

**MEMORANDUM PRESENTED BY THE
CENTER FOR ADOPTION POLICY STUDIES¹**

**Resolving conflicts between the UN Convention on the Rights of the
Child and the Hague Convention on Intercountry Adoption**

Question Presented

How must countries who have ratified both the UN Convention on the Rights of the Child and the Hague Convention on Intercountry Adoption resolve the conflicting principles between the two treaties, and what priority may be assigned to intercountry adoption as compared to intracountry foster and institutional care?

Answer

The drafters of the Hague Convention on Intercountry Adoption (Hague Convention) describe it as a practical delineation of the principles set forth in the UN Convention on the Rights of the Child (UN Convention), which contained no mechanism itself for promulgating and enforcing a specific intercountry adoption policy.² While the

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² See Rebecca Rios-Kohn, *The Convention on the Rights of the Child: Progress and Challenges*, 5 GEO. J. FIGHTING POVERTY 139, 155-156 (Summer 1998). See also Kimberly A. Chadwick, *The Politics and Economics of Intercountry Adoption in Eastern Europe* *J. Int'l Legal Stud.* 113 (Winter 1999), *passim*.

UN Convention subordinates intercountry adoption to intracountry foster care and the Hague Convention prioritizes permanent family relationships to intracountry foster or institutional care, countries that have ratified both conventions seemingly ignore the issue entirely when implementing their intercountry adoption policies.³ In international law, although intracountry foster care may remain preferable in principle, issues of feasibility and legal finality have subordinated this alternative in practice. It may also be argued that the lower priority assigned to intercountry adoption in the UN Convention was the result of the dispersed and unregulated international adoption system particularly addressed by the Hague Convention, thereby allowing intercountry adoption to become a more palatable alternative for children in need of permanent family care. Furthermore, even if intracountry alternatives are explicitly (UN Convention) or implicitly (Hague Convention) favored, neither convention calls for the creation of such favored alternatives if they are not currently available within a sending country.

Analysis

Many countries have ratified both the UN Convention and the Hague Convention, but little has been done to address a significant divergence between the two conventions: Article 21 subsection (d) of the UN Convention describes the role of intercountry

³ For example, adoption laws in most European Countries, including the receiving countries of UK, Ireland, and Spain as well as sending countries in South America who also fall under the multilateral agreements of the Organization of American States, do not mention of the intracountry foster care alternative when discussing which children are eligible for adoption, even though all have ratified the UN Convention.

adoption as subsidiary to both adoption and foster care within a child's country of origin⁴ while the Preamble and Article 4 of the Hague Convention subordinate intercountry adoption only to intracountry adoption without direct discussion of intracountry foster care.⁵ While in most signatory nations little attention has been paid to this particular divergence, the difference in language (and perhaps intent) creates a theoretical question as to how to adhere to both treaties, and no document explicitly resolves this problem. Even within the reports issued by the Hague regarding the preliminary drafting of the Hague Convention, which provide the most information regarding the intent of the final language, the drafting parties called for varying levels of deference to the UN Convention. Some associated with the Hague Convention's final form assume deference to the language of the UN Convention and thus call for adherence to the UN Convention's preference of intracountry foster care among countries that have ratified both conventions, but at the same time, it seems that many involved with the drafting of the Hague Convention viewed the Hague Convention as the means for practical implementation of the principles set forth in the UN Convention and deliberately amended the preferences in Article 21 of the UN Convention to promote permanent family relationships as a central objective of the Hague Convention.⁶ In addition, a

⁴ Article 21 of the Convention on the Rights of the Child, states in part, "Intercountry adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin."

⁵ Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, done May 29, 1993, Miscellaneous No. 40 (1994).

⁶ See Cynthia Price Cohen, *The Developing Jurisprudence of the Rights of the Child*, 6 ST. THOMAS L. REV. 1, 93 (1993) (Stating: "From a jurisprudential point of view, it is immaterial that the Convention on the Rights of the Child does not fit squarely into a standard definition of law. If one analyzes law by examining its effect, it would appear that the rights of the child are firmly established within the framework of international law. By ratifying the Convention on the Rights of the Child, one hundred and fifty-four countries have agreed to incorporate its standards into their national legislation. Moreover, the central themes of the Convention are being restated in the drafting and interpretation of other international treaties

strong argument exists for reconsideration of the hierarchy set forth by the UN Convention, which took into account the highly unregulated international adoption system, a problem directly rectified by the Hague Convention.⁷ Such an argument is more convincing in light of UN encouragement of countries that have ratified the UN Convention to also ratify the Hague Convention.⁸

The Hague Proceedings

In his preliminary report, Hans van Loon, Secretary General of the Hague Conference on Private International Law, begins discussion of the development of the Hague Convention with the note that although Article 21 of the UN Convention contained language mentioning intercountry adoption, subsequent discussions with the UN confirmed that the UN would not take a formal role in shaping intercountry adoption

and legal instruments. But, no legislation remains static. Even though one might be tempted to assert that, because of its near universal acceptance as a legal norm, the right of the child to respect for his or her human dignity is now approaching a status of jus cogens, the theory of the rights of the child continues to be in a state of evolution.”)

⁷ See William L. Pierce, *International Commentaries: 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 CONTEMP H L & POL'Y 535, 539-540 (Spring 1996). (Stating that the: significant movement of the Hague Convention signals a more precise definition of the intent of the United Nations with respect to the appropriate care of children outside of their own homes and is, in and of itself, sufficient reason for the United States to ratify the 1993 Hague Convention. It should be emphasized that the United Nations Declaration and Convention predate the Hague Convention and are similar in nature with regard to children's welfare. The Declaration and Convention also grew out of a knowledge of intercountry adoptions that were characterized by largely unregulated adoptions, a significant portion of which involved highly publicized abuses. The Hague Convention, coming later in time, focuses specifically on intercountry adoptions involving official delegations with expertise in intercountry adoptions. The Hague Convention outlines internationally agreed norms and procedures that add to the previously available options of those intercountry adoptions regulated by the Convention. The Hague Convention places intercountry adoptions before foster and institutional care in the child's country of origin. Observers have suggested that an adoption that complies with the Hague Convention's norms and procedures would rank ahead of foster care and institutional care in the country of the child's origin, but that internationally unregulated adoption would be the arrangement of last resort.)

and instead encouraged the Hague Conference on private international law to provide further international policy on the subject.⁹ Van Loon presented three central objectives for an international framework for intercountry adoption:

1. Ensure that no child is adopted abroad unless it has been established that the original family cannot take care of him or her and that no other viable alternative in the country of origin is available.
2. Define criteria and improve practice and procedures for intercountry adoption once it has been established that is the only viable alternative to the child; and finally,
3. help eliminate the abuses of intercountry adoption, in particular, abduction and/or sale of children.¹⁰

With regard to the subsidiary role of intercountry adoption, van Loon acknowledges the competing considerations of legal certainty stemming from adoption (whether inter- or intracountry adoption in form) versus the importance of a child experiencing his or her native society and culture, but also notes that child experts give reduced credence to the

⁸ William Duncan, *The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, in INTERCOUNTRY ADOPTION, DEVELOPMENTS, TRENDS, AND PERSPECTIVES, 41 (Peter Selman, ed., 2000)

⁹ J.H.A. van Loon, *Report on Intercountry Adoption* HAGUE. CONFERENCE ON PRIVATE INTERNATIONAL LAW, PROCEEDINGS OF THE SEVENTEENTH SESSION, TOME II 21, para 15(May 10-29, 1993).

Van Loon states:

In order to co-ordinate the work of the Conference with that of the United Nations, the Secretary General of the Hague Conference met with the Legal Counsel to the Secretary General of the UN in April 1988. The Legal Counsel confirmed that the United Nations, after the adoption by the General Assembly of the Declaration of December 1986, did not intend to pursue work specifically on intercountry adoption. The United Nations would, however, welcome any initiatives undertaken by the Hague Conference on private international law.

See also THE CONCLUSIONS OF THE SPECIAL COMMISSION at 129 paragraph 4:

The starting point for the Convention should be the United Nations Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20 November 1989 and which calls for the conclusion of multilateral agreements to promote the standards set by its article 21, and the 1986 United Nations Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children;

importance of maintaining children within their native countries.¹¹ However, van Loon later affirms UN Convention Article 21(b), including the priority it grants to intracountry foster care even though the Hague Convention does not explicitly do so.¹² This author speculates that van Loon (and possibly several drafters of the Hague Convention) view intracountry foster care as a preferable but infeasible alternative to intercountry adoption.¹³ This preference, therefore, cannot be treated as a preclusion to intercountry adoption but instead perhaps a reformation or softening of the hierarchy of alternatives in accordance with the paramount consideration of child welfare.

The preliminary draft of the Hague Convention, dated September 1991, provides additional insight into the fading appointment of priority between intercountry adoption and intracountry foster care. The Tentative draft Convention discards any language regarding foster care in its preamble, instead “recognizing that intercountry adoption, may offer the advantage of a permanent family to a child who cannot in any suitable

¹⁰ See van Loon at 93 para. 169.

¹¹ See *id* at 55 para. 86. Van Loon includes foster care under the umbrella of legal uncertainty, possibly explaining the removal of the preference of it to intercountry adoption in the final language of the Hague Convention.

See also *id* at 67 para. 121 and 95 para. 171:

Yet, there would seem to be growing agreement that whatever choice of law system is preferred the welfare of the child should be of paramount importance and should temper a mechanical application of conflict rules.

While the discussion cited above refers to conflicts of laws between sending and receiving countries, a best interests of the child standard forms the basis of both the UN Convention and the Hague Convention, and as such, may serve as a predictor for the expected treatment of conflicts in international law as well:

All modern instruments concur that in intercountry adoption the best interests of the child should be – not the sole but – the paramount consideration.

¹² The Preamble of the Hague Convention makes mention only of intracountry adoption as a preferable alternative to intercountry adoption and Article 4(b) of the Hague Convention calls only for “due consideration” of alternatives within the state of origin prior to intercountry adoption.

¹³ See *id* at 95 para. 170. See also Cohen, at 78. (Stating “The goal of the Convention on Intercountry Adoption is not to promote the adoption of children across borders. On the contrary, it seeks to both discourage and to facilitate such adoptions. On the one hand, it discourages intercountry adoptions by characterizing them as a process of ‘last resort.’ And on the other hand, it facilitates intercountry adoption

manner be cared for in his or her country of origin,”¹⁴ without delineating what a suitable manner may be. Nonetheless, the preamble directly refers to the principles set forth in the UN Convention. In the Explanatory Notes to the Tentative draft Convention, it is summarily explained that language that prioritized foster care was dropped because “it appeared to be controversial”¹⁵ and “inappropriate.”¹⁶

Further commentary in the Report of the Special Commission by G. Parra-Aranguren on the final language of the Hague Convention confirms a softened hierarchy, while still maintaining that domestic alternatives remain important and at least considered above intercountry adoption.¹⁷ However, Parra-Aranguren notes that the drafters

by ensuring that those adoptions which do occur meet certain standards that protect the child, while also discouraging both the sale of children and child trafficking.”)

¹⁴ See TENTATIVE DRAFT CONVENTION at 151. The Preamble continues to state that: Convinced of the necessity to take measures to ensure that intercountry adoptions are made only in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children, Desiring to establish common provisions to this effect, taking into account the principles set forth in international instruments, in particular the United Nations Convention on the Rights of the Child of 20 November 1989 and the United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally ... Have agreed on the following provisions - ...

¹⁵ See *id* at 159 para. 4: ...The new text avoids the reference to foster placement – which appeared to be controversial in some of the comments on the FWD – while retaining the essence of the language and principle of Article 21, sub-paragraph *b* of the UN Convention...

¹⁶ See *id* at 161 para. 18, referring to Article 4(b): Several comments on the FWD had criticized [the FWD] mainly for three reasons:

- (1) the reference to foster care was seen as inappropriate,
- (2) it was seen as practically impossible to ensure *in each individual case* that all alternatives for placement in the country of origin had been exhaustively explored, and
- (3) in some cases ... the best interests of a child may require that a child is placed abroad for adoption even where there is a family available in the country of origin willing to take care of the child. The new formulation avoids the disadvantages of the former sub-paragraph (b) while retaining the essential principle, *i.e.* that placements in the country of origin should in each case be given consideration first, before intercountry adoption is to be considered. The formulation is also more precise in that it requires the competent authorities not just to establish that an intercountry adoption ‘may be considered as a means of protecting the best interests of the child’, but that it actually *is* in the child’s best interests.

¹⁷ See SPECIAL COMMISSION – Report at 175, 185 paragraph 21-23.

deliberately omitted a paragraph from the preamble that would have stated that “appropriate measures should be taken, at both national and international level, to enable children to remain in the care of their biological family or to be otherwise suitably cared for in their country of origin” and places intercountry adoption into a general mix of alternatives for children who are not able to remain with their biological families.¹⁸ Furthermore, the report downplays the authority of the UN Convention, commenting that “it is made clear that the draft [of the Hague Convention] does not reproduce all [provisions of the UN Convention regarding intercountry adoption], no matter how important they may be, but only have them as the starting point for the best regulation of intercountry adoptions.”¹⁹ In his later report Parra-Aranguren, when discussing the final form of the Hague Convention, clarifies the major shift in doctrine, that:

The third paragraph of the Preamble, in referring to permanent or suitable family care does not deny or ignore other child alternatives, but highlights the importance of permanent family care as the preferred alternative to care by the child’s family of origin.²⁰

It is clear from the legislative history of the Hague Convention that the drafters deliberately abstained from granting specific priority to intracountry foster care over intercountry adoption while at the same time intended the Hague Convention to carry out the principles of the UN Convention. Perhaps because of this intention, the drafters did not consistently address the legal implications of the divergence of the two conventions,

¹⁸ *See Id.*

¹⁹ *See Id* at 187 para. 31.

²⁰ *See* PARRA-ARANGUREN REPORT at 553 para. 43. Parra-Aranguren further states that “The idea behind the amendment is that the placement of a child in a family, including intercountry adoption, is the best option among all forms of alternative care, in particular to be preferred over institutionalization.”

but instead perceived the mention of foster care as a less significant issue than has been made of it.

What arises from this analysis is the notion that both the Hague Convention and the UN Convention contained the intent that intercountry adoption be subsidiary to viable family-like options within a child's country of origin, but that neither convention called for the creation of such alternatives within a country if they do not currently exist. The UN Convention makes but brief mention of the placement of children outside their original families, and calls for exploration of existing options within a country of origin prior to intercountry placement. The Hague Convention does the same, but as an instrument envisioned as having the purpose of fulfilling the UN Conventions objectives, relies more on a conception of child welfare that seeks permanent or family-like solutions for children. That the UN Committee on the Rights of the Child recommends adherence to the Hague Convention²¹ further indicates that the UN Convention was not intended to preclude intercountry adoption, nor is a lack of stated preference for intracountry foster care fatal for compliance with either convention.

Conclusions

While both the UN Convention explicitly states a preference for intracountry foster care over intercountry adoption and both it and the Hague Convention give priority to maintaining a child in his or her country of origin, ratification of either does not preclude intercountry adoption as an alternative for children who lack families. Neither convention calls for the *creation* of intracountry alternatives to intercountry adoption if

²¹ See Duncan at 45. (Stating that "The United Nations Committee on the Rights of the Child regularly recommends adherence to the Hague Convention in its reports on States Parties to the 1989 Convention.")

they do not currently exist. UN encouragement of its members to join the Hague Convention further supports the notion that the two theories are fundamentally compatible. Finally, it is important to remember that the UN Convention was written in a climate of a total absence of regulation of intercountry adoption, a problem that the Hague Convention directly addresses. Therefore, if debated today, many of the obstacles that plagued intercountry adoption and reduced its priority would be ameliorated by the very ratification of the Hague Convention.