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The Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption:

Seeking the Cultural Relativism of the Inter-country Adoption

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There is a time to be quite and a time to talk.

Aung San Suu Kyi

I thank my parents for all their support, care and patience, my brother for being that kind of sibling everyone wants to have, my dear friend Tereza for help, my dear friend Pepa for encouragement when I needed the most and Thomas for his love.

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Hereby, I declare that I worked on this thesis myself using all the sources listed in the References and I quoted according to an approved quotation method.

In Prague, July 14th 2013 Karolína Šklebená

ABSTRACT

This thesis focuses on the rights of the child in respect to the inter-country adoption. It aims to seek the notions of cultural relativism within those fundamental rights which are immediately applicable on the process of adoption. The thesis bases its theoretical framework on the current discourse on the universality of human rights. The theory of the three levels of cultural relativism is applied on the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption to demonstrate the cultural relativism of the Convention itself.

INTRODUCTION

I used to have a child friend called Erik. His parents came from Madagascar to study in the socialist Czechoslovakia and fell in love. Unfortunately, they were too busy or too young to take care of him so he spent much of his infancy with a director of their students' house and his wife. After his biological parents had broken up and left the city, Erik was adopted by the Czech couple. He was raised in the North-West Bohemia and became probably the first black ice-hockey goalkeeper in the Czech Republic. Thus, without even realizing it, I witnessed an inter-country,[1] interracial adoption at the age of five.

The inter-country adoption experienced a huge boom in the past decades becoming an important topic on the practical and the theoretical level. The number of children adopted from abroad had been constantly since the 1950s and so were the issues connected to it. But what are the reasons and consequences of such adoptions? What makes the inter-country adoption controversial in respect to the rights of the child and who is really benefiting from it? Those and many more questions arise around the topic. The complexity of the modern world, its structures and its processes does not make the answers easy ones.

In this thesis I do not aspire on explaining all positive and negative aspects of the inter-country adoption; neither I intend to question its moral aspects since it is not possible to propose a general explanation or to describe every single determinant of the inter-country adoption. Rather, this thesis focuses on what allows the inter-country adoption to become an internationally discussed topic, what are the origins of the inter-country adoption and how the culture determines the overall attitude towards the inter-country adoption. The cultural relativity originates from the main debate on the human rights which is ongoing between the universalists and the relativists.

[1] This adoption was inter-country only on a hypothetical basis, since Erik obtained the Czechoslovakian citizenship at birth, because his parents were permanent residents in Czechoslovakia.

I focus on the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption (Hague Convention or Convention) which besides the United Nations Convention on the Rights of the Child (UNCRC) is the sole legally binding international and global document dealing with children rights in respect to the inter-country adoption. I explain the cultural determination of the Hague Convention based on the cultural relativism of both children rights and the concept of the inter-country adoption. Regarding the Hague Convention, I am not particularly concerned with its practical implications, even though I mention a few of them within the text to illustrate the reality and the implementation of the inter-country adoption.

To analyze the cultural relativism of the Hague Convention I use Jack Donnelly's theory of the three levels of relativity of human rights. He asserts that every international convention can embody different levels of relativism in the scope of its articles. I prove that the Hague Convention can be analyzed in such way as well. There are three main perspectives of the cultural relativity within the Hague Convention – the perspective of universality/ relativity of the rights of the child; the perspective of universality/ relativity of the definition of a child and its implications regarding the rights of the child; and the perspective of cultural determination of the substitute child care in different socio-economical units under specific cultural-historic circumstances. These three dimensions make it impossible for the inter-country adoption to be a universally accepted concept, and thus it should be mirrored in the respective international legislation. Moreover, at the lowest level there are significant practical (mainly economic) determinants of relativity.

Evolving from the theoretical framework of the cultural relativism of human rights elaborated in the Chapter I, I submit following research questions:

- To what extent are the fundamental rights of the child culturally relative and how does the cultural relativity effect the inter-country adoption?

- Within the scope of the Hague Convention on inter-country adoption, which levels of relativism of human rights according to Donnelly can be identified and how do they influence the practice of the inter-country adoption?

I state that analogously to human rights the practice of adoption (and thus the inter-country adoption) relies on cultural and religious principles which significantly vary in different societies. Furthermore, in parallel with the concept of human rights, I presume that the institution of the modern adoption[2] was imposed on those societies from outside. I emphasize the controversial position of the inter-country adoption which on one side is seen as a tool to satisfy certain rights of the child, while at the same time it might violate them. Provided that the Hague Convention remains the most important international legal instrument handling the inter-country adoption, it is crucial to think about whose rights might be jeopardized; in other words, to identify the possible victims of the Hague Convention approach towards the inter-country adoptions. This might be explained via a historical evolution of the modern inter-country adoption and its negative effects as well as via analysis of countries actively participating on the Hague Convention drafting and finalization.

The Hague Convention originates in the necessity to support collaboration between states in respect to the inter-country adoptions and to create a legal framework responding to widespread illegal activities closely interconnected with them. At the end of the 1980s, there was no mediating mechanism and there were many duplications, delays and possibilities to exploit the system of inter-country adoptions. Opinions on advantages and disadvantages of the facilitation system introduced by the Hague Convention diverge remarkably from utmost critics of the state intervention in the inter-country adoption, to defenders advocating for further extension of the Hague Convention's competences. While the majority of authors aims to analyze practical, legal or moral aspects of the inter-country

[2] The term of modern or formal adoption refers to the Western (predominantly Catholic) institution of substitute child care where a child becomes an integral part of his/ her new family. The adopted child is perceived as equal in all aspects of family life to a biological child.

adoption and effects of the Hague Convention, my goal is to highlight cultural specifics of different approaches and to argue that overlooking the importance of cultural sensitivity and the lack of culture-orientation unease a successful implementation of the Hague Convention in many countries in the world.

In this thesis, I am using sources from various scholars working in different disciplines such as international law, sociology, anthropology, international relations etc. I am also using multiple case studies to generalize the positive and negative aspects of the inter-country adoption with respect to local culture. In the Chapter 2 I list important scholars grouped according to their primary approach towards the inter-country adoption, because I found crucial to introduce their bias which influence information and data they work with. Especially controversial topics – such as the role of private adoptions – suffer heavily from on-purpose selected data. In such cases, I work with both sides to demonstrate the opinion diversity. Moreover, I acknowledge that a majority of the sources is from the U.S. authors, given that the inter-country adoption is a phenomenon particularly important for the U.S. citizens. Authors coming from the predominantly sending countries or Europe are rare, but I do emphasize their opinions, because they bring a different point of view on what is usually perceived as ultimate good with a few issues. I am also working with articles and books from different periods of time, because the evolution of the inter-country adoption is dynamic and the main issues change over time.

1. THEORETICAL FRAMEWORK AND METHODOLOGY

1.1. CULTURAL RELATIVISM AND HUMAN RIGHTS

A simple definition of human rights is a great part of current discourse. Often their content and origin are topics of endless arguments. Shaw (2008: 265-268) believes that morality and ethics are the core principles guiding the human rights norms but suggests that morality cannot always be transformed into a form of law. In terms of policy-making theories, Shaw observes and acknowledges the human dignity as a key concept of human rights law. Renteln (1985) indicates four potential justifications of the human rights existence: 1) divine or God's authority; 2) natural law; 3) intuition or morality; and 4) international law and international regimes. Even though, each of the above justification can be used to defend a particular human right, all of them are also subjects to criticism which will be further elaborated. Importantly, Donnelly (2003) distinguishes the constitutive and the regulative function of human rights arguing that they limit and condition states' power while determining human beings as political subjects on their own. These functions are especially important in cases where the model of the Weberian modern state is not fully functioning, mainly due to the overuse of the legitimate violence or administration based on other structures but meritocracy. Particularly the issues based on clashes between the state sovereignty and the human rights protection made this topic an integral part of international relations. Forsythe (2012) describes a complicated yet partially successful incorporation of the human rights provisions into resolutions of the UN Security Council.

According to Shaw (2008: 265-269) the origins of the human rights date back to the 17th century and are linked especially to the work of John Locke who defined the right to life, liberty and property, and thus created the concept of rules superior to the free will of the ruler. Kälin and Künzli (2011) highlight that new concepts of individual liberties and rights were proclaimed in the USA Constitution, while

the French Revolution defined the rights and the liberties of a man in the Declaration of the Rights of Man and of Citizens which played a crucial role in shaping a perception of a human being, although on the national level only.[3] The very first international human rights legislation dealt with slavery and sick, wounded or imprisoned soldiers and it came into existence during the 19th century (Shaw 2008) and are interconnected with foundations of the International Committee or Red Cross and the anti-slavery movement in the United Kingdom (Steiner, Alston, Goodman 2008). On the top of that, new human centered principles evolved with industrialization in order to eliminate its negative effects on working class population. Ross (2010) points out the controversial topics arising in the 19th century such as serfdom, harmful working conditions or child labor. Moreover, the impoverishment and proletariatization of the working class led to a reaction of leftish ideologists (such as Karl Marx and Fridrich Engels), feminists and to the internationalization of the topic. This Europe-based discourse led to establishment of the International Labor Organization based on tripartite composition of collaboration between workers, employers and governments.

However, it was only in the 20th century that the human rights principles became an important part of the international law. The establishment of the League of Nations shifted the protection of human rights towards a new direction – freedom of conscience and religion, fair treatment of native populations, protection of minorities and right to petition (Shaw 2008: 270-272). This is not to say that the League of Nations focused on the human rights as we do nowadays. Influenced by the atrocities of the World War I, the League of Nations as well as the Treaties of Paris of 1919 to 1921 emphasized the protection of minorities rather than individuals (Steiner, Alston and Goodman 2008). Still the real change followed the end of the World War II and closely correlated with a vigorous increase of non-governmental human rights organizations, intergovernmental bodies, human right

[3] Nevertheless; the Marxists criticize the proclaimed universality of human rights while mainly promoting the rights of bourgeoisie (Kochi 2000).

courts etc. Despite not legally binding, the Universal Declaration of Human Rights, later accompanied by two legally binding Covenants, meant a huge step towards international recognition of universal human rights principles. The war tribunals in Nuremberg and Tokyo in addition to that; presented a new phenomenon of individuals accountable for war crimes and international responsibility of individual rights (Steiner, Alston and Goodman 2008). From the very beginning, the approaches towards the human rights varied significantly in the Western bloc, the Eastern bloc and the Third World countries. The West focused mainly on the civil and political rights, emphasizing the individuals, the Soviet Union, on the other hand stressed the right to international peace and security accenting the role of the state. Soviets underlined the importance of economic and social rights while being reserved to committing themselves to protect individuals. The Third World adopted a combination of both systems and advanced the sovereignty of states; their equal status as well as social and economic rights. Later on, nevertheless, the civil rights were overshadowed by their economic problems following decolonization. Especially the Asian countries (Talbott 2005) advocated during the 1980s and beginning of the 1990s for greater cultural relativity of human rights which was perceived negatively by various NGOs mainly because of the ongoing discrimination against women and other forms of exploitation. The Vienna Declaration, in this respect, managed to maintain the universality as a non-doubtable principle stating that despite possible cultural, religious and other differences among the states, all states are obliged to protect all fundamental human rights and freedoms (Alston, Gilmour-Wash 1996: 35-37).

In order to fully understand the main constraints of the international human rights law it is crucial to go back to the 19th century to the origins of the international law itself. As Binder (1999) argues, the international law is created by the states and it is only binding if the states want to be bound. Therefore, if the states do not treat their people decently, there is a low probability they will accede to any human rights

norms. Harris-Short (2003) reaffirms this view insisting that the international law is a law between states; however, the state view does not have to correspond with attitudes and believes of its population. Even though the states are supposed to implement, to enforce and to interpret the international law for the benefits of its people and the states might be held accountable by other states, if it comes to individuals or groups of individuals violating the international laws they do not feel bound due to the cultural or traditional habits, the state is often unable to solve the situation while at the same time it is responsible for it. Moreover, Shaw (2008: 270-272) supports this clam stating that even though until today the international human rights law remains almost an exclusive domain of the states, the influence and the importance of other actors should not be disregarded or underestimated.

On the exclusively inter-state level of the international human rights law Donnelly (2007) emphasizes the scope of consensus on majority of the human rights rather than the differences. He argues that there are only a few conflicts regarding the human rights and different cultures "[pose] only a modest challenge to the contemporary normative universality of human rights" (2003: 89). On the contrary, Shaw (2008) indicates the turn in the conflict from West-East to North-East which occurred with the end of the Cold War that uncovers dissensions in the understanding or willingness to implement of various forms of international law, including the human rights. Furthermore, Renteln (1985) points out that the sole ratification does not establish universal acceptance of the rule, stating that ratifications do not necessarily have to mirror believes of the population or they might be effectuated for political reasons and questioning the legalistic understanding of ratification of different governments.

Nagengast and Turner (1997) stress that there is always a political aspect in the human rights discussions because states are often involved in the human rights violation, either as perpetrators or as bystanders; and thus every decision made

becomes immediately a political topic. Donnelly (1984) deems the modern state to be a threat to the human dignity because it disposes of more sophisticated administration and technology and the traditional institutions are getting weaker. He claims that with the traditional moral authorities diminishing an introduction of the human rights standards seems to be necessary in order to eliminate abuses of the state power. Under these circumstances it seems natural that the states would prefer to avoid their responsibilities and to cover the violations under the cultural specifics. Commission for Global Governance (1995) stated that even though human rights are often seen as a direct relationship between citizens and states, it is not feasible to consider them the exclusive perpetrators and protectors. Conversely, individuals and other non-state actors have to recognize and support human rights. Goodhart (2008) concludes that rather than states or products of market economy, the power of all kinds threatens human rights. In his point of view, the human rights derive in general from the necessity to protect victims of oppression and dominance.

In this context, a controversial issue is whether the accelerating globalization process of the 20th and 21st century causes a homogenization of the world's culture and traditions or rather enhances the local cultural specifics and identities. Stammers (1999) rejects common perceptions of globalization as merely economic process interconnected with cultural "westernization" [4] and underlines the multidimensionality of globalization leading to various and complex processes. He describes a set of dichotomies (universalization/ particularization, homogenization/ differentiation and integration/ fragmentation) which describe the current state of global social dynamics. All the options can heavily influence the possibility to achieve the universal human rights legal system. Robertson (in Westaway 2012: 64) introduces the concept of globalization as a "form of institutionalization of the two-fold process involving the universalisation of particularism and the particularization of universalism". This suggests a complex

[4] Compare with Stiglitz (2002) or International Monetary Fund (1997).

shift in understanding the local and the global, as well as, the ongoing process of change. To conclude, the process of evolution and definition of the human rights standards is without any doubts heavily influenced by the accelerating globalization trends in both positive and negative ways. The globalized economy, for example, fuels the widespread violations of workers' rights while at the same time encourages attempts for transparency and social responsibility of the main actors.

Universalism of human rights: Does universal mean Western?

The legal positivism derives the universality of human rights from the universal UN membership, ratification of one or both Covenants and general incorporation of the human rights' standards into the national legislation, particularly into national constitutions. It insists on the principle pacta sunt servanda and on naturally positive attitude of the states towards international law. Nevertheless, the legal positivism does not solve the problems of culture or tradition and is not able to deal with the divine law. On the top of that, taken into account the Euro-centrism or "westernization" of majority of international norms, it is clear that the notion of universalism based primarily on legal positivism cannot be maintained (Kälin and Künzli 2011).

Other proponents of the universality of human rights base their claims on the natural law. They argue that all legal systems introduce forms of protection of human dignity and tools for limitation of unlawful claims to power. Human beings are entitled human rights just for sake of being human beings. According to these authors, the Ancient Greeks considered human as free and rational and the Roman law stated a difference between the divine law and the ius gentium. The Christian as well as the Islamic law guarantee inherent human dignity and equality, the law of Manu and the Buddhists emphasized natural human demands and understood the necessity of these principles for a well-functioning community. Even during the early colonial periods colonialist attributed local populations with certain yet significantly different

sets of rights. Later on, the anthropocentrism overcame the theocentrism and the state became accountable to its inhabitants instead of to the divine power. All the major theorists of this period reminded the role of the state in assuring security (Hobbes), life, liberty and private property (Locke) etc. Finally, the father of universalism Immanuel Kant considered all humans free and demanded the legislation to guarantee this freedom to all people regardless the national boundaries. He emphasized that the natural law is both rational and man-made, and thus states are entitled to protect their citizens (Kälin and Künzli 2011; Steiner, Alston and Goodman 2008).

The current predominantly Western understanding of the concept of human rights is therefore based on both natural law and legal positivism. People are considered by nature equal and free, their dignity and autonomy shall be protected by the state which has the monopoly of power.

Opponents of the universality of human rights usually use counterarguments based on history, culture and cognitivity. Historical criticism points out the fact that human rights' principles came into existence due to specific conditions in the Western countries and are not transformable to other environments under different conditions (Kälin, Künzli 2011: 25). Given that the Western concepts focus mainly on civil and political rights (ensuring participation on political life and limits of the state power) and to certain extent workers' rights (mirroring the leftist movements of 19th century), there is undeniable connection between the human rights' principles and capitalist-liberal development of Western countries (Goodhart 2003: 936-938)

The cognitive critique orientates on the possibility to achieve a universal definition of dignity. Since it is not possible to explain one culture or social practice through another, standards and values are socially constructed and differ significantly and cultures cannot be unified. A supracultural point of does not exist and as a result in

case one of the cultural views prevails, it is again just success of a particular culture, not the sign of universalism (Shaw 2008: 41-41)

Cultural relativism of human rights: the relativity of relativism

Anthropologists have been dealing with the issues of culture relativity since the 1940s and especially feminist and postmodern theorists focused on the concept of local culture in their research (Nagengast, Turner 1997). In the field of international law the debate between the universalists and the relativists occurred with the adoption of the Universal Declaration of Human Rights (UDHR) in 1948 and later on the United Nations Covenant on Civil and Political Rights (UNCCPR) in 1966 which are said to reflect specifically the Western values whilst ignoring specifics of other societies. These instruments moved the protection of human rights from the state to the international level indicating that the way states treat their citizens are no longer their untouchable internal affair (Kälin, Künzli 2011). Shaw (2008) elucidates that given that the international law developed during the 19th century following Christian values and reflecting European position in the world, it is natural that principles accenting the Western superiority have been rejected or questioned. He describes the second half of the 20th century as a period of "internationalization of international law" (ibid 2008: 39) and gives as an example the International Court of Justice where the principal legal systems of the world are comprised.

In his work Stammers (1999) uncovers the relationship between human rights and power emphasizing that human rights' principles are socially constructed and depended on respective socio-cultural conditions; consequently they might be changed or re-created. The dependency on a social structures; nevertheless, denies or marginalizes the impact of divine or philosophical rules or ultimate rationalism. However, it is not clear who requires the international human rights law to respect the cultural relativism. Harris-Short (2003) claims that whereas states are willing to abide the human rights standards in order to modernize the society, the general

public is not convinced about the necessity of such changes or might perceive them as a threat imposed from the outside. In contrast Donnelly (2007) demonstrates on the example of African countries that on the one hand the governments demand the international norms to respect the culture and make exceptions based on traditions, on the other hand, within their own territory they suppress tribal traditions in order to create a homogenous Western-inspired nation state. Therefore, he calls for an authentic culture and alternatives of human protection, if cultural relativism is to be applied on a certain human right.

Cultural relativism: types and levels

Donnelly (1984) thought up a scale of relativistic thinking which diverged between the radical universalism at one far end and the radical relativism the other. While the moral rules are universally valid for the radical universalists, the radical relativists acknowledge the culture to be the only determinant of moral rules. For Donnelly, however, both of these extreme positions are neither justifiable nor feasible. Conversely, the strong and weak cultural relativists consider culture a principal, respectively important source of moral rules, but differ on the scope of universality. Extremely weak cultural relativity considers the majority of human rights universal with just a limited space for local adjustment or exceptions.

States often respond to external criticism of certain practices of social control or family issues by playing the culture card or by referring to the state sovereignty (Nagengast, Turner 1997). Scholars have not yet agreed whether the cultural relativism is just an excuse of governments wanting to maintain their power over people or whether the universalism is a mere product of the Western values and Westernization of the ruling class in the non-Western societies. Donnelly (1984) points out that the criticism of an ill-effect of Westernization and the importance to get back to the traditional life-style often comes from the Westernized urban elites who have no intention to live the traditional life-style themselves. On the top of that, in order to

achieve a sense of nationalism in a heterogeneous country, many mainly African leaders oppress their own people prohibiting ethnical specialties. He explains (1989) that cultural relativism should not derive from non-existing practices uncovering the fact that social structures of slums and impoverished areas of modern states in Africa are far from mirroring pre-colonial village structures.

In contrast, Harris-Short (2003) reminds that the subjectivity of perception and interpretation of a culture brings new difficulties to the universalism. Groups seeking a change within society are usually suppressed or discriminated against. This means that on the international level the state delegates advocate for a particular internal "culture of the masses" which does not necessarily reflect the reality. On the other hand, traditional interpretations of certain religious or tribal rules can be deeply rooted in the society, even though they do not comply with the original meaning. Polygamy in Islamic societies serves as an example how "men had interpreted Islamic law to suit themselves" (Delegation from Guinea in Harris-Short 2003: 168). She adds that states are aware of the positive and negative impacts of the culture or the traditions. In addition, in some countries the colonial rule or the globalization destroyed some parts of the traditional culture while reinforcing other parts. Consequently, if the states are willing to achieve a change of behavior or beliefs they have to learn lessons from the past and to proceed constructively rather than directively.

Donnelly (2007) argues that currently different cultures are able to find overlapping consensus on the human rights' standards. Furthermore, he adds that as well as historically the Western religious concepts did not praised human rights and changed over time, the non-Western values might be perceived both compatible and incompatible with them. The paradigm of human rights is generally considered a source of good practices and it is not widely questioned. Consequently, for various reasons both the international community and the state delegates seek ways to implement the paradigm yet not to adjust it to the cultural environment or enrich

the overall Western concept of human rights with other views. On the other hand, in practice states often point to cultural particularities which contrast or eliminate this perception. Harris-Short (2003) asserts that the universality of human rights albeit agreed on is being attacked to cover deliberate use of power on the marginalized population such as women, indigenous people or children. As an illustration, whilst freedom from slavery, torture and murder or freedom of conscience, speech and dissent are usually considered "immediately enforceable" (Nagengast, Turner 1997: 1) collective, social or economic rights are more controversial. In Saudi Arabia, for example, women are traditionally not allowed to practice sports in order not to hurt themselves or not to follow the devil. Therefore, girls are basically excluded from the physical education, even though in 2006 the official statement of the Saudi Arabia delegation declared that children were supported in numerous physical activities. The same statement, however, did not mention that children only referred to boys and that the country obviously violates the non-discrimination principle of the UNCRC (HRW 2012).

The proponents of the term cultural imperialism[5] argue that Western scholars and theorists, NGOs and policy makers do not respect the traditional structure of a respective society and that they overestimate the role of an individual at the expense of a group. Others advocate for differentiation between public violation of human rights committed by a state and therefore a subject of international law; and private and often voluntary acts unknown to the Western-thinking critics but with deep cultural background (just as FGM or wife burning). Nagengast (1997) answers that even though the primary function of the international human rights law is to protect people from the misuse of the state power; it is also intended to hold states accountable for ensuring the basic human rights standards within their territory. It means penalization of the individual acts violating human rights. She asserts that despite the fact that the actual codification of human rights is based on

[5] Huntington (2001) uses the term imperialism of human rights to describe current situation in international organization such as United Nations, International Monetary Fund etc..

the Western standard the other ancient societies also introduced social and moral standards which do comply with the basic human rights.

According to Harris-Short (2003) while the elites and the country representatives genuinely support universality of particular human rights, cultural specifics (and mainly those related to family, children or women) complicate or make implementation impossible. She presents female genital mutilation (FGM) as an example of a distance between an official human rights policy and a possibility to implement it because it is obvious that a strong international pressure on governments clashes with an internal resistance of people. Similarly, Nagengast tries to find a middle way which merges the universalism on one side and respect to the local culture on the other one arguing that "the concept of culture [which] is today used also grievously penalize those "minorities" to whom respect may be intended" (1997: 350). She points out that the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) is an example of misusing the cultural relativism to disapprove the equality between women and men in terms of sexuality, freedom of religion or position within family. The relativity of human rights perception is stressed and the liberal concept based on individual rights is rejected by the non-Western countries because it weakens the traditional sense of community life. She claims that women usually suffer from violation of their rights despite the existence of special laws to protect them. Ironically, "men treat women like "angels of culture" who must be protected from themselves and from the outside world" (Nagengast 1997: 359); nevertheless, this protection often leads to a lack of political or civil rights criticized by the NGOs or UN bodies.

Donnelly (1989) comes with a doctrine of cultural relativism claiming that there are culturally determined practices and traditions that cannot be legitimately criticized. He acknowledges that universalism must be based on universal moral rules shared by a universal moral community, nevertheless, such assumption is not acceptable under current situation which is symbolized by increasing cultural gap. Supportive to

Donnelly's statement Lehmannova (2010a) describes the divergence of the global values. She asserts that the three distinctive structural dimensions of the social reality – techno sphere, norms and institutions, and values and spirituality – occur on different levels of integration, in case of values and spirituality Lehmannova (2010a) talks about disintegration as a result of the accelerating globalization.

Facing the problem of the different behavior of the state elites and the people Donnelly (1984, 1989, and 2007) [6] comes with three levels of relativity in implementation of human rights:

1. the substance of list of human rights;

2. the interpretation of particular rights;

3. the form of implementation of particular rights.

Donnelly asserts that lower levels always specify the upper ones. He believes that a culture has a great influence on the interpretational level of particular rights; moreover, the interpretational differences are more exposed to external judgments, and thus the range of cultural relativism remains limited. The form of implementation embodies the most relative approach and depends on the efficiency of political implementation of particular rights (often influenced heavily by economic and social preconditions). In contrast to the lower levels, deviations on the substantial level are rarely acceptable and only possible for the rights on "the edges" (1989: 117). The substance of the list of human rights should express international normative universality, in extreme cases a weak universality. Among such extreme cases of approved relativity, Donnelly (2007) reckons exceptional differences of the threat (e.g. threat to Indigenous people); disagreement over details

[6] Within the latest work (2007), Donnelly uses terms *concept*, *conception*, and *implementation* instead of *substance*, *interpretation* and *form*. Not to confuse with *concept* and *conception* of childhood used in following chapters, this thesis works with the former terms.

not threatening the general meaning of the substance list; deep believes based on autonomous choices; and low level of coercion.

Donnelly (1984: 402) asserts that the international consensus voiced through the International Bill of Human Rights in spite of differences among the modern states symbolizes a weak relativist or a relative universalist approach towards human rights, where a human being poses universal rights, yet cultures could be sources of limited differences in interpretation or form. He (1989) uses an example of the right to political participation explaining that on the substance level it is generally agreed people should have rights to participate in politics; on the contrary, the interpretation of the type of participation (electoral or non-electoral participation), democracy (direct or non-direct democracy) or the political system (multiple-party or one-party) is a subject of wild discussions and quarrels.

In addition, Donnelly (1989) believes that the cultural relativism stems from a logical construct stating that if human rights are to be culturally relative and at the same time to emanate from the human nature, then the human nature must be at least partially culturally relative. Hence the human nature is a product of both the society and the nature.

Beside the levels of relativity in implementation, Donnelly (1989) defines types of evaluative controversies related to human rights. A model similar to the models of game theory combines two types of judges (internal and external) with their own values influencing their judgments and two types of judgment (important and unimportant). Each judge decides on defensibility of a given topic based on core values of his own culture, thus may further express a positive or a negative opinion. For the first type of controversy (uninteresting), a particular topic seems unimportant to both judges, positive or negative opinions on both sides do not have any implications. For the second type of controversy (insensitive), the external judge considers the topic unimportant while the internal judge considers it important. In

such case Donnelly (1989) warns about danger of cultural arrogance from the outside, because a negative external opinion can lead to serious consequences. For the third type of controversy (most effective), the external judge considers the topic while the internal judge unimportant, in such situation there is a great moral importance of the topic for the exterior and low for the interior. If the exterior does not fail to be culturally aware and sensitive, this situation creates the best position to achieve an internal change. In contrast, the last type of controversy (most difficult) usually results in cultural clashes.[7] In this case, both internal and external judge subscribes great moral importance to a particular topic and in case of opposite positions the conflict is unavoidable. Donnelly (1989) explains the conflict by inability of the external judge to overcome his own identity and moral values. He argues that the Western morality is based on Kant's philosophy of ius cosmopoliticum (Kant 1999) and as a consequence does not believe that "our moral percepts are for us and us alone" (Donnelly 1989:116). In such case, cultural relativism is unacceptable for the Western culture tight by its own moral viewing that requires it to deny any other options, yet at the same time, the only adequate solution for the other culture. Although not explicitly expressed in any of his texts, due to the cosmopolitanism rooted in its cultural paradigm,[8] the Western culture usually plays the role of the external judge. Furthermore, due to decades of political, economic and to certain extent social hegemony over the rest of the world, the Western culture also serve as an exporter of its own values abroad.

Other scholars also use arguments supporting the three-level theory of relativity. Harris-Short (2003) points out that a universally accepted right to culture in India represents not only the preservation of one's culture but the non-imposing of a foreign culture as well. Similarly, while accepting the necessity of a special treatment of a child, Islamic countries reject the possibility of a universal definition of the best interest of a child emphasizing that Koranic law and local traditions define

[7] However, not in the sense and the implications of Huntington's Clash of Civilizations.
[8] Based on the principles of rationalism, human activity and common good (Lehmannova 2010b)

their own specific concept which should not be judged with a biased prejudice. Nagengast (1997) identifies three dichotomies (individual versus group rights, civil and political versus cultural and economic rights, public versus private rights) that often use the concept of cultural relativity to argument against universalism of human rights. Nevertheless, having just argued that there are three levels of relativity it might be concluded that those dichotomies come under the interpretation level.

Universalism vs. relativism – conclusion

The debate emerging between the universalists and the relativists can have several possible outcomes varying from not reaching any conclusion due to incompatibility of totally polarized opinions to complex view labeled as the culture determined universalism (Nagengast, Turner 1997). Donnelly (2007) states that culture as the main determinant of a particular social behavior is a mere fact, and thus cannot be denied.

Stammers (1999) summarizes the criticism of the mainstream ideas on both sides of the discourse. The proponents of the human rights' universality often derive their views from metaphysical abstraction emphasizing independency of the rights on the social reality, which obviously contradicts author's view of social movements and social agents as crucial actors in the long-term development. Furthermore, it denies the fact that human rights, such as other elements of social reality, have been socially constructed. The legal positivism, on the other hand, concentrates too much on codified norms accepting the universality as given. Non-legal or non-institutionized forms of human rights are excluded from the discourse. Besides that, the legal positivism is based on the state-centric notion of human rights' protection, because it is concerned above all with development and enforcement of existing norms or institutions.

In contrast, strong relativism which can vary from accenting particular cultures and their undeniable differences to postmodern analysis rejecting meta-narratives of all

kinds does not comply with real long-term socio-economic and cultural development which proves cultural exchange and dynamic change in time exists. Moreover, it overlooks the homogenization and unification of global politics and economics and their impact on change of power structures. In this context, Stammers (1999: 993) argues that regardless the necessity of human rights in the past, the current situation in many places around the world requires human rights standards to be followed.

Interestingly for the universalist-relativist discussion, Goodhart (2008), based on Donnelly's arguments supporting the relative or the weak universality, comes with a theory denying both universalism and relativism as viable terms to describe the concept of human rights. Instead, he claims the legitimacy of enforcement and usefulness of human rights due to their global application, and emphasizes the increasing inclusion and the generalization of the human rights standards balancing the expanding number of threats, regardless their metaphysical or philosophical status.

1.2. METHODOLOGY

The case study of this thesis is basically divided into two parts. In the first one – Chapter 2 – I introduce the concept of the inter-country adoption, its basic provisions and a brief historical overview. Furthermore, this part explicates the origins and the evolution of the inter-country adoption in terms of changing parental motives, state involvement, benefits and obstructions, globalization and global debate on the rights of the child. It searches for the original roots of the inter-country adoption deeper in the history to explain primary motives to adopt foreigners in the Western countries. Chapter 2 also familiarizes with various opinions on inter-country adoption.

The second part applies the main conclusions of the Donnelly's theory of cultural relativism on respective parts of the Hague Convention in order to analyze their compliance with the theoretical demarcation of cultural relativity. Chapter 3 analyzes

the Convention on the substantial level and compares it with the UNCRC. Chapter 4 compares various concepts of the substitute child care in different societies and legal systems with the Catholic Canon Law and its follow-up represented by the modern civil law. In the end of the Chapter 4, I introduce a compliance analysis based on Donnelly's theory of evaluative controversies. Chapter 5 focuses on the interpretational level of the Hague Convention and emphasizes practical internal obstacles of the Hague Convention that makes it even more relative. The last Chapter examines the Hague Convention from a practical point of view. The comparative analysis acquaints with different standpoints regarding the functionality and the efficiency of the Hague Convention's provisions. On purpose an extra emphasis is given to relations of the Hague and the non-Hague countries to underline diverse approaches and procedures.

I argue that the concept of the inter-country adoption, albeit it seems global, is in fact alien to the majority of societies. Given, that the Hague Convention tries to introduce new measures with a potential to achieve a global (not universal) application. Keeping this in mind, I answer the first research questions based on the theoretical framework and the Chapters 2 and 3. To find answers to the second research question, I examine the Donnelly's theory in Chapters 3, 4 and 5.

2. INTER-COUNTRY ADOPTION: INTRODUCTION TO THE PHENOMENA

The term inter-country adoption refers to a form of adoption by non-relatives where the adopted child is a resident or a national of a different country than the prospective parents (Bartholet 2005: 107). In the past years it has become a highly controversial topic among scholars and experts in various fields. The inter-country adoption is a subject of research of sociology (Shura 2010), psychology (Brodzinski, Singer, Braff et al. 1984), family studies and social work (Judge 2012), anthropology and gender studies (Briggs, Marre 2009), international law (Bartholet 2005; Smolin 2005; Mezmur 2009; etc), international relations (Sargent 2009) and other social sciences, however, there are also medical studies, physical or mental development and health issues of internationally adopted children (Cogen 2008, Gindis 2008 [online]).

2.1. TERMINOLOGY AND TYPES OF INTER-COUNTRY ADOPTION

Within the respective literature the inter-country adoption is also referred as international (Bartholet and Dillon 2008, Johnson 2002, Pereboom 2007, and others), transnational (Carlson 1988) and also might be understood as transracial. This difference in terminology (excluding transracial adoptions) does not seem to have any significant influence on the topic discussed and the meaning is interchangeable. However, the international legislation obviously operates with the term inter-country adoption strengthening the position of the state in the process.

Since the inter-country adoption obviously derives from domestic adoption, it is important to understand exactly the term adoption.[9] In context of this thesis the adoption refers to:

[9] Formal adoption is used in case the term adoption might become unclear or misleading.

> "[an] act of adoption of a child by a non-biological parent/ s which constitutes legal relations between the child, the adoptive parent/ s and their relatives" (Pecinka 2007: 46)

as well as to:

> "[a] legal procedure through which a permanent family is created for a child whose birth parents are unable, unwilling or legally prohibited from caring for a child" (Triseliotis in Department of Economic and Social Affairs 2009: 28)

The legal consequences of an adoption usually do not distinguish between domestic and inter-country adoptions; however, they might vary in conditions and requirements for both the children and the prospective parents. Pecinka (2007) describes different types of adoption based on preservation of relationship between the child and the biological family and based on marital status of adoptive parents. Full adoptions terminate completely all legal relations between the child and the biological family and at the same time establish new legal relations between the child, the adoptive parent/ s and relatives of the adoptive parent/ s. These legal relations correspond with the legal relations in a biological family. In contrary, incomplete adoptions maintain at least some legal relations and the adopted child is not legally fully incorporated in the adoptive family.[10] In terms of marital status – requirements on the prospective parents may deviate from heterosexual[11] married couples to single parents (Pecinka 2007: 46-47).

Apart from the traditional actors in domestic adoption (birth family, adoptive family, child and governmental agency), the inter-country adoption involves additional elements such as Central Authorities, adoption agencies, adoption agents or mediators, orphanages and foreign child care institutions. On the top of that,

[10] The Czech legal system does not anchor incomplete adoptions.
[11] Homosexual couples are allowed to adopt a child in Argentina, Belgium, Brazil, Canada, Denmark, Iceland, the Netherlands, Norway, South Africa, Spain, Sweden, the United Kingdom and Uruguay.

the children are usually moved away from their culture,[12] often losing all their personal contacts, language skills and they might face difficulties with incorporating into the new culture. Due to this complexity and a relative intricacy and as well as due to the Western countries being the exclusive receivers while "the global South"[13] the main sources of adopted children, the views on inter-country adoptions varies significantly.

Carlson divides the discourse participants into three rough groups: vigorous supporters (2010: 739-741), moderate critics (2010: 763-769) and cynical critics (2010: 741-763). Masson (2001) uses a similar division defining groups of abolitionists, pragmatists and promoters. The vigorous supporters/ promoters promote adoptions in general and inter-country adoptions in particular, emphasizing that having a loving family is ultimately in the best interest of a child, criticizing the principle of subsidiarity as a threat to children's potential well-being. Often, they are characteristic by great mistrust to governments relying heavily on private agencies while dismissing the counter-arguments based on extensive amount of child trafficking cases and money laundering. The works of Bartholet (1991, 1993, 2000, 2005, 2007, 2008, 2010), Hubing (2001), Saunders (2008), Amato (1998), and Dillon (2003, 2008) represent strict pro-adoption arguments.

The moderate critics/ pragmatists acknowledge that children might benefit from inter-country adoptions; nevertheless, they respect and support the principle of subsidiarity as well as they admit a regulatory vacuum, high risk of corruption and illegal activities (fraud, kidnaping, child trafficking) evolving from a high demand for adoptable children. They also often counterbalance the immeasurable best interest of the child with interests of the birth family and the wider community. Among the number of other moderate critics belong for example Oreskovic and Maskew

[12] Majority of inter-country adoptions move children to Western/ American culture.
[13] In this context "South" comprises of Africa, Latin America, South and South East Asia, China and former USSR and socialist countries.

(2008), UNICEF (2003, 2004, 2009) and other NGOs, Heckel (2010), Wallace (2003), Thompson (2004) or Carlson (1988, 2010) himself.

In contrast to the previous groups, the cynical critics/ abolitionists categorically renounce the inter-country adoptions by questioning the true motives of adoptive parents, by claiming that the interest of the child himself is irrelevant or that the institutional care itself is not necessarily harmful while it additionally preserves the child's cultural heritage. They also advocate for the interests of the community of origin suggesting neo-colonialist notions in inter-country adoptions and often point out injustice of inter-country adoption in relation to children "left behind" (explained in Carlson 2010: 753). Although the loudest opponents and cynical critics are recruited among politicians or within the ruling class in sending countries, following scholars are full members of the club as well - Berquist (2004), Smolin (2005, 2007, 2010a, 2010b), Selman (2002, 2007, 2009, 2011), Gailey (2000), Kapstein (2003, 2010), Graff (2008) and Baroness Nicholson who in spite of not being a scholar contributed heavily to the discourse due to her role in the total ban on inter-country adoption in Romania (in Pereboom 2007: 6, in McKinney 2007: 376).

Even though the above distinction is very useful for dividing the scholars according to their primary attitudes towards inter-country adoptions, I find especially the groups of critics extremely simplified. While the Western critics often focus on the prospective families and their true motives or fear of extensive criminal activities connected to the inter-country adoption, the authors of the countries of origin often raise additional questions while still acknowledging the possible positive aspects of the inter-country adoption. However, mainly those authors often come out with the cultural determination of such adoptions. Mezmur (2008a, 2008b, 2009), Roby and Shaw (2006), King (2009) the African Child Policy Forum (2012) and others offer a less Western-oriented point of view on the inter-country adoption.

Actors and procedures of inter-country adoption

Biological parents are usually understood under the term birth family, however, the extended family is taken into consideration if a child is about to be relinquished for adoption. An adoptive/prospective family refers to a person or couple willing to adopt a child in a foreign country. Countries involved in the inter-country adoption are divided to countries of origin or sending countries and receiving countries.

The position of private agencies has shifted since the occurrence of several cases of human trafficking and baby selling scandals in which private agencies were directly involved. In Guatemala, for example, various reports conducted by among others UNICEF or Hague Conference on International Law proved that non-regulated inter-country adoption attracts illegal practices and corruption of responsible state officers (Heckel 2010: 11-15). According to criteria of HCPIL[14] the contemporary adoption procedures might be divided to: 1) Hague Convention regulated adoptions with accredited private bodies;[15] 2) Hague Convention regulated without accredited private bodies; 3) public/ government processed adoptions in non-Hague countries and 4) non-regulated private adoptions.

The first type of procedure is possible in countries where private agencies accredited under the Article 10 and 11 of the Hague Convention are allowed to mediate the inter-country adoptions. However, the private agencies or other accredited bodies are not allowed to make a final adoption decree or to certify adoption (HCPIL

[14] According to the Guide to Good Practice (HCPIL 2008b) there are three different ways to process the inter-country adoption through a) governmental body; b) private agency and c) independently. The first two variants are accepted under certain conditions and regulated by the Hague Convention. The Guide to Good Practice defines independent adoption as "[a case] where the prospective adoptive parents are approved as eligible and suited to adopt by their Central Authority or accredited body […] they then travel independently to a country of origin to find a child to adopt, without the assistance of a Central Authority or accredited body in the State of origin (HCPIL 2008: 16). The independent adoption does not fulfill all necessary requirements of the Hague Convention and should not be approved. However, the term independent adoption should not be confused with private adoption which means that prospective parents from one country agreed on an adoption directly with birth parents from another country without any assistance of public authorities (or accredited bodies if signatories of the Hague Convention). In case such an adoption undergoes in two Contracting states of the Hague Convention, it does not comply with the Hague Convention and it also cannot be processed (HCPIL 2008: 115-116).

[15] The term accredited body refers to "an adoption agency which has been through a process of accreditation in accordance with Articles 10 and 11; which meets any additional criteria for accreditation which are imposed by the accrediting country; and which performs certain functions of the Convention in the place of, or in conjunction with, the Central Authority" (HCPIL 2008: 10).

2008: 39).[16] Colombia, South Korea and the USA might serve as examples. The second type of procedure occurs in countries such as the Czech Republic where the inter-country adoption (in both positions as either receiving or sending country) can be processed only through the Central Authority[17] (UMPOD 2013).

The third group of countries where public authorities (social service, courts, ministries etc.) are mainly responsible for inter-country adoption comprises mainly of African countries. In 2008 seven[18] out of 54 African countries were parties of the Hague Convention. The Madona's adoption from Malawi revealed many issues that those countries face. Malawi as well as majority of African countries follows the CRC[19] and ACRWC[20] and its own adoption acts.[21] Mezmur (2008a: 22) in reaction to several adoption scandals[22] in African countries argued that the Hague Convention has a potential to target illegal adoptions, if the states manage to ratify and properly implement it pointing out the issues of unclear interpretation of subsidiarity, informed consent and corruption. In the last case, inter-country adoptions are under full control of the private entities, government or public service does not interfere, either because it is not willing to or is not able to like in Guatemala, Romania, Cambodia, Georgia, China etc. (Wechsler 2009: 35-39).

Even though nowadays public adoption programs are preferred by the international community, the majority of sending countries and major human rights or child rights organizations; originally, the inter-country adoptions started as private acts of families, charities or NGOs. Taking into account the fact that USA citizens keep adopting internationally more than any other nation in the world, adoption agencies

[16] Each contracting state is required to submit an organigram stating authorities responsible for particular functions of the Hague Convention (see HCPIL 2008: Annex 6).
[17] Urad pro mezinarodnepravni ochranu deti (the Agency for International Protection of Children) was appointed the Central Authority in the Czech Republic in 2000.
[18] Burkina Faso, Burundi, Kenya, Madagascar, Mali, Mauritius and South Africa (Mezmur 2008: 8).
[19] Except from Somalia which has not ratified CCR yet (Buck 2011).
[20] Except from Central African Republic, Djibuti, Democratic Republic of Congo, Sahrawi Arab Democratic Republic, Somalia, Sao Tome and Principe, Swaziland andTunisia which have not ratified ACRWC yet and Morocco which is not a part of African Union (ACRWC Ratification Table available at http:/ / pages.au.int/ acerwc/ pages/ acrwc-ratifications-table).
[21] In Malawi inter-country adoptions must comply with the Malawi*'s* Adoption Act originally called the Adoption of Children Ordinance enforced in 1949 by the colonial government.
[22] Namely Madona's adoption in Malawi, Angelina Jolie's adoption in Ethiopia and the case of humanitarian aid workers from Zoe's Arc in Chad.

still hold their position in the main donor countries such as Russia, Nicaragua or China.[23]

In case of the private inter-country adoption, a licensed agency either local or international is responsible for ensuring safe and legal transfer of a child to his or her new family. These agencies vary in both their size and professionalism. The Hague Convention poses restriction to private agencies operating in countries which are parts of the Hague Convention. The private adoption agencies usually use marketing practices to attract potential adoptive parents, albeit their resources might be limited and vary a lot (Nelson-Erichsen 2007: 15-16). Despite licenses and certifications which are supposed to separate ethical agencies from the others, there are numerous intermediaries such as lawyers, doctors, social workers, unofficial adoption agents etc. who are responsible for choosing a child, getting consent with adoption, obtaining necessary health documentation and other activities. Since there is usually no real supervision, even a licensed agency does not have full control over the processes leading to a child's adoptability. This structure particularly creates a space for corruption, illegal practices or baby selling (Clair 2012; Wilken 1995). However, in contrary to the government supervised adoption process, it usually takes less time and therefore it has a positive impact on the child's mental and physical development (Bartholet 1993). Private agencies involvement is particularly favored by strong proponents of inter-country adoption who highlight its humanity and speed (Oreskovic, Maskew 2008: 74).

In spite of the fact that international community does not entirely abandon involvement of private entities in the adoption process, the Central Authorities created under the Hague Convention aim to strengthen the position of public social care and the state involvement. Estin (2010: 57) states that both countries involved in the adoption process have the right to delegate any adoption procedure to an accredited public or private entity, but until both Central Authorities agree with

[23] The list of USA approved inter-country adoption agencies available on: http:/ / adoption.state.gov/ hague_convention/ agency_accreditation/ agency_search.php.

the adoption and the Hague Convention's requirements are fulfilled, both countries can veto the adoption based on their own policies.

The domestic child welfare system and private or public child care institutions also play a crucial role in adoptions. While in the developed countries the institutional care generally provides safe environment for the development of children with respect to their physical or mental abilities and foster care is commonly used, the Third World countries usually lack sophisticated modern systems of child care, the traditional systems are discussed in Chapter 4.1., institutional care prevails over foster care and does not always include all in need. Children are therefore left behind on streets or in insufficient and harmful conditions within birth families or relatives. In terms of international arrangement of inter-country adoption, the hierarchy of possibilities of the out-of-birth family care follows usually the principle of subsidiarity. This principle formulated within the Hague Convention[24] demands the contracting parties to support the biological families not to surrender a child, to seek an adoptive family within the state of origin, and to assure a protective environment respecting these demands (Sargent 2009). Shortly, the principle of subsidiarity favors the inter-country adoption over the institutional care but not over any means of family care in the state of origin.

It is important to notice that international regulations on a child care do not stand alone and that countries use other legal instruments to control inter-country adoptions. Since countries vary significantly in cultural, social, ethical and legal backgrounds and attitudes towards adoptions in general, there is a wide range of requirements for inter-country or domestic adoption. There are two main types of legislation on international adoption – national and international. On the national level the inter-country and domestic adoption legislation usually comes out of traditional and religious conceptions of adoption and foster care; nevertheless, often

[24] The principle of subsidiarity varies in the UNCRC and the Hague Convention. The UNCRC favors the in-country care even in case of the institutional care and thinks about the inter-country adoption as the last possible option. See Article 21 (b).

heavily influenced by the Western standards (Mezmur 2008a, ACPF 2012). On the international level, as discussed in Chapters 4 and 5, the inter-country adoption legislation is more likely to be influenced by the Western adoption practices. There are general, regional and bilateral agreements. They vary significantly in terminology, typology of contracting parties, attitude towards the problematic of adoption and legal enforcement.

2.2. EVOLUTION OF INTER-COUNTRY ADOPTION

Adoptions before the World War II

There are several theories on the beginning of modern inter-country adoptions. Majority of scholars agree on the first wave occurring with the Korean War. However, first transports of children from poorer areas to the richer ones occurred in the USA between 1864 and 1929. At that period the *Children Aid's Society* relocated thousands of street children from New York to various Christian families within the country. Even though these so called orphan trains did not move children across the borders, the aim to rescue children from unhealthy environment has been present among main arguments for the adoptions ever since (King 2009: 419-420). In the USA before the World War II, the adoption process was not seen as a viable solution for childless couples. Social pressure required blood lines between children and parents and fostering somebody else's child was seen just as an act of mercy. Adoptions became more tolerated[25] in the second half of the 20th century; however, customs required adopted children to mirror biology thus transracial adoptions did not exists. On the top of that, the immigration law which imposed quotas on social classes and countries made inter-country adoption impossible, even a child adopted by an American citizen had little chance not to be denied (Carlson 1988: 323-324).

[25] All American states had enacted adoption legislation for in-America born children by 1930s (Carlson 1988: 323).

Modern Inter-country Adoptions in the 20th century

Davis (2011) defines five major waves of the inter-country adoption according to the region of origin of adoptees: 1) war orphans, 2) Latin America, 3) Eastern Europe, 4) China and 5) Africa. The first war orphans came from Europe (often from Germany and other defeated countries) soldiers fighting in Korea or Viet Nam brought the majority of adopted children to the USA. While Latin America and lately Eastern Europe became sending countries mainly due to poor conditions in the institutions, China largely contributes because of the one child policy and tradition of a male child preference. Africa, on the other hand, faces tremendous numbers of HIV/ AIDS orphans.

Alexandra Young (2012) presents an alternative view on history of inter-country adoptions. Her study describes the evolution of modern adoption in three waves according to adoptive family motivation– humanitarian response (1945-1975), period of reciprocity (1975-1991) and market-driven policy and beyond (1991-2005). During the initial phase the donor countries faced problems with wars or conflicts and the USA was the main receiving country. In the second phase mutual benefits prevailed because parents who did not succeed in adopting at home were able to adopt abroad, and thus lower the burden of abandoned children there (Young 2012: 4). This phase experienced significant growth in the inter-country adoptions as well as in the number of sending countries. The third phase represents a growing demand for children and an increase in illegal practices; market-like businesses profiting from adoption mediation pushed behind the well-being of children. Fortunately, in this phase the international community started to discuss the ill-effects of the inter-country adoption. Young (2012) describes contemporaneity as a possible child-centered adoption phase in which fewer children are available for the inter-country adoption and their nature change. However, Young's point of view focuses mainly on the USA as the main actor in receiving children from abroad, and thus operates with the strongest stream.

In the introduction to their book Diana Marre and Laura Briggs (2009) include European perspective of the inter-country adoption. Stating that before the World War II, the inter-country adoption or the foster care took place mainly due to humanitarian reasons. In Europe a lot of children were rescued from countries undergoing political turmoil or civil wars. Because dictatorships, wars and internal conflicts caused increase in civilian victims there was an urgent need to take care of orphans and vulnerable children. During the 1930s thousands of children from Spain, Germany, Austria, Czechoslovakia,[26] Finland etc., were transported to foster and adoptive families in the United Kingdom, United States, Canada, Soviet union or Scandinavia (Briggs, Mare 2009: 2-3). However, rescued children were encouraged in maintaining relationships with their parents and families and new hosting families were rather foster than adoptive. It was generally believed that refugee children would reunite with their families. In cases where parents died or went missing, like in case of Jewish children, international organizations sought other members of family before the child was given to a permanent care to anyone else (Briggs, Mare 2009:4).

As a part of the Cold War, alienate superpowers launched different programs to alleviate poverty across the world. Children from underprivileged families were one of the target groups for the new policies. In the USA on the domestic level this shift in policies brought an increase in number of non-white children in institutions and further pressure to place children to the right families. Experiencing success with placement of Korean children into racially and religiously different environments, the government experimented with Afro-American and Native children adopted into white families. In the 1970s, Canada and the USA launched a program assisting in cross boundary adoption of Native children.

On the international level, the proxy wars mainly in Latin America enabled the inter-country adoption to be misused for political reasons. CIA is believed to play a key

[26] The most famous case were so called Winton trains when mainly Jewish children were evacuated from Czechoslovakia in 1930s to the United Kingdom to be protected from Nazis.

role in the operation Pedro Pan when 14 000 Cuban children were moved to the USA as a part of anti-Communist and anti-Castro policy. The rest of Latin America as well experienced kidnapping and unlawful removal of children from people in opposition or accused of leftism and communism. Such cases occurred for example in Argentina, Chile, El Salvador, Guatemala, Nicaragua or Brazil (Briggs, Mare 2009: 11). Based on previous willingness of many Western families to adopt children from war-zones or areas of civil unrest, Latin American countries launched programs of inter-country adoption sending abroad together with the others even children disappearing for political reasons, nevertheless, this practice was abandoned during the following transformations to democracy. Even though some countries (such as Guatemala) have not managed to get all the problems under control, majority succeeded to decrease the number of internationally adopted children, while increasing domestic adoptions (Briggs, Mare 2009: 11-12).

War orphans and humanitarian adoptions

First wave of war orphans' adoption as perceived nowadays dates to the end of the World War II. Especially in Europe the conflict destroyed homes and families of millions of children. Save the Children placed orphaned and displaced children to new homes in Great Britain and several Scandinavian countries. Meanwhile, in the USA Committee for the Care of European Children found new homes for about 300 Polish, German, Greek and Italian children. (Thompson 2004: 444-445). Carlson (1988) highlights that public awareness about the war atrocities was not the sole motivation for inter-country adoptions and points out that the demand for children to adopt already grew faster than the supply in the USA. The Congress further enabled the process of inter-country adoption by passing the Displaced Person Act in 1948.[27] The Act served to simplify arrival process for refugees from Europe; however, its provision on orphans had been amended and extended for more than ten years to allow the inter-country adoption from various parts of the world. According to

[27] The Displaced Person Act was a temporary solution for two years. In 1950 it was amended to last two more years and at the same time the list of countries was extended (Carlson 1988: 327-328).

Selman (2009) between 1948 and 1962 nearly 20 000 children, mainly from Europe, were adopted by Americans.

The Korean War brought new opportunities for American families to adopt a child. Thompson (2004) indicates the Korean emphasis on homogenous society as the main reason why the after-war society was not able to include mixed race children. Korean women giving birth to a half Korean half American child were considered military prostitutes, children with this burden were excluded from the society and exposed to despise. In 1954 the South Korean government established a special body to place these children for adoptions abroad (Kim in Sargent 2010: 244). At that time, the international legal framework for inter-country adoptions did not exist. A vast majority of adoptions, thus, was mediated by private agencies. Governments were only slightly involved (Sargent 2010: 243). The USA government regulated the arrivals of Korean children by Refugee Relief Act of 1953,[28] which did not deal primarily with children but with refugees fleeing from the Communist Europe (Carlson 1988: 328). The inter-country adoption at that time was mostly seen as an act of humanity or help to homeless children from the war. Berquist (in King 2009:420) describes the role of media covering the Korean War in the extent not possible before. Due to this strong picture of poverty and helplessness, Korea became one of the most important suppliers of babies to the USA. The turn of Korean adoptions did not come until the political pressure during the Olympic Games in Seoul in 1988 accusing the government from excessively benevolent attitude towards adoptions managed to reverse the trend (Thompson 2004: 44; Wallace 2003: 693).

It is possible to conclude that the first wave of inter-country adoptions was mainly fueled by humanity or humanism of people in richer and peaceful regions (represented by the USA at that time). A lot of families invited these children to their homes believing that this was their only chance to live and survive. Nevertheless, the first signals of scarcity of American (lately Western) children available for national

[28] The Refugee Relief Act removed national origin restrictions and allowed adoption to all American families, nevertheless, the Act only served for limited time expiring in 1956 (Carlson 1988: 329-330).

adoption appeared at that time as well. Within less than two decades from the end of the World War II the inter-country adoption in the USA had become such an important source of children for American families, that in 1961 the Congress passed the Immigration and Nationality Act which accepted "the immigration of adoptable children [as] a permanent fixture of the immigration law" (Carlson 1988: 330).

Baby-boom versus shortage of infants

The second wave of international adoption came with the accelerated globalization of poverty, diseases, underdevelopment and economic and political changes. By the 1960s Europe [29] had recovered from the war atrocities and experienced economical growth accompanied by a falling supply of adoptable children of European origin (Carlson 1988: 330-331). In the USA, however, the demand for adoptable children soared.

Since the 1970s the USA lost its exclusive position as the only receiving country. Spain, Italy, France and Scandinavian countries underwent shortages of adoptable children as well. The inter-country adoption was also perceived as means to help children in institutions (Ruzik [2009]: 1). In hte 1980s the USA represented 48 % of all adoptions, followed by France (11 %), Sweden (9 %), the Netherlands (7 %) and Italy (6 %) (Kane 1993: 6).

Table 1 Top receiving countries between 1970 and 1998

	1970	1975	1980	1985	1990	1995	1998
USA	2 409	5 633	5 139	9 285	7 093	9 679	15 774
Sweden	1 150	1 517	1 704	1 560	965	895	928
Netherlands	192	1018	1594	1 138	830	661	825
Norway	115	397	384	507	500	488	643

Source: Selman 2002: 211

Table 1 declares the overall prevalence of the number of children adopted to the USA, however, while in 1998 there was 11.2 adoptions per 1 000 births in Norway,[30] in the USA the number reached only 4.2 (Selman 2012: 213). It is important to note

[29] Western Europe.
[30] 10.8 in Sweden, 9.9 in Denmark and 9.2 in Switzerland.

that in receiving countries the trend of inter-country adoptions opposed the general tradition of children mirroring parents. In this context, Bergquist (2004) talks about social change brought in by the Civil Rights Movements and Women Movements in the 1960s which required an internal change of the American society.

South Korea has played a crucial part in the history of the inter-country adoption. It is the only sending country which has been holding the front positions in number of adoptees sent abroad for almost fifty years. Kim (2005) states that the emphasis of the Korean Confucian society on bloodlines and low level of social services for impoverished families, and an attitude to the female sexuality contrasting with the overall sexual practices left thousands of single mothers – factory workers in the 1960s and the 1970s, single university students in the 1980s and teenage mothers until recently – in a desperate situation. Although South Korea remained the main supplier of children towards the USA, the centers for adoptable children shifted towards developing countries. In the 1970s Latin America experienced series of civil wars and a period of instability. Between 1973 and 1975 the number of children adopted abroad tripled and reached 997. Colombia became the first Latin American country open to inter-country adoptions. It was the second largest supplier after South Korea in 1975 (Selman 2009). Later on Colombia was followed by El Salvador, Mexico, Brazil, Chile and Guatemala. In the 1980s Brazil was the fourth biggest supplier of children worldwide. In 1989 ten countries represented 90 % of all adoptions – Colombia, Brazil, Chile, Guatemala, Peru and El Salvador were amongst them (Kane in Young 2012: 5).

Latin America together with East Asia remained the major supplier of babies in the 1980s as well. Viet Nam[31] and South Korea introduced new policies to reduce the number of children - contraception and sterilization lowered the fertility rates (Young 2012). Latin America, on the other hand, increased the share of total children sent for adoption to 37 %, mainly because of Colombia (Young 2012). A majority of

[31] Vietnamese government responded mainly to the Operation Baby-lift (Alstein and Simon: 1991)

those children was adopted to American families. Alstein and Simon (1991) indicate that by the end of the 1980s, almost one in four babies entering the USA for adoption came from Latin America.

On the contrary, African countries did not belong among the most important sending countries for a long time. Table 2 shows only one African country (Madagascar) and one European country (Poland) unlike eight countries from Latin America and the Caribbean and five countries from Asia. Africa experienced faster growth of adoptions in the end of the 1990s mainly due to an increase in number of orphans left behind in variety of humanitarian crisis, civil wars and due to the spread of HIV/ AIDS.

Table 2 Top 15 sending countries in 1980s.

South Korea	61 235	Chile	5 243	Haiti	1 526
India	15 325	Philippines	5 167	Poland	1 480
Colombia	14 837	Peru	2 205	Honduras	1 095
Brazil	7 527	El Salvador	2 178	Thailand	858
Sri Lanka	6 815	Mexico	1 597	Madagascar	845

Source: Kane 1993: 15

The fall of the USSR and the end of Cold War opened countries such as Romania, Ethiopia or China to the *world's market with babies.* In 1991 following the fall of Ceaucescu regime, estimated 10 000 children were adopted from the country. Media coverage of the terrible conditions in orphanages shifted the attention of adoptive families towards Eastern Europe. One in three children adopted in USA in 1991 came from Eastern Europe (Young 2012). Apart from Romania, children were adopted also from Belarus, Bulgaria and Ukraine. Nevertheless, since 2005 the high numbers from the beginning of the 1990s keep decreasing. Selman (2009) points out that out of the whole Central and Eastern Europe only Estonia, Hungary, Latvia, Lithuania and Poland sent more children abroad for adoption in 2007 than in 2003. In 2002 the Center for Adoption Policy Studies released a report on inter-country adoptions in Romania concluding that a weak welfare system, ineffective judiciary and insufficient programs worsened the overall situation in the country. The ban on inter-country adoption, albeit having a positive effect at the beginning, was too long and

actually prevented the neediest children (Roma children in case of Romania) to profit from having new families abroad. The report attempts to highlight the situation of Roma children who constitute a particularly vulnerable group in many post-communist countries.

The widespread poverty and the government's pro-adoption attitude made Ethiopia a country with a rising number of children free for the inter-country adoption. The total number has been rising even after 2004 when the major sending countries cut down on their shares (Selman 2009: 581; Mezmur 2008a: 8-10). Beckstrom (1972) adverts to problems of increasing numbers of foundlings and the inability of the urban administration to adequately respond to such problems. In China, the one-child policy and the culture-based preference to have a boy resulted in de facto genocide on girls caused by selective abortions, non-registrations of baby girls and relinquishments of baby girls (Selman 2002: 221). The same problems occur in India which also belongs among the top sending countries. In contrast to India and China where the natality rate exceeds the mortality rate, at the beginning on the 1990s, Russia experienced fall both in the life expectancy and the natality. Even nowadays Russia faces future problems with the elderly population and the lack of labor force. However, the country is not able to take care of children in institutions and the number of adopted children grew from 2 559 in 1995 to 4 855 in 1998 (Selman 2002:214) and further to 9 425 in 2004 to decline to 4 873 in 2007 (Selman 2009: 581). [32]

[32] In December 2012 Russian president Vladimir Putin signed a law banning American citizens from adopting Russian children. At the same time a few USA funded NGOs were outlawed (HRW 2012).

Table 3 Top sending countries between 1980 and 1998

Country	Adoptions 1980-89	Country	Adoptions 1995	Country	Adoptions 1998
Korea	6 123	China	2 599	Russia	5 064
India	1 532	Korea	2 145	China	4 855
Colombia	1 484	Russia	2 014	Viet Nam	2 375
Brazil	753	Viet Nam	1 523	Korea	2 294
Sri Lanka	682	Colombia	1 249	Colombia	1 162
Chile	524	India	970	Guatemala	1 143
Philippines	517	Brazil	627	India	1 048
Guatemala	224	Guatemala	574	Romania	891
Peru	221	Romania	558	Brazil	443
El Salvador	218	Philippines	427	Ethiopia	438
Mexico	160	Paraguay	360	Bulgaria	347
Haiti	153	Poland	304	Thailand	333
Poland	148	Ethiopia	297	Poland	326
Honduras	110	Bulgaria	232	Philippines	322
Thailand	86	Thailand	222	Cambodia	307
		Chile	142	Haiti	248
		Mexico	131	Ukraine	237
				Mexico	210

Source: Selman 2012: 214

The changes in the number of children sent for adoption and the major sending countries are summed up in the Table 3. Nevertheless, for example the orphan crisis in Romania is not apparent due to its short duration. On the other hand, it is clear that after the initial process of South Korean adoption cut- down in the end of the 1980s, adoptions were allowed again in the early 1990s. The increasing role of China and Russia is also evident.

Modern Inter-country adoptions in the 21st century

The overall trend of the rising number of childless couples or individuals and booming natality rates in developing countries prevail even in the 21st century (Bartholet 2005: 112; Thompson 2004: 446). Due to social and legal shifts in the Western Europe, the inter-country adoption also serves to people who are not eligible to adopt a child within their country such as homosexual couples etc. (Wallace 2003: 694). In 2004 about 45 000 children were adopted to 20 major receiving countries with almost 23 000 going to the USA, followed by Spain, France, Italy, Canada and the Netherlands most often coming from China, Russia, Guatemala, South Korea, Ukraine, Colombia, India, Haiti, Bulgaria and Viet Nam (Ruzik [2009]: 7).

Figure 3 shows the total numbers of inter-country adoptions between 1998 and 2007. It is evident that the inter-country adoption peaked in 2004 and has been declining ever since. There are several possible explanations including increasing regulation from sending countries because of adoption scandals or internal politics. While Romania and Bulgaria, for example, reduced number of children available for adoption because of the EU pressure, China reacted to the growing demand for adoption of single parents leading to homosexual couples nurturing Chinese children. In many cases, countries seems to react to scandals related to the inter-country adoption (Selman 2009).

However, because of extensive frauds and criminal activities, even prospective parents became more aware of the possible ill-effects of the inter-country adoption. Countries such as Cambodia, Romania and Guatemala imposed temporary or permanents bans, other such as Colombia work on increasing security of adopted children. On the other hand, widely publicized adoptions of celebrities like Madonna or Angelina Jolie uncovered ongoing problems in African countries which become newcomers in the inter-country adoption market (Bystrom 2011, Mezmur 2008b).

The 21st century also experienced a comeback to truly humanitarian motives to adopt internationally. Attempts to rescue children from Chad (Mezmur 2008a), Haiti and Indonesia (Selman 2011) after man-made respectively natural disasters caused heated discussions on the inter-country adoption from post-disaster areas. Although, in a joint recommendation of the UNHCR and the Hague Conference on the Private International law (1994) urge countries to implement special measures on children who are refugees for any reasons. The question is whether the affected countries are able to grant the children with a sufficient care and support and what is the adequate response of the international community.

The 21st century brings new discussions even to the receiving countries. Saunders (2008) observes that while the EU officials tend to be skeptical towards the inter-country adoption, stressing the importance of maintaining family, cultural and

religious bonds as much as possible, the USA do not consider resettling children from one environment to another undesirable. There is no doubt that the USA simply understands the inter-country adoption as a continuous process of living the American dream. Standers emphasize the ideological dimension of the inter-country adoption during and after the Cold War, when parents of adopted children became saviors and offered the save place for children suffering from lack of everything. The humanitarian motives, nevertheless, have been decreasing over time and personal motives (delays in domestic adoptions, social or legal obstacles to adopt etc.) prevail.

Table 4 Top 10 receiving countries between 1998 and 2007.

Country	1998	2001	2003	2004	2006	2007
USA	15 774	19 237	21 616	22 884	20 679	19 614
Spain	1 487	3 428	3 951	5 541	472	3 648
France	3 777	3 094	3 995	3 402	3 188	3 420
Italy	2 233	1 797	2 772	3 402	3 188	3 420
Canada	2 222	1 874	2 180	1 955	1 535	1 713
Netherlands	825	1 122	1 154	1 307	816	778
Sweden	928	1 044	1 046	1 109	879	778
Norway	643	714	714	706	448	426
Denmark	624	631	523	528	447	428
Australia	245	289	278	370	421	405
total	31 710	36 379	41 530	45 288	39 742	37 526

Source: Selman 2009: 576

Table 4 demonstrates the evolution of children coming to the top 10 receiving countries in 10 years. There was a peak in 2004 and since then the total numbers decrease. Selman (2007) explains the total decrease by the fall of the supply, nevertheless, he mentions drop in the demand of traditional adopting countries such as the Netherlands and Sweden.

To shortly comment on the historical context, it is obvious that there are many trends and motives on both sides to participate on the inter-country adoption. Be it a desire to save a suffering child, a desire to have a child or an effort to relieve overcrowded and inconvenient institutional care, the positive aspects should prevail over the negative ones. The inter-country offers a solution for many children and many

parents. It is up to the states to cooperate and support each other, in order to gain maximum and lose minimum from the practice.

3. SUBSTANCE LEVEL OF THE THE RIGHTS OF THE CHILD: FUNDAMENTAL PRINCIPLES OF THE HAGUE CONVENTION

The Hague Convention builds upon principles of the Convention on the Rights of the Child (1989) and of the UN 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 (1986). Nevertheless, it does not conceive them complex enough to truly reflect standards necessary for minimizing the ill-effects of the increasing number of the inter-country adoptions, thus, it aims to establish new sets of legally binding regulations, a supervision of inter-country adoptions, means of communication between sending and receiving countries, and to strengthen collaboration between states involved. Taken into consideration the wide scope of inter-country adoptions, non-Hague Conference members as well as representatives of NGOs were invited to participate.[33] Even though a wide range of countries – both receiving and sending – was present to the drafting and especially Latin American countries (Peru, Colombia, Bolivia, etc.) acted actively in submitting proposals, the major sending countries and the most vulnerable countries were either not present (Russia, South Korea, African countries) or not active (China, Ethiopia, India). Egypt, Turkey and Indonesia stood as the only representatives of the Islamic world ultimately expressing indifference towards or disapproval of adoptions as a concept

[33] Parra-Aranguren (1993: 4) lists following states presented at First meeting of the Special Commission: Member states: Argentina, Australia, Austria, Belgium, Canada, China, Denmark, Egypt, Finland, France, Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, Luxembourg, Mexico, Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela and Yugoslavia;
Non-Member States: Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Ethiopia, Honduras, India, Indonesia, Madagascar, Mauritius, Peru, Philippines, Romania, Senegal, Sri Lanka, Thailand and Viet Nam;
Inter-governmental organizations: International Institute for the Unification of Private Law (Unidroit), Inter-American Children's Institute (IIN) and Council of Europe;
Non-governmental organizations: International Bar Association (IBA), International Social Service (ISS), Inter-American Bar Association (IABA), International Federation Terre des Hommes (FITDH), Defence for Children International (DCI), International Academy of Matrimonial Lawyers (IAML) and Committee for Cooperation within the Nordic Adoption and Parent Organizations (NCA).

by the Islamic law. Until now only Mali, Azerbaijan and Turkey acceded, respectively ratified in case of Turkey, the Hague Convention (Status Table: accessed July 6, 2013).

Parra-Aranguren (1993) in the Explanatory report describes discussions, recommendations and preliminary drafts uncovering background of the most comprehensive yet criticized global international agreement on the inter-country adoptions. He clarifies preparation and endorsement of the Hague Convention article by article, nevertheless, for the purpose of this thesis, the most important provisions appears in the preamble and Articles 1 to 5. In the Preamble, the Hague Convention regards the respect of fundamental rights of the child and the principle of the best interest of the child as necessary conditions for legal and legitimate inter-country adoptions. Furthermore, it stresses the necessity of a family background, preferably of a biological family.

According to Donnelly's levels of cultural relativism, the substance level of the rights of the child represents the universal acceptance of certain rights and standards. In respect to the inter-country adoption, this standard follows from the UNCRC. Para-Aranguren (1993) asserts that by the fundamental rights of the child mentioned in the Preamble and in the Article 1 the state representatives apprehended all children rights recognized by the international law, especially those listed within the UNCRC. Although it is important to notice that certain provisions such as the best interest or second generation rights (culture, language) modified in order to comply with the real situation of inter-country adoptions.

3.1. MEET A UNIVERSAL CHILD

Apart from the overall discourse on the universality or the relativity of the rights as mentioned above, the rights of the child uncovers another culturally sensitive topic. Who is a child? How to define a child? When does childhood begin and end? Does a universal definition of a child exist? Those questions and many more appear if children rights are discussed. Acknowledging that a definition of a child is a topic covered by various social as well as natural sciences,[34] the following part only focuses on defining a child in terms of legal definition, cultural relativism of the rights of the child and particularly on those rights especially important to adoption (family, identity, culture and language etc.).

Despite the fact that there are many national and international norms, conventions and legal instruments dealing with child protection, children rights, family issues etc. the general acceptance of a definition who is a child is missing. Van Bueren (1998) emphasizes that the term a child is a social construct, generally based on a negative connotation towards an adult. However, this is not enough if we intend to protect a child to know who a child is not. Ross (2010) points out that children such as any other group possessing special set of rights suffer from extensive generalization yet not enough flexibility. She underlines the sociological, historical and psychological perception of childhood. Some of the researches (Ariès 1962 in Ross 2010, Stone 1990 in Ross 2010) base their assumptions of different approaches towards children throughout the history of the development of child-related vocabulary, clothing or treatment. On the contrary, Archard (1993 in Ross 2010) argues that there is a great difference between a concept of childhood which is present in every culture in any period of the history and a conception of childhood. The concept of childhood refers to an ability to understand that there is a difference between a child and an adult, while the conception refers to implications of such understanding. Due to different conceptions, the cultures vary significantly in determination of the age childhood

[34] For sociological and psychological definition of childhood see Ross (2010: 6-14).

ends and how it ends; the dimensional differences between a child and an adult such as duty or ability to work, vote or marry or different stages of the child's life. The cultural determination of the childhood is crucial for understanding of difficulties that universal children rights' protection instrument face even nowadays.

The conceptual understanding of childhood and a child's position within a society also influence different positions towards a child care and a substitute care particularly. In individualistic societies where children are tightly integrated into a relatively small family unit, the primary responsibility of their development and care lays on the closest family members like parents or grandparents. The collectivist societies, on the other hand, share such responsibility among various actors within a community and a direct impact of close family members is much lower. Given that a child's position within a society belongs to particularly sensitive topics, there is no doubt that ideological discussions between the universalists and the relativists are extremely tough.

3.2. Convention on the Rights of the Child: the Fundamental Rights of the Child

Since prior to the formulation of the UNCRC no international declaration or convention included a definition of a child, the majority of discussions occurred around the final meaning of the Article 1 of the UNCRC. Van Bueren (1998) gives examples of discussions on the beginning of childhood that divided countries to those who consider the beginning of life at conception,[35] at a specific phase of pregnancy[36] or at birth. Since the final meaning of the Article 1 does not mention explicitly the minimum age, several states submitted reservations and declarations to express their understanding or further specify the definition of a child, usually in terms of respecting the right of the child on life since the conception thus outlawing

[35] Such as Catholic countries or countries with a strong opposition towards abortions – Ireland, Holy See or Poland.
[36] Such as Muslim countries, e.g. Egypt and Morocco.

abortions. Similarly, a great attention was paid to the proposed the age of majority. Van Bueren (1998) makes references to various suggestions of age lower than 18 years based on different criteria of majority such as minimum age of ending the compulsory education, active participation on family life support or other aspects of socio-cultural reality. Conversely, the proponent of 18 years as the end of childhood in the legal terms argued for maximum extension of the period of protection by the UNCRC. The Netherlands made a somehow compromised suggestion stating that majority should not be achieved solely by the limit age, but can be derived from various forms of emancipation from parental care such as marriage, military service or legal capacities (Van Bueren 1998: 36-37). Buck (2010) considers the provisions of the Article 1 a compromise solution and emphasizes the active role of the Committee on the Rights of the Child (CtRC) in encouraging countries with lower minimum age to adjust their domestic legislations to the core of the Article 1.[37]

Thus, even though one might easily conclude that since the adoption of the UNCRC a child is universally defined as it stands in the Article 1: "a child means every human being bellow the age of eighteen years"; however, such a conclusion would simply ignore the first and the last part of the Article stating: "for the purpose of the present Convention [...] unless under the law applicable to the child, majority is attained earlier." These provisions, in contrast, satisfy needs of different conceptions of childhood and eliminate objections based on potential non-compliance of the Article with the cultural or the social norms. Van Bueren (1998) asserts that such flexibility referring to national legislations allows wide reflection of cultural specifics related to the dimensional conception of childhood. For the purpose of adoption, the definition of age might be and might not be crucial. It is crucial in cases where adoption constitutes not just legal or moral relationships (which might be the case of adult

[37] Child labor and child marriage, although outlawed, remain a major problem for a vaste number of countries which do not comply with the limit age of 18 years. A lot of countries face gender inequality in the age limits for majority which further discriminates against the unprotected individuals, usually girls.

adoption ensuring continuation of family line) but obligations to care about an adoptee. Such differentiation is usually based on the notion of vulnerability of the adoptee and its capability to decide.

Brems (2007) argues that if children rights derive from the human rights because of particular differences between children and adults which constitute a need for protection, then in parallel differences between children should be granted similar attention. She examines the UNCRC Articles and lists expressions of cultural relativism within the Convention based on elastic language and inclusion of cultural specifics to the rights included. She mentions several articles and explicitly points on the Article 20 dealing with substitute care about children where kafalah is mentioned as a means of alternative care in order to satisfy Islamic countries where adoption is not allowed. Furthermore, this article makes countries obliged to take into consideration ethnicity, religion, culture and language of a child while deciding about the best alternative of a biological family. Similar compromise in order to comply with national or cultural specifics on substitute care was made at the Article 21 concerning adoption. This Article is only binding for the countries that "recognize and/ or permit the system of adoption" and guarantee that "the best interest of the child shall be the paramount consideration" once adoption is contemplated. Discussions evolving into such a solution further support the basic assumption used in this thesis about adoption being culturally determined and as such being potentially trouble-making on the inter-country level.

In order to enhance the number of ratification of the UNCRC, some articles are formulated in a vague language. This is the case of (among others) the Article 3 stating that "in all actions [...] the best interest of the child shall be a primary consideration." Bix (2008) identifies the best interest principle within the common law and explains that what started as a legal collocation developed into a legal standard. Brems (2007) stresses that a compliance with particular cultural norms is, in fact, usually in the best interest of the child. She highlights a negative impact of social

exclusion caused by refusal of a particular practice if such practice is of a huge moral importance. On the other hand, she emphasizes the Article 24 constituting the right to health where cultural practices with a negative impact on the child's health conditions are forbidden. Thus, states are responsible for elimination of the harmful practices given enough space to adjust a strategy for the local conditions. On the top of that, she argues that while abolishing a cultural practice can be perceived as culturally insensitive and have an opposite impact, highlighting objectively measured negative consequences seems to be more reasonable and acceptable.

Buck (2010) reminds that the best interest principle originates from contextual issues of the custody of a child and countries have great influence on what is the view of a particular best interest. Alston and Gilmour-Walsh (1995) emphasize that the best interest principle originates in family law of the USA as well as France and the United Kingdom and through their colonial rule it was imported to legal systems around the world. They suggest that within the UNCRC the Article 3 is not a right itself but servers three different purposes: 1) support, justification and clarification of a particular approach towards fulfillment of the rights of the child; 2) principle assisting in conflicts between different rights of the child; 3) one of criteria evaluating child-related norms. To sum it up, while the best interest principle allows the local culture to play a significant role in exercising of a particular right, it should not be a prevailing argument justifying obvious physical, psychological or social harm to a child; therefore, the final decision must be in compliance with the best interest as understood within the scope of UNCRC.

A particularly important provision for the inter-country adoption (and adoptions in general) is the Article 8 constituting the child's right to identity. Stewart (1992) explains that this article was originally created to address the state's duty to reestablish identity to children who have been abducted and/ or disappeared from

their parents.[38] He suggests four types of sources of identity: 1) family, 2) tribe, 3) biology, 4) state. Regarding the right to family identity (biological parents, extended family, family name) there are several possible interpretations with different implications to adoptions. One of these interpretations is that in case of an adoption, the right to family shall be included into definition of the best interest of the child; another states that the right to family identity may suggest informing a child about his true identity. The Hague Convention, however, does not provide any extra protection to a child's identity. It is fully up to a sending country whether it requires the adoptive parents to maintain any of the child's former cultural habits (such as religion in case of Philippines etc.). The Article 24 which states that a contracting state may refuse an adoption that is in contrast with its public policy may in case of religion protect child identity. The prospective parents who do not comply with the states policies (such as non-believers, homosexuals, single parents) may not be accepted by the sending country or vice versa.

3.3. Conclusion: Substance Level of the Inter-country Adoption

On the substantial level, the Hague Convention adopts a remarkable range of children rights it aims to protect. It accepts a very broad definition of childhood restricted by the age limit and the best interest principle, well-known and often used within the frame of child-oriented discourses. Furthermore, the Hague Convention cherish the principle of subsidiarity in terms of preference of domestic over inter-country adoptions, however, formally elevates the right to family over the right to culture and language. Therefore, it opens a debate whether certain rights are more important than others, in case of the Hague Convention a few certainly are. Martin (2007) concludes that in respect to culture the inter-country adoption imposes a hierarchical structure of superior and subordinate rights of the child.

[38] Article 8 reacts to forced disappearance of children in Argentina during the rule of military junta between 1976 and 1983.

On the other hand, the Hague Convention deals with a topic which is not universally accepted. Thus, even on the substantial level, it is not possible to expect nothing but partial acceptance of the norm by the international community.

The Hague Convention is not in contradiction to any major, globally accepted means of child protection. Besides that, the Hague Convention accepts the role of a universal set of good practices which should be followed. In practical terms, analogically to Goodhart (2008), albeit not universal, the Hague Convention is a legitimate global instrument on inter-country adoptions.

4. INTERPRETATION LEVEL OF THE RIGHTS OF THE CHILD: FORMS OF SUBSTITUTE CHILD CARE IN THE HAGUE CONVENTION

According to Donnelly's division, the most controversial manifestations of relativism occur at the interpretational level. In respect to the the inter-country adoption two types of cultural relativism emerge – cultural determination of substitute child care and cultural determination of the rights of the child.[39] The cultural determination of the substitute child care arises from different paradigms of cultures as well as from constant interactions enhanced by accelerated process of political and economic globalization. Those two types of social change can have both convergent and divergent effect on the practice of adoption, inter-country adoption respectively. Specifically, the approach towards the inter-country adoption derives from the means of substitute care typical for a particular country further enhanced by decision-makers and their political views. Such an approach can be positively or negatively influenced by the recent evolution of the practice of inter-country adoption – like in the case of Romania or Cambodia.

In this respect, interpretation of status of a child within a society and the right of a child to family plays a crucial role. Given that at the substantial level, adoption belongs to one of various forms of substitute care entitled to protect children's fundamental right to protection; this chapter focuses mainly on uncovering the concept of adoption and its implication on other concepts of substitute care. In the end, based on Donnelly's theory of evaluative controversies, particular cultures are evaluated in terms of ability to accept the concept of inter-country adoption.

[39] Discussed in the Chapter 3.

4.1. Traditional Variations of Substitute Child Care: Cultural Determination of Adoption

In 2009 the Department of Economic and Social Affairs of the United Nations revealed a study on adoption and foster care stating that de facto[40] adoption and foster care in various forms are practices well-known to almost all traditional societies. Unsurprisingly, communitarian societies emphasize the need for socialization of a child, and thus prefer flexible, community-based practices; in contrast, the modern form of adoption promoted by the West denies such flexibility and requires secrecy and finality.

To elaborate more on the topic following paragraphs briefly describe different institutions of child care and attitudes towards modern adoption within Catholic, Confucian, Hindu, Islamic and Jewish law and examine the role of foster care and de facto adoption in traditional societies such as African tribes, American indigenous peoples and Oceania island societies. Particular attention is devoted to Catholicism since it basically formulates the concept of modern adoption. Even though many countries nowadays have adopted legislation based on Western (predominantly Catholic) perception and definition of the modern adoption, the cultural background cannot be dismissed. In the text, the term modern adoption describes adoptions where all parental rights are transferred from biological parents to adoptive parents, and de facto adoption describes practices similar, not yet fully compatible with modern adoptions.

Christian tradition – the Catholic Canon Law

As the main source of legislation in Europe and later the United States the Catholic Canon Law served as a bridge between the Roman law and the modern civil legislation on adoptions. Pollack et al. (2004) explains that as early as in the late Middle Age, the Canonist started to study and compile the legal concepts from

[40] The term de facto adoption refers to practices similar to adoptions but usually different in terms of official parent-child relationship, rights to inherit family property etc.

the very begging of the Modern Era. The topics such as parental rights, termination of parental rights and legal abandonment of children as well as other civil aspects of life were included into arising Canon Law. The Canon Law itself went through various developments influenced by historic phases. Whereas the early Canon law followed up on the Greco-Roman adoption provisions, the early Middle Age required ad hoc regulations and means of care of abandoned children because of widespread instability. An important change took place with turn towards the Roman Law during the 12th to the 15th century when first and truly basic legislation on adoptions came into existence. Later on, the American church and Protestant movements emerged and brought new challenges to the previous provisions as well as new motives to adopt children. The industrial revolution and rising immigration to the USA at the end of the 19th and the beginning of the 20th century caused a sharp decrease in living conditions especially of the urban working class. Pollack (et al. 2008) argues that as one of the results of such social change resulting in chaos and loss of traditional family life; the number of orphans, children living in broken homes or born out of wedlock soared. Since the majority of working class at that times consisted of immigrants from various parts of Catholic Europe,[41] both Catholic and Protestant organizations were involved. The institutions of de facto adoption (or place-out systems) were nevertheless competing over the faith of children. While Protestants felt superior and tried to place children to Protestant families, Catholics were determined to preserve the faith even if it entailed placing children with racially different parents.[42] This according to Pollack (2008: 132) led to an increase in number of adoption agencies, and thus shaped both attitude towards and legislation on adoptions in the USA. In this respect, Catholic organizations had a huge influence on attitudes towards interracial adoptions and adoptions of disabled children

[41] After the Civil War the USA experienced waves of immigration mainly from Ireland, Germany, Poland, Lithuania, Hungary or Italy.

[42] „Linda Gordon's The Great Arizona Orphan Abduction is an important history of the interaction of Catholic attitudes toward placing-out and adoption […] interested in preserving the Catholic faith of children entrusted to their care, the Sisters of Charity, who ran a major New York foundling home, placed a group of largely Irish immigrant children with largely Hispanic Catholic parents in an Arizona mining town in the fall of 1904" (Pollack et. al 2008: 131).

worldwide. Although the practice of adoption had been spread fast, it was only in 1983 that the Canon law fully accepted that children adopted following the civil law measures are considered children of those who have adopted them. The Canon law furthermore established requirements for baptism of adopted children and prohibited marriage to parents, grandparents, siblings and cousins. In terms of prospective parent requirements, the Canon law was not specific, even though the Catholic Church emphasized that parents should be a married couple to fulfill the principle of the best interest of a child. Nowadays, beside the humanitarian motive, adoptions also serve as an alternative for childless families, since they are preferred over all reproductive biotechnologies. On the top of that, two icons of Catholic Church of the 20th century – the Pope John Paul II and the Mother Theresa – who advocated for the adoption in order to eliminate the evil of abortion (Pollack et al. 2008) stressed the importance of adoption and its Catholic spirit. In 2000 Pope John Paul II summarized the current opinion of the Catholic Church stating that:

> "Adopting children; regarding and treating them as one's own children means recognizing that the relationship between parents and children is not measured only by genetic standards. Procreative love is first and foremost a gift of self. There is a form of "procreation" which occurs through acceptance, concern and devotion. The resulting relationship is so intimate and enduring that it is in no way inferior to one based on biological connection." (in Vaughan Brakman and Fozard Weave 2007: 123)

The basic fact that the Catholicism regards adoptive families as equal to biological families differentiates this conception from all the others. From a moral or legal point of view the adoptive children have the same rights and obligations as the biological ones. Furthermore, the precedent of the faith being superior to the race and to the nationality provided a base for transracial and inter-country adoptions. Protestants promoted a slightly different approach regarding the religion (mainly

due to own feeling of supremacy), but in terms of inter-country adoptions their approach equals to that of Catholics.

China and India: Cultures of the male descendants' preference

In Confucian societies (e.g. China, Japan and South Korea) adoption is not a child-oriented act but a family-oriented. The primary aim is to ensure a heir for a child-less couple and maintain the family lineage, the property and the ancestral rituals (Department of Economic and Social Affairs 2009: 24). Johnson (2002) focuses on differences in approaches towards domestic adoptions in two main exporting countries, pointing out that in traditional Korean or Chinese society the institution of adoption of a non-relative child does not exist. Her research in the 1990s, nevertheless, uncovered strong willingness to care about female children even in a permanent way. Traditionally in China, Johnson (2002) argues, adoption was used (as mentioned above) to obtain a male heir. While in Chinese and Korean legal systems only permitted the so called agnatic adoptions[43], Japanese customs allowed even non-relative adoption in order to bring a male descendant to the family. In general, Confucianism accents bloodlines and prefers sons over daughters; therefore, the adoption habits encompass such practices as posthumous adoptions and adoptions of adults (Department of Economic and Social Affairs: 2009). On the contrary, Johnson (2002) describes a Chinese tradition of minglingzi which denies the general assumption of Confucianism focusing only on adoption of male relatives since it declares that although prohibited adoptions of non-relatives occurred in the 19th and the early 20th century. She also describes a tradition of tongyangxi which refers to a de facto adoption of a girl to perform household tasks and to marry a potential heir to the family. Van Leeuwen (1999), nevertheless, considers above mentioned examples as extremely rare to really contribute towards general practice.

[43] Agnatic adoption refers to an adoption within the bloody lines. Usually one of the sons of a family is adopted by a male relative in order to preserve family and blood lines.

Under such legal and cultural circumstances it is obvious that the Confucian society favors sending abandoned children abroad over stigmatizing in-country family care. Furthermore, the huge number of war orphans of mixed couples in Korea as well as Chinese one-child policy even enforced the traditional attitudes towards adoption. Even though nowadays the Confucian countries become more open towards domestic adoption, in compliance with the UNCRC and the Hague Convention's principle of subsidiarity, the actual number of the domestic adoptions remain low (Department of Economic and Social Affairs 2009: 25). Johnson (2002) considers the shift in the strict Chinese adoption laws and the one-child policy towards the possibility of having two children in case of the first one being a girl a positive sign for Chinese female orphans.

Similarly to the Confucianism within the Hindu legislation, adoption was perceived primarily as a way to ensure family and name lineage, care giving for elderly and ancestor worship, yet only sons could have been adopted. Adoptions were common throughout the history and codified in the Hindu code of Manu-Smrti around the 1st century B.C. Goody (in Department of Economic and Social Affairs 2009) asserts that since maintaining the lineage is important for Hindu families, adopted sons had equal position, including privileges and duties towards their family, with biological sons, yet they kept to the possibility to maintain minimum links with their family of origin to prevent marriages with blood relatives. There were a lot of requirements considering the adoption – an adoptive family (represented by the father) could not have had any male descendants, an adoptee must have had at least one male sibling not to interrupt the family bloodline. The traditional system preferred adoptions based on family relations over non-relative adoptions and required respect to the caste system; also it did not tolerate either female or orphan children's adoptions.

During the 20th century the official Indian civil legislation imposed restrictions and regulations on adoptions. Halder and Jaishankar (2009) underline a number of

existing laws on the domestic adoption; nevertheless they emphasize a legal vacuum on the national level regarding inter-country adoption which leads to frauds and human rights' violations. They call for strict rules and monitoring systems. Although, they admit developments within the practice, for example that nowadays children of both sex and orphans can be adopted even outside their caste in India. Other countries such as Nepal or Myanmar/ Burma also incorporated traditional adoption rules to their civil legislation (Department of Economic and Social Affairs 2009).

Respect to bloodlines: Shari'a and Halacha

In contrast to the traditional Asian societies,[44] Islamic *Shari'a* strictly maintains the bloodlines, thus abandoned or orphaned children should be placed exclusively with their relatives. In case a child needs a placement outside his or her family – within the institution of kafalah[45] – he or she does not acquire any inheritance rights and keeps his or her biological father's name. Nevertheless, Pollack et al. (2008) argues that despite general simplification of such rules to a prohibition of adoptions Islamic law operates with a complex and sophisticated doctrine dealing with abandoned, orphaned or parentless children. He explains that a stranger cannot legally and morally become a parent of a child born out of wedlock, thus Islam had to develop a special institution to care about abandoned or orphaned children. The strict rules on legal parenthood and poverty have entailed a vast number of abandoned children and foundlings. The Law of foundlings was established to deal with those children with respect to the Quran and the Prophetic dictum and was based on three main principles. The first one states that there is a legal obligation for society[46] to take care of foundlings; the second one says that a person can become a caregiver but not a legal parent and the third one ensures that a foundling is free

[44] The pre-Islam rules on adoption in currently Muslim countries differ significantly but are not further elaborated due to minimal influence on contemporary practice.
[45] In terms of a child care kafalah means a form of family placement when a child does not acquire any legal connections to the new family. Kafalah is also often used in terms of a sponsorship system misused in certain Muslim countries, such as Saudi Arabia, to create master-subordinate relationships between employer and employee. See HRW (2008).
[46] An individual is only obliged to care about a foundling who was found in a life-threatening situation or if and individual voluntarily becomes a caregiver (Polack et al. 2008: 138-157).

and cannot be enslaved unless there is any evidence to prove otherwise. Nowadays, 20 countries worldwide do not recognize the modern adoption; all of them are predominantly Muslim countries. On the other hand; the most populous Muslim country – Indonesia, as well as Turkey and Tunisia do not prohibit adoptions.[47]

In a similar way to the Islamic law, Jewish Halacha does not comprehend the modern adoption. Jewish traditions and jurisprudence considers caring for orphaned or abandoned children an act of goodness. Judaism as well stresses the importance of the bloodlines and the faith and, on the top of that, it prohibits incestuous relationships even by accident as well as any kind of intimate (hugging, kissing) behavior between males and females unless they are legal spouses or a parent and a child (Department of Economics and Social Affairs 2009: 27). Nevertheless, Jewish scholars do not agree on whether a child whose biological parents are unknown but he or she is incontrovertibly a Jew should or should not be informed about his or her adoption status. There are different rules applied for an adoption of Jewish and non-Jewish children which guarantee a non-Jewish child the right to convert or not to convert to Judaism (Pollack et al. 2008: 116-118). Moreover, the Jewish culture tends to have a negative approach towards adoption given that Moses – inter-country adopted to Egypt – did not accept his new identity and left Egypt. Interestingly, in 1984 during the Operation Moses about 1 500 Ethiopian children arrived to Israel unaccompanied, many of them were later adopted or taken care of by Israeli families (Israeli Association for Ethiopian Jews [accessed July 8, 2013]; Ministry of Absorption of Immigrants [accessed July 8, 2013]). Currently, all adoptions in Israel are regulated by the Adoption of Children Law from 1981 which defines adoption in a modern way, however, requires a child and his adoptive parents to be of the same creed (Department of Economic and Social Affairs 2009: 28).

[47] The adoption is officially prohibited in Algeria, Djibouti, Egypt, Libya, Mauritania, Morocco, Afghanistan, Bahrain, Iran, Iraq, Jordan, Kuwait, the Maldives, Oman, Pakistan, Qatar, Saudi Arabia, Syria, United Arab Emirates and Yemen.

Traditional societies: Family care in the first place

Unlike the societies and the empires based on Christianity, Islam, Judaism, Confucianism or Hinduism where either religious legal systems or written sources of the best practices existed, the traditional societies in Africa,[48] Oceania or Americas did not followed any strict rules. De facto adoptions usually played a different social role and did not interfere with family bonds.

In order to understand the possible obstacles of an adoption in Africa, it is important to understand that being a child is above all a life-long reciprocal obligation with parents for whom to have a child represents a form of security in an old age (Ncube in Brems 2007: 24). In Africa, de facto adoptions vary according to tribes and traditional family structures. Notwithstanding the introduction of the modern adoption legislation by colonial powers, a family-centered child care has not been fundamentally affected. A widely practiced polygamy and an important role of family in the elderly care constituted several possibilities of substitute parent-child relations. In Ethiopia for example, a de facto adoption contains elements of the modern adoption such as the termination of inheritance rights from the birth family or the acquisition of a new family name (Department of Economic and Social Affairs 2009).

In Eastern Africa, children are being adopted by childless or male-childless women in order to safeguard the elderly care. Generally, a child born to a relative or a co-wife is chosen. De facto adoptions of orphans or illegitimate children are rare but not restricted. Considerably more than de facto adoptions, the sub-Saharan societies practice informal foster care or godparent care – also referred to as informal kinship care which might be both intra and inter-country. In a traditional way, a foster family or godparents take care of children and support him or her but the relationship with the birth family remains unchanged. This tradition is sustained even if a part of family migrates abroad and usually results in sending a child from the developing

[48] In this part African countries are meant to be mainly black African or sub-Saharan countries with prevalence of Christianity or native religions. The North African countries and predominantly Muslim countries (Sudan, Mauretania etc.) follow Islamic law and thus are excluded.

country to the developed one in sake of education or better living conditions (Department of Economic and Social Affairs 2009). On the other hand, the kinship care preserves family bindings and culture but, on the other hand, kinship care is not itself a guarantee of non-exploitative environment for children (International Social Service, UNICEF 2004: 4). Child labor and child abuse are often reported in such cases. Moreover, nowadays especially due to the HIV/ AIDS crisis in many African countries, these traditional means of care of orphaned or abandoned children are overloaded, and therefore diminishing or transforming into exploitation rather than care.

Beckstrom (1972) describes the traditional practice of de facto adoption in Ethiopia. Surprisingly, conversely to other African traditions, in Ethiopia adoptions served not to rescue abandoned children but to acquire an heir to the family. An adopted child assimilated fully into a new family and from the legal point of view was equal to all the other children. Two main Ethiopian tribes – the Gallas and the Amharas developed two slightly different practices gudifetcha-mogassa and yemar-yetut lij. Nevertheless, even though similarities with the Western concept are undeniable, children maintained their connection with the biological family through their names, the possibility to inherit from the biological parents varied. It is important to notice, that those traditional ways of parenting non-biological children occurred mainly in the countryside. Beckstrom (ibid) emphasized that even in 1970s the rising number of abandoned children cause problems in Ethiopia.

According to African Child Policy Forum (ACPF, 2012), African countries' attitude towards the inter-country adoption varies as much as their respective laws. In many countries these laws were accepted under the colonial rules and have not been updated yet, some countries have no or insufficient legislation. Only a few dispose of sufficient legislation, such as Kenya. Mezmur (2008a) proves that majority of African countries are not ready for unproblematic inter-country adoptions.

The indigenous peoples of the North America arranged de facto adoptions of children to assure the elderly care as well. Large families gave up their children for childless families or families with single-gender children only. The traditional practices of out-of-the-family child care in Oceania are similar to those in Africa or North America. In Maori tradition children live outside their families for a period of their lives and frequently they move to several relatives or members of their community. Adopted children are considered gifts and they rarely terminate relations with their biological families. In Papua New Guinea about half of the children live and are raised in non-biological family. Several Oceania nations differentiate between adoptions by grandparents or members of family and general adoptions. In contrast to a kinship adoption, the general one also aimed to strengthen community alliances or to gain a future family budget contributor (Department of Economic and Social Affairs 2009). Roby (2004) clarifies that in certain cultures of Oceania, such as the Marshall Islands, a de facto adoption brings the two families together but parental rights remain unbroken.

A specific form of the substitute care for children developed over time in Haiti, where parents often send their children to other families, both related and unrelated, in order to provide better or some education, nutrition or a perspective of an employment. Such children are called restaveks[49] and according to estimates about 10 % of children younger than 14 live with non-biological parents (Fafo 2002). The practice of sending children away from original families is of a particular interest of children rights organizations, because it often leads to what is called child domestic work. Nevertheless, given that a performance of household chores is not just acceptable but desirable in Haiti, the distinction between a substitute child care and a labor contract is very blurry. On the top of that, children are either expected to return back home or to support the family in the future. Restaveks often constitute financial or moral liabilities of their biological families to the care giving family. With

[49] From the French rester-avec meaning to stay with.

increasing diaspora, the phenomenon of restaveks has already crossed the borders and a lot young Haitians live with families in the USA or Europe (Fafo 2002).

To conclude, it is unquestionable that the traditional structures or institutions of out-of-home child care remain relevant nowadays. While governments and national legislations (excluding Islamic countries listed above) widely accepted Western definition of formal adoption, cultural norms and habits are usually taken into account. On the other side, the inability to achieve a universally accepted perception of the formal adoption brings out problems and misunderstandings regarding the inter-country adoptions. Whilst Europeans and Americans are culturally determined to understand all the steps and consequences of inter-country adoption including the termination of parental rights and the loss of culture of origin, the rest of the world perceives formal adoption through lenses of their traditions or religion. Moreover, in terms of the inter-country adoption based on conscious consent of birth parents that mostly belong to underprivileged members of society; the form of consciousness may become a serious obstacle and a possible cause of injustice.

4.2. Implementation of Donnelly's four types of Evaluative Controversies on Adoptions

I am using a modification of Donnelly's model of controversies in perception of different moral importance to certain topics to demonstrate the various types of implementation of adoption as substitute child care in above mentioned societies. For this purpose I summarize all three types of Christianity – Catholicism, Protestantism and Orthodox – under the term Christianity and I do not consider important any deviations in terms of smaller Christian churches or sects. This simplification is based on the fact that no obvious importance of the main types of Christianity in ex-colonial powers as well as on the direct influence of Catholic Canon Law on the modern legislation. Apart from that, I further simplify the model using only the two evaluative controversies – most effective, most difficult – assuming that

the Christianity grants a great moral importance to adoptions as an ideal form of substitute child care,[50] nevertheless, the alien culture can perceive the concept of adoption as either unimportant or beneficial or important in terms of compliance with its own values and traditions. This model, albeit simplifying a complex situation in particular cultures, supports the argument that an attitude towards adoptions and inter-country adoptions descends from generally practiced forms of substitute child care.

Table 5 Controversies in the perception of the inter-country adoption

	Alien Culture	
Christianity	Unimportant/ Beneficial Confucianism Hinduism Non-Orthodox Judaism Traditional Societies Latin America	Important Islam Orthodox Judaism Traditional Societies

Except from the Islamic countries and the Orthodox Judaism, all the other cultures have been influenced by the Christian concept of substitute child care – adoption. Partially due to coercion, partially on voluntary basis modern states changed shifted the community-based care to state-based one more or less successfully. All non-Christian cultures have one thing in common – domestic adoption is either not possible or not probable. This further determines their overall attitude towards inter-country adoption.

Johnson (2002) asserts that China (as well as other Confucian societies) roughly benefits from inter-country adoption. Taken into account a very low incentive of the local population to adopt abandoned or orphaned children, foreigners disburden the society. Confucian societies do not focus on the child well-being, but rather on family well-being. Thus, sending abandoned children abroad is not widely perceived as a loss for the society as a whole. Similarly, the Hindu societies face huge problems with an increase of available children not balanced by a sufficient institutional care or

[50] See Chapter 4.3.

domestic adoptions. All those countries, mainly due to the baby-boom benefited from an increasing interest from the West in the 1990s. Given the cultural preconditions and political unwillingness to promote domestic adoption the inter-country adoption was an easy solution which helped to reduce the number of children in orphanages as well as to finance the poorly equipped state institutions. In such case, an adoption of children, albeit a foreign social concept, has a great chance to be accepted by the local population and the local representatives as one of the solutions. Hence, a long-term impact on those societies (mainly because of the gender inequality of adopted children) is at least debatable.

Saunders (2008) describes how the US influence in the Third World countries, especially in Latin America, made the inter-country adoption more acceptable for the local population. The pathways of globalization and the growth of American power have had a direct impact on the inter-country adoption. He emphasizes the role of political changes and slow transformation to a market economy as well as accelerating globalization process which decreased barriers not only for trade but to also movement of people, and infants. Latin American countries seem not to have any major problems, on the cultural level, with the inter-country adoption, which was obvious from their active participation in preliminary sessions of the Hague Convention. Given that majority of those countries are Christian and Catholic, the concept of adoption is not strange to them. Unfortunately, Latin America experienced huge problems with human trafficking and baby selling, which ended up in total or partial ban is some of those countries – such as Guatemala.

The case of traditional societies is more difficult to categorize, because there are great differences among such countries. The impact of adoption may be both positive and negative and it is even debatable within one country. Usually, the overall approach depends on political and religious elites, internal stability and post-colonial heritage. Especially African countries burdened with HIV/ AIDS crisis struggle to find a balance approach which results in either extremely negative attitude towards inter-

country adoptions or in not following the subsidiarity principle by preferring inter-country adoptions (such as in case of Democratic Republic of Congo). Furthermore, as Donnelly (2007) stresses it is hard, in contemporary Africa, to distinguish what really is in favour of a local population and what is a product of a mere political populism.

In this respect, only Muslim countries and Orthodox Jews preserve their traditional views of substitute child care. Rare exceptions of countries approving the inter-country adoption document more an interchange between cultures and a secular political system, than any strong deviation from the norm.

4.3. Conclusion: Interpretation Level and the Inter-country Adoption

In this context, it is justifiable to conclude that on the interpretational level, the Hague Convention represents one of several possible interpretations of the rights of the child to family, culture or identity. Even though strict proponents such as Bartholet (1993, 2005) usually advocates for giving the inter-country adoption precedence over any other type of child care (apart form a well-functioning biological family), such practise is culturally not justifiable. The right to identity as well as the right to own culture are undeniable and can only be subordinate to the right to family in case that it is evidently in the best interest of a child. Thus, in respect to a local culture (which does not have to necessarily correspond with those mentioned above but may be even more specific) the inter-country adoption should be used wisely and contextually in order not to cause more harm than good.

Different cultures seem to be heterogeneous in their overall approach towards the inter-country adoption. Countries which experienced any form of colonial rule and thus are more experienced with alien concepts as well as countries where children are relinquished from their families in order to save the male patrimony are more open towards the adoptions. The possibility (either social/ cultural or

economic) to take care of the orphans or the vulnerable children varies significantly even between those countries which are in favour of the inter-country adoption. In contrast, Muslim countries which rely heavily on the traditional legal systems which offers a different means of protecting abandoned children react negatively. As an outstanding example, I consider the countries of Latin America which are culturally determined to practice domestic adoptions, the concept is not imposed or alien, however the unfavourable economic and social situation caused that Latin American countries belong to the biggest suppliers of children.

5. IMPLEMENTATION LEVEL OF THE RIGHTS OF THE CHILD: HAGUE CONVENTION ON THE INTER-COUNTRY ADOPTIONS

Donnelly (1989, 2007) indicates that the implementation level a priori cannot be universal, because the differences in material and cultural possibilities as well as capabilities vary significantly. Donnelly among other things accents the economic and the cultural determinants of the implementation. Taken into account the interpretational level of children rights and the inter-country adoption, it is obvious that the Hague Convention is a very culturally relative international norm.

On the implementation level there are two main motives for a country not to sign or ratify the Hague Convention. The first motive is overlapping with differences on the interpretational level such as non-recognition of adoption or its illegality in the country, attempts to protect the country's future generations or its reputation etc. Sargent (2009) argues that on the lowest level a sole relationship between a mother and a child derives from the local cultures and thus is culturally relative. However, it is not in the scope of this thesis to include such detailed anthropological and sociological analysis. The second motive is more based on economic and political situation within the country. Although, the second motive is not strictly cultural, it is important to mention since it indicates a lot of issues associated with the current state of inter-country adoptions worldwide. This second motive is able to further specify which countries and cultures the Hague Convention is intended for.

There are plenty of provisions in the Hague Convention that the contracting states are entitled to specify themselves. To demonstrate the relativity of implementation I am discussing two issues – financial burden and cooperation.

5.1. WHY MONEY MATTERS

Chapter III of the Hague Convention constitutes a duty to each member state to establish a Central Authority. The Central Authorities gain a lot of responsibilities and basically become the most powerful institution within a contracting state in respect to the inter-country adoptions. They are entitled to monitor all adoptions in terms of inappropriate financial benefits from the adoptions (Article 8), to cooperate with other central authorities (Article 7), to collect information about adopted or adoptable children and to provide counseling to prospective parents or parents willing to relinquish their children (Article 9) etc. To conclude, the Central Authority is responsible for all the inter-country adoptions from or to the respective country, nevertheless, the Hague Convention does not require the Central Authority to be just one body (Article 22). Most of the moderate critics of the inter-country adoption emphasize the financial burden and the bureaucracy related to the Hague Convention. Wittner (2003) gives an example of an impossibility to fully implement the Hague Convention in Cambodia, because the country is simply not able to invest in a huge and complicated system which is required by the Hague Convention. She underlines the fact that while a majority of receiving countries is rich Western countries with already established systems of domestic social service, the developing countries lack those institutions, and therefore are not able to fulfill all the criteria.

Briscoe (2009) further asserts that even if the country is able to afford a Central Authority, it is not itself a guarantee of sufficient child protection. Partially because of poor economic situation which does not allow the country to adequately fund all necessary procedures, partially because inter-country adoption may represent a steady source of income for corrupted officials. The Hague Convention in this respect does not offer any specific measures or procedures, only vaguely prohibits improper financial gain in the Article 32.

Even though it might not be so obvious, finance play an important role even in defining adoptability of a child. The Hague Convention authorizes in Articles 4 and 16

a sending country to decide about the adoptability, however, the Convention does not provide any further requirements or criteria. Such flexibility allows the states to fully decide, nevertheless, it also give space to speculations and frauds. In the Guide to Good Practice (Hague Conference on Private International Law 2008b), the authors underlines that a sending country does not have an unlimited power in defining the adoptability, since a receiving country has to approve the adoptability as well. Nevertheless, just a mere fact that a child is legally adoptable does not mean that the inter-country adoption is in his/ her best interest in both countries. In practice, the non-existing definition leads to adoptions of children who were relinquished because of economic reasons leading to an ironic situation where an inter-country adoption of such a child is several times more expensive than the initial unaffordable costs of a biological family to keep the child. Bartholet and other proponents of the inter-country adoption usually argue that the inter-country adoption actually helps children in institutions and in the streets, sometimes overseeing the fact that a majority of those children are actually not orphans and suitable for adoptions (Oreskovic, Maskew 2008). Nevertheless, Chou and Browne (2008) conducted a study proving that although many vigorous supporters of the inter-country adoption claim the contrary, there is no evidence that the inter-country adoption would decrease the number of adoptable children in institutions.

Private agencies and intermediaries represent another controversial topic covered by the Hague Convention. Oreskovic and Maskew (2008) discuss that the USA were mainly responsible for inclusion of the possibility to conduct the inter-country adoptions via private adoptions. While Bartholet (2010) emphasizes the positive aspects of private agencies because of their fast procedures, critics of this approach (Heckel 2010, Mezmur 2008a) point out that private entities are way too often responsible for frauds, child trafficking and other illegal activities. Interestingly, both alienated groups use Guatemala as an example, the proponents cherish no government involvement and thus fast movement of children from biological parents

of institutions to the adoptive parents (Oreskovic, Maskew 2008). The opponents (Casa Allianza in Heckel 2010) collected plenty of evidence of unlawful behavior of private agencies. However, under the provisions of the Hague Convention, it is up to every contracting state to decide whether private mediators can legally operate.

5.2. HAGUE CONVENTION AS AN EXCLUSIVE CLUB

The Hague Convention sets up requirements only for adoptions which undergo between the contracting parties (Article 2). As already mentioned, not all the countries are for various reasons able to accede to the Convention. Thus the contracting parties create an exclusive club of countries following certain rules among each other; on the other hand, this type of behavior is not required in relation to a non-contracting state. Thompson (2004) depicts the relations between the Hague countries and the non-Hague countries and describes a legal vacuum remaining in cases when a non-Hague state is involved. Bartholet (1993) criticizes that the Hague Convention builds barriers and makes adoption processes slow. Given such arguments, the potential adoptive parents can easily turn their attention towards countries which are not bound by the Convention and allow easier and less costly way to adopt. Even though Bartholet and others (2008) call for strict enforcement of laws criticizing bans on inter-country adoptions, in many countries especially of Latin America child laundering and frauds exceeded the positives of adoption. The mere fact, that the Hague countries do not have to apply the same requirements on adopted children from the non-Hague countries, aggravates disparities cause by underdevelopment of many sending countries. In places, such like Guatemala or Cambodia, governments have almost no influence on adoptions. In this respect, the Hague Convention serves as an example of countries which have the control over their territory. Ironically, those countries via private adoptions of their citizens contribute to a deterioration of the state power in a different country. The Guide to Good Practice (Hague Conference on the Private International Law 2008b) highlights the importance of cooperation and shared responsibilities of a sending and

a receiving country, however, such ruling principles do not exist if one of the countries is not a contracting party to the Hague Convention. It means that not all the children who could be protected under the international law actually are.

As mentioned before, the contracting states have the right to refuse an adoption in case it contradicts their public policy. The Hague Convention delegates to the contracting states to decide about the adoptability of a child. A respective Central Authority comes with a definition of an orphan and his or her adoptability under specific criteria and therefore reduces number of children to be sent abroad. Bartholet (1993) suggests that there are millions of children free for adoption regardless their orphan status because the conditions they live in are abusive, harmful and exploitative. Although the Hague Convention does not suggest any definition of adoptability, there is a certain scope of peer-control among the contracting countries directly involved in the adoption process. Non-Hague countries are much freer in their decisions. Breuning and Ishiyama (2009) discuss the impact of HIV/ AIDS orphan crisis in Africa on the inter-country adoptions. They emphasize that there are a lot of so called orphans who in fact have not lost both of their parents. Ryan (2006) argues that in 1990s in Romania children who did not have any contacts with parents for more than half a year were placed to public orphanages and thus released to inter-country adoption. In this respect, children in non-Hague countries are less protected from the potential harm of the inter-country adoption than the other children. Frauds and fake information about children often lead to violations of their fundamental rights which are protected by the UNCRC and mirrored in the Preamble of the Hague Convention. Various cases from Romania, Cambodia, Guatemala, India and other countries expose the ill-effects of insufficient cooperation between governments, social service and adoption bodies. They also exhibits that market driven adoptions in countries where there are too many orphan like or abandoned children opposed to low capacity institutions of child welfare, it is way too easy to call a child adoptable.

In terms of implementation of the protection of children adopted abroad, the Hague Convention creates a club of countries financially and politically stable enough to be able to implement all that is required from them. The sending countries might experience great troubles to truly adhere to the Convention's provisions and those, which fail or are not willing to, are excluded completely. The receiving countries, usually more developed, are not obliged either to help the sending countries to fulfill their duties or to exclusively cooperate with those which are willing to and where no obvious violation of the rights of the child and the basic principles of the inter-country adoption occur. In this respect, the Hague Convention is very moderate towards the rich and developed countries and on the contrary very strict towards the poorer, less developed countries which are, unfortunately, responsible for the children's lives.

5.3. CONCLUSION

The implementation level represents the biggest interest of the moderate critics who do not take a stand against the concept of inter-country adoption itself, hence, disapprove of the ongoing procedures. Based on the inequality between the sending and the receiving countries, the implementation of the Hague Convention varies significantly. Donnelly (2007) himself considers financial and social situation as the most important determinant of the relativity on the implementation level. Given the nature of the inter-country adoption, nothing can be truer than the fact that financial issues are usually present at all stages of the process – as a root of inability of the biological family to take care of their children, as a reason for wider family and in-country adoptive parents not to be able to adopt more children, as a reason for a sending country not to be able to afford sufficient substitute child care and finally as an obstacle to successful implementation of the Hague Convention. The Hague Convention is very demanding and gives a lot of responsibility to the states, however, does not offer any mechanism to monitor or to evaluate their progress. Neither has it created any form of coercion towards unification or universalization

(in terms of widening the contracting base). The relativity of implementation of basic principles such as adoptability or improper financial gains is very wide and if still not sufficiently for a particular country, not ratifying the Hague Convention does not seem to stigmatize the countries at all. The receiving countries do not feel (and are not) morally or legally bound to condition their cooperation in respect of the inter-country adoption to any sort of accommodation of the Hague Convention.

Hansen and Pollack (2006) also point out that great disparities in quality of implementation bodies (Central Authorities) which is not regulated and depends heavily on the possibilities of each contracting state (or does not exist at all in non-Hague states) threaten the rights of children and their families. As such, it seems that on the implementation level, the Hague Convention is too relative while at the same time too demanding. The financial issues play even greater role than expected.

CONCLUSION

Even though many people hope for it, the inter-country adoption is a phenomenon which is not about to disappear. Conversely, it is highly probable that due to the emergence of the global middle class with an access to contraception and abortions that no longer faces the stigma of single parenting; a demand for children to adopt from abroad will rise.

The Hague Convention represents a first step which demonstrates the will of countries to cooperate and to establish a legal framework, hence, as I argued in this thesis, a step which suffers several shortages. After decades of unregulated inter-country adoptions within a legal vacuum the Hague Convention created the first international agreement on procedures, methods and standards. Only four years after the adoption of the UNCRC the international community recognized that the inter-country adoption constitutes new challenges to the rights of the child. In the 20th and 21st century the inter-country adoption changed significantly from a provision of homes to victims of war atrocities to seeking children for childless couples. Moreover, due to the technological progress it is no longer problematic to process adoptions fast and on purpose. In 2004 over 45 000 children were relocated from one country to another to be adopted. However, the inter-country adoption has both positive and negative impacts. There is an on-going discussion between proponents, critics and opponents and it does not seem to come to its end. Undoubtedly, several countries experienced bigger problems than other and although the situation is evolving towards greater security and protection of all the parties involved, there are still challenges to overcome in order to fulfil the main idea of the inter-country adoption – to act in the best interest of the child.

For the purpose of this thesis, I submitted two research questions dealing with the cultural relativism and the inter-country adoption. Answering the first research question I argue that the rights of the child are culturally relative. Although the UNCRC is generally accepted as the most universal declaration on children

rights, a sense of cultural relativism occurs. In order to achieve a global ratification, it was essential to leave enough space for cultural specifics. In this respect the UNCRC plays a role of the package of culturally relative principles instead of a sole universal doctrine on the rights of the child. As such, it became legitimate and respected worldwide. There is a mutual influence of the cultural relativism of the rights of the child and the inter-country adoption. Article 20 enumerates different types of the substitute child care and Article 21 de facto expresses that there are countries which do not recognize the adoption and as such are not bound by this article. In comparison with other articles such as the right to identity, to family, to own culture and language, these two are the most relative ones because the discussed relativity of the rights of the child is enhanced by the proclaimed relativity of the adoption practice.

In respect to Donnelly's theory of the three levels of relativism of human rights, I discuss that the Hague Convention embodies all three levels of relativism within its articles. I answer the second research question in three chapters dealing with a respective level of relativism. The result represents an outline of reflections of a particular level of relativism of the rights of the child and of relativism of the substitute child care in the Hague Convention.

The Chapter 3 analyzes the substantial level of the cultural relativism in the Hague Convention. I acknowledge the fundamental rights of the child the Hague Convention aims to protect which derive from the UNCRC and other international norms. In compliance with the general international law the Hague Convention accepts a very broad definition of childhood; on the top of that, it requires the contracting parties to act according to the best interest of the child principle. Basically all the provisions mentioned in the Preamble of the Hague Convention refer to generally accepted and vaguely worded principles of the child protection. Even though, the Hague Convention assumes the principle of subsidiarity, on the contrary to the UNCRC, it prefers any possibility of permanent in-family care to other means

of the substitute child care like foster and institutional care. Therefore, it formally elevates the right to family over the right to culture and language. Given that the Hague Convention serves a relatively specific purpose, this change in the meaning and implications of the principle of subsidiarity might be perceived as an on-purpose adjustment which does not contravene the fundamental rights of the child.

The Chapter 4 introduces and compares different approaches to abandoned and orphaned children in Christian, Confucian, Muslim, Hindu and Jewish legal systems, as well as, within the traditional societies of Africa, North America and Oceania. Albeit nowadays, except Muslim countries, the legal regulations on adoption constitute a part of legal systems worldwide, the fundamental notion of adoption varies significantly. Thus, on the interpretation level the Hague Convention represents one of several possible expositions of the rights of the child to family, culture or identity. Therefore, in respect to a local culture the inter-country adoption should be used wisely and contextually in order not to cause more harm than good. Moreover, different cultures seem to be heterogeneous in their ability to incorporate the concept of the inter-country adoption. While the Confucian and the Hindu culture adopt the concept quite smoothly, the Muslim and the Jewish culture are extremely reluctant to it. Latin America, albeit Christian, represent a specific intersection of Catholic understanding of the concept of adoption and Third Worlds problems of high fertility rates, poverty and weak states.

The Chapter 5 uncovers the implementation level of the relativism of the rights of the child in respect to the inter-country adoption. The implementation level is in variance with the previous two, because it deals rather with political, economic and social disparities between countries than cultural aspects. This emanates from actual needs of countries involved actively in inter-country adoptions to address practical issues. On this level, inequalities and differences between sending and receiving states become the most obvious. The sending states are often saddled with

the primary responsibility to identify and to protect vulnerable children, even though it might overestimate their real abilities to do so. On the other hand, the receiving countries benefit from already established systems and are not explicitly required to support or to encourage the sending countries materially. Given, that to meet all the provisions of the Hague Convention a state needs a sophisticated system of birth registration, a wide net of social workers and potential in-country adoptive parents, it is obvious that the economic and the social situation play the key role. For certain countries, unfortunately, the inter-country adoption does account for the top priority issues and thus, their children are more vulnerable to ill-effects of the non-regulated inter-country adoption.

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