

INTER-COUNTRY ADOPTION OF CHILDREN VIS-À-VIS HUMAN RIGHTS LAW – A CRITICAL ANALYSIS

*Dr. Kasturi Gaku*¹

The adoption process has been prevalent in different forms and throughout the ages, the motive behind adoption has undergone radical change. In ancient societies, adoption was not confined to only children but also adults. With the initiation of international human rights law, efforts have been made by the world community towards ensuring that children deprived of family environments are growing up with parental care and assistance through the process of adoption. However, there are cases where children of one nationality are adopted by foreigners and these children are no longer within the protective umbrella of their birth country. In such a scenario adopted children are susceptible to numerous vulnerabilities. Inadequacy in domestic laws to prevent child exploitation in matters of inter-country adoptions together with instances of trafficking and selling of children in the name of inter-country adoption had raised serious concern both at the international and regional level. How law addresses the need for the protection of such children through the inter-country adoption process is pertinent and hence, the author in this paper has endeavoured to critically analyse the provisions of international human rights law vis-à-vis inter-country adoption of children.

Keywords: *Adoption, Best Interest, Children, Human Rights, Inter-country.*

¹ Assistant Professor of Law (Senior), National Law University and Judicial Academy, Assam.

INTRODUCTION

Adoption practices have been in vogue since ancient times. Instances of adoption practices in ancient societies are replete in various literary and legal sources. The adoption process was prevalent in different forms and throughout the ages, the motive behind adoption has undergone radical change. In ancient societies, adoption was not confined to only children but also adults. Adoption practices in Western tradition during the ancient and medieval periods were religious-centric and meant for the continuation of the family line. The welfare of adoptive parents was the object behind adoption.

However, with the formulation of various international and regional instruments on child adoption, a revolutionary change has been brought about in the system of child adoption around the world which is based on the principle of “best interest of the child”. The welfare of the adopted child is the paramount consideration in the adoption process. The present paper endeavours to comprehensively divulge the human rights legal framework governing inter-country adoption of children.

HUMAN RIGHTS LAW AND INTER-COUNTRY ADOPTION OF CHILDREN

In the international scenario the promotion and respect for human rights and fundamental freedoms have been strongly advocated in the United Nations Charter 1945.² Elaboration of human rights of all persons including children has been enshrined in the Universal Declaration of Human Rights (UDHR) 1948. Article 1 of the UDHR proclaims that “all human beings are born free and equal in dignity and rights”.³ This provision applies to all children. However, the dignity and rights of many children are inhumanely violated and this is especially true for children who are deprived of parental care and assistance. Many children “deprived of the family

² Walter Kalin and Jorg Kunzli, *The Law of International Human Rights Protection* (Oxford University Press 2009) 14.

³ Ian Brownlie and Guy S Goodwin Gill (eds), *Basic Documents on Human Rights* (Oxford University Press 2006).

environment”⁴ are rendered destitute, abandoned, and orphaned. To ensure that these children are accorded an opportunity to grow up with parental care and exercise their rights, it is important that they are given protection.

Children’s need for protection against vulnerabilities has been acknowledged by the UDHR which under article 26 has emphasized that “childhood is entitled to special care and assistance and social protection should be made available to all children irrespective of being born in or out of wedlock”.⁵ A way through which special care and assistance can be provided to children deprived of parental care is through adoption. A few international instruments have stipulated principles and laws which at present govern the inter-country adoption of children. Inter-country adoption is also regarded as international or transnational adoption in which children that are residents and citizens of one country are adopted by parents who are resident citizens of another country.⁶ Adoption across borders is viewed by the advocates of international adoption as a practice where children without parents and issueless parents come together and form a family tie which goes beyond nationality, race, and culture.⁷

The issue of inter-country child adoptions has been addressed by the world community through the formulation and establishment of internationally recognized legal standards. The aim and object behind each of the international instruments relating to child adoption varies. Adoption of a child within his or her country is governed by the domestic law of that country. But when a child of one nationality is adopted by foreigners and taken to the country of the adoptive parents, the child adopted no longer is under the protective umbrella of his or her birth country and such a child is likely to be exposed to socio-economic, cultural and psychological vulnerabilities. Inadequacy in domestic laws to prevent child exploitation in matters of inter-country adoptions together with instances of trafficking and selling of

⁴ Convention on the Rights of the Child art 20 <<https://www.ohchr.org/en/instrumentsmechanisms/instruments/convention-rights-child>> assessed on 20 October 2023.

⁵ Michael Goodhart, *Human Rights Politics and Practice* (2nd edn, Oxford University Press 2013) 400.

⁶ Johanna Oreskovic; Trish Maskew, Red Thread or Slender Reed: Deconstructing Prof. Bartholet’s Mythology of International Adoption (2008) 14 Buffalo Human Rights Law Review 71 <<https://heinonline.org>> accessed 20 October 2023.

⁷ Laura McKinney, International Adoption and the Hague Convention: Does Implementation of the Convention Protect the Best Interests of Children (2007) 6 Whittier Journal of Child and Family Advocacy 361 <<https://heinonline.org>> accessed 20 October 2023.

children in the name of inter-country adoption had raised serious concern both at the international and regional level. To render protection to children during inter-country adoptions, countries around the world have come together to determine international standards relating to inter-country adoptions through various multilateral and bilateral initiatives.

An examination of the international human rights legal instruments is pertinent to understand the implications of the relevant conventions on inter-country adoption of children.

Convention on the Reduction of Statelessness 1961

The United Nations Conference on the Elimination or Reduction of Future Statelessness adopted the Convention on the Reduction of Statelessness (CRS) which entered into force on 13th December 1975.⁸ CRS 1961 is a comprehensive international legal instrument which provides detailed guidance on the implementation of the right to a nationality which can be readily transposed into domestic legislation of the States.⁹ The CRS mandates that States must “grant its nationality to a person born in its territory who would otherwise be stateless”.¹⁰ States may exercise discretion in determination of its nationals but being party to the CRS they are obligated for the acquisition of nationality by a child born within its territory who would have been otherwise stateless.¹¹ This safeguard has been considered as the cornerstone of efforts to reduce statelessness over time.¹² For addressing statelessness which may occur at birth or later in life States are required by the CRS to establish safeguards in their national legislation.¹³ Different measures are prescribed under CRS to reduce statelessness. Inter-country adoptions may cause

⁸ UN Convention on the Reduction of Statelessness – UNTC <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20V/V-4.en.pdf> > assessed 20 October 2023.

⁹ Institute on Statelessness and Inclusion, *The World's Stateless Children* (Wolf Legal Publishers 2017) 345.

¹⁰ art 1.

¹¹ Sebastian Kohn, Why the 1961 Convention on Statelessness Matters (European Network on Statelessness, 30 August 2011) <<https://www.statelessness.eu/blog/why-1961-convention-statelessness-matters>> assessed 20 October 2023.

¹² UNHCR ‘UNHCR Global Action Plan to End Statelessness 2014-24’ (Division of International Protection 2014) 10 <<http://www.unhcr.org/statelesscampaign2014/Global-Action-Plan-eng.pdf>> assessed 20 October 2023.

¹³ UNHCR ‘UNHCR Action to Address Statelessness: A Strategy Note’ (Division of International Protection 2010). <<https://www.unhcr.org/.../statelessness/.../unhcr-action-address-statelessness-strategy-n>> assessed 20 October 2023.

difficulty in the enjoyment of the children's right to nationality. Adoption of a child across an international border by adoptive parents of different nationalities usually entails that child, and the nationality of his or her adopters. However, where the nationality laws of a child's country of origin provide for automatic deprivation of nationality on adoption of the child by foreign nationals and the nationality laws of the adopters do not permit for immediate acquisition of nationality by the adopted child then statelessness ensues placing the adopted child in a vulnerable situation.¹⁴ CRS has addressed this serious problem and aims at protecting persons including children from being rendered statelessness on account of change in personal status due to marriage, termination of marriage or adoption etc. CRS clearly stipulates that "if the law of a contracting State entails the loss of nationality as a consequence of any change in the personal status of a person such as marriage, termination of marriage, legitimation, recognition or adoption, such loss shall be conditional upon possession or acquisition of another nationality".¹⁵ This provision is an imperative step in protecting the children from losing their nationality because of inter-country adoption.

No children of one country adopted by persons of another nationality will lose the nationality of their birth country provided they have acquired the nationality of another country or country of their adoptive parents. If any State that is a party to the CRS has a law that entails the loss of nationality of a child through adoption, then such loss will be conditional upon acquiring another nationality by that child. Thus, CRS prevents automatic loss of nationality. CRS aims at safeguarding the welfare and interest of children adopted through inter-country processes so that they do not become stateless. As of 20th October 2023, CRS has 79 Parties and 5 signatories to it.¹⁶ Significantly none of the 79 Contracting parties to the CRS have made any declaration or reservation regarding the application of a provision of inter-country adoption laid down in Article 5(1) which indicates their commitment to work towards the reduction of statelessness which might arise as a result of change in status of persons including children owing to adoption.

¹⁴ European Network on Statelessness, 'No Child Should be Stateless' (2015) <<https://www.statelessness.eu/resources/no-child-should-be-stateless>> assessed 20 October 2023.

¹⁵ art 5 (1).

¹⁶ UN Convention on the Reduction of Statelessness (n 8).

Convention on the Rights of the Child 1989

The human rights of children were given official recognition through the adoption of the Declaration of the Rights of the Child (DRC) in 1959. DRC emphasizes the right of a child to name and nationality from birth without any exceptions irrespective of the status of the child. DRC was not binding on any country or government.¹⁷

Realizing the need to provide a binding international instrument for the protection of children, the General Assembly by Resolution 44/25 without a vote on 20th November 1989 adopted the Convention on the Rights of the Child (UNCRC) 1989.¹⁸ UNCRC is an elaboration of the human rights standards relating to children which focuses on the survival, protection, development and participation of children. UNCRC stipulates that the best interest of the child should be the primary consideration in regard to all actions concerning children.¹⁹

UNCRC recognises the right of the child to be cared for by his or her parents.²⁰ UNCRC has contemplated situations where a child may be deprived of family environment and parental care. In order to provide care and protection to such children certain alternate measures which include inter alia foster placement, kafalah, adoption, or the placing of children, if needed in suitable child care institutions have been prescribed under UNCRC.²¹ Continuity of upbringing and the ethnic, religious, cultural and linguistic background of the child must be given due consideration in deciding solutions for children.²² State Parties through their national laws are required to ensure alternative care for a child²³ who has been deprived of his or her family environment either temporarily or permanently or where it is not in the child's best interest to be permitted to stay in that environment.²⁴ Special protection and assistance to which a child is entitled to, has to be provided by the State.²⁵

¹⁷ Asha Bajpai, *Adoption Law and Justice to the Child* (Centre for Child and the Law NLSIU 1996) 136.

¹⁸ Ian Brownlie & Gill (eds), *Basic Documents on Human Rights* (Oxford University Press 2006) 241.

¹⁹ art 3 (1).

²⁰ art 7 (1).

²¹ art 20 (3).

²² *ibid.*

²³ art 20 (2).

²⁴ art 20 (1)

²⁵ *ibid.*

The child's best interest must be the paramount consideration for the States in which the system of adoption is recognized or permitted.²⁶ It has to be ensured by the State Parties that only competent authorities authorize the adoption of the child. Prior to such authorization competent authorities on the basis of applicable law, procedure and pertinent information are to determine that the adoption of the child is permissible having regard to the status of child in relation to parents, relatives and legal guardians.²⁷ Where required competent authorities are to make sure that the informed consent to adoption, based on necessary counselling has been given by concerned persons.²⁸ Inter-country adoption as an alternative means for care of the child may be considered by the State Parties where the child neither finds placement with a foster or an adoptive family nor can be suitably cared for in his or her country of origin.²⁹ It has to be ensured by the State Parties that the safeguards and standards which are in existence with respect to adoption at the national level are accessible for enjoyment of the same by a child in case of inter-country adoption.³⁰ In inter-country adoption all appropriate measures are to be taken by the State Parties for ensuring improper financial gain does not occur for those who are involved in such placement.³¹ UNCRC does not claim to be a comprehensive international law on inter-country adoption as it requires the promotion of the objectives of article 21 by State Parties through conclusion of agreements –bilateral or multilateral and emphasizes that State Parties within such framework are required to endeavour for ensuring that it is the competent authorities or organs which are to carry out the child's placement in another country.³²

UNCRC requires the State Parties to review their legislations relating to children so as to ensure that laws are in consonance with the provisions of the Convention.³³

The Convention has proved to be a major source of inspiration for several countries including India in regard to formulating and reviewing of legislation on child adoption. The enactment of the JJ (C& PC) Act 2015 in India which has

²⁶ art 21.

²⁷ art 21(a).

²⁸ *ibid.*

²⁹ art 21(b).

³⁰ art 21(c).

³¹ art 21(d).

³² art 21(e).

³³ art 4.

replaced the JJ Act 2000 draws support from the Constitution of India and the UNCRC in addition to other sources.

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000³⁴

United Nations General Assembly at its fifty-fourth session adopted the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OP-CRC-SC) 2000 on 20th May 2000 by resolution 54/263.³⁵ OP-CRC-SC entered into force on 18th January 2002.³⁶ Exploitation of children in the name of adoption can take place domestically and trans-nationally. If child adoption laws do not provide penal provisions for violators of such law then there is the possibility that children given in adoption may be sold or forced into prostitution or child pornography. OP-CRC-SC has under article 3(1) (a)(ii) stressed that State Parties should ensure that their criminal or penal law deals with coercive adoptions irrespective of whether such criminal act has been committed by an individual or organised group either domestically or trans-nationally.³⁷ Anyone acting as an intermediary indulging in improperly inducing consent for adoption of a child should be punished under the criminal law.³⁸ Though this provision is applicable only with regard to the acts of intermediaries yet it has been recommended by the Committee on the Rights of Child (CRC) that the activities of all those which are involved in the sale of children for the purpose of adoption be criminalized by the State Parties.³⁹ CRC's interpretation is justified as the OP-CRC-SC has emphasized that appropriate administrative and legal measures should be taken up by the State Parties so as to ensure compliance of the international legal instruments by all persons involved in the adoption process⁴⁰ . State Parties in

³⁴ OHCHR Optional Protocol to the Convention on the Rights of the Child <<https://www.ohchr.org/en/professionalinterest/pages/opscrc.aspx>> assessed 20 October 2023.

³⁵ Optional Protocol - UNTC <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-11..> assessed 20 October 2023.

³⁶ Optional Protocol - UNTC <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-11..> assessed 20 October 2023.

³⁷ United Nations Department of Economic and Social Affairs (Population Division), 'Child Adoption: Trend and Policies' (2009) 56.

³⁸ OP CRC-SC art 3 (a)(ii).

³⁹ The United Nations Children's Fund, *Handbook on The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography* (UNICEF Innocenti Research Centre 2009) 11.

⁴⁰ art 3(5).

accordance with their national laws are to criminalize also the attempt to commit, complicity or participation in acts specified under article 3(1) of OP-CRC-SC⁴¹ and these offences are to be punished by the State Parties with penalties taking into account their grave nature⁴². Measures are to be taken up by the State Parties as per the law of their country for establishing the civil, criminal or administrative liability of legal persons for such offences.⁴³ State parties have been conferred with wide amplitude of power to take measures subject to their national laws in dealing with offences such sale of children, sexual exploitation, forced child labour and adoption of children in violation of international legal instruments. OP-CRC-SC requires State Parties to incorporate within their criminal laws the acts, activities and offences stipulated under article 3(1) as a ‘minimum’ without specifying and defining as to what is ‘minimum’. For implementing the provisions of OP-CRC-SC in preventing the offences against children, laws, administrative measures and social policies are to be adopted, implemented, and disseminated by the State Parties.⁴⁴ OP-CRC-SC emphasizes upon the awareness, education, and training of public and children about the measure to prevent the offences⁴⁵ and also is obligated to encourage the participation of community and children in the education and training programmes at domestic and international level⁴⁶. Strengthening of international co-operation by State Parties through the conclusion of multilateral and bilateral arrangements is encouraged.⁴⁷

ANALYSIS

Statelessness is a shifting global phenomenon⁴⁸ adversely affecting large portion of the world population who are susceptible to multi-dimensional vulnerabilities. International co-operation through application and adherence to common rules for preventing and reducing statelessness is vital to ensure that every human being enjoys the right to nationality. CRS 1961 is a universal instrument

⁴¹ art 3(2).

⁴² art 3(3).

⁴³ art 3(4).

⁴⁴ art 9(1).

⁴⁵ art 9(2).

⁴⁶ art 9(2).

⁴⁷ art 10(1).

⁴⁸Jay Milbrandt ‘Adopting the Stateless’ (2014) 39(2) Brooklyn Journal of International Law <<http://brooklynworks.brooklaw.edu/bjil/vol39/iss2/4>> assessed 20 October 2023.

which has responded to the threat of statelessness through incorporation of clear, elaborate and concrete safeguards for reduction of statelessness. By providing common rules CRS has equipped States in resolving the disputes relating to nationality and has enabled them in mobilising international support for effectively dealing with the prevention and reduction of statelessness.⁴⁹ However it is to be noted that out of the total 193 Members of the United Nations⁵⁰ only 79 countries have ratified/acceded the CRS 1961. Non-accession to CRS by large of States has hindered the global consolidation and stabilisation required for prevention and reduction of statelessness. Lack of uniformity and coherence in the nationality laws of different States continue to render some individuals stateless.⁵¹ In the absence of any prescribed formal reporting obligations for State Parties under CRS 1961⁵² it becomes difficult for ensuring that safeguards for reducing statelessness are being properly implemented by the State Parties. Detailed safeguards stipulated under CRS are required to be implemented by the States through their respective nationality laws. But since no specific parameters of nationality laws have been demarcated by the CRS, States are provided with a wide leeway to determine and elaborate the content of their nationality laws.⁵³ For instance under the Romanian nationality law where the adoption of an under-aged Romanian child residing abroad is cancelled or annulled, such child will not be considered to have been a Romanian citizen even though such a step might result in statelessness. Such a legal provision clearly depicts a wide departure in Romania's nationality law from its international obligation under the CRS 1961.⁵⁴

UNCRC defines a child as a person who has not completed the age of eighteen years until as per the national law which is applicable to that child adulthood is attained earlier. UNCRC has lessened its impact by recognising the

⁴⁹ UNHCR 'Preventing and Reducing Statelessness: The 1961 Convention on the Reduction of Statelessness' (2010) 2 <<https://www.refworld.org/docid/4cad866e2.html>> accessed 20 October 2023.

⁵⁰ Member States United Nations <<https://www.un.org/en/member-states/>> assessed 20 October 2023.

⁵¹ UNHCR Preventing and Reducing Statelessness (n 8).

⁵² *ibid* 10.

⁵³ *ibid* 3.

⁵⁴ European Network on Statelessness, 'No Child Should be Stateless' (2015) <<https://www.statelessness.eu/resources/no-child-should-be-stateless>> assessed 20 October 2023.

power of each of the States to determine who a child is.⁵⁵ There is a fear that States may deny their rights to children by declaring them as adults in accordance with their national laws.⁵⁶ The confusion and variance in the definition of 'child' in different States has limited the applicability of UNCRC. It has been advocated that adopted persons have the human right to identifying information about their biological parents. However, article 21 has failed to acknowledge and address the right relating to disclosure of identifying information.⁵⁷

UNCRC is legal document which purports to set binding standards for the ratifying or acceding States and it is laudable that international commitment in rendering protection to the rights of children within the mandate of UNCRC has received overwhelming support through ratification or accession by 196 countries (as on 20 October 2023)⁵⁸. Unfortunately, UNCRC does not provide a strong mechanism for enforcement of its standards by the State Parties. UNCRC is monitored by the Committee on the Rights of the Child (CRC) comprising of eighteen experts. CRC has been established with the object of examining the extent of progress achieved by the State Parties in realizing their obligations under UNCRC. State Parties to UNCRC are required to submit reports on the measures that they have adopted for giving effect to the rights of children and the progress that they have achieved in enjoyment of the rights stipulated under UNCRC. Initial report must be submitted by the State Party within 2 years and subsequently periodic report must be submitted every five years. Sufficient information must be given by the State Parties in their reports to enable the CRC to comprehensively understand the efforts made by concerned States in implementing the UNCRC. Additional information relevant UNCRC's implementation by State Parties may be sought by the CRC. CRC reviews the reports submitted by the State Parties. On the basis of these reports and information provided by NGOs, the CRC may make concluding observations and general

⁵⁵ Sherilyn C Baxter, 'The Suggestions on the Rights of the Child: Why the United Nations' Convention on the Rights of the Child Is a Twenty-Five Year Failure' (2015) 2 *Journal of Global Justice and Public Policy* 89 <<https://heinonline.org>> assessed 20 October 2023.

⁵⁶ Osifunke Ekundayo, 'Does the African Charter on the Rights and Welfare of the Child (ACRWC) only Underlines and Repeats the Convention on the Rights of the Child (CRC)'s Provisions?: Examining the Similarities and the Differences between the ACRWC and the CRC' (2015) 5 (7) (1) *International Journal of Humanities and Social Science* 149 <www.ijhssnet.com/journals/Vol_5_No_7_1_July_2015/17.pdf> assessed 20 October 2023.

⁵⁷ D Marianne Blair, 'The Influence of International Conventions on Municipal Adoption Law: The Disclosure Debate' (2002) 96 *Proceedings of the Annual Meeting (American Society of International Law)* < <http://www.jstor.org/stable/25659772> > assessed 20 October 2023.

⁵⁸United Nations Convention on the Rights of the Child -UNTC<https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11> assessed 20 October 2023.

recommendations to the reporting States.⁵⁹ Most of the State Parties do not qualify CRC recommendations as mandatory or necessary.⁶⁰ Reporting requirement puts very minimal pressure upon State Parties to fulfil obligations mandated under UNCRC.⁶¹ Utilization of the reporting process in a strategic manner is undermined due to the delay in the submission of reports by the government of the State Parties and the protracted time interval between the submission of the report and session of the CRC.⁶² If there is delay in submission of reports by more than one year then the concluding observations of CRC could be perceived as being irrelevant.⁶³ On 31st January 2019, CRC Chairperson Renate Winter had stated that 27 reports had been reviewed by CRC and that the backlog stood at 35 reports, with 17 new reports being received since January 2018.⁶⁴ As CRC is only advisory and non-disciplinary it is ineffective in ensuring the enforcement of its standards by the respective State Parties. UNCRC has not laid down any established rules for treaty non-compliance.⁶⁵ UNCRC enforcement mechanism is weak because of its reliance on diplomacy rather than legal sanctions.⁶⁶

UNCRC though laid down principles of good adoption practices, the provision in article 21 which stipulates that “States Parties that recognize and/or permit the system of adoption” provides an escape clause to the Islamic countries that do not recognise the institution of adoption. This has resulted in lodging of reservations and therefore, unfortunately several ratifying States such as Egypt, Jordan, Kuwait and the United Arab Emirates which do not recognize adoption as a means to care and protect children have ratified or acceded to the UNCRC with reservations to the provision of adoption.⁶⁷ Reservations to article 21 of UNCRC has

⁵⁹ David A Balton, ‘The Convention on the Rights of the Child: Prospects for International Enforcement’ (1990) 12 Human Rights Quarterly 120 <<https://heinonline.org>> assessed 20 October 2023.

⁶⁰ Baxter (n 55) 90.

⁶¹ Balton (n 59) 128.

⁶² Lisa Woll, ‘Reporting to the UN Committee on the Rights of the Child: A Catalyst for Domestic Debate and Policy Change’ (2000) 8 The International Journal of Children’s Rights 71 <<https://heinonline.org>> assessed 20 October 2023.

⁶³ *ibid* 81.

⁶⁴ OHCHR Committee on the Rights of the Child holds on informal meeting with States <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24129>> assessed 20 October 2023.

⁶⁵ Luisa Blanchfield, The United Nations Convention on the Rights of the Child (*Congressional Research Service* 1 April 2013) 9 <<https://fas.org/sgp/crs/misc/R40484.pdf>> assessed 20 October 2023.

⁶⁶ Baxter (n 55) 100.

⁶⁷ Trevor Buck, *International Child Law* (Cavendish Publishing Limited 2005) 155.

been for a number of reasons such as by Canada due to inconsistency with customary forms of care among the aboriginals; by Argentine on the ground that prior to application of article 21 strict mechanisms are to exist for legal protection of children with regard to inter-country adoption; by Maldives on the point that under Islamic Shariah, system of adoption is not one of means for the protection and care of children; in Bangladesh article 21 is subject to its existing laws and practices; by Brunei Darussalam as article 21 is contrary to its Constitution and principles of Islam. UNCRC's reservation provision limits its applicability upon the reserving states. The effect of reservation makes it difficult for the other State Parties to the UNCRC to grasp and determine the extent of commitment on the part of the reserving State Parties to be bound by the obligation of realizing the provisions of UNCRC.⁶⁸ UNCRC does not permit reservations which are incompatible with the objects and purpose of UNCRC.⁶⁹ State Parties can individually judge such matters. Neither any particular body has been designated nor has CRC been authorized for determining which reservations can be considered to be incompatible within the ambit of article 51(2). No dispute resolution clause has been prescribed under UNCRC.⁷⁰

UNCRC has specified minimum standards to be achieved by the State Parties with regard to the rights of children and it is neither intended to set highest possible standards nor cover exhaustively the entire universe of child rights.⁷¹ This is evident from the fact that State Parties to UNCRC for the realization of the rights of the child are invited to apply provisions of their national laws or applicable international instruments which are more conducive⁷². UNCRC does not specify or define what is 'more conducive' thereby giving rise to vague interpretation by the State Parties. State Parties which are fundamental actors in implementing the provisions of UNCRC by virtue of art 41 are provided with a wide leeway to disregard their obligations under UNCRC in the guise of their subjective parameter of what amounts to 'more conducive' as per their domestic laws.

⁶⁸ Lawrence J Leblanc, 'Reservations to the Convention on the Rights of the Child: A Macroscopic View of State Practice' (1996) 4 *The International Journal of Children's Rights* 357 <<https://heinonline.org>> assessed 20 October 2023.

⁶⁹ art 51(2).

⁷⁰ Leblanc (n 68) 373.

⁷¹ Marta Santos Pais, 'The Convention on the Rights of the Child and the Work of the Committee' (1992) 26 (1) *Israel Law Review* 16 <<https://heinonline.org>> assessed 20 October 2023.

⁷² art 41.

Though UNCRC under article 35 requires State parties to take measures for preventing the abduction, sale or trafficking in children for any purpose or form yet such provision lacks significant force due to reliance upon national laws for providing specific legal measures.⁷³ Such purpose may also be for adoption. Moreover, UNCRC has not specified the exact nature of what constitutes trafficking.⁷⁴

Advocates favouring the policies which facilitate international adoption for unparented children have criticized that article 21 gives strong preference to placement of children in domestic adoption or institution rather than allowing foreign adoption. The Domestic Placement Preference Principle (DPP Principle) of UNCRC thereby accords inter-country adoptions the last alternative position. This tends to reduce the practice of inter-country adoptions and provides wide scope to certain State Parties to defend in the name of the DPP principle their extra-ordinarily restrictive policies on foreign adoption. Inestimable number of children who were capable of being adopted because of the prevalence of DPP Principle either had to languish in orphanages or survive in the streets due to lack of domestic alternative care.⁷⁵ Elizabeth Bartholet while alluding about the reports relating to orphanages after the imposition of moratoria on international adoptions by Vietnam, Guatemala and Romania had viewed that around the world there were 8 million children in orphanages and 100 million were lining on the streets.⁷⁶

The Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OP-CRC-CP) adopted by UNGA Resolution 66/138 of 19th December 2011 entered into force on 14th April 2014.⁷⁷ OP-CRC-CP empowers individuals including children to submit communications to CRC by claiming to be victims of violation by the State Party to OP-CRC-CP of any of rights stipulated under

⁷³ Priya Sharma, 'Towards a Better Approach for Inter-Country Adoption' in Lakshmi Jambholkar (ed), *Select Essays on Private International Law* (Universal Law Publishing Co Pvt Ltd 2011) 166.

⁷⁴ Michael D Aune, 'Unregulated Custody Transfers: Why the Practice of Rehoming Should Be Considered a Form of Illegal Adoption and Human Trafficking' (2017) 46 *Georgia Journal of International and Comparative Law* 185 (2017) <<https://heinonline.org>> assessed 20 October 2023.

⁷⁵ James G Dwyer, 'Inter-Country Adoption and the Special Rights Fallacy' (2013) 35 *University of Pennsylvania Journal of International Law* 189 <<https://heinonline.org>> assessed 20 October 2023.

⁷⁶ Elizabeth Bartholet, 'International Adoption: The Human Rights Position' (2010) 1(1) *Global Policy* 91 <<https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1758-5899.2009.00001.x>> assessed 20 October 2023.

⁷⁷ OHCHR Optional Protocol to the Convention on a communications procedure <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPICCRC.aspx>> assessed 20 October 2023.

UNCRC, OP-CRC-AC and OP-CRC-SC.⁷⁸ As per the admissibility requirements specified in article 7 the communication has to be in writing and submitted after exhaustion of domestic remedies. However, where the application of remedies is unreasonably prolonged such exhaustion is not required.⁷⁹ Written requirement of communication may not promote effective utilization of the communication procedure as children may not be able to adequately express their feelings in writing. OP-CRC-CP has not specified any yardstick as to how it can be determined that the application of domestic remedies is unreasonably prolonged.⁸⁰ Inter-State communication system though enables children to enforce their rights through a powerful entity- State yet due to the opt-in option inter-state procedure is applicable only to those States which recognize the competence of the CRC to receive inter-state complaints through declaration.⁸¹ As on 20th October 2023 only 51 States have ratified or acceded to OP-CRC-CP⁸² and this has definitely undermined its potential as an effective international complaints mechanism for enforcement of children rights.

A huge responsibility is entrusted upon the State Parties to the OP-CRC-SC for preventing offences such as sale of children, illicit transfer and illegal adoption of children etc. However, this responsibility is only upon States which are party to OP-CRC-SC. Out of total 193 Members of the United Nations as on 20th October 2023 OP-CRC-SC has been ratified or acceded by 178 State Parties⁸³. As compared to OP-CRC-SC, CRC has been ratified or acceded by 196 State Parties⁸⁴. OP-CRC-SC supplements UNCRC by providing detailed provisions to State Parties in ending sexual abuse and exploitation of children and renders protection against sale of children for non-sexual purposes such as illegal adoption, forced labour etc.⁸⁵ Therefore the applicability of OP-CRC-SC has been limited as universal ratification

⁷⁸ art 5.

⁷⁹ art 7(5).

⁸⁰ Zelalem Shiferaw Woldemichael, Communications Procedure under the 3rd Optional Protocol to the Convention on the Rights of the Child: A Critical Assessment (2015) 7 Jimma University Journal of Law 78 <<https://heinonline.org>> assessed 20 October 2023.

⁸¹ *ibid* 108.

⁸² Optional Protocol on a communications procedure - UNTC <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV> assessed 20 October 2023.

⁸³ Optional Protocol - UNTC <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&clang=_en> assessed 20 October 2023.

⁸⁴ CRC-UNTC <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11..> assessed 20 October 2023.

⁸⁵ Advancing the CRC Convention on the Rights of the Child UNICEF <https://www.unicef.org/crc/index_protocols.html> assessed 20 October 2023.

or accession to OP-CRC-SC has not been achieved. Declarations and reservations at the time of ratification or accession have been made by some of the State Parties with regard to provisions relevant to adoptions under article 3 of OP-CRC-SC. Argentine Republic had stated that neither international instruments on the international adoption of minors have been signed by it nor international adoption of children who are domiciled or resident in its jurisdiction is permitted.⁸⁶ Kuwait and United Arab Emirates have made reservation with respect to art 3(5). In relation to adoption Syrian Arab Republic has made reservation to art 3(1)(a)(ii) and art 3(5). Declaration has been made by Malaysia and Republic of Korea to the effect that art 3(1)(a)(ii) is applicable only to State Parties to the Hague Adoption Convention 1993.⁸⁷ Through such declarations and reservations, some State Parties have limited the extent of OP-CRC-SC applicability upon them. Moreover, measures to be taken by the State Parties with regard to acts and offences relating to adoption of children under their penal laws are only required to be ‘minimum’ subject to the respective national laws. OP-CRC-SC has limited its applicability among its State Parties by stipulating that where provisions embodied in a state party law or international law in force in a State are more conducive for realization of the child’s right then OP-CRC-SC cannot affect such provisions⁸⁸. What amounts to ‘more conducive’ has not been defined. CRC monitors the implementation of OP-CRC-SC through the Reporting System as per which State Parties are required to submit their initial reports within two years and thereafter periodic reports every five years.⁸⁹ In the reports State Parties must provide information comprehensively about the measures undertaken by them for implementing OP-CRC-SC. By 25th May 2015 sixty-five State Parties had not submitted their first reports and a third of them were more than 10 years overdue.⁹⁰ Timely submission of reports and its evaluation by CRC are pertinent for monitoring the action taken by States in implementing OP-CRC-SC in their respective countries. Delay in submission of reports hinders the CRC monitoring. No sanction or mechanism has been provided under OP-CRC-SC for ensuring the enforcement and

⁸⁶ Optional Protocol - UNTC (n 83)

⁸⁷ Optional Protocol - UNTC (n 83)

⁸⁸ art 11.

⁸⁹ art 12.

⁹⁰ UN experts urge final push for universal ratification of Optional Protocols to Convention on the Rights of the Child <<https://reliefweb.int/.../un-experts-urge-final-push-universal-ratification-optional-proto..>> assessed 20 October 2023.

compliance on the part of the State Parties for timely submission of initial and periodic reports.

CONCLUSION

International instruments have laid down provisions relating to inter-country adoptions. These provisions have tried to resolve the differences arising out of inter-country adoptions among States which are parties to the international instruments. The human rights of children to be protected against trafficking in the name of adoption has been acknowledgment in UNCRC. To mitigate the possibility of exploitation of children through inter-country adoptions, international instruments on child adoption have stressed the need to establish Central Authorities for regulating adoptions who are responsible for ensuring that inter-country adoptions are in accordance with law and no improper financial gains result from adoption. These instruments have tried to harmonize the divergence in national laws governing inter-country and emphasized upon international and regional co-operation for the welfare of the child. Respect has been accorded to national laws regulating child adoption. Inter-country adoptions are taken recourse to only when adoption of a child within his or her country of origin has failed.

Ratification or accession to international human rights instruments on inter-country adoptions other than UNCRC has been slow and not universal. As such only State Parties to international instruments are obligated to implement the provisions. However, even among the ratifying or acceding States there have been reservations to certain child adoption provisions which have obstructed the protection of the best interest of the adopted child. Supplementary nature of the international human rights instruments on inter-country adoption enabling State Parties to adhere and apply their national laws in governing adoption concomitant with the vagueness of certain provisions, admissibility of reservation, unclear public policy principle and lack of legal sanctions have limited the applicability and enforceability of the international human rights instruments on inter-country adoption of children.

Children are precious treasures of the future and they are the most valuable assets of a nation and society. It is the duty of State to look after them with a view to ensure the complete development of their personalities. Since society expects them to

grow as responsible citizens of the future, they need special care, protection, affection and facilities because of their tender age, physique and underdevelopment mental faculties. There is no exaggeration if it is said that future well-being of a particular nation depends upon how the children grow and develop.⁹¹ Hence, there should be universal ratification of international instruments on inter-country adoptions without reservation by the States around the world for protection and welfare of children. Clarity on the definition and application of the principle of public policy by the States ratifying international human rights instruments along with imposition of legal sanctions for violation of the rights of adoptee is imperative for affording protection to children from subjective interpretation of States.

⁹¹ *Lakshmi Kant Panday v Union of India*, 1984(2) SCC 244