

**INTERCOUNTRY CHILD ADOPTION: AN ANALYTICAL STUDY IN THE  
LIGHT OF INTERNATIONAL HUMAN RIGHTS LAW**



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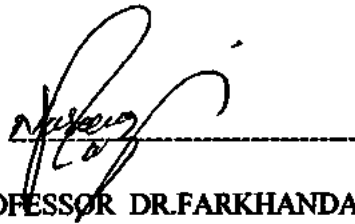


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**PROFESSOR DR.FARKHANDA ZIA**

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**INTERNAL EXAMINER**

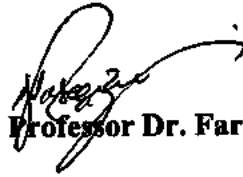


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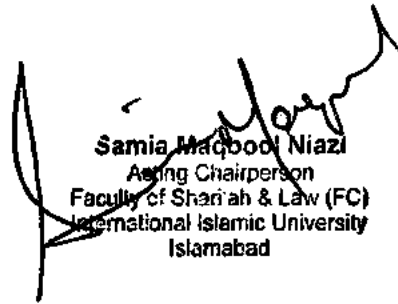
***CERTIFICATION***

This is certified that we evaluated the thesis titled "Intercountry Child Adoption: An Analytical Study In the Light of International Human Rights Law" submitted by Sarah Ahmad Jajja, Registration No.65-FSL/LLMHRL/F10 in partial fulfillment of the award of the degree of LLM Human Rights Law. The thesis fulfills the requirements in its core and quality for the award of the degree.



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## DECLARATION

I certify that the material contained in this dissertation is my own work and does not contain unreferenced or unacknowledged material. It is further declared that I have researched this dissertation entirely on the basis of personal efforts made under the guidance of my supervisor Professor Dr.Farkhanda Zia.

Sarah Ahmad Jajja.

Signature: Sarah Jajja

Date: 22-Dec 14

# DEDICATION

*To my*

*[My Mother & Humanity]*

## **ACKNOWLEDGMENT**

First of all innumerable thanks to ALLAH ALMIGHTY, who is benevolent, Omnipotent and most merciful. He is the one who gave me the physical and mental strength to accomplish the assigned task completely.

The completion of this research work as well as my LLM program would not have been possible without the support and guidance from several people:

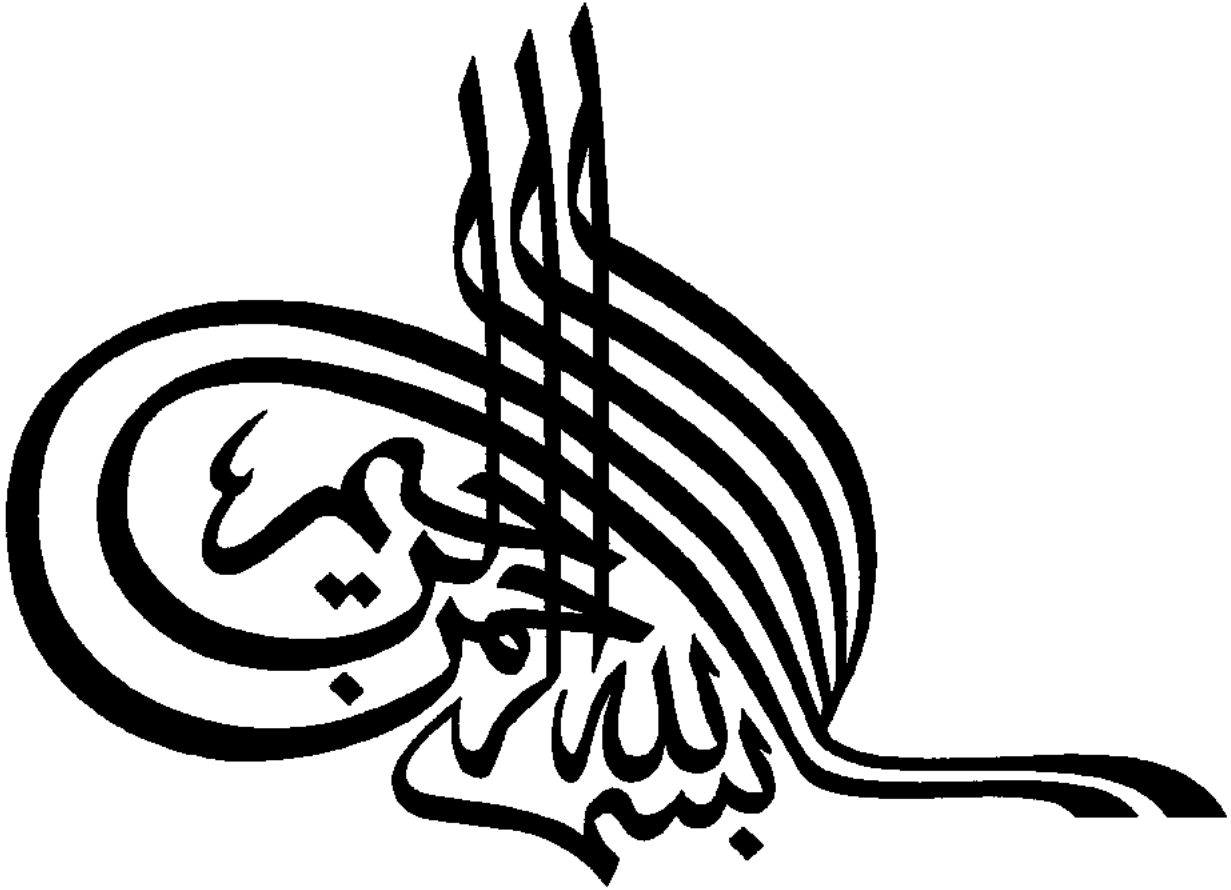
First and foremost I am grateful to my supervisor and teacher Dr. Farkhanda Zia who very patiently helped and guided me throughout this dissertation. Without her continuous guidance and positive attitude, this work would never have been completed. Thank you for your great support throughout the dissertation, insightful suggestions and comments.

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**SARAH**





*In the name of Allah,  
the Most Beneficent,  
the Most Merciful*

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## INTRODUCTION

The practice and concept of inter country adoption has always been doubtful from the start till now. It has been defined by few advocates as a global problem and few termed it as a global solution<sup>1</sup>. It also took attention by being termed as a global trade and also took the focal importance as a global gift. But one thing is certain that it is a long established phenomenon that conventionally came up as a result of unanticipated trials of combats and natural catastrophes etc.<sup>2</sup> Inter country adoption<sup>3</sup> on is a strict legal concept that has binding nature. The practice regarding the adaption of a child spread as the communities grew up but the adoption of children by parents not in their own community but other countries is a new concept.<sup>4</sup> In the ancient time intra-state adoption was being practiced rather it is more correct to say that adoption between the families was practiced. The cause behind adoption is natural disaster, destructions of war and any other circumstances which make the children orphan or unable the parents to cater and nourish their children. It is common knowledge for everyone that once the children become orphan then their kin in the family comes forward to protect, cater and nourish them.

The role of inter family adoption is a solution on a small scale or sudden orphanage but there was no solution when huge numbers of children are affected due to destruction of war or any other natural disaster like any wild spreading disease killing the innocent children. Therefore a concept of intercountry adoption was emerged for the best interest of the deprived and homeless children with the intention to provide them home and permanent family and happiness.

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<sup>1</sup>Masson, J." Intercountry Adoption: A Global problem or global solution." *Journal of International Affair*, 2001:55.

<sup>2</sup> Triseliotis, J. "Intercountry Adoption: Global trade Or Globa gift?" *Adoption And Festering*, 2000: 24.

<sup>3</sup> C ,Menozzi and B, Mirikin, "Child Adoption: A Path to Parenthood?," at <http://paa2007.princeton.edu/download.aspx?submissionId=70610> accessed 18<sup>th</sup> February 2013

<sup>4</sup> Bean, Philip. *Adoption: Essays in social policy, law and sociology*. Tavistock Publications, 1984:273.

Briefly in regards to an issue where everyone agrees to join hands with, we know the whole philosophy of inter country adoption is serving the most helpless of humans, to help them grow in family surrounded by love, kindness and care.<sup>5</sup> Paulo Barrozo in an article establishes that there exists a jurisprudential foundation for adopted children to have fundamental human rights to the homes that time and again can be initiated only by means of international adoption. It is important to mention that management and states have an accountability to acquire the entire accessible procedures to compose a certain and safe pattern for children's right and safety.<sup>6</sup> It should be made sure that kids are appreciated, sheltered and satisfied to all possible level as a grown up person who can speak for his rights. As soon as the states and countries endorse and approve different principles, rules and conventions, they have the same opinion to evaluate their existing regulations and to create more harmonious laws for the safety of the children. States and governments have to assist family units to look after children's rights and generate an atmosphere in which they have possibility to cultivate and attain their prospective development. For instances, this may involve changing existing laws or creating new ones.<sup>7</sup>

In this thesis I undertook the research study to come across why and what caused inter country child adoption laws to surface up and tried to discover if the law is successful in implying what it was made for. The framework of Hague convention was brought into discussion as a basic set to define the pros & cons and what are the flaws as far as the implication of intercountry child

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<sup>5</sup> Bartholet, Elizebeth. "International Adoption: Thoughts of Human Rights Issues." *Bufflo Human Rights Law Review*, 2007:152.

<sup>6</sup> Archer, Frakenburg W.K & J. "The denver II : A major Revision and Restandardisation of the Denver Development Screening Test." *Pediatrics Law* , 1997: 91-97.

<sup>7</sup> UNICEF Convention on the Rights of the Child [http://www.unicef.org/crc/files/Rights\\_overview.pdf](http://www.unicef.org/crc/files/Rights_overview.pdf) last seen on 23rd June 2013.

adoption law is concerned. This convention is considered as a setting stone or the principle and foundational line for the purpose of further legislation. The research also analyzed and looks into procedures, methods and techniques of developed countries for the successful implication of law.

#### **A. Literature Review:**

In the view of Howard Altstein and Rita James Simon, "most writers date the popularization of adoption with the Pharaoh's daughter snatching Moses from the bulrushes of the Nile, although some would argue that Moses was actually a foster child in that he lived with the Pharaoh's daughter but was nursed by and eventually returned to his birth mother".

If we look back in the history we will find that in the past the practice of adoption was not practiced for the purpose of child's security and safety. It was just considered as a means to gain power or property. The main aim of adoption was to gain power and property by inheritance. According to Howard Altstein and Rita James Simon "an example of the last case is the five 'good emperors of Rome'. Nerva reigned from A.D 96-98 and adopted Trajan as his successor. Trajan then ruled from A.D 98-117 and, in turn, adopted Hadrian to be his successor. Hadrian, who ruled from A.D 117-138, adopted Antonius Pius. The later ruled from A.D 138-161 and adopted Marcus Aurelius, insuring his succession. Marcus Aurelius reigned as emperor for 19 years (A.D 161-180), but he broke the adoption series by elevating his birth son, Commodus, as heir, and Commodus proved to be a disaster".<sup>8</sup>

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<sup>8</sup>Howard Altstien, Rita James Simon. *Intercountry Adoption, A Multinational Perspectives*. Pragear Publishers, 1991.pg 1-2.

A book has been written by Michael Humphrey and Heather Humphrey on Intercountry Adoption, 'Practical Experiences'. In this book he describes that parents normally relinquish their children as a result of social pressure and poverty. Poor economic conditions lead towards the lack of social services. When the children were not properly cared by the original parents and when all other means of protecting their best interests in the birth country are exhausted, then the intercountry adoption is an alternative and safe way for the parents to send their children to other developed countries to provide a good and nourished life for their healthier and bright future. Humphrey analyzes that waiting for better social circumstances is illogical than to give children for adoption. In developing countries, child protection services are inadequate due to their poor economic conditions. So the intercountry adoption is the only safe way to provide them with happiness and permanent family. Intercountry adoption practices are also helpful for the weak social infrastructure of highly populated countries. The purpose of such adoptions is to create or enlarge a family as well as it offers home to a needy child for his safeguard from the further suffering.

The Politics of Adoption, International Perspectives on Law, Policy & Practice by Kerry Halloran describes adoption in legal terms as a legal method of creating relationship between the child and the one who is not the natural parent of the child analogous to that of parent and child. Adoption can also be defined as providing homes for children who need them, as its primary purpose. And there are a number of reasons that can be taken into consideration when talking in favor of intercountry adoption e.g. poverty, malnutrition, inadequate child care services etc, but on the other hand he also describes the effects of adoption on children. He analyses that the removal of children from his birth state and original culture and termination of relationship with his or her biological parents can be unjust. The children are forced to forget their previous

identity which raises the issue of racism and discrimination. The right to access the information about the adoptees and birth parents should be there in adoption laws.

Similarly Ruth Lyn Meese analyzing in her book, 'Children of Intercountry adoption in School', says that the focal point of practice of intercountry adoption is child. Child's best interests are safeguarded and it is not the child-less couples whose interests are taken into account. These children who are brought to other countries must be taken as special children and be given much time and care to help them adjust in the new place and people. In the case of infants, they get adjusted easily in the new family as they forget their past quickly. While it is seen that grown up children face difficulties in adjusting in new environment and family because of the language problem and sense of affiliation with their birthparents and family of origin. They can't easily communicate with their age-fellows and are not generally good at their studies. This can result in frustration and subsequently the failure of child. Effects of inter-country adoption vary on different children as few children have the capability to adapt the new culture easily and others find it too hard to get adjusted in a new environment. Some can experience the feeling of loss and sorrow and might get confused about their identity. An article 'International adoption, Current Status And Future Prospects' written by Elizabeth Berthelot, describes intercountry adoption as a need of birth parents, prospective parents and the adopted child at the same time. Adoption is the possible way to provide a home and permanent family to a deprived and homeless child. Diana Marre and Laura Briggs in their book 'International Adoption, Global Inequalities And The Circulation of Children' acknowledged the principle of the best interest of the child is not so easily implemented, but it can be said that the adoptions which are legally made following the laws, serve the best interest of the child.



## **B. Objectives of Research:**

The purpose of this research is to analyze the concept of inter-country child adoption law and to highlight the flaws attached to this practice. Both the national and international laws and all precedents about inter-country adoption will be examined. Most importantly the lifelong effects that inter-country adoption has on a child will be highlighted and discussed in detail. To promote the ratification or accession of the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption by all states involved in such adoption and adherence to the principles of this convention by countries which are not party to the convention.

### **a) Research Design:**

This research work is divided into four parts and investigates the legal instrument of inter country adoption laws of different countries. The research focus on the legal application of intercountry adoptions keeping in view the paramount wellbeing of the children under Hague Convention.

Chapter 1 serves as an introduction to intercountry child adoptions. It looks the feature how and what initiated the need to legislate the present law and will touch few bit of background features of inter country child adoptions seeing that how it went forward and changed its shape. There will be a past examination of intercountry child adoptions that will focus on its birth and beginning. To conclude this section, we will highlight the problems appearing while practicing the law.

Chapter 2 deals the mode in which The Hague Convention 1993 is operating and being used to formulate laws. It scrutinizes the accomplishment of the Convention and the concerns occurring

from the applications of contemporary intercountry child adoption laws. In addition, it will investigate the concerns that a child has to come across as a consequence of the law.

Chapter 3 deals with the conventional prospects of the laws of intercountry child adoption and the effects of the Convention adoption on children. It can be correctly understood that in its core the intention of the legislation is the betterment and wellbeing of the child unquestionably. The chapter also touches the legislative prospects of child adoption laws in Pakistan. The final Chapter, Chapter 4 concludes the research.

## CHAPTER I

### Background of Intercountry Adoption Practice

#### Introduction:

Child adoption has become a very profound and welcomed concept all over the world due to changing scenario in acceptability of Intercountry Child Adoption laws.

The United Nations Convention on the rights of the Child defines a 'child' as a person below the age of 18, except the rulings of the precise state lay down the lawful maturity scale for adulthood.<sup>9</sup> These are non-discriminatory regulations, which require equal treatment and apply on every child in whatever country, region and culture he is in, without the disposition of race, color and creed assess apparently on neutral criteria.<sup>10</sup>

The concept of adoption is deep rooted and well knitted into every society east or west. Over the year different social contexts had mirrored this concept into many different dimensions.<sup>11</sup>The unsurpassed and paramount wellbeing and welfare of the children have got to be the most important apprehension in constructing the pronouncements and legislation regarding them. Every grown-up person ought to accomplish that is most excellent for children kids. While they are making resolutions, end product of their resolutions should be seen in the light how they will affect children. This predominantly pertain its effects on everything like on policy making and on legislation through law makers. Thinking of the word adoption with reference to a

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<sup>9</sup> Article 2 of Convention on the Rights of the Child, last seen on 2<sup>nd</sup> June 2013.

<sup>10</sup>Ibid.

<sup>11</sup>Hollinger.J.H. "Adoption Law & Practice." *Journal of Family law*, 1993: 23.

child, the first motive that comes into mind is for a couple who is childless followed by the proposition of welfare. But Kerry O'Halloran, in his book, *The Politics of Adoption: International Perspectives on Law, Policy & Practice* has elaborated more than these two concepts. In his view Adoption can involve many motives for example;

- (A) Legacy Motive
- (B) Relationship and Association Motive
- (C) Adherence Motive
- (D) 'Extra Pair of Hands' Motive
- (E) Welfare and Well-being Motive
- (F) Childless Couple Motive

#### **1. Definitions of Adoption:**

Pediatric On call defines, child adoption is a process of permanent change in status when a person takes on responsibility of parenting for a minor who is not a kin, and in this process all the rights from already existing guardians (biological parents or legal guardians) are permanently transfers to him<sup>12</sup>.

It further elaborates adoption as an action that requires undeviating social acknowledgment and identification through legal or religious sanction. Adoption is making a child one's own or in other words taking the custody of a child into a family through legal means and raising the kid as one's own. More Generally speaking, it is moving of a child from one family circle to another.

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<sup>12</sup><http://www.pediatriconcall.com/forpatients/CommonChild/Adoption/adoption.asp> last seen on 23rd May 2013.

Black's law dictionary defines child adoption as a legal action of an adult person to take someone else's kid into his own family unit, treating him as his own. This is a creation of obligation on himself towards all the duties/rights as towards his real (biological) child<sup>13</sup>. The dictionary also defines adoption as a "Judicial Act" between two persons that is a certain relation, purely civil of paternity and filiations. It is taking a child or a minor in parental custody giving rise to all the parental rights and obligations including right to inherent from parents in few jurisdictions.

Kerry O'Halloran, in his book *The Politics of Adoption: International Perspectives on Law, Policy & Practice* (Springer Publisher, Second Edition 2009) at p.8 wrote a definition given by Tomlin Committee report (Cmnd 2401)(1925) that defined adoption as

Under Common Law; When adoption is conducted within the permissibility of allowed public policy without bringing in the ambit of statutory frame work of law it is deemed to be called "Adoption under Common Law". An Adoption under common law brings in the role play of traditional and customary practices under the order of the high court, as explained earlier, without anything or action going against national or public policy foundation.

### **1.1 Background of Intercountry Adoption:**

The concept of intercountry adoption has been seen since long. The practice of sending and receiving of orphaned and needy children has been witnessed since late 19th to early 20th century in different countries e.g Canada, UK and Australia etc<sup>14</sup>

Most of intercountry adoptions were practiced in the countries which faced war or were economically and socially backward to the sound families/couples residing in developed

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<sup>13</sup> Black, Henry Campbell. *Black's Law Dictionary*. New York: West Publishing Company, 2001.

<sup>14</sup> Robbins, Joseph. *The lost Children: A study of Charity Children in Ireland 1700-1900*. Dublin, 1980.

countries. Different governing factors resulted in intercountry adoptions like infertility of couples, willingness of couples to extend the existing families, giving safeguard to the children of war affected areas, overcoming the needs of birth parents and fulfilling the basic needs of adoptive child etc. Intercountry adoption is considered as an alternative way to provide home and permanent family to a homeless child.<sup>15</sup>

Intercountry adoption became prominent figure after world war. After the world war 2nd, the rate of Intercountry adoption increased. The devastation of Europe and the killing of male population as the result of war in turn resulted in increased number of homeless children and increased the number of childlessness. As a result of that childlessness in Europe at 1st the adoptive countries that are looking for adoption from Europe turned their attention to the third world countries for adaption purpose. At 1st the adoptive countries, were looking towards Europe to adopt children from there but gradually they shifted over to the third world countries for this purpose. In the middle of 1940's the adoptive countries took orphaned children from parts of Europe as the result of war and poor situation there. Later on started adopting children because of infertility, high rate of abortion and other reasons of childlessness among couples.

Initially Intercountry adoption took place between European countries but latter on US also stepped into it. At the end of World War II, the adoptive countries started taking children from Germany and Greece. Majority of the children were adopted from Greece as that time Greece was also facing civil war in 1946, and they were considered as the neediest group of orphaned children around Europe.

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<sup>15</sup>Bartholet, E. "International Adoption: Current Status & Future Prospect." *Spring Publication*, 1993: 112.

In start, the western countries started to adopt children from same race and culture but latter on as a result of Korean War they diverted their attention toward those effected children. Various problems and issues rose because of difference in race and culture of children and adoptive parents. This process faced a lot of criticism whether parents of different race would really protect the right and needs of adopted children or not or whether these adoptions are in the best interest of child. A large number of Asian children were adopted by America amongst whom Majority of children were from Korea. One interstate agency placed over more than 13,000 children in the US in 1976.<sup>16</sup>

Intercountry child adoption means a transfer of child from one country to another country. Depending upon the governmental arrangements, the Intercountry child adoption may be completed in the sending and receiving country.<sup>17</sup>

Inter country child adoption is such a radical legal order that changes the fundamental status of the child on permanent level. This concept has an absolute effect on such a wider scale that involves generations to come.<sup>18</sup> Same is advocated by Christine Adamec and William L (1991) in *Encyclopedia of Adoption* that defined the concept as a process by which a child having citizenship of one country is adopted by the parents that are citizens of a diverse nation state. Adoption has a huge practical implication in the life of the individual being adopted. As the adopted child is introduced to new culture of origin against his own native region in which he is born. More Generally speaking it is moving of a child from one family circle to another with in a society.<sup>19</sup>

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<sup>16</sup> Mark, James. *Holt International Children's Services. Annual Reports, Eugene Oregon, 1975&1976.*

<sup>17</sup> Davies, Martin. *The Blackwell Encyclopedia of Social Work.* Cavendish publishing, 2007.

<sup>18</sup> Mcwhinnie.A. *Adopted Children: How they grew up.* London: Routledge & Keagan Paul Publication, 1967.

<sup>19</sup> Adamec Chirstine & William L, Pierce. *Encyclopedia of adoption.* British Publishers, 1991.

But when we invoke the jurisdictional idea of inter country adoption here we are talking about total migration of a child from one regional jurisdiction to another.<sup>20</sup> Here we can find a lot of discussion regarding inter country adoption being against the fundamental rights of children as they lose their true identity etc but at the same page we will also find quite a voices that will propagate the qualities and what good the concept of inter country adoption has served to the world at large.<sup>21</sup>The development and amendments of intercountry adoption were the aftermath of world war when there were great numbers of orphans and war effected children waiting to be cared of and to be pampered. The history is evident that with every passing moment the patterns of development and amendments have changed from time to time according to the prevailing needs of that time. Over the years unlike custodianship, adoption has proved its permanence against all family law related issues. Inter country adoption as envisioned, sustained its hard core reputation in all this evolution of its construction and amendments as “a legal contract” taking care of the interests of all the three parties involved.<sup>22</sup>

Inter country adoption saturates and shapes its roots from “contract”.The concept re-defines and re-elaborates the legal participation of the three parties involved. Inter country adoption is an enduring and unalterable structure of a contract, which usually bears and undergo on unqualified origin. Precedents and “Present Day” need of prevailing times, when the amendment undergoing is or was played important role,

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<sup>20</sup>Rowe & L,Lambert. *Children Who wait*. London: Adventure Work Publishers, 1977.

<sup>21</sup>Berthelot, Elizabeth, “International Adoption: The Human Rights Position”, *Global Policy Howard Law school*, 2010.

<sup>22</sup>Bartholet , Elizabeth, International Adoption, chapter in "Children and youth in adoption, orphanages, and Foster care", edited by Ask eland, Lori, *Greenwood Publishing Group*, 2005.



while fitting the legislation in jigsaw of inter country adoption process. They serve as hallmarks to lay down the foundations. For instance;

- Unauthorized removal of the child in question being adopted from its original area of jurisdiction is not allowed.
- Same as all the very foundation of a contract, inter country adoption is an expression for commitment or a promise to adopt a particular course of process for which evidence of promise and free consent is prime.
- Courts strictly guard the sanctity of a contract by ensuring the propriety of the contract that dictates that there can't be the involvement of any kind of financial reward.<sup>23</sup>

The process of adoption is termed as mere matter of private family law over the years, making it mainly "clandestine" of all family laws involved proceedings. The very basic of contract plays its role here too, as the contract is kept a very private and undisclosed affair.<sup>24</sup> For case in point, Assurances of secrecies are given:

- To the parents adopting the child,
- To the biological parent or parents
- And there is no access allowed to the agency files of the adopted children at all.

For the above all purposes the children are identified with serial numbers in the court. But this cover of confidentiality has been lifted for the parents progressively in

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<sup>23</sup>Bartholet, Elizabeth, International Adoption, chapter in "Children and youth in adoption, orphanages, and Foster care", edited by Ask eland, Lori, Greenwood Publishing Group, 2005.

<sup>24</sup>O'Halloran, Kerry. *The Politics of Adoption: International Perspectives on Law, Policy & Practice*. Springer Publisher, Second Edition, 2009.

recent years for the purpose of facilitating adopting the child for the matter of information of the children.<sup>25</sup>

Adoption as a fundamental process retained its strict legality in lieu of its obligation. This commitment retains its face till the maturity of the child. This structure of family unit status till present day is not able to be forfeited.

Adoption as legal process is a very exclusive and distinctive relationship. As this principle puts a permanent end to all parental rights and duties towards and in regards to biological and natural parents, and similarly engages the adoptee parents to take in all the rights and responsibilities in question. This constitutes an unconditional and inclusive break between the biological parent and the child adopted.<sup>26</sup> So in entire manner relocation of adopted child in new home effects extensive family network and matters related to it, resulting in re-distribution and re-definition of relationships within a family unit.

Inter country adoption so far in all means have met its legislative intents. In result of all these developments the process of adoption has become more unwrapped and clear. The center of the adoption process is always a child. His/her need and convenience and acquirement are the ultimate goal of all this process. Courts in the process always require a self governing opinion of the child's welfare in question.<sup>27</sup> In most of the societies and legal systems the concept of Inter country adoption has taken

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<sup>25</sup> Rutstein, S.O. and I.H. Shah, "Infecundity, Infertility, and Childlessness in Developing Countries DHS Comparative Reports No. 9. Calverton, Maryland: ORC Macro and the World Health Organization. Last seen on 21<sup>st</sup> July 2013.

<sup>26</sup> Peter, Selman. "The Impact of Intercountry Adoption on the well-being of Children in Europe." *University of New Castle*, 2008: 387- 397.

<sup>27</sup> Halloran, Kerry O, "The Politics of Adoption; International Perspectives on Law Policy and Practice," *Springer second edition*: 12.

a very precise legal position. Roles of the parties involved are well defined and mediated with law. Though the adopter parent share everything with the adopted child from home to the assets, but this relationship in its core is artificial fundamentally, scooping around child-care essentially with legal bindings around its sphere.<sup>28</sup> In my view it seems the focal point of intercountry adoption is child. It is his welfare around which the adoption process revolves. Thus, the process of adoption is becoming clearer with the passage of time. Many countries are having laws related to its which are leaving no space for any illegal activity. This is therefore a big advancement making the adoption process fairer, although the adopter share everything with adoptee but sometimes its looks the nature of this relationship is artificial not like real child and parent relationship.

Ruth stein, S.O. and I.H. Shah (2004) in an article "Infecundity, Infertility, and Childlessness in Developing Countries" (DHS Comparative Reports) noted down that an estimate done by the population division of United Nations calculated that approximately there are nine hundred and twenty three million (923 m) women, who are aged forty years (40 years) around the world. In this estimation around seventy one million (71 m) women do not have children. Among half of these nine hundred and twenty three million women who are the residents of developed countries, infertility is also quite common. This is quite a figure to address that more than one hundred and eighty six million women in developed countries who are married (one out of four married women) in their productive age are sterile.<sup>29</sup> Keeping this estimation in mind if

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<sup>28</sup>Halloran, Kerry O, "The Politics of Adoption; International Perspectives on Law Policy and Practice," *Springer second edition*: 12

we suppose that even if a very small portion of this sterile and infertile population tends to adopt the ratio of adoption will be quite a number.<sup>30</sup>

In estimation by population division of United Nation it was approximated that around two hundred and sixty thousand children are taken on for adoption in the world every year.<sup>31</sup> Rutstein and Shah (2004) estimated that this number is very small in the context that there are around 2.2 billion children are under age (less than eighteen years), and in this number every year less than twelve in every 100,000 kids are consumed in the process of adoption. Among Bulgaria, the countries with huge number of adoption are Mongolia, Samoa and the United States. These countries are the countries that are very actively involved in the process of adoption in comparison with rest of the world.<sup>32</sup>

This research work, will explore the general principal involved and governing laws advocating the concept of inter country child adoption

## **1.2 Problems Faced By the Sending Countries in the Past:**

In the developing countries parents mostly relinquished their children because of poor economic condition particularly those who were born out of wed-lock faced serious problems in countries where religion is enforced by the state.<sup>33</sup>

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<sup>30</sup> S.O, Rutstein and I.H. Shah, *Infecundity, Infertility, and Childlessness in Developing Countries* DHS Comparative Reports No. 9. Calverton, Maryland: ORC Macro and the World Health Organization, 2004. Last seen on 21<sup>st</sup> July 2013.

<sup>31</sup> C, Menozzi and B, Mirikin, "Child Adoption: A Path to Parenthood?," 6. accessed 18th February 2013.

<sup>32</sup> S.O, Rutstein. and I.H. Shah, "Infecundity, Infertility, and Childlessness in Developing Countries DHS Comparative" Reports No. 9. Calverton, Maryland: ORC Macro and the World Health Organization, 2004. Last seen on 21<sup>st</sup> July 2013.

<sup>33</sup> C Manzoni, and B, Mirikin, "Child Adoption: A path To Parenthood?," last accessed 4<sup>th</sup> march 2013.

The sending countries, in the start, were reluctant to send their children because of fear of exploitation. Later on a debate was started over ethical standards when Intercountry adoption was known as financial transaction in the children's market. Intercountry adoption were suspected as business which depicts selling of children for large sum.<sup>34</sup> Because of these objections various social institutions improved policies to serve the rights of adopted children between states practicing Intercountry Adoption. Till 1975 Latin America was a main source of sending children to other developed states. Vietnam and Korea felt that they were losing considerable number of their children because of Intercountry adoption therefore they reformulated their policies that resulted in stopping the adaption process.<sup>35</sup> There were two main reasons behind that, one was the end of Vietnam War and improvement in the social and economic conditions of Asian states and another main factor was abortion was legalized in Korea that enabled the parents to get rid of child if they don't want them.<sup>36</sup>

In the early period of Intercountry adoption, adoptive parents were looking for healthy infant for adoption and also birth parents were looking for economically socially sound family, because of this reason western countries turned their attention towards Greece and Germany. When the supply of white children from these countries was much declined then they diverted towards Asian countries particularly Japan and thereby compromised on racial differences.<sup>37</sup> If we look on the practical history of Intercountry adoption we will find the US always falls in the category of receiving countries. In 1989, it was seen that in USA around 3 million people were willing to adopt children from developing countries. At that time developing countries were facing the problem of higher birth rates and the developed countries facing the issue of lower

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<sup>34</sup>Bean, Philip. *Adoption: Essays in social policy, law and sociology*. Tavistock Publications, 1984.pg 275.

<sup>35</sup>Bean, Philip. *Adoption: Essays in social policy, law and sociology*. Tavistock Publications, 1984.pg 276.

<sup>36</sup>Simon, Howard Altstien & Rita James. *Intercountry Adoption, A MultiNational Perspective*. Pragear, 1991.pg 1-5.

<sup>37</sup>Micheal Humphrey, Heather Humphrey. *Intercountry Adoption: Practical experiences*. London: Routledge, 1993.pg 119-124.

birth rates. Due to higher birth rates and lower infant mortality the developing countries were unable to take care of their children and they found intercountry adoption was an alternative to take care of their children and to provide them home and permanent family. It shows that intercountry adoption was the need for both sending and adopting states.<sup>38</sup>

### **1.3 Role of Human Rights Law in Child Adoption:**

On May 29, 1993 in Hague, a Convention was held addressing the issue of "Protection of Children and Co-operation in Respect of Inter country Adoption". This convention eventually shaped into a multilateral treaty. Multiple countries are signatories to this convention. More than seventy five countries have adapted the Convention of "Protection, of Children and Co-operation in Respect of Inter Country Adoption".<sup>39</sup> Along with other core motivations, the Convention promotes to reinforce security for children, biological parents and potential adoptive parents in the adoption process. The Convention also endow with an agenda to toil collectively to guarantee that the adoption process undergoes in the pre-eminent worth of adopted child to avoid any misuse of intercountry adoption for example the unlawful seizure, transaction or trafficking of children. From the time when convention on the rights of child in 1989 came in circulation, the children have come into lime light of right-related focus. The world wide endorsement of this convention on children's right has indeed served as an apparatus that provided a noteworthy vigor to the original condition of the children's right in general. The topic will be discussed in detail in later chapters. .

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<sup>38</sup>Simon, Howard Altstien & Rita James. *Intercountry Adoption, AMultiNational Perspective* . Pragear, 1991.pg6-8.

<sup>39</sup>The Hague Convention on Intercountry Adoption: A Guide for Prospective Adoptive Parents by United States Department of State Bureau of Consular Affairs, last seen on 24th June 2013.

### **1.5 Concluding Remarks:**

The chapter had discussed the practice of inter country adoption, its background and development in different times as to how it was evolved with regards to the best interest of the child principle. Subsequently the chapter discussed the problems which were faced by the sending countries in the past and the reasons how the birth parents send their children many miles away from them. One important thing in my view is that the practice of intercountry adoption is the best and alternative way to provide good and nourished life and permanent family to a deprived child. It seems illogical to wait for improved social conditions or weak infrastructure of large populated countries. In developing countries child care services are so under developed due to the weak social infrastructure and poor economic conditions of the state. On the other side in some countries some children are relinquished by their birth parents for many reasons e.g. In countries where religion is important and is enforceable through government, the children born out of wed-lock are mostly deprived by their parents. The question is what will be the future of those children and how they will get a love and family and also where the right of every child cared and pampered by the parents stands? The answer to these and the only suitable alternative way and way out is provided by intercountry adoption.

## CHAPTER II

### International Laws Relating to Intercountry Adoptions:

#### **Introduction:**

Laws and regulations around the world are not the same. Different parts of the world have different and unique legal and cultural systems. But child protection principles and guidelines laid down universally are to facilitate these various systems to cope with invariable set of values and commitments.<sup>40</sup> Laws and conventions underlining and focusing directly or indirectly the principals of intercountry child adoption laws as in light of human rights are as follows:

1. The European Convention on Human Rights, 1950 (ECHR),
2. Declaration on Social and Legal principals relating to the Protection and welfare of children 1986
3. United Nations Convention on the rights of the children 1989,
4. Hague Conference on Private International Law,
5. Hague Convention on Jurisdiction, Applicable Laws and Recognition of Decrees in relation to Adoption 1965
6. Hague Convention on protection of Children and Co-operation in respect of Inter Country Child Adoption 1993.

It is important to mention that management and states have an accountability to acquire the entire accessible procedures to compose a certain and safe pattern for children's right and safety. It should be made sure that kids are appreciated, sheltered and satisfied

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<sup>40</sup>Convention on the rights of the Child, last seen on 23<sup>rd</sup> June 2013.



to all possible level as a grown up person who can speak for his rights. As soon as the states and countries endorse and approve different principles rules and conventions, they have the same opinion to evaluate their existing regulations and to create more harmonious laws for the safety of the children. States and governments have to assist family units looking after children's rights and generate an atmosphere in which they have possibility to cultivate and attain their prospective development. In some instances, this may involve change in existing laws or creating new ones.

## **2. The European Convention for the Protection of Human rights And Fundamental Freedom 1950:**

The European Convention on Human Rights (ECHR) constitutes an international treaty to protect fundamental human rights. This treaty was formally the Convention for the Protection of Human Rights and Fundamental freedom that was drafted in 1950.

Under Article 1 in regards to 'Obligation to respect human life', who needs more care, respect and attention towards the fundamental rights then the little humans who can't speak for themselves. The next article is indirect continuation of the first article that states that everyone's right of living must be sheltered by regulations in any jurisdiction whatsoever.<sup>41</sup>Nobody should be dispossessed of his life knowingly.<sup>42</sup>Similarly in Article 8 stating the "Right to respect for private and family life" the convention laid down that every person has the right to have respect for his personal and family life, respect and value for his habitats and his association. The convention further explains that there shall be no interference by anyone in exercise of such

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<sup>41</sup>C.A. White, Clare Ovey & Robin. "The European Convention on Human Rights." London: Oxford University Press, 2009. 1-3.

<sup>42</sup>Ibid.

rights.<sup>43</sup> Convention as a whole provides a frame work of international rights in which article 8 is somewhat related to intercountry adoptions.

## **2.1 Declaration on Social and Legal principals relating to the Protection and welfare of children, 1986:**

The Declaration on Social and Legal principals relating to the Protection and welfare of children was taken up in 1986 and it provides various provisions for guidelines and regulating the practice of inter country child adoption. The Declaration was divided in to three parts comprising of the following segments;

**Part A: Welfare of a child in a general Prospect**

**Part B: Foster placement**

**Part C: Adoption of Child**

1. Local child Adoption
2. Inter country child Adoption

When placing the child out of the circle of its biological family unit, his fundamental requirements like his care, love, security must be the supreme contemplations.<sup>44</sup> For the above stated purpose states are advised to formulate appropriate policies and guidelines under the declaration.<sup>45</sup> The main intent of adoption is to offer suitable and permanent family unit to a child who cannot be cared for by his own parents. The first preference for a child is to be cared for by his birth parents. In case birth parents are not available, the role of

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<sup>43</sup>Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No.14.

<sup>44</sup>Declaration on social and legal principle relating to the protection and welfare of children 1986.

<sup>45</sup> Ibid. Article 7.

1. Relatives of the child's parents,
2. Foster or adoptive family or,
3. Some suitable organization should be deemed accordingly.

Foster adoption should be the 2nd choice for a child to provide home. It declares that intercountry adoption should be taken as last resort to secure the rights of the child and must be considered in case there is no foster placement or adoption available to the child in his state of origin<sup>46</sup>. For the purpose likewise as within the country, states should legislate policies and laws for efficient administration and management designed for the security of kids and proper actions have been formulated in the states concerned.<sup>47</sup> Abduction and any kind of illicit placement of children should be prevented by enacting proper legislation and policies.<sup>48</sup> When exercising intercountry child adoption process, it should be made sure by the government that it is carried and supervised by proficient body to ensure the child safety and security as well as child's legal and social interest's should be taken care of.<sup>49</sup> This also should be made sure that there should not be any involvement of financial benefits by the concerned authorities.<sup>50</sup> Article 24 of the Declaration clearly states in case the nationality of the adopted child is different from that of prospective parents, both the laws of child's national state and the laws of adoptive parents state shall be taken into consideration. Declaration also gives protection to the child cultural social and religious interest. All these principals are focused on the fundamental right of life that without distinguishing race, color and creed every soul has right to exploit his potential to its fullest.

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<sup>46</sup> Ibid. Article 17

<sup>47</sup> Ibid. Article 18

<sup>48</sup> Ibid. Article 19

<sup>49</sup> Ibid. Article 20

<sup>50</sup> Ibid. Article 19

## **2.2 African Charter on the Rights and Welfare of the Child 1990:**

The African Charter on the Rights and Welfare of the Child (ACRWC), the first provincial treaty on children's rights, builds on the 1979 Declaration on the Rights and Welfare of the African Child, but most of its provisions are modeled after those of the CRC. The Preamble states that "the child occupies a unique and honored position in the African society" and requires legal protection as well as "particular care with regard to health, physical, mental, moral and social development." A child is defined as "every human being below the age of 18 years".<sup>51</sup> The African Charter on the rights and Welfare of Children provides the principles of non-discrimination and the best interests of the child and also provides that children have an inherent right to life, protected by law. The death sentence is not to be applied to crimes committed by children.<sup>52</sup> It declares that Children have a right to a name and nationality as well as to freedom of expression, association and peaceful assembly; thought, religion, and conscience; confidentiality; education; and rest and relaxation.<sup>53</sup> It provides special measures of protection are to be taken for handicapped children and children should enjoy physical, mental, and spiritual health.<sup>54</sup> Children should also be protected against all forms of economic exploitation and from performing work likely to be harmful and against all forms of torture, maltreatment, and abuse; harmful social and cultural practices; all forms of sexual exploitation or abuse ; the use of narcotics and illicit drugs ; and abduction, sale, trafficking, and use in begging. <sup>55</sup>

## **2.3 Universal Declaration of Human Rights 1948:**

The Universal Declaration of Human Rights contains two articles that exclusively submit to children. Article 25(2) states: motherhood and childhood are entitled to special care and

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<sup>51</sup> Article 2 of the "*African Charter on the rights and Welfare of Children*".

<sup>52</sup> Ibid Article 3-5

<sup>53</sup> Ibid article 6-12

<sup>54</sup> Ibid article 13-14

<sup>55</sup> Ibid article 27-29

assistance. All children whether born in or out of wedlock shall enjoy the same social protection.<sup>56</sup> It provides that the right to education for all, and deals both with access to and the aims of education. Thus, education is to be free, at least in the elementary and fundamental stages; elementary education is to be compulsory; and education should be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. Nevertheless, "parents have a prior right to choose the kind of education that shall be given to their children."<sup>57</sup>

#### **2.4 International Covenant on Economic, Social and Cultural Rights 1966:**

The Preamble to the International Covenant on Economic, Social and Cultural Rights (ICESCR), insofar as it recognizes the indivisibility of human rights, is related to children's rights as well. Thus, it notes that recognition of the inherent dignity and of the equal and absolute rights of all members of the human family is the foundation of freedom, justice and peace in the world and that these rights derive from the inherent dignity of the human person.<sup>58</sup> Under article 10, "the widest possible protection and support should be accorded to the family, particularly for its establishment and while it is responsible for the care and education of dependent children. It further stipulates that special measures of protection and assistance should be taken on behalf of the children without any discrimination. It clearly states that they should be protected from economic and social exploitation; that employing them in morally or medically harmful or dangerous work or in work likely to slow down their normal development should be punishable by law; and that age limits should be set below which the paid employment of child labor is

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<sup>56</sup>"United Nation Declaration of human rights" Article 25(2)

<sup>57</sup> Ibid article 26

<sup>58</sup>"The Preamble to the International Covenant on Economic, Social and Cultural Rights".

prohibited and punishable by law. The ICESCR also provides for the right of everyone to education and stipulates primary education shall be compulsory and available free to all<sup>59</sup>.

### **2.5 International Covenant on Civil and Political Rights 1966:**

The International Covenant on Civil and Political Rights (ICCPR) contains general provisions from which children are entitled to benefit as well as certain specific provisions on safeguards for children in the administration of justice and as members of a family unit. Thus, article 2 obliges States Parties to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the ICCPR, without any distinction of any kind. Like the ICESCR, the ICCPR recognizes the family as entitled to societal and state protection (article 23(1)), states that States Parties should make sure the liberty of parents to ensure their children's religious and moral education in compliance with their own convictions. If a marriage is dissolved, provision must be made for the protection of any children (article 23(4)). Article 24 of the ICCPR is specifically committed to children. It stipulates that "every child shall have, without any discrimination as to race, color, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State." It further prescribes that every child must be registered immediately after birth and have a name and that every child has the right to acquire a nationality.<sup>60</sup>

Accession No. TH/4934

### **2.6 United Nation Convention on the Rights of Child 1989:**

The United Nations Convention on the rights of the children 1989 are related to safeguarding and implementation of the rights of the children and similarly defines the duties of the states as how

<sup>59</sup> Article 13 of the Preamble to the International Covenant on Economic, Social and Cultural Rights.

<sup>60</sup> Article 24 of the Preamble to the International Covenant on Economic, Social and Cultural Rights.

to secure children rights and how to implement them. It is right of the child to be cared for and to be protected by their family and to grow up within their family environment.<sup>61</sup> Consequently the offspring have the right to be sheltered by their family unit and to grow surrounded by their basic habitat.<sup>62</sup> The principle laid down in the convention ensure the responsibility of the governments to make certain the improvement of the child by their families or in other case the authorized custodians to safeguard the children right and they should up bring the child in such a manner to keep in mind the best interest of the child. In case child is deprived of his proper care and family environment and to remain in a family which is not in the best interest of child, then the state is responsible for the protection of such child. For this purpose the states must take certain measures in accordance with their national laws and ensure alternative care. Such alternative care can be in the form of foster placement, placement in the child care institutions or adoptions. States should takes certain measures to ensure that intercountry adoption does not result in any improper financial gain by original parents or the adoptive parents and that the placement of the child is carried out in the proper way as prescribed by law.<sup>63</sup>

## **2.7The Hague Conference on Private International Law:**

In the later part of the 20th century various disputes raised as a result of the increased mobility of families which included adoption<sup>64</sup>. On 29th May 1993, a convention in Hague was held on the improvement to provide guidelines for co-operation in regard to intercountry child adoption. This was held to ensure that laws should be enacted which look after children and their family unit alongside the danger of unlawful, uneven, hasty or rushed adoptions in a foreign country. This gathering, which functions by a structure of state's vital establishments, added force to the

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<sup>61</sup>*Preamble of the Convention on the Rights of the Child 1989.*

<sup>62</sup>*Ibid.*

<sup>63</sup> Article 18, 20 and 21 of the Convention on Rights of Child 1989.

<sup>64</sup> Dyer, Adair, "The Internationalization of Family Law,"*30 UC Davis Law Review* (1997): 625.

article 21 of the children rights convention of United Nations. The Hague Conference on Private International Law involved a series of Conventions to set out different rules and principles for adoption or other issues like child abduction and trafficking. In 1993 at its seventeenth session, the Hague Conference responded to the Convention on the Rights of Child invitation to facilitate and make it possible the implementation of Article 21 of the Convention through agreements and the Hague Convention on the Protection of Children and Co-operation in Respect of Inter country Adoption came into force which is the most direct relevant legislation provided for intercountry adoptions. This Convention aims to protect the children throughout the world as it received a very good response. An international meeting was held for the implementation of the Adoption Convention in 1994. It was determined that an adopted child ought to be pre-arranged with an intercontinental authorization when the establishment take delivery of a legal document that officially state that particular adoption has been made in compliance among the Adoption Conventions. In this way the adoption will be internationally acknowledged.<sup>65</sup>

## **2.8 Hague Convention 1993 Inter Country Child Adoption:**

### **2.8.1 Introduction:**

The desire to take a child from a foreign country started as a consequence of different factors in the earlier period. It was not in point of fact, because of childless couple and infertile couples in different regions or as the concept to adopt a child as if they were becoming sympathetic towards the children.<sup>66</sup> There were a variety of features that caused increases in rate of inter country child

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<sup>65</sup>Dyer, Adair, "The Internationalization of Family Law," *30 UC Davis Law Review* (1997): 625.

<sup>66</sup>Micheal Humphrey, Heather Humphrey. *Intercountry Adoption: Practical experiences*. London: Routledge, 1993. pg110- 112.



adoption. One of the main factors was declining productiveness rates and validation of abortion. Many others and the most important dynamic of the cause was the deficiency of children which were up to that time available for adoption.

Soon after adoption, step by step the adoptee parents started to take away the children from the original jurisdictions of child's birth to their own. The real issue rose when the legality of adoption came in question. Intercountry child adoption became controversial on the point when one country was not recognizing the adoption laws of the other country. For example, a baby adopted from one region where measures to adopt were thought-out to be against the law as the adoption order of child's original jurisdiction was not acknowledged and recognized in the jurisdiction of that of the adoptee parents. In the same way in an Adoption submission (Non-Partial: infringement of trial) where on the first level an order was made in the child's original jurisdiction of birth for the validation of adoption procedure. But latter when the adoptee parents brought the child to their jurisdiction the validation orders were held invalid.<sup>67</sup> The adoptions made in secret and not officially allowed cannot be continued for a longer time period and the absence of any international framework was founding troubles mutually for both sending and receiving states.<sup>68</sup> Intercountry child adoption after developing into worldwide phenomena around 1960s shown a rapid increase in being accepted and coming into lime light, consequently resulting in adopted children were being migrated over long distances, region to region and culture to culture. The development of the inter country child adoption was not too much novel idea by the time. As bit of indirect work had been done before Hague Convention on Private International Law on the subject of intercountry adoptions, these adoptions were causing serious

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<sup>67</sup> Case law ,(1999) 1 FLR 370 and (1993) 2 WLR 110 <http://www.familylawweek.co.uk/site.aspx?i=ed114279> , last seen on 23<sup>rd</sup> June 2013

<sup>68</sup>Pfund, Peter H. "Intercountry Adoption: the 1993 Hague Convention, its purpose, implementation and Promise." *Family Law Quarterly*, 1994: 54.

problems relating to the children rights. Therefore there was a need for such regulations to protect the children from these problems. To avoid exploitation of various rights as talked earlier from fundamental issues to serious irregularity, a serious effort became compulsory. A direct regulation was needed as annual figure of intercountry child adoption reached 15,000 to 20,000.<sup>69</sup> At the same time as the inter country child adoption started becoming exercisable on a bigger extent the point of objection and worry remained that without any proper and regular international code of regulations, was likely to endanger for the rules which included the immigration law as well. The involved state parties felt and understood the need for proper regulations which could meet the requirements of both the parties, i.e. the adoptee and adopted. It was agreed by both the states, the sending and receiving states that there was need for international co- operation and recognition over intercountry adoptions was necessary.<sup>70</sup>

In 1993 a Conference on Private International law was held at Hague and after a few months the Convention and Co-operation in respect to intercountry child adoption was shaped up. This convention comprised of two folding, first it comprised of laws and regulations to be followed by the party states and second measure was the code of practice between the adoptee and adopted parties to facilitate the intercountry child adoption. As the Convention was for the protection and securing the rights of the children therefore the emphasis is to provide homes for the homeless children and not to provide the children to childless couples.<sup>71</sup> The Convention further elaborates that the states have an obligation to ensure that intercountry adoptions are made in the best interest of the adopted child and also prevent him from exploitations during the course of practice and prevent all harms in terms of his rights and in terms of crimes against children such

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<sup>69</sup>J, Couch man. "Intercountry adoption in New Zealand: A Child Rights Perspective." *27 Victoria University of wellington Law Review*, 1997: 421.

<sup>70</sup>Nygh, P. "Australia Joins Another Hague Convention." *Australian journal of Family Law*, 1998: 12.

<sup>71</sup>The Preamble of *the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*.

as trafficking of the children, their kidnapping and buying or selling them for different illegal purposes.<sup>72</sup> The convention on intercountry child adoption not only addressed many issues intercountry child trafficking but also brought about in light many answers to the illegal activities relating to children's right for example the answers to the problems of immigration of the adopted child, their nationality problems as well as jurisdiction dilemmas. More precisely for the accomplishment of the UN Convention on the Rights of the Child, the Hague Conference on Private International Law formed three conventions namely:

1. The Hague Convention on International Child Abduction 1980,
2. The Hague Convention on Intercountry Adoption 1993 and
3. The Hague Convention on Protection of Children 1996

Briefly these conventions give protection and security to the rights of children from any danger and to take certain steps for the safety of the child with the best interest of the child to be paramount. The recent Hague Conventions guarantee to look after the adopted child on the move.<sup>73</sup>

### **2.8.2 Historic Back Ground of the 1993 Hague Convention on Intercountry Child Adoption:**

At the seventeenth session of the Hague Conference on Private International Law, 44 member states in addition to 20 non- member states at The Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption 1965 collectively accepted and rectified the Convention.<sup>74</sup>

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<sup>72</sup>Murphy, John. *International Dimensions in Family Law*. Manchester University Press, 2005. pg184-186.

<sup>73</sup>Pfund, Peter H. "Intercountry Adoption: the 1993 Hague Convention, its purpose, implementation and Promise." *British Journal of Family Law Quarterly*, 1994: 54.

<sup>74</sup>Hague Conference on Private International Law, <http://www.jus.uio.no/lm/hague.conference/doc.html> last seen on 23rd June 2013.

The Convention completed its session on 29th May 1993 and came in to operation on 1st May 1995. In October 1994, a particular Commission concluded an obligatory set of rules of the Hague Convention of 1994 but it did not appeal to many countries and was discarded soon after. This was followed by non-binding proposal by the same commission. This proposal kept its focus on displaced children like immigrants etc.

### **2.8.3 Working Principle of the 1993 Hague Convention on Intercountry Child Adoption:**

The declaration on the Rights of Child and the United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children with Special Reference to Foster Placement and Adoption Nationally and Internationally lays down the working road map for the 1993 legislative declaration.<sup>75</sup> Not to mention the road map is sticking with the fundamental principal that it has to give priority to the best of adopted children's interests, their welfare and betterment.

### **2.8.4 Working Objectives of the 1993 Hague Convention on Inter Country Child Adoption:**

If we talk main stream, there were two prime and most dealt objectives of The Hague Convention on children adoption as the Convention lays down the responsibilities of the state of origin of the adopted child and the receiving state in which the child is adopted.

1. To set up a system within adopted and adoptee's country and to address the issues, that can give rise to and because of jurisdictional difference in legislation, immigration or criminal misconducts like trafficking and give rise to child abuse.

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<sup>75</sup>The Preamble of "*The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993*".

2. To set up a system within the contracting state of adoption and to make the adoption rules and regulations in accordance with the prevailing laws of the country.<sup>76</sup>

It can't be said that the Convention was signed just to facilitate the practice of interstate adoptions but its main aim was to ensure that the interstate adoption practice is being performed in a appropriate and legal manner and in "the best interest of the adopted child" who is the main concerned party in the whole operation. In this process it is very important that the eligibility of the child in question for adoption and his consent to put him in a totally new system should be ensured by the state of origin. The eligibility of receiving states should also be taken into account before the practice of the interstate child adoption.<sup>77</sup>

To summarize the objectives of the Hague Convention, there are three folds, these are ;

1. To set up, maintain and to make certain that inter country child adoption is operating in "the best interest of the adopted child" ,
2. To respect the basic rights of the adopted child that are acknowledged in international law,
3. To set up a system of co-operation amongst contracting countries to guarantee that the rights of the adopted children are being taken care of and the criminal activities are compromised to zero level to put a stop to the abduction, sale and trafficking of the adopted children and to secure the recognition in contracting states of adoption made in accordance with the convention.<sup>78</sup>

The 1993 Hague Convention works in accordance with the Conference on the Rights of Children had clearly taken certain steps to ensure that the Convention is not stay just as an apparatus to make possible the performance of inter country child adoption rather than the aim of the

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<sup>76</sup>Articles 1 of "*The Hague Convention 1993*".

<sup>77</sup>Articles 4 & 5 of "*The Hague Convention 1993*".

<sup>78</sup> *Ibid.*, Article 1

Convention is to implement the rules and laws enshrined in the Convention and also to ensure that the practice of the interstate child adoption is according to the convention's requirement and it gives improved child care facilities inside the concerned countries.<sup>79</sup>

### **2.8.5 The Best Interest of Child; And the Secondary Nature of Intercountry Adoptions under the Hague Convention 1993:**

To replace a child from his real home and force him to forget his cultural identity is something that cannot be ever taken as within the scope of the best interest of the child. Priority is always given to the placement of a child in his country of origin with the help of foster placement or any other such manner. Adoption should always be considered as an substitute way to provide the child with the family and in such a case again preference should be given to take care of the child within the cultural norms of the family of origin. The last option is intercountry adoption that can be practiced if a child cannot be adopted in his country of origin. It should always be taken into account that intercountry adoption is in child's best interest.<sup>80</sup> To save the best interest of the child is the most important aim of an adoption whether it is a domestic adoption or an intercountry adoption. Domestic adoptions is the first place to fit in for a homeless child but it cannot be taken as in the best interest of child when the birth state had undergone poverty or weak fiscal resources to provide a better care for the child. There are certain other problems that make the domestic adoption impractical which can contain intolerance to mixed-race children.<sup>81</sup> Other problem can include as in certain developing states the couples have a high number of children, which is another cause for intercountry adoption as in such developing states it will be in the best interest of child to send the child to some other economically established state as

<sup>79</sup>LaquerEstin, Ann, "Families Across Borders: The Hague Children's Conventions and the Case for International Family Law in the US," Vol 62, [http://www.law.uiowa.edu/documents/Estin\\_BOOK.pdf](http://www.law.uiowa.edu/documents/Estin_BOOK.pdf), last seen on 23<sup>rd</sup> June 2013.

<sup>80</sup> Article 21(b) of "The Convention on the Rights of Child 1989" & Article 4(b) of "The Hague Convention 1993".

<sup>81</sup> Carlson, R.R, "Transnational Adoption of Children," *Tulsa Law Journal* 317(1988):23.

compared to the domestic adoption.<sup>82</sup> In the light of these problems which the developing countries are facing and the poor health, education and living conditions in the birth state, the domestic adoption cannot be considered in the best interest of the child. But on the other hand one can't disregard the advantages of in-country placement. Cultural matching is something that plays a important role in the child's upbringing. Such advantages are clear when the child is not an infant and an older one and is aware of his cultural identity and the language and is closely associated with his age fellows living in his country.<sup>83</sup> If such a child has to experience the practice of intercountry adoption then it will be very difficult for him to cope up with the new culture and to mix up with the other children who have a different ethnic identity and are the speakers of a different language. Racial and cultural issues can have a damaging impact on an older child. Such a child can feel lonely that's why the consent of the child is of vital importance when one talks about the best interest of the child.<sup>84</sup> The idea of secondary adoption should always be taken into account the best interest of child principle. The alternatives of the intercountry adoptions must be taken into consideration before the practice of intercountry adoption and when all of the other alternative options are find to be exhaustive then the countries should undergo the practice.<sup>85</sup>

The Convention does not make it binding to practice intercountry adoption. The Convention says that when an adoption is being contemplated, it should be carried on in a proper way and in accordance with the rules specified in the Convention. The intention of Convention is not to

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<sup>82</sup>Bogard, H.E. "Who are the Orphans? Defining Orphan Status and the need for an International Convention on Intercountry Adoption." *Emory International Law Review*, 1991: 571.

<sup>83</sup>Peter, Hayes. "Giving Due Consideration to Ethnicity in Adoption Placements - A Principled Approach." *Child and Family Law Quarterly*, 2003: 255.

<sup>84</sup>Bartholet, E., "Where do Black Children Belong? The Politics of Race-Matching in Adoption," *University of Pennsylvania Law Review* 139, 1991: 1163.

<sup>85</sup>Eliezer, Jaffe D. *Intercountry Adoption: Laws and Perspective of Sending Countries*. Martins Nijhoff Publishers, 1995.pg 221-222.

replace the national system of adoption. The standards obligatory by the Convention are the minimum standards, the countries can perform such functions which seems appropriate to them.<sup>86</sup>

#### **2.8.6 Where The Adoption Should Be Made; Priority Is Given To The State Of Origin?**

A high quality of decision making is required at the placement stage. Such decisions include the problems regarding the matching of the children with the forthcoming parents. It's the duty of the birth state to fulfill the requisite of the matching of children. The central authorities should carry out these functions and to make a report after meeting the prospective adopters if it seems possible to send the child to that state. The co-operation between the sending and the receiving countries is necessary.<sup>87</sup>

Some birth countries such as South America insisted on their right to make a decision regarding intercountry adoption. On the other hand there are some other receiving countries like United Kingdom and Switzerland that insisted the right to finalize the adoption and to make a decision should lie within the receiving state. Under Article 28 of the Convention the sending country may insist that adoption should be made within its jurisdiction before the child is allowed to leave the birth state.<sup>88</sup>

The Convention contains no fix rules on jurisdiction. Birth countries and the receiving countries both have different views on the issue of jurisdiction. According to certain birth countries, it is their right that the adoption should be made in the country of origin before moving the child to the receiving countries so that the new adopted status of the child will be secured. On the other

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<sup>86</sup>Eliezer, Jaffe D. *Intercountry Adoption: Laws and Perspective of Sending Countries*. Martins Nijhoff Publishers, 1995.pg 221-222.

<sup>87</sup>Article 17 of the Hague Convention 1993.

<sup>88</sup>Eliezer, Jaffe D. *Intercountry Adoption: Laws and Perspective of Sending Countries*. Martins Nijhoff Publishers, 1995.pg 224



hand, certain receiving countries are of the view that adoption should take place at the receiving country followed by a probationary period. The Convention does not set any uniform rules and the matter is left for the countries to decide and the co-operation between them, is therefore of vital importance. The right of the birth country to insist that the adoption should take place at their territory before sending the child to the receiving country is expressly stated in the Convention.<sup>89</sup>

The Convention favors the role for the birth country in certain matters. The issues regarding the consent should also be taken into consideration by the authorities in the birth countries.<sup>90</sup> In relation to the consent of the child and his birth parents, it is the internal law of the country which is most likely to be applied.<sup>91</sup> It can be said that the country of origin has given priority in some matters under the Convention.

## **2.9 Critics on Hague Convention:**

The convention was ratified on a large scale by developed and developing states. But along these states, some didn't ratify the convention. For instance, USA, which is considered in the list of those countries who receive a large number of children under the umbrella of inter-country adoption has signed but didn't ratify the convention. In recent years, approximately 10,000 children are adopted by USA as a result of inter-country adoption.<sup>92</sup>

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<sup>89</sup> Article 28 of The Hague Convention 1993

<sup>90</sup> Sarcevic, Petar & Paul Volker, Andrea Bonhomie (eds), *Year Book of Private International Law*, Vol. 8, European Law Publishers 2007, pg 81-83.

<sup>91</sup> Article 4 of The Hague Convention 1993

<sup>92</sup> Bartholet, E, "International Adoption: Current Status And Future Prospects, Adoption", *Springer Publications*: 1993.

There is no complain procedure and enforcement mechanism set by the convention.<sup>93</sup> Furthermore, they could have included clauses related to crimes like child trafficking and exploitation of children which are related to international adoption, but they didn't do so and it's a mistake on the part of the drafters of the convention.<sup>94</sup>

The convention also excludes refugees and orphan children when being taken to receiving states.<sup>95</sup> The consent of biological parents is required in inter-country adoption but the convention doesn't put barrier upon the legal authorities to ensure free consent of child and his biological parents. Furthermore, the term 'financial gain' is not defined in the convention. According to convention, only concerned authorities can perform this function but as there is no definition of fiscal gain in the convention, there is a chance of performing adoption practice by unauthorized persons.<sup>96</sup> Although, countries vary in dealing with the international adoption, some states designed their laws that facilitate the homeless children and adopted parents while some countries totally prohibit adoption whether domestic or foreign. Some are in favor of adoption but their laws are not designed to facilitate it. Therefore, they prevent parents who are interested in adoption across the boundaries.

### **2.9.1 Arguments in favor and against inter-country adoption:**

The arguments in favor of intercountry adoption do not differ much from the arguments in support of adoption in general. The rapid communication systems have reduced the whole world to one community. Common humanity and collective responsibility towards each other is

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<sup>93</sup>John, Murphy. *International Dimensions' in Family Law*. Manchester University press, 2005.pg 205-207.

<sup>94</sup>Eade, Mark, " Intercountry Adoption: International, National and Cultural Concerns," *Saskatchewan Law Review*, 1993: 381.

<sup>95</sup>K, Beavers. "Intercountry Adoption of Unaccompanied Refugee Children." *Child and Family Law Quarterly*, 1997: 131.

<sup>96</sup> Article 22 of The Hague Convention 1993

something far more than the national boundaries. One can consider adoption as an act of charity and it does not stop at home or at a particular state. Children suffering from devastations of wars, famines or abandonment can be taken as the concern of everybody and every state when their own families or countries are not in a position to care for them. It is a moral duty and obligation over the other states and everybody to stand for such children when they are in a miserable condition and their circumstances are as such that they are in a need to be adopted by the parents of any other state which can provide family and moral support to them. The people who speak in favor of intercountry adoptions consider it as appropriate as the adoption normally happens with the consent of both of the parties, the birth parents and the prospective parents.

The benefits and short-comings of inter-country adoption are controversial amongst world. Countries are divided into two groups on benefits and dangers of the inter-country adoptions. They have different laws regarding inter-country adoption. In the west, the legitimacy of inter-country adoption is still in doubt. The parents normally relinquish their children as a result of war, poverty, political and economic upheavals and also lack of social services. Inter-country adoption is an alternative and safe way to provide them healthy environment and permanent family.<sup>97</sup> Those who are in favor of inter-country adoption have opinion that the law pays attention on the removal of children from their birth parents and their roots. But it doesn't consider the danger to children growing up in substandard atmosphere and in streets.<sup>98</sup> Few supporters are aware of this cost. It's a common assumption that more laws will protect more children from abuse or misuse.<sup>99</sup> A child under the case of poor parents or an orphan child will face malnutrition and shall be suffering scarcity of due love and affection resultantly he may not

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<sup>97</sup>Micheal Humphrey, Heather Humphrey. *Intercountry Adoption: Practical experiences*. London: Routledge, 1993.pg 131-134.

<sup>98</sup>Bartholet, E, "International Adoption: Current Status and Future Prospects, Adoption," *Springer Publication*: 1993.

<sup>99</sup> Ibid.

grow having balanced and positive personality which is a great cruelty with that every child. Best substitution for the above mentioned children is Intercountry Adoption. Through this practice, the children would be shifted from the hell of depression and suppuration to the heaven of care and affection, where he could grow as a balanced and positive child. Intercountry adoption is also helpful to the weak social infrastructure of large populated countries.<sup>100</sup>

In the view of supporters of inter-country adoption, the legal procedures designed on papers to safeguard the children against misuse is practically taken as legal barrier that deny children having homes and healthy future that they need to escape from the life of misuse and exploitation.<sup>101</sup> They argued that only few laws are dealing across boundaries. Mostly laws are designed to protect children from inter-country adoption rather than to set-forth measures to help such placements. In developing countries, millions of children live in an in-adequate situation and a large number of children die because of diseases, malnutrition, extreme level of misuse and deprivation. And in some countries they have worse condition like some "street children" maintain a connection with their families while remaining is on their own. Adoption is an alternative way to resolve their condition and to provide homes.<sup>102</sup>

The supporters of the inter-country adoption, often voice that it is an extraordinarily positive option for needy children as compared to all other realistic options.

### **2.9.2 Arguments against inter-country adoption:**

The arguments which the opponents often raise including the UN organizations are, We are living in a society where different races do not mix freely. In a truly ecumenical society of brotherhood

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<sup>100</sup>O'Halloran, Kerry. *The Politics of Adoption: International Perspectives on Law, Policy & Practice*. Springer Publisher, Second Edition, 2009.pg 149-150.

<sup>101</sup>Bartholet, E, "International Adoption: Current Status And Future Prospects, Adoption," *Springer Publication*: 1993.

<sup>102</sup> *ibid*

and equality with no racism intercountry adoption is a good thing and it would pose no problems. That would be an ideal society with no discrimination or issues which pose a danger to the fight between the people of different races, rich and poor nations or white and black people, but we are not living in such a society. Different races do not mix freely and racism is widespread everywhere and there is no genuine equality of power between black and white and rich and poor people.

Arguments raised against Intercountry adoption or as this practice encourage the trade of children selling and buying of the children may never be interest of the children but is always in the favor of the people who are making such transactions.<sup>103</sup> The adopted children always face racial, ethnic discrimination under the catering of adaptive parents which may never influence positively on the personality of the child. Lastly, when the trends to let the children for adoption get encouraged it will cause to fold results: one is encouragement of child market traders and to sale as many children through all the right and wrong sources. And the other point is, it will discourage the organization working for the welfare and betterment of the children in developing countries

The opponents of the intercountry adoption have opinion that intercountry adoption programs might be contradictory with programs designed to improve the status of the millions of children who are living in miserable condition. Some argued that instead of adopting the children, the Govt. and officials who are responsible for the welfare of the needy children should design programs to help the children in their motherland.<sup>104</sup> Another argument voiced against the

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<sup>103</sup> O'Halloran, Kerry. *The Politics of Adoption: International Perspectives on Law, Policy & Practice*. Springer Publisher, Second Edition, 2009.pg 143-146.

<sup>104</sup> Micheal Humphrey, Heather Humphrey. *Intercountry Adoption: Practical experiences*. London: Routledge, 1993.pg 131- 134.

intercountry adoption is that there is a risk of abuse and exploitation of children and there is also a danger that fiscal advantage can be used to pressurize impoverished biological parents to surrender their children. Some argued there can be a fear of discrimination; children might not get adequate care in their new family. It is also unfair to deprive children from their roots, culture, race and origin. Furthermore there is a risk of discrimination in foreign land for them.<sup>105</sup> Disruption of adoption can cause threat to the status, identity and also mental disturbance.

### **2.10 Concluding Remarks:**

The chapter 2 deals with an introduction to law leading to an international framework of inter country adoption. Subsequent to which there is a discussion on the most direct relevant legislation for the inter country adoption, which is the Hague convention 1993. The main and the most important objectives of The Hague convention is to establish the system of cooperation between sending and receiving countries and to ensure that the system of adoption works in accordance with the principles and rules clearly mentioned in the convention. Under article 13 of Declaration on Social and Legal principles relating to the Protection and welfare of children, the main purpose of adoption is to provide home and permanent family to deprived child who cannot be cared for by birth parents. Under article 17 of the said declaration, foster placement should be the second choice and intercountry adoption should be taken as last resort when all the other options within the state or origin have been exhausted. It cannot be said that Hague convention was signed just to regulate the inter country adoption practices, but its main purpose is to ensure that the practice of inter country adoption is being carried out in proper and legal manner and in

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<sup>105</sup>Bartholet, E, "International Adoption: Current Status And Future Prospects, Adoption," *springer*, 3 ( 1993):97.

the best interest of the child concerned. The Hague convention clearly states the responsibility of the birth state and eligibility of the adopted state should also be concluded before practice of intercountry adoption. Under Hague convention, it should be made sure that inter country adoption takes place in the best interest of child and his basic rights are recognized in international law. The convention is not just an instrument to facilitate the practice of intercountry adoption but holds responsible the contracting states to ensure the best interest of child and to prevent the sale, abduction and trafficking of children.

To remove a child from his birth home and force him to forget his culture and identity cannot always be taken within the scope of the best interest of child. Priority should be given to the adoption of a child in his state of origin. Inter country adoption should be practiced as a last resort. There are a few lacunas in the convention e.g. the term 'improper fiscal gain' is not defined in the convention; therefore there is a chance that intercountry adoption can still be performed by unauthorized officials. Under the convention, the consent of birth parents and child is required but convention does not set any frame work or duty over the central authorities to ensure that the consent be recognized that is without any financial gain and pressure. Beside these, the convention doesn't set forth any enforcement mechanism and complaint procedure. Even with these short comings, we cannot ignore the scope of Hague convention and advantages of the intercountry adoptions.

## **CHAPTER III**

### **Conventional Prospects of Intercountry Adoption Practicse and Impacts of the Adoption on Children.**

#### **3.1 Conventional Prospect:**

If we look back at the intercountry adoption movement in the past we will come to know that during 1960s when Western countries were facing the problem of childlessness, the Third World countries provided them with healthy infants through the practice of intercountry adoption. Apparently there are various advantages of the practice. It seemed obvious that due to the practice of intercountry adoption a poor and homeless child which is relinquished by his parents is provided with a home and a better life as compared to the life of misery and poverty. On the other hand the practice of intercountry adoption provided a relief and benefit to the childless couple as well. This was the one side of the picture. What the West have depicted charitable the developing countries defined it as imperialism and colonialism where their children were exploited by the whites. The developing countries considered themselves being cheated regarding the security and safety of their children. Sending and receiving countries both are agreed to the fact that three conditions must be met for the practice of intercountry adoption. As the intercountry adoptions must always be taken as the second option, the three conditions are: intercountry adoptions should be practiced in case of disastrous circumstances like War, second reason is as a result of poor social and economic conditions and lastly when the social services are not fulfilling their duties due to unsatisfactory links between the social and child welfare agencies. If we look back at the past almost all large-scale practices of intercountry adoptions



included any one of these factors. But there are some exceptions as well. The first exception is of Lebanese civil war which had not resulted in a large number of intercountry adoptions from Lebanon into the West even it had strong social, economic and political ties with other countries like France. The exception can be found in case of Nigerian Civil War in 1960s which resulted in a large number of orphaned and homeless children. At that time Nigeria refused to accept all offers by the foreign states. African countries have not generally sanctioned intercountry adoptions. Only 137 African children were adopted by US couples between 1979 and 1987. An adoption agency was also formed in the US for the record of intercountry adoptions of the African born children to the US.<sup>106</sup> Recent developments in different countries that previously sanctioned the adoption of their children by Western countries in the past are now becoming aware of the irregularities usually found to be present while practicing intercountry adoptions. Some states like Ecuador, Brazil and Philippines have eliminated the practice of intercountry adoptions. The reasons behind the elimination of the practice were related to the issues of child security and safety as well as the fear of selling and exploitation of children.

### **3.2 Contemporary Intercountry Adoption Practice:**

Intercountry adoption under every legislation is considered as an alternative way to provide a child with a home and a family. So there should be a general policy that facilitates the sole purpose of intercountry adoption.<sup>107</sup>

The failure of national and political polices and complicities have added more to made the concept of inter-country adoption a mere success. Briefly instead of state and government ensuring the development of infrastructure to protect and care these

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<sup>106</sup> Simon, Howard Altstien & Rita James. *Intercountry Adoption, AMultiNational Perspective* . Pragear, 1991.pg 2.

<sup>107</sup> O'Halloran, Kerry. *The Politics of Adoption: International Perspectives on Law, Policy & Practice*. Springer Publisher, Second Edition, 2009. Pg. 143.

children who are victim of social and economic deprivation, they are being removed from their original system of society and culture causing controversy at some level that will be discussed in detail ahead.

Clare Menozzi & Barry Mirkin, in their paper *Child Adoption: A Path to Parenthood?* During 1974 "World Population Plan of Action" facilitated people to complete their preferred family unit. The concept advocated in The 1974 World Population Plan of Action of the World Population Conference was revolving around the assistance of pairs who cannot have children for some reason by the world governments.<sup>108</sup> In this way on one side such people can achieve their desired family size on the other hand the victimized orphan and homeless children can dream their future.<sup>109</sup>

They further elaborated that though after thirty years; a new screen is coming up that demonstrate that adoption is one of the very famous tools explaining how people are pushing hard to unconventional and substitute manners of becoming parent.<sup>110</sup>

There is no second opinion that this concept of inter country adoption serves as an umbrella to such children and kids who are abandoned by social consequences. This shift of such children from one home to another home is consistently engages a complete and total cut off from his or her original social and cultural life.<sup>111</sup>

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<sup>108</sup>Clare Menozzi & Barry Mirkin, "*Child adoption: A path to parenthood?*" Last seen on July 2013.

<sup>109</sup>Herman, E., "*The paradoxical rationalization of modern adoption*", *Journal of Social History*, vol. 36, No. 6, (2002), pp. 339-385.

<sup>110</sup>Lingblad, F., Hjerm, A., & Vinnerjung, B., "Intercountry adopted children as young adults – A Swedish Cohort Study," *American Journal of Orthopsychiatry* 73 (2003): 190-202.

<sup>111</sup>Chandra, A., and other, "Adoption, adoption seeking, and relinquishment for adoption in the United States", *Advance Data*, No. 306, Hyattsville, Maryland: National Center for Health Statistics, U.S. Department of Health and Human Services, (1999). Last seen on 21<sup>st</sup> July 2013.

Children who are homeless due to their victimization by chronic poverty, (like seen in third world countries) or by the catastrophes' whether natural or by war absolutely need an atmosphere which provides them and ensures the sanctuary.

Phenomena of inter country adoption has very rapidly changed its face and physique. It has successfully established itself as a modern social phenomenon gripping the roots of very society today.

Family life disruptions and many other causes like war, chronic poverty, civil unrest associated with legacy motive, relationship and association motive, adherence motive, 'extra pair of hands' motive, welfare and well-being motive, childless couple motive shaped the face of this trend.

### **3.3 Impacts of the Adoption on Children According to Convention:**

Chapter 5 of The Hague Convention 1993 talks about the effects of the Convention adoptions. The participants of the Special Commission and the Diplomatic Conference were of the opinion not to restrict the scope the Convention only to that type of adoption that terminates the legal relationship between the child and the family of origin. They want to make the Convention as inclusive as possible. They were of the view that the Convention should apply to all forms of intercountry adoptions. There are three types of intercountry adoptions:

1. First type fully terminates the legal relationship between the child and his family of origin. Such adoptions are known as full adoptions.
2. The second type of adoption does not fully terminate the relationship between the child and his family of origin and such adoptions are known as limited adoptions.

3. The last type is the one which admits both kinds of adoptions that are full and the limited adoptions. Such adoptions accept that the legal relationship between the child and his family of origin will be terminated or not is dependent on the type of adoption granted in a particular case.<sup>112</sup>

The Convention is inclusive in the sense that it defines adoption very broadly. The Convention covers the adoptions that create a permanent parent-child relationship.<sup>113</sup> It means that the Convention applies to both full and simple adoptions. The Convention's primary aim was to regulate the process rather than the effects of the adoption. As an effect of full adoption the child has to terminate his relationships with his birth parents. The child is entitled to such rights as equivalent to those of the full adoptions, in both the sending and the receiving state.<sup>114</sup> The recognition of an adoption includes recognition of a legal parent-child relationship between the child and his adoptive parents. It also includes the parental responsibility of the adoptive parents for the child and terminates the pre-existing relationship between the child and his birth parents.<sup>115</sup>

The sole centre of the practice of the intercountry adoption is the 'Child'. The purpose of the practice is just to do what is in his best interest. The practice of intercountry adoption mechanism is not to provide a child for the childless couple and to benefit the adoptive parents but its purpose is to secure the rights of the child. The main aim is to provide security and safety to the child. To undergo intercountry adoption is for the interest of the child and not for the childless couple. The child which is taken to another state as a result of intercountry adoption can be affected by various factors. According to some experts, child adopted as a result of intercountry

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<sup>112</sup> G. Parra-Aranguren, *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, Para.438, (Manchester University Press 2005), 205-207.

<sup>113</sup> Article 2 of The Hague Convention 1993.

<sup>114</sup> Nigel Lowe and Gillian Douglas (eds), *Families Across Frontiers* (MartinusNijhoff's Publishers, 1996: 585.

<sup>115</sup> Article 26 of The Hague Convention 1993.

adoption must be considered as a special child in his/her early days. If a child is an infant or very young then the risk of facing problems is least because at that age the children used to adapt to the new environment very quickly and forget their past as well. But to adapt a new culture and a new language is not much easy as it seems to be for a grown up child. The grown up children more often include the school going children. Such children face a number of problems in schools. They have to change their looks so as to look same as their rest of class fellows. Language is one of the main problems faced by such children. To cope up with a new language can cause serious problems for them from not to easily communicate with their fellows to achieve low grades in the class. That can result in frustration and subsequently the failure of the child. This shows that if a student is an intelligent one in the state of origin, intercountry adoption practice makes him a coward and he loses his confidence. This can affect the ability to grasp and learn in the school. Their same age class fellows are much active in front of them and such adopted children gradually lack the social skills and can become shy and can feel isolated. The effects of intercountry adoptions are different in different children. Some children have an inborn ability to adapt to different environments easily and more quickly. But there are some other children who have different temperaments and it's more difficult for them to forget their past and such children can experience a feeling of loss and sorrow and they can even get confused about their identity.<sup>116</sup> Such problems get worse when accompanied by the racial issue and if the adoptive parents belong to a different race and the child is of a different race. The problem of attachment and separation is a very difficult task which a child has to face as a result of intercountry adoption. The child may take a long time to develop trust in their adoptive parents and to learn a new language and to cope up with a different environment.

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<sup>116</sup> Ruth Lyn Meese, *Children of Intercountry Adoptions in School, A Primer for parents and Professionals*, Greenwood Publishing Group: 2002: 55-57.

In the past, the practice of intercountry adoption evolved as a result of war and various children who were left by their birth parents were abandoned and were adopted by the wealthier states. Such children have a deep impact on themselves of the circumstances which make them homeless. Children who were adopted after the Second World War always raised the question of their origin. Such children always attempt to find and to meet their original parents. According to the International Social Services any adopted or even an illegitimate child has the right to know the identity of his parents. But there comes the question on the right of privacy of the parents. Access to birth parents is the first thought that comes into the mind of an adopted child in case if the child is not an infant. Different states have different laws regarding the access to the birth records. In UK, in 1975 a law was passed which allowed the adopted children to apply to a General-Registrar in case if they want to access their birth records. There were many children who were adopted before 1975 and there were different rules for them. But the law recognizes the confidentiality and the right of privacy of the birth parents and it was always dealt with due care. In Australia, Victoria was the first state which included the access to birth records in its adoption law. In Canada the law recognizes to maintain an adoption register. But if the birth parents had desired to remain unidentified, it was their right to be unidentified and no one has the right to disclose them upon their child. In some states like USA, the lobbies are formed not by the children to access their parents but also by the birth parents to ask for the information and to enable them to find out how their child is and what has become of their child. But there are certain regulations to access these demands. The right of privacy of the other family is always taken into account before providing any information.<sup>117</sup>

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<sup>117</sup> John Eekelaar and PetarSarcevic (eds), *Parenthood in Modern Society, Legal and Social Issues for the Twenty-First Century* (MartinusNijhoff Publishers, 1993), 243-249.

### 3.1.1 Nationality of the Child:

Intercountry adoption results in the new nationality of the child and the loss of his previous nationality. The main thing is to avoid such circumstances which lead the child to become stateless. The child should be registered immediately after the birth and it's the birth right of the child to have a name, to acquire a nationality and to be cared by his parents. The state parties should take such measures to ensure that these rights are implemented according to the national law of the state.<sup>118</sup> The Convention on Certain Questions Relating to the Conflict of Nationality Laws, which was signed in 1930 at The Hague, provides that loss of nationality through adoption shall be conditional upon the acquisition by the adopted person of the nationality of the adopter.<sup>119</sup> The loss of nationality of the child which could result from intercountry adoption shall be conditional upon the acquisition of another nationality.<sup>120</sup> Both the sending and the receiving states should avoid a situation in which the adopted child become stateless.<sup>121</sup>

The United Nations Convention on the Rights of child provides for the principle of non-discrimination. The child undergone through intercountry adoption should be given the standards equivalent to those existing in case of national adoptions.<sup>122</sup> This principle will apply in the case where the child's nationality is concerned.

In many states the acquisition of the nationality of the child of the receiving state is dependent on the adoptive parents that they also have the nationality of that state. Some countries like China regard the acquisition of the nationality of the receiving state as a precondition before

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<sup>118</sup> Article 7 of the Convention on the Rights of the Child 1989.

<sup>119</sup> Article 17 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws.

<sup>120</sup> Article 11 of the European Convention on the Adoption of Children 1967.

<sup>121</sup> Report drawn up by the Permanent Bureau, August 2005, Guide to Good Practice under The Hague Convention 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, available at [http://www.hcch.net/upload/wop/ado\\_pd02e.pdf](http://www.hcch.net/upload/wop/ado_pd02e.pdf) accessed 11th March 2010.

<sup>122</sup> Article 21 of the Convention on the Rights of Child 1989.

undergoing intercountry adoption. This would cause problems for various parents who are living in a particular state, have the residency and are the residents of that state but do not have the nationality. In such a case the state of origin might allow the adoptive parents to adopt their child, if the child obtains the nationality of the adoptive parents. The child is able to acquire the new nationality of his adoptive parents when the adoption is being officially made or upon the child's arrival in the receiving state. The child's nationality, before travelling to the receiving state ends up in the state of origin while some states which do not agree to the point, most often left their children with two nationalities. Such problem is then resolved by the rule of effective nationality.<sup>123</sup> The child will acquire automatically the nationality of one of the adoptive parents or the nationality of the receiving state without relying on the adoptive parents to take an action regarding his nationality.

Some people argue that there is a risk of discrimination as a result of intercountry adoption and such risk is not there when the child is adopted nationally. When an adoption is made nationally there is lower risk of the fact that the child will be discriminated racially or religiously or that his rights are safeguarded in a proper manner or not.<sup>124</sup> In intercountry adoptions, besides various criticisms it can be said that this risk is minimal because of the acquisition of the citizenship rights; the child can legally protect his rights.

There exists a suspicion about intercountry adoptions that it can be used as an excuse or an illegal way to avoid the immigration rules. Some states, therefore, grant the residency but not the citizenship rights to the adopted children. But there still exists certain states which grant the citizenship rights to the adopted children. The Hague Convention provides rules for resolving the

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<sup>123</sup> Report and Conclusions of the Special Commission on the Practical Operation of the Hague Convention 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, 28<sup>th</sup> November-1<sup>st</sup> December 2000.

<sup>124</sup> Nigel Lowe and Gillian Douglas (eds), *Families Across Frontiers*, MartinusNijhoff Publishers, 1996: 591-592.



issues of child's nationality and citizenship but the Convention had reduced the role of nationality and it doesn't much emphasis on the nationality issue. In order to protect a child and to ensure his safety the issue of nationality must be taken into account. The receiving state should regardless of the child's nationality, should take all appropriate measures in order to provide and ensure all safeguards and services to the child.<sup>125</sup> As a result of Hague Conventions, a reduction in the role nationality has been seen from the past. It can be said that the children are unable to enjoy full rights and full protection guaranteed to them by the Convention unless and until they become the national of the receiving state. But according to the Convention on the Rights of Child the state parties should ensure the Convention rights to each and every child irrespective of the child's nationality or ethnic origin.<sup>126</sup> In case the adopted child has different nationality other than the adoptive parents, the contracting state to which the adoptive parents are nationals should facilitate the acquisition of its nationality by the child.<sup>127</sup> Furthermore the child adopted should be given safeguards and protection equivalent to the child adopted in case of a national adoption.<sup>128</sup> Some states like Columbia recognizes dual nationality and the child can maintain his nationality unless it is expressly waived. Similarly in Romania, if a child is Romanian national and is adopted by nationals of some other state, will remain a Romanian national unless and otherwise requested by the adoptive parents. If the adoption becomes invalid or nullified then the child will be considered as a Romanian national. Under The Hague Convention 1993, a child adopted as a result of intercountry adoption will be entitled to the acquisition of citizenship of the receiving state if the adoptive parents or any one of them is the national of that state.

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<sup>125</sup>PetarSarcevie, Paul Volken, Andrea Bonomi (eds), *Year Book of Private International Law*(European Law Publishers, 2007), 83-86.

<sup>126</sup> Article 2 of The Convention on the Rights of the Child 1989.

<sup>127</sup> Article 11 of the European Convention on the Adoption of Children

<sup>128</sup> Article 21 of The Convention on the Rights of the Child 1989.

In relation to immigration rules, US policy is quite significant because at least half of the intercountry adoptions in the world are made to the US. The US legislators have passed two Acts which are Adoption Act of 2000 and the Child Citizenship Act of 2000. According to the Child Citizenship Act of 2000, the adopted child becomes the citizen of US automatically and he has not to apply for a visa or made an application as was happening in the past. The US then, at the same time, started to emphasis on the parents rights and stopped the flow of children into US through intercountry adoptions due to the risk of trafficking of children.<sup>129</sup> If we look at the recent practice the receiving countries are in a dilemma that whether they treat inercountry adoptions as a matter of immigration rules or just a family matter. The receiving states are confused that should they grant citizenship to the adopted child or not.

### **3.1.2 Ethnic Identity of the Child:**

The most obvious effect of an intercountry adoption on a child is his removal from his birth country and original culture and termination of his relationship with his birth parents. The child has to live with a different cultural heritage. Some sending countries like Korea helped in setting up of a culture specific support groups in the receiving states for the adopted children. There are a lot of controversies about the preservation of the adopted children's identity and cultural heritage.<sup>130</sup> The question is who is to monitor this preservation and enforce the protection of the child's cultural heritage and identity.

A strong criticism is made over intercountry adoptions on the issue of ethnic identity. A child when taken to a different culture then his ethnic identity is always in question. The child should

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<sup>129</sup> Alison Brysk, *Human Rights and Private Wrongs: Constructing Global Civil Society* (Published by Routledge: 2005), 56-57

<sup>130</sup> Halloran, O'Halloran, Kerry. *The Politics of Adoption: International Perspectives on Law, Policy & Practice*. Springer Publisher, Second Edition, 2009, pg165-166.

be given a chance to talk about his past, about his cultural heritage and he should be given an opportunity to make cultural discussions with his adoptive parents or friends. This could help the child to preserve his ethnic identity. It has been observed that the children who are confident enough to talk about their past and background adjust more rapidly than those who often hesitate and are afraid of sharing their ideas about their background and are less enthusiastic about their past. Some adoptive parents are of the view that if they give an opportunity to their adopted child to learn more about his background he will not be able to mingle up with the new culture and this will cause emotional distress between parents and the child.<sup>131</sup> Almost every time when adoptive parents adopt a child of a different race they took them as of their own race no matter what's the color or the nationality of the child and they always try to abolish racial differences if one comes across. Most of the adopted children have an interest in exploring their identity and their past. They do not much care for the ethnic identity of their adoptive parents rather they always try to look up for and to find out about their own. Some children feel embarrassed about their past. Adoption agencies have taken various steps to safeguard the ethnic identity of the child. Many adoption agencies have forced the adoptive parents to take care of the child's ethnic identity. The agencies provide various cultural activity programmes. The adoptive parents should take their child to the programmes and to know and learn about their culture. If the adoptive parental involvement and support is lacking, the adopted child will never be able to preserve his identity. The cultural activities also help children to meet and to develop relationships with other children of the same culture. Adoptive parents should support the child at all the times but they should not force or push the child to involve in such activities. In case of the difference in language, the adopted child should be given an opportunity to spend time with the children of his own culture,

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<sup>131</sup> Howe, D, "Assessing Adoptions in Difficulty," *British Journal of Social Work*, 22 (1992):1-15.

if such children are easy to find out by the adoptive parents, to provide the child an opportunity to talk in his native language.<sup>132</sup> There is a post adoption agency in London, which work along with the adoptive families. It has been shown that if the adopted children are properly counseled, they think and feel much better and improve themselves with their age.<sup>133</sup>

### **3.2 Right of a Child to Access His Birth Parents:**

The right to access the information about the adoption and the birth parents should be there in the adoption law of the sending countries and should be properly maintained. If such an option is there in the law of the receiving states then it will be of no use unless the sending state has such an option in their adoption law. In some countries like India no pre or post adoption contact is allowed between the birth and the adoptive parents. Under Hague Convention 1993 the information about the birth parents and the state of origin is maintained by the authorities in the sending states and right to access such information should be provided in the adoption laws of the receiving state.<sup>134</sup>

### **3.3 Right of the Birth State to Know About the Condition of Their Child:**

A majority of the children adopted by the adoptive parents are taken care of and fully protected by the receiving state but there is a minority of children for whom the intercountry adoption practice is a harsh experience. Such children when transferred to the receiving states are severely abused by their adoptive parents who had adopted them with good intentions and to take care of

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<sup>132</sup> Nam Soon Huh and William J. Reid, "Intercountry Transracial Adoption and Ethnic Identity: A Korean Example," *International Social Work* 43 (2000): 75-87.

<sup>133</sup> Bernal, M. G. Knight, C. Garza, K. Ocampo and K. Cota, "The Development of Ethnic Identity in Mexican-American Children," *Hispanic Journal of Behavioral Sciences* 12(1): 3-24 (1990)

<sup>134</sup> O'Halloran, Kerry. *The Politics of Adoption: International Perspectives on Law, Policy & Practice*. Springer Publisher, Second Edition, 2009.

them. Some children even die as a result. Therefore it can be rightly said that it's the right of the birth parents or the state of origin to ask for the proof of a good upbringing of their child for their satisfaction. The birth parents, whatever the circumstances may be that lead them to send their child to some other state and with new parents, are always concerned about their child. In case if due to some reasons they are not able to ask for their child openly, there should be certain mechanisms that let them know about the progress of their child and to know what's their child up to in a new state and how he is living with new people and an environment totally different from the one in which their child used to live when they were his parents. Some countries have formulated their adoption laws for this purpose. For example a sending state like Russia requires annual post-adoption reports for three years from the receiving country to know about the condition of their child. All intercountry adoptions are subject to a two year minimum programme of monitoring in this regard. This shows that several sending countries now require from the receiving countries or from the social services of the receiving countries for reports on the child's progress.<sup>135</sup> Such regular reports should be made to the country of origin. The time period to make such reports is different in different countries. For example, in Sri Lanka and Peru its four years and for Romania its two years.

### **3.4 Legislation in Pakistan on Inter Country Child Adoption**

In Pakistan while adopting this practice there are few rules that need to be followed for example:

1. The adoptee parents should be Muslim,

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<sup>135</sup> O'Halloran, Kerry. *The Politics of Adoption: International Perspectives on Law, Policy & Practice*. Springer Publisher, Second Edition, 2009.pg 166.

2. One of the adoptee parents should be citizen of Pakistan and other should be the citizen of the resident country,
3. The duration of marriage between the adoptee couple should be at least 3 (three) years.<sup>136</sup>

The process of adoption is the same as in the other countries, though Pakistan is not signatory of any of the conventions of inter country child adoption. Here for the sake of demonstration and understand; we will take the example of process involved when child is being adopted by European parents.

1. In most of the cases it is seen that adoptee parents are prone towards the option of adoption because of the reason that involve such people or partners unable to have their babies due to infertility and other complications.<sup>137</sup> But in Muslim countries the driving force is the happiness of Allah and it is strongly encouraged.<sup>138</sup> This in no manner advocates that in conventional systems families are not attracted to help the devastated children. In all parts of the world where people are effected due to direct or indirect influence of orphanage consequences in any manner what so ever tend to help the children in need. Precisely when starting the process of decision of adoption is made.<sup>139</sup>
2. A main cost of travel, documents, visa etc. is arranged according to the officially prescribed manner and amount.
3. A credible orphanage is selected after the decision of adoption is made and finances for the process are arranged. Selecting a credible orphanage is very vital step. It is to be made sure

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<sup>136</sup><http://dawn.com/news/1038528/pakistan-not-barring-inter-country-guardianship-of-children>

<sup>137</sup>[http://adoption.state.gov/country\\_information/country\\_specific\\_info.php?country-select=pakistan](http://adoption.state.gov/country_information/country_specific_info.php?country-select=pakistan)

<sup>138</sup><http://dawn.com/news/1038528/pakistan-not-barring-inter-country-guardianship-of-children>

<sup>139</sup><http://adopt.com/pakistan/index.html>

that it is not a black list orphanage and no monetary benefits are involved for the orphanage.<sup>140</sup>

4. It is important that adoption should be made through government authorized and advised organization instead of going through privately to make sure the certainty and transparency in the adoption process.
5. After taking these initial steps the adoptee parents submit their whereabouts. Including the proofs of their identifications, citizenship and national identity cards.
6. When pre adoption papers are submitted with the desired and selected orphanage or authorized organization, application of adoption is submitted to the office of the concern organization.
7. The organization does their homework of confirmations and other required documentations for adoption.
8. NICOP is applied and a lawyer is engaged.
9. The organizations conduct the interview of the adoptee parents and pass them through the required scrutiny.
10. The high court of Pakistan validates and approves the guardianship through Guardian and ward act and few provisions of family law. preparing court documents for Pakistan
11. After approval from the high court order the adopted baby is given in the custody of the adoptee parents. Guardianship forms are filled and necessary arrangements of visa and travel are made.

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<sup>140</sup><http://www.pakistanadoption.com/ukadoption/gettingstarted.htm> also see, Madeline Engel, Norma K. Phillips, Frances A. Della cava, (2007) "International adoption: a sociological account of the US experience", International Journal of Sociology and Social Policy, Vol. 27 Iss: 5/6, pp.257 - 270

12. After reaching the resident country the documentation of the adopted child are submitted to the required authorities and necessary requirements are fulfilled.
13. After completing all these processes required updates including the whereabouts, location, postal codes etc .are posted to Pakistani authorities. All these precautions are to make sure that the child is safe and sound and enjoying the motive for which he has been adopted. As the country of natural birth this is the responsibility of the state that even when the child is adopted and has been shifted to another jurisdiction is taken care of.

### **3.5 Case Study of Ethiopia**

In 2009 a Dutch adoption agency conducted a research in Ethiopia from 2004 to 2009 to see the outcomes and impacts of inter country child adoption. Therefore, twenty five random files were selected and it was noted that out of those randomly selected files nineteen files had some kind of irregularities. The case study concluded that on the whole, the existing adoption structure aggressively produces an inexcusably large amount of offspring accessible for the purpose of inter country adoption. Protection policies inside the country to protect a child from harm and trafficking are totally ignored and far from implementation. While inter country child adoption is taking over the concept of local adoption in particular. The adoption procedure is conundrum by deception and further illegal actions. Biological parents are declared deceased, while they are alive in reality, dates of birth of the adopted children are fallacious, fake and bogus information is given to the Courts for adoption purpose. So consequently the higher demand of adopted



children in the market is encouraging the kidnapping, child trafficking and many other illegal activities and therefore, breaking the family systems.<sup>141</sup>

To put an adopted child away from his origin and family cannot be termed as "best interest of the child". Literal distinctiveness of the child is a very sacred phenomena being a human. Sending an adoptive child away from his origin should be the last resort. Preference should be that the child should be adjusted in his own society or within his own customary practices, as this is his fundamental right, which should be respected and government should take all the necessary actions to make this possible. Child's best interest of the child in all cases is the ultimate goal of adoption as a principle rule of practice.<sup>142</sup>

Briefly the best interest of the child is the main goal of the adoption process either we are talking about local or domestic adoption or we are talking about the inter country adoption practices. Domestic and local adoption remains the first choice if the state is able to provide the child with adequate health, education and financial facilities. But the countries where the per capita income is very low and the state governments are failing to cope up with the financial and economic health of the country inter country child adoption is the only resort in the best interest and for the wellbeing of the adopted child.<sup>143</sup> Additional difficulties can take account of as in definite emergent countries the parents have a lot or quite a number of children, which they financially cannot afford.<sup>144</sup>

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<sup>141</sup>Kerry, Niel, "Fruits of Ethiopia - A study on intercountry adoption in Ethiopia," *Hispanic Journal of Behavioral Sciences* 12(1): 8-24 (1999).

<sup>142</sup> Article 21(b) of the Convention on the Rights of Child 1989 & Article 4(b) of The Hague Convention 1993.

<sup>143</sup> Carlson, R.R, "Transnational Adoption of Children" , Vol.23 *Tulsa Law Journal*, (1993),p-317.

<sup>144</sup>Bogard, H.E. "Who are the Orphans? Defining Orphan Status and the need for an International Convention on Intercountry Adoption." *Emory International Law Review*, 1991: 571.

### **3.7 Concluding Remarks:**

Intercountry adoption under every legislation is considered as an alternate way to provide a child with a home and a family. So there should be a general policy that facilitates the sole purpose i.e. "the best interest of child", through intercountry adoption. The focal point of practice of intercountry adoption is child. Child's best interests are safeguarded and it is not the child-less couples whose interests are taken into account. These children who are brought to other country must be taken as special children and be given much time and care to help them adjust in the new place and people. Philosophy behind this adaption is to facilitate the deprived child to get a good and nourished life and not to fever the childless parents. But any approach and policies being framed in the best interest of the child, commonly it is observed that the adapted child enjoys the good and healthy life but there are some cases in which the adapted child is badly abused even to the extent of his death. So, in the best interest of the child the abuses and malpractices against the child must be restricted and this may only be possible through the best adaption laws and policies. As it is clearly states in Hague Convention the states should maintain a system of co-operation amongst contracting countries to guarantee that the rights of the adopted children are being taken care of and the criminal activities are compromised to zero level to put a stop to the abduction, sale and trafficking of the adopted children and to secure the recognition in contracting states of adoption made in accordance with the convention.

## Chapter IV

### Conclusions And Recommendations

Intercountry adoption mechanism is a long established phenomenon and now about 30,000 children are being adopted yearly by the practice which involves about 50 families. The purpose of the structure and the practice of intercountry adoption which is set out by The Hague Convention provide that "the safeguards to ensure that adoption take place in the best interest of the child and with respect for his or her fundamental rights as accepted in international law".<sup>145</sup> Intercountry adoption is always taken as an alternative means of providing a child with care and only after all other options for the placement of child within the country of origin have been exhausted.<sup>146</sup> This poses an obligation on the countries to invest in the placement of child within his own country. In reality intercountry adoption in all cases is a consequence of a total failure on the part of the state in its national policies.<sup>147</sup> The investment should be made on the resources to enable the country to ensure a better care for a child before sending him to another state. This principle should also applicable to the domestic child care adoptions. Intercountry child adoption is a safe way to provide homes to needy children affected from war and poverty, political turmoil etc.

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<sup>145</sup> Article 1 of The Hague Convention 1993

<sup>146</sup> Ibid., Article 4

<sup>147</sup> O'Halloran, Kerry. *The Politics of Adoption: International Perspectives on Law, Policy & Practice*. Springer Publisher, Second Edition, 2009, pg 56.

There are few international laws dealing with the adoption across boundaries mostly designed to safeguard against potential abuse rather than to set-forth principles to facilitate such adoptions. Convention on the rights of the child puts responsibility on states that they must ensure that the child must be brought up within his family circle. According to the convention on rights of child states should check the condition of the child whether he is improving or not. And if child is growing under unsuitable family environment, then state should either send him to child care institutions or to some other suitable family. The guidelines set by the Hague convention provide that "the safeguard to ensure that adoption takes place in the best interest of a child and with respect to his fundamental rights as recognized in international law". Intercountry adoption is in advantage for children who are to be adopted as they will be having an opportunity to have a permanent family of their own. Intercountry adoption is taken as a last resort when all other options like providing home to such children and giving them good care and basic facilities, are not available in their own country. These possess a barrier on the practice of intercountry adoption. Intercountry adoption is in fact a failure of a state's policies.

The Hague convention provides merely the minimum standards for international adoption. Annually, there are a large number of intercountry adoptions which are not in accordance with the Hague convention 1993. Few of the developed states are not following the articles of Hague convention while adopting children from sending states through bilateral agreements. Free consent of birth-parents can be neglected as a result of such agreements and may give rise to threat of child-trafficking. The deserving children e.g. orphan and refugee children are neglected because of in-supportive clauses of Hague convention in terms of adoption. To remove a child from his birth home and force him to forget his culture and identity cannot always be taken within the scope of the best interest of child. Priority should be given to the adoption of a child in

his state of origin. Inter country adoption should be practiced as a last resort. There are a few short comings in the convention e.g. the term 'improper fiscal gain' is not defined in the convention; therefore there is a chance that intercountry adoption can still be performed by unauthorized officials. Under the convention, the consent of birth parents and child is required but convention does not set any frame work or duty over the central authorities to ensure that the consent be recognized that is without any financial gain and pressure. Beside these, the convention doesn't set forth any enforcement mechanism and complaint procedure. Even with these short comings, we cannot ignore the scope of Hague convention and advantages of the intercountry adoptions.

**Recommendations:**

1. Once a child is being adopted by the adoptive parents, the birth parents in most of the cases, hardly find any way to know about the condition of their child. The states are now formulating laws for post-adoption reports to know about the condition of the adopted children. Recently the Russian government has suspended the adoption of their children by US citizens until both the countries conclude an agreement on the terms 'specifying responsibilities' by the host family. This happened when a seven year boy who was adopted by an American woman has been sent home on his own with a note that he was no longer wanted. There should be proper mechanisms which allow the birth states to know about their children. Now various birth states are formulating their adoption laws for this purpose.
2. The human rights lawyers should design the laws to ensure that the adoptive child will get love and care and protection against any kind of exploitation and deprivation. And

that the best interests of the child should be the guidelines in drafting of international adoption.

3. The adoptive country should express their good faith that they have genuine concerns about exploitation and resentment. Both sending and receiving countries should agree on legal principles for facilitating such international adoptions.

If we look at the current scenario there are several millions of abandoned and orphaned children in Africa suffering from various diseases and for such children the opportunity of intercountry adoption is rarely available. There is a possibility of undermining the interests of such older and disabled children as a result of the practice of intercountry adoptions. The adoptive parents are always looking for a healthy child. It shows that intercountry adoption mechanism works in favor a young and healthy children and the preference is always given to them. On the other hand the children who require more care and affection are always remained at the avoiding end. Now countries are formulating policies that work for the children placed in various institutions and with special needs.<sup>148</sup> There should be proper implementation of such policies.

Besides the shortcomings one can't over look the advantages and the positive aspects of the practice of intercountry adoption as it provides home to a child the alternative for whom would be death as a result of poverty or abandonment. The present system regulating the framework require such reforms that ensure the protection of best interests of all children and at a high level so as to achieve the aim which is laid down by the Convention.

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<sup>148</sup>Kristein Rummery, Ian Greener and Chris Holden. *"Analysis and Debate in Social Policy 2009"*. The Policy Press, 2009, pg153.

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