

Human Rights to Culture, Family, and Self-Determination: The Case of Adoptive Couple v. Baby Girl

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Abstract

*The well-being of indigenous children is a subject of major concern for indigenous peoples and human rights advocates alike. In 2013, the U.S. Supreme Court decided in *Adoptive Couple v. Baby Girl* that the Indian Child Welfare Act did not prevent the adoption of a Cherokee child by a non-Indian couple. This occurred over the objections of her Cherokee biological father, extended family, and Tribal Nation. After the decision, Baby Girl's father and the adoptive couple contested the matter in a number of proceedings, none of which considered the child's best interests as an Indian child. The tribally-appointed attorney for Baby Girl, as well as the National Indian Child Welfare Association and National Congress for American Indians, began examining additional venues for advocacy. Believing that the human rights of Baby Girl, much like those of other similarly situated indigenous children, were being violated in contravention of the United Nations Declaration on Indigenous Peoples Rights, and other instruments of international law, they asked us to bring the matter to the attention of the United Nations Special Rapporteur for Indigenous Peoples Rights ("UNSR"). We prepared a "statement of information" to alert the UNSR of the human rights violations occurring in the case. With the permission of the attorneys and organizations involved, this chapter introduces the Baby Girl case, contextualizes the claims in international human rights law, and then reproduces the statement of information, and portions of the UNSR's subsequent public statement. It concludes with an update on the Baby Girl case and broader discussion about the potential for using international law and legal forums to protect the human rights of indigenous children.*

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Introduction

Children have always held a special place in indigenous cultures.¹ Accordingly, in today's era of indigenous self-determination, many tribal communities are focused on the well-being of their children, and provide family, health, and educational programs to support them.² At the same time, however, as a recent report of the UN General Assembly noted, indigenous children remain vulnerable to human rights violations, such as "extreme forms of exclusion and discrimination" leading to deprivations of individual and collective rights to family, culture, education, health care, and other "basic safeguards that are necessary for their survival, development and protection."³ The history of conquest and colonization has brought about disruption to the fabric of tribal societies such that generations of indigenous peoples have suffered from poverty, relocation, disease, and violence. This historical legacy has had a lasting impact on indigenous children as well.⁴

In nations across the world, the forced removal of indigenous children from their parents and families -- occurring well into the 20th century at the hands of government, religious, and educational institutions fostering assimilation policies -- has left a legacy of loss and disruption that has been difficult to remedy in contemporary times.⁵ In the United States, for example, following decades of boarding school programs and other initiatives to remove Indian children from their families, Congressional studies showed that by the 1970's one quarter of American Indian children were being adopted by non-Indians.⁶ As has been well-documented, this phenomenon was driven in significant part by government social workers and religiously affiliated adoption agencies who

¹ Examples could be drawn from indigenous communities across the world. *See, e.g.*, Center for Advanced Studies in Child Welfare, *The Anishinabe Child in the Context of Child Welfare*, July 28, 2011 ("The Anishinabe hold their children in high regard. Every child is sacred. This is directly related to Ojibwe spiritual beliefs."); Secretariat of Aboriginal and Torres Strait Islander Childcare, *Fostering their Culture: Caring for Aboriginal and Torres Strait Islander Children* 9 (2008) (describing that Aboriginal and Torres Strait Islander children have a "special place within family and community" that reflects each child's place in the community's kinship structure and his or her relationship to the land).

² *See* University of Arizona, Native Nations Institute, Indigenous Governance Database, <http://nnidatabase.org/db/video/honoring-nations-julie-wilson-child-welfare-indian-country> (providing cases studies of family and youth services in a number of American Indian tribal communities).

³ *See, e.g.*, UN Secretary General, Status of the Convention of the Rights of the Child, A/67/225, August 13, 2012 (focusing, in part, on the situation and rights of indigenous children).

⁴ *See generally* SONIA HARRIS-SHORT, *ABORIGINAL CHILD WELFARE, SELF-GOVERNMENT, AND THE RIGHTS OF INDIGENOUS CHILDREN: PROTECTING THE VULNERABLE UNDER INTERNATIONAL LAW* (2012) (recognizing the impact of colonization on the contemporary welfare and legal situation of aboriginal children in Canada and Australia).

⁵ *See, e.g.*, PETER READ, *THE STOLEN GENERATIONS: THE REMOVAL OF ABORIGINAL CHILDREN IN NEW SOUTH WALES 1883 TO 1969*, NEW SOUTH WALES GOVERNMENT - DEPARTMENT OF ABORIGINAL AFFAIRS, 2006.

⁶ For an account of this history, *see, e.g.*, Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 HARV. HUM. RIGHTS J. 47 (2007).

sought to provide Indian children with what they perceived as better social, cultural, and economic opportunities. Yet the testimony of adult adoptees, as well as tribal leaders, suggested that these policies were often implemented in misguided fashion to the harm of individual children and entire communities. In 1978, Congress passed the Indian Child Welfare Act “to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families,” by setting forth procedural and substantive legal protections that apply to state child custody proceedings involving an Indian child who is a member of or eligible for membership in a federally recognized tribe.⁷

In the years since ICWA was passed, tribes in the U.S. have worked to develop infrastructure and services to protect tribal children.⁸ Tribal attorneys are knowledgeable about ICWA and regularly bring actions to enforce its notice, jurisdiction, and placement provisions in proceedings throughout the country.⁹ Tribal advocates work to educate family and child service agencies, attorneys, and courts on applicable federal and state law, and to resist legislative and judicial challenges to ICWA.¹⁰ As importantly, many tribal nations have prioritized child and family welfare in their governance and program building initiatives.¹¹ Many tribes now administer their own programs in tribal foster care and adoptive family services, health care for pregnant women and children, education from pre-school through university and graduate studies. Tribal court systems have adopted special rehabilitative programs for juvenile justice, and many tribes, along with urban Indian organizations, have cultural revitalization programs with a component for children. Domestic violence, substance abuse, and suicide prevention initiatives across Indian Country are designed, in significant part, to strengthen and heal tribal families, and allow parents and other caregivers to recover their roles in raising children.¹²

Still major challenges in Indian child welfare remain, including the failure of U.S. state governments and private adoption agencies to comply with ICWA. A recent U.S.

⁷ See Indian Child Welfare Act of 1978, 25 U.S.C. § 1901-1963 (2000).

⁸ For an account of these developments, see generally MATTHEW L.M. FLETCHER, WENONA T. SINGEL & KATHERYN E. FORT, *FACING THE FUTURE: THE INDIAN CHILD WELFARE ACT* at 30 (2009).

⁹ See *Mississippi Choctaw v. Holyfield*, 490 U.S. 30 (1989) (upholding tribal court jurisdiction over child custody proceeding involving children whose parents were domiciled on reservation).

¹⁰ See, e.g., Lorie M. Graham, *The Past That Never Vanishes: A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. IND. LAW. REV. 1 (1998).

¹¹ See Terry L. Cross and Robert J. Miller, *The Indian Child Welfare Act of 1978 and its Impact on Tribal Sovereignty and Governance*, in FLETCHER, *supra* note __, at 13–27 (describing tribal governance approaches to child welfare, including the development of tribal legislative codes and judicial bodies, cooperative agreements with states, and tribal citizen participation in child services reform).

¹² For examples of certain technical assistance programs supported by the National Indian Child Welfare Association, see, e.g., http://www.nicwa.org/technical_assistance/.

Government Accounting Office Report noted that many states are neither implementing ICWA nor collecting data on its implementation.¹³ Recent studies show that American Indian children in states across the nation continue to be placed in non-Indian adoptive homes at high and disproportionate rates. In 2008, for example, 56% of adopted American Indian and Alaska Native children were placed in non-Native homes.¹⁴ These cases have exposed not only the unlawful treatment of American Indian children in the adoption and child welfare systems,¹⁵ but also a persistent attitude, in some quarters, that American Indians need to be “saved” from their Indian birth families and communities through adoption.¹⁶ Behind these statistics and cases are the Indian children and families who suffer from ongoing violations of their human rights, including the forced removal of children from Indian parents and extended family members who are loving, capable caregivers.

In one recent case, a newborn baby eligible for citizenship in the Cherokee Nation (“Baby Girl”) was put up for adoption by her birth mother, without notice to her biological Indian father or her tribal nation.¹⁷ Four years of custody battles ensued, with Baby Girl spending the first two years of her life with the pre-adoptive couple in South Carolina and the second two with her biological father and extended family in the Cherokee Nation. The case reached the U.S. Supreme Court where, on a 5-4 decision, the majority held that ICWA did not prevent termination of the father’s parental interests in this case. The pre-adoptive couple then filed actions in several state and federal courts to compel a transfer of custody to them, and Baby Girl’s father and extended family refused to relinquish custody without a determination of whether such transfer would be in Baby Girl’s “best interests” as an Indian child. The State of South Carolina then put out an arrest warrant for Baby Girl’s father and the Cherokee Nation moved the family to the safety of tribal land.

¹³ See U.S. Government Accountability Office, Report to Requesters, Indian Child Welfare Act: Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States (2005), available at <http://www.gao.gov/new.items/d05290.pdf>.

¹⁴ R.M. Kreider, *Interracial Adoptive Families and Their Children: 2008* in ADOPTION FACTBOOK V: NATIONAL COUNCIL FOR ADOPTION 109 (2011), available at <https://www.adoptioncouncil.org/publications/adoption-factbook.html>.

¹⁵ See Associate Press, Native American Groups Seek Child Welfare Probe, February 3, 2014 (noting that the The National Indian Child Welfare Association, the National Congress of American Indians, the Native American Rights Fund, and the Association on American Indian Affairs formally requested the U.S. Department of Justice Civil Rights Division launch an investigation into the unlawful treatment of American Indian and Alaska Native children in private adoptions and public child welfare systems.”).

¹⁶ See, e.g., Jacqueline Keeler, *Baby Veronica and Indian Sovereignty 50 Years After the March on Washington*, Native Condition, Aug. 29, 2013, <http://www.nativenewsnetwork.com/baby-veronica-and-indian-sovereignty-50-years-after-the-march-on-washington.html> (describing “Christian adoption groups” including the Christian Alliance for Indian Children and Citizens Equal Rights Alliance (CERA) whose “websites and articles are filled with stories about the poverty and abuse of Indian children in Indian country.”)

¹⁷ *Adoptive Couple v. Baby Girl*, 570 U.S. __ (2013).

At that point, the tribally-appointed attorney for Baby Girl, as well as the National Indian Child Welfare Association, and National Congress for American Indians, began examining additional venues for advocacy. Believing that the human rights of Baby Girl, much like other similarly situated indigenous children, were being violated in contravention of the United Nations Declaration on Indigenous Peoples Rights, and other instruments of international law, they asked us to bring the matter to the attention of the United Nations Special Rapporteur for Indigenous Peoples Rights, S. James Anaya (“UNSR”). The UNSR is an independent expert who encourages best practices in the human rights of indigenous peoples, reports on the situation of indigenous peoples in select countries, investigates cases of alleged human rights violations, and contributes to thematic studies regarding issues of importance to indigenous peoples.¹⁸ Employing the UNSR’s process for communications regarding human rights violations, we drafted a “statement of information” on behalf of the Baby Girl’s attorney and the organizations mentioned above.¹⁹ The UNSR then issued a public statement regarding the situation.

Both the statement of information and portions of the UNSR’s public statement are reproduced here, with the permission of the attorneys and organizations involved, toward the goals of enhancing education about indigenous children’s human rights, and increasing familiarity with the UNSR’s communications procedures regarding human rights violations. We conclude the chapter with some comments about the aftermath of the case involving Baby Girl and the current state of indigenous child welfare advocacy internationally and in the U.S.

¹⁸ See Website of the UN Special Rapporteur on the Rights of Indigenous Peoples, <http://unsr.jamesanaya.org/>.

¹⁹ For a description of this process, see <http://unsr.jamesanaya.org/comm/submitting-information-to-the-special-rapporteur>.

**Statement of Information on the Welfare and Best Interests of “Baby Girl” and
similarly situated Indigenous Children in the United States**

**Submitted to the U.N. Special Rapporteur on the Rights of Indigenous Peoples,
S. James Anaya**

**Submitted on behalf of “Baby Girl,”[†] by her Next Friend, Angel R. Smith, by the
National Indian Child Welfare Association, and by the National Congress of
American Indians**

August 2013

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[†] While the submission to the UN Special Rapporteur used the child’s actual name, it has been changed here for privacy reasons to “Baby Girl.”

^{*} With thanks to Brian Badgley, a recent graduate of Suffolk University Law School, for his research assistance.

Introduction

The following document outlines an urgent request to the U.N. Special Rapporteur on the Rights of Indigenous Peoples to ensure the protection of the rights of indigenous children, their families and tribal nations in the United States. Specifically, this request comes as a result of recent developments in an attempted adoption involving a Cherokee child known as “Baby Girl.”²⁰ Her situation and the manner by which she arrived in it raises serious concerns regarding the rights of American Indian and Alaska Native children, their families and tribal nations as guaranteed under international human rights law.

Baby Girl is an (almost) four year old child and citizen of the Cherokee Nation of Oklahoma, facing judicially-ordered removal from her Indian family through the transfer of custody to a non-Indian couple in South Carolina, without a legal determination of whether this transfer would be in her best interests as an Indian child. Happy, healthy, and well-adjusted, Baby Girl presently lives with her biological Cherokee father and step-mother in Oklahoma, where she enjoys a close relationship with her parents, extended family, and tribal nation, and experiences the benefits of full participation in her Cherokee culture and citizenship, all contributing to her identity and welfare as an Indian child.

Baby Girl and all similarly situated Indian children, families, and tribal nations have deeply felt interests in maintaining their individual and collective rights to family, culture, and community. These basic human rights, along with the fundamental principles of self-determination, non-discrimination, due process, and equality, are recognized under the United Nations Declaration on the Rights of Indigenous Peoples and other relevant international laws referenced below. In the United States, these interests are further protected by the Indian Child Welfare Act of 1978 (“ICWA”),²¹ which was enacted to address the widespread removal through foster care and adoptive placements of Indian children from their homes, families, and tribes; and to foster the welfare of Indian children and tribes through procedural and substantive protections.

Despite the clear human rights protections that this domestic law of the United States provides to Indigenous children, their families and tribes, the U.S. Supreme Court recently held that ICWA was inapplicable to Baby Girl’s case, and the South Carolina Supreme Court summarily ordered Baby Girl’s transfer to a non-Indian pre-adoptive couple without any hearing on the best interest of the child in the context of her protected rights, and without any opportunity for her, her extended family, or tribal nation to be heard. Immediate attempts by Baby Girl’s independent attorney, family, and tribal nation to seek relief from the order to transfer were summarily rejected by the South Carolina courts and the U.S. Supreme Court. When Baby Girl’s father did not comply with the order to relinquish his daughter, an arrest

²⁰ Known by several names, this Cherokee child is hereinafter referred to as “Baby Girl.”

²¹ At the time of ICWA’s passage, 25-35% of all Indigenous children in the U.S. were being removed from their homes, and 80-90% were being placed in non-Indigenous homes. H.R. Rep. No. 1386, 95th Cong., 2nd Sess., 9 (1978).

warrant was issued and he was charged with “custodial interference” under South Carolina law.²²

Baby Girl’s situation is, as a result, urgent and extremely vulnerable. At the same time, her situation also represents that of many other Indian children who are also facing ad hoc removal and placement without proper hearings or the opportunity to have their international human rights protected. Indeed, across the U.S., family and child service providers are failing to comply with ICWA, and there is little administrative or judicial oversight to address this problem. Thus, we urgently seek your assistance and intervention to promote domestic recognition and protection of the rights of Indian children, their families and tribal nations, pursuant to international human rights law.

The Situation of Baby Girl and Other Indian Children, Families, and Tribes in the U.S.

As the United Nations Special Rapporteur recently noted in his country report regarding the situation of Indigenous peoples in the United States, the removal and separation of Indian children from Indigenous environments is an issue of longstanding and ongoing concern in this country. According to the report, past practices of removal of Indian children from their families and communities have been partially “blunted by passage of the Indian Child Welfare Act in 1978, federal legislation that advances a strong presumption of indigenous custody for indigenous children.”²³ However, according to the Special Rapporteur, this law “continues to face barriers to its implementation.”²⁴ Baby Girl’s case is representative of the continued barriers faced in the United States in terms of having the interests and rights of Indian children, their families and tribal nations protected in a manner consistent with international law.

Children, as well as their families and tribal communities, often suffer emotional, psychological, spiritual, and cultural harms when they are separated from their Indian families and nations.²⁵ This is especially so when such separation is not in any way necessary for the well-being of the child, as in this instance where the biological father has been adjudicated to be a fit and loving parent, and placement in his home has been determined to provide Baby Girl with the familial and tribal connections that allow her to enjoy her culture and her ability to be educated in that culture.²⁶

To be clear, Baby Girl is a happy, healthy, and well-adjusted child who is thriving in the care of her father and her step-mother; as the report of a child psychologist who examined Baby

²² While litigation on Baby Girl’s behalf has been filed in tribal, state, and federal court, these are collateral proceedings without any clear indication as to the impact they will have, if any, on the case.

²³ Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: The situation of indigenous peoples in the United States of America, para. 46-47, U.N. Doc. A/HRC/21/47/Add.1 (August 31, 2012).

²⁴ Id.

²⁵ See B.J. Jones, Mark Tilden, and Kelly Gaines-Stoner, *THE INDIAN CHILD WELFARE HANDBOOK: A LEGAL GUIDE TO THE CUSTODY AND ADOPTION OF NATIVE AMERICAN CHILDREN 1-12* (2d ed. 2008).

²⁶ *Adoptive Couple v. Baby Girl*, 398 S.C. 625, 649, 653–655 (2012).

Girl indicates, she is bonded with Mr. and Mrs. Brown not only as her biological father and step-mother, but as her the emotional and psychological parents who provide her with the stability, care and identity that she needs to thrive.²⁷ Baby Girl has enjoyed nearly two years living in close relationship with her sister, grandparents, great-grandparents and the larger tribal community. In this context, Baby Girl learns and experiences on a daily basis where she comes from and how she is related to her family and the Cherokee Nation.²⁸ Additionally, Baby Girl attends the Cherokee Nation's pre-kindergarten program for her formal schooling. With her family, Baby Girl has participated in Cherokee celebrations and ceremonies; had exposure to the Cherokee language, foods, and arts; and begun to learn her role in the community. The Cherokee people, including tribal leaders, ceremonial ground members, and individuals from all walks of life, have deeply embraced Baby Girl. These relationships all contribute to the intergenerational transmission of cultural knowledge and experience that is critical to the survival of Indigenous culture and the well-being of Indigenous children. For nearly two years, Baby Girl has experienced the collective support and resilience of an Indigenous community and she has an interest in maintaining these relationships and activities that shape her life, education, and culture.

Unfortunately, as Baby Girl faces removal from her family, her interests are representative of the kinds of issues that Indigenous children in the U.S. and elsewhere – namely that the historical and ongoing trauma caused by the removal of Indigenous children from their families, cultures, and communities, and the unique interests of Indigenous children associated with their membership in sovereign tribal nations, are not sufficiently considered or protected in domestic proceedings.²⁹ In 2005, the U.S. Government Accountability Office (GAO)

²⁷ Ray Hand, Ph.D., Psychological Evaluation 10 (2013), Memorandum of Law in Support of Plaintiff's Motion for a Temporary Restraining Order and a Preliminary Injunction, Exhibit 1, *filed in V.B. v. Martin*, 2013 U.S. Dist. LEXIS 106995, 2013 WL 4018248 (D.S.C. July 31, 2013).

²⁸ The Cherokee Nation of Oklahoma is a federally recognized Indian tribe, comprising approximately 300,000 citizens, whose treaties with the U.S. date to the country's founding. The Cherokees, who traditionally lived in what is now the southeastern portion of the U.S., were relocated in the 1830s by the federal government to Indian Territory—now known as Oklahoma. Nearly a quarter of the population, including many children, perished during the removal which became known as the Trail of Tears. Today, the Cherokee Nation occupies and governs much of a 14-county jurisdictional area in Northeastern Oklahoma, within which Baby Girl resides with her family in the town of Nowata. The governmental headquarters of the Cherokee Nation is in nearby Tahlequah, where the Nation has its executive, legislative, and judicial branches, and several of the proceedings relating to Baby Girl are taking place.

²⁹ U.S. Government Accountability Office, Report to Requesters, Indian Child Welfare Act: Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States (2005), available at <http://www.gao.gov/new.items/d05290.pdf>. According to the GAO: "Our review of 51 CFSR [Child and Family Services Review] reports showed that 10 reports, generally from states with small American Indian populations, had no discussion of ICWA implementation, while 32 raised some concerns with how the law was implemented in the state, such as caseworkers receiving inadequate ICWA training or not consistently determining a child's ICWA status. Similarly, our review of 47 improvement plans provided by ACF as of December 2004 showed that 12 of the 32 states with ICWA implementation concerns identified during the CFSR review did not report any planned corrective actions." (emphasis added). See also Suzette Brewer, Second Indian Infant Child Whisked Away to South Carolina for Quickie Adoption, INDIAN COUNTRY TODAY, August 13, 2013 (reporting on the contested adoption of another Oklahoma Indian child allegedly facilitated by the same adoption attorney involved in Baby Girl's case),

issued a report on national ICWA compliance, finding that many states were neither implementing the law nor collecting data on its implementation. To address these problems, the GAO Report recommended that the U.S. Department of Health and Human Services (HHS) serve as the national oversight body for ICWA study, reporting, and compliance, but HHS rejected the recommendation. Moreover, recent studies show that American Indian children in states across the nation continue to be placed in non-Indian adoptive homes at high and disproportionate rates. In 2008, for example, 56% of adopted American Indian and Alaska Native children were placed in non-Native homes.³⁰ Thus, Baby Girl's situation as an Indian child facing removal from her Indian family without due process or compliance with ICWA is in some ways not unusual.

Baby Girl's story also goes to the very heart of Indigenous culture, survival, and self-determination. Indigenous communities across the world, with their histories of oppression and assimilation, and traditional and cultural emphasis on kinship systems and intergenerational relationships, are particularly invested in their children's well-being and education. Much like in Baby Girl's case, it is the extended family and tribal community that instills cultural lessons through the very fabric of life in and near Indigenous communities, and ensures the future survival of the tribe. Historically, it was awareness of this very dynamic that caused federal policy makers in the U.S. to target Indian children in their assimilation efforts -- through religious mission and boarding school programs and placement in non-Indian homes -- in the larger attempt to eradicate tribal culture in the 19th and 20th centuries.³¹

Today, even as attitudes toward Indian culture change, removal of Indian children from their families is still animated by the uninformed and discriminatory practices of child and family services professionals -- especially those whose bias leads them to believe that Indian children would be better off in adoptive families whose resources and status appear to offer superior opportunities to Indian children.³² These dynamics are apparent in Baby Girl's case wherein the original guardian ad litem touted the economic, social, and cultural circumstances of the pre-adoptive couple as reasons why Baby Girl would be better off with them, and also

<http://indiancountrytodaymedianetwork.com/2013/08/13/sold-oklahoma-second-indian-infant-adopted-south-carolina-150856>.

³⁰ R.M. Kreider, *Interracial Adoptive Families and Their Children: 2008* in ADOPTION FACTBOOK V: NATIONAL COUNCIL FOR ADOPTION 109 (2011), available at <https://www.adoptioncouncil.org/publications/adoption-factbook.html>.

³¹ See Lorie M. Graham, *The Past That Never Vanishes: A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. IND. LAW. REV. 1 (1998) (tracing the history of assimilation efforts directed at Indian children in the U.S.).

³² As one tribal leader put it, "One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34-35 (1989) (citing Chief Calvin Isaac's statement to Congress in hearings leading up to the passage of ICWA).

indicated that her Cherokee heritage was not something that needed to be considered by the court.³³

It was precisely in recognition of circumstances like these that Congress enacted ICWA. As the U.S. Supreme Court said in *Mississippi Band of Choctaw Indians v. Holyfield* (1989), “The Indian Child Welfare Act of 1978 was the product of rising concern in the mid–1970’s over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.”³⁴ Congress found that “an alarmingly high percentage of Indian families [were being] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies.” This “wholesale removal of Indian children from their homes” prompted Congress to enact the ICWA, which establishes federal standards that govern state-court child custody proceedings involving Indian children. ICWA accomplishes these goals with certain procedural and substantive provisions,³⁵ many of which were not followed in this case and some of which

³³ These statements of the guardian ad litem (“GAL”) appointed by the South Carolina family court are preserved in the Trial Transcript from the South Carolina court. For citations and quotations, see Brief for Respondent Birth Father, 2013 WL 1191183, *11-13.

Although appointed by the Family Court, that court noted that the GAL and her attorney both “were unilaterally selected by [petitioners’] counsel” (Pet. App. 129a); the GAL had a continuing business relationship with petitioners’ attorney, with whom she had worked frequently in the past and who had already referred her multiple cases in 2009. Trial Tr. 591-592.... When the GAL finally ... conduct[ed] a [home] study on the Father ... she informed Father and his family that “she knew the adoptive couple prior to the child being placed in their home” and “had worked with them before the child had been placed” (JA 113); *that petitioners were a well-educated couple with a beautiful home, could afford to send Baby Girl to any private school that they chose and, when she was older, to any college she wanted; and that there was nothing that Baby Girl needed that petitioners could not buy for her.* JA 146-147. *The GAL therefore told Father’s family that they “really need[ed] to get down on [their] knees and pray to God that [they] can make the right decision for this baby” (id. at 148), and they “needed to talk to God and pray about taking the child from the only family that she has known” (id. at 113). At trial, Father stated that the GAL treated him and his family as “a bunch of *** rednecks that can’t *** afford anything, that we’re not able to provide this child with proper education, schooling ***. Pretty much that we weren’t fit to love this child and raise her.”* Trial Tr. 514. The GAL’s initial report made no note of Baby Girl’s Native American heritage because the GAL thought that was “not something ... the courts need to take into consideration.” Trial Tr. 632. As for the GAL’s view of Native American culture, she stated that *the advantages of having Native American heritage “include[ed] free lunches and free medical care and that they did have their little get togethers and their little dances.”* Id. at 634.

Id. (emphasis added).

³⁴ *Holyfield*, 490 U.S. at 32.

³⁵ In relevant parts, ICWA provides: “An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.” 25 U.S.C. § 1911 (a); “In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child’s tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child’s tribe....” 25 U.S.C. § 1911 (b); “In any State court proceeding for the foster care placement of, or termination of parental rights to, an

have been narrowly construed by the U.S. Supreme Court³⁶ so as to deny adequate human rights protection to similarly situated Indian children, families, and their tribal nations.

Factual and Procedural Background in Baby Girl's Case

Baby Girl was born in September 2009 in Oklahoma. Her biological parents, Christy Maldonado and Dusten Brown were engaged when the mother became pregnant in December 2008. The relationship deteriorated, the mother broke off the engagement, and refused all visits and communication with Mr. Brown. In June, the mother sent Mr. Brown a text message asking if he would rather pay child support or relinquish his parental rights. Believing he was relinquishing parental rights to her, the biological mother, Mr. Brown agreed. The mother then decided, without informing Mr. Brown, who was on active U.S. military duty, to seek an adoptive placement for their unborn child. When her attorney contacted the Cherokee Nation to determine whether Mr. Brown was enrolled in the tribe, which would have triggered the protections of ICWA, the inquiry letter misspelled his first name and incorrectly stated his birthday. Based on this information, the Cherokee Nation could not verify Mr. Brown's citizenship in the tribal records.

Working through an adoption agency, the biological mother selected Melanie and Matt Capobianco ("Adoptive Couple"), non-Indians living in South Carolina.³⁷ The couple was present at Baby Girl's birth in Oklahoma in September 2009. The next morning, the biological mother signed forms relinquishing her parental rights and consenting to the adoption. The Adoptive Couple initiated adoption proceedings in South Carolina a few days later, and

Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding." 25 U.S.C. § 1911 (c); "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe...." 25 U.S.C. § 1912(a); "[a]ny party seeking" an involuntary termination of parental rights to an Indian child under state law must demonstrate that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful" 25 U.S.C. § 1912(d); a state court may not involuntarily terminate parental rights to an Indian child "in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child" 25 U.S.C. § 1912(f); and, with respect to adoptive placements for an Indian child under state law, "preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a).

³⁶ *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (2013). This submission does not attempt to re-litigate the Court's decision. Instead, it notes that even the Court's narrow construction leaves open the possibility that Baby Girl could stay with her Indian father or be adopted by other members of her extended family. This question would be explored within the context of a best interest hearing. There is nothing in the history of this case that should preclude Baby Girl, or any other Indian child or tribal nation, from receiving due process and equal treatment under the law, in fulfillment of their individual and collective human rights, as discussed below.

³⁷ During most of the procedural history of this case, the status of the Capobiancos has been that of "pre-adoptive couple" and the South Carolina court only entered its adoption order in July 2013. Thus the reference to "Adoptive Couple" here is only to follow the styling of the case to date.

returned there with Baby Girl. After returning to South Carolina, the Adoptive Couple allowed the biological mother to visit and communicate with Baby Girl, but there was no attempt to communicate with Mr. Brown, his extended family, or the Cherokee Nation regarding the proposed adoption during this time.

Four months after Baby Girl's birth, just days before Mr. Brown was deployed to Iraq, he received notice of the pending adoption. He signed the documents based on a misunderstanding that they were to relinquish sole custody to the biological mother, a decision that he believed would ensure his child's security, especially if he did not return from Iraq. When the process server explained that Mr. Brown had in fact just consented to adoption by Adoptive Couple, Mr. Brown immediately tried to get the papers back, but the process server said Mr. Brown would face criminal charges if he did so. Mr. Brown immediately contacted a lawyer, and requested a stay of the adoption proceedings pursuant to the Servicemen's Civil Relief Act. In the adoption proceedings, Mr. Brown stated that he did not consent to Baby Girl's adoption and that he sought custody as her father. Around the same time, the Cherokee Nation identified Mr. Brown as an enrolled citizen and concluded that Baby Girl was an "Indian child" as defined by ICWA. Three months later, the Cherokee Nation intervened in the litigation, as is its right pursuant to ICWA's section 1911(c).

The trial, which was delayed while Mr. Brown was serving in Iraq, took place in the South Carolina Family Court in September 2011, by which time Baby Girl was two years old. The Family Court held the Adoptive Couple had not carried the heightened burden under ICWA's section 1912(f) of proving that Baby Girl would suffer serious emotional or physical damage if her Indian father had custody. The Family Court therefore denied the Adoptive Couple's petition for adoption and awarded custody to Mr. Brown, ordering Baby Girl's return to his care and custody. On December 31, 2011, at the age of 27 months, Baby Girl returned to Oklahoma, now in the custody of her biological father.

The South Carolina Supreme Court affirmed the Family Court's denial of the adoption and the award of custody to Mr. Brown.³⁸ Determining that the ICWA applied because the case involved a child custody proceeding relating to an Indian child, as defined by the Act, the court also concluded that Mr. Brown was a "parent" pursuant to ICWA. The court then held that two separate provisions of the ICWA barred the termination of Mr. Brown's parental rights. First, the court held that Adoptive Couple had not shown that "active efforts ha[d] been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family" under section 1912(d). Second, the Adoptive Couple had not shown that Mr. Brown's custody of Baby Girl would result in serious emotional or physical harm to her "beyond a reasonable doubt" under section 1912(f). Finally, the court stated that, even if it had decided to terminate the biological father's parental rights, section 1915(a)'s adoption-placement preferences would have applied, which would mean additional protection for the child in terms of her connection to her extended family and tribe.

The Adoptive Couple sought and obtained a writ of certiorari in the U.S. Supreme Court, which heard oral arguments in the spring of 2013. On June 25, 2013, the Court issued a 5-4 decision, holding that the ICWA provisions cited above did not preclude termination of Mr.

³⁸ See *Adoptive Couple v. Baby Girl*, 398 S.C. 625, 731 S.E.2d 550 (2012).

Brown's parental rights. Taking a narrow approach to ICWA's policy of protecting Indian children and families, the majority held that the two provisions of ICWA that the South Carolina Supreme Court had relied on in this case should instead only apply to the parent of an Indian child who had "continued custody" of the child.³⁹ Under this reading, the majority held that because Mr. Brown had not enjoyed custody of his daughter before the adoption proceedings, he was ineligible to invoke the substantive protections of ICWA which require active efforts be made in involuntary proceedings and that proof beyond a reasonable doubt of the serious harm to the child be shown. Further, the Court held that § 1915 did not preclude adoption of Baby Girl by Adoptive Couple – even though they fell outside the statutory placement preferences because no alternative [preferred] party had formally sought to adopt the child under ICWA.⁴⁰

In her dissenting opinion, Justice Sotomayor, joined in relevant parts by Justice Scalia, Ginsburg, and Kagan, disagreed with the majority's interpretation of ICWA. She noted in particular that when the majority "excludes noncustodial biological fathers from the Act's substantive protections, this textually backward reading misapprehends ICWA's structure and scope. Moreover, notwithstanding the majority's focus on the perceived parental shortcomings of Birth Father, its reasoning necessarily extends to all Indian parents who have never had custody of their children, no matter how fully those parents have embraced the financial and emotional responsibilities of parenting."⁴¹ These points are apt given the overriding policy objectives of ICWA and the upheaval and dislocation that Indian families have experienced. To exclude all Indian parents lacking custody of their children from invoking any of the protections of ICWA would surely undermine Congress' stated objectives: "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture."⁴²

Notwithstanding her different view of the statute, however, Justice Sotomayor noted that the majority opinion should not prevent Baby Girl from remaining with her extended Indian family. She wrote: "[t]he majority does not and cannot foreclose the possibility that on remand, Baby Girl's paternal grandparents or other members of the Cherokee Nation may formally petition for the adoption of Baby Girl."⁴³ Additionally, "the statute applies '[i]n any

³⁹ *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552, 2560 (2013).

⁴⁰ *Id.* at 2564. The U.S. Supreme Court's characterization of the practice of forcibly removing children as "mischief" (*Id.* at 2561), a practice that is labeled "genocide" by both the Genocide Convention and the U.N. Declaration (see, e.g., UNDRIP, Art. 7), illuminates the inability or unwillingness of the highest court in the United States to honor the purpose of ICWA in remedying past wrongs and protecting Indigenous children, their families, and tribal nations.

⁴¹ *Id.* at 2573 (Sotomayor, dissenting).

⁴² 25 U.S.C. § 1902.

⁴³ *Adoptive Couple*, 133 S.Ct. at 2585.

adoptive placement of an Indian child under State law.”⁴⁴ Justice Breyer’s concurring opinion also noted that ICWA’s placement preferences, which were not before the U.S. Supreme Court, might apply in a case of this nature.⁴⁵

Accordingly, on July 1, 2013, following the U.S. Supreme Court decision, Mr. Brown and his wife filed an action in Oklahoma state court seeking to adopt Baby Girl. On July 3, Mr. Brown filed a motion with the South Carolina Court to remand the matter to the Family Court for a full analysis on Baby Girl’s best interests. This was consistent with assurances that Baby Girl’s guardian ad litem had made to the U.S. Supreme Court during oral argument, stating that a best interest analysis would have to be conducted if the case were remanded to state court to ensure an appropriate placement and outcome.⁴⁶ The extent to which the U.S. Supreme Court’s decision relied on this representation is unclear, but it turned out to be inaccurate. On remand to the South Carolina Supreme Court, the Adoptive Couple, joined by the same guardian ad litem, filed an “Emergency Motion for Final Order Following Remand from US Supreme Court” and “Transition Proposal” in which they *opposed* a best interest inquiry.

Additionally, Baby Girl’s grandparents and stepmother filed an action in the Cherokee Nation District Court for temporary guardianship of Baby Girl while Mr. Brown was to serve his 30-day mandatory training in the National Guard. The motion for temporary guardianship was granted on July 17, 2013. Later the same day, the Supreme Court of South Carolina, by a vote of three to two, ordered that custody be awarded to the Adoptive Couple.⁴⁷ Under South Carolina state law, the court held that Mr. Brown’s consent to the adoption was not required and no further inquiry was necessary to determine whether his parental rights should be terminated. The court stated that “the [U.S.] Supreme Court plainly contemplated an expeditious resolution of this case,” and remanded the case to Family Court for the “prompt entry of an order approving and finalizing Adoptive Couple’s adoption of Baby Girl” without an inquiry into Baby Girl’s best interest.⁴⁸ The court also ordered that upon entry of the family court’s order, “custody of Baby Girl shall be transferred to Adoptive Couple.”⁴⁹

⁴⁴ Id. (citing ICWA, 25 U.S.C. § 1915(a)).

⁴⁵ See id. at 2571 (Breyer concurring).

⁴⁶ Paul Clement, representing the guardian ad litem, stated at oral argument before the U.S. Supreme Court: I’m here representing the guardian who represents the best interest of the child. From the child’s perspective, the child really doesn’t care whose fault it was when they were brought in one custodial situation or another. They just want a determination that focuses on at the relevant time, that time, what’s in their best interest. And so in the same way that we think if you rule in our favor and you remand to the lower court that there has to be a best interest determination that takes into account the current situation.

Transcript of Oral Argument at 24, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No. 12-399), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-399.pdf

⁴⁷ *Adoptive Couple v. Baby Girl*, __ S.E.2d __, 2013 WL 3752641 (July 17, 2013).

⁴⁸ Id. at *3.

⁴⁹ Id.

Two dissenting justices would have remanded the case to the Family Court for a factual finding about Baby Girl's best interest. In their view, nothing in the Court's decision "suggests, much less mandates, that the state court is ... obligated to order that the adoption of this child by Adoptive Parents be immediately approved and finalized. Further, the majority order the immediate transfer of the child, no longer an infant or toddler, upon the filing of the family court's adoption order, without regard to whether such an abrupt transfer would be in the child's best interest."⁵⁰ The dissenting justices specifically noted that "what is ultimately at stake is the welfare of a little girl," and "this is a situation where the decisions that are in the best interests of this child, given all that had happened in her short life, must be sorted out in the lower courts."⁵¹

Despite the majority holding, Mr. Brown and the Indian family kept trying in the courts, only to have all of their petitions for rehearing denied. On July 24, 2013, the South Carolina Family Court set a hearing "to determine the matter of transfer of physical custody" of Baby Girl. On July 25, Mr. Brown filed an Application for a Stay of the Judgment of the Supreme Court of South Carolina in the U.S. Supreme Court. The application, along with a subsequent petition to the U.S. Supreme Court requesting a stay of the proceedings, was denied. Subsequently the Family Court and South Carolina Supreme Court ordered Baby Girl's transfer to Adoptive Couple, without a best interest determination.⁵²

Baby Girl will turn four years old in a few weeks. As her South Carolina guardian ad litem's attorney suggested before the U.S. Supreme Court, Baby Girl has a right to have her best interests assessed in terms of the "relevant time," which surely includes the last two years of her life. In the past two years, the bonds between Baby Girl and her extended family and tribe have become even stronger, and these ties, along with her significant development from age two to four, make the risks of disruption and dislocation even greater.⁵³ Instead, the courts have

⁵⁰ Id. (Pleicones and Beatty, dissenting).

⁵¹ Id. at 3-4.

⁵² The Family Court approved a transition plan, or a series of meetings between Baby Girl and Adoptive Couple, after which they would take Baby Girl back to South Carolina. When Mr. Brown did not bring Baby Girl to the first meeting, because he was at mandatory National Guard training in Iowa, the Family Court changed its order to call for an immediate transfer. South Carolina issued a warrant leading to Mr. Brown's arrest for "custodial interference" on August 12, 2013 and followed that up with a request for extradition from Oklahoma. While Baby Girl remains safely with her extended Indian family for the time being, the persecution of her father and attempts by state authorities to remove her make the situation precarious.

⁵³ On July 9th, 2013, Ray Hand, Ph.D., a psychologist licensed in Oklahoma, conducted a psychological evaluation and attachment and bonding assessment on Baby Girl in anticipation of South Carolina ordering that her best interests be evaluated. While the best interest determination never happened, the expert statement remains available. Dr. Hand described Baby Girl's relationship with her Birth Father at length. He stated that "Dusten Brown is now not only Baby Girl's biological father. He has become her real, psychological father. Robin Brown is now Baby Girl's psychological mother, and the entire Brown family have become Baby Girl's family." While assessing possible harms to Baby Girl if she were to be transferred again, Dr. Hand stated that: "the transition between caretaking by her adoptive family and her biological father and his family has gone smoothly, likely because of Baby Girl's early age at the time of that transition. It is critical to note that most researchers indicate the older a child is when bonding disruptions occur, the greater the risk.... Mental health professionals widely support the notion that the disruption of

refused to give Baby Girl, her family, and her tribe the opportunity that any other would have to be heard on these issues, suggesting numerous human rights violations. Indeed, Baby Girl is facing forcible removal from her parents, extended family, and tribe, all in disregard for her basic rights and interests as an Indian child. This kind of action threatens to reify the circumstances and concerns animating ICWA, suggesting little has changed since 1978 when Congress acted to stop the harmful and discriminatory removal of Indian children from their homes. While disturbing, this case is unfortunately not unique. As described above, cases and reports from the United States, as well as similar situations around the world, suggest that the very youngest members of Indigenous communities are still vulnerable and threatened, with distressing ramifications for them, as well as for the self-determination and cultural survival of their communities.⁵⁴

The Human Rights of Indigenous Children, their Families, and Tribal Nations

1. Indigenous children's collective and individual rights to culture, education, family, and tribal nation

Under international law, Indigenous children have rights to their culture and to education in that culture, as well as rights to maintain connections to their Indigenous family and tribal nation. All of these rights are undermined in this case. Baby Girl is faced with forced removal from her Indian family and tribal nation without adequate protection or recognition of her right to culture; nor have the collective rights of the tribal nation been considered at any point in the various proceedings. As noted earlier, her case is representative of the issues that Indigenous children in the U.S. still face in the domestic family and child services system.

Article 7 of the U.N. Declaration on the Rights of Indigenous Peoples protects against acts of forcible removal of Indigenous children from their families and communities. This provision was added in recognition of the well-documented experiences of Indigenous children who were historically taken or separated from their families and communities and removed to non-Indigenous families. As recently noted by U.N. Special Rapporteur, the U.S. was not

psychological bonds between parents and their children creates significant development risks." Therefore, "Baby Girl is at risk to suffer harm and suffer enduring harm when deprived of her psychological parents." This report is cited *supra* note ___.

⁵⁴ In a recent report, the U.N. Secretary General noted, "Children of indigenous background, like all other children, are rights holders and are therefore entitled, without discrimination, to all the safeguards that are necessary for their survival, development and protection." U.N. Secretary-General, *Status of the Convention on the Rights of the Child*, U.N. Doc. A/67/225 (August 12, 2012). However, according to the report, Indigenous children in numerous settings around the world continue to experience human rights violations, including discrimination and removal. For recent literature examining the situation of Indigenous children in particular states, see, e.g., Vanda Sinha and Anna Kozlowski, *The Structure of Aboriginal Child Welfare in Canada*, THE INTERNATIONAL INDIGENOUS POLICY JOURNAL, 4(2)(2013) ("Aboriginal children are currently overrepresented in out-of-home care in Canada; this extends a historical pattern of child removal that began with the residential school system. The overrepresentation of Aboriginal children persists despite legislative and structural changes intended to reduce the number of Aboriginal children in care.").

immune to these human rights violation.⁵⁵ Article 7 protects both the rights of Indigenous children not to be forcibly separated from their communities, as well as the collective rights of Indigenous peoples to “live in freedom, peace, and security as distinct peoples.” Article 8 of the Declaration provides further recognition and protection of the rights of “indigenous peoples and individuals . . . not to be subjected to forced assimilation or destruction of their culture.” In relevance to the case at hand, the provision articulates the need for “effective mechanisms” for prevention of the denial of these rights. Similarly, Article 9 of the Declaration recognizes the right of “Indigenous peoples and individuals . . . to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.” Each of these rights is being violated by the failure of the domestic courts to provide Baby Girl, her tribal nation, and her extended family with opportunities to be heard regarding the best interests of this Indian child—an important aspect of Baby Girl’s best interest as an Indigenous child is her continued connection to extended family, culture, and community. Currently, Baby Girl and other similarly situated Indian children are being cut off from their culture and their Indigenous nation in an arbitrary fashion that clearly undermines the individual rights of the child and the collective rights of her family and tribal nation.

These rights to culture and community are firmly established in international law, including Article 27 of the International Covenant on Civil and Political Rights, which ensures an Indigenous individual’s “right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.” According to the Human Rights Committee, States are obligated “through its legislative, judicial or administrative authorities” to ensure that these rights are adequately protected.⁵⁶ Article 30 of Convention on the Rights of the Child also recognizes that no “indigenous child” shall be “denied the right, in community with other members of his or her group, to enjoy his or her own culture” or “language.” In its General Comment, the Committee on the Rights of the Child speaks directly to the issue of the “best interest of an indigenous child” and the need to “consider the cultural rights of the indigenous child” in making such a determination. This includes ensuring that the “indigenous community” is “consulted and given an opportunity to participate in the process on how the best interests of Indigenous children in general can be decided in a culturally sensitive way” and that “effective measures are implemented to safeguard the integrity of indigenous families and communities.”⁵⁷ The Committee further highlights the obligation of States to “prevent the loss of [a child’s] cultural

⁵⁵ Throughout U.S. history, Indian children were systematically removed from their families and communities “with the objective of expunging them of their indigenous identities.” Special Rapporteur Report, *supra* note __, para. 46.

⁵⁶ U.N. Office of the High Commissioner for Human Rights, General Comment No. 23 on The Rights of Minorities (Art. 27), P 6.2, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (April 8, 1994); see also *Lovelace v. Canada*, Communication No. R 6/24, U.N. Human Rights Comm’n, Supp. No. 40, 166 (1981) at 166.

⁵⁷ Comm. on the Rights of the Child, General Comment No. 11 (2009): Indigenous Children and their rights under the Convention, U.N. Doc. CRC/C/GC/11 (Feb. 12, 2009), paras. 31 and 46.

identity,”⁵⁸ and to ensure “continuity in the child’s upbringing” consistent with “his or her religious, cultural, ethnic and linguistic background.”⁵⁹

While the U.S. is not a party to this Convention on the Rights of the Child, the principles articulated above are an accepted part of customary law regarding the unique cultural protections that need to be provided to indigenous children, their families, and communities.⁶⁰ A host of other relevant international laws provide similar protections to the Indigenous individual and group. For instance, Article 1.1 of the 1966 *International Convention Against All Forms of Racial Discrimination* recognizes that any distinction, exclusion, or restriction based on race that has the purpose or effect of nullifying the enjoyment of human rights in the cultural life is prohibited. Additionally, Article 15 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) expressly protects the right to culture. As one ILA study on the rights of Indigenous Peoples notes, this right of “an individual to belong to an indigenous group” and the right of the group to maintain ties with its members are “some of the least controversial rights recognized under the Declaration,” and firmly established in international law.

Related to this right to belong to an Indigenous community, to maintain ties with that community, and to have these rights considered in the context of any placement of an Indigenous child, is the right to an Indigenous education. Several provisions of the Declaration address this issue. For instance, Article 14 provides specifically for the right of Indigenous children to be educated in their own culture and in their own language, and for the Indigenous group to direct this education. If an indigenous child is being arbitrarily separated from his or her family and community, where cultural and linguistic education often occurs, then these basic rights to education are not being met.⁶¹

Finally, these rights to culture, family and community are reflected in the *Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption*, which the United States ratified in 2008. One of the main objectives of that Convention is “to establish safeguards to ensure that inter-country adoptions take place in the best interests of the child

⁵⁸ Id. at para. 48.

⁵⁹ Committee on the Rights of the Child, Recommendations: Day of General Discussion on the Rights of Indigenous Children, 34th Session, 15 September-3 October 2003, available at <http://www.ohchr.org/english/bodies/crc/docs/discussion/indigenouschildren.pdf>.

⁶⁰ Compare *Roper v. Simmons*, 543 U.S. 551, 561 (2005), where the Supreme Court considered the CRC within the context of the “necessity of referring to ‘the evolving standards of decency that mark the progress of a maturing society.’”

⁶¹ This right to an Indigenous education within the context of one’s culture and community is widely recognized throughout international law, such as Articles 28 and 29 of ILO Convention No. 169. Article 29 is specifically relevant to the case at hand where an Indian child is being arbitrarily separated from her Indigenous family and community, because it prevents “[t]he imparting of general knowledge and skills that will help children belonging to the peoples concerned to participate fully and on an equal footing in their own community and in the national community shall be an aim of education for these peoples.” International Labour Organisation Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, 28 I.L.M. 1384 (1989) [hereinafter ILO Convention No. 169], para. 29.

and with respect for his or her fundamental rights as recognised in international law.”⁶² The State parties to that Convention recognize that “each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin” and that measures should be taken to ensure that “inter-country adoptions are made in the best interests of the child and with respect for his or her fundamental rights.”⁶³ The current situation, in which Baby Girl and other indigenous children are being denied a best interest hearing that takes into consideration their various rights as Indigenous children (including their rights to be in community with others who share their culture and to an Indigenous education), is contrary to these international norms.

2. Right to self-determination, including the right of tribal nations to protect the well-being of their children

Tied to the right of Indigenous children to maintain familial and community connections, is the right and duty that an Indigenous tribal nation has to provide and protect those children. The preamble to the United Nations Declaration on the Rights of Indigenous Peoples recognizes in particular “the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child.” This right is reflected in Article 3 of the Declaration, that Indigenous peoples have a “right to self-determination,” which includes freely pursuing their “economic, social and cultural development.” Such a right is undermined when they are arbitrarily denied access to their children. Furthermore, Article 8 provides Indigenous peoples with “the right not to be subjected to forced assimilation or destruction of their culture.” The linkages between this right to self-determination and protection of Indigenous children can also be found in Article 21 of the Declaration, which specifically provides for the rights of “indigenous peoples” to “the improvement of their economic and social condition,” with “particular attention” being paid to the “rights and special needs” of Indigenous youth and children.

This right to self-determination is well-established under international law, including under the U.N. Charter and Articles 1 of the ICCPR and the ICESCR. Similarly the Committee on the Elimination of Racial Discrimination has noted that State parties have an obligation to “recognize and respect” the “distinct culture, history, language and way of life” of Indigenous peoples, and “to promote its preservation” and “ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs.”⁶⁴ These rights are clearly being violated here by the fact that Baby Girl’s tribal nation has had little or no opportunity to be heard on this case, despite the procedural protections articulated in ICWA.

⁶² Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption, Art. 1(a).

⁶³ Id. at Preamble.

⁶⁴ Comm. on the Elimination of Racial Discrimination, General Recommendation 23: Rights of Indigenous Peoples, annex V, para. 4, U.N. Doc. A/52/18 (Aug. 18, 1997), available at <http://www.unhcr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c?Opendocument>.

The failure of states to comply with ICWA, as described above, often has the effect of excluding tribes from child welfare decision-making processes, which in turn violates their basic rights to self-determination. As noted in the *Holyfield* case cited above, the social, cultural, and economic well-being of Indigenous peoples are directly tied to their ability to maintain connections with their youngest citizens: “Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes’ ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.”⁶⁵

3. Right to non-discrimination, equality under the law, and due process, including the right to have a fair and impartial hearing on the best interests of the Indian child

Numerous provisions of the U.N. Declaration deal with the fundamental right of non-discrimination. In general Article 9 grants “indigenous peoples and individuals . . . the right to belong to an indigenous community” while maintaining that, “no discrimination of any kind may arise from the exercise of such a right. “ Additionally, Article 22 of the Declaration places special emphasis on the rights of Indigenous children, requiring States to “take measures, in conjunction with indigenous peoples, to ensure that indigenous . . . children enjoy the full protection and guarantees against all forms of . . . discrimination.” According to Article 2 of the Convention on the Elimination of All Forms of Racial Discrimination this includes “when the circumstances so warrant, tak[ing], in the social, economic, cultural, and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.” In the United States, these special and concrete measures came in the form of legislative action to protect against the unwarranted separation of Indigenous children from their extended families and tribal nations. However, as *Baby Girl’s* case so aptly demonstrates, these protections are not being applied equally and fairly in all Indian child welfare proceedings. *Baby Girl*, her tribe, and her extended family have all been summarily and arbitrarily denied the right to have a hearing on her best interests in terms of her future placement and the terms of that placement.

Numerous international treaties and instruments also protect the due process rights of Indigenous peoples and their children, as well as equality under the law. Article 5 of the CERD grants the “the right to equal treatment before the tribunals and all other organs administering justice,” while Article 40 of the U.N. Declaration on the Rights of Indigenous Peoples provides Indigenous peoples with “the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights.” Article 40 goes on to mandate that “such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.” It

⁶⁵ *Holyfield*, 490 U.S. at 34-35.

is clear that in this case the courts neither granted due process to the tribal nation or Baby Girl, nor gave any consideration whatsoever to tribal customs, traditions, or rules.

More specifically, Article 8 of the Declaration requires States to “provide effective mechanisms for prevention of, and redress for...any form of forced assimilation or integration.” The various domestic court decisions that fail to provide a best interest hearing for Baby Girl with regard to her placement actively subverts mechanisms already in place to redress past violations of forced assimilation and integration. The actions of the domestic courts also demonstrate a disregard for the basic human rights of Indigenous children, including their rights to equality before the law, given that other children in similar situations would be provided such a hearing.⁶⁶

REQUEST FOR INTERVENTION

The United States has endorsed the U.N. Declaration on the Rights of Indigenous Peoples, which represents a global consensus on the rights of Indigenous peoples, including the special protections afforded Indigenous children. These protections were necessary given the history of forcible removal and assimilation that impacted Indigenous children worldwide, including in the U.S. In 1978, with the passage of the Indian Child Welfare Act, the U.S. took a giant leap forward in attempting to address these discriminatory policies. Yet, this important law continues to face legal and political barriers when it comes to full implementation, as Baby Girl’s case so aptly demonstrates.⁶⁷

⁶⁶ This failure of due process consideration is, of course, not unique and a pattern of violation can be seen through recent cases. The Western Shoshone case perhaps best illustrates a recent example of similar due process violations. In their Decision, the Committee for the Elimination of Racial Discrimination noted that “past and new actions taken by the State party on Western Shoshone ancestral lands lead to a situation where, today, the obligations of the State party under the Convention are not respected, in particular the obligation to guarantee the right of everyone to equality before the law in the enjoyment of civil, political, economic, social and cultural rights, without discrimination based on race, colour, or national or ethnic origin.” Committee for the Elimination of Racial Discrimination[CERD], 68th Sess., Decision 1 (68), Geneva, Switz., Feb. 20-Mar. 10, 2006, Early Warning and Urgent Action Procedure, available at http://www.law.arizona.edu/depts/iplp/advocacy/shoshone/documents/WS_CERD_Decision_2006-03.pdf. Prior to this decision, the Inter-American Commission on Human Rights concluded that the United States had violated the individual due process rights of the Dann sisters and the collective due process rights of the Western Shoshone in contravention to the American Declaration. *Mary and Carrie Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/II.117, doc. 5 rev. 1 paras. 165, 172 (2002), available at <http://www.law.arizona.edu/depts/iplp/advocacy/shoshone/documents/DannIACHRPubRpt7502.pdf>

⁶⁷ Beyond the Court’s decision to construe ICWA narrowly in the *Adoptive Couple* majority opinion, a concurring opinion stated concern about the “constitutional problems” that would arise if ICWA applied in this case, a view that fails to appreciate, and potentially undermines, the federal government’s authority in Indian affairs, deriving as it does from its political relationship with tribes. See *Adoptive Couple*, 133 S. Ct. at 2565 (Thomas, concurring). Additionally, opponents of ICWA are currently seeking legislative reform to diminish its protections for Indian children, families, and tribes. See, e.g., Michael Overall, ‘*Save Baby Girl*’ Protestors Head to Washington to Push for Adoption Law, TULSA WORLD, July 10, 2012, available at <http://newsok.com/save-Baby-Girl-protesters-head-to-washington-to-push-for-adoption-law-changes/article/3691435>.

Despite the best efforts of the biological father, Baby Girl's own recently-appointed attorney, and the Cherokee Nation to ensure that ICWA was followed in this case, they have been consistently denied any right or opportunity to be heard. With the expedited nature of Baby Girl's original placement and lack of meaningful opportunity for her father, family, or tribe to participate, the potential irregularities in this case go back to its very beginning. Moreover, no court has agreed to protect Baby Girl's rights to be heard on the question of "best interest" at this stage of her life, given her connections to her biological father, extended family, and tribal community. In fact, the only hearing that was held on the issue of "best interest" occurred two years ago and resulted in the South Carolina courts finding in favor of her father. Thus, the state courts have actually gone against their initial judgment with no opportunity for the parties to argue against reversal of that judgment. These actions are reminiscent of the child welfare practices that led to the passage of ICWA in the first place—wherein judges determined without process or evidence that an Indian child would be better off in a non-Native home. Thus, we respectfully request that the U.N. Special Rapporteur on the Rights of Indigenous Peoples consider the duties of the United States to protect the rights of Baby Girl, her tribal nation, and all other Indian children and tribal nations in the U.S. who are facing similar rights violations.

In particular, we respectfully ask the Special Rapporteur to consider: (1) a request to the U.S. for an investigation of the circumstances leading to the decision to allow Baby Girl to be adopted out to a non-Indian family without an adequate opportunity to be heard; (2) a request to the U.S. to hold a proper hearing to determine Baby Girl's best interests as an Indian child, consistent with her rights under international law, with an opportunity for her extended family and tribal nation to participate and have their rights fully protected as well; (3) a request to the U.S. that it take action in a court of law, consistent with its domestic civil rights laws and Constitution, to ensure that the child not be transferred until such a determination is made; (4) a future investigation of the current state of affairs in the U.S. on the practices of foster care and adoption placement of Indian children and potential solutions to ensure compliance with ICWA, a federal statute enacted in furtherance of federal obligations to tribes and which is consistent with the United States' international human rights obligations.

Thank you for your consideration of this submission.

August 20, 2013

[signatures redacted]

The Aftermath

We filed the statement of information with the UNSR on August 20, 2013, at which point Baby Girl was living in Oklahoma with her family, with the Oklahoma Supreme Court having stayed a district court order for her transfer to the adoptive couple.

On September 10, 2013, the United Nations Special Rapporteur on the rights of indigenous peoples issued a statement “call[ing] on the relevant state, federal and tribal authorities in the United States of America to take all necessary measures to ensure the wellbeing and human rights of [Baby Girl],” noting in particular her rights under international law: “I urge the relevant authorities, as well as all parties involved in the custody dispute, to ensure the best interests of [Baby Girl], fully taking into account her rights to maintain her cultural identity and to maintain relations with her indigenous family and people.”⁶⁸ In recognition of the larger systemic issues facing indigenous children in the U.S., the Special Rapporteur stressed that “[t]he individual and collective rights of all indigenous children, their families and indigenous peoples must be protected throughout the United States:”

[T]he removal and separation of Indian children from indigenous environments is an issue of longstanding and ongoing concern. ‘While past practices of removal of Indian children from their families and communities have been partially blunted by passage of the Indian Child Welfare Act in 1978, this law continues to face barriers to its implementation....’ I encourage the United States to work with indigenous peoples, state authorities and other interested parties to investigate the current state of affairs relating to the practices of foster care and adoption of indigenous children, and to develop procedures for ensuring that the rights of these children are adequately protected.⁶⁹

The statement was widely publicized in mainstream and indigenous media, and brought attention to the human rights dimensions of the case.⁷⁰ Yet, the courts of the U.S. failed to accord Baby Girl, her family, or her tribe any legal opportunity to

⁶⁸ See <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13695>.

⁶⁹*Id.* In an earlier 2012 report on the situation of Indigenous Peoples in the United States, the Special Rapporteur had also noted the need for further action on the part of the U.S. as it relates to the protection of indigenous children. See <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session21/Pages/ListReports.aspx>.

⁷⁰ See, e.g., Associated Press, *Baby Veronica Case, Consider Cherokee Girl's Rights, Says UN Official*, September 10, 2013, <http://newsok.com/baby-veronica-case-consider-chokeee-girls-rights-says-un-official/article/3881296>; see Ariane de Vogue, *Baby Veronica custody case rages on*, September 11, 2013, The Note, ABC News, <http://abcnews.go.com/blogs/politics/2013/09/baby-veronica-custody-case-rages-on/>.

determine whether it was in her best interests to be transferred to the adoptive couple. The Oklahoma Supreme Court temporarily stayed an order to transfer in order to allow mediation talks, which ultimately failed. During this time, the adoptive couple had court-ordered visits with Baby Girl in Oklahoma, all while the biological family and tribal community continue to embrace and care for her. Baby Girl, holding the hands of her father and step-mother, danced in the Cherokee National Holiday powwow in late August. Surrounded by her extended family, other tribal members, and Disney princess gifts, she celebrated her fourth birthday at a party on September 15. As Baby Girl's tribally-appointed attorney, Angel Smith, reminded everyone: "[Baby Girl] certainly has her own worldview. She has her own thoughts. She has her own voice. It's not just a news story. This is a real child, and this, one way or another, will have a real impact on the rest of her life."⁷¹

In the end, the Oklahoma Supreme Court lifted its stay of the transfer court order on September 23, 2013, and the adoptive couple indicated their intent to enforce the transfer order through whatever means necessary. In a dramatic series of events widely publicized in the news and social media, Baby Girl's biological father made the wrenching decision to turn his daughter over to the adoptive couple.⁷² Baby Girl, clutching a teddy bear, was buckled into the car that would drive her away from her biological family and tribal community, and to the adoptive couple's home in South Carolina.⁷³

Even then, the legal ordeal was not over. Two days after Baby Girl was transferred to the adoptive couple, the Charleston County Family Court began contempt proceedings against her biological father and the Cherokee Nation for withholding Baby Girl following the South Carolina adoption decree, and sought sanctions including the cost

⁷¹ See Hani Lo Wang, *'Baby Veronica' custody battle continues*, NATIONAL PUBLIC RADIO, September 11, 2013, available at <http://www.npr.org/blogs/codeswitch/2013/09/11/221402527/baby-veronica-custody-battle-continues>.

⁷² See *Baby Veronica transferred to adoptive couple*, CHEROKEE PHOENIX, September 24, 2013, <http://www.cherokeephoenix.org/Article/Index/7636>; see also <http://usnews.nbcnews.com/news/2013/09/24/20665873-baby-veronica-returned-to-adoptive-parents-after-oklahoma-high-court-lifts-order?lite>.

⁷³ Max Ehrenfreund, *Baby Veronica returned to adoptive parents*, WASHINGTON POST, September 24, 2013, http://www.washingtonpost.com/national/baby-veronica-returned-to-adoptive-parents/2013/09/24/379eadca-2525-11e3-b3e9-d97fb087acd6_story.html ("Veronica left the Tahlequah home where she had been staying recently. She said goodbye to Brown and her biological grandparents. 'He told her she was going to stay with Matt and Melanie (Capobianco) and they would be nice to her,' said Shannon Jones of Charleston, the birth father's attorney. 'He told her he loved her. After she walked away, Brown released the emotion he held in. He cried. It was around 8 p.m. eastern time as she was driven a short distance to the Cherokee Nation's police headquarters. She wore blue jeans, pink Velcro shoes and a pink vest, and she clutched a pink teddy bear. . . .").

of living and legal expenses incurred by the adoptive couple. In October 2013, Baby Girl's biological father announced, while crying at a press conference, that he was dropping his appeals in the hope of giving his daughter a chance at a normal life.⁷⁴ He vowed that he would always love his daughter and that his home would be her home. Baby Girl's biological father closed his press conference stating, "I miss you more than words can express, you'll always be my little girl, my little princess and I will always love you until the day I die."⁷⁵

Chrissi Nimmo, the attorney for the Cherokee Nation, encouraged the adoptive couple to dismiss pending lawsuits against the biological father and to honor their promises to allow ongoing contact and visitation between father and daughter.⁷⁶ The lawyer for the adoptive couple said that "the way forward must respect the [adoptive couple's] role as [Baby Girl's] parents."⁷⁷ In November 2013, the adoptive couple filed a lawsuit against the biological father and Cherokee Nation, in Oklahoma demanding more than \$1 million in costs amassed during their custody battle for Baby Girl. The Cherokee Nation issued a statement emphasizing its immunity from lawsuit, and reiterating the many ways in which the parties should remain focused on the wellbeing of Baby Girl.⁷⁸

Baby Girl's case is one in which indigenous peoples have led the charge to protect the human rights of a small child, her family, and her community. As we have observed elsewhere, the realization of human rights occurs through the development of mutually reinforcing mechanisms and norms in international, domestic, and indigenous settings alike.⁷⁹ This case suggests several continuing and interrelated opportunities for the advancement of indigenous children's rights to culture, family, and self-determination.

⁷⁴See Craig Day, Biological Father of 'Baby Veronica,' Dusten Brown, Drops Legal Fight, October 10, 2013 <http://www.newson6.com/story/23657724/biological-father-of-baby-veronica-dusten-brown-drops-legal-fight> (including press conference video).

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ Michael Overall, *Baby Veronica Case: Biological Father Still Facing Felony Complaint In S.C.*, TULSA WORLD, September 24, 2013, available at, http://test.serve.tulsaworld.com/site/printerfriendlystory.aspx?articleid=20130924_800_0_Dsiehn312037.

⁷⁸ See Suzette Brewer, *Cherokee Nation files forceful response to Capobiancos' \$1million attorneys' fees suit*, INDIAN COUNTRY TODAY, November 23, 2013.

⁷⁹ See, e.g., Kristen A. Carpenter and Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, CAL. LAW. REV. (2014); Lorie M. Graham, *Education Rights and the UN Declaration*, in OXFORD COMMENTARY ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, Oxford University Press (forthcoming 2014).

Internationally, the statement of the UNSR contextualizes the need for domestic ICWA compliance within the broader struggle to protect the human rights of indigenous children worldwide. There remain other international venues, such as the UN Human Rights Committee or the Committee on the Elimination of Racial Discrimination, where indigenous parties could seek further international analysis of the US's failure to address these issues. Nationally, the Baby Girl case brought to light the widespread mistreatment of American Indian and Alaska Native children in private adoptions and public child welfare systems, prompting indigenous organizations including NICWA and NCAI to request that the Department of Justice launch an investigation into ICWA compliance and oversight.⁸⁰ At the tribal government level, the Cherokee Nation has recently amended its own child custody laws to prioritize the role of the biological family and extended family members in raising children. The tribal council's resolution states, "Every Cherokee child has a right to be raised in a home that embraces their unique cultural heritage."⁸¹ This amendment complements a whole system of child welfare laws and programs that the Cherokee Nation, like other tribes around the country, has long administered.⁸² Tribal governments are also working with states on cooperative approaches to child welfare.⁸³

Beyond these examples, the future will likely hold additional opportunities for human rights focused advocacy in the field of indigenous children's welfare. In this regard, it is too soon to assess the full impact of the *Adoptive Couple v. Baby Girl* case, including

⁸⁰ See Associated Press, *Native American Groups Seek Child Welfare Probe*, February 3, 2014 (noting that The National Indian Child Welfare Association, the National Congress of American Indians, the Native American Rights Fund, and the Association on American Indian Affairs formally requested the U.S. Department of Justice Civil Rights Division launch an investigation into the unlawful treatment of American Indian and Alaska Native children in private adoptions and public child welfare systems."). In another recent action, the ACLU has filed suit on behalf of two tribes and several families arguing that state and local officials have terminated Indian parental rights without sufficient process, for example in proceedings where they failed to receive notice the hearings lasted just several minutes. See ACLU, *Federal judge rules lawsuit over treatment of South Dakota Indian tribes and parents can move forward*, January 29, 2014, available at <https://www.aclu.org/racial-justice/federal-judge-rules-lawsuit-over-treatment-south-dakota-indian-parents-and-tribes-can>.

⁸¹ See A Resolution Changing the Placement Preferences of Indian Children, Res. No. 03-14, Cherokee Nation Council, January 20, 2014, available at <https://cherokee.legistar.com/LegislationDetail.aspx?ID=1477752&GUID=A2965DB0-A069-40BD-957D-345CA986FF76&Options=ID|Text|&Search=child>; see also Will Chavez, *Council changes placement preferences for Cherokee children*, CHEROKEE PHOENIX, January 15, 2014, available at <http://www.cherokeephoenix.org/Article/Index/7902>.

⁸² See, e.g., Cherokee Nation Indian Child Welfare, <http://www.cherokeekids.org/>. See also Cherokee Nation Human Services, <http://www.cherokee.org/Services/HumanServices.aspx>.

⁸³ Kathryn E. Fort, *Waves of Education: Tribal-State Court Cooperation and the Indian Child Welfare Act*, 47 TULSA L. REV. 529 (2011).

whether international forums can provide effective and meaningful spaces for the protection of indigenous children's rights. As many Indigenous Peoples, and the Iroquois in particular, have long understood, "in each deliberation, we must consider the impact of our decisions on the next seven generations."⁸⁴ While this conception offers no immediate relief to Baby Girl, her father, her extended family or her indigenous nation, it may suggest a better future for other indigenous children, one in which the rights to culture, family, and self-determination are honored and respected.

⁸⁴ Oren Lyons, *American Indian in the Past*, in *EXILED IN THE LAND OF THE FREE* 13, 33 (Oren R. Lyons & John C. Mohawk eds., 1992).