FEATURE

The Principle of Subsidiarity in the Hague Convention on Intercountry Adoption: A Philosophical Analysis

*Sarah-Vaughan Brakman**

In May 1993 the Hague Conference on Private International Law issued the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption (hereafter, "the Hague Convention" or HCIA).[1] The goals of the Hague Convention are to standardize intercountry adoption, to eliminate the abuse and trafficking of children, to make intercountry adoptions quicker, and to make it easier for children to have citizenship finalized in their new countries. Countries that sign the treaty indicate their intention to abide by its stipulations regarding the regulations on child placement, as well as on the role of money, the terms of citizenship, and the use of intermediaries. Countries that become party to the convention through ratification or accession are under legal obligation to apply the HCIA regulations.[2] As of the time of this writing, ninety-nine countries are party to the HCIA and three others are signatory states.[3]

Conceptually, the HCIA rests on two ethical principles: the best interests of children and subsidiarity. Article 1 of the HCIA states that it was created "to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law."[4] In this way, the convention builds on other children's rights

*An earlier version of this article was presented at the Luncheon Lecture Series of the Ethics Program at Villanova University in 2018. I thank the audience for their engagement, in particular Peter Koch and Stephen Napier. I am grateful to Mark Doorley, Paul Sheldon, the editors of *Ethics & International Affairs*, and three anonymous referees for their comments. I am especially indebted to Sally J. Scholz, who provided extensive comments on multiple drafts and who generously discussed the ideas in this article on several occasions. My reading of her work on solidarity inspired my interest in the HCIA and subsidiarity.

Ethics & International Affairs, 33, no. 2 (2019), pp. 207–230.

doi:10.1017/S0892679419000170

documents, such as the 1989 United Nations Convention on the Rights of the Child (CRC) and the 1986 United Nations Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (referred to here as the UN Declaration on the Protection and Welfare of Children).[5] The CRC holds that the rights of children are based on the dignity of the human person and grounded especially on the unique physical, psychological, and mental vulnerabilities that are constitutive of childhood. Article 3 declares that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." The preamble of the CRC extends to children the Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948, by "recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love, and understanding."[6] The position of the UN declaration, the CRC, and the HCIA is that in addition to being a matter of children's rights, it is in a child's best interest to grow up in a family.

The second foundational principle of the HCIA is that of subsidiarity. Though international documents offer no explicit definition of "subsidiarity," the term refers to the priority ordering of placements for unparented children.[7] In all documents, subsidiarity starts with the requirement that attempts be made to reunite children with their biological parents and, if not possible, then with their biological relatives. If placement with relatives is not possible, the next alternative is adoption within the country of birth. Lastly, there is intercountry adoption (ICA). As I will explain, there has been disagreement historically about where alternative domestic care, such as foster care and institutional placement, falls in the preference ranking—whether before or after ICA. Nonetheless, in all iterations of subsidiarity, domestic adoption always ranks ahead of ICA as a matter of international policy.

Despite the goal of the HCIA to streamline ICA processes to facilitate safe and ethical adoptions, there has been a global decline in ICA in recent years.[8] For example, intercountry adoptions from Madagascar peaked in 2004 (the year the country ratified the HCIA) at over 300, but by 2012 the figure had fallen to fewer than 50.[9] Additionally, between the years 2000 and 2016 there was a 75 percent decrease in ICA into the United States from the six leading sending

https://doi.org/10.1017/S0892679419000170 Published online by Cambridge University Press

countries.[10] The decline is not because most children now live with parents or because all available children have been adopted in their respective native countries. UNICEF currently estimates that 18 million children globally have lost both parents, though there is reason to believe the number is much higher.[11] Further, one current estimate of the number of children living in alternative care situations is 2.7 million, though, here again, the number is likely much higher.[12]

Many factors have likely contributed to the overall decline of ICA. For example, some countries that are party to the HCIA have halted ICA entirely. This may have been for political reasons, such as Russia's ban on adoptions by American families, or because the country could not yet implement the strict HCIA standards, such as was the case with Cambodia and Vietnam. Still others have greatly curtailed ICA in part for reasons of national pride, such as South Korea.[13] Of particular interest to this essay is that there is some evidence to suggest that one cause might be subsidiarity itself, in that the priority of domestic adoption might be imposing limits or delays on ICA. A recent UNICEF study reports that individuals and agencies in receiving countries have sought to adopt from countries that are not included in the HCIA "where more children may be 'available' because subsidiarity and other protective considerations are applied less strictly."[14]

In this article I analyze subsidiarity from a philosophical perspective with the goal of determining whether the priority ranking in favor of domestic adoption is just.[15] In the next section I describe the meaning and use of subsidiarity in international child rights documents, specifically the HCIA. In the following section I analyze subsidiarity as a normative principle regarding child placement. And in the final section I demonstrate the incongruity between the principle of subsidiarity in the HCIA and the principle of subsidiarity traditionally used in social ethics and political philosophy. Appealing to this theoretical version of subsidiarity reveals at least two significant problems with HCIA placement policy, and as a result I conclude that subsidiarity in the HCIA must be formally revised.

The Principle of Subsidiarity and the Hague Convention

Neither the UN Declaration on the Protection and Welfare of Children, nor the CRC, nor the HCIA gives any explicit definition of "subsidiarity"—and in fact none of them uses the term at all—yet they all describe the preferential ordering for the placement of children.[16] It was only subsequently issued legal documents

https://doi.org/10.1017/S0892679419000170 Published online by Cambridge University Press

and guidelines that associated this preference for ordering with the term subsidiarity. For example, a 1994 document explaining the HCIA issued by the Permanent Bureau of the Hague Conference on Private International Law (HCCH) states that

> no adoption within the scope of the Convention shall be granted, either in the State of origin or in the receiving State, unless the competent authorities of the State of origin have verified compliance with those specific conditions, i.e. (a) the adoptability of the child, (b) respect of the subsidiarity principle; (c) the obtaining of the necessary consents of other persons than the child, and (d) if required, the wishes, opinions or consent of the child. Therefore, these conditions represent minimum safeguards that cannot be disregarded, it being understood that for the granting of the adoption additional requirements might be imposed by the Contracting State where it takes place.[17]

All subsequent references to the principle of subsidiarity that have been made in international documents on children's rights indicate the same priority ranking for domestic adoption/placement that is implied in the preamble of the HCIA and stipulated clearly in its Article 4(b):

> An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin . . . have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests.[18]

The HCCH's *Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice* gives the clearest formulation of subsidiarity available:

> "Subsidiarity" 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.[19]

Moreover, the guide effectively defines subsidiarity as a principle meant to implement the best interests of children. In the guide's glossary entry for the "Best interests of the child," one of the "essential factors" to take into consideration when determining best interests is "a consideration of national solutions first (implementing the principle of subsidiarity)."[20]

The first preference is the reunification of the child with his or her birth family, either parents or relatives. This is a generally accepted priority internationally. On

https://doi.org/10.1017/S0892679419000170 Published online by Cambridge University Press

both moral and legal grounds, birth parents have the right to raise their children. If they cannot do so and/or they relinquish their rights, biological families (blood relatives) are considered next because of their objective and subjective connections with the children. Of note here is the priority given to "national solutions" in the name of the principle of subsidiarity.

For decades there has been debate about where ICA would appear in the priority list after domestic adoption. The CRC appears to rank all domestic alternatives, including foster care and possibly institutional care, ahead of ICA. For example, Article 21(b) of the CRC indicates that states "recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin."[21] The wording here holds open the possibility of a "suitable" caring situation in-country other than foster or adoption. Institutional care, group homes providing family-like care, orphanages, or even orphan villages might reasonably be thought to fulfill the CRC's specification for suitable care. Note also that foster care is not a permanent family. This ambiguity regarding the placement priority vividly illustrates what is at stake in attempts to make sense of subsidiarity. There is evident disagreement at this stage about how to prioritize in-country institutional care and ICA. This confusion seems to have played a part in the restrictions and even halting of ICA in some countries.[22] And, in addition to genuine confusion, there are also opposing political and ethical worldviews about children's rights.[23]

The publication of *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention* (2008) provided influential clarification as to the intent of the HCIA regarding in-country, nonpermanent, nonfamily placements versus ICA:

> It is sometimes said that the correct interpretation of "subsidiarity" is that intercountry adoption should be seen as "a last resort." This is not the aim of the Convention. National solutions for children such as remaining permanently in an institution, or having many temporary foster homes, cannot, in most cases, be considered as preferred solutions ahead of intercountry adoption. In this context, institutionalization is considered as "a last resort."[24]

This statement and more recent information about the history of the drafting of the HCIA lends weight to the view that ICA is intended to follow directly after domestic adoption and before nonadoption domestic alternatives.[25]

Regardless of the legal confusion, the ethical argument for why all types of adoption should come before nonpermanent domestic options finds support in overwhelming data clearly showing the critical importance for normal human development of having a consistent single caretaker in the first years of life.[26] Children who spend their first years in temporary care or serial foster care placements can show significant cognitive, physical, emotional, and social delays in comparison to children adopted before the age of one and children raised in birth families. Even years after adoption into a permanent family, the cognitive development as well as emotional development of people who spent their first years in alternative care settings "cannot always completely overcome the effect of early adversity."[27] Significantly, however, there is "massive catch-up" post-adoption, thus proving that environment is essential to supporting growth. According to Rebecca Compton, an academic psychologist who has conducted an extensive literature review of the effects of adoption on child development, there is no debate in the medical, social, psychological, and/or developmental behavioral literature: Adoption is a highly successful path for unparented children, and in terms of typical child development, it is more successful the younger the age. Unfortunately, she says, "This 'earlier is better' theme, robustly supported by research, has yet to be fully embraced by individuals and agencies responsible for developing adoption policies."[28]

If domestic adoption and ICA both provide permanent families for unparented children and this is what has been shown to be the best route to human development, then it seems to follow logically that there should be no preference indicated in adoption treatises between either ICA or domestic adoption (with the exception being if one were more expedient than the other).[29] Yet all international documents on adoption invoke subsidiarity in either name or substance and clearly state that children ought to be placed in families domestically, if possible, over international adoption. This implies that something other than permanent family placement is at stake in the subsidiarity principle; and evidence suggests that this other consideration is the concept of cultural, ethnic, and/or racial heritage.

Subsidiarity and the Role of Heritage Rights

To attempt to understand why the HCIA prioritizes domestic adoption over ICA, let us assume that the convention's conception of subsidiarity necessarily includes the view that culture, race, and/or ethnicity is constitutive of the identity of

https://doi.org/10.1017/S0892679419000170 Published online by Cambridge University Press

children and therefore that ensuring a child born in a culture remains in that culture is part of what we owe children. The "heritage rights" claim may be understood in two ways. First, it could be a consequentialist claim about the welfare of children such that we might understand that we act in their best interests emotionally and psychologically when we maintain, promote, and protect their heritage. On this account, placement by ICA is not as "good" for children as domestic adoption, or it may even entail a harm for them. Second, heritage rights could be a deontological claim about what is owed children based on their personhood, such that if a domestic adoption situation was available for a child and the child was instead placed through ICA, the child would be *wronged*, even if the child was not necessarily *harmed*. This would be to consider heritage rights as part of a child's universal fundamental rights, as, for example, is named in the CRC. I will consider each argument in turn and argue that in neither case can heritage rights be a definitive basis for prioritizing domestic adoption over ICA in general.

Heritage Rights, Wellbeing, and Harm

Heritage rights may include the consequentialist claim that being removed from one's birth culture necessarily amounts to *harmful* deprivation. There have been many memoirs and public discussions by adult adoptees detailing everything from their ambivalence to outright negativity about ICA, largely based on matters of identity and culture loss.[30] There is no doubt that ICA (as well as transracial domestic adoption) raises serious challenges for an individual, in addition to the loss already inherent in adoption. The literature is clear that no matter how good one's adoptive home and life have been, many individuals who were adopted through ICA as children experience a sense of loss or grief, and feel compelled to find connection with their biological and/or cultural backgrounds. But are such narratives necessarily consequences of ICA? Further, have they been linked with negative outcomes for children when they become adults such that ICA itself may be considered detrimental or perhaps a high-risk factor for detrimental outcomes?

Compton asks and carefully answers these questions in her review of the literature on outcomes for children and adults who came into their families via ICA.[31] Unlike the clear markers for physical, cognitive, social, or emotional development, it is a thorny consideration to decide what constitutes "harm" when referencing cultural or ethnic identity. As Compton rightly claims, this is because the question

of "identity" is fundamentally a value-based one. Consider an example along the lines of one Compton offers: If an ethnically Armenian three-year-old boy was adopted from modern-day Turkey and now lives with his French adoptive parents in France, whether he identifies as Armenian (ethnicity), Turkish (nationality), or French (citizenship) may depend to a large extent on his own personal views about what determines identity. And his own personal values may also shape whether he thinks that not identifying as Armenian is detrimental.[32]

Another way to look at this, says Compton, is to identify markers of a healthy self-image, notably pride in one's ethnicity (however one thinks of it) and self-esteem. Research on self-esteem and ethnicity for adults who were adopted via ICA does not seem to show a negative correlation. According to Compton, what the data does show is that those who were adopted transnationally and who perceive conflict between parts of their cultural identities show indications of psychological distress. She notes that scholars have extended the concept of bicultural identity integration, developed in relation to nonadopted individuals who belong to more than one cultural/racial group, to ICA individuals as well; and that data seem to indicate that those who see their cultural identities as harmonious do not show signs of distress.[33]

The implication is that harms experienced by individuals who were adopted via ICA are not a feature of having been transnationally adopted but rather are related to something about the specific experience of multicultural integration (or lack thereof) or are a sequela resulting from specific adoption practices or processes. In addition, data from transracial domestic adoptions in the United States collected over the course of twenty-five years shows that children and adults (usually children of color adopted by white parents) have overwhelmingly positive outcomes.[34] In fact, the strength of this data and the large number of children of color waiting for adoption in the United States helped generate support for the passage of the U.S. Multiethnic Placement Act of 1994 (amended by the Interethnic Adoption Provisions of 1996), which made illegal the practice of "race matching"—that is, the use of race as a determining basis for child placements.[35]

Yet it might be argued that domestic adoption is better than ICA for two other reasons. First, domestic adoption may be better able than ICA to provide the cultural or ethnic environment necessary for flourishing. Here, the argument is that the best interest principle demands priority for domestic adoption because in-country placement naturally will be better able to promote heritage rights. Second, others have claimed that parents place children in care settings, such as

https://doi.org/10.1017/S0892679419000170 Published online by Cambridge University Press

institutions, with the view that the children will later return to the family or that the family can at least still visit the children.[36] If we accept that children belong first with biological parents (on both moral and legal grounds), then allowing ICA from countries where the parents of children in foster care or institutions are still living would constitute a grave harm.[37] These are reasonable interpretations of the grounding of subsidiarity and present a challenge to my argument. Even so, there are strong reasons to doubt their feasibility and accuracy.

One such reason is that children might be relinquished for adoption due to cultural conceptions of pregnancy and child-rearing (for example, a stigma against unmarried mothers and their children) or economic or public health factors.[38] Under such circumstances, the likelihood of domestic adoption or family reunification is very low. In India, for example, domestic adoption is rare, seemingly in large part because it is seen as public and visible evidence of infertility, which is stigmatized.[39] At the same time, in order to implement the HCIA's subsidiarity, India established a rule that 80 percent of adoptions must be domestic and 20 percent may be done through ICA. The result is that children who are "reserved" for the 80 percent are mostly living in some institutionalized setting, not with adoptive families.[40] Moreover, there appears to be evidence that parental and family visitation of institutionalized children is exceedingly rare.[41]

In some countries where adoption stigma is strong, when domestic adoption does occur children are either told not to disclose their adoptive status or are themselves unaware of it.[42] We know from other data that secrecy regarding a child's origins, if revealed or discovered later in life, is strongly correlated with low self-esteem and mental health challenges.[43] In these cases, choosing domestic placement when children could have been adopted by ICA is counter to their psychological wellbeing. Additionally, if a country has become a party to the HCIA, it must first perform "due diligence" to seek domestic placements, even when it knows that neither family reunification nor domestic adoption is possible for most children. This could mean implementing a new policy, as in the case of India, but more typically countries put "holding" periods on children while they search (or show indications that they have searched) for domestic placements.[44] However, in countries where domestic adoption is rare due to economic, political, and/or social reasons, there are more children "remaining in orphanages for longer periods of time, thereby incurring the increased developmental and psychic harm that comes from being institutionalized, while also diminishing their prospects for ever moving into a permanent family."[45]

Advocates of the HCIA may respond that the difficulties noted above are temporary implementation problems that happen while pursuing the goal of more robust domestic childcare systems. After all, the HCIA includes the requirement to undertake initiatives to render domestic adoptions more feasible and plentiful and alternative care options more family-like and nurturing. As shown, however, this amounts to stipulating a priority that is virtually impossible in the present. Hence, we have not only a partial explanation for why some countries have reduced ICA rates but also an ethical critique of subsidiarity. In effect, subsidiarity is requiring states to violate the best interests of some children in the present (by not placing them in a permanent family as early in life as possible) to meet the best interests of other children in the future. The result is an injustice for children on the same ethical grounds on which the HCIA claims to be founded.

For these reasons, it is a mistake to hold the view that domestic adoption ought to have priority because ICA by its nature entails harm to children. A further implication is that it would be unjust for any country to halt ICA for reasons other than procedural difficulties (unless there are no children living in nonfamilial, nonpermanent care settings). Interestingly, the terms of the HCIA are such that any country that becomes a party to it must conduct ICA according to its stipulations, but there is no stipulation that says the countries must allow ICA in the first place. In the final section of this article I discuss the ethical permissibility of halting ICA after a country accepts the HCIA into force.

Heritage Rights and Wrongs

Separate from the worry about wellbeing and harm, there are those who argue that ICA abrogates an individual's fundamental right to be as connected as possible with her biological, familial origins. This is a different, more deontological argument. As articulated by David Smolin:

> The child is a part of his/her family as a matter of both basic human need and fundamental human right. These fundamental human rights include the right of a child to remain with the family to which she was born, and the corollary right of parents to the care and custody of each child born to them. Thus, the family that the child belongs with, as a matter of the rights of the child and of her parents, is clearly the family into which the child is born. Further, the child is born not only to a father and mother, but also into a broader set of relationships, including siblings, grandparents, aunts and uncles, cousins, and so on. Thus, as a matter of widespread cultural practice, human need, and fundamental rights, the family into which the child is born extends beyond

the parents, and beyond the nuclear family, to include an inter-generational and extensive family group.[46]

For Smolin and other scholars, children are part of kinship systems that even extend into the notion of tribe. On accounts like this, a preference for in-country placement that would meet the child's basic needs is the best choice because it is respectful of his or her identity. Smolin's preference for domestic adoption and even in-country alternative care arrangements holds that children have a right to be raised in the country of their heritage.[47] The argument goes that even if children are not harmed by ICA, they are wronged because they are separated from their kinship systems and from their identity.

My response to the wronging argument is twofold. First, we might question the basic premise that one's biological ancestry generates a heritage right. Many adoption scholars have taken issue with this privileging of genetics, as have political and philosophical theorists who question the valorization of identity based on features of ethnicity, race, class, or gender.[48] There is strong support for an argument that the biological basis of identity is in fact a culturally constructed concept, such that we do not know if one's "real" self is solely or even primarily biologically/genetically grounded. What follows from this is that a principle that instantiates a priority ordering for placement based on biology is a principle not of fact but of a value choice. Thus, it is at least a contested position that a newborn child *necessarily* belongs, much less belongs primarily, to a particular culture—notably, a culture she has never directly experienced. What can it really mean to ask an adult who was adopted via ICA as an infant whether she wishes she had been raised with her "own" people?

Second, even if we were to accept that genetics and/or biological connectedness secures heritage rights, as many believe, it seems to be a distinctly different kind of move to argue that placement in families within national borders ought to take priority *as an extension* of the biological relatedness claim. Again, we would be claiming that children's ethnicity or race is primarily or solely constitutive to their identity. But if someone does not think she was wronged or harmed by ICA and has a flourishing sense of self and integrated cultural identity, do we really think that person is mistaken about whether she was wronged? Admittedly, an argument could be made here either way; and while it is philosophically interesting to consider, the view of this article is that it is clearly not a settled matter that a right to one's heritage exists, and that even if it does, such a right does not necessarily extend to one's cultural/ethnic group.

But since this is still debatable, let us go further. Suppose we grant that heritage rights exist, and we grant that these include the right to identify according to one's ethnicity, cultural group, or racial heritage. I argue that it still does not follow that every child must be raised in the country of his or her heritage, especially if doing so might be otherwise harmful to a child's wellbeing overall. Moreover, ethnic, cultural, and racial groups often span multiple borders. In the past, some colonial powers drew borders with the explicit purpose of bifurcating such groups. It seems plausible, then, that some children could be adopted through ICA and still be a part of the very same "extensive family group," whereas if these same children were adopted domestically they might be denied their heritage rights.[49] In addition, the view that heritage rights ought to be respected in placement decisions could be fulfilled by providing children with opportunities to connect with their heritage on a sustained basis. The CRC, for example, stipulates a right to one's heritage, seemingly as part of a best interest determination, stating that nations must "respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference."[50] Some scholars have noted that the language in the CRC protecting nationality and cultural identity for children was a direct response to historical incidents of forcible removals and transfers of children from their countries during genocidal conflicts. Since as Compton notes this is ethically distinct from legal adoptions, it would be a mistake for the HCIA to appropriate this as a right to be protected against ICA.[51]

What is important here is the recognition that ICA does not inherently violate heritage rights just because children are not raised in their birth culture. We can plausibly argue that when children are adopted through ICA, their heritage rights must be met such that these children know they were adopted and have access to their adoption records, including the names and backgrounds of their birth parents. As a matter of their fundamental rights, moreover, all children should be educated about their heritage; have the sustained presence of others from their country of birth in their lives if possible; and have opportunities during childhood to return to their country of origin if possible. This might well include ongoing open communication between parents and their children about the children's heritage and its meaning and place in their lives.[52] Therefore, instead of a right to one's heritage, the more accurate conception is a right to the opportunities to exercise heritage rights. While significant numbers of adult ICA adoptees are returning to their birth countries to live even if they cannot find their biological relatives,

https://doi.org/10.1017/S0892679419000170 Published online by Cambridge University Press

and while most of these people say they believe they have been wronged by being adopted via ICA, this is not in itself proof that the wrong perceived occurred due to the nature of ICA as such.[53]

Finally, even if ICA ensures children's heritage rights, could someone still argue for the priority of domestic adoption by stipulating that these rights are in general better met through domestic adoption? The claim here would be that domestic adoption implements the best interest principle better, all things considered, than ICA—not that ICA fails to fulfill the best interest for some children. While I think a good argument could be made in many cases that heritage rights might be better served by domestic adoption, this does not justify the in-principle priority of domestic adoption, all things considered. For example, what if a domestic adoption meant that children's heritage rights were better met than they could be by ICA but that these children were denied other important rights, such as education and political and social rights? To secure the priority of domestic adoption in principle over ICA, we also would need an argument about the relative importance of heritage rights in a best interest determination. Neither the HCIA, nor the CRC, nor the UN Declaration provides or implies such an argument. Based on this final point, we can say that the argument for prioritizing domestic adoption is, ethically at least, an open question due to a lack of specification about the best interest principle.

In sum, subsidiary's prioritization of domestic adoption over ICA cannot be grounded in a consequentialist claim that domestic adoption better promotes children's wellbeing, because the empirical research does not support that conclusion. Further, this prioritization also cannot be grounded in a deontological claim about children's fundamental heritage rights, because even if such heritage rights are based purely on biology, this still does not necessarily entail physical placement within a culture, as there are reasonable arguments that heritage rights might instead entail simply the opportunity to connect meaningfully with one's culture during childhood.

Having now argued that heritage rights cannot be the basis for prioritizing domestic adoption over ICA, let us examine a final challenge: sovereignty.

The Challenge from National Sovereignty

There is some evidence that subsidiarity may be a form of respect for state sovereignty. For many sending countries, ICA indeed represents a new form of colonialism, as they see it depleting their country of its most precious resource: its children. This loss is further exacerbated by the material and cultural transfer

inherent in the process. Countries can perceive ICA as robbing them of their culture and exploiting their economic situation; families may be coerced into giving their children to agencies or to wealthy Westerners.[54] The social context of ICA (and domestic adoption in some nations) is often one where a society's class and ethnic divisions are on full display. The practice of adoption exacerbates these divisions and furthers the dissipation and destruction of native cultures, while gratifying the desires of those with money to obtain children from those without.[55]

A related concern is the maintenance of nationalism in the face of increasing international pressure. Many former and current sending countries have begun to see ICA not as a solution to child welfare and a means to aid national child welfare programs but as a drain on national reputation. National pride, shown in not wishing to see themselves or have the world see them as "unable to care for their own," has led some countries to curb or severely restrict ICA,[56] while at the same time prompting governments to address cultural taboos against domestic adoption and encourage permanent alternative care settings for unparented children in-country.[57] The creation of "orphan villages," such as the ones sponsored by SOS Children's Villages International, are attempts to simulate family-like care.

Concerns about colonialism are serious and justified given the historical record, and nations have the right to state sovereignty. Yet, understanding subsidiarity in international children's rights documents and international child welfare laws as a claim to state sovereignty is not logically defensible. On one hand, there is the matter of what the document itself states—that subsidiarity is understood as implementing best interests. On the other hand, even if sovereignty does ground subsidiarity's preference for domestic adoption, sovereignty is not absolute. Therefore, if the best interest principle is the overarching principle, as the HCCH and the United Nations have clarified, then subsidiarity, and by extension sovereignty, must yield to best interest in situations where they clash.

To be sure, the HCIA respects state sovereignty in other ways. Consider that the HCIA does not declare that states are "obliged to carry out intercountry adoptions; only that if they do so, it must be in compliance with HCIA."[58] This stance shows an ultimate respect for national sovereignty. Becoming a party to the HCIA and then halting the practice of ICA preserves a right to self-govern while also acting in compliance with international agreements. The result of this level of respect for state sovereignty, though, has been that the treaty that sought to protect

https://doi.org/10.1017/S0892679419000170 Published online by Cambridge University Press

unparented children has indirectly contributed to children remaining in foster care or institutional settings, harming their development.

In sum, any worry that removing the preference for domestic adoption over ICA from the HCIA would limit state sovereignty could be addressed in part by reiterating that countries are free to halt ICA entirely whenever they wish. The next section, however, goes on to show that allowing states to halt ICA without censure or comment conversely amounts to prioritizing state sovereignty over the best interests of children, which is not only counter to the HCIA conceptually but also unjust.

The Principle of Subsidiarity in Social and Political Philosophy

Historically, philosophers and political theorists have offered a different conception of subsidiarity than what I have discussed so far. A working but very simplified definition might be: "The principle that each social and political group should help smaller or more local ones accomplish their respective end without arrogating those tasks to itself."[59] This original concept is operative in fields such as politics (for example, the Treaty of Maastricht);[60] economic and business arrangements;[61] and environmental policies.[62] The principle of subsidiarity was developed from fundamental premises that are shared with the conception of human rights found in international documents on the rights of children. These premises are the ideas of human dignity, the innate freedom of persons, and the inherent social nature and interconnectedness of persons. Subsidiarity also shares with international human rights law a particular conception of the role of the state as an instrument of the will of the people oriented toward the protection and promotion of the dignity and freedom of individuals.[63] Subsidiarity demands that, as a matter of respect for the dignity of persons and their freedom, the body that has decisional authority ought to be proper to the nature of the decision and to its impact on individuals and the common good.

While the principle of subsidiarity has clear echoes in intellectual history, from Aristotle, to medieval philosophers such as Althusius, to federalism, it was not until the latter part of the nineteenth century that it found explicit expression by Catholic social theorists.[64] Pope Leo XIII is credited with developing the concept of subsidiarity (though not the term) in the 1891 encyclical "Rerum novarum":

https://doi.org/10.1017/S0892679419000170 Published online by Cambridge University Press

> Whenever the general interest of any particular class suffers, or is threatened with harm, which can in no other way be met or prevented, the public authority must step in to deal with it . . . the principle being that the law must not undertake more, nor proceed further, than is required for the remedy of the evil or the removal of the mischief.[65]

This document is primarily concerned with the condition of workers and the need for state intervention to protect their right to decide for themselves. Justice in this case entails the right of individuals and groups of individuals to decide matters regarding their lives. The higher levels of authority or governance "must not undertake more" than is necessary to assist them. Some theorists call this characterization of subsidiarity "negative subsidiarity" to describe the requirement to forebear taking over matters that individuals and groups have the right to decide themselves.[66] Here subsidiarity is a matter of distributive justice, with decisional authority adhering at the proper level to respect human freedom, rights, and dignity. In terms of governance and organization, "services should be provided at the lowest possible level of government, with central authority playing a supervisory role and providing an ultimate financial guarantee."[67]

In 1931, Pope Pius XI in "Quadragesimo anno" stipulated by name the "principle of 'subsidiary function.'" However, this pope's focus was on the rights of workers and the rise of totalitarianism:

> Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do.

In the next paragraph, Pius XI expounds on the idea in relation to the power of the state:

> The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly. Thereby the State will more freely, powerfully, and effectively do all those things that belong to it alone because it alone can do them: directing, watching, urging, restraining, as occasion requires and necessity demands. Therefore, those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of "subsidiary function," the stronger social authority and effectiveness will be, [and] the happier and more prosperous the condition of the State.[68]

https://doi.org/10.1017/S0892679419000170 Published online by Cambridge University Press

We see in these passages not only reference to negative subsidiarity in the form of noninterference but also what can be called "positive subsidiarity," where intervention by the state or international order is justified when it is able to "powerfully and effectively do all those things that belong to it alone because it alone can do them." Mere local units of society sometimes cannot protect and promote human dignity and freedom.[69] The nation, or a community of nations, through intervention (not interference) enables local communities to achieve their ends. On this account, subsidiarity appears to be a principle of social justice, ensuring that the fundamental rights of individuals are protected and promoted by organizations oriented to the common good.

Philosopher Hans-Martin Sass says that "within this definition one has differentiated between a positive concept of subsidiarity recognizing individual personal commitment and goals in life to serve others, and a negative concept limiting the influence and power of an ever growing bureaucracy."[70] It might seem problematic for the conceptualization of the principle to claim both aspects simultaneously, appearing collectivist and libertarian, respectively. I argue that subsidiarity is best understood as a dialectical principle of ethics that uniquely balances universal human rights and the pluralism of cultures and beliefs. As such, subsidiarity in social ethics, unlike subsidiarity in the HCIA, is not a procedural principle for implementing best interests. Rather, it is, as Paolo Carozza argues, "a structural principle of international human rights law [that] integrates international, domestic, and subnational levels of social order on the basis of a substantive vision of human dignity and freedom, while encouraging and protecting pluralism among them."[71]

Subsidiarity as a principle of ethics therefore holds that decisions ought to be made and responsibility distributed to the lowest possible level with the requisite authority and information. This ensures the common good, all the while remaining attentive to the uniqueness of individuals, communities, and cultures, and also acknowledging human interdependence and mutual responsibility.[72]

What does the principle of subsidiarity have in common with subsidiarity in the HCIA? The HCIA does implicitly include a type of subsidiary function in that it gives individual nations the authority to execute the placement of unparented children. Also, it creates its own hierarchy of decision-making by establishing the central authority for each state, accredited bodies, and institutional or individual non-accredited bodies.

Though subsidiarity is a general principle of ethics (and not a procedural rule, as in the HCIA), it also constitutes a critique to the HCIA, most clearly for

appropriating to a supranational level a decision about placement that is more proper to the local level. One reason would surely be the recognition that domestic adoption, as this article has argued, does not necessarily accord with the best interests of children more than does ICA. Such determinations should only be made by those who are most able to determine what is in the best interest of any given child. While the level of decision-making would surely be with local authorities, we see that subsidiarity also has implications for extended biological family decision-making, to which subsidiarity in the HCIA may not be able to speak. For example, ethically, biological family members who live outside the child's state of origin ought to have decisional capacity. Moreover, subsidiarity requires that respect be granted to the preference of birth parents for their child's placement. This is a feature in domestic adoption in some countries, whereby birth parents who relinquish their parental rights may voluntarily stipulate the features of the placement of their child, including the location of the adoptive parents and how much and what types of contact the adoptive parents must allow with the birth parents.[73] Subsidiarity may in these ways require systems that are characterized by more openness and individual choice than the HCIA now allows. Applying subsidiarity more fully may also extend choice to the preferences of the child herself in terms of decisional authority.[74]

Certainly, there will be some situations in which international bodies ought to intervene. For example, it is a matter of social justice that countries that cannot provide permanent families for children currently in need must continue to participate in ICA. Closing one's borders to ICA for reasons other than the inability to protect the welfare of children violates the best interest principle. Any argument in favor of state sovereignty proposed to justify this move is indefensible on logical grounds, for by signing the HCIA each nation indicates a commitment to universal rights for children. By their own lights, then, nations would be unjustified in halting ICA. Moreover, it seems that countries that cannot place their children domestically or for which domestic placement would not lead to the children's flourishing must turn to the international community for assistance in doing so.

Finally, the protection of human dignity and the common good must also concern itself with abuses of birth parent coercion and trafficking, which might only be able to be addressed by a higher authority. Currently, it should be noted, the HCIA has not eliminated kidnapping or baby selling, though it claimed these as central to the original goal of the treaty.[75] It is very possible that a reconceived HCIA based on the actual principle of subsidiarity might go a long way in providing protection and ending those abuses.

https://doi.org/10.1017/S0892679419000170 Published online by Cambridge University Press

Conclusion

The principle of subsidiarity stipulated by the HCIA prioritizes domestic adoption over ICA on the basis of either a mistaken conceptualization of the best interest of children or a conception of state sovereignty that is incoherent given the stated goals of the convention.[76] Subsidiarity in the HCIA is also flawed in its general characterization as a procedural principle; it is more accurately characterized as a structural principle that serves to balance the pluralism of communities with universal human rights. It can do this by stipulating which unit or deciding body of society ought to have decisional authority at a given moment. Subsidiarity may be construed as a principle of distributive justice that shows that local communities and individuals have the moral authority to make decisions that national or international bodies sometimes unjustly assume. Simultaneously, subsidiarity may be construed as a principle of social justice when local communities cannot protect or ensure the best interests of children and national or international bodies must intervene to do so. On this reading, subsidiarity concurs with the HCIA's priority of delegating child placement decisions to individual states, but it also disagrees in two important ways. First, an international body must not limit the power of states, local communities, or birth parents to decide about the relative good for children. The in-principle prioritization of domestic adoption by the HCIA, as a matter of international policy, is a serious violation of human freedom, human dignity, and the rights of children. As such, it is also a violation of distributive justice and should be dropped. Second, an international body must intervene when local communities cannot protect the dignity and freedom of their people. Given that some states have halted and others have delayed ICA as a matter of policy so that they can search for possibilities for domestic adoption (which may not even be in the best interest of children), subsidiarity requires as a matter of social justice that the HCIA and the United Nations condemn such practices. Subsidiarity, in its accurate ethical characterization, calls for international bodies as well as the central authority in each state where the HCIA is entered into force to intervene to do all in their power to ensure that ICA is a real and viable option for children. At the same time, subsidiarity likely requires international bodies to assist sending nations in their efforts to increase their domestic adoption options and to create and sustain more humane alternative care settings for all vulnerable children.

Though more critical analysis is surely needed, the ethical arguments here demonstrate the necessity for formal revision of the subsidiarity principle in the HCIA so as to allow adoption to truly comport with the best interests of children and their fundamental rights.

NOTES

[1] "Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption," Hague Conference on Private International Law, May 29, 1993, assets.hcch.net/docs/77e12f23-d3dc-4851-8f0b-050f71a16947.pdf.

[2] *The Hague Convention on Intercountry Adoption: A Guide for Prospective Adoptive Parents*, pub. no. 11373 (New York: United States Department of State, Bureau of Consular Affairs, 2006).

[3] *1993 Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption: 25 Years of Protecting Children in Intercountry Adoption* (Hague: Hague Conference on Private International Law Permanent Bureau, 2018), assets.hcch.net/docs/ccbf557d-d5d2-436d-88d6-90cddbe78262.pdf.

[4] Hague Conference on Private International Law "Convention on Protection of Children," p. 1.

[5] "Convention on the Rights of the Child," November 20, 1989, United Nations Human Rights, Office of the High Commissioner, www.ohchr.org/en/professionalinterest/pages/crc.aspx; "Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally," A/Res/41/85, December 3, 1986, United Nations General Assembly, www.un.org/documents/ga/res/41/a41r085.htm.

[6] "Convention on the Rights of the Child," United Nations Human Rights, p. 1. Elsewhere I analyze the best interest of children principle as it is used in international child rights documents. I critique the concept of best interest as being underspecified and undertheorized; I appeal to a capabilities approach to specify and ground the best interest principle; and I defend a bolder policy regarding the role of ICA for unparented children globally. Sarah-Vaughan Brakman, "A Capabilities Approach and the Best Interest of Children in Intercountry Adoption" (unpublished manuscript).

[7] The term "unparented children" has become controversial in the field. International policy often refers to "orphans," meaning children who have lost both parents to death, and some believe that intercountry adoption (ICA) ought to be considered solely for orphans. Many children, however, have lost just one parent and the remaining parent cannot care for them. Here, unparented children refers to orphans as well as to children whose living parent(s) is not caring for them and who have no stable familial living situation.

[8] Wm. Robert Johnston, "Historical International Adoption Statistics, United States and World," Johnston's Archive, last updated August 5, 2017, www.johnstonsarchive.net/policy/adoptionstatsintl.html.

[9] Nigel Cantwell, *The Best Interests of the Child in Intercountry Adoption* (Florence: UNICEF Office of Research, 2014), p. 42, www.unicef-irc.org/publications/pdf/unicef%20best%20interest%20document_web_re-supply.pdf.

[10] See Mark Montgomery and Irene Powell, *Saving International Adoption: An Argument from Economics and Personal Experience* (Nashville: Vanderbilt University Press, 2018, p.4). Or see Mark Montgomery and Irene Powell, "International Adoptions Have Dropped 72 Percent since 2005—Here's Why," the Conversation, February 28, 2018, theconversation.com/international-adoptions-have-dropped-72-per-cent-since-2005-heres-why-91809. In the article, Montgomery and Powell discuss the findings from their book and report that, between 2000 and 2016, the number of children in the United States adopted from the six most popular countries (Ethiopia, China, South Korea, Russia, Romania, and Guatemala) fell more than 75 percent.

[11] Kevin Voigt and Sophie Brown, "International Adoptions in Decline as Number of Orphans Grows," CNN, September 17, 2013, www.cnn.com/2013/09/16/world/international-adoption-main-story-decline/index.html.

[12] Nicole Petrowski, Claudia Cappa, and Peter Gross, "Estimating the Number of Children in Formal Alternative Care: Challenges and Results," *Child Abuse and Neglect* 70 (August 2017), pp. 388–98.

[13] Montgomery and Powell, *Saving International Adoption*. For Russia's ban, see p. 44; for implementation difficulties as likely reasons for the decrease in ICA from Cambodia and Vietnam after entry into force of the HCIA, see pp. 157–58; for South Korea restrictions on ICA as a result of national pride, see p. 41.

[14] Cantwell, *Best Interests of the Child in Intercountry Adoption*, p. 43.
[15] See Elizabeth Bartholet, "International Adoption: The Child's Story," *Georgia State University Law Review* 24, no. 2 (winter 2007), pp. 333–79; Elizabeth Bartholet, "International Adoption: Thoughts on the Human Rights Issues," *Buffalo Human Rights Law Review* 13 (2007), pp. 151–203; and Elizabeth Bartholet, "International Adoption: The Human Rights Position," *Global Policy* 1, no. 1 (January 2010), pp. 91–100. Bartholet notes the principle of subsidiarity and its role in the decline of ICA. My philosophical argument aligns with Bartholet's conclusions in many respects.
[16] See the 1986 Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, Art. 17; the "Convention on the Rights of the Child," United Nations Human Rights, Art. 21(b); and "Convention on Protection of Children and Co-Operation," Hague Conference on Private International Law, Art. 4(b). See also Lakshmi Kant Pandey v. Union of India, February 6, 1984, indiankanoon.org/doc/551554/. This case may be the first instance of subsidiarity as a placement level, though the document does not use the term explicitly.
[17] G. Parra-Aranguren, *Explanatory Report on the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, Hague Conference on Private International Law, 1994, assets.hcch.net/upload/expl33e.pdf., paragraph 108. The Hague Conference on Private International Law describes itself as "an intergovernmental organisation, the purpose of which is 'to work for the progressive unification of the rules of private international law' (Article 1 of the Statute of the Hague Conference)." "FAQ" (under "What Is the 'Hague Conference on Private International Law'?," HCCH, www.hcch.net/en/faq.
[18] *Convention on Protection of Children*, Art. 4, Hague Conference on Private International Law.
[19] *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice* (Bristol, U.K.: Family Law, 2008), p. 29, Hague Conference on Private International Law, assets.hcch.net/docs/bb168262-1696-4e7f-acf3-fbbd85504af6.pdf.
[20] Ibid., p. 15. See also *1993 Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, p. 23, which lists subsidiarity by name and describes the priority for domestic placements in the name of this principle. This document, published in fall 2018, contains a reference to a forthcoming HCCH working paper specifically on the principle of subsidiarity.
[21] "Convention on the Rights of the Child," United Nations Human Rights, p. 6.
[22] Cantwell, *Best Interests of the Child in Intercountry Adoption*.
[23] See Bartholet, "International Adoption: The Human Rights Position."
[24] *Implementation and Operation of the 1993 Hague Intercountry Adoption Convention*, p. 30.
[25] See Chad Turner, "The History of the Subsidiarity Principle in the Hague Convention on Intercountry Adoption," *Chicago Kent Journal of International and Comparative Law* 16, no. 1 (2016), pp. 95–121. To my knowledge, this is the only article exclusively on subsidiarity and the HCIA. It traces the history of the principle of subsidiarity in the creation of the HCIA and argues that the original intention was for ICA to rank above nonadoption domestic placement options. Additional evidence for the claim that the HCIA intended ICA to rank above domestic options such as foster care and institutional care can be found in G. Parra-Aranguren, *Explanatory Report on the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*. Despite such credible evidence supporting the interpretation of the HCIA's intentions, the view that ICA has priority over domestic nonpermanent and nonfamilial care options has been a contentious one among scholars and policy experts.
[26] The information and the quotes in this paragraph are from Rebecca J. Compton, *Adoption Beyond Borders: How International Adoption Benefits Children* (Oxford, U.K.: Oxford University Press, 2016), chs. 1–3.
[27] Ibid., p. 33.
[28] Ibid., p. 36.
[29] Bartholet, "International Adoption: The Child's Story."
[30] See, among many others, Jane Jeong Trenka, *The Language of Blood: A Memoir* (Minneapolis, Minn.: Graywolf Press, 2003).
[31] See Compton, *Adoption beyond Borders*, pp. 57–82. She also raises the argument of genetic essentialism.
[32] Compton, *Adoption Beyond Borders*, p. 67. I changed the example's contents to enhance the point.
[33] Ibid, pp. 68–70. See also Harold D. Grotevant, Ruth G. McRoy, Gretchen M. Wrobel, and Susan Ayers-Lopez, "Contact between Adoptive and Birth Families: Perspectives from the Minnesota/Texas Adoption Research Project," *Child Development Perspectives* 7, no. 3 (July 2013), pp. 193–98.
[34] For the results of a decades-long research program on this issue, see Rita J. Simon, Howard Altstein, and Marygold S. Melli, *The Case for Transracial Adoption* (Washington, D.C.: American University Press, 1994). See also Howard Alstein and Rita James Simon, *Adoption across Borders: Serving the Children in Transracial and Intercountry Adoptions* (Lanham, Md.: Rowman & Littlefield, 2000).

[35] U.S. Department of Health and Human Services, Administration for Children and Families, Office for Civil Rights, *Ensuring the Best Interests of Children through Compliance with the Multiethnic Placement Act of 1994, as Amended, and Title IV of the Civil Rights Act of 1964*, www.hhs.gov/sites/default/files/ocr/civilrights/resources/specialtopics/adoption/mepatraingppt.pdf. More recently, a multidisciplinary field called critical adoption studies has arisen in which transracial adoptees discuss serious consequences they have experienced as a result of being adopted such as bodily alienation and racial isolation. See discussion in Montgomery and Powell, *Saving International Adoption*, pp. 102–9. The authors, themselves parents of a child adopted through ICA and transracially, observe that as of now there are no studies on which to base policy, nor are there studies to explore what effect post-adoption transracial/transcultural training, sensitivity, and education might have on these experiences. Nonetheless, such experiences are real and ones we need to hear more about as the qualitative studies focusing on them develop.

[36] See Diana Marre and Laura Briggs, "The Circulation of Children," introduction to *International Adoption: Global Inequalities and the Circulation of Children*, edited by Diana Marre and Laura Briggs (New York: New York University Press, 2009), pp. 1–28; and E. J. Graff, "The Lie We Love," *Foreign Policy*, October 6, 2009, foreignpolicy.com/2009/10/06/the-lie-we-love.

[37] See Graff, "The Lie We Love,"; and Laura Briggs, *Somebody's Children: The Politics of Transracial and Transnational Adoption* (Chapel Hill, N.C.: Duke University Press, 2012).

[38] S. C. S., "Why Adoptions Are So Rare in South Korea," *Economist*, May 27, 2015, www.economist.com/the-economist-explains/2015/05/27/why-adoptions-are-so-rare-in-south-korea; Ann Babe, "The Stigma of Being a Single Mother in South Korea," Al Jazeera, March 1, 2018, www.aljazeera.com/indepth/features/stigma-single-mother-south-korea-180226144516720.html.

[39] Aditya Bharadwaj, "Why Adoption Is Not an Option in India: The Visibility of Infertility, the Secrecy of Donor Insemination, and Other Cultural Complexities," *Social Science & Medicine* 56, no. 9 (May 2003), pp. 1867–80.

[40] Montgomery and Powell, *Saving International Adoption*, p. 159.

[41] See Bartholet, "International Adoption: The Child's Story"; Bartholet, "International Adoption: Thoughts on the Human Rights Issues"; and Bartholet, "International Adoption: The Human Rights Position."

[42] Rachel Faircloth Green, "Making Kin Out of Strangers: Soviet Adoption during and after the Second World War," in Nick Baron, ed., *Displaced Children in Russia and Eastern Europe, 1915–1953: Ideologies, Identities, Experiences* (Leiden, Netherlands: Brill Academic Publishers, 2016).

[43] See Betty Jean Lifton, *Lost and Found: The Adoption Experience* (New York: Harper & Row, 1988); and Anne Baran and Reuben Pannor, "Open Adoption," in David M. Brodzinsky and Marshall D. Schechter, eds., *The Psychology of Adoption* (New York: Oxford University Press, 1990), pp. 316–31.

[44] See, for example, Bartholet, "International Adoption: The Human Rights Position."

[45] Ellen Pinderhughes, Jessica Matthews, Georgia Deoudes, and Adam Pertman, *A Changing World: Shaping Best Practices through Understanding of the New Realities of Intercountry Adoption* (New York: Donaldson Adoption Institute, 2013), p. 8.

[46] Elizabeth Bartholet and David Smolin, "The Debate," in Judith L. Gibbons and Karen Smith Rotabi, eds., *Intercountry Adoption: Policies, Practices, and Outcomes* (Farnham, U.K.: Ashgate, 2012), p. 379.

[47] David Smolin, "Intercountry Adoption and Poverty: A Human Rights Analysis," *Capital University Law Review* 36 (January 2007), pp. 413–53. In these arguments, there is also a sensitivity to the birth parents, who in many countries place children in orphanages or care facilities due to poverty with the hope that they will be able to reclaim them in a few years. This last consideration raises the idea that the best interests of children are primarily served by being with birth parents such that the possibility of reunification overrides other aspects of the interests of children.

[48] This is a fact/value problem. Such a view has been assumed when, for example, people refer to the birth parents as the "real" parents of children and the adoptive parents as, in effect, the less real parents. See Sarah-Vaughan Brakman and Sally J. Scholz, "Adoption, ART, and a Re-Conception of the Maternal Body: Toward Embodied Maternity," *Hypatia* 21, no. 1 (winter 2006), pp. 54–73. Also, for critiques of identity claims as foundational or even relevant to ethics, see Francis Fukuyama, *Identity: The Demand for Dignity and the Politics of Resentment* (New York: Farrar, Straus and Giroux, 2018); and Kwame Anthony Appiah, *The Lies That Bind: Rethinking Identity* (London: Profile Books, 2018).

[49] I wish to thank the editors for calling my attention to this implication.

[50] "Convention on the Rights of a Child," United Nations Human Rights, p. 3.

[51] Compton, *Adoption beyond Borders*, pp. 58–59. Compton cites examples of forcible removals of children on the basis of ethnicity, including the thousands of children from Poland, Ukraine, and Russia who were taken to Germany and put in homes for "Germanization"; the abduction of children taken from families in Argentina's Dirty War; and the removal of indigenous children in North America

and Australia and placement in white homes. For a first-person account, see Ingrid von Oelhafen, *Hitler's Forgotten Children: A True Story of the Lebensborn Program and One Woman's Search for Her Real Identity* (New York: Penguin Publishing Group, 2016).

[52] Of course, after a point, these things would only have to happen if parents and children wanted them to, because we should not force people to exercise their rights.

[53] Maggie Jones, "Why a Generation of Adoptees Is Returning to South Korea," *New York Times Magazine*, January 14, 2015, www.nytimes.com/2015/01/18/magazine/why-a-generation-of-adoptees-is-returning-to-south-korea.html.

[54] Madelyn Freundlich, *Adoption and Ethics: The Role of Race, Culture, and National Origin in Adoption* (Washington, D.C.: Child Welfare League of America, 2000), p. 94; Bartholet and Smolin, "The Debate," p. 373.

[55] See Briggs, *Somebody's Children*.

[56] See Bartholet (in debate with Smolin, 2012) and Montgomery and Powell, *Saving International Adoption*.

[57] For example, China has relaxed the one-child policy. China is also allowing older children with special needs to be available for ICA. See Chen Guangcheng, "China Is Finally Ending the One-Child Policy. It Can't Happen Soon Enough," *Washington Post*, June 11, 2018, www.washingtonpost.com/opinions/china-is-finally-ending-the-one-child-policy-it-cant-happen-soon-enough/2018/06/11/5dde684c-6b4b-11e8-9e38-24e693b38637_story.html?noredirect=on&utm_term=.0d9fb78d4f24. See also Claudia Fonseca, "Transnational Connections and Dissenting Views: The Evolution of Child Placement Policies in Brazil," in Marre and Briggs, eds., *International Adoption*, pp. 154–73.

[58] Cantwell, *Best Interests of the Child in Intercountry Adoption*, p. 35.

[59] Paolo G. Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law," *American Journal of International Law* 97, no. 1 (January 2003), pp. 38–79: 38.

[60] Treaty on European Union, 1992, europa.eu/european-union/sites/europaeu/files/docs/body/treaty_on_european_union_en.pdf; see also Roberta Panizza, "The Principle of Subsidiarity," *Fact Sheets on the European Union–2019*. www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity; David Begg, ed., *Making Sense of Subsidiarity: How Much Centralization for Europe?* (London: Centre for Economic Policy Research, 1993); Antonio Estella de Noriega, *The EU Principle of Subsidiarity and Its Critique* (Oxford: Oxford University Press, 2002).

[61] See Leslaw Michnowski, "Global Governance and Information for the World Society's Sustainable Development," *Dialogue and Universalism* 20, nos. 11–12 (2010), pp. 127–39; and John E. Kelly, "Solidarity and Subsidiarity: 'Organizing Principles' for Corporate Moral Leadership in the New Global Economy," *Journal of Business Ethics* 52, no. 3 (July 2004), pp. 283–95.

[62] Pablo Martinez de Anguita, Maria Ángeles Martín, and Abbie Clare, "Environmental Subsidiarity as a Guiding Principle for Forestry Governance: Application to Payment for Ecosystem Services and REDD + Architecture," *Journal of Agricultural and Environmental Ethics* 27, no. 4 (2014), pp. 617–31.

[63] Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law." Here, the conception of the good of individuals is understood as the common good rather than the individualism of social contract theory.

[64] Ibid., p. 41. For a more in-depth history of Catholic social thought and the principle of subsidiarity, see Donal Dorr, *Option for the Poor: A Hundred Years of Vatican Social Teaching* (New York: Orbis Books, 1992).

[65] Pope Leo XIII, "Rerum novarum: On Capital and Labor" (encyclical given by Pope Leo XIII, St. Peter's Basilica, Rome, May 15, 1891), Papal Encyclicals Online, last updated February 20, 2017, www.papalencyclicals.net/leo13/l13rerum.htm.

[66] The identification of subsidiarity having both a positive and a negative aspect can be seen, for example, in Haas-Martin Saas, "The New Triad: Responsibility, Solidarity, and Subsidiarity," *Journal of Medicine and Philosophy: A Forum for Bioethics and Philosophy of Medicine* 20, no. 6 (December 1995), pp. 587–94 as well as in Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law."

[67] Norman Barry, "Welfare Policies," in Ruth F. Chadwick, ed., *Encyclopedia of Applied Ethics*, 2nd ed. (San Diego: Academic Press, 1998), pp. 519–30: 525.

[68] Pope Pius XI, "Quadragesimo anno" (encyclical given by Pope Pius XI, St. Peter's Basilica, Rome, May 15, 1931), La Santa Sede Francisco, www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.htm.

[69] Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law," p. 44.

[70] Haas-Martin Saas, "The New Triad: Responsibility, Solidarity, and Subsidiarity," p. 591.

[71] Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law," p. 44.

[72] Solidarity is often invoked as a complementary principle to subsidiarity in social and political philosophy, and further work on subsidiarity and ICA should expand the analysis to include a focus on

solidarity. Solidarity is both descriptive of the nature of human dignity and human interconnectedness and prescriptive as a virtue. Solidarity in the sense of human interconnectedness calls for individuals and groups to be disposed and act according to the recognition of the innate sociality of human existence and to act to further the common good. For an exhaustive treatment of the principle, see Sally J. Scholz, *Political Solidarity* (State College, Pa.: Penn State University Press, 2008).

[73] The HCIA is difficult to understand regarding the issue of openness in placement. On some readings, the HCIA may be seen to focus on abolishing meetings between birth and adoptive parents given its charge regarding child trafficking and coercion. However, some type of system that closely supervises at the central level yet allows freedom at the local level is called for in this article. For parallel arguments from law and economics, respectively, see Peter Hayes, "The Legality and Ethics of Independent Intercountry Adoptions under the Hague Convention," *International Journal of Law, Policy and the Family* 25, no. 3 (December 2011), pp. 288–317; and Montgomery and Powell, *Saving International Adoption*.

[74] See "Convention on Protection of Children and Co-Operation," Hague Conference on Private International Law, Art. 22.2. I wish to thank an anonymous reviewer for calling my attention to how the structure of the HCIA may support subsidiarity operationally.

[75] See Montgomery and Powell, *Saving International Adoption*, p. 159, for more on kidnapping and baby selling in countries where HCIA has entered into force.

[76] I argue that it is not defensible for national policy to prioritize domestic adoption. I offer this as a persuasive argument, as I believe in state sovereignty as an important principle.

Abstract: The principles of the best interest of children and subsidiarity constitute the conceptual foundation of the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption (HCIA). Subsidiarity in the HCIA dictates a priority for domestic adoption placements for children over intercountry adoption. This article argues against subsidiarity on two fronts. First, the analysis shows that the in-principle priority of domestic adoption cannot be justified on the basis of either heritage rights or state sovereignty. Second, the principle of subsidiarity in the HCIA is a procedural principle, one that stipulates the political/geographical location of the placement of children through a priority ordering. This does not comport with the principle of subsidiarity as it has been conceptualized in ethics and social philosophy, which gives normative structure to the process of decision-making by stipulating the proper level for decisional authority. Subsidiarity in this original sense holds that decisions regarding child welfare should be made at the lowest level possible, by those most affected by the decisions, unless doing so would not be the most suited to protecting and promoting the best interests of children. Appealing to subsidiarity in this theoretical version reveals at least two significant problems with HCIA placement policy and leads to the conclusion that subsidiarity in the HCIA must be formally revised as a structural principle of ethics that will not support the general priority of domestic adoption.

Keywords: intercountry adoption, subsidiarity principle, heritage rights, state sovereignty, children's rights, Hague Convention on Intercountry Adoption, domestic adoption, best interest principle