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# INTERNATIONAL ADOPTION: IS IT THE QUIET MIGRATION OF CHILD LAUNDERING?

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December 2019

## SYNOPSIS

International adoption has been an established practice for a significant number of decades. From World War II, when war orphans from Europe were permitted to migrate to various countries as a way to support children displaced by war and other events or provide a better life for children from underdeveloped countries.

However, with the rise in demand for children and people's willingness to pay large sums of money to obtain a baby, unscrupulous businesses had developed in the trafficking of children in a number of countries assisted by careless national controls over international adoption and a lack of regulation.<sup>1</sup> International cooperation was therefore needed to protect children's rights and to prevent the sale and trafficking of children.<sup>2</sup> In response to international concern, on 29 May 1993, during the 17<sup>th</sup> Session of the Hague Conference on Private International Law, 63 States signed *The Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption* ("the Hague Convention").<sup>3</sup>

Consequently, this paper explores some of the ideological and ethical dilemmas that make it difficult to distinguish international adoption from child trafficking and argues that an examination of legal standards of the Hague Convention may represent a way of addressing this situation. Hence this paper considers the question of *International Adoption: Is It The Quiet Migration Of Child Laundering?*

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<sup>1</sup> O. Calcetas-Santos, 'Report of the Special Rapporteur on the sale of children, child prostitution and child pornography' (27 January 2000), United Nations Economic and Social Council, Commission on Human Rights 53rd Session, 5-6 at <<http://casa-alianza.org.EN/human-rights/sexual-exploit/ONU/sale.shtml>>; W Duncan, 'The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption' (1993) 17(3) *Adoption and Fostering* 9.

<sup>2</sup> S. Detrick and P. Vlaardingerbroek, *Globalization of Child Law the Role of the Hague Conventions* (Martinus Nijhoff Publishers: The Hague, 1999) 19; J Degeling, 'Intercountry Adoption—A New Convention for Australia?' (1993) 1(5) *Australian Law Librarian* 215.

<sup>3</sup> W. Duncan, above n 1, 9; P H Pfund, 'Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation and Promise' (1994) 28(1) *Family Law Quarterly* 54.

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## 1. INTRODUCTION

### 1.1 Overview

International adoption is a phenomenon, often referred to as the “quiet migration”.<sup>4</sup> Its beginnings date back to the middle of the twentieth century after World War II as a means of helping vulnerable children. Promoted as a humanitarian gesture, World War II orphans and other displaced minors from Europe could migrate to various countries to support children displaced by war and other events to provide a better life for children from underdeveloped countries. But, with the rise in demand for children and buyers willing to pay large sums of money to obtain a baby, unscrupulous businesses had developed in the trafficking of children in countries deficient in national controls over international adoption and a lack of regulation.<sup>5</sup>

As a result, ‘children from around the globe are still suffering from slavery, manual labour, sexual exploitation, genocide, organ harvesting, and armed conflict’ (Bartholet, 2012). The movement of children across international borders for adoption purposes is not a relatively recent occurrence. This activity, known interchangeably as “intercountry adoption” or “international adoption”, involves “a child living in one country, the prospective adoptive parents living in another country, and the transfer of the child to that country to live there with the adoptive parents”.<sup>6</sup>

Intercountry adoption increased quickly during the post-war period, motivating the legal community to regulate and control the practice of intercountry adoption by establishing international instruments. Initial attempts which included the United Nations Convention on the Rights of the Child (CRC) were unsuccessful. The reason for this failure hinged on the fact that these instruments ‘failed to specify uniform procedures and controls to be followed by participating countries.’<sup>7</sup> Without consistent standards, the ‘incidences of baby selling escalated in certain countries, particularly in Romania and Peru, throughout the early 1990s’.<sup>8</sup> This period saw many children being stolen from their birth parents and sold off, thus reinforcing the need for a global standard.

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<sup>4</sup> Peter Selman, ‘*Intercountry Adoption in the new millennium: the quiet migration*’ (Population Research and Policy Review, June 2002, Vol.21), p.205.

<sup>5</sup> O. Calcetas-Santos, ‘Report of the Special Rapporteur on the sale of children, child prostitution and child pornography.’ (27 January 2000), United Nations Economic and Social Council, Commission on Human Rights 53rd Session, 5-6.  
W Duncan, ‘The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption’ (1993) 17(3) *Adoption and Fostering* 9.

<sup>6</sup> Jareborg, M.J., “Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption” (1994) 63 *Nordic J. Int’l L.* 185.

<sup>7</sup> Ibid (1)

<sup>8</sup> Ibid (2)

In 1993 the Hague Convention on Protection of Children and Co-operation in Intercountry Adoption (Hague Convention) was created as the instrument to address this and many other problems.<sup>9</sup> This reflected the work undertaken by the 68 member and non-member States present at the 17th session of the Hague Conference on Private International Law. While no other global instruments exist on the subject matter, the Hague Convention represents the first system of cooperation between participating countries to improve the practice of intercountry adoptions. It sets out minimum standards and detailed adoption procedures for all participating countries to follow including 'responsibilities between the countries that send the children for adoption (sending countries) and the countries that receive the children (receiving countries)'.<sup>10</sup>

It is questionable whether the Hague Convention has improved on past child adoption instruments through the introduction of standards. One fundamental criticism is that its 'implementation by major sending and receiving countries has been a difficult and sometimes impossible task'.<sup>11</sup> Regrettably, numerous sending countries have either deferred implementation, declined to implement, or have unsuccessfully applied it. The majority of receiving countries have successfully implemented the Hague Convention, but most surprisingly, the United States, as one of the world's most powerful countries and the largest receiver of children for adoption has failed to do so.<sup>12</sup>

The Hague Convention has also been criticised for 'creating a dual system of intercountry adoption by allowing adoptions between member and non-member countries, thus highlighting another fundamental flaw'.<sup>13</sup> For instance, the Hague Convention fails to prohibit the sale of babies; moreover, there is no definition for terms such as "adoption" and "orphan".<sup>14</sup> Furthermore, there is no enforcement or means of review or benchmarking its success. Despite these shortcomings, many hail its success in improving and promoting the practice of intercountry adoption.

While many consider intercountry adoption as the best possible way of matching children to families without children,<sup>15</sup> the practice has been besieged by intense moral debate.<sup>16</sup> The debate remains divided on the topic along with its merits and appropriateness in solving the problem of homeless

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<sup>9</sup> Hague Conference on Private International Law: Final Act of the 17th Session, & the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, Convention No.33, 29 May 1993, 32 I.L.M 1134.

<sup>10</sup> Ibid (6)

<sup>11</sup> Thompson, N.S., "Hague is Enough? A Call for More Protective, Uniform law Guiding International Adoptions" (2004) 22 *Wis.Int'l L.J.* 441, 445.

<sup>12</sup> Olsen, L.J., "Live or Let Die: Could Intercountry Adoption Make the Difference?" (2003- 2004) 22 *Penn St. Int'l L.Rev.*

<sup>13</sup> Ibid

<sup>14</sup> Ibid

<sup>15</sup> Ibid (5)

<sup>16</sup> Gates, C.J., "China's Newly Enacted Intercountry Adoption Law: Friend or Foe?" (1999- 2000) 7 *Ind. Global Legal Stud.* 369, 375.

children.<sup>17</sup> Irrespective of the political, economic and social debate, prospective parents are persuaded to embrace the joy of adopting a foreign child, but also to be ready to accept the possible criticisms that follow.<sup>18</sup>

## **1.2 Structure of Paper**

Following on from the opening chapter the second chapter will consider the diverse forms of illicit practices occurring in the course of international adoption and classifying them to obtain a better understanding of why this type of activity occurs. The third chapter identifies existing international treaties on children's rights, more specifically, the protection of children from trafficking and the sale of children. The fourth chapter deals with the international adoption process, with specific reference to the 1993 Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption. The final chapter, conclusion, outlines the fundamental legal distinction between a legitimate adoption and the illicit sale of children identifying the principal failure of the practice of Intercountry adoption.

## **2. ILLICIT PRACTICES WHEN DEALING WITH INTERNATIONAL ADOPTION**

### **2.1 Underhanded Practices**

Intercountry adoption is considered illicit child selling and child trafficking regardless of whether it consists of an intermediary arranging consent for adoption in violation of the standards of the Hague Convention or the child is transferred to another State for remuneration.<sup>19</sup> According to Smolin (2004) 'child laundering' occurs through the act of "illegally removing children from their birth families through child buying or kidnapping, and then laundered through the adoption and legal systems as orphans and then adoptees".<sup>20</sup> These illegal practices occur due to social and financial reasons which will be covered in this paper.

#### **a) Private Agencies (Unqualified Intermediaries)**

Private agency groups which are usually not accredited and lack qualified and competent personnel specialising in child welfare often conduct international adoption. However, accredited agencies involved in international adoption are also known to operate outside sanctioned child welfare services.<sup>21</sup> The people working in this area are known as 'facilitators' which include, intermediaries from placement agencies, social workers, orphanages, doctors, lawyers and official immigration staff

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<sup>17</sup> Ibid (5)

<sup>18</sup> Gates, C.J., "China's Newly Enacted Intercountry Adoption Law: Friend or Foe?" (1999- 2000) 7. *Global Legal Stud.*

<sup>19</sup> David M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 Val. U.L. Rev 281 (2004) p.300.

<sup>20</sup> Ibid.

<sup>21</sup> John Triseliotis, *Intercountry Adoption Global Trade or Global Gift? Adoption & Fostering*, Volume 24, (2000).

and more often than not, 'their professional credentials are not required'.<sup>22</sup> Facilitators place children with adoptive parents either through their orphanages, contract State or private agencies. The illegalities associated with international adoption in most cases come from 'unofficial officers or intermediaries who are often paid by facilitators to seek out young children in developing countries.'<sup>23</sup>

b) Inducement Birth Family Consent

One of the more common and depressing forms of stealing children for transfer to other countries is through the pretence of lawful international adoption by inducing the consent of birth families to sell their children. A fundamental requirement for international adoption under the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption is the 'informed and free given consent in a legal expressed form by the birth parents, not induced by payment or any other form of compensation'.<sup>24</sup> The sending countries usually develop systems to enable this process to occur by employing a literate person to head up the conspiracy, with financial and social standing to negotiate with Western adoption agencies and prospective adoptive parents.<sup>25</sup>

Large sums of money is offered for children along with false statements in telling the children's parents that they will continue to have contact with the child, receive financial support from the adoptive parents, their child is going to have a better life and that in good time they will be able to migrate to the western country and be reunited with their child.<sup>26</sup> Sadly, the money meant for the birth family is used for international adoption fees, a donation for the receptive orphanage, bribe for government officials and the intermediary,<sup>27</sup> all this is in breach of article 32 (1) of the Hague Convention.

c) Financial Vulnerability

Poor developing countries are vulnerable to illegal international adoption practices due to financial hardship in implementing laws that would protect those families subjected to it.<sup>28</sup> This is symptomatic of those struggling to access resources and have a subsistent livelihood as they are less

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<sup>22</sup> Ibid (12)

<sup>23</sup> David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping and Stealing Children*, p. 118

<sup>24</sup> Hague Convention, Article 4 (c).

<sup>25</sup> Ibid (16)

<sup>26</sup> Ibid (16)

<sup>27</sup> Ibid (16)

<sup>28</sup> Sheela Patel and Diana Mitlin, *Reinterpreting the Rights-Based Approach: A Grassroots Perspective on Rights and Development*, (Kumarian Press, 2009), 107-121, p. 16.

concerned with the problem of unlawful adoption.<sup>29</sup> This is also true in combating child laundering, ‘for societies with millions of poor families and limited resources may not choose to use their limited governmental capacity on a proper international adoption system’.<sup>30</sup>

This inevitably leads to an ineptitude of the legitimate adoptions, as the government lacks the capacity and capability to enforce regulations to prevent this illegal practice. Furthermore, these countries also experience high rates of child trafficking for sex, debt bondage and cheap child labour, which are considered more urgent problems to be tackled.<sup>31</sup> Corruption is also prevalent in countries with a low income per capita and a large proportion of persons living in extreme poverty. Corruption hinders the economic development of these countries and results in “routine bribery to public officials to obtain legitimate approvals and services as well as a means of acquiring illegitimate approvals and services”.<sup>32</sup>

#### d) Social Conviction

The baby shortage in Western countries has seen many couples to look abroad to find children. Hence, intercountry adoption provides a solution for children without parents and childless parents.<sup>33</sup> Given this, international adoption is seen by some to be a vestige of colonialism of Western to Eastern countries and those developing countries now considered a new form of colonialism, initiated under the guise of humanitarian principle and globalisation.<sup>34</sup> Orphanages and some religious institutions have also been the subject of concern in regards to child laundering under the pretence of international adoption.

For these cash strapped institutions, the temptation to succumb to this illegal practice is high given the vast sums of money involved – this goes a long way in providing much-needed food and other resources. Given the importance of and the role that religion plays in society, many see little harm in their actions, as it is seen as the greater good.<sup>35</sup> Indigent and vulnerable people from developing countries who are victims of illegal adoption practices have little to no redress when it comes to vindicating their rights due to the lack of legal resources.

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<sup>29</sup> David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping, and Stealing Children*.

<sup>30</sup> Ibid.

<sup>31</sup> David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping, and Stealing Children*.

<sup>32</sup> Balakrishnan Rajagopal, *Corruption, Legitimacy and Human Rights: The Dialectic of the Relationship*, 14 Conn. J. Int’l L. 495, (1999).

<sup>33</sup> S. R. Wallace. “International Adoption: The Most Logical Solution to the Disparity between the Numbers of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others”. (2003).

<sup>34</sup> David Leblang, Steven Liao and Sonal Pandya, *Babies Across Borders: The Political Economy of International Child Adoption*, International Studies Quarterly (2015), 59, 615-628, p. 621.

<sup>35</sup> Ibid, (24).

## 2.2 The Moral Debate

The moral debate on international adoption is diverse with those against fiercely rejecting the argument 'that saving a child from horrible living conditions is sufficient motivation for intercountry adoption'.<sup>36</sup> They would argue that intercountry adoption signifies to the world the governments an inability to look after its children and weakens a national asset – its people.<sup>37</sup> Others would assert removing a child from its birth country is not in the 'best interests of the child because it strips the child of its group link and deprives a child of its ethnic and cultural background'.<sup>38</sup> Opponents further contend that raising children in a foreign country may subject them to higher levels of discrimination.<sup>39</sup>

By and large, the theoretical argument against this practice is the allegation that international adoption has facilitated the creation of black markets for baby selling. With demand for foreign babies and children in industrialised countries continuing unabated, illegal dealings such as 'kidnapping, child abduction, child trafficking and financial exploitation have become prevalent in sending countries, where entrepreneurs will take advantage of the demand with the expectation of the high return'.<sup>40</sup> Despite the implementation of increased regulation, both domestically and internationally, such illegal activities have continued and 'do not operate in the child's best interests'.<sup>41</sup>

On the other hand, supporters of intercountry adoption place emphasis on what is in the best interests of the child. They would suggest that adoption enables a child to grow and develop in a caring and loving family environment, which is not offered in institutional care and may become the orphaned child's only reality of a family.<sup>42</sup> In addition to this, they claim that 'food, shelter and care are in every child's best interests', regardless of where it occurs or the country it occurs in.<sup>43</sup> Thus, these protagonists argue intercountry adoption makes sense and should be promoted.<sup>44</sup> Also, it is considered that this practice saves young lives from 'poor and unsanitary conditions in their birth country',<sup>45</sup> and a more desirable option to a child being raised in an institution in their country of

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<sup>36</sup> Liu, M, "International Adoption: An Overview" (1994) 8 *Temp. Int'l & Comp. L.J.* 187, 195.

<sup>37</sup> Gates, C.J., "China's Newly Enacted Intercountry Adoption Law: Friend or Foe?" (1999-2000) 7 *Ind. J. Global Legal Stud.* 369, 375.

<sup>38</sup> Thompson, N.S., "Hague is Enough? A Call for More Protective, Uniform law Guiding International Adoptions" (2004)

<sup>39</sup> *Ibid*

<sup>40</sup> Wallace, S.R. "International Adoption: The Most Logical Solution to the Disparity between the Numbers of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?" (2003).

<sup>41</sup> *Ibid*.

<sup>42</sup> Thompson, N.S., "Hague is Enough? A Call for More Protective, Uniform law Guiding International Adoptions" (2004).

<sup>43</sup> Liu, M, "International Adoption: An Overview" (1994) 8 *Temp. Int'l & Comp. L.J.* 187, 193

<sup>44</sup> Olsen, L.J., "Live or Let Die: Could Intercountry Adoption Make the Difference?" (2003-2004) 22 *Penn St. Int'l L.Rev.*

<sup>45</sup> *Ibid* (33)

birth, foster care, or on the streets. Research identifies that there are inherent risks in prolonged foster and institutional care.<sup>46</sup>

### 2.3 Intercountry Adoption and Countries Domestic Issues

In some developed countries, in particular, the United States, intercountry adoption has been linked to the foster care crisis in that local laws make it difficult for prospective parents to adopt domestically, forcing them to look, overseas for children.<sup>47</sup> Attempts to have these laws amended, thus encouraging developed countries to care for their own orphaned and abandoned children have been less than successful.<sup>48</sup>

Antagonists of intercountry adoption claim that participating countries use this type of practice as a temporary fix to “conceal the economic and social needs of the underdeveloped countries”.<sup>49</sup> They maintain that intercountry adoption enables sending countries to disregard the principal causes of the high number of orphans in their countries. Other critics have argued that ‘charity begins at home’ meaning that, ‘those who care about these children should spend the money on providing assistance to children within their societies instead of spending their time and money to take the children away from their country of origin’.<sup>50</sup>

Countering this argument, the proponents of intercountry adoption believe that social adjustment and progress takes time and often entails sacrificing a current generation of orphaned children who need homes and families now.<sup>51</sup> For those against intercountry adoption, they maintain that the practice is no more than a ‘quick fix’<sup>52</sup> solution to a perennial problem of homeless children. Hence, to correct the existing challenges faced by poor sending countries that contribute to the high number of orphans requires a fundamental change to achieve long term solutions. Failure to address these inequalities, between rich and developing nations, will, therefore, cause innocent children to continue to be the victims.<sup>53</sup>

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<sup>46</sup> Monaghan G & Young, L., *Family Law in Australia* (6th ed, 2006) at para. 15.

<sup>47</sup> Wallace, S.R., “International Adoption: The Most Logical Solution to the Disparity between the Numbers of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?” (2003). *Int’l & Comp. L* 689, 711-712.

<sup>48</sup> Kleiman, E.L., “Caring for our own: Why American Adoption Law and Policy Must Change” (1997) *Colum. J.L. & Soc. Probs.* 327, 328.

<sup>49</sup> Gates, C.J., “China’s Newly Enacted Intercountry Adoption Law: Friend or Foe?” (1999-2000) 7 *Ind. J. Global Legal Stud.* 369, 375.

<sup>50</sup> Smolin, D.M., “Intercountry Adoption as Child Trafficking” (2004-2005) 39 *Val.U.L. Rev* 281, 283

<sup>51</sup> *Ibid* (40)

<sup>52</sup> *Ibid*

<sup>53</sup> *Ibid*

Intercountry adoption is an area that will always be surrounded by extreme controversy and debate. While both camps formulate valid arguments, the most relevant consideration is to ensure that the best interests of the children are preserved. On balance, while both sides have opposing views as to what constitutes “best interests”<sup>54</sup> they do share a common goal, “the best interests test is well recognised for its indeterminacy”<sup>55</sup>. This is because it is highly subjective and as such, “is capable of being manipulated to suit several sides of any one argument” (Elster).<sup>56</sup>

### 3. INTERNATIONAL INSTRUMENTS

#### 3.1 Overview of Regulations

Previous international instruments to protect children, such as the United Nations Convention on the Rights of the Child (1989),<sup>57</sup> did nothing to prevent these illegal activities, despite article 21 (d) condemning “improper financial gain”.<sup>58</sup> Additionally, article 35 encourages States to take action to prevent the abduction, sale or traffic of children. Similarly, the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children - Special Reference to Foster Placement and Adoption Nationally and Internationally (1986),<sup>59</sup> also failed to define (article 20) the “improper financial term” and, consequently, did not provide means to prevent it. Due to the high number of flaws contained within the legislation, In 1988, the Hague Conference on Private International Law started to promote changes with the view of obtaining universal agreement based on the reality that international adoption was demanding a new approach.

This paved the way for the Hague Conference in 1989, to introduce the subject of international cooperation for intercountry adoption to the Special Commission thus, creating a new instrument in a Memorandum. This instrument highlighted the need for ‘legally binding standards in intercountry adoption, as well as the necessity for a governance system of those standards and the need to promote co-operation between countries of origin and countries of destination’.<sup>60</sup> This finally led to the Seventh Session of the Hague Conference on Private International Law adopted the Final Act of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption in 1993. The Hague Convention of 1993 introduced international standards and practices for

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<sup>54</sup> Elster, J, *Solomonic Judgments*, (Cambridge)

<sup>55</sup> *Ibid*

<sup>56</sup> *Ibid* (47)

<sup>57</sup> UNGA, “Resolution 44/25”, UN Doc. A/RES/44/25, (1989).

<sup>58</sup> *Ibid*

<sup>59</sup> UNGA, “Resolution 41/85”, UN Doc. A/RES/41/85, (1986).

<sup>60</sup> Memorandum concerning the preparation of a new Convention on international co-operation and protection of children in respect of intercountry adoption”, November (1989), pp. 1-2.

intercountry adoptions, “to prevent coerced and forceful removal of children from their state of origin”.<sup>61</sup>

Unlike the CRC, the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption is not a ‘human rights instrument’.<sup>62</sup> Rather, it is a private law treaty of the Hague Conference on Private International Law. It exclusively focuses on intercountry adoption “to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children”,<sup>63</sup> thereby ‘taking into account the principles outlined in international instruments’,<sup>64</sup> in particular, the United Nations principles outlined in international instruments, such as the Convention on the Rights of the Child”.<sup>65</sup>

### **3.2 International and Regional Legal Framework**

This section examines instruments dealing with fundamental principles and standards considered pertinent to the practice of intercountry adoption and how regulation can be achieved within this framework and protect the best interest of the child. Article 20 of the Convention on the Rights of the Child (CRC) deals with children who ‘are temporarily or permanently deprived of their family environment due to abandonment or orphaned, or if the State has determined that they should be removed from their environment for their best interests due to neglect, abuse or exploitation by the parents or guardians’.<sup>66</sup> While every child is entitled to rights contained in the CRC, children without families are more vulnerable to exploitation and abuse should have the right to special assistance by the State.<sup>67</sup>

Given the CRC provision, intercountry adoption is considered as one of the viable forms of alternative aid for those children deprived of their family environment. Therefore, in line with national laws, it is at the discretion of State Parties to decide when intercountry adoption is the appropriate solution for children without families. Nonetheless, it can be inferred from the wording of Article 20 (3) in the CRC that preference to alternate care other than a family entity, such as institutional care should only be considered as a last resort ‘if necessary’.<sup>68</sup> This articulates the importance the CRC attaches to the “family as the fundamental group of society and the natural environment for the growth and

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<sup>61</sup> S. Orr. “Human Trafficking Through International Adoption” Washington University, (2018) p14.

<sup>62</sup> Ibid

<sup>63</sup> Permanent Bureau ‘The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention’ (2008) 1 Guide to Good Practice p1, 22.

<sup>64</sup> Convention on the Rights of the Child Article 35

<sup>65</sup> Ibid (55)

<sup>66</sup> Convention on the Rights of the Child Article 20 (1).

<sup>67</sup> Convention on the Rights of the Child, Article 20 (2).

<sup>68</sup> CRC Article 20 (3)

well-being of all its members and particularly children".<sup>69</sup> Also, the CRC espouses the significance of a child to grow up in a nurturing family environment for the 'full and harmonious development' of the child's personality.<sup>70</sup>

Overall, there are three core international instruments that govern the practice of intercountry adoption. These consist of the Convention on the Rights of the Child; African Charter on the Rights and Welfare of the Child (ACRWC); and the Hague Convention. The many rules and safeguards contained in these international instruments were adapted from the Declaration on Foster Placement and Adoption.<sup>71</sup> Article 21 of the CRC regulates the practice of adoption (both domestic and intercountry) and is directly linked to Article 20. Since the CRC expands on intercountry adoption and is silent on other forms of alternate care highlights the importance placed to safeguarding children's rights when they are adopted.<sup>72</sup>

At the regional level, intercountry adoption is dealt with under Article 24 of the ACRWC. While these provisions regulate the adoption process, there lacks any obligation on State Parties to allow intercountry passage as other care possible for children without families. The Hague Convention is celebrated as the comprehensive manual regulating intercountry adoption, the principles and standards established in the CRC have been refined through the addition of substantive procedures and safeguards.<sup>73</sup>

### **3.3 The European Union Anti-Trafficking Instrument**

It is essential to identify the European Convention on the Adoption of Children<sup>74</sup> because it is considered an "effective complement"<sup>75</sup> to the 1993 Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption. Article 17 rebukes the illegal financial gain relating to the adoption of a child. The Explanatory Report to the European Convention on the Adoption of Children (Revised)<sup>76</sup> identifies what shouldn't be considered "improper financial gain" and the "reimbursement of direct and indirect costs and expenses of adoption and the payment of reasonable remuneration with services rendered are allowed".<sup>77</sup>

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<sup>69</sup> CRC, para 5.

<sup>70</sup> CRC, para 6.

<sup>71</sup> CRC, para 10 and Hague Convention, para 5

<sup>72</sup> C. Phillips Child-headed households: A feasible way forward, or an infringement of children's right to alternative care LLD (Leiden University) (2011) p47.

<sup>73</sup> Permanent Bureau 'The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention' (2008) 1 Guide to Good Practice p1, 22.

<sup>74</sup> CETS 202 Adoption of Children (Revised Convention 2008).

<sup>75</sup> Explanatory Report – CETS 202 – Adoption of Children (Revised Convention 2008).

<sup>76</sup> Ibid

<sup>77</sup> Ibid

The Council of Europe also offers Recommendation 1443 on international adoption respecting children's rights. Not surprisingly the Council of Europe condemns the establishment of a 'flow market of children from underdeveloped countries to developed countries' this includes 'activities perpetrated to facilitate adoption and to commercialise its practice'.<sup>78</sup> Furthermore, paragraphs 4 and 5 refer the 1993 Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, pointing the need for the Council of Europe member States to ratify it and conduct policies and actions to abide the Convention standards and rules.

Recommendation 1828 is intended as a most significant recommendation as it deals with the disappearance of newborn babies for an illegal adoption in Europe – this practice is condemned in all form by the Council. Given this, the Recommendation makes a firm stand by requesting member States to 'sign and ratify all international instruments protecting children and preventing trafficking in human beings', together with the 1993 Hague Convention, and to 'implement all necessary actions to eradicate the exploitation committed in international adoption'.<sup>79</sup>

#### **4. THE HAGUE CONVENTION ON THE PROTECTION OF CHILDREN AND COOPERATION IN RESPECT OF INTERCOUNTRY ADOPTION**

##### **4.1 Essential Elements of the Hague Convention**

The fundamental purpose of the Hague Convention is to ensure that intercountry adoptions are made "in the best interests of the child".<sup>80</sup> Of significance is the acknowledgement that international adoption may itself be in the best interest of the child.<sup>81</sup> The Hague Convention maintains that 'every child ought to grow up in a family environment, and that international adoption may be the only way to achieve this end for some children'.<sup>82</sup> The Hague Convention oversees that international adoptions are safe and lawful but equally encourages intercountry adoption over other alternatives such as long term institutionalisation.

Its intercountry adoption regulation on international adoption obliges each consenting country to undertake significant internal changes to their global adoption processes, as this facilitates sound processes and represents an endorsement of intercountry adoption. Akin to this is that each member state is required to create a Central Authority to superintend all intercountry adoptions within the

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<sup>78</sup> Council of Europe Commissioner for Human Rights, *Adoption and Children: A Human Rights Perspective*, prepared by N. Cantwell, Comm/Issue Paper (2011), Strasbourg.

<sup>79</sup> Ibid (70)

<sup>80</sup> Hague Convention, 1993.

<sup>81</sup> E. Bartholet, *International Adoption: Propriety Prospects, and Pragmatics*, 13 J.A.M. ACAD. MaTRIM LAW 181, 186, (1996).

<sup>82</sup> Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993.S. Treaty Doc. No. 105-51, 32 ILM 1134.

state.<sup>83</sup> The duties of the Central Authority encompass compliance matters relating to the Hague Convention's objective of 'serving the best interests of the children'.<sup>84</sup> Some of the broader duties include:

- 'preventing improper financial gain in connection with an adoption',<sup>85</sup>
- collecting and preserving information about each child and prospective adoptive parent(s),<sup>86</sup> and
- facilitating the goal of adoption'.<sup>87</sup>

In carrying out its duty, the Central Authority may delegate some responsibilities to other public authorities. However, when accredited, these bodies can only function on a nonprofit basis, be staffed by people approved to engage in international adoption, and are under the direction of the Central Authority concerning operation and finance.<sup>88</sup> Moreover, the Central Authority for the country of the prospective parent must determine eligibility and prepare a comprehensive report about the applicant.<sup>89</sup> This also includes developing a parallel report by the Central Authority on the child's prospects of adoption.

These requirements facilitate detailed communication between the reciprocal country's involved to ensure that adoption can proceed.<sup>90</sup> Also, the Central Authority must undertake all necessary steps to ensure that the child can leave their home country as well as be able to enter and permanently reside in the parental state.<sup>91</sup> This process ensures emigration and immigration for the child and eliminates the likelihood that the adoption would cease due to conflicting laws between the parties.<sup>92</sup> In general, the Hague Convention's prerequisites for the requirements of each Central Authority is to streamline the 'process of international adoption and ensure full disclosure of information and compliance with each country's laws'.<sup>93</sup> These functional requirements serve to advance the Hague Convention's objective of facilitating international adoption in the child's best interests. While these represent minimum requirements, their implementation raises concerns about their enforceability and practicality.<sup>94</sup>

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<sup>83</sup> Ibid.

<sup>84</sup> Ibid, art 6.

<sup>85</sup> Ibid, art 8.

<sup>86</sup> Ibid, art 9 [a].

<sup>87</sup> Ibid, art 9 [b].

<sup>88</sup> Ibid (11)

<sup>89</sup> Ibid (15)

<sup>90</sup> Ibid (art 17)

<sup>91</sup> Ibid (art17)

<sup>92</sup> E. Bartholet, *International Adoption: Propriety Prospects, and Pragmatics*, 13 J.A.M. ACAD. MATRIM LAW 181, 186 (1996)

<sup>93</sup> Hague Convention (art 6-22)

<sup>94</sup> Hague Convention (art 1 [a]); E. Bartholet, *International Adoption: Propriety Prospects, and Pragmatics*, 13 J.A.M. ACAD. MATRIM LAW 181, 186 (1996).

## 4.2 Transnational Applicability of the Hague Convention

The 1993 Hague Convention is only relevant between two Convention countries. This is seen as a significant gap within the treaty,<sup>95</sup> As major sending nations have not ratified the Convention, thus increasing the likelihood and frequency of abuses, especially within the poorer countries. World-Wide applicability of the Convention would ensure that the principle 'best interests of children' be adhered to.<sup>96</sup>

## 4.3 Requirements for possible Intercountry Adoption

The principal objective in establishing the Convention is to ensure 'children's best interests and respecting children's fundamental rights.'<sup>97</sup> This should be the fundamental philosophy of international adoption, and this is stressed in article 1 (a) of the Hague Convention. Other key objectives outlined in article 1 include:

- 'establishing a system of co-operation between the Contracting States to ensure that the child's best interests are safeguarded;
- prevent the abduction, sale or traffic of children; and
- securing the recognition between the Contracting States of adoptions made within the parameters of the Convention'.<sup>98</sup>

The Hague Convention fosters the concept of "children's best interests" which was taken from article 3 (1) of the Convention on the Rights of the Child. However, there's no international standard on how these interests should be settled despite repeated attempts to close this gap on the Convention.<sup>99</sup> This has a significant effect on international adoption, as decisions are made between actors with different cultures and social backgrounds.<sup>100</sup> The other key area in the Hague Convention is the principle of subsidiarity, article 4. This maintains that international adoption should only take place if there is no other way for children to remain in their original State, with their family – meaning that institutional care should only be considered as a last resort. Besides, observance of the following requirements is necessary to make an international adoption viable.

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<sup>95</sup> Karen Smith Rotabi and Judith L. Gibbons, *Does the Hague Convention on Intercountry Adoption Adequately Protect Orphaned and Vulnerable Children and Their Families?* Springer Science + Business Media, LLC, 2011.

<sup>96</sup> UNGA (1989) "Resolution 44/25", UN Doc. A/RES/44/25, 20 November 1989, United Nations Convention on the Rights of the Child, Article 3.

<sup>97</sup> Hague Convention 1993.

<sup>98</sup> Ibid.

<sup>99</sup> Nigel Cantwell, *The Best Interests of the Child in Intercountry Adoption*, UNICEF Office of Research, 2014, p. 5. UNCRC, (2013).

<sup>100</sup> United Nations Department of Economic and Social Affairs, *Child Adoption: Trends and Policies*, United Nations, New York, 2009.

This includes:

- ‘the child needs to be considered adoptable;
- there must have been an attempt from the State to place the child within other relatives if the parents are unavailable; and
- if the child does not have any relatives available, the State must try to place the child in an adoptive family’<sup>101</sup>

The other prerequisites about article 4 are: necessary consents must have been given freely, not induced by payment or compensation and the mother given up the child only after the birth of the child. Further, article 5 provides the scope for adoption under the Convention within the receiving State, with the giving determining the suitability of the prospective adoptive parents.<sup>102</sup>

#### **4.4 Difficulty in Distinguishing Child Trafficking from Intercountry Adoption**

The notion of child trafficking being associated with intercountry adoption is a hard concept to accept for many people. For others, intercountry adoption is considered a form of child trafficking on the basis it involves the transference of children from emerging nations to rich nations to satisfy the demand for children by rich countries. From this perspective, those most ideological opposed to intercountry adoption would argue that ‘those who are concerned about the suffering of children in developing nations should help children within their societies, rather than spending inordinate sums of money to strip children of their national identity, native culture, and language’.<sup>103</sup>

Conversely, those most supportive of intercountry adoption can’t ignore the millions of children in desperate ‘need for intercountry adoption in developing and transition economy nations’.<sup>104</sup> The most vulnerable children abandoned, killed, left in orphanages, or living on the streets exposes an urgent need for adoption. According to Smolin (2004), this ethical perspective of objecting to intercountry adoption lacks legitimacy, “since they sacrifice the concrete good of children to ideological idols”.<sup>105</sup> This inconsistency of views concerning intercountry adoption creates confusion and uncertainty within the operation of the system, thus obscuring its legitimacy. From this perspective, intercountry adoption is neither good or bad, but instead, it is a potential or conditional good.

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<sup>101</sup> Hague Convention 1993

<sup>102</sup> G. Parra-Aranguren, *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, 31 December 1993.

<sup>103</sup> Holly C Kennard, *Curtailing the Sale and Trafficking of Children: A discussion of the Hague Convention in Respect to Intercountry Adoptions*, 14 J. Intil L. 623

<sup>104</sup> DM Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping and Stealing Children*, 2004.

<sup>105</sup> Ibid.

Nonetheless, the international community has been raising concerns for some time over intercountry adoption, given the scandals and illicit activities with child trafficking including, abusive adoption practices. Under these situations, the disparity between the 'good judgement' concept of child trafficking and the correct legal definition has distorted the debate on whether intercountry adoption is good or bad. Hence, general legal information has begun to address 'when intercountry adoption has descended into a form of illicit child trafficking'.<sup>106</sup> The international document addressing intercountry adoption as a form of child trafficking is the Optional Protocol to the Convention on the Right of the Child on the Sale of Children, Child Prostitution and Child Pornography (OP-CRC). This document defines the "sale of children as any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration".<sup>107</sup>

Under international law, intercountry adoption constitutes illicit child selling and child trafficking 'where an intermediary induces consent to adoption in violation of the standards of the Hague Convention and when the child is transferred for remuneration or any consideration'.<sup>108</sup> Technically, both elements, that is, inducement of consent by an intermediary in a manner violating Hague standards and the transfer of children for remuneration or consideration, need to be established to constitute the "sale of children" in order to violate the standards of the OP-CRC.<sup>109</sup>

However, the OP-CRC is not without its shortcomings. First, the prohibition falls short of addressing an incident of a child taken from their birth family without consent, expressly, abduction or kidnapping. In such instances, where there has not been an improper "inducing" of consent, the OP-CRC will not apply in its entirety. While the OP-CRC definition of the "sale of children" would be met, it fails to meet the OP-CRC definition of 'prohibited sale of children'.<sup>110</sup>

Secondly, the OP-CRC expects that an intermediary improperly 'induce consent and therefore does not address situations where adoptive families directly purchase children from birth parents without the use of an intermediary',<sup>111</sup> these types of acts would be a breach of the Hague Convention.<sup>112</sup> However, the failure of the OP-CRC to incorporate abusive adoption practices within the definition of illicit sale of children highlights the prudent manner in which international law is addressing these abusive adoption practices.

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<sup>106</sup> DM Smolin, *Intercountry Adoption as Child Trafficking*. (2004).

<sup>107</sup> OP-CRC, art 2(a).

<sup>108</sup> Ibid; 103.

<sup>109</sup> Ibid; 103.

<sup>110</sup> OP-CRC, art 2(a).

<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

## 5. Conclusion

There is no question that the Hague Convention has made a significant contribution towards ensuring that intercountry adoptions are governed by minimum standards as well as maintaining the best interests of the child. However, from a legal perspective, the judicial distinction between a lawful adoption and the illegal sale of a child is ambiguous in both theory and practice. The legal distinction is maintained by an indiscriminate system of classification under which exchanges of money are classed as legitimate or illegitimate.

This classification system is elusive because the difference between legitimate and illegitimate is upheld by applying "conclusory legal classification without a clear relationship to the actual nature of the underlying transaction".<sup>113</sup> Hence, the domestic system of adoption generally classifies financial benefits given to the birth parent, and the birth parent's approval to the adoption, as unrelated "gift" and "consent."<sup>114</sup> This classification is also applied when "the representation induces the financial assistance that the birth parent currently intends to place the child with those providing the gift".<sup>115</sup>

The good example of this is provided by Richard Posner,<sup>116</sup> Judge of the United States Court of Appeals, who argued that the law should permit birth parents to sell their parental rights to qualified adoptive families. Judge Posner defended his position by claiming "the birth parents would be selling their custodial rights, rather than the child, hence favouring adoption and not constituting any baby-selling".<sup>117</sup>

Other advocates of intercountry adoption such as Bartholet (2017) lay blame with human rights organizations, such as UNICEF, for having created pressure against international adoption.<sup>118</sup> These international organisations usually argued that international adoption should only be considered after domestic adoption and "permanent" family or foster care is unavailable, as well as call for moratoriums or bans on sending countries, based on the alleged adoption abuses.<sup>119</sup>

For other scholars, such as Smolin (2007) who believes that this position leads to the minimisation of scandals and undermines the efforts in the international adoption much needed reform of some

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<sup>113</sup> H Van Loon "Hague Convention 1993 on the Protection of Children and Cooperation in Respect of Intercountry Adoption" (1995) 3 Int'l J. Child Rights.

<sup>114</sup> J Triseliotis, "Intercountry Adoption: Global Gift or Global Trade?" (2000).

<sup>115</sup> Ibid.

<sup>116</sup> Richard Posner, *Sex and Reason* 409-17 (1992).

<sup>117</sup> Ibid.

<sup>118</sup> DM Smolin, *Child Laundering and the Hague Convention on Intercountry Adoption: The Future and Past of Intercountry Adoption* 48, U. Louisville Law Re 441, 2009-2019.

<sup>119</sup> E Bartholet, *International Adoption: The Human Rights Position*, Harvard Law School Faculty Scholarship Series, Paper 28, p. 7-9.

practice standards.<sup>120</sup> Smolin also suggests that the ideological discussion around international adoption, which consists of power imbalances between sending and receiving countries, the loss of the child's original culture and identity, as well as the fact that international adoption is a remnant of colonialism of poorer countries,<sup>121</sup> has led to the crucial point of the discussion and that is, “the regulatory failure that leads to the child laundering scandals”.<sup>122</sup>

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<sup>120</sup> Ibid, 108, p.442.

<sup>121</sup> Ibid, 108, p.445.

<sup>122</sup> Ibid, 108, p. 445.

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