

INTERCOUNTRY ADOPTION: LOSS OF IDENTITY OF A CHILD?

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Intercountry adoption is regarded as one means of child care in the modern time. As it involves physical displacement across borders,¹ it implies not only the total and definitive rupture of the relationship of the adopted child with his or her biological parents, but also transfer of the adopted child to a country with completely different culture and a complete change in identity of the adopted child almost always without his or her consent. Thus, some critics on intercountry adoption emphasise on the effect of intercountry adoption on the right of the child to culture. They say that intercountry adoption results in 'the loss of a child's cultural heritage' and consequently 'leads to the loss of the child's identity.'² As a result, they tend to reject the institution of intercountry adoption. In this work, the writer argues that, first, intercountry adoption can be regarded as one acceptable means of alternative care to children without losing sight of its effect on their cultural right. Second, the legal regime governing intercountry adoption at the international level includes safeguards that protect cultural rights of children during intercountry adoption and hence it is possible to balance the right with other rights of the child.

INTRODUCTION

Adoption, which is the statutory process of terminating a child's legal rights and duties toward the natural parents and substituting similar rights and duties toward adoptive parents,³ is

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¹ Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 29 May 1993, Article 2(1).

² Martin, J. 'The good, the bad, and the ugly? A new way of looking at the intercountry adoption debate,' 13 *U.C. Davis Journal of International Law and Policy*, 2007, p.174.

³ Garner B.A (ed.), *Black's Law Dictionary*, 7th ed., 1999, p.50. Adoptive parent is a parent by virtue of legal adoption. *Id*, p.1137. Adoption literally refers to the voluntary act of taking someone's child into one's own family and legally raising him or her as the child of such family. *Cambridge Advanced Learner's Dictionary*, 2003.

one of the areas of concern in relation to children. This process or institution is not a new phenomenon.⁴ It can be traced back to the period of Old Testament, at least.⁵ Since then, though some scholars claim that adoption has been a universal practice, it has been prevalent in most parts of the world.⁶

Originally adoption matters were governed by some traditional norms. Today, however, adoption is regulated under both national and international laws and should be made in accordance with formal legal procedures prescribe therein. Moreover, despite expected changes owing to changes in human life realities, adoption has been practiced for various reasons since the beginning. Generally, it could be argued that it had been chiefly used to realize the needs of adults, for instance, adults that need to adopt a child due to their inability to have one for natural/biological or medical reasons, much more than the needs of children. This is because members of the international community have not viewed children as subjects of rights until recently.

Be that as it may, adoption may be effected with parents of children and others, known as adoptive parents. These adoptive parents may be relatives or friends, or complete strangers. They may also be nationals or residents of the same country with the adopted child and/or his or her parents, or non-nationals or non-residents of such country. Therefore, adoption may take place within the country where the adopted child resides and he or she may live with the adoptive family there; or, adoption may take place within or outside the country where the adopted child is a national and resident and he or she may live with the adoptive parents in another country where the adoptive parents reside or where the adoptive parents are nationals. The later context of adoption is

⁴ Ryan, C. *Intercountry Adoption: Past, Present and Future Concerns Regarding its Existence and Regulation*, p.132, available at <https://sisterinlaw.murdoch.edu.au/index.php/sisterinlaw/article/view/3/32> accessed on 6/01/2015.

⁵ Albrecht, S. *Intercountry adoption: A Swiss perspective*, unpublished, University of Cape Town, School for Advanced Legal Studies, p.5.

⁶ *Ibid*; Ryan at note 5 above, p.132.

technically referred to, in this work, as ‘intercountry adoption’.

As intercountry adoption involves physical displacement across borders,⁷ it implies not only the total and definitive rupture of the relationship of the adopted child with his or her biological parents, but also transfer of the adopted child to a country with completely different culture and a complete change in identity such as name, family ties and nationality, of the adopted child almost always without his or her consent because of his or her age. Thus, some critics on intercountry adoption, like Martin, emphasise on the effect of intercountry adoption on the right of the child to culture. They say that intercountry adoption results in ‘the loss of a child’s cultural heritage’ and consequently ‘leads to the loss of the child’s identity.’⁸ As a result, they tend to reject the institution of intercountry adoption.

It is undeniable that intercountry adoption may involve transfer of a child to a country that has a culture different from his or her country of origin. This article examines whether such fact relating to the culture of the adopted child makes intercountry adoption subject to outright rejection. Particularly, it seeks to address two specific issues: *Is intercountry adoption effected/ conducted in accordance with the international legal framework for intercountry adoption in such a way that the child loses his or her identity? And, is there any attempt in this framework to balance the right to culture and identity on the one hand and the other rights on the other hand of adopted child?*

The writer presents his work in six sections. The first section deals with the historical antecedents of intercountry adoption. The second section dwells on the issue of nomenclature. The third section gives a brief account of child care as enshrined under the United Nations Charter on the Rights of the Child, 1989 (UNCRC), and the African Charter on the Rights and Welfare of the Child, 1990 (ACRWC). The fourth section provides a short overview of the purposes of the Hague Convention and the system

⁷ Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 29 May 1993, Article 2(1).

⁸ Martin, J. ‘The good, the bad, and the ugly? A new way of looking at the intercountry adoption debate,’ 13 U.C. Davis Journal of International Law and Policy, 2007, p.174.

it establishes. The fifth section discusses the place of the right to cultural identity in intercountry adoption. Lastly, a short conclusion and recommendation would be presented under the sixth section.

I. HISTORICAL ANTECEDENTS

Like I said above, unlike its reasons and prevalence, scholars are relatively at a consensus that adoption has been practiced for long. However, this is not true for adoption in both contexts discussed above. As far as intercountry adoption is concerned, it is a recent development. It has been said that situation of children after World War II, existence of many orphans among others, has given rise to the concept of intercountry adoption.⁹ During and after the Korean and Vietnamese War, intercountry adoption ‘truly received global awareness.’¹⁰ Since then, intercountry adoption has been practiced for different reasons¹¹ and existed with two of its faces: one face ‘as a heart-warming act of good will that benefits both child and adoptive family’ and the other face as ‘child trafficking or baby selling.’¹²

By now, intercountry adoption is increasing (involving the transfer of more than 30,000 children each year from over 50

⁹ Ibid; Hillis, L, ‘Intercountry Adoption Under the Hague Convention: Still an attractive option for homosexuals seeking to adopt?’ *Ind. J. Global Legal Stud.*, Vol.6, 1998-1999, p.239.

¹⁰ Ryan at note 5 above, p.135; Katz, L.M., “A Modest Proposal? The Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption” (1995) 9 *Emory Int’l L. Rev.* 283, 286.

¹¹ Demographic and humanitarian reasons and “the ideology of ‘solidarity with the Third World’” can be mentioned as some of positive reasons. See UNICEF, Intercountry Adoption, Innocenti Digest, p.2, available at <http://www.unicef-irc.org/publications/pdf/digest4e.pdf>, accessed on 06/01/2015.

¹² Smolin, D.M, ‘The two faces of intercountry adoption: The significance of the Indian adoption scandals,’ *Seton Hall Law Review*, Vol. 35:403, 2005, pp. 403-404.

countries)¹³ as the number of orphaned and abandoned children is increasing in the world due to conflicts, HIV/AIDS, natural disaster, poverty, and other reasons related to adoptive parents—particularly some parents do not want to give birth.¹⁴ This is particularly true for Africa where poverty and HIV/AIDS have been plugging the life of its people. Thus, in between 2005-2009, at least, three highly publicized intercountry adoption cases in Africa revitalized concerns over the rights of children in intercountry adoption. These cases were the Madonna case in Malawi, the Angelina case in Ethiopia and the Zoe's Ark case in Chad.

Moreover, intercountry adoption is a sensitive area of concern as it (may be used) is susceptible to be used as a cover to child trafficking. In other words, intercountry adoption provides incentive and opportunity for child trafficking to occur.¹⁵ The world has witnessed grave cases of human trafficking particularly of children and women who were illegally sent to various countries for

¹³ J Masson 'Intercountry adoption: a global problem or a global solution?' *Journal of International Affairs*, Columbia University School of International Public Affairs, 2001, p.1. In addition, the number of adoptable children in the West and developed countries has become insignificant. Marlene Hofstetter and Terre des hommes Lausanne, *International Adoption, The Global Baby Chace*, p.2, available at http://www.childtrafficking.com/Docs/hofstetter_2004_the_global_baby_chase_7.pdf, accessed on 06/01/2015.

¹⁴ Albrecht cited above at note 6, p.11; Ryan cited above at note 5, p.133; ATD Fourth World, *How poverty separates parents and children: A challenge to human rights*, available at <http://www.un-ngls.org/atd-study-poverty.pdf>, accessed on 06/01/2015; ...Policy brief: *Intercountry adoption in emergencies*, 2005, available at http://www.adoptioninstitute.org/publications/2005_Brief_ICA_In_Emergencies_April.pdf, accessed on 26/10/08. 'The combination of poverty, ineffective legislation and bureaucracy in donor countries, with money and desperation for children in receiving countries, provides the perfect climate for trafficking and sale to flourish.' Discussion Paper 34 (1994) - *Review of the Adoption of Children Act 1965 (NSW)*, 12. *Inter-Country Adoption in an International Perspective*, p.5.

¹⁵ See M Jimenez "Trafficking in Central America: The case of Honduras" (1993) 10(1-2) *International Children's Rights Monitor* 6.

prostitution and other sorts of forced or exploitative labour. Human trafficking is highly despised act that is condemned by the global community as a global or transnational crime;¹⁶ as an organized crime¹⁷ as though trafficking in persons may be committed by an individual or a couple, in most cases it involves an organized criminal group; and, as a crime against humanity under international law.¹⁸

¹⁶ United Nations Convention Against Transnational Organized Crime, Nov. 2, 2000, art. 3(2). For scholarly discussions on this matter, see generally L Smith & M Mattar, *Creating International Consensus on Combating Trafficking in Persons: U.S. Policy, the Role of the UN, and Global Responses and Challenges*, 28 FLETCHER FORUM WORLD AFFS. 155, 157-58 (2004); *The Role of the Government in Combating Trafficking in Persons – A Global Human Rights Approach: Hearing Before the Subcommittee on Human Rights and Wellness of the House Comm. on Gov't Reform*, 108th Cong. 85-86 (2003) (prepared statement of M Y. Mattar, Co-Director, The Protection Project of the Johns Hopkins University School of Advanced International Studies.). Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 20, 2000, art. 17. In order to effectively combat trafficking in persons, states should discharge the following five main international obligations in accordance with the U.N. Protocol: '1) recognizing trafficking in persons as a specific and serious crime, 2) undertaking measures with respect to the prevention of trafficking in persons, 3) providing protection for the victims of trafficking, 4) guaranteeing repatriation of the trafficked victims, and 5) prosecuting the cases of trafficking.' M. Y. Mattar 'State Responsibilities in Combating Trafficking in Persons in Central Asia,' *Loy. L.A. Int'l & Comp. L. Rev.* [Vol. 27:145-222], especially 168-210.

¹⁷ United Nations Convention Against Transnational Organized Crime, Nov. 2, 2000, art. 2(a).

¹⁸ See generally U.N. Convention, *supra*, arts. 5-13. *Id.* In order to be classified as crimes against humanity, the above acts must be "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." *Id.* art. 7(1). The definition of "crimes against humanity" in the Rome Statute of the International Criminal Court includes, inter alia, "enslavement," "imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law," and "rape, sexual slavery, enforced prostitution, forced pregnancy . . . or any other form of sexual violence of comparable gravity." Rome Statute of the International Criminal Court, July 17, 1998, art. 7(1)(c), (e) & (g), U.N. Doc. A/Conf. 183/9 (1998), 37 I.L.M. 999, 1004 [hereinafter Rome Statute of the ICC]. According to the ICC Statute, the term "enslavement" means the

In addition to this experience, even child trafficking in the field of intercountry adoption has been an increasing phenomenon since 1960s. This has resulted from the fact that more and more couples from the developed countries of the West and the North want to fulfil their desire to become parents by adopting a child from the South and the East; and, at the same time, the children who need protection through intercountry adoption have become less and less, which in turn has made intercountry adoption to follow the common laws of the market: the offer searches the demand and the demand tracks the opportunities, with a great deal of assistance from globalization, the means of communication and travel facilities all over the world. This has resulted in baby-buying and baby-selling scandals.¹⁹

Particularly in some countries, intercountry adoption was conducted through offensive acts like some birth mothers received illicit payments in connection with surrendering their babies for adoption;²⁰ declaration of paternity by a 'father' abroad as the child

exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children." Rome Statute of the International Criminal Court, July 17, 1998, art. 7(1)(c), (e) & (g), U.N. Doc. A/Conf. 183/9 (1998), 37 I.L.M. 999, 1004 [hereinafter Rome Statute of the ICC].

¹⁹ Generally see Smolin, D.M. 'Intercountry Adoption as Child Trafficking,' Valparaiso University Law Review, Vol.39, No.2, 2004, p.281; Dillon, S. 'Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming The United Nations Convention on the Rights of the Child With the Hague Convention on Intercountry Adoption,' Boston University International Law Journal, Fall 2003. UNICEF said that between 1993 and 1997, the number of adopted babies from foreign countries registered for leading industrial nations grew from 16,000 to 23,000. UNICEF Warns of Growing Criminal Role in Baby Trafficking, Deutsche Presse-Agentur, July 31, 2000. See also AIDS, Child Trafficking Major Problems in Asia-Pacific, Agence France Press, May 7, 2003 ("Children are being trafficked for labour, sexual exploitation, forced marriage, begging and adoption."), available at <http://www.hcch.net/e> [hereinafter Hague Convention].²

²⁰ Bartholet, Elizabeth. 1988-. "International Adoption: Overview." In *Adoption Law and Practice*. Edited by Joan H. Hollinger, et al., 1-43. New York: Matthew Bender Publisher. P. 128; 'International Adoption: Current Status and Future Prospects,' *The Future of Children* 1 (Spring 1993) 89-103; 'Beyond

being his in presence of the biological mother; registering the child by the adoptive parents as their offspring in the country of origin; kidnapping a child and making the adoption with the consent of a 'false mother' for adoption; taking a child with a new identity by telling the biological mother that the baby died shortly after birth; and, adoption taking place through forged documents (false birth certificate, false consent of the mother, etc.) or without fulfilling legally prescribed requirements. This has proved that the ugly fact about children- 'Children are vulnerable members of every society and have been subject to various forms of abuse'- applies to the case of intercountry adoption as well, as children have suffered abuses of their rights in the name of intercountry adoption. As a result, the international community has attempted to prevent abuses of children's rights by formulating conventions which set standards for States' treatment of children.

With respect to the regulation of intercountry adoption, attempts to provide a legal framework to regulate the same have dated back almost to the same period whereby the practice of intercountry adoption has become popular, the 1950s. In the mid-1950s, there was a consultation on how to address problems relating to intercountry adoption at international level.²¹ Since then, there have been various declarations and conventions relating to intercountry adoption adopted at the international level.²² Towards the end of 1980s, the global community has identified that prevention of child trafficking and sale shall be put as a high priority on the international agenda. G Parra-Aranguren, in her Explanatory Report on the Convention on Protection of Children and Co-operation of Intercountry Adoption, has stated the reasons

Biology: The Politics of Adoption and Reproduction,' *Duke Journal of Gender Law and Policy* Vol.2 (Spring 1995) pp.5-14; 'International Adoption: Propriety, Prospects and Pragmatics,' *Journal of the American Academy of Matrimonial Lawyers* Vol.13 (Winter 1996) , pp.181-210; 'What's Wrong With Adoption Law?' *The International Journal of Children's Rights* Vol.4, 1996, pp263-272.

²¹ UNICEF, Intercountry Adoption, Innocenti Digest, p.2.

²² Id, pp.2-5; Van Loon, H. 'Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption' *The International Journal of Children's Rights*, Vol.3, 1995, pp.463-464.

for including the subject of intercountry adoption with priority in the Agenda of the Seventeenth Session of the Special Commission on general affairs and policy of the Hague Conference on private international law were summarized by the Permanent Bureau of the Conference as follows:

- (i) a dramatic increase in international adoptions which had occurred in many countries since the late 1960s to such an extent that intercountry adoption had become a worldwide phenomenon involving migration of children over long geographical distances and from one society and culture to another very different environment;
- (ii) serious and complex human problems, partly already known but aggravated as a result of these new developments, partly new ones, with among other things manifold complex legal aspects; and
- (iii) insufficient existing domestic and international legal instruments, and the need for a multilateral approach.²³

The Permanent Bureau mentioned that insufficiency of the international legal instruments to meet the present problems caused by intercountry adoptions shows that the following requirements are necessary:²⁴

- (a) a need for the establishment of legally binding standards which should be observed in connection with intercountry adoption;²⁵
- (b) a need for a system of supervision in order to ensure that these standards are observed;²⁶

²³ J.H.A. van Loon, "Report on intercountry adoption", Prel. Doc. No 1 of April 1990, pp. 6-7; *cf. Proceedings of the Sixteenth Session (1988)*, Tome I, *op. cit.*, pp. 181-185.

²⁴ "Memorandum concerning the preparation of a new Convention on international co-operation and protection of children in respect of intercountry adoption", drawn up by the Permanent Bureau, November 1989, pp. 1-2..

²⁵ This informs (in what circumstances is such adoption appropriate; what law should govern the consents and consultations other than those with respect to the adopters?). "Memorandum concerning the preparation of a new Convention on international co-operation and protection of children in respect of intercountry adoption", drawn up by the Permanent Bureau, November 1989, pp. 1-2.

²⁶ This is about (what can be done to prevent intercountry adoptions from occurring which are not in the interest of the child; how can children be protected from being adopted through fraud, duress or for monetary reward; should measures of control be imposed upon agencies active in the field of

- (c) a need for the establishment of channels of communications between authorities in countries of origin of children and those where they live after adoption;²⁷ and there is, finally,
- (d) a need for co-operation between the countries of origin and of destination.²⁸

At the same time, a similar concern developed in the UN too. Thus, in 1986 the General Assembly of the United Nations adopted an important Declaration, known as the Declaration on the Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, 1986, by consensus.²⁹ This Declaration laid down the principle that intercountry adoption was only to be considered as a placement option if a child could 'not be placed in a foster or an adoptive family or [could] not in any suitable manner be cared for in the

intercountry adoption, both in the countries where the children are born and in those to which they will travel?). "Memorandum concerning the preparation of a new Convention on international co-operation and protection of children in respect of intercountry adoption", drawn up by the Permanent Bureau, November 1989, pp. 1-2.

²⁷ This is (it would be conceivable, for example, to create by multilateral treaty a system of Central Authorities which could communicate with one another concerning the protection of children involved in intercountry adoption). "Memorandum concerning the preparation of a new Convention on international co-operation and protection of children in respect of intercountry adoption", drawn up by the Permanent Bureau, November 1989, pp. 1-2.

²⁸ This informs (an effective working relationship, based on mutual respect and on the observance of high professional and ethical standards, would help to promote confidence between such countries, it being reminded that such forms of co-operation already exist between certain countries with results which are satisfactory to both sides). "Memorandum concerning the preparation of a new Convention on international co-operation and protection of children in respect of intercountry adoption", drawn up by the Permanent Bureau, November 1989, pp. 1-2.

²⁹ General Assembly of the United Nations adopted by consensus the *Declaration on the Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally*, 1986.

country of origin'.³⁰ In addition, The United Nations Commission on Human Rights appointed a Special Rapporteur to investigate the problem relating to intercountry adoption in 1990.³¹ This has culminated in the adoption of the most important convention in the modern intercountry adoption: The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption of 29 May 1993 (Hague Convention, hereinafter), which provides for detailed rules that govern intercountry adoption. This Convention would be emphasized on in this work.

II. INTERCOUNTRY ADOPTION: DEFINITION, PURPOSES, CONTENTIONS

Generally speaking, intercountry adoption, which is also known as 'international adoption', may simply be defined as a/the process by which adults that are habitual residents in one country take another person's child that habitually resides in another country into their own family and legally raise him or her as their own child. As a result, it involves the movement of a child across international boundaries for the purposes of adoption. In line with this, Jareborg submitted that intercountry adoption is a practice that seeks to involve 'a child living in one country, the prospective adoptive parents living in another country, and the transfer of the child to that country to live there with the adoptive parents'.³²

The Hague Convention does not categorically define intercountry adoption. However, Art.2 of the Convention suggests

³⁰ Id, Article 17.

³¹ The mandate of the Special Rapporteur was created by the Commission on Human Rights by resolution 190/68 for one year in 1990. The mandate was extended to two years and then again for three years from 1992. The Special Rapporteur furnishes annual reports to the Commission updating his progress.

³² Jareborg, M.J., 'Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption,' *Nordic J. Int'l Law*, Vol.63, (1994), p.185.

the elements any definition to the term should include. Having regard to those elements, intercountry adoption may possibly be defined as adoption in which a child habitually resident in one Contracting State ('the State of origin') has been, is being, or is to be moved to another Contracting State ('the receiving State') either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin, and that creates a permanent parent-child relationship. This definition tells that intercountry adoption exists if and only if the following requirements are fulfilled:

- The child to be adopted shall be a habitual resident in one Contracting State ('the State of origin');
- The adoptive parent (s) shall be spouses or a person habitually resident in another Contracting State ('the receiving State');
- The child shall be moved from the State of origin to the receiving State to live with the adoptive parents;
- There shall be adoption of the child either in the State of origin or in the receiving State; and,
- The adoption shall create a permanent parent-child relationship.

At this juncture, it is important to note that though the Hague Convention requires adoption, it neither requires the adoption to take place in the State of origin nor does it prohibit movement of a child to the receiving State for the purpose of adoption. Moreover, the Hague Convention considers intercountry adoption as intercountry adoption *per se* only where it involves a child and adoptive parents from two Contracting States to the Convention.

A. Intercountry Adoption: the Contested Nature

Many legal institutions or mechanisms have not been the results of consensus. There have been, more often than not, arguments for and against them for various reasons be it political,

philosophical, practical, economic, social or others. As far as intercountry adoption is concerned, it is no exception. Intercountry adoption has been a contentious institution. Based on the idea reflected in their writings, scholars advocated for differing value positions and they can generally be classified into three value positions: abolitionists, pragmatists and promoters.³³

Abolitionists have focused on the negative impact that intercountry adoption can have on child welfare systems in sending countries.³⁴ They emphasize that intercountry adoption diverts professional resources (social workers, lawyers and courts) from the needs of many children to service a few foreign adopters. Abolitionists argue that if the money spent on adopted children was applied to children's services in sending countries, the lives of large numbers of children could be improved.³⁵ Abolitionists further stress that intercountry adoption undermines the development of better local services, especially having regard to the material position of local adopters in light of the material standards of foreigners.³⁶ They are also worried about the neo-colonialism and ethno-centricity inherent in decisions whereby children are adopted 'in their best interests' from poor, emerging states into rich, powerful countries.³⁷ They remain concerned about the effect of seeing the export of children as a solution to a country's child care problems, in addition to questioning the impact on the well-

³³ J Masson, at note 14 above, p.2.

³⁴ Ibid.

³⁵ Triseliotis, J. 'Intercountry Adoption: Global Trade or Global Gift?' *Adoption and Fostering*, Vol.24, No.2 (2000) pp. 45-54; Ngabonziza, D 'Moral and Political Issues Facing Relinquishing Countries' *Adoption and Fostering*, Vol.15, No.4, (1991), pp.75-80.

³⁶ Hoelgaard, S. 'Cultural Determinants of Adoption Policy: a Colombian Case Study,' *Int. Journal of Law, Politics and Family*, Vol.12, (1996), p.241.

³⁷ Olsen, L.J., 'Live or Let Die: Could Intercountry Adoption Make the Difference?' *Penn State International Law Review*, Vol.22, (2003-2004), p.490; Wallace, S.R., "International Adoption: The Most Logical Solution to the Disparity between the Numbers of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?" *Ariz. J. Int'l & Comparative Law*, Vol.20, (2003), p.709.

being of those adopted. They argue also that intercountry adoption is not in the best interests of the child, as it involves uprooting a child from his or her birth country and raising him or her in a foreign country, and thereby strips the child of his or her group link and deprives a child of his or her ethnic and cultural background, and exposing him or her to an increased risk of discrimination.³⁸

For abolitionists, the adverse impacts of intercountry adoption extend to the sending countries too. If prospective adopters prefer foreign babies to local children who need adoptive parents, intercountry adoption may also prevent the development of domestic adoption for hard to place children. 'Their opposition to intercountry adoption is also based on concerns about abuse, particularly abduction and coercion, to meet demands for children, and the way that accepted practices, such as requiring donations to orphanages, can easily develop into corruption, possibly even the selling of children.'³⁹

On the opposite direction, there are promoters of intercountry adoption. The promoters emphasize the way that individual children can be helped by intercountry adoption in contrast to abolitionists' views about the impact on children and society generally. They, in general, place emphasis on what is in the best interests of the child by taking the concept of the best interests of the child broadly. Accordingly, they perceive intercountry adoption as 'an ideal solution bringing together parents with homes, love and care to offer and children who (desperately) need families.'⁴⁰ They suggest that intercountry adoption is in the best

³⁸Thompson, N.S., 'Hague is Enough? A Call for More Protective, Uniform law Guiding International Adoptions' *Wisconsin Int'l Law Journal*, Vol. 22, (2004) p.453.

³⁹Wallace, S.R., at note 38 above, p.710. It 'has led to the creation of black markets for baby selling. With the high demand for foreign babies persisting in industrialised nations, activities such as kidnapping, child abduction, child trafficking and financial exploitation have become prevalent in sending countries, where entrepreneurs will take advantage of the demand with the expectation of the high return. *Ibid.*

⁴⁰Kirton, D. 'Intercountry Adoption in the UK Towards an Ethical Foreign Policy?' in P. Selman, *Intercountry Adoption: development, trends*

interests of the child as it allows a child to grow in a loving family environment, as opposed to institutional care, and some times represents the only realistic opportunity at being part of a permanent family.⁴¹ It enables children to receive food, shelter and care, even if it occurs in a country different to where the child was born.⁴² It 'saves' children from poor and unsanitary conditions in country where they were born.⁴³

Promoters further say that the problems of intercountry adoption are associated with too much bureaucracy, which restricts the number of families who can be assisted, increases the time taken to arrange adoptions, encourages the avoidance of formal procedures and allows the exploitation of adopters.⁴⁴ Unlike the organizations who seek both the promotion and close regulation of intercountry adoption, scholars with the value position of promotion are more usually associated with the rejection of controls and acceptance of the notion that, like natural parents, those seeking to adopt should not be subject to assessment or restrictions.⁴⁵

Given the abolitionists and promoters as value positions that refer to two opposite poles of arguments on intercountry adoption, pragmatists seem to fall in between these extremes. Pragmatists admit the need for the institution of intercountry adoption and at the same time believe in the need for regulating intercountry adoption as a way of eliminating abuses and improving standards in a practice that will continue.⁴⁶ This compromised value position has been the basis that led to a range of unilateral, bilateral and international statements and measures, particularly the

and perspectives, British Association for Adoption and Fostering (BAAF), 2000, p.74.

⁴¹ Thompson, N.S., at note 39 above, p.452.

⁴² Liu, M, 'International Adoption: An Overview,' *Temp. Int'l & Comp. Law Journal*, Vol.8, (1994), p.193.

⁴³ Wallace, S.R., at note 38 above, p.706.

⁴⁴ J Masson, at note 14 above, p.2.

⁴⁵ Id, pp.2-3.

⁴⁶ Id., p.3; Carlson, R.R., the Emerging Law of Intercountry Adoptions: An Analysis of the Hague Conference on Intercountry Adoption,' *Tulsa Law Journal*, Vol. 30, (1994), p.243.

development of the Hague Convention, that are intended to improve practice in intercountry adoption.⁴⁷

III. THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, 1989, AND THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD, 1990

The United Nations Convention on the Rights of the Child, 1989 (CRC) and the African Charter on the Rights and Welfare of the Child, 1990 (ACRWC) provide for the rights of the child at global and regional (African) levels, respectively. As their name by itself depicts, they are human rights conventions. They provides for fundamental rights of children as separate and distinct group or subjects of international human rights.⁴⁸ The former could be taken as elaboration of the right of children ‘to special care and assistance’⁴⁹ provided under the Universal Declaration of Human Rights, (UDHR), 1948.⁵⁰ Whereas, the later provides the African version of the CRC or the later is adopted with a view to give children’s rights an African perspective; a means to realize the duty to ‘ensure the protection of the rights of ... the child as stipulated in international declarations and conventions’ imposed upon states under Art.18 (3) of the African Charter on Human and Peoples’ Rights, 1981 (ACHPR);⁵¹and the elaboration of the right of

⁴⁷ Van Loon and G. Parra-Aranguren, ‘Explanatory Report on the Convention on Protection and Co-operation in Respect of Intercountry Adoption,’ Hague Conference on Private International Law (1993).

⁴⁸ Ibid.

⁴⁹ Universal Declaration of Human Rights, 1948 (UDHR), adopted and proclaimed by the General Assembly of United Nations, General Assembly resolution 217 A (III) of 10 December 1948, Article 25 (2).

⁵⁰ Toope, S.J. ‘The Convention on the Rights of the Child: Implications for Canada,’ in *Children’s Rights: A comparative perspective*, Freeman, M. (ed.), Dartmouth publishing company limited, England, 1996, p.35.

⁵¹ African Charter On Human and Peoples’ Rights, 1981. Art.18 (3) reads ‘The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international [sic] of the rights of the woman and the child as

children 'to special care and assistance' as enshrined under the UDHR as per Art.18 (3) of the ACHPR.

Thus, as all African states, except Somalia, are Party States to the CRC, and many of these states are again Party States to the ACRWC, children in many African states enjoy double protection of most of their rights. Of course, African children enjoy a better protection under the ACRWC than under the CRC. For instance, the ACRWC extends protection to all persons under the age of 18 as it defines a child as a person 'below the age of 18 years' under Art.2, unlike Art.1 of the CRC, which allows exclusion of some persons below the age of 18 years based on domestic laws. The ACRWC provides also a more comprehensive protection for children in armed conflicts, refugee children and children under disabilities.⁵²

However, the CRC and the ACRWC exhibit glaring similarity than disparity. Of particular significance is the fact that they embody the same cardinal principles that are regarded as giving breath to the rights of the child they contain. The principles are four in number. The CRC and ACRWC and the rights enshrined therein are founded on these four cardinal or basic principles: the principle of non-discrimination (art.2; art.3), the principles of best interests of the child (art.3; art.4), the principle of the right to life and maximum survival and development (art.6; art.5), and the principle of participation (art.12; art.7).⁵³ Therefore, regard should be had to these principles in applying and

stipulated in international declarations and conventions.'

⁵² Gose, M., *The African Charter on the Rights and Welfare of the Child: An assesment of the legal value of its substantive provisions by means of a direct comparison to the Convention on the Rights of the Child*, Community Law Centre, University of the Western Cape, Cape Town, South Africa, 2002, p.140.

⁵³ Hodgkin, R. and Newell, P., *Implementation Handbook for the Convention on the Rights of the Child, Fully revised edition*, United Nations Children's Fund 2002, p.1; Gose, M., *The African Charter on the Rights and Welfare of the Child: An assesment of the legal value of its substantive provisions by means of a direct comparison to the Convention on the Rights of the Child*, Community Law Centre, University of the Western Cape, Cape Town, South Africa, 2002, p.17.

interpreting the provisions under both instruments.

Be that as it may, though these child rights instruments deal with various rights under different provisions, some of the rights and one of the cardinal principles – the principle of the right to life and maximum survival and development (art.6; art.5) would be most relevant for the purpose of this work. They possess paramount significance as they provide for the rights of the child to identity, culture, to be cared for by her/his parents or family environment on the one hand, and other rights, like the right to life, on the other.⁵⁴ The rights highly associated with the topic under discussion would be briefly dealt with in the subsequent sub-sections.

A. The Right of a Child to Life, Survival and Development under the CRC and the ACRWC

As the sub-title says, here, I deal with the right of a child to life, survival and development under the CRC and the ACRWC. The approach I follow would be such that norms and values common to both instruments would be simply discussed, but where peculiarity or/and some sort of emphasis is required with respect to one of the instruments, specific reference to that instrument would be made.

One of the cardinal principles of the rights of the child is principle of the right to life and maximum survival and development (CRC art.6; ACRWC art.5). This principle should be given due consideration while interpreting and applying the other rights of children. This principle is consisting of three highly interrelated rights: the right to life, the right to survival and the right to development.

B. The Right of a Child to His or Her Culture and Identity under the CRC and the ACRWC

Evaluation of whether transfer conducted under the

⁵⁴ CRC, Arts6-11 & 18-21, and ACRWC Arts5, 19-20 & 24-26, 29-30.

international framework for intercountry adoption in such a way that the child loses his or her identity has to begin with the contents of these rights under CRC, ACRWC and the Hague Convention as these are the most important instruments relating to intercountry adoption at international level.

The right to identity is, literally speaking, the right to know 'who a person is, or the qualities of a person ... which make' him or her different from others.⁵⁵ If one applies this to the case of children, child right to identity signifies child's right to know who he or she is. This includes the rights of a child to name, nationality, and know his or her family.⁵⁶ The right of a child to his or her identity has been protected by the CRC and the ACRWC to a reasonable degree, at least. This protection can also be inferred from the duty of the state to provide for birth registration, to allow children to preserve their identity, refrain from arbitrary deprivation of identity and obligation to ascertain identity of children speedily when arbitrary deprivation occurs.⁵⁷ At this point mention should be made that the ACRWC is somehow weak as it lack the latter three state duties.

Having such protection, states are obliged to ensure the right of the child to his or her identity under the CRC and ACRWC to all children regardless of their status.⁵⁸ This right may not be compromised or lessened for a child is subject or has entered a state through intercountry adoption. Otherwise, it amounts to discrimination based on status of a child. Hence, it is clear to see that the right to identity of a child is protected under the CRC and the ACRWC even during the time of intercountry adoption.

As far as the right to identity of a child under the Hague Convention is concerned, it is possible to see that the convention tries to protect the right of the child to his or her identity. This can be seen particularly from Article 4 and Article 16. The former Article requires the counselling and due information as to the

⁵⁵ Cambridge Advanced Learner's Dictionary, Cambridge University Press, 2003.

⁵⁶ CRC, Article 7 (1), 8 (1). ACRWC Articles 6 & 19.

⁵⁷ Ibid; Id, Articles 7 (2) & 8 (2); ACRWC, Article 19.

⁵⁸ CRC, Article 2, ACRWC, Article 3.

consequences of their consent to persons, institutions and authorities whose consent is necessary in the process of intercountry adoption, 'in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin.'⁵⁹ It also emphasises on the consent of able children and other persons.⁶⁰ The latter Article obliges the Central Authority of the State of origin to 'prepare a report including information about his or her identity... background, social environment ... medical history including that of the child's family...'⁶¹ hence, even during intercountry adoption the right to identity of a child is protected under the normative frame work of intercountry adoption at international level.

It may be argued that these two provisions may be criticized as offering less protection for the right to identity of a child to the level under the CRC and the ACRWC but the Hague Convention it not without any kind protection to child's right of identity. The defects under the Hague Convention may be cured by reading its provisions in light of states' obligations and the rights of children under the CRC and the ACRWC. It, therefore, is not valid to out rightly conclude that intercountry adoption deprives a child of his or her identity.

Moreover, the right to identity is different from the right to culture as the later is specific and the former is broad. Therefore, it is not acceptable to conclude that deprivation of cultural right during intercountry adoption, if any, is equivalent to 'the loss of the child's identity.' This does not mean that culture does not form part of identity of a child; rather, it is to say that identity of a child is much more than the culture of a child. Culture of a child may form only part and parcel of his or her identity, not the whole identity of a child.

The right to culture: when one comes to the right of a child to his or her culture under the CRC, the ACRWC and the Hague Convention, he or she can see that the CRC provides that 'due regard shall be paid [by State Parties] to the desirability of

⁵⁹ Hague Convention, Article 4 (c)(1).

⁶⁰ Id, Article 4 (c) (2)-(4), (d).

⁶¹ Id, Article 16 (1) (a).

continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background' while a child is placed in an alternative care domestically.⁶² Alternative care is a care that should be provided for when a child is deprived of his family environment permanently or temporarily and includes adoption.⁶³ Hence, the CRC obliges States to give 'due regard' to the protection of cultural rights of children in the process of adoption. This shows that the protection of this right is left to States. Such soft obligation is practically valid as the right of the child to be loved and cared for or get family environment through alternative care triumphs over his or her right to culture.⁶⁴ But this should not be taken to mean that states may shy away from their international obligation to protect cultural rights of children. States should try their best to protect cultural right of children while at same time providing alternative care, in our case adoption, to children deprived of their family environment temporarily or permanently. This should be a principle guiding domestic adoption.

As far as intercountry adoption is concerned, the CRC provides that intercountry adoption should be entertained only '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.'⁶⁵ Hence, states are allowed to consider intercountry adoption only at last resort. This by itself has an implication on the cultural right of a child as it shows that only where other rights in the best interests of the child trump that the right to culture of a child may be disregarded.⁶⁶ Furthermore, the CRC provides that states should provide for 'safeguards and standards equivalent to those existing in the case of national adoption'⁶⁷ in cases of intercountry adoption. One of such safeguards and standards is that 'due regard shall be paid [by State Parties] to the desirability of continuity in a child's upbringing and to the child's ethnic, religious,

⁶² CRC, Article 20 (3), ACRWC, 25 (3).

⁶³ Ibid & Id, Article 20 (1).

⁶⁴ Dillon, cited at note 20 above, p.200.

⁶⁵ CRC, Article 21 (b).

⁶⁶ CRC, Article 21; cited at note 20 above, p.200.

⁶⁷ CRC, Article, 21 (c).

cultural and linguistic background' as mentioned above. From this, it is possible to read that states should give 'due regard' to cultural rights of children while intercountry adoption should be made.

Another worth noting provision of the CRC as far as the right to cultural identity of a child is concerned is Article 30.⁶⁸ This provision protects the cultural right of children from religious, cultural and ethnic groups, and indigenous people. It, however, is not meant cultural rights to trump above other rights of the child.⁶⁹

The ACRWC provides for more or less similar standard the CRC as far as the protection of cultural rights and intercountry is concerned. It provides that in case of domestic adoption 'due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious or linguistic background.'⁷⁰ With respect to intercountry adoption, 'safeguards and standards equivalent to those existing in the case of national adoption' should be provided.⁷¹ Similarly, intercountry adoption should be made at last resort.⁷² Hence, it protects cultural rights in the same way as the CRC. The arguments made in relation to the CRC equally apply to the case of ACRWC.

As far as the Hague Convention is concerned, it is provided that the Central Authority of the State of origin shall 'give due consideration to the child's upbringing and to his or her ethnic, religious and cultural background.'⁷³ Hence, cultural right of a child is recognized and protected. It could also be argued that, under this Convention, cultural right of a child is protected in three ways. First, the Convention obliges the Central Authority of the State of origin to 'give due consideration' to the right while determining adoptability of a child. Secondly, it obliges the Central Authority of

⁶⁸ Davel, T. 'Intercountry adoption from an African perspective,' in *Children rights in Africa: A legal perspective*, Sloth-Nielsen, J. (ed.), Ashgate publishing company limited, England, 2008., p.261.

⁶⁹ Mezmur B., As painful as giving birth: A reflection on the Madonna adoption saga, unpublished, p.13.

⁷⁰ ACRWC 25 (3).

⁷¹ Id, Article 24 (c).

⁷² Id, 24 (b); Davel, cited ate note 69 above, p.260

⁷³ Hague Convention, Article 16 (1)(b).

the receiving State to determine the suitability of prospective adoptive families.⁷⁴ This duty may be interpreted progressively to include a duty to consider the position of prospective adoptive families in relation to cultural right of a child to be adopted. Thirdly, recognition process of adoption provided under the Convention may also be taken as a means to protect cultural rights of a child through interpretation.⁷⁵ For instance, a state may refuse recognition of intercountry adoption made without any or due consideration of cultural rights of a child.

IV. PURPOSE OF THE HAGUE CONVENTION ON INTERCOUNTRY ADOPTION

Like I said in the introduction part, there have been various international instruments in the international arena about intercountry adoption. This shows that the Hague Convention is not a Convention on a new concept, rather is a Convention prepared with a view 'to establish common provisions' regulating intercountry adoption taking the previous attempts into account.⁷⁶ Hence, one of the purposes of the Hague Convention is unifying and explaining substantive and procedural rules that govern intercountry adoption of children at global level while at same time affirming attempts to regulate same made in the past.⁷⁷ Accordingly, it serves to insure that the laws in both receiving State and State of origin work harmoniously.⁷⁸

In addition, the Hague Convention is adopted with a view to not only institutionalize intercountry adoption but also 'establish safeguards to ensure that' such adoptions are made in the best interests of the child.⁷⁹ It also establishes safeguards to ensure the protection of fundamental rights of children as provided under

⁷⁴ Id, Article 5 (a) and Article 15.

⁷⁵ Id, Articles 23-27.

⁷⁶ Id, preamble para.6.

⁷⁷ Rosenblatt, J. *International Conventions Affecting Children*, Martinus Nijhoff Publishers, 2000, p.87.

⁷⁸ Ibid.

⁷⁹ Hague Convention, Article 1(a) (b).

international law during intercountry adoptions are carried out.⁸⁰

Furthermore, the Hague Convention has the purpose of preventing child abduction, sale and trafficking by regulating the way by which intercountry adoption should be made.⁸¹ Therefore, it has been said that the Hague Convention is adopted not only to protect rights and interests of children but also ‘to create rules of procedure, conduct, choice of law, international recognition of adoption decrees, and to establish institutions for international oversight and cooperation.’⁸² This conclusion, however, should not be taken to mean that the Convention is limited to the interests of children. Rather, it is designed broadly to ensure the interests of ‘both the birth and prospective adoptive parents’ as well.⁸³

Lastly, the Hague Convention has the purpose of supplementing the details of intercountry adoption contemplated under the Convention on the Rights of the Child, 1989 (CRC).⁸⁴ It reaffirms the priority of the need to bring up children in a family environment⁸⁵ and protection or enforcement of their rights under international law as a whole.⁸⁶

To conclude, the Hague Convention ‘reflects widely shared international opinion’ as it governs and legitimizes intercountry adoption deemed to be important alternative care put as last option for children.⁸⁷ It also helps in reducing the number of adoption scandals as it reinforces existing rules against baby-buying and other improper practices.⁸⁸ It can, further, ‘be used to demonstrate that internationally adopted children will be protected

⁸⁰ Id, Article 1 (a).

⁸¹ Id, preamble para.5.

⁸² Carlson, R.R., at note 47 above, p.245.

⁸³ Graff, N.B., ‘Intercountry adoption and the Convention on the Rights of the Child: Can the free market in children be controlled?’ *Syracuse Journal of International Law and Commerce*, Vol.27, 2000, p.237.

⁸⁴ Convention on the Rights of the Child, 1989 (CRC), Article21.

⁸⁵ Hague Convention, preamble paras 1 & 2.

⁸⁶ Id, Article 1 (a); Grraf, cited at note 84 above, p.420.

⁸⁷ Bartholet, E. ‘International Adoption,’ in *Children and youth in adoption, orphanages, and foster care*, Askeland. L (ed.), Greenwood Publishing Group Inc., (2005), p.114.

⁸⁸ Ibid.

against sale and exploitation, and that the world community approves of such adoption as a good option for children.⁸⁹ Hence, it has to be employed to change an attitude that sees intercountry adoption as child selling or trafficking. This is possible for the Convention particularly if all states in the world ratify it and work towards its implementation.

V. THE PLACE OF THE RIGHT TO CULTURAL IDENTITY IN INTERCOUNTRY ADOPTION

Under this section, the writer discusses the place of cultural rights of the child and the balancing to be done in relation to the cultural right of a child on the one hand and other rights on the other. This will be done in relation to the contents of these rights under CRC, ACRWC and the Hague Convention.

Examination of the CRC, ACRWC and the Hague Convention as to whether the formulation of any of these instruments implies cultural identity should be given primacy over other rights of the child or not leads to the following conclusions. These conclusions should, however, be approached with caution. This writer says that because in the ideal world human rights are supposed to be interrelated, interdependent and indivisible. Therefore, it is not acceptable to put them hierarchically. The same is true about children's rights as they are human rights. But in the real world, things are different. The right to life, the right to survival and development, the right to education and the right to family environment may sometimes become in the best interests of the child than the right to culture.

For instance, if one considers a situation of an orphan child living in poverty with no education, he or she can see that such child is deprived of his or her right to family environment, education, and the right to health and food and living in such situation with his or her culture is much more less than protection to the child.⁹⁰ Therefore, if these rights can not be protected in his

⁸⁹ Ibid.

⁹⁰ Dollin, cited at note 20 above, p.220.

or her country, it would be in the best interest of the child to arrange for any other possible alternative care, the most important being intercountry adoption. Such proposition is acceptable in light of ‘all the best to our children’ than letting them die in ‘loyalty to their culture.’⁹¹ This analysis takes us to the conclusion that if protection of one right becomes in the best interests of the child, one favors the protection of this right at the cost of other rights. This fact of the real world is the main thesis upon which the conclusions below are dependant.

First, the primary concern in case of intercountry adoption is the best interests of the child under the CRC, ACRWC and the Hague Convention.⁹² This implies that intercountry adoption may be made even if the child is deprived of his right to cultural identity as long as the adoption is in the best interests of the child. A child should not be deprived of his right to survival and development under the guise of protecting his or her right to culture. For instance, a child in Ethiopia who is starving may better be subject to intercountry adoption at last resort than letting him or her die in Ethiopia with a view to protect his or her cultural right.

Second, the right of the child to cultural identity should not be taken to the level of depriving children their right to family environment. ‘Leaving children in institutions, not to mention on the streets, is not dealing with children, and no idea of group rights allows us to do that.’ Therefore, it is not acceptable to prohibit intercountry adoption on the ground of the right to culture of a child and let him or her leave without family environment. Family environment is not comparable with cultural right. As a result, the right to cultural identity of a child should not be presented as a ground for objection to intercountry adoption.⁹³ Especially, in the eyes of the safeguards to protect the cultural right of children, intercountry adoption should not be lifted to the level of ‘cultural genocide’ or whatever name is attributed to it. Some even argue that intercountry adoption is better than placing children in

⁹¹ Mezmur, cited above at note 70, p.14.

⁹² CRC, Article 21, ACRWC, 25 (3) & Hague Convention, Article 1 (a).

⁹³ Dollin, cited at note 20 above, p.220.

institutional care as it offers children a family environment, which is lacking in institutional care.⁹⁴ They also say that the right to culture of a child ‘can hardly be taken so far as to suggest that remaining in institutional care in the country of origin is to be preferred to intercountry adoption.’⁹⁵

To conclude, the place of the cultural right of a child is concerned it is important to consider this quote.

[T]he argument that culture should supersede and/or disallow intercountry adoptions might make a mockery of the best interests principle. If the best interests of the child means anything at all, let alone being “*the* paramount consideration”, preserving cultural identity should be seen as a means, and not necessarily an end in itself, in considering alternative care for children deprived of their family environment. International law seems to be in consensus that, *as much as possible*, an attempt should be made to protect and safeguard the cultural background of the child. But this should not be done at the cost of depriving a child of a family environment ... since living in an orphanage [let alone in the streets]⁹⁶ can by no standards be equated with a family environment.⁹⁷

CONCLUSION

Intercountry adoption may involve transfer of a child from one country (country of origin) to another (receiving country) whose culture is completely different. Therefore, there might sometimes be a tension between the right to culture and best interests of a child to be available for intercountry adoption. In such cases, one has to carefully try to balance the two rights. The balancing should be done by adhering to the rules discussed above in relation to protection to the right to culture of a child. In particular, intercountry adoption should be considered only if there is no any possibility of alternative care for a child in his home country and the intercountry adoption to be made is in the best

⁹⁴ Mezmur, cited at note 70 above, p.15.

⁹⁵ Id, p.223.

⁹⁶ Where many children in poor countries live as there are no enough numbers of orphanages.

⁹⁷ Mezmur, op cit pp14-15.

interests of the child. This enables the protection of the child as much as possible as the child stays in his home country unless that is impossible or not in the best interest of the child. Secondly, states should give priority to send children in intercountry adoption to a country with similar culture than to a country with completely different cultures when they are encountered with such choice. This may mitigate the impact of deprivation of the right to culture of a child. Thirdly, States Parties to the Hague Convention should strengthen their Central Authorities so that information about children are properly kept to protect the right to identity of children. Hence all states should ratify the Convention to protect the rights of children.

