

The History of the Subsidiarity Principle in the Hague Convention on Intercountry Adoption

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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...

An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin -...

b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests;...

*Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (the Hague Convention)*¹

INTRODUCTION

It has been over 20 years since the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (the Hague Convention) was drafted. Since then, 95 States have ratified or acceded to the Hague Convention,² with more expected to ratify in the coming years.³ Among the many important principles laid out in the Hague Convention, perhaps none is as widely debated as the subsidiarity principle, set forth in the Preamble and Article 4(b) (quoted above). The subsidiarity principle, should, in theory, help States understand the hierarchy of placement for children. In other words,

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¹ Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, Preamble and Art. 4(b), S. TREATY DOC. NO. 105-51.

² Status Table of Contracting States, 33: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW http://www.hcch.net/index_en.php?act=conventions.status&cid=69 (last visited Sep. 12, 2015).

³ See e.g., Press Release of the Government of the Republic of Ghana, Cabinet Approves Memoranda on Child Adoption and Others (2015) available at http://www.ghana.gov.gh/images/documents/four_memos.pdf (signaling Ghana's intent to become a contracting State to the Hague Convention).

the issue is whether intercountry adoption should be viewed as subsidiary to domestic care options, and if so, which domestic options.

Many of those involved in the debate have relied on explanatory reports of the Hague Convention, studies in fields other than law, anecdotal evidence, or a combination of these and other evidence to support their views on the subsidiarity principle. Despite the availability of the drafting history of the Hague Convention, relatively little attention has been paid to what the drafters of the Hague Convention intended the subsidiarity principle to be or the evolution of the principle during its drafting.

Through a detailed analysis of the drafting history of the subsidiarity principle, paying particular attention to what was included and what was not, one can learn a great deal about how the subsidiarity principle should actually be applied. The principle, as will be shown, is really about families: children deserve families; children need families; children should be in permanent families whenever possible. Such views of children and families influenced the drafting of the subsidiarity principle and should likewise influence the interpretation and implementation of the principle today.

I. THE SUBSIDIARITY PRINCIPLE

A. What is Subsidiarity?

Subsidiarity is a concept that dates back at least 200 years and, in general terms, means that problems should first be dealt with at a local level.⁴ It is in some respects a principle of decentralization with the larger authority taking a subsidiary role and allowing the localized authority to respond to the needs of those closest to it. It is a principle that is commonly evoked in international law settings.⁵

In the context of intercountry adoption, the parallel to the local level in decision-making is the biological family. The biological family has the priority and the right to raise their children. However, the issue with subsidiarity in the intercountry adoption context centers on who should raise a child if the biological

⁴ See *Subsidiarity*, WIKIPEDIA (October 10, 2015) (explaining subsidiarity's roots in Catholicism and its wide application to everything from military and government operations to neuropsychology and cybernetics), <http://en.wikipedia.org/wiki/Subsidiarity> (last visited Sep. 12, 2015).

⁵ See e.g., Andreas Follesdal, *The Principle of Subsidiarity as a Constitutional Principle in International Law*, 2 GLOBAL CONST. 37 (2013).

family cannot. The hierarchy of options, both domestic and international, for the raising of a child in the event the biological family cannot is thus the central focus of those studying and implementing the subsidiarity principle.

B. The Debate over Subsidiarity in the Hague Convention

Although international law is full of contested issues and debated topics, none may be as fundamental in its sphere—or as hotly contested—as the principle of subsidiarity vis-à-vis intercountry adoption. Establishing a certain view of this principle is crucial because it dictates how, why, and perhaps most importantly, when intercountry adoptions should take place. Proponents and opponents of intercountry adoption argue fiercely about the meaning of subsidiarity,⁶ but, even amongst themselves, proponents of intercountry adoption do not agree on exactly what subsidiarity is.

The debate about subsidiarity is best captured by two main views (all other views tending to be variants of these two). Elizabeth Bartholet is a well-known advocate for one view; which promotes “no preference” for an in-country placement, including domestic adoption, over intercountry adoption.⁷ This is because the best interests of the child are the controlling principle when considering a child’s welfare and thus an expression of preference negates the best interests principle.⁸ Under Bartholet’s view, the notion that intercountry adoption should be viewed as a “last resort” is unreservedly incorrect.⁹ Bartholet strongly advocates for concurrent planning, meaning that domestic adoption and intercountry adoption are pursued simultaneously with a child being placed internationally if a domestic adoption is unavailable.¹⁰

David Smolin is also well known in the intercountry adoption context and takes a somewhat opposing, “pro-country” view. Smolin maintains that when

⁶ Unfortunately, a glance at a simple dictionary does little to resolve the debate. However, subsidiarity as “the state of being subsidiary” with subsidiary subsequently defined as “of secondary importance” is illustrative to a certain extent. See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1245 (11th ed. 2003) also available at <http://www.merriam-webster.com/dictionary/subsidiary>.

⁷ ELIZABETH BARTHOLET & DAVID SMOLIN, THE DEBATE *in* INTERCOUNTRY ADOPTION: POLICIES, PRACTICES, AND OUTCOMES 236 (Judith L. Gibbons & Karen Smith Rotabi eds., 2012).

⁸ *Id.*

⁹ *Id.* at 234.

¹⁰ *Id.* at 237. Bartholet recognizes that the Hague Convention expresses preference for a domestic adoption over an intercountry adoption, but expresses concern about delay and children languishing in institutions if both options are not pursued concurrently.

family preservation and reunification efforts are unsuccessful, domestic adoption certainly trumps intercountry adoption.¹¹ Likewise, domestic placements that are short of a legal, permanent family, such as foster care or institutional care, may come before intercountry adoption.¹² Under this view, such placements may be particularly appropriate when taking into account the language, culture, nationality, and age of the child.¹³

Bartholet's view relies heavily on the assumption that the best interests of a child will predominately direct that the child be in a permanent family (with full legal rights and obligations).¹⁴ Bartholet emphasizes the need for family and certainty that adoption provides over alternative forms of care,¹⁵ whereas Smolin believes the best interests of a child may include a multitude of factors that can outweigh placement in a permanent family for an individual child.¹⁶ Smolin emphasizes family, but primarily in the context of family reunification and preservation, as opposed to placing an emphasis on finding a new family for a child if those measures fail.¹⁷

Perhaps as the impetus for such debate, the principle of subsidiarity is not clearly defined in the Hague Convention¹⁸ or elsewhere. Language in itself is inherently ambiguous and thus terms like "permanent," "suitable family," "possibilities for placement," and "due consideration," which appear in the text of the Hague Convention,¹⁹ only fuel the debate. The waters are further muddied by differing concepts of the term "family" and "adoption." Where non-nuclear family structures are common or adoption is only a temporary situation,²⁰ the correct interpretation of subsidiarity may be even more difficult to elucidate. Ultimately however, international legislation, like all other forms of legislation,

¹¹ *Id.* at 241.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 236.

¹⁵ *Id.*

¹⁶ *Id.* at 241–42.

¹⁷ *Id.* at 242.

¹⁸ *Supra* note 1.

¹⁹ *Id.* at Preamble, Art. 4(b).

²⁰ *See, e.g.*, JINI L. ROBY & TRISH MASKEW, HUMAN RIGHTS CONSIDERATIONS IN INTERCOUNTRY ADOPTION: THE CHILDREN AND FAMILIES OF CAMBODIA AND MARSHALL ISLANDS *in* INTERCOUNTRY ADOPTION: POLICIES, PRACTICES, AND OUTCOMES 62 (Judith L. Gibbons & Karen Smith Rotabi eds., 2012) (noting that the majority of mothers in Marshall Islands did not understand the finality of adoptions).

relies on such ambiguities to generate buy-in from a sufficient number of participants to ensure that the agreed upon rules will be broadly implemented.

Other international documents also contain references to the subsidiarity principle,²¹ the most influential of these being the Convention on the Rights of the Child.²² Article 21 of the Convention on the Rights of the Child recognizes “that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin.”²³ In contrast, the Hague Convention on Intercountry Adoption contains different language seeming to purposefully omit any reference to foster care as an alternative to be considered *before* intercountry adoption as well as rejecting the concept of “suitable care” in favor of “suitable family.”²⁴ As will be shown, this difference in language is purposeful and illustrative of the fact that the drafters of the Hague Convention recognized a need to establish the concept of permanent families for children as fulfilling the best interests of the child.

The differences between these two conventions and their significance, as well as linguistic ambiguities and cultural differences have been discussed at great lengths.²⁵ However, there is still an incomplete understanding of subsidiarity. This may be due, in part, to the fact that little attention has been paid to the drafting history of the Hague Convention and the development of the subsidiarity principle during the course of drafting. A firm understanding of the origins and evolution of the subsidiarity principle in the Hague Convention can, to a certain extent, help resolve the debate over what “subsidiarity” truly means.

²¹ See G.A. Res. 41/85, Art. 17, U.N. Doc. A/RES/41/85 (Dec. 3, 1986); European Parliament Res. A4-0392/1996, pars. C & G (Nov. 22, 1996) (both containing language that makes intercountry adoption subsidiary to domestic placements, including foster care).

²² Convention on the Rights of the Child, 1577 U.N.T.S. 3 (Nov. 20, 1989).

²³ *Id.* at Art. 21(b).

²⁴ Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *supra* note 1, at Preamble, Art. 4(b).

²⁵ See e.g., Elizabeth Bartholet, *Ratification by the United States of the Convention on the Rights of the Child: Pros and Cons from a Child's Rights Perspective* 633 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 18 (2011) (persuasively discussing the differences between the Convention on the Rights of the Child and the Hague Convention, with particular regard to the subsidiarity principle in both conventions).

II. THE HISTORY OF SUBSIDIARITY IN THE HAGUE CONVENTION ON INTERCOUNTRY ADOPTION

A. Right to a Family and Best Interests

The right to a family and the principle of best interests are two overarching principles that set the tone for the Hague Convention on Intercountry Adoption. In 1990, Hans Van Loon, at that time a lawyer with the Permanent Bureau of the Hague Conference on Private International Law,²⁶ wrote a report²⁷ on intercountry adoption that served as one of the primary background documents for the drafters of what would become the Hague Convention on Intercountry Adoption. Van Loon noted that inklings of subsidiarity can be traced as far back as nearly 1800 years B.C. where law held that “before a man can adopt a foundling he must look for the child’s parents and if he finds them must restore the child to them.”²⁸ This same text also serves as an illustration of the importance of family and its far-reaching roots. In a report following the adoption of the Hague Convention, it is noted that “the right to a family is a fundamental right,” demonstrating the enduring perception of the importance of family.²⁹

The right of a child to a permanent family³⁰ heavily influenced the formation of the Hague Convention and remains a very important consideration in the workings of the Permanent Bureau of the Hague Conference.³¹ The right of

²⁶ In 1996 Van Loon began service as the Secretary General of the Hague Conference; a post he held until 2013. He is often referred to as the “father” of the Hague Convention on Intercountry Adoption.

²⁷ See PROCEEDINGS OF THE SEVENTEENTH SESSION 10 TO 29 MAY 1993, TOME II, ADOPTION-CO-OPERATION 15–101, (ed. Permanent Bureau of the Conference, 1994).

²⁸ *Id.* at 27 (discussing the Codex Hammurabi).

²⁹ *Id.* at 553.

³⁰ Although the term “permanent family” is also subject to significant debate, the assumption is that a permanent family is one in which children and parents enjoy full legal rights and obligations towards each other. Otherwise any situation that could plausibly be called a “family”, including foster families, group homes, and some institutions could also be labeled as permanent inasmuch as a child in that situation is unlikely to ever leave such care. See e.g., California Department of Social Services, Adoption FAQs, <http://www.childsworld.ca.gov/pg1302.htm> (noting that “[a]doption is a legal process which permanently gives parental rights to adoptive parents” and “[a]doption is the permanent legal assumption of all parental rights and responsibilities for a child. Adoptive parents have the same legal rights and responsibilities as parents whose children are born to them”).

³¹ See LAURA MARTÍNEZ-MORA, HANNAH BAKER & EMMANUELLE HARANG, THE 1993 HAGUE INTERCOUNTRY ADOPTION CONVENTION AND SUBSIDIARITY: IS THE SUBSIDIARITY PRINCIPLE STILL “FIT FOR PURPOSE”? *in* A COMMITMENT TO PRIVATE

a child to a family shares an interconnected relationship with the best interests principle since a child in a permanent family is likely having his or her best interests met³² and it is in the best interests of a child to be in a permanent family whenever possible.

The principle of the best interests of the child is a complimentary principle to the right to a family. Both ideas are contained in the Convention on the Rights of the Child, where it is declared that in situations of intercountry adoption the best interests of the child should be “the paramount consideration.”³³ The best interests principle thus must guide all actions in intercountry adoptions and should be a primary factor in any child welfare decision.³⁴ Unfortunately, in the lexicon of intercountry adoptions it has become commonplace to assert that domestic care options should be implemented before international options³⁵ and intercountry adoption should “only be implemented if it is in the best interests of the child.”³⁶ Such emphasis ignores the fact that domestic options must also be in the best interests of the child³⁷ and incorrectly

INTERNATIONAL LAW: ESSAYS IN HONOUR OF HANS VAN LOON 344 (2013) (noting the importance of ensuring “that children are raised in permanent families”). The Permanent Bureau of the Hague Conference is tasked not only with helping to draft conventions, but also with assisting with the implementation of conventions through publishing documents (in this context referred to as Guides to Good Practice), reporting to Member States on developments with conventions, promoting the adoption of conventions insofar as possible, and holding Special Commission, working group, and other meetings that allow experts from Contracting States to discuss ways to improve cooperation and implementation of conventions.

³² There are certainly exceptions, such as abusive and neglectful families. However, that does not mean that a child from a home of abuse and neglect would necessarily be better off in a non-family setting.

³³ Convention on the Rights of the Child, *supra* note 22, at Art. 21. Also, the Preamble talks extensively about the importance of the family.

³⁴ This included domestic child welfare decisions.

³⁵ This hierarchy of domestic care options and international options being one of the most common framings of the subsidiarity principle.

³⁶ MARTÍNEZ-MORA, BAKER & HARANG, *supra* note 31, at 343 (stating that “[o]nly after due consideration has been given to national solutions should intercountry adoption be considered, and then only if it is in the child’s best interests”).

³⁷ See e.g., CHILD WELFARE INFORMATION GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD (2012) (noting that whenever a court makes a decision about a child, including adoption and placement it “must weigh whether its decision will be in the “best interests” of the child”) and AUSTRALIA DEPARTMENT OF COMMUNITIES CHILD SAFETY AND DISABILITY SERVICES, POLICY: THE WELLBEING AND BEST INTERESTS OF THE CHILD IN ADOPTION (2013), <http://www.communities.qld.gov.au/resources/childsafety/adoption/wellbeing-best-interest-child-adoption-626.rtf> (stating that the wellbeing and best interests of an adopted child “are paramount considerations in all adoption matters”).

implies (perhaps unintentionally) that international solutions are less likely to comply with the best interests principle. The scope of the Hague Convention does not extend beyond intercountry adoptions to the realm of domestic adoptions and thus it would be inappropriate for the Convention to mandate procedures in domestic adoptions. Nonetheless, the best interests of the child standard is the same standard imposed in both domestic and intercountry adoptions and in both cases placement with a permanent family is most likely to be in the best interests of the child.

Of fundamental importance is the fact that the driving force behind the Hague Convention is the best interests principle and not the subsidiarity principle. However, the proper implementation of the subsidiarity principle will fulfill the best interests principle.³⁸ In the largely unsuccessful first Hague treaty on intercountry adoptions in 1965, international adoptions were not to be granted unless “in the interest of the child.”³⁹ The Convention on the Rights of the Child and the Declaration on the Rights of the Child similarly espouse the best interests of the child as a principle of great importance.⁴⁰ From the very beginning of its drafting, all the way through its final adoption, the Hague Convention also placed emphasis on the best interests principle. In its initial illustrative draft articles, the first objective of the Hague Convention was noted as establishing “safeguards to ensure that intercountry adoption takes place in the best interests of the child.”⁴¹ Although not retained in the same language, the final version of the treaty also declares its conviction that adoptions should take place “in the best interests of the child.”⁴² The Permanent Bureau’s Guide to Good Practice No. 1, a post-hoc

³⁸ See CHILD WELFARE INFORMATION GATEWAY, *supra* note 37 (discussing the importance of family and permanency in determining the best interests of the child). No child welfare advocate has been found to reasonably argue that children are better off in domestic foster care or institutional care than in a domestic adoptive placement, with reasonable exceptions for special situations.

³⁹ Convention on Jurisdiction, *Applicable Law and Recognition of Decrees Relating to Adoptions*, Nov. 15, 1965, 4 I.L.M. 338 (1965).

⁴⁰ Convention on the Rights of the Child, *supra* note 22, at Art. 21; G.A. Res. 1386(XIV), principle 3 (Nov. 20, 1959).

⁴¹ PROCEEDINGS OF THE SEVENTEENTH SESSION 10 TO 29 MAY 1993, *supra* note 27, at 137.

⁴² Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *supra* note 1, at Preamble. “Convinced of the necessity to take measures to ensure that intercountry adoptions are made 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.”

analysis and interpretation of the Hague Convention, confirms that the best interests principle is the “overarching principle” of the Convention and not the subsidiarity principle.⁴³

With the understanding that the best interest principle and the right to a family are overarching principles that heavily influenced the drafting of the Hague Convention, an analysis of the evolution of the subsidiarity principle within the Hague Convention itself can be better understood. From these two precepts stems a marked transition of the subsidiarity principle towards a family-focused principle that embraces permanency as being in the best interests of the child.⁴⁴

B. Preamble

Within the Hague Convention, the concept of subsidiarity is mentioned twice, once in the Preamble and once in Article 4 b).⁴⁵ Surprisingly, the Preamble underwent significant change in the course of its drafting, whereas Article 4 b) remained essentially unchanged from the early stages of its drafting. Although some may be quick to discount preambles, objective statements, and chapeaus in international instruments, there is little doubt that the subsidiarity principle contained in the Preamble of the Hague Convention should be looked to as doing a great share of work in defining subsidiarity. Such a view is consistent with accepted methods of treaty interpretation.⁴⁶

The history of the preamble paragraph on subsidiarity involves multiple iterations, significant debate, and a great deal of interaction between countries present at the drafting of the Convention. The third paragraph of the Preamble was largely the product of a proposal by Colombia and Bolivia intended to ensure that the fundamental right of a child to a family was protected.⁴⁷ Despite

⁴³ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, THE IMPLEMENTATION AND OPERATION OF THE 1993 INTERCOUNTRY ADOPTION CONVENTION: GUIDE TO GOOD PRACTICE 114 (2008).

⁴⁴ *Id.* (explaining that a permanent home, even abroad, is preferable to a temporary one).

⁴⁵ See *supra* note 1 for the exact language of both the Preamble and Article 4(b) as it relates to subsidiarity.

⁴⁶ See e.g., G.G. Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points* 28 BRIT. Y.B. INT. L. 1, 10 (1951) (conceding that a preamble “does not and should not have direct operative force,” but at the same time pointing out that it is an important guide reflecting the spirit in which the treaty is to be read and the purpose and objectives of the treaty).

⁴⁷ PROCEEDINGS OF THE SEVENTEENTH SESSION 10 TO 29 MAY 1993, *supra* note 27, at 553.

multiple opportunities to introduce the concepts of alternative care, foster care, or institutionalization as coming before intercountry adoption in the hierarchy of subsidiarity, the drafters consistently rejected such proposals⁴⁸ in favor of a more family oriented document.⁴⁹ Ultimately, the adopted Preamble embodies the idea that subsidiarity means “the placement of a child in a family including in intercountry adoption, is the best option among *all* forms of alternative care, in particular to be preferred over institutionalization” (emphasis added).⁵⁰

Despite conclusions drawn from a Special Commission in June of 1990,⁵¹ the tentative draft of the Convention quickly did away with the concept found in the Convention on the Rights of the Child that foster care should come before intercountry adoption.⁵² This early version of the Preamble read: “Recognizing that intercountry adoption may offer the advantage of a permanent family to a child who cannot in any suitable manner be cared for in his or her country of origin.”⁵³ The omission of a specific reference to foster care as being a “suitable manner” was mentioned in the explanatory notes and the reporter indicated that this omission was because some of the comments to the draft indicated such language was controversial.⁵⁴ Although the reporter claims that the language of the tentative draft retains the essence of the Convention on the Rights of the Child,⁵⁵ particular attention must be paid to what subsequently occurred in the drafting history while remembering that reports and explanatory notes are in themselves subsidiary to the actual text.⁵⁶

⁴⁸ *Id.* at 247, 472.

⁴⁹ *Id.* at 553.

⁵⁰ *Id.*

⁵¹ *Id.* at 129. The Conclusions stated as a fundamental principle that “a child’s interests are in general best served if the child is raised by his or her own parents or, alternatively, by a foster or adoptive family in the child’s own country; intercountry adoption is to be seen as a solution of a subsidiary nature for ensuring the welfare of the child.”

⁵² *Id.* at 151.

⁵³ *Id.*

⁵⁴ *Id.* at 159. What was “controversial” was not recorded in the explanatory report. However, presumably certain drafters felt that foster care was not a suitable form of care in this context and inclusion of foster care before intercountry adoption would violate the best interests principle. The further debates and proposals that took place during the drafting tend to corroborate this theory.

⁵⁵ *Id.*

⁵⁶ See Peter Hayes, *The Legality and Ethics of Independent Intercountry Adoption Under the Hague Convention*, 25 INT’L J. L., POL’Y & FAM. 288, 300 (2011) (indicating that the reporter’s views on certain issues may have been tainted. For example, “Parra-Aranguren’s commentary can be seen as the first step in the campaign against

The next iteration of the Convention was introduced at the Special Commission in 1992 as a preliminary draft.⁵⁷ The language from the tentative draft was retained in full⁵⁸ and the reporter again asserted that the Convention on the Rights of the Child was being followed in spirit if not in text.⁵⁹ The reporter also noted that this version of the Preamble makes clear that “intercountry adoption is one possible alternative to take care of the child” and that intercountry adoption is subsidiary to a child being cared for by his or her own parents.⁶⁰ Nonetheless, as the drafting of the Hague Convention progressed, the focus shifted from “caring” for a child to being driven by the concept of family. After the preliminary draft was introduced, States submitted comments to the draft. Although the term “permanent family” had been included in the Convention since the tentative draft,⁶¹ some of the comments about the Preamble focused on changing the concept of caring for a child to ensuring that a child grows up in a “family environment.”⁶² Poland proposed that the language about a child that cannot be raised in his home country be altered to indicate that the child should be placed in “une famille nourricière ou adoptive ou être convenablement élevé.”⁶³ Poland’s proposal again illustrates a shift towards the idea of family rather than care, but ultimately this proposal to insert language about foster families failed.

Egypt also attempted to change the direction of the Convention’s thinking and its actual language.⁶⁴ Egypt commented that other forms of alternative care, including kafala,⁶⁵ should have been included in the drafts of the

independent ICA under the Hague Convention. For having lost on the text of the Convention, the Permanent Bureau quickly realized that it could yet win on its interpretation”).

⁵⁷ PROCEEDINGS OF THE SEVENTEENTH SESSION 10 TO 29 MAY 1993, *supra* note 27, at 167.

⁵⁸ *Id.*

⁵⁹ *Id.* at 185.

⁶⁰ *Id.* at 187.

⁶¹ *Id.* at 151.

⁶² *Id.* at 247. Comment made by Sweden.

⁶³ *Id.* Quoted text translated: “a foster or adoptive family or be suitably raised.”

⁶⁴ *Id.* at 243. The delegate from Egypt submitted lengthy remarks calling for the Convention to recognize alternatives enshrined in Islamic Law and called for this “international codification effort” to “take into consideration all the elements and aspects of the matter to be codified, and the different legal systems in question.”

⁶⁵ Kafala most frequently involves caring for a child that is not part of the family caring for the child with the child retaining his or her biological family name and not taking on the name of the family caring for him or her.

Convention from the beginning.⁶⁶ Egypt decried the drafters as ignoring the Convention on the Rights of the Child and neglecting to take into account national, cultural, and religious interests.⁶⁷ This comment provided one opportunity, of what would prove to be many, for the drafters to change course with the principle of subsidiarity. Ultimately, however, as was the case with Poland's proposal, the concept of foster care and alternative care as being preferred over intercountry adoption was purposefully omitted from the Convention and language more oriented towards families was inserted.

Prior to distributing its proposed text, the drafting committee considered working documents submitted by delegates from the various countries. These working documents, including several about the Preamble,⁶⁸ would serve as the basis for discussion and voting on changes to the text of the Convention. The proposed text distributed by the drafting committee proved to be a merger of the concept of care and the idea of family as it added two new paragraphs to the Preamble that were very focused on family.⁶⁹ These two new paragraphs underwent no substantial change before being adopted into the final version of the Hague Convention.⁷⁰ Conversely, the first paragraph of the preliminary draft (which became the third paragraph in the working draft) remained the same at

⁶⁶ PROCEEDINGS OF THE SEVENTEENTH SESSION 10 TO 29 MAY 1993, *supra* note 27, at 243.

⁶⁷ *Id.*

⁶⁸ *Id.* at 296 (Colombia proposal to amend the first paragraph to "Recognizing that intercountry adoption may offer the advantage of a permanent family to a child who cannot find a suitable family in his or her country of origin"); *id.* at 298 (Colombia proposing to amend the Preamble to "Bearing in mind that a child, for the full and harmonious development of his or her personality, should grow up in a family environment"); *id.* at 304 (Indonesia partially concurring with a Swedish proposal that the Preamble should be changed to "Recalling that, as a priority, appropriate measures should be taken to enable children to remain in the care of their biological family; Bearing in mind that a child for the full and harmonious development of his or her personality, should grow up in a family environment and in an atmosphere of happiness, love and understanding" (internal references omitted)); *id.* at 319 (Egypt proposal to amend the Preamble to "Taking into account the other alternatives and forms of child care, *e.g.* foster placement and kafala as enshrined in Islamic law, and the need to promote international co-operation therein.") (italics in original).

⁶⁹ *Id.* at 339. The paragraphs reading "Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding, Recalling that each country should take, as a matter of priority appropriate measures to enable the child to remain in the care of his or her family of origin."

⁷⁰ *See* Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *supra* note 18, at Preamble (the only change being that of replacing the word "country" with the word "State" in the second paragraph of the Preamble).

this stage of the Convention,⁷¹ but would undergo significant change before the ultimate adoption of the Convention.⁷²

The final text of the third paragraph in the Preamble expressing subsidiarity was the result of a joint proposal from Colombia and Bolivia, but only after an interesting evolution of votes and debate. On May 10, 1993, the drafters and delegates began reviewing the Convention and the working documents in order, starting with the Preamble.⁷³ At the beginning of the first meeting, the chairman expressed to the delegates that the Hague Convention's most important consideration was to benefit the adoptive child and reminded the delegates that "the Convention is intended to give a family to a child and not a child to a family."⁷⁴ The first point of substance that was raised was by the delegate from Colombia.⁷⁵ She wished to change the Preamble's wording of "in any suitable manner be cared for" to "find a suitable family," pointing out that this modified language was intended to express the view that "intercountry adoption is a good option... because it is an alternative advantageous to a child for whom a suitable family cannot be found domestically."⁷⁶ This initial attempt to alter the subsidiarity paragraph of the Preamble to have a greater family focus, although finding support from the Chilean and Chinese delegates, was voted down.⁷⁷

In a later session, the delegate from Egypt returned to the Preamble and sought to change the language to indicate that alternatives short of domestic adoption should be recognized as appropriate.⁷⁸ The delegate stated that "[a]lthough these alternatives fall short of full legal adoption, they often provide

⁷¹ PROCEEDINGS OF THE SEVENTEENTH SESSION 10 TO 29 MAY 1993, *supra* note 27, at 339.

⁷² See Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *supra* note 18, at Preamble (the final text changing from "Recognizing that intercountry adoption may offer the advantage of a permanent family to a child who cannot in any suitable manner be cared for in his or her country of origin" to "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.").

⁷³ PROCEEDINGS OF THE SEVENTEENTH SESSION 10 TO 29 MAY 1993, *supra* note 27, at 356.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 356–57. Amongst those arguing against the Colombian proposal was a delegate from Greece who did not disagree with the proposal's intent, but felt that the current language was broad enough to capture the view put forth by the Colombian delegate.

⁷⁸ *Id.* at 472.

for the same health, social and educational care as that of full adoption and they should be recognized.”⁷⁹ Smolin, one of the foremost supporters of domestic options, even over permanent families, takes a surprisingly similar view.⁸⁰ However, no country was willing to support the Egyptian proposal and it consequently failed.⁸¹ The failure of this proposal, brought up for the second time, is a perfect illustration of the fact that the drafters of the Hague Convention did not intend subsidiarity to mean that care short of a permanent family should be considered ahead of intercountry adoption. The further evolution of the Preamble reinforces this conclusion.

Immediately after the failure of the Egyptian proposal, Indonesia proposed language that would eventually lead to the first and second paragraphs of the Preamble as finally adopted.⁸² The Austrian delegate then rose in support of a proposal by Colombia⁸³ (which was identical to one of his own proposals) that underlined the importance of children growing up in a family environment.⁸⁴ The Colombian delegate again expressed her conviction that “a child [be] brought up within a family, whether that family be in the country of origin or in another State.”⁸⁵ The delegate from Sweden affirmed his strong support for this same ideal.⁸⁶ The delegate from the Holy See likewise expressed his support because of ambiguities in another part of the Convention and his belief that this proposal was supported by the Convention on the Rights of the Child.⁸⁷ After a few further comments,⁸⁸ including the Austrian delegate noting that the Preamble “would be very important to the public face of the Convention,” a vote was taken

⁷⁹ *Id.*

⁸⁰ See BARTHOLET & SMOLIN, *supra* note 7, at 241 (discussing the idea that alternative care including “high quality foster or institutional care” may be a preferred option to intercountry adoption).

⁸¹ PROCEEDINGS OF THE SEVENTEENTH SESSION 10 TO 29 MAY 1993, *supra* note 27, at 472.

⁸² *Id.* at 472–73.

⁸³ *Id.* at 298. The text of the proposal being “Bearing in mind that a child, for the full and harmonious development of his or her personality, should grow up in a family environment.”

⁸⁴ *Id.* at 473.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* One of these comments was from the Irish delegate who stated that the Preamble should use the full wording contained in the Convention on the Rights of the Child expressing a similar idea. This comment received no additional support.

and the proposal passed.⁸⁹ Upon the conclusion of the vote, the chairman noted that the drafting committee would have to look at the Colombian and Indonesian proposals and redraft them to be in harmony with the rest of the Preamble.⁹⁰ Then, in the odd way that the mundane and the extremely important are so often intertwined, he remarked, “The rest of the world will judge the document, to an extent, on the contents of the Preamble.”⁹¹

At the following session, the delegate from Colombia presented a joint proposal of her country and Bolivia⁹² recommending deletion of the third paragraph as it then existed⁹³ in favor of “[r]ecognizing that intercountry adoption may offer the advantage of a permanent family to a child who cannot find a suitable family in his or her country of origin.”⁹⁴ This proposed language solidified the subsidiarity principle as a principle about “family” and not about “care.” The Colombian delegate then reminded the other delegates that a child’s right to a family is a fundamental right.⁹⁵ The chairman called for a vote and the joint proposal passed; forever embodying a view of subsidiarity in the Hague Convention as one based, not on alternative care, but on the fundamental concept of family.⁹⁶

From its earliest iterations⁹⁷ to its explanatory report,⁹⁸ the Hague Convention emphasized the importance of a permanent family. The reporter noted that the third paragraph of the Preamble, where the concept of subsidiarity is contained, does not deny other alternatives, “but highlights the importance of permanent family care as the preferred alternative to care by the child’s family of

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 478.

⁹³ *Id.* at 339. The paragraph placed emphasis on care as opposed to family focused reading, “Recognizing that intercountry adoption may offer the advantage of a permanent family to a child who cannot in any suitable manner be cared for in his or her country of origin.”

⁹⁴ *Id.* at 350.

⁹⁵ *Id.* at 478–79. The minutes for the Colombian delegate’s remarks were recorded in French and note “Elle rappelle que le droit à une famille pour un enfant est un droit fondamental et demande, en cas de rejet de la proposition de la Colombie et de la Bolivie, la suppression du paragraphe 3.”

⁹⁶ *Id.* at 479.

⁹⁷ *Id.* at 151.

⁹⁸ *Id.* at 553.

origin.”⁹⁹ Importantly the focus is on family and not on care or nationality. The Colombian proposals helped to shape the Convention towards one that is focused on families rather than care.¹⁰⁰ The idea is that for a child to be in a permanent family is better than “*all* forms of alternative care.”¹⁰¹ The subsidiarity principle and its history, as contained in the Preamble, by both what it includes and what it leaves out, confirms that in all instances family comes first.¹⁰²

C. Article 4(b)

The history of Article 4(b) is not as lively as that of the Preamble. As part of a comprehensive overview of adoption, the Van Loon Report,¹⁰³ which served as a background document for the Hague Convention, attempted to accurately explain the subsidiarity principle.¹⁰⁴ Van Loon noted that most child experts agreed that domestic adoption, when available, was preferable to intercountry adoption.¹⁰⁵ Likewise, most child welfare experts did not agree with a view that Smolin seems to condone, which is that a child’s culture and society are of such importance that even institutionalization in a child’s home country is preferable to intercountry adoption.¹⁰⁶

Against this backdrop, along with other preliminary documents¹⁰⁷ and international instruments, including the Convention on the Rights of the Child, the drafters of the Hague Convention began work on drafting an article on the subsidiarity principle. In the conclusions of the 1990 Special Commission, subsidiarity was listed as a fundamental principle and defined to include domestic adoption and in-country foster care ahead of intercountry adoption.¹⁰⁸ Although with less drama than the Preamble, the subsidiarity article of the Hague Convention also underwent changes that shifted it towards a family focus.

Despite the recommendations in the conclusions of the 1990 Special Commission, the first iteration of the Convention contained no mention of “foster

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 296, 298.

¹⁰¹ *Id.* at 553 (emphasis added).

¹⁰² Meaning that not only does biological family come before adoptive family, but adoptive family, no matter the location, comes before alternative forms of care.

¹⁰³ See PROCEEDINGS OF THE SEVENTEENTH SESSION 10 TO 29 MAY 1993, *supra* note 27.

¹⁰⁴ See *id.* at 33, 55, 59, 93, 114, 119.

¹⁰⁵ *Id.* at 55.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 129.

¹⁰⁸ *Id.*

care.”¹⁰⁹ The focus of the subsidiarity article, from the beginning, was on getting the child into a family. The comments from this early draft do indicate that the drafting committee felt it did not have enough time to fully discuss the subsidiarity article and recommended that the principle be more thoroughly developed.¹¹⁰ Fortunately over two years were available for the drafters to discuss, debate, and draft the subsidiarity article before the final version would be adopted.¹¹¹

The second iteration of the subsidiarity article,¹¹² altered the language found in the Illustrative Draft Articles to remove any references to care and redefine subsidiarity to focus more on the child’s interests in permanency.¹¹³ This version of the treaty allowed for an adoption to take place if “the competent authorities of the State of origin have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child’s best interests.”¹¹⁴ This version of the subsidiarity article would remain unaltered during the entire course of the drafting and was ultimately adopted verbatim into the Hague Convention.¹¹⁵

Three important considerations were the impetuses for the changes to the subsidiarity article and each illustrates the importance the drafters placed on the child’s right to a family. First, any reference to foster care was removed because it was seen as inappropriate.¹¹⁶ Second, the practical impossibility to ensure that all alternatives in the child’s country of origin had been exhausted in each

¹⁰⁹ *Id.* at 139. The Illustrative Draft Articles included an article on subsidiarity, which read that an adoption should only be granted if “the competent authorities of the State of origin have determined that no suitable alternative exists for the adoption or the placement of the child in the State of origin.”

¹¹⁰ *Id.* at 145.

¹¹¹ *See id.* at 137 (noting that the date of the draft article is in December 1990).

¹¹² At the time this article was numbered as Article 4(b), although it would later appear in subsequent drafts as Article 5(b) before returning in the final version as Article 4(b).

¹¹³ PROCEEDINGS OF THE SEVENTEENTH SESSION 10 TO 29 MAY 1993, *supra* note 27, at 153.

¹¹⁴ *Id.* The superfluous use of the term “best interests” in the subsidiarity article may be the reason that such an emphasis is placed on it to the forgetting of the fact that the best interests principle is to govern all adoptions, both domestic and intercountry.

¹¹⁵ Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *supra* note 18, at Art. 4(b).

¹¹⁶ PROCEEDINGS OF THE SEVENTEENTH SESSION 10 TO 29 MAY 1993, *supra* note 27, at 161.

individual case led to the term “due consideration.”¹¹⁷ Third, it was acknowledged that the best interests of the child may mean that in certain cases (such as a special handicap) a child may actually be better off adopted internationally *even if* there is a family in the country of origin willing to adopt the child.¹¹⁸ This third point belies the assertion that the exception in the subsidiarity principle is for a child to be kept in her home country in an institution instead of adopted abroad.¹¹⁹ In fact, the exception to subsidiarity supports the idea of concurrent planning since an intercountry adoption could, in some instances, prove to be better for the child than a domestic adoption.¹²⁰ This version of the subsidiarity article was ultimately adopted without amendment or significant discussion.¹²¹ However, the battle over subsidiarity in the Preamble had not yet concluded at the time the subsidiarity article was adopted.¹²² The fact that the drafters were willing to agree on the language of the subsidiarity article, based on the explanations given by the committee that drafted it, before the details of the Preamble had been fully hammered out, illustrates both the complexity of drafting and the importance of the Preamble in helping define subsidiarity.

Even though the article appeared to be conclusively adopted, Egypt, after having failed to alter the language of the Preamble, made a last ditch effort to change the subsidiarity article and institute concessions for countries that do not recognize adoption.¹²³ As in all previous occasions, Egypt’s proposal failed.¹²⁴

D. Subsidiarity as Adopted in the Hague Convention

As shocking as it may seem to some, the history and plain language of the subsidiarity principle can only lead to one conclusion: the language used in the Convention on the Rights of the Child was not followed. Where the Convention on the Rights of the Child clearly includes foster care as being higher

¹¹⁷ *Id.* It was noted that it would be practically impossible to ensure that all alternatives for placement in the country of origin had been exhausted.

¹¹⁸ *Id.*

¹¹⁹ See ELIZABETH BARTHOLET & DAVID SMOLIN, *supra* note 7, at 241 (Smolin contending that “in some instances” institutionalization may be better than an intercountry adoption by a willing family).

¹²⁰ See *id.* at 237 (Bartholet arguing that both intercountry and domestic adoptive homes should be looked for simultaneously).

¹²¹ *Id.* at 369.

¹²² *Id.* at 472.

¹²³ *Id.* at 480–81.

¹²⁴ *Id.*

up the child welfare ladder than intercountry adoption,¹²⁵ the Hague Convention appears to have purposefully omitted the same language.¹²⁶ Under the doctrine of *expressio unius est exclusio alterius* and the plain language of the subsidiarity principle, both the Preamble and Article 4(b) of the Hague Convention, to say nothing of explanatory reports by the actual drafters,¹²⁷ must be interpreted as promoting permanent families. This includes viewing domestic and intercountry adoption as the preferred solution for children who cannot remain in the care of their biological parents. As in all legislation, but particularly so in international treaty making, divining a single and complete intent from multiple parties with varying interests is so difficult that a reliance on the plain language of the text is the surest way to correctly understand the document.

Both the Convention on the Rights of the Child¹²⁸ and the Hague Convention¹²⁹ hold that intercountry adoption should take place in compliance with the best interests of the child. Although the drafters were not explicit about the controversy¹³⁰ surrounding the inclusion of foster care as clearly preferred to intercountry adoption, it stands to reason, based on the drafting history, that the drafters felt that non-permanent solutions, including foster care, would not generally fulfill the best interests principle. Thus, the Hague Convention appears to be a truer embodiment of the best interest principle because it clearly mandates that permanent solutions be given preference over temporary ones. In contrast, the Convention on the Rights of the Child ends up contradicting itself by requiring that adoption decisions be in the best interests of the child, but then proceeds to dictate that a non-permanent solution (i.e. foster care) be picked over a permanent solution (i.e. intercountry adoption).¹³¹ The Hague Convention avoids such contradictions by refraining from defining non-permanent solutions

¹²⁵ Convention on the Rights of the Child, *supra* note 22, at Art. 21(b).

¹²⁶ See PROCEEDINGS OF THE SEVENTEENTH SESSION 10 TO 29 MAY 1993, *supra* note 27, at 161 (refusing to use the term “foster care” because it was deemed inappropriate).

¹²⁷ See *id.* (discussing the fact that the exception to subsidiarity actually cuts in favor of the intercountry adoptive family and not an institution or other domestic placement, including adoption).

¹²⁸ Convention on the Rights of the Child, *supra* note 22, at Art. 21(b).

¹²⁹ Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *supra* note 18, at Preamble.

¹³⁰ See PROCEEDINGS OF THE SEVENTEENTH SESSION 10 TO 29 MAY 1993, *supra* note 27.

¹³¹ See Convention on the Rights of the Child, *supra* note 22, at Art. 21.

as preferable to permanent solutions.¹³² If subsidiarity were to be otherwise applied, it would violate the best interests principle in the vast majority of instances.

A subtle, yet important, difference in wording between the Convention on the Rights of the Child and the Hague Convention is also indicative. The Hague Convention rejected the concept of “care” found in the Convention on the Rights of the Child¹³³ in favor of the concept of “family.”¹³⁴ Whereas the Convention on the Rights of the Child would implement subsidiarity by stating that intercountry adoption should only follow when a child “cannot in any suitable manner be cared for in the child's country of origin,”¹³⁵ the Hague Convention notes that intercountry adoption may offer “a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.”¹³⁶ The contrast between the wording in these two conventions again illustrates that the Hague Convention made a more honest attempt to promote the best interests of the child, with an understanding that such interests will almost always dictate a permanent family as the best solution.

The reporter’s retelling of the drafting of the Hague Convention tries to assert that the omission of “foster care” in the subsidiarity principle was not all that important since States would still follow the subsidiarity principle as contained in the Convention on the Rights of the Child.¹³⁷ In addition to running afoul of the best interests principle, such logic negates the fact that the Hague Convention is a specific instrument on intercountry adoption and is more recent than the Convention on the Rights of the Child. There were multiple opportunities to insert references to foster care or reformulate the subsidiarity article,¹³⁸ but no such change or reformulation occurred.

¹³² Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *supra* note 18, at Preamble and Art. 4(b).

¹³³ See Convention on the Rights of the Child, *supra* note 22, at Art. 21(b).

¹³⁴ Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *supra* note 18, at Preamble.

¹³⁵ Convention on the Rights of the Child, *supra* note 22, at Art. 21(b).

¹³⁶ Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *supra* note 18, at Preamble.

¹³⁷ PROCEEDINGS OF THE SEVENTEENTH SESSION 10 TO 29 MAY 1993, *supra* note 27, at 199.

¹³⁸ *Id.*

Notably, the reporter also admitted that the subsidiarity principle was understood to embrace the idea that a child being in an adoptive family, regardless of location, “is the best option among *all* forms of alternative care”¹³⁹ (emphasis added). In this instance, as opposed to the discussion of the intent to follow the Convention on the Rights of the Child, the reporter is actually reporting on what a delegate and drafter of the Hague Convention had said. Unfortunately, many academics are quick to forget the words of the Hague Convention or of those who actually drafted it. Instead, they rely on the explanatory comments of the reporter and neglect to follow correct methods of legal interpretation.¹⁴⁰

Ultimately, it is interesting that Article 4 b), which is looked to as the main explanation of the subsidiarity principle in the Hague Convention, underwent less change and debate than the Preamble’s explanation of subsidiarity. The two work in tandem and their history and drafting must also be taken together to fully comprehend what is meant by the subsidiarity principle in the Hague Convention.

Regrettably, even when looking at these two clauses together, there are still ambiguities about what the subsidiarity principle really entails. However, it is clear that the focus should be on family and permanency.¹⁴¹ From the background documents¹⁴² to the end product, a view more akin to the one espoused by Elizabeth Bartholet, placing emphasis on permanent families, persisted. The only portion of Smolin’s view that appears correct is that a child should remain with her biological family where possible. On all other counts his view is rejected by the Hague Convention. Despite attempts to alter the principle, subsidiarity as drafted in the Hague Convention remained firmly focused on finding permanent families for children, with adoption, regardless of geography, being viewed as a better option than care that was legally less than adoption.

¹³⁹ *Id.* at 553.

¹⁴⁰ See CLAIRE FENTON-GLYNN, CHILDREN’S RIGHTS IN INTERCOUNTRY ADOPTION: A EUROPEAN PERSPECTIVE 21 (2014) (relying on the comments of the explanatory report rather than looking to the actual text of the Hague Convention).

¹⁴¹ See PROCEEDINGS OF THE SEVENTEENTH SESSION 10 TO 29 MAY 1993, *supra* note 27, at 553.

¹⁴² *Id.* at 55.

IV. SUBSIDIARITY IN LIGHT OF ITS HISTORY

The subsidiarity principle as envisioned in the Hague Convention has a family focused hierarchy. The priority is for every child to remain in his or her family of origin as appropriate and possible.¹⁴³ This becomes particularly important in times of crisis,¹⁴⁴ but applies at all times. Where the subsidiarity principle really comes into play is in the instances where a child can no longer remain in her family of origin.¹⁴⁵

The language of the Hague Convention recognizes the need to find a “suitable family” in the State of origin when a child can no longer remain in her family of origin.¹⁴⁶ After “possibilities for placement”¹⁴⁷—in the context of the history of the subsidiarity principle, permanent families¹⁴⁸—in the country of origin are given “due consideration” then an intercountry adoption may take place.¹⁴⁹ As Jorge Alberto Silva explained with reference to Mexican children being adopted abroad, “The treaty does not establish that Mexicans must be preferred to foreigners, but that one must first look for a home in the country of origin”¹⁵⁰ (translation own). When adoption in the country of origin is not possible, or not preferable, an intercountry adoption is entirely appropriate. The Permanent Bureau’s Guide to Good Practice, although written long after the drafting of the Hague Convention, states that “[w]hile it is important to look for a

¹⁴³ Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *supra* note 18, at Preamble.

¹⁴⁴ See HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *supra* note 43, at Annex 9, Annex 10 (reports from the Permanent Bureau and UNICEF, respectively, on children in crisis situations).

¹⁴⁵ There are questions about adoptability, consent, abandonment, and other issues that may make a child ineligible for adoption, but the focus here is on children that are eligible for intercountry adoption, as well as domestic alternatives to their biological families.

¹⁴⁶ Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *supra* note 18, at Preamble.

¹⁴⁷ *Id.* at Art. 4(b).

¹⁴⁸ Again noting that permanent families should be families with full legal rights and obligations. Such families are likely to only be possible through adoption.

¹⁴⁹ Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *supra* note 18, at Art. 4(b).

¹⁵⁰ Jorge Alberto Silva, *El Impacto de los Convenios Internacionales sobre la Legislación Interna Mexicana Relativa a la Adopción Internacional de Menores* (2011), <http://www.juridicas.unam.mx/publica/rev/derpriv/cont/4/tci/tci7.htm>. The text in Spanish reads “El tratado no establece que debía preferirse a los mexicanos sobre los extranjeros, sino que primero debe buscarle un hogar en su país de origen.”

home in the country of origin, a permanent home in another country would be preferable to a temporary home in the country of origin.”¹⁵¹

In light of the history of the subsidiarity principle in the Hague Convention, intercountry adoption should not be viewed as a last resort or as an option that must come after every domestic alternative. Indeed, foster care, other forms of care less than legal adoption, and institutionalization are all options that should not be considered until after attempts to find a domestic or intercountry adoptive family have failed.

Foster care may be appropriate in instances where a domestic or intercountry adoption is not a possibility, but it should never be used as a tool to circumvent an adoption.¹⁵² This is particularly important since foster care is not a permanent solution and, except in atypical circumstances, cannot offer the same type of family environment that a child’s right to family entails. One country, in commenting on care for special needs children noted that “these [c]hildren do not get families. [T]hese [c]hildren are placed in foster homes.”¹⁵³ This perception of foster care as unabashedly less than being in a family reinforces the need for permanent families to come before foster care and other alternative care solutions.

Institutionalization, on the other hand, should never be viewed as a viable alternative, given the damaging effects it has on children.¹⁵⁴ Even UNICEF, an organization not known for its ardent support of intercountry adoptions, decries institutionalization “as a last resort” that should only be used “as a temporary measure.”¹⁵⁵

¹⁵¹ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *supra* note 43, at 114.

¹⁵² Assuming that both the potential adoption and the foster care would be in the child’s best interest.

¹⁵³ Lesotho, Questionnaire No. 2 on the Practical Operation of the 1993 Hague Convention on Intercountry Adoption, question 14(c) (2014), *available at* http://www.hcch.net/upload/wop/adop2015q2_1s.pdf.

¹⁵⁴ *See, e.g.*, Dana E. Johnson, *An Orphanage is Not a Family* (Dec. 16, 2011), <http://guatemala900.org/wp/?p=2572>; Minnesota Medicine, *Fostering Healthy Brains* (March 2006), <http://www.minnesotamedicine.com/Past-Issues/Past-Issues-2006/March-2006/Pulse-Brain-March-2006>; Dennis Drotar et al., Early Psychological Outcomes in Failure to Thrive: Predictions from an Interactional Model 14 J. CLINICAL CHILD PSYCHOL. 105, (1985) (explaining the devastating effects an orphanage has on a child).

¹⁵⁵ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *supra* note 43, at Annex 10. Such a statement gives further credence to opposing the view of Smolin and others that

A. Exception to Subsidiarity

There is, however, an exception to the subsidiarity principle that is spelled out in the explanatory report.¹⁵⁶ Those advocating under Smolin's view argue that the exception to subsidiarity is in favor of the child staying in her home country to be able to enjoy the culture, language, and other aspects of life that can only be provided there even if an intercountry adoption is available and the domestic option is short of adoption.¹⁵⁷ This view is unquestionably incorrect. The drafters of the Hague Convention reached a "consensus" that an exception to the subsidiarity principle, in certain circumstances, is possible.¹⁵⁸ When there is cause (meaning that it is in the child's best interests) for such an exception, a child that has an opportunity to be placed in a domestic adoption may in fact be adopted abroad.¹⁵⁹ This is noted as being most likely to happen when the child is a relative of the family abroad or the child has a specific handicap and cannot adequately be taken care of in her home country.¹⁶⁰

There is most definitely an exception to the subsidiarity principle. Yet, this exception is not one that allows for a child to be placed in an institution or care that is less than a permanent family in lieu of being adopted abroad. Rather, the exception to the subsidiarity principle cuts in favor of intercountry adoption in certain instances, consistent with the overarching principles of the Hague Convention and its family centered focus.

B. The Fallacy of Exhaustion

Unfortunately, along with the misconception of exceptions to the subsidiarity principle, there is also a popular fallacy that all domestic options

sometimes institutionalization is in the best interests of a child and is to be preferred over intercountry adoption in certain instances.

¹⁵⁶ PROCEEDINGS OF THE SEVENTEENTH SESSION 10 TO 29 MAY 1993, *supra* note 27, at 569.

¹⁵⁷ See ELIZABETH BARTHOLET & DAVID SMOLIN, *supra* note 7, at 241 (Smolin stating that institutionalization may be an exception to the subsidiarity principle in certain instances).

¹⁵⁸ PROCEEDINGS OF THE SEVENTEENTH SESSION 10 TO 29 MAY 1993, *supra* note 27, at 569.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* The full text of the paragraph detailing this exception to subsidiarity reads: "Notwithstanding the express acceptance of the subsidiarity principle, there was consensus that, in certain circumstances, the best interests of the child may require that he or she be placed for adoption abroad, even though there is a family available in the State of origin, for instance, in cases of adoption among relatives, or of a child with a special handicap and he or she cannot adequately be taken care of."

must be exhausted (in other words, looked for and found unavailable) before an intercountry adoption can be considered.¹⁶¹ For example, a recent report from the Donaldson Adoption Institute repeatedly claims that all domestic permanency alternatives must be exhausted before an intercountry adoption can take place.¹⁶² This is unequivocally incorrect. As noted above, there is an exception to subsidiarity that explicitly allows for an intercountry adoption to be preferred over a domestic adoption.¹⁶³ Furthermore, the language of the Hague Convention itself makes it abundantly clear when it states that a child may be placed in intercountry adoption “after possibilities” for domestic adoption have been given “due consideration.”¹⁶⁴ The text does not say “after all possibilities” or “after exhaustion of possibilities.”

Indeed, the practical effect of reading into the Hague Convention the requirement that *every* possible chance be given for a domestic adoption to occur before considering intercountry adoption would almost certainly violate the best interests principle. After all, a child that is presently four-years-old and living in an institution may not be adopted now, but could potentially be adopted domestically in a year, two years, or ten years. However, there is no guarantee that such an adoption would take place. Meanwhile, an intercountry adoption may be available for the child. If exhaustion were required, more and more children would be subject to languishing indefinitely in orphanages because of the “possibility,” however remote, that one day they will be adopted within their country of origin.

For these reasons, the Permanent Bureau’s Guide to Good Practice unambiguously states that the Hague Convention “does not require that all possibilities be exhausted.”¹⁶⁵ To require such exhaustion would be “unrealistic” and “may delay indefinitely” the possibility of finding a permanent family for a

¹⁶¹ See Ellen Pinderhughes et al., *A Changing World: Shaping Best Practices through Understanding of the New Realities of Intercountry Adoption: A Policy & Practice Perspective*, THE DONALDSON ADOPTION INSTITUTE 10, 59, 60, 61, 89 (2013), http://adoptioninstitute.org/old/publications/2013_10_AChangingWorld.pdf (noting that domestic options for permanency for children must be “exhausted” before an intercountry adoption can be considered).

¹⁶² *Id.*

¹⁶³ PROCEEDINGS OF THE SEVENTEENTH SESSION 10 TO 29 MAY 1993, *supra* note 27, at 569.

¹⁶⁴ Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *supra* note 18, Art. 4(b).

¹⁶⁵ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *supra* note 43, at 29.

child¹⁶⁶. The Guide to Good Practice also clarifies that even a search for relatives should “not unnecessarily prolong the period of institutional care for the child.”¹⁶⁷ Consistent with the focus on permanent families and the overarching principles of the best interests of the child and a child’s right to a family, supported by the actual text of the Hague Convention and the history of the subsidiarity principle, any call for an exhaustion of possibilities in a child’s country of origin is incorrect, ludicrous, and damaging to children.

CONCLUSION

The subsidiarity principle in the Hague Convention is found in both the Preamble and Article 4(b)¹⁶⁸ and can only be correctly understood when looking at both together. Leading up to the drafting of the Hague Convention, background documents were prepared which tried to explain what subsidiarity was understood to encompass in that period of time.¹⁶⁹ The drafters of the Hague Convention had these documents and others, including the Convention on the Rights of the Child, available to them when drafting the Hague Convention. They deliberately declined to follow the language in the Convention on the Rights of the Child that would place foster care ahead of intercountry adoption, instead preferring to place emphasis and preference on permanent families.¹⁷⁰

Multiple attempts were made to change the language of the subsidiarity principle,¹⁷¹ but the only ones that proved successful were those that shifted the principle towards being more focused on permanent families.¹⁷² The subsidiarity principle in the Hague Convention is focused on helping children find families, whether in their countries of origin or abroad. Forms of lesser care, including foster care, are to be seen as alternatives to permanent families, with institutionalization being, in every way, the last resort.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 73.

¹⁶⁸ Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *supra* note 18, at Preamble, Art. 4(b).

¹⁶⁹ PROCEEDINGS OF THE SEVENTEENTH SESSION 10 TO 29 MAY 1993, *supra* note 27, at 27.

¹⁷⁰ *Id.* at 161.

¹⁷¹ *See, e.g., id.* at 243 (One of Egypt’s attempts to change the text of the subsidiarity principle).

¹⁷² *See id.* at 350 (The Colombian and Bolivian proposal that ultimately became the text of the Hague Convention).

Unfortunately, there is a raging debate about what the subsidiarity principle means,¹⁷³ and misinterpretations¹⁷⁴ and fallacies abound.¹⁷⁵ Smolin and others advocating for children to be placed in non-permanent care ahead of intercountry adoptions have either not read the text of the Hague Convention alongside its drafting history or do not understand it. Permanent family solutions, including intercountry adoption, are clearly preferable to non-permanent solutions such as foster care, group homes, and institutionalization.¹⁷⁶

Particular wording and reasoning in the Convention on the Rights of the Child was not followed by the Hague Convention. It appears that this was done to avoid contradictions and truly promote the best interests of the child by emphasizing permanent families over foster care and other forms of “suitable care.”¹⁷⁷

Through the forgoing detailed analysis of the history of the drafting of the subsidiarity principle, including discussion of what was and was not included and why, clarity should be brought to the debate on subsidiarity. The subsidiarity principle is about families. It is an expression of the idea that every child has a fundamental right to grow up in a loving and permanent family and that such is in the child’s best interests. No care situation that is short of a permanent family should be preferred over a permanent family, regardless of geographic location.¹⁷⁸ The bottom line, as touted by child welfare advocates and the drafters of the Convention, is that every child deserves a family.

¹⁷³ See BARTHOLET & SMOLIN, *supra* note 7 (contending about the definition of the subsidiarity principle).

¹⁷⁴ *Id.* at 241.

¹⁷⁵ *A Changing World: Shaping Best Practices through Understanding of the New Realities of Intercountry Adoption: A Policy & Practice Perspective*, *supra* note 161, at 10.

¹⁷⁶ There may be some exceptions, but in the vast majority of cases the best interests principle and the proper application of subsidiarity would require that a child be placed in a permanent family if such a family is available.

¹⁷⁷ Convention on the Rights of the Child, *supra* note 22, at Art. 21(b).

¹⁷⁸ Again, assuming that all options would comply with the best interests principle.