

# We Have the Right Tools: An Examination and Defense of Spending in International Adoption

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*In recent years, international adoption has faced increasing criticism for the presence of humanitarian aid that flows through the system. Critics argue that the presence of humanitarian aid corrupts the process, and distorts the priorities of nations to search for domestic placement for children first, as required by many international conventions. This Note explores these ideas by examining the extent of international aid that flows through the system, but also the tools available to curb abuses and ultimately promote child welfare. This Note comes to the conclusion that the appropriate tools in the form of international conventions are available to protect children, and that halting international aid or international adoption entirely are both unreasonable solutions that have not been called for by the international legal bodies. The Note finishes by discussing the more nuanced tools available to promote child welfare through international adoption spending.*

## I. INTRODUCTION

In 2006, Madonna adopted David Banda from a Malawian orphanage and in 2009 she returned to Malawi, attempting to adopt four-year-old Mercy James.<sup>2</sup> The locals who have seen her story, and her effect on the nation, say that she adopted much more than children from the nation, rather, she adopted the nation.<sup>3</sup> It has been documented that the singer spent \$3 million through her encounters in Malawi, helping 900,000 Malawian orphans with basic needs such as food, school and shelter.<sup>4</sup> However, from the very beginning of her journey into the nation, critics have voiced concerns about how she obtained her children, what laws she may have skirted, and what the effect of her massive donations were on the nation's government.<sup>5</sup> Others, however, have defended her actions, alleging that she followed all the rules and arguing that she used her capital in a way to bring to the foreground the plight of a nation with a very small international adoption

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2. Jacques Peretti, *Madonna, Mercy and Malawi: Her Fight to Adopt a Second African Child*, THE GUARDIAN, June 12, 2009, <http://www.theguardian.com/music/2009/jun/12/madonna-mercy-malawi>.

3. *Id.*

4. Nancy Gibbs, *With her Malawi Adoption, Did Madonna Save a Life or Buy a Baby?* TIME, Oct. 22, 2006, <http://content.time.com/time/world/article/0,8599,1549282,00.html>.

5. See *id.* (explaining how, from the very beginning, Madonna had to defend whether she had pulled strings, or even *bought* a baby).

system for others who had similar humanitarian intentions.<sup>6</sup> Ultimately, the critiques that plagued Madonna's adoption are not unique to the superstar. On a slightly different level, the same thing happens each and every day for families that are not famous, but who also desire to both adopt internationally, and give humanitarian aid through the process. Critics of international adoption question the motives of adopters, and the structure of the system, with an overarching concern of whether or not child welfare is being promoted through the infrastructure, especially in the presence of humanitarian aid that flows through the system. Advocates of the system, however, contend that the flow of humanitarian aid through the international adoption infrastructure contributes to child welfare.

UNICEF estimated that in 2005 there were over 132 million children officially classified as orphans in the world.<sup>7</sup> Further, by 2030, UNICEF has estimated that almost 70 million children may die before their fifth birthdays.<sup>8</sup> International adoption has never been a solution for any more than 50,000 children in any calendar year, meaning that fewer than one half of one percent of these orphans will ever be adopted internationally.<sup>9</sup> Therefore, a question must be asked about how international adoption affects the children who are never adopted, and whether any good that comes to help the 132 million orphans, and others in need, can be attributable to the work of the international adoption infrastructure.

There have been two clear sides on the debate over the role of money in international adoption. Critics of international adoption have been vocal about the dangers that money in the international adoption system can bring. Advocates of international adoption have repeatedly pointed out the good that can come from humanitarian aid in the system, and the benefits it can bring to the children who are never adopted. Neither side has effectively quantified the good that can be brought, and so this Note fills a gap in the literature, and provides a defense of the methods of funding due to the international legal infrastructure that is currently in place, arguing that we have the tools necessary to ensure humanitarian aid sent through the international adoption infrastructure can be given in a way that does not harm child welfare.

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6. See Earl Ofari Hutchinson, *Madonna Cast an Ugly Glare on Africa's Orphan Tragedy*, HUFFINGTON POST, Oct. 19, 2006, [http://www.huffingtonpost.com/earl-ofari-hutchinson/madonna-cast-an-ugly-glar\\_b\\_32055.html](http://www.huffingtonpost.com/earl-ofari-hutchinson/madonna-cast-an-ugly-glar_b_32055.html).

7. UNICEF, *Orphans*, UNICEF PRESS CENTER (June 15, 2015), [www.unicef.org/media/media\\_45279.html](http://www.unicef.org/media/media_45279.html). However, this press release goes on to state the difficulty of calculating such a number, which may be why we have not seen any more recent estimates since the time that this number was presented over ten years ago.

8. UNICEF, *State of the World's Children 2016*, at vi, (June 2016) [http://www.unicef.org/publications/files/UNICEF\\_SOWC\\_2016.pdf](http://www.unicef.org/publications/files/UNICEF_SOWC_2016.pdf) [hereinafter *State of the World's Children*].

9. Based on division between the number of orphans, see UNICEF *supra*, note 7, and numbers of children adopted, see Selman, *infra* notes 21-27; see also (*un*)*adopted*, LIFELINE CHILDREN'S SERVICES, <http://lifelinechild.org/unadopted/> (last visited Sept. 26, 2016).

As this Note will describe, the majority of international adoption agencies in the United States that provide overseas adoption services have mechanisms and programs through which international aid is given by donors and distributed for the good of child welfare overseas.<sup>10</sup> Scholars have stated that “[f]rom a position of social justice, [the] ethical appropriateness of only intervening to remove children from institutions for intercountry adoption must be questioned when we are doing little to address the issues that separate all children, with or without disabilities, from their families.”<sup>11</sup> International adoption drastically improves the life outcomes of the children adopted for the better. However, it does much more than this: it also provides an avenue through which humanitarian aid can flow, and this factor must be added to the larger literature debating the merits and pitfalls of international adoption. Currently international adoption touches the lives of so many more children than solely those who are successfully adopted. There are still a number of factors that have not been able to be quantified on the role of aid that goes through international adoption, versus through other humanitarian organizations, and so any discussion of the future of the international adoption system would simply be incomplete if the discussion fails to account for the humanitarian aid that flows through the international adoption system.

This Note will begin by describing the current landscape of international adoption, and conclude by examining the legal and policy implications of the current situation. Descriptively, this Note will synthesize information on the 193 international adoption agencies currently accredited by the Council on Accreditation in the United States. This analysis will focus on the services that are currently being provided by international adoption agencies through the international adoption infrastructure, typically labeled “orphan care” or “humanitarian aid.”<sup>12</sup> The second half of the Note will then argue that we have the legal tools necessary to continue this level of giving, and prevent the money that flows through international adoption infrastructure from being used illicitly. The sections of this Note defending international adoption aid will examine the blunt solutions that have been proposed to curb the abuses allegedly stemming from international aid, such as cutting out all aid, or halting international adoption, and then come to the conclusion that these solutions are not only unrealistic, but have not been called for by the international law community, and would ultimately harm some of the most vulnerable children in the system. Finally, this Note will propose more nuanced solutions that can work within the framework of

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10. See *infra* Part III.

11. Patricia Fronck, Denise Cuthbert & Indigo Willing, *Intercountry Adoption: Privilege, Rights and Social Justice*, in *THE INTERCOUNTRY ADOPTION DEBATE DIALOGUES ACROSS DISCIPLINES* 348, 361 (Robert L. Ballard, et. al. Ed., 2015).

12. I describe “international adoption infrastructure” as the channels through which these services flow when primary service provider international adoption agencies independently provide resources overseas that promote child welfare.

international law, and provide for desirable outcomes for child welfare—both by protecting those children who are adopted, but also providing for those who are not.

This Note will be divided into six parts in order to fully analyze the issue. Part II will begin by giving background on the trends of international adoption currently, as well as the international laws that create the international adoption regime which binds not only the United States, but all members of the Hague Convention. After this, Part III will analyze the aid that flows through United States adoption agencies to the rest of the world. This section will deliver a quantitative analysis of the 193 international adoption agencies working in the United States, and will qualitatively analyze a sampling of the programs to provide an overview of the work that is being done. Part IV will then provide a defense of the general idea of spending through international adoption, with an examination of how it can not only help children, but empower governments to better their larger infrastructure. Part IV will also critique some of the blunt solutions that have been proposed, such as doing away with all aid, or doing away with adoption altogether, before providing more nuanced solutions that would provide for better child welfare. Finally, Part V will look at the implications of the limitations of current research. Part VI will conclude.

## II. THE BACKGROUND

Although a debate rages about the future of international adoption and international adoption law, one thing is relatively uncontested: international adoption brings a positive change for the majority of children who have the opportunity to be adopted.<sup>13</sup> Many studies have been done on children's overall development and the effects on children's cognitive development after adoption, and the benefits to children have been most pronounced when adoption brings radical changes in their situations—such as when a child transitions from an institution to a loving home.<sup>14</sup> International adoption continues to bring drastically better results for child welfare, health and development than institutionalization.<sup>15</sup>

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13. Monica Dalen, *Cognitive Competence, Academic Achievement, and Educational Attainment Among Intercountry Adoptees: Research Outcomes from the Nordic Countries*, in INTERCOUNTRY ADOPTION POLICIES, PRACTICES, AND OUTCOMES 199, 207 (Judith L. Gibbons & Karen Smith Rotabi, Ed., 2012).

14. *Id.* at 207. See also Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*, 21 B.U. INT'L L. J. 179, 185 (2003). "What is clear is that. . . every study on the subject has shown that institutional life for young children leads to significant psychological damage. *Id.* at 221. Paulo Barrozo, *Finding Home in the World: A Deontological Theory of the Right to Be Adopted*, 55 N.Y.L. Sch. L. Rev. 701, 702 (2011) (finding the unique attributes of a family that make it particularly important for child development).

15. CHARLES A. NELSON, NATHAN A. FOX, CHARLES H. ZEAH, ROMANIA'S ABANDONED CHILDREN (2014). For a theoretical discussion, see Barrozo, *supra* note 14, at 704 ("Because they interject a buffer of love between the young and the harshness of a world of vulnerability, typical families are the

International adoption sprang from a history of humanitarian motives tracing all the way through to the present day. In the very first instances of “international adoption,” after the Korean War when orphans were being sent from Korea to the United States, Korea, as a developing nation, characterized the actions of U.S. parents as particularly benevolent. The adoption rhetoric had strong tones of “saving” orphans from the impoverished third-world.<sup>16</sup> It was at this time that adoption and religion intertwined, as moral and religious dictates motivated this rescuing action.<sup>17</sup> Since that time, international adoption saw a slight change in its rhetoric in recent years, where the concept of the charity and benevolence of international adopters was replaced by an emphasis on the role of what a child from an impoverished nation could bring to a childless couple.<sup>18</sup> As one scholar stated: “[m]otivation for adoption had shifted from the altruistic, finding a home for a parentless child, to the supply and demand economics of finding children for childless couples.”<sup>19</sup> More recently, this rhetoric has proved not to be entirely correct, and certainly does not tell the whole story, as in the recent Special Commission meeting of the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (“HCIA”), it was reported that “[s]everal States also reported that broad implementation of the Convention has led to a global evolution in perspective and, as a result, intercountry adoption is now viewed through the lens of child protection in Contracting States *with the child as the main focus*.”<sup>20</sup> Now, in 2017, coming back to the humanitarian history from which it sprung, it appears that there is a renewed focus on child protection, but also international adoption agencies are looking even more broadly at promoting the welfare of the unadopted children through their infrastructure.

Therefore, adoption in its broadest terms refers to two levels of interactions. One interaction is between a parentless child and child-desiring, potential parents. On another level, there exist the complex interactions between richer nations who typically receive children and poorer nations who typically send children.<sup>21</sup> These two levels of interactions allow for vari-

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best institution in which to grow and develop whatever portion of human potential individuals possess at various points of their young lives. Thus, the young not growing up in good families constitutes potentially one of the most serious breaches of their human rights because of its possible, if not probably, far-reaching effects.”)

16. Shani King, *Challenging Monobumanism: An Argument for Changing the Way We Think About Intercountry Adoption*, 30 MICH. J. INT’L L. 413, 422-23 (2009).

17. Kathleen Ja Sook Bergquist, *International Asian Adoption: In the Best Interest of the Child?*, 10 TEX. WESLEYAN L. REV. 343, 344 (2004).

18. *See id.* at 346.

19. *Id.* (emphasis added).

20. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *20 Years of the 1993 Hague Convention – Assessing the Impact of the Convention on Laws and Practices Relating to Intercountry Adoption and the Protection of Children*, at 8, Preliminary Doc. 3 (May, 2015) (by the Permanent Bureau), <https://assets.hcch.net/docs/f9f65ec0-1795-435c-aadf-77617816011c.pdf> (emphasis added) [hereinafter *20 Years of the 1993 Hague Convention*].

21. *See infra* Part II.A.

ous levels of analyses. When looking at the relationship between a parentless child and potential parents, the analysis is very simple: the question is simply asked whether in this particular instance it is in the best interests of the child to be adopted. Secondly, however, when analyzing the interactions between nations, this broader view must look at the larger international adoption system and all the lives that it touches: birth parents, adoptive parents, children who will never be adopted, etc. This section will examine international adoption through the lens of these two interactions, and describe the current trends, law, and infrastructure in place.

### A. *International Adoption Today*

Thousands of children cross international borders every year on their way to new parents and new families.<sup>22</sup> As the media has continued, year after year, to portray the reality of orphaned and vulnerable children all across the world, international adoption has been a humanitarian solution for many orphans.<sup>23</sup> However, in recent years international adoption has seen significant declines. Peter Selman, one of the most widely cited scholars on the number of international adoptions undertaken each year explains that “[a]fter a period of steady growth from the early 1990s, when numbers doubled from 1993 to 2004, the annual number of intercountry adoptions fell by more than half between 2004 and 2012.”<sup>24</sup> More specifically, he finds that between 2005 and 2009, the global number of international adoptions fell from 45,000 to under 30,000.<sup>25</sup> In 2011, only 9,320 children were adopted internationally by United States citizens—the lowest total since 1995,<sup>26</sup> in 2013 it had fallen to 7,094.<sup>27</sup> Across the entire world, the annual total of adoptions fell to just 16,147 in 2013.<sup>28</sup> What these numbers show is that international adoption seems to have peaked about a decade ago, and has since steadily declined with no indication of going back up.

The HCIA Special Commission provided a number of reasons for the decline. They explain that particularly harmful to the system is the “suspension of, or moratorium on, intercountry adoptions in specific States of origin, often following abuses, corruption, crime, irregular adoptions and

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22. Peter Selman, *Global Trends in Intercountry Adoption: 2003-2013*, in THE INTERCOUNTRY ADOPTION DEBATE DIALOGUES ACROSS DISCIPLINES 1, at 9 (Robert L. Ballard, et. al. Ed., 2015).

23. Karen Smith Rotabi & Judith L. Gibbons, *Does the Hague Convention on Intercountry Adoption Adequately Protect Orphaned and Vulnerable Children and Their Families?*, 21 J. OF CHILD & FAM. STUD. 106, 108 (2011) (internal citations omitted).

24. Selman, *supra* note 22, at 9.

25. *Id.* at 45.

26. *Id.*

27. *20 Years of the 1993 Hague Convention*, *supra* note 20, at 19.

28. See Peter Selman, *Twenty Years of the Hague Convention: A Statistical Review*, (presentation) powerpoint slides available at <https://www.hcch.net/en/publications-and-studies/details4/?pid=6161&dtid=57>; See also Elizabeth Bartholet, *Permanency Is Not Enough: Children Need the Nurturing Parents Found in International Adoption*, 55 N.Y.L. SCH. L. REV. 781, 783 (2011) (“[I]nternational adoption is in crisis.”).

traffic in children for adoption.”<sup>29</sup> Typically, these moratoriums have occurred in states with very high levels of international adoption previous to the shut down, which has a large impact on the total number of adoptions. Additionally, the Special Commission states that such abuses which can cause suspensions and moratoriums “affect the reputation of intercountry adoption as a legitimate child protection measure” and may affect the system as a whole.<sup>30</sup> As confidence in the system is shaken, the number of international adopters, and international adoptees, plummets.

The economic value of today’s international adoption system is sizable. International adoption has been described as a “lucrative, largely unregulated multinational and multimillion dollar industry.”<sup>31</sup> Further, the demand for children has created what critics describe as an industry driven by its customers.<sup>32</sup> Parents in the United States typically pay agencies between \$15,000 and \$35,000 for their services,<sup>33</sup> and aggregated over the roughly 50,000 children that were once adopted annually, this number is staggering. Some have expressed concerns stemming from the size of the industry, which mostly relate to the high profits generated for adoption service providers, and the incentive structure that could potentially take advantage of women and children.<sup>34</sup>

One additional element in the analysis of the international adoption infrastructure today is the demographic differences between sending and receiving nations. The GNPs of the top ten nations that receive children are between \$20,000–36,000 and all but two of the top ten sending nations have GNPs of less than \$4,000.<sup>35</sup> As a result, international adoption has

29. 20 Years of the 1993 Hague Convention, *supra* note 20, at 23.

30. *Id.*

31. Joan Heifetz Hollinger, *Intercountry Adoption*, 8 ADOPTION Q. 41, 42 (2008).

32. Katherine Herrmann, *Reestablishing the Humanitarian Approach to Adoption: The Legal and Social Change Necessary to End the Commodification of Children*, 44 FAM. L. Q. 409, 416-17 (2010); *see also* Karen Smith Rotabi, Carmen Monico and Kelley McCreery Bunkers, *At this Critical Juncture in the Era of Reform: Reviewing 35 Years of Social Work Literature on Intercountry Adoption*, in THE INTERCOUNTRY ADOPTION DEBATE DIALOGUES ACROSS DISCIPLINES 49, 75 (Robert L. Ballard, et. al. eds., 2015) (noting that “ICA has been a highly unregulated and multimillion-dollar industry over the past 60 years”).

33. Herrmann, *supra* note 32, at 416-17.

34. Heifetz Hollinger, *supra* note 31, at 42.

35. Peter Selman, *Intercountry Adoption in the New Millennium; The “Quiet Migration” Revisited*, 21 POPULATION RES. AND POLY REV. 205, 219 (2002) (finding only Brazil and Korea to have higher GNPs, at \$4,790 and \$10,550 respectively). Critics of international adoption have even gone so far as to comment on the neocolonial/postcolonial tones of adoption, commenting that international adoption “takes children from vulnerable and poor families often from non-white racial or ethnic groups and often from nations that have been under colonial rule or neocolonial domination, and gives them to wealthy, predominantly white families in rich nations who often had been involved in colonial rule or neocolonial domination.” David M. Smolin, *Can the Center Hold? The Vulnerabilities of the Official Legal Regimen for Intercountry Adoption*, in THE INTERCOUNTRY ADOPTION DEBATE DIALOGUES ACROSS DISCIPLINES 245, 247 (Robert L. Ballard, et. al. eds., 2015). The interesting part about international adoption laws are that with the subsidiarity principle, in theory international adoption will go away as soon as nations are able to care for their own children in a sustainable way, however the ways in which the system works in the meantime must be with a critical eye toward this idea of a system that takes children from predominantly poorer countries, and moves them to predominantly richer countries. Part IV.B discusses the ways in which these governments that could feel themselves rendered powerless in the international adoption

been described as “predominantly a movement of children from poorer to richer countries.”<sup>36</sup> Given the size of the industry and the amount of money involved in the “market,” some have expressed concerns about the coercive influences with the wealth imbalances between sending and receiving nations. Additionally, the system has been criticized for the fact that, in poorer nations, it is possible the governments do not have the infrastructure or finances to investigate and prevent abuses in the presence of such a wealth imbalance.

### B. *The Law Governing International Adoption*

The two main conventions concerning international adoption are the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption (“HCIA”) and the Convention on the Rights of the Child (“CRC”). In the United States, the HCIA has been implemented by Congressional Act. As of this writing, the HCIA has been ratified by 48 nations.<sup>37</sup> The CRC, however, has not yet been ratified in the United States, but at the time of this writing had been ratified by every other nation.<sup>38</sup>

The CRC and the HCIA interact in a complementary fashion. The official outline of the HCIA states that “[t]he 1993 Hague Convention gives effect to Article 21 of the [CRC] by adding substantive safeguards and procedures to the broad principles and norms laid down in the [CRC]. The 1993 Convention establishes minimum standards, but does not intend to serve as a uniform law of adoption.”<sup>39</sup> However, although the HCIA may not have been intended to serve as a uniform law of adoption, the Special Commission meeting twenty years after the HCIA was entered into force “affirmed the continued relevance and fundamental importance of the Convention and

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exchange must be empowered by international adoption to set their own standards and improve their own child welfare.

36. Selman, *supra* note 35, at 222-223; see also Sara R. Wallace, *International Adoption: The Most Logical Solution to the Disparity Between the Numbers of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?*, 20 ARIZ. J. INT’L & COMP. L. 689, 694 (2003) (finding that it is typically the nations who are economically underdeveloped that “experience a population explosion simultaneously with an economic downturn” who are suddenly unable to care for their orphan population, and the situation appears to be one in which international adoption becomes an immediate solution).

37. Status Table, 33: *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=69> (last visited Nov. 23, 2016).

38. Status of Ratification Interactive Dashboard, *Convention on the Rights of the Child*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <http://indicators.ohchr.org/> (last visited Nov. 23, 2016) (may require toggling the treaty bar down to the *Convention on the Rights of the Child* option from the original link).

39. Outline, *The Hague Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, at 1, <https://asets.hcch.net/docs/e5960426-2d1b-4fe3-9384-f8849d51663d.pdf> (Jan 2013).



welcomed its broad acceptance as the international benchmark for intercountry adoption today[.]”<sup>40</sup>

There are two provisions of the HCIA and CRC that affect this Note’s topic and will be examined below: the restrictions and requirements governing the flow of donations and humanitarian aid in international adoption, and the subsidiarity principle. Additionally, the enforcement mechanisms, and the soft law and hard law components of the two conventions must be examined in order to evaluate the strength of the larger regime.

### 1. *Condemnation of Financial Gains*

The HCIA and the CRC strictly admonish financial gains as a result of international adoption. The Preamble to the Hague Convention sets the stage for how important it is to reduce not only illicit payments for children, but also to “prevent the abduction, the sale of, or traffic in children.”<sup>41</sup> Following this, the rest of the Convention articulates specific mechanisms and requirements in order to ensure this declaration is followed in the face of any money that may be sent through the larger system.

In Article 4(c)(3), the HCIA admonishes paying parents to relinquish their children. The provision forces Central Authorities to ensure that “the consents have not been induced by payment or compensation of any kind and have not been withdrawn.”<sup>42</sup> Additionally, the age and maturity of the child must be regarded, and if applicable, it is imperative that the child’s consent had not “been induced by payment or compensation of any kind.”<sup>43</sup>

Article 8 of the HCIA prohibits Central Authorities from activities leading to improper financial gain. The provision states that Central Authorities “shall take, directly or through public authorities, all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objections of the convention.”<sup>44</sup> Article 32(1) further expands on this, stating that:

- (1) No one shall derive improper financial or other gain from an activity related to an intercountry adoption.
- (2) Only costs and expenses, including reasonable professional fees of persons involved in the adoption may be charged or paid.
- (3) The directors, administrators and employees of bodies involved in an adoption

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40. Special Commission, *Conclusions and Recommendations adopted by the Fourth Meeting of the Special Commission on the practical operation of the 1993 Hague Intercountry Adoption Convention*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW at 1 (2015) <https://assets.hcch.net/docs/858dd0aa-125b-4063-95f9-4e9b4afd3719.pdf> [hereinafter Special Commission (2015)].

41. Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption pmbl., adopted May 29, 1993, 1870 U.N.T.S. 167, 42 U.S.C. 14901 [hereinafter HCIA].

42. *Id.* at art. 4.

43. *Id.*

44. *Id.* at art. 8.

shall not receive remuneration which is unreasonably high in relation to services rendered.<sup>45</sup>

The CRC states in Article 21 that nations must “[t]ake all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it.”<sup>46</sup>

When defining costs, the Special Commission states “[c]osts include fees and other amounts for specific services and for obtaining specific documents.”<sup>47</sup> It then describes donations as “voluntary ad hoc payments or gifts of material goods from prospective adoptive parents or accredited bodies for the well-being of children in institutions. Donations are usually given to the orphanage or institution connected to the parents’ adopted child.”<sup>48</sup> Naturally, the specific details on what is “unreasonably high” leaves some gray area, but it is advised by the Special Commission that “improper financial or other gain” is “an amount of money or other material gain that is not justifiable because it is not in accordance with ethical practices and standards, including national and international legislation, and/or is not reasonable in relation to the service rendered.”<sup>49</sup> “Reasonable” is defined as an amount measured in relation to the “circumstances and the living standards in a specific State and other child welfare services.”<sup>50</sup> However, even with a list of factors to analyze what is reasonable, the Special Commission bemoaned the fact that there still exists a “lack of clarity and consistency in deciding what is ‘reasonable.’”<sup>51</sup>

## 2. *Priority on Subsidiarity*

The HCIA and CRC prioritize domestic placement through the subsidiarity principle even in the face of the money that could be brought by international adopters. The subsidiarity principle requires that states place the appropriate priority on placing children domestically before looking for international solutions. The concerns stemming from money in the international adoption system and promotion of the subsidiarity principle is that the presence of foreign money may cause authorities to place children internationally without thoroughly exhausting the domestic avenues. In order to ensure that domestic placement is prioritized, the laws in in this area must be strong enough to withstand the pressure that can be brought with foreign dollars, and some have even argued that the HCIA may push in the opposite

45. *Id.* at art. 32.

46. Convention on the Rights of the Child, art. 21, Nov. 20 1989, G.A. Res. 44/25, 44 U.N. GAOR Supp. No. 49, U.N. Doc. A/44/736 [hereinafter CRC].

47. *Note on the Financial Aspects of Intercountry Adoption*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW at 1 (June 2014), [https://assets.hcch.net/upload/wop/note33fa2015\\_en.pdf](https://assets.hcch.net/upload/wop/note33fa2015_en.pdf) [hereinafter Note on Financial Aspects].

48. *Id.*

49. *Id.* at 2.

50. *Id.*

51. *Id.* at 3.

direction—that there is so much value placed on looking for a home in the nation of origin for children, that children may be denied the option of a family in a nation that is not theirs of origin, in exchange for a non-family situation in their nation of origin.<sup>52</sup> As this section will describe, however, the law surrounding subsidiarity, and the balance it places on all these competing interests provides an adequate tool to ensure that money does not corrupt the system's priorities.

The Hague Convention begins in the preamble to describe the competing interests concerning subsidiarity in international adoption. It states initially that priority should be placed on keeping a child in their family of origin.<sup>53</sup> However it then explains the value of making sure that children grow up in a family environment, which may not necessarily be their family of origin, explaining “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.”<sup>54</sup> This tension between trying to keep children in families of origin, and then the compromise of nonetheless prioritizing the initiatives to keep children in *families* should their families of origin break down, continues throughout the rest of the Convention, and ultimately leads to the tension of determining when international adoption that could provide a family not of origin is in the best interests of a child, compared to institutionalization in the nation of origin.

Article 4 of the HCIA mandates that “[a]n adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin . . . (b) 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.” The CRC in Article 3(1) states that “the best interests of the child shall be a primary consideration,” but according to Article 21, they must only “recognize that intercountry 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.”<sup>55</sup> Currently the HCIA requires that domestic placements be explored before a child is available to be internationally adopted.<sup>56</sup> At minimum, this requires

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52. Scholar Paulo Barrozo voices concerns that although the HCIA was intended to be a child's rights document, it seems to have become one that gives “a sovereign-like absolute property ownership” over unparented children to the governments of the nations from which they come. Barrozo, *supra* note 14, at 705. “However, the basic flaw in the structure of the CRC is that it offers states no method of prioritizing the rights of children when an impoverished state is unable to satisfy all of its provisions.” *Id.*; see also Mahsa Farid, *International Adoption: The Economics of the Baby Industry*, 12 WHITTIER J. CHILD & FAM. ADVOC. 81, 93 (2012).

53. HCIA, *supra* note 41, at pmb1. (stating “that each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin”).

54. *Id.*

55. CRC, *supra* note 46, at art. 21 (emphasis added).

56. Kelley McCreery Bunkers, Karen Smith Rotabi & Benyam Dawit Mezmur, *Ethiopia at a Critical Juncture in Intercountry Adoption and Traditional Care Practices*, in INTERCOUNTRY ADOPTION POLICIES, PRACTICES, AND OUTCOMES 133, 133 (Judith L. Gibbons & Karen Smith Rotabi, ed., 2012).

“verification that the biological family and kinship group is not able to care for the child, that there is no opportunity for domestic adoption, and that the child meets the nation’s criteria for ICA placement. This bureaucratic process is characterized . . . with a clear demonstration that family-based care options have been sufficiently explored within the country of origin.”<sup>57</sup> Ultimately, the result of the tension between a family of origin, or merely a family, can leave children institutionalized in their home nation of origin, which would likely be severely lacking in comparison to the benefit that could be brought from a *family*, and institutionalization is far from the family-based care envisioned by the Convention, even in the absence of a *family of origin*.

The emphasis on subsidiarity, and keeping children in their home nation even in the absence of an available family situation, was reiterated in the Special Commission meeting, twenty years after the HCIA came into force. The Commission stated, “[t]o further promote the principle of subsidiarity, States are encouraged to strengthen their domestic child protection systems, including the establishment and promotion of measures which support family preservation and reunification, as well as in-country alternative permanent family care, such as domestic adoption and other traditional forms of alternative care.”<sup>58</sup> However, the Commission recognized that a lack of resources remained one of the largest challenges to the subsidiarity principle, “and encouraged States to provide support to other States to improve their domestic child protection systems.”<sup>59</sup> It was admonished that such support “should not be offered or sought in a manner which compromises the integrity of the intercountry adoption process, such as creating a dependency on income deriving from intercountry adoption.”<sup>60</sup>

Although in theory this priority on subsidiarity makes sense because of the value placed on home culture and heritage, many have argued that it has been implemented in such a way that it bureaucratically holds children who have no realistic chances of being domestically adopted in institutions for longer than they must be kept.<sup>61</sup> Even the Recommendations and Conclusions of the HCIA Special Commission admonishes “unintentionally harming children by delaying unduly a permanent solution through intercountry adoption” when searching for domestic placement.<sup>62</sup> The balance that these provisions strike between searching for domestic placement and finding a child a foreign family in the absence of a family within the child’s nation of origin will continue to be contentious in the future, and so further analysis

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57. *Id.*

58. Special Commission (2015), *supra* note 40, at 2.

59. *Id.*

60. *Id.*

61. Elizabeth Bartholet, *International Adoption: A Way Forward*, 55 N. Y.L. SCH. L. REV. 687, 696 (2010/11).

62. Special Commission (2015), *supra* note 40, at 2.

of these provisions with the added variable of international money must be undertaken.

### 3. *The Enforcement Mechanisms*

The HCIA's enforcement mechanisms reside in Article 42, which states that "[t]he Secretary General of the Hague Conference on Private International Law shall at regular intervals convene a Special Commission in order to review the practical operation of the Convention."<sup>63</sup> The Special Commission's most recent meeting added a recommendation "encourag[ing] Contracting States to ensure that their laws and practices adequately respond to the current reality of intercountry adoption[.]"<sup>64</sup> The goal of the HCIA is that nations will implement the provisions of the agreement, but it appears that a lack of resources may make this impossible for states, and it is incredibly difficult for the Convention to have any hard power in these circumstances.<sup>65</sup>

The CRC is monitored by the Committee on the Rights of the Child, which consists of eighteen independent experts who monitor the implementation of the Convention.<sup>66</sup> The Committee is able to hear individual complaints by state parties on alleged violations of the CRC, and holds three sessions each year.<sup>67</sup> When the Committee engages in discussions with states, concluding observations are published "to serve as the basis for a national debate on how to improve the enforcement of the provisions of the Convention."<sup>68</sup> Further, "[g]overnments are expected to implement the recommendations contained therein."<sup>69</sup>

The Special Commission on the HCIA gives reports on the progress of nations and creates soft law surrounding the Convention. It was reported most recently by the Commission that "as a result of the Convention, [nations] consider that adoption professionals, and also the general public, have

63. HCIA, *supra* note 41, at art. 42.

64. Special Commission (2015), *supra* note 40, at 1.

65. "This situation places the effectiveness of the Convention in danger." *Id.* Further, the Special Commission recognizes that "resources provided to improve intercountry adoption should not be provided at the expense of a State's national child protection system." 20 Years of the 1993 Hague Convention, *supra* note 20, at 10. *See also*, Sarah Sargent, *Suspended Animation: The Implementation of the Hague Convention on Intercountry Adoption in the United States and Romania*, 10 TEX WESLEYAN L. REV. 351, 354 (2004) ("A country that ratifies a Hague Convention has a legal obligation to apply the terms of that convention in its domestic and international law. Because the Hague Convention is enacted as part of national law, the penalties for non-compliance are found in each country's enabling legislation.").

66. UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, COMMITTEE ON THE RIGHTS OF THE CHILD <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx> (last visited Mar. 4, 2017).

67. UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, MONITORING CHILDREN'S RIGHTS, <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIntro.aspx> (last visited Mar. 4, 2017).

68. United Nations Human Rights Office of the High Commissioner, Fact Sheet No. 10 (Rev. 1), *The Rights of the Child*, at 5, <http://www.ohchr.org/Documents/Publications/FactSheet10rev.1en.pdf> (last visited Mar. 4, 2017).

69. *Id.*

a better knowledge and understanding of the safeguards and principles required in intercountry adoption . . . This has led to a more consistent application of Convention safeguards across an increasing number of Contracting States.”<sup>70</sup> As the Convention continues to be applied, and applied correctly, the safeguards continue to grow, pushing more and more states to join and apply the law correctly, creating norms with greater and greater force.

### III. THE UNITED STATES: A CASE STUDY

In order to examine the prevalence of aid flowing through the international adoption infrastructure, a case study of the United States’ international adoption agencies was undertaken. Ultimately, very little literature has analyzed the actual amounts and types of aid being sent, and so this step of examination is necessary to determine whether a defense of international aid in adoption is even relevant. As will be described, humanitarian aid appears to be an integral component to the work of the majority of international adoption agencies—and although this study has been unable to find an exact dollar amount or a number of people ultimately affected, a threshold has been reached under which an examination of this aid is clearly warranted.

#### A. *Quantitative Analysis*

##### 1. *Methodology*

My quantitative research on international adoption agency aid is based on self-reported data from the 193 international adoption agencies registered on the United States’ State Department website in August, 2016, all of which were accredited by the Council on Accreditation.<sup>71</sup> On the State Department’s website basic information on the organizations is provided, including: (1) whether the agency conducts incoming or outgoing adoptions, (2) the agency’s state of residence, and (3) the agency’s active web address.

From these initial 193 organizations, I examined all the websites provided in order to find agencies that had direct contact with the nations from which they facilitated the adoption of children (therefore the vast majority of the 193 agencies included in this study were direct providers).<sup>72</sup> Only

70. *20 Years of the 1993 Hague Convention*, *supra* note 20, at 8.

71. *Adoption Service Provider Search*, Bureau of Consular Affairs, UNITED STATES DEPARTMENT OF STATE, <https://travel.state.gov/content/adoptionsabroad/en/hague-convention/agency-accreditation/adoption-service-provider-search.html> (last visited Sept. 26, 2016).

72. The Council on Accreditation is a non-profit accreditor of human services since 1977. Its goal is “excellence in the delivery of human services globally, resulting in the well-being of individuals, families, and communities” and its accreditation is imperative to the functioning and credibility of international adoption agencies. Organizations that provided only home studies or post-adoption counseling seemed unlikely to be doing humanitarian work in any nation related to international adoption and it seemed inappropriate to add them to this study because they only worked with other agencies who had

four websites were either broken, contained inadequate information, or had lost their domain space and were therefore ineligible to be included in this study. Based on the requirements that an agency must have some kind of adoption program or relationship with at least one nation, and a website on which to report its functions, 114 agencies were ultimately included in the study. The websites of these 114 agencies were searched for information on (1) the types of humanitarian care the agency provided, (2) the nations in which the agency worked, (3) whether the agency had a religious affiliation, (4) the year the agency was founded, (5) the agency’s annual budget, and (6) the number of children the agency processed.

2. Results

a. *The Majority of International Adoption Agencies Contribute Humanitarian Aid in the Nations they Serve*

	Contribute Humanitarian Aid	Do not Contribute Humanitarian Aid	Total
Number of Organizations	68 (59.6%)	46 (40.4%)	114 (100%)

TABLE 1: THE NUMBER OF INTERNATIONAL ADOPTION AGENCIES THAT CONTRIBUTE TO HUMANITARIAN AID.

From Table 1 it can be seen that 68 international adoption agencies based in the United States contributed to humanitarian aid, which was approximately 60% of international adoption agencies that had programs internationally. This aid could be anything from facilitating child sponsorship<sup>73</sup> to building orphanages,<sup>74</sup> and specifics will be examined in Subsection B below. Sixty percent of United States adoption agencies with programs overseas contribute directly to the welfare of children who will likely never see United States soil.

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connections in nations. COUNCIL ON ACCREDITATION, <http://coanet.org/about/about-coa> (last visited Mar. 25, 2017).

73. *Sponsor an Orphan*, ALL GOD’S CHILDREN INTERNATIONAL, <https://allgodschildren.org/orphan-care/sponsor-an-orphan/> (last visited Sept. 26, 2016).

74. *House of Angels*, LITTLE MIRACLES INTERNATIONAL ADOPTION, [www.littlemiracles.org/index.php?page=houseofangels](http://www.littlemiracles.org/index.php?page=houseofangels) (last visited Sept. 26, 2016).

*b. Humanitarian Aid Contributors by Nations Served*

Nation	Contribute Humanitarian Aid	Do Not Contribute Humanitarian Aid	Total
China	39 (69.6%)	17 (30.4%)	56 (100%)
Dominican Republic	5 (50%)	5 (50%)	10 (100%)
Ethiopia	11 (78.6%)	3 (21.4%)	14 (100%)
Haiti	17 (81.0%)	4 (19%)	21 (100%)
Honduras	11 (84.6%)	2 (15.4%)	13 (100%)
South Korea	14 (70%)	6 (30%)	20 (100%)
Philippines	11 (61.1%)	7 (38.9%)	18 (100%)
Poland	12 (70.6%)	5 (29.4%)	17 (100%)
Taiwan	8 (66.7%)	4 (33.3%)	12 (100%)
Uganda	14 (70%)	6 (30%)	20 (100%)
Ukraine	17 (63%)	10 (37%)	27 (100%)

TABLE 2: INTERNATIONAL ADOPTION AGENCIES THAT CONTRIBUTE AID BY NATIONS SERVED.

Table 2 examines an assortment of nations that have a large number of international adoption agencies providing adoption services within their borders. The table examines geographically whether some nations' agencies have a higher propensity to contribute to humanitarian aid.

*c. Humanitarian Aid Contribution by Religiously Affiliated Organization*

	Contribute Humanitarian Aid	Do not Contribute Humanitarian Aid	Total
Religious	33 (78.6%)	9 (21.4%)	42 (100%)
Non-Religious	35 (48.6%)	37 (51.4%)	72 (100%)

TABLE 3: INTERNATIONAL ADOPTION AGENCIES THAT CONTRIBUTE AID BY RELIGIOUS STATUS.



The above table examines whether there is a correlation between an international adoption agency having a religious affiliation and their contribution to humanitarian aid. As can be seen above, international adoption agencies that are religious are thirty percent more likely to contribute humanitarian aid in conjunction to participating in international adoption.

The vast majority of religious international adoption agencies are some variety of Christian organizations, with a few Jewish organizations and one Islamic organization. The literature on one's religious affiliation affecting one's views on international adoption typically focuses on the Evangelical church, therefore this section will analyze in terms of Christian emphasis on humanitarian aid through adoption agencies over other religions' propensity, simply because little scholarship exists on the other religions' interactions with international adoption within the United States.

What the data shown in Table 3 asserts is that that not only may religious organizations be more involved with international adoption, but that the religious organizations that participate in international adoption also have a higher chance of providing humanitarian aid to the children who would never be adopted. It appears that this phenomenon can be traced back to the commands of the Bible to Christians. The Bible gives clear mandates to care for orphans and "the fatherless," in essence, many of the people that this humanitarian aid would go to—orphans and single-parented families.<sup>75</sup> Additionally, the above data does not look at historical trends, but this trend of providing for orphans is described by other scholars as something that is far from new, as "care for orphans is as much an ancient Christian commitment as it is a contemporary trend."<sup>76</sup> It has been documented recently that the last six years have continued to see increases in giving to orphan care and adoption from the Christian community, even as national adoption trends have been on the decline.<sup>77</sup>

Naturally, the Christian adoption movement is not without its critics. It has been characterized as "uncritically and naively promot[ing] participation in intercountry adoption" and has been criticized as failing to recognize and acknowledge systemic weaknesses that could lead to abuses within the system.<sup>78</sup> Unfortunately, with religiously affiliated agencies more likely to give aid, a loss of the Christian orphan movement could be detrimental to

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75. Jedd Medefind, *Ancient Commitment, Modern Trend: The History, Hazards and Hope of Today's Christian Orphan Care Movement*, in *THE INTERCOUNTRY ADOPTION DEBATE: DIALOGUES ACROSS DISCIPLINES* 417, 432 (Robert L. Ballard, et. al. eds., 2015).

76. *Id.* at 418.

77. *See id.* at 425-26 ("The Evangelical Council for Financial Accountability ("ECFA") tracks the annual growth in giving by Christians. For the second year in a row, ECFA's 2012 *State of Giving Report* showed both orphan care and adoption in the top three of 27 discreet categories for year-over-year increases in giving.").

78. David M. Smolin, *Moving from Fad to Fundamentals: The Future of the Evangelical Christian Adoption and Orphan Care Movement*, in *THE INTERCOUNTRY ADOPTION DEBATE DIALOGUES ACROSS DISCIPLINES* 445, 460-61 (Robert L. Ballard, et. al. eds., 2015).

the children who would never be adopted, and thus such broad sweeping criticism could be especially harmful if unwarranted.

### B. Qualitative Analysis

Scholars and international adoption agencies alike appreciate the fact that “[t]he large-scale solution to caring for children is not dependent on international adoption.”<sup>79</sup> Child welfare must be solved internally by nations who create comprehensive child welfare policies that leave no orphans to fall through the cracks.<sup>80</sup> Realistically, these internal systems are costly, and once put in place there are on-going costs to maintain the programs. Therefore, in order to fully understand the international adoption regime, one must look at the international adoption system as a whole, and the “sustainable financial contribution[s]” that can be brought through both the international adoption system, but also international adopters who continue to give back to their adoptee’s home nation.<sup>81</sup> The effect of each and every donation sent by developed nations to lesser developed nations can have enormous impacts on the long-term improvement of child care and child welfare.<sup>82</sup>

For example, in the case of China, scholars have argued that the increase in adoptions from China contributed beneficially to the infrastructure of child welfare in China as a whole.<sup>83</sup> Not only were the plights of the young girls who were given permanent homes in the United States improved dramatically from the institutions from which they came, but the \$3,000 “donation”<sup>84</sup> allegedly led to alleviating the worst conditions within China’s child welfare infrastructure.<sup>85</sup> In 1996, it was estimated that through thousands of adoptions and their donations, the nation received more than ten million dollars.<sup>86</sup> Ultimately, with this sheer quantity, even if some percentage of this ended up in the pockets of corrupt officials, the actual number received into the child welfare infrastructure would be striking in terms of the outcomes and total systemic change that it could lead to.<sup>87</sup>

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79. Ronald V. Ludlow, *Walking the Mine Field: The Moral Issues of International Adoption*, J. L. & FAM. STUD. 401, 412 (2007).

80. *See id.* Additionally, the solutions can be compounded— “[f]or when we help a boy access the medicine and nutrition he needs to grow up healthy and strong, we not only increase his chances in life, we also decrease the economic and social costs associated with poor health and low productivity. When we educate a girl, we not only give her the tools and knowledge to make her own decisions and shape her own future, we also help raise the standard of living of her family and her community.” State of the World’s Children, *supra* note 8, at vii.

81. Ludlow, *supra* note 79, at 412.

82. *Id.*

83. Michelle Van Leeuwen, *The Politics of Adoptions Across Borders: Whose Interests are Served? (A Look at the Emerging Market of Infants from China)*, 8 PAC. RIM L. & POL’Y J. 189, 200 (1999).

84. Mandatory “donation” requested by the Chinese government in exchange for adopting from China.

85. Van Leeuwen, *supra* note 83, at 201.

86. *Id.* at 200-01.

87. *Id.* at 201.

China's history of international adoption contributing dramatically to the welfare of children who are not adopted is not unique. China is one of many nations in which there is a requisite threshold that institutions must meet in order to participate in international adoption. Before institutions are even eligible to send children abroad, they are required to meet staff-to-child ratios, hygiene standards, and equipment requirements.<sup>88</sup> The effect of this requisite standard of care on the children who are left in the institution and never adopted is that they have the opportunity to grow up in environments that are far better than if international adoption were not an option. In the absence of international adoption, there may be no real incentives, nor the means, for institutions to reach a certain threshold of livability, and no resources to maintain that threshold. Ultimately, whether it is the push to increase the standard of living in order to reach the threshold for international adoption, or the participation in international adoption that brings in the resources, "[o]rphanages that regularly place children for adoption through the intercountry program often are recognized as providing better care for children than those new to the system."<sup>89</sup>

Additionally, aid may be necessary to prop up monitoring infrastructure for a nation's government to track abuses and problems in their child welfare system. Pressure has been put on many nations' governments to improve not only their physical institutions, but also their governmental child welfare infrastructure.<sup>90</sup> In the absence of adequate funding, such improvements have often proven beyond the capabilities of many nations.<sup>91</sup> When the governmental allowance that is provided to care for the abandoned children is meager, good intentions can only go so far. Further, in child welfare, the priorities can be skewed when it feels much more urgent to make sure that children are fed and clothed daily, and so these day-to-day expenses can take priority over long-term investment in infrastructure to track abuses that may be occurring.<sup>92</sup> Therefore, funds donated through international adoption, or collected through "donations" such as in China, may go specifically to the immediate needs of children, but when collected systematically by governments can be put toward creating greater overall child welfare.

Below is a description on a sampling of the projects and initiatives that I found to be undertaken by just a few of the United States' 68 international adoption agencies that participate in humanitarian giving and humanitarian initiatives.

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88. Patricia J. Meier & Xiaole Zhang, *Sold Into Adoption: The Hunan Baby Trafficking Scandal Exposes Vulnerabilities in Chinese Adoptions to the United States*, 39 CUMB. L. REV. 87, 99 (2008-09).

89. *Id.* at 101. However, this reputation can be dangerous because it could lead to the commodification of children if it turns into a reputation for having the "best children."

90. Ethan Kapstein, *The Baby Trade*, FOREIGN AFFAIRS (Nov. 1, 2003) <https://www.foreignaffairs.com/articles/2003-11-01/baby-trade>.

91. *Id.*

92. *Id.*

### 1. *Private Children's Homes*

The improvement of children's homes provides two specific benefits for child welfare. First, it directly improves the livelihoods of the children who are awaiting adoption. Second, it benefits the livelihoods of the children who will never be adopted. Currently, many international institutions are underfunded, and child-to-caregiver ratios can be so distorted that even basic needs cannot be met.<sup>93</sup> International aid money from international adoption is frequently targeted at private children's homes, and in developing nations where the value of \$1 USD goes quite far, this aid is truly life changing.<sup>94</sup>

A number of international adoption agencies from the United States have either built their own children's homes, or contributed substantially to children's homes already in existence. *Amazing Grace*, for example, has built their own group-home type building where orphans can live with a mother and father.<sup>95</sup> *Faith International Adoption* has opened its own children's home in Ghana.<sup>96</sup>

Further, adoption agencies often look to the very practical needs of existing children's homes, contributing to what has already been built. *Bal Jagat* has provided washing machines, refrigerators and air conditioners to the orphanages that it partners with,<sup>97</sup> and *Children of the World* provides general maintenance to an orphanage in Mexico that receives close to no governmental funding for the children it cares for.<sup>98</sup>

The nation that has the most conclusive documentation among scholars of private money leading to the bettering of institutions is China. As described by Kay Johnson, a critic of international adoption, "international adoption has been a reasonably effective means of bringing funds into the welfare system at a time when it was sorely strapped and barely able to cope with the increasing numbers of children in its care."<sup>99</sup> The result of this increase in funding was that orphanages could improve the physical plant, the staff-

93. Cecilia Baxter, et. al., *Review of Medical Issues, Growth Failure and Recovery, and Development of Internationally Adopted Children*, in THE INTERCOUNTRY ADOPTION DEBATE DIALOGUES ACROSS DISCIPLINES 109, 130 (Robert L. Ballard, et. al. eds., 2015).

94. See Ludlow, *supra* note 79 (discussing the starfish principle and the choice to give a lot to one, or a little bit to many).

95. *Orphan Care*, AMAZING GRACE ADOPTIONS + ORPHAN CARE, [www.agadoptions.org/orphan-care/](http://www.agadoptions.org/orphan-care/) (last visited Sept. 26, 2016).

96. *Charitable Donations*, FAITH INTERNATIONAL ADOPTIONS, [faithadopt.org/relief-works/](http://faithadopt.org/relief-works/) (last visited Sept. 26, 2016).

97. *Donate Today*, BAL JAGAT – CHILDREN'S WORLD INC., [www.baljagat.org/donate-today.html](http://www.baljagat.org/donate-today.html) (last visited Sept. 26, 2016).

98. *Relief Efforts – India*, 2016, CHILDREN OF THE WORLD, INC., [childrenoftheworld.com/relief-efforts/india/](http://childrenoftheworld.com/relief-efforts/india/) (last visited Sept. 26, 2016).

99. Kay Johnson, *Politics of International and Domestic Adoption in China*, 36 L. & SOC. REV. 379, 388 (2002).

ing, and the medical care, and provide for the children's educational and developmental needs.<sup>100</sup>

## 2. Education

A number of international adoption agencies work to provide education for the children in a nation who will never be adopted, in recognition of an obligation to care for the children who may never be provided an abundance of opportunities. UNICEF stated that "education has long served as a great leveler of opportunity because it helps people realize their potential and contribute to their communities and the world."<sup>101</sup> International adoption agencies are cognizant of the fact that one of the most powerful things they can do for the children left behind, and the communities in which these children reside, is to provide the opportunity for education. *Adoption Associate's* humanitarian aid consists of funds to provide for a child's education.<sup>102</sup> *Bay Area Adoption Services* has a "Back 2 School" program that educates three hundred children between the ages of 4-11.<sup>103</sup> *Dillon International* provides about 400 scholarships for children in Vietnam to attend school.<sup>104</sup> Further, even simple things can have immeasurable impact on the lives of the children left behind—in Uganda, *Amazing Grace Adoptions* simply laid cement for the floor of a local school so that the diseases and parasites that could threaten children as they sat in their classrooms would no longer pose a threat.<sup>105</sup>

## 3. Health Programs

Unique health needs plague international adoptees. Children in institutions typically suffer from a combination of "little or no pre-natal care. . . , exposure to toxins during pregnancy such as alcohol, drugs, and infections that can affect their long-term health and developmental outcomes."<sup>106</sup> Further, spending their lives in institutions that are both "underfunded and understaffed . . . , creates the additional risks of medical and infectious diseases and poor nutrition."<sup>107</sup> The result of these circumstances then "may

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100. *Id.*

101. State of the World's Children, *supra* note 8, at 41. "Because the first years of a child's life affect brain development so significantly, early childhood offers a critical window of opportunity to *break intergenerational cycles of inequality*." *Id.* at 50. (emphasis added). "On average, each additional year of education a child receives increases her or his adult earnings by about ten percent." *Id.* at 55.

102. *Donate*, ADOPTION ASSOCIATES [www.adoptionassociates.net/giving-opportunities](http://www.adoptionassociates.net/giving-opportunities) (last visited Sept. 26, 2016).

103. *Back to School Education Program*, BAAS INTERNATIONAL, [baas.org/international-child-welfare-programs-uganda/back-2-school-programs-uganda/](http://baas.org/international-child-welfare-programs-uganda/back-2-school-programs-uganda/) (last visited Sept. 26, 2016).

104. *Humanitarian Aid*, DILLON INTERNATIONAL, <https://www.dillonadopt.com/humanitarian-aid/> (last visited Sept. 26, 2016).

105. *Orphan Care*, *supra* note 95.

106. Baxter, et. al., *supra* note 93, at 110.

107. *Id.*

result in developmental and emotional delays and challenges in attachment.”<sup>108</sup>

In acknowledgement of the unique challenges that face foster children coming from institutions, *Adopolis* worked to have Sensory Integration (a subspecialty of occupational therapy) training available to all foster parents.<sup>109</sup> The agency targets the treatment toward children who may have begun their lives in institutions, and now live with foster parents domestically, never to be internationally adopted. Those providing the treatment state “[c]hildren who suffer developmental delays caused by life in an unwholesome environment often benefit from this therapy,” and therefore these practitioners have made it a priority to give access to this healthcare to the children who need it most.<sup>110</sup>

More broadly, international adoption agencies will frequently provide medical supplies and services to institutions. *Adoption Avenues*, for example, works specifically to provide medicine, medical equipment and medical care to the children in orphanages who will never be adopted due to their medical conditions.<sup>111</sup> In India, *Children of the World* has set up eye clinics and also provided care for a leper colony.<sup>112</sup> In the aftermath of the 2004 tsunami, *Children of the World* was also able to build a clinic to provide medical care after the crisis.<sup>113</sup> *Cradle of Hope* sponsored a mission of volunteer optometrists to provide free eye examinations and glasses in Russia.<sup>114</sup> *Dillon International* provides cleft lip and palate surgeries in China.<sup>115</sup>

#### 4. Host Programs

A number of international adoption agencies have host programs in which orphans from across the world have the opportunity to come to the United States for a summer, or a few weeks, for a variety of reasons. Some agencies participate in host programs in order to allow the children to live with families that are considering adoption.<sup>116</sup> Some programs require that children who are hosted be available for adoption, with a clear intention that they will be adopted after the program.<sup>117</sup> Others simply see the holiday opportu-

108. *Id.*

109. *Citizens of the World – A Humanitarian Aid Program at Adopolis*, ADOPOLIS, [adopolis.org/ICBF\\_class.html](http://adopolis.org/ICBF_class.html) (last visited Sept. 26, 2016).

110. *Id.*

111. *Donations to Adoption Avenues*, ADOPTION AVENUES, [www.adoptionavenues.org/donate.html](http://www.adoptionavenues.org/donate.html) (last visited Sept. 26, 2016).

112. *Relief Efforts – India, 2016*, CHILDREN OF THE WORLD, INC., [childrenoftheworld.com/new-page-1/](http://childrenoftheworld.com/new-page-1/) (last visited March 31, 2017).

113. *Id.*

114. *Humanitarian Aid*, CRADLE OF HOPE ADOPTION CENTER, INC., [www.cradlehope.org/humanitarian-aid/](http://www.cradlehope.org/humanitarian-aid/) (last visited Sept. 26, 2016).

115. DILLON INTERNATIONAL, *supra* note 104.

116. *E.g.*, *Colombia Child Hosting Program 2016*, A LOVE BEYOND BORDERS, [www.bbinternationaladoption.com/Colombian-Child-Holiday-Hosting-Program](http://www.bbinternationaladoption.com/Colombian-Child-Holiday-Hosting-Program) (last visited Sept. 26, 2016).

117. *E.g.*, *Applications being accepted for 2015 Summer and Holiday Hosting Program*, ADOPOLIS, [adopolis.org/hosting.html](http://adopolis.org/hosting.html) (last visited Sept. 26, 2016).

nity as a chance to dispel the stigma for older children that they are “untouchable” once they have passed beyond a certain age in an institution—giving these children, before they age out, a chance to see how a family functions, and take that knowledge with them throughout the rest of their life.<sup>118</sup> Additionally, these programs contribute even to the most basic needs of the children who attend them: nutrition and care for the summer that they spend away from the institution in which they reside.<sup>119</sup> The programs are typically family-centric, and give the opportunity for a “holiday enrichment experience.”<sup>120</sup> As described by one agency, the programs “offer the kids living in institutions or foster homes . . . an opportunity for a life-changing experience they may not otherwise enjoy and for them to experience life in a family and how a healthy family functions and feels.”<sup>121</sup>

### 5. Community Improvement Programs

There are a number of organizations that have made it a priority to spend aid money on projects designed to keep families together. *Bethany Christian Services* provides “family-based care for children in need”—providing economic, emotional, and spiritual support in order to preserve families.<sup>122</sup> *Illien Adoptions* focuses on family preservation by “helping parents acquire skills to earn a living to support their children and therefore prevent abandonment due to poverty.”<sup>123</sup> *International Child Foundation* works to provide seamstress education as a long-term, community-driven initiative to allow young women to break the cycle of poverty for themselves and their future families.<sup>124</sup>

Community preservation efforts appear to be one area that has been specially targeted by the Christian humanitarian aid movement. International adoption scholar David M. Smolin, a professor critical of international adoption explains that the biblical call to protect the widow and the orphan is really a call to family preservation efforts.<sup>125</sup> He has expressed concern about the abuses that can occur through international adoption, when in some cases a much smaller amount of money could be sent to help impoverished families stay together. However, it appears that studies that specifically examined humanitarian aid sent by Evangelicals concluded that a large per-

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118. E.g., CHINA HOSTING PROGRAM, CCAI ADOPTION SERVICES, [www.ccaifamily.org/Hosting/chinahostingprogram](http://www.ccaifamily.org/Hosting/chinahostingprogram) (last visited Sept. 26, 2016).

119. E.g., *Summer Hosting Program*, CHILD ADOPTION ASSOCIATES, INC., [www.child-adoption.org](http://www.child-adoption.org) (follow “Summer hosting program” hyperlink) (last visited Sept. 26, 2016).

120. E.g., ADOPOLIS, *supra* note 117.

121. *Colombia Child Hosting Program 2016*, *supra* note 116.

122. *Child Protection and Welfare*, BETHANY GLOBAL, <https://www.bethany.org/global-services/child-protection-and-welfare> (last visited Sept. 26, 2016).

123. *Illien Global Families*, ILLIEN ADOPTIONS INTERNATIONAL, INC., [www.illienadoptions.org/humanitarian\\_aid.html](http://www.illienadoptions.org/humanitarian_aid.html) (last visited Sept. 26, 2016).

124. *Sustainable Aid*, INTERNATIONAL CHILD FOUNDATION, INC., [childfound.org/sustainable-aid-projects/](http://childfound.org/sustainable-aid-projects/) (last visited Sept. 26, 2016).

125. Smolin, *supra* note 78, at 447.

centage of the humanitarian aid money given already goes to “family preservation.”<sup>126</sup> Encompassed in the definition of “community preservation” are “community development, and related efforts to prevent children from becoming orphans by helping hard-pressed families stay together.”<sup>127</sup>

To take Ethiopia as a small case study, the Joint Council on International Children’s Services reported that in 2010, \$14 million was spent on services by international adoption agencies in Ethiopia alone.<sup>128</sup> This aid was spent “primarily in community development, including medical care, family empowerment and preservation, education, and foster care and kinship care[.]”<sup>129</sup> Through its analysis, the study concluded that less than 0.1% of children and families were served by international adoption, but that 1.6 million families and children benefited from the community development aid provided by international adoption agencies.<sup>130</sup>

#### IV. A DEFENSE OF INTERNATIONAL ADOPTION SPENDING

Based on the findings in Part III, the majority of international adoption agencies engage in humanitarian giving, and therefore a defense of this giving is merited. With the knowledge that this giving is such an integral part of international adoption agency work, the question that must be asked first is whether the giving is good, and then whether it is safe. In order to answer the question of whether the aid is doing good in child welfare, this Section will argue that it promotes child welfare and it promotes governments to better child welfare. Then, to analyze whether the aid is safe, this Section will examine the frames of the CRC and HCIA to question whether the law in this area is strong enough to ensure that the international adoption system is not sacrificing children into a dangerous abyss in order to build better orphanages for those left behind.

Initially, international adoption agencies that engage in humanitarian aid have a unique niche in which they can work to further the best interests of children because of their position dispersed among the most vulnerable orphans. As a result, separating aid that comes through international adoption from the act of adopting children is an unrealistic way of viewing the larger infrastructure of international adoption law. Promoting international child welfare is much larger than any one organization, and larger than any one method. Shani King states that “[e]ven the strongest supporters [of international adoption] admit the movement of adoptees across international bor-

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126. Medefind, *supra* note 75, at 429.

127. *Id.*

128. Elizabeth Bartholet & David Smolin, *The Debate*, in INTERCOUNTRY ADOPTION: POLICIES, PRACTICES, AND OUTCOMES 233, 247 (Judith L. Gibbons & Karen Smith Rotabi eds., 2012) (*The Debate* involves both Professor Bartholet and Professor Smolin engaging with each other’s arguments in a back-and-forth style. This information is taken from page 247, where Professor Bartholet is writing.).

129. *Id.*

130. *Id.*



ders represents only a tiny fraction of the neglected, abused and abandoned children in these countries.”<sup>131</sup> A sole focus on the children actually being adopted does not lead to a realistic evaluation of the overall infrastructure, and specifically how to fashion the intricacies of international adoption law when the international adoption agencies do much more than simply facilitate adoptions.

Further, the laws that govern adoption and the humanitarian aid that travels through adoption are one and the same. The provisions of the HCIA relating to donations and adoption fees reach the careful balance of handling the humanitarian aid that resides in the international adoption infrastructure with a system of checks and balances. The HCIA already puts in place safeguards against any one child being illicitly adopted, even in the face of international money.<sup>132</sup> Protecting the children being adopted, “[t]he subsidiarity principle of the HCIA requires a continuum of child welfare services prior to [intercountry adoption]. At a minimum, this includes verification that the biological family and kinship group is not able to care for the child, [and] that there is no opportunity for domestic adoption[.]”<sup>133</sup> On each individual case, the best interests of the child standard dictates that each and every child that is sent out from their country of origin for international adoption placement has been given the opportunity for the possibility of domestic placement first. This legal safeguard has been used for years as the strongest legal mechanism to ensure legitimate adoptions.

The Special Commission on the Hague Convention, when it examines the international adoption system, has continued to examine donations through international adoption agencies, and international adoption performed by these agencies, as joint issues governed by the HCIA. Acknowledging the potential for problems associated with money flowing through the international adoption system, the Special Commission nonetheless still calls for nations to provide aid for one another.<sup>134</sup> In acknowledgement of potential issues, however, the Commission advocates a clear separation of contributions and donations between the formal work of the adoption process when providing potential adopting families fee charts as good practice, but treats both donations and fees as part of the larger international adoption infrastructure.<sup>135</sup> Essentially, the very Commission that monitors the functioning of the Hague Convention closely examines the funds flowing through inter-

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131. King, *supra* note 16, at 425.

132. Although some have voiced concern about the complexity of using such systems to bring perpetrators to justice. See, Diane B. Kunz, *The Re-Invention of Adoption law: A reflection*, 55 N.Y.L. SCH. L. REV. 853, 859 (2010/11).

133. Bunkers, Rotabi & Mezmur, *supra* note 56, at 133.

134. *20 Years of the 1993 Hague Convention*, *supra* note 20, at 28. *But see*, Special Commission (2015), *supra* note 40, at 2 (encouraging states to nonetheless help one another).

135. *20 Years of the 1993 Hague Convention*, *supra* note 20, at 28. Indeed, this was not new to the 2015 Special Commission meeting, in 2010 there were already calls for such separation. See Special Commission, *Conclusions and Recommendations and Report of the Special Commission on the Practical Operation of the 1993 Hague Intercountry Adoption Convention*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW at

national adoption, and rather than calling a moratorium on international adoption or a halt to the funds, merely prescribed guidelines on how to best provide this aid, recognizing that nations may need it in order to better their child welfare.<sup>136</sup>

This section will examine how international aid sent through adoption can benefit the welfare of children who are never adopted, and assist governments in promoting child welfare. It will then examine the laws governing adoption to judge whether adoption can be done in a safe and sustainable way, before proposing more nuanced solutions on how to handle an infrastructure that juggles both adoption and humanitarian aid.

### A. *Promotion of Child Welfare*

Spending through international adoption directly promotes the welfare of children who will never be adopted. In addition to the direct benefits articulated by Part III that flow to the children who are never adopted, there are two ways that child welfare is more generally improved by the presence of humanitarian aid that flows through international adoption. First, by having solutions present for children who will never be adopted through the international adoption infrastructure, it creates a more well-rounded narrative about child welfare in a nation. Second, the presence of international aid through adoption allows for more nuanced solutions to the various child welfare problems. By judging the international adoption infrastructure without taking into account the plights of the children never adopted and how they can be helped through the international adoption infrastructure, we risk continuing the marginalization of children who will never have a chance of being adopted for health, genetic or ethnic reasons.<sup>137</sup>

The predominant international adoption narratives typically revolve around the theme of rescue, and the narrative easily includes children being adopted, but creates a gaping hole when not every child in need of rescue will ultimately be adopted.<sup>138</sup> In this narrative, a picture is painted depicting the awful reality of institutionalized life, leading to developmentally or

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7 (2010) (by the Permanent Bureau), [https://assets.hcch.net/upload/wop/adop2010\\_rpt\\_en.pdf](https://assets.hcch.net/upload/wop/adop2010_rpt_en.pdf) [hereinafter Special Commission (2010)].

136. Hague Conference on Private International Law, The Financial Aspects of Intercountry Adoption, Fact Sheet No. 2 for the 2015 Special Commission Meeting, at 2-3, <https://assets.hcch.net/docs/f9889398-2f15-44b1-ad5d-f0e044bb69ce.pdf>. This formal fact sheet provided at the Special Commission meeting called for more transparency and a clear separation of the aid for adopters—essentially calling for greater infrastructure rather than a halt to the aid or adoption in general.

137. Additionally, “long-term substitute parenting of completely unrelated children is not a universal cultural practice.” Richard Carlson, *Seeking the Better Interests of Children with A New International Law of Adoption*, 55 N.Y.L. SCH. L. REV. 733, 760 (2011). Further, these new adoptive families in many areas are even more unlikely to cross ethnic lines. Local variations of family placement have also fallen short in many instances for reasons including “war, urbanization undermining family values, or other social factors eroding traditional or idealized ways of life.” *Id.*

138. King, *supra* note 16, at 432-33.

physically damaged children.<sup>139</sup> This picture creates a sense of urgency for those in the Western world to remove children from institutions as soon as possible: before they become “ruined.”<sup>140</sup> Ultimately, however, this narrative marginalizes and leaves certain invisible children who will never be adopted, either because of the special needs they deal with, or because international adoption has simply never been a solution for any more than roughly 50,000 children each year.<sup>141</sup> This demographic of un-adopted children can only be included in this narrative of rescue if international adoption can encompass a solution for them in lieu of being adopted. In the absence of this, children who do not fit the exact dimensions necessary for international adoption are not factored into the international adoption debate, even when international adoption contributes to their welfare, and these un-adopted children have a lot to lose in the absence of international adoption.

The presence of international aid also changes the paradigm from one of “more” or “less” desirable children to one that recognizes the uniqueness of every circumstance and tailors solutions as a result of this. Critics have expressed concern about the nature of international adoption sorting children into categories of “most adoptable” and “least likely to be adopted” and the stigmatization that could occur as a result of the sorting.<sup>142</sup> Initially, the potential for this stigmatic activity does not vanish in the absence of international adoption, as even a system that only participates in domestic adoption will involve some level of “sorting.”<sup>143</sup> However, the benefit of international aid that is sent through an infrastructure so close to the ground level of this sorting is that it is able to make child welfare a fully dimensional concept because it promotes the bettering of all children through individual and unique ways: for one, the best case scenario is to be internationally adopted, for the next, family reunification support. Through the aid that is given in international adoption, these nuanced solutions can be explored, and sorting from “most adoptable” and “least likely to be adopted” becomes sorting between different avenues for the best outcomes based on the individual circumstances.

### *B. Enabling Governments to Promote Child Welfare*

Spending through international adoption also indirectly benefits children by helping governments to promote their children’s welfare. International adoption agencies do much more than merely transfer children from lesser

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139. *Id.*

140. *Id.*

141. With the number dwindling steadily. See Selman, *supra* note 22, at 9. Although, the number of children that are adopted internationally is almost entirely special needs, and composes the vast majority of placements for special needs children. See, e.g., *Bulgaria Annual Adoption Statistics*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, <https://assets.hchc.net/upload/adostat2010-2014bg.pdf> (finding that the vast majority of disabled children that were adopted, were adopted internationally).

142. Carlson, *supra* note 137, at 754.

143. *Id.*

developed countries—indeed, such a narrow view undermines the autonomous role that the sending nations should be playing in promoting the welfare of children within their borders with the help of international organizations. International adoption infrastructure can contribute to nations furthering their governmental child welfare goals. The transaction costs of international adoption fall predominantly on the receiving nations, and adoption can typically pay for itself.<sup>144</sup> Adoptive parents pay the costs of supporting their future children, and then the parents bring resources into the nations from which they adopt through fees and charitable contributions, but also through the local economy (*i.e.* staying in hotels for their stay, eating locally as they process the paperwork in the nation).<sup>145</sup> However, this direction of the flow of money should not render sending nations powerless. Rather, the funds that come through the international adoption infrastructure must empower sending nations to use their resources and take control to better their child welfare infrastructure internally.

### 1. *Better Infrastructure for Child Welfare*

In the absence of allowing humanitarian aid in conjunction with international adoption, we risk marginalizing states that truly desire the best for their children's welfare but simply have inadequate resources. As was discussed above, national infrastructure to promote child welfare is neither cheap nor static—once a system has been built, the maintenance and amendments to the infrastructure will be constant. When international adoption agencies are able to promote child welfare by not only contributing financially to the system,<sup>146</sup> but also by forcing the standard of living in institutions up in order to facilitate international adoption,<sup>147</sup> the effect on the sending nation is not one of simply taking what is handed to them, but rather empowering nations to have the resources to build the coherent policies that can handle the ever-changing pressures.

The resources necessary to root out corruption can also prove elusive when barely enough funds exist to feed and clothe children in institutions.<sup>148</sup> As international adoption slows down, there is even less money put toward tracking abuses in both international adoption and the nations' larger child welfare systems. Currently, foreign aid is rarely spent on child welfare issues.<sup>149</sup> Therefore, the money necessary to promote child welfare in nations

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144. Bartholet & Smolin, *supra* note 128, at 234 (Professor Bartholet argues in this section of *The Debate* “[i]nternational adoption demands no resources from resource-starved countries” as it “pays for itself.”).

145. *Id.* (Professor Bartholet writing).

146. China's \$3,000 donation is an example of this.

147. Meier & Zhang, *supra* note 88, at 99.

148. See Kapstein, *supra* note 90 (“Even in the cleanest of supplier states, there is little money to spare for tracking abuses . . .”).

149. See *id.* (“Very little foreign aid is currently earmarked for adoption and child welfare issues.”).

abroad must be found elsewhere, so a blanket ban on adoptions would likely leave a nation's system in an unrecoverable situation.<sup>150</sup>

## 2. *Stigma and Transparency*

The fear of stigma should not undermine the good that humanitarian aid can bring to receiving governments. Critics of international adoption have expressed concerns that the nations who send children abroad may be stigmatized by their perceived inability to care for their own children.<sup>151</sup> Essentially, governments in sending nations face the burden of creating coherent policies in typically underfunded situations, all while being concerned about being stigmatized should they not be able to adequately control every contour of international adoption in their nations, and keep the number of children being sent abroad under a "certain level" so as not to be deemed weak.

Addressing the stigma that can be attached to sending nations, or perceived to be present on sending nations, can be difficult. Poverty is a very highly correlative factor to giving up children.<sup>152</sup> Specifically, developing nations find themselves in particularly difficult circumstances when infrastructure is already lacking and a sudden influx of children needing a home occurs due to a sudden economic or natural disaster.<sup>153</sup> This trigger can be especially stigmatizing if a nation *had been* adequately caring for all of its children, when suddenly something changed the status quo and overnight child welfare in a nation became overwhelming.<sup>154</sup> An example of this can be found in Haiti, where the 2010 earthquake prompted rapid relinquishment of children to other countries.<sup>155</sup> Adding to an already complicated situation, this circumstance created major backlash and stigma when it was perceived that a wealthier nation took advantage of the situation.

Currently, the fact that humanitarian aid can be sent openly through the international adoption infrastructure promotes transparency and can allow for such stigmas to be dispelled for sending nations. The benefit of the HCIA having provisions that allow international aid to flow through inter-

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150. See, e.g., James G. Dwyer, *Inter-Country Adoption and the Special Rights Fallacy*, 35 U. PA. J. INT'L L. 189, 207 (2013) (arguing that by shutting down the adoption system, "many thousands of children [in Russia], including many disabled children, will never have a family life" although the action taken by Russia was plausibly completely legal under the CRC). Cf. Carlson, *supra* note 137, at 746 (arguing that "Romania's complete ban against intercountry adoption was, in retrospect, the wrong solution because it was aimed at a different and apparently non-existent problem" leaving children in limbo).

151. Catherine M. Bitzan, *Our Most Precious Resource: How South Korea is Poised to Change the Landscape of International Adoption*, 17 MINN. J. INT'L L. 121, 128 (2008) (sending countries may be characterized as "economically weak, morally compromised, and pawns in the game of imperialism" due to their roles in international adoption).

152. See Selman, *supra* note 35, at 219.

153. Bitzan, *supra* note 151, at 128. See also, State of the World's Children, *supra* note 8, at 79 ("[M]any families living above the threshold of extreme poverty may be just one disaster away from falling into it. As climate hazards arise more frequently, the cumulative effect of repeated shocks will make it difficult for many of the most disadvantaged households to survive, recover, cope and adapt.")

154. See Wallace, *supra* note 36, at 694.

155. Ginger Thompson, *After Haiti Quake, the Chaos of U.S. Adoptions*, N.Y. TIMES, (Aug 3, 2010).

national adoption is that currently it can be sent in the open. Should international adoption ban all money, the black market that may open in order to illicitly send money in exchange for favors is a very concerning outcome—and then the perception of being taken advantage of becomes all too real.<sup>156</sup> Without an open discussion of the humanitarian resources contributed through international adoption, the whole story is not told, parties are made one-dimensional, and the reality can become misperceived.<sup>157</sup> With money being sent through the appropriate channels, people see the full story. That way, evidence can be clearly shown when no parties are being taken advantage of, making clear when intervention is actually necessary.

### 3. *Sustainability of Aid*

The concerns about aid being sent in a sustainable manner have been raised by many scholars, and most recently the HCIA Special Commission. In 2015, the Special Commission stated in their Final Conclusions:

The SC recognised that a lack of resources in some States remains one of the most serious challenges to the implementation of the subsidiarity principle, and encouraged States to provide support to other States to improve their domestic child protection systems. Any such support should not be offered or sought in a manner which compromises the integrity of the intercountry adoption process, *such as creating a dependency* on income deriving from intercountry adoption.<sup>158</sup>

The concern here is that corruption can become a serious issue when a nation feels as though, in the absence of international adoption, entire segments of their child welfare infrastructure would not be funded. Therefore, when international adoption donations and funding is sent to governments, it can only promote child welfare if it is done in a sustainable way.

In South Korea, the nation, although developed, struggles with maintaining the resources for the nation's child welfare system. Describing the situation, Catherine M. Bitzan writes:

The diminishing number of Korean children adopted abroad raises a critical question—how will South Korea care for the homeless children who remain? The government's Child Welfare Act clearly favors placement in more family-like foster care over

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156. Malinda L. Seymore, *Openness in International Adoption*, 46 COLUM. HUM. RTS. L. REV. 163, 197 (2015) (arguing that the very presence of mystery in international adoption contributes to corruption—as long as information is unknown, what may be dangerous remains hidden).

157. The Haiti Earthquake situation is an example of this, where in the midst of the natural disaster, parties were unsure of the motives and actions of other parties. The lack of screening and flurry of activity in the aftermath of the earthquake caused major pushback against many actors. *See, e.g.*, Thompson, *supra* note 155.

158. Special Commission (2015), *supra* note 40, at 2 (emphasis added).

caring for children in large institutions, yet many children continue to be placed in the nation's extensive orphanage system. Many of these children are raised in substandard conditions due to a lack of funding and understaffing[.]<sup>159</sup>

There is an element of concern that is unstated in the above passage: that perhaps the receiving nations have crippled South Korea, allowing South Korea to become reliant on the funding that international adoption brought in.<sup>160</sup> Clearly the concerns of the Special Commission are relevant, and as international adoption continues to decrease, it will be even more important to provide aid to governments to build sustainable infrastructure.

Ultimately, if one accepts the premise that international adoption has the ability to input a large amount of resources in a nation, and that international adoption infrastructure is contributing in a way that no other child welfare efforts are currently, this aid then fills an important role. Therefore, instead of suggestions to halt it altogether, further scrutiny is needed of the practices already in place, because sustainable aid to governments will promote greater child welfare across the world, and it is possible.<sup>161</sup> However, any adoption agencies interested in giving aid must be cognizant of the wide range of factors that have already been analyzed in the humanitarian aid literature which can lead to situations of dependency in which concerns about imperialist undertones could taint the relationships and systems in which they are involved.

### C. *The Tools Provided by the CRC and the HCIA Which Promote Safety*

In order to both promote child welfare and ensure that spending in conjunction with international adoption does not lead to abuses within the system, a number of nuanced solutions must be explored. Currently, critics are calling for drastic "solutions" such as shutting down the entire system, or forbidding any money to travel through international adoption. This section

159. Bitzan, *supra* note 151, at 135-36.

160. Indeed, the Special Commission on the HCIA addressed this in 2015 in their Recommendations and Conclusions, urging nations not to allow this to occur, while still pushing nations to provide resources for each other in order to promote the subsidiarity principle. See Special Commission (2015), *supra* note 40, at 2.

161. Ultimately questions about the ways in which humanitarian aid should be sent overseas are far from confined to this topic. There is much dialogue in the literature on how to sustainably provide humanitarian aid to empower, rather than cripple nations. See, e.g., Taylor B. Seybolt, *Harmonizing the Humanitarian Aid Network: Adaptive Change in a Complex System*, 53 INT'L STUD. QUARTERLY 1027, 1027 (2009) ("Humanitarian assistance has saved the lives of millions of civilians caught up in violent conflicts. At the same time, it has failed to save many others and has sometimes exacerbated the underlying drivers of conflicts whose consequences it seeks to address."); Richard J. Brennan & Egbert Sondorp, *Humanitarian aid: some political realities*, 333 BMJ 817, 817 (2006) ("Recent crises have highlighted problems faced by the global humanitarian aid community. These include the difficulty of achieving interagency coordination, poor documentation of humanitarian need, and the lack of security for aid workers."); James Petras, *Resistance, Humanitarian Aid and Media*, 38 ECONOMIC AND POLITICAL WEEKLY, 1461-1462 (arguing that humanitarian aid [especially after the Iraq war] can come in as a kind of blackmailing device).

will examine the problems with such drastic solutions before providing realistic proposals to prevent abuses and promote child welfare.

Simply removing money from international adoption will not fix the problem of corruption or promote subsidiarity, and there are many children who have a lot to lose. Critics of international adoption have voiced concerns about money promoting corruption in international adoption, arguing that money must be kept entirely out of the infrastructure.<sup>162</sup> One critic of the system has described the failure to limit the financial aspects of intercountry adoption as a “fundamental regulatory failure in the infrastructure.”<sup>163</sup> Scholars have documented “lack of regulation and oversight, particularly in the countries of origin, coupled with the potential for financial gain, spur[ring] the growth of an industry around adoption, where profit, rather than the best interests of children, takes center stage.”<sup>164</sup> It is argued that the solution—regulation of all money spent in international adoption—would be a step in fixing the systemic vulnerabilities of the system.<sup>165</sup> Additionally, critics explain that a cap on international adoption fees would allow for a “much more realistic standard of evidence for proving corruption” and would protect birthmothers by providing a clearer line between legitimate international adoption and child trafficking.<sup>166</sup>

However, this solution simply is unrealistic. Not only would it not actually stop prospective adoptive parents who adamantly wish to adopt a child from doing so (paying for adoption formally, versus donating to the orphanage simultaneously to adopting can look remarkably similar), but this solution simply takes away every dollar that may have actually gone to child welfare in a nation. Looking at this situation solely for the welfare of children, taking these dollars away would mean that very tangible items: formula, blankets, workers’ salaries, etc., are not being paid, and this means less care for children awaiting adoption, and those who will never be adopted. This subsection will look specifically at how taking money out of the system will not reduce corruption, nor will it promote subsidiarity in any meaningful new way.

### 1. *Reducing Corruption?*

Initially, taking money out of international adoption will not reduce corruption. The danger of taking money out of international adoption in an attempt to reduce corruption is twofold: initially, the argument relies on

162. See, e.g., Herrman, *supra* note 32, at 416-17; Esben Leifsen, *Child Trafficking and Formalisation: The Case of International Adoption from Ecuador*, 22 CHILD. & SOC’Y 212, 219 (2008); Special Commission, *supra* note 135, at 14-15 (discussing Professor Smolin’s presentation in which he made recommendations to the Special Commission to “establish strict limits on fees and donations” in international adoption. The Special Commission ultimately declined to establish these limits.

163. Smolin, *supra* note 78, at 461.

164. Seymore, *supra* note 156, at 214.

165. Smolin, *supra* note 78, at 461.

166. Herrmann, *supra* note 32, at 421.



descriptive facts that have a danger of snowballing, and second, it has the potential to harm some of the most vulnerable children on earth.

It is undisputed that in almost every sending nation, the amount of money that can be obtained through international adoption compared to domestic adoption is significantly higher.<sup>167</sup> Critics argue from this baseline description that in a market driven by international consumers, pressure is then put on the social agencies to accept any and all potential international adopters from wealthier nations, and to feed a steady stream of infants into the hands of parents adopting internationally.<sup>168</sup> The money, it is argued, “serves as a catalyst for systemic corruption of the international adoption process.”<sup>169</sup> It is further argued that the fruits of this corruption end in inevitable baby-buying scandals—in the push to find more and more children who can be sent abroad, corners can be cut, and the system becomes eroded.<sup>170</sup> However, in this snowball argument of wealth imbalances causing flat-out baby-buying, there is a complete failure to acknowledge the presence of a legal infrastructure dedicated to preventing such abuses.

Initially, this parade of ills was discredited by the Special Commission to the HCIA, which has published reports discussing how the implementation of the HCIA is having an effect on reducing such illicit payments. The most recent report states:

In the responses of States, most recognized that, prior to the implementation of the Convention, they had experienced problems . . . such as: improper payments to birth family members, intermediaries, officials, or others; other improper inducements of consent of the birth parents or family; fraud, such as misrepresentation of identity or false promises; forgery or falsification of documents; the abduction of children for the purposes of intercountry adoption . . . and other illicit practices. Many states indicated that, following implementation of the Convention, these problems no longer occur in their State or are less frequent. The majority of States thought that the Convention has had a positive influence on the identification and prevention of illicit practices, as well as the measures taken to address such practices.<sup>171</sup>

Not only does the HCIA provide soft law to keep nations in check, it also provides legal avenues for redress.<sup>172</sup> The CRC deals with corruption by for-

167. *Id.* at 416-17.

168. *Id.*

169. *Id.*

170. Leifsen, *supra* note 162, at 219.

171. *20 Years of the 1993 Hague Convention*, *supra* note 20, at 13.

172. Even one of the strongest critics of international adoption, David Smolin, acknowledged in his presentation to the Hague Special Commission that “the continuing systemic problem of child laundering is principally due to inadequate implementation of the Convention, rather than due to the imperfections in the Convention itself.” David M. Smolin, *Abduction, Sale and Traffic in Children in the Context of*

bidding any “improper financial gain.”<sup>173</sup> Further, the HCIA forbids payments to induce mothers to give up their children, ensuring that “the consents [to adoption] have not been induced by payment or compensation of any kind.”<sup>174</sup> Further, states “shall take, directly or through public authorities, all appropriate measures to prevent improper financial or other gain in connection with an adoption” and that “[n]o one shall derive improper financial or other gain from an activity related to an intercountry adoption.”<sup>175</sup> In order to do this, “[o]nly costs and expenses, including reasonable professional fees of persons involved in the adoption may be charged or paid,” and “directors, administrators and employees of bodies involved in an adoption shall not receive remuneration which is unreasonably high in relation to services rendered.”<sup>176</sup> Using these provisions to fight the corruption that is occurring appears at this point to be a much more plausible solution than a blanket ban on sending material resources.

Additionally, it is important to note that the Special Commission on the HCIA has never taken any steps to put caps on spending through international adoption agencies. The Commission has regularly implored nations to keep humanitarian aid and adoption fees separate, and to keep records of humanitarian aid in order to ensure transparency, but it has not called for a halt, or even a slow-down on the aid.<sup>177</sup> Additionally, the Special Commission has encouraged receiving nations “to consider ways in which to assist and support States of origin in the performance of their functions and in the application of safeguards under the Convention, including by means of capacity-building and other programmes.”<sup>178</sup>

Ultimately, a blanket ban on any kind of resources being transferred through the international adoption system is both unrealistic and harmful. It is unrealistic because there is no way to fully take money out of the sys-

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*Intercountry Adoption*, Information Document No 1, 14 (2010), <https://assets.hcch.net/upload/wop/adop2010id01e.pdf>.

173. Kapstein, *supra* note 90.

174. HCIA, *supra* note 41, at art. 4.

175. *Id.* at arts. 8, 32.

176. *Id.* at art. 32.

177. Perhaps most problematic to this argument is the fact that the “Country Profile” sent out to Hague Convention nations in 2014 for their responses contained a section on donations and cooperative projects. Country Profile 1993 Hague Intercountry Adoption Convention Receiving State, form, <https://www.hcch.net/en/publications-and-studies/details4/?pid=5003&dtid=42>. The form gives a question on whether it is mandatory to give donations, then a question on whether foreign accredited bodies are allowed to give donations, then a third question on whether prospective adoptive parents are allowed to give donations. *Id.* at 17. Only under this third question is there a warning in bold “This is not recommended as good practice” with a cross reference to a report on *The Financial Aspects of Intercountry Adoption-HCCH*. *Id.* This report then synthesizes the concerns with money influencing the process and creating dependency, but instead of a suggestion to ban funds, again just describes good practices such as separation of donations and adoption fees, and admonishments to not allow such donations to be given in a nonsustainable way, and not to be given directly to biological families for fear of conflict of interest. *Note on the Financial Aspects of Intercountry Adoption*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW at 40 (2014) (by the Permanent Bureau), <https://assets.hcch.net/upload/wop/note33fa2014.pdf>.

178. Special Commission (2010), *supra* note 135, at 2.

tem: if one were to limit adoption fees, agencies could still give resources under the table for preferential treatment. Further, as governments begin pushing these “payments” into the shadows, the lack of transparency seems even more dangerous to child welfare because then it is unclear what is happening, and corruption can breed in the absence of transparency.<sup>179</sup>

## 2. *Prioritization on Subsidiarity?*

Second, prioritization of subsidiarity is not lacking due to the presence of money in international adoption. The concern, discussed by international adoption critics, is that the presence of such high prices for international adoption will “[have] an impact on public commitment to domestic services” when domestic adopters will not pay nearly as high prices to adopt as their international counterparts.<sup>180</sup> The prospect of service providers having even a small predilection toward finding foreign placements over finding domestic placements is a concerning outcome given the nature of the laws and the value we place on home culture and identity. However, it is important to note that the presence of foreign money is far from the only factor that drives international placement.

The solution, critics argue, is to remove money in order to prioritize domestic placement. Yet this solution ultimately misunderstands the problem. The reality is that the conditions that have contributed to having so many un-parented children in a nation can equally contribute to the lack of prospective domestic adoptive parents.<sup>181</sup> Additionally, systemic bias against adoption, or against racial minorities, can contribute to domestic families simply not desiring to adopt.<sup>182</sup>

Further, critics fail to mention the legal infrastructure in place, which already strongly favors domestic placement and would force Central Authorities to circumnavigate much of the HCIA if they were looking only to procure the United States dollars that could come through international adoption.<sup>183</sup> Concerns that domestic placement opportunities would be compromised due to the presence of international adoption fees is a concern similar to those concerns regarding corruption: first, that we have legal infrastructure to fight, and second, that seems to be relying on a snowball

179. See Seymore, *supra* note 156 (explaining that transparency is the antidote to corruption).

180. Jonathan Dickens, *Social Policy Approaches and Social Work Dilemmas in Intercountry Adoption*, in *INTERCOUNTRY ADOPTION POLICIES, PRACTICES, AND OUTCOMES* 29, 36 (Judith L. Gibbons & Karen Smith Rotabi eds., 2012).

181. Bartholet & Smolin, *supra* note 128, at 234 (Professor Bartholet writing in this part of *The Debate*).

182. *Id.*

183. Bartholet, *supra* note 61, at 696 (Bartholet argues that often the laws favor domestic placement at the expense of the children, where prolonged waits in institutions for bureaucratic reasons seem unreasonable and can be devastating). See also Carlson, *supra* note 137, at 762 (“Delay for the sake of local adoptive placement increases the risk of harm to the child’s mental and physical development, and makes the child’s later transition and attachment to a new family even more difficult.”).

argument.<sup>184</sup> Further, to ban money travelling through the international adoption infrastructure in order to provide more domestic placements completely undermines the fact that much of the international aid that travels through the international adoption infrastructure flows to family preservation efforts.<sup>185</sup> The argument is not to be made that nations should “sell” a small number of children internationally in order to help a greater number at home, whatever the reality of the circumstance here requires informed thinking about the nature of the aid, and the good it can provide when sent appropriately in order to reach beneficial solutions to the problems present in international adoption.

For example, in China, scholars criticize the “donations” to orphanages with concerns that either they never make it to be used on child welfare (instead pocketed by corrupt authorities) or that they create incentives for orphanages to procure children to send abroad in order to create what has been described as “addictive” benefits—“beautiful new buildings, better programs for the children, or direct benefits for the directors and staff . . .”<sup>186</sup> It is argued that in turn this creates incentives for orphanages to find adoptive parents abroad, because the amount of money received for domestic adoption paled in comparison.<sup>187</sup> Interestingly, the intuitive solution to this situation is simply to take away the \$3,000 donation, because it would build parity between potential domestic and international adoptive parents, and, it is argued, would ultimately stop any kind of trafficking activity because sending infants abroad would no longer be lucrative.<sup>188</sup> The only problem with this reasoning is that the \$3,000 donations are what transformed the orphanages and the lives of the babies and children who were never going to be adopted. The “beautiful new buildings, [and] better programs for the children” were only possible because of international aid, because “[g]overnment subsidies to orphaned and abandoned children are meager.”<sup>189</sup> Therefore, to take these donations away would not only reduce child welfare in the nation, but also would not bring any additional potential domestic parents out of hiding. Rather, it would be a “solution” that misses the goal of bettering child welfare on two separate levels. In the face of a lack of prospective domestic adoptive parents, a plan to halt all resources flowing through international adoption in order to focus on finding domestic parents misunderstands the problem. This harms the children who have

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184. Some have even argued that the legal tools we have to fight against abuses in intercountry adoption swing so far in the other direction that they turn the HCIA, which was supposed to be a child’s rights document, into the ability of a state to exert “monopolistic dominion over their populations.” Barrozo, *supra* note 14, at 705.

185. See Part III.A.v.

186. David M. Smolin, *The Missing Girls of China: Population, Policy, Culture, Gender, Abortion, Abandonment and Adoption in East-Asian Perspective*, 41 CUMB. L. REV. 1, 59–61 (2011).

187. See *id.* at 62; see also Kapstein, *supra* note 90.

188. \$3,000 was roughly three times the per capita GNP in China in 1998. Selman, *supra* note 35, at 221.

189. Meier & Zhang, *supra* note 88, at 99.

no chance of domestic adoption, and are therefore kept in limbo between the two worlds, with no resources.

#### D. *Better and more Nuanced Solutions*

This Note began descriptively by examining the fact that humanitarian aid is given to nations through a majority of international adoption agencies. It is also undisputed that there are concerns, some legitimate and some illegitimate, about corruption in the international adoption system. Further, in the “unregulated market” that international adoption has become, there are concerns for corruption in the future. Taking all these facts as true, there are a number of better solutions to corruption that should be considered, which can only be plausibly accepted after acknowledging the role of humanitarian aid in international adoption.

##### 1. *Increasing Salaries and More Definite Job Descriptions*

One solution to the concerns of money leading to corruption would be to increase the salaries of those working in child welfare in sending nations. One scholar on Ecuadorian adoptions explained that he saw “low monthly salaries” as a driving force for small illicit exchanges—not wide scale corruption, but “less serious deviances” in the international adoption process.<sup>190</sup> Esben Leifsen describes these irregular transactions as small payments for extra services, “a package of clips chang[ing] hands in return for a friendly attitude.”<sup>191</sup> He argued that although such gestures may not bring other illegal actors into the exchange per se, these smaller informal gestures can cause the actors already in the system to work faster, and in speeding up the process these “irregular practices supply the oil to the wheels of a general bureaucratic structure” which can then make possible the kidnapping of a child, or create the excess pressure on a mother to give up her baby.<sup>192</sup> Knowing that humanitarian aid is being sent through the international adoption system, in order to avoid corruption, it may be worth looking at how it could contribute to an environment where simply making ends meet does not require corruption: where a lack of paperclips never leads to children being taken away from parents and papers being slid across desks before the appropriate boxes are checked.

Ethan Kapstein suggests that another solution to corruption or baby-buying could be in providing salaries for workers in sending nations, rather than fees being paid to foreign contractors on a per-child basis.<sup>193</sup> When fees are paid per-child, it creates an incentive to gather more and more children. If,

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190. Leifsen, *supra* note 162, at 219.

191. *See id.* at 217-219.

192. *See id.* at 219.

193. Kapstein, *supra* note 90.

however, these contractors were paid a modest salary, incentives could be placed on doing the job correctly.<sup>194</sup>

The Special Commission acknowledged that “several States mentioned that there remains a clear correlation between the contributions and donations made by an adoption accredited body and the number of intercountry adoptions it undertakes.”<sup>195</sup> The Special Commission went on to describe the process that this can create of “one-upmanship” where in order to not make a financial gain look “improper” or “undue,” a body feels as though it needs to continue providing a level of work entitled to receiving such donations or contributions.<sup>196</sup> Based on this concern, the ability to have salaries set before donations come in would be beneficial because, although the donations provide better resources for the children, they should not incentivize those in the Central Authority to feel the need to push the wheels faster than originally anticipated and agreed to, and harm children while providing services that could have been provided safely. Further, a clear demarcation between donations and fees, when agencies handle both, would alleviate these concerns.

## 2. *Making Better use of the Infrastructure in Place*

Second, the infrastructure already in place must continue to be used and appropriately funded. The Intercountry Adoption Technical Assistance Program of the Hague Conference (“ICATAP”) was given mention in the most recent Special Commission meeting for the “important support it has provided to States in the implementation and operation of the Convention.”<sup>197</sup> Additionally, at the 2015 Special Commission meeting, “there were a number of suggestions which amounted to recommending an increased role for the Permanent Bureau in relation to monitoring compliance.”<sup>198</sup> The Hague Convention and the Hague Conference on Private International Law already have mechanisms that, with greater funding, could be used in order to bolster the strength of the HCIA. At the conference, nations suggested that the Permanent Bureau through ICATAP could issue reports, or monitor compliance, or have a more active advisory role, or even develop new guides and tools and provide up to date information.<sup>199</sup> As of 2010, the Permanent Bureau had given substantial assistance to Cambodia, Guatemala, Mexico,

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194. The Special Commission acknowledges that only exceptionally may remuneration be paid on a case-by-case basis or on an hourly rate. *Note on the Financial Aspects*, *supra* note 47, at 2.

195. *20 Years of the 1993 Hague Convention*, *supra* note 20, at 28.

196. *Id.*

197. Special Commission (2015), *supra* note 40, at 1. The Special Commission stated “[t]he Permanent Bureau has unrivalled experience in assessing country compliance with Hague standards as well as the expertise of persons who have been involved in a number of country missions . . . .” The Hague Conference on Private International Law, *The Hague Conference International Centre for Judicial Studies and Technical Assistance: The Intercountry Adoption Technical Assistance Programme*, 4 (2009) (by the Permanent Bureau), <https://assets.hcch.net/docs/c955e159-53a1-4aea-89b6-c8b09b1c3f55.pdf>.

198. *20 Years of the 1993 Hague Convention*, *supra* note 20, at Annex B, ix.

199. *Id.*

Nepal and Namibia, and had also undertaken shorter assistance missions to a number of other nations.<sup>200</sup> However, in a continual state of being inadequately resourced, in 2010 the Special Commission had to call upon states to consider making contributions to ensure the ability of the Bureau to continue to be able to do work, calling the work of the ICATAP “essential for the proper functioning of the Convention.”<sup>201</sup> This system does not need new policing mechanisms, rather it needs support for the ones already in place, but underfunded.

Another solution is to have more nations ratify the HCIA. It is not necessary to build a new treaty or write new law; rather, ensuring that every nation is party to the conventions already present may be enough. The International Social Service stated in its presentation at the 2015 Special Commission meeting that looking at the total number of adoptions, 62% of the 16,767 total adoptions were non-convention cases.<sup>202</sup> The fact that so few adoptions even occurred under the HCIA points to the fact that even though the HCIA may have the legal solutions to any problems with funding through international adoption infrastructure, if only 38% of adoptions are occurring under the HCIA, a large swath of the system is not being policed as well as it could be.

### 3. *Greater Transparency*

From the point of view of agencies working internationally, a simple solution is to keep a paper trail. The use of cash to fund orphan care and a lack of receipts can create a lack of transparency, that may be inadvertent, but can begin to look very fuzzy.<sup>203</sup> Simply using bank transfers, and not cash, is one suggestion provided by the 2015 Special Commission.<sup>204</sup> Additionally, for prospective adoptive parents, clear information on the financial aspect of international adoption, and a timetable of when costs are due, creates a framework in which illicit practices become immediately obvious.<sup>205</sup> Further, agencies are encouraged to separate donation funds and adoption fees, even though a single agency can handle both, simply as a matter of good accounting.

Finally, it is imperative that agencies continue to prioritize transparency in disaster situations. The Special Commission has made recommendations that nations must enact special protocol in case of disaster situations in order to ensure that families are not taken advantage of. The 2010 Special Commission examined this closely, and recommended that “[n]o new adoption

200. Special Commission (2010), *supra* note 135, at 24.

201. *Id.* at 9.

202. Hervé Boéchat and Flavie Fuentes, International Social Service, *The Grey Zones of Intercountry Adoption*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, Information Document No 6 (June 17, 2010) at 5, [https://assets.hcch.net/upload/wop/adop2010\\_info6e.pdf](https://assets.hcch.net/upload/wop/adop2010_info6e.pdf).

203. Hague Conference on Private International Law, *supra* note 136, at 2.

204. *Id.*

205. *Id.*

applications should be considered in the period after a disaster or before authorities in that State are in a position to apply the necessary safeguards.”<sup>206</sup> The simple recognition that there are times when the system is even more susceptible to the danger that aid money could bring is a good first step, and such protocol made ahead of time is necessary to keep the system, and families, safe.

These solutions must be further analyzed, and many more should be proposed before looking at any solutions that could potentially cut all international adoption, or all money transfer through international adoption. This Note began descriptively to look at the state of international adoption currently, and came to the conclusion that humanitarian giving and international adoption are intricately intertwined. In recognition of this fact, this Note has finished by making suggestions based on the facts presented. Arguments on taking money out completely, as was discussed above, are simply unrealistic given the current situation, but there are better solutions that must be explored.

## V. LIMITATIONS OF THIS RESEARCH

### A. *Can we Quantify What International Adoption Agencies are Doing?*

The state of the self-reported data that this Note worked with was sorely limited. Although most international adoption agencies had functioning websites,<sup>207</sup> the level of information on the websites was lacking in many key places. For example, only 64 websites had listed the year they were founded, while only 36 had listed any ballpark estimate of children that they had processed. Even more concerning, only 7 of the 114 agencies had budgets that were made publically accessible. Ultimately, the lack of information given to the public is concerning.

Scholars have argued that openness in adoption is an “antidote to fraud and corruption.”<sup>208</sup> Scholars articulate concerns for adoptive parents, who, even with charitable intentions, may fall victim to organizations that are not as charitable as they claim.<sup>209</sup> After examining all of the websites, I have confidence in my data: if it was present on their website, I saw it, however often it was simply not present. Transparency is a vital step that must be taken by all international adoption agencies: complete transparency to the residents of the United States with whom they work, and complete transparency to all governmental agencies with whom they work.

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206. Special Commission (2010), *supra* note 135, at 9.

207. Only four of the original 193 websites were completely broken or had lost their domain.

208. Seymore, *supra* note 156, at 197.

209. See Herrmann, *supra* note 32, at 425.



B. *What do we know about Corruption?*

Right now the exact percentage of gifts given through the international adoption infrastructure that actually make it to improving child welfare is very unclear. Ultimately, the issue here is that *we simply do not know* how much money from the international adoption infrastructure makes it to child welfare. That number could affect all calculations in this Note. However, every dollar that does make it through to child welfare is a dollar more, and until it can be shown that the transaction costs for aid travelling through international adoption look remarkably different than other forms of international aid,<sup>210</sup> international adoption fills a gap in funding that no other organizations are currently filling.

C. *Does Adopting Give a Greater Incentive for Families to Give Charitably?*

Intercountry adoption began with charitable beginnings in Korea,<sup>211</sup> and Sara Wallace argues that “[t]he phenomenon of international adoption, once spurred by the devastation of war, now reflects a more general awareness of developing world poverty and developed world privilege.<sup>212</sup> Described by Jedd Medefind, President of the Christian Alliance for Orphans, “[t]he experience of loving one former orphan deeply can forge a deep and lasting concern for all orphaned children. It gives a concrete form to the broad challenges facing orphans around the world.”<sup>213</sup> There are some who argue that the adoptive parents find attachment to the nations from which their children have come, and “participate in a greater degree in global anti-poverty efforts as a consequence of their experience with [intercountry adoption].”<sup>214</sup> Richard Carlson posits that “prospective adoptive parents who visit orphanages appear to have been important forces in campaigns to correct deficient conditions at some orphanages, to raise money or public allocations for orphanages, and to improve the management and care of children in orphanages.”<sup>215</sup> One study in China found that there was a tendency for families to take a continuing interest in the social welfare institution.<sup>216</sup> Fund-raising campaigns, as well as donations of goods that benefit institutions have allowed adoptive families to feel as though they continue to be connected to the place from which their child came.<sup>217</sup>

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210. See, e.g., Third-party accounting agencies have estimated that especially in disaster situations, the percentage of money donated that is channeled directly to the affected state for which it was gathered is roughly 3%. *Follow the money: are funding patterns keeping pace with trends and evidence?* WORLD DISASTERS REPORT, Chapter 4, <http://ifrc-media.org/interactive/1248/> (last visited Oct. 2, 2016).

211. King, *supra* note 16, at 422-23.

212. Wallace, *supra* note 36, at 693.

213. Medefind, *supra* note 75, at 426.

214. Smolin, *supra* note 35, at 254.

215. Carlson, *supra* note 137, at 755.

216. Meier & Zhang, *supra* note 88, at 100.

217. *Id.*

Perhaps international adoption does create a kind of connection between families and the nations from which their children were born, and when this connection directly leads to humanitarian giving, it is powerful for them to be able to continue giving through the organization that united them with their child. Further research on this topic would be illuminating.

*D. Is the Money all Coming from the Same Pot?*

A question that must be asked through all of this is whether, in the absence of adoption, the same total quantity of money would be spent on humanitarian aid as currently spent on adoption and humanitarian aid combined. Ronald V. Ludlow employs the “starfish” principle to discuss international adoption—described as the choice to change the lives of “relatively few children through individual adoption, rather than improving the lives of many children through in-country aid.”<sup>218</sup> He questions the morals of choosing to spend between \$10,000 and \$30,000 on the adoption of one child, when 73.4% of the Somalian population has incomes of less than \$2 each day.<sup>219</sup> Ultimately, this argument only works to criticize international adoption if one chooses to believe that in the absence of adopting a child, the price that would have gone to adopting that child would be given directly to aid. Further, it must be remembered that much like international adoption, the transaction of humanitarian aid through any other avenue would not be completely frictionless, with very few international aid organizations reaching an ideal level of donated money actually arriving at the doorsteps of those claimed to be benefiting from the aid.<sup>220</sup>

Proponents of international adoption argue that the additional intervention that may assist child welfare through the international adoption infrastructure has a positive impact in response to poverty. These proponents argue that international adoption infrastructure brings in a large group of people who otherwise may not be involved in fighting poverty at all.<sup>221</sup> Historically, “poverty alleviation and family assistance have most often operated on a completely separate track from intercountry adoption.”<sup>222</sup> Statistically it is argued that international adoption simply does not operate

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218. Ludlow, *supra* note 79, at 407.

219. *Id.* David Smolin made a similar argument in front of the Special Commission on the HCIA, arguing that a much smaller fraction of the funds necessary for a family to adopt internationally could be used to keep the original family intact. See Smolin, *supra* note 172, at 14. However, there is no clear reason that a family would, in the absence of adopting, just give money to keep a foreign family together. Further, one cannot argue that by choosing to adopt some children one is morally guilty of choosing not to adopt others. See, e.g., Carlson, *supra* note 137, at 752. “The fact that intercountry adoption does not reach all children is an irrational reason to oppose it.” *Id.* at 753.

220. See, e.g., WORLD DISASTERS REPORT, *supra* note 210 (discussing how much “middlemen” in international humanitarian aid take as their cut, and concluding that roughly 3% of international funding is channeled directly to affected states).

221. Richard Carlson advocates “appearances can be deceiving. Intercountry adoption might in fact be generating more funds for competing services than it diverts.” Carlson, *supra* note 137, at 755.

222. Smolin, *supra* note 78, at 466.

humanitarian aid programs at the same scale that other, larger NGOs who do not participate in international adoption are able to.<sup>223</sup> However, the demographics of those who typically adopt is striking in this regard. One study of international adoptee parents in the state of Minnesota found that the parents were of a generally higher socioeconomic status than other parents in the area.<sup>224</sup> Further, the findings of the study suggested that “people who adopt internationally are even more likely to be of higher socioeconomic status than those who adopt domestically.”<sup>225</sup> Simply put, higher socioeconomic status would lead one to believe that there is higher potential for these parents to give charitably to the nations from which their children have come, participate in payments such as China’s \$3,000 donation, and also continue to give in the future.

## VI. CONCLUSION

Ultimately, child welfare is the top priority of international adoption. In an area in which the distinctions between child trafficking and legitimate adoption can contain a lot of gray area, it is even more important that further research be done.<sup>226</sup> There has been much discussion on the future of international adoption, and it is time to add in the voices of those never to be adopted with ongoing discussion on the role of humanitarian aid in the larger international adoption infrastructure. In conclusion, “[e]fforts to bar intercountry adoption will deprive some children of a needed opportunity and are more likely to perpetuate than alleviate deleterious conditions in local orphanages.”<sup>227</sup> However, international aid must continue to be given through the current legal infrastructure in ways that are both transparent and sustainable, and nuanced solutions must be explored in order to protect some of the most vulnerable children on earth while providing for their welfare.

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223. *Id.*

224. Wendy L. Hellerstedt, et. al. *The International Adoption Project: Population-based Surveillance of Minnesota Parents Who Adopted Children Internationally*, 12 *MATERNAL CHILD HEALTH J.* 162, 168 (2008). Perhaps this confirms the hypothesis by Lynn D. Wardle that the HCIA has increased the costs of international adoption to such a high level that it may be “beyond the reach of the middle class.” Lynn D. Wardle, *Legal Perspectives on Some Causes of and Remedies for Declining International Adoptions*, in *THE INTERCOUNTRY ADOPTION DEBATE DIALOGUES ACROSS DISCIPLINES* 277, 288-89 (Robert L. Ballard, et. al. Ed., 2015); see also, *20 Years of the 1993 Hague Convention*, *supra* note 20, at 28 (expressing concern that with the added costs, it may be difficult for even the adoption accredited bodies to be sustainable).

225. Wendy L. Hellerstedt, et. al., *supra* note 224, at 169.

226. Kapstein, *supra* note 90.

227. Carlson, *supra* note 137, at 755.

