THE GOOD, THE BAD & THE UGLY? A NEW WAY OF LOOKING AT THE INTERCOUNTRY ADOPTION DEBATE

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INTRODUCTION

The two sides of the intercountry[1] adoption debate seem worlds apart. Proponents view international adoption as an effective solution to stop the proliferation of institutionalized and street orphans across the globe.[2] To them, intercountry adoption is a panacea—offering a potential solution to such diverse issues as children orphaned after war and disaster; adults who are unable to conceive; global intolerance; and the limited resources of developing nations. On the other hand, critics of intercountry adoptions view it as modern-day imperialism, allowing dominant, developed cultures to strip away a developing country's most precious resources, its children.[3] Moreover, the view one holds in the debate impacts how subsidiary issues such as culture, family, rights, and sovereignty are treated.

The emotional nature of intercountry adoption often leads each side to demonize the other, impeding the ability to find common ground.[4] Moreover, keeping the debate focused on whether intercountry adoption is good or bad is problematic; there will always be compelling arguments on either side, and compelling reasons to which each can point in support of their position. As such, focusing on the positives or negatives in the debate amounts to a stand-off in which neither side is willing to compromise any ground, a perpetual lose-lose situation.

Yet are these two sides really so far apart? Is there not another way of examining the debate that accommodates both viewpoints and makes allowances for each side? What if, for instance, one legal instrument could accommodate both one country's view that culture should be paramount in deciding a child's adoption and a prospective parent's desire to adopt across cultural lines? These are not simply rhetorical questions. Currently, many countries (predominantly potential sending countries) refuse to participate in intercountry adoptions.[5] These countries refuse to allow intercountry

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[1] In this article I use the term intercountry, international and transnational adoption interchangeably.

[2] *See generally* Stacie I. Strong, *Children's Rights in Intercountry Adoption: Towards a New Goal*, 13 B.U. INT'L L.J. 163 (1995) (discussing adoption as a human right).

[3] *See* Curtis Kleem, Note, *Airplane Trips and Organ Banks: Random Events and the Hague Convention on Intercountry Adoption*, 28 GA. J. INT'L & COMP. L. 319, 325-326 (2000).

[4] *See, e.g.*, David Smolin, *The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals*, 35 SETON HALL L. REV. 403, 465 (2005)[hereinafter Smolin, Indian Adoption Scandals] (discussing the tension held on either side of an adoption scandal in India).

[5] *See, e.g.*, LAW REFORM COMMISSION OF TANZANIA, REPORT OF THE COMMISSION ON

adoption largely because of issues that fall under the rubric of family, culture, and rights. In crafting a framework that accommodates all sides of the debate we can move the process forward to a more fluid structure that takes into consideration both sides of the debate.

To do so we must start from a different premise, one where a prism of choice frames the intercountry adoption debate. Instead of locking the groups in a war of right and wrong, each group in the intercountry adoption debate can work together within a framework that is flexible enough to accommodate the different arguments and the hierarchical presumptions that embody each approach. This paper argues that such an approach to international adoption is possible if we analyze how each side of the debate treats the main axes of debate: issues of culture, family, and rights. Accordingly, the thesis of this paper provides that one can develop a framework that accommodates each side by recognizing the importance it attaches to each of these axes. Under this paradigm, this Paper examines the legal landscape, not to determine whether it facilitates or restricts intercountry adoption, but to determine how successful it is at accommodating the various viewpoints towards intercountry adoption and its underlying presumptions regarding family, rights, and culture.

The main legal instrument governing intercountry adoption is the Hague Convention on the Protection of Children and Co-operation in Intercountry Adoption (the "Hague Convention").[6] Most commentators who have examined the Hague Convention have done so from the perspective of determining whether the Hague Convention facilitates or impedes intercountry adoption and, depending on their viewpoint, what changes need to be made to bring the Hague Convention in line with their philosophical perspective.[7] This paper takes a different approach. Rather than looking at

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THE LAW RELATING TO CHILDREN IN TANZANIA § 298 (April 1994), *available at* http://lrct-tz.org/pdf/watoto.pdf (discussing Tanzania's prohibition of adoption by any adult from a non East African country). Many of the issues that play into intercountry adoptions also impact those countries that have prohibitions on sending their children out to be adopted. However, the analysis of these countries and their assumptions and rhetoric are outside the scope of this paper.

[6] The Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 1993 U.S.T. Lexis 106, *available at* http://www.hcch.net/index_en.php?act=conventions.pdf&cid=69[hereinafter Hague Convention].

[7] *See, e.g.*, 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 (2003) (discussing how to transform the Hague Convention in such a way as to facilitate intercountry adoptions); Nicole Bartner Graff, *Intercountry Adoption and the Convention on the Rights of the Child: Can the Free Market in Children be Controlled?*, 27 SYRACUSE J. INT'L L. & COM. 405 (2000) (discussing ways the Hague Convention can restrict the practice of intercountry adoption by curtailing illegal activities).

whether the Hague Convention facilitates or inhibits intercountry adoption, I will examine how well it provides a framework for accommodating the choices and the hierarchal preferences that each country and each prospective parent must make within the axes of rights, family, and culture. To that extent, I will also examine whether the Hague Convention can adequately provide that framework.

This article proceeds in four parts. Part One will provide a general overview of the intercountry adoption debate, discussing how each side approaches the debate and the underlying assumption that each side makes in support of its argument. Part Two will examine two legal instruments on adoption, one international (the Hague Convention) and one domestic (the Indian Child Welfare Act[8] or "ICWA"), as a basis for analyzing where current legal instruments fall within the traditional paradigms of the debate. Part Three will examine how the debate plays out within three major axes: on issues of family, rights, and culture. This part will provide a more detailed analysis on how the Hague Convention addresses these issues and in what ways, if any, the ICWA can provide an alternative framework. In doing so, I will examine how the drafters treated each one of three distinct paradigms: family, rights, and culture. Part Four will offer my analysis regarding the Hague Convention's ability to provide an accommodating framework.

I. AN OVERVIEW OF THE DEBATE

A. The Context

Intercountry adoption occurs when a child from his or her country of origin is moved to another country, where he or she will live with adoptive parents.[9] It implies the total and definitive rupture of his or her relationship with the biological family.[10] Historically, intercountry adoption had its genesis in a post World War II climate when soldiers returning home spotlighted attention on children orphaned by the war.[11] Under the Marshall Plan, the U.S. was pouring millions of dollars into rebuilding Allied

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8 25 U.S.C. §§ 1901-1963 [hereinafter ICWA].

9 UN Children's Fund, Guidance Note on Intercountry Adoption in the CEE/CIS Baltics Region (Feb. 2003), *available at* http://www.unicef.org/ceecis/Guidance_note_ Intercountry_ adoption.pdf)[hereinafter "UNICEF Baltics Report"].

10 *Id*.

11 UN Children's Fund, Intercountry Adoption, INNOCENTI DIG. 4, 1999, at 2 available at http://www.unicef-icdc.org/publications/pdf/digest4e.pdf [hereinafter INNOCENTI DIGEST], see also discussion infra § I.B.1

countries decimated by the war.[12] However, intercountry adoption took a markedly distinct tack. Instead of committing resources to helping orphans within the country, the solution was to pull the children out of the country, and thus out of the problem, by providing them with homes elsewhere.[13] While intercountry adoption at that time was child-driven, there were seeds of the larger intercountry adoption debate that would grow in years to come.[14]

The second wave of intercountry adoption occurred after the Korean War.[15] Korean culture dissuaded the use of domestic adoption as a means of caring for war orphans. In addition, the combination of mixed ancestry children (usually Asian American) led many more Americans to become involved in intercountry adoption.[16] Since then, intercountry adoption has evolved. What began as a means of helping children after war has become, for many, a way to create a family when traditional biological or domestic options are unavailable.[17]

Factors affecting the increase of people in receiving countries turning to international adoption include: (1) a high infertility rate; (2) increased acceptance of intercountry adoption; (3) easy access to abortion; (4) decreased availability of domestic children for adoption;[18] and (5)

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[12] *See* Daniel Fung, *Constitutional Reform in China: The Case of Hong Kong*, 39 TEX. INT'L L.J. 467, 467 (2004) (discussing the Marshall Plan to rebuild after WWII and its consequences for Europe). See also U.S. AGENCY FOR INT'L DEV., Marshall Plan, http://usaid.gov/multimedia/video/marshall/ (last visited March 14, 2007).

[13] *See* INNOCENTI DIGEST, *supra* note 11, at 2.

[14] One of the recurring criticisms that has been levied against intercountry adoption is that it is a paternalistic solution, one in which the children who are being adopted are viewed as needing rescue from their plight. This view either dismisses, or minimizes the benefit to the child in staying in his home or the concomitant trauma that would result to an already traumatized child who is forced to leave his home, his tribe and his culture for an unknown future.

[15] Nicole Bartner Graff, *Intercountry Adoption and the Convention on the Roghts of the Child: Can the Free Market in Children be Controlled?* 27 SYRACUSE J. INT'L L. & COM. 405, 405 (2000).

[16] Deborah Kay, *The 1993 Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption: Potential for Success or Failure*, 2 NEW ENG. INT'L & COMP. L. ANN. *available at http://www.nesl.edu/intljournal/vol2/hague.htm* (1996).

[17] *See generally* ELIZABETH BARTHOLET, FAMILY BONDS, 102 (1993) (arguing that adoption should be considered as an alternative to fertility treatments).

[18] Michele Goodwin, *The Free Market Approach to Adoption: The Value of a Baby*, 26 B.C. THIRD WORLD L.J. 61, 68 (2006). In reality, the shortage of children for domestic adoption is a shortage of white children. There are still many African American children in the domestic adoption system. This disparity occurs for two main reasons: (1) white Americans (who make up a majority of prospective parents), feel uncomfortable adopting black children, and (2) many advocates in the black community discourage interracial adoptions. *See* BARTHOLET *supra* note 17, at 97.

established networks of intercountry adoption.[19] On the sending side, factors include: (1) difficult social and economic conditions; (2) migration to urban areas; (3) the breakdown of extended families; (4) high pregnancy rates among unmarried women; (5) difficulty in obtaining abortions; (6) an increase in unwed mothers heading households; and (7) high unemployment rates.[20]

With the advent of a parent-driven model to intercountry adoption, the dynamics of international adoption changed. A market of adoption developed where children were seen as supplying a demand.[21] While the rate of intercountry adoption increased steadily in the last two decades, overall, it affects a very small population, particularly in sending countries.[22] One study concluded:

> Our statistics... indicate that a very small proportion of the children at risk in most countries of origin are either 'saved' or 'harvested' through the process of intercountry adoption. One could thus argue that individual children are benefiting from this migration, but that the movement of children, per se, is not significantly affecting the human resources of most countries of origin nor the numbers of the children at risk.[23]

B. The Debate

In its simplest form, the intercountry adoption debate is between two seemingly disparate concepts. There are those who believe that saving children without families by bringing them into loving, adoptive homes should always occur, at whatever cost.[24] On the other side are those who believe that intercountry adoption is modern day reverse colonization: taking children out of developing countries and bringing them into developed countries.[25] One author offers an excellent summary of the debate:

> To some intercountry adoption in itself is more or less a form of child trafficking, as it involves the transfer of children from poor nations to rich nations in order to meet the demand of those in rich nations for children. The fact that those seeking to adopt

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[19] Saralee Kane, *The Movement of Children for International Adoption: An Epidemiologic Perspective*, 30 THE SOC. SCI. J. 4, 313 (1993).

[20] *Id*.

[21] *See* Goodwin, *supra* note 18, at 67.

[22] Kane, *supra* note 19, at 335.

[23] *Id*. at 336.

[24] Smolin, Indian Adoption Scandals, *supra* note 4, at 453.

[25] *See* Graff, *supra* note 15, at 406.

> want daughters and sons, not sex or labor, seems to make little difference... it is still a matter of the citizens of rich countries using their wealth and power to "buy" the vulnerable of the poor.... those who really care about the suffering of children in developing nations should provide assistance and help to children within their own societies, rather than spending inordinate sums to strip children of their national identity, native culture and language.
>
> By contrast, those most supportive of intercountry adoption perceive literally millions of children in need of intercountry adoption in developing and transition economy nations. Children abandoned, killed, left in dismal orphanages, or living on the street bear horrific testimony to the pressing need for adoption. From this perspective, ethical or political objections to intercountry adoption lack legitimacy, since they sacrifice the concrete good of children to ideological idols.[26]

The rhetoric on these two sides allows little room for accommodation. Proponents of international adoption believe that nothing is more sacrosanct than preserving the lives of children.[27] Critics of intercountry adoption believe that the colonialist and paternalistic notions are apparent and, in the extreme, have compared this type of adoption to genocide.[28] Further complicating matters is that these two opposing camps cannot be tracked along typical ideological lines; there are political liberals and political conservatives on both sides of the debate.[29] This can make strange bedfellows, with the ACLU and political conservatives advocating for the same cause.[30]

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[26] David M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 VAL. U. L. REV. 281, 283 (2004)[hereinafter Smolin, Child Trafficking Article]. (Smolin and I start from the same perspective. We both believe that continuing the intercountry adoption debate on ideological grounds has limited usefulness. However, Smolin and I differ in how we structure the framework. Moreover, for Smolin the framework to be applied is restricted to detecting the limits of intercountry adoption. I, instead, construct a different framework by using ICWA to see if our current legal instrument (namely the Hague Convention) is suitable for accommodating the different sides of the debate.)

[27] *Id*.

[28] Antonio Buti, The Australian 'Stolen Generations' and Reparations 6 (Mar. 2006) (paper presented at the University of Texas Law School) (on file with author).

[29] For instance, Christian conservatives believe in intercountry adoption as one form of evangelism, allowing children from developing countries to be raised in a Christian home. Smolin, Indian Adoption Article, *supra* note 4, at 455. On the other side, liberals believe that intercountry adoption is one of the best ways to promote the rights of children. Dillon, *supra* note 7, at 180.

[30] *See* ACLU, CAUGHT IN THE NET: THE IMPACT OF DRUG POLICIES ON WOMEN AND

Madonna's recent attempt to adopt a Malawian child illustrates the problem. Late in 2006, Madonna and her husband, Guy Ritchie, traveled to Malawi to survey progress on an orphanage they were building.[31] Shortly thereafter, news reports broke that the pop idol and her husband were adopting a young boy from the country.[32] The reaction was swift and adamant on both sides. Human rights organizations protested the manner of the adoption, claiming that Madonna had circumvented local law that requires any adoptive parent to reside in the country.[33] The human rights organizations used that as a springboard to claim that Madonna was using her vast wealth to take advantage of the situation and circumvent the adoption process.[34] In contrast, many people in the Western world did not understand why Madonna's adoption was controversial. To them, it was a heroic act by a woman willing to give a child the kind of opportunities normally not within his reach. In the end, the Malawian court granted Madonna an "interim adoption," awarding her custody of the child for eighteen months.[35]

As such, the Madonna adoption highlights one consistent demarcation in the debate, the divergent views of sending countries (typically developing countries like Peru and Malawi), and receiving countries (most often developed countries such as the United States). For receiving countries, the advent of international adoption is a way to facilitate the demand made by prospective parents for children that are not available domestically. Others within receiving states believe intercountry adoption is a noble act that often rescues children. Sending countries are not so optimistic.

FAMILIES 55 (2005)[hereinafter "CAUGHT IN THE NET"] (advocating for more restrictive adoption controls to protect the rights of imprisoned mothers). *See* http://vlz.es/urlext.php?ext=http://www.churchexecutive.com/Page.cfm/PageID/9238 (stating discussing a summit to teach Christian leaders how to adopt locally and internationally).

[31] Maddie Denies Adoption, THE SYDNEY MORNING HERALD (Oct. 5, 2006) http://www.smh.com.au/news/music/maddie-deniesadoption/2006/10/05/1159641427301.html (discussing the purpose of the visit to Malawi—to oversee the building of an orphanage).

[32] Reports differ on the age of the child, with the youngest estimate putting him at three months in Oct. 2006 and the oldest estimates placing his age at one year. *See* Madonna Given Interim Adoption, BBC NEWS, (Oct. 16, 2006) http://news.bbc.co.uk/2/hi/entertainment/6056912.stm (placing the child's age at three months); Adoption: Material Mommy, NEWSWEEK, Oct. 23, 2006 at 8, *available at* http://www.msnbc.msn.com/id/15267323/site/newsweek (placing his age at one year).

[33] Madonna Given Interim Adoption, BBC NEWS, October 16, 2006, *available at* http://news.bbc.co.uk/2/hi/entertainment/6056912.stm.

[34] Adoption: Material Mommy, NEWSWEEK, Oct. 23, 2006 at 8, *available at* http://www.msnbc.msn.com/id/15267323/site/newsweek

[35] BBC NEWS, (Oct. 16, 2006) http://news.bbc.co.uk/2/hi/entertainment/6056912.stm

1. The Good

To proponents of the system, intercountry adoption offers the best solution for children without parents and parents without children.[36] In addition, given the poverty and destitution faced by these children, intercountry adoption seems to provide an opportunity to literally save children from such fates as child pornography, prostitution, or forced labor. In contrast, many of the arguments advanced against transnational adoption seem much more esoteric: few seem to agree with the notion that subjecting a child to racism is a much greater evil than forcing a child to live on the streets. To proponents, the practical reality of institutionalized children takes precedence over obscure notions of cultural paternalism and baby-selling.[37]

Six arguments are used most often by proponents of intercountry adoption. First, intercountry adoption fulfills the mandate of what some scholars claim is a child's right not to be institutionalized.[38] Second, adults who wish to be parents have the opportunity to do so by choosing to adopt internationally.[39] As a third and related point, international adoption provides parents to children without families.[40] Fourth, intercountry adoption alleviates the world's ills by taking children away from countries with overtaxed resources and reducing the overall number of homeless children.[41] Fifth, adopting children from one country and bringing them to another promotes tolerance and diversity by creating families with different national and ethnic backgrounds.[42] Finally, intercountry adoption provides additional opportunities for non-traditional families, such as single parents and homosexual couples.[43]

To some advocates, intercountry adoption provides a way to fulfill a

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36 Stacie Strong, *Children's Rights in Intercountry Adoption: Towards a New Goal*, 13 B.U. INT'L L. J. 163, 169 (1995).

37 See Dillon, *supra* note 7, at 200 (stating "in no sense could the right of a child to enjoy a particular culture be said to trump the more fundamental right to be loved and protected as an individual.").

38 *Id*. at 212.

39 BARTHOLET, *supra* note 17, at 47.

40 Lisa Katz, *A Modest Proposal? The Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, 9 EMORY INT'L L. REV. 283, 291 (1995).

41 *See, e.g.*, Dillon, *supra* note 7, at 226 (discussing how, despite overtaxed resources, many nations prefer to see orphans "languishing" then having them adopted internationally.)

42 JEAN NELSON ERICHSEN & HEINO ERICHSEN, HOW TO ADOPT INTERNATIONALLY 8 (2003).

43 *See generally* Lisa Hillis, *Intercountry Adoption under the Hague Convention: Still an Attractive Option for Homosexuals Seeking to Adopt?* 6 IND. J. GLOBAL LEGAL STUD. 237, 237 (1998).

child's basic human right not to be institutionalized.[44] Sara Dillon, the major proponent of this view, writes that intercountry adoption is one method of achieving a child's right to a family.[45] Dillon acknowledges concerns regarding intercountry adoption's inextricable link to a history of colonialism and imperialism.[46] However, Dillon sees these as distinct concepts and contends that intercountry adoption must be viewed solely within the context of individualized children's rights.[47] Dillon notes:

> [I]t may be asked... how a multicultural world can agree on a set of standards with regard to children's rights. The ideas of wealthy northern countries about the role of the child are likely to clash with deeply held ideas in the developing world. It may be argued that what are termed international children's rights actually reflect the biases of a certain part of the world and can in no way be considered universal.[48]

Dillon further reasons that "the psychology of small children varies little from culture to culture and, as with the law on torture, law relating to the needs of small children ought not to take into account local variations."[49] In presenting this argument, Dillon represents those who believe that the care of a child and the formation of the family trump any notion of cultural preservation.

Proponents for intercountry adoption also advance parent-driven arguments. Rather than compete for healthy white children who are in short supply in countries like the United States, proponents instead advocate seeking adoptable children in other countries.[50] This is also known as the

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[44] Dillon, *supra* note 7, at 187.

[45] *Id*.

[46] *Id*.

[47] *Id*. at 188.

[48] *Id*. at 192.

[49] *Id*. (while Dillon's argument on the right of children not to be institutionalized seems well thought out, her response to the cultural argument miss the point. Those who value a sense of culture are not concerned with the current culture of the small child, but rather his or her future exposure to the culture of their birth. Children who are adopted out of their country of origin, both individually and as a group, will experience a meaningful loss of their birth culture. And, while Dillon's argument is at its strongest when she compares those children who are currently in institutions (which was admittedly the focus of her article), her argument on a position for intercountry adoption that is within the context of individual rights for the child may be less persuasive in those situations where the child is living in foster care, or where a child has been given up by her biological parents for pecuniary gain.).

[50] Sara R. Wallace, *International Adoption: The Most Logical Solution to the Disparity between the Number 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, 693 (2003).

market of adoption debate.[51] This idea now manifests itself on a policy level. Originally intercountry adoption developed to help "war orphans."[52] Now, there is a prohibition on the international adoption of refugees from wars and natural disasters.[53] This debate has also taken various tangents derived from the parent-driven model: the debate on a market approach to adoption;[54] advocacy for consumer protection laws for adoptive parents who were misinformed as to their adoptive child's health;[55] and the advent of adoption as baby-selling.[56] Parent-driven advocates emphasize the benefits of intercountry adoption for prospective parents such as fewer delays than domestic adoptions;[57] increased pool of non-African American babies;[58] and

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[51] *See* Caeli Elizabeth Kimball, *Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, 33 DENV. J. INT'L L. & POL'Y 561, 566 (2005); Kay, *supra* note 16 ("[I]ntercountry adoption has been known since the post war years, but what was originally a humanitarian movement in response to the needs of young victims of war has more recently tended to develop as a service for childless couples.") (quoting Jennifer Horne-Roberts, Intercountry Adoption, 142 NEW L.J. 286, 286 (1992)).

[52] Katz, *supra* note 40, at 285.

[53] *See* Richard R. Carlson, *The Emerging Law of Intercountry Adoptions: An Analysis of the Hague Conference on Intercountry Adoption*, 30 TULSA L.J. 243, 248-49 (1994) (noting the Hague Conference's decision to avoid the issue of refugee adoption. Later on, with respect to the tsunami specifically, the Permanent Bureau noted "[I]n the spirit of [the 1994 recommendation], it is clear that in a disaster situation, like that brought about by the tsunami, efforts to reunify a displaced child with his or her parents or family members must take priority and that premature and unregulated attempts to organise the adoption of such a child abroad should be avoided and resisted.") *See* THE PERMANENT BUREAU, Draft Guide to Good Practice Under the Hague Convention of May 29, 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption 73 (August 2005)[hereinafter Guide to Good Practice], *available at* http://www.hcch.net/upload/wop/ado_pd02e.pdf. This can lead to a whole separate avenue of debate: Is the policy toward not adopting refugee children done to protect the child? (i.e., intercountry adoption would only create further trauma for a child who has already been through so much loss of stability.) Or is it being done to prevent disruption in the market of adoption? (i.e., because refugees' origins are so unstable, we should avoid any disruption that adopting them would cause for the prospective parents, especially when there are other children available to adopt?).

[54] Graff, *supra* note 7, at 405.

[55] Donovan Steltzner, *Intercountry Adoption: Toward a Regime that Recognizes the 'Best Interests' of Adoptive Parents*, 35 CASE W. RES. J. INT'L L. 113, 115 (2003).

[56] Gina Croft, *The Ill-Effects of a United States Ratification of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, 33 GA. J. INT'L & COMP. L. 621, 635 (2005).

[57] Steltzner, *supra* note 55, at 119.

[58] *Id*. Steltzner notes that many prospective parents turn to international adoption to avoid adopting African American children. *See also* MYRA ALPERSON, THE INTERNATIONAL ADOPTION HANDBOOK 144 (1997) (stating "I also had to deal honestly and bluntly with my own personal limits [in deciding to adopt internationally instead of domestically]. I didn't know if I could cope with an African American child.").

avoiding potential litigation by birth parents.[59]

Other arguments in support of intercountry adoption advance the best interests of the child.[60] Proponents reason that many children eligible for international adoption currently reside in institutions or on the streets. As such, intercountry adoption provides the basic needs for a child within a family environment, a far superior situation than the alternatives.[61] Moreover, given that intercountry adoption occurs mainly in developing countries struggling with poverty, proponents point out that these countries do not have the resources to devote to the care needed for those children.[62]

Many believe that one of the key benefits of intercountry adoption is that it promotes tolerance and cultural awareness.[63] For these advocates, adopting children of different cultural backgrounds exposes the public to problems of the developing world.[64] It also sheds light on issues of racism domestically when the parents must come in direct contact with the racism their children face.[65]

Finally, advocates note that adults who would be considered undesirable as domestic adoptive parents, such as single men and women, homosexual couples, or older adults, can adopt internationally with fewer problems.[66] At a minimum, these advocates place intercountry adoption on

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[59] *Id*. at 120. Typically under U.S. law, birth parents have a certain amount of time after an adoption is finalized to petition for custody. No such provision exists under the Hague Convention. See also ERICHSEN & ERICHSEN, *supra* note 42, at 8.

[60] The best interest of the child standard has been advanced by both proponents and critics of adoption.

[61] Dillon, *supra* note 7, at 200.

[62] *See* Wallace, *supra* note 50, at 693 (noting that "[t]he practice of international adoption is prevalent in countries where not only families, but also countries themselves, cannot care for their orphaned or abandoned children."). *See also* Christine Narad & Patrick W. Mason, *International Adoptions: Myths and Realities*, 30 PEDIATRIC NURSING Nov./Dec 2004, at 483. Narad & Mason identify what they call five "myths" of international adoption including: (1) that adoptees were raised in an environment that will meet their needs; (2) that medical reports will contain accurate and complete information; (3) that any delays in the child's development is normal; (4) a child can be quickly integrated into a family's routine; and, (5) all the child needs is love. Instead, the authors paint a stark picture of the life of international adoptees, who, according to Narad & Mason were more than likely raised in an institution where children are tied to beds, fed quickly by uninterested caregivers and live in an environment where they are unable to interact grow or develop. Further, Narad & Mason note "[c]ountries that are overburdened with the need to care for large numbers of abandoned children are also often faced with poverty and economic instability, and the needs of abandoned children are usually low priority.".

[63] *See* ERICHSEN & ERICHSEN, *supra* note 42, at 8.

[64] *Id*. (stating "[s]uddenly you view your child's homeland as yours as well.").

[65] *See generally* GAIL STEINBERG & BETH HALL, INSIDE TRANSRACIAL ADOPTION (2000) (particularly Section 2 on "Racial Identity").

[66] *See, e.g.*, Hillis, *supra* note 43, at 237.

equal footing with domestic adoption. Some believe that the comparative ease and unique cultural benefit of intercountry adoption makes it a generally superior choice for all people interested in adopting.[67] For these advocates, there should be no differential treatment in prospective parents who are foreigners and prospective parents who are local.

2. The Bad

The most vocal critics of international adoption argue that it is a form of modern-day imperialism.[68] Instead of imposing a set of culture and values from the outside in, this form of imperialism takes a child and forces him to adjust to a new, seemingly better way of life.[69] This form of imperialism, which I call reverse imperialism, is particularly insidious because it occurs under the guise of saving children. Critics argue that children are a precious commodity to a developing nation.[70] Taking these children away is the equivalent of stripping a country of its natural resources, a modern form of colonialism.[71]

Some have argued that intercountry adoption takes away a child's nationality, thereby denying him the right to his proper cultural identity.[72] To these critics, the ramifications are severe and affect the child's psychological stability.[73]

Other critics have argued that turning to other countries for adoption merely exacerbates problems of the domestic foster care system in the United States.[74] To these critics, if Americans did not have intercountry adoption as a potential solution, then perhaps there would be more of an impetus to change the current structure of foster care so that more American

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[67] ERICHSEN & ERICHSEN, *supra* note 42, at 8.

[68] Kleem, *supra* note 3, at 325.

[69] *Id*. at 325-326.

[70] *Id*.

[71] *Id*. at 325. This has manifested in rumors of organ harvesting; some critics of intercountry adoption claimed that babies were being adopted so that their organs might be used for other children the parents already had. *Id*. at 326.

[72] Linda J. Olsen, *Live or Let Die: Could Intercountry Adoption Make the Difference?*, 22 PENN. ST. INT'L L. REV. 483, 510 (2004).

[73] D. Marianne Bower Blair, *The Impact of Family Paradigms, Domestic Constitutions and International Conventions on Disclosure of an Adopted Person's Identities and Heritage: A Comparative Examination*, 22 MICH. J. INT'L L. REV. 587, 646 (2001).

[74] *See* Erika Lynn Kleiman, *Caring for our Own: Why American Adoption Law and Policy Must Change*, 30 COLUM. J.L. & SOC. PROBS. 327, 334 (1997)(stating "[w]hatever the reason for the changing numbers, many prospective parents claim they cannot find children to adopt in the United States. This is unfortunate, because, in fact there is no shortage of American children who need permanent homes.").

children would be eligible for adoption.[75] These critics view intercountry adoption as going against the spirit (if not the letter) of the U.N. Convention on the Rights of the Child ("CRC") and its embodiment of strong cultural rights for children.[76]

Internally, many sending countries have increasingly shied away from intercountry adoption, demonstrating a deep-seated, fundamental discomfort with the notion.[77] For these countries, intercountry adoption is a source of shame that highlights their limited resources.[78] In recent years, pressure from countries in the developed world has exacerbated this shame.[79] As a result, many countries that had previously been the main source of children in intercountry adoptions have now proscribed the practice.[80] For instance, China and Korea, traditionally two major sending countries, have restricted intercountry adoptions in the wake of domestic societal pressure to take care of its own.[81] In 2000, Russia was the second highest country of origin of intercountry adoptions.[82] In 2006 it placed a ban on intercountry adoptions.[83] This was perhaps inevitable. As one author wrote:

> [T]he Russian people are very sensitive to the fact that they have so many children they cannot adequately care for. They consider it a slight that other nations view Russia as being in the company of third-world countries with similar problems. Some Russians look at this as a matter of national pride, and see the international adoption scheme as a road toward "cultural genocide."[84]

During 1990 and 1991, Romania was one of the primary countries from which to adopt children.[85] In 2004, under pressure from the European

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[75] *Id*.

[76] *See, e.g.*, CONVENTION ON THE RIGHTS OF THE CHILD, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]. In particular, Articles 7 and 8 address provisions of the child's rights within the context of culture.

[77] Kimball, *supra* note 51, at 579.

[78] *Id*.

[79] Noelle Knox, *Romania to Make its Ban on International Adoptions Permanent*, USA TODAY, June 16, 2004 at 9D (discussing pressure Romania received from the European Union to end its practices).

[80] *Id*.

[81] Kleem, *supra* note 3, at 325 (describing the pressure felt in sending countries over intercountry adoptions).

[82] Steltzner, *supra* note 55, at 124.

[83] Oliver Bullough, REUTERS, May 23, 2006, *available at* http://www.boston.com/news/world/europe/articles/2006/05/23/russia_moves_to_restrict_foreign_adoptions/

[84] Steltzner, *supra* note 55, at 125.

[85] Adoption Institute: International Adoption Facts http://www.adoptioninstitute.org/FactOverview/international.html (last visited on May 13, 2007) (providing a table of sending

Union, an organization it wished to join, Romania placed a permanent ban on the adoption of children.[86] As the leading receiving country for international adoption from Romania, the U.S. waged a full public relations campaign to stop the ban from passing.[87] But in the end, the Romanian government claimed that the ban was the only way to prevent corruption in the system.[88]

Many Middle Eastern countries proscribe intercountry adoption outright.[89] For these predominantly Muslim countries, the Koran prohibits adoption for lineage purposes.[90] As such, adoption of children outside of the biological line represents a prohibitive genealogical break.[91] Instead, many Middle Eastern countries have developed an alternative form of adoption entitled kafalah.[92] This form of care allows children to be tended to by another family without the attendant changes in name or inheritance rights that accompanies traditional adoption.[93]

3. The Ugly

Of course, outside of the theoretical vacuum, not all debates play out so neatly. Many participants in the intercountry adoption debate hold a derivative position—somewhere between viewing intercountry adoption as good or viewing intercountry adoption as bad. People who position themselves in these camps generally start with either an optimistic or a pessimistic framework. For the optimists, intercountry adoption, in theory, may provide one of the best solutions for the current plight of children. Optimists believe that intercountry adoption, ideally, offers a win-win situation for those parents who wish to have children and those children who need parents. However, while optimists acknowledge the ideals of

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countries and background on the history of Romanian adpoptions). INNOCENTI DIGEST, *supra* note 11, at 4.

[86] Romania to Make its Ban on International Adoptions Permanent, USA TODAY, June 16, 2004, at 9D.

[87] *Id.*

[88] *Id.* The irony is that although traditional orphans (children without either parent) is what motivates people to allow their children to be adopted in the first place, in the end critics say, the worst source of corruption comes when the children who are actually adopted do not come from institutions at all but from either being sold by their parents or kidnapped by children traffickers. *Id.* (stating "the accounts of rescued orphans [in Romania] were replaced by stories of Romanian mothers being paid to give up their children."

[89] J.H.A. Van Loon, REPORT ON INTERCOUNTRY ADOPTION (Preliminary document No.1 of the Hague Conference) (1990) [hereinafter Van Loon, REPORT] 25.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

intercountry adoption, they are concerned with its practical implementation and the abuses that result. Baby selling and corruption are the two most often raised issues.[94] Presumably, people in this camp believe that, absent corruption and irregularities, intercountry adoption could be a primary method for eradicating child poverty and homelessness. Optimists derive their view of intercountry adoption from the "good," in that they believe that intercountry adoption at its core should be saved. Therefore, optimists focus much of their advocacy on eradicating corruption from the intercountry adoption system.[95]

The pessimists start from a different perspective. Philosophically, they believe that intercountry adoption can never act as more than a band-aid on the issue of child poverty and limited resources. For them, the next step in moving the issue forward is not eradicating corruption from intercountry adoption but rather eradicating the root causes that lead to intercountry adoption in the first place.[96] For pessimists, intercountry adoption acts as a short-term solution, a necessary stop-gap to be used until other methods are developed to address the underlying causes of why so many children are orphaned.[97] To pessimists, a "victory" in the intercountry adoption debate would be for intercountry adoption to become obsolete.[98]

A corollary position for pessimists is the notion of subsidiarity—that all efforts should be used to place orphans first in their country of origin. Only after these efforts fail should intercountry adoption be considered.[99] As the Permanent Bureau[100] notes "[t]he subsidiarity principle is central to the success of [intercountry adoption]. It implies that efforts should be made to assist families in remaining intact or in being reunited, or to ensure that a

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[94] *See* Kristina Wilken, *Controlling Improper Financial Gain in International Adoptions*, 2 DUKE J. GENDER L. & POL'Y 85, 86 (1995).

[95] For instance, the Permanent Bureau also noted that "[p]rotection of families is one of the safeguards envisaged by the Convention to protect children from abduction, sale or trafficking for the purposes of adoption. … Families and children also need protection from the more subtle forms of exploitation, and protective measures are envisaged in the Convention to prevent undue pressure on, or coercion, inducement or solicitation of birth families to relinquish a child." *See* Guide to Good Practice, *supra* note 53, at 18.

[96] This happens on two fronts. First would be eradicating the underlying causes of orphans in developing nations (typically, AIDS, malnutrition, conflict). Second would be equipping the country with better resources to be able to internally assist those children who inevitably do become orphans.

[97] Smolin, Indian Adoption Scandals, *supra* note 4, at 453.

[98] *Id.*

[99] *Id.*

[100] For a good overview of the Hague Conference and its role as an intergovernmental organization see INNOCENTI DIGEST, *supra* note 11, at 15-16. The Permanent Bureau is responsible for monitoring legislating and advising countries on bringing national law in line with Hague Convention. *Id.*

child has the opportunity to be adopted or cared for nationally."[101]

For the pessimists, intercountry adoption can never be a viable alternative while money is a part of the system.[102] The potential for financial gain will inevitably cause distortion due to the constant edge it gives developed countries over developing countries.[103] This, scholars point out, puts intercountry adoption in direct competition with the principles of subsidiarity and creates a "distortion in the market" because foreigners can pay more for adoptions than locals can.[104] UNICEF, as well as many sending countries, takes this side of the debate.

According to UNICEF, intercountry adoption "is intended solely as an indivdualised child welfare measure.... Intercountry adoption is therefore to be considered as a very exceptional measure and one that cannot be looked at in isolation. It is one possible option in an overall child welfare and protection policy."[105] Further, UNICEF operates under three guiding principles regarding long-term childcare: (1) family-based solutions are generally preferable to institutional placements; (2) permanent solutions are largely superior to inherently temporary ones; and (3) in-country solutions are generally better than those involving other countries.[106] Because intercountry adoption embodies the first two solutions but not the third, UNICEF views intercountry adoption as "invariably" a subsidiary solution.[107] In addition, even when compared against other solutions that encompass two out of the three criteria, UNICEF argues that intercountry adoption "must be weighed carefully against any others that also meet two of these basic principles."[108]

Another perspective on the intercountry adoption issue is the one developed by the Permanent Bureau itself. The Permanent Bureau articulated a three-tiered system regarding the preference for intercountry adoption as a means of childcare and protection.[109] The first and most ideal practice is for children to grow up with their family of birth.[110] When this is not possible, a family should be sought within the child's country of origin. When in-country adoption is not possible, then intercountry adoption may be

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[101] *See* Guide to Good Practice, *supra* note 53, at 15.
[102] Smolin, Indian Adoption Scandals, *supra* note 4, at 447-450.
[103] *Id.*
[104] Noelle Knox, *Orphans Caught in the Middle*, USA TODAY, May 18, 2004, at 1D.
[105] *See* UNICEF Baltics Report, *supra* note 9.
[106] *Id.* at 1.
[107] *Id.*
[108] *Id.*
[109] *See* Guide to Good Practice, *supra* note 53.
[110] *Id.*

considered as a way to provide a child with a home.[111] Although not stated explicitly, the Permanent Bureau position seems to view intercountry adoption as a temporary solution.[112]

While each side of the international adoption debate offers a different viewpoint, it is important to note that the underlying premise—that intercountry adoption has "sides"—makes these simply a variation on the more traditional strands of debate. Both, to some extent, place a value on intercountry adoption and the legal instrument that governs it, instead of treating it as a valuable neutral framework that can accommodate the different concerns and preferences that the various parties may have.

II. AN OVERVIEW OF THE HAGUE CONVENTION AND THE INDIAN CHILD WELFARE ACT

A. Introduction: Why a Comparison?

The Indian Child Welfare Act and the Hague Convention developed from seemingly diametrically opposed mandates. Congress created the ICWA to make the adoption of Native American children by non-Indians as difficult as possible.[113] The Hague Convention was developed, at least in part, to facilitate intercountry adoptions.[114] Yet, a closer examination shows that the two instruments share similar contexts, albeit dealt with in different ways. Creators of both documents were concerned with exploitations and abuses in the adoption system. Native American communities argued that the skewed social work practices in deciding parental rights and neglect criteria were decimating the Indian family.[115] Similarly, participants in the debate on intercountry adoption have pointed out that the lack of fixed

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[111] *Id.*

[112] *Id.*

[113] *See* Andrea V. W. Wan, *The Indian Child Welfare Act and Inupiat Customs: A Case Study of Conflicting Values, with Suggestions for Change*, 21 ALASKA L. REV. 43, 43-44 (2004) (noting that ICWA " was…intended to ensure that Indian and Alaska native children were not removed from the communities and culture in which they were born.").

[114] *See* Hague Convention, *supra* note 6, pmbl. *See also* Carlson, *supra* note 53. Not everyone agrees with this genesis of the Hague Convention. For instance, Richard Carlson argues that, from its inception, the Hague Convention was subject to disparate visions. On the one hand, the Convention was viewed by many, mainly in Western states as a means to facilitate intercountry adoption. On the other hand, the Convention was viewed by many delegates, particularly those representing sending countries much more restrictively, mainly as an instrument to curtail abuses. *See* Carlson, *supra* note 53.

[115] *See generally* Samuel Prim, *The Indian Child Welfare Act and the Existing Indian Family Exception: Re routing the Trail of Tears?*, 24 LAW & PSYCHOL. REV. 115, 115 (discussing removal of Indian children based on misconceptions in dominant culture).

guidelines or harmonized laws leads to the exploitation of children for financial gain in the country of origin.[116]

Intercountry adoption and the adoption of Native American children in the United States have many points of comparison. Both debates resonate with notions of historical exploitation by a dominant white race over indigenous cultures. The debates are suffused with similar claims regarding the inherent biases towards nuclear family formation within the system of adoption.[117] Finally, each debate involves notions of sovereignty implicated within a larger debate on individual rights versus group rights.

Because of the unique approach that Congress took regarding the adoption of Native American children, the ICWA represents the best municipal instrument for the comparison of the Hague Convention on Intercountry Adoption. The unique relationship between the federal government and Native Americans makes the ICWA a governing law that nonetheless recognizes American tribes as semi-sovereign nations.[118] Similarly, the Hague Convention is meant to govern the behavior of private individuals indirectly through laws that affect the behavior of sovereigns. Yet each document takes a radically different approach in its attempt to deal with these competing interests. By comparing the text and the background of these two instruments, I hope to add some insight into how we can approach this debate in the future.

B. The Hague Convention

The Hague Convention on Intercountry Adoption, adopted on May 29, 1993, was a breakthrough in international law. As one author notes, "[t]his agreement signifies the beginning of a global community approach to international adoption concerns and cooperation, and recognizes that private, partisan competition, and unregulated adoption work cannot continue without establishing proper international childcare principles and practices."[119]

The Hague Convention was the result of a multi-year process hosted by the Hague Conference on Intercountry Adoption.[120] The Conference itself

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[116] *See* Graff, *supra* note 7, at 426.

[117] Elizabeth Bartholet, *International Adoption: Current Status and Future Prospects*, THE FUTURE OF CHILDREN, No. 1. 83, 93 (1993).

[118] Christine M. Metteer, *A Law Unto Itself: The Indian Child Welfare Act as Inapplicable and Inappropriate to the Transracial/Race-Matching Adoption Controversy*, 38 BRANDEIS L. J. 47, 54 (1999 -2000).

[119] INTERCOUNTRY ADOPTIONS: LAWS AND PERSPECTIVES OF 'SENDING' COUNTRIES (Eliezer Jaffe, ed., 1995).

[120] For an overview of the Hague Conference on Private International Law see INNOCENTI DIGEST *supra* note 11, at 5.

was significant because it represented the first time that non-member states participated in the drafting of a Hague Convention.[121] The objectives of the Convention were as follows: (1) to establish safeguards to ensure that intercountry adoption is in the best interests of the child (and with respect of his fundamental rights); (2) to establish a system of co-operation amongst contracting states to ensure that those safeguards are respected; (3) to prevent abduction, child trafficking, and baby buying; and (4) to make sure that adoptions between the states are given "full faith and credit." [122] The Hague Convention is, at its heart, a practical document. It provides a means for making intercountry adoptions more harmonious and efficient.[123] While the Convention's preamble seems to promote the idea that a permanent family is in the best interests of a parentless child, the enactment of the Convention was not a means of developing families along cross-cultural lines.

Superficially, the Hague Convention marks a shift in the view of policymakers towards intercountry adoption as a desirable option. For instance, one author notes that the preamble, discussing intercountry adoption as a potential advantage to an adoptee "is very significant and marks an important change by those who were responsible for the drafting of the Hague Convention."[124] In prior instruments on the subject of child placement, intercountry adoption was typically relegated to a level of desirability after foster care.[125] With the advent of the Hague Convention, adoption was placed at the forefront of options to be pursued. However, in drawing up the Hague Convention, members tried to make the document acceptable to the widest number of individual states, both member and non-member states.[126] As a result, the Hague Convention has left much of the substantive law of adoption to the individual states. For instance, it allows for some systems of adoption that do not terminate the biological parent's rights.[127] Subsequent guidelines also made clear that states can be a party to

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[121] *See* Van Loon, REPORT *supra* note 89, at 13.

[122] *See* HAGUE CONVENTION, *supra* note 6, art. 1.

[123] *Id*. In fact, inviting non-member states was one of the ways the Conference hoped to make the final document more harmonious.

[124] William L. Pierce, *Accreditation of Those who Arrange Adoptions Under the Hague Convention on Intercountry Adoption as a Means of Protecting, Through Private International Law, the Rights of Children*, 12 J. CONTEM. HEALTH L. & POL'Y 535, 538 (1996).

[125] *Id.*

[126] *See* Guide to Good Practice, *supra* note 53, at 8.

[127] *See* HAGUE CONVENTION, *supra* note 6 (recognizing that adoption can terminate the pre-existing relationship between the child and his biological parents "if the adoption has this effect in the Contracting State where it was made.") However, this is tempered by Art.27 which permits the adoption to terminate the parental rights if 1) the receiving State's law so permit and 2) the biological parents consent. *See also* discussion *infra* Part III.A.2.

the Hague Convention even if they do not allow intercountry adoption within its borders.[128]

Thus, many argue that the Hague Convention can be seen as a victory for intercountry adoption and leading scholars view the final draft as marking a definitive shift in favor of intercountry adoption.[129] However, a closer analysis of the document and an examination of subsequent statements by the Permanent Bureau (the institution responsible for overseeing the Hague Convention) show that calling the Hague Convention a victory for international adoption may be premature. At the least, it demonstrates that the position of countries regarding intercountry adoption is by no means a settled question.

A key concept debated during the Hague Conference was the idea of "subsidiarity."[130] Many of the drafters argued that intercountry adoption should be pursued only as a last resort, after acceptable options within the countries of origin failed.[131] What constituted "acceptable options" often reflected the state and the culture. Again and again, during the debates surrounding the drafting of the Convention, sending countries emphasized the idea that intercountry adoption must occur only after corresponding measures at home proved fruitless.[132] Another concept that concerned drafters was the idea that any instrument enacted should exclusively promote the interests of the child.[133] The parent-driven model was resoundingly condemned.[134] The Chairman of the Hague Conference on Intercountry

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[128] *See* Guide to Good Practice, *supra* note 53, at 64.

[129] Pierce, *supra* note 124, at 539. The author, one of the delegates to the Commission that was responsible for drafting the Convention, notes the specific shift in the language of adoption from the 1986 UN Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children with Special Reference to the Foster Placement and Adoption Nationally and Internationally (the "1986 Declaration") and the 1993 Hague Convention. As he states, "the 1993 Hague Convention speaks of finding 'a suitable family' whereas the 1986 Declaration speaks of caring for a child in 'any suitable manner.' In 1993, the position clearly favors suitable family care for children even if it is necessary to allow a child to leave its country of origin." Similarly, the shift is apparent when comparing the Convention to Convention on the Rights of the Child. *Id.*

[130] Van Loon, REPORT, *supra* note 89, at 55. For a discussion of subsidiarity generally, see INNOCENTI DIGEST, *supra* note 11, at 5.

[131] *See* Guide to Good Practice, *supra* note 53.

[132] *See* MINUTES OF THE HAGUE CONFERENCE 356 (Part of the working documents for the Hague Convention). A corollary issue emphasized by Columbia was the idea that intercountry adoption was being pursued because it was good for the child not because the State of origin could not take care of its own.

[133] *Id.*

[134] *See e.g.,* MINUTES OF THE HAGUE CONFERENCE 356 (where the Chairman "asked the delegates never to lose sight of the fact that the Convention is intended to give a family to a child and not a child to a family.").

Adoption reminded participants that the goal of intercountry adoption was to provide a child with a family, not a family with a child.[135] Subsequent statements by the Permanent Bureau emphasize both points, that intercountry adoption should be pursued only when suitable in-country options fail and that intercountry adoption should be done in a way that looks primarily at the interests of the child.[136]

C. *The Indian Child Welfare Act*

The Indian Child Welfare Act represents an aberration in an otherwise longstanding tradition in adoption law. Prior to its enactment, the standard for deciding adoption and child custody cases was solely based on a determination of the best interests of the child. This standard, first articulated by State ex rel Sparks v. Reeves,[137] was adopted universally through caselaw, statutes, and international instruments. At the time, advocates viewed the standard as the ideal solution for dealing with adoption issues. It offered enough flexibility for courts to consider a variety of factors particular to a given situation while recognizing that the primary goal was to serve the interests of the child. However, scholars began to point out that the best interests of the child standard seemed to promote underlying biases regarding race, gender, culture, and family.[138]

These biases were particularly apparent in the adoption of Native American[139] children. At the time of the ICWA's enactment, statistics revealed that white social workers had a strong bias against the Indian home environment. As a result, Native American children were one-third more likely to be removed from their family and adopted, almost without exception, into a white household.[140] Moreover, social workers gave subjective reasons, like neglect and abandonment, for the termination of parental rights.[141] These reasons were not easily quantifiable and subject to

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[135] *See* SPECIAL COMMISSION REPORT 243 (part of the working documents for the Hague Conference).

[136] *See* Guide to Good Practice, *supra* note 53.

[137] 97 So.2d 18, 20 (Fla. 1957).

[138] This manifested itself in a myriad of ways: for instance, the almost un-rebuttable presumption in child custody cases that the best interests of the child was with his mother, Hansen v. Hansen, 169N.W. 2d 12 (Minn. 1969); the view that the best interests of the child requires him to be placed in a heterosexual family, Lofton v. Secretary of Children and Family Services, 358 F. 3d. 804 (11th Cir. 2004); and a presumption that the best interests of the child was served by placing the child in a family that was racially homogeneous, In re Adoption/Guardianship No. 2633, 646 A. 2d. 1036 (Md. Ct. Sp. App. 1994).

[139] Given the title of the statute under discussion, this article will use the term Native American and Indian interchangeably.

[140] Prim, *supra* note 115, at 115.

[141] Jennifer Nutt Carleton, *The Indian Child Welfare Act: A Study in the Codification of the*

many biases, both conscious or unconscious.[142]

The ICWA has three main objectives: (1) to preserve the promotion of Indian families, their security, and stability; (2) to establish minimum guidelines for the removal of Indian children from their families; and (3) to establish welfare services to Indian communities for the operation of child services.[143] These objectives sought to establish guidelines and preferences if adoption became necessary, not to promote adoption of Indian children out of their homes.

Congress, in its findings, enumerated at the beginning of the legislation, recognized this bias by stating that, "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children by non-tribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions."[144] As a result, the legislature enacted a statute that provided for a revised best interest of the child standard.[145] This standard recognized Congress' duty "to protect the best interests of Indian children,"[146] by "promot[ing] the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from the families... which will reflect the unique values of Indian culture."[147]

III. A COMPARATIVE ANALYSIS OF THE AXES OF DEBATE

One of the issues highlighted previously is the intractability of the opposing positions on the issue of intercountry adoption. An examination of each side's position tends to show that the arguments fall along three axes of debate: issues of rights, culture and family. In taking a position either for or against intercountry adoption, each side, consciously or unconsciously, makes hierarchal preferences among the axes. This can have many permutations. For instance, many proponents of intercountry adoption tend to view the formation of a family as the primary importance. For other proponents, a child's right not to be institutionalized outweighs any other consideration. On the other end, opponents of intercountry adoption believe that a child's cultural identity outstrips his need for a family or that placing a child in a non-traditional family structure may be more important than the

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Ethnic Best Interests of the Child, 81 MARQ. L. REV. 21, 28 (1997).

[142] Prim, *supra* note 115, at 115.

[143] *Id.*

[144] ICWA § 1901.

[145] *Id.*

[146] *Id.*

[147] *Id.* at § 1902.

traditional paradigm of the nuclear family that informs intercountry adoption. As such, what has been missing from the debate so far has been an examination and deconstruction of these three axes: family, culture, and rights. By comparing how two major adoption laws deal with these axes of debate, we can develop a better understanding of whether the Hague Convention adequately accommodates the different choices made by each participant in intercountry adoption.

Both the ICWA and the Hague Convention provide guidelines on how to treat issues of family, culture, and rights. While both articulate a "best interests of the child" standard in the context of adoption, the interplay of the axes of debate within the context of that standard manifests itself in very different ways.[148] Clearly many of the axes intersect. For instance, transnational adoption typically involves the right of a sovereign sending state to terminate the cultural identity of a child in order to place him or her within that country's notion of a family. Comparing the ICWA to the Hague Convention can offer insight into the ability of the current legal framework to accommodate both sides to the intercountry adoption debate.

The ICWA's preamble makes it clear that the drafters intended to bring the issue of culture, family, and, to a lesser extent, rights to the forefront of the legislation. In contrast, the Hague Convention's treatment of family, culture, and rights is much more subtle. With the exception of the promulgation of the rights of the child (embodied in the "best interests" standard laid out in the preamble and restated throughout the document), the Hague Convention in fact has seemingly very little to say about its position on family or culture. However, a close examination of the language of the treaty shows the underlying assumptions present in the Hague Convention and offers a view of what an accommodating framework might look like.

A. Family

The debate on family can be examined in two ways. The first and most obvious construct regards the family structure. Is there a preference for a nuclear or expanded family? The second construct regards family creation. Is a family created biologically or through other means, like adoption)? Both the ICWA and the Hague Convention, whether explicitly or implicitly, provide some insight into how the idea of family is constructed and offer

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[148] Each side is using the best interest of the child as part of the debate on intercountry adoption. A full analysis of this standard is beyond the scope of this article but, at the least, it is important to say that the use of the best interest of the child standard on both sides of the adoption debate is either a reflection of its genius towards flexibility or its complete obsolescence to the current landscape of adoption. My personal view is that it is a red herring, bandied about far too often to be in anyway meaningful and distracting the players from the real issues surrounding intercountry adoption.

insight into what accommodations can be made on the subject.[149]Western concepts of family typically limit family structure and its role in child rearing to a nuclear family construct, barring exceptional circumstances.[150] Expansive child-rearing structures, where other family members have primary care giving responsibility to the child, are generally thought of as a failure in family structure. In contrast, many Eastern and African countries take a much more expansive view. The traditional saying "it takes a village to raise a child" models this expansive view of family structure and its role in child rearing. This has significant implications for intercountry adoption. It can influence when a child may legally be deemed an orphan. Furthermore, it impacts what family structure is viewed as failing a child, thus making him eligible for adoption.[151]

Similarly, in the United States and other Western countries, current adoption law is promulgated in favor of creating families that mimic a biologically based one.[152] This manifests in the preference for a two-parent household,[153] the practice of placing children with parents of similar physical characteristics,[154] and the issuance of a new birth certificate when the adoption is final.[155]

The idea of mimicking adoptions after biologically based family patterns has far reaching impacts on the adoption debate. It informs the issue of adoption by same sex couples, the termination of parental rights, the disclosure of identifying information of the adoptee, and even the nature of adoption itself.[156] Within the realm of intercountry adoption, this idea also

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[149] Some commentators suggest that, at least with ICWA, the idea of family can be delineated another way: The idea of a tribal nation as family. As one article notes "[t]he ICWA not only recognizes the interest of the tribe in the Indian child and vice versa, but from the perspective of U.S. adoption law it appears to grant a quasi-parental role to the tribe." *See* Pauline Turner Strong & Kortney Kloppe-Orton, What is an Indian Family? Kinship, Sovereignty and the Indian Child Welfare Act, at 4 (paper on file with author).

[150] *See* Alissa M. Wilson, *The Best Interests of Children in the Cultural Context of the Indian Child Welfare Act in In Re S.S. and R. S.*, 28 LOY. U. CHI. L. J. 839, 841 (1997).

[151] See discussion *infra* part III.A.1 on ICWA and family.

[152] BARTHOLET, *supra* note 17. Bartholet argues that this makes adoption legally sanctified discrimination. Bartholet notes that adoption is the last legal framework where preferences are made for adoptive parents with certain racial, marital status and sexual orientation preferences. As such, Bartholet argues that adoption turns the anti-discrimination laws on its head.

[153] BARTHOLET, *supra* note 17, at 70.

[154] *Id.* at 95. (For instance, matching children with blonde hair and blue eyes to parents who have those same physical traits).

[155] *Id.* at 54.

[156] For instance, traditionally adoption among European nations in the mid twentieth century reflected the notion that adoption was thought of as a 'rebirth' where all ties to the biological family would be terminated and the illusion was created that the adoptee was, in fact, born into that family. D. Marianne Brower Blair, *The Impact of Family Paradigms,*

impacts a number of issues. First, the Hague Convention attempts to standardize practices among divergent nations. The idea of what type of adoption would be sanctioned runs, implicitly or explicitly, throughout the debates over various provisions of the Convention.[157] More globally, because intercountry adoption often involves adoption outside of one's culture and race, the idea of mimicking family patterns after a typical biological family is becoming increasingly challenged.

For proponents of intercountry adoption the formation of a family—by any means necessary—is the primary goal in intercountry adoption. Proponents look at an adoptive family structure as one that has equal merit, and therefore should be afforded equal rights, as a biologically based structure.[158] Similarly, while proponents of intercountry adoption generally do not comment on their view of extended families versus nuclear families, it seems that their assumption falls towards believing in the superiority of the nuclear family. These advocates, primarily from developing countries, tend to view children with non-traditional family ties as abandoned, intead of examining whether other, more expansive caretaking roles are fulfilling the child's need for a family.[159]

Critics of intercountry adoption seem to manifest a preference for biologically based family formation. Generally speaking critics advocate for more stringent laws regarding terminating biological ties.[160] Critics also tend to recognize the value of non-traditional family structures such as expanded child rearing.[161]

There are, of course, exceptions. Some advocates for intercountry adoption may view expansive family structures as a benefit. However, this usually develops with a view toward making non-traditional family structures (such as single adults and domestic partners) more eligible to adopt, not in viewing these same structures as equally eligible to provide for a child as an alternative to adoption.

Domestic Constitutions, and International Conventions on Disclosure of an Adopted Person's Identities and Heritage: A Comparative Examination, 22 MICH. J. INT'L L. 587, 595 (2001). This was reflected in the issuance of new birth certificates and the pattern of matching parents with children who possessed similar biological features.

[157] For instance, each one of the above mentioned issues was discussed and debated during the Hague Conference. *See generally* MINUTES OF THE HAGUE CONFERENCE 356 (Part of the working documents for the Hague Convention).

[158] *See generally* BARTHOLET, *supra* note 17.

[159] *See, e.g.,* Van Loon, REPORT, *supra* note 89, at 43 (discussing the need to distinguish between children on the street and children of the street (those who maintain some family contact).

[160] *See* CAUGHT IN THE NET, *supra* note 30, at 55.

[161] *See* Wilson, *supra* note 150, at 841.

1. The Hague Convention and Family

The Hague Convention seems to punt on the concept of family within the confines of intercountry adoption; the relevant language, found in the preamble, obliges states to take "appropriate measures to enable the child to remain in the care of his or her family of origin."[162] The Convention however does not set out a definition of family. This could be a reflection of the varying viewpoint of states regarding what a family is and the inability among states to reach a consensus on the subject. However, members of the Convention cite this as one of the flaws of the document.[163] Interestingly, the Hague Convention did not explicitly charge countries to provide definitions regarding an acceptable family construct. Nonetheless, countries would apply the municipal law of that country for the definition of family and whether that would include a nuclear or expanded model.

While the Hague Convention is relatively silent on the concept of family, the document tends to show support for the conventional nuclear family structure. For instance, information is not taken on the prospective parents' extended family. Non-traditional family structures, such as the extended family participating in raising the child, are not factors that can be used by the prospective parent to bolster their claim that they are able to raise a child.[164] Instead, under home study models, only primary caregivers are analyzed and examined for proper suitability.[165] Similarly, the Hague Convention, grants parenting rights solely to the prospective guardian as legal parent. No ancillary rights are given to any other family member that may have helped raise the child.[166]

The Hague Convention seems to reflect both sides of the debate regarding the creation of the family and the preference for biologically formed families. In one sense, the Hague Convention seems to accord great weight to families formed under adoption. It makes clear that adopted children should have the same rights as children who are formed through more typical biological traditions. As such, it provides for equal protection of families formed by adoption and those created biologically. Moreover, this marks a change for some countries that did not accord adoptees the same legal rights for inheritance.

The preamble of the Hague Convention states:

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[162] HAGUE CONVENTION, *supra* note 6, pmbl.

[163] *See* INDIA'S REPLY TO QUESTIONNAIRE ON THE PRACTICAL OPERATION OF THE 1993 HAGUE CONVENTION ON PROTECTION OF CHILDREN AND COOPERATION IN RESPECT OF INTERCOUNTRY ADOPTION (2005), *available at* http://www.hcch.net.

[164] *See* HAGUE CONVENTION, *supra* note 6.

[165] *Id.*

[166] *Id.*

> recognizing that the child, for the full and harmonious development of his or her personality should grow up in a family environment... Recalling that each State should take, as a matter of priority appropriate measures to enable the child to remain in the care of his or family of origin, Recognizing that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her state of origin.[167]

Accordingly, the Hague Convention views families of origin as the most appropriate unit of care. However, culture is not mentioned as a defining aspect of the family. The Convention attempts to straddle the fence by discussing the necessity of maintaining an adoptee in a family of origin but not in staying in the country of origin. A number of alternative conclusions can be drawn from this position. First, the drafters gave deference to countries that valued culture, yet the drafters did so without contradicting the essence of the Convention's guidelines on intercountry adoptions. Second, one could argue that the Convention places a higher priority on family than culture. This conclusion conflicts with the high priority many countries place on culture and national identity. Third, the Convention's language gives a fluid concept to family and culture. Instead of viewing the values as either/or concepts, the Convention seems to view the idea of culture and family as intertwined concepts that can transcend geographic location.

2. The ICWA and Family

The ICWA discusses or references family throughout the statute.[168] The aim of the ICWA, as stated in its declaration of policy is not to promote adoption but rather to protect and preserve Indian families.[169] This has a significant impact on the tone of the statute. The ICWA sees adopting

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[167] *Id.* pmbl.

[168] The relevant sections of ICWA that touch on family or guardianship issues are: the Preamble and Congressional findings; §1902 (declaration of policy); § 1903 (definitions); § 1911 (state court proceedings); § 1912 (pending court proceedings); § 1913 (parental rights; voluntary termination); § 1914 (court petitions); §1915 (placement of Indian children); and § 1931 (grants for reservation programs).

[169] ICWA § 1902 states:

> The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes.

children out of Indian families as an obstacle to the preservation of Indian tribes. As such, the statute establishes rules that place structural obstacles and limits on the number of adoptions outside of the Indian family.[170] In the statute, the Indian tribe seems to play three roles: as a sovereign with exclusive jurisdiction over proceedings which involve their children; as a tribe with group rights that come from their position as a community; and in a familial role in its capacity as a preference category for custody of Indian children.[171]

The ICWA takes a clear stand on the concept of family, broadening its view of family from the typical Western nuclear concept. The drafters recognized that part of the justification for adopting children out of tribes was an argument of neglect.[172] Social workers viewed alternative family arrangements involving child rearing by extended family members or other members of the tribe as tantamount to "neglect" and thereby grounds for removal.[173] The drafters hoped to correct the biases displayed regarding preferences for a nuclear family arrangement to child rearing. As a result, the statute outlines three alternative groups (besides parents) that could take part in the child rearing of the Indian child: an "Indian custodian,"[174] an extended family member, or the Indian child's tribe.[175] The idea of the extended family permeates all of the ICWA. It extends not just to preferences for an Indian child to be adopted within the tribe but also is apparent in the expansive notice requirements for Indian custodians and the tribe.[176] In fact, hearings leading up to the enactment recognized that, (as one article notes):

> the Indian notion of family can extend to cover 'scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family,' and that under this caregiving pattern it is considered normal and acceptable to leave a child with any of these family members. Congress made clear that in giving the tribes jurisdiction of many child welfare

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[170] ICWA § 1915.

[171] *See* ICWA § 1911 (establishing exclusive jurisdiction); ICWA § 1901 (recognizing the special place of Indian tribes as a commubity) and; ICWA § 1915; (providing for the tribe as one of the adoptive placements)

[172] *See* Wilson, *supra* note 150, at 831.

[173] *Id.*

[174] According to the statute, an Indian custodian "means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child." ICWA §1903.

[175] ICWA §1913.

[176] ICWA §1912.

> cases, and in providing 'minimum federal standards and procedural safeguards' in custody cases involving Indian children that are heard in state courts, it intended to prevent situations where a social worker or judge sought to terminate the parents' rights simply because that official was unfamiliar with or unwilling to accept these caregiving arrangements.[177]

While the ICWA contradicts traditional notions of family structure, it does not completely shun traditional notions on the creation of a family. For instance, traditional views consider adoption as the less desirable preference for forming a family.[178] Adherents to these traditional views regard bloodlines as particularly significant in determining what constitutes a family.[179] Scholars argue that there is a fundamental preference in our culture for designs of family that are formed around bloodlines.[180] The ICWA also reflects this view of family.[181]

The idea of bloodlines determining family is a very strong current that runs through many Native American cultures.[182] As such, the ICWA manifests an idea of biologism—a preference for families based on bloodlines. The ICWA recognizes that tribes have different definitions of what makes a child Indian.[183] Some commentators argue that the concept of some tribes rejecting conventional definitions of identity through blood marks a rejection of biologism.[184] Yet, in fact, this reinforces that bloodlines are important, albeit under expanded definitions. All of the tribes seem to base at least some aspect of membership on Indian ancestry and bloodlines. Therefore, expanding the definition of an Indian child to include a child who is only "1/16" Indian blood is not a rejection of bloodlines as the basis for family, but rather a view taken by the tribe that their bloodlines are so much a part of the concept of family that it still forms the basis of attachment, even

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[177] *See* Strong & Kloppe-Orton, *supra* note 149, at 6.

[178] This is not a particularly Western notion. For instance, in Marshallese culture the biological lines of family are so strong that the idea that a law can decide that a biological mother is no longer part of her child's family and terminate her rights, is offensive and does not exist under Marshallese law. *See* Jini L. Roby, *Understanding Sending Country's Traditions and Policies in International Adoptions: Avoiding Legal and Cultural Pitfalls*, 6 J. L. & FAM. STUD. 303, 303, 310-11 (2004).

[179] Christine Bakeis, *The Indian Child Welfare Act of 1978: Violating Personal Rights for the Sake of the Tribe*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 543, 576 (1996).

[180] *Id.*

[181] *Id.*

[182] *See* Wan, *supra* note 113, at 65.

[183] Bakeis, *supra* note 179, at 576. For instance, some tribes consider one to be an Indian child even if the child is only 1/16th Indian. Others will reject you under this standard. *Id*.

[184] *Id.*

when it has been diluted by other intermingling genes.[185]

B. Culture

The intercountry adoption debate is suffused with the concept of culture, on both an individual and a societal level. Individually, critics of intercountry adoption believe that the loss of a child's cultural heritage (which inevitably occurs during intercountry adoption) leads to the loss of the child's identity.[186] As such, the cultural component, at a minimum, must play a role in evaluating the best interests of the child. In some instances, the threat of loss of cultural heritage can be enough to proscribe intercountry adoption altogether. Proponents in the debate meanwhile argue that a child's culture is insignificant at a young age and that there are little variations in the psychological development of children.[187]

Many in favor of intercountry adoption believe that it is important to expose the child to the cultural aspects of the place of his or her birth.[188] But what does that mean exactly? Since the child will have moved to a new country, the parent inevitably exposes the child to these cultural aspects through a Western perspective. Moreover, while some believe that the adopted child's cultural background should be developed, they contend exposure must be done in small doses.[189] Anything more is thought to confuse the child.[190] For instance, Myra Alperson, an adoptive mother, offers this advice:

> Don't confuse your child! Be who you are: the child's parent and role model. You (parent and child) are now part of a special unique family. Don't deny your culture and don't deny his or hers. Celebrate who you each are.
>
> During my home study interview, when I had decided to adopt from China, I was asked what my thoughts were about how I would raise my child. "Well," I said, "I live near a university that has a large East Asian studies program, and I'm thinking of

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[185] In many ways this is similar to views of race that was historically held throughout the South. Often referred to as the "one drop rule," these laws provided that you were still considered black even if you displayed exclusively Caucasian features if you were found to have any "Negroid" ancestry in your bloodline. Sharona Hoffman, *Racially Tailored Medicine Unraveled*, 55 AM. U. L. REV. 395, 416 n. 140 (2005).

[186] Antonio Buti, The Australian 'Stolen Generations' and Reparations, paper presented at the University of Texas Law School, Mar. 2006, p.6 (paper on file with author).

[187] *See* Dillon, *supra* note 7.

[188] BARTHOLET, *supra* note 17, at 106

[189] ALPERSON, *supra* note 58, at 114.

[190] *Id.*

> looking for a baby-sitter who is from China or someone who speaks Chinese who can raise my child to know about Chinese things." My social worker said this was absolutely the wrong way to choose a baby-sitter. Above all, she said, I needed to find someone who loved children and was experienced with them. The cultural emphasis might be confusing — to me and the child.[191]

Alperson credits this as "one of the best pieces of advice I got" and agrees with the implicit message from the social worker that too much cultural emphasis may make her child feel "that her loyalties must be divided."[192] This conversation mirrors many of the biases that played out within the Indian Child Welfare Act. While on the surface it may look as if the debate focuses on the child, there is an underlying presumption that the caregiver cannot serve the dual functions of exposing the child to her native culture while loving and caring for the child.

Societally, culture and cultural exploitation underlies many of the pros and cons on intercountry adoption. There is much acrimony inherent in the process because of the cultural differences between sending and receiving countries and the historical involvement of receiving countries in the domination and exploitation of sending countries. As such, evaluating legal instruments to determine their treatment of culture is crucial to advancing the debate.

1. The Hague Convention and Culture

The Hague Convention gives short shrift to the concept of culture. Buried in Article 16, the Convention sets forth the criteria for determining whether a child is 'adoptable.'[193] It states that "due consideration" should be given to the child's "ethnic, religious and cultural background."[194] Indeed, the Hague Convention itself would seem to suggest that the drafters simply did not believe cultural consideration were a significant factor.

While debating the issues on intercountry adoption, the drafters recognized the need to discuss the impact of the child's cultural identity on the adoption process.[195] However, the focus of such information seemed to be on cultural identity as a source of data rather than cultural identity as a source of identity in and of itself. This focus on the culture of the child

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[191] *Id.*

[192] *Id.*

[193] HAGUE CONVENTION, *supra* note 6, art. 16

[194] *Id.* The wording of the Convention is such that it seems to place ethnicity, religion and culture together under one general factor of consideration.

[195] *See generally* MINUTES OF THE HAGUE CONFERENCE .

dismisses the importance of culture as a defining formative part of a child's identity, whether known or not, and instead tends to treat it as a series of facts akin to genealogical or medical history.[196]

Other provisions in the document reinforce the diminished importance of culture. For instance, Article 21 of the Hague Convention requires a number of actions when an adoption is deemed a failure, i.e., not in the best interests of the child. These include: placing the child in temporary care; arranging for another adoption; or placing the child in alternative long-term care.[197] The convention explicitly considers returning the child to its original country as a "last resort" option.[198] The reluctance to return the child to the place of his cultural origin seems to suggest that culture is not a weighty matter of consideration.

More subtly, the Hague Convention seems to give deference to Western concepts of culture, often choosing Western standards on adoption matters. When cultural norms and concerns are not at odds with westernized notions of family, then the Hague Convention addresses these issues. For instance, many nations have differing views on the effect of adoption. Some countries maintain that it is culturally acceptable to prevent an adopted child from inheriting property.[199] These same countries were concerned that a child would not enjoy the same inheritance rights if adopted internationally. Parts of the Hague Convention address this concern by granting full inheritance rights to an adopted child.[200]

However, the Hague Convention follows Western norms when the cultural norms of the sending country are at odds with these Western norms. This is evident in what the Hague Convention considers a legally binding adoption. For instance, in Western cultures, adoption is not just the placement of children in a new prospective home, but also the termination of parental rights by the biological parents.[201] In contrast, other non-Western

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[196] Of course, this then leads to the debate on whether or not a culture is truly yours and is part of your formation if you do not know that this culture exists. In other words does culture stand on its own as part of an individual's identity (as self-actualization) or does it needs to be acknowledged to become a part of that? For information on the drafters' intent see Van Loon, REPORT, *supra* note 89, at 99.

[197] HAGUE CONVENTION, *supra* note 6, art. 21.

[198] *Id.*

[199] Van Loon, REPORT, *supra* note 89, at 61

[200] Roby, *supra* note 178, at 320.

[201] *See* Hague Conference on Private International Law, Conclusions and Recommendations of the Second Meeting of the Special Commission on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (September 2005), *available at* http://www.hcch.net/upload/wop/concl33sc05_e.pdf. (hereinafter Special Commission Report).

states have a more fluid notion of adoption: rather than a choice of one family over the other, adoption represents a cooperative effort whereby both families are involved in the care of the children.[202] Nonetheless, the Hague Convention, while allowing some national divergence, primarily tracks the Westernized version.[203]

In addition, the Hague Convention is distinctive for what it does not say on culture. In both the ICWA and the CRC, the child's cultural identity is seen as an integral consideration that should be embraced explicitly.[204] In contrast, the Hague Convention does not reflect the right of a child to maintain cultural and national ties.[205]

Given the permanency of adoption and the difficulty of overseeing how a child is maintaining ties to his cultural heritage, this may have very little practical effect. However, making such an aspirational declaration would demonstrate the Convention's commitment to maintaining cultural ties with the child's country of origin. As one author notes, "the uniform standards [of the Hague Convention] cannot take into account cultural differences in what is viewed to be 'in the best interests of the child.'"[206]

Subsequent developments appear to be more flexible on the issue of culture. For instance, in their Guide to Good Practice, the Permanent Bureau acknowledges that a state may only want to engage in intercountry adoption with states that share close cultural ties or a common language.[207] This seems to reflect a growing consensus on the importance of considering culture in intercountry adoption. The Permanent Bureau notes, "[p]ost-adoption services should also include measures to assist adopted children preserve their cultural links with their country of origin, and assist adoptive parents to recognise the value and importance of such links for the child's future development."[208]

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[202] *See, e.g.,* Roby, *supra* note 178, at 304 (discussing how, "in Marshallese culture adoption only bridged two families together to bring up children.").

[203] *See* HAGUE CONVENTION, *supra* note 6, art. 26. (While the Hague Convention allows for national regimes where biological parents can maintain some rights, it also has an override provision where those rights can be terminated if the receiving (read Western) country allows it and if the biological parents consent to it). *See also Id*. at 27.

[204] ICWA §1902; CRC Art. 29.

[205] *See generally* HAGUE CONVENTION, *supra* note 6. *See also* Alice Hearst, *Book Review Essay*, 36 LAW & SOC'Y REV. 489, 491 (2002)(discussing the international instruments that proclaim a child's heritage as a type of right that needs to be preserved).

[206] Wallace, *supra* note 50, at 720.

[207] Guide to Good Practice, *supra* note 53, at 64.

[208] *Id.* at 82.

2. The ICWA and Culture

The ICWA explicitly embraces culture. It is embodied within the "best interests of the child" [209] standard and in the concept of family. In fact, the ICWA clearly links family and culture by ascribing special rights and privileges to an Indian custodian.[210] Moreover, the ICWA is unique in that it demonstrates a clear hierarchal preference for preserving Indian culture, sometimes over traditional Westernized notions of family. In that regard, the ICWA embodies the philosophical stance that the way to preserve Indian culture is through maintaining Indian children within their cultural unit.

The ICWA is much more explicit in its cultural preferences than the Hague Convention. In taking such a strong stance culturally, the ICWA is admittedly establishing other interests that should also be taken into account, most notably, "the continued existence and integrity of Indian tribes."[211] Presumably, the cultural identity of Indian tribes and the impact of a child's cultural identity are inextricably linked. As such, there is a mutually reinforcing benefit in establishing a child's home within his culture, even in a non-traditional family setting. The drafters of the ICWA seemed consistent in their approach to the preservation of Indian families as the preservation of Indian culture. For instance, Section 1931 of the statute provides for grants to be used for reservation programs. However, the ICWA stipulates that preventing the break up of Indian families is a key objective, accomplished by insuring that the removal of a child from the custody of his parent or Indian custodian shall be a measure of last resort.[212]

The ICWA's adoption preferences also show this deference to culture. In establishing criteria for adoption out of the tribe, the ICWA establishes a clear preference for placement inside, rather than placement outside, of the tribe.[213] The order of preference begins with a member of the child's extended family, then another member of the child's tribe, and finally other Indian families (presumably outside of the child's particular tribe).[214] In doing so, the ICWA again makes explicit within the framework of its statute

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[209] It seems that many of the problems associated with intercountry adoption occur when the concept of the best interests of the child is taken out of its cultural and regional understanding and applied in a seemingly neutral way but one instead that is filled with territorial and Westernized biases. In an historical moment of clarity Congress understood this dilemma and created ICWA. ICWA has many flaws, but one of its greatest achievements is that it understood the tension between the pronounced standard and the differing concepts of tribal and cultural interests.

[210] A non-Native custodian does not have similar rights.

[211] ICWA § 1902.

[212] *Id.* § 1915

[213] *Id.*

[214] *Id.*

that cultural preferences need to be upheld.[215] In enacting its three-tiered system of preference, the drafters of the ICWA also seemed to demonstrate a view of Native American tribes as having a certain amount of shared cultural attributes whereby adoption into other Native American tribes would be preferable to adoption in the dominant culture.

The deference to culture can also be seen in less obvious ways in the ICWA. For instance, when discussing the consent needed for the termination of parental rights, the ICWA provides that an explanation of the consent requirement must be explained either in English or in a language that the parent or Indian custodian understands.[216] This can be seen as a great facilitator to the concept of culture since much of what is important for a culture is lost when translated into language of the dominant culture.[217]

C. Rights

Two separate concepts of rights that implicate the intercountry adoption debate will be examined. First, what happens when the rights of the child compete with the rights of others[218] in the intercountry adoption process? Second, what type of rights is a child entitled to within the context of intercountry adoption?

The concept of rights, particularly with regard to children, developed only recently.[219] During the twentieth century, the rights of the child went beyond the traditional notion of protecting children (which in itself only began after the industrial revolution)[220] to the idea of protecting their liberty. This included giving children a voice within a legal framework.[221] Concomitantly with this rise in the rights of the child was the recognition of the rights of individuals generally, sometimes to the derogation of the rights of the nation. Some of these rights include the right of protection from sexual exploitation and abuse ("protectionist rights") as well as the right to a

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215 It is interesting to note that this constricted view of preferences could have been handled another way. For instance, in setting up hierarchies for foster care, a similar hierarchy is established that gives preference to in-tribe options. However, in this instance the tribe was given deference to establish another system of preference. One wonders why similar flexibility was not given within the context of adoption.

216 ICWA § 1913.

217 *Cf.*, CRC *supra* note 76, at art. 29 (discussing the importance of language and culture of the child).

218 There are many "others" whose interests can compete with the child; this article will examine the rights of the parent, the rights of the family (as a distinct unit) and the rights of a nation.

219 LINDA MALONE, INTERNATIONAL HUMAN RIGHTS 17 (2003).

220 David William Archard, Children and Rights, *available at* http://plato.stanford.edu/entries/rights-children#2 (last visited on Nov. 17, 2005).

221 *Id.*

language and a national identity ("liberty rights").[222] More specifically and more controversial is the notion that a child has a right to a family.

Often times there are competing interests that occur when the rights of an individual are pitted against others, including when the rights of a child compete with the rights of a parent, a family, or a nation.[223] For example, under Article 7(1) of the CRC, a child has the right to know her parents.[224] However, that right is typically considered against the right of the child's biological parents to keep their identity confidential from the child they relinquished for adoption.[225]

This notion of competing rights (particularly between a parent and a child) is one of the more controversial aspects of the debate regarding children in a legal framework. In fact, one of the main arguments advanced for why the United States is one of two states not a party to the Convention on the Rights of the Child is the treaty's potential for the empowerment of children over their parents.[226] Domestic debate on U.S. ratification on the CRC included those critics who claimed that passage of the treaty in the United States would prevent parents from disciplining their children and result in a prohibition on home schooling.[227]

More recently, the competing interests component of the rights debate has been explored within the context of intercountry adoption. Critics of intercountry adoption claim that current models of intercountry adoption provide that the rights of the parent take precedence over the rights of the child.[228] On the other hand, proponents of intercountry adoption contend that promoting the rights of the parent will ipso facto promote the rights of the child.[229]

The type of children's rights emphasized in the intercountry adoption debate often depends on what side you choose. For instance, proponents of intercountry adoption claim that they are promoting the child's protectionist

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[222] *See generally* CRC.

[223] For instance, the debate on whether adoption should be parent driven or child driven is simply another way of framing whose rights should be paramount within the context of adoption, the parent's or the child.

[224] CRC, art. 7(1).

[225] Guide to Good Practice, *supra* note 53, at 80.

[226] *See, e.g.*, Christopher Klicka, The UN Convention on the Rights of the Child: The Most Dangerous Attack on Parents' Rights in the History of the United States, *available at* http://www.hslda.org/docs/nche/000000/00000020.asp.

[227] *Id.* (stating "[t]his Treaty will essentially outlaw spanking").

[228] *See* discussion *supra* Part I.B.2.

[229] *See, e.g.*, Note, Donovan Steltzner, *Intercountry Adoption; Towards a Regime that Recognizes the "Best Interests" of Adoptive Parents*, 35 CASE W. RES. J. INT'L L. 113, 115 (stating that the best interests of the child and their adoptive parents "while seemingly in conflict, are, at their roots, inseparable.")

right, namely his right to a family.[230] In contrast, critics tend to emphasize the child's liberty rights, namely the child's right to know his cultural and national identity, something that critics claim is stripped by the process of intercountry adoption.[231] The Hague Convention and the ICWA encompass both aspects of the rights debate, however the Hague Convention seems to emphasize the rights of the child while the ICWA seems to promote group rights.

1. The Hague Convention and Rights

The Hague Convention follows the model of many human rights treaties in how it examines the state's obligations towards individual rights. For instance, there is very little discussion of states' rights set forth in the document; reference to state behavior is done mainly within the context of the duty the state owes to a child.[232] This is seen in the obligation enumerated in the Hague Convention to ensure that intercountry adoptions are made in the best interests of the child.[233] However, other provisions of the Hague Convention may dilute the strong protectionist rhetoric of the preamble. Article 4 of the Hague Convention provides for intercountry adoption only after the state of origin has determined that in-country possibilities were exhausted (which are not exclusively linked to family placement).[234] In doing so, the Hague Convention does not seem to apply until the full consideration of in-country options takes place. This places the rights of the group (namely the state) over the rights of the child for those who believe that in-country placement does not serve the child's best interest.

In addition, subsequent statements by the Permanent Bureau may also dilute the individual child's right, particularly for those who view that a child has an unconditional right to a family.[235] Under the Permanent Bureau's stance, even if a country is a signatory to the Hague Convention,

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[230] *See* Dillon, *supra* note 7. This claim can also be framed as a child's right to be free from abuse or sexual exploitation, something proponents often claim the child would more likely face without the benefits of intercountry adoption. *Id*. (claiming that the notion that intercountry adoption saves children is fairly accurate).

[231] *See, e.g.,* Van Loon, REPORT, *supra* note 89, at 47 (discussing the challenges of intercountry adoption from a cultural perspective).

[232] *See, e.g.*, HAGUE CONVENTION, *supra* note 6, art. 6 (discussing obligation to designate a Central Authority to monitor the intercountry adoption process); *id*. at art. 18 (requiring that states take "all necessary steps" to obtain from the child permission to leave the country).

[233] *Id.* pmbl.

[234] *Id.* art. 4.

[235] Guide to Good Practice, *supra* note 53, at 66.

that state does not, in fact, need to participate in intercountry adoption.[236] The Permanent Bureau's position is that a country placing a moratorium (definite or indefinite) on intercountry adoption is not inconsistent with the provisions of the Convention.[237] The Permanent Bureau further states:

When implementing changes [to a country's adoption system], the use of interim measures should be considered, to allow children in need of permanent placement to find such a placement in a child-friendly time frame, especially where arrangements for the placements have already begun. Otherwise, children who are currently in institutions and in immediate need of a family may unfortunately remain there for years unless they are placed in permanent families through intercountry adoption. Thus the absence of a national adoption system does not preclude intercountry adoption, though it is clearly preferable for national adoption to be viable in States Party to the Convention.[238]

The Hague Convention enshrines both protectionist and liberty rights for the child. The protectionist rights are obvious; from the beginning, the Hague Convention provides for the best interests of the child and develops mechanisms that will help maintain those interests. For instance, since implementation of the Hague Convention, periodic special commissions monitor and implement the provisions of the Convention.[239] Most recently, delegates published its conclusions and recommendations in September 2005.[240] Among the recommendations approved by the Special Commission are those that emphasized the need for cooperation and communication among states of origin and receiving states.[241] Specifically, the recommendations encourage states to communicate regarding potential adoptees to better understand the needs of children in States of origin.[242] In addition, the Special Commission encourages states to avoid unnecessary delays that may keep a child from finding a permanent family home.[243]

In addition, as part of the process of intercountry adoption, the Permanent Bureau noted that the process of matching children with suitable parents should have the best interest of the child in mind. Professionals should conduct the matching and not the parents themselves. The Bureau notes, "[p]arents should not visit an institution to pick out an appealing child or choose a child from photo lists. Matching should not be done by

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[236] *Id.*

[237] *Id.*

[238] *Id.* at 45.

[239] SPECIAL COMMISSION REPORT, *supra* note 135.

[240] *Id.*

[241] *Id.* at 5.

[242] *Id.* at 18.

[243] *Id.*

computer."[244] These two subsequent guidelines expand on the protectionist rights that the Convention committed itself to with the propagation of the best interest of the child standards.

More atypical are the liberty rights also enshrined in the Hague Convention. Article 4(d) lays out the consideration that must be given to the child within the context of adoption. Among the rights given to the child (where appropriate) is his or her right to consent to the adoption.[245] This shows the respect given by the drafters to the Convention towards the child and his ability to participate in his adoption and his fate. It further recognizes that there are some instances where his consent may, in fact, be required. Specifically, the Hague Convention requires the following: (1) counseling and information be given to the child; (2) consideration being given to the child's "wishes and opinions;" and (3) uncoerced, uninduced, and documented legal consent (where consent is required).[246] The Hague Convention also has a provision on the confidentiality relating to the parent's identity, which some may argue puts parental interests over the rights of the child.[247] In reflecting the issues of a child's right to an identity, members of the special commission re-emphasized the need to embody that right. Recommendation number 17 encourages receiving states to automatically grant adoptees nationality from one of the parents, without any action on the part of the parent.[248]

2. The ICWA and Rights

The ICWA, in contrast to the Hague Convention, embodies protectionist rights to a much lesser extent. The interests of the child, while potentially one factor in a laundry list of considerations determining the child's best interests, are not key to the completion of the adoption. Moreover, any consideration that is given to the child's protection rights is inextricably tied to the rights of the group (namely the Indian family) and notions of culture.[249]

The ICWA's surrounding framework and its treatment of other aspects of rights would seem to suggest that a child does not have a fundamental right to be adopted—at least under American definitions of adoption. Instead, group rights, the rights of the tribe, and other Indian families would seem to take precedence over the rights of the child. For instance, the

[244] *See* Guide to Good Practice, *supra* note 53, at 17.
[245] HAGUE CONVENTION, *supra* note 6, art. 4(d).
[246] HAGUE CONVENTION, *supra* note 6, art. 4.
[247] HAGUE CONVENTION, *supra* note 6, art. 16.
[248] SPECIAL COMMISSION REPORT, *supra* note 135, at 6.
[249] ICWA § 1902.

ICWA would seem to imply that it is preferable for an Indian child to live within the tribe, in legally defined foster care, rather than to have him or her adopted by a non-native family.[250]

In addition, the ICWA does not envision a scenario where the child's consent would be key to the adoption process. Instead, the hierarchy places the rights of the group (the tribe) over the rights of the individual child.[251] This demonstrates less of a willingness than in the Hague Convention to accord individualized liberty rights to the child (by allowing each individual child to participate in the process, to the extent possible, through giving or withholding his consent to the adoption). The ICWA does succeed over the Hague Convention in according the child the right of cultural identity, a liberty right that critics believe is lacking in the intercountry adoption framework.

IV. A NEW PARADIGM

A. A General Analysis

There are practical implications to changing the debate on intercountry adoption from "good or bad" to "what is important to you?" This new paradigm would allow both prospective parents and countries to work within the same legal framework while simultaneously allowing each "side" to hold on to their respective beliefs. For instance, those advocates who believe that culture is paramount would look to certain portions of the legal instrument. Proponents of a rights based regime would look to other provisions. This would offer enormous flexibility, with a system where what's important to each side matches what is important to the sending country.[252] Moreover, international law provides a unique opportunity for the development of such a framework. Unlike typical national models for law making, international law generally exists in a more egalitarian arena where laws are created by agreement in a bilateral or multilateral framework, not imposed top down by

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[250] ICWA § 1918.

[251] *See, e.g.,* ICWA § 1902 (discussing the rights of the Indian tribe to preserve their culture by maintaining children within their borders).

[252] The Hague Convention, as a treaty, is a multilateral agreement between states. However, because it involves a subject of private law, the choices to be made regarding what type of an adoption is desirable essentially involves choices between prospective parents and countries of origin. Countries of origin stand in the place of the biological parents and, as such, must establish what it believes to be important for that family as a unit. In contrast, a separate agency can be established to act as a representative of the child as a means of acting solely on behalf of the child's interest, without considering the competing interests of the other parties.

a sovereign with the capacity to coerce.[253] As such, success requires a model of consensus and not coercion. Moreover, this new paradigm should apply a value neutral framework to accommodate the various preferences that the nations have to the issues at hand. That way, it can provide for the maximum amount of participation while still allowing for the particular goals of a country. Likewise, parents who operate under this model can look to the individual state and their laws to see which model best suits their needs. In that way an effective matching of individual values can occur. Older children as well can participate in the process, by using their individualized preferences on issues such as culture, family, and rights to decide their future.

Unfortunately, no framework yet conceived can fashion a way for infants or small children to participate meaningfully in this process. As such, the country of origin must stand in as proxy for its own interests and values as well as for those of the small child. One potential solution would be to appoint accrediting agencies as representatives for small children. The agency would make determinations based on the its professional judgment of what would work best for the child within the dynamics of culture, rights, and family. However, this approach will be successful only if the agency is truly independent from the country of origin's own hierarchal preferences, allowing it to voice the position of the child and the child alone. Nonetheless, this too is limited at best. There is no meaningful way to allow a small child or infant to understand the decisions based on the various paradigms, much less voice their opinion.[254]

B. Considering the Hague Convention within the New Paradigm

To date, most commentators evaluate the Hague Convention in the wrong light. Instead of evaluating it from the point of view of whether or not it helps or hinders intercountry adoption, we should evaluate it from the point of view of whether or not it accommodates all the hierarchal preferences. Seen in this light, many aspects of the Convention considered weak, such as a lack of definitions on key concepts, can instead be seen as expanding the relative options for all players in the intercountry adoption debate. For instance, in the typical paradigm a significant shortfall in the document is its lack of definition for family. In contrast, in an accommodating framework the Convention's terseness allows different visions on the rights of biological parents, leaving the door open for

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[253] *See* Cynthia Price Cohen, *The Developing Jurisprudence of the Rights of the Child*, 6 ST. THOMAS L. REV. 1, 92 (1993).

[254] *See* Archard, *supra* note 220 (providing a general discussion on the dilemma on meaningfully translating the rights of small children).

divergent ideas on family creation.

However, the Convention could have gone further. By failing to explicitly provide a role in the child rearing process for anyone other than the child's parents, the Hague Conference missed a crucial opportunity to validate other formations of family that have an impact on the child's development. In this sense, the ICWA model appears to provide a more accommodating framework that would allow for those roles which are outside of the strict definition of parent but which nonetheless impact the child's custody status.

The Convention's silence on issues of culture has a much more detrimental effect in providing an accommodating framework. The document itself is deficient; its slight mention of culture is not enough. In that sense, the ICWA's explicit treatment of culture provides more fodder. However, explicit endorsement of culture allows little room to accommodate other viewpoints on the subject. Therefore, the ICWA's language on this axis, while better than the Hague Convention's, is still problematic for accommodating both sides of the debate. Instead, the Permanent Bureau's subsequent treatment of culture may provide the best alternative for accommodating both sides of the debate. Its recognition of placing a child within a country of shared culture and language may counteract some of the Westernized notions of culture suffused throughout the Hague Convention.

As for rights, the Convention manages to embody the protectionist rights afforded to children under the CRC. Moreover, allowing for the child to contribute to the determination of his placement to the extent possible is a key victory for the accommodating framework. It allows the child himself to maintain an individual voice without letting that voice overwhelm the process entirely. In this regard, the Hague Convention offers a superior alternative to the ICWA, which seems to have explicitly endorsed the rights of the group over the rights of the individual.

One important development that the Permanent Bureau highlighted was that states ratifying the Convention are not bound to engage in intercountry adoption.[255] As the Permanent Bureau noted "[r]atification/accession does not imply commitment to a particular level of involvement in intercountry adoption in the sense of an obligation to supply or receive a minimum number of children through intercountry adoption."[256] Rather, if the contracting state does decide that intercountry adoption is appropriate, then they will follow the procedures of the Convention. This allows states to choose how to engage in the debate on their terms.

Perhaps the Convention's greatest victory for the accommodating

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[255] *Id.* at 64.
[256] *Id.*

framework is in its constant deferral to contracting states. Within the document, provisions are derogated by consideration of the laws of the individual laws of the states.[257] In other sections, the document is silent on the implementation of the Convention's goal. This provides further deference to states in enacting laws that appropriately reflect their circumstance. Finally, the Convention's silence on many of these provisions allow leeway for subsequent guidelines, giving greater flexibility in responding to needs in the debate as they arise.

CONCLUSION

The Hague Convention may offer the best framework for accommodating the various positions along the intercountry adoption spectrum. It allows sufficient flexibility within its model for those countries who wish to engage in intercountry adoption and does not constrict those countries that do not. Moreover, it defers to individual states on key issues along the axes of family, culture, and rights. This allows States to adjust their national policies within this framework to suit their needs. This national divergence in turn provides variety for those parents who have varying needs, such as those who view their rights as paramount.

Of course, the system is not perfect. There are failings. For instance, the Hague Convention's treatment of culture imposes a hierarchy that places the child's right to a family over his right to cultural identity rather than embracing an accommodating preference. In this regard, the Hague Convention could benefit from the spirit of the ICWA, although the language from the statute itself may be too explicit.

The most effective way to change the system is through subsequent guidelines that take into consideration the dynamics occurring within the intercountry adoption debate and adjusts accordingly. As such, the current pronouncements by the Permanent Bureau give hope. Its pronouncements on key issues along the axes debate demonstrate its ability to respond quickly and with sensitivity to the sides of the debate. It may provide the best solution to preventing any side in the intercountry adoption debate from becoming intractable in their position.

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[257] *See, e.g.*, art. 16 (requiring that the state of origin be satisfied that the child is adoptable) and arts. 26 & 27 (allowing for different municipal laws regarding biological parents).