cannot and will not be reunified with birth families and to legally free unparented children for domestic and international adoption constitute *prima facie* human rights violations.

Karen Bos: The Science on the Human Infant's Need for Nurturing Parenting, and the Destructive Impact of Institutions.



It has been known for over 50 years that children raised in institutions are at great risk for serious mental and physical health problems. We now have proof based on controlled social science studies that these developmental problems are directly caused by institutional rearing. We also now have scientific evidence of the damage to brain development produced by institutional care, damage which in turn results in long-term developmental problems. Today I will discuss the current scientific evidence for how institutional care is harmful for brain development.

Why is it that institutional care is bad for child development? Let me begin by describing what characterizes life in an institution. Children raised in an institution experience severe isolation and regimentation, with little access to caregivers (see slides 2-5); and older children often suffer physical and sexual abuse.

We know that experience plays a powerful role in shaping brain development after birth. Normal brain development depends on experiences that should be common to all children. These

experiences include:

- a) sensory stimulation;
- b) access to a caregiver who is responsive to and consistently cares for the child;
- c) adequate nutrition;
- d) an environment that is low in so-called “toxic” stress.

Many children living in institutions lack some or all of these elemental requirements for development.

Why *specifically* are such conditions so bad for the brain? One reason is that inadequate input leads to under-development of some brain circuits and the mis-wiring of others. Accordingly, such children experience a range of problems due to “errors” in brain development.

Early experience often exerts an especially strong influence in terms of later brain development. This influential period of time is referred to as a *sensitive period*. The first few years of life are the most critical in terms of laying a strong foundation for later brain development. Indeed, in some aspects of brain functioning, stimulation must occur during a certain stage of development or the brain will never develop normally. Thus it may be difficult or impossible to recover from the impact of early institutional care, even after removal from this setting.

Accordingly, while any time spent in institutional care is destructive, time spent in early infancy is the most destructive. Children who spend their first two years of life in an institution are at high risk of serious disabilities in later life. And of course, the longer children spend in institutions, the worse off they will be.

Next I want to talk about some of the specific deficits that children raised in institutions experience. Children raised in institutions are known to experience a range of problems, including impairments in physical, cognitive, language, and social-emotional functioning. Specifically, these children often show growth stunting, impaired intellectual development, language delays, attachment problems, depression and anxiety, aggressive behavior problems, and inattention/hyperactivity. As one example, to illustrate the impact of institutional care on physical growth alone, one estimate is that institutionalized children fall behind one month of growth for every 2.6 months in a Romanian orphanage, 3.0 months in a Chinese orphanage, and 3.4 months in a Russian orphanage (see slide 6). By these calculations, a ten year old child who has lived in a Romanian institution his whole life would be expected to be the height of an average six year old. Here are some pictures of children raised in institutions in Romania that demonstrate this growth stunting (slide 7).

Cognitive development provides another striking example of the negative outcomes of institutional care as well as the positive outcomes of removing children from such care to nurturing family-like care. A study that I am involved with in Romania has found that children raised in institutions have an average IQ in the range of borderline mental retardation (see slide 8). When these children are removed from institutional care and placed into very high quality foster care, cognitive function improves, although it is still lower than children of similar

demographics who were raised in their families from birth (see slide 9). This improvement is the greatest for the children who are youngest when removed from the institution, especially if the child is younger than two years.

Recent research has allowed us to see some of the specific damage to the brain that institutional care causes. For example, neuro-imaging studies such as MRIs and EEGs have shown that institutionalized children have lower levels of brain activity in different important regions and a reduction in the connections between brain areas that are essential to normal brain functioning (see slide 10).

In summary, institutional care has long been known to lead to impairments in physical, cognitive, language, and social-emotional development. Recent science has confirmed in fairly dramatic ways that the origin of these deficits is in compromised brain development and further underscore the need for family placement from early infancy on, rather than institutional care, to give abandoned children an opportunity for normal development.

Elizabeth Bartholet: Human Rights Violations Suffered by Unparented Children in Guatemala, Honduras, and Peru, and Request for Remedies

1. The Situation of Unparented Children in These Countries, and Related Human Rights Violations

Extreme poverty, civil unrest, war, and widespread illness have resulted in large numbers of children being orphaned, abandoned, or surrendered by their parents to institutional care. Limited welfare support exists to enable poor and single parents to raise their children.

International Adoption functioned in the past to place many thousands of children per year from these three countries in permanent nurturing homes, with many placed as young infants, giving them a good chance for normal development. International Adoption has now been largely shut down in these countries, reducing the total number of children placed in the United States to less than 1% of the number placed in the peak placement years. Placement for even those relatively few children typically occurs only after lengthy, damaging periods in institutional care. There continue to be very few domestic adoptive homes available in these countries, nowhere near enough for the children in need. Almost no domestic homes exist for older children or children with disabilities.

The many thousands of children per year who could have been placed in permanent nurturing families abroad are now almost certainly languishing in institutions or on the streets. Our information is that growing numbers of children are now crowding the existing institutions, and new institutions are being built.

Many of the children in institutions are orphaned, or have been abandoned. While many others have biological parents who can be identified, very few of these children will ever be sent home

to live with those parents, either because of inadequate welfare support, or because of parental unfitness. Yet there is no adequate system to identify children who should be freed for adoption.

Conditions in these institutions vary, but social, medical and developmental sciences demonstrate that even so-called “good” institutions are destructive for infants and children. The institutions in poor countries like Guatemala, Honduras, and Peru, are generally extremely limited in staff and other resources. Children who spend any significant number of months there are at extreme risk for future mental, physical and emotional problems.⁹

We recognize that abuses such as kidnapping and baby-buying occur, and we condemn these practices. But we urge the Commission to reject the kind of policy responses that many including the U.S. have encouraged, and that these three countries have adopted -- moratoria on International Adoption, restrictive regulations that require holding children while searches for in-country homes are conducted, and prohibitions on the private intermediaries that often function as the lifeblood of such adoption. These policies simply punish unparented children by denying them adoptive homes. We urge you to embrace instead policy responses which punish those who violate the laws against kidnapping and baby-buying by enforcing and where needed strengthening such laws. See the *International Adoption Policy Statement* attached, endorsed by many leading human and child rights experts and organizations.

2. Request for Remedies

(A) Considering the “victimization, human suffering, and rehabilitation of the victims,”¹⁰ we respectfully request that the Commission issue a decision recognizing that under governing international and human rights law:

- § (i) children’s best interests should be the guiding principle in matters related to Unparented Children, and should take precedence over State Sovereignty interests.¹¹
- § (ii) The most fundamental rights of the child are to live and to grow up in a permanent nurturing family;¹²
- § (iii) Adoption, whether domestic or international, generally serves children’s interests in nurturing family care better than foster care or other “substitute family” care, and should be expanded to serve the needs of more children;

⁹ Extensive documentation of the problems suffered by children in institutions, the role played by International Adoption in providing permanent nurturing homes for such children, and recent severe restrictions on such adoption, is contained in Bartholet, “International Adoption: Thoughts on the Human Rights Issues,” 13 *Buff. Hum. Rts. L. Rev.* 151 (2007), http://www.law.harvard.edu/faculty/bartholet/PUB_BUF_IA_2007.pdf, and “International Adoption: The Human Rights Position,” 1 *Global Policy* ____ (forthcoming 2010), <http://www.law.harvard.edu/faculty/bartholet/IA-GIPol72409.pdf>.

¹⁰ IACtRH, *Case of the “Street Children” v. Guatemala*, Judgement of May 26, 2001. Separate Opinion of Judge A.A. Cancado Trindade, paragraph 3.

¹¹ IACtHR, *Advisory Opinion OC-17/2002*, paragraph 2 of the dispositive part of the Court’s Opinion (“children’s development and full enjoyment of their rights must be considered the guiding principles”).

¹² IACtHR, *Advisory Opinion OC-17/2002*, paragraph 4 of the dispositive part of the Court’s Opinion (“the family is the primary context for children’s development and exercise of their rights”).

- § (iv) Institutionalization deprives children of their liberty and subjects them to other violations of their human rights;
- § (v) States must take action to ensure children’s rights to true family care from the earliest point in life possible;
- § (vi) Preferences for in-country placement which delay or deny adoptive placement, or which relegate children to institutional care, typical foster care or street life, violate children’s human rights;
- § (vii) States must develop adequate systems for identifying all children in need of parental care, determining whether they can and should be returned to their biological parents, and if not, then terminating parental rights and placing children promptly in adoptive homes, whether domestic or international;
- § (viii) States must include International Adoption among the options for Unparented Children, and design systems implementing such adoption so as to expedite placement and minimize the damage children suffer in state care awaiting placement.
- § (ix) Adoption abuses should be addressed through enforcement and where needed strengthening of laws against kidnapping and baby-buying, not through restrictions on International Adoption such as in-country holding periods, or the prohibition of private intermediaries.

(B) We respectfully request that the Commission ask the Rapporteur on the Rights of the Child to conduct a special Investigation of the situation of Unparented Children in Guatemala, Honduras, and Peru, and issue a Report on the resulting findings, together with related Recommendations and Orders. An Investigation focused on the Human Rights problems of Unparented Children would be a hugely significant step, bringing desperately needed light to the issues. Many now dispute the facts, making claims that there are limited numbers of children in need, that “permanent foster care” can provide adequate nurturing, that domestic adoption can provide any needed adoptive homes. We believe these claims are false, but the Commission’s Investigation and Report would provide proof of important facts now disputed. Similarly there is dispute about the impact of shutting down International Adoption, and whether it is more likely to stimulate domestic reforms helpful for children, or to harm children as we believe the facts show. And we need more specific information about the number of children held in institutions, the length of time they are held, the conditions in which they live, and the harm they suffer. We need more specific information about the parental status of children held in institutions, the need for systems identifying those who should be freed for adoption, the nature of current adoption regulation, and the need for adoption reform ensuring that as many children in need of homes as possible be placed as early in life as possible.

(C) We respectfully request that the Commission ask the Rapporteurs for each country in the Americas to include these Unparented Children issues in their regular inquiries and reports and recommend, as needed, hearings, Special Investigations and Reports by the Rapporteur on the Rights of the Child, and the prosecution of particular cases before the Inter-American Court of Human Rights. While the egregious violations of children’s rights in Guatemala, Honduras, and Peru warrant the targeted Investigation and Report we call for, these problems constitute part of a larger pattern sadly typical of many other countries in the Americas. The United States is part of

this pattern, having played an important role recently in shutting down International Adoption in Guatemala, and imposing its own three-month waiting period before children can be placed for adoption outside the United States.

* * * *

We recognize that Guatemala, Honduras and Peru have an honorable tradition of commitment to the human rights of vulnerable persons. Should the States seek a friendly settlement of the human rights violations here charged, we would consider it a privilege to work with them toward legal and policy reform.

Attachments:

- A. *Slides for Karen Bos Testimony*
- B. *International Adoption Policy Statement endorsed by various Human Rights and Child Rights experts and organizations,*
<http://www.law.harvard.edu/programs/about/cap/ia/iapolicystatement.pdf>

Respectfully Submitted,

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The Center for Adoption Policy
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The Effects of Institutional Care on Brain and Behavioral Development

What characterizes life in an
institution?

...isolation



....regimentation



...little access to caregivers



Effect of orphanage confinement on growth

- Institutionalized children fall behind one month of growth for every:
 - **2.6 months** in a Romanian orphanage
 - **3.0 months** in a Chinese orphanage
 - **3.4 months** in a Russian orphanage



11 year old girl

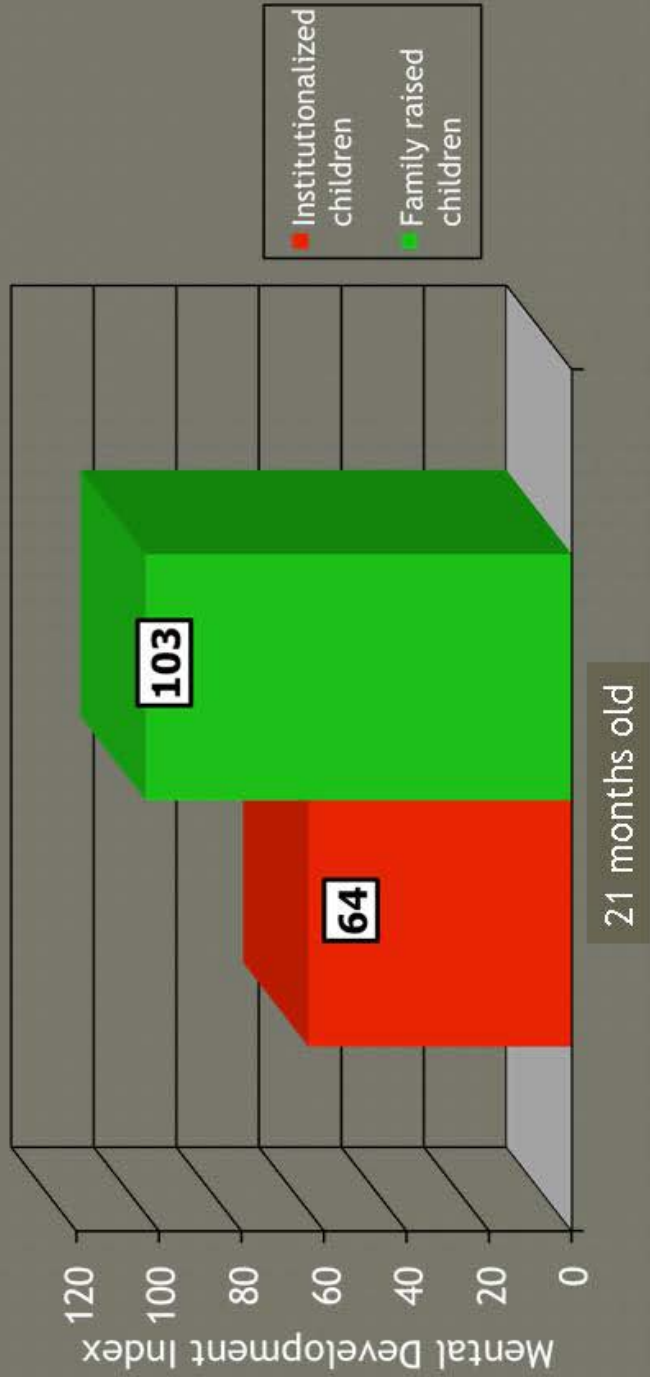


14 year old girl

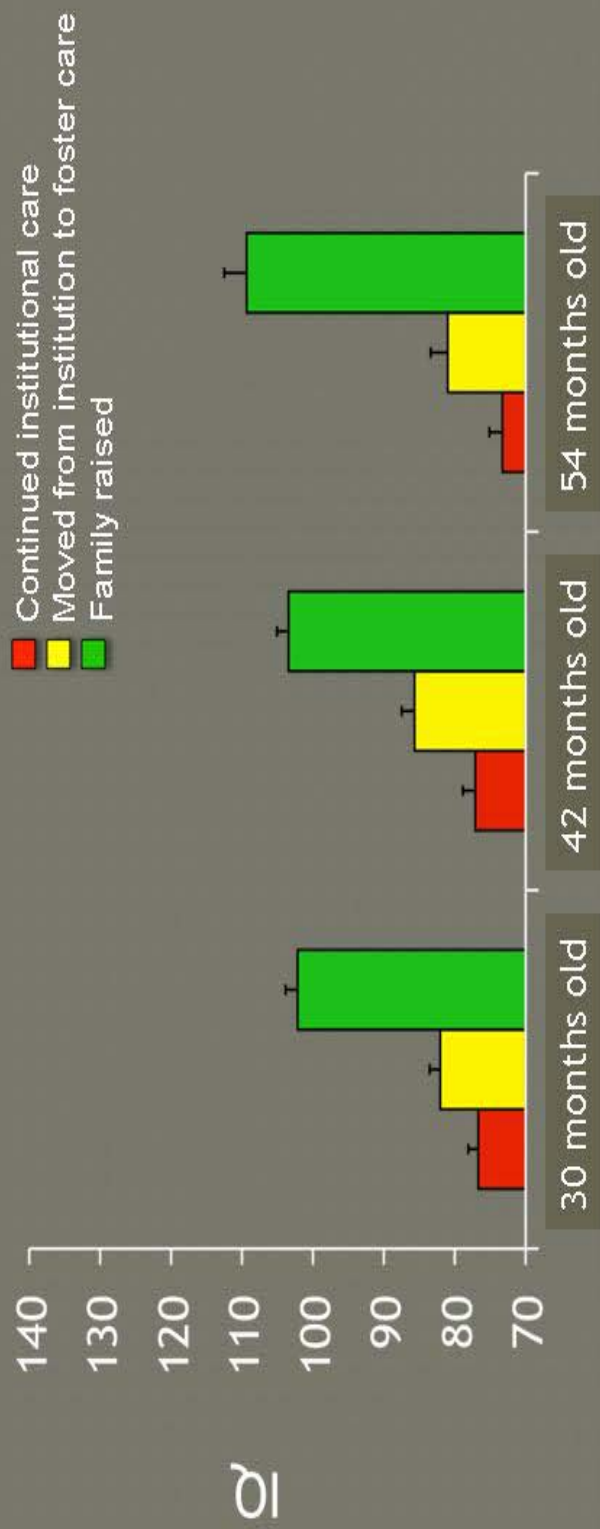


17 year old girl

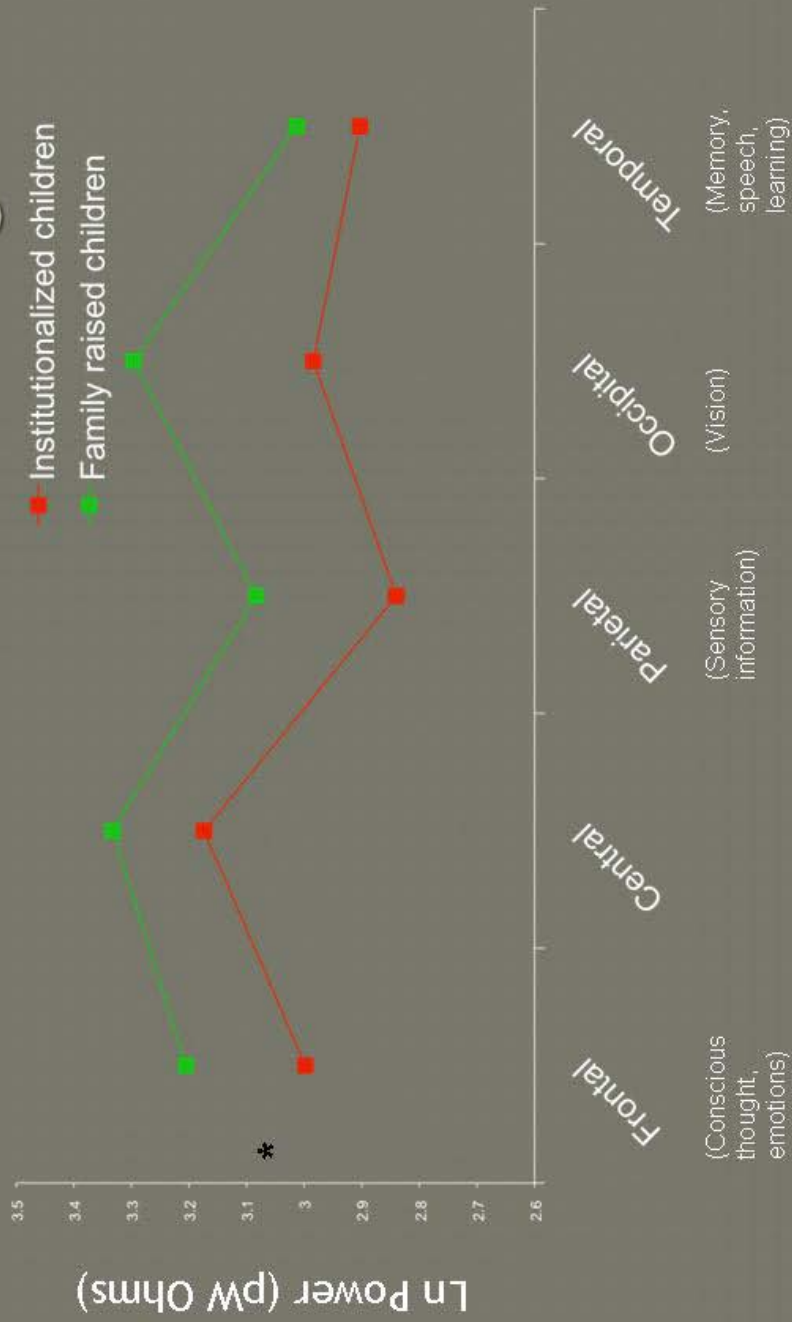
Cognitive development



Cognitive development



Brain activity across different brain regions



Listed below are the organizations and individuals endorsing the International Adoption Policy Statement.

Organizational Endorsements:

- The American Academy of Adoption Attorneys, May 2008
- Harvard Law School Child Advocacy Program, May 2008
- The Center for Adoption Policy, June 2008
- National Council For Adoption, April 2009
- University of San Diego Children's Advocacy Institute, May 2009
- University of San Francisco - School of Law Child Advocacy Clinic, May 2009

Individual Endorsements:

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