

**INTERCOUNTRY ADOPTION IN AN AFRICAN CONTEXT:
A LEGAL PERSPECTIVE**

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ABSTRACT

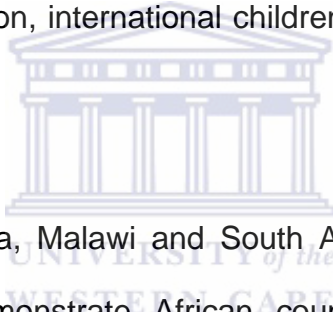
Although it may seem ironic that a policy affecting so few children should engage so much political and social attention, the symbolic significance of intercountry adoption far outweighs its practical import. This fact is partly demonstrated by the polarised views on intercountry adoption, and opinions continue to be divided over the necessity and propriety of the practice.

At present, there can be few who would quibble with the fact that African children are attracting an increasing attention from prospective adoptive parents living in other parts of the world. Celebrity adoptions (the adoptions of Angelina Jolie and Madonna) have contributed to this increased interest in African children. While intercountry adoption from African countries is still quite modest compared to adoptions from the top four countries of origin, there are concrete reasons to believe that interest in adoption from African countries will continue to increase.

Thus, while Africa is “the new frontier” for intercountry adoption - it is highly questionable if the continent is equipped to provide its children with the necessary safeguards in respect of the practice. A central thesis of this study was to explore how the best interests of the African child can be upheld in intercountry adoption. In connection with this thesis, a number of related research questions were raised, such as: does the African context present any peculiar situations that are relevant to intercountry adoption? Does the African Children’s Charter (ACRWC) add any value to

the provisions of the CRC in addressing African realities relevant for intercountry adoption? What are some of the challenges, lessons, and opportunities for the regulation of intercountry adoption on the African continent?

Five themes are considered in dedicated Chapters of this study. They are the African context; the international legal framework; adoptability; the principle of subsidiarity; and illicit activities in respect of intercountry adoption. It is argued that context matters, and there are historical, cultural, social, religious, and legal contexts that are relevant for intercountry adoption in Africa. Since human rights issues are at the core of the current debate over intercountry adoption, international children's rights law is also very crucial for the discussion.



Four countries (Ethiopia, Kenya, Malawi and South Africa) are used in this study in supplementary fashion to demonstrate African countries' experiences. The study identifies the role of various stakeholders for the promotion and protection of children's rights in Africa in respect of intercountry adoption. It is concluded that as a predominantly sending continent, Africa's views on intercountry adoption issues should be seriously considered and taken into account, if a socially and legally sound, and child-centred, intercountry adoption regime is to be formed on the continent.

ACRONYMS / ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ACPF	African Child Policy Forum
African Committee	African Committee of Experts on the Rights and Welfare of the Child
ANPPCAN	African Network for the Prevention and Protection of Child Abuse and Neglect
AU	African Union
CARA	Central Adoption Resource Authority (India)
Children Act	Kenyan Children Act
Children's Act	South African Children's Act
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
CEDAW	Convention on the Elimination of Discrimination against Women
CRPWD	Convention on the Rights of Persons with Disabilities
DCS	Department of Children's Services (Kenya)
DSD	Department of Social Development (South Africa)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
Hague Convention	Hague Intercountry Adoption Convention of 1993
HCCH	Hague Conference on Private International Law
HRC	Human Rights Committee
IBCR	International Bureau of Children's Rights

ISS/IRC	International Social Service/International Reference Centre for the Rights of Children Deprived of their Family
MDGs	Millennium Development Goals
MOLSA	Ministry of Labour and Social Affairs (Ethiopia)
MOWA	Ministry of Women's Affairs (Ethiopia)
OPSC	Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography
Palermo Protocol	Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children
Permanent Bureau	Permanent Bureau of the Hague Conference on Private International Law
RACAP	Register of Adoptable Children and Prospective Adoptive Parents
RFC	Revised Family Code of Ethiopia
SALRC	South African Law Reform Commission
SCA	Supreme Court of Appeals (Malawi and South Africa)
The 1986 Declaration	The 1986 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
UDHR	Universal Declaration of Human Rights
UNAIDS	The United Nations Joint Programme on HIV/AIDS
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
U.S.	United States
VCLT	Vienna Convention on the Law of Treaties

KEY WORDS

Intercountry adoption

Adoption

Child rights

African Children's Charter

Convention on the Rights of the Child

Family environment

Alternative care

Principle of subsidiarity

Trafficking

Institutionalisation



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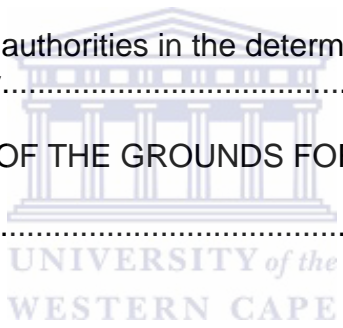
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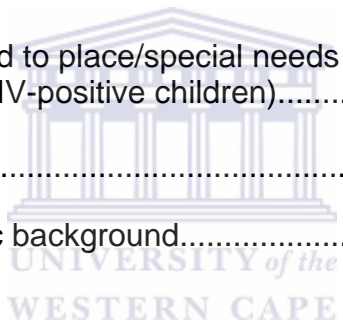
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DECLARATION

I declare that “Intercountry adoption in an African context: A legal perspective” is my work and has not been submitted for any degree or examination in any other university or academic institution. All sources and materials used in this study are duly acknowledged.

Benyam Dawit Mezmur

Date

_____ November 2009



CHAPTER 1

INTRODUCTION

1.1 BACKGROUND TO THE STUDY

Tracing the history of intercountry adoption leads one to the conclusion that the practice is identified as a post-World War II phenomenon.¹ Its association with post-war activities is indicative of the benevolent humanitarian solution it had initially represented.

Currently, however, it seems that intercountry adoption has evolved from its roots as a humanitarian act into a widely accepted option for childless people who wish to create a family.² Since World War II Western societies have changed, so that the “supply” of domestically adoptable children has become scarce. The increased use of contraceptives, the increase in infertility among families in developed countries, and the growing acceptance of single parents have contributed to this Western “baby shortage”.³ These facts and the notion that it is somehow less difficult to adopt internationally have encouraged more Westerners to look to other countries for adoptable children.⁴

The increased popularity of intercountry adoption since its arrival on the international legal scene following World War II is not anything recent. What is recent, however, is the increased attention African children are attracting from prospective adoptive parents

¹ Bergquist, (2004), 343; Bartholet, (2007), 159; UNICEF Innocenti Digest, (1998), 2.

² Kleiman, (1997), 333; Kane, (1993), 313.

³ Katz, (1995), 287.

⁴ Kleiman, (1997), 333.

living in other parts of the world. Amongst other factors, there is no doubt that this recent interest is fuelled by the expanded media coverage which continues to bring the plight of abandoned and orphaned children from Africa to audiences all over the world, coupled with recent news stories that have chronicled high profile intercountry adoption cases from Africa: the intercountry adoptions by Angelina Jolie (from Ethiopia) and Madonna (from Malawi) spring to mind.

Opinions are divided over the necessity and propriety of intercountry adoption. It is not an exaggeration to state that intercountry adoption has impacted on public consciousness in two incompatible ways.⁵ On the one hand, intercountry adoption is presented as a heart-warming act of goodwill that benefits both a child and an adoptive family.⁶ To consider the practice as a panacea for children without parents and parents without children is a prevalent view.⁷ Intercountry adoption as an opportunity to deliver children from destitute lives is also a perception held by many.⁸

On the other hand, critics characterise the practice as “modern-day imperialism, allowing dominant, developed cultures to strip away a developing country’s most precious resources, its children”.⁹ They argue that children adopted internationally will have difficulties adjusting to their new languages and cultures.¹⁰ It is also contended that intercountry adoption is a paternalistic solution, one in which the children who are

⁵ Smolin, (2005), 403.

⁶ Smolin, (2005), 403; Bartholet, (2007), 158.

⁷ Dillon, (2003), 179 (discussing how to transform the Hague Convention in such a way as to facilitate intercountry adoptions).

⁸ See generally Strong, (1995), 163 (discussing adoption as a human right).

⁹ Martin, (2007), 174 citing Kleem, (2000), 325-326.

¹⁰ Perry, (1998), 131.

being adopted are viewed as needing “rescue” from their plight,¹¹ echoing the welfarist approach to children that preceded ideologies based on children’s rights as incorporated in the CRC and the ACRWC.

In addition, contrasted with the positive face of adoption are some scandals and irregularities concerning the practice – and at its worst, adoption is portrayed as child trafficking or child selling.¹² The statement about the two contradictory perceptions of intercountry adoption is perhaps as equally valid in Africa as elsewhere. Some African countries have decided to restrict intercountry adoption to certain narrowly defined situations,¹³ and, at the extreme end, there prevails a preference to prohibit intercountry adoption altogether.¹⁴ Interestingly, both advocates for and against intercountry adoption use the “best interests of the child” as the basis for their positions.

Since human rights issues are at the core of the current debate over intercountry adoption,¹⁵ international children’s rights law is crucial for the discussion. For this purpose international children’s rights law is composed of the Convention on the Rights of the Child (CRC),¹⁶ the African Charter on the Rights and Welfare of the Child (ACRWC),¹⁷ and the Hague Convention on the Protection of Children and Cooperation

¹¹ Martin, (2007), 176.

¹² Smolin, (2004), 281; Smolin (2005), 404; Van Bueren, (1995), 96; Goodwin, (2006), 68.

¹³ For instance, some countries like Botswana, Malawi, Sierra Leone, and Zambia have a residency requirement for prospective adoptive parents.

¹⁴ For instance, Nigeria.

¹⁵ Bartholet, (2007), 151-52.

¹⁶ UN Convention on the Rights of the Child (hereinafter “CRC”), entered into force 2 September 1990.

¹⁷ African Charter on the Rights and Welfare of the Child (hereinafter “ACRWC”), entered into force 29 November 1999.

in Respect of Intercountry Adoption (the Hague Convention).¹⁸ Despite these instruments, a number of answers, particularly, how to define the best interests of the child in the context of intercountry adoption remain vague and controversial.

1.2 TITLE OF THE STUDY

The title of this study is “Intercountry adoption in an African context: A legal perspective”.

1.2.1 Why “an African context”?

The debate over intercountry adoption is dominated by views from the West, where the majority of traditionally receiving countries are located.¹⁹ This is so despite the fact that, currently, most children available for intercountry adoption come from less-developed countries where factors including the stigma of illegitimacy, the minimal use of contraceptives, stringent laws on abortion, conflict, poverty, and health problems (such as HIV/AIDS) contribute to the population of homeless children.²⁰ One writer who recognises this problem is King. He uses the phrase MonoHumanism “to underscore the ethnocentric and myopic failure to include discourses that have their origins in the lives, cultures, and vocabulary of historically oppressed peoples...”.²¹ As a predominantly sending continent, Africa’s views on intercountry adoption issues should

¹⁸ The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption (hereinafter “the Hague Convention”), entered into force 1 May 1995. It is important to note that the Hague Convention is not a human rights convention *per se*, but is an agreement on the standards to be observed where intercountry adoption occurs. However, it is important to note that human rights issues are at the core of the current debate over international adoption. See, for instance, Bartholet, (2007), 151-152.

¹⁹ See, generally, King, (2009).

²⁰ Katz, (1995), 287.

²¹ King, (2009), 414.

be seriously considered and taken into account, if a socially and legally sound, and child-centred, intercountry adoption regime is to be formed on the continent.²²

The use of the indefinite article “an” African context instead of “the” African context is a conscious one. While the latter seems to insinuate that there is a monolithic African context when it comes to intercountry adoptions, the former approach (which is adopted by this study) seems to imply a more limited scope of generalisation which is mainly (but, of course not exclusively) applicable to the four countries (Ethiopia, Kenya, Malawi, South Africa) that are used as add-ons in the study.²³

1.2.2 Why “[a] legal perspective”?

Issues pertaining to adoption generally tend to require an interdisciplinary approach spanning law, sociology, psychology, and anthropology to name a few disciplines. As a result, there are a number of issues pertaining to intercountry adoption which go beyond the scope of this study. The phrase “[a] legal perspective” in the title of this study is intended to demarcate this scope. Moreover, the sub-title “[a] legal perspective” also reflects that the study relies heavily on the applicable legal texts provided for at the global, regional and national level.

1.3 TERMINOLOGY

²² See section 1.5 below for the aims of this study.

²³ See section 1.7 below on the choice of jurisdictions for a detailed explanation of the four case studies.

A number of terminological choices have been made throughout this study. In order to simplify the text, unless the context requires otherwise, this study shall try to use consistent terms throughout. Some of these terms are explained below.

The notion of “adoption” covers a great variety of legal approaches, customs and practices.²⁴ As used in this study, it is “the legal practice through which a person acquires new family ties that are defined as equivalent to biological ties and which supersede the old ones, either wholly or in part”.²⁵ Adoption, as understood in this study, creates a permanent legally recognized parent-child relationship.

The phrase “domestic adoption” is used to refer to an adoption that takes place between a child and an adoptive parent who are habitual residents of the same place.²⁶ “Intercountry adoption” refers to the practice where a child who is habitually resident in one country has been (is being) adopted by a person(s) who is (are) habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin.²⁷ Unlike domestic adoption, intercountry adoption entails a change in the child’s habitual country of residence.²⁸ In this study, as it is also the case in international law treaties,²⁹ the term “intercountry adoption” has been chosen in contrast to “international adoption”, in order to avoid the impression that there is a uniform set of substantive adoption rules globally.³⁰

²⁴ Vite and Boechat, (2008), 19.

²⁵ As above.

²⁶ Usually the child and the adoptive parent(s) have the same nationality.

²⁷ See Art. 1 of the Hague Convention on which this description is based.

²⁸ UNICEF Innocenti Digest, (1998), 2.

²⁹ The CRC, the ACRWC, and the Hague Convention use the phrase “intercountry adoption”.

³⁰ Van Bueren, (1998), 96 citing Delupis, (1975), 27, 28.

“Informal adoption” is understood as the practice (usually under customary law) of a traditional kinship care arrangement which does not go through a formal legal process but nonetheless offers children a family environment. *Kafalah* of Islamic Law entails the acceptance of children without families in what is tantamount to a permanent form of foster care, but without the children concerned taking on the family name or enjoying the right to inherit from the family with which they are placed.³¹

The phrase “full adoption” connotes a situation where the child is totally and exclusively integrated in the (extended) adoptive family.³² In contrast to this, “simple adoption” is:

...one in which the parent-child relationship which existed before the adoption is not terminated but a new legal parent-child relationship between the child and his or her adoptive parents is established, and those adoptive parents have parental responsibility for the child.³³

It is observed that simple adoption often attracts those who cannot imagine a total breach between the parents of origin and the child, and this is often the case in the majority of African countries.³⁴ The Hague Convention applies to simple and full adoptions.³⁵ Also, related to “full adoption” and “simple adoption” are notions of “closed adoption” and “open adoption”. “Open adoption” implies room for informal future relations among all parties to the adoption while “closed adoption” does not make such allowance.

³¹ See Hodgkin and Newell, (2002), 295–296. For a detailed discussion of the practice of *kafalah*, see Assim, (2009).

³² Vite and Boechat, (2008), 16.

³³ Permanent Bureau, Guide to Good Practice, (2008), 16.

³⁴ Vite and Boechat, (2008), 17.

³⁵ Permanent Bureau, Guide to Good Practice, (2008), 121. However, it is worth noting that the Hague Convention does not cover “adoptions” that “are adoptions in name only and do not lead to the establishment of a permanent parent-child relationship and the transfer of parental responsibility of the child to the adoptive parents”. Permanent Bureau, Guide to Good Practice, (2008), 121.

The notions of “independent adoption” and “private adoption” are used in this study as understood in the Guide to Good Practice developed by the Permanent Bureau of the Hague Conference on Private International Law (Permanent Bureau). Accordingly, “independent adoption” is:

...used to refer to those cases 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.³⁶

“Private adoption” refers to a practice “where arrangements for adoption have been made directly between a biological parent in one Contracting State and prospective adopters in another Contracting State”.³⁷ Under the Hague Convention, while independent adoptions do not constitute good practice, private adoptions are not compatible with the Convention.³⁸

“Matching” is the process of identifying, assessing and determining the prospective adoptive parents who would best meet the needs of the child.³⁹ This is differentiated from “entrustment”, which is the “actual [physical] placing of the child in the care of the the prospective adopters” (insertion mine).⁴⁰

On the one hand, “sending countries” are the States from which most of the children are adopted, and it is used synonymously with “countries/States of origin”. On the other hand, “receiving countries” are those States to which a child is taken through an

³⁶ Permanent Bureau, Guide to Good Practice, (2008), 16.

³⁷ As above.

³⁸ As above.

³⁹ Permanent Bureau, Guide to Good Practice, (2008), 86.

⁴⁰ Permanent Bureau, Guide to Good Practice, (2008), 119.

intercountry adoption process (irrespective of whether the adoption is finalised in the country of origin or in the receiving country).

1.4 STATEMENT OF THE PROBLEM

Although it may seem ironic that a policy affecting so few children should engage so much political and social attention, the symbolic significance of intercountry adoption far outweighs its practical import. This fact is partly demonstrated by the polarised views on intercountry adoption that are mentioned above.

The popularity of the CRC and the ACRWC suggests a high level of normative consensus among the various nations of the world on the idea and content of children's rights as human rights. However, what constitutes the best interests of the child in the context of intercountry adoption continues to be highly emotive and controversial.⁴¹ This pervades despite the fact that, arguably, the best interests of the child principle has been the subject of more academic analysis than any other concept included in the CRC.⁴² Sometimes, the principle might connote very polarised and contradictory notions.⁴³ For instance, as Exon notes, “[s]ome may think that blood is thicker than water”, and hence “a biological relationship is superior in the adoption realm”.⁴⁴ Yet

⁴¹ See, for instance, Vite and Boechat, (2008), 23.

⁴² Hodgkin and Newell, (2007), 41. However, writing in the context of the U.S., Kohm observes that “[t]he dearth of scholarship, however, on the foundations of this best interests standard for children in American family law jurisprudence does not make the judge's job any easier”. Kohm, (2008), 337.

⁴³ See, generally, Parker, (1996), 26; Sloth-Nielsen and Mezmur, (2008b), 23-25.

⁴⁴ Exon, (2004), 3-4.

others might place “precedential value on geography, nationality, religion and culture” or “money and prestige”.⁴⁵

There is still considerable divergence of opinion about the nature of the relevant rights, their foundation and practical implications, their content, scope and, increasingly, the locus of the duties and responsibilities, that correlate with the rights. The competing rights and duties of biological parents, adoptive parents, children, and the state continue to create disharmony which ultimately can prejudice the rights of children in adoptions.⁴⁶ While it is not the objective of this study to reach conclusions regarding the “true” meaning of words and phrases in the substantive Articles of the CRC and the ACRWC, a reasonable construction of provisions is required.

The list of issues that seem to defy consensus in the context of intercountry adoption is a long one. For instance, one area of child law where the “turf” between “cultural imperialism” and “cultural protectionism” looms large, is in the field of intercountry adoption. The answer to the question “what should be the place of the right to cultural identity in the intercountry adoption?” continues to elude agreement.⁴⁷ On the subject of the right to life, it is not uncommon to regard intercountry adoption as a “life saving” act.⁴⁸ However, can not allowing intercountry adoption in a specific case lead to the inference that the right to life is violated? While the specific phrase “family environment”

⁴⁵ Exon, (2004), 4.

⁴⁶ Steltzner, (2003), 152; *DeBoer v. Schmidt*, 501 N.W.2d 193, 194 (Mich. Ct. App. 1993).

⁴⁷ Martin, (2007), 174.

⁴⁸ In “Lie or let die: Could intercountry adoption make the difference?”, as the title itself intones, Olsen ends the article by posing the question: “Should the orphaned children of the world live, or should we let them die? Intercountry adoption could be the vehicle through which many children have the chance to live”. Olsen, (2004), 525.

appears in Article 20(1) of the CRC, and subsequently in the ACRWC,⁴⁹ what constitutes a family environment for the purpose of adoptions is also not clear. Even the seemingly basic questions of whether there is a right to be adopted and if there is a right to adopt are two other issues where disagreement pervades.⁵⁰

In addition, the debate over intercountry adoption is dominated by views from the West, which constitute the majority of traditionally receiving countries. A coherent schema for articulating children's rights in adoptions in an African context is conspicuously missing from the debate. The practice continues to pose difficult legal and ethical complexities for the international community at large, and for African countries in particular. Apart from substantive law issues, there remains confusion as to the methods for successful implementation of such reforms to an adoption system in the African context.

1.5 RESEARCH QUESTIONS AND THE AIMS OF THE STUDY

The main question this study attempts to ask is:

- How is it possible to promote the best interests of the African child in intercountry adoption?

Within this main question are a number of sub-questions, such as:

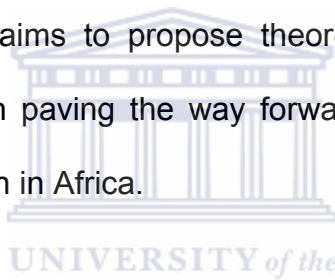
- Is there a particularly different African context that is relevant for intercountry adoption?

⁴⁹ Preamble, Arts. 2(a), 3, 23, and 25 of the ACRWC.

⁵⁰ Woodhouse, (2005), 297. Van Bueren, (1995), 94. Letsas, (2008).

- What are some of the legal mechanisms that could be set in place in order to steer the practice of intercountry adoption back onto the right path of finding families for children, as opposed to finding children for families in Africa?
- Does the ACRWC offer any added standards in regulating intercountry adoption in Africa?
- What are some of the measures necessary to combat illicit activities in intercountry adoption in an African context?

By attempting to answer these research questions, the study aims to contribute towards the further elaboration of the use of intercountry adoption in the best interests of the African child. The study also aims to propose theoretical and practical (policy and legislative) recommendations in paving the way forward for upholding children's best interests in intercountry adoption in Africa.



The study will identify the systemic vulnerabilities and gaps in the current intercountry adoption systems found in Africa that make adoption irregularities and scandals, to a degree, predictable. Therefore, one of the general purposes of this study will be to examine and analyse the experience of other countries, and the lessons learned, so that "sending" African countries can use them and propose policies and legal interventions to uphold the best interests of the child in intercountry adoption processes.

The study does not aim to achieve a full understanding of the detailed legal framework governing intercountry adoptions, nor to reveal the full picture pertaining to children deprived of their family environments in Africa. Rather, it seeks to broaden a debate and

discussion that is often binary and under-inclusive in that it fails to include all the voices that should be heard regarding the interests of African children.

1.6 METHODOLOGY

A number of methodologies are employed in order to answer the central questions posed in the study. Emphasis is placed on an analysis of a range of literature, which includes both primary and secondary sources pertinent to the subject of discussion. These include international law (both “soft” law and “hard” law) as well as national laws (composed of Constitutions, Acts, Bills, Regulations, Directives, case law, and so forth). In the former category are conventions and charters, resolutions, declarations, general comments, State Party reports under the various international and regional human rights instruments. In particular, the Concluding Observations of the CRC Committee are given detailed examination.⁵¹

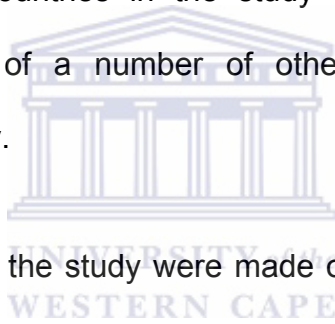
Inevitably, the study also places considerable reliance on secondary sources including books and academic articles. Various internet sites have been consulted for relevant data and information. The study also relies to a limited extent on interviews and observations during visits to the countries that form the basis of the study, especially in respect of Ethiopia and Kenya.

⁵¹ For a detailed discussion of the role of concluding observations in the context of the CRC Committee, see Verheyde and Goederties, (2006), 29-30. An interview with Jaap Doek, (26 August 2009 in Lisse, Amsterdam) who is the former Chairperson of the CRC Committee has confirmed the strong value of concluding observations in understanding the interpretation of the provisions of the CRC.

1.7 CHOICE OF JURISDICTIONS

The selection of different legal systems by a researcher necessarily depends on the subject chosen, the aims of the research and the accessibility of the legal systems.⁵²

Four countries have been chosen for the purpose of this study: Ethiopia, Kenya, Malawi and South Africa (hereafter referred to as “countries in the study”). It should be mentioned at the outset that the countries in the study are used in supplementary fashion to demonstrate African countries’ experiences. The study is not intended to be a detailed examination of the intercountry adoption laws and practices of the countries in the study. As a result, the countries in the study augment the discussions.⁵³ As appropriate, the experiences of a number of other countries (both African and otherwise) are used in the study.



The choices of the countries in the study were made on the basis of a combination of predominantly thematic and, to a lesser extent, practical factors. These criteria are summarised next. First, as a common feature, all these countries experience high levels of HIV/AIDS and poverty, which in turn has led to a large number of children being deprived of their family environment.⁵⁴ Secondly, after the latest submission of their State Party Reports to the CRC Committee, all the countries in the study have been identified by the CRC Committee to be in need of reforming their legal frameworks

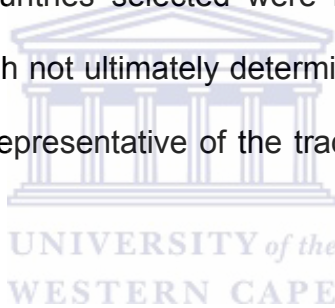
⁵² Curry-Sumner, (2005),12. On a pragmatic level, the selected countries are English speaking ones, and this is a factor that to a lesser extent has influenced the choice of jurisdictions.

⁵³ It is also important to mention that not all the countries in the study will be used for every thematic issue in the Chapters. For instance, because the law in Malawi does not regulate adoptability in any meaningful manner, the country is excluded in the discussion in Chapter 4.

⁵⁴ See Chapter 2 below discussing in detail the magnitude of the problem of HIV/AIDS and its subsequent deprivation of children’s family environment in the four countries under the study.

pertaining to intercountry adoption in the light of Article 21 of the CRC, and the Hague Convention.⁵⁵

In addition, all these countries in the study have ratified both the CRC and the ACRWC; this implies the legally binding nature of these instruments on all the countries. South Africa⁵⁶ and Kenya⁵⁷ have both ratified, and started implementing, the Hague Convention. This is not the case for Ethiopia and Malawi. Furthermore, Ethiopia and Malawi have not completed a consolidated children's rights law, while South Africa and Kenya have completed such legislation. As a result, the choice of jurisdictions was decided to ensure that the countries selected were representative of both of these categories of countries. Although not ultimately determinative, countries have, as far as possible, been selected to be representative of the traditional legal systems present in Africa.⁵⁸



Ethiopia seemed an interesting jurisdiction for a number of additional reasons. First, with a population of close to 85 million,⁵⁹ the number of children deprived of their family environment is relatively high. The country is currently the number one sending African

⁵⁵ CRC Committee, Concluding Observations: South Africa, (February 2000), para 26; Ethiopia (November 2006), paras. 41-44; Kenya, (June 2007), paras. 40, 41; Malawi, (January 2009), paras. 45, 46.

⁵⁶ Ratified on 21 August 2003.

⁵⁷ Ratified on 12 February, 2007.

⁵⁸ Civil law (Ethiopia); a mix of statutory law, English common law, tribal law, and Islamic law (Kenya); a mix of Roman-Dutch law and English common law, and customary law (South Africa); and English common law and customary law (Malawi).

⁵⁹ CIA, "The World Factbook: Ethiopia", (2009).

country to the U.S. - a country that in turn has an intake of half of the number of children adopted globally on an annual basis.⁶⁰

1.8 LEGAL FRAMEWORKS WHICH FORM THE BASIS FOR THE STUDY

A very complex legal framework governs intercountry adoption.⁶¹ This includes the domestic laws of sending and receiving countries, and international law.⁶²

1.8.1 International law

Central to this study are the CRC, the ACRWC, and the Hague Convention. Before the adoption of the CRC, “children’s rights” were viewed as a quest for charity. The CRC, adopted in 1989,⁶³ was ratified by 100 States within two years of its adoption,⁶⁴ and to date has been ratified by 193 States.⁶⁵ In the words of Doek, the former Chairperson of the UN Committee on the Rights of the Child (CRC Committee): “No other human rights treaty comes that close to universal ratification” and “the CRC is at the same time the human rights treaty with widest coverage”.⁶⁶ The CRC Committee monitors compliance

⁶⁰ U.S. Department of State “Intercountry adoption: Ethiopia”, (December 2008). While Ethiopia is among the 15 or so countries in the world that have reported to the CRC Committee three times, it is lagging behind in harmonising its laws and practices (in a consolidated child law statute) in accordance with the CRC and the ACRWC.

⁶¹ See, for instance, King, (2009), 452; Bartholet, (1996), 186-196 (offering a brief discussion of the complex legal framework governing international adoption in the U.S. and internationally).

⁶² King, (2009), 452; Bartholet, (1996), 186-196.

⁶³ The CRC was the culmination of a decade of work and negotiations between governments and non-governmental organisations.

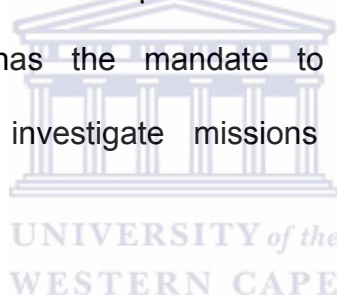
⁶⁴ Doek, (2003a), 126.

⁶⁵ Two countries, namely Somalia and the United States, remain to ratify it. Although the CRC is the second youngest of the seven human rights treaties, it is the most successful one. Firstly, it took less than ten months to enter into force. In 1990, Kenya, Namibia, Uganda and Zimbabwe were amongst the first countries in Africa to ratify the CRC. Malawi ratified the instrument on January 2 1991.

⁶⁶ Doek, (2003b), 235.

with the CRC.⁶⁷ The CRC Committee, amongst other functions, considers States Parties reports and issues Concluding Observations; holds Days of General Discussion; and publishes its interpretation of the content of human rights provisions, in the form of General Comments on thematic issues.⁶⁸

It was in order to give the CRC specific application within the African context that the ACRWC was adopted by the now defunct Organization of African Unity (OAU).⁶⁹ The adoption of the ACRWC is congruent with the UNs' recognition of regional arrangements for the protection of human rights.⁷⁰ The monitoring organ for the ACRWC is the African Committee of Experts on the Rights and Welfare of the Child (African Committee) which has the mandate to receive individual complaints (communications), undertake investigate missions and consider States Parties



⁶⁷ For the mandate and composition of the CRC Committee, see Arts. 42-45 of the CRC; and, see generally, Verheyde and Goedertier, (2006).

⁶⁸ As above. See, too < <http://www2.ohchr.org/english/bodies/crc/comments.htm>>.

⁶⁹ One of the reasons for a separate African Charter on the Rights and Welfare of the Child was that during the drafting process of the CRC, Africa was underrepresented. Only Algeria, Morocco, Senegal and Egypt participated meaningfully in the preparatory meetings. Furthermore, specific provisions on aspects peculiar to Africa were not sufficiently addressed in the UN instrument. For a detailed discussion of the ACRWC, see Olowu, (2002); Chirwa, (2002); Viljoen, 1998); Viljoen, (2000); Mezmur, (2006b); Lloyd, (2002a); Lloyd, (2002b); Lloyd, (2002c); Lloyd, (2003); Lloyd, (2004a); Lloyd, (2004b); Lloyd, (2008); Mezmur, B. and Sloth-Nielsen, J. (2009). For a discussion and comparison of the provisions of the CRC and the ACRWC, see Mezmur, (2008a).

⁷⁰ At its 92nd Plenary Meeting in December 1992, the UN General Assembly reaffirmed that "regional arrangements for the promotion and protection of human rights may make a major contribution to the effective enjoyment of human rights ...".Regional arrangements for the promotion and protection of human rights were sanctioned by UN General Assembly Resolution A/RES/47/125. The following year, in June 1993, the World Conference on Human Rights (held in Vienna) also reaffirmed the fundamental role that regional and sub-regional arrangements can play in promoting and protecting human rights and stressed that such arrangements should reinforce universal human rights standards as contained in international human rights instruments.

Reports.⁷¹ The ACRWC enjoys the ratification of 48 countries,⁷² including all the countries under this study.⁷³

The aim of the Hague Convention is to uphold the best interests of the child in intercountry adoption law and practice;⁷⁴ and it was adopted to fill the legal void that is present when intercountry adoption occurs by *ad hoc* process or sometimes even in a legal vacuum.⁷⁵ The CRC is the foundation for the Hague Convention.⁷⁶ Deciphering the objectives of the Hague Convention is not a difficult task. Article 1 puts up front what it is that the Convention seeks to achieve: to establish safeguards to ensure that the best interests of children will be protected in intercountry adoption; and to establish a system of co-operation⁷⁷ so that safeguards are respected thereby preventing thereby prevent the abduction, the sale of, or traffic in children; and to ensure recognition of intercountry adoptions.⁷⁸ Apart from preventing illicit activities, the Hague Convention is intended to reduce “delays, complications and considerable costs” in intercountry adoption.⁷⁹ Worldwide acceptance of the Hague Convention has been extraordinary.⁸⁰ As of 14

⁷¹ See Arts. 42-45 of the ACRWC for the mandates of the African Committee. For a detailed discussion of the work of the African Committee see Lloyd, (2002b); Lloyd, (2002c); Lloyd, (2003); Lloyd, (2004a); Lloyd, (2004b); Lloyd, (2008); Mezmur, (2006a); Mezmur, (2007a); Mezmur, (2007b); Sloth-Nielsen and Mezmur (2008a); Mezmur and Sloth-Nielsen (2008a); Sloth-Nielsen and Mezmur, (2009).

⁷² Available at <<http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>>.

⁷³ See section 1.6 below for a discussion on these countries.

⁷⁴ It features six times in the CRC - in the Preamble, and in arts. 1, 4, 16, 21 and 24.

⁷⁵ Carlson, (1994), 244; Parra-Aranguren, (1994), 545.

⁷⁶ See, generally, Duncan, (1994) for a discussion of how the CRC informed the Hague Convention.

⁷⁷ See, Duncan, (1996) for a discussion of how States of origin and receiving States cooperate to resolve problems of conflict.

⁷⁸ Art. 1 of the Hague Convention.

⁷⁹ Duncan, (2000), 47.

⁸⁰ See, generally, Duncan, (2000).

October 2009, 81 countries (including Kenya and South Africa) have become Contracting States to the Hague Convention.⁸¹

Other international documents that are relevant for this study include the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OPSC)⁸²; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (the Palermo Protocol)⁸³; and the 1986 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 UN Declaration).⁸⁴



1.8.2 Domestic law

A variety of domestic legislation and case law is also relied upon in this study. Law and practice from countries around the world (and where relevant and accessible, from Africa) are used. In particular, pieces of legislation (understood in its wider sense including regulations and guidelines) and case law from the countries in the study are highlighted.

In Ethiopia, while the 1960 Civil Code initially regulated adoption, its provisions on the practice have been repealed and replaced by the Revised Family Code of 2000

⁸¹ Available at <http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=69>.

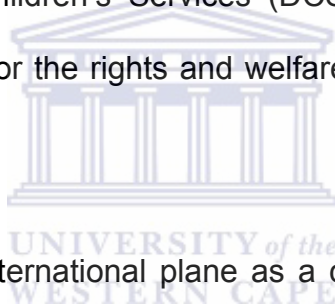
⁸² Adopted on 25 May 2000 and entered into force on 18 January 2002.

⁸³ Adopted in 15 November 2000 and entered into force on 25 December 2003.

⁸⁴ Adopted on 3 December 1986. Other international documents include the International Covenant on Civil and Political Rights (ICCPR) (1966); the International Covenant on Economic Social and Cultural Rights (ICESCR) (1966); the African Charter on Human and Peoples' Rights (ACHPR)(1981);

(RFC).⁸⁵ Until 2008, the monitoring of intercountry adoption fell under the Ministry of Labour and Social Affairs (MOLSA) by using the MOLSA Intercountry Adoption Guidelines (former MOLSA Guidelines). However, intercountry adoption currently falls under the Ministry of Women's Affairs (MOWA) and the practice is governed by the MOWA Intercountry Adoption Guidelines (MOWA Guidelines) of 2008.⁸⁶

In Kenya, the Children Act No. 8 of 2001 (Children Act)⁸⁷ sets out the legislative framework for children's rights in general, and incorporates provisions on intercountry adoption. The Children Act is supplemented by the Children (Adoption) Regulations of 2005.⁸⁸ The Department of Children's Services (DCS)⁸⁹ is the Government agency mandated to provide services for the rights and welfare of children as stipulated in the Children Act.



Malawi's appearance on the international plane as a country of origin for intercountry adoption is fairly recent. In October 2006, Malawi's High Court granted Madonna and her filmmaker (ex) husband Guy Ritchie an interim order allowing them to take custody of a boy identified as infant DB, who lived in an orphanage. On 28 May 2008, through a

⁸⁵ Proclamation No. 213/2000. The Constitution of Federal Democratic Republic of Ethiopia (1996) and the Revised Penal Code (2004) (Proclamation No. 414/2004) are also used in this study.

⁸⁶ Unfortunately this study does not deal with any case law from Ethiopia. This is mainly because a consideration of about 350 court cases in the last two years by this writer do not illuminate any issues (none of these cases are contested) as the First Instance Court often approves the adoption contract upon receiving MOWA's opinion.

⁸⁷ The Children Act came into force on 4th January 2002.

⁸⁸ Adopted on 20 May 2005 as Legal Notice No. 43 and Legislative Supplement No. 21.

⁸⁹ Formerly in the Office of the Vice President and Minister for Home Affairs, it is currently operating under the Ministry of Gender, Children and Social Development.

judgment of Malawi's High Court (*Infant DB case*)⁹⁰ an adoption order was granted to permit Madonna and her (ex) husband to adopt the child permanently.⁹¹

In 2009 Madonna returned to Malawi in a bid to adopt another Malawian child (*Infant CJ Case*).⁹² The *Infant CJ case* was precipitated by the launch in the High Court of Blantyre⁹³ of an application for an adoption order in respect of a girl child who was living in an orphanage. The High Court placed emphasis on two provisions of the the Adoption of Children Act (the Adoption Act)⁹⁴ - Section 3(5), which provides that “[a]n adoption order shall not be made in favor of any applicant who is not resident in Malawi”,⁹⁵ and Section 4(b), which provides that “[t]he court before making an adoption order shall be satisfied... that the order if made will be for the welfare of the infant....”.⁹⁶

In the result, the High Court rejected Madonna's petition to adopt the child in April 2009 (*High Court Infant CJ case*) as she was not considered to be a resident of Malawi and the adoption was found to be not in the best interests of Infant CJ.⁹⁷ Madonna appealed this decision to the Supreme Court of Appeals (SCA). The SCA handed down a 20 page long judgment in June 2009 which upheld the appeal and allowed Madonna to adopt

⁹⁰ Adoption Cause No. 2 of 2006 *In the Matter of the Adoption of Children Act (Cap. 26:01) and In the Matter of David Banda (A Male Infant)* (hereinafter “*Infant DB case*”)

⁹¹ For a detailed discussion of this case, see Mezmur, (2008b); Mezmur, (2009a).

⁹² For a discussion of this case, see Mezmur, (forthcoming, 2010).

⁹³ Blantyre is the commercial capital of Malawi. The capital city is Lilongwe.

⁹⁴ CAP.26:01 of 1968.

⁹⁵ Sec. 3(5) of the Adoption Act.

⁹⁶ Sec. 4(b) of the Adoption Act.

⁹⁷ Adoption Cause No. 1 of 2009 *In the Matter of the Adoption of Children Act (Cap. 26:01) and In the Matter of CJ (A Female Infant)* (unreported) (hereinafter “*High Court infant CJ case*”).

(SCA *Infant CJ* case).⁹⁸ These cases received extensive media attention and have attracted the attention of the public at large inside and outside of Malawi.

In Malawi, the Child Care, (Protection) and Justice Bill of 2005 (“the Malawi Child Bill”), once promulgated, will regulate intercountry adoption.⁹⁹ In 2009, a Discussion Paper¹⁰⁰ and an Issues Paper¹⁰¹ on adoption has been developed by the Special Law Reform Commission of Malawi. The Government organ which is currently playing the role of a Central Authority in Malawi is the Ministry of Women and Child Development (Department of Social Welfare).

In South Africa, intercountry adoption was not allowed until 2000. In 2000, the fact that Section 18(4)(f) of the Child Care Act¹⁰² absolutely proscribed the adoption of a child born of a South African citizen by a non-citizen¹⁰³ was challenged by a British couple who wanted to adopt a child found abandoned (*Fitzpatrick* case).¹⁰⁴ After a thorough examination, the Court found that Section 18(4)(f) was unconstitutional because it conflicted with Section 28 of the South African Constitution which enumerates the rights

⁹⁸ Adoption Cause No. 1 of 2009 *In the matter of Adoption of Children Act (Cap. 26:01 and in the matter of Chifundo James (a Female Infant)* (unreported) (MSCA Adoption Appeal No. 28 of 2009) (hereinafter “SCA *Infant CJ* case”).

⁹⁹ Of note in the Malawi Child Bill is a provision requiring the applicants or one of them, if not a relative of the child, to have fostered the child in Malawi for a period of one year. Sec. 3A(2)(d) of the Malawi Child Bill. Furthermore, the Malawi Child Bill then goes on to require that “the receiving country is a signatory to and has implemented the [Hague] Convention on protection of Children and Co-operation in Respect of Inter-Country Adoption” (insertion mine). This is so despite the fact that Malawi itself is not yet a Contracting State to the Hague Convention nor is there, as far as can be ascertained, any process of ratification underway.

¹⁰⁰ Malawi Special Law Commission, Discussion Paper, (2009).

¹⁰¹ Malawi Special Law Commission, Issues Paper, (2009).

¹⁰² Act 74 of 1983.

¹⁰³ Or by a person who has the necessary residential qualifications for the granting of South African citizenship but has not applied for a certificate of naturalization

¹⁰⁴ *Fitzpatrick v Minister of Social Welfare and Pensions* 2000 (3) SA 139 (C) (Fitzpatrick High Court case). *Minister for Welfare and Population Development v Fitzpatrick* 2000 (7) BCLR 713 (CC) (*Fitzpatrick* Constitutional Court case).

of the child.¹⁰⁵ The Constitutional Court confirmed a finding of unconstitutionality pertaining to Section 18(4)(f) of the Child Care Act,¹⁰⁶ and reasoned that an absolute prohibition on adoptions by non-citizens was contrary to the best interests of the child since it deprived the court of the flexibility needed when assessing what is in the best interests of each child.¹⁰⁷ The Constitutional Court struck down those provisions of the Child Care Act that permitted an adoption to be effected only by South African citizens, thereby opening the door to intercountry adoptions taking place in respect of South African children for the first time.

Another interesting case,¹⁰⁸ was started by the launch in the Johannesburg High Court of an application for an order granting American applicants guardianship over a minor baby girl (Baby R) of South African birth, who had been abandoned and was in foster care.¹⁰⁹ Further, it was common cause that, once armed with a guardianship order,¹¹⁰ the applicants were intending to depart the country, and to pursue an adoption order in the relevant domestic forum in the U.S..

¹⁰⁵ The Court focused its inquiry on the child's best interests and found that Section 18(4)(f) was too limiting in that it categorically prohibited adoption of a South African citizen by a noncitizen without considering the best interests of the child. *Fitzpatrick* Constitutional Court case Para. 16 of Judgment).

¹⁰⁶ According to the Court, the facts of the case clearly illustrated that *the best interests of a child* born to South African parents may well lie in such child being adopted by non-South African adoptive parents. *Fitzpatrick* Constitutional Court case para. 19.

¹⁰⁷ *Fitzpatrick* Constitutional Court case para. 16.

¹⁰⁸ For a commentary on the SCA judgment of this case, see Sloth-Nielsen and Mezmur, (2007b).

¹⁰⁹ The "respondents" were opponents in name only: they were the child's existing foster parents, and they did not oppose the proposed order. They had become friends of the prospective adoptive parents, who had formed a relationship with the child while visiting her in their care.

¹¹⁰ Without which they would have had great difficulty proceeding beyond the borders of South Africa with an unrelated infant.

The initial judge became concerned about the lack of effective opposition in the case, and invited the intervention of an *amicus*, the Centre for Child Law (CCL), a public interest litigation unit based at the University of Pretoria. The arguments of the *amicus* won the day in the High Court and, subsequently in the SCA,¹¹¹ the appellants were also unsuccessful in their pursuit of an order granting them guardianship of the child. The majority in the SCA judgment held that while the eligibility and suitability of the applicants as prospective adoptive parents was not in dispute, the application for an order declaring them to be the guardians of the child constituted the incorrect procedure; questioned the manner in which the principle of subsidiarity was being complied with; and indicated that the appropriate avenue would have been to seek an adoption order in the Children's Court.¹¹²

Appealing to the Constitutional Court, the applicants sought an order setting aside and replacing the order of the SCA with an order awarding sole custody and sole guardianship of Baby R to the applicants.¹¹³ After the hearing commenced in the Constitutional Court, an agreement was reached to direct the Children's Court to hear on an expedited basis the application for adoption of Baby R by the applicants, to which the Department of Social Development and the *amicus curiae* recorded that they would express no opposition to such adoption.¹¹⁴ The Court made the agreement an order of

¹¹¹ *De Gree v Webb* (Centre for Child Law, University of Pretoria, *Amicus Curiae*) 2006 (6) SA 51 (W) (hereafter "*De Gree High Court case*"); *De Gree v Webb* (Centre for Child Law, University of Pretoria, *Amicus Curiae*) 2007 (5) SA 184 (SCA) (hereafter "*De Gree SCA case*"). These cases will be referred to as "the *De Gree case*" when used jointly.

¹¹² See, *De Gree SCA case*, para. 27.

¹¹³ *AD v DW* (Department of Social Development Intervening; Centre for Child Law, *Amicus Curiae*) 2008 (3) SA 183 (CC) ("the *AD v DW case*"), para. 12.

¹¹⁴ *AD v DW case*, para. 17.

court by consent.¹¹⁵ Subsequently the adoption was granted by the Children's Court. Nonetheless, the Constitutional Court went on to interrogate the principle of subsidiarity¹¹⁶ and the best interests of Baby R.¹¹⁷ The Court held that:

Although the jurisdiction of the High Court to hear the application for sole custody and sole guardianship had not been ousted as a matter of law, this [the *AD v DW* case] was not one of those very exceptional cases where by-passing the Children's Court procedure could have been justified (insertion mine).¹¹⁸

It also indicated that "the subsidiarity principle itself must be seen as subsidiary to the paramountcy principle".¹¹⁹

As far as legislation is concerned, drafted during apartheid, the Child Care Act¹²⁰ gave little or no recognition of international children's rights.¹²¹ As a result of this, the Children's Act 38 of 2005 (the Children's Act), parts of which are already operational, will eventually replace the Child Care Act. The chapters on adoption and intercountry adoption are yet to come into force.¹²² Since the future application of the chapters of the Children's Act on adoption and intercountry adoption is certain,¹²³ this study mainly focuses on these provisions. The Children's Act is supplemented by the Children's

¹¹⁵ As above.

¹¹⁶ *AD v DW* case, para. 49, 54-55.

¹¹⁷ *AD v DW* case, para. 38.

¹¹⁸ *AD v DW* case, para. 34.

¹¹⁹ *AD v DW* case, para. 55.

¹²⁰ Act 74 of 1983.

¹²¹ Skelton and Proudlock, (2007), 1-11.

¹²² Until it does, the Child Care Act will regulate adoption in South Africa. It was observed in *AD v DW* case that "Section 315 of the Children's Act provides for a progressive implementation of the Act, with different provisions of the Act coming into force on a date indicated by the President by proclamation in the Government Gazette. By Proclamation 13 in Government Gazette 30030 on 29 June 2007 the President established 1 July 2007 as the date on which sections 1-11, 13-21, 27, 30, 31, 35-40, 130-134, 305(1)(b), 305(1)(c), 305(3)-(7), 307-311, 313-315, and the second, third, fifth, seventh and ninth items of Schedule 4 to the Act become operative. The remainder of the Act, including the parts relevant to adoption and sole custody and sole guardianship orders, has not yet entered into operation" *AD v DW* para. 53 footnote 57.

¹²³ See, for instance, Couzens, (2009), 54, who airs the same view.

Amendment Act of 2007¹²⁴ and the Draft Consolidated Regulations pertaining to the Children's Act.¹²⁵

1.9 LIMITATIONS OF THE STUDY

This study has limitations. In the interest of brevity, time and more importantly space, the study covers only four African countries. It is not assumed that the four countries in the study do justice to the diversity of the African experience when it comes to alternative care in general, and intercountry adoption in particular. Despite this limitation, it is safe to assert that the main issues pertaining to intercountry adoption in Africa are predominantly similar, and the discussions in the context of the four countries under the study are generally applicable to other sending African countries.

Every possible attempt is made to ensure that substantial uniformity exists in the discussions of the country case studies. However, there is a dominance of information from particular countries in the study, in particular, from South Africa.¹²⁶ This imbalance is ascribed to a number of factors. While the location and research reach of the writer has been as balanced as possible, there are some disparities created as a result of factors such as the availability of more resource materials in relation to some countries than was available for others. In addition, information on Malawi is relatively limited. This is mainly because while the other three countries have undertaken their law reform

¹²⁴ Act No 41 of 2007.

¹²⁵ Consolidated Draft Regulations Pertaining to the Children's Act 38 of 2005.

¹²⁶ This state of affairs can be explained; for instance, the debates on South African legal system and its accompanying judicial decisions pertaining to intercountry adoption are well documented and more articulate than that of other countries.

pertaining to adoptions in general, Malawi has not. Furthermore, the history of Malawi as a sending country is perhaps only as old as Madonna's first arrival in the country to adopt (2006).

Finally, this study is not a comparative study as understood in its strict sense where the three (in some respects, five)¹²⁷ successive stages of description, comparison and explanation¹²⁸ are employed.¹²⁹ While at some stages, comparisons are made in such a way as to reflect what the jurisdictions may learn from each other, the aim is to assess the domestic laws, policies, and practices of the countries in the study against the backdrop of the international legal framework. All these limitations must be taken into account when using the outcomes of the study.

1.10 OUTLINE OF CHAPTERS OF THE STUDY

Chapter 1 describes the background to the study, the research questions, the statement of the problem, the aims of the study, the limitations of the study, choice of jurisdictions, and so forth.

Chapter 2 will provide a detailed discussion of the "African context" that is relevant for intercountry adoption. This Chapter, apart from providing the relevant historical background, it also includes social, cultural and economic realities that are deemed to have a bearing upon intercountry adoption. The legal context that should inform

¹²⁷ Orucu, (2007), 37-40.

¹²⁸ Kokkini-Iatridou, (1988), 187-190.

¹²⁹ For a discussion of what comparative family law entails see, generally, Boele-Woelki, (2009), 3-36.

intercountry adoption on the African context will also be interrogated in detail. The conclusion sums up the relevance of these contexts in relation to intercountry adoption in Africa.

Chapter 3 highlights the international legal framework relevant to intercountry adoption. The instruments that are the central focus of the Chapter are: the CRC, the ACRWC, and the Hague Convention. Throughout this chapter, an attempt is made to look at the content of the right in question, its scope, as well as the nature of the corresponding State Party obligations. Such discussions anchor the right in question in intercountry adoption. Other instruments are also mentioned where relevant. Furthermore, the jurisprudence of the CRC Committee is relied upon in order to better understand the interpretation of the relevant provisions of the CRC.

Chapter 4 considers adoptability. In this Chapter an attempt is made to answer the question: “who is adoptable?”. A detailed examination of the concept of adoptability that serves the best interests of the African child will be undertaken. After a brief overview of the concept of adoptability, the main reasons why a proper determination of adoptability is very important are investigated. This will be followed by an examination of the relevant international legal frameworks pertaining to adoptability. Subsequently, different themes such as termination of parental rights including through a decision of a competent authority, abandonment, and relinquishment; Orphanhood and poverty as grounds for adoptability; as well as the adoptability of refugee children, special needs/hard-to-place children, and children who have a Muslim background form some of the issues for examination.

Chapter 5 investigates the principle of subsidiarity - which in general requires that intercountry adoption should be a measure of last resort. As subsidiarity is a central principle in intercountry adoption, some of its implications are scrutinised. Some of the issues discussed in this Chapter include: what is meant by “last resort”; the hierarchy and ranking of various alternative care options; and, in particular, the place of institutional care for children in the general scheme of alternative care.

Chapter 6 focuses on the legislative and institutional responses necessary to prevent and address illicit activities related to intercountry adoption in Africa. Central to this Chapter will be the argument that for intercountry adoption to be conducted in compliance with the best interests of the child, it is important to prevent and address illicit activities that are associated with it. The absence, or incompetency, of institutional structures necessary to prevent and address illicit activities in intercountry adoption might result in the best interests of the children involved in intercountry adoption being compromised. The Chapter will scrutinise the role of these institutions in countering illegal activities, such as child selling and buying, trafficking, and improper financial gains, in the context of intercountry adoption.

The final Chapter (Chapter 7) will highlight the main conclusions that can be distilled from the various themes examined in the study. A number of recommendations will be made with regard to African countries, regional and international bodies, such as, the African Committee and the CRC Committee, as well as the international community at large.

CHAPTER 2

WHAT ARE SOME OF THE IMPORTANT AFRICAN CONTEXTS IN INTERCOUNTRY ADOPTION?

2.1 INTRODUCTION

Some of the main questions that might spring to mind from reading the title of this study are: “What is an African context in connection with intercountry adoption?” and “Does this African context have any peculiar bearing on intercountry adoption?”. These and related questions, however formulated, could be answered from different perspectives with varying depth. They involve not only legal issues but also a range of social, political, economic, cultural, religious, anthropological, and other factors.

Therefore, the main thrust of this chapter is to appraise the underlying historical, social and cultural, religious, economic and legal contexts on the African continent in relation to child care, adoption and other related matters. Put differently, this chapter sets the platform for an informed appraisal of intercountry adoption as viewed through an African lens.

Reinforcing the motivation behind this Chapter, it is argued that context matters. In “Child care in context”¹ the authors demonstrate aptly that economic, political and cultural forces drive the provision of child care. In order for this study to add value to studies which already exist on intercountry adoption, there is a specific need to address context. Therefore, the need to prepare a Chapter on an African context emanated from the basic premise that a sound and effective alternative care option, including

¹ Lamb *et al.* (1992). Most professionals who work internationally and across cultures appreciate the fundamental importance of culture and context.

intercountry adoption, must be grounded firmly in an African context, taking African realities into account.²

It becomes all the more important to investigate the African context with regard to intercountry adoption in order to capture the bigger picture of the arguments for and against the practice. If one does not appreciate the number of factors that inform child care (including alternative care) and social services in Africa, it may be more challenging to understand the basis of some of the arguments of proponents and detractors of intercountry adoption in Africa.

For ease of exposition, an in-depth analysis of the majority of the factors that have direct and indirect bearing on children's rights in the context of Africa is not embarked upon. A prioritisation of issues is undertaken on the basis of relevance: the history of the continent (including slavery and colonialism); some of the relevant cultures and values (for instance, the role of the extended family and kinship care); social realities (the challenges posed by the HIV/AIDS pandemic); both the financial and human resource challenges faced by African governments; and some of the legal realities on the African continent are examined. Some of the issues discussed below are challenges the Africa continent at large is facing, and addressing these challenges could reduce the number of children who are deprived of their family environment.

² In part this Chapter has the nature of a report that is often referred to as a "situation analysis". It is an exposition of the reality, and presents such reality as it is. For instance, in the sections dealing with the value of children in African societies, culture, HIV/AIDS and so forth, there is a reiteration of previous studies and facts and very little room for analysis except to synthesise and draw together previous studies and facts.

This Chapter is divided into six sections: historical context; social and cultural context; religious context; economic context; and legal context. This division is not a watertight one and some overlap is necessary. The conclusion sums up the relevance of these contexts in relation to intercountry adoption in Africa.

2.2 HISTORICAL CONTEXT

2.2.1 Slavery, colonialism and imperialism: General

Present day Africa is partly forged from a shared history among countries on the continent – a history which includes slavery, followed by colonialism.³ Events that happened in the past, such as slavery and colonialism, continue to have an impact (both positive and negative), and their investigation provides insight into the realities, and attitudes of contemporary Africa.⁴

In relative terms Africa's colonial relationship with Europe lasted a short period.⁵ However, colonialism has exerted enormous influence on Africa's post-colonial economic, social, cultural, legal and political performance. In a number of respects the underdevelopment of the continent is attributed to its past - namely, slavery and colonialism.⁶

³ This includes institutionalised discrimination. See Geiss, (1974), 7-8.

⁴ See generally, Gann and Duignan (eds.), (1969). For discussions of the impact of the slave trade on women and their children, and of the profound economic, political, and social impact of colonialism on Africa as a whole, see Boahen, (1985).

⁵ Mostly from the 1880s to the 1960s.

⁶ In his book *Economics and world history*, economic historian Bairoch indicates that “there is no doubt that a large number of structural features of the process of economic underdevelopment have historical roots going back to European colonization”. Bairoch, (1993), 88; See, too, Graziella and Canova, (2002), 1851-1871 for a similar view.

Spitzer reminds us that “[f]or many Africans... slavery remains an unhealed wound that is frequently, if not constantly, reopened by feelings of continued oppression, manipulation, and discrimination”.⁷ Even the debate whether Europe should pay reparations for the slavery and colonialism in Africa looms large today in some quarters.⁸

It has been asserted that the implementation of colonialism was meant to create a powerless, helpless and destitute people.⁹ As a result of colonialism, it is argued, “...African cultural values suffered and continue to suffer as the colonising powers forced Africans to abandon their religious beliefs, governmental systems, and a host of other traditional ways of doing things”.¹⁰ Some writers believe that not only has colonialism had economic, legal and political ramifications, but that it also had psychological impacts which bent the minds of the colonised “to make them the servants of their own exploitation”.¹¹

The psychological impact of colonialism on its own has defined the kind of reaction a significant number of people on the continent have towards the West in general, and Western culture, values and goals in particular. Slavery compounded with colonialism

⁷ Spitzer, (2002), 1313.

⁸ For the issue of reparations for the negative effects of slavery and colonialism see Haring, (2002), 393; Camponovo, (2003), 659; Lantos, (2002), 31; Maisel, (2002), 739; Morris, (2003), 49; Feagin, (2004), 49; McDougall, (2002), 135; Brophy, (2003), 497; Alves, (2003), 971.

⁹ For some of the reasons that colonisers used as a justification for colonisation, see Matua, (1995), 1113, 1126-27, 1130, 1137-1142; see, too, Wilson, (1977), 116 (where it is argued that in the late nineteenth century Europe's imperialism was locked in a symbiotic relationship with its intense nationalism).

¹⁰ Pwiti and Ndoro, (1999), 143-153.

¹¹ See, for instance, Gladwin and Saidin, (1980), 1.

has created a mindset of suspicion in present day Africans towards the West.¹² In addition, the majority of present day Africa does not sympathise with, or relate to, the culture and thinking of the west.¹³

It is true that in Africa social, economic, and legal ties have become intertwined between former colonisers and former colonies. As a result the term “neo-colonialism” has been coined describing the continuing presence of influence, and sometimes control, which is exercised by former colonial powers over former colonies.¹⁴ However, it needs to be noted that such control is exercised from a distance¹⁵ and that it is less overt.¹⁶

The psychological impact aside, the effect of colonialism on the laws and legal institutions of Africa is also very significant. In describing this situation Merry writes that:

[c]olonialism typically involved the large-scale transfer of laws and legal institutions from one society to another, each of which had its own distinct sociocultural organization and legal culture. The result was a dual legal system: one for the colonized peoples and one for the colonizers. ... Postcolonial countries are now grappling with this legacy as they

¹² For instance, in the context of religion, Adjei argues that “[t]he establishment of Christian missions in Africa has been an act of spiritual aggression; they operated on the principle that everything African and indigenous is contrary, while everything European and foreign is acceptable, to the will of God. The glaring contradiction between the religious theory and the economic and political practices of Christians has made Africans distrust the Christian church, and it is losing ground through its own fault”. Adjei, (1944), 189-198. Current events can also testify to these facts. For instance, the so called “Brown-Mugabe” standoff is one. There is a feeling among many Africans that Zimbabwe is a victim of an imperialist conspiracy and the treatment meted out to Zimbabwe is then seen in the larger context of the north-south dialogue, a rich-poor relationship, and, finally, the lack of accountability and responsibility for the colonial injury inflicted on colonial subjects for the benefit of the colonial powers.

¹³ Even the so-called “new generation”, which is charged with assimilating to western culture does not form any significant portion of the African population.

¹⁴ According to Nkrumah “Neo- Colonialism is also the worst form of imperialism. For those who practice it, it means power without responsibility and for those who suffer from it, it means exploitation without redress”. Nkrumah, (1965), XI. For a discussion of the relationship between former colonial powers and former colonies, see generally Donovan, (2002-2003), 3.

¹⁵ Nkrumah, (1965), XI.

¹⁶ As above.

debate how to fashion a unified legal system out of this duality and how to resurrect and implement the remnants of indigenous, precolonial law.¹⁷

By implication the institutional and legal frameworks that inform post-colonial Africa are often a direct inheritance from Europe. This legal context is discussed in section 2.6 below.

2.2.2 Slavery, colonialism and imperialism: Intercountry adoption

Transposing the suspicious mindset of many Africans outlined above to the context of intercountry adoption, it could be contended that some of the arguments advanced by detractors of intercountry adoption, labelling it as “imperialism”¹⁸ and “neo-colonialism”, are not completely baseless.¹⁹

Current practice shows that a number of African countries of origin tend to send their adopted children predominantly to countries that were their respective former colonisers. For instance, a significant number of adoptions from French speaking Africa go to France.²⁰ In addition, there is evidence that adoptions from Guinea-Bissau are

¹⁷ Merry, (1991), 889 and 890.

¹⁸ Landes describes imperialism as an imbalance of power between two social groups which the stronger one tries to exploit to the detriment of the weaker. See Landes, (1961), 510-511.

¹⁹ These arguments include those that view intercountry adoption as being a form of modern day imperialism as well as constituting the deprivation of a cultural heritage. Critics who deplore the practice of intercountry adoption as “modern-day imperialism, allowing dominant, developed cultures to strip away a developing country's most precious resources, its children”¹⁹ are in abundance. Referring to Buti, Martin further observes that:

[t]he intercountry adoption debate is suffused with the concept of culture, on both an individual and a societal level. Individually, critics of intercountry adoption believe that the loss of a child's cultural heritage (which inevitably occurs during intercountry adoption) leads to the loss of the child's identity.

²⁰ Martin, (2007), 203 citing Buti, (2006), 6.

²⁰ See, for instance, CRC Committee, State Party Report: Burkina Faso, (February 2002), para. 212.

frequently destined to Spain.²¹ This fact, if not addressed sensitively, could be risky, as there is a high probability of it being labelled as “a new form of colonialism” or “imperialism”.

A recent example of this sentiment occurred in Chad. On 25 October 2007 police arrested nine French citizens in eastern Chad, near the Sudanese border, as they prepared to fly 103 African children to France (the “Zoe’s Ark case”). Seven Spaniards, who formed the crew of the chartered plane, were also detained.²² Immediately after the arrests were made Chadians chanting “no to the slave trade, no to child trafficking” protested against the French group.²³ These remarks made during the protest lend support to the existence of the sentiment that slavery and colonialism (and imperialism) continue to inform opinions about intercountry adoption. It also indicates the delicate nature of the practice, especially when undertaken between former colonisers and their former colonies.

Reviewing the continent’s historical background, particularly slavery and colonialism, it is proposed that any intervention (legal, social and policy) with regard to intercountry adoption would be incomplete if these attendant circumstances and some of their present day ramifications are not taken into account.

²¹ At least until early 2008, when the Government of Spain decided to suspend adoptions from Guinea-Bissau as a result of reports of illegal and irregular adoptions from that country. See *Adoptantis*, (March 2008). See too ISS, *Monthly Review*, (February 2008), 2 and 3.

²² Reportedly a number of parents were waiting in an airport in France in the hope of getting a child to adopt. See Reuters (31 March 2008); See, too, Mail and Guardian Online (31 October 2007).

²³ See Reuters, (31 March 2008).

2.3 CULTURAL AND SOCIAL CONTEXT

The potency of culture in political, legal, and social discourse in Africa is enormous. Africa is a continent so rich and diverse in its culture; it not only changes from one country to another, but within an individual country many different cultures can be found.²⁴ Across the continent, traditional practices and modern structures are strongly combined and intertwined in the African social and legal systems.

The importance of taking into account the local culture and social context in drafting laws that regulate adoption has been commented upon. In the context of Brazil, for instance, evidence has been furnished by Fonseca that even though Brazilian laws are often touted as being at the forefront of progressive international legislation, these same laws pay very little heed to local values, culture and social dynamics.²⁵ This fact has led to a scenario in which:

...foreign adopters conform more closely to Brazilian legal directives than do national candidates, since the laws, rather than being based on and adapted to an accurate assessment of local reality, derive from the abstract principles that dominate international debates.²⁶

There are a number of cultural practices that have direct implications for the care, and alternative care of children on the African continent. Those with greater relevance and ramifications (be they positive or negative) for this study are highlighted below.

²⁴ Certainly, these "traditional" practices are not without their complications, and they could invite State assistance and/or supervision. No attempt is made herein to construct "culture" as an undifferentiated and homogenised across the African continent. It is not, and different societies might subscribe to either similar or different cultures depending on the specific culture/cultures in question.

²⁵ Fonseca, (2002), 397.

²⁶ Fonseca, (2002), 398.

2.3.1 The value of children in African societies

Some of the main reasons why African couples are encouraged to have as many children as possible, and the subsequent ramifications thereof, include:

- 1) to perpetuate lineage lines and assume family positions and titles;
- 2) to provide assistance in times of illness and old age;
- 3) to distribute the future burden of family obligations and responsibilities between a large number of siblings; and
- 4) to provide many daughters who would bring bridewealth to the family and enable the male members of the family to arrange advantageous marriages.²⁷

In their appraisal of child care in traditional East Africa, Harkness and Super have observed how the perception that children (like cows and wives) are a form of wealth, prevails.²⁸ This is one of the reasons why, where a successful birth occurs, it is indeed a time for celebration by the family and the community. In contrast, this scenario underpins the main reason why childlessness continues to be regarded in many quarters as one of the greatest of all personal tragedies.²⁹ For instance, Makec contends that “a marriage which is childless in Dinka society lacks a ‘sound foundation’”.³⁰ In addition, because they are regarded as a treasure, children are “to be guarded against the consequences of the ‘evil eye’ of jealous neighbours or

²⁷ See, generally, Asirifi, (1977), 114-118.

²⁸ Harkness and Super, (1992), 444. Furthermore, the woman who produces and brings to maturity many children acquires a social seniority in the community that is not available to women less fortunate in relation to fertility and child survival.

²⁹ A similar observation has been made by Fortes, (1950), 262.

³⁰ Makec, (1986), 50 as cited in Rwezaura, (1994), 88.

strangers”.³¹ The view that children are a gift from God resonates very strongly among Africans.

Apart from the symbolic and emotional factors that elevate the status enjoyed by children in African communities, there is also the functional element – namely, that children usually assist their parents (and sometimes their communities) with their occupational and household chores.³² Article 31 of the ACRWC mirrors this fact in its entrenchment of the duties of the African child,³³ a provision that is domesticated in a number of African countries.³⁴

The proposition that “[c]hildren may be central players in the demolition of the traditional family, but they are also the greatest hope for revitalization and reconstitution of the family”³⁵ holds very true in African societies. This stance is evident in a number of practices and cultures on the continent.³⁶

³¹ Harkness and Super, (1992), 446. It is also interesting to note that sometimes the name given to a child is intended to protect the child from evil and harm. In Burkina Faso, for instance, a name chosen for a child is believed to protect the child from evil forces. See Belembaogo, (1994), 208.

³² See Belembaogo, (1994), 212.

³³ For a discussion of the responsibilities of the African child under Art. 31 of the ACRWC, see Sloth-Nielsen and Mezmur, (2008c).

³⁴ See, for instance, Art. 17 of the South African Children’s Act and Art. 29(5) of the Constitution of Swaziland (2005) which expressly provides that “children have the duty to respect their parents at all times and to maintain those parents in case of need”.

³⁵ Woodhouse, (1993), 511.

³⁶ To mention but one: the presence or lack of a child or children in a marriage has its own implications for the stability of marriage in a number of African communities. Amongst the Dinka of Sudan, for instance, Makec observes that “the offspring of the union stand in the middle of the two families. They hold both sides of the marriage ... together”. Makec (1986) 50 as cited in Rwezaura, (1994), 88. This is an opinion aired in the context of various countries and communities, such as Mozambique, Tanzania and Zimbabwe. See, generally, Ruel, (1982), 54; Welch and Sachs, (1987), 374. Among the *Maasai*, there is a specific prayer “*ENKAI Aomon Entomono*” (Lord, I pray for maternity) that signifies the status children bring to their mother. See Tarayia, (2004), 193.

Even those practices that are classified as “harmful cultural practices” are often, if not always, undertaken in good faith with the intention of promoting the welfare of the child. A good example is female genital cutting (also known as female genital mutilation or “FGM”).³⁷ Research has found that one of the reasons why parents allow the performance of FGM on their children is to give the child a better chance of getting married in the future.³⁸

With this as background, the need for alternative care legislation and policy to take this context into account is patent. The predominant attitude towards the value of children partly explains why abortion is not a practice accepted by custom, and the success of family planning interventions (for instance, use of contraceptives) on the continent remain slow. In addition, when parents are involved in child selling and other similar activities, it is often a manifestation of extreme poverty – which could be reduced by supporting parents with the necessary resources to raise their children. The view that highly values children should also dictate, amongst others, when adoption is to happen, what form adoption should take (for instance open or closed/ simple or full), and the hierarchy of alternative care options to be prioritised.

2.3.2 The extended family (kinship care) and the African child

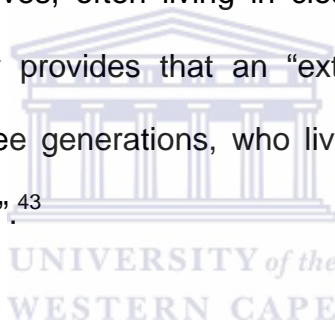
³⁷ A definition of female genital cutting adopted by the WHO, UNICEF and UNFPA indicates that the practice involves the “...partial or total removal of the external genitalia or other injury to the female genital organ...”. See WHO/UNICEF/UNFPA, (1997), 3.

³⁸ Wheeler, (2004), 258 citing a wide range of works such as Dorkenoo, (1994), 34. See, too, Belembaogo, (1994), 212-213 (arguing that “[o]nly a girl who has been excised can marry a man and maintain sexual relations with him”).

A proper understanding of the extended family is of relevance to a wide array of policy concerns.³⁹ For instance, in the context of economic development policies as well as effective healthcare delivery, Pilisuk and Froland share this view.⁴⁰ The same is true, for instance, in the area of the assimilation of immigrants.⁴¹

Before entering into any discussion, however, two questions that require an initial response are: What is meant by an “extended family”? and What is “kinship care”?

The notion “extended family” suggests “[a] family group that consists of parents, children, and other close relatives, often living in close proximity”.⁴² As an alternate definition, the same dictionary provides that an “extended family” is “[a] group of relatives, such as those of three generations, who live in close geographic proximity rather than under the same roof”.⁴³



These two definitions are very restrictive, since they prescribe very specific requirements, viz. of being a “close relative”, living in “close geographic proximity”, and being part of “three generations”, which do not necessarily relate well to the understanding of the notion in Africa. This is because, as will be demonstrated below, the notion of the extended family in Africa covers more groups of people than those which the above definitions offer.

³⁹ This augurs well with the fact that the issue of the extended family is not the preserve of any particular field but a concern of a continuum of specialisations, including anthropology, demography, and social work. A list of literature covering these fields include Castillo, *et al.* (1968), 1-40; Chen, (1985), 193-202; Goldstein and Warren, (2000), 382-404; Gunda, (1982), 40-51; and Halpern, and Anderson, (1970), 83-97.

⁴⁰ See Pilisuk and Froland, (1978), 273-280.

⁴¹ See, for instance, Glick, (2000), 179-198; Benson, (1990), 9-29.

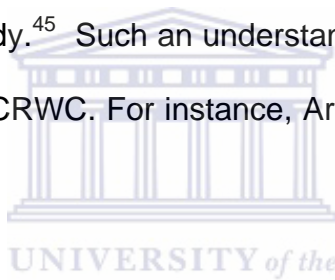
⁴² Available at <<http://www.thefreedictionary.com/extended+family>>.

⁴³ As above.

After reminding us that there is no agreement on a standardised definition of “extended family”, Ezewu provides a more reflective understanding of the concept in Africa:

...from actual practices in the various societies in Africa, the following characteristics can be observed: 1. The extended family system is a combination of several nuclear, polygamous, or polyandrous types of family, and the relationships between the members are biological and social. 2. The members through biological relationships usually trace their origin to a common ancestor, lineage and a common genealogical line. 3. The members usually occupy a specific geographical location in a village or city as a home place for all members even if they live in other parts of the world, returning to it from time to time. 4. The members have a common identity and group feelings, looking up to one another for help at times of disaster or misfortune and sharing one another's happiness.⁴⁴

Ezewu's definitional observations provide for a more inclusive and wider ambit, which will be used throughout this study.⁴⁵ Such an understanding is not contrary to either the provisions of the CRC or the ACRWC. For instance, Article 5 of the CRC embraces the role of the extended family.⁴⁶



Directly related to the concept of the extended family are the notions of “kinship” and “kinship care”. By definition, “kin” are “[o]ne's relatives; family; kinfolk”.⁴⁷ “Kinship care”, according to Karp, generally refers to situations in which a relative other than a parent lives with, and becomes the primary caregiver of, a child, typically because the child's only parent is unable or unwilling to care for the child.⁴⁸ However, this is a simplistic

⁴⁴ Ezewu, (1986), 222.

⁴⁵ Ezewu's understanding of an “extended family” in Africa, especially the first characteristic outlined above, is also shared by Shimkin *et al.*, who describes an extended family as one in which individual relationships extend beyond the conjugal or biological family -spouses and children-and include daily interaction with, and responsibilities for, other family members such as aunts, uncles, grandparents, and cousins. See Shimkin *et al.*, (1978), 66.

⁴⁶ See discussion of Art. 5 of the CRC in Chapter 3, section 3.4.2.1 below.

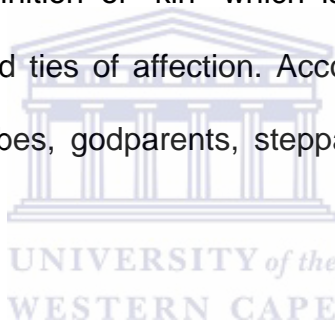
⁴⁷ Available at <<http://www.thefreedictionary.com/Kin>>. In other words, it is “a person's relatives collectively”.

⁴⁸ Karp, (January/February 1994), 10.

definition and seems oblivious of some of the disagreements and questions over what constitutes “kin” and “kinship care”.

Some of these questions include: Who qualify as kin? Should one be a blood relative to qualify as kin, or can others, such as, godparents or neighbours, be included? In other words, as long as there is a close personal and emotional tie, can one qualify as “kin”? Should there be fulltime nurturing for care to qualify as “kinship care”? Or can care on a part-time basis qualify as “kinship care”?⁴⁹

Bilchik provides a broader definition of “kin” which is designed to be inclusive and respectful of cultural values and ties of affection. Accordingly, Bilchik defines “kin” as “relatives, members of their tribes, godparents, stepparents, or any adult who has a kinship bond with a child”.⁵⁰



In the context of the U.S., the role of the extended family amongst the African-American community is a fact that does not need much elaboration.⁵¹ Such prevalence is mainly

⁴⁹ For an investigation of some of the definitions that are provided in different contexts see Takas, (1994); Bilchik, (2005); Kinship Care Resource Centre, (2005); Generations United, (2005) 1; Davis and Chiancone, (1997), 103;

⁵⁰ Bilchik, (2005).

⁵¹ See, for instance, Holmes, (1995), 1649 (highlighting the role of the extended family among the Black American communities and further arguing that the difference between the family constellation of adopted children and children in birth families mandates a social policy and legal process that address the complexity of adopted children's family and kinship structures and elevate the interests of adopted children when they conflict with the interests of birth and adoptive parents). See too, Hill, (1993), 95-98 as cited in Holmes, (1995), 1659 (where it is argued that “[t]he extended family experience in African-based communities is a comprehensive social system that affects all aspects of individual and community activities. Within African-based communities, and particularly in the African-American community, this social system includes pooling of financial resources, maintaining family businesses and property, providing lodging and employment opportunities, and caring for the elderly as well as the physical, emotional, educational, financial, and child-rearing support of children, through the cooperative efforts of the adults in the community and the family”).

as a result of the practice's highly valued significance in Africa.⁵² Holmes reminds us, referring to a number of studies by sociologists,⁵³ that both the African and the African-American communities have three fundamental characteristics that affect child rearing.⁵⁴ The first is the practice of fostering children with kin and non-kin households; the second relates to the expansion of the family through fictive kin (also known as "relatedness");⁵⁵ and the third one mirrors a situation where child rearing and parenting responsibilities are shared for the benefit of children.⁵⁶ Often, these three characteristics have contributed to promoting the best interests of the child.

There are a number of studies⁵⁷ with regard to the African continent that highlight the role of the extended family and kinship care in promoting the rights and welfare of children deprived of their family environment. There is a substantial amount of literature to support the argument that, despite growing smaller through time, the extended family continues to provide support for children deprived of their family environment as a result of the death of biological parents or other legal guardians. For instance, writing in 2008, it is commented that in South Africa many children in alternative care arrangements

⁵² Holmes, (1995), 1649.

⁵³ Such as Oppong, (1994), 68-70; Hill, (1993), 97; Billingsley, (1992), 381-383; See, too, Ford and Harris, (1991), 71-83.

⁵⁴ Holmes, (1995), 1659.

⁵⁵ As above.

⁵⁶ As above.

⁵⁷ See, for instance, Drew *et al.*, (1996a) 79-86; Drew *et al.*, (1996b), 42; Foster, (2002a), 91-115; Foster, (2002b), 1907-1910. Foster *et al.*, (2002); Foster *et al.* (1996), 389-404; Tim *et al.*, (2002), 459-470; Neil, (1997); Gillian, (2002); Seeley, *et al.*, (1993), 117-122 (suggesting that there is a need to question the assumption that the extended family, in the culture under study, is able to provide adequate support for AIDS patients). See, for instance, Foster, (2005); Roeland and Boerma, (2004), S55-S65 (where it is concluded that the extended family takes care of over 90% of the double orphans).

never go through a Children's Court proceeding but are simply informally incorporated into an extended family system.⁵⁸

In some parts of the continent, statistics show that kinship support structures absorb a lion's share of the children in need of alternative care.⁵⁹ After conducting an analysis of national surveys from 40 countries, one study highlights that:

For 13 countries, information is available on the relationship to the head of the household of double orphans and single-parent orphans not living with a surviving parent The (extended) family takes care of nine out of 10 of these children.⁶⁰

The importance of recognising the role of the extended family and kinship care in Africa in the context of children deprived of their family environment (and intercountry adoption) should be fairly obvious. For instance, in the context of orphans, ensuring that these children have alternative family care arrangements is an essential initial step to ensuring the wellbeing of the child following the loss of parents. Such alternative care could, and sometimes should, be effected preferably through the extended family.

One of the practical, as well as legal, implications of the recognition of the role of the extended family as well as kinship care in Africa might be that willing kinship caregivers would need to be informed that a child who is a relative is being placed in foster care, adopted and so forth. A mandate requiring relatives to be informed of the need for alternative care for a child in such circumstances would be a culturally and socially conscious decision.

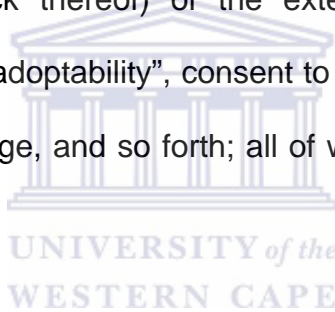
⁵⁸ Bessler, (2008), 80 citing Davel and Mungar, (2007), 77.

⁵⁹ For instance, see Roeland and Boerma, (2004), S55-S65. In addition, a 1997 study has found that in rural Tanzania 95% of orphans are cared for by relatives. See Boerma, *et al.* (1997), 141-153.

⁶⁰ Roeland and Boerma, (2004), S55-S65.

Another ramification that the connection between the child and the extended family would have on the adoption process calls for a serious re-evaluation of laws that attempt to sever completely the ties that existed between children and their family, including the extended one. In fact, some resistance existed in the 1990s on the part of South American sending countries to try to force receiving countries to recognise open adoptions that do not sever ties between an adopted child and the family of origin.⁶¹

In sum, it could be asserted that the role of the extended family in Africa is not lightly to be ignored in finding alternative care for children deprived of a family environment. The meaningful recognition (or lack thereof) of the extended family in Africa has an implication for the meaning of “adoptability”, consent to adoption, the nature of adoption (open or closed), cultural heritage, and so forth; all of which are issues that are central to intercountry adoption.



2.3.3 “Customary adoption” in Africa

Adoption, as understood in its legal sense, cannot be considered an established practice of African customary law.⁶² Customary adoption is an arrangement in traditional circles where a child is placed in the care of a family member or a friend of the family. The child might be placed in such care either because he or she has lost caregivers, or to generally facilitate the child’s well-being and access to nutrition, shelter, education, training in a trade, or health care.⁶³

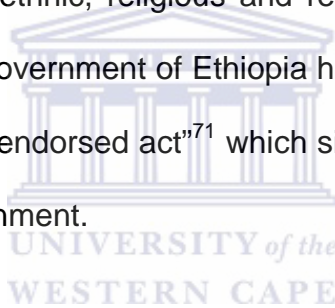
⁶¹ See, generally, Jaffe, (1995), Chapters 7-12 where South American countries’ laws are examined.

⁶² Bennett, (1995), 107.

⁶³ Bennett, (1995),107.

In customary adoption, the child almost always maintains his contact with his family of origin, and legal termination of parental rights and responsibilities does not take place. Customary adoption is conducted by agreement between families as the custom requires, and not through the courts.⁶⁴

Customary adoption is a practice that continues to exist in a number of African countries. These countries include Burkina Faso,⁶⁵ Cameroon, Ethiopia,⁶⁶ Ghana,⁶⁷ Kenya, Lesotho, Malawi, Sierra Leone,⁶⁸ South Africa, Swaziland,⁶⁹ and Uganda. For instance, in Ethiopia, while different forms and rules existed in relation to customary adoption, depending upon the ethnic, religious and regional groupings involved,⁷⁰ the practice occurs still now. The Government of Ethiopia has called it “a very deep-rooted”, and “highly valued and socially endorsed act”⁷¹ which signifies the role of the practice in offering children a family environment.



In Swaziland, despite the fact that the 1952 Adoption of Children Act recognises customary law of adoption, it has been pointed out that the Act has not tried to integrate it.⁷² In 1994, one writer reported that since the enactment of this Act in 1952, he had not come across a single case of domestic adoption.⁷³ The fact that customary adoption is widely practiced could be the main reason why domestic adoption is not common.

⁶⁴ See CRC Committee, State Party Report: Ethiopia, (September, 1995), para. 87.

⁶⁵ CRC Committee, State Party Report: Burkina Faso, (July 1993), para. 46(b).

⁶⁶ Beckstorm, (1972), 145.

⁶⁷ CRC Committee, State Party Report: Ghana, (December 1995), para. 74.

⁶⁸ See Lisk, (1992), 28-42.

⁶⁹ Bhalla, (1994), 356-357.

⁷⁰ See, generally, Beckstrom, (1972).

⁷¹ CRC Committee, State Party Report: Ethiopia, (October 2005), para. 121.

⁷² Bhalla, (1994), 356.

⁷³ Bhalla, (1994), 363.

In the context of Cameroon, it has been argued that "...the slow-paced attitude to legislate on adoption in Cameroon resulted from the objection that statutory adoption runs counter to the African concept of the family where the acquisition of membership is by birth".⁷⁴ In addition, it is contended that the resistance to adoption has its own economic perspective - that "statutory adoption could enable a 'stranger' to control family property, especially landed property".⁷⁵

Therefore, the notion of adoption might not always tie well with customary adoption in mainly traditional African societies. The presence of customary adoption in a number of African countries can explain partly why domestic (civil law) adoption is not widely practiced.

This indicates too that it is not only a child's parents that are interested in his or her upbringing.⁷⁶ It is a common practice that the social group to which a child belongs may also want to retain him or her.⁷⁷ This is sometimes done under the guise of ensuring the perpetuation and survival of a group's culture.⁷⁸

The fact that customary adoption does not usually involve State institutions makes it difficult to know how many children are being afforded a family environment through the practice. At times, the view that "[t]radition considers reporting adopted children to third

⁷⁴ Ngwafor (2006), 128 citing Kasunmu and Salacuse, (1966), 243.

⁷⁵ Ngwafor (2006), 128

⁷⁶ Bennett, (1995),107.

⁷⁷ As above.

⁷⁸ As above.

parties as a form of discrimination abominable to God and man”⁷⁹ contributes towards the lack of data on this group of children.

Nonetheless, as will be argued in detail in Chapter 5, section 5.4.2.2, supporting the practice of customary adoption (through legislation and policy interventions) should be a crucial strategy African countries should adopt to cater for the needs of children deprived of their family environment. The presence of the practice can also facilitate a State’s efforts to adhere to the principle of subsidiarity before embarking on intercountry adoption. It is highly doubtful if eliminating the practice, as the CRC Committee has sometimes recommended,⁸⁰ would be in the best interests of African children.

2.3.4 Discrimination against “illegitimate” children

Children generally referred to as “illegitimate” children are those that are born outside of wedlock. The constitutions of at least six African countries explicitly entrench the equality of children born within or outside of marriage.⁸¹ However, *de jure* and *de facto* discrimination against illegitimate children, sanctioned by culture and religion, continues to be a present day reality in Africa.⁸²

⁷⁹ CRC Committee, State Party Report: Ethiopia, (October 2005), para. 122.

⁸⁰ See, for instance, CRC Committee, Concluding Observation: Niger, (June 2009), paras. 49 and 50.

⁸¹ These are the Constitutions of Central African Republic, Congo, Malawi, Sao Tome and Principe, Swaziland, and Togo. See Heyns and Kaguongo, (2006), 704. For instance, Art. 40 (2) of the Constitution of the Republic of Congo states that "children, whether born in or out of wedlock, shall have the same rights", while Art. 29(4) of the Kingdom of Swaziland's 2005 Constitution provides that "[c]hildren whether born in or out of wedlock shall enjoy the same protection and rights".

⁸² It needs to be noted that discrimination against illegitimate children had existed (and continues to exist) in other parts of the world, too. For further reading on “illegitimacy” in Europe and North America, see Hartley, 1975; Teichman, 1982; Levene, *et al.* (eds.), (2005).

When children are discriminated against on the basis of their parent's marital status, they are often denied their rights to maintenance, succession/inheritance, birth registration, and other similar rights. Discrimination in these respects is tantamount to violating the best interests of the child principle.⁸³ The violations of the rights of illegitimate children can facilitate the risk of depriving them of their family environment. For instance, it is argued that, in Africa, the social stigma as well as the "legal disability"⁸⁴ that accompanies illegitimacy may lead to the assumption that a number of children who are conceived outside of wedlock are abandoned at, or soon after, birth. The fact that mothers cannot claim maintenance or inherit property for and through their illegitimate children exacerbates these children's difficulty to survive and thrive.⁸⁵ This in turn could lead a mother, apart from the possibilities of abortion and infanticide,⁸⁶ either to abandon her child(ren) or relinquish parental responsibilities.⁸⁷ Therefore, it is argued that addressing discrimination on the ground of birth status can contribute towards keeping children within their family environment, and the question of adoption would possibly not arise.

⁸³ It needs to be noted at this juncture that "illegitimate" children (by definition, as provided above, as "those born outside of wedlock") and children born via donor sperm generally share similar status and discrimination. Children born from donor sperm are considered to be not related at all to their genetic father, and courts generally regard donor conceived children to have no legal rights of support from biological parents except for the support that parents agree to provide. However, for the purpose of this Chapter (and the study) the latter is omitted since it is not a significant problem in present day Africa.

⁸⁴ In its consideration of States Parties reports, the CRC Committee has often recommended to a number of African countries to address both *de jure* and *de facto* discrimination of children born outside of wedlock. CRC Committee, Concluding Observations: Sierra Leone, (June 2008), para. 63; Kenya, (June 2007), paras. 24 and 30; Mali, (May 2007), paras. 31 and 32; Senegal, (October 2006), paras. 23 and 24; Swaziland, (October 2006), paras. 25 and 26.

⁸⁵ Especially on a continent where it is a well known fact that the economic dependence of women on men, as a result of both law and culture, is rampant.

⁸⁶ In some countries, mainly Muslim ones, the possibility of "honour killing" of a mother (who gives birth outside of marriage) by her father, brother, or any other male relative is a real danger.

⁸⁷ See IRIN, (16 April 2006) which reported that "[t]he mothers of illegitimate children also face social stigmas. In many cases, young women who become pregnant outside of marriage must choose between either having illegal abortions or abandoning their children, or facing the stigma of unwed motherhood".

The very limited status that illegitimate children are accorded also has the negative effect of exposing these children to practices that are illegal and irregular in the contexts of both national and intercountry adoption. To illustrate this, mention can be made of the fact that the identification of potentially vulnerable mothers (in this context those mothers who are single) and “inciting them to give up their future or new born baby” is one of the major abusive methods identified that is used to secure children for adoption.⁸⁸

The refusal by State institutions to register illegitimate children at birth also contributes to the violation of their rights, and exposes them to a wide array of violations, including, trafficking, illegal adoptions, and deprivation of the right to service delivery. If they are abandoned, the possibility of being deprived of a family environment is exacerbated by the lack of a birth certificate which could have facilitated reunion with the biological parent(s). Even when illegitimate children are allowed to register at birth, stringent conditions might apply leading to a birth certificate that does not contain information similar to that contained in one issued for children born in wedlock.⁸⁹

Unfortunately the position under Islamic law also falls short of promoting the best interests of the child principle. For instance, in Comoros, not only does legislation make

⁸⁸ UNICEF Innocenti Digest, (1998), 6. It is further argued that “[i]n some cases, it is ostensibly founded on the moral or religious opinion that a mother who has a child out of wedlock is not the most suitable person to bring up a child properly; in others, on the conviction that the child will necessarily be better off with a couple, especially if they are wealthier”. UNICEF Innocenti Digest, (1998), 6.

⁸⁹ See, for instance, Secs. 6 and 19 of the Birth Registration Act, (No. 48 of 1968) of Botswana which discriminate against a child born out of marriage. The rights of the father, even to visitation, are not recognised, consequently denying the child access to his or her father.

a distinction between legitimate and illegitimate children⁹⁰ for birth registration purposes but the child is also referred to as “a child born of a prohibited relation”.⁹¹ Positive change is also often faced with resistance. A recent example is Mali, where the new Draft Family Code attempted to re-define children’s rights within families, for instance, by allowing non-marital children to enjoy rights similar to those of marital children.⁹² This attempt was opposed by Islamic organisations in the country.⁹³

Therefore, it is contended that addressing the discrimination against illegitimate children would contribute towards reducing the number of children deprived of their family environment. The law should regulate whether the father of a child born outside wedlock can qualify in any way for notice of an adoption proceeding.⁹⁴ Not only is such regulation in the best interests of the child,⁹⁵ it is also one means of protecting the rights of the adoptive parents who otherwise might find themselves involved in custody disputes with an alleged putative father.

2.3.5 Other cultural practices

There are other cultural practices that have a bearing upon the care of children in the majority of traditional societies in Africa. Some of these practices are outlined below.

⁹⁰ Comoros Act No. 84-10 of 1984 on Civil Status and the Family Code.

⁹¹ Djabir, (2007), 23. It is further reported that a child born out of wedlock “...may not have legal relationship with his [her] biological father, including inheritance, under Islamic law, even with the consent of all parties”. Djabir, (2007), 23.

⁹² Afrik.com, (5 May 2008).

⁹³ Afrik.com, (5 May 2008).

⁹⁴ In this regard, questions, such as, “does the biological connection between the unwed father and the child suffice to create a protected interest for the father or should the unwed father have grasped the opportunity to form a relationship with his child for there to be a protected right of the father?” need to be addressed.

⁹⁵ For instance, it helps to reduce the chances of disruption, if the adoption is declared void and the child is required to be returned to his or her country of origin.

One cultural practice in Africa that has a direct bearing on child care (and by implication alternative care) is the practice of polygamy. By definition “polygamy” involves plural marriage. However, for the purpose of this Chapter it is used in its broader sense which includes “the practice of plural marriage, as well as the practice of entering into plural marriage-like relationships simultaneously”.⁹⁶ At least historically, by far the most common polygamous arrangement was where a male had several wives (polygyny), as opposed to a female having several husbands (polyandry).⁹⁷

Parts of Africa represent a present day proof that the notion of a monogamous matrimonial union as the basis of family relationships is not universal. Although to varying degrees, polygamous marriages are practised in all corners of the continent, for example in Angola, Botswana, Ethiopia,⁹⁸ Eritrea, Cameroon, Cote D’Ivoire,⁹⁹ The Gambia, Nigeria, Rwanda,¹⁰⁰ Sudan, and Egypt. In polygamous marriages, children who lose their mother are often taken care of by the other wife or wives of the father and are often not deprived of their family environment.

The practice of widow inheritance, prevalent amongst African countries¹⁰¹ such as, Nigeria,¹⁰² Uganda, Kenya,¹⁰³ Tanzania, and Zimbabwe¹⁰⁴ also has implications for

⁹⁶ Campbell, (2005), 1.

⁹⁷ See Banda, (2005), 116-119, for a discussion of the practice of polygyny in Africa.

⁹⁸ The RFC provides in Art. 11 that a “...person shall not conclude a marriage as long as he is bound by bonds of a preceding marriage”.

⁹⁹ Despite the fact that the practice of monogamy was outlawed as far back as 1964.

¹⁰⁰ The practice of polygyny in Rwanda continues despite the fact that its 1991 Constitution provides in Art. 25 that “[o]nly monogamous marriages shall be recognized within the conditions and forms prescribed by law”.

¹⁰¹ Wing and Smith, (2003), 39; Ewelukwa, (2008), 214-215.

¹⁰² For a detailed discussion of widow inheritance in Nigeria, see Babatunde and Owasanoye (eds.), (2001); Umeasiegbu, (1977). Fasoranti and Aruna, (2007).

¹⁰³ See Shu-Acquaye, (2004), 55.

¹⁰⁴ See, for instance, Chirawu, (2006), 26, 37.

child care, particularly the care of orphans who have lost their father. The practice commonly requires the widow to marry her husband's brother, or another family member, after her first husband dies. Without taking a position on the implications that this culture has on women's rights,¹⁰⁵ an issue beyond the scope of this study, historically widow inheritance is envisaged and implemented as a tradition allowing a man to take responsibility for the wellbeing of his brother's (or close relative's) wife and child(ren).¹⁰⁶ The practice of widow inheritance has implications in the determination of adoptability, and for the status of orphanhood, as in these circumstances death does not necessarily lead to children's deprivation of a family environment.

2.3.6 Attitude of unquestioning submission to authority

Donohugh observes that certain definite attitudes of the African native are discoverable, since the "African native is conditioned in his responses by his cultural background".¹⁰⁷ Amongst these, "unquestioning submission to authority", also sometimes referred to as "natural benign docility", could be singled out. Although Donohugh's observation was made decades ago, it still holds some truth in a number of communities in Africa.

Some African scholars argue that, "culturally, it is as if the traditional African script of 'submit to family and community authority and immerse yourself in and partake of all

¹⁰⁵ Such as, exposing the women to HIV/AIDS, its violation of the rule against discrimination under international law, and so forth. For a detailed discussion of widow inheritance, and its implications for human rights, see Loftspring, (2007), 253-255; Potash (ed.), (1986); Nyindo, (2005), 40-46; Okeyo and Allen (1994), 20-25; Okeyo, (1994), 433.

¹⁰⁶ Human Rights Watch, (2003), 34.

¹⁰⁷ Donohugh, (1935), 329-339. See too, Lassiter, (1999), 1 where the writer attempts to identify and assess the nature, range, quality, and utility of research and writing by selected African scholars on African culture and personality and recurring African responses to indigenous social life and Western acculturation. The writer does so by reviewing and analysing a sampling of works by African scholars published since the mid-1960s.

group values and norms' was rewritten during the colonial period".¹⁰⁸ Unquestioning submission to authority, according to Donohugh, "contribute[s] towards a group solidarity, a recognition of common interests, which would be of the greatest advantage in the altered situations under other political control or administration" (insertion mine).¹⁰⁹

In 1997 Nyasani argued that the "child in Africa was muzzled right from the outset and was thereby drilled into submission to authority from above".¹¹⁰ If this conclusion is to be embraced fully, then it is a logical assumption that children who have been raised all their life to respect authority figures and to never challenge them, would not find it easy to become adults who question authority. There is also an overwhelming body of literature, and other evidence, to indicate that the emphasis on the group - the idea of communitarianism - is indeed a distinct feature of traditional African culture,¹¹¹ which in turn contributes to the attitude of unquestioning submission to authority.¹¹²

There is a strong argument that can be made that, generally, African individuals are not accustomed to challenging authority, and that, in fact, such an act would be considered as aberrant and not sanctioned by society. In connection with this, it is also important to

¹⁰⁸ Isiguzo, (undated).

¹⁰⁹ Donohugh, (1935), 329-339.

¹¹⁰ Nyasani, (1997), 129.

¹¹¹ See, for instance, Quashigah *et al.* (1999), 190-191.

¹¹² The notion of protection of the individual is a great advance over its absolutist antecedents, but the African concept of human rights highlights that it needs to be balanced by the acknowledgement that the individual is embedded within a community. Thus the African concept of human rights, both traditional and contemporary, recognises the importance of the group simultaneously with the significance of the individual. See, for instance, Quashigah *et al.*, (1999), 190-191.

make the point that such an attitude towards authority has direct implications for all parties that are involved in intercountry adoption on the continent.

It would not be correct to characterise an unquestioning attitude to authority as being solely African. There are other parts of the globe where a similar attitude is embraced and entrenched as part of a certain community's culture.¹¹³ Although a study of the issue of Africans' reluctance to challenge/question legitimate authority in the context of intercountry adoption has not yet been undertaken, studies in the context of other communities exist, such as one conducted by Roby which highlights the impact of this attitude in the context of the Marshall Islands in the Pacific ocean.¹¹⁴

In describing the situation of a mother who had been solicited to bring her children to the U.S. to place them with an adoptive family and relinquish her parental responsibilities, Roby writes:

She also did not know that it was morally and legally permissible for her to decline signing the papers at that moment. Not signing those papers would be a breach of a promise in her mind. In addition, she had been raised all her life to respect authority figures and to never challenge directives by someone in a higher social class than herself. Even though things felt strangely awry, she had signed the papers. Without understanding, she had "voluntarily" relinquished all her parental rights in her children.¹¹⁵

Roby makes further observations that have far reaching application beyond the Marshall Islands:

In their zeal for international adoption, American adoption agencies are often reluctant to acknowledge the foundational forces that are reflected in the sending jurisdictions' policies, often responding with hostility to anything they consider a hindrance to their

¹¹³ For example, in South America. As discussed further below, such an attitude can also be deciphered from some of the communities who live in the Marshall Islands.

¹¹⁴ Roby, (2004), 303.

¹¹⁵ Roby, (2004), 304.

desired goal. But an understanding of those factors is critically important in a mutually respectful and dignified adoption process and to avoid any legal or cultural pitfalls. In addition, other critically important factors include cultural traditions, religious beliefs, national family and child welfare policies, the capacity development of sending countries, and the history between the sending and receiving jurisdictions.¹¹⁶

Similar scenarios are inevitable in Africa. For instance, mothers who relinquish their parental responsibilities and sign papers under the supervision of government authorities (or any legitimate authority, for that matter) do not usually question the content or the short and long term implications of their acts. In the best interests of the child as well as families of origin, amongst others, the kind of administrative and judicial frameworks set in place to regulate adoptions, as well as the nature and standard of consent required for adoption, need to take this reality in Africa into account.

2.3.7 Attitudes to sexual orientation in Africa

Previously considered to be a complete taboo, issues pertaining to gays and lesbians are becoming more and more current subjects of public discussion and controversy on the African continent.¹¹⁷

In Africa, like some other places in the world, those who view the practice as “evil”, “unnatural”, and “contrary to God’s will” exist. A common belief that homosexuality is

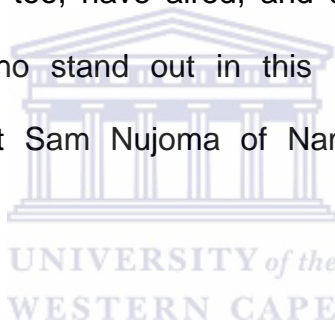
¹¹⁶ As above.

¹¹⁷ See Cameron, (2001), 642 (discussing the rights of gays and lesbians in the Southern Africa context particularly drawing lessons from South Africa and criticising the positions taken in some countries in the region). For instance, in Kenya, it was reported that “[a] new phenomenon is gaining currency in the country: Lesbians, gays and transsexuals are coming out openly to demand their rights”. The Nation (25 January 2007).

somehow un-African also resonates well within a large sector of the population of Africa.¹¹⁸ Some even regard it as a vestige of colonialism.

To dispel this view writers have shown that homosexuality had existed even before colonisation of the African continent. For example, Murray¹¹⁹ mentions cases of homosexuality in traditional Africa from “Nubia to Zululand on the East Coast of Africa (and offshore on Zanzibar and Madagascar, as well)”.¹²⁰

Nonetheless, not only do religious leaders continue to deplore homosexuality on the continent, government leaders, too, have aired, and continue to vehemently express their disapproval.¹²¹ Those who stand out in this regard are Robert Mugabe of Zimbabwe,¹²² former president Sam Nujoma of Namibia,¹²³ and President Yoweri Museveni of Uganda.¹²⁴



The legal status of homosexuality on the African continent also mirrors this sentiment.

The practice continues to be illegal in the majority of African countries, and what is

¹¹⁸ Boykin, (2001). The writer cites specific examples from Egypt, Somalia, Zimbabwe, Namibia, and Uganda where, after men were accused of setting up a gay website, church leaders and presidents aired homophobic comments. According to an anti-homosexuality Bill currently being considered by Uganda’s Parliament, life imprisonment is the minimum punishment for anyone convicted of having homosexual intercourse.

¹¹⁹ Murray, (undated).

¹²⁰ Murray, (undated), 5.

¹²¹ See, for instance, Amnesty International, (2001); Human Rights Watch, (2003).

¹²² Afrol News has reported that “Zimbabwe is more known for its homophobia and extreme statements made by president Mugabe, including various claims that homosexuality is not an African phenomenon but rather a Western decadency” Afrol News (2002).

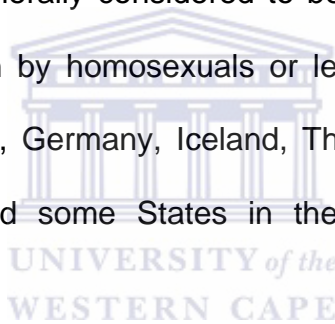
¹²³ It is reported that former president Sam Nujoma had announced in 2001 that Namibia does not allow homosexuality or lesbianism and that orders had been given to the police to arrest, deport and/or imprison homosexuals. See, for instance, Boykin, (2001).

¹²⁴ Reportedly, “[i]n September 1999 president Yoweri Museveni instructed Ugandan police to lock up and charge homosexuals”. Afrol News, (2002).

commonly referred to as “state sponsored homophobia” is rife.¹²⁵ According to the International Lesbian and Gay Association (ILGA), homosexual acts are illegal in 37 African countries.¹²⁶

Though the regional human rights body, the African Commission on Human and Peoples’ Rights, almost had the opportunity to deliberate on the position to be taken on homosexuality under the ACHPR, the opportunity was lost when the communication dealing with the issue was withdrawn by the complainant.¹²⁷

Not only in Africa, which is generally considered to be very conservative, but even in Europe and the U.S., adoption by homosexuals or lesbians is a highly controversial issue. Only Denmark, the U.K., Germany, Iceland, The Netherlands, Spain, Belgium, Norway, Sweden, Quebec and some States in the U.S., authorise adoptions by homosexual couples.¹²⁸



This contextual dimension - namely, the resistance to accept homosexuality and homosexuals - has a direct bearing on intercountry adoption on the continent in general. First, countries might expressly forbid gays and lesbians, both as individuals and as couples, to adopt children. In Kenya, homosexuals are among the four categories of

¹²⁵ See Ottosson, (2008).

¹²⁶ Ottosson, (2008), 45. The practice of homosexuality is not illegal in 10 African countries (Burundi, Central African Republic, Cape Verde, Congo, Equatorial-Guinea, Gabon, Madagascar, Mali, Rwanda and South Africa) while its status is neither illegal as such nor entirely legal in Burkina Faso, Democratic Republic of Congo, Egypt and Niger. In Chad the legal status of homosexual acts is unknown. See Ottosson, (2008).

¹²⁷ *William Courson v. Zimbabwe*, Communication 136/94 (1994).

¹²⁸ ISS Monthly Review, (February 2008), 2. A judgment of the European Court of Human Rights of 22 January 2008 disallowing homosexual adoption is one example. ISS Monthly Review, (February 2008), 2.

persons who are expressly not allowed to adopt.¹²⁹ As regards Ethiopia, the U.S. State Department indicates that “[i]n general ... openly gay or lesbian individuals or couples” may not adopt.¹³⁰ However, it is reported that “the Ethiopian government has occasionally approved cases involving persons in all of these categories”.¹³¹ With the exception of South Africa,¹³² it is concluded that there is no legislation in Africa that allows gays and lesbians to adopt.

Secondly, as they have done in the past, homosexual applicants might continue to try to evade the system by posing as heterosexual and/or single prospective adoptive parents.¹³³ In this regard, it is argued that the role and duty of receiving countries to duly inform sending countries of this situation needs to be highlighted. It is argued that:

The assessment of an applicant must be a transparent process, which commits the responsibility of social services and the State, which they represent. If one expects a maximum of information and guarantees on the child from countries of origin, reciprocity also requires that the social assessments of the applicants be comprehensive and compliant with the reality of the situation.¹³⁴

In addition, such practice of evading the requisite legal requirement might fall short of promoting the best interests of the child. For instance, if the pretext is uncovered at a later stage, the possibility of the “disruption” of the adoption might occur, which is usually not in the best interests of the child.

¹²⁹ The other three are “[a] sole male applicant intending to adopt a female child”, “[a] sole female applicant intending to adopt a male child”, as well as an “[a]pplicant above the age of 65”. See Sec. 158(2) of Children Act; See, too, Child Welfare Society of Kenya, (undated).

¹³⁰ U.S. Department of State, “Intercountry adoption: Ethiopia”, (December 2008).

¹³¹ As above.

¹³² Where the principle that the State may not unfairly discriminate against an individual on the basis of their sexual orientation is expressly protected in the Constitution. See Sec. 9(2) of the South African Constitution.

¹³³ See ISS Monthly Review, (February 2008), 2 (discussing how in the past, receiving countries have managed to “evade the problem by considering homosexual adoption applicants as single persons”).

¹³⁴ ISS Monthly Review, (February 2008), 2.

Thirdly, Hills¹³⁵ argues that:

If the goal of the [Hague] Convention is, as its Preamble suggests, to ensure that children 'grow up in a family environment, in an atmosphere of happiness, love, and understanding,' then it must be implemented in such a way as to fully accept the eligibility ... of homosexual persons as potential adoptive parents (insertion mine).¹³⁶

Therefore, if African countries that do not allow homosexual adoption were to perceive the Hague Convention as facilitating this,¹³⁷ reluctance to accede to the instrument could be greater. As a result, this issue should be approached with caution.

Fourthly, if legislation is enacted in Africa to allow intercountry adoption by homosexuals, the direct and indirect ramifications of such legislation (particularly on the best interests of the child) need to be properly assessed. For instance, if the legislation is to apply without exception to all adoption service providers, experience from the U.K. suggests that such a move could be resisted by faith based organisations (for instance, Catholic orphanages) that might go to the extent of suspending or closing down their adoption programmes as an indication of their refusal to place children with homosexual adopters.¹³⁸ Such closures, even temporarily, might not be in the best interests of children who might otherwise have been able to benefit from a family environment through adoption (even without the introduction of legislation allowing homosexuals to adopt).

¹³⁵ Hills, (1998), 237.

¹³⁶ Hills, (1998), 238.

¹³⁷ The Hague Convention does not introduce a comprehensive uniform international code on adoption, and leaves the determination of eligibility to adopt to the competent authorities of receiving States (in the first instance) and countries of origin. Permanent Bureau, Guide to Good Practice, (2008), 112.

¹³⁸ See Christian Today, (08 March 2007) (providing that when "Prime Minister Tony Blair announced on January 29 that Roman Catholic adoption agencies should not be exempted" from proposed regulations that would have barred discrimination against homosexuals, "[t]he Roman Catholic Church warned it would halt its adoption programs before it would agree to place children with gay parents"). See too Ekklesia, (08 March 2007), where it is indicated that, after an attempt to secure a permanent opt-out for Catholic adoption agencies, it was decided that they should only benefit from a grace period to give the agencies time to adjust.

Therefore, the implications of these attitudes need to be taken into account, and ways of promoting children's best interests need to be sought. For any law reform effort or policy intervention in respect of intercountry adoption from Africa to be labelled as effective and culturally sensitive, the attitudes of governments and communities towards homosexuals need to be considered.

2.3.8 HIV/AIDS and Africa's children

If one were to seek to identify the three main factors that mar the life of the African child at present, the answer that would spring to mind would arguably be: poverty, armed conflict,¹³⁹ and HIV/AIDS.¹⁴⁰ Since the first clinical evidence of HIV/AIDS was reported some 25 years ago, the virus has spread at an alarming rate, particularly in sub-Saharan Africa, a region which can least afford the sickness, death, and loss of productivity associated with the epidemic. This region has just over 10% of the world's population, but more than two thirds (68%) of all people who are HIV-positive live in this region, a region where more than three quarters (76%) of all AIDS deaths in 2007 occurred.¹⁴¹

¹³⁹ According to Kaime's calculation, "[a]t least 23 countries in Africa are either engaged in some form of armed conflict or are just emerging from one. The violence in Darfur, the never-ending lawlessness in Somalia and the on-going civil wars in the Sahrawi Republic, Uganda, Côte d'Ivoire and Chad as well as the recent history of violence in the Democratic Republic of Congo, and the Mano River states of Sierra Leone, Liberia and Guinea make Africa one of the most unstable continents on the globe". See Kaime, (2008), 183.

¹⁴⁰ Hence, UNICEF ranks HIV/AIDS as one of the three greatest threats to childhood today.

¹⁴¹ UNAIDS/WHO, (2007), 15. A recent report (2008) highlighted that "sub-Saharan Africa remains the most heavily affected by HIV, accounting for 67% of all people living with HIV and for 72% of AIDS deaths in 2007". See UNAIDS, (2008), 5. Whereas global trends indicate that HIV infections have fallen in several countries, this is offset by increases in new infections in other countries. In this regard, an example is Kenya where it is reported that "in 2007, HIV prevalence ranged between 7.1% and 8.5% - compared with the 2003 estimate of 6.7%". See UNAIDS, (2008), 5.

The total number of people living with HIV in 2008 was estimated at 33.4 million,¹⁴² of whom an estimated 22.4 million people live in sub-Saharan Africa.¹⁴³ It is reported that in 2007 AIDS killed approximately 330,000 children under the age of 15, and that an estimated 2.1 million additional children under the age of 15 were living with HIV.¹⁴⁴ In 2008 an estimated 1.9 million people in the region became newly infected, while 1.4 million died of AIDS.¹⁴⁵ While the total AIDS related deaths in 2008 was around 2 million, the number of children was estimated at 280,000.¹⁴⁶ The number of children under 15 years living with HIV in 2008 was estimated at 2.1 million.¹⁴⁷

Some further reference to statistics is helpful here in order to demonstrate the dire situation that African children infected, and affected, by HIV/AIDS face. According to a 2007 Report:

- Only 1 in 10 pregnant women with HIV in low and middle income countries is receiving antiretroviral (ARV) prophylaxis for preventing mother-to-child transmission (MTCT) of HIV.
- Only 1 in 10 children needing antiretroviral treatment (ART) receives it - the others face a bleak and short lived future.
- At most 1 in 25 children born to HIV-infected mothers receive cotrimoxazole prophylaxis to prevent opportunistic infections.¹⁴⁸
- Children who have lost both parents to AIDS or any other cause, are generally less likely than non-orphans to attend school.¹⁴⁹

¹⁴² UNAIDS, (2009), 6.

¹⁴³ UNAIDS, (2009), 21.

¹⁴⁴ UNAIDS/WHO, (2007), 1.

¹⁴⁵ UNAIDS, (2009), 21.

¹⁴⁶ UNAIDS, (2009), 6.

¹⁴⁷ As above.

¹⁴⁸ Illnesses caused by various organisms, some of which usually do not cause disease in persons with healthy immune systems. Persons living with advanced HIV infection may suffer opportunistic infections of the lungs, brain, eyes, and other organs.

¹⁴⁹ UNICEF/UNAIDS/WHO, (2007), 3.

The scourge of HIV/AIDS has particularly dire effects for children and the fulfilment of their rights.¹⁵⁰ The succinct words of Pais, former Director of the Innocenti Research Centre, describe this aptly:

AIDS is killing not only parents, but also brothers and sisters, aunts and uncles, neighbors, teachers and other members of the community. It is emptying schools, wiping out families and extinguishing hope.¹⁵¹

Following this, Pais poses a rhetorical question: "If it takes a village to raise a child, what happens to that child when the village is besieged by the dying and the dead?"¹⁵²

As the implications and effect of HIV/AIDS upon children have come to the fore, most notably in the context of Africa, legal and policy responses have adapted to accommodate children's vulnerability amidst the AIDS crisis.¹⁵³ As the CRC Committee has recognised in its General Comment No 3,¹⁵⁴ many of these challenges lie at the level of policy or practice, especially as regards health services delivery and prevention campaigns. However, equally, there are issues of legal import surrounding HIV/AIDS¹⁵⁵ including in respect of intercountry adoption.

¹⁵⁰ See, generally, Sloth-Nielsen and Mezmur, (2008d); Sloth-Nielsen, (2005).

¹⁵¹ UNICEF Innocenti Digest, (2006), 6.

¹⁵² UNICEF Innocenti Digest, (2006), 6.

¹⁵³ It is observed that "[i]ndeed, the rise of HIV/AIDS and its impact on children has spawned an entirely new children's rights 'language': the 'orphan generation', OVCs (orphaned and vulnerable children), MTCT (mother-to-child-transmission), and child-headed households have long since entered the everyday lexicon in policy and programming on the continent". Sloth-Nielsen and Mezmur, (2008d), 279.

¹⁵⁴ CRC Committee, General Comment No. 3, (2003). See Sloth-Nielsen, (2005), for a detailed discussion of this General Comment. At its 17th session in 1998 the CRC Committee held a day of general discussion on the theme of HIV/AIDS and children's rights, in which it recommended that a number of actions be taken, including facilitating the engagement of States Parties on HIV/AIDS issues in relation to the rights of the child.

¹⁵⁵ See, generally Sloth-Nielsen and Mezmur, (2008d); Sloth-Nielsen, (2005).

One of the devastating effects of the HIV/AIDS pandemic on children is to deprive them of their family environment.¹⁵⁶ In 2001 a UNAIDS report indicated that of the more than 13.2 million children who have been orphaned¹⁵⁷ by the AIDS epidemic, 95% were from sub-Saharan Africa.¹⁵⁸ In 2008, more than 14.1 million children in sub-Saharan Africa were estimated to have lost one or both parents to AIDS.¹⁵⁹ This statistic on its own speaks volumes about the magnitude of the challenge that African governments face.

Even though it would be wrong to make the assumption that the problem of orphanhood in Africa is created solely by HIV/AIDS, a study conducted in 17 sub-Saharan countries has found that orphan prevalence is related to adult HIV prevalence estimates.¹⁶⁰ This clearly supports the interpretation that the orphan crisis is, in large part, AIDS-related.¹⁶¹

There are a number of factors that make the lives of orphans and vulnerable children more difficult in Africa.¹⁶² Apart from being orphaned, the diverse effects of HIV/AIDS on children can include: growing up in low capacity households; children heading

¹⁵⁶ Obviously the sexually transmitted nature of HIV/AIDS is also likely to affect the rate of the increase of double orphans disproportionately compared with the increase of single parent orphans, leading to a higher probability that it would cause the death of both parents than most other conditions.

¹⁵⁷ There is some controversy surrounding the definition of the word “orphan”. Whereas a 2004 report by UNIADS/UNICEF/USAID defined the word as “any child under the age 18 who has lost one or both parents”, some have criticised this definition as “unusual” and “even somewhat perverse”. Such criticisms are based on the argument that “in no other context are children with one surviving parent called orphans”. UNAIDS, UNICEF, USAID. (2004); Richter and Rama, (2006), 18. For further discussion of the notion of “orphan” and its implication for adoptability, see Chapter 4, section 4.5.2 below.

¹⁵⁸ UNAIDS, (2001), 6.

¹⁵⁹ UNAIDS, (2009), 21.

¹⁶⁰ George *et al.* (2003), 1235-1247.

¹⁶¹ As above.

¹⁶² The human rights of the child placed at risk in the context of HIV/AIDS include: the right to life; the right to the highest attainable standard of mental and physical health; the right to non-discrimination, equal protection and equality before the law; the right to privacy; the right to freedom of expression and opinion and the right to freely receive and impart information; the right to equal access to education; the right to an adequate standard of living; the right to social security, assistance and welfare; and the right to parental care.

households;¹⁶³ dropping out of school; being forced into child labour; failing to access health services; facing severe emotional burdens occasioned by the illness and death of kin; and social stigma. Thus it is clear that, for large parts of Africa, “Aids is beginning to reverse decades of steady progress in child survival”.¹⁶⁴ In addition, it has become evident that property transfers for the benefit of surviving children is an especially thorny issue when factors, such as the applicability of customary law and communal ownership of properties, arises, since children are, by and large, not beneficiaries after the death of caregivers.¹⁶⁵ To add to this, property grabbing and dispossession by relatives have been an unwelcome features of the rise of HIV/AIDS, which lawmakers have of necessity had to attempt to address.¹⁶⁶ For women and children, widowed and orphaned by AIDS, this is particularly devastating as they are most likely HIV infected themselves and will need all of their resources for medical treatment.¹⁶⁷

The most critical area of concern for Africa that HIV/AIDS raises is the issue of children’s rights to parental or family care, or to alternative care when deprived of a family environment, due to the growing number of orphaned children.¹⁶⁸ While the majority of orphans are absorbed by the extended family, a significant number are

¹⁶³ The General Comment breaks new ground insofar as it accords recognition at the international law level to the phenomenon of childheaded households. See Sloth-Nielsen, (2005), 76 for further discussion.

¹⁶⁴ UNAIDS, (2001), 11.

¹⁶⁵ See Sloth-Niselsen and Mezmur, (2008d), 2910291; Loftspring, 2007; Strickland, (2004); Preble, (1991), 862-964.

¹⁶⁶ Sloth-Nielsen and Mezmur, (2008d), 291-292.

¹⁶⁷ See, Loftspring, 2007; Strickland, (2004); Preble, (1991), 862-964.

¹⁶⁸ In relation to alternative care and OVCs, the stance adopted in the General Comment is that communities (and not governments alone) are at the forefront of the fight against the epidemic, and hence that community absorption of orphans is the preferred and first response. “[O]rphans are best protected and cared for when efforts are made to enable siblings to remain together, and in the care of relatives or other family members”. CRC Committee, General Comment No. 3, (2003), para. 31.

institutionalised. The debate over the institutionalisation of children who are HIV/AIDS orphans is controversial.

Antiretroviral therapy has made a significant impact in preventing new infections in children as more HIV-positive mothers gain access to treatment preventing them from transmitting the virus to their children.¹⁶⁹ Notwithstanding the high cost of the treatment for HIV/AIDS, a number of studies point out that there are attractive options for countries with very limited resources,¹⁷⁰ provided that the political and social will is present. A 2007 UNAIDS report declares that:

Substantial progress has been achieved in bringing essential HIV services to those in need in the low- and middle-income countries where 95 per cent of all people living with HIV reside. The number of people receiving antiretrovirals in these countries increased five-fold between 2003 and 2006, and declines in HIV prevalence have been reported in several countries following the implementation of strong HIV prevention measures.¹⁷¹

Experience in countries such as Botswana and Uganda is showing that timely initiation of antiretroviral therapy significantly reduces HIV-related orphanhood.¹⁷² Despite these breakthroughs in treatment and their relative affordability, African governments still trail behind, and find it difficult to provide these treatments to their large number of HIV infected children and/or parents. The decline for funding for prevention measures in a number of countries, such as, Swaziland, Lesotho, and Ghana because of lack of financial resources is also contributing to the negative impact of the epidemic.¹⁷³ Unfortunately, even with the significant gains that have been achieved through

¹⁶⁹ UNAIDS, (2009), 25.

¹⁷⁰ See, for instance, Goldie *et al.*, (2006) 1141-1153; Stover *et al.*, (2006), 1474-1476; Hogan *et al.*, (2005), 1431-1437.

¹⁷¹ UNAIDS, (2007), 1.

¹⁷² UNAIDS, (2009), 25.

¹⁷³ UNAIDS, (2009), 26.

treatment scale-up, sub-Saharan Africa's epidemic continues to outpace the response.¹⁷⁴

Twenty-five years into the epidemic, it is a well settled position by now that:

No single intervention, or type of intervention, will result in sufficient or sustained support for the well-being of the very large numbers of children affected by HIV/AIDS over the extended timescale of the epidemic.¹⁷⁵

Addressing the HIV/AIDS pandemic through prevention and treatment efforts is one major way of minimising the number of children who may be deprived of their family environment in Africa. The magnitude of the challenge posed by HIV/AIDS forces governments to devise a range of response mechanisms for the care of their orphans. One of these care options, it appears, is intercountry adoption.

Thus, whether to accept or reject intercountry adoption as one means of alternative care in Africa requires, at a minimum, an appreciation and understanding of the challenges that the AIDS pandemic poses to the continent. Taking into account the current and projected orphan numbers on the continent is also a crucial part of this appreciation. Any meaningful and concerted intervention to introduce intercountry adoption as one means of alternative care demands that all stakeholders take into account the HIV/AIDS pandemic, and its impact, trends and context at grassroots level.

2.4 RELIGIOUS CONTEXT

2.4.1 *Sharia*, African countries, and adoption

¹⁷⁴ As above.

¹⁷⁵ Richter and Rama, (2006), 16.

For some, the information that there are more Muslims in Africa than in the Middle East may come as a surprise. However, out of a population of almost one billion people, estimates put the figure of the followers of the Islamic religion on the African continent at a staggering 446 million.¹⁷⁶ Thus, Africa is home to 27% of the world Muslim population.¹⁷⁷ As a result, *Sharia*, which is said to be a religious set of principles based on the four pillars of Islam (namely, *Qu'ran*¹⁷⁸ (Islamic holy text), the *Sunna* (teachings of the Prophet Mohammed), the *Ulama* (religious scholars) and the *Qiyas* (case law))¹⁷⁹ is applicable many countries on the continent.

One can find Islam as the religion mainly practised (sometimes as a State religion) in any number of countries in almost all corners of the African continent. The Islamic region traditionally recognised on the continent is North Africa, which is composed of Algeria,¹⁸⁰ Morocco,¹⁸¹ Egypt,¹⁸² Tunisia,¹⁸³ Mauritania,¹⁸⁴ and Libya.¹⁸⁵ The Islamic inclination of some of these countries is partly reflected in their official names. For

¹⁷⁶ See Kettani, (2009), 1.

¹⁷⁷ The existence of such a significant number of Muslims is understandable if account is taken of the fact that the Islamic religion has been present on the continent for a long period of time. A number of writers agree that the presence of Islam in Africa can be traced to the seventh century when the prophet Muhammad advised a number of his early disciples, who were facing persecution by the pre-Islamic inhabitants of the region, to seek refuge across the Red Sea in the Christian Kingdom of Abyssinia (present day Ethiopia). See Kane, (2007), 64-68.

¹⁷⁸ Believed to be a collection of God's revelations to Muhammad, and Islam's sacred scripture, the *Qur'an* delineates the core beliefs of Islamic society and establishes the criterion for being a Muslim. The *Qur'an* is divided into *surahs*, or chapters, which are arranged according to length rather than chronology, so that the longer chapters which represent later revelations actually precede the shorter and earlier revelations. See, for instance, Esposito, (1991), 8-9, 19 and 27.

¹⁷⁹ See Khan, (2002), 279; Zarifis, (2002), 22.

¹⁸⁰ Sunni Muslim (State religion) 99%, and Christian and Jewish 1%. See CIA, "The World Factbook: Algeria", (2008).

¹⁸¹ Muslim 98.7%, Christian 1.1%, and Jewish 0.2%. See CIA, "The World Factbook: Morocco", (2008).

¹⁸² Muslim 90%, Coptic 9%, and other Christian 1%. See CIA, "The World Factbook: Egypt", (2008).

¹⁸³ Muslim 98%, Christian 1%, Jewish and other 1%. See CIA, "The World Factbook: Tunisia", (2008).

¹⁸⁴ Muslim 100%. See CIA, "The World Factbook: Mauritania", (2008).

¹⁸⁵ Sunni Muslim 97%, and other 3%. See CIA, "The World Factbook: Libya", (2008).

instance, Libya is officially called “the Great Socialist People's Libyan Arab Jamahiriya” while Egypt officially goes by the name of “the Arab Republic of Egypt”.¹⁸⁶

Other countries on the continent that apply *Sharia* to varying degrees include Nigeria, Senegal, Somalia, Mali, Chad, Sudan, Djibouti, Ethiopia, Tanzania, and Kenya. In some of these countries, *Sharia* might apply (to the Muslim community) even in cases where a good portion of the population adheres to a religion other than Islam.¹⁸⁷

The application of *Sharia* varies from one country to the other.¹⁸⁸ Khan observes that:

The Shar'ia law broadly influences the legal code in most Islamic countries, but the extent of its impact varies widely. In Africa, most states limit the use of Shar'ia to “personal-status law” for issues such as marriage, divorce, inheritance and child custody.¹⁸⁹

Therefore, as opposed to areas of taxation and penal law,¹⁹⁰ the personal status law aspects of *Sharia* continue to bind the majority of Muslims throughout Africa.

The issue of adoption, which fits squarely within personal status law, remains not only an unrecognised institution in *Sharia* but, through interpretation, a prohibited one.¹⁹¹

¹⁸⁶ There is no misconception on the part of this writer that “Arab” is defined independently of religious identity, and pre-dates the rise of Islam, with historically attested Arab Christian kingdoms and Arab Jews. However, it is a fact that the Arabic language gained greater prominence with the rise of Islam in the 7th century AD as the language of the *Quran*, and Arabic language and culture were more widely disseminated as a result of early Islamic expansion. As a result, in present day ordinary parlance, the notion “Arab” is usually directly related to “Islam”. In 1980 the Egyptian Government amended Article 2 of the Egyptian Constitution which presently reads that “Islamic sharia will be the principle [sic] source of Egyptian legislation”. For further details on this, see Lombardi, (1998), 81.

¹⁸⁷ A good example is Nigeria, where approximately 50% of the Nigerian population is Muslim while 40% is Christian. CIA, “The World Factbook: Nigeria”, (2008). *Sharia* forms part of Nigeria’s legal system, and it is applied to the Muslim community. The application of *Sharia* in Nigeria is an issue that has drawn a lot of international attention in recent times. See Anyanwu, (2005-2006), 315.

¹⁸⁸ Olowu, (2008), 70;

¹⁸⁹ See Khan, (2002), 277.

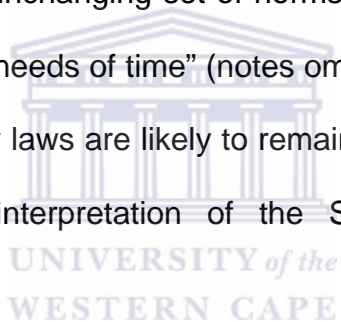
¹⁹⁰ See Schacht, (1964), 76. A similar view is shared by Abu-Odeh who observes that Islamic law has survived in the modern era primarily through family law. See Abu-Odeh, (2004), 1043.

¹⁹¹ Sonbol, (1995, 51; Vite and Boechat, (2008), 21.

This argument is primarily based on the reason that “Islam has been attentive to genealogical clarity and the preservation of the family structure”¹⁹² and that, in order to “maintain that, Islam nullifies all those practices that may obscure or eliminate the blood bond, such as adoption”.¹⁹³ The *Quranic* edict that has been interpreted to prohibit adoption reads:

... Nor hath He made those whom ye claim to be your sons. This is a saying of your mouth... Proclaim their real parentage. That will be more equitable in the sight of God. And if ye know not their fathers, then (proclaim them) your brethren in faith and your clients.¹⁹⁴

However, some scholars contend that “... the principles of Islamic law, or *Shari’a*, do[es] not consist of [sic] immutable, unchanging set of norms, but have an in-built dynamism that is sensitive ... to changing needs of time” (notes omitted).¹⁹⁵ Rehman observes that since “Sharia and Islamic family laws are likely to remain relevant to Islamic societies ... a consistent review and re-interpretation of the Sharia is therefore of utmost significance”.¹⁹⁶



By transposing these arguments to current day realities (such as an increased number of children deprived of their family environment) arguing the case for allowing intercountry adoption in Muslim countries (though likely to be unsuccessful) is not impossible. In fact, although the Muslim world seems to be virtually unanimous in

¹⁹² UNICEF and International Centre for Demographic Studies and Research, (2005), 12.

¹⁹³ As above. For a discussion of children’s rights in Islam, see Badamasiuy, (2009); Nasir, (2002); Sait, (2000); Olowu, (2008); Rajabi-Ardeshiri, (2009).

¹⁹⁴ The *Quran*, 33:4/5.

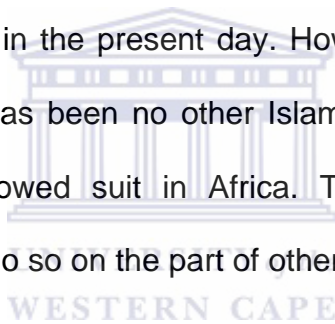
¹⁹⁵ UNICEF and International Centre for Demographic Studies and Research, (2005), 3-4. Some of these scholars believe that patriarchal interpretations create conflict for Muslim women who do not have the benefit of a religious education. See, for instance, Al-Hibri, (1997), 3.

¹⁹⁶ Rehman, (2007), 108.

holding that adoption, as understood in the western world, does not have support under Islamic law,¹⁹⁷ Nasir has found one exception in Africa - Tunisia. According to him:

On 4/3/1958, Act No.27 in respect of Public Guardianship Taking into Care and Adoption, was promulgated in an obvious attempt to find a remedy for the growing numbers of foundlings and children of refugees, according to the Explanatory Note issued by the Ministry of Justice. The Act tried to steer a middle course between the social and Sharia exigencies. On the one hand, it granted the right to adopt to every adult, whether male or female, on complying with the conditions of being married, possessing civil rights, being of sound character, mind and body, and capable of looking after the adoptee... On the other hand, honouring the Sharia rule, all the prohibited degrees for marriage purposes shall remain observable by the child if his relatives are known (Art.15).¹⁹⁸

It could be argued, if indeed the issue of foundlings was considered a significant problem in 1958, it is more so in the present day. However, the Tunisian Act is more than 50 years old, and there has been no other Islamic country (as far as this writer could ascertain) that has followed suit in Africa. This might be an indication of disinterest, or unwillingness to do so on the part of other Muslim countries.



It is doubtful if a rights based argument can be formulated in order to legitimise adoption under *Sharia* as an alternative means of care for children deprived of their family environment. As will be shown in Chapter 3, section 3.4.3.2.1 below, intercountry adoption is not an alternative means of care that every State Party to the CRC and the ACRWC is obliged to undertake. The fact that *Sharia* does not allow adoption (let alone

¹⁹⁷ In Algeria, for instance, the Family Law No. 84/1984 (promulgated 09 June 1984), dealing with inheritance, guardianship, maintenance, marriage, wills, gifts, and other related issues, expressly provides: "Adoption shall be forbidden, under the Sharia and the law" (Art. 46). Art. 83 of Decree No 1/57/379 which forms part of the Code of Personal Status and Succession of 1957 entrenches that "[a]doption as understood customarily is void and shall produce no legal effect. Adoption for the purpose of rewarding or bequeathing, known as according a person the status of one's child, shall not establish a parentage, and shall be subject to the provision of the will". See too Pollack *et al.*, (2004), 732, 733-752 (partly arguing that the Islamic law of foundlings functions as a close substitute for adoption, and also identifying the alternatives to a more robust set of rules that would be more accommodating to "quasi-adoptive" relationships).

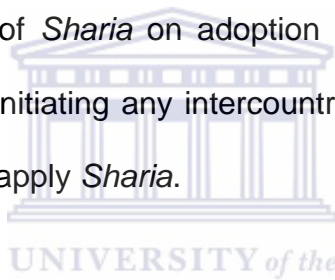
¹⁹⁸ Nasir, (2002), 153-154.

intercountry adoption) does not necessarily demonstrate Islam's lack of commitment to dealing with the issue of children deprived of their family environment. In Islam, a number of verses in the *Quran* are interpreted to enjoin society to provide full care for orphans. For instance, the *Quran* reads:

And they give food, in spite of their love for it [or for the love of HIM], to the *MISKIN* [the poor], the orphan and the captive...¹⁹⁹

So, too, the practice of *Kafalah*,²⁰⁰ which is recognised by the CRC²⁰¹ and the ACRWC²⁰² offers children a form of alternative care under Islamic law.

Four points can be highlighted from this discussion. First, receiving countries should be sensitive towards the position of *Sharia* on adoption in African countries. This might entail, in its extreme form, not initiating any intercountry adoption processes in respect of countries that predominantly apply *Sharia*.



Second, in multi-religious societies, the application of *Sharia's* prohibition of adoption should not apply beyond the adherents of Islam. A good example in this regard is present in Egypt and Lebanon where intercountry adoption within the Christian communities is allowed.²⁰³ Thirdly, where countries do not allow adoption, other alternative care options such as *kafalah* should be supported and strengthened so as to be able to respond to the needs of children deprived of their family environment.

¹⁹⁹ Al-Insan or The Human, verse 8 as cited in UNICEF and International Centre for Demographic Studies and Research, (2005), 78.

²⁰⁰ The practice entails the acceptance of children without families into what is tantamount to a permanent form of foster care, but without the children concerned taking on the family name or enjoying the right to inherit from the family with whom they are placed. See Hodgkin and Newell, (2002), 295-296. See Assim, (2009) for a detailed discussion of *kafalah*.

²⁰¹ Art. 20 of CRC.

²⁰² Art. 25 of the ACRWC.

²⁰³ See Chapter 3, section 3.4.3.2.1 below for a brief mention of countries that do not “recognise” but “permit” adoption.

Fourthly, in very exceptional circumstances, a recognition that the best interests of the child may dictate that adoption be allowed in countries that adhere to *Sharia* would be possible. For instance, in Comoros, despite the wide application of *Sharia* law, courts have sometimes resorted to French civil law in order to legitimise adoption in order to promote a child's best interests.²⁰⁴ To sum up, for any intervention (on the part of both receiving and sending countries) in the area of intercountry adoption from Africa to be meaningful, an appreciation of the status of the institution in Islamic law should be borne in mind.

2.5 ECONOMIC CONTEXT

2.5.1 Economic context: General

Generally speaking, many economic growth indicators put African countries at the bottom of the list.²⁰⁵ As is well known, 80% of the highly indebted poor countries (HIPCs) are in sub-Saharan Africa.²⁰⁶ In sub-Saharan Africa, the number of people who live on \$1.25 a day rate was 50 % in 2005; the number of poor has almost doubled, from 200 million in 1981 to about 380 million in 2005; and future forecasts are also grim, since if the trend persists, a third of the world's poor will live in Africa by 2015.²⁰⁷ Furthermore, many African countries continue to face difficulties in debt servicing. Even

²⁰⁴ CRC Committee, State Party Report: Comoros, (October 1998), para. 93.

²⁰⁵ See, generally, UNECA, (2009). Ironically, this is so despite the fact that the continent is endowed with natural resources such as oil, and minerals, and has much potential for growth.

²⁰⁶ See IMF, (2009).

²⁰⁷ World Bank, (26 August 2008).

when HIPCs transfer the debt they owe to creditors, these transfers have been diverting resources from investment in human development and economic recovery.²⁰⁸

Inequality and exclusion from basic services continue to be serious and pervasive problems. For instance, in 2002, it was reported that Africa alone accounted for 90% of malaria mortality.²⁰⁹ As a general rule of thumb, where malaria prospers most, human societies have prospered least.²¹⁰ In addition, Africa's population continues to soar. Its population growth continues to hover at 2.5% per year, twice that of Latin America and Asia.²¹¹ While this trend might contribute towards Africa's competitive advantage in the long term,²¹² it is currently adding ecological stresses to the economic strains.

The current global economic crisis might have its genesis in the developed world, but it is already hitting Africa hard.²¹³ As a result, growth in sub-Saharan Africa is projected to decline from just under 5.5 % in 2008 to 1.5 % in 2009.²¹⁴ It even threatens to wipe out some of the hard-won socio-economic gains in the last decades.²¹⁵

The majority of African governments do not have sufficient available resources to implement the human rights programmes in the social, health, education and welfare sectors that are required to ensure sufficient progress in fulfilling survival and

²⁰⁸ UNDP, (2005), 87.

²⁰⁹ Sachs and Malaney, (2002), 681.

²¹⁰ As above.

²¹¹ Commission for Africa, (2009), 16.

²¹² As above.

²¹³ World Bank, (2008), 1.

²¹⁴ Commission for Africa, (2009), 12.

²¹⁵ Commission for Africa, (2009), 12-13.

development rights. Available resources include both financial and human resources, and unfortunately many African governments have significant deficits in relation to both.

As a result, it is more true in Africa than anywhere else that private sector corporations, including multinationals, donors and other international agencies continue to be key players in ensuring “available resources”, rather than States being solely responsible.²¹⁶

Unless some dramatic change takes place, this state of affairs is likely to prevail for at least the immediate future.

The agenda of much “international cooperation” to Africa is sometimes clouded by a lack of transparency, welfarism, or by a humanitarian foundation, as opposed to being rights-based or viewed as a legal responsibility.²¹⁷ Some donors continue to attach harmful economic policy conditions to aid and debt relief.²¹⁸

There is some progress in promoting ownership thereby contributing to the development of African solutions, for instance, by working with and through African institutions such as the AU and the African Development Bank (AfDB).²¹⁹ This, however, is not a claim that can be made by many development partners in the West.²²⁰

²¹⁶ See, generally, *Ad hoc* working group on available resources, (2007).

²¹⁷ See, generally, Riddell, (1999), 309-335; Riddell, (2007) (for a discussion of some of the shortcomings of aid).

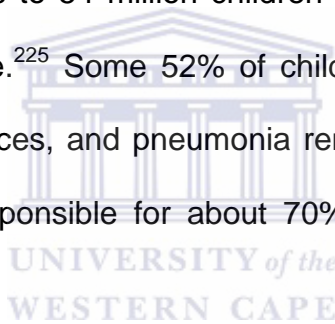
²¹⁸ See generally Riddell, (1999), 309-335; Conyers and Mellors, (2005), 83-89; Bräutigam and Knack, (2004), 255-285; Arimoto and Kono, (2009), 276-287; Djankov *et al.*, (2008), 169-194; Loots, (2006), 363-381. *Ad hoc* working group on available resources, (2007).

²¹⁹ Commission for Africa, (2009), 13.

²²⁰ Although the 2005 Paris Principles have gone some way towards achieving improved co-ordination of co-operative efforts and increased accountability of recipient governments, it is argued that at grassroots level, the Paris Principles are not showing much effect yet, and are even having negative unintended consequences (such as interminable inter-donor and intergovernmental meetings, to the exclusion of beneficiary communities, and at the expense of actual programme delivery). See *Ad hoc* working group on available resources, (2007).

2.5.2 Economic context: Children

The lack of a strong economy in the majority of the countries in Africa has led to grim child well-being indicators.²²¹ The “State of Africa’s Children Report of 2008” paints this picture vividly. For instance, in 2006, the under-five mortality rate for sub-Saharan Africa was 160 per 1,000 live births, meaning that roughly one in every six children failed to reach their fifth birthday.²²² Around 45% of sub-Saharan Africa’s population does not use improved drinking-water sources.²²³ In addition, more than 60% remain without access to improved sanitation facilities as of 2004.²²⁴ Sub-Saharan Africa’s rapid population expansion translates to 54 million children under five without access to an improved drinking-water source.²²⁵ Some 52% of children with suspected pneumonia have no access to health services, and pneumonia remains the most prevalent of the six fatal diseases that are responsible for about 70% of child deaths in developing countries.²²⁶



According to “State of the World Children 2008”, current inadequate efforts particularly in sub-Saharan Africa will be grossly insufficient for the continent to meet the health-related MDGs for children.²²⁷ After all, as succinctly put by UNICEF:

...six of the eight MDGs can best be met as the rights of children to health, education, protection and equality are protected. They will only be sustained as the rights of every child are realized. These same six match the goals set out in A World Fit for Children.²²⁸

²²¹ See generally, UNICEF, (2008a).

²²² UNICEF, (2008a), 4.

²²³ UNICEF, (2008a), 9-10.

²²⁴ As above.

²²⁵ UNICEF, (2008a), 10.

²²⁶ ACPF, (2008a), 4.

²²⁷ UNICEF, (2008b), 1.

²²⁸ UNICEF, (2003), 2.

At the mid-point in the global effort to achieve the MDGs by 2015, progress in many African countries is not on track.²²⁹ And unfortunately, as the final date for the MDGs approaches, less than six years away, the world finds itself mired in an economic crisis that is unprecedented in its severity and global dimensions. Reports have started to indicate that the global economic crisis would mean that more African children will die and drop out of school, too.²³⁰

The CRC Committee has systematically recommended to many African countries that, in light of Article 4 of the CRC,²³¹ States Parties should prioritise and increase budgetary allocations for children at national, regional and sub-regional levels in an effort to improve the implementation of the rights of the child throughout a country.²³² Some States Parties are criticised for their considerable military expenditure when compared to allocations to other services such as education and health.²³³

Even when the resources are available and the will on the part of stakeholders (most importantly governments) exists, the lack of a child budget monitoring system for the purpose of tracing the way in which the decentralisation of resources for children from

²²⁹ MDG Africa Steering Group, (2008).

²³⁰ Associated Press, (31 August 2009).

²³¹ The corresponding provision of the ACRWC Art 1(1) provides that:

Member States of the Organization of African Unity Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake to the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.

Unlike the CRC Art 4, no distinction is made between civil and political rights on the one hand and socio-economic rights on the other.

²³² CRC Committee, Concluding Observations: Eritrea (June 2008), para. 17; Sierra Leone (June 2008), para. 18; Swaziland, (October 2006); Ethiopia, (November 2006), para. 17; Benin, (October 2006), paras. 17 and 18; Republic of Congo, (October 2006), paras. 14 and 15.

²³³ See CRC Committee, Concluding Observations, Eritrea, (June 2008), para.16; Ethiopia (November 2006), para. 16;

central organs (like Federal Ministries) to local authorities, frustrates efforts.²³⁴ In this regard, the CRC Committee has recommended to States Parties that they start budget tracking from a child rights' perspective with a view to monitoring budget allocations for children, seeking technical assistance for this purpose from, *inter alia*, UNICEF.²³⁵ Of the insufficient resources available too, however, corruption limits the amount that ultimately reaches children.²³⁶

The existence of social services that specifically target children are very minimal.²³⁷ Except for the South African child support grant,²³⁸ and a few limited cash transfer schemes in countries, such as Kenya, Namibia, Zambia, and Ethiopia, such services are absent. It is worth noting that even non-child specific grants might have a positive impact on children. A good example in this regard could be the universal social pension in Lesotho where reportedly 65% of the cash is spent on children cared for by older persons.²³⁹

More often than not, government ministries or departments in charge of children's issues receive only a small fraction of the State annual budgetary allocations, and thus they lack adequate funding to carry out their work relating to children. It is reported in Sierra Leone that:

²³⁴ It is usually difficult to identify the amount of resources allocated to children's issues in a given country. This is partly compounded by the fact that issues such as education, health care and all social science budgets do not appear to be disaggregated on the basis of age.

²³⁵ CRC Committee, Concluding Observations: Sierra-Leone, (June 2008), para. 18.

²³⁶ See, for instance, CRC Committee, Concluding Observations, Republic of Congo, (October 2006), paras. 14 and 15.

²³⁷ For a discussion of cash transfer schemes in a number of African countries, see Sloth-Nielsen, (2008c).

²³⁸ As above.

²³⁹ Samson, (2006).

In 2006, the Ministry of Social Welfare, Gender and Children's Affairs was allocated a total of just over 500,000 USD, the smallest budget of any ministry, despite the breadth of its mandate, which encompasses all matters relating to children, women and the protection of the vulnerable.²⁴⁰

The Sierra Leone experience is more the rule than the exception in Africa.²⁴¹

It is not only the lack of economic resources that are affecting the rights of children in Africa. Other factors, such as, lack of human resources, the failure to prioritise children's issues, the legacy of conflict, instability, environmental degradation, and corruption have a role to play. Nonetheless, the enormity of the challenge of securing the necessary economic resources to protect and promote children's rights in Africa should not be underestimated.

2.5.3 Some preliminary observations on the implications of the economic context on intercountry adoption

The economic context outlined above has a number of implications for children's rights in general and their opportunities to grow up in a family environment in particular. The dim economic forecasts highlight the fact that the current situation which is characterised by lack of resources, absence of social security, inequality, and aid dependency is to continue for the foreseeable future.

In the context of intercountry adoption, this means that many African countries will continue to struggle to put in place the necessary institutional support systems for

²⁴⁰ Teale, (2008), 366-367 citing Ministry of Finance statistics, May 2007. See too Government of Sierra Leone Justice Sector Reform Strategy 2008-2010, (2007), 89.

²⁴¹ See, for instance, CRC Committee, Concluding Observations: Eritrea, (June 2008), para. 17; Sierra Leone, (June 2008), para. 18; Swaziland, (October 2006); Ethiopia, (November 2006), para. 17; Benin, (October 2006), paras. 17 and 18; Republic of Congo (October 2006), paras. 14 and 15.

children's wellbeing. These include a sound birth registration system; social security; institutions that coordinate and monitor intercountry adoption-related matters; qualified social workers, judges and other personnel that deal with adoption issues; awareness raising on adoption; combating the effects of HIV/AIDS; and so forth. The capacity to collect and analyse vital data is also limited as a result of economic resources.

There is no doubt that aid will be a small part of the solution for Africa's economic problems.²⁴² However, the capacity of donors not only to influence but, in some respects, to dictate policies that have a direct bearing upon the realisation of children's rights is immense.

The fact that donors are highly involved, for instance, through intergovernmental agencies and NGOs might also lead to a risk of government abdicating its main responsibility in respect of spearheading policy and law development that caters for its children's needs. Many of child law reform initiatives on the African continent are donor driven. UNICEF in particular plays a significant role. In Swaziland, child law reform efforts were initiated and largely sustained by NGOs.²⁴³

It is argued that the economic context outlined above partly highlights the dire situation of many African children, and the number of factors that influence this context. Any policy and legislative proposal for alternative child care, including intercountry adoption on the African continent should take this economic context into account.

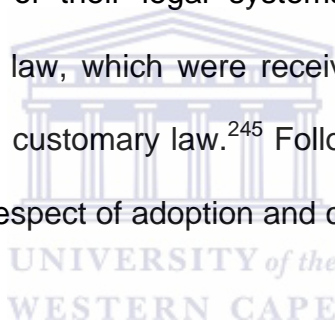
²⁴² The World Bank estimates that even in the European Union, with a combined GDP of about €8 trillion, annual aid through the structural and cohesion funds will average less than €50 billion between 2007 and 2013. World Bank, (2008), 5.

²⁴³ See, generally, Gallinetti, (2007); ACPF, (2008b), 25.

2.6 LEGAL CONTEXT

Many African countries have a plethora of legislation relating to matters which affect children. A number of factors characterise this legislation in Africa. Some countries which did not recognise adoptions at all before their colonial period might have been forced to recognise it during the period that colonial legislation was inherited.²⁴⁴

One common theme most African States share in their legal systems is duality and in some instances their incorporation of a hybrid system. For many African countries, both the duality and hybrid nature of their legal systems were created as a result of colonialism. Norms of Western law, which were received in the territories by colonial States, apply along with African customary law.²⁴⁵ Following is a discussion of some of the important legal contexts in respect of adoption and child care in general.



2.6.1 Outdated and non-comprehensive nature of some children's rights legislation in Africa

It is Article 4 of the CRC and Article 1 of the ACRWC that provide an obvious basis for assuring that legal reform is a core obligation that States Parties agree to undertake. In

²⁴⁴ For instance, this is the case of Lesotho and Swaziland. "Colonial governments often promulgated regulations concerning land and labor, regulations that frequently extended to specifying conditions of marriage and divorce and patterns of dancing, drinking, and entertainment". Therefore, since these legislation touched upon areas of family law, it would be safe to assume that the institution of adoption may have been introduced by colonial legislation. Merry, (1991), 890. Davel highlights the absence of the common law concept of adoption in traditional African communities. Davel, (2008), 270. In the meantime, since the role law played in the colonizing process is an instance of its capacity to reshape culture and consciousness, it is not surprising that there has been some resistance towards inherited legislation.

²⁴⁵ See Himonga, (2008), 73-90. A good example of this is Botswana. In Botswana two entirely different and potentially conflicting legal traditions namely the Roman-Dutch law and the English common law were received. In addition, marking its dualism, the Botswana legal system co-exists the pre-colonial customary law system along with its received foreign legal systems. See Fombad and Quansah, (2006), 53-64; See, too, Otlhogile, (1994); Quansah, (2001).

this respect it is true that, increasingly, inherited colonial legislation is being overhauled and replaced with modern, more accessible, and often more comprehensive, dedicated children's statutes. For instance, writing about the Children's Act of Kenya, Odongo alluded to the fact that one of the intentions of the law reform was to repeal statutes which were inherited from the colonial legal system and which predated the revolutionary notion of children's rights.²⁴⁶ However, a significant amount of existing legislation relating to matters which affect children in Africa is still outdated (and mostly predates the CRC and the ACRWC).²⁴⁷

An assessment of children's rights in Central African Countries (Cameroon, Central African Republic, Chad, Congo, Democratic Republic of the Congo, Equatorial Guinea, Gabon, and Sao Tome and Principe) has found that judicial systems that are still reliant on colonial era legislation make implementation more difficult.²⁴⁸ In relation to Botswana's Children's Act, which was enacted in 1981, questions have been raised whether "the Act fulfils the objectives that were paramount in the minds of the legislators then, or whether ...its provisions are still relevant in the light of today's circumstances".²⁴⁹

The observation that a number of outdated laws exist is specifically true in the area of adoption laws in Africa, too. Malawi's Adoption Act, for instance, falls within this category. Enacted originally as the Adoption of Children Ordinance in 1949 in pre-

²⁴⁶ Odongo, (2004), 421.

²⁴⁷ See, for instance, Sloth-Nielsen, (2008b), 53-56 for a discussion of the outdated nature of children's rights legislation in a number of African countries and the factors that impel legal reform.

²⁴⁸ Ngokwey, (2004), 186.

²⁴⁹ Maripe, (2001), 340. In June 2009, the Children's Act No 8 of 2009 of Botswana was enacted and it awaits the finalisation of its regulations for its implementation.

independence Malawi, it was formally adopted as the Adoption of Children Act, forming part of the Laws of Malawi. Zambia's Adoption Act was enacted in 1958, before Zambia attained independence. The Zambian Government admits that the statute conforms to the requirements of the CRC only to "some extent".²⁵⁰ The Adoption Proclamation of 1952 of Lesotho is also a colonial piece of legislation which is outdated.²⁵¹

One of the main recommendations of a sub-regional study involving the review of 19 Eastern and Southern African countries is that States need to undertake a holistic, multi-sectoral, and inclusive audit and review of existing legislation on children.²⁵² Even where comprehensive assessments have been undertaken, the study recommends that there is need for continuous review and revision of laws.²⁵³

2.6.2 Recently completed and ongoing law reform efforts regarding child law

There are examples of some child law reform processes that have been completed and the final statutes passed by parliament. These are statutes that have been enacted after the adoption of the CRC and the ACRWC. Examples of this are found in Ghana, Kenya, Madagascar, Mozambique, Nigeria, and Uganda. The Children's Act 38 of 2005 of South Africa, parts of which still await promulgation, is a good example of a recently passed consolidated child statute. Others include the Child Rights Act of Nigeria (2003),

²⁵⁰ CRC Committee, State Party Report: Zambia, (November 2002), para 226.

²⁵¹ Ndumo, (2006), 381.

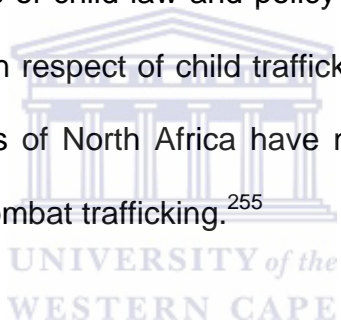
²⁵² ACPF, (2008b), 108. While harmonisation efforts are underway in a number of African countries such as Namibia and Tanzania, they are still absent in others such as, Ethiopia, Eritrea, Djibouti, and Libya.

²⁵³ As above.

the Children's Act of the Gambia (2005), the Children Act of Sierra Leone (2007) and the Children Act of South Sudan (2008).

Other pieces of legislation are not yet at the completion stage and are either in drafting or in parliamentary processes. Developments in Botswana, Namibia, and Swaziland fall into this category. In 2007, in both Algeria and Morocco, a Children's Code was being drafted.²⁵⁴ Angola, Lesotho and Malawi have also consolidated bills on children that are still pending.

In many countries certain areas of child law and policy are specifically less developed. This is the case, for instance, in respect of child trafficking. A study conducted in 2007 found that all of the five States of North Africa have not developed a specific policy, strategy and plan of action to combat trafficking.²⁵⁵



Despite the disproportionate impact of HIV/AIDS on children, as highlighted above in section 2.3.8, the extent to which recent statutes address or incorporate HIV/AIDS-related issues to ameliorate the plight of affected children is very limited.²⁵⁶ While a trend has been noted that HIV/AIDS issues crop up at a policy level, for example, with regard to OVC policies in place in many African countries, questions remain about the extent to which these are filtered into enforceable national legislation. At this preliminary stage, there is the impression that generally statutes either do not address issues

²⁵⁴ IBCR, (2007), 172

²⁵⁵ IBCR, (2007), 186

²⁵⁶ Sloth-Nielsen and Mezmur, (2007), 335; See too, generally, Sloth-Nielsen and Mezmur (2008d).

flowing from the HIV/AIDS pandemic, or that, if they do, they do not do so comprehensively.²⁵⁷

2.6.3 Institutional structures for coordinating and monitoring child law implementation

In light of Article 4 of the CRC and Article 1 of the ACRWC, States Parties have obligations to comply with certain general measures of implementation.²⁵⁸ Under Article 4 of the CRC, as a general measure of implementation, States Parties are required to report to the CRC Committee:

...on existing or planned mechanism at the national, regional and local levels, and when relevant at the federal and provincial levels, for ensuring implementation of the Convention, for *coordinating policies* relevant to children and for *monitoring progress* achieved..." (emphasis mine).²⁵⁹

Thus, States Parties should ensure that governmental departments competent in the areas covered by the CRC and the ACRWC maintain effective coordination of their activities. In addition, although self-monitoring and self-evaluation is an obligation for governments, the CRC Committee also regards as essential the independent monitoring of progress towards implementation by, for example, parliamentary committees, NGOs, academic institutions, professional associations, youth groups and independent human rights institutions.²⁶⁰

²⁵⁷ Sloth-Nielsen and Mezmur, (2007a), 335.

²⁵⁸ Implementation", according to the CRC Committee, "is the process whereby States parties take action to ensure the realization of all rights in the Convention for all children in their jurisdiction". See CRC Committee, General Comment No 5, (2003), para. 1.

²⁵⁹ Guidelines for periodic reports of the CRC Committee, (1997), para. 18.

²⁶⁰ CRC Committee, General Comment No 5, (2003), para 46.

Effective implementation of the CRC is said to require “visible cross-sectoral coordination ... between different levels of government and between Government and civil society - including in particular children and young people themselves”.²⁶¹ In addition, the coordinating body must be empowered and supported at the highest possible levels of government to allow it to function at its full potential.²⁶²

The CRC Committee has noted with concern, however, that most of these bodies and mechanisms are not adequately coordinated, and that they often fail to apply the comprehensive approach needed to ensure the full realisation of all children's rights.²⁶³

Moreover, they are often in dire need of institutional capacity, skills and financial resources to carry out their mandates.²⁶⁴ A similar view is shared by Doek who states that where a plan of action also exists, it is critical that a specific body, such as a ministry or an inter-ministerial committee, is mandated and adequately resourced to coordinate the implementation of this plan of action.²⁶⁵

In respect of monitoring, it is also indicated that monitoring institutions, if not constitutionally entrenched, should at least be legislatively mandated.²⁶⁶ The legislation should include provisions setting out specific functions, powers and duties relating to children that are linked to the CRC and its Optional Protocols as well as the laws relating to children's rights in the country concerned.²⁶⁷

²⁶¹ CRC Committee, General Comment No 5, (2003), para 27.

²⁶² CRC Committee, General Comment No 9, (2008), para 15.

²⁶³ CRC Committee, Report to the Secretary General, (1998), 19.

²⁶⁴ CRC Committee, Report to the Secretary General, (1998), 16.

²⁶⁵ Doek, (2006), 207.

²⁶⁶ CRC Committee, General Comment No 2, (2002), para. 7.

²⁶⁷ CRC Committee, General Comment No 2, (2002), para. 9.

It is interesting to note that, even if specialist independent human rights institutions for children, ombudspersons or commissioners for children's rights have been established in a growing number of countries worldwide, this is not necessarily a requirement. Especially, in the context of Africa, where resources are very limited:

... consideration must be given to ensuring that the available resources are used most effectively for the promotion and protection of everyone's human rights, including children's, and in this context development of a broad-based NHRI that includes a specific focus on children is likely to constitute the best approach. A broad-based NHRI should include within its structure either an identifiable commissioner specifically responsible for children's rights, or a specific section or division responsible for children's rights.²⁶⁸

In Africa, according to Sloth-Nielsen, "no fewer than 20 countries have established national human rights commissions/institutions".²⁶⁹ In addition, "over 10 ombudsmen/public protectors are also provided for in African constitutions".²⁷⁰ Mention should also be made of the fact that "a little over 45 constitutions of African countries provide for an independent judiciary".²⁷¹ Despite this, it is common knowledge that the degree of success of these institutions in independently monitoring the implementation of children's rights depends on the strength of particular legal, financial, political and social factors in a given country.

Unfortunately, finding a country in Africa which fulfils the majority of the indicators of good practice for independent monitoring of the implementation of children's rights is

²⁶⁸ CRC Committee, General Comment No. 2, (2002), para. 6.

²⁶⁹ Sloth-Nielsen, (2007), 99.

²⁷⁰ As above.

²⁷¹ As above.

very difficult.²⁷² Regressive measures, as opposed to progressive ones, such as in Ghana, where the specific department dealing with child rights under the Ghana Commission of Human Rights and Administrative Justice was abolished, are notable.²⁷³ In North Africa, it was reported in 2007 that there has been little progress in establishing effective independent national institutions to monitor compliance, and to protect and promote children's rights.²⁷⁴ The Botswana experience highlights that, even though Government has displayed a reasonable level of commitment to legislative measures to protect children's rights, implementing the legislative innovations in the administrative domain has been very limited.²⁷⁵

What is often overlooked is that States Parties neglect that the CRC and the ACRWC enjoin them to take all appropriate legislative, administrative and other measures for the implementation of the rights recognised in these instruments.²⁷⁶ This seems to be the reason why it is not uncommon in the field of children's rights in Africa that even when the legislative machinery has done its part in enacting legislation, the administrative machinery still lags behind.²⁷⁷ There is often a need for administrative structures to be re-orientated and strengthened in several ways if the rights of children are to be fully

²⁷² However, save its shortcomings in terms of accessibility and availability to all children in the country (which in part relates to the human and financial resources allocated to it) the Special Desk for Children's Affairs within the Commission for Human Rights and Good Governance of Tanzania is worthy of note.

²⁷³ CRC Committee, Concluding Observations: Ghana, (2006), para. 15. Here the experience of Nigeria with the National Human Rights Commission (NHRC) and its regional offices and in particular the appointment of a Special Rapporteur on Child Rights within the NHRC could be a promising example. See, CRC Committee, Concluding Observations: Nigeria, (2005), paras. 19-20.

²⁷⁴ IBCR, (2007), 175 and 190.

²⁷⁵ Maripe, (2004), 344.

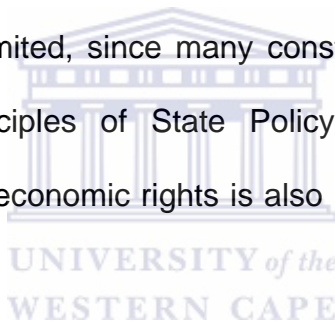
²⁷⁶ See, Sloth-Nielsen *et al.* (2009) 76-82 for a discussion of the experiences of some African countries in this regard.

²⁷⁷ Maripe, (2004), 356.

recognised in African countries.²⁷⁸ That is why it seems that addressing factors that impede progress, including negative social attitudes, stigma, discrimination, taboos, and cultural and traditional practices and beliefs, has been identified as an important objective in need of concerted efforts.

2.6.4 Justiciability of socio-economic rights (of children) in Africa

All African constitutions recognise human rights in one way or another.²⁷⁹ Civil and political rights feature more prominently than socio-economic rights in these constitutions. The number of African constitutions that recognise socio-economic rights in their Bill of Rights is very limited, since many constitutions recognise this group of rights only as Directive Principles of State Policy.²⁸⁰ Subsidiary legislation that encompasses justiciable socio-economic rights is also not in abundance on the African continent.



In the context of children's socio-economic rights, an even more limited number of instances of constitutionalisation exist. It is important to give credit to South Africa's Constitution that appears to be quite progressive regarding children's socio-economic rights.²⁸¹ Article 52 of the Constitution of Sao Tome and Principe which provides that the "youth...enjoy special protection in order to render effective their economic, social, and cultural rights" also deserves mention. However, as observed elsewhere,²⁸² the general

²⁷⁸ See, for instance, Maripe, (2004), 356 in the context of Botswana.

²⁷⁹ See Heyns and Kaguongo, (2006), 673-714.

²⁸⁰ Heyns and Kaguongo, (2006), 677.

²⁸¹ See Sec. 28(1)(c) of the South African Constitution.

²⁸² Sloth-Nielsen and Mezmur, (2007a), 343.

practice in African countries is to include this group of rights as “Directive Principles of State Policy” which are not directly justiciable²⁸³ but serve only as guiding principles.²⁸⁴

As Chirwa notes, unlike the position at the regional level, the status of socio-economic rights at the constitutional level is markedly less promising.²⁸⁵ It has been proposed that, because economic upliftment and gradual recovery of financial health can rightly be identified as continental priorities, advocacy of, and research on, measures to enhance the fulfillment of children's socio-economic rights must be regarded as key objectives.²⁸⁶

2.6.5 Preliminary observations on some of the implications of the legal contexts on intercountry adoption

The legal contexts highlighted above have a number of direct implications for intercountry adoption. Outdated legislation might mean that intercountry adoption is prohibited, at least in law. A good example of this is Namibia, where it was reported that intercountry adoption was illegal in Namibia.²⁸⁷ Outdated laws might also mean, as is the case in Liberia, that there are no arrangements to regulate and monitor the practice.²⁸⁸ In the absence of a sound regulatory framework, the possibility of compromising children’s best interests while undertaking intercountry adoption is high.

²⁸³ It needs to be noted that this assertion must be qualified in so far as case law from abroad, notably India, has supported the use of such directives of state policy as a basis for elaborating the normative content of socio-economic rights.

²⁸⁴ See Sloth-Nielsen, (2007), 91-96 (discussing children’s socio-economic rights in African constitutions).

²⁸⁵ Chirwa, (2008), 105.

²⁸⁶ Sloth-Nielsen and Mezmur, (2007a), 344.

²⁸⁷ CRC Committee, State Party Report: Namibia, (February 1993), para. 108.

²⁸⁸ CRC Committee, Concluding Observations: Liberia, (July 2004), para. 38.

As will be discussed below,²⁸⁹ in the absence of promulgated statutory provisions, the development of rules and standards governing intercountry adoption in a number of African countries has thus far been the preserve of the judiciary. This has been the case, for instance, in Malawi and Namibia.

This does not, however, suggest that the judiciary is always prepared to deal with, or is aware of, the important issues that are pertinent to children's best interests in intercountry adoption. In fact, as the *Infant DB* and *Infant CJ* cases in Malawi show, the possibility exists of two directly conflicting judgments not only creating confusion, but also compromising the best interests of children.²⁹⁰ Indeed, divergent judicial approaches to intercountry adoption are becoming characteristic of regional developments in this sphere.

On a positive note, the fact that there remain a number of bills that continue as work in progress has a spin-off, too. It implies that there is an opportunity to positively influence legislation so that its text can reflect the CRC, the ACRWC, the Hague Convention and other international law instruments relevant in the context of adoption.

Recently promulgated statutes also pose a challenge in respect of how these laws are operationalised, especially since there is often a shortage of good practices that can be identified in regard to implementation.²⁹¹ This is partly because there is a marked

²⁸⁹ See for instance, Chapter 5, section 5.6.3 on the principle of subsidiarity in Malawi.

²⁹⁰ It has been alleged that since the first Madonna case, a veritable flood of applications for intercountry adoptions of children in Malawi has served before the High Courts. This has led to the development of draft guidelines for judges dealing with intercountry adoption applications (personal communication, Edward Twea, Judge of the Malawi High Court, 13 March 2009).

²⁹¹ Sloth-Nielsen and Mezmur, (2007a), 335.

tendency for children's legislation to be implemented only in a piecemeal fashion, or only in large towns or capital cities.²⁹²

The drafting and enacting of child law without a properly thought out financial plan for its implementation characterises many of the child law reforms in Africa. To the writer's knowledge, the only country on the African continent that has implemented a costing of child-related law reform is South Africa.²⁹³ This absence of costing legislation contributes towards making the implementation of new child laws on the African continent an incomplete and fragmented effort. Without budgets to implement laws, most will continue to remain only paper promises.

The implementation of new child laws in Africa also elevates the need to develop training and capacity-building for all those involved in the implementation process - government officials, parliamentarians and members of the judiciary - and for all those working with and for children to a higher level. In the context of adoption, social workers, probation officers and judges should undergo a process of initial training and re-training to increase their knowledge and understanding of the new law, and to encourage active respect for all its provisions.

Furthermore, as will be shown in Chapter 6, section 6.3 below, intercountry adoption is one field of child law that requires a significant level of cooperation and coordination. This should be self-evident from the very fact that the practice often involves a minimum of two countries' authorities, and a number of organs within the country of origin.

²⁹² Sloth-Nielsen and Mezmur, (2007a), 335; Sloth-Nielsen, (2008b), 69.

²⁹³ See, generally, UNICEF Innocenti Case Study, (2007).

The lack of proper coordination of the implementation of children's rights has negative implications for the collection of sufficient and reliable data on children, disaggregated to enable identification of discrimination and/or disparities in the realisation of rights. As a result, finding seemingly basic statistics on how many children are deprived of their family environment in a State Party becomes a difficult task.

Lack of effective coordination at the practical level also means that a State Party to the CRC and the ACRWC may find it difficult to follow-up and implement the recommendations that stem from the CRC Committee and the African Committee. This hampers progress in enacting and implementing children's rights related laws, as guidance from experts at the international level will not have the expected impact.

The absence of justiciable socio-economic rights in almost all African countries has serious implications for children's enjoyment of a family environment. For instance, where the right to health is not justiciable, HIV-positive parents do not have an enforceable claim to ARVs, which in turn contributes to children's deprivation of a family environment. Or, there is a high possibility that the absence of a right (to access) to social security might contribute towards parents' decision to abandon their children because of poverty.

Even where socio-economic rights exist in legislation in one form or another, it is not expected that the justiciability of these rights will provide a simple or one-dimensional solution.²⁹⁴ As Viljoen cautions:

²⁹⁴ Viljoen, (2007), 569.

To have meaningful effect, justiciability has to go hand in hand with a respect for the rule of law; an independent, functioning and respected judiciary; and the availability of at least some resources.²⁹⁵

Countries in Africa that have a high number of children deprived of their family environment generally tend to fall short, at least, of respect for the rule of law, and the presence of an independent judiciary.²⁹⁶

African countries should take into account the legal contexts discussed above in order to have an intercountry adoption system that complies, at least, with the minimum standards prescribed by international law and practice. They ignore these contexts at the risk of violating their children's rights.

Receiving countries, too, by recognising some of the limitations of the legal contexts, should exercise caution in undertaking intercountry adoption with some African countries. This might, depending on the attendant circumstances, require establishing more detailed safeguards than the norm. For instance, it may mean requesting DNA tests where systematic irregularities exist in the determination of adoptable children.

The legal contexts have implications not only on receiving countries, but also on the developed world at large. This is the case, in particular, within the framework of international cooperation. The CRC Committee, in its concluding observations and general comments, often encourages States Parties to seek international cooperation in broad terms, either in relation to general or specific issues. States Parties to the CRC bear the obligation not only to implement the Convention within their respective

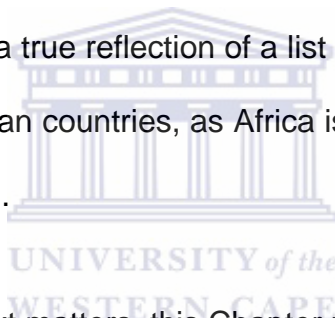
²⁹⁵ Viljoen, (2007), 569-570.

²⁹⁶ Examples include Eritrea, Sierra Leone, Liberia, and Angola.

territorial jurisdiction, but also to contribute, through international cooperation, to global implementation.²⁹⁷ There is also a need for continuous technical assistance from organisations, such as, UNICEF and the Permanent Bureau of Hague Conference on Private International Law, in drafting, enacting and implementing children's rights (and adoption) related legislation in Africa.

2.7 CONCLUSION

An edited book entitled "Intercountry adoptions: Laws and perspectives of 'sending' countries" published in 1995 did not have any chapter on an African country.²⁹⁸ However, a decade or so later, a true reflection of a list of sending countries in the world would include a number of African countries, as Africa is increasingly becoming the new frontier for intercountry adoption.



Premised on the fact that context matters, this Chapter provided a broad overview of the important African contexts that are relevant for children's access to a family environment, with a focus on intercountry adoption. It set the platform for an informed appraisal of intercountry adoption as viewed through an African lens. It was underscored that the African context that is relevant in respect of intercountry adoption involves not only legal issues but also a range of social, political, economic, cultural, religious, and other factors.

²⁹⁷ CRC Committee, Day of General Discussion, (2007), para. 6.
²⁹⁸ Jaffe, (1995).

The historical background of the continent (especially slavery and colonialism) and how it should inform any intervention (legal, social and policy) with regard to intercountry adoption was underscored. For instance, the delicate nature of intercountry adoption, especially when undertaken between former colonisers and their former colonies, and the need for caution was highlighted.

The potency of culture in political, legal, and social discourse in Africa is enormous. As a result, cultural practices inform children's rights in Africa to a great extent. The extended family (and kinship care) plays a huge role in child care in Africa. Statistics show that kinship support structures absorb a lion's share of the children in need of alternative care. The practical and legal implication of according recognition to the role of the extended family in respect of intercountry adoption was highlighted. For instance, the point was made that laws that attempt to sever completely the ties that existed between children and their family, including the extended one, should be questioned. In addition, the meaningful recognition (or lack thereof) of the extended family in Africa has an implication for the meaning of adoptability, consent to adoption, the nature of adoption (open or closed), cultural heritage, and so forth; all of which are issues that are central to intercountry adoption. In connection with this, supporting the practice of customary adoption (through legislation and policy interventions) was suggested as a crucial strategy African countries should adopt to cater for the needs of children deprived of their family environment.

Cultural practices and social realities that hamper children's access to a family environment, particularly discrimination against illegitimate children, and the HIV/AIDS

pandemic, were discussed. It was submitted that whether to accept or reject intercountry adoption as one means of alternative care in Africa requires, at a minimum, an appreciation and understanding of the challenges that the AIDS pandemic poses to the continent.

In addition many Africans' attitude of unquestioning submission to authority and attitudes to sexual orientation in Africa were broached. In respect of the latter, the point was made that homosexual applicants might continue to try to evade the system by posing as heterosexual and/or single prospective adoptive parents, and receiving countries have a duty to duly inform sending countries of this situation, in order to minimise the potential of putting future adoptions from these sending countries at risk.

In discussing a religious context in Africa, *Sharia* was singled out. The need for receiving countries to be sensitive towards the position of *Sharia* on adoption in African countries was argued. After discussing the economic context in Africa, it was concluded that the dim economic forecasts highlight the fact that the current situation which is characterised by lack of resources, absence of social security, inequality, and aid dependency is to continue for the foreseeable future. Many African countries will continue to struggle to put in place the necessary institutional support systems for children's well-being. Since the capacity of donors not only to influence but, in some respects, to dictate policies that have a direct bearing upon the realisation of children's rights is immense, a call for a participatory child-centred approach was made.

Finally, the legal context was highlighted. That there have been great strides in child law reform efforts in the last decade is not in doubt. It would not be an exaggeration to state that African countries are star performers in the ratification of human rights treaties. However, outdated legislation, ongoing law reform efforts, lack of provision of justiciable socio-economic rights in domestic law, and inadequate institutional structures for coordinating and monitoring child law implementation are characteristic of a number of African countries. The drafting and enacting of child law without a properly thought out financial plan for its implementation is another factor present in many of the child law reforms in Africa. It was recommended that African countries should take into account these legal contexts in order to have an intercountry adoption system that complies, at least, with the minimum standards prescribed by international law and practice. They ignore these contexts at the risk of violating their children's rights. In sum, this Chapter has argued that a sound and effective alternative care option, including intercountry adoption, must be grounded firmly in an African context, taking African realities into account.

CHAPTER 3

INTERCOUNTRY ADOPTION: THE INTERNATIONAL LEGAL FRAMEWORK

3.1 INTRODUCTION

The three main international instruments that have a direct bearing on intercountry adoption are the Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child (ACRWC), and the Hague Intercountry Convention. This has already been mentioned in Chapter 1. This Chapter attempts to appraise in detail the legal framework under international law that pertains to intercountry adoption.

In addition to the general principles of the CRC and the ACRWC,¹ a number of provisions within the CRC and the ACRWC draw upon, reinforce, integrate and complement a variety of other provisions, and cannot be properly understood in isolation from them.² The provisions pertaining to intercountry adoption are not an exception to this synergy.³ This emphasises the indispensable interconnected nature of the CRC's and the ACRWC's provisions.⁴

Therefore, it is important to put the provisions on intercountry adoption in the context of the whole Convention and Charter. The instruments themselves host a bundle of concepts and rights that should guide the analysis of intercountry adoption. Such a

¹ Also referred to as the "four cardinal principles" or the "four pillars". See section 3.3 below for detailed discussion of these principles.

² See, for instance, CRC Committee, General Comment No 1, (2001), para. 6 in the context of the right to education.

³ Art. 21 of the CRC and Art. 24 of the ACRWC.

⁴ See, for instance, General Comment No. 1, (2001), para. 6.

discussion serves as a backdrop and helps ground the arguments that follow in subsequent Chapters.

Though the Hague Convention is the most directly applicable treaty in the intercountry adoption sphere,⁵ it is Articles 21 and 24 of the CRC and the ACRWC, respectively, that precede it and expressly address the practice. However, neither Article 21 of the CRC nor Article 24 of the ACRWC on domestic and intercountry adoption have an independent existence.⁶ Therefore, in the interest of completeness, an attempt is made to anchor some of the relevant rights, such as the right against non-discrimination, the right to a name, and the right to birth registration, in the legal framework regulating intercountry adoption.

The fact that a wide array of provisions of the CRC and the ACRWC have a direct, or an indirect, bearing upon intercountry adoption can also be inferred from the General Guidelines of the CRC Committee that provide for the form and content of the periodic reports to be submitted by States Parties.⁷ According to these Guidelines the substantive provisions of the CRC are classified into eight themes.⁸ Of immediate interest for the purpose of this chapter is the theme “family environment and alternative care” under which intercountry adoption falls. Under this theme, the relevant Articles of the CRC that are listed are: parental guidance;⁹ parental responsibilities;¹⁰ separation

⁵ While the discussions in this chapter mainly revolve around the CRC and the ACRWC, where appropriate, reference to the provisions of the Hague Convention is made.

⁶ See, UNICEF Innocenti Digest, (1998), 5.

⁷ CRC Committee, General Guidelines for periodic reports, (2005).

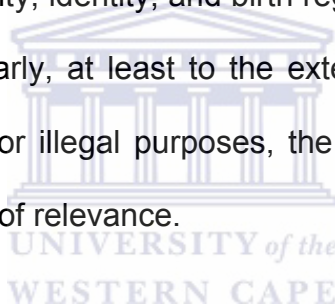
⁸ As above.

⁹ Art. 5 of the CRC.

¹⁰ Art. 18(1) and (2) of the CRC.

from parents;¹¹ family reunification;¹² recovery of maintenance for the child;¹³ children deprived of a family environment;¹⁴ adoption;¹⁵ illicit transfer and non-return of children abroad;¹⁶ abuse and neglect,¹⁷ including physical and psychological recovery and social reintegration;¹⁸ and periodic review of placement.¹⁹

Furthermore, although not included explicitly under the heading “family environment and alternative care”, the four cardinal principles of the CRC and the ACRWC that underpin the overall implementation of these two instruments, as well as the principle of “the evolving capacities of the child”, are of significant relevance. In addition, rights pertaining to name and nationality, identity, and birth registration have their own bearing on intercountry adoption. Similarly, at least to the extent that intercountry adoption is done in an illegal manner, or for illegal purposes, the provisions of the CRC and the ACRWC on child trafficking are of relevance.



It should be mentioned at the outset, however, that the list of provisions under the CRC and the ACRWC that can be read to have a bearing on the issue of intercountry adoption is long. This is patent from the preceding paragraphs. Therefore, a detailed exposition of these provisions and their bearing on intercountry adoption is perhaps a topic for further research.

¹¹ Art. 9 of the CRC.
¹² Art. 10 of the CRC.
¹³ Art. 27(4) of the CRC.
¹⁴ Art. 20 of the CRC.
¹⁵ Art. 21 of the CRC.
¹⁶ Art. 11 of the CRC.
¹⁷ Art. 19 of the CRC.
¹⁸ Art. 39 of the CRC.
¹⁹ Art. 25 of the CRC.

Throughout this Chapter, an attempt is made to look at the content of the right in question, its scope, as well as the nature of the corresponding State Party obligations. Such discussions attempt to anchor the right in question in intercountry adoption. While it is not the objective of this Chapter to reach conclusions regarding the “true” meaning of words and phrases in the substantive Articles of the CRC and the ACRWC, where necessary, a reasonable construction of provisions is offered.

The analysis in this Chapter is assisted by resort to the *travaux preparatoires* of the CRC. Such an approach is supported by the Vienna Convention on the Law of Treaties (VCLT).²⁰ In addition, reliance on the concluding observations, general comments, and recommendations by the CRC Committee are essential in order to form a better understanding of the provisions of the CRC and the ACRWC.

At the regional level, the assistance that could be garnered for this chapter from the African regional human rights system, mainly composed of the African Commission on Human and Peoples’ Rights and the African Committee, is very limited.²¹ Therefore, while acknowledging the regional limitations of the European Court on Human Rights (European Court) under the European Convention on Human Rights and Fundamental Freedoms (ECHR), reference is still made to the effective control machinery and wealth of case law offered by this regional body. After all, States Parties to the ECHR are also

²⁰ Art. 49 of VCLT.

²¹ See Chapter 1, section 1.8.1 and the footnotes therein for a discussion of the African Committee and its work to date.

States Parties to the CRC, and the decisions of the European Court may suggest some guidelines for the interpretation of some of the provisions of the CRC.²²

After this introduction, the chapter sheds some light on the interdependence and interrelatedness of children's rights. Subsequently, the definition of a child; the four cardinal principles; and the provisions on alternative care and adoption are explored. After this, section five interrogates, amongst others, children's rights to identity, culture, and privacy. In particular, the rights explored include: the right to a name and birth registration; the right to freedom of religion; and, albeit briefly, the rights related to child trafficking. Some concluding observations are made at the end of the Chapter.

3.2 INTERDEPENDENCE AND INTERRELATEDNESS OF CHILDREN'S RIGHTS

The fact that human rights are interrelated, interdependent and interconnected is an issue that seems to have gathered close to virtual consensus.²³ The UN has reiterated in various forums its dedication to the interdependence and interrelated nature of human rights.²⁴ In the words of Lee, human rights are "like a tapestry; just as the pulling of one string may unravel an entire tapestry, so may the denial of one basic human right lead to denying other rights".²⁵ Mutua refers to it as "the *often-chanted mantra* of the indivisibility, interrelatedness and interconnectedness of all human rights" (emphasis mine).²⁶

²² See Doek, (2006a), 25 (in the context of Art. 9 of the CRC).

²³ The UDHR, ICESCR, ICCPR, and the CRC all embrace the idea of universality and indivisibility of rights. See too Vienna Declaration and Programme of Action, (1993), para. 5.

²⁴ See, for instance, Van Boven, (1982), 51; Sohn, (1982), 15.

²⁵ Lee, (1995), 330.

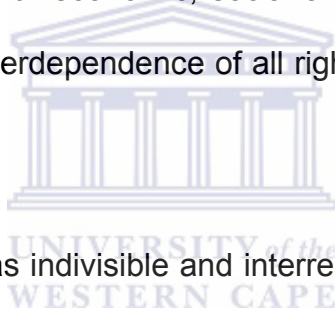
²⁶ Mutua, (1999), 210.

As Lopatka, who is sometimes unofficially referred to as the “godfather” of the CRC,²⁷ observes: “From the standpoint of the Convention, the rights constitute a unity; they are complementary and interdependent”.²⁸ This view is shared by Freeman, who writes that:

[r]ights are invisible and inter-dependent. Human rights - for that is what children’s rights are - include the whole range of civil, political, social, economic and cultural rights. Denying certain rights undermines other rights.²⁹

The CRC Committee has often echoed this position.³⁰

One of the strong aspects of the CRC, which is imitated in the ACRWC, is that it implies a multi-disciplinary vision of the child. Both the CRC and the ACRWC comprehensively group civil and political rights with economic, social and cultural ones.³¹ They strongly re-affirm the indivisibility and interdependence of all rights, and suggest a holistic vision of the child.



The nature of children’s rights as indivisible and interrelated connotes that all rights are important and essential to the harmonious development of the child. A reading of the CRC and the ACRWC as whole instruments lends important insights into how the different provisions of the documents might be construed to affect the practice of intercountry adoption.³² Such recognition is one of the main reasons why organisations working on children’s rights, including UNICEF, are encouraged to “prioritize [their]

²⁷ In 1978, as Deputy Chairman of the Commission, he introduced the Draft Convention on the Rights of the Child. He was Chairman-Rapporteur of the Working Group made responsible by the Commission for developing the Draft Convention.

²⁸ Lopatka, (1999), 87.

²⁹ Freeman, (2007b), 7.

³⁰ See CRC Committee, General Comment No. 4, (2003), para. 5.

³¹ However, this does not mean that both categories of rights are on the same footing. That this is not the case is expressly stated in Art 4 of the CRC where the phrase of “progressive realization” is used as the measure to be taken for socio-economic rights.

³² Graff, (2000), 412.

work, recognizing that all rights embodied in the CRC are indivisible and interdependent” (insertion mine).³³

Two scenarios help to reinforce this point. First, the fact that the integration of children’s economic and cultural rights with civil and political rights under the CRC and the ACRWC reinforces and resonates with the so-called “indivisibility” of human rights - the ways in which the rights regime is an integrated structure at whose core is the dignity of every human person.³⁴ Secondly, an analysis of the four cardinal principles of the CRC and the ACRWC³⁵ drives the point home that the application of these provisions across the board is an example of the interconnectedness of the provisions.

3.3 DEFINITION OF A CHILD, AND THE GENERAL PRINCIPLES OF THE CRC AND THE ACRWC IN THE CONTEXT OF INTERCOUNTRY ADOPTION

3.3.1 General introduction

For the application of the CRC and the ACRWC, the starting point is the definition of a child.³⁶ It would be incomplete to discuss children’s rights in connection with intercountry adoption, without first establishing who a child is. Similarly, as identified by the CRC Committee, the so-called “four pillars” of the CRC are considered general principles of fundamental importance for the implementation of the whole Convention.³⁷ The four

³³ Rios-Kohn, (1996) 300.

³⁴ See Detrick, (1999), 22; Liefgaard, (2007), 574. However, it is to be noted that the fact that the CRC and the ACRWC do not establish a hierarchy of rights and recognise that they are all equally important, interrelated and indivisible, does not mean that actions to ensure their realisation should not be prioritised.

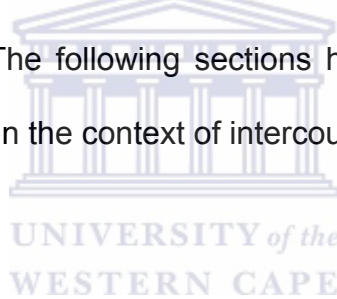
³⁵ See sections 3.3.3-3.3.6 for a detailed discussion of the four cardinal principles.

³⁶ See Grahn-Farley, (2003), 886.

³⁷ See, CRC Committee, General Guidelines for periodic reports, (2005), para. 21.

cardinal principles (also known as “the four general principles”) not only capture the spirit of the treaty, but also declare its object and purpose.³⁸ These principles have also been referred to as “the soul of the treaty”.³⁹ In order for all children to enjoy all the rights contained in the CRC and the ACRWC, it is critical for the Articles containing these principles to be fully respected.⁴⁰

The four cardinal principles accord children the right against “non-discrimination”;⁴¹ the right to have their best interests be a primary consideration in all actions concerning them;⁴² the “inherent right to life, survival and development”;⁴³ and the right of a child “who is capable of forming his or her own views ... to express those views freely in all matters affecting the child”.⁴⁴ The following sections highlight the definition of a child and the four cardinal principles in the context of intercountry adoption.



3.3.2 Definition of a child

The definition of a child is a fundamental provision that basically determines the scope of application of the CRC and the ACRWC.⁴⁵ Article 1 of the CRC states that “a child means every human being below the age of eighteen years unless, under the law

³⁸ Rios-Kohn, (1998), 146.

³⁹ Rios-Kohn, (1998), 143.

⁴⁰ Rios-Kohn, (1998), 146.

⁴¹ Art. 2 of the CRC.

⁴² Art. 3 of the CRC.

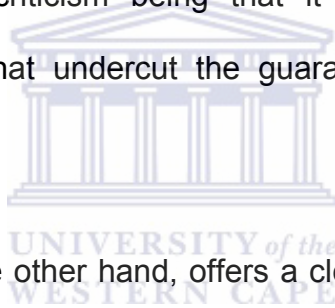
⁴³ Art. 6 of the CRC.

⁴⁴ Art. 12 of the CRC. For different ways of grouping the rights established in the CRC, see generally LeBlanc, (1995); Detrick, (1992); Van Bueren, (1995). For a brief discussion of child participation in the context of the ACRWC, see Mezmur and Sloth-Nielsen, (2009). For a brief comparison of the CRC and ACRWC provisions on child participation, see Mezmur, (2008a), 9.

⁴⁵ Detrick, (1999), 51.

applicable to the child, majority is attained earlier”.⁴⁶ Age is a criterion that can help to escape the ambiguities and contradictions of other definitions of a child, as it gives predictability regarding which rule or provision will apply to whom.⁴⁷ Therefore, arguably, the choice of age 18 in the CRC has contributed for the construction of a uniform identity of the child.⁴⁸

As a product of protracted negotiations, Article 1 of the CRC places limits on who will be afforded its protections depending on the age of majority in the law applicable to the child in the home country.⁴⁹ This approach has been a subject of criticism by some commentators, one of such criticism being that it contains loopholes relating to exemptions for national law that undercut the guarantee of universal rights for all children without distinction.⁵⁰



Article 2 of the ACRWC, on the other hand, offers a clear and concise definition of the child as “every human being under 18 years” of age. In addition, unlike the CRC provision,⁵¹ there are no limitations or attached considerations, so that it may be applied to as wide-ranging a number of children as possible. It is promising to witness that some of the law reform efforts on the African continent reflect the impact of the ACRWC on

⁴⁶ Art. 1 of CRC.

⁴⁷ See Grahn-Farley, (2003), 887.

⁴⁸ Grahn-Farley, (2003), 887. There are a number of places in the world where children are governed by customary law which does not define childhood by reference to numerical age.

⁴⁹ See Detrick, (1999), 58-59; Van Bueren, (1995), 36-37.

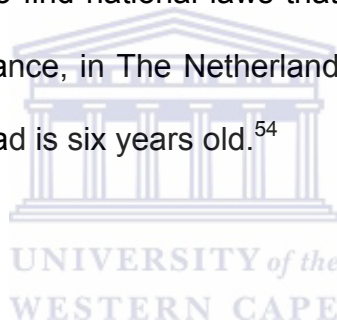
⁵⁰ See Grover, (2004), 260.

⁵¹ This provision is ambiguous and weak, lacking specific protection within the African context in order to take into account child betrothals, child participation in armed conflict and child labour.

standard-setting exercises at the national level. In this respect, the definition of a child is one example.⁵²

In the context of intercountry adoption, Article 1 of the CRC and Article 2 of the ACRWC have an implication for issues such as who can be adopted; who can adopt; and who benefits from the protection, provision and participation rights incorporated in these instruments.⁵³

Generally speaking, to be adopted, children would be persons below the age of 18. However, it is not uncommon to find national laws that limit the adoption of children to an age lower than 18. For instance, in The Netherlands, the maximum age at which a child can be adopted from abroad is six years old.⁵⁴



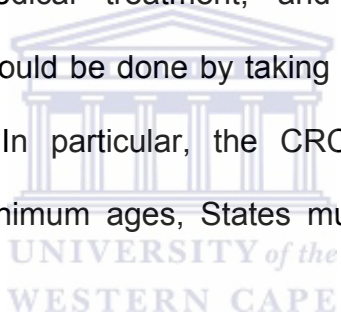
⁵² The constitutions of South Africa and the Democratic Republic of Congo, for example, follow the ACRWC's definition of a child without exception – that is, as persons under the age of 18 years. Although the Constitution of Malawi defined a child as a person under the age of 16, the proposed Child (Justice, Care and Protection) Bill seeks to remove the child/young person categorisation by adopting a comprehensive definition of the child as any person below the age of 18 years. Furthermore, in Nigeria, where the 1943 Children and Young People's Act classified only those people under 17 years as juvenile offenders, the Child's Rights Act of 2003 rectifies this and puts the age at 18. A similar problem transpires under Chapter 44 of the Children and Young Persons Act of 1945 of Sierra Leone and will most likely be addressed when the Child Rights Bill becomes an Act. Egypt adopted a Children's Code in 1996 which regulates the duties and functions of institutions providing juvenile justice services to children and applies to all persons under the age of 18. In addition, it is interesting to note that although Morocco is not a party to the ACRWC, under Law no 11 of 1999, which amends and supersedes Sec. 446 of the Penal Code, a child is defined as a person under the age of 18. In Sec. 2, the Kenyan Children's Act specifically defines a 'child' as any person under the age of 18 years. The adoption of the definition of a child with no exception (in consonance with the ACRWC) is not without practical advantage in the lives of African children, as it helps to extend the protection of the rights under the Charter and the CRC to a larger group of persons and to the maximum extent possible.

⁵³ The rights in the CRC have also been described by some child rights commentators as the three Ps: "protection," "provision," and "participation". See Cantwell, (1992), 27.

⁵⁴ Curry-Sumner and Vonk, (2009), 348. Save exceptions, the U.S. puts this age limit at 16. To cite a traditionally sending country as an example, China sets the maximum age for intercountry adoption at 13.

These ages are fixed by taking into account various policy considerations, such as the age at which children tend to bond better; the need to have younger children adopted domestically; the assumption that older children should benefit from alternative care options other than intercountry adoption; and so forth. This, however, begs the question as to whether these measures would withstand the tests of Article 1 of the CRC and Article 2 of the ACRWC, as well as the right against non-discrimination.⁵⁵

States Parties to the CRC and the ACRWC can legitimately provide for minimum legal ages defined by national legislation for various purposes (such as, criminal responsibility; consent to medical treatment; and end of compulsory primary education).⁵⁶ This, however, should be done by taking into account other provisions of the CRC and the ACRWC. In particular, the CRC Committee has emphasised consistently that, in setting minimum ages, States must have regard to the general principles of the CRC.⁵⁷



It could be argued that the jurisprudence of the CRC Committee has established that, in general, minimum ages that are protective should be set as high as possible.⁵⁸ On the other hand, those ages that pertain to the child's autonomy demand a more flexible

⁵⁵ See section 3.3.4 below on the non-discrimination principle. The relationship between and importance of the non-discrimination principle (Art. 2) in relation to the definition of the child is stressed in the CRC Committee Guidelines for periodic reports, (2005), para. 19.

⁵⁶ Newell and Hodgkin, (2007), 4.

⁵⁷ Newell and Hodgkin, (2007), 5. For instance, in cases where there is a difference in the legislation between minimum ages for domestic adoption, on the one hand, and intercountry adoption, on the other, the extent to which Art. 2 of the CRC and Art. 3 of the ACRWC on non-discrimination have been given consideration is very crucial.

⁵⁸ Newell and Hodgkin, (2007), 5. These include ages for protecting children from criminalisation, involvement in armed conflict, child labour and similar other circumstances.

system, sensitive to the needs of the individual child.⁵⁹ Sensitivity to the individual child's needs bodes well for "the evolving capacities of the child" principle in the CRC.⁶⁰

In addition, it is observed by Newell and Hodgkin that the "Convention provides a framework of principles; it does not provide direction on the specific age, or ages, at which children should acquire such rights".⁶¹ As a result, determining whether or not a minimum age for a particular purpose is congruent with the letter and spirit of the CRC and the ACRWC is not simple.⁶²

Therefore, any minimum ages set for allowing children to be adopted should be the result of a process that has taken into account fully the provisions of the CRC and the ACRWC. In particular, it should pass the test of the best interests of the child principle, and the right against discrimination. The other general principle – namely, the right to life, survival and development - is relevant, too. It is submitted that this principle, for instance, would require a State Party to take into account a number of factors including: the number of children who are permanently deprived of their family environments in the country; the viable and suitable alternative care options (other than intercountry adoption) available for these children in practice; and also have a proper grasp of the age group of these children, as well as the actual profile of those who can benefit from a family environment.

⁵⁹ Newell and Hodgkin, (2007), 5. At this juncture, it is important to note that some issues such as minimum age for filing a complaint in court, or of sexual consent, could be cross-cutting issues falling in both protective as well as autonomy-related minimum ages.

⁶⁰ Art. 5 of the CRC.

⁶¹ Newell and Hodgkin, (2007), 5.

⁶² Although, ages such as the minimum age for criminal responsibility has been established by the CRC Committee to be 12. See CRC Committee, General Comment No. 10, (2007), para. 33 in this regard.

The question of who is to be adopted also brings to the fore the application of the CRC and the ACRWC to unborn children. Both the CRC and the ACRWC are silent on the beginning of childhood.⁶³ However, the issue of when childhood begins was debated during the drafting stage of the CRC.⁶⁴ Ultimately the end product, as spelt out in Article 1 of the CRC, is what the drafters arrived at as a compromise upon which all negotiating States could agree.⁶⁵ As a result, the definition in Article 1 allows for several interpretations of when childhood might begin,⁶⁶ and provides scope for each State to decide for itself when childhood begins.

Nonetheless, Preambular paragraph 9 of the CRC seems to point towards protection of the unborn child by quoting the 1959 Declaration: "the child . . . needs ... appropriate legal protection before as well as after birth". In addition, the inclusion in the CRC and the ACRWC of a child's right to life does not include an opinion about the right to an abortion.⁶⁷ The drafters of the CRC did not discuss the abortion issue *per se* because the Convention focuses on the rights of children, born or unborn, not on the rights of mothers to decide whether or not to bear a child.⁶⁸ In this light, some countries provide rights to the unborn child.⁶⁹

In the context of intercountry adoption, or adoption in general, there is legislation that does not allow the adoption of a child before the child is born, or has attained a

⁶³ See Newell and Hodgkin, (2007), 1.

⁶⁴ McSweeney, (1993), 472.

⁶⁵ McSweeney, (1993), 472..

⁶⁶ For a discussion of the beginning of childhood under the CRC, see generally Janoff, (2004), 163; Cohen, (1997), 34; Cohen, (1998), 201; Alston, (1990), 173; Lopatka, (1999), 90-94.

⁶⁷ Cohen, (1989), 1450.

⁶⁸ As above.

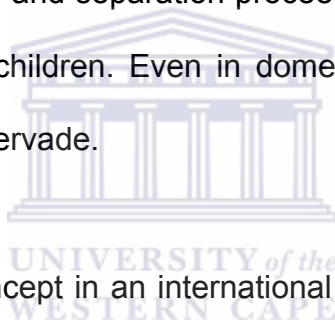
⁶⁹ For instance, laws that ban abortion are a good example.

specified age (usually weeks or months).⁷⁰ These measures are often prescribed to protect both the rights of the child as well as that of the mother, and it is argued, they are congruent with the spirit and letter of the CRC and the ACRWC.

3.3.3 Best interests of the child

3.3.3.1 Best interests of the child: General

Despite its controversial nature⁷¹ the best interests principle has been in use since at least as early as the 19th century.⁷² The principle has become a term of art used within the context of marriage, divorce and separation proceedings, child custody matters and other areas of law that affect children. Even in domestic law, references to the best interests of the child standard pervade.



The first appearance of the concept in an international human rights instrument was in the 1959 Declaration. Principle 2 of the 1959 Declaration provided in part that:

The child shall enjoy special protection, and shall be given opportunities and facilities... .
In the enactment of laws for this purpose, *the best interests of the child* shall be the paramount consideration.⁷³

Subsequently the best interests standard has found its way into the CRC, the ACRWC, and the Hague Convention. All these instruments explicitly aspire to advance this principle.

⁷⁰ For instance, Kenyan law requires the child to be a minimum of 6 weeks old.

⁷¹ See, for instance, Guggenheim, (2005), 38-43 (arguing that the best interests doctrine is "intensely value-laden," and a parental rights doctrine is preferable); Buss, (2000), 312.

⁷² See *Commonwealth v. Briggs*, 33 Mass. (1864) 205 ("In the case of a child of tender years, the good of the child is to be regarded as the predominant consideration.").

⁷³ Principle 2 of the 1959 Declaration. This was followed by subsequent human rights instruments such as CEDAW, Hague Convention of 1980, CRC (and its two Protocols), the ACRWC, and the Hague Convention.

Arguably the best interests of the child concept has been the subject of more academic analysis than any other concept in the CRC.⁷⁴ However, its appropriate meaning still continues to elude academics, lawyers, social workers, legislators, policy makers and judicial officers. Not only does the legal meaning of the best interests of the child mean different things to different people, but, sometimes, it might connote very polarised and contradictory notions. For instance, as Exon notes, “[s]ome may think that blood is thicker than water”, and hence “a biological relationship is superior in the adoption realm”.⁷⁵ Yet others might place “precedential value on geography, nationality, religion and culture” or “money and prestige”.⁷⁶

Under the CRC, Alston identified two roles for the best interests principle. First, it has been credited as a tool that can “support, justify or clarify a particular approach to issues arising under the Convention”.⁷⁷ Secondly, rather controversially, it is said to be a “mediating principle which can assist in resolving conflicts between different rights where these arise within the overall framework of the Convention”.⁷⁸ A third role, it could be added, is to serve as a “gap-filling” provision when lacunae are identified.⁷⁹

Article 3 of the CRC, which is the umbrella provision on the best interests of the child, provides in part that:

⁷⁴ Hodgkin and Newell, (2007), 41. However, writing in the context of the U.S., Kohm observes that “[t]he dearth of scholarship, however, on the foundations of this best interests standard for children in American family law jurisprudence does not make the judge’s job any easier”. Kohm, (2008), 337.

⁷⁵ Exon, (2004), 3-4.

⁷⁶ Exon, (2004), 4.

⁷⁷ Alston, (1994), 15-16.

⁷⁸ Alston, (1994), 16.

⁷⁹ Freeman (2007a), 32 citing Parker, (1994), 26.

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.⁸⁰

The counterpart provision in the ACRWC, Article 4(1), provides that: "In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration".⁸¹

Paragraph (1) of Article 3 of the CRC merits closer examination. As argued elsewhere,⁸² both the CRC and the ACRWC emphasise the consideration of the best interests of the child principle "in all actions concerning children". This quoted phrase is intended to be interpreted broadly, so as to encompass any action that directly or indirectly affects children.⁸³ As Freeman correctly demonstrates, "[t]he decision to build a new major road concerns children".⁸⁴ The decision to go to war, decisions taken in relation to global warming, and the passing of laws about cloning, too, are material to children's interests.⁸⁵ South African Constitutional Court Justice Sachs expresses this idea thus:

The word paramount [in relation to the best interests principle] is emphatic. Coupled with the far reaching phrase 'in every matter concerning the child', and taken literally, it would

⁸⁰ Art. 3(1) and (2) of the CRC.

⁸¹ Art 4(1) of the ACRWC. However, the best interests principle is also referred to in six other places in the Charter. Article 9(2) on freedom of thought, conscience and religion; Article 19(1) on parental care and protection; Article 20(1)(a) on parental responsibilities; Article 24 on adoption; and Article 25(2)(a) and 25(3) on separation from parents all refer to the best interests of the child principle. It is to be noted that within the CRC too, the best interests principle appears in various provisions.

⁸² See, for instance, Sloth-Nielsen and Mezmur, (2008b), 23 -25.

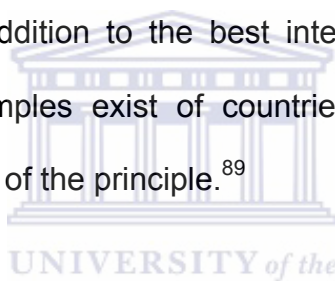
⁸³ During the drafting of the CRC, an early draft of Art 3 read "[i]n all official actions concerning children," but the word "official" was dropped to broaden the scope of the provision.

⁸⁴ Freeman, (2007a), 46.

⁸⁵ As above.

cover virtually all laws and all forms of public action, since very few measures would not have a direct or indirect impact on children, and thereby concern them.⁸⁶

While Article 3(1) of the CRC and Article 4(1) of the ACRWC are essentially the same, the latter provides that the best interests of the child should be *the* primary consideration. Under the CRC there is a downgrading of the primacy of best interests of the child as it speaks of the principle being “a” primary consideration. It is apparent from the drafting history of the CRC that the Working Group considered, and rejected, making the best interests of the child “the” primary consideration.⁸⁷ Therefore, in order to reach consensus, the Working Group replaced “the” with “a”, the implication being that other considerations, in addition to the best interests of the child, can assume primacy.⁸⁸ In Africa, few examples exist of countries that have domesticated “the primary consideration” phrasing of the principle.⁸⁹



CRC Article 3(1)'s and ACRWC Article 4(1)'s use of “shall” is unqualified, enjoining States Parties to take affirmative actions to provide for the enumerated rights. However, the use of the word “undertake” in Article 3(1) of the CRC might be labelled to indicate a lesser degree of obligation, since the promise to “undertake” an obligation, arguably, requires only a good faith effort for a State Party to be in compliance, and does not necessarily require success.⁹⁰ Similarly, the obligation to “undertake to ensure” in Article

⁸⁶ See *M v S (Centre for Child Law Amicus Curiae)* 2007 (12) BCLR 1312 (CC) (hereafter *M v S*) para. 25.

⁸⁷ Considerations, (1989), para. 125.

⁸⁸ Considerations, (1989), para. 125.

⁸⁹ See Art. 36(2) of the Ethiopian Constitution; Art. 3(2) of the Children’s Protection Bill of 2004 of Lesotho.

⁹⁰ See Cohen and Davidson, (1990), 36 -37.

3(2) of the CRC has been equated to a contractual, or semi-contractual obligation, with less force perhaps than an imposed one⁹¹ - such as the duty “to ensure”.

The wording “any person or authority” in the ACRWC seems to indicate the wide scope of application envisaged for the best interests of the child principle. Not only are state-initiated actions concerning the child bound by the best interests principle, private actors too should take all actions concerning the child in accordance with the best interests principle.

This, however, would raise a number of questions. The main one is, if “any person” is to be read literally to cover all private actors, does it mean that the State has to ensure that every non-state decision maker in society – every parent, every business enterprise, and every other child or adolescent, for instance – makes sure that every decision in any matter affecting a child should be made in the best interests of the child?

It is argued that the answer to this question is in the positive. This line of interpretation has textual support. Throughout the ACRWC, where the term “any person” is used, the reference is to individual non-state actors. For instance, in Article 29 (a) which entrenches that States Parties shall take appropriate measures to prevent “the abduction, the sale of, or traffick of children for any purpose or in any form, by *any person* including parents or legal guardians of the child”, “any person” refers to individual non-state actors. It is submitted that the same is true for Article 42(c) of the

⁹¹ Freeman, (2007a), 67.

ACRWC.⁹² This wording can be contrasted, for example, with Article 7 of the ACRWC dealing with child participation, which does not mention “any person or authority”.⁹³

In addition, recourse to rules of legal interpretation as codified in the VCLT would validate this point. The primary rule of interpretation is the “ordinary-meaning” rule:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.⁹⁴

And, in ordinary parlance, “any person” is a catch-all phrase that means “anyone”.

One common ground used to criticise the principle is its indeterminate nature.⁹⁵ It is argued, for instance, that “what is best for a specific child or for children in general cannot be determined with any degree of certainty”.⁹⁶ In support of this assertion, it is submitted that;

For a determinate answer to the question of what would be in the child’s best interests, (a) all the options must be known, (b) all the possible outcomes of each option must be known, (c) the probabilities of each outcome occurring must be known and (d) the value attached to each outcome must be known.⁹⁷

In an attempt to demonstrate the diverse interpretations the principle attracts, Alston noted that;

⁹² Which provides that the functions of the Committee shall be, amongst other things:
(c) To interpret the provisions of the present Charter at the request of a State Party, an Institution of the Organization of African Unity or any other person or Institution recognized by the Organization of African Unity, or any State Party.

⁹³ Commenting on Art. 12 of the CRC, which uses similar language to Art. 7 of the ACRWC, Abramson argues that if the drafters of the CRC had wanted the “child participation” provisions of Art. 12 of the CRC to apply to non-state actors too
...they would have used suitable language to do it, such as, ‘shall take all appropriate measures to ensure that parents, legal guardians, and any other person will allow the child to freely express....

Abramson, (2006), 5.

⁹⁴ Art. 32(1) of VCLT.

⁹⁵ See, for example, Peskind, (2005), 449.

⁹⁶ Elster (1987), 12.

⁹⁷ Elster (1987), 12.

... it might be argued that, in some highly industrialised countries, the child's best interests are 'obviously' best served by policies that emphasize autonomy and In more traditional societies, the ... the principle that 'the best interests of the child' shall prevail will therefore be interpreted as requiring the sublimation of the individual child's preferences to the interests of the family or even the extended family.⁹⁸

While the main challenge remains in understanding what is meant by "the best interests of the child", compounded by the absence of an accepted definition,⁹⁹ general observations about the principle can be proffered. At the outset, it should be pointed out that, even though it is one of the cardinal principles of both the CRC and the ACRWC, the best interests of the child principle should respect the other three cardinal principles. More often than not, if a certain measure goes against any of the other three pillars of the CRC and the ACRWC, for instance, the rule against discrimination,¹⁰⁰ it is unlikely that it would pass the best interests of the child test.

Resort to the CRC Committee's jurisprudence in the form of General Comments could shed some further light on what is meant by the best interests of the child, albeit in the context of specific themes. For instance, premised on the scarce attention that has been paid to the principle as a primary consideration in the planning and implementation of policies and programmes for the prevention, care and treatment of HIV/AIDS, the best

⁹⁸ Alston, (1994), 5.

⁹⁹ According to Eekelaar, best interests can be defined as:

Basic interests, for example to physical, emotional and intellectual care developmental interests, to enter adulthood as far as possible without disadvantage; autonomy interests, especially the freedom to choose a lifestyle of their own.

This definition too needs further unpacking if it is to offer any concrete suggestions in countering some of the points raised by detractors of the principle mentioned above. Eekelaar, (1992), 230-231.

¹⁰⁰ For instance, when the principle is incorporated in national law, it should not reflect either direct or indirect discrimination on the basis of any of the prohibited grounds under the CRC and the ACRWC.

interests of the child in the context of HIV/AIDS requires that “[t]he child should be placed at the centre of the response to the pandemic, and strategies should be adapted to children’s rights and needs”.¹⁰¹ In the light of the rights of children with disabilities, too, the best interests of the child principle dictates that institutions and other facilities that provide services for children with disabilities are expected to conform to standards and regulations that should have the safety, protection and care of children as their primary consideration.¹⁰² It is argued that this consideration should outweigh any other and under all circumstances, for example, when allocating budgets.¹⁰³ Within the context of unaccompanied and separated children, the CRC Committee is of the view that:

A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child’s identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs. Consequently, allowing the child access to the territory is a prerequisite to this initial assessment process.¹⁰⁴

In addition, seemingly subsidiary matters “such as the appointment of a competent guardian as expeditiously as possible” are considered to serve “as a key procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child”.¹⁰⁵ In connection to this, it would be remiss not to mention that the UNHCR has developed Guidelines on the best interests of the child in the context of unaccompanied and separated children.¹⁰⁶

¹⁰¹ CRC Committee, General Comment No. 3, (2003), para. 10.

¹⁰² CRC Committee, General Comment No. 9, (2006), para. 30. The principle should be the basis on which programmes and policies are set and the principle should be duly taken into account in every service provided for children with disabilities and any other action affecting them. General Comment No. 9, (2006), para. 29.

¹⁰³ CRC Committee, General Comment No. 9, (2006), para. 30.

¹⁰⁴ CRC Committee, General Comment No. 6, (2005), para. 20.

¹⁰⁵ CRC Committee, General Comment No. 6, (2005), para. 21.

¹⁰⁶ UNHCR, (2008).

These understandings of the CRC Committee of the best interests principle, however, may only serve as general guidance - hence the title “General Comment”. There still is a considerable need for interpretation in order to apply this guidance to real cases. For instance, how does one balance competing interests between the views of the child, the views of parents, the views of the court, and the position of any other professionals, when these views are in conflict?

The English case,¹⁰⁷ which is famously known as the “Zulu boy case”, is a good illustration of the complexity of disputes about children and the determination of their best interests.¹⁰⁸ Central to the case was the question whether it is in a nine year old’s best interests to remain in Britain with his foster mother or to return to his biological parents in South Africa.¹⁰⁹ The foster mother brought the child, who was 18 months old at the time, to Britain in 1992 when she took British citizenship. This was done with the parents’ consent as they viewed the arrangement to be good, amongst other reasons, for the child’s education. However, a problem arose when the biological parents started legal proceedings to have the child returned, after discovering in 1994 that the foster mother had launched an attempt to adopt him. By the time the case reached a substantive hearing, the child had been in the care of the foster mother for almost ten years, the last four of which had been spent in England. The child had maintained that

¹⁰⁷ *Re M* (Child’s upbringing) (1996) 2 FLR 441.

¹⁰⁸ In this case, amongst others, the conflicts involved were between the interests of prospective adoptive parents *versus* the interests of biological parents; the views of the child *versus* the views of biological parents and the views of the court; and culture and biology on the one hand, and nurture on the other. For a discussion of this case, see, Fortin, (2003), 435.

¹⁰⁹ Freeman, (2007a), 29.

he did not want to return to live in South Africa.¹¹⁰ Their Lordships described this decision as "difficult and anxious". Lord Justice Neill said that the child "... has the right to be reunited with his Zulu parents and with his extended family in South Africa".¹¹¹ It was also stated that the child's development "must be, in the last resort and profoundly, Zulu development and not Afrikaans or English development".¹¹²

This Judgment has been a subject of criticism.¹¹³ Assessed against the provisions of the CRC and the ACRWC, especially the requirement to make the best interests principle a primary (if not the paramount) consideration, it leaves much to be desired. For instance, almost all the considerations taken into account by the Court seemed to have made the interests of the biological parents paramount - which has the unfortunate overtone of considering the child "as the property of its biological parents". In addition, the role of the views of the child, as one important element in defining the best interests of the child was ignored. While to consider a child's views and to attach less or no weight thereto, is one thing, to completely not consider them is quite another thing. While a *prima facie* right of the child to be brought up by its natural parents exists in both the CRC and the ACRWC, compelling factors – mainly the best interests of the child – can, and should be able to, override this *prima facie* right. Both the CRC and the ACRWC support a child's cultural background,¹¹⁴ but there is no textual support in these instruments that propels the inference that cultural considerations trump all other rights. Measures that were less

¹¹⁰ The follow-up to the case suggests that the child had not been settled in South Africa after the court decision and that six months on he had returned to England with his biological parents' agreement. See Freeman, (1997), 382; Fortin, (2003), 427.

¹¹¹ Re M (Child's upbringing) (1996) 2 FLR 441, 454.

¹¹² As above.

¹¹³ For such media criticism, The Independent, (10 March 1996).

¹¹⁴ See section 3.5.3 below on cultural identity and children's rights in adoptions.

intrusive in order to ensure the “continuity in the child’s upbringing”,¹¹⁵ such as, making an order for contact with the biological family, and requiring the foster mother to obtain Zulu lessons for the child,¹¹⁶ would have fulfilled some of the concerns of the Court and the biological parents, and would have served some of the best interests of the child.¹¹⁷

3.3.3.2 Best interests of the child: Intercountry adoptions

It is the very principle - the best interests of the child - that has been credited with being the justification behind international law developments in adoptions.¹¹⁸ During the drafting of the CRC, it was Barbados’s initial proposal that the best interests of the child principle required that the CRC should establish provisions on the rules and procedures for adoptions.¹¹⁹

Article 21 of the CRC stipulates that “States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration...”. This provision is duplicated almost word for word in Article 24 of the ACRWC. There is a clear shift from the reference to the best interests of the child being “a primary consideration” in Article 3 of the CRC to being “the paramount consideration” in the context of adoptions.

The drafting history of this provision tells of a conscious decision to make the best interests of the child “the paramount consideration”. A simple reference to the best

¹¹⁵ A phrase used in Art 20(3) of the CRC.

¹¹⁶ Presumably to promote continuity with his heritage. Freeman, (1997), 382.

¹¹⁷ Freeman, (1997), 382.

¹¹⁸ Vite and Boechat, (2008), 22.

¹¹⁹ *Travaux Préparatoires* (1995), 5 as cited in Vite and Boechat, (2008), 22.

interests of the child, similar to that in Article 3(1) of the CRC, was considered to be insufficient,¹²⁰ for instance, because it was considered inadequate to counter the possibility of the parents' interests intervening in the determination of the best interests of the child.¹²¹

It is argued that Article 21 of the CRC (and Article 24 of the ACRWC) establishes "... that no other interests, whether economic, political, state security or those of the adopters, should take precedence over, or be considered equal to, the child's".¹²² In addition, by declaring "that the best interests of the child shall be the paramount consideration" with regard to adoption systems, Article 21 of the CRC and Article 24 of the ACRWC appear to lay down a clear base from which all adoption policy should flow.¹²³ The use of the peremptory "shall" in these Articles is significant, too.

The full (tongue twisting) title of the Hague Convention (The 1993 Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption) belies its chief aim which is to uphold the best interests of the child in intercountry adoption law and practice. Explicit mentions of the principle predominate in the Hague Convention.¹²⁴ According to the Preamble, for instance, the best interests of the child recognises that the most ideal place for a child's growth is in a "family environment".¹²⁵

¹²⁰ Detrick, (1999), 347.

¹²¹ As above.

¹²² Hodgkin and Newell, (2002), 296.

¹²³ Graff, (2000), 416.

¹²⁴ It features six times in the Convention - in the Preamble, and in Arts. 1, 4, 16, 21 and 24.

¹²⁵ Preamble CRC and ACRWC.

Under a section entitled “measures supporting the best interests principle”, the Guide to Good Practice prepared by the Permanent Bureau identifies three main areas that would help promote the best interests of the child in adoptions: efforts to combat abduction of, sale of and trafficking in children to ensure that a child is genuinely adoptable; efforts to collect and preserve as much information as possible about the child’s origins, background, and medical history; as well as ensuring a matching that meets the needs of the child with the qualities of the adoptive parents and family.¹²⁶ It is submitted that, in a broader sense, however, almost everything that is contained in the Hague Convention (or, for that matter, the CRC and the ACRWC, too) is what the drafters thought would serve to promote the best interests of the child.¹²⁷

Procedurally, the best interests of the child require that the proposals of adoptable children by countries of origin should be given priority over the requests of receiving countries.¹²⁸ In practice this would entail the dispatching of files of children in need of intercountry adoption by States of origin to the potential receiving States, rather than the other way round.¹²⁹

Post-adoption contact is yet another sphere where the best interests of the child could play a role.¹³⁰ In some quarters, there is still some debate on who decides whether or

¹²⁶ Permanent Bureau, Guide to Good Practice, (2008), 31-32.

¹²⁷ This ranges from respect for the subsidiarity principle to the “no initial contact” rule; from the establishment of the necessary institutional structures to regulating the costs of intercountry adoptions; and from ways of cooperation between the authorities of ‘sending’ and ‘receiving’ countries to rules on post-adoption matters.

¹²⁸ Vite and Boechat, (2008), 27.

¹²⁹ As above.

¹³⁰ For the discussion of some of the advantages of post-adoption contact, see Maldonado, (2008), 321. But, for post-adoption contact to happen, open adoption should be promoted.

not post-adoption contact is in the best interests of the child.¹³¹ The option is sometimes left for courts to decide, while in other circumstances it is left as the preserve of the adoptive family.¹³² Whichever position of the debate one takes, it is important to recognise the role of the child's views in such determination.

At a general level this writer shares the view of Freeman that “[p]ost-adoption contact makes little ... sense when the adoptee is a baby”.¹³³ However, the best interests of an older child (whom Freeman describes as “where the child concerned has a sense of his/her being, his/her relationships and his/her status”¹³⁴) could certainly dictate that post-adoption contact be allowed. In fact, in the context of older children, the best interests of siblings who are also children (if not adopted together) might dictate that post-adoption contact is an imperative.

In deciding intercountry adoption cases, it is advisable that courts invest their energies in matters that address the welfare of the child. Taking account of considerations that do not help promote the best interests of the child in adoptions could be labelled as an abuse of discretion.¹³⁵ For instance, it has been found that the denial of an adoption order because the adoption would terminate a family name, meaning that the family line would cease to exist, can hardly be labelled as being in the best interests of a child.¹³⁶ Rather, it is a scenario that interjects the interests of others, or a general interest in a

¹³¹ See Strasser, (1999), 1023.

¹³² As above.

¹³³ Freeman, (1997), 379.

¹³⁴ As above.

¹³⁵ Hester, 248 S.E.2d at 539 cited in Smith, (2009), 278.

¹³⁶ As above.

"family name and the heritage which accompanies it",¹³⁷ thereby compromising the best interests of the child. From this follows the discussion in the next paragraphs on conflicting interests in intercountry adoptions.

In sum, it could be argued that with no clear definition or criteria of what constitutes the best interests of the child, the adoption process becomes less certain, less uniform, and, ultimately, more difficult to implement in practice. In the meantime, it is submitted that the indeterminacy of the best interests standard does not necessarily produce a result which is detrimental to children. In fact, the absence of a fixed and inflexible definition of what constitutes best interests allows for a case by case consideration, and facilitates a context-dependent application to the individual child.

3.3.3.3 Best interests of the child versus “best interests” of biological parents and (prospective) adoptive parents

Some argue that an intercountry adoption regime should have, if not at its centre of it, at least related thereto, the best interests of the adoptive parents. For instance, in a self-explanatory article titled “Intercountry adoption: Towards a regime that recognizes the ‘best interests’ of the adoptive parents” Steltzner emphatically argues that prospective adoptive parents’ “best interests” rests on their capacity to make fully informed adoption choices.¹³⁸ In this regard, Steltzner expresses disquiet with some adoption agency practices whereby prospective adoptive parents are misinformed about the true physical and mental condition of the children to be matched with them. The article suggests that any policy that distorts the ability of parents to make this assessment should be

¹³⁷ Smith, (2009), 279.

¹³⁸ Steltzner, (2003).

reviewed with great scrutiny.¹³⁹ This approach, it is submitted, could be accommodated within the best interests of the child principle.¹⁴⁰

A conflict could ensue between the interests of prospective adoptive parents, biological parents, and the best interests of the child. Especially in contested adoptions, those e situations in which biological parents and adoptive parents fight for custody of a child, all too often the child's interests are not considered when determining with whom she will ultimately reside. To demonstrate these conflicts, and the balancing acts necessary to promote the best interests of the child, the following discussion highlights the highly publicised American case of Baby Jessica¹⁴¹ and a lesser known case from South Africa.

The facts of the Baby Jessica case involved an unwed mother (Cara Clausen) who gave birth to the child on 8 February 1991 and put the child up for adoption. Subsequently, not only did the mother sign papers relinquishing her parental rights, she also lied about the identity of the biological father and had another man sign the release-of-custody form terminating the father's parental rights. Within days, the child was placed with a couple (Roberta and Jan DeBoer) who named her Jessica. Soon thereafter the DeBoers filed a petition for adoption. The Court terminated Clausen's and the named father's parental rights.

¹³⁹ Steltzner, (2003), 152.

¹⁴⁰ In fact, it fits squarely within that principle, as the matching of special needs children with adoptive parents who are not fit and proper to cater for their special needs goes against the children's best interests.

¹⁴¹ *DeBoer v. Schmidt*, 501 N.W.2d 193, 194 (Mich. Ct. App. 1993).

However, a problem arose nine days later when Clausen filed a request to revoke the release-of-custody, together with an affidavit naming the true biological father as Daniel Schmidt. Schmidt filed a petition asserting his parental rights and expressing his opposition to the adoption within about one month after Jessica's birth. Clausen and Schmidt married in April 1992. Despite this, the DeBoers, believing their petition for adoption would be granted, kept Jessica with them.

The trial and appellate courts ruled that the natural father's rights had not been terminated in accordance with the law, in that there was no indication that the natural parent was unfit.¹⁴² After their unsuccessful attempts to obtain legal custody of, and adopt, Jessica in Iowa, the DeBoers filed a petition in December 1992 in a Michigan court, asking for custody of Jessica in her "best interests". Even though the parties went through various trial and appellate level courts, all the courts involved refused to consider the best interests of the child unless the requisite grounds were met to terminate the Schmidts' parental rights.¹⁴³

On 26 July 1993 the U.S. Supreme Court entered an order denying a stay of the Michigan Supreme Court's decision, reasoning that the DeBoers claim that Jessica's best interests will be served by allowing them to retain custody of her was based, in part, on the relationship that they had been able to develop with the child after it became clear that they were not entitled to adopt her. He stated that neither Iowa law,

¹⁴² This was upheld even though there were allegations that he had abandoned two children previously born of other women prior to the birth of Jessica.

¹⁴³ *Quilloin v Walcott*, 434 US 246, 255 (1978), where it is stated that regardless of how a state structures its proceedings, the Supreme Court has stated that the state must show that the parents are unfit before a court can determine whether termination would serve the child's best interests.

Michigan law, nor Federal law, authorized unrelated persons to retain custody of a child whose natural parents have not been found to be unfit, simply because they are better able to provide for her future and her education. On 3 August 1993 the DeBoers were forced to give Jessica to the Schmidts, almost two and a half years after they had taken custody of her.¹⁴⁴

In another illustrative case, in South Africa, *In the matter of Bryony Disemelo (Child concerned), Lynn Noble (First applicant), Regina Ramodia (Second applicant)*,¹⁴⁵ the Court was seized of two counter applications to adopt a child. The child's mother and father had given signed consent in favour of the second applicant, who was also the aunt of the child. However, the first applicant who had been giving care to the child since she was four months old, had also applied for an adoption order. On 12 June 2003, Ms. Noble applied for the adoption of the child while Mrs. Ramodia, applied to adopt the same child on 9 September 2003.

It was the mother's assertion that, when she left the child at the hospital, she had thought that the child would be safe; that her sister would visit the child; and, since she had left her address (at her sister's home in Johannesburg where she was initially staying) with the hospital, that she had thought she would be contacted once the child was ready to be discharged.¹⁴⁶ She further disputed the assertion that she had abandoned her child by stating that she was informed that her sister had attempted to see the child, but had not been allowed to do so by the hospital; and that upon her

¹⁴⁴ See Miller, (1994), 497.

¹⁴⁵ Case number 14/1/2-52/2003 in the Children's Court for the District of Randburg.

¹⁴⁶ As above.

return to Johannesburg, she had gone to the hospital but had been referred by the hospital to the Social Worker who informed her of the status of the child with Ms. Noble.¹⁴⁷

The Court, in deciding the case, placed the best interests of the child at the centre of its inquiry. It summoned a number of professionals, from social workers to psychologists, in its quest to determine where the best interests of the child lay. In fact, in a commendable appreciation of the fact that the child's best interests may not necessarily be represented either by the family of origin or the prospective adoptive parent, the Court appointed a guardian *ad litem* for the child. After a thorough examination, the Court decided that the child should remain with Ms. Noble.

The common thread that runs through these two cases is that the "best interests" of prospective adoptive parents, adoptive parents, and biological parents can be accommodated within the best interests of the child principle if they are, as a minimum, either neutral or, preferably, in agreement with the child's best interests. A tension exists when these "best interests" conflict with the best interests of the child. A legal framework that considers the best interests of the child as *the* paramount consideration would make children's rights the overriding factors in making decisions about them. However, a legal system that considers the best interests as a primary consideration would do a balancing act, and weigh up all competing interests before arriving at a decision.

¹⁴⁷ As above.

At times, national interests might also come in conflict with the best interests of the child in intercountry adoptions. To illustrate: Marx's article entitled "Whose best interests does it really serve? A critical examination of Romania's recent self-serving international adoption policies",¹⁴⁸ criticises the moratorium placed on intercountry adoptions from Romania. She argues that Romania is hiding behind the best interests standard promulgated in international treaties and using it to justify its own narcissistic policies.¹⁴⁹ While the validity of the argument is not embraced by this writer,¹⁵⁰ it nonetheless can demonstrate the perception that national interests might be viewed as compromising children's best interests.

3.3.3.4 Best interests of the child: Limitations

Even though the best interests of the child principle should be the paramount consideration in adoptions, it appears that, in one sense, it could be circumscribed by the legal necessity of complying with legal requirements and securing the necessary consents.¹⁵¹ If such compliance is not present, it is insinuated that the adoption should not proceed even if it is viewed to be in the best interests of the child.¹⁵² Could it be argued that such an approach undermines the "paramountcy" of the best interests of the child principle?

¹⁴⁸ Marx, (2007), 373.

¹⁴⁹ As above.

¹⁵⁰ Mainly because the reason for the moratorium was to protect children's best interests until a comprehensive regulatory framework is set in place.

¹⁵¹ Newell and Hodgkin, (2007), 288.

¹⁵² As above. However, it is interesting to note that some national courts accord the best interests principle overriding value even when it is apparent that the adoption was done in breach of international or national law. For instance, in Germany, in *AG Hamm, 17 April 2006 – XVI 44/05*, 363, the court ruled that a foreign adoption can be recognised even if it is legally flawed as long as it serves the interests of the child and is consistent with the essential principles of German law.

Nonetheless, such line of argument is difficult to sustain irrespective of how relatively “best interests” are defined. For instance, it is submitted that, if the adoptability requirement is not complied with, it is difficult to maintain that it is in the best interests of a child to be adopted.¹⁵³ In addition, where the consent of natural parents is not secured in contravention of legislation, it is safe to assume that the child’s and the parent’s right to family life would be violated.¹⁵⁴ Such an adoption could hardly be labelled in the best interests of the child.

The possibility exists that a child’s best interests could be limited by consideration of the best interests of another child or children. In the context of intercountry adoption, for instance, if the adoption of a child has the capacity to compromise the rights of other children in the new household (for instance, their right to health care or their right to education), the child’s best interests could be limited by the best interests of children in the household. This seems to be one of the reasons why courts usually want to establish the financial capacity of prospective adoptive parents, before allowing them to bring an additional child into their family.

3.3.4 Non-discrimination

3.3.4.1 Non-discrimination: General

Because equality is a principle deep-rooted in human morality, the principle of non-discrimination has quickly been recognized legally as one of the fundamental principles

¹⁵³ Vite and Boechat, (2008), 37.

¹⁵⁴ See Arts. 7 and 8 of the CRC.

of modern democracies.¹⁵⁵ Thus, internationally, all but one¹⁵⁶ of the seven core human rights treaties contain explicit provisions on equality and non-discrimination.¹⁵⁷ Through their writings, scholars have recognised and signified the importance of non-discrimination and equality; for instance, Ramcharan describes it as “one of the major themes of most UN core human rights treaties”,¹⁵⁸ while Nowak refers to it as “the most important principle imbuing and inspiring the concept of human rights”.¹⁵⁹

Even though the term “discrimination” is derived from *discriminare*, meaning “to treat differently”, discrimination is to be distinguished from differentiation.¹⁶⁰ The most commonly used definition of discrimination is provided by the Human Rights Committee in its General Comment No 18 on the principle of non-discrimination. It provides that discrimination is:

...any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.¹⁶¹

This definition, it is argued, contains four important elements: (1) the differentiation of similar situations; (2) the absence of legitimate ends; (3) the lack of proportionality of

¹⁵⁵ Besson, (2005), 434.

¹⁵⁶ The Convention Against Torture does not have a provision on the principle of non-discrimination.

¹⁵⁷ In fact, two of the seven (namely, the ICERD and CEDAW) core human rights treaties are exclusively devoted to the issue of equality and non-discrimination.

¹⁵⁸ Ramcharan, (1981), 246.

¹⁵⁹ Nowak, (1993), 458.

¹⁶⁰ See section 3.4.3 for a discussion of differentiation in the context of adoptions and how it is justified within the law.

¹⁶¹ HRC, General Comment No. 18, (1989), para. 6.

means to ends; and (4) the use of suspect classifications.¹⁶² A contrary reading of these four elements conveys the message that the differentiation of different situations; the presence of legitimate ends; the presence of proportionality of means to ends; and often, but not necessarily always, the use of non-suspect classifications, could possibly pass the test of the non-discrimination principle and be classified as justified distinction.

Both the CRC and the ACRWC entrench the right of non-discrimination.¹⁶³ The principle of non-discrimination has been identified by the CRC Committee as a general principle of fundamental importance for implementation of the whole Convention.¹⁶⁴ The Committee has indicated that this principle is applicable irrespective of budgetary resources,¹⁶⁵ and to “each child within (a State Party’s) jurisdiction”.

The principle of non-discrimination is often identified with that of equality.¹⁶⁶ As a result, it is correctly argued that equality and non-discrimination are positive and negative statements of the same principle.¹⁶⁷

The principle of non-discrimination incorporates a number of specifically proscribed grounds of discrimination, such as, race, colour, and sex. Initially it was the UDHR that, after an introductory general Article asserting that “all human beings are born free and

¹⁶² Bayefsky, 1990, 11–24; Besson, (2005), 435.

¹⁶³ Art. 2 of the CRC and Art. 3 of the ACRWC.

¹⁶⁴ Hodgkin and Newell, (2002), 19. See also CRC Committee, General Comment No. 3, (2003), para. 5; General Comment No. 1, (2001), para. 6; and General Comment No. 5, (2003), paras. 4 and 12. For a criticism of the recognition of the principle of non-discrimination as one of the four cardinal principles, see Abramson, (2008), 64.

¹⁶⁵ It is to be noted that other treaty bodies such as CERD, the CESCR, and the CEDAW Committees have indicated that the principle of non-discrimination is not subject to progressive realization.

¹⁶⁶ Bayefsky, (1990), 1.

¹⁶⁷ For an analysis of the principle of non-discrimination from the perspective of gender, see Cohen (1997), 29; Backstrom, (1996-97), 541.

equal,"¹⁶⁸ that listed these grounds.¹⁶⁹ Subsequently international and regional instruments have mainly reiterated the UDHR's formulation of the principle of non-discrimination.

Article 2 of the CRC provides that:

States Parties shall respect and ensure the rights set forth in the present Convention to each child without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

The counterpart provision of the ACRWC also uses similar phraseology and states in

Article 3 that:

Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.

It is interesting to note that the CRC, one of the most recent UN human rights treaties, has an unusually comprehensive version of the principle of non-discrimination. This conclusion is premised on the fact that

[n]ot only does it apply the Universal Declaration's prohibited grounds of discrimination against the child, it extends this prohibition to discrimination aimed at the child's parents or legal guardians.¹⁷⁰

¹⁶⁸ See Art. 1 of the UDHR.

¹⁶⁹ See Art. 2 of the UDHR. But it is to be noted that the 1959 Declaration stated in Principle 1 that: [t]he child shall enjoy all the rights set forth in this Declaration. Every child without any exception whatsoever shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether himself or his family.

See Todres (1998) 162-163 (briefly discussing this provision). Similar provisions appear in the other major conventions. Examples include, Art. 2(1) of the ICCPR; Art. 2(2) of the ICESCR. In addition, Art. 10 of the ICESCR states that "special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions".

¹⁷⁰ Cohen, (1997), 34.

Further, both the CRC and the ACRWC address not only legalised discrimination, but also *de facto* discrimination.¹⁷¹

In the context of the ACRWC, Chirwa convincingly argues that, “unlike article 2 of the CRC, the Charter does not make any reference to the ‘state’”¹⁷² in describing the nature of the obligation, and this is taken to imply that “... the obligation not to discriminate is binding not only on the State but other actors as well”.¹⁷³ In spite of the fact that the CRC, in Article 2(1), confines States Parties to only ensure that children “within their jurisdiction” receive the rights in the CRC without discrimination, the ACRWC does not include any such limitations. That Articles 26(2) and 26(3) of the ACRWC oblige States Parties individually and collectively to accord the highest priority to the special needs of children living under discriminatory regimes, as well as the obligation to offer, “whenever possible, ... material assistance to such children and direct efforts to the elimination of all forms of discrimination”, is indeed laudable. Lloyd agrees that:

These explicit provisions are a positive contribution by the ACRWC, as they do not dilute the importance of non-discriminatory practices and directly confront some of the most relevant issues affecting children in Africa.¹⁷⁴

In its consideration of States Parties reports, the CRC Committee has identified some legislative and policy interventions that violate the right against discrimination.¹⁷⁵

¹⁷¹ The non-discrimination obligation in the CRC is also said to require States to review legislation, planning and education, and to raise awareness and disseminate information to address and redress disparities brought about by discrimination.

¹⁷² Chirwa, (2002), 159.

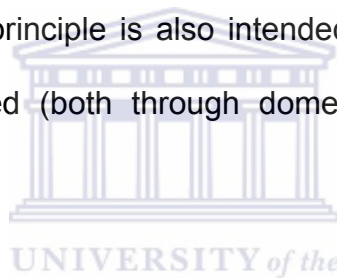
¹⁷³ As above.

¹⁷⁴ Lloyd, (2008), 38.

¹⁷⁵ For instance, it has encouraged States to take all necessary measures to ensure that customary law does not impede the implementation of this general principle, notably through raising awareness among community leaders. See, for instance, Concluding Observations: Comoros, (October 2000), para. 23; Zambia, (July 2003), para. 25.

3.3.4.2 Non-discrimination: Intercountry adoption

The rule against non-discrimination has a direct bearing on intercountry adoption. This relationship often manifests itself in three areas: first, the principle of non-discrimination is intended to address some of the main causes that lead children to be deprived of a family environment (for instance, discrimination against children born outside of wedlock), which, in turn, leads to these children's need for alternative care, such as adoption; secondly, the rule against discrimination is also intended to cater for the needs of vulnerable and minority children so that they can also benefit from the possibility of growing up in a family environment such as through adoptions;¹⁷⁶ and thirdly, the non-discrimination principle is also intended to guarantee equivalent rights and protections for all adopted (both through domestic and intercountry adoption) children.



For instance, adoption procedures that have an apparent bias in favour of either boys or girls give rise to a form of discrimination.¹⁷⁷ Although legislation that allows same-gender couples to adopt children as co-parents is not common,¹⁷⁸ where it does occur, children might often be subjected to discrimination on the basis of their parent's sexual orientation. An age of consent for adoptions which is not equally applicable to both boys and girls would be in violation of the rule against discrimination.¹⁷⁹ In connection with accessing intercountry adoption procedures, particular attention must also be paid to *de*

¹⁷⁶ See Permanent Bureau, *Guide to Good Practice*, (2008), 31, in this regard.

¹⁷⁷ Hodgkin and Newell, (2002), 296.

¹⁷⁸ For instance, in 2000, it was reported that even though the Netherlands Constitution Art. 1 prohibits discrimination on any ground whatsoever, and the Netherlands allows same-gender partnership registration, Dutch law prohibited homosexual co-parents from adopting children that they have raised from birth. See Maxwell *et al.*, (2000), 337-338. This, however, is not the case anymore.

¹⁷⁹ CRC Committee, *Concluding Observations: Chile*, (January 2007), para. 47.

facto discrimination and disparities which may be the result of a lack of a consistent policy, and involve vulnerable groups of children, such as children infected or affected by HIV/AIDS,¹⁸⁰ street children, children belonging to racial, ethnic, religious or linguistic minorities, indigenous children, girl children, children with disabilities, and so forth.

Furthermore, the rule that has direct implications for intercountry adoptions is the one that requires that the State should not discriminate against or punish the right holder on account of a parent's (or relative's) actions, beliefs, or status; which does not have any counterpart in other UN international human rights instrument. As mentioned above, discrimination against children as children born outside of wedlock is one good example of discrimination on the basis of the status of the parents. This kind of discrimination often causes children to be deprived of their family environment through abandonment.

A State Party to the CRC and the ACRWC is forbidden to unreasonably treat the right holder differently on the basis of the parent's or guardian's or family member's actions, beliefs, or status. The word "unreasonably" is indicative of the fact that the right is context dependent, and that this provision does not envisage an absolute right.¹⁸¹

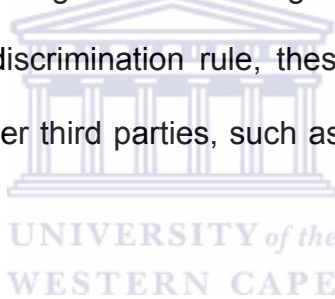
While the rule against discrimination has relevance for many of the provisions of the Hague Convention, Article 26(2) of the Hague Convention entrenches a specific non-discrimination clause. The thrust of Article 26(2) is that when the effect of an adoption is

¹⁸⁰ See Chapter 5 below for further details on the adoptability of HIV/AIDS positive children.

¹⁸¹ In explaining the non-absolute nature of this right in the area of inheritance and adoption, Abramson writes that "[f]or instance, adoption depends upon the actions of two sets of adults, the birth parents and the adoptive parents, and the adoption will alter the legal relations of the child to both sets. Once the child's legal status changes, the State will treat the youngster differently; the child will not be allowed to inherit from the birth parents, whereas the non-adopted birth-siblings can, for example". Abramson, (2008), 130.

to terminate a pre-existing legal parent-child relationship, the child's rights resulting from the adoption should be equivalent to those resulting from a similar adoption made under national law in the receiving State.¹⁸²

The practice of running genetic tests on adoptees to determine whether an individual child has a genetically based disease, or disease susceptibility, has been labelled as discriminatory.¹⁸³ By performing a genetic test, it is argued, "prospective adoptive parents discriminate against the child by placing him or her in a class of either 'good' or 'bad,' based on the probability of a genetic disorder".¹⁸⁴ While the running of tests on adoptees for the purpose of finding children the right match in adoptive parents can withstand the test of the non-discrimination rule, these genetic tests are intended to solely serve the interests of other third parties, such as, adoption agencies or adoptive parents.¹⁸⁵



The controversy surrounding inter-racial placement (also known as race matching)¹⁸⁶ of children through adoption is another area that has a discriminatory angle to it. This controversy has been more pervasive in the U.S., where it has also received

¹⁸² Permanent Bureau, *Guide to Good Practice*, (2008), 31.

¹⁸³ Schlee, (2001), 182. Art. 21 of the Charter of Fundamental Rights of the European Union states: "any discrimination based on ... genetic features ... shall be prohibited. According to the explanatory text, this non-discrimination provision draws on Article 11 of the EU Convention on Human Rights and Biomedicine (adopted November 1996) which prohibits any form of discrimination on the basis of genetic heritage. See Charter of Fundamental Rights of the European Union Art. 21; See too European Convention on Human Rights and Biomedicine, available at <<http://conventions.coe.int/treaty/en/treaties/html/164.htm>>, 11.

¹⁸⁴ Schlee, (2001), 182. For some more details on this, see Lorandos, (1996), 277.

¹⁸⁵ As a result, they fail to serve the best interests of the child, but rather perpetuate potential discrimination against children by testing them for untreatable, adult onset diseases, thereby negatively affecting their chances of benefiting from a family environment through adoption.

¹⁸⁶ Although race matching takes many forms, its consistent premise is that same-race placements are preferable to cross-race placements; the optimal placement for a black child, for example, is with a black family.

considerable scholarly attention, than anywhere else in the world.¹⁸⁷ It is now clearly impermissible in the U.S. to "delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved".¹⁸⁸

In *Interracial intimacies: Sex, marriage, identity, and adoption*,¹⁸⁹ Kennedy observes that there are two distinct forms of racial discrimination that pervade the adoption process in the U.S.. The first one involves social workers who match children to parents on the basis of race.¹⁹⁰ The second coalesces around adoptive parents who typically choose a child on the basis of race.¹⁹¹ Kennedy views the use of race by social workers as illegitimate discrimination attributable to the State, and by adoptive parents as a morally justifiable assertion of individual autonomy. While Kennedy's distinction has been challenged by authors, such as Banks,¹⁹² it brings to the fore the question whether the provisions of Article 2 of the CRC and Article 3 of the ACRWC apply to non-State actors.

Applying different safeguards to children adopted from States Parties to the Hague Convention, on the one hand, and those from countries that are not Contracting States to the Hague Convention, on the other, might also violate the non-discrimination rule in

¹⁸⁷ Since the early 1990s, race matching has received considerable scholarly attention. See, for instance., Bartholet, (1999b); Bartholet, (1991), 1163; Forde-Mazrui, (1994), 925.

¹⁸⁸ 42 U.S.C.A. § 671(a)(18)(B) (West Supp. 1998) as cited in Davidson, (1998), 191.

¹⁸⁹ Kennedy, (2002).

¹⁹⁰ Banks, (2003), 455.

¹⁹¹ As above.

¹⁹² As above.

relation to intercountry adoption.¹⁹³ Viewed strictly from the perspective of interpretation of treaty law, this line of argument may sound baseless: after all, more often than not treaties impose obligations only between contracting parties.¹⁹⁴ What is being suggested here, however, is that the best interests of the child principle independently demands respect for the rule against discrimination.¹⁹⁵ This in turn would call on Contracting States to the Hague Convention to try and apply, “as far as practicable...the standards and safeguards of the Convention to the arrangements for inter-country adoption which they make in respect of non-Contracting States”.¹⁹⁶ The careful choice of words, “as far as practicable...”, is indicative of the non-imperative nature of this proposal.

3.3.4.3 Non-discrimination: Affirmative action

The non-discrimination principle does not bar affirmative action, which, by definition, is legitimate differentiation in treatment of individual children. In other words, it is the preferential treatment of certain disadvantaged or underrepresented groups, and requires “positive action” *per se*. Differentiation does not automatically lead to discrimination. In fact, at the heart of the rule against discrimination is the tenet that non-discrimination law is particularly concerned with redressing structural disadvantages and counterbalancing the underlying power inequalities in society.

¹⁹³ In the latter case basic guarantees may not be applied, that could lead to compromising the best interests of the child. Such a distinction could not pass the best interests test, and, as a result, the possibility of justifying it as a fair discrimination is low. See Vite and Bochat, (2008), 50, giving the example of Art. 29 of the Hague Convention espousing the “no initial contact” rule. For further details on this rule, see Chapter 6, section 6.2.7.

¹⁹⁴ Save for the limited exception of treaties that constitute customary international law.

¹⁹⁵ See also section 3.3.3 above, indicating that the best interests of the child should be compliant with the other three cardinal principles of the CRC and the ACRWC.

¹⁹⁶ Permanent Bureau, Recommendations of the Special Commission, (2001), 31.

Therefore, at times, it is the failure to differentiate that could constitute discrimination.¹⁹⁷ As already alluded to above, differentiation only constitutes discrimination in the absence of an objective and reasonable justification.¹⁹⁸ In the CRC, preferential treatment enjoys both textual and institutional (through the CRC Committee) support.

In its Preamble the CRC recognises that “in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need *special consideration...*” (emphasis mine). In addition, the provisions of both the CRC and the ACRWC draw distinctions between different groups of children. A good example is the provision on the right to free and compulsory primary education – which make a distinction between primary and secondary school children.¹⁹⁹

This is also a position that garners support from the jurisprudence of the CRC Committee. In this respect, it is worth having regard to the relevant part of General Comment No. 5 on “General measures of implementation for the Convention on the Rights of the Child”. The CRC Committee notes that:

This non-discrimination obligation requires States actively to identify individual children and groups of children the recognition and realization of whose rights may demand special measures.²⁰⁰

In the context of intercountry adoption, this implies a number of things. As far as special needs children are concerned, it is argued that a sound intercountry adoption system that respects the rule against discrimination would at least have three central

¹⁹⁷ See HRC, General Comment No. 18, (1989), para. 10.

¹⁹⁸ See Hendriks, (2001), 46.

¹⁹⁹ Art. 28 of the CRC and Art. 11 of the ACRWC.

²⁰⁰ CRC Committee, General Comment No. 5, (2003), para. 12

characteristics. First, a State would respect the non-discrimination rule and abstain from taking measures that would discriminate against this group of children. Secondly, pursuant to its duty to ensure that all children within its jurisdiction enjoy all the rights enshrined in the Convention without discrimination of any kind, the State should proscribe discrimination; provide for effective remedies in case of violations; and conduct awareness raising and educational campaigns targeting the public at large and specific groups of professionals with a view to preventing and eliminating de facto discrimination against this group of children.²⁰¹

Thirdly, and more importantly to this section at hand, a State should take some positive measures aimed at providing enhanced treatment to special needs children so that they could benefit from adoptions.²⁰² These measures, could include facilitating the adoption applications of prospective adoptive parents who are willing to adopt special needs children; relaxing the requirements, such as age gaps, between children and prospective adoptive parents. In sum, the right against discrimination has a many implications for intercountry adoption, and its violation would compromise children's rights in a number of ways.

3.3.5 The right to life, survival and development

Article 6 of the CRC enjoins States Parties to "...recognize that every child has the inherent right to life",²⁰³ and to "ensure to the maximum extent possible the survival and

²⁰¹ See General Comment No. 9, (2006), para. 9 (a)(b)(c).

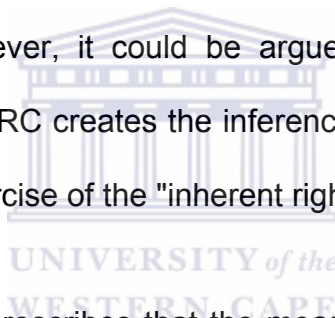
²⁰² Vite and Boechat, (2008), 52.

²⁰³ Art. 6(1) of the CRC.

development of the child”.²⁰⁴ The corresponding provision, Article 5 of the ACRWC, provides under a heading “Survival and Development” that:

1. Every child has an inherent right to life. This right shall be protected by law.
2. States Parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child.
3. Death sentence shall not be pronounced for crimes committed by children.²⁰⁵

It is submitted that the nature of States Parties obligations espoused by Article 6 of the CRC and Article 5 of the ACRWC are of a high standard. In the context of children’s right to survival and development, the obligation is to “ensure”.²⁰⁶ The use of the term “shall” in Article 5(1) of the ACRWC on the protection of the right to life by law is forceful too. On the other hand, however, it could be argued that the choice of the word “recognize” in Article 6 of the CRC creates the inference that States are obliged only to refrain from obstructing the exercise of the “inherent right to life”.



Notably, Article 4 of the CRC prescribes that the measures taken by States Parties to guarantee the survival and development of the child and the right to an adequate standard of living are to be undertaken “to the maximum extent of their (the States Parties’) available resources” (insertion mine).²⁰⁷ A similar limitation is in-built in Article 5(2) of the ACRWC.²⁰⁸

²⁰⁴ Art. 6(2) of the CRC. The right to life is not a preventive measure alone, but ensures that State parties take steps to prolong the life of the child; thus it encompasses both the survival and the development of children.

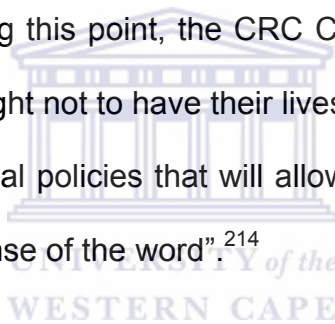
²⁰⁵ Art. 5 of the ACRWC.

²⁰⁶ Art. 6 of CRC and Art. 5(2) of the ACRWC

²⁰⁷ LeBlanc, (1995), 78.

²⁰⁸ Art 5(2) of the ACRWC. Therefore, there is merit in noting the presence of a qualifying statement that these mandates are to be accomplished within a State’s ability to do so.

Initially the Working Group drafting the CRC had intended Article 6 of the CRC to have priority over all the other rights in the Convention.²⁰⁹ While a negative approach to the right to life is apparent from previous human rights instruments, such as the ICCPR, the drafters of the CRC had intended Article 6 of the CRC to reflect a positive approach to the right to life.²¹⁰ The dual nature obligation that this right embeds – composed of both positive and negative elements - is a position that is reinforced both by the terminology of the text and by the drafting history of the provisions.²¹¹ This right has to do with raising life expectancy, reducing child mortality, immunisation, addressing malnutrition and preventable diseases, and other related issues,²¹² which cannot be labelled only as negative obligations. Buttressing this point, the CRC Committee, for instance, noted in 2003 that “[c]hildren have the right not to have their lives arbitrarily taken”,²¹³ but also “to benefit from economic and social policies that will allow them to survive into adulthood and develop in the broadest sense of the word”.²¹⁴



The right to life, survival and development in Article 6 of the CRC and Article 5 of the ACRWC is also an implicit part of a number of other Articles in these instruments. This position is reiterated by the CRC Committee.²¹⁵ To illustrate: closely related to this right are Article 27 of the CRC which deals with maintaining an adequate standard of living;

²⁰⁹ See Considerations, (1988), para. 21.

²¹⁰ Considerations, (1989), para. 89

²¹¹ As a result, simply refraining from action that would deprive children of the opportunity to benefit from basic material needs, including food, clothing, and shelter, would not suffice as compliance with the obligations States Parties have under these instruments. Stewart, (1998), 168.

²¹² See Mower, (1997) 32-33. See too Sloth-Nielsen and Mezmur, (2008b), 5.

²¹³ CRC Committee, General Comment No. 3, (2003), para. 11.

²¹⁴ As above.

²¹⁵ The CRC Committee “reminds States parties (and others concerned) that the right to survival and development can only be implemented in a holistic manner, through the enforcement of all the other provisions of the Convention, ... as well as through respect for the responsibilities of parents and the provision of assistance and quality services (Arts. 5 and 18)”. CRC Committee, General Comment No. 7, (2005), para. 10.

Articles 24 and 25 of the CRC and Article 14 of the ACRWC that deal with health care,²¹⁶ and Article 37 of the CRC prohibiting capital punishment for crimes committed by children under 18 years of age. Articles 26 and 27 of the CRC, and, in a limited sense, Article 14 of the ACRWC²¹⁷ obligate governments specifically to provide, "in case of need", material assistance and support to children, particularly with regard to nutrition, clothing and housing.²¹⁸

The term "survival rights" covers a child's rights to life and the needs that are most basic to the child's existence, which include, an adequate living standard, shelter, nutrition and access to medical services.²¹⁹ Ensuring survival and physical health are priorities, but States Parties are reminded that Article 6 of the CRC encompasses all aspects of development, and that a child's health and psychosocial wellbeing are in many respects interdependent.²²⁰ Thus, implicit in this requirement are the issues of safety, health, and welfare of the child.²²¹

There is also an expectation that the term "development" be interpreted in its broadest sense as a holistic concept.²²² This should encompass the child's physical, mental,

²¹⁶ There is a tendency to misconstrue the right to life and the right to health care. Both the CRC and the ACRWC do not entitle children a right to good health as such. Rather, children are entitled to services and programs that are conducive to providing a child with proper medical health care. See Mower, (1997), 32.

²¹⁷ It is to be noted that the ACRWC does not have a corresponding provision to Art. 26 of the CRC on provision of social security for the child. See, too, Mezmur, (2008a), 14.

²¹⁸ Stewart, (1998), 168.

²¹⁹ Sloth-Nielsen and Mezmur, (2008b), 5. It is also indicated that the term "survival" encompasses the obligation on signatory states to take positive steps toward providing "growth monitoring, oral rehydration and disease control, breastfeeding, immunization, child spacing, [and] food". See Considerations, (1989), para. 88.

²²⁰ See CRC Committee, General Comment No. 7, (2005), para. 10.

²²¹ See Goetz, (1996), 155.

²²² CRC Committee, General Comment No. 5, (2003), para. 12.

spiritual, moral, psychological and social development.²²³ After all, the child's standard of living is not only related to basic physical provisions fundamental to the child's survival, but also to a child's moral and social development.²²⁴

The inherent right to life, survival and development is a right that warrants particular attention where children permanently deprived of their family environment are concerned.²²⁵ On the subject of the right to life, it is not uncommon to regard intercountry adoption as a “life saving” act.²²⁶ However, can not allowing intercountry adoption in a specific case lead to the inference that the right to life is violated?

This was part of the strategy attempted by Madonna’s lawyers in their appeal to the SCA²²⁷ in Malawi to have a decision of a lower court²²⁸ denying the applicant an adoption order reversed. Counsel argued that “a child in dire circumstances has still a right to life”²²⁹ and that “to deny the child the opportunity of adoption on a ground whose relevance or significance in the modern world is doubtful amounts to arbitrary deprivation of the right to life”.²³⁰ Article 16, the right to life provision of the Malawi

²²³ CRC Committee, General Comment No. 5, (2003), para. 12.

²²⁴ See Seitles, (1997-1998), 178. Thus, the positive action required of states includes the duty to guarantee each child an opportunity to develop his or her personality, which is a far greater objective than mere survival. See Goetz, (1996), 175-176.

²²⁵ In addition, while assuring an adequate standard of living for all children is relevant, it is even more apposite for children who are deprived of their family environment. Article 27 of the CRC addresses this issue and obliges States Parties to ensure that children are provided with food, clothing, and housing according to the financial resources available and the norms of the particular culture.

²²⁶ In “Live or let die: Could intercountry adoption make the difference?”, as the title itself intones, Olsen ends the article by posing the question: “Should the orphaned children of the world live, or should we let them die? Intercountry adoption could be the vehicle through which many children have the chance to live”. Olsen, (2004), 525.

²²⁷ *SCA Infant CJ case*.

²²⁸ *High Court Infant CJ case*.

²²⁹ *SCA Infant CJ case*, 5.

²³⁰ As above.

Constitution, was invoked.²³¹ In dismissing this line of argument, the SCA reasoned that:

We do not also subscribe to the idea that by declining to grant an adoption order on the ground of residence the decision of the Judge in the court below is in violation of section 16 of the Constitution which recognizes the right to life with regard to the infant. There is no evidence on record or from the Guardian *Ad litem* that suggests that the infant will die due to lack of adequate care and nutrition.²³²

This approach, it is submitted, is valid. In the absence of compelling evidence that the denial of an intercountry adoption order would fully compromise the right to life of a child, an argument invoking the right to life seems untenable. The Court left open, however, the minimal possibility that a State's refusal to grant intercountry adoption of a child who could "die due to lack of adequate care and nutrition" could constitute a violation of the right to life. Arguably, for instance, this could include cases where a country does not offer HIV/AIDS treatment, and the adoption of a child who is HIV positive to a country where he or she could have had access to HIV/AIDS treatment is denied.

The obligation to ensure life, survival, and development is cemented by Article 4 that obliges States Parties to address economic, social and cultural rights to the maximum extent of their available resources.²³³ This obligation should be complemented, where needed, with international cooperation.²³⁴ Premised on this, an argument could be advanced, rather ineptly, that States Parties who do not have the capacity to uphold the

²³¹

As above.

²³²

SCA *Infant CJ* case, 5-6.

²³³

See, CRC Committee, General Comment No. 11, para 34. For a detailed discussion of Art. 4 of the CRC, see generally, Rishmawi, (2006).

²³⁴

CRC Committee, General Comment No. 11, para. 34. For a detailed discussion of international cooperation in the context of the CRC, see generally, Rishmawi, (2006), 35-43.

rights to survival and development of children permanently deprived of their family environment, should use intercountry adoption. An attempt could be made to bolster this argument by viewing intercountry adoption as an element of international cooperation. However, it is argued that intercountry adoption does not constitute either financial or technical cooperation as envisaged in the CRC. There is no State practice that lends support to it, too.

3.3.6 Child participation

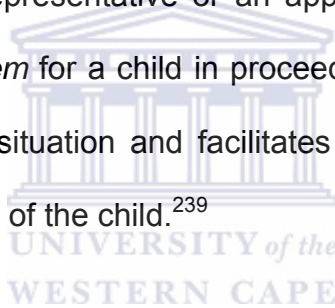
Article 12 of the CRC provides:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The right of a child “who is capable of forming his or her own views ... to express those views freely in all matters affecting the child” (Article 12 of the CRC and Article 7 of the ACRWC) is one of the four cardinal principles of both the CRC and the ACRWC. In their basic form, these provisions indicate that children have the right to participate in decision making that is relevant to their lives, and to influence decisions taken within the family, the school or the community to which they belong.

It is argued that children’s participation rights are a “cluster of rights” of which the core seems to consist of respect for the views of the child,²³⁵ the right to freedom of expression,²³⁶ the right to freedom of thought, conscience and religion,²³⁷ the right to freedom of association and peaceful assembly (Article 15), and the evolving capacities as a legitimate limitation on parental guidance.²³⁸

Nowhere in the international normative framework mentioned above does one find an indication that child participation should necessarily be directly by the child. In fact, Article 12(2) of the CRC speaks of the child being offered an opportunity to be heard “either directly, or through a representative or an appropriate body”. In this light, the appointment of a *curator ad litem* for a child in proceedings assists by providing for an independent assessment of a situation and facilitates the airing of an opinion that is presumably in the best interests of the child.²³⁹



Although not traditionally conceptualised as one of four cardinal principles, the “evolving capacities of the child” is also a very important principle. This principle entrenches that there is a reduced need for direction and a greater capacity to take responsibility for decisions affecting children’s lives as they acquire enhanced competencies.

²³⁵ Art. 12 of the CRC and Art. 7 of the ACRWC.

²³⁶ Art. 13 of the CRC and Art. 7 of the ACRWC.

²³⁷ Art. 14 of the CRC and Art. 9 of the ACRWC

²³⁸ Art. 5 of the CRC and Art. 9(1) of the ACRWC. See too Ang, (2006), 9. It is interesting to note that the rights enshrined in Arts 13–16 (right to freedom of expression, religion, thought, and association) of the CRC can also be found in the ICCPR in articles that use terms such as “everyone” or “no one”.

²³⁹ For the role of a *curator ad litem* in the context of South Africa, see *Centre for Child Law and Another, Ellis, v Minister of Home Affairs and others* (2005) 6 SA 50 (T) as well as *Du Toit and Another v Minister of Welfare and Population Development* (2003 2)SA 198 (CC)). See, too, Sloth-Nielsen and Mezmur, (2008b), 19-20.

Here, it is apposite to consider the opinion of the CRC Committee on the participation of young children in the adoption process. The CRC Committee notes that “[r]espect for the young child’s agency – as a participant in family, community and society – is frequently overlooked, or rejected as inappropriate on the grounds of age and immaturity’.²⁴⁰ By recognising that young children “make choices and communicate their feelings, ideas and wishes in numerous ways, long before they are able to communicate through the conventions of spoken or written language”,²⁴¹ the Committee reminds

States parties to take all appropriate measures to ensure that the concept of the child as rights holder with freedom to express views and the right to be consulted in matters that affect him or her is implemented from the earliest stage in ways appropriate to the child’s capacities, best interests, and rights to protection from harmful experiences.²⁴²

After all, if children’s best interests are understood to be a guiding principle in the work that child advocates hold dear, how well can and do they assist and develop children’s meaningful participation in defining this principle? This is a crucial question that needs to be addressed.

A recent General Comment by the CRC Committee on children’s right to be heard eloquently captures the role of this right in adoptions. The General Comment leaves no doubt about the vital role of having a child heard when “a child is to be placed for adoption”²⁴³, as well as when a child “finally will be adopted”.²⁴⁴ The application and relevance of this right is wide-ranging, in that it should be upheld even when “step-

²⁴⁰ CRC Committee, General Comment No. 7, (2005), para. 14.

²⁴¹ As above.

²⁴² As above.

²⁴³ CRC Committee, General Comment No. 12, (2009), para. 55.

²⁴⁴ As above.

parents or foster families adopt a child, although the child and the adopting parents may have already been living together for some time”.²⁴⁵

Whenever possible, States Parties are urged to inform the child about the effects of adoption.²⁴⁶ This includes providing the child, depending on his or her evolving capacities, with information about: severance of legal ties with significant others; assumption of a new name, residence, domicile, and citizenship, as the case may be; and acquisition of such rights as may be attached as conditions to the adoption order. The duty to entrench children’s right to be heard by legislation is one of the unequivocal obligations States Parties bear.²⁴⁷

A case from the European Court captures this synergy between best interests of the child and the views of the child well. In *Pini and Others v. Romania*²⁴⁸ the applicants had sought to adopt two Romanian children who had been abandoned. A court granted their applications and made an order for the children’s birth certificates to be amended. An appeal lodged by the Romanian Adoption Board against those orders was dismissed and they became final. When the applicants sought to enforce the adoption orders, PSBCV, the institution where the children had been placed in care, refused to hand over the children or their birth certificates. The PSBCV as well as the children applied to have the adoption orders quashed. They refused to leave Romania and said that they wished to remain in the care of the PSBCV. Relying on Article 8 (right to respect for family life)

²⁴⁵ As above.

²⁴⁶ CRC Committee, General Comment No. 12, (2009), para. 56.

²⁴⁷ As above. Reiterating the interconnectedness of children’s rights, particularly the four cardinal principles of the CRC and the ACRWC, it is observed that “the ‘best interests’ of the child cannot be defined without consideration of the child’s views”. CRC Committee, General Comment No. 12, (2009), para. 56.

²⁴⁸ Applications Nos. 78028/01 and 78030/01, (2001).

of the ECHR, the applicants complained that the Romanian authorities' failure to comply with final judicial decisions has deprived them of contact with their adopted children.

The Court found that there had been no violation of Article 8.²⁴⁹ Taking into account the interests of the children and in particular the opposition which they had expressed to their adoption, the Court considered that there had been no absolute obligation on the authorities to ensure that the children left the country against their will and to ignore the pending legal proceedings in which the lawfulness and merits of the initial adoption orders had been challenged. The Court found that the interests of the two girls should prevail over the interests of the prospective adoptive parents to create a new family with the children.²⁵⁰

Two important points can be distilled from this case. First, the Court's understanding and reference to the fact "that the child's interests may, depending on their nature and seriousness, override those of the parent"²⁵¹ is promising. This is so despite the fact that the Court does not recognise children's best interests in adoption to be the paramount consideration. Secondly, the importance attached to the views of the child in defining his or her best interests is laudable.²⁵²

²⁴⁹ *Pini and Others v. Romania*, (2001), para. 153.

²⁵⁰ As above.

²⁵¹ *Pini and Others v. Romania*, (2001), para. 155

²⁵² *Pini and Others v. Romania*, (2001), para. 157. The Court stated that "[i]t must be pointed out that in the instant case the children rejected the idea of joining their adoptive parents in Italy once they had reached an age at which it could reasonably be considered that their personality was sufficiently formed and they had attained the necessary maturity to express their opinion as to the surroundings in which they wished to be brought up". *Pini and Others v. Romania*, (2001), para. 157.

Finally, providing minimum ages for participation, including for adoption purposes, is a common practice within States Parties to the CRC and the ACRWC. Assessed against the provisions of the CRC and the ACRWC, such minimum ages may risk being non-compliant with the rule relating to “the evolving capacities of the child”.²⁵³ This is because the notion of “evolving capacities” cannot be ascribed to a fixed age limit. In addition, in an implicit acknowledgment that children’s levels of understanding are not uniformly linked to their biological age, the CRC and the ACRWC require that due weight be given in accordance with age and maturity.²⁵⁴ In other words, “[a]rticle 12 makes it clear that age alone cannot determine the significance of a child’s views”.²⁵⁵

3.4. CHILDREN DEPRIVED OF THEIR FAMILY ENVIRONMENT, ALTERNATIVE CARE, AND ADOPTION (ARTICLES 20, 21, AND 25 OF THE CRC; ARTICLES 24 AND 25 OF THE ACRWC)

3.4.1 The family under international law: A brief overview

The point of departure for this section is a brief discussion of the notion of “family”. The family is “the natural and fundamental unit of society and is entitled to protection by society and the State”.²⁵⁶ The family is an important structure that governs marriage practices, lineage, child bearing, death, succession, and inheritance, amongst other things.²⁵⁷ In light of this, the right to family life, which has been recognised as a

²⁵³ See Art. 5 of the CRC and Art. 9(1) of the ACRWC.

²⁵⁴ CRC Committee, General Comment No. 12, (2009), para. 29.

²⁵⁵ As above.

²⁵⁶ Art. 16(3) of UDHR. Arts. 12, 16, and 25 of the UDHR provide for the first time a recognition of the right to a family life as a basic human right. .

²⁵⁷ See Agrawal, (2004), 19.

fundamental right in international law, is enunciated in all major international instruments and conventions.²⁵⁸

Thus, while the ideal of the notion of family has obvious appeal, its content and form are not so clearly apparent, because of lack of consensus.²⁵⁹ Therefore, at this juncture, it is fitting to ask “what is a family?”.

It is known that in some countries family relations are based on a nuclear family concept while other traditions in Asia and Africa recognise diverse alternative family forms, such as polygamous, extended, and joint families.²⁶⁰ However, at the global level, the two Covenants interpret the term “family” to include “all those comprising the family as understood in the society of the State Party concerned”.²⁶¹ This is an all encompassing approach, which leaves the definition to the discretion of States Parties.

In the last decade the new concept of “family in its various forms” has been introduced by the UN.²⁶² According to Aguirre and Wolfgram, it is argued that the UN understands the concept “various forms of family” as composed of three groups: Nuclear, extended, and reorganised families.²⁶³ These groups are in turn divided into subgroups. Accordingly, the “nuclear family” subgroups include biological, social, one-parent,

²⁵⁸ See Art. 23(1) ICCPR; Art. 10(1) ICESCR. Similar provisions may be found in various regional conventions, such as: American Declaration of the Rights and Duties of Man, Art. VI: and Art. 18(1) of the ACHPR.

²⁵⁹ See Cantwell, (2006), 390. In General Comment No. 19 of the HRC: “The Committee notes that the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition...”. HRC, General Comment No. 19, (1990), para. 2.

²⁶⁰ Goonesekere, (2000), 83.

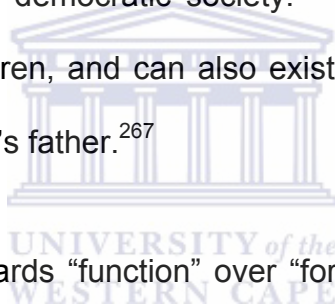
²⁶¹ See, for instance, HRC, General Comment No. 19, (1990), para. 2.

²⁶² See Report of the *Ad Hoc* Committee, (2000), 60.

²⁶³ Aguirre and Wolfgram, (2002), 36-41.

adoptive, and *in vitro*, whereas the extended family subgroups include three-generation, kinship, tribal, and polygamous families.²⁶⁴ The last group, namely “reorganised families”, is said to be composed of remarried, community living, and same-gender families.²⁶⁵ So, this redefined concept of the “family” allows for “other unions”, which do not necessarily reflect the natural family pattern based on blood and kinship.

At the regional level, in Europe, Article 8 of the ECHR establishes a fundamental right to respect for private life and family life. While the possibility to interfere with these rights exists, for it to be legal, it should not be applied arbitrarily, have a legitimate aim, and should also be necessary in a democratic society.²⁶⁶ The notion of family is said to include spouses and their children, and can also exist between a non-married mother and her child, and with the child’s father.²⁶⁷



The preference expressed towards “function” over “form” in constructing the notion of family is appealing to those who advocate, for example, the case for sexual minorities. In arguing the case for the rights of gays and lesbians to be eligible to adopt, Tobin and Mcnair are in full agreement that the family can still remain the fundamental unit of society and the optimal place within which all children should be raised and provided

²⁶⁴ As above.

²⁶⁵ As above.

²⁶⁶ See, generally, Danelius, (2004) for a discussion of the principles of the European Court and human rights regarding family life.

²⁶⁷ *Johnston et al v. Ireland*, A112, para 55. See too, *Marckx v Belgium*, A 31, para 31. It is not clear if it extends, for instance, to child headed households, which, in any case, is a concept fairly alien to most parts of the European continent.

with care.²⁶⁸ However, they contend that the effective functioning of this unit is not to be assessed by reference to its legal structure or the sexual orientation of its members.²⁶⁹

3.4.2 Children deprived of a family environment and alternative care under the CRC and the ACRWC

3.4.2.1 What is a “family environment”?

The recognition under international law that children without a family and deprived of parental care need special protection dates back at least to 1924. Among the five principles of the 1924 Geneva Declaration on the Rights of the Child, “[t]he orphan and the waif must be sheltered and succoured” is one example.²⁷⁰ The 1959 Declaration also stipulated a comparable provision in Article 6.²⁷¹

A similar position is echoed by the CRC and the ACRWC. Both of these treaties clearly acknowledge the primary role of the family and parents in the care and protection of children, and the obligation of the State to help them in carrying out these duties. Among the principles that underlie the CRC, in the context of family environment, paragraphs 5 and 6 of its Preamble come to the fore. Paragraphs 5 and 6 read in part as follows:

Convinced that the family, as the fundamental group of society ... should be afforded the necessary protection and assistance ...,

²⁶⁸ Tobin and McNair, (2009), 113.

²⁶⁹ As above. To substantiate their point further, they quote Nevins in the Canadian case of *Re K 5* who observed that it is the capacity of its members to ensure the “healthy development of a child through the provision a stable, consistent, warm and responsive relationship between a child and his or her care giver” that is of central concern. 5 (1995) 15 RFL (4th) 129 (Canada) para. 143.

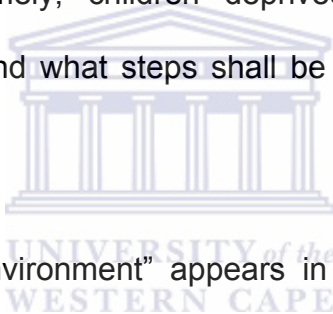
²⁷⁰ The 1924 Geneva Declaration of the Rights of the Child (192 Declaration).

²⁷¹ Principle 6 of the 1959 Declaration.

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,²⁷²

These paragraphs add weight to the rule that the preferred environment for the growth and wellbeing of the child is the family environment.

However, these paragraphs are not alone in evincing support of the family. Apart from the Preamble, there are 19 other Articles in the CRC²⁷³ that expressly acknowledge the role and importance of parents and the family in the promotion and protection of children's rights. Nonetheless, Article 20 of the CRC and Article 25 of the ACRWC entrench an exception - namely, children deprived of their family environment temporarily or permanently - and what steps shall be taken to provide these children with alternative care.²⁷⁴



The specific phrase “family environment” appears in Article 20(1) of the CRC, and subsequently in the ACRWC;²⁷⁵ the UN Guidelines for the Prevention of Juvenile Delinquency;²⁷⁶ and the Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children.²⁷⁷

It transpires from the CRC *travaux preparatoires* that during the drafting of Article 20 of the CRC terms, such as, “biological family”, “natural family environment”, and “normal

²⁷² Para. 5 and 6 of its Preamble.

²⁷³ Arts. 2,3,5,7,8,9,10,11,14,16,18,20,21,22,23,24,27,37, and 40.

²⁷⁴ Art. 20(1) of the CRC. Generally, the rights of the child, in international human rights law, are to be viewed independently from his or her membership of a family environment. Nevertheless, the above treaties indicate that the rights (and interests) of the child are often best protected by maintaining the child within his or her family. Breen, (2003), 756.

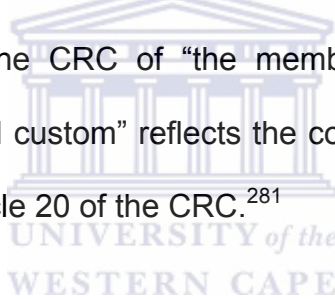
²⁷⁵ Preamble, Arts. 23, 3, 25, and 2(a).

²⁷⁶ (1990), para. 14.

²⁷⁷ (1990), para. 18.

family environment”, were proposed.²⁷⁸ Ultimately, according to Cantwell and Holzscheiter, the final decision to accept the least prescriptive term, “his or her family environment”, suggests an attempt to look beyond conventional parental care.²⁷⁹

Detrick argues that other provisions of the CRC, notably Article 5, could be of some assistance.²⁸⁰ Article 5 of the CRC provides for “the responsibilities, rights and duties of *parents or, where applicable, the members of the extended family or community as provided for by local custom*” (emphasis mine)], and is interpreted to hint at the definition of a “family” under the CRC. Citing the *Technical Review of the Text of the Draft Convention on the Rights of the Child* as further support, Detrick concludes that the inclusion in Article 5 of the CRC of “the members of the extended family or community as provided by local custom” reflects the context of the use of the notion of “family environment” under Article 20 of the CRC.²⁸¹



This position is congruent with the much more flexible definition of “family” that seems to be endorsed by the CRC Committee. Reference to the Committee’s observation during its General Day of Discussion on the “Role of the Family in the Promotion of the Rights of the Child” can testify to this. The Committee observed that:

... When considering the family environment the Convention reflects different family structures arising from the various cultural patterns and emerging familial relationships. In this regard the Convention refers to the extended family and the community and applies to

²⁷⁸ Cantwell and Holzscheiter, (2008), 30.

²⁷⁹ Cantwell and Holzscheiter (2008), 32 also citing the *Travaux Preparatoires* 56-59, (1982), reproduced in Detrick, (ed.), (1992), 298.

²⁸⁰ Detrick, (1996), 98.

²⁸¹ As above. The reference to “local custom” in Art. 5 of the CRC has been understood to be intended to cover the wide range of family relationships that exist in a multi-cultural world. See Goonesekere, (1998), 102. Art. 5 has been read as an attempt by the CRC to generally extend the definition of the family. See Rios-Kohn, (1998), 146.

situations of nuclear family, separated parents, single parent family, common law family and adoptive family.²⁸²

From this, the inference has been made that Article 5 of the CRC is intended to serve as an “umbrella” provision.²⁸³ In fact, commentators like Todres explicitly refer to Article 5 as “one of the umbrella provisions of the CRC” similar to the four cardinal principles.²⁸⁴ However, this inference is not acceptable to some observers. Prime amongst these is Cantwell.²⁸⁵ Some of the considerations that are said to challenge the validity of this inference include: that there is no reference in the *travaux preparatoires* which supports this inference; that Article 5 is not one of the four cardinal principles of the CRC; Articles, such as, 3,7,9 and 18 of the CRC, show that rights and duties are to be limited to persons with legal responsibility towards the child; and that the role of the range of persons mentioned in Article 5 of the CRC applies only to providing “appropriate direction and guidance” for children and is not necessarily applicable as far as their general care is concerned.²⁸⁶ It is also pointed out that while the role and significance of parents and the family enjoy reference in 19 Articles of the CRC, the treaty explicitly mentions the wider family as such only four times.²⁸⁷ In a rather vague manner, “members of the (applicant’s) family”²⁸⁸ and “relatives”²⁸⁹ occur in the CRC.

²⁸² CRC Committee, General Day of Discussion, (1994), para. 2.1

²⁸³ See Todres, (2006), 21.

²⁸⁴ Todres, (2006), 21. Elevating Article 5 of the CRC to an “umbrella” provision connotes that its application is of an overarching nature, similar to the four cardinal principles, which should be read together with every right contained in the Convention. See Abramson, (2008) 66, on what is meant by “umbrella” provision.

²⁸⁵ See Cantwell, (2006), 389-400; See too Cantwell and Holzscheiter (2008), 34-35.

²⁸⁶ Cantwell and Holzscheiter, (2008), 34-35

²⁸⁷ “Family members” (Art 2(2)); “members of the extended family” (Art 5); “another member of the family” (Art 9(4)); and “other members of the family” (Art 22)

²⁸⁸ Art. 10(1) of the CRC.

²⁸⁹ Art. 21 of the CRC.

It is submitted that, strictly speaking, Article 5 of the CRC is not an umbrella provision. The CRC Committee has not given it such a position. There is also nothing to aid one to establish that the drafters of the CRC intended it to be such. Nonetheless, Article 5 of the CRC generally sheds light on the approach to be adopted in interpreting other related provisions - as it embodies a spirit of cultural sensitivity and inclusiveness.²⁹⁰ It is submitted that, upon closer analysis, the validity of some of the arguments that are advanced to challenge the applicability of a flexible and wide definition of “family” in the context of “family environment” is highly questionable.

The CRC Committee has reiterated a flexible construction of the notion of “family” in 2006, similar to the one proposed in 1994, in its recommendations on the Day of General Discussion under the theme “Children Without Parental Care”.²⁹¹ The only difference between the two is the explicit addition of “re-constructed family” and “joint family” as two of the various forms of family to which the Convention refers.²⁹²

Further support for this approach can be found in General Comment No 7 of the CRC Committee which provides that the Committee:

... recognizes that ‘family’ ... refers to a variety of arrangements that can provide for young children’s care, nurturance and development, including the nuclear family, the extended family, and other traditional and modern community-based arrangements, provided these are consistent with children’s rights and best interests.²⁹³

The fact that the CRC reiterated a broader construction of the notion of a family in relation to different themes lends support to the argument that the range of persons

²⁹⁰ Cantwell and Holzscheiter, (2008), 35.

²⁹¹ CRC Committee, Day of General Discussion, (2005), paras. 636-689.

²⁹² As above.

²⁹³ CRC Committee, General Comment No. 7, (2003), para. 15.

mentioned in Article 5 of the CRC could apply beyond the context of providing “appropriate direction and guidance” for children.²⁹⁴

In the context of the ACRWC, a provision corresponding to Article 5 of the CRC is not present.²⁹⁵ However, recognition of the role of the extended family and of communities in the care of children is discernible. For instance, Article 20 of the ACRWC indicates “[p]arents or other persons responsible for the child” as having “the primary responsibility for the *upbringing and development* of the child” (emphasis mine).²⁹⁶ This obligation on parents as well as “other persons responsible for the child” goes beyond the obligation under Article 5 of the CRC.

An interpretation of the ACRWC provisions in the spirit of “the virtues of their (African) cultural heritage, historical background and the values of ...African civilisation”²⁹⁷ does indeed recognise the fact that the extended family and other persons often have a role to care for a child. In such circumstances, this kind of care could qualify as being a “family environment”.

²⁹⁴ The role of grandparents in caring for children has drawn the attention of the CRC Committee. In this regard, in its recommendation on the Day of General Discussion on Children without parental care”, the Committee expressed its view that:

As regards different family structures, the Committee wishes to pay attention to the concept of the extended family and, particularly, to the possible role of the grandparents in the child-rearing responsibilities which is very rarely acknowledged in domestic laws and practices. The Committee encourages the States parties to take a more active approach to this issue by adopting appropriate measures to support the role of the grandparents in child-rearing.

CRC Committee, Children without parental care, (2005), para. 648.

²⁹⁵ Though it is to be noted that Art. 9 of the ACRWC resembles Art. 5 of the CRC. Art 9(2) provides in full that “[p]arents, and where applicable, legal guardians shall have a duty to provide guidance and direction in the exercise of these rights having regard to the evolving capacities, and best interests of the child”.

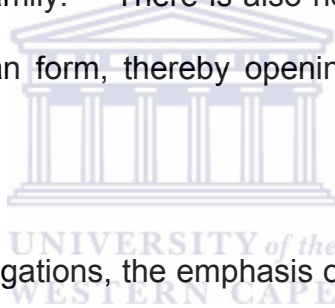
²⁹⁶ Although Art. 20 of the ACRWC is titled “Parental Responsibilities”, its provisions apply beyond parents.

²⁹⁷ Para. 5 of the Preamble to the ACRWC.

3.4.2.2 Advantages of the reference to a “family environment”

The reference to a “family environment” has a number of advantages for the protection of children’s rights. Zilliox draws attention to the fact that what is offered by Article 20 of the CRC, and what it protects, “does not necessarily fall into the category of civil or political rights or in the category of economic, social, and cultural rights”.²⁹⁸ In addition, the innovative feature of this Article is apparent in its reference to family, and not parents. This has been observed to be an important distinction.²⁹⁹

Notably, the use of the language of “family environment” has managed to bypass dispute about the nature of a family.³⁰⁰ There is also no doubt that the choice of words emphasises function rather than form, thereby opening the way for its application in various cultures.³⁰¹



From the viewpoint of State obligations, the emphasis on family environment in contrast to a family helps to create a legally enforceable right. While it is impossible to expect government to create families for every child, providing a family environment that is protective of the functional relationships most important to the child seems pragmatic.

3.4.2.3 Child-headed households as a “family environment”

Though it is not an entirely new phenomenon, the situation of child-headed households had not been singled out for special attention during the drafting of the CRC.³⁰² With the

²⁹⁸ Zilliox, (2006), 376.

²⁹⁹ Hodgkin and Newell, (2007), 278.

³⁰⁰ Kaufman, (1994), 4. It is a way of providing a wider protection too, as relationships in a family environment are protected irrespective of whether they embody a particular family structure.

³⁰¹ As above.

³⁰² Cantwell and Holzscheiter, (2008), 41.

advent of the HIV/AIDS pandemic, however, the presence of child-headed households has surfaced increasingly in the last decade.³⁰³ The recognition of child-headed households as constituting a family environment is still considered controversial in some quarters. Admittedly, such a recognition is not without its risks.

Nonetheless, the fact that remaining in child-headed households often corresponds best to the wishes of the children concerned is gaining ground.³⁰⁴ As a result, in some countries, efforts are being made to seek ways of securing the conditions for their adequate protection in the community.³⁰⁵ These efforts can be juxtaposed with attempts to bring these children into conventional and structured care environments. A country that stands out in this regard is South Africa.³⁰⁶

It could be argued that the CRC Committee does not bar the possibility of recognising child-headed households as constituting a family environment. In fact, some of the comments that are made by the CRC Committee seem to support such recognition. For instance, General Comment No 3 recommends that “[o]rphans are best protected and cared for when efforts are made to enable siblings to remain together...”.³⁰⁷ The State is under an obligation to make efforts that would strengthen family ties.³⁰⁸ The recognition of child-headed households as a family environment is also implied in the CRC Committee’s Concluding Observations to the Republic of the Congo. In this particular

³⁰³ There is disagreement on the definition of a “child-headed household”.

³⁰⁴ Cantwell, (2006), 8. See Hodgkin and Newell, (2007), 278, briefly discussing Art. 4 of the 1986 Declaration and giving the impression that placement in (and by implication, recognition of) child-headed households falls within the category “care by relatives of the child’s parents”.

³⁰⁵ Cantwell, (2006), 8.

³⁰⁶ For a discussion of some of the issues pertaining to child-headed households, see generally Bessler, (2008), 33; Bonthuys, (2008), 333; Nicholson, (2008), 407; Sloth-Nielsen, (2005).

³⁰⁷ CRC Committee, General Comment No. 3, (2003), para. 34,

³⁰⁸ CRC Committee, Concluding Observations: Sierra Leone, (2008), para. 49.

case, the CRC Committee recommended the State Party to provide “economic and psychosocial support to children who head families and act as parents so that they may continue their education, when necessary”.³⁰⁹

At times a child-headed household set-up could be the only way of keeping siblings together. Even when child-headed households are recognised as a family (and which, therefore, does not necessarily imply deprivation of a family environment), it is important that “States parties are encouraged to provide support, financial and otherwise, when necessary”.³¹⁰

3.4.2.4 Other elements of Article 20 of the CRC and Article 25 of the ACRWC

Apart from State actions, such as deportation and imprisonment, the use of the word “deprived” in Article 20(1) of the CRC and Article 25(1) of the ACRWC encompasses other scenarios, such as, poverty and illness³¹¹, which could deprive a child of a meaningful family environment.³¹² Abandonment and displacement are also other common reasons that could deprive children of their family environment.³¹³

³⁰⁹ CRC Committee, Concluding Observations: The Republic of the Congo, (2006), para. 47(b).

³¹⁰ CRC Committee, General Comment No. 3, (2003), para. 34.

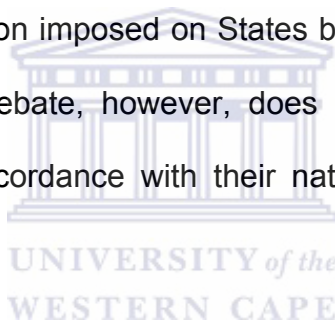
³¹¹ In this regard, there is merit in pointing out that Art 23(4) of the Convention on the Rights of Persons with Disabilities, adopted in December 2006 entrenches that “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents”.

³¹² During the drafting of this provision, it was pointed out by a member of the Working Group that: “...acknowledgement must be made of the fact that imprisonment or other similar judicial or administrative sanction are not the only reasons that would prevent children from receiving appropriate care from their parents....”. It was further underscored that to provide only “...judicial or administrative sanctions as reasons for children being deprived of parental care would thus create a false emphasis”. See Considerations, (1982), para. 62.

³¹³ Hodgkin and Newell, (2007), 277.

It is to be noted that States Parties' obligation to provide alternative care is a strong one. The combination of the words "shall" and "ensure" in Article 20(2) of the CRC and Article 25(2)(a) of the ACRWC creates a high degree of obligation on States Parties to provide alternative care to children deprived of their families.³¹⁴

The mention in Article 20(2) of the CRC that alternative care is to be provided "in accordance with their national laws" may be read to limit the nature of the States Parties' obligation. However, this is not the case. A closer look at the provision indicates that the phrase "in accordance with their national laws" does not refer to the higher standard of State Party obligation imposed on States but to the type of alternative care to be provided.³¹⁵ A similar debate, however, does not arise in the context of the ACRWC as the phrase "in accordance with their national laws" does not appear in Article 25 of the ACRWC.



It is also worth observing that the words "alternative care" are not employed by the ACRWC. Rather, the ACRWC speaks of "alternative *family* care" (emphasis mine).³¹⁶ It would be wrong to suggest that "alternative care" and "alternative family care" are synonymous. The implications of "alternative family care" are discussed in Chapter 4. In addition, other elements of Article 20 of the CRC and Article 25 of the ACRWC are

³¹⁴ See Cohen and Davidson, (1990), 38 (discussing how the combination of the words "shall" and "ensure" imposes a higher level of obligation).

³¹⁵ Detrick, (1999), 336. It is to be noted that the discussion during the drafting of this provision seems to support this position. See, generally, Considerations, (1989), 339 - 348.

³¹⁶ Art. 25 of the ACRWC.

highlighted at a later stage, in particular in the Chapter dealing with the principle of subsidiarity.³¹⁷

Finally, the recognition in Article 25 of the CRC of the need for periodic review of placement is also relevant, since many children potentially eligible for adoption live in orphanages or other institutions, where they very often languish or are “forgotten” until adulthood. A periodic review of the child’s placement will ensure that, at the earliest possible time, decisions are taken by parents, guardians or the competent authorities relative to the child’s reunification with his or her birth family or extended family, or permanent care by an adoptive family.³¹⁸



3.4.3 Intercountry adoption

3.4.3.1 Intercountry adoption: General introduction

During the drafting of the CRC one of the most controversial areas of negotiation was adoption.³¹⁹ While it started with an obligation on States Parties to “facilitate” adoption,³²⁰ the end product does not mandate that the States parties take measures to facilitate the adoption of children.³²¹ Rather, Article 21 entails an obligation on States Parties to make the best interests of the child “the paramount consideration”³²², and to regulate adoption if it is recognised as an alternative means of care.

³¹⁷ Chapter 5 below.

³¹⁸ UNICEF Innocenti Digest, (1998), 5.

³¹⁹ See Cohen, (1989), 1450. The controversy mainly centered on the objection of Islamic delegations based upon non-recognition of adoption in Islamic religion.

³²⁰ UNICEF Innocenti Digest, (1998), 5.

³²¹ Le Blanc, (1995), 120.

³²² See section 3.3.3 above on a discussion of the best interests of the child principle in the context of intercountry adoption.

Article 21 of the CRC provides that:

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
- (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
- (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.³²³

Although Article 24 of the ACRWC is very similar to Article 21 of the CRC, there is merit in quoting it in full as it is a provision that is central to this thesis. Article 24 of the ACRWC provides that:

States Parties which recognize the system of adoption shall ensure that the best interest of the child shall be the paramount consideration and they shall:

- (a) establish competent authorities to determine matters of adoption and ensure that the adoption is carried out in conformity with applicable laws and procedures and on the basis of all relevant and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and guardians and that, if necessary, the appropriate persons concerned have given their informed consent to the adoption on the basis of appropriate counselling;

³²³

Art. 21 of CRC.

- (b) recognize that inter-country adoption in those States who have ratified or adhered to the International Convention on the Rights of the Child or this Charter, may, as the last resort, be considered as an alternative means of a child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- (c) ensure that the child affected by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- (d) take all appropriate measures to ensure that in inter-country adoption, the placement does not result in trafficking or improper financial gain for those who try to adopt a child;
- (e) promote, where appropriate, the objectives of this Article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework to ensure that the placement of the child in another country is carried out by competent authorities or organs;
- (f) establish a machinery to monitor the well-being of the adopted child.³²⁴

The following sections shed some light on the elements of Article 21 of the CRC and Article 24 of the ACRWC. However, since the majority of the discussions in this study coalesce around these provisions and subsequent chapters deconstruct in detail the elements of these provisions,³²⁵ a relatively rudimentary approach is taken in the following sections. In this regard, since the principle of subsidiarity and adoptability are issues with dedicated chapters below, their discussion is totally deferred for now.

3.4.3.2 Preliminary considerations

In the interest of clarity, it is apposite to investigate at the outset three interrelated questions pertaining to intercountry adoption. The first issue for investigation is whether there is an international law obligation to provide for intercountry adoption as an

³²⁴ Art 24 of the ACRWC.

³²⁵ See, for instance, Chapter 4 on adoptability, Chapter 5 on the principle of subsidiarity, and Chapter 6 on improper financial gains, trafficking and other illicit activities pertaining to adoption.

alternative means of care. The second and third, which are closely related, look at whether there is a right to be adopted and whether there is a right to adopt, respectively.

3.4.3.2.1 Is there an obligation under international law to provide for intercountry adoption as an alternative means of care?

It appears that the answer to this question is no.

The majority of the principles and rights provided in the CRC and the ACRWC are not a matter of discretion for States Parties.³²⁶ However, the wording of Article 21 of the CRC and Article 24 of the ACRWC contains no mandate requiring States to permit adoption, either nationally or internationally.³²⁷ Indeed, Article 21 of the CRC and Article 24 of the ACRWC reflect the exception, in giving states the option to have adoption and intercountry adoption as alternative means of care.

Contrary to popular belief, no country, by virtue of it being State Party to the CRC and the ACRWC, is under an automatic international obligation to allow intercountry adoption as a means of alternative care.³²⁸ A close reading of the carefully crafted wording of Article 21 of the CRC (as well as that of Article 24 of the ACRWC) reveals the opposite. The caveat to Article 21 provides for “States Parties that *recognize and/or permit* the system of adoption ...” (emphasis mine), while Article 24 of the ACRWC speaks of “State Parties *which recognise* the system of adoption ...” (emphasis mine). The *travaux préparatoires* to the CRC indicate that this caveat was added during the

³²⁶ Most provisions require states to “ensure”, “undertake”, “recognize”, “respect”...

³²⁷ LeBlanc, (1995), 143-44.

³²⁸ See, for instance, Dillon (2003), 207.

negotiations, in response to interventions by a number of Muslim countries (particularly Bangladesh), since Islamic law does not recognise the concept of an adoption which disguises the true parentage and blood relationships of a child.³²⁹ The “recognize and/or permit” phrase used is also not redundant. Countries that might not generally recognise, but do permit adoption, are those States, for instance, that allow the practice for non-Muslims within their jurisdiction. A case in point is Lebanon, which, while not recognising adoption for Muslims, allows non-Muslims to adopt other non-Muslims within its jurisdiction.³³⁰

Furthermore, Article 21 (b) of the CRC has the same caveat where it speaks of the fact that “intercountry adoption may be considered as an alternative means of child’s care ...”. The wording deliberately falls short of saying that countries must consider intercountry adoption as one of the options for the care for children without families.³³¹

If one has regard to State practice on the issue, the reality emerges that there are a number of countries in the world that are States Parties to the CRC but still do not allow intercountry adoption. Of course, the classic examples are Islamic countries that adhere to *Sharia* law. However, non-Islamic countries, such as Korea and Myanmar, are also

³²⁹ *Travaux Préparatoires*, 16. The *Quranic* edict that has been interpreted to prohibit adoption reads: ‘ ... Nor hath He made those whom ye claim to be your sons. This is a saying of your mouth ... Proclaim their real parentage. That will be more equitable in the sight of God. And if ye know not their fathers, then (proclaim them) your brethren in faith and your clients. (33:4/5)’. In Algeria, for instance, the Family Law 84/1984 (promulgated 09 June 1984) dealing with inheritance, guardianship, maintenance, marriage, wills, gifts, and other related issues expressly provides that ‘Adoption shall be forbidden, under the *Sharia* and the law’ (Art 46). In a similar fashion, Article 83 of Decree No 1/57/379 which forms part of The Code of Personal Status and Succession of 1957 entrenches that “[a]doption as understood customarily is void and shall produce no legal effect. Adoption for the purpose of rewarding or bequeathing, known as according a person the status of one’s child, shall not establish a parentage, and shall be subject to the provision of the will”.

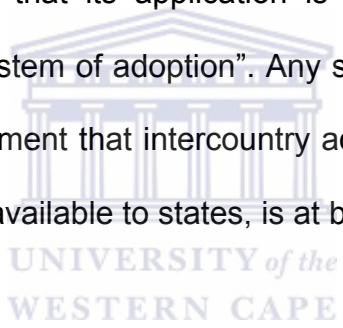
³³⁰ Hodgkin and Newell , (2002), 296.

³³¹ As above.

examples. In Africa, it can be mentioned that while Nigeria allows adoption, its 2003 Children's Rights Act proscribes intercountry adoption.³³²

Finally, Article 20 of the CRC, in listing the various alternative forms of care for children deprived of their family environment, highlights that “[s]uch care could include, inter alia, foster placement, *kafalah*³³³ of Islamic law, adoption ...”.³³⁴ The use of the phrase “could include” is yet more proof that intercountry adoption is not imposed by international law.

This leads to one conclusion that the provision made for intercountry adoption in Article 21 of the CRC is optional, in that its application is limited to those countries that “recognize and/or permit the system of adoption”. Any support that international human rights law may lend to the argument that intercountry adoption should necessarily form part of alternative care options available to states, is at best tenuous.³³⁵



3.4.3.2.2 Is there a right to be adopted under international law?

Some have articulated a child's right to be adopted under domestic law. In “Waiting for loving: The child's fundamental right to adoption”,³³⁶ Woodhouse argues that adoption constitutes a fundamental family relationship and is not simply a privilege created by

³³² See Initial and First Periodic Report of Nigeria to the African Committee available at <www.africa-union.org>.

³³³ *Kafalah* under Islamic Law entails the acceptance of children without families in what is tantamount to a permanent form of foster care, but without the children concerned taking on the family name or enjoying the right to inherit from the family with which they are placed. See Hodgkin and Newell, (2002), 295–296; Assim, (2009).

³³⁴ Art 20(3) of CRC.

³³⁵ This position does not necessarily bar potentially convincing arguments in favour of intercountry adoption. For instance, can a country validly decline intercountry adoption when the country maintains large numbers of children in institutions? Nonetheless, as the law stands, as opposed to what the law ought to be, there is no obligation under international law to allow intercountry adoption as an alternative means of care.

³³⁶ Woodhouse, (2005), 297.

state law.³³⁷ By comparing adoption to marriage, she contends that adoption is as crucial to children seeking parents as marriage is to adults seeking partners.³³⁸ She employs three major premises for her conclusions: first, that adoption is a basic family relationship and not a state-created privilege;³³⁹ secondly, that adoption is no less fundamental because it is based on choice rather than blood ties;³⁴⁰ and thirdly, that children, like adults, have a fundamental right to form a family.³⁴¹ Without going into the validity of her arguments, suffice it to mention that her position is based on domestic statutes and case law, and does not necessarily purport to reflect a child's right to be adopted under international law.³⁴²

There is no doubt, generally speaking, that both the CRC and the ACRWC seek to place a children definitively deprived of their family environment with a family, in preference to in an institution.³⁴³ This, however, can only happen when possible and in the best interests of the child. As already discussed above in relation to "family environment", there is no right to a family or a family environment under international law.³⁴⁴ Van Bueren maintains that "[a]doption, quite rightly, is not regarded as the entitlement of a child to a family life".³⁴⁵ In other words, the provisions of the CRC and the ACRWC do not articulate a child's right to be adopted since children's right to be adopted is directly related to children's "right to a family".

³³⁷ Woodhouse, (2005), 307,328

³³⁸ As above.

³³⁹ Woodhouse, (2005), 308-316

³⁴⁰ Woodhouse, (2005), 316-319

³⁴¹ Woodhouse, (2005), 319-322

³⁴² However, for responses to her position, see for instance, Duncan, (2005), 345.


³⁴³ Van Bueren, (1995), 94.

³⁴⁴ Van Bueren is of the opinion that this perhaps explains the absence of any specific reference to adoption or fostering in either of the two Declarations on the Rights of the Child which preceded the CRC. Van Bueren, (1995), 94.

³⁴⁵ Van Bueren, (1995), 125.

The submission that there is a right to a family, however, should be considered carefully. Where an adoption system is set in place by a State Party, children who are deprived of their family environment and for whom adoption is in their best interests, should have a right of access to the system without discrimination.³⁴⁶ In the meantime, though a child does not have a right to a family life, hence to be adopted, a child has the right to respect for his or her existing family life,³⁴⁷ for instance, once the child is adopted.

In sum, there is no right to be adopted under international law. This is partly so because there is no right to a family in the CRC and the ACRWC. Moreover, it is directly related to the fact that there is no obligation under international law to provide for intercountry adoption as an alternative means of care.



3.4.3.2.3 Is there a right to adopt under international law?

The question “is there a right to adopt?” is a loaded one.³⁴⁸ The question could imply a claim on the basis of equality before the law that if a certain group of persons are allowed to adopt, other groups should also be treated equally and be allowed to adopt. It could also imply an obligation on the part of the State to provide interested parties with an adoptive child or a right that one be authorised to adopt, should an adoptive child become available. Meanwhile, does it also mean a right to adopt a specific child with whom one already has *de facto* parent-child bonds?³⁴⁹

³⁴⁶ See discussion above in section 3.3.4 on non-discrimination.

³⁴⁷ Van Bueren, (1995), 94. See, too, Art. 16 of the CRC on non-interference in family life.

³⁴⁸ Letsas, (2008), 1.

³⁴⁹ Letsas, (2008), 1.

If one uses the language of rights in the context of “a right to adopt”, it means acknowledging a human right to adopt as a question of entitlement, and a commensurate responsibility to ensure its effective enjoyment. Such an approach could indeed come into conflict with children’s best interests, since the purpose of adoption is to provide the best possible parents for children, not to provide children for adults who desire to parent them. As a result, adoption policy and practice guided by the best interests of the child does not recognise a “right to adopt”.³⁵⁰ This position is further demonstrated by the experience from Europe.

In Europe, for instance, while a legal family created through adoption is protected under paragraph 1 of Article 8 of the ECHR, a duty does not flow from this Article for States Parties to grant a person the status of adoptive parent or adoptive child.³⁵¹ In *X v Belgium and the Netherlands* it was acknowledged that while the right to found a family is absolute and that the State cannot interfere with the exercise of this right, equally, it has no legal obligation to provide the services that may be necessary for the right to be exercised.³⁵² In other words, it is argued that the right to respect for family life presupposes the existence of a family and does not safeguard the mere desire to found a family.³⁵³ As a result, it was maintained that unmarried persons cannot claim a right to adopt.³⁵⁴

³⁵⁰ Adult assertions of a right to adopt reveal a fundamental misunderstanding of the most basic principle of adoption: the whole purpose of adoption is to serve the best interests of children.

³⁵¹ *Di Lazzaro v. Italy*, no. 31924/96, Commission decision of 10 July 1997, DR 90, 134 (139).

³⁵² *X v Belgium and the Netherlands*, no. 6482/74, Commission decision of 10 July 1975, DR 7, 77.

³⁵³ *Marckx v. Belgium*, judgment of 13 June 1979, Series A No. 31, para. 31.

³⁵⁴ As above.

The “right to adopt” is often the language invoked by gays and lesbians in order to tackle discrimination on the basis of sexual orientation in relation to adoption. This would mean that, insofar as a straight couple has the “right” to adopt a child, a homosexual couple should have that same right. In other words, they argue that States which have systems for adoption should neither implicitly nor directly prohibit homosexuals from adopting simply because of their sexual orientation. Even in this context, however, the proper terminology is not “the right to adopt” but rather “the right to be assessed as a prospective adoptive parent”.

In the final analysis, irrespective of the various implications that the right to adopt conveys, in international law, there is no right to adopt. This conclusion is further bolstered by the foregoing sections that there is neither an obligation under international law to provide for intercountry adoption as an alternative means of care, nor a right to be adopted.

3.4.3.3 Substantive provisions of the CRC and the ACRWC on intercountry adoption

As quoted above, Article 21 of the CRC and Article 24 of the ACRWC deal with a number of substantive issues that pertain to intercountry adoption. These provisions deal with adoptability, the principle of subsidiarity, and illicit activities in intercountry adoption, such as, trafficking and improper financial gains. All these issues are discussed in subsequent Chapters and will not form part of the discussion here.

Other issues that Article 21 of the CRC and Article 24 of the ACRWC address are the provision of equivalent standards for domestic and intercountry adoption; post-adoption

follow-up; and the conclusion of bilateral or multilateral agreements to regulate intercountry adoption. The following discussion focuses on these three issues.

3.4.3.3.1 Equivalent standards for domestic and intercountry adoption

One of the notable provisions of Article 21 of the CRC and Article 24 of the ACRWC is the obligation imposed on States Parties that adoption laws should grant a child who is the subject of intercountry adoption the same level of safeguards as are available for domestic adoptions.³⁵⁵ This provision draws its inspiration from the 1986 UN Declaration.³⁵⁶

There seems to be no consensus on the purpose of this provision. Padilla, for instance, maintains that “[b]ecause incountry adoption laws in many western countries often serve to prohibit adoption for eligible parents, this provision could serve to equally limit intercountry adoption” under the guise of providing equivalent standards for domestic and intercountry adoption.³⁵⁷ Padilla cites the comment of one person to substantiate her interpretation of the provision.³⁵⁸

However, a reasonable construction of this provision proffers that, just as in domestic adoption, intercountry adoption should benefit from similar safeguards and be authorised when in the best interests of the child.³⁵⁹ The involvement of competent

³⁵⁵ Detrick, (1999), 351.

³⁵⁶ As above.

³⁵⁷ Padilla, (1993), 842.

³⁵⁸ Padilla, (1993), 842 footnote 215 citing that Moore, (1992), 8 where “[o]ne British commentator noted that if intercountry adoption were subject to the same standards as adoption within Britain, the process would become “interminable and therefore impracticable”.

³⁵⁹ Hodgkin and Newell, (2007), 299.

authorities in the determination of the best interests of the child is crucial, and this should be done on the basis of proper investigation and information and with proper consents having been obtained.³⁶⁰

It is questionable whether the safeguards available for domestic adoption would achieve a similar level of guarantee in promoting the best interests of children in intercountry adoption.³⁶¹ For instance, safeguards often necessary in intercountry adoption, but not recognised in the case of domestic adoption, include, respecting the subsidiarity principle and upholding the “no initial contact” rule. It is submitted that, if the phrase “...standards *equivalent* to...” is read to mean “comparable to”, and not “the same as”, then the possibility of providing for better safeguards for intercountry adoption seems to be accommodated within the text of the provision.



3.4.3.3.2 Post- adoption follow-up

Some detractors of adoption deplore the fact that once a child leaves his or her state of origin, the possibility of a follow-up is lost. They use this as an argument for a total ban on intercountry adoption. A contrary reading of their position seems to suggest that if post-adoption procedures are put in place, the possibility of upholding the best interests of adopted children could be facilitated. Post-adoption services consist of providing for a period of time for follow-up reports on the situation of adopted children.

Article 24(f) of the ACRWC requires a follow-up once adoption takes place, by stating that “State Parties shall ‘establish a machinery to monitor the well-being of the adopted

³⁶⁰ As above.

³⁶¹ Vite and Boechat, (2008), 49.

child”, a requirement that is not apparent in the CRC. This provision reflects recognition of the fact that adoption is not a once-off event but a process. Article 24(f) of the ACRWC is relevant in the context of both domestic and intercountry adoption. This can be deciphered from the use of the word “adopted child”.³⁶² Article 24(f) of the ACRWC should be interpreted to include the conclusion of international cooperation agreements or treaties relating to monitoring and enforcing the Charter’s provisions.³⁶³ Understood in this manner, it could go a long way to ensuring that States exercise a continuing duty regarding the welfare of the adopted child.

3.4.3.3.3 Conclusion of bilateral/multilateral agreements

In order to regulate intercountry adoption, one option available to countries is to enter into co-operation agreements. Both the CRC and the ACRWC suggest this option for States.³⁶⁴ According to LeBlanc, the need for bilateral or multilateral agreements flows from the fact that Article 21 of the CRC addresses intercountry adoption in a rudimentary manner.³⁶⁵ As a result, the drafters agreed to leave most of the important work in this field to future negotiations.³⁶⁶

A few African countries have entered into bilateral agreements of this nature. Ethiopia’s bilateral agreement with Australia³⁶⁷ sought to establish a system of cooperation between the two countries that shall ensure the prevention, or the total elimination, of

³⁶² Art 24(f) of the ACRWC.
³⁶³ See Gose , (2002), 111-112
³⁶⁴ See Art. 21(e) of the CRC.
³⁶⁵ LeBlanc, (1995), 143.
³⁶⁶ As above.
³⁶⁷ Parliament of Australia, (2005).

the abduction, trafficking, or sale, of children and adolescents. In 2006, a bilateral agreement between Morocco and Spain was expected.³⁶⁸

3.5 CHILDREN'S RIGHTS TO IDENTITY, PRIVACY, AND RIGHTS AGAINST EXPLOITATION

3.5.1 Introduction

This section examines rights not discussed above that have an indirect bearing upon intercountry adoption. These include the right to a name and birth registration, the right to freedom of religion and the right against child trafficking. Issues pertaining to cultural identity, freedom of religion and the right to privacy are also explored.

3.5.2 Children's right to identity and adoptions: Birth registration, right to a name and nationality, and the right to know and be cared for by one's parents

As Van Bueren put it: "An individual's identity is at root an acknowledgement of a person's existence; it is that which makes a person visible in society".³⁶⁹ This section focuses mainly on Articles 7 and 8 of the CRC, and Article 6 of the ACRWC. It is logical that Article 7 is read in conjunction with Article 8 (preservation of identity, including nationality, name and family relations), as they display some level of overlap. These provisions read as follows:

³⁶⁸ Vericat, (2006). Attempt by this writer to establish whether or not this agreement materialized have been unsuccessful.

³⁶⁹ Van Bueren, (1995), 117.

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 6, the corresponding provision in the ACRWC, provides that:

Article 6: Name and Nationality

1. Every child shall have the right from his birth to a name.
2. Every child shall be registered immediately after birth.
3. Every child has the right to acquire a nationality.
4. States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.

All these provisions are interrelated. Even though Article 8 of the CRC and Article 6 of the ACRWC do not define the concept of “identity”, they give three examples of what it includes: nationality, name, and family relations. It is to be noted, however, that unlike the CRC, children’s right to know and be cared for by their parents is not recognised explicitly in the ACRWC. A provision similar to Article 8 of the CRC is also not present

in the ACRWC.³⁷⁰ The following sub-sections proffer a detailed discussion of these rights in the context of adoption.

3.5.2.1 The child's right to birth registration

In ancient times, children were not registered at birth.³⁷¹ In addition, in the past, birth registration was often regarded as a concept of public administration³⁷² and alien to the language of "rights". However, with the coming into force of the ICCPR and the CRC, birth registration has come to be viewed as a basic human right for all children.³⁷³

The importance of birth registration for the promotion and protection of children's rights is an elevated one. As Newell and Hodgkin correctly put it:

Registration is the State's first official acknowledgement of the child's existence; it represents recognition of each child's individual importance to the State and of the child's status under the law. Where children are not registered, they are likely to be less visible, and sometimes less valued.³⁷⁴

It is also important for the protection of children born out of wedlock; asylum-seeking and refugee children; for prevention of malpractices in intercountry adoption; and for

³⁷⁰ There is not, as such, a right to identity under the ACRWC. In fact, the word identity does not appear anywhere in the text of the document. This seems to have emanated from the understanding that identity is composite of a number of rights (such as the right to a name, nationality, and so forth) and a separate provision on the concept might have been deemed unnecessary.

³⁷¹ A classical example which asserts this fact is the period of the Roman Empire where women and children were not allowed to be registered by the civil registration system. See, in this regard, Wei, (2000), 48.

³⁷² See, for instance, Huawen, (2004) arguing that birth registration is still considered as a public administration issues as opposed being the right of a child. See also, Changbin, (1991), 469 as cited in Huawen, (2004), 3.

³⁷³ Before the CRC, it was Art. 24(4) of the ICCPR that provided that "[e]very child shall be registered immediately after birth and shall have a name". For a detailed discussion on this, see Van Bueren, (1995), 118.

³⁷⁴ Newell and Hodgkin, (2007), 98. For a similar position, see Nowak (1993), 432. According to Nowak, the right to identity flows from the right to privacy and the right to recognition before the law.

preventing the abduction, and trafficking of children. In some instances the absence of a birth certificate can result in the sentencing of a child to the death penalty.³⁷⁵

A UNICEF study states that “a fully registered birth and the accompanying birth certificate help a child secure the right to his or her origins, to a nationality and also help to safeguard other human rights”.³⁷⁶ Since birth certificates contain the date of birth of a child, they are very crucial for the enforcement of minimum age legislation.³⁷⁷ Without a proper birth registration system, effective national planning for children becomes difficult, too.³⁷⁸ This is so because without birth registration children are not recognised by law, and they are apt to be invisible in government statistics.

The term “immediately” in Article 7(1) of the CRC and Article 6(2) of the ACRWC signifies the need to undertake registration in an urgent manner after birth.³⁷⁹ It can be interpreted to refer to “a defined period of days rather than months”.³⁸⁰ In addition, the CRC Committee recommends that birth registration should be free³⁸¹ and universally accessible.³⁸² States are further urged to facilitate and provide late registration free of charge.³⁸³ Special measures, such as, mobile units and periodic birth registration campaigns to target particularly vulnerable children, are often encouraged.³⁸⁴

³⁷⁵ See, for instance, CRC Committee, Concluding Observations: Yemen, (May 1999), para. 20.

³⁷⁶ UNICEF Innocenti Digest, (2002), 4.

³⁷⁷ Van Bueren, (1995), 118.

³⁷⁸ Newell and Hodgkin, (2007), 98.

³⁷⁹ Van Bueren, (1995), 118.

³⁸⁰ Newell and Hodgkin, (2007), 100.

³⁸¹ CRC Committee, General Comment No. 10, (2007), para. 39; CRC Committee, Concluding Observations: DRC, (February 2009), para. 36.

³⁸² See CRC Committee, General Comment No. 11, (2009), para. 41.

³⁸³ See, for instance, CRC Committee, Concluding Observations: Malawi, (January 2009), para. 37; Chad, (January 2009), para. 40; General Comment No. 7, (2005), para. 25.

³⁸⁴ See, for instance, CRC Committee, Concluding Observations: Mauritania, para. 39; General Comment No. 9, paras. 35-36; General Comment No. 7, (2005), para. 25.

In consequence of birth registration, there is also an obligation not to discriminate on the basis of the information contained in the birth certificate or obtained through the registration procedure.³⁸⁵ According to the CRC Committee, even when a child is born outside of wedlock, it is important to identify the father in the birth certificate.³⁸⁶ Since the registration of the birth of a child is the minimum guarantee for the enjoyment of his or her rights, it should also not be affected by the uncertainties that may relate to the issue of citizenship or other related status.³⁸⁷ There is an obligation to preserve and protect the elements of the identity of the child.³⁸⁸

In the context of this study, for instance, the absence of birth registration and a supporting birth certificate may facilitate the production of false papers for illegal domestic and intercountry adoption. It is common practice that, once an adoption order is made, a copy of the amended birth registration with the adoptee's name and other relevant information is prepared. As a result, original birth certificates can also become crucial at a later stage when an adoptee attempts to establish his or her identity in relation to his or her family of origin.³⁸⁹

3.5.2.2 The child's right to a name

Since names are used to identify and categorise, they are also very significant elements of one's identity. A name (in particular a surname) can reflect one's cultural, ethnic,

³⁸⁵ Ziemele, (2007), 21.

³⁸⁶ CRC Committee, Concluding Observations: Ireland, (February 1998), para. 36.

³⁸⁷ Ziemele, (2007), 23.

³⁸⁸ As above.

³⁸⁹ See discussion below on the right to know one's origin in this regard.

religious, or familial heritage. In fact, it carries with it practical as well as symbolical importance. The power to name³⁹⁰ is also a very important issue, and as a result, it is not uncommon to have court cases where people (in particular divorced or unmarried couples) fight over the choice of name and surname for their children.³⁹¹

The previous chapter has alluded to the importance of names within African societies.³⁹² For instance, the importance of names in Muslim societies is well captured in a recent article by Ishaque.³⁹³ Ishaque contends that when considering issues of identity, such as names, one has to be mindful of core values which are universal and thus can provide an opportunity to enter into a dialogue with the ultimate aim of protecting the child.³⁹⁴

The right to a name was first mentioned in Principle 3 of the 1959 Declaration. However, it was in Article 24(2) of the ICCPR that, for the first time, one finds a binding recognition of the essential nature of the right to a name to the formation and preservation of a child's identity. During the drafting of the CRC, the incorporation of this right did not face any resistance. The only divergent view expressed at the drafting stage suggested the inclusion of children's right to a "sensible" name which was found to be unnecessary;³⁹⁵ the feeling was that national law should regulate what is sensible or not, and a name

³⁹⁰ Herring, (1998), 235.

³⁹¹ See, for instance, Herring, (1998), 235,

³⁹² Ishaque, (2008), 393-420.

³⁹³ As above.

³⁹⁴ Ishaque, (2008), 393-420. The Koran states, "[Allah] . . . does not regard your adopted sons as your own sons. . . . Name your adopted sons after their fathers; that is more just in the sight of Allah." Koran, xxxiii, 4-6. Accordingly, very few Muslim countries practice formal adoption.

³⁹⁵ Van Bueren, (1995), 117.

that violates any of the four cardinal principles of the CRC and the ACRWC would be in violation of the CRC and the ACRWC.³⁹⁶

One consequence of adoption is usually that the surname of the adopted child is changed to that of the adoptive parents. Often the given name of the child is also changed to a new name often determined by the adoptive parents. It is not uncommon to include the preferred name change for the child in the petition to a court for an adoption order. In Liberia, for instance, when a petition for adoption is filed with the Probate Court, the petition must contain, amongst others, the petitioners' desire to adopt the child and the child's change of name.³⁹⁷

In the interest of children's identity right (particularly older children) maintaining original names and surnames are very important. Therefore, and by having regard to the best interests of the child principle and child participation, it is advisable that legal systems retain the option that adopted children are able to retain or regain their original names and surnames, if they so request. In addition, on a practical level, consideration must also be given to a situation where the surname of an adopted child can be changed into a double (for instance, hyphenated) name at his or her request, consisting of the original surname in combination with the surname gained as a result of adoption.³⁹⁸ To illustrate: in Niger, Government has reported that "[w]ith a view to preserving the child's identity, the law provides that, in cases of simple adoption, the adoptee keeps his or her

³⁹⁶ Newell and Hodgkin note that "[d]omestic laws should have appropriate mechanisms to prevent registration of a name that might make a child an object of ridicule, bad luck or discrimination, Newell and Hodgkin, (2007) 103.

³⁹⁷ U.S. Department of State "Intercountry adoption: Liberia" (December 2008).

³⁹⁸ See Committee on Lesbian Parenthood and Intercountry Adoption, (2008), 12.

original name, to which the name of the adopter may be added, if the child so desires”.³⁹⁹

3.5.2.3 The child’s right to acquire a nationality

Before the CRC, the essential nature of the right to acquire a nationality for the constitution and preservation of a child’s identity was also recognised in Article 24(3) of the ICCPR.⁴⁰⁰ Article 7(1) of the CRC and Article 6(3) of the ACRWC seem to follow the language of Article 24(3) of the ICCPR which provides that “[e]very child has the right to acquire a nationality”. All these treaties share the view that the purpose of the child’s right to acquire a nationality is mainly “to prevent a child from being afforded less protection by society and the State because he is stateless”.⁴⁰¹

An inclination of States Parties desire to maintain immigration issues as the preserve of national law can be gleaned from these provisions. In fact, the legislative history of the drafting of the CRC indicates that most of the discussion and debate surrounding Article 7 of the CRC involved the conditions under which a child would acquire a nationality, and particularly the tension between the immigration laws of the various potential States parties and the need to ensure that each child acquired some nationality.⁴⁰²

Notably, the child’s right to acquire a nationality would be satisfied by obtaining any nationality. The phrase “would otherwise be stateless” suggests that national measures

³⁹⁹ CRC Committee, State Party Report: Niger, (November 2008), para. 154,

⁴⁰⁰ The right to nationality is also recognised in a number of other international instruments. These include, Principle 3 of the 1959 Declaration, Art. 15(1) of the UDHR, and Art. 20(1) of the American Convention on Human Rights.

⁴⁰¹ HRC, General Comment No. 24, (1989), para. 8.

⁴⁰² See Blair, (2001), 646.

for implementing Article 7 of the CRC and Article 6 of the ACRWC should make it their underlying goal to eliminate the problem of statelessness. In this regard it is crucial to address the issues of the absence of equality between the sexes,⁴⁰³ and discrimination against children who are born outside of wedlock, which are two of the main reasons that lead to children's statelessness.⁴⁰⁴

This provision of the CRC has been read to embody the international rule of *jus soli*, in accordance with which children would acquire nationality by birth, if they would otherwise be stateless.⁴⁰⁵ In this regard, Article 6(4) of the ACRWC is a more comprehensive provision as it explicitly and clearly provides for nationality to be granted from the territory or residence in which one is born.⁴⁰⁶ In respect of children, arguably, it is noted that the principle of *jus soli* is part of international customary law.⁴⁰⁷

Some commentators have pointed out that the Hague Convention, by emphasising family environment if not in the State of origin, then internationally, has taken the notion of identity rights beyond the confining limits of nationality.⁴⁰⁸ However, the effects of a Convention adoption on a child's nationality are not governed expressly by the Hague Convention.⁴⁰⁹ As a result, questions, such as, in what circumstances does an adoption

⁴⁰³ Undoubtedly, the growing recognition of the child's right to acquire a nationality does not, by itself, amount to the recognition of the equal right of both parents to pass their nationalities to the child. However, as Goonesekere argues, at least as far as the CRC is concerned, its general articles on gender equality (Art. 2), family and parental rights and responsibilities (Arts. 5, 8-10, and 18), and its norm of the best interests of the child (Art. 3) require that if the child's nationality is traced through the parents (*jus sanguinis*), then it must be traced equally through both parents. Goonesekere, (1996), 89-90.

⁴⁰⁴ Ziemele, (2007), 24.

⁴⁰⁵ Ziemele, (2007), 25, 28-29.

⁴⁰⁶ See, Mezmur, (2008a), 9.

⁴⁰⁷ Ziemele, (2007), 29.

⁴⁰⁸ Maravel, (1996), 318.

⁴⁰⁹ See Permanent Bureau, Guide to Good Practice, (2008), 108.

lead to acquisition of a new nationality for the child or the loss of an existing nationality do not necessarily get an answer from the provisions of the Hague Convention.⁴¹⁰ However, Article 26(2) of the Hague Convention which requires that the child should enjoy in the receiving State rights equivalent to those which result from similar adoptions within that State is of some guidance.⁴¹¹ In other words, Contracting States should make sure that an adopted child is not made stateless.

It is important that the loss of nationality through adoption should be conditional upon the acquisition by the adopted person of the nationality of the adopter. Article 17 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws⁴¹² espouses the same principle. In Korea the fact that adoption procedures were extremely cumbersome where a father was not a national has led the CRC Committee to point out its incompatibility with the provisions of the CRC.⁴¹³ Such practices would also not be congruent with the rule against discrimination.⁴¹⁴

3.5.2.4 The child's right to know, and be cared for, by his or her parents

Being able to know one's origin is a way of ascertaining one's complete identity information.⁴¹⁵ The absence of a capacity to do so might contribute to an unhealthy sense of self-esteem.⁴¹⁶

⁴¹⁰

As above.

⁴¹¹

Permanent Bureau, Guide to Good Practice, (2008), 109.

⁴¹²

Adopted 12 April 1930.

⁴¹³

CRC Committee, Concluding Observations: Republic of Korea, (February 1996), para. 22.

⁴¹⁴

See section 3.3.4 for a discussion on the principle against discrimination.

⁴¹⁵

Cahn and Singer, (1999), 173.

⁴¹⁶

As above.

The strict understanding of, and adherence to, the notion of adoption as a “rebirth”, as well as “the legacy of secrecy”, act as a challenge to the realisation of children’s right to know their origins.⁴¹⁷ In the past secrecy was the rule where court records and birth records were closed to all.⁴¹⁸ In recent times, however, progress made in areas such as genetic research, and the increase of both domestic and intercountry adoptions have put the spotlight on the right to know one’s genetic origins. As a result, it is noted that recent reform of the domestic laws of many nations reflect increased awareness, to varying degrees, of the importance of a post-adoption connection to biological origins.⁴¹⁹ The main complicating feature of this right emanates from the fact that it could conflict with other person’s rights – namely, for instance, the competing rights to autonomy and privacy of the mother, the father, the adoptive parents or the gamete donor as the case may be.⁴²⁰ While disclosure of identifying information by mutual consent is widely accepted, what is controversial is when the interests of the adoptee and the family of origin, in particular the biological parents, conflict with one another. In such scenarios there is a need, if possible, to devise a way of addressing the rights of both the adoptee and the birth family, and, if possible, of striking a balance between the conflicting rights.

⁴¹⁷ See, for instance, Blair, (2001), 591 who recounts the historical evolution of confidentiality in adoption and some of the justifications for it. For a discussion of the history of adult adoptee access to birth records, see Samuels, (2001), 434 (arguing that “adoption law did not proceed in a simple, single step from a period in which court and birth records were closed to the public to a period in which the records were permanently closed to all of the parties. Instead, a more complete and accurate history of the law reveals interim periods, lengthy ones in many states, in which court records were closed to all, while birth records, as recommended by social service and legal authorities, were closed to everyone except the adult adoptees whose births they registered”).

⁴¹⁸ See, for instance, Samuels, (2001), 434.

⁴¹⁹ Van Bueren, (1995), 121; Blair, (2001), 587.

⁴²⁰ Besson, (2007), 138.

In particular, two major arguments against access to adoption records by adoptees seem to have permeated the legal discourse. One is, that open records will lead to more abortions.⁴²¹ The second argument contends that if birth parents were promised, conditional upon their consent to adoption, a right to privacy and confidentiality, it should not be violated.⁴²²

In the same vein, the main rights of the child involved are the rights to privacy, family life, identity and freedom of expression.⁴²³ A child's access to adoption records also has the right to equality implications for adopted children as a class.⁴²⁴

All three relevant instruments for discussion (the CRC, the ACRWC, and the Hague Convention) address, in varying degrees, and explicitly or implicitly, the right of the child to know his or her origins.⁴²⁵ Nonetheless, the novelty of the CRC (and impliedly the ACRWC) lies in the fact that the child's right to know his or her parents *qua* child, and not only later as an adult,⁴²⁶ found explicit expression in the instrument for the first time.

The drafting history of the right to know, and be cared for by, one's parents in the CRC indicates the significant role played by Muslim countries in proposing the inclusion of this right.⁴²⁷ The underlying view advocated by these countries was that the right to

⁴²¹ Cabellero (2006), 306; Behne, (1997) 80; Racine, (2002), 1453-1454; Hughes, (2007), 445.

⁴²² Cabellero, (2006), 306.

⁴²³ Van Bueren, (1995), 122.

⁴²⁴ Van Bueren, (1995), 121.

⁴²⁵ Arts. 7 and 8 of the CRC and Arts. 6 and 10 of the ACRWC.

⁴²⁶ Much of the discourse that exists about the right to know one's origin is argued in the context of adult adoptees. See, for instance, Racine, (2002), 1435; Hughes (2007) 429; Samuels (2001), 367; As argued above, the application of the provisions of both the CRC and the ACRWC are limited to persons below the age of 18.

⁴²⁷ Blauwhoff, (2009), 50

know one's parents is very fundamental for the child's psychological wellbeing.⁴²⁸ This underlying view was accepted by the drafters of the CRC.

The nature of States Parties' obligation with regard to the right to know and be cared for by one's parents has both a positive and negative slant to it. As a positive duty, States should register, preserve, and open access to birth data, while, as a negative duty, they should also protect the child's interests against active violations.⁴²⁹ It is also important to recognise that, the "right to know" does not imply the right to know and be with parents.⁴³⁰ The right places more emphasis on biological ties, rather than on social ties.⁴³¹

The right to know, and to be cared for by one's parents is qualified by the phrase "as far as possible". This phrase is intended to reconcile some divergent views surrounding the scope of the right.⁴³² Although various meanings have been attached to the limitation imposed by the phrase "as far as possible,"⁴³³ a reasonable construction of this phrase is that it is intended to accommodate national laws that do not, in general, allow adoptees to know identifying information about their biological parents.⁴³⁴ This limitation, read with the obligation in Article 7(2) of the CRC to implement the right in accordance with national laws as well as relevant international instruments, suggests that the CRC does not create an unlimited right to access to identifying records.

⁴²⁸ As above.

⁴²⁹ Besson, (2007), 145.

⁴³⁰ Besson, (2007), 145-146.

⁴³¹ Besson, (2007), 146.

⁴³² Blauwhoff, (2009), 51.

⁴³³ Some have asserted that this means that, the right should be implemented as far as it is possible as a matter of fact. Besson, (2007), 150.

⁴³⁴ Report of Working Group, (1989).

Even Article 8 of the CRC does not impose such an absolute obligation on States Parties. Inspired by the abduction of children in Argentina between 1975 and 1983, Article 8 of the CRC attempts to establish a duty on States to preserve or safeguard, and when necessary, to re-establish, the identity of the child.⁴³⁵ As a lawful “deprivation of identity”, adoption appears to be excluded from the scope of Article 8 of the CRC because Article 8 generally refers to “unlawful” deprivation of identity.⁴³⁶

While Article 30 of the Hague Convention requires contracting States to ensure the preservation of information concerning the child's origin, including the identity of the child's parents and medical history, there is no indication that the adoptee has an absolute right to disclosure of information about the family of origin.⁴³⁷ This is apparent from a reading of the second leg of this provision, that States are bound to ensure that the child or her representative “has access to such information, under appropriate guidance, in so far as is permitted by the law of that State”.⁴³⁸

However, the CRC Committee has objected to States laws which do not allow adopted children to know identifying information about their biological parents.⁴³⁹ It has not, however, gone as far as asserting that the right to know, and to be cared for by one's parents is an unlimited right. The Committee's preference for children's right to know

⁴³⁵ Van Bueren, (1995), 118-119; Blauwhoff, (2009), 52 highlighting that this provisions is known as the “Argentine article”;

⁴³⁶ Welbourne, (2002), 282; For a debate whether this provision is applicable to adoptions, see Van Bueren, (1995), 120; Moreover, the context in which Art 8 was proffered, in reaction to atrocities in Argentina, further supports its inapplicability to adoptions that do not involve the wrongful taking of children.

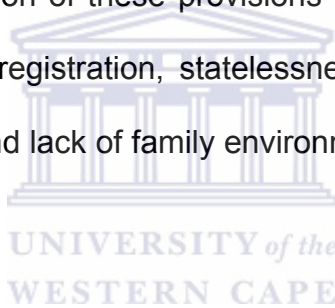
⁴³⁷ See Rains, (2004) 595-597.

⁴³⁸ Art. 30 of the Hague Convention.

⁴³⁹ CRC Committee, Concluding Observations: Kazakhstan, (July 2003), paras. 45-46; Czech Republic, (March 2003), paras. 8-9.

can be contrasted with the previous position of the European Court which favoured the rights of biological parents.⁴⁴⁰

A solution that takes all of the fundamental rights and public policy concerns into consideration is needed, though it is not an easy one to formulate. Nonetheless, there is a strong case to be made for open adoptions especially in cases where the child who is a subject of adoption is an older child. In addition, even when parents or significant others cannot offer the child a home, they may an important part of a child's life, and the child may be important to them. In the final analysis the role of the best interests of the child principle in the interpretation of these provisions is patent. As stated by Ziemele, generally, "it is clear that non-registration, statelessness, lack of knowledge of one's roots as part of one's identity and lack of family environment are not in the best interests of the child".⁴⁴¹



3.5.3 The child's right to cultural identity and intercountry adoption

One area of child law where the "turf" between "cultural imperialism" and "cultural protectionism" looms large is in the field of intercountry adoption. One of the many issues that seems to elude consensus in the area of intercountry adoption, is the right to cultural identity. Certain critics denounce the practice of intercountry adoption as "modern-day imperialism, allowing dominant, developed cultures to strip away a

⁴⁴⁰ See *Odievre v. France*, 15, (2003), paras. 44, 47.

⁴⁴¹ Ziemele, (2007), 31.

developing country's most precious resources, its children".⁴⁴² Referring to Buti, Martin further observes that:

[t]he intercountry adoption debate is suffused with the concept of culture, on both an individual and a societal level. Individually, critics of intercountry adoption believe that the loss of a child's cultural heritage (which inevitably occurs during intercountry adoption) leads to the loss of the child's identity. Some even go to so far as to brand the practice as a "cultural genocide". Countries that prohibit intercountry adoption based on arguments of culture and cultural identity continue to exist (notes omitted).⁴⁴³

As Woodhouse notes, "... culture of origin, no matter how hard to define with satisfying logic, do[es] matter to children and therefore should matter in adoption law".⁴⁴⁴ After all, Article 20(3) of the CRC reads that, when considering alternative care solutions, "due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background".⁴⁴⁵

It is sometimes the same concept of cultural identity that is used by opponents of intercountry adoption to deny children a family environment, even when it is clear that intercountry adoption would be in the children's best interests.⁴⁴⁶ Unfortunately, it is a fact that some groups (sometimes a whole nation) consider the claiming of a right of

⁴⁴² Martin, (2007), 174.

⁴⁴³ Martin, (2007), 174-175 also citing Buti, (2006), 6. For arguments that intercountry adoption is a "cultural genocide" see, for instance, Crichlow, (2002), 104-127; Hubinette, (undated); Krieken, (1999), 297-312.

⁴⁴⁴ Woodhouse, (1995), 114.

⁴⁴⁵ Art. 25(3) of the ACRWC entrenches a similar position.

⁴⁴⁶ See, for instance, Candea, (2001). The attitude that intercountry adoption allows dominant, developed cultures "to strip away a developing country's most precious resources, its children" prevails in these quarters. Kleem, (2000), 325-326. Because a child's right to a name and nationality are crucial for his or her identity, "opponents of intercountry adoption argue that rather than promoting a child's identity, the practice strips it away and replaces it with a name and identity chosen by the adoptive parents". Olsen, (2004), 510.

custody or control over their children as an issue⁴⁴⁷ that has priority over promoting the rights of these children's best interests.

Making the claim that States have a right of custody or control over children, with no consideration of the best interests of the children, has a "children as objects" ring to it. As Woodhouse advocates, "a child-centered perspective would suggest that the right to preservation of a group identity of origin is best analyzed as a right of the child, and a responsibility or trust of the group".⁴⁴⁸

In some instances it is the concepts of "continuity" and "background" under Article 20(3) of the CRC and Article 25(3) of the ACRWC that are used to argue the case for the primacy of cultural identity, and serve as a ground for prohibiting or undermining intercountry adoptions as an alternative means of care. But as Cantwell and Holzscheiter remind us:

... while connected, the questions of "continuity" and "background" should not be seen as one and the same issue. The text of article 20 does not explicitly demand "continuity ... in the child's ... background" but requires that due regard be paid both to continuity in upbringing and to the child's background.⁴⁴⁹

This argument adds clarity to the position that culture cannot, and should not, be used as a smokescreen to deny children their right to grow up in a family environment, when that family can only be found abroad.

At the regional level, the ACRWC purports to take into consideration

⁴⁴⁷ Woodhouse, (1995), 112.

⁴⁴⁸ As above.

⁴⁴⁹ Cantwell and Holzscheiter, (2008), 61. However, while due regard is to be paid both to continuity in upbringing and to the child's background, in contrast, it is worth noting that "State Parties *shall* in accordance with their national laws ensure alternative care" (emphasis mine). See Art 20(2) of CRC and Art 25(2)(a) of the ACRWC.

...the virtues of their [African member States'] cultural heritage, historical background and the values of the African civilization which should inspire and characterize their reflection on the concept of the rights and welfare of the child.⁴⁵⁰

However, although it copies Article 20(3) of the CRC virtually word for word, Article 25(3) of the ACRWC omits the word “cultural” when listing the background aspects of the child to which due regard shall be paid when considering alternative family care.⁴⁵¹ In this light, if the best interests of the child means anything at all, let alone being “the paramount consideration”,⁴⁵² preserving cultural identity should be seen as a means, and not necessarily as an end in itself, in considering alternative care for children deprived of their family environment.

Under Article 31 of the CRC and Article 12 of the ACRWC, children have the right “to participate freely in cultural life” and it is the duty of States to respect and promote the right of the child to fully participate in cultural life. These provisions too do not insinuate that cultural identity overrides children’s rights and needs to a family environment, to love, and to care.

3.5.4 The child’s right to freedom of religion

The synergy that exists between freedom of religion, on the one hand, and adoptions, on the other, is relatively limited. Without examining which range of beliefs qualify for protection under Article 14 of the CRC and Article 9 of the ACRWC,⁴⁵³ in brief, the thrust

⁴⁵⁰ Para. 7 of the Preamble to the ACRWC.

⁴⁵¹ Art. 25(3) of the ACRWC provides in full that:

When considering alternative family care of the child and the best interests of the child, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious or linguistic background.

⁴⁵² As Art. 21 of the CRC and Art. 4 of the ACRWC provide.

⁴⁵³ Art. 18 of the ICCPR has a similar provision on freedom of thought, conscience, and religion.

of these provisions is that the right of the child to religious freedom is the right of every child to be unhindered in his or her growth as an autonomous independent actor within the matrix of parents, religious community and society.⁴⁵⁴

What is clear from Article 14(2) of the CRC is that the evolving capacities of the child should be the overarching principle guiding the interpretation and implementation of this provision. The *travaux préparatoires* of the CRC clearly show that Article 14(2) was consciously drafted in such a way so as to serve as a limitation on parental rights.⁴⁵⁵ Article 9(2) of the ACRWC explicitly adds the best interests principle as a guiding principle in providing guidance and direction in the exercise of the right to freedom of thought, conscience and religion.



From the provision that “[e]very child shall have the right to freedom of thought conscience and religion” emanates a child’s freedom to choose and change one’s religion. However, this is not an absolute right accorded to every child with no distinction.⁴⁵⁶ Otherwise an “open-ended” freedom of choice of religion for every child which does not take into account their evolving capacities, and in relation thereto, the need for guidance from parents or legal guardians, might lead to the unnecessary consideration of children as fully autonomous “little adults”.

In some countries minimum ages are provided above which children’s religious denominations cannot be changed unless the opinion of the child has been sought. In

⁴⁵⁴ Langlaude, (2007), 100.

⁴⁵⁵ As above.

⁴⁵⁶ As mentioned above, the evolving capacities of the child and the best interests principle should have play a role in children’s exercise of their right to freedom of thought, and religion.

Iceland, for instance, the state had reported to the CRC Committee indicating that such age is fixed at 12.⁴⁵⁷ Without saying whether it thought 12 is or is not an appropriate age or whether the country should take the evolving capacities of the child into account, the CRC Committee questioned the basis on which the age of 12 had been chosen.⁴⁵⁸

Of the three different facets of religion established by Gunn, one is “religion as identity”.⁴⁵⁹ It is argued that “identity religion is experienced as something akin to family, ethnicity, race, or nationality”.⁴⁶⁰ In its basic form identity religion “understands co-religionists to be a part of the same group (perhaps even regardless of their personal beliefs)”,⁴⁶¹ and it emphasises shared histories, cultures, ethnicity, and traditions.⁴⁶² As a result changing a child’s religion as a result of intercountry adoption could have implications for a child’s identity, since religion could be tied inextricably to ethnicity, family, culture, traditions, and history. In addition, it needs to be noted that if a child is a Muslim and refuses to be adopted for this reason, a balancing act needs to be effected between the child’s right to participate and the child’s religion, on the one hand, and the child’s best interests and need for a family environment, on the other.

From the viewpoint of prospective adoptive parents, it could be mentioned that, at times, there are some eligibility requirements pertaining to religion to which prospective adoptive parents have to adhere in order to qualify as adoptive parents. For instance, in China, it is provided that:

⁴⁵⁷ CRC Committee, Summary Record, (January 1996), para. 12.

⁴⁵⁸ As above.

⁴⁵⁹ The other two are religion as belief, and religion as way of life. See Gunn, (2003), 200.

⁴⁶⁰ Gunn, (2003), 201.

⁴⁶¹ As above.

⁴⁶² As above.

Families with religious beliefs that prohibit any kind of medical treatment, including blood transfusions, for the child, will not be eligible to adopt. According to the CCAA this includes religions that use alternatives to blood transfusions, as this is not available in every country.⁴⁶³

In addition, it is not uncommon to experience that when an adoption agency is religiously affiliated, preference may be given to prospective adoptive parents who profess the same or a similar religion.

3.5.5 Right to privacy

Children, like adults, have a right to privacy. This is evidenced by Articles 16 and 10 of the CRC and the ACRWC, respectively. Children's right to privacy "symbolises pre-eminently the right to dignity and respect".⁴⁶⁴ Article 16(1) of the CRC states: "No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation". In an effort to concretise this right, Article 16(2) entrenches the child's right to the protection of the law against such interference or attacks. The only addition to Article 10 of the CRC that Article 16 of the ACRWC brings is that, in the exercise of this right, "parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children". This addition is indeed implicit in the CRC provision.⁴⁶⁵

Children's right to privacy in the context of intercountry adoption may feature in various ways. For instance, in the context of "photo-listing", where lists of children available for

⁴⁶³ Children's Hope International available at <<http://www.chinaadoptionagency.com/>>.

⁴⁶⁴ Graff, (1998), 7. For a discussion of this right from the view point of sociology and psychology see Markinioti, (1998), 18 and Jaffe, (1998).

⁴⁶⁵ For a discussion of the right to privacy in various contexts see CRC Committee, General Comment No. 3, (2003), paras. 20, 24, 29, and 40(c); General Comment No. 6, (2005), paras. 29 and 98; General Comment No. 10, (2008), paras. 50, 64-67, and 99.

adoption (usually through public agencies) containing photos and descriptions are published,⁴⁶⁶ an international consensus seems to be gaining ground that children's privacy should be protected. The assurance of privacy as to the identity of the natural parents and extended family members, enables them, too, to place the child for adoption with an agency, in the knowledge that their actions and the reasons for their actions will not become public knowledge. Thus, adoption laws should protect the privacy of all of the parties: the child, the natural family, and the adopting family.

Unfortunately, this practice of maintaining the privacy of children in adoption proceedings is sorely lacking⁴⁶⁷ in a number of jurisdictions on the African continent. Publishing the names of children or families involved in intercountry adoption in the media could raise legal and ethical questions for reporting. It is contrary to the CRC Committee's recommendation that "[t]he integrity of the child should be protected in reporting about, for instance, involvement in criminal activities, sexual abuse and family problems".⁴⁶⁸

It would be ideal if courts issue an "anonymisation order" to curb the further publication of the identity of the applicants, respondents, and in particular the infant, in order to protect their privacy. The Constitutional Court case of *AD v DW* is exemplary in this regard.⁴⁶⁹ Such an order could demand that, in citing the case, abbreviations or initials

⁴⁶⁶ They may be printed in a book or newspaper, shown on TV or posted at a web site. The Internet is just the latest medium for communicating photo-listings to the public.

⁴⁶⁷ See for instance, in Uganda, cases such as Family Cause No.81 / 05 in the *matter of Adoption of Maria Hodkins an infant by Mark and Kate Skidmore* and Family Cause No 13/06 in the matter of Jacob Mukisa Meyer-an infant where the cases identify the children with their full names.

⁴⁶⁸ CRC Committee, Day of General Discussion, (1996), 1.

⁴⁶⁹ In this case, the Constitutional Court made an anonymisation order to protect the privacy of the child (as well as that of the foster parents).

be used, and that any papers filed in the matter should refer to the parties involved by means of these abbreviations. In addition, an order indicating that no person shall publish in any manner whatsoever any information which reveals, or may reveal, the identity of the parties involved, should more often than not be made.

3.5.6 Child exploitation, trafficking and other similar practices, and intercountry adoption

Contrasted with the positive face of adoption are some scandals and irregularities concerning the practice – and at its worst, adoption is portrayed as child trafficking or baby selling.⁴⁷⁰ Therefore, issues pertaining to child labour,⁴⁷¹ sexual exploitation,⁴⁷² and sale, trafficking and abduction of children⁴⁷³ have relevance for the discussion of intercountry adoption. In this regard, apart from the CRC and the ACRWC, the OPSC, and the Palermo Protocol are of direct application. A detailed discussion of these issues is deferred, as it forms the focus of a substantive discussion in Chapter 6 below.

3.6 CONCLUSION

The CRC, the ACRWC, and the Hague Convention are the three main international instruments that have a direct bearing on intercountry adoption. The discussion in this Chapter has reaffirmed the interdependence and interrelatedness of children's rights in the context of intercountry adoption.

⁴⁷⁰ Smolin, (2004), 281; Smolin, (2005), 404; Van Bueren, (1995), 96.

⁴⁷¹ Art. 32 of the CRC, and Art 15 of ACRWC.

⁴⁷² Art. 32 of the CRC, and Art 27 ACRWC.

⁴⁷³ Arts 34, 35, and 36 of the CRC and Art 29 of the ACRWC.

Article 1 of the CRC and Article 2 of the ACRWC have been highlighted as having implications for several issues related to intercountry adoption. Despite the fact that the meaning of the best interests of the child still continues to elude many, an effort was made to make some important observations about the principle. Article 3(1) of the CRC and Article 4(1) of the ACRWC are very similar. However, the latter provides that the best interests of the child should be the primary consideration. This means that African countries that are States Parties to the ACRWC have an even greater obligation to promote the best interests of children than non-States Parties elsewhere.

Resort to the CRC Committee's jurisprudence in the form of General Comments was identified as being able to shed further light on what is meant by the best interests of the child, albeit in the context of specific themes. Instances of discrimination which are obvious in the context of intercountry adoption, as well as subtle forms of discrimination in the context of intercountry adoption, have been highlighted. In regard to the right to life, survival, and development, it was proposed that the term "development" should be interpreted by African countries in its broadest sense as a holistic concept encompassing the child's physical, mental, spiritual, moral, psychological and social development. It was also observed that "the 'best interests' of the child cannot be defined without consideration of the child's views."

Arguments in favour of the "best interests" of prospective adoptive parents are made by some writers. Some also contend for the "best interests" of the family of origin. It was argued that the "best interests" of prospective adoptive parents (adoptive parents) and biological parents can be accommodated within the best interests of the child principle if

they are, as a minimum, either neutral or, preferably, in agreement with the child's best interests. It was submitted that a legal framework that considers the best interests of the child as the paramount consideration, and is in compliance with the ACRWC, would and should make children's rights the overriding factor in making decisions about them.

Instances of discrimination which are obvious in the context of intercountry adoption, as well as subtle forms of discrimination in the context of intercountry adoption, have been highlighted. While the rule against discrimination has relevance for many of the provisions of the Hague Convention, Article 26(2) of the Hague Convention entrenches a specific non-discrimination clause. The thrust of Article 26(2) is that, when the effect of an adoption is to terminate a pre-existing legal parent-child relationship, the child's rights resulting from the adoption should be equivalent to those resulting from a similar adoption made under national law in the receiving State.⁴⁷⁴ Applying different safeguards to children adopted from Contracting States to the Hague Convention, on the one hand, to those from countries that are non-Contracting States to the Hague Convention, on the other, might also violate the non-discrimination rule in relation to intercountry adoption. Failure by a State to take positive measures aimed at providing enhanced treatment to special needs children so that they too could benefit from adoptions⁴⁷⁵ may also be discriminatory. In addition, it was submitted that the practice of running genetic tests on adoptees to determine whether an individual child has a genetically-based disease or disease susceptibility, when these tests are intended to

⁴⁷⁴ Permanent Bureau, *Guide to Good Practice*, (2008), 31.

⁴⁷⁵ Vite and Boechat, (2008), 52.

solely serve the interests of other third parties, was found to be potentially discriminatory.

In the context of the right to life, survival, and development, it was submitted that the term “survival rights” covers a child’s rights to life and the needs that are most basic to the child’s existence, which include an adequate living standard, shelter, nutrition and access to medical services. It was suggested that the term “development” should be interpreted by African countries in its broadest sense as a holistic concept encompassing the child’s physical, mental, spiritual, moral, psychological and social development.

Understanding what constitutes a “family environment”, in order to determine which children or group of children are deprived of their family environment and in need of alternative care, was accorded great attention. Article 5 has been read as an attempt by the CRC generally to extend the definition of the family. In relation to intercountry adoption, this insight revealed that children who are in the care of their extended family or benefitting from kinship care and not children deprived of a family environment, and, hence, are not in need of alternative care. Further provisions of the ACRWC have been understood as reinforcing a wider notion of a “family”. In this respect, it has been argued that the care provided to African children by those who fall within the definition of “family” in terms of the ACRWC could qualify as constituting care within a “family environment”.

The fact that there is no obligation under the CRC and the ACRWC to provide intercountry adoption as an alternative means of care was confirmed. In addition, the absence of a right to adopt as well as a right to be adopted under international law was underscored.

Since names (especially family names) reflect one's cultural, ethnic, religious, or familial heritage and occupy a special place in African societies, it was submitted that legal systems should retain the option that adopted children are able to retain or regain their original names and surnames, when this is requested. The fact that children's right to privacy in the context of intercountry adoption may feature in various ways, and the need to provide safeguards against violations of the right, have been elaborated.

This Chapter has generally emphasised that human rights standards are not static, but rather evolve and adapt to new circumstances. It is submitted that the CRC and the ACRWC have benefited from this evolution. Nonetheless, further research and the development of more jurisprudence is required to better understand the meaning and scope of the various rights that have a bearing upon intercountry adoption.

Premised on the international legal framework discussed in this Chapter, the subsequent Chapters highlight thematic issues that have been identified as crucial for intercountry adoption in an African context. First from amongst these thematic issues, the next Chapter undertakes an examination of adoptability.

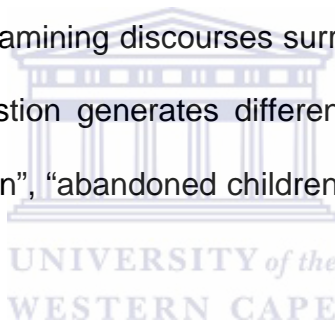
CHAPTER 4

UNDERSTANDING ADOPTABILITY IN THE BEST INTERESTS OF THE AFRICAN CHILD

4.1 INTRODUCTION

It is noted that “the pursuit of the best interests of the child is the foundation of adoption, from which ensue two equally essential principles: subsidiarity and adoptability”.¹ This Chapter will address the former – namely, “adoptability”, whilst Chapter 5 will focus on the principle of subsidiarity.

A preliminary question when examining discourses surrounding intercountry adoption is “who is adoptable?”. This question generates different answers, such as, “orphans”, “orphans and vulnerable children”, “abandoned children”, and “children deprived of their family environment”.



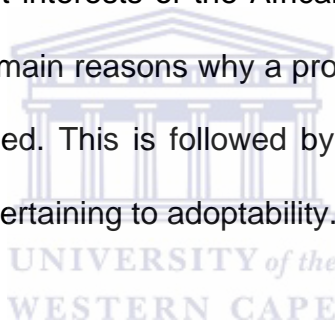
A common misconception prevails that the mere deprivation of a child of his or her family environment, temporarily or permanently, would automatically make such child adoptable. This misconception was reflected in the aftermath of the tsunami that struck Southeast Asia and the eastern coast of Africa on 26 December 2004. Subsequent to the tsunami, a number of people and organizations around the world responded with an enormous outpouring of concern and assistance. In particular, as news of the tragedy reached the rest of the world, many people were touched by the vast numbers of children left orphaned and indicated interest in providing homes for the orphaned

¹ ISS/IRC, (2006b), 1.

children.² Many wished to adopt children who were deprived of their family environments,³ though such deprivation might ultimately have been a temporary one.

As a result, many of the countries affected by the disaster shut their borders to adoption altogether.⁴ This was done primarily because in such situations of natural disaster families get separated, documents get damaged or lost, and determining the adoptability or otherwise of a child becomes non-viable.

In this Chapter, an attempt is made to arrive at a clarification of the concept of adoptability that serves the best interests of the African child. After a brief overview of the concept of adoptability, the main reasons why a proper determination of adoptability is very important are investigated. This is followed by an examination of the relevant international legal frameworks pertaining to adoptability.



Subsequently, different themes are highlighted for discussion. These themes include termination of parental rights including through a decision of a competent authority, abandonment, and relinquishment. Orphanhood and poverty as grounds for adoptability, as well as the adoptability of refugee children, special needs/hard-to-place children, and children who have a Muslim background form some of the issues for examination. A concluding section sums up the findings of the chapter.

² See National Post, (14 January 2005), 3.

³ See, for instance, The Evan B. Donaldson Adoption Institute, (2005), 1; Washington Post, (13 January 2005), C05.

⁴ For instance, in regard to India, see Jakarta Post, (5 January 2005), 2.

4.2 WHAT IS ADOPTABILITY?: A BRIEF OVERVIEW

The use of the term “adoptable” does not necessarily enjoy general acceptance. In fact, it is criticised by some as suggesting “availability” as though the child is a commodity.⁵ Nonetheless, the use of the term continues for lack of a better word that can describe children who are eligible or free for adoption.

According to the Hague Convention, a child must qualify for adoption under the laws of his or her country of origin in order to be adopted.⁶ Thus, put in simple language, adoptability indicates that a child is free for adoption. To borrow the words of Cantwell, the term “adoptable” refers to the status of a child who is “officially recognised as having a legal status enabling adoption to be considered, and deemed to require and to be potentially able to benefit from such a measure”.⁷

The Hague Conference on Private International Law has identified two elements of adoptability that should be present for a child to be available for adoption. First, the child’s psycho-social adoptability should determine that it is impossible for the birth family to care for the child, and that the child will benefit from a family environment.⁸

⁵ See Parra-Aranguren, (1994), para. 117.

⁶ Art. 4(a) of the Hague Convention.

⁷ Cantwell, (2003), 1. This is indicative of one important lesson to be gleaned from the immense debate surrounding intercountry adoption - that not every child that is deprived of his or her family environment is adoptable.

⁸ Permanent Bureau, Guide to Good Practice, (2008), 82. It is argued that “[d]ue to earlier experiences, some children may lose the ability/desire to develop a new bond of emotional dependency, or they may show clear limitations in adjusting to a family environment”. ISS/IRC, (1999a), 9.

Second, the child's legal adoptability should be ascertained. Relying on the law of the country of origin, the legal adoptability of the child forms the basis for severance of the filiation links with the birth family, in particular parents.⁹

Countries might have different requirements for children to be eligible for adoption. As a result, the question of who is adoptable could vary amongst cultures, legal systems and jurisdictions. However, this does not mean that it is impossible to determine some common elements and standards that epitomise the concept. Actually, since adoptability is not a self-defining construct, it is important to grapple with the complex and inconsistent legal and cultural issues that need to be addressed to determine whether a child is, in fact, adoptable.¹⁰

The adoptability of a child who is deprived of his or her family environment is often decided on the basis of pre-determined legal rules. Such rules include, whether the child has been abandoned, neglected, or orphaned.¹¹ However, to look at adoptability as being a strictly legal question is very limiting.¹² Therefore, while the adoptability of a child is mainly decided through the application of pre-determined legal rules, it is also determined on the basis of, amongst others, social, psychological, and medical conditions.¹³

⁹ Permanent Bureau, *Guide to Good Practice*, (2008), 82.

¹⁰ Oreskovic and Maskew, (2008), 78.

¹¹ See, ISS/IRC, (2006a), 1-2; ISS/IRC, (2006b).

¹² Parra-Aranguren, (1994), para. 117; UNICEF Innocenti Digest, (1998), 14.

¹³ As above.

In addition, whether a child is adoptable domestically or through intercountry adoption is an issue determined partly by applying the subsidiarity principle.¹⁴ In other words, first preserving or re-uniting the child with the birth family should be given priority before a child is declared adoptable. In this regard, adoption should be subsidiary to family reunification in terms of the subsidiarity principle.¹⁵ Secondly, in compliance with the subsidiarity principle again, generally, domestic adoption should enjoy preference over intercountry adoption.¹⁶

In addition, it is important to note that the adoptability of a child to a specific receiving State could also depend on the definition of adoptability in the receiving state. For instance, to adopt a child overseas and bring that child back to the U.S., the child must be found eligible to be adopted under U.S. law. Therefore, even if an Ethiopian child who is 17 years old might meet the adoptability requirements in his or her country of origin,¹⁷ as U.S. law requires a child to be under the age of sixteen to qualify for a U.S. immigrant visa, the adoptability of such child into the US, as far as the law is concerned, is impossible.¹⁸

¹⁴ For a detailed discussion of the subsidiarity principle, see Chapter 5 of this study. See too, for a discussion of subsidiarity from the view point of traditionally receiving but also sending countries, ISS/IRC, (March-April 2009).

¹⁵ As above.

¹⁶ See, Chapter 5, section 5.4.2.2 for a detailed discussion of the issues that pertain to the subsidiarity principle and domestic adoption. See too Art. 21(b) of the CRC and Art. 24(b) of the ACRWC.

¹⁷ Notably, Ethiopian law does not set an age limit on who is adoptable, as long as the person is a child (by definition, a person below the age of 18).

¹⁸ After a matching of a child with a prospective adoptive parent is made, an application to the U.S. Government, Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) for provisional approval to adopt that particular child needs to be made to determine whether the child is eligible under U.S. law to be adopted and enter the United States. U.S. Department of State, Intercountry adoption: Who can be adopted?" (undated). However, a child can be 16 or 17 if adopted with younger siblings and will be eligible for an immigrant visa. See, for instance, U.S. Department of State, "Intercountry adoption: Sierra Leone", (December 2007).

This, however, is not an issue of adoptability as such. Rather it is an issue of matching, which is the practice of matching the needs of the child with the qualities of the adoptive parents and family.¹⁹ Reverting to the example above, the authorities in Ethiopia should abstain from matching a child who is 17 years old with prospective adoptive parents in the U.S.. Nonetheless, the child would still continue to qualify as adoptable under Ethiopian law for domestic adoption. And in case domestic adoption is not a viable option or does not succeed, the child is adoptable and could be matched with prospective adoptive parents from countries that allow the adoption of older children up to the age of 18.

All the above issues are discussed in subsequent sections of this chapter. However, before embarking on a detailed analysis of the concept of adoptability, the procedures for determining such a status, and the guidance that can be sought from the international legal framework, it is crucial to understand why a proper determination of adoptability is very important in order to promote and protect the best interests of the child. The next section embarks on this task.

4.3 WHY IS A PROPER DETERMINATION OF ADOPTABILITY IMPORTANT?

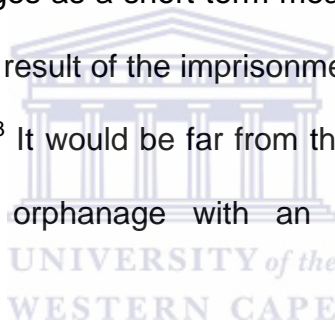
Dillon highlights the importance of the concept of adoptability in intercountry adoption when she notes that “[t]he real debate on intercountry adoption may circle around the

¹⁹ See Permanent Bureau, *Guide to Good Practice*, (2008), 31-32.

concept of adoptability”.²⁰ Thus, the importance of determining who is adoptable (and in turn, who is not adoptable) cannot be overemphasised.

A clear definition and understanding of who is adoptable is important for the following three reasons:-

A) A clear definition and understanding of who is adoptable is vital so that the concept of “adoptable children” is not confused with that of “children currently in out-of-home care”.²¹ Children in institutions are not necessarily adoptable.²² For example, children who reside in orphanages as a short term measure because they are deprived of their family environment as a result of the imprisonment of the sole primary care giver are not necessarily adoptable.²³ It would be far from the reality in the developing world to equate placement in an orphanage with an intent to relinquish the child permanently.²⁴



²⁰ Dillon, (2008), at footnote 80.

²¹ Cantwell, (2003), 71.

²² In recognition of this fact, in Argentina, for instance, it is provided that a release of a child for adoption by the biological parents will not be necessary in those instances when the child has been housed in a government institution continuously for more than one year *without* any indication of interest from the birth parent(s). Thus, the mere fact that a child is in an institution does not qualify the child to be labelled as adoptable. See U.S. Department of State, “Intercountry adoption: Argentina”, (November 2008).

²³ See generally, Robertson, (2007).

²⁴ See UNICEF Innocenti Insight, (2006), 36 (discussing how, “[i]nstitutional placement as an economic and social coping strategy can be attractive to some families, because they anticipate that their children will have better access to services or receive material goods that the families feel they cannot provide” despite the fact that the biological parents are around). In research conducted in Zimbabwe, it has been established that, despite the presence of care givers, the ready availability of institutions to provide long term care for orphaned children has resulted in encouraging some relatives to forego their responsibility to care for orphaned children. Foster, *et al.*, (1995).

B) A clear definition and understanding of who is adoptable has the capacity to disprove the wrong perception (especially within some parts of the Western world) that there are lots of orphans, especially in the developing world - and hence a lot of adoptable children. There is a dire need to disprove such a misperception which in turn has the capacity to minimise the misinterpretation of adoptability that has the potential to result in flagrant abuses against, and exploitation of, a child who is adoptable.²⁵

In this regard, Graff contends that Westerners have been sold the myth of a world orphan crisis.²⁶ She challenges the assumption that there exist millions of children who are waiting for their “forever families” to rescue them from lives of abandonment and abuse.²⁷ Clearly, there is a cause for concern when sweeping statements are made, without statistics, that “millions on millions” of children are available for intercountry adoption.²⁸ It is even more disconcerting when such statements are made by seasoned researchers on the subject of intercountry adoption. For instance, a similar assertion by Bartholet has been a subject of severe criticism.²⁹ Amongst other factors, given the high number of unregistered births in the developing world every year,³⁰ Oreskovic and Maskew argue that this assumption can neither be proved nor disproved with any certainty.³¹

²⁵ Thompson, (2004), 463.

²⁶ Graff, (2008), 1.

²⁷ As above.

²⁸ See, for instance, Bartholet, (2007), 158 who employs such a line of argument. See, too, Dillon, (2003), 179, who contends that more empirical evidence on the number of adoptable children is needed.

²⁹ See, generally, Oreskovic and Maskew, (2008), 71 and in particular “Part I: Millions on Millions?” 77-81.

³⁰ See, generally, UNICEF Innocenti Digest, (2002).

³¹ Oreskovic and Maskew, (2008), 77-78.

According to Graff, the infants and toddlers being adopted by Western parents today are not orphans at all,³² indicating a failure of intercountry adoption schemes intended to benefit those children who are deprived of their family environment. And unfortunately, there is some evidence to partly reinforce Graff's position. Amongst such evidence, that provided by Oreskovic and Maskew is persuasive:

Despite the fact that we do not know how many "orphans" - however the term is defined - are actually adoptable, the evidence does show clearly that at least in one demographic dimension, the characteristics of the world's orphans differ significantly from those of children who are adopted internationally. UNICEF and USAID estimate that approximately 88% of the world's orphans are over the age of 5. But a review of the children adopted by U.S. citizens over the last 11 years shows that on average, 85-89% of the children adopted were under the age of 5. This disparity suggests that prospective adoptive parents in the U.S. view only a small fraction of the world's orphanage population as "adoptable". It also suggests that it is unlikely that children languish in orphanages primarily because of anti-adoption sentiment or restrictive state policies but rather because they do not satisfy the well-documented preference of adoptive parents for infant and toddler girls.³³ (notes omitted)

Oreskovic's and Maskew's assertion hints at the fact that many children who are benefitting from the system of intercountry adoption are not necessarily those who are in need of a family environment, but those who are "produced" into the system.³⁴ Minimising the misperception of who is "adoptable" has the potential to result in reducing illicit activities, and exploitation of, a child not yet adoptable.³⁵

³² Graff, (2008), 1. For a discussion on orphanhood and adoptability, see section 4.5.2 below.

³³ See, generally, Oreskovic and Maskew, (2008), 80-81. See, too, Smolin, (2006), 113, where he argues that "... while the untrained Western eye may perceive millions of adoptable orphans in such societies, child stealing/kidnapping rings may still develop, as agencies find it most convenient or effective to buy or steal the kinds of infants and children which seem most likely to meet Western specifications". Smolin, (2006), 128.

³⁴ Although conclusive evidence is not present, Oreskovic's and Maskew's assertion could be taken to imply in part that there is non-compliance with the principle of subsidiarity. This is because, a concrete implementation of the principle of subsidiarity naturally encourages domestic adoption and when it is implemented, "it often results in an increase of the average age of internationally adoptable children, as the younger ones are more easily adopted by local couples". See ISS/IRC, (2006a), 1-2.

³⁵ Thompson, (2004), 463.

In this regard, Dillon discusses what she terms the “adoptability conundrum”, which is described as the difficulty of distinguishing children who would be in the system of orphanage care (in any event) from those brought into the system by the lure of the profitability of international adoption, and who would not otherwise be in care.³⁶ If children are drawn into the intercountry adoption scheme in order to fulfil the requirements of prospective adoptive parents (for instance, for girls below the age of 1 year), in other words being “produced” for this end, those children who could, and should, be adopted run the risk of being excluded from the system.

This kind of experience would make adoption appear to be a “business” where the economic elements of “supply and demand” actively intervene.³⁷ For some, arguably, a situation whereby the supply of adoptable babies rises to meet foreign demand and dwindles when Western cash is no longer available (for instance when a moratorium is imposed), is indicative of a trend that many legally adoptable children enjoy less benefit from intercountry adoption schemes.³⁸

Nonetheless, while the general assertion that there are “millions on millions” of children awaiting adoptive families is not valid, some of Graff’s arguments are not necessarily fully accurate. For instance, Graff seems to make the assumption that the definition of orphan is not relative.³⁹ However, the definition of orphan for the purpose of intercountry

³⁶ The absence of a clear definition makes it impossible to tell whether the children most in need of families were being adopted or whether the facilitators are actually generating children who would be more desirable from the adopter’s point of view.

³⁷ Meier and Zhang, (2008-2009), 91-92 (identifying the root of the problem of trafficking as the supply and demand forces that drive the market for intercountry adoption); See too Smolin, (2006), 117.

³⁸ Graff, (2008), 3.

³⁹ As above.

adoption (or adoption in general) might vary from country to country.⁴⁰ Some of Graff's statements also seem to equate orphanhood with "adoptability" which clearly should not be the case. To mention but one example, Graff states that the infants and toddlers being adopted by Western parents today "are not orphans at all".⁴¹ This seems to imply that, if these children were orphans, their adoptability would have been justified or obvious. As is often the case in Africa, many orphans get absorbed by the extended family which therefore makes them unavailable for adoption.⁴²

C) The availability of a clear understanding of adoptability would also facilitate compliance with the principle of subsidiarity. The subsidiarity principle in general terms requires that intercountry adoption be considered once other suitable domestic measures are exhausted, or ruled not to be in the best interests of the child. Thus, for instance, if a child is not adoptable for one reason or another,⁴³ priority could be given to foster placement without wasting a lot of time. Or, if it is clear that a child is adoptable, there might not be any need to subject the child to institutionalisation. However, in situations where there is confusion about the clear standards for adoptability (or otherwise) of a child, the risk of compromising the best interests of the child by waiting for an unnecessary period of time or by other means is evident.

In sum, even with the recent relative widespread acceptance of the Hague Convention, one cannot devise appropriate and just national or international legal regimes for

⁴⁰ See section 4.5.2 below for a detailed discussion of the term "orphan".

⁴¹ Graff, (2008), 1.

⁴² See Chapter 2, section 2.3.2 above for a discussion of the role of the extended family.

⁴³ For instance, because he or she is an older child (and by definition hard-to-place).

international adoption unless a better and more transparent understanding of which children should be considered truly adoptable is formulated.⁴⁴ There is an urgent but unmet need for sound international adoption policy to require a far greater degree of information on orphans and adoptable children than is currently available. This proposition is further cemented by the following discussion of adoptability under the international legal framework.

4.4 ADOPTABILITY UNDER THE INTERNATIONAL LEGAL FRAMEWORK

The question of adoptability is often an issue that is either avoided or scantily investigated by writers when they discuss both domestic and intercountry adoption. Even the two leading works on the *travaux preparatoires* of the CRC⁴⁵ do not offer any detailed insight into the question of who is adoptable. One of the major works on the ACRWC⁴⁶ also fails to pay any detailed attention to the subject. As far as the Hague Convention is concerned, as will be shown in the respective section below, a detailed engagement of what factors help in establishing the adoptability of a child is often lacking- as the issue is relegated for the laws of states of origins to regulate.

A number of reasons could explain this lack of detailed engagement with the concept by writers. However, suffice it to mention that the different grounds that various legal

⁴⁴ Important work is being done by Trish Maskew and her organisation, Ethica, to publicize the need to purge the international adoption system of questionable ethical practices. See, for instance, Maskew, (2003). For a detailed discussion of illicit activities in intercountry adoption, see Chapter 6 of this study.

⁴⁵ Detrick, (1999); Van Bueren, (1995); Newell and Hodgkin, (2007).

⁴⁶ Gose, (2002).

systems consider to be criteria for adoptability make a comprehensive discussion of the concept difficult.

While it may be difficult and even unnecessary to provide prescriptive criteria for the determination of adoptability, it is possible to analyse the provisions of the CRC, the ACRWC, and the Hague Convention and extract some of the common and important principles for the determination of adoptability. It is this task that this section embarks upon.

4.4.1 The CRC and the ACRWC

While States are not under an obligation to establish a system of adoption *per se*,⁴⁷ where the system exists it should be accompanied by a clear policy and appropriate legislation.⁴⁸ Although not provided for under Article 21 of the CRC (and Article 24 of the ACRWC) in so many words, it is the obligation of States Parties to the CRC to establish “clear conditions under which a child is adoptable”.⁴⁹ In addition, it is the view of the Committee that it is an obligation under the CRC to “[e]ffectively identify those children potentially adoptable” (emphasis mine).⁵⁰

⁴⁷ See, for further details, discussion of this position Chapter 3, section 3.4.3.2.1.

⁴⁸ For instance, see, CRC Committee, Concluding Observations: Nepal, (September 2005), para. 53 which stipulates that:

Given the significant number of Nepalese children who are adopted by foreigners and in the context of the current armed conflict in the State party, the Committee is concerned at the lack of a clear policy and appropriate legislation on intercountry adoption, which results in various practices, such as trafficking and smuggling of babies.

⁴⁹ CRC Committee, Concluding Observations: Serbia, (June 2008), para. 43(a).

⁵⁰ See, for instance, CRC Committee, Concluding Observations: Serbia, (June 2008), para. 43(b); Republic of Georgia, (June 2008), para. 39(c).

Therefore, although the word “adoptable” does not appear anywhere in the CRC and the ACRWC, a closer look at the provisions of these instruments, albeit very limited, sheds some light on adoptability. Reference to Article 21(a) of the CRC shows that the permissibility of adoption must be determined:

...on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child’s status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary.⁵¹

Article 24 of the ACRWC stipulates the same requirement. However, it is to be noted that it only refers to “guardians” as opposed to “legal guardians”. This is a welcome move since it is reflective of the reality in Africa where persons might be *de facto* and not necessarily *de jure* guardians.

These provisions are reflective of Articles 7 and 9 of the CRC⁵² and Articles 19 and 20 of the ACRWC.⁵³ They reaffirm the assumption that children’s best interests are promoted optimally within their original family environment as much as possible. In addition, the provisions also offer parents the opportunity to exercise their primary responsibility as far as the care of their children is concerned.⁵⁴

⁵¹ This provision is similar to Art. 3(2) of the CRC which provides that “States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures”.

⁵² The right to birth registration, name and nationality and the right to know and be cared for by parents as well as the right not to be separated from his or her parents respectively.

⁵³ For a discussion of these provisions in the context of intercountry adoption, see Chapter 3 above.

⁵⁴ See Art. 3(2) of the CRC too.

However, an adoption can occur if parents are unwilling or are deemed by judicial or administrative process to be unable to discharge this responsibility.⁵⁵ This takes into account the possibility of children being orphaned, abandoned, and relinquished, amongst others. In addition, children could be separated from their parents in order to protect their best interests. For instance, where child abuse is prevalent within the family environment, the best interests principle might dictate that the child be separated from his or her parents permanently.

The authorisation of adoption “on the basis of all pertinent and reliable information” under the CRC⁵⁶ and “on the basis of all relevant and reliable information” under the ACRWC⁵⁷ should be read to imply that, amongst others, it is not only legal requirements that need to be fulfilled before a child is declared adoptable. Therefore, though adoptability establishes the fact that the child is legally adoptable, determination of adoptability should go beyond the legal determination.⁵⁸ It should also establish that the child is both emotionally and medically capable of benefiting from adoption.⁵⁹ It is wrong to assume that all children who are deprived of their family environment permanently are ready to reap the benefits of a permanent family environment. Writing on

⁵⁵ Newell and Hodgkin argue that “any legislation that permits adoptions under less stringent conditions would probably amount to a breach of both children’s and parents’ rights under the Convention”. Newell and Hodgkin, (2007), 296.

⁵⁶ Art. 21(b) of the CRC.

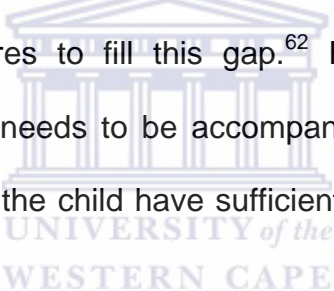
⁵⁷ Art 24(a) of the ACRWC.

⁵⁸ See ISS/IRC, (2006b), 1-2; ISS/IRC, (2007), 1.

⁵⁹ There is evidence that proves that some children, as a result of various previous experiences, have a difficulty forging an attachment with an adoptive family. At times, they may also have limitations to adapt to a new family environment. It is these types of cases in particular that the determination of emotional and medical capabilities of children to benefit from adoption becomes crucial. See ISS/IRC, (2006b), 1. Sometimes, the adoptability of a child could be conditional on the availability of specific types of eligible adoptive parents. A good example here is the adoptability of children with physical or mental disability, illness, and the like. This group of children will need an adoptive family environment that offers special features that make their physical, emotional or psychological recovery possible. See ISS/IRC, (2006b), 1.

intercountry adoption from an African perspective, Davel⁶⁰ correctly concurs that apart from the legal criteria, other factors such as medical, psychological and social aspects of adoptability need to be addressed in implementing the relevant legislation.

The CRC Committee also seems to support the view that the determination of adoptability should have a social dimension. This is apparent from its consideration of State party reports under the CRC. In its Concluding Observations on Mauritius's State Party report, for instance, it has expressed its concern about the "lack of a specific requirement to have a social report to assist judges in their decisions that adoption is in the best interests of the child".⁶¹ It subsequently recommended that the State Party should take legislative measures to fill this gap.⁶² Furthermore, establishing clear conditions for adoptability also needs to be accompanied by the obligation to ensure that "the biological parents and the child have sufficient information prior to consenting to a decision" on the adoption.⁶³



In the determination of adoptability, one of the central elements that the CRC and the ACRWC recognise is the importance of the views of the child. This is entrenched by Article 12 of the CRC and Articles 4(2) and 7 of the ACRWC.⁶⁴ The CRC Committee has aired its concern where, "although the assessment of the needs of the child in the placement of an adoptive home has been established, the views of the child are not

⁶⁰ Davel, (2008), 263.

⁶¹ CRC Committee, Concluding Observations: Mauritius, (March 2006), para. 45.

⁶² As above.

⁶³ CRC Committee, Concluding Observations: Serbia, (June 2008), para. 43(a).

⁶⁴ See Chapter 3, section 3.3.6 for a detailed discussion on these provisions in the context of adoption.

included in the selection process”.⁶⁵ In such situations, states are reminded to “[t]ake into consideration the views of the child within the processes and procedures of institutions that administer the adoption processes”.⁶⁶

Adoptability for the purpose of intercountry adoption could be subject to an additional or extra determination process. In other words, even if a child is declared adoptable, in some jurisdictions (notably India)⁶⁷ it is a requirement that failing domestic placement, the child be declared adoptable again for the purpose of international placement. However, it is submitted that adoptability for the purpose of intercountry adoption should be addressed through the application of the principle of subsidiarity (which is discussed in Chapter 5), and a two pronged process does not seem necessary. In other words, once a child is declared adoptable (generally for both domestic and intercountry adoption), applying the principle of subsidiarity is expected to do away with the need to declare a child adoptable twice - once for domestic adoption, and then, failing that, for intercountry adoption.

The kind of institutions that could be given the task of determining adoptability is also not an issue explicitly catered for under the CRC and the ACRWC.⁶⁸ In the absence of this, State practice indicates that the task of determining adoptability could be given to

⁶⁵ CRC Committee, Concluding Observations: Saint Lucia, (September 2005), para. 47.

⁶⁶ CRC Committee, Concluding Observations: Saint Lucia, (September 2005), para. 47(b).

⁶⁷ In case the Adoption Coordinating Agency (ACA) cannot find suitable Indian parent/parents within 30 days, the ACA will have to issue a Clearance Certificate which paves the way for the adoptability of the child internationally. The ACA is an agency in a state/region set up for the promotion of In-country Adoption through co-ordination of its member agencies, and recognized by Central Adoption Resource Authority and to issue clearance certificate for a child to be placed in inter-country adoption. See Central Adoption Resource Authority, (undated).

⁶⁸ See the discussion under Chapter 6 below on competent authorities on the intercountry adoption process.

courts, administrative structures or government authorities. Related to the determination of adoptability is also the obligation of the competent authority “deciding on the adoptability the child” to ensure that “all efforts have been made for the child to maintain links with his/her [extended] family and community, and that adoption is used in last resort”.⁶⁹

The age at which children can be considered adoptable is generally up to 18 years of age. This is compliant with the definition of a child in Article 1 of the CRC and Article 2 of the ACRWC.⁷⁰ However, some States have provided a lower age limit than 18 above which children cannot be considered adoptable.⁷¹ As argued above in Chapter 3, while States can provide for minimum ages for various purposes (for instance, for giving consent for medical treatment), these ages should be able to withstand scrutiny against the best interests of the child, the rule against discrimination, and the evolving capacities of the child in the context of child participation.⁷²

⁶⁹ CRC Committee, Concluding Observations: Mexico, (June 2006), para. 42(d).

⁷⁰ See Chapter 3, section 3.3.2 for a discussion of the definition of a child in relation to adoptions.

⁷¹ For instance, the U.S. provides for the age 16. The U.S. Department of State indicates in its “who can be adopted?” section that, amongst other requirements “... the child must be under the age of 16 at the time an I-600 petition is filed on his or her behalf with USCIS or a consular officer (a child adopted at age 16 or 17 will also qualify, provided he or she is a birth sibling of a child adopted, or who will be adopted, under the age of 16 by the same adopting parents)”. See U.S. Department of State, “Intercountry adoption: Who can be adopted?”, (undated). The Netherlands allows intercountry adoption only of children up to the age of 6. See Committee on Lesbian Parenthood and Intercountry Adoption, (2008), 57. In Costa Rica, while two parallel systems of adoption are recognised (those arranged through the *Patronato Nacional de la Infancia* (PANI), the Costa Rican child welfare authority, and private adoptions) Costa Rican law prohibits adoption of children less than four years of age, except in cases in which the child is part of a family group, or is difficult to place. See U.S. Department of State, “Intercountry adoption: Costa Rica”, (September 2009). In a clear display of exception from the common practice, Salvadoran law allows the adoption of children over 18 provided that they are in the care of parents or relatives, and a court finds that adoption would be in the best interests of the child. Assessed against international law, this should be able to withstand scrutiny since States Parties have the right, by keeping children’s best interests at heart, to provide for minimum ages for various themes. In the case of Kenya children must at least be six weeks old to be adoptable. See Sec. 156(1) of the Children Act; U.S. Department of State, “Intercountry adoption: Kenya”, (November 2008).

⁷² See Chapter 3, section 3.3.2 for a detailed discussion of this.

Finally, even though the best interests of the child is of paramount importance in adoptions, it seems that, in one sense, it could be circumscribed by the legal necessities of complying with legal requirements and securing the necessary consents.⁷³ If such compliance is not present, it is insinuated that the adoption should not proceed even if it is viewed to be in the best interests of the child.⁷⁴ Such a decision, it could be argued, undermines the “paramountcy” of the best interests of the child.

Nonetheless, such a line of argument is difficult to sustain, irrespective of how relatively “best interests” is defined. For instance, it is submitted, that if the adoptability requirement is not complied with, it is difficult to maintain that it is in the best interests of a child to be adopted. In addition, where, in contravention of legislation, the consent of natural parents is not secured, it is safe to assume that the child’s and the parent’s right to family life would be violated.⁷⁵ Such an adoption could scarcely be labelled to be in the best interests of the child.

Determining adoptability should also be compliant with other relevant provisions of the CRC and the ACRWC. For instance, when considering factors, such as age and health, that have a bearing on adoptability, caution should be exercised that one of the cardinal principles of the CRC and the ACRWC – namely, non-discrimination – is not violated.⁷⁶

In this regard, Hodgkin and Newell are of the view that any legislation that permits

⁷³ Newell and Hodgkin, (2002), 288.

⁷⁴ Newell and Hodgkin, (2002), 288. However, it is interesting to note that some national courts accord the best interests principle overriding value even when it is apparent that the adoption was done in breach of international or national law. For instance, in Germany, in *AG Hamm, 17 April 2006 – XVI 44/05*, 363, the court ruled that a foreign adoption can be recognised even if it is legally flawed as long as it serves the interests of the child and is consistent with the essential principles of German law.

⁷⁵ See Arts. 7 and 8 of the CRC.

⁷⁶ See Chapter 3, section 3.3.2 for a detailed discussion of this.

adoptions under less stringent conditions than what is provided for under the CRC would probably amount to a breach of both children's and parents' rights under the Convention.⁷⁷

4.4.2 The Hague Convention

It is in Chapter II that Articles 4 and 5 of the Hague Convention set down the main requirements for intercountry adoption. Of interest to this chapter is Article 4(a) which entrenches that an adoption is only allowed once the competent authorities of the state of origin have determined: "(1) that the child is *in fact* adoptable".⁷⁸

4.4.2.1 The term "adoptable" during the drafting of the Hague Convention

As its *Explanatory Report* indicates, the term "adoptable" in the Hague Convention was a subject of an in-depth discussion during the drafting stages of the Convention.⁷⁹ As already mentioned above, the expression "adoptable" was criticised as suggesting the "availability" of children, as though children are merchandise to be acquired by the prospective adoptive parents.⁸⁰ In other words, the connotation that the term "adoptable" could imply - that the child concerned may be perceived as the object rather than the subject of an adoption – was of concern.

⁷⁷ Newell and Hodgkin, (2007), 296.

⁷⁸ Art. 4(a)(1) of Hague Convention.

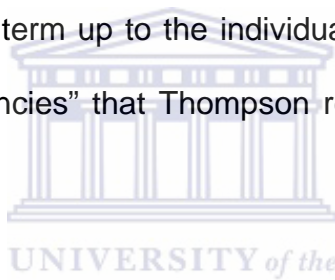
⁷⁹ Parra-Aranguren, (1994), para. 117-119.

⁸⁰ Parra-Aranguren, (1994), para. 117.

It was also contended that the term might be understood as only referring to the legal conditions necessary for the adoption, with the exclusion of psycho-social conditions.⁸¹ The expression “free for adoption” was considered inappropriate because it fails to take into account, amongst other things, the psycho-social conditions of the child.⁸² As a result, in the absence of a better word, the term adoptable was retained.⁸³

4.4.2.2 The term “adoptable” in the Hague Convention

Throughout the Hague Convention the word “adoptable” appears only twice⁸⁴ and “adoptability” appears once.⁸⁵ These terms are not defined anywhere in the treaty. This leaves the interpretation of the term up to the individual sending countries. It is on the basis of this and other “deficiencies” that Thompson referred to the Convention as “a vague Hague”.⁸⁶



However, the fact that the Hague Convention does not provide for a definition of the term “adoptable” is not by default but by design – hence, it is an intentional vagueness. This vagueness, it is believed, is expected to allow some level of flexibility, thereby catering for varying cultural, economical, and social differences amongst contracting states. The lack of definition of “adoptable” in the Hague Convention could also be

⁸¹ As above.

⁸² Parra-Aranguren, (1994), para. 117.

⁸³ As above. In addition, it was said that the expression “in need of adoption” was declared less appropriate, because a child may need to be adopted but not fulfil the necessary legal requirements.

⁸⁴ In Arts. 4 and 16(1)(c) of the Hague Convention.

⁸⁵ In Art. 16(1)(a) of the Hague Convention.

⁸⁶ Thompson, (2004), 459-461. Thompson writes that “the deficiencies identified here constitute the Hague Convention’s overall weakness: the lack of clear and concise definitions of key adoption terms and procedures”. Thompson, (2004), 460-461.

explained by the procedural, as opposed to substantive, nature of the treaty.⁸⁷ Adoptability is a substantive issue.

In addition, it is important to recall that it is not one of the objectives of the Hague Convention to introduce a comprehensive, uniform international code on adoption.⁸⁸ Rather, the Hague Convention sets out the basic requirements necessary to ensure that intercountry adoptions take place in the best interests of the child. As a result, the provision of a definition of, or grounds for, adoptability would not necessarily have been appropriate.

4.4.2.3 Adoptability in the Hague Convention

Despite the lack of definition of the term “adoptable” under the Convention, it is possible to tease out some characteristic features of adoptability. It is provided that Article 4(b)(1) of the Hague Convention builds on Article 21(b) of the CRC which is discussed in the previous section. Therefore, it is important to note that most of the arguments mentioned above in the context of the CRC (and the ACRWC) in respect of adoptability apply to the Hague Convention, as appropriate.⁸⁹

The lack of definition of the term “adoptable” in the Hague Convention has also raised the question whether Article 4(b) connotes that “the child is merely capable of being

⁸⁷ Maravel, (1996), 316 (writing that “[o]ne may say that it is a procedural rather than substantive document in that it regulates the process of intercountry adoption rather than substantive norms of adoptability or other matters”.)

⁸⁸ See Art. 1 on the objectives of the Hague Convention.

⁸⁹ For instance, the arguments pertaining to consent, grounds for adoptability and so forth. In addition, similar arguments that the “child’s psycho-social adoptability is determined by the conclusion that it is impossible for the birth family to care for the child, and by the assessment that the child will benefit from a family environment”. See, Permanent Bureau, (2008), Guide to Good Practice, 82.

adopted” or that “the child ought to be adopted”.⁹⁰ A definition of “adoptable” offered by Cantwell indicating that the term refers to the status of a child who is “officially recognised as having a legal status enabling adoption to be considered, and deemed to require and to be potentially able to benefit from such a measure”,⁹¹ seems to favour the former interpretation. In addition, it is submitted that the application of the principle of subsidiarity, which seems to *generally* favour local solutions over international ones, seems to accord with the interpretation of adoptability which implies that “the child is merely capable of being adopted”.⁹²

For adoption to be in the best interests of the child, there should exist evidence that, even though the birth family (including the extended family) cannot care for the child, the child is still capable of benefiting from a family environment. Ensuring that the child is adoptable should include establishing that all necessary consents have been obtained.⁹³ Article 4(a)(1) of the Hague Convention is to be read in conjunction with Article 16 (b) which demands that information about the adoptability of the child should be included in the report to be prepared by the Central Authority of the State of origin when it is satisfied that the child is adoptable.⁹⁴

⁹⁰ See Murphy, (2005) 189.

⁹¹ Cantwell, (2003), 1.

⁹² The assumption that adoptability connotes that the “child ought to be adopted” could be labelled to be too inflexible to the extent that it might fail to accommodate the best interests of the child principle. For instance, a child who is found abandoned may be declared adoptable, and before adoption takes place, the extended family of the child might surface and offer to take custody of the child. In such circumstances, reading “adoptability” as to mean “ought to be adopted” could go contrary to the best interests of the child.

⁹³ See Arts. 16(1)(c) and 16(2) of the Hague Convention.

⁹⁴ Art. 16(1)(a) of the Hague Convention provides that “[i]f the Central Authority of the State of origin is satisfied that the child is adoptable, it shall – a) prepare a report including information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child's family, and any special needs of the child”.

As far as grounds of adoptability are concerned, there is not even a general criterion provided for by the Hague Convention.⁹⁵ However, once again, it is safe to deduce that the same general requirement under the CRC and the ACRWC, that adoptability should be determined “on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child’s status concerning parents, relatives and legal guardians” would apply.⁹⁶ This is confirmed by the Guide to Good Practice of the Hague Conference on Private International Law which indicates that orphanhood, abandonment, and relinquishment are some of the acceptable grounds for adoptability.⁹⁷

Under the Hague Convention, it is the obligation of Central Authorities of sending States to produce reports on all adoptable children that may be better protected by intercountry adoption.⁹⁸ It is important that these reports are prepared irrespective of whether adoptive parents have filed their reports (indicating their willingness and capacity to adopt) with the sending State's Central Authority. Therefore, before the sending State's Central Authority is allowed to try to find prospective adoptive parents who match the needs of a child, a report should be generated on an adoptable child describing, "at a minimum, the child's identity, adoptability, background, social environment, family and medical history and special needs".⁹⁹

⁹⁵ Of course this is once again related to the criteria that adoptability is to be determined on the basis of the laws and procedures of the state of origin.

⁹⁶ It is to be noted that, amongst others, the Preamble to the Hague Convention refers to the CRC.

⁹⁷ See Permanent Bureau, Guide to Good Practice, (2008), 81-82.

⁹⁸ Katz, (1995), 308.

⁹⁹ As above. One of the objectives of this advance preparation of reports is to do away with the practice of locating children to “fill the orders” or meet the needs of adoptive parents. It helps to keep intercountry adoption as a child centred service and subverts the practice of a parent-driven adoption market.

Reverting to the lack of definition on who is adoptable, though some level of flexibility in definitions is envisaged by the Hague Convention, it may be contended that it still leaves too much discretion in the hands of the Central Authorities of sending countries to unilaterally determine the meaning of such key terms. It could be argued that such discretion compromises one of the objectives of the Convention, viz to prevent the abduction, the sale of, or traffic in children,¹⁰⁰ and contributes to perpetuate “the lack of uniformity the Hague Convention attempted to streamline in the first place”.¹⁰¹

It is submitted that such claims would not be totally acceptable. It is argued that, though sending countries have the ultimate mandate to determine who is adoptable, under the Hague Convention, to some extent, receiving states have an influence in shaping the adoptability requirements that are set in place by the relevant authorities (including legislators) of the country of origin.¹⁰² This is possible in terms of Article 17(c) of the Convention, which provides that “[a]ny decision in the State of origin that a child should be entrusted to prospective adoptive parents may only be made if – c) the Central Authorities of both States have agreed that the adoption may proceed”. This provision allows the relevant authorities (mainly Central Authorities) of the receiving state to insist

¹⁰⁰ Art. 1(b) of the Hague Convention.

¹⁰¹ Thompson, (2004), 465.

¹⁰² Although it does not have, in strict sense, implications for the rules of adoptability, an example of “other measures” that receiving states could take that have the capacity to influence the adoptability of children (specifically to minimise the possibility of abusing adoptability requirements) includes making DNA testing compulsory. For instance, on 1 October 1998 the U.S. Immigration and Naturalization Service introduced compulsory DNA testing for all intercountry adoptions from Guatemala. See Human Rights Internet, (2008). Talks are underway to implement, albeit in a limited scope, a similar measure in Ethiopia. See Ethica, (23 June 2009).

on the application of certain additional requirements of adoptability under the law of the sending state¹⁰³ in order for a child to be matched with a family in that receiving State.

Similarly, if receiving States are of the view that the determination of adoptability in the country of origin does not comply with international law, and falls short of promoting and protecting the best interests of the child, they have the option of placing a moratorium on adoptions from the country of origin. This, as experience has shown (in the case of Guatemala and Romania, for instance) has the potential to influence the process of determining adoptability in the State of origin.

The assertion that the discretion vested in sending States would contribute to perpetuate “the lack of uniformity the Hague Convention attempted to streamline in the first place”, as already mentioned above, is also flawed. As pointed out above, the Hague Convention is more procedural than substantive in nature.¹⁰⁴

4.4.2.4 Competent authorities in the determination of adoptability

While the issue of institutional framework in intercountry adoptions is addressed in detail in chapter 6, it is worth mentioning that it is also a crucial tenet of adoptability that it is determined by competent authorities.¹⁰⁵ The question of who determines adoptability is

¹⁰³ Since one of the objectives of the Convention is co-operation, the additional requirements of the receiving State should be made known to the State of origin through exchange of information.

¹⁰⁴ Maravel, (1996), 316 (writing that “[o]ne may say that it is a procedural rather than substantive document in that it regulates the process of intercountry adoption rather than substantive norms of adoptability or other matters”.)

¹⁰⁵ Under the Hague Convention, a competent authority could be “any authority appointed by a Contracting State to perform a function attributed in the Convention to this type of authority”. Some functions require a competent authority that is a public authority such as a court or an administrative body. Permanent Bureau, Guide to Good Practice, (2008), 15 (Glossary).

an issue partially addressed by the *Explanatory Report* of the Hague Convention as well as its provisions. Accordingly, the adoptability of a child is to be determined by the “competent authorities of the state of origin”.¹⁰⁶ Such determination is to be made according to the criteria of the applicable law as well as by considering psycho-social and cultural factors.¹⁰⁷ Therefore, contracting states have the obligation either to appoint or designate competent authorities to fulfill their functions.

It is possible to decipher from the terms “competent authorities” the drafter’s indifference to the branch of government (or authority) which would be vested with the power and responsibility to determine adoptability. “Competency” connotes the power or jurisdiction to make the decision in question. It is submitted that, as long as competency is displayed by the authority that determines adoptability of a child, the requirement of the Convention would be complied with. Therefore, the state of origin is at liberty to determine its competent authority, whether it be an administrative, judicial, or any other type of competent authority.

The Hague Convention does not rule out the possibility of various competent authorities for various Convention functions. Therefore, for instance, the competent authority that determines adoptability could be different from the one that makes the Article 23 certification of adoption under the Hague Convention.¹⁰⁸

¹⁰⁶ Parra-Aranguren, (1994), para. 119.

¹⁰⁷ As above.

¹⁰⁸ Permanent Bureau, Guide to Good Practice, (2008), 39.

4.5 A CRITICAL ANALYSIS OF THE GROUNDS FOR ADOPTABILITY

4.5.1 Termination of parental rights and responsibilities as a result of court orders, recognition of abandonment, and voluntary relinquishment

Although a myriad of issues are related to the topic of termination of parental rights, this section will address only three: 1) termination of parental rights and responsibilities through court orders; 2) termination of parental rights and responsibilities as a result of recognition of abandonment; and 3) termination of parental rights and responsibilities as a result of voluntary relinquishment.¹⁰⁹ While most states have formal mechanisms included in their laws that specify the ways in which a child may enter into the care of, or protection by, the state,¹¹⁰ these three are the most common methods (along with orphanhood) by which parents permanently lose rights to their children. Usually, for a child to be declared adoptable and an adoption to take place, parental rights should be terminated in one of these ways.¹¹¹

The phrase “termination of parental rights and responsibilities through court orders” is understood to refer to situations where parents or guardians are found to be “unfit” and/or “improper” for the care of a child and their rights and responsibilities are terminated as a result of an administrative or court order. This may happen, for

¹⁰⁹ While there is a lot of overlap between the terms abandonment and relinquishment, they are not used interchangeably in this study. It is possible to relinquish one's legal rights to a child without actually disappearing from the child's life, which is what abandonment implies. It is not clear, for instance, whether it is only abandonment or relinquishment of parental rights and responsibilities too that could be accommodated as grounds to declare children as adoptable. State practice is divided on the issue. While some States allow both, others limit abandonment as the only ground for a child to be declared adoptable.

¹¹⁰ See Guide to Good Practice, (2008), 69-72 for a discussion of a child's entry into care in the context of intercountry adoption.

¹¹¹ Termination of parental rights is not necessary, however, in the context of step-parent or so called second-parent adoptions. A second-parent adoption takes place when one parent, either an adoptive or birth parent, seeks to add another parent for his or her child.

instance, if the parent/s or guardian/s is abusing or neglecting the child, and permanency planning has been found to be in the best interests of the child.¹¹²

Similarly, while there is a lot of overlap between the terms “abandonment” and “relinquishment”, they are not used interchangeably in this chapter. Therefore, “abandonment”, as understood in this chapter, refers to “the act of leaving a child with the intention of forsaking one’s parental rights, with no intention of return”.¹¹³ The notion of “relinquishment”, on the other hand, refers to a parents or guardians decision to surrender rights and responsibilities in respect of a child.¹¹⁴ It is possible to relinquish ones legal rights in respect of a child without physically disappearing from the child's life, which is what abandonment implies.

4.5.1.1 Termination of parental rights and responsibilities as a result of a court order

It is one of the important elements of Article 9 of the CRC and Article 19 of the ACRWC that the child shall not be separated from his or her parents against their will.¹¹⁵ In exceptional circumstances, competent authorities subject to judicial review can determine separation, in accordance with applicable law and procedures, for the best

¹¹² For a discussion of what permanency planning is, and its application in various contexts see generally, Testa, (2005), 499; Young and Lee, (2003), 46; Herring, (1995), 183.

¹¹³ Guide to Good Practice, (2008), 70, citing “Morocco (Law 15-01 relating to the care of abandoned children (*kafala*), Official Bulletin, 15 September 2002, Art. 1). Abandonment must be approved by a court, among others, in Bolivia (1999 Children and Adolescents. Code, Arts 35, 289 and 293), the Dominican Republic (2003 Child and Adolescence Protection System and Fundamental Rights Code, Art. 132) and France (Civil Code, Art. 350)”.

¹¹⁴ Permanent Bureau, Guide to Good Practice, (2008), 71.

¹¹⁵ Art. 19(1) of the ACRWC stipulates that “[n]o child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law that such separation is in the best interest of the child”. The phrase “against their will” has been interpreted to refer equally to the will of both the parents and the child. Doek, (2006a), 21-22.

interest of the child.¹¹⁶ If a parent's act or failure to act deprives a child, and the deprivation is currently causing or will in the future cause serious physical, mental or moral harm, then it is common practice that a designated person or authority may petition the court to terminate the parental rights of such parent.¹¹⁷ Nonetheless, it is important to appreciate that involuntary termination of a living birth parent's rights is an extreme measure reserved for cases of egregious abuse, abandonment, desertion, neglect, or inability to support.

As far as the determination of the termination of parental responsibility is concerned, the procedure should always keep at its centre the best interests of the child or children involved. One of the vital ways to do this is to establish “a due judicial process, including technical assessment of the capacity of the parents or guardians, in cases involving termination of the parental responsibility”.¹¹⁸ It is crucial that states “[e]nsure that exhaustion of all means to prevent termination of parental responsibility and/or separation of the child is set as a clear criteria [sic] in all cases involving adoption”.¹¹⁹

As far as the States Parties' obligation to respect non-separation is concerned, there is a need to use positive measures to address the causes for the removal of children from their parents,¹²⁰ including providing parents or guardians with appropriate assistance.¹²¹

¹¹⁶ Art. 9 of CRC.

¹¹⁷ The type of behaviour that may cause the court to consider terminating parental rights includes prolonged alcohol or other substance abuse, or a failure to discontinue abusing alcohol or other substances after receiving treatment.

¹¹⁸ See, for instance, CRC Committee, Concluding Observations: Nepal, (September 2005), para. 53.

¹¹⁹ CRC Committee, Concluding Observations: Nepal, (September 2005), para. 54(d).

¹²⁰ See, for instance, Braveman and Ramsey, (1997), 447 (arguing that “[w]e need to focus our energy, attention, and resources on the elimination of child poverty so that children will not be removed from caring parents because the parents are financially unable to provide for their basic needs”); Guggenheim, (2000), 1716.

¹²¹ As above.

There is a protracted debate in some quarters whether termination of parental rights should only take place after the adoptability of a child has been asserted (or, in some instances, even only after an adoptive parent is found).¹²² In this regard, it is submitted, that, even if adoptability might factor into parental rights termination decisions, it need not be a fundamental consideration. Rather, it should once again be the best interests of the child that should be the overall consideration. If the prospect of adoptability is to unduly influence whether or not to terminate parental rights, the possibility that certain groups of children such as older children, special needs children, or children from minority groups could suffer from neglect or abuse at the hands of their parents would increase. It would also mean that these groups of children would remain in institutional or foster care for a longer period of time until termination of parental rights occurs.¹²³

Within the jurisdictions of all the countries in the study, the termination of parental rights and responsibilities (leading to the adoptability of a child) is possible. What needs to be mentioned at the outset, however, is that this measure cannot be labelled as a common child protection measure in any of the countries under the study. The fact that it is a highly exceptional measure, and, when it happens, does not often lead to the adoptability of children, is partly apparent from the unsuccessful attempt by this author to find cases of termination of parental rights that subsequently led to the adoptability/adoption of a child.

¹²² See *Williams v. Arkansas Dep't of Human Servs.*, CA 05-947, (3 May 2006) (not designated for publication); See *Williams v. Arkansas Dep't of Human Servs.*, CA 05-947 Appeal (6 December 2006) (not designated for publication). See, too, Noonan and Burke, (2005), 241-256.

¹²³ In the context of the U.S., this has been found to mean “we expect African American children, children of Hispanic decent, older children, and disabled children to have a lower probability of parental rights termination because they have less chance of being adopted”. Noonan and Burke, (2005), 245.

4.5.1.1.1 South Africa

In South Africa, it is noteworthy that, under the Child Care Act of 1983, when there is no prospect for a child to reunify with his or her original family soon enough for his or her developmental needs to be met, the possibility for a child to be adopted exists.¹²⁴ Nonetheless, the South African Law Reform Commission (SALRC) had found that, in practice, courts have often been reluctant to terminate parental rights and responsibilities.¹²⁵

In addition, certain children might be caught up in statutory care with no prospect of reunification with original family. These children's situation is exacerbated if they do not benefit from adoption because "disruptive or violent behaviour by seriously disturbed parents makes it impossible to even begin introducing them [these children] to prospective adoptive families" (insertion mine).¹²⁶ Since the Child Care Act requires that a child develop a relationship with a prospective adoptive parent before an application before a court is brought, and no other provision existed for termination of parental rights, children's rights to a family environment have been compromised.

Fortunately, clarity on these issues is introduced through the Children's Act 38 of 2005. The Children's Amendment Act 41 of 2007 inserts section 135 in the Children's Act that allows for the termination of parental rights and responsibilities of the parents of children

¹²⁴ Sec. 19 of the Child Care Act

¹²⁵ See, generally, SALRC Project 110, (2001).

¹²⁶ Mosikatsana and Loffell, (2007), 15-5.

in statutory care.¹²⁷ This is to be done only when it is in line with the best interests of the child with a view, amongst others, to the adoption of such child.¹²⁸

According to the Children's Act, the termination of parental responsibilities and rights can be initiated by various parties. Pursuant to Section 135 of the Children's Act, these includes through the application of the Director-General or a provincial head of social development or a designated child protection organisation. At times, the application for the termination of parental responsibilities and rights can be made without the consent of a parent or care-giver.¹²⁹

As entrenched in Section 136 of the Children's Act, in considering such an application, the relevant court must take certain factors into account, such as the need for the child to be permanently settled, preferably in a family environment (taking into consideration the age and stage of development of the child); the success or otherwise of any attempts that have been made to reunite the child with the person whose parental responsibilities and rights are challenged; and the probability of arranging for the child to be adopted or placed in another form of alternative care. The consideration of these

¹²⁷ Sec. 135 of the Children's Act.

¹²⁸ Mosikatsana and Loffell, (2007), 15-5. A joint reading of Secs. 155, 156, and s157 of the Children's Act is of further guidance in the determination of which children are adoptable. The thrust of a combined reading of these sections gives the view that a children's court is enjoined to consider various options, including adoptions, for the purpose of achieving stability in the life of a child who is need of care and protection. See Mosikatsana and Loffell, (2007), 15-5. After all, the South African Constitution (Sec. 28(1)(d)) allocates to every child the right to be protected from maltreatment, neglect, abuse or degradation, which includes more than the current emphasis on remedial interventions.

¹²⁹ These scenarios are to occur if the child at the time of the application, is older than seven years, and has been in alternative care for more than two years; is older than three years but not older than seven years, and has been in alternative care for more than one year; or is three years or younger, and has been in alternative care for more than six months.

circumstances is crucial in order not to use the procedure to the detriment of the child.¹³⁰

While “the probability of arranging for the child to be adopted”¹³¹ is one of the relevant factors a court should take into account when considering an application for the termination of parental rights and responsibilities, it is not a precondition for the termination of such rights. This is laudable, and is clearly contrary to the negative position held by some that termination of parental rights and responsibilities should take place only when the adoptability of a child has been asserted (or, in some instances, when an adoptive parent is found).¹³²

In order to minimise compromising the best interests of the child through a premature or unwarranted termination of parental rights and responsibilities leading to adoptability, the Children’s Act builds sufficient safeguards. For instance, the appreciation of the legislator that termination of parental rights and responsibilities does not necessarily lead to the automatic adoptability of a child is apparent from Section 230 of the Act.¹³³

Section 230(3) of the Children’s Act 38 of 2005, which entrenches the definition of adoptable children, provides in relevant part that:

A child is adoptable if—

- (a) the child is an orphan and has no guardian or caregiver who is willing to adopt the child;
- (b) the whereabouts of the child’s parent or guardian cannot be established;

¹³⁰ For instance, as per the UN Guidelines on Alternative Care, such consideration complies with the requirement that family separation should be a measure of last resort.

¹³¹ Sec.136 of the Children’s Act.

¹³² See section 4.5.1.1 above for such a discussion.

¹³³ Sec. 230 of the Children’s Act.

- (c) the child has been abandoned;
- (d) the child's parent or guardian has abused or deliberately neglected the child, or has allowed the child to be abused or deliberately neglected; or
- (e) the child is in need of a permanent alternative placement.

Under this Section, there is no indication that a child is adoptable simply because the parent's rights and responsibilities were terminated.¹³⁴

Arguably, however, Section 230(3)(e) could be read to enunciate that if the termination of parental rights and responsibilities was made in order to secure stability in the child's life, a child could become adoptable automatically.¹³⁵ This Section provides that a child is adoptable if "the child is in need of a permanent alternative placement".

It is submitted that such an argument is untenable in the face of the fact that alternative care under Sections 46(1)(a)(i) and 167(1)(a) includes foster placement. For instance, an older child who requires a permanent alternative placement might not be adoptable because he or she lacks the capacity to form attachments and benefit from a family environment. In such exceptional circumstances, children will not be adoptable even if they display a need for a permanent alternative placement.

This approach is also compliant with the position that the determination of adoptability is not an issue to be determined only by using legal principles, but also requires social as well as psychological assessments. In addition, it also counters the assumption that in all cases where termination of parental rights and responsibilities takes place, the best option is always adoption, which is a position devoid of the generally acceptable

¹³⁴ As above.

¹³⁵ See CLE and CCL, (2009), 26.

standard that the best interests of a child should be considered on a case by case basis.

4.5.1.1.2 Ethiopia

In Ethiopia, during marriage, the mother and the father are joint guardians and tutors of their children,¹³⁶ and the default of one of the parents (which includes through death, disability, unworthiness or removal) shall make the other parent exercise such functions alone. The termination of parental rights and responsibilities is catered for under Article 247 of the RFC.¹³⁷ In this regard, it is interesting and noteworthy that, the removal of ascendants shall be declared by a court “only with extreme caution”.¹³⁸ The word “removal” under the RFC connotes termination of parental rights and responsibilities.¹³⁹ The termination of parental rights and responsibilities as a result of a court order that leads to the adoptability of a child is used sparingly.



4.5.1.1.3 Kenya

The Kenyan experience also indicates a similar situation. While Section 6(1) of the Children Act gives the child a right to live with and be cared for by the parents, the “court or the Director determines in accordance with the law that it is in the best interests of the child to separate him from his parent”. This may happen, for instance,

¹³⁶ Art. 220 of the RFC.

¹³⁷ Art. 247 of the RFC

¹³⁸ Art. 247(1) of the RFC. In addition, Art. 249 of the RFC under the title “Duties of the Court” provides that:

- 1) Where the court is to appoint or to remove a person as guardian or tutor of a minor, it shall, before making its decision, consult, in so far as possible, the ascendants and the brothers and sisters of the child who have attained majority
- 2) Where it thinks fit, it may hear the minor himself
- 3) The court shall decide having regard solely to the interest of the minor and without being bound by the information which it has obtained.

¹³⁹ See Art. 219 of the RFC.

where a parent is abusing a child.¹⁴⁰ In such circumstances, “the best alternative care available shall be provided for the child”.¹⁴¹ Section 6(3) provides in full that:

Where a child is separated from his family without the leave of the court, the Government shall provide assistance for reunification of the child with his family.

This suggests, rather obliquely, that in court-ordered separations, family reunification might not be an option, and termination of parental rights and responsibilities could follow from this. It is notable that the involvement of the court is congruent with Article 9 of the CRC and Article 19 of the ACRWC.

4.5.1.2 Termination of parental rights and responsibilities as a result of abandonment

Apart from termination of parental rights and responsibilities as a court order, parents might abandon or relinquish their children, and terminate their parental rights and responsibilities voluntarily. The common dictionary definition of “abandonment” is:

To relinquish or give up with the intent of never again resuming or claiming one's rights or interests in; to give up absolutely; to forsake entirely; to renounce utterly; to relinquish all connection with or concern in; to desert, as a person to whom one is bound by a special relation of allegiance fidelity; to quit; to forsake.¹⁴²

Abandonment of a child is desertion by the parent with the intent to completely sever the parent-child relationship, including its rights and obligations. Abandonment can be viewed as a drastic form of relinquishment of parental rights and responsibilities.¹⁴³ It includes the intention to abandon as well as the physical act of surrendering all parental

¹⁴⁰ See, for instance, Sec. 24(7) of the Children Act on the exercise of parental responsibility.

¹⁴¹ Sec. 6(2) of the Children Act

¹⁴² Webster's Third New International Dictionary.

¹⁴³ Monica, (2000), 267.

duties.¹⁴⁴ Therefore, abandonment must be wilful, and it must be established that there is a settled intention to renounce *permanently* the rights and duties of parenthood.¹⁴⁵ This definition is indicative of the need to draw a distinction between those children who are “conditionally abandoned”,¹⁴⁶ i.e. where parents express the intention to retrieve the child later; to contribute to the care of the child later; or express ongoing parental interest in the child, on the one hand, and those children that are indeed permanently abandoned. In this thesis, it is the permanently abandoned group of children that are referred to as abandoned.

In most countries, particularly African countries, abandonment is a crime.¹⁴⁷ Child abandonment could also be interpreted to constitute a breach of Articles 18(1) and 19(1) of the CRC, and Article 20(1) of the ACRWC. Despite this, one route followed by some countries (mainly Western) to minimise the problem of abandoned infants deaths, is to provide legislation that offers confidentiality and immunity to parents who leave their unharmed infants at a hospital or other designated places.¹⁴⁸ Often these laws also set out procedures for child welfare agencies to follow immediately after the

¹⁴⁴ Black's Law Dictionary, (1990), 2. Abandonment is sometimes classified into conditional and unconditional. Such a distinction is necessitated to differentiate between those children who are handed over to orphanages temporarily and those that are abandoned irreversibly. According to the 7th edition of Black's Law Dictionary, abandonment in general is defined as “[t]he relinquishing of a right or interest with the intention of never again claiming it” while within family law it is defined as “[t]he act of leaving a spouse or child willfully and without an intent to return”. Garner, (1999), 1-2.

¹⁴⁵ Van Bueren observes that there are two types of abandonment- namely acts of commission (wilful abandonment) and acts of omission (neglect). Van Buren, (1998), 284. The former is the focus here as neglect is a form of abandonment which leads to termination of parental responsibilities through a judicial or administrative process.

¹⁴⁶ This is sometimes referred to as temporary relinquishment.

¹⁴⁷ For instance, in Kenya, Ethiopia, and Egypt.

¹⁴⁸ See, for instance, Gee, (2001), 151; Partida, (2002), 61. These child abandonment laws are commonly referred to as "safe haven laws", "baby Moses laws" or in Europe, "hatchery laws". Germany for example, "has adopted the use of 'baby slots' in which unwanted newborns may be deposited anonymously." while South Africa has a program called "the revolving crib," and Hungary has established "anonymous drop-off locations".

abandonment takes place, including an expedited process to terminate parental rights.¹⁴⁹

It is submitted that abandonment is not a concept the elements of which are necessarily agreed upon amongst all cultures and backgrounds. Possibilities exist, for instance, where street children are not necessarily without a family, and hence, not abandoned.¹⁵⁰

In some parts of the world, it is not uncommon for “parents to entrust the child they cannot care for, without, however, wishing to abandon him”.¹⁵¹ This is a clear indication that the definition, and declaration, of abandonment should be able to take these realities into account, and consequently be a matter of the law relating to the adoptee rather than to the adopter.¹⁵²

Despite the various standards pertaining to abandonment, a few points could be highlighted as constituting good practice. Therefore, a sound abandonment determination legal regime would provide for a clear standard for abandonment, as well as for the authority that formally verifies and declares that abandonment has occurred.¹⁵³ This should be accompanied by measures to be taken to locate the family of origin, and to guide the way forward in order to place those children who could benefit from a family environment.¹⁵⁴

¹⁴⁹ See, for instance, Gee, (2001), 151.

¹⁵⁰ This calls for an appreciation of the distinction between children who work on the streets and those who live on the streets.

¹⁵¹ ISS/IRC, (2006a), 2.

¹⁵² As above.

¹⁵³ Permanent Bureau, Guide to Good Practice, (2008), 71.

¹⁵⁴ As above.

In addition, while some States require a specified amount of time to lapse between abandonment and the declaration of adoptability, others do not have such a requirement. In the case of India, for example, a maximum of three months is allowed for tracing the parents in cases of abandonment.¹⁵⁵ It is only after the three months period has lapsed that the child may be declared adoptable.¹⁵⁶

Abandonment is a ground for the adoptability of a child cutting across all the countries under the study. All the respective legislation (both primary and subsidiary) of the countries under the study expressly identifies abandonment as a ground for adoptability.

4.5.1.2.1 South Africa

Section 230(3) of the Children's Act expressly recognised abandonment as one of the potential grounds that could lead to adoptability. The term "abandoned" is defined in the Act as a child who "has *obviously* been deserted by the parent, guardian or care-giver" or "has, for no apparent reason, had no contact with the parent, guardian, or care-giver for a period of at least three months" (emphasis mine).¹⁵⁷ The presence of this definition facilitates the understanding of Section 230(3)(c) of the Children's Act.

Further clarifications ushered in through the Draft Regulations to the Children's Act are of immense importance in promoting the best interests of the child in the determination of adoptability as a result of abandonment. In this regard, of particular importance is Regulation 56 of the Draft Regulations. Titled "Abandoned or orphaned children",

¹⁵⁵ CARA, (1995), Chapter IV; See, too, Dohle, (2008-2009), 138.

¹⁵⁶ CARA, (1995), Chapter IV.

¹⁵⁷ Art. 1(a) and (b) of the Children's Act.

Regulation 56(1) enjoins designated social workers to “cause an advertisement to be published in at least one local newspaper circulating in the area where the child has been found calling upon any person to claim responsibility for the child”. Furthermore, before being satisfied that a child is abandoned, a presiding officer should take into account the definition of abandonment in the Act;¹⁵⁸ be satisfied that a period of at least three months have lapsed since the publication of the advertisement and that no person has claimed responsibility for the child;¹⁵⁹ and also have regard to

an affidavit, ... setting out the steps taken to trace the child’s parent, guardian or care-giver, by the social worker concerned to the effect that the child’s parent, guardian or care-giver cannot be traced and an affidavit by any other person who can testify to the fact that the child has had no contact with his or her parent, guardian or care-giver for a period of at least three months.¹⁶⁰

This is congruent with what the South African Government communicated to the Permanent Bureau of the Hague Conference in 2005. The Government indicated that:

A child is only adoptable after the Children’s Court has made a finding in terms of the Child Care Act. That can only happen if: The court is sure that the biological parents gave proper consent and were given enough time to reconsider (60 days), or proof of death of parents, or sufficient proof that parents cannot be traced (police reports, affidavits, advertisements [sic]).¹⁶¹

In the past, in South Africa, it was reported that¹⁶² the lack of a clear definition and guidelines associated with abandonment was a major drawback in establishing adoptability. Allegedly, Commissioners had set their own procedures for the management of such cases and these were at times incompatible with the developmental needs of the children. To reinforce this point, the SALRC highlights the

¹⁵⁸ Regs. 56(2)(a) of the Draft Regulations.

¹⁵⁹ Regs. 56(2)(b)(3) of the Draft Regulations.

¹⁶⁰ Regs. 56(2)(d) of the Draft Regulations.

¹⁶¹ Available at <http://www.hcch.net/upload/adop2005_za.pdf>.

¹⁶² According to the SALRC Project 110, (2001), para. 10. 4. 5.

example that some Commissioners refused to free abandoned infants for (domestic) adoption until a lengthy police search (sometimes spanning a period of two years) had been carried out before a child was declared abandoned and made available for adoption.¹⁶³ By the time this was over, the child's development had been compromised and the chance of adoption reduced. This, in conjunction with a lack of permanency orientation among social workers, may result in infants being institutionalised and "drifting in care" for years.¹⁶⁴ Fortunately, the foregoing provisions under the Children's Act and the Draft Regulations have attempted to tackle some of these concerns head on.

These provisions under the Children's Act and the Draft Regulations are informed by real life experiences. For instance, the complication that may arise in relation to the determination of adoptability, especially on the ground of abandonment, is epitomized in the *Infant BD* case discussed in Chapter 3.¹⁶⁵ It transpired from the case that the child was born on 20 December 2002 in the Johannesburg Hospital, and, since she was born prematurely, the mother was discharged from the hospital before the child.¹⁶⁶ Within a month, on 21 January 2003, the child was removed from the Johannesburg hospital to the place of safety on 21 January 2003 by way of a Form 4 under the Child Care Act which indicated that the child was abandoned.¹⁶⁷ However, despite only seeing the child only after five months, the mother contended that she did not intend to abandon the child and testified that she took the telephone numbers of the hospital and phoned to

¹⁶³ SALRC Project 110, (2001), para. 10. 4. 5..

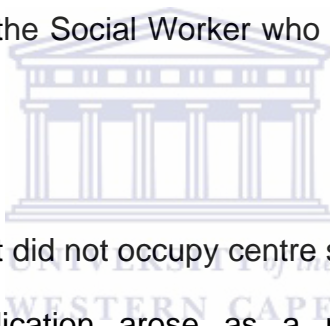
¹⁶⁴ Currently, Sec. 157(3) stipulates that "[a] very young child who has been orphaned or abandoned by its parents must be made available for adoption in the prescribed manner and within the prescribed period except when this is not in the best interests of the child".

¹⁶⁵ Section 3.3.3.3. Case number 14/1/2-52/2003 in the Children's Court for the District of Randburg.

¹⁶⁶ As above.

¹⁶⁷ As above.

inquire about the child's condition.¹⁶⁸ When she phoned the third time, according to the mother, the child was no longer there.¹⁶⁹ It was the mother's assertion that when she left the child at the hospital, she had thought that the child would be safe; that her sister would visit the child; and since she had left her address (of her sister's place in Johannesburg where she was initially staying) with the hospital, she had thought she would be contacted once the child was ready to be discharged.¹⁷⁰ She further disputed the assertion that she had abandoned her child by stating that she was informed that her sister attempted to see the child, but was not allowed by the hospital; that upon her return to Johannesburg, she allegedly went to the place where she left the baby and was referred by the hospital to the Social Worker who informed her of the status of the child with Ms. Noble.¹⁷¹



While the issue of abandonment did not occupy centre stage in this case, it could clearly be discerned that the complication arose as a result of the determination of abandonment leading to adoptability. For arguments sake, assuming that all the mother's contentions are true, the direct application of the relevant provisions of the Children's Act and the Draft Regulations on the definition of abandonment, the requirement of advertisement, the time lapse required before abandonment is declared, and other similar conditions embrace great potential to minimise similar occurrences from taking place.

¹⁶⁸ As above.

¹⁶⁹ As above.

¹⁷⁰ As above.

¹⁷¹ As above.

4.5.1.2.2 Kenya

Section 157 of this Act, with a side title of “Children who may be adopted” provides in relevant part that:

- 1) Any child who is resident within Kenya may be adopted whether or not the child is a Kenyan citizen, or was or was not born in Kenya:

Provided that no application for an adoption order, shall be made in respect of a child unless the child concerned has been in the continuous care and control of the applicant with in the Republic for a period of three consecutive months preceding the filing of the application and both the child and the applicant or applicants as the case may be evaluated and assessed by a registered adoption society in Kenya.

The Children’s Act indicates that abandonment is one of the main grounds that could lead towards the determination of a child as adoptable. In this respect, the court has the mandate to dispense with a parent’s or guardian’s consent if he or she has “abandoned, neglected, persistently failed to maintain or persistently failed to maintain the child”.¹⁷² In elaborating this provision further, the Act stipulates that “abandonment may be presumed if the child appears to have been abandoned at birth or if the person or institution having care and possession of the child has neither seen nor heard from a parent or guardian of the child for a period of at least six months”.¹⁷³

Case law in Kenya seems to uphold such a position. In *Re S W (a child) (2006) eKLR* (adoption cause 190 of 2004), for instance, before justifying and confirming the decision to make the child free for adoption, the Kenyan High Court highlighted that “[t]he child was abandoned and has not been claimed for over 6 months”.¹⁷⁴ This seems to give

¹⁷² Sec. 159(1)(a) of the Children Act.

¹⁷³ Sec. 159(1)(a)(i) of the Children Act.

¹⁷⁴ *Re S W (a child) (2006) eKLR*, 3.

the implication that the time that lapses between abandonment and the initiation of an adoption procedure is one of the important elements before declaring children adoptable.

What is missing, however, is a requirement on police or other authorities to undertake family tracing efforts. Neither the Children Act nor the Children (Adoption) Regulations of 2005 attempt to regulate this in any meaningful detail. Current efforts to amend the Children Act have taken note of this shortcoming, and attempts are underway to remedy it.

4.5.1.2.3 Ethiopia

It is reported that, in the context of Ethiopia, in general:

...orphans identified for intercountry adoption have been abandoned by their parents or have lost their parents to disease or other misfortune When a child is abandoned, by law it comes into the custody of the government. When a child is found to have two HIV/AIDS-infected parents, or one living HIV/AIDS-infected parent, the government routinely declares that the child is an orphan and assumes legal guardianship of the child.¹⁷⁵

The previous Guidelines for Adoption issued by MOLSA, the Ministry in charge of adoptions before 2007, had sections that further clarified adoptability. These sections are not present in the current Internal Guidelines of MOWA. Despite this, it is observed that the practice of defining who is adoptable has continued along the same lines of the previous Guidelines of MOLSA. As a result, it would not be unwarranted to anchor the discussion of who is adoptable in Ethiopia partly within the provisions of the former Guidelines.

¹⁷⁵ U.S. Department of State, "Intercountry adoption: Ethiopia", (December 2008).

Accordingly, a child is adoptable if he/she is disadvantaged and/or unaccompanied. Under paragraph 2(3) of the former Guidelines by MOLSA, a child is “unaccompanied or disadvantaged” if a child is fully orphaned (both parents); an abandoned child (both parents untraceable); a child with parents who are certified as terminally and/or mentally incapacitated by an appropriate and accredited body; or a child who cannot be allowed to remain in his or her family environment for his/her own best interests.

This requirement on adoptability is relatively detailed compared with what can be found in a number of African countries, with the exception of a few countries, such as, South Africa. It is further consolidated by paragraph 6(3) of the Guidelines which lists the documents and information that needs to be compiled about an adoptable child. These documents need to be produced before a child is given to prospective adoptive parents through an adoption contract. The main report that needs to be produced should have information on “the child’s life history”. This should include, but is not limited to, the identity of the child, the child’s family situation, the child’s close relatives name list, and if the child is in an institution, information relating to how and when the child entered institutional care.¹⁷⁶ In addition, MOWA should receive a dossier, accompanied with a letter, from the competent authority tasked with monitoring the well-being of children at the province/zone/ *kebele*¹⁷⁷ level detailing the situation of the child.

While abandonment, as quoted above, is expressly recognised as a ground for adoptability, some of the necessary pre-conditions for the determination of abandonment are lacking. One of the main safeguards that is set in place to counter a

¹⁷⁶ Para. 6.3 of MOWA Guidelines.

¹⁷⁷ This is the lowest administrative level.

premature determination of the adoptability of abandoned children is found in paragraph (6)(5)(2) of the Guidelines by MOWA. According to this section, it is a compulsory requirement that, before an abandoned child is made available for adoption, the child must stay in an orphanage for a minimum of two months. This, it is believed, is to allow for a period of grace in case any person would come to claim the child. However, efforts by police or other competent bodies to trace families, and how and for how long tracing efforts are to be conducted before abandonment is declared remain elusive.

4.5.1.3 Termination of parental rights and responsibilities as a result of relinquishment

Apart from abandonment, as already mentioned above, another way of terminating parental rights and responsibilities is through relinquishment. By definition, "to relinquish" is "letting something go or giving something up".¹⁷⁸ "Relinquishment" of a child is a voluntary consent to the termination of one's parental rights to a child. It is also called "voluntary termination of parental rights" and "consent to adoption".¹⁷⁹ As mentioned above, relinquishment is often effected by giving up one's rights in writing in the presence of a judge or a representative of an agency taking custody of the child. During relinquishment, it is not uncommon to solicit information regarding the parents' age, heritage, education, physical appearance, health history, and religious background, as well as the reasons for the relinquishment or the placing of the child for adoption.¹⁸⁰

¹⁷⁸ Available at <<http://www.thefreedictionary.com/Relinquishment>>.

¹⁷⁹ Temporary relinquishment does not terminate parental rights and responsibilities, and does not make a child adoptable. In Russia, for instance, temporary relinquishment, which entails the possibility of taking the child back from the state's care after a certain period of time (from one month to three years) is encountered extremely rarely at the present time, because a woman who chooses that option, as a rule, has to have a permanent address (residence permit) in the same town where she gave birth to and relinquished the child. See Isupova, (2004), 50-51.

¹⁸⁰ See Permanent Bureau, Guide to Good Practice, (2008), 71-72. See, too, Art. 16 of the Hague Convention.

Since the process of the determination of adoptability should not take an unreasonable amount of time, the existence of relinquishment as a ground for adoptability might be very crucial in achieving this end. In fact, experience shows that the older children are, the less their prospects of adoption.¹⁸¹ The CRC Committee has expressed its concern where there has been a lengthy process of declaring a child available for adoption, resulting in a prolonged stay in an institution.¹⁸² In this particular instance the State party was recommended to “identify the factors in the adoption process which result in children’s prolonged stay in institutions” and to address them.¹⁸³

A relinquishment may be made in favour of particular adoptive parents,¹⁸⁴ or to an agency or institution to place the child for adoption.¹⁸⁵ Some countries disallow the former type of relinquishment where a child is handed over to prospective adoptive parents.¹⁸⁶ In fact, valid concerns might drive a government to disallow the relinquishment of parental rights and responsibilities altogether.¹⁸⁷ One such concern could be to fight corruption, baby selling and buying, and child trafficking. Therefore, while there is nothing in the CRC and the ACRWC as well as in the jurisprudence of the

¹⁸¹ See section 4.5.4 on special needs and hard to place children.

¹⁸² CRC Committee, Concluding Observations: Philippines, (September 2005), para. 48.

¹⁸³ CRC Committee, Concluding Observations: Philippines, (September 2005), para. 49.

¹⁸⁴ It is of interest to note that the act of surrendering a child directly to the adoptive parents, or for adoption by specific adoptive parents, does not constitute abandonment, as the designation of a specific person is considered a “condition” of abandonment.

¹⁸⁵ Once the relinquishment is made and accepted, the agency stands *in loco parentis* to the child and has to the power to place the child for adoption and grant consent to the adoption.

¹⁸⁶ In Argentina, for instance, biological parents may relinquish their children for adoption only through the courts. It is also indicated that the law provides for a 60-day window period after the birth of the child to allow the birth mother time to think about her decision. U.S. Department of State, “Intercountry adoption: Argentina”, (November 2008).

¹⁸⁷ The practice of proscribing voluntary relinquishment is not a practice that sits well with everyone. Some contend that denying a birth mother the right to voluntarily relinquish her child often means that a baby who would have been quickly placed with an adoptive family ends up spending a significant amount of time in State care, awaiting a legal declaration of abandonment. See McKinney, (2007), 361.

CRC Committee that disallows the practice of relinquishment of rights and responsibilities in respect of children, some countries use the prohibition of relinquishment in order to counter the ill effects of direct adoptions in which birth parents give their child to specific prospective adoptive parents or their intermediaries. These countries include a number of South American countries, such as Peru and Bolivia.¹⁸⁸

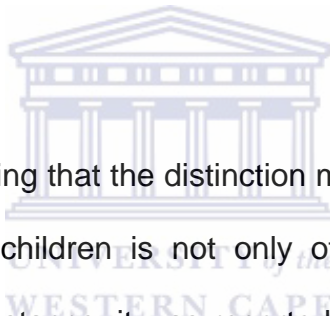
However, if relinquishment is to be allowed under national law as a ground for determining the adoptability of a child, certain stringent conditions need to be put in place and complied with. And despite the fact that relinquishment law is very diverse from one country to the other, a few basic generalised observations are possible.

In principle, since a child is not adoptable unless the parental rights of its birth parents have been properly terminated, laws impose stringent safeguards against a hasty,¹⁸⁹ coerced, or otherwise improperly influenced, parental relinquishment of rights and responsibilities in respect of a child for adoption. Since it is not uncommon for birth parents to challenge adoptions on the grounds that they were not properly informed that the consequence of signing a consent was the termination of their parental rights, the requirement that relinquishment should be made in writing and witnessed is mainly aimed at serving as a safeguard against such scenarios.

¹⁸⁸ McKinney, (2007), 395-396.

¹⁸⁹ See, for instance, Freundlich, (1999), 97 (arguing that while expedited termination of parental rights may indeed solve the short-term problem of too many children remaining too long in foster care without a definitive permanency plan, it may also negatively affect children's chances of permanency with their birth family).

Furthermore, the general rule that parental rights and responsibilities cannot be relinquished in favour of anyone before the child is born should be enforced. In most countries, laws specify whether or not there is a reasonable period of time after the signing of adoption consent papers during which the relinquishing parent(s) can revoke consent.¹⁹⁰ To illustrate, the CRC Committee criticised Hungary for the short period of time (2 months) during which a biological mother may withdraw her consent to adoption.¹⁹¹ The rights of biological fathers must be respected too, and failure to advise a known father and allow his participation in an adoption plan, or allow him to explore his wish to parent, may lead to the adoption being contested, and/or possible disruption or dissolution thereof.¹⁹²



There is also a merit in mentioning that the distinction made between abandonment and (voluntarily) relinquishment of children is not only of theoretical importance. It has practical implications too. For instance, it was reported in 1999 that under Chinese law relinquished children may only be adopted by couples who are over thirty-five and childless, and only one such child may be adopted per couple.¹⁹³ However, it is important to note that parents seeking to adopt orphans, abandoned and "special

¹⁹⁰ For instance, the 1997 Adoption Law of Paraguay imposes a mandatory 45-day waiting period on parents who wish to relinquish their child for adoption, during which the judge must take all necessary measures to maintain the child within his or her birth family. Ley de Adopciones (Paraguay), No. 1.136/97, Art. 21.

¹⁹¹ CRC Committee, Concluding Observations: Hungary, (March 2006), para. 34.

¹⁹² In light of adoption, relinquishment has some positive spin-offs over abandonment in promoting and protecting the rights of the prospective adoptive or adopted child. For instance, it offers the opportunity to know more details about the biological parents of the child. This in turn might be helpful in the future in case tracing the background of the child becomes important.

¹⁹³ See Leeuwen, (1999), 208.

needs" children do not fall under such restrictions.¹⁹⁴ While Liberian legislation seems to recognize both abandonment and relinquishment as grounds for adoptability, there is no need to secure parental consent when termination of parental rights and responsibilities takes place by a decision of the competent authorities or through abandonment.¹⁹⁵ However, if the case is one that involves relinquishment, evidence should be produced showing that consent of the appropriate persons is secured, or justification adduced why such consent is not necessary. The same is true for Angola and a few other African countries.¹⁹⁶

4.5.1.3.1 South Africa

In South Africa, a cursory look at Section 230(3) of the Children's Act on adoptable children seems to discount the adoptability of children as a result of the relinquishment of parental rights and responsibilities. This is because a child whose parents choose to relinquish parental rights and responsibilities do not fit into the category of orphaned; abandoned; a child the whereabouts of whose parents or guardians cannot be established; or a child whose parents or guardians abused or deliberately neglected, or a child whose parents or guardians allowed the child to be abused or deliberately neglected., all of which are the specific categories referred to in this section.

¹⁹⁴ Art. 8. The adopter may adopt one child only, male or female. Orphans, disabled children or abandoned infants and children, who are raised in the social welfare institutes, and whose biological parents cannot be ascertained or found, may be adopted irrespective of the restrictions that the adopter shall be childless and adopt one child only. See Adoption Law of the Peoples' Republic of China (October 2005).

¹⁹⁵ U.S. Department of State, "Intercountry adoption: Liberia", (December 2008).

¹⁹⁶ U.S. Department of State, "Intercountry adoption: Angola", (July 2008). The situation is the same, for instance, in Burkina Faso, Sierra Leone, and Tanzania. See U.S. Department of State, "Intercountry adoption: Burkina Faso", (August 2008); Sierra Leone, (December 2007); Tanzania, (March 2009).

The only provision under the Children's Act (perhaps along with the notion of "freeing orders") that could be read to offer the possibility of the adoptability of a child through relinquishing parental rights and responsibilities is Section 230(3)(e). This section provides that a child is adoptable if the child is in need of permanent alternative care.¹⁹⁷

Detailed provisions on parental consent coupled with the prevailing practice of adoption testify to the fact that relinquishment of parental rights and responsibilities could nevertheless make a child adoptable. For instance, Section 233(3) of the Children's Act stipulates that "[i]f the parent of a child wishes the child to be adopted by a particular person the parent must state the name of that person in the consent". Direct relinquishment to prospective adoptive parents without involving the state machinery such as the courts, social workers, the Department of Social Development, and other relevant competent authorities does not find any support under South African law. Even when a parent wants a certain person to adopt his or her child, Section 233(5) of the Act requires rightly that the eligibility of the person as an adoptive parent must be determined by a children's court in terms of Section 231(2) of the Act.

4.5.1.3.2 Ethiopia

In Ethiopia, the possibility of relinquishing a child for adoption can be deciphered, rather obliquely, from the MOWA Guidelines. The point of departure for this argument is paragraph 5(1) of the Guidelines that lists the group of persons or authorities who can

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And since section 150(1) of the Children's Act envisages a long list of group of children who are labelled as "in need of care", including those "without any visible means of support" or live "in circumstances which may seriously harm that child's physical, mental or social well-being", parents might relinquish their rights and responsibilities leading to the adoptability of their child.

apply for an adoption order. Included amongst this group of persons are parents,¹⁹⁸ giving the implication that they could relinquish a child for adoption.

Since an adoptable child, by definition, includes “a child with parents who are certified as terminally and/or mentally incapacitated by an appropriate and accredited body; or a child who cannot be allowed to remain in his or her family environment for his/her own best interests”,¹⁹⁹ the possibility of relinquishing parental rights and responsibilities which could make the child adoptable is legally justifiable.

According to paragraph 6(2)(b) of the MOWA Guidelines, a child is free for adoption when the adoption contract between the prospective adoptive parents and the parents or guardians of the child is concluded in accordance with the law. Notwithstanding paragraph 6(2)(b), if the child is an orphan and does not have any parents, his or her ascendants should produce proof of their filiations in order to be allowed to sign an adoption contract.

The rule is slightly different for collateral relatives of the child who want to make the child available for adoption. In such cases, it is required that collateral relatives should have secured legal guardianship before making the child available for adoption. In practice, this would require them to apply for (have already secured) a guardianship order pursuant to Article 228 of the RFC. The motive of this provision can be safely

¹⁹⁸ Para. 5(1)(f) of the MOWA Guidelines.

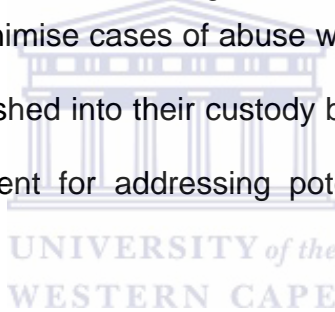
¹⁹⁹ Para. 2.3 of the former Guidelines by MOLSA.

assumed - that it wants to protect the best interests of the child by prohibiting collateral relatives without a guardianship order from entering into an adoption contract.²⁰⁰

While it does not enjoy a clear and strong legal basis, the practice pertaining to the relinquishment of parental rights and responsibilities leading to adoptability in Ethiopia has attempted to keep pace with the current challenges. For instance, a move in this direction came in November 2008, and it was reported that:

The Ethiopian Ministry of Women's Affairs now requires additional documentation for adoption cases in which a living birth parent or parents has/have abandoned their child to an orphanage. The regional social affairs bureau must now authenticate the letter issued by the local *Kebele* court that acknowledges the abandonment.²⁰¹

This measure is intended to minimise cases of abuse where orphanages routinely claim that a certain child was relinquished into their custody by a parent(s). However, there is still some room for improvement for addressing potential illicit practices related to relinquishment.²⁰²



Unfortunately, the RFC allows the possibility of any person below the age of 18 years and under guardianship to be adopted. It is submitted that the language “any person who is less than eighteen years of age” could be read to include a child merely conceived and not yet born. In fact, as a follow-up to this provision, Article 187(1) of the RFC expressly allows that “[a] child merely conceived may be adopted”.²⁰³ This stands

²⁰⁰ If a disagreement arises between the collateral relatives of the child about any aspect of the upbringing of the child, the collateral relative(s) with guardianship would have the overriding power.

²⁰¹ Available at <<http://www.jcics.org/Ethiopia.htm>>.

²⁰² See Chapter 6 for a detailed discussion of illicit activities in relation to intercountry adoption.

²⁰³ However, the legislator in Ethiopia has attempted to provide some level of safeguard for the adoption of a child merely conceived. Article 187(2) of the RFC requires that the adoption agreement for a child merely conceived may be revoked unilaterally at the will of the mother within six months following the birth of the child.

in a stark contrast with the positions under the Kenyan Children Act and the South African Children's Act and goes against the position of the CRC Committee on the subject matter of adoption of unborn children.

4.5.1.3.3 Kenya

As far as the possibility of relinquishing a child directly to a prospective adoptive parent is concerned, there are some provisions in the Kenyan Children Act that could be interpreted to outlaw such a practice. One provision that is of great relevance in this regard is Article 156(2). It states that:

It shall not be lawful for any person whether being a parent or guardian of a child or otherwise [...] to place a child into the care and possession or control of a person who proposes to adopt him, if an adoption order in respect of the child cannot be lawfully made in favour of that child.

The evident group of persons in favour of whom a lawful adoption order cannot be made are listed under Section 158(3) of the Children Act which includes persons of unsound mind and homosexuals. Except in special circumstances, persons such as a sole male applicant in respect of a female child²⁰⁴ and a sole female applicant in respect of a male child are persons in favour of whom a lawful adoption order can also not be made.

It is submitted that, a broad reading of this provision, in conjunction with other provisions of the Children Act, further elaborates the stance that directly relinquishing a child by a parent or a guardian into the care of a prospective adoptive parent (especially one who is not a relative of the child) falls foul of Section 156(2). For instance, the determination of the suitability of a prospective adoptive parent is the preserve of a registered

²⁰⁴ Sec. 158(2)(a) of the Children Act.

adoption society.²⁰⁵ Without such an assessment, which is a task that a parent or guardian neither has the capacity nor the authority to undertake, the placing of a child directly into the care and possession or control of a person who proposes to adopt him is in contravention of this suitability assessment that needs to be undertaken by an adoption society.

In addition, while there are scattered provisions in the Kenyan Children's Act that give parents or guardians some leverage in deciding aspects of their child's adoption (such as demanding that their child be brought up in accordance with a certain religion),²⁰⁶ there is no explicit provision that allows for relinquishing a child directly into the care of a prospective adoptive parent. In fact, according to Article 24(8)(a) of the Children Act, a person who has parental responsibility for a child may not surrender or transfer any part of that responsibility to another, though it is possible to arrange for some or all of the parental authority to be met by one or more persons acting on his or her behalf.²⁰⁷

Regulations 19(a) and (b) of the Children (Adoption) Regulations of 2005 also further corroborate this assertion in that no child shall be delivered into the care and possession of an adopter by or on behalf of an adoption society until "the case committee has considered the reports required under regulation 18" (psycho-social and medical reports) and "the adopter has been approved by the case committee". While the language "on behalf of an adoption society" might be read to refer to parents or

²⁰⁵ See Sec. 177(7)(b).

²⁰⁶ See, for instance, Fifth Schedule of the Regs.

²⁰⁷ Art. 24(8)(a). Sub-art (c) of the same provision, however, cautions that "[t]he making of any such arrangement shall not affect any liability of the person making it which may arise from any failure to meet any part of such person's parental responsibility for the child concerned".

guardians of the child, in practice it refers to orphanages. In addition, since the only channel to a case committee to approve adoptions in Kenya is through an adoption society, the possibility of parents or guardians relinquishing parental rights and responsibilities directly to prospective adoptive parents is close to zero.

Despite the foregoing, a contradiction seems to be created by Regulation 30 on the position of Kenyan law on relinquishment of parental rights and responsibilities directly to prospective adoptive parents. Regulation 30 entrenches that “[e]very prospective adopter shall, forthwith upon a child being placed with him by any party other than an adoption society, notify the Director of such placement and of the date thereof”. Far from clearly prohibiting “any party” other than an adoption society from placing a child with a prospective adoptive parent, Regulation 30 attempts to somehow to regulate it.²⁰⁸ Though it is not quite clear who “any party” refers to, it could be argued that it could include birth families. However, the orientation of the law seems to disallow this. As a result, once again, a joint reading of the Children Act along with the Regulations should hold sway in favour of a legal regime that prohibits the relinquishing of parental rights and responsibilities directly into prospective adoptive parents.²⁰⁹

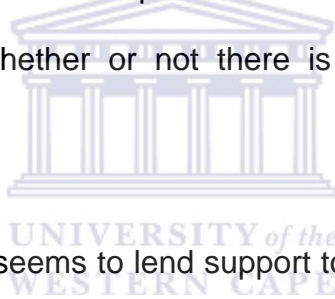
This said, relinquishing parental rights and responsibilities in favour of a registered adoption society with a view to the child being adopted is accommodated within the law in Kenya. In particular, it is envisaged under Regulations 17-19 of the Children (Adoption) Regulations of 2005. The Regulations enjoin the adoption society to furnish

²⁰⁸ For instance, it provides that, in such circumstances, the visits are to be conducted by the Director or his authorised representative (Regulation 30(1))²⁰⁸ and such visits are to be reported to the guardian *ad litem* (Regs. 30(2)).

²⁰⁹ However, it should be recognized that scope for alternative readings remains.

the parent or guardian an explanatory memorandum detailing, amongst other things, the effects of an adoption order, the requirements for consent, the possibility of giving consent on condition that the child is brought up in a particular religious persuasion, conditions for the withdrawal of consent, and the rules on any financial payments and receipts in connection with the adoption.²¹⁰

In passing, it is noteworthy to mention that some of the practices in the declaration of adoptability in Kenya seem to give the indication that children are declared adoptable only when there is a prospective adoptive parent interested in the specific child. In principle, a child should be declared adoptable if the child would benefit from a family environment, irrespective of whether or not there is a prospective adoptive parent interested in the child.²¹¹



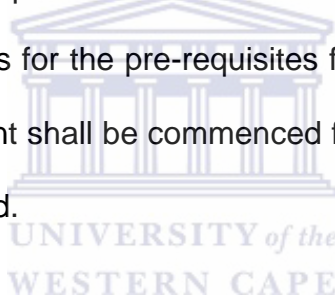
There is at least one case that seems to lend support to the existence of this ill-advised procedure. In *Re RMM (A Child) (2006)*, the case involved a petition to adopt a 15 year old girl by an American couple who were 31 and 29 years old respectively. The Judge refused the adoption because granting it would have been in contravention of Section 158(1) of the Children’s Act which requires that the prospective adoptive parents must have attained the age of 25 years and be at least 21 years older than the child but not have attained the age of sixty-five years. More often than not the statutory age requirements need to be fulfilled before an adoption order is granted. The judge further commented that “Little Angels Network, a registered adoption society in Kenya, has not declared the child free for adoption, *principally because of non-compliance of this case*

²¹⁰ See Fifth Schedule of the Regs., which is composed of 12 paras.

²¹¹ See discussion above under section 4.5.1.1.

with the statutory age requirements” (emphasis mine).²¹² This seems to give the impression that children are declared adoptable once a prospective adoptive parent is found for them.

Finally, it seems that the possibility of relinquishing parental rights and responsibilities and giving lawful consent to adoption before the child is born is non-existent under Kenyan law. In an indirect attempt to outlaw such situations, Section 159(8)(a) of the Children Act charges that a document signifying the consent of the mother of the child shall not be admissible unless the child is at least six weeks old on the date of the execution of the document. This provision seems to draw its source from Section 156(1) of the Children Act that provides for the pre-requisites for adoption - which includes the requirement that no arrangement shall be commenced for the adoption of a child unless the child is at least six weeks old.



4.5.2 “Orphan” status

It is commonplace to read about the orphan crisis that is sweeping the African continent.²¹³ While the information about the crisis is hardly false,²¹⁴ it is flawed to equate orphans with adoptable children. The media often use the words “orphaned” and “adoptable” children interchangeably. Apart from media reports, there is a vast amount of literature that seems to assume this synonymous relationship between the two

²¹² In *Re RMM (A Child)* (2006), 4.

²¹³ Davis County Clipper, (18 April 2009).

²¹⁴ While the African continent is home to a large number of orphan children (however defined), the majority of these children are not available for adoption. As already discussed above under Chapter 2, section 2.3.2, a large number of orphaned children are absorbed by their extended families in Africa.

terms.²¹⁵ In other words, it is unfortunately confusing that international adoptees are often referred to as “orphans”²¹⁶ as much as “orphans” are considered as being automatically adoptable.

In ordinary parlance, an orphan is defined as a “child whose parents are dead”²¹⁷ or a “child who has been deprived of parental care ...”.²¹⁸ However, the use of the term has evolved and could encompass a larger group of children. Since differences in orphan definition have program and policy implications,²¹⁹ various disciplines and organizations have adopted different tailor-made definitions of the term.

One such organisation is UNICEF. Although UNICEF reports 132 million orphans worldwide,²²⁰ this definition includes "single orphans" who have lost just one parent, and "double orphans" being cared for by extended families- hence not necessarily children in need of alternative care (adoptable).²²¹ Contrary to traditional usage, UNAIDS also

²¹⁵ For instance, just recently, Myers, after noting the orphan population in Asia that was estimated at 87.6 million in 2004 argued that “[n]o matter what the cause, the fact remains that millions of children throughout the world lack parents...”.²¹⁵ See Myers, (2009), 780.

²¹⁶ Bhabha, (2004), 185.

²¹⁷ The Free Dictionary available at <<http://www.thefreedictionary.com/orphan>>.

²¹⁸ As above.

²¹⁹ Not only does the definition of “orphan” vary if one approaches it from an epidemiological or a legal point of view, but the ordinary language usage varies among people of different cultures and ethnic groups. The difference in the use of this terminology is prone to misinterpretation, which could lead to misguided child welfare interventions. For instance, one might understand UNICEF’s “orphan” statistics to mean that globally there are 132 million children in need of a new family. This is bound to lead to program and policy responses that focus on providing care for individual children rather than supporting the families and communities that care for orphans (and are in need of support). UNICEF, “Press Centre: Orphans”, (2007).

²²⁰ See, for instance, UNICEF, “Press Centre: Orphans”, (2007).

²²¹ It is understandable that UNICEF’s definition is partly intended to show the magnitude of the problem of children who have lost one or both parents, and raise funds to improve child welfare systems in affected communities. It is indicated that “UNICEF and numerous international organizations adopted the broader definition of orphan in the mid-1990s as the AIDS pandemic began leading to the death of millions of parents worldwide, leaving an ever increasing number of children growing up without one or more parents”. UNICEF, “Press Centre: Orphans”, (2007).

uses the term “orphan” to describe a child who has lost either one or both parents.²²² The same is true with the use of the terms “Aids orphan” used by UNAIDS, WHO and UNICEF to refer to a child who loses his/her mother to AIDS before reaching the age of 15 years;²²³ therefore, not necessarily indicating a child’s deprivation of his or her family environment. Furthermore, the orphan statistics used by UNAIDS and UNICEF do not include children who have lost only their fathers (and still have mothers to care for them). This is despite the fact that research in Uganda has found that, in some instances, paternal orphans are affected more severely than maternal ones.²²⁴

These organisations’ use of the term “orphan” does not necessarily indicate that the children are necessarily deprived of their family environment. Indeed, the possibility that some of these children could still have one surviving parent who is caring for them, according to the definitions provided above, is illuminative of the fact that not all so-called “orphans” are adoptable. These children may also well be cared for by their extended families. In sum, data from these and other similar organizations should not be presented as conclusive evidence indicating that there are “millions of orphans” who are “waiting for adoptive parents”.

In addition, even if a child is a double orphan- by definition one who has lost both parents through death - the child might first become the legal responsibility of a guardian appointed by the birth parents’ will, by a state court, or by operation of law.

²²² UNAIDS “UNAIDS’ Terminology Guidelines”, (2008).

²²³ Some of these children have also lost, or will later lose, their father to AIDS. As a matter of interest, it is important to note that “[i]n the context of AIDS, it is preferable to say “children orphaned by AIDS” or “orphans and other children made vulnerable by AIDS”. Referring to these children as “AIDS orphans” not only stigmatizes them, but also labels them as HIV-positive, which they may not necessarily be”.

²²⁴ See Monk, (2000), 7-12.

Such scenarios indeed make the child non-adoptable, as the child is not deprived of a family environment.

At the country level too, different definitions of the term “orphan” prevail. One study vividly displays the various definitions that are (and were) found in a number of African countries.²²⁵ According to this study, in Namibia, an orphan is a “child under the age of 18 who has lost a mother, a father, or both – or a primary caregiver – due to death, or a child who is in need of care”.²²⁶ In Uganda and Rwanda, an orphan is a child below the age of 18 who has lost one or both parents.²²⁷ In Botswana, in order for a child to be classified as an orphan, he or she must have lost one (single parents) or two (married couples) biological or adoptive parents.²²⁸ In a clear departure from these definitions of the term orphan, in Ethiopia, an orphan is a child less than 18 years of age who has lost both parents.²²⁹ These differences in definition clearly show that the relevant figures of a certain country’s statistics on orphans do not necessarily testify to the number of children who are deprived of their family environment (and are adoptable).

Despite this recognition, the use of the term “orphans” to imply “adoptable” children continues. One reason for this could be that it serves the purpose of adoption advocates to generally speak of, and write about, “orphans”, thereby creating the implication that all orphans are adoptable. This is mainly because, in Dillon’s words, the word “orphan” is highly “emotive, conveys the intense loneliness of a child without loving and devoted

²²⁵ Smart, (2003), 3.

²²⁶ As above.

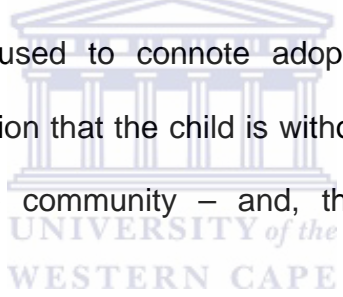
²²⁷ As above.

²²⁸ As above.

²²⁹ As above.

care”.²³⁰ It is also a way of depicting that it is an unnatural state for a child to live in the absence of a family environment.²³¹ The indiscriminate use of the word “orphan” has also contributed to making prospective adoptive parents oblivious of the fact that not all orphans are adoptable. There is a tendency to believe that almost all children in orphanages are orphans and hence adoptable.²³²

Based on the preceding discussion, it is warranted to conclude that one of the problems and confusions in relation to adoptable children is caused by the continued unqualified use of the term “orphan” to describe children who are deprived of their parent(s), but not necessarily deprived of their family environment and in need of care. It is argued that if the word “orphan” is to be used to connote adoptability at all, it needs to be accompanied with the qualification that the child is without any care by extended family members or members of the community – and, therefore, deprived of a family environment.²³³



More controversial (and complicated) is the question of the adoptability of so called “social orphans”. The term “social orphan” refers to a child who may have living parents,

²³⁰ Dillon, (2008), 39.

²³¹ As above.

²³² See, for instance, European Commission Daphne Programme, (2007), 66. It is “estimated that only 4% of young children in residential social care across the European Region are biological orphans because their parents are deceased”).

²³³ However, the argument that the use of the term “orphan” needs to be accompanied with the qualification that the child is without any care by extended family members or members of the community, is not without its shortcomings, too. It can be challenged on the ground that it seems to make an underlying assumption that adoptability is a strictly legal question. For instance, a child might be an orphan and not benefiting from a family environment. However, the child might not be adoptable currently because adoption is not in his or her best interests, as the child is not in a psychological state where he or she could benefit from any new family attachments. Thus, where orphan status is to be used in determining the adoptability of children, not only should the legal adoptability of the child be ascertained, but the child’s social, psychological and developmental status too.

but who is not currently living under the care of those parents.²³⁴ The term can be differentiated from so called “true orphans”, that is, children who have lost their parents due to their death.

As already highlighted above,²³⁵ some countries allow social orphans (through relinquishment especially) to be adoptable while others do not. For instance, Chinese law explicitly allows the adoption of social orphans. According to Article 4(3) of the Adoption Law of the People’s Republic of China, “[m]inors under the age of 14” whose “parents are unable to rear them due to unusual difficulties” can be adopted.²³⁶

Allowing only those children who have either lost one or both parents to be adoptable could be challenged on the basis that it discriminates against the social orphans that are found all over the world, but in greater numbers in the developing world. This would exclude those who have living parent(s) but are nonetheless effectively deprived of a family environment. It is also not necessarily in line with the spirit of the relevant provisions of the CRC and the ACRWC. After all, the consistent thread running through

²³⁴ Dillon, (2008), 39.

²³⁵ See section 4.5.1.3.

²³⁶ Adoption Law of the People’s Republic of China available at <http://www.china-caa.org/site/infocontent/ZCFG_2005100901425793_en.htm>. As far as receiving States are concerned, for instance, the U.S. Immigration and Nationality Act has been reported to have a highly specific definition of the term “orphan” which permits children with one or two living parents to be deemed to be orphans for the purposes of orphan visa petitions. The former U.S. definition of “orphan” required an even more narrow definition:

For an adoptee to qualify, both parents must have died or have abandoned the child, or there must be a demonstration that the 'sole or surviving' parent is unable to care for the child. Excluded are children who in some technical sense have two parents ... even if those parents are demonstrably unable or unwilling to care for the child, and even if those parents want to surrender the child for adoption.

See Bartholet, (1993), 147. See, too, Immigration and Nationality Act (INA) § 101(b)(1)(F), 8 U.S.C. § 1101 (2000). The current definition of “orphan”, however, accommodates the concept of the so called “social orphans” to a certain extent.

these international instruments, especially incorporated under Article 20 of the CRC and Article 25 of the ACRWC, is intended to address the effective deprivation of children's family environment, irrespective of the cause of the deprivation.²³⁷ The recognition that it could sometimes be in the best interests of a social orphan to benefit from adoption, also reflects the reality that it is parental destitution, and social and political pressures, rather than death or disappearance, that appear to be the prime factors motivating relinquishment of children.²³⁸ This in part draws to centre stage the contribution of poverty in depriving children of their family environment, which forms the substantive discussion of the next section.

The orphan status of a child is an express ground for adoptability under all the jurisdictions of the countries under the study. Where the South African law and practice parts company from the other countries in the study, however, is in its comprehensive nature and detailed guidance.

In South Africa, a child is adoptable if "the child is an orphan and has no guardian or caregiver who is willing to adopt the child".²³⁹ The term "orphan" means a child who has no surviving parent caring for him or her.²⁴⁰ In connection to this, there is some merit in mentioning that the Children's Act wisely caters for any occurrence of social parentage

²³⁷ See, for instance, Art. 25(1) of the ACRWC which reads "for any reasons". Allowing only those children who have either lost one or both parents is also an indication of failure to recognize that it is diverse circumstances that prevent children from growing up with families and in a family environment and, instead, force them to live on the streets or in state-run institutions. Apart from death, mental and physical illnesses, financial hardships accompanied by lack of social services also prevent children from having the benefit of a family environment.

²³⁸ Bhabha, (2004), 185.

²³⁹ Sec. 230(a) of the Children's Act.

²⁴⁰ Sec. 1 of the Children's Act.

by defining a “caregiver” as any person other than a parent or guardian, who factually cares for the child and includes “any person who cares for a child with the implied or express consent of a parent or guardian of the child” as well as a “child at the head of a child-headed household”.²⁴¹

It is notable that, under South African law, orphanhood *per se* is not a sufficient ground to lead to lead to adoptability. The cumulative conditions of orphanhood on the one hand, and, the absence of a guardian or care giver willing to adopt the child on the other, should be present simultaneously for the child to be declared adoptable. This approach clearly recognises that orphans could get absorbed in their extended family or community and might not qualify for adoptability.

In South Africa, in accordance with Draft Regulations 56, the procedure put in place to establish whether a child is an orphan or not is laudable too. Just like the establishment of abandonment, the process involves an advertisement to be published in at least one local newspaper circulating in the area where the child has been found calling upon any person to claim responsibility for the child.²⁴² In addition, in determining whether a child has been orphaned, a presiding officer must “be satisfied that the child has been orphaned as defined in section 1 of the Act”²⁴³; and also have regard “to the death certificate or certificates of the child’s parent or parents, guardian or care-giver, obtained by the social worker concerned, or, if such certificate cannot be obtained, to an affidavit

²⁴¹ Sec. 1 of the Children’s Act.

²⁴² Regs. 56(1) of the Draft Regulations.

²⁴³ Regs. 56 (2) (a) Draft Regulations.

by a person or persons who can testify to the death of the child's parent, guardian or care-giver".²⁴⁴

Both in Ethiopia and Kenya, a basic definition of "orphan" is lacking in the respective pieces of legislations let alone detailed guidelines on which orphans could be declared adoptable. The practice of the Ethiopian authorities that declares a child found to have two HIV/AIDS infected parents, or one living HIV/AIDS-infected parent, as an orphan (leading to the assumption of legal guardianship of the child by the state)²⁴⁵ is not without its shortcomings too. Not only is this practice contrary to the definition of orphan cited above,²⁴⁶ but it also has the potential to deprive the children the opportunity of being taken care of by their extended family members or communities.

The Births and Deaths Registration Act (Cap 149) Laws of Kenya (in the L.N 184/1971) provides that registration of births and deaths of all inhabitants within the Republic is compulsory, the practice proves otherwise. In Ethiopia, the absence of an Officer of Civil Status maintaining a register of deaths as initially envisaged by the Civil Code of 1960 compounds the problem. In both countries, the practice is that it is difficult to prove orphan status on the basis of death certificates.

In sum, even though orphanhood is a common ground for adoptability, it should be approached with caution. Indeed, not every orphan is adoptable. As a result, for a child to be declared adoptable, the child should at least be deprived of his family

²⁴⁴ Regs. 56(2)(c) Draft Regulations.

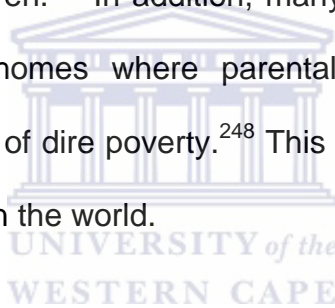
²⁴⁵ U.S. Department of State, "Intercountry adoption: Ethiopia", (April 2008).

²⁴⁶ Citing Smart, (2003), 3.

environment. Appropriate procedures to prove orphan status should be set in place to prevent and address illicit activities in intercountry adoption.

4.5.3 Poverty

Poverty, however defined, is one of the main factors that severely limits the capacity of African families to take care of their children. Therefore, drawing the line between termination of parental rights and responsibilities, abandonment and voluntary relinquishment, on the one hand, and poverty on the other, as potential grounds for adoptability is very difficult. Poverty is often one of the reasons why parents abandon or voluntarily relinquish their children.²⁴⁷ In addition, many children taken away from their original families come from homes where parental neglect is sometimes barely distinguishable from the effects of dire poverty.²⁴⁸ This reality is arguably more acute in Africa than in any other region in the world.



While some see intercountry adoption as a means of addressing the poverty of children and parents/communities,²⁴⁹ there are also those who contend that the practice is a mechanism to exploit the vulnerabilities of poor families and communities.²⁵⁰ It is sufficient to mention that the debate on poverty as a ground for adoptability of a child is bound to generate polarised responses from different quarters.

²⁴⁷ See, for instance, AP, (05 February 2001).

²⁴⁸ See, for the experience of Brazil in this regard, Fonseca, (2003), 111 and the citations therein.

²⁴⁹ See the brief discussions on the arguments for and against intercountry adoption in Chapter 1, section 1.1.

²⁵⁰ As above.

Nonetheless, to borrow Smolin's words, "there is a palpable cruelty to taking away the children of the poor"²⁵¹ simply because of the poverty of the parents. Domestic legislation in some countries expressly provides that poverty cannot be a sufficient ground for declaring a child adoptable. Attempts to find African laws as examples has been unsuccessful. However, Article 6 of Guatemala's law (also known as Oretaga's law)²⁵² provides: "The situation of poverty or extreme poverty of the parents does not constitute sufficient motive for placing a boy, girl or adolescent for adoption".²⁵³

Poverty alone as a ground for adoptability is not considered to be in accordance with the provisions of the CRC, too. A number of examples can be mentioned to support this. For instance, in 2005, Nepal was requested by the CRC Committee to "abolish the provisions in the Conditions and Procedures made to provide Nepalese Children to Foreign Nationals for Adoption (2000) that states that poverty of the parents of a child can be a legal ground for adoption".²⁵⁴ The CRC Committee has raised deep concern about the fact that children living in poverty are over-represented among the children

²⁵¹ Smolin, (2007), 437.

²⁵² For a discussion of this law, see, generally, Sohr, (2006), 559.

²⁵³ As cited in Sohr, (2006), 571-572. The same was true of the 1990 Children's Code of Brazil (though already repealed) which stated that poverty alone should not be a ground for the removal of parental authority. In Art., this Code provided that "the lack of material resources does not constitute a sufficient motive for the loss or suspension of parental rights," and, if this is the only motive, "the child or adolescent will remain in the family of origin, which must be referred to official aid programs".

²⁵⁴ See CRC Committee, Concluding Observations: Nepal, (September 2005), para. 54(c). If poverty is to find its way into the legal books as a ground for the determination of the adoptability of a child at all, some precautionary measures need to be taken. This is partly because, the existence of the possibility of declaring the adoptability of a child solely on the basis of poverty is prone to high level of abuse. For instance, agencies arranging adoption placements could easily secure consent of parents by using financial inducement and invoke poverty as a ground for the adoptability of a child. This way, the use of poverty as a ground for adoptability also makes a loophole that compromises the requirement that consents be fully informed and be given free from either duress or financial inducement.

separated from their parents, both in the developed and developing countries.²⁵⁵ The UN Guidelines for the Appropriate Use and Conditions of Alternative Care for Children evinces a similar position.²⁵⁶

Thus, when poverty is the main reason why parental responsibility is terminated or abandonment or relinquishment is chosen, the rule requiring family preservation²⁵⁷ dictates that families should be offered support in keeping their children. This may take the form of the creation of domestic social services to aid poverty-stricken birth families in supporting their children.

Understandably, such support cannot be forthcoming in every country. In fact, many third world countries, especially the so called “least developed countries” (composed of a majority - 34 - of African countries) who also happen to be predominantly traditionally sending countries, can barely afford any such costs. However, every effort should be made by all stakeholders to support family preservation. In this regard, it is important to reiterate the obligations of States in Article 27 of the CRC and urge them “to ensure that poverty as such should not lead to the separation decision and to the out-of-home placement”.²⁵⁸

²⁵⁵ CRC Committee, Day of General Discussion, (2005), para. 658.

²⁵⁶ See, para. 14 which provides that “[f]inancial and material poverty alone, or conditions directly and uniquely imputable to such poverty, should never be a justification for the removal of a child from parental care, for receiving a child into alternative care, or for preventing his/her reintegration, but should be seen as a signal for the need to provide appropriate support to the family”.

²⁵⁷ See Chapter 5, section 5.4.2.1 on this.

²⁵⁸ See, CRC Committee, Day of General Discussion, Children without parental care, (2005), para. 659. Support for families living in poverty could include material assistance, implementing poverty reduction strategies and community development, including the participation of children.

A central question that emerges is: if poverty is to be considered as a valid ground for establishing the adoptability of a child, on what/whose standards is such poverty to be assessed? The term “poverty” is often used as an all-encompassing term to describe situations where people lack many of the opportunities that are available to the average citizen. Despite the relative nature of the term “poverty”, there is some broad guidance from traditionally receiving countries on how poverty should be defined and used to qualify a child for entry into the receiving country through intercountry adoption. There are some cases that address which children satisfy the orphan definition for entry into the U.S. through intercountry adoption. The U.S. Department of Homeland Security Board of Immigration Appeals has ruled that an inability to care for the child would be demonstrated when the parent is destitute by local standards, and cannot provide the child with the nourishment and shelter necessary for subsistence consistent with the local standards of the child's place of residence.²⁵⁹ For instance, in a recent petition to classify a Nigerian child as orphan (as an immediate relative for intercountry adoption purposes), the poverty of the biological mother of the child was argued. It was contended that the biological mother was dependent on her parents and unemployed and unable to care for the child. Her status as a student and a young girl who had had the child at the age of sixteen was also invoked. In rejecting the poverty argument and in effect dismissing the appeal, the Administrative Appeals Office of the U.S. Citizenship and Immigration Services reasoned that:

The U.S. consular investigation evidence reflects that the beneficiary (child to be adopted) lives in the same household as her biological mother... and the record contains no detailed

²⁵⁹ See, for instance, in the context of Guatemala, U.S. Department of State, “International adoption: Guatemala Sheet” (undated), part IV(B)(1)(a).

or current evidence to clarify or corroborate the claim that [she] is unable to work or to provide proper care to the beneficiary *in accordance with the local standards in Nigeria*. [emphasis mine] Accordingly, the petitioner has failed to establish that all of the requirements contained in the sole parent definition have been met, as set forth in 8 C.F.R. § 204.3(b). The beneficiary therefore does not meet the definition of an orphan, as set forth in section 101 (b)(1)(F) of the Act.²⁶⁰

This might indeed be a good approach in dealing with poverty as a ground for the adoptability of a child. It is important that, when poverty is a central ground in determining the adoptability of a child reports (preferably official ones) regarding local standards of living in the country should be taken into account. It would also be helpful if the documents on the child to be sent to the receiving country include such reports. Poverty should lead to the adoptability of a child only when the poverty the child lives under is found to be below local standards, and that such poverty has made it impossible to care for the child in any meaningful manner.

In passing, it can also be mentioned that, as much as poverty alone cannot be a sole ground for declaring the adoptability of a child, adoptions by rich families cannot be prioritised. In this regard, the CRC Committee has expressed concern in reviewing the

²⁶⁰ Petition to Classify Orphan as an Immediate Relative Pursuant to Section 101(b)(1)(F) of the Immigration and Nationality Act, 8 U.S.C. 1 101(b)(1)(F), U.S. Citizenship and Immigration Services 07 January 2009) .Volume 8 of the Code of Federal Regulations (8 C.F.R.) section 204.3 provides in pertinent part:

Sole parent means the mother when it is established that the child is illegitimate and has not acquired a parent within the meaning of section 101(b)(2) of the Act. An illegitimate child shall be considered to have a sole parent if his or her father has severed all parental ties, rights, duties, and obligations to the child, or if his or her father has, in writing, irrevocably released the child for emigration and adoption. This definition is not applicable to children born in countries which make no distinction between a child born in or out of wedlock, since all such children are considered to be legitimate. In all cases, a sole parent must be *incapable of providing proper care* as that term is defined in this section.

Incapable of providing proper care means that a sole or surviving parent is unable to provide for the child's basic needs, consistent with the local standards of the foreign sending country.

State Party report of Mexico over “the fact that adoptions by rich families are reportedly prioritized, without giving due consideration to the best interests of the child and her or his cultural origins”.²⁶¹ This would help to avoid the practice of making children adoptable to the highest bidder, and in turn make the practice child centred.

Unfortunately, none of the countries under this study have an explicit provision that can parallel, for instance, that of Guatemala’s – that expressly proscribes that poverty alone cannot be a ground for adoptability. However, it is worth noting two positive observations.

Firstly, despite the lack of explicit provisions that outlaw poverty as a sufficient ground for adoptability, so too, there are also no provisions that explicitly identify poverty as a sole ground for adoptability. In particular, in South Africa, the presence of a range of social grants (including the child support grant), play a significant role to minimise the role of poverty in making children available for adoption or other forms of alternative care.

Secondly, few provisions within the Kenyan Children Act seem to entrench measures that have the possibility of minimising the use of poverty as a sole ground for the declaration of adoptability. This is apparent from, for instance, the fact that “persistent failure to maintain”, which could be a reason to satisfy a court to dispense with consent of the parents or guardians of the child, can only presumed where:

²⁶¹ CRC Committee, Concluding Observations: Mexico, (June 2006), para. 42(c).

...despite demands made, no parent or guardian has contributed to the maintenance of the infant for a period of at least six consecutive months and *such failure is not due to indulgence* (emphasis mine).²⁶²

On a different but related note, Section 231(4) and (5) of the Children's Act clearly state that an adoptive parent may not be disqualified by virtue of his or her financial status and that an adoptive parent can be in receipt of a state grant. This means that a prospective adopter "could adopt a child on a very meagre income and then go and apply for the child support grant".²⁶³

To sum up, using poverty as a sole ground for adoptability could be labelled as taking "advantage of the vulnerability of the poor to obtain their children".²⁶⁴ It can safely be speculated that a number of children are declared adoptable in Africa as a result of poverty. Legislation that limits the use of poverty as a ground for adoptability is important. Family preservation measures should be provided to families in poverty in order to preserve their children.

4.5.4 Adoptability of hard to place/special needs children (with a focus on HIV-positive children)

The phrases "hard to place" and "special needs" children are used interchangeably in this chapter. These phrases are generally used to describe those children for whom,

²⁶² Art. 159(1)(a)(ii) of Children Act.

²⁶³ CLE and CCL, (2009), 17.

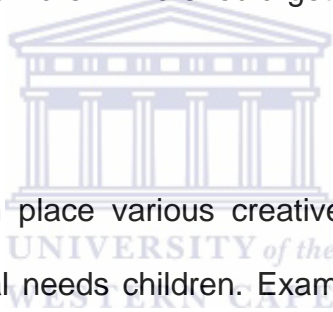
²⁶⁴ Smolin, (2007), 453.

because of the presence of certain characteristics and conditions, it is particularly difficult to find permanent homes through adoption.²⁶⁵

The adoptability of so-called “hard to place” children has drawn the interest of the CRC Committee on a number of occasions.²⁶⁶ The Committee has repeatedly requested State parties to:

Promote awareness of adoption in general and in particular promote adoption of children belonging to groups that have particular difficulties to be adopted including siblings, disabled children and minority children.²⁶⁷

Older children²⁶⁸ (and, as mentioned in the preceding paragraph, sometimes siblings²⁶⁹) also fall within this category of children who should get special attention regarding their adoptability.²⁷⁰



Different countries have put in place various creative policies and laws in order to facilitate the adoption of special needs children. Examples abound in this regard. For instance, though Australian state of Victoria has a quota of two files per year for adopting children from Lithuania who are aged less than six years, there is no quota for

²⁶⁵ See McKenzie, (1993), 62-76 (which discusses the history of special needs adoption, the current status of special needs adoption services, and possible future challenges and directions for reform).

²⁶⁶ CRC Committee, Concluding Observations: Serbia (June 2008); Georgia, (June 2008), para 39(b).

²⁶⁷ As above.

²⁶⁸ See, for instance, CRC Committee, Concluding Observations: Georgia, (June 2008), para 39(b).

²⁶⁹ In Ethiopia, for instance, “adoption agencies report a strong need to place sibling groups”. Adoption under one roof “Adoption from Ethiopia” available at <<http://ouradopt.com/content/adopting-ethiopia>>

²⁷⁰ It is important to note that the definition of special needs, although displays some degree of commonality, could vary from one jurisdiction to the other. In Victoria, “Special needs” includes: older children, sibling groups of more than three and children with health problems. See <http://www.cyf.vic.gov.au/__data/assets/pdf_file/0016/251215/icas-info-kit-march-2009.pdf>.

children older than six years.²⁷¹ In lifting the moratorium on single applicants to adopt children, the Intercountry Adoption Board of the Philippines put the condition that it would only consider single applicants who will be accepting children from six years old and above of either gender with minor correctable medical conditions.²⁷²

China's policy that attempts to facilitate the adoption of special needs children is also exemplary. For instance, prospective adoptive parents who adopt special needs children are exempted from the requirement that a family must have fewer than five children under the age of 18, with the youngest being at least one year old.²⁷³ In addition, while the general age limit for prospective adoptive parents to be eligible to adopt is between the ages of 30 and 50, parents who apply to adopt a special needs child could be between the ages of 30 and 55.²⁷⁴ However, China only allows children up to the age of 13 to be adoptable through intercountry adoption, which may be contradictory to its overall preference to have hard to place children (in this case older children) adopted.²⁷⁵

The declaration of adoptability is not an end in itself - but a means to an end. Therefore, a clear distinction needs to be made between the adoptability of hard to place children

²⁷¹ State Government of Victoria: Department of Human Services "Intercountry adoption information kit", (March 2009), 21.

²⁷² Reported at the Adoption Authority of Ireland, (undated), available at <<http://www.adoptionboard.ie/intercountry/philippines.php>>.

²⁷³ U.S. Department of State "Intercountry adoption: China", (April 2008).

²⁷⁴ As above.

²⁷⁵ As above. While placing siblings together is often seen as the preferred option, it is not always appropriate or possible, and can result in a longer wait for an adoptive family. As a result relaxing the rules, as the American law does, in order to promote the best interests of siblings is a commendable move. If siblings are not placed together, the issue of ongoing contact must be taken into account. It is important to note that finding similar measures for special needs children (like China) under law and policy are difficult to come by in many parts of the world - including Africa.

in theory, and their adoption in reality. As a result, in order to promote the best interests of hard to place children, not only should legal rules avoid directly and unfairly disallowing their adoptability, they should also not hamper, *de jure or de facto*, the actual adoption of this group of children.

For instance, it is not uncommon for traditionally sending countries to include in their legislation a requirement that, before prospective adoptive parents adopt a second child/sibling, they should finalise the first adoption.²⁷⁶ If these same adoptive parents are to apply again at a later stage for the adoption of another child or children, the non-flexible implementation of the rule that requires adherence to minimum age gaps between these prospective adoptive parents and other adoptable siblings could be a barrier to the adoption of older siblings.²⁷⁷ In addition, as far as siblings/twins are concerned, the experience from Nepal is indicative that a rule that disallows prospective adoptive parents to adopt children of the same sex could result in sibling separation.²⁷⁸ A well thought out policy and law that does not hamper (both in theory and practice) the adoptability and adoption of special needs children is clearly required.

However, one of the most controversial aspects of adoptability that is worthy of detailed reflection, as far as special needs children are concerned, pertains to the question of whether HIV-positive children should be declared adoptable or not. Some States prohibit (sometimes *de jure* but oftentimes *de facto*) the adoption of HIV-positive

²⁷⁶ For instance, under Sec. 7(4) of Nepal's Conditions and Procedures to provide Nepali Children to the Foreign Citizens under Adoption as Sons and Daughters, 2008, it appears that adoptive parents have to finalize the adoption of the first child before they can adopt a sibling.

²⁷⁷ Terre des Hommes Foundation and UNICEF, (2008), 43.

²⁷⁸ As above. These scenarios draw to attention the importance of rules that require the undertaking of maximum effort by relevant persons/authorities for twins to be adopted by the same family could go a long way in averting separation.

children. This is so despite the absence of any international regulation that prohibits the intercountry adoption of children suffering from severe disabilities, including children who have been diagnosed as HIV-positive.²⁷⁹ It is argued that such an approach does not enjoy the support of the Hague Convention. However, there is nothing expressly stated in the Hague Convention, as the Guide to Good Practice notes, to prevent a receiving state from applying to intercountry adoption any health controls which apply generally to immigration into that country.²⁸⁰ The implications of a prohibition of the adoptability of HIV positive children, assessed against the provisions of the CRC and the ACRWC, have not been well interrogated.

The most detailed and authoritative document on the rights of children in the era of HIV/AIDS is General Comment No. 3 titled "HIV/AIDS and the Rights of the Child".²⁸¹ This document does not expressly address the issue of the adoptability (or otherwise) of HIV positive children. However, the General Comment re-iterates that the CRC Committee interprets "other status" under Article 2 of the Convention to include HIV/AIDS status of the child or his/her parent(s).²⁸² This automatically implies that the discriminating against children on the basis of their HIV status is a violation of the CRC, unless a justification(s) exists that would make such discrimination a fair one.

Guideline 5, paragraph 22(f) of the United Nations Guidelines on HIV/AIDS and Human Rights expressly entrenches that "the HIV status of a... child should not be treated any

²⁷⁹ Permanent Bureau, Guide to Good Practice, (2008), para. 508.

²⁸⁰ As above.

²⁸¹ CRC Committee, General Comment No. 3, (2003).

²⁸² CRC Committee, General Comment No. 3, (2003), para 9; General Comment No. 4, (2003), para. 6. See, too, Vandenhoe, (2005), 174-176.

differently from any other analogous medical condition in making decisions regarding custody, fostering or adoption".²⁸³ In other words, according to the Guidelines, singling out HIV as a condition that bars the adoptability of a child does not sit well with the demands of international human rights law.²⁸⁴

In specific cases, where the adoption of a HIV positive child into a household which has as its members other children is concerned, the best interests of this latter group of children might be brought into play, too. In such circumstances, provision should be made, on a case by case basis, not to allow HIV positive children to be adopted in a household where they might pose a risk to the rights of other children. In fact, there is case law to support the position that where the placement of a HIV positive child in a family posed a threat to other children in the family, policy and law should reasonably protect children from the significant risk of harm that could result from being placed in a home with someone with a serious contagious disease.²⁸⁵

Nonetheless, it is worth noting that such a prohibition does not constitute a blanket ban on the adoptability of a child who is HIV positive. Rather, it is a prohibition of the adoption of a HIV positive child into a specific household, in order to protect and

²⁸³ OHCHR and UNAIDS, (2006), 35 Guideline 5, para. 22(a) encourages that disability laws should also be enacted or revised to include HIV and AIDS in their definition of disability. This as premise, the provision under Art. 23 of the CRPWD repeats the provisions at the beginning of Art. 9(1) of the CRC, adding: "In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents". And to prevent "concealment, abandonment, neglect and segregation of children with disabilities" States must "undertake to provide early and comprehensive information, services and support to children with disabilities and their families. See Hodgkin and Newell, (2007), 123.

²⁸⁴ See, for instance, UNHCHR, (1995), 1; UNHCHR, (1999), (reiterating that a prohibition of discrimination based on "other status" in non-discrimination provisions prohibits discrimination based on HIV/AIDS).

²⁸⁵ See, generally, Zounes, (2008), 529.

promote the best interests of children who are not HIV positive.²⁸⁶ It is more a question of matching than adoptability. This should also stand scrutiny against the non-discrimination rule. It does not also indicate an over-inclusiveness of the excluded category (namely HIV positive children being adopted into a household where they might pose a direct threat to the health or safety of others).

Though very slow, progress is being made in rendering HIV positive children adoptable. For instance, in the past Ethiopia did not allow the adoption of HIV-positive children.²⁸⁷ Although there was neither policy nor law which substantiated this position, a *de facto* prohibition on the adoption of HIV positive children had prevailed. However, this has changed lately. In 2005, the first HIV positive children to the U.S. were adopted.²⁸⁸ Currently, there are newspaper reports that indicate that the adoption of HIV positive children from Ethiopia is on the rise.²⁸⁹ The number of organisations that specifically promote the adoption of HIV positive children is also on the increase.²⁹⁰

²⁸⁶ For example, the Americans with Disabilities Act of 1990 which was designed to promote a clear federal mandate that discrimination on the basis of one's disability was intolerable has exceptions where disability discrimination will be tolerated. One such exception arises where an "individual poses a direct threat to the health or safety of others". See 42 U.S.C. § 12182(b)(3) (1995) as cited in Zounes, (2008), 529.

²⁸⁷ There are a number of news reports to corroborate this position. For instance, in 2006, the Boston Globe wrote that the "...Ethiopian government does not allow children who are HIV-positive to be adopted overseas". See Boston Globe, (7 December 2006).

²⁸⁸ Personal communication with Rita Radostitz, Volunteer at the AAI in Ethiopia (22 November 2006); Vitabeat, (01 September 2005).

²⁸⁹ Vitabeat, (01 September 2005). In 2005, it was reported that "[c]hildren will not be sent overseas if they are found to be HIV-positive themselves". BBC, (04 March 2005).

²⁹⁰ For instance, Cotlands is a long-serving South African "non-profit" agency that continues to meet the ever-changing needs of children impacted by HIV/AIDS in this country. It raises awareness and promotes the adoption of HIV positive children. Responding to the often posed question "how can you think of adopting of dying child?" Cotlands executive director, Jackie Schoeman, has said that:

Yes, this is an obvious question, but at Cotlands we look at the issue of adopting HIV positive children from a different angle," she says. "The HIV positive child is still living — a child who deserves a warm and loving home. See Cotlands, Press Release, (March 2004).

The foregoing discussions apply to the countries under the study. In particular, various provisions that cater for the rights of special needs children exist in Kenya and Ethiopia.²⁹¹ In Ethiopia, the Guidelines by MOWA contain some progressive provisions to address the rights of special needs children. In relation to prospective adoptive parents who are interested in adopting children with disability or children with health problems, the Internal Directives are explicit in according them priority in adoptions. This is entrenched in paragraph 5(5) of the Guidelines.

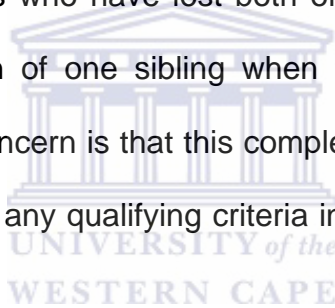
What is not clear, however, is whether or not prospective adoptive parents who are interested in the adoption of older children would benefit from a similar kind of special treatment. A straight forward reading of paragraph 5(5) of the Internal Directives seems to suggest otherwise. By definition, older children are neither children with disability nor children with medical problems. What could perhaps be read into this stance by the Guidelines is that the adoption of older children (or the lack thereof) is either really not a problem or Government does not actively seek to facilitate the adoption of older children for a number of reasons. One reason could be the fact that older children usually have developed their own identity (more so than infants and toddlers). Since their adoption has more of an uprooting effect than the adoption of younger children, on a purely speculative basis, a policy decision might have been taken not to place older children through intercountry adoption.

In South Africa, an assessment of a number of social worker reports on the adoptability of children expresses that the children were “tested for HIV, Hepatitis B and Syphilis”

²⁹¹ In South Africa, at least the practice indicates that there are measures that cater for special needs/hard to place children.

and when they tested negative, they were declared “medically fit for adoption” by the respective paediatrician. This poses the question, if the children had tested positive for HIV, does it mean that they would have been declared unadoptable? There is anecdotal evidence that seems to suggest that the tests are done for matching the right child with prospective adoptive children and that the adoptability of HIV positive children does indeed happen in practice.

Finally, it is submitted that the position of the Internal Directives in Ethiopia on the adoption of siblings is rather extreme. Using firm language, it is stipulated that it is not permissible to separate siblings who have lost both of their parents.²⁹² The possibility remains open for the adoption of one sibling when the siblings have not lost both parents. What is a cause for concern is that this complete ban on separation of siblings does not seem to be subject to any qualifying criteria including the best interests of the child.



4.5.5 Refugee children

There are startling statistics on the number of refugee children in Africa, including those from Chad, Democratic Republic of Congo, Liberia, Somalia, Sudan, and Zimbabwe.²⁹³ Some of these children are unaccompanied or separated, thus not necessarily benefiting from a family environment. While a number of African refugee children have

²⁹² Para. 6(1)(4) of the MOWA Guidelines. The loss of parents could be for any reason including, death and abandonment.

²⁹³ See, generally, UNHCR, (2008), 84-93; Kaime, (2004).

been internationally adopted in the past, the case of the “lost boys” of Sudan stands out.²⁹⁴

The adoptability of refugee children is an issue that requires a high level of caution. This is partly because, in situations where children are refugees for one reason or another, families get separated, documents get damaged or lost, and determining the adoptability or otherwise of a child becomes to an extent guesswork. Therefore, generally speaking, to leave open the possibility of family reunification, refugee children are not available for adoption.

There should be no doubt that in refugee situations, separation should not be considered equivalent to abandonment. This should be the case even when the parent has deliberately sent a child away to safety. In its Guidelines on Protection and Care of Refugee Children, the UNHCR acknowledges that unaccompanied children are not necessarily orphans, too.²⁹⁵ In other words, being a refugee cannot, and should not, be equated with adoptability.

The refugee status of children ushers in other additional measures that need to be followed before children are declared adoptable. For instance, tracing the relatives of refugee children who have been separated from their families may require additional efforts.

²⁹⁴ See, for instance, Stark, (2003); Sharfman, (2007-2008), 149-150; Ward-Lambert, (2009), 674-675.

²⁹⁵ UNHCR, (1994), 374.

During the drafting of the Hague Convention, it was not clear whether the Convention should apply to refugee children or not.²⁹⁶ The opinion that finally prevailed on the matter was to request the Secretary General of the Hague Conference to examine the issue and make specific proposals to a Special Commission of the Hague Conference to ensure appropriate protection of this category of children.²⁹⁷ This culminated in the *Recommendation Concerning the Application to Refugee Children and Other Internationally Displaced Children of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*.²⁹⁸

Apart from declaring that, in relation to the Hague Convention, the child's country of origin is the country where the child is residing subsequent to his or her displacement,²⁹⁹ the Recommendation highlights further that, before an intercountry adoption is initiated, all reasonable measures should be taken in order to trace, and reunite the child with his or her parents or family members.³⁰⁰ In the context of the 2004 tsunami disaster, the Permanent Bureau had issued a statement echoing these principles.³⁰¹

All States, whether or not they are parties to the Hague Convention, are urged to observe particular caution in order to prevent irregularities in respect of any cross border adoptions of refugee children. The obvious shortcoming of the Recommendation

²⁹⁶ Parra-Aranguren, (1994), para. 609.

²⁹⁷ As above.

²⁹⁸ Permanent Bureau, Recommendations, (1994).

²⁹⁹ See Permanent Bureau, Recommendations, (1994), para. 1. This is a clear indication that, when it comes to refugee children, there is a change in the use of the terminology "state of origin". Thus, with respect to these children, the State of origin referred to in Art. 2, para. 1 of the Hague Convention, is the State where the child is residing after being displaced.

³⁰⁰ See, Permanent Bureau, Recommendation, (1994), para. 2(a).

³⁰¹ See Permanent Bureau, Press Release, (January 2005).

is the fact that it is limited in application to children who cross borders, and does not address the issue of internally displaced children. The term “internationally displaced” in the title of the Recommendation is indicative of this. This in fact does not accord with Article 23 of the ACRWC which recognises rights for internally displaced children similar to those refugees, who by definition are those that have crossed an international border.

The CRC Committee, in General Comment No. 6 on separated and unaccompanied refugee children, makes the general point that:

States must have full respect for the preconditions provided under Article 21 of the Convention as well as other relevant international instruments, including in particular the 1993 *Hague Convention on Protection of Children and Co-operation in Respect of Inter-Country Adoption* and its 1994 *Recommendation concerning the application to Refugee and other Internationally Displaced Children* when considering the adoption of unaccompanied ... children.³⁰²

In addition, it is underscored that refugee children must not be adopted in haste at the height of an emergency.³⁰³ The Committee has re-iterated that the adoption of unaccompanied or separated children should only be considered once it has been established that the child is in a position to be adopted.³⁰⁴ Once it has been determined that a child is “adoptable”, in the case of refugee children, consideration should be given to placement of the child within the refugee community or with families in the country from which the child has fled.³⁰⁵

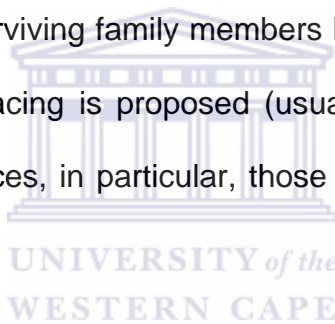
³⁰² CRC Committee, General Comment No. 6, (2005), para. 91.

³⁰³ As above.

³⁰⁴ In practice, this means, *inter alia*, that efforts with regard to tracing and family reunification have failed, or that the parents have consented to the adoption. The consent of parents and the consent of other persons, institutions and authorities that are necessary for adoption must be free and informed. This supposes notably that such consent has not been induced by payment or compensation of any kind and has not been withdrawn. CRC Committee, General Comment No. 6, (2005), para. 91.

³⁰⁵ UNICEF Innocenti Digest, (1998), 9.

A recent example on the African continent that shed light on the adoptability of refugee children is the Zoe's Ark case in Chad which was discussed in Chapter 2.³⁰⁶ It was the contention of the Zoe's Ark group that the children that it was attempting to transport to France for adoption purposes were refugees from the Darfur conflict in Sudan.³⁰⁷ In analysing the events surrounding the Zoe's Ark case, irrespective of whether the 103 children were from Chad or Sudan's Darfur region, it is argued that the extended conflict in both countries should have warranted a moratorium on intercountry adoption from the affected areas.³⁰⁸ In addition, the refugee status of the children, if they were refugees at all, should have caused the granting of a reasonable time during which all feasible steps to trace the parents or other surviving family members had been carried out. Though a general reasonable time for tracing is proposed (usually two years),³⁰⁹ this period of time may vary with circumstances, in particular, those relating to the ability to conduct proper tracing.



In general, therefore, refugee children are not adoptable. And, while some refugee children could benefit from intercountry adoption, their adoptability should be determined in a very cautious manner. While unaccompanied or separated children must not be adopted in haste at the height of an emergency, to equate the refugee status of children (unaccompanied or otherwise) with adoptability does not serve the best interests of the child.

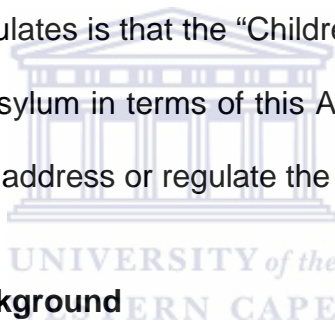
³⁰⁶ Section 2.2.2. See Reuters, (31 March 2008).

³⁰⁷ As above.

³⁰⁸ As above; Mezmur, (2009), 163-164.

³⁰⁹ See, for instance, CRC Committee, General Comment No. 6, (2005), para. 91.

The development of the law in relation to the adoptability of refugee children under the countries under the study is lacking. The use of the word “unaccompanied”³¹⁰ under Ethiopian law in describing adoptable children implies that refugee children could be adoptable. The phrase in Article 157(1) of the Kenyan Children Act, which provides that “any child who is resident within Kenya may be adopted whether or not the child is a Kenyan citizen, or was or was not born in Kenya” leaves open the possibility of refugee children being adopted in and from Kenya. Although the Refugees Act, 1998 (Act No. 130 of 1998) of South Africa requires a refugee child to be brought before the Children’s Court as a child in need of care, the express suggestion the Act stipulates is that the “Children’s Court may order that a child ... be assisted in applying for asylum in terms of this Act”.³¹¹ Neither the Children’s Act nor the Refugees Act expressly address or regulate the adoptability of refugee children.



4.5.6 Children of Islamic background

Under the CRC and the ACRWC, it is also possible to argue that the adoptability of a child is dependent on the religion of the parents or guardians and/or the child. Under the CRC, as already explained in Chapter two,³¹² adoption is not a practice that enjoys the support of Islam. It is this same reason why it is regarded as an alternative means of care only for those States that recognise and/or permit it.³¹³ Therefore, children who are Muslims could be declared non-adoptable.

³¹⁰ Para. 2(3) of the former MOLSA Guidelines.

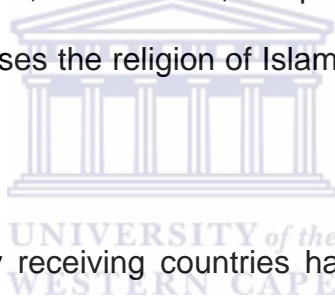
³¹¹ See Sec. 32(1) and (2) of the Refugees Act.

³¹² See Chapter 2, section 2.4.

³¹³ See Chapter 3, section 3.4.3.2.1 on this.

This approach would not necessarily violate the non-discrimination rule under Article 2 of the CRC and Article 3 of the ACRWC.³¹⁴ On one occasion, the CRC Committee has recommended to a state party that it ensures “that adoption is possible for children of all religions”.³¹⁵ However, this recommendation was qualified with the caveat that the practice should be undertaken “in accordance with the strict regulations reflected in article 21 of the Convention”,³¹⁶ which in fact could be read to mean that it is possible to exclude its application to Muslim children.

There are provisions in national law that envisage the application of adoption legislation only to non-Muslims. In Malaysia, for instance, Adoption Act 1952 (Act 257) shall not apply to any person who professes the religion of Islam and to a child who according to law is a Muslim.³¹⁷



In some instances, traditionally receiving countries have displayed recognition of the non-adoptability of Muslim children. A good example in this regard is France. In recognition of this state of affairs, France has often resisted the adoption of children from Algeria or Morocco.³¹⁸ In 2001, a statutory intervention by way of amendment was made to give such a position a legal basis. As a result, the French Civil Code Article 370-373 in relevant part provides that:

Adoption of a foreign minor may not be ordered where his personal law prohibits that institution, unless the minor was born and resides usually in France.³¹⁹

³¹⁴ See discussion of fair discrimination under Chapter 3, section xo for further details on this.

³¹⁵ CRC Committee, Concluding Observations: India, (February 2004), para. 49(c).

³¹⁶ As above.

³¹⁷ CRC Committee, Concluding Observations, Malaysia, (December 2006), para. 97.

³¹⁸ Cuniberti, (06 February 2009).

³¹⁹ See French Civil Code, Art. 370-373.

These, unfortunately, are isolated cases. None of the countries under the study expressly provide for a religiously sensitive treatment of adoptability.³²⁰ This is the case despite the fact that some of the countries in the study, in particular Ethiopia and Kenya, are home to a considerable number of Muslims. Under Kenyan law, what comes close to a religiously sensitive approach to the adoption of a child is the possibility of giving consent by a parent or guardian on condition that the child is brought up in a particular religious persuasion.³²¹ In South Africa, the form to be filled by a social worker to determine the adoptability of a child has a section on the religion of the child.³²² It is not quite clear if the religion of a child would have any implications on the adoptability or otherwise of a child.

In sum, while adoption may generally stand a relatively good chance of providing a family environment for children of all religions, both the CRC and the ACRWC display some level of religious sensitivity and tolerance, and the non-adoptability of Muslim children would not be in violation of international law.³²³ Where Muslim children are deprived of their family environments, they could benefit from the practice of *kafalah*, which is the practice under Islamic law that comes close to adoption.

³²⁰ In Kenya, however, Sec. 6(1) of the Fourth Schedule of the Act; Foster Care Placement Rules, states that whenever possible, a child shall be placed with a foster parent who has the same cultural background as the child's parents and who originates from the same areas in Kenya as the parents of the child. Arguably, cultural background may well be read to include religion.

³²¹ See, for instance, Schedule 5 of the Children (Adoption) Regulations.

³²² Copy on file with writer.

³²³ This also ties well with the fact that adoption is not a compulsory form of alternative care under international law. See a more detailed discussion of this in Chapter 3, section 3.4.3.2.1. See, too, Chapter 3, section 3.5.4 for a discussion of freedom of religion and adoption.

4.6 CONCLUSION

The question of “who is adoptable?” is an *a priori* question when examining discourses surrounding intercountry adoption. It has been argued that, contrary to the common misconception, the mere deprivation of a child of his or her family environment, temporarily or permanently, would not automatically make such child adoptable.

The three main reasons why a clear definition and understanding of who is adoptable is important were highlighted. The procedures for determining the adoptability of a child, and the guidance that can be sought from the international legal framework was explored.

A child's psycho-social adoptability and legal adoptability have been found to be the two cardinal elements of adoptability. The point has also been made that while actual adoptability of a child to a specific receiving State could also depend on the definition of adoptability in the receiving State; this, however, is not an issue of adoptability but rather, an issue of matching.

The termination of parental rights and responsibilities through court orders; the termination of parental rights and responsibilities as a result of the recognition of abandonment; and the termination of parental rights and responsibilities as a result of voluntary relinquishment as grounds for adoptability were highlighted. Amongst other points, it was underscored that since the process of the determination of adoptability should not take an unreasonable amount of time, the existence of a legal mechanism

for relinquishment as a ground which can lead to a determination of adoptability might be very crucial in minimising unwanted delay.

Subsequently, different themes were discussed including: termination of parental rights including through; a decision of a competent authority; abandonment; relinquishment; Orphanhood and poverty as grounds for adoptability; the adoptability of refugee children, special needs/hard-to-place children, and children who have a Muslim background, as well as the reason for singling these specific groups out.

It was contended that the use of the phrase “orphan” as though it is synonymous with “adoptability” has serious shortcomings, and is also misleading for programme interventions on children’s access to a family environment. It was concluded that one of the problems causing confusion in relation to adoptable children is caused by the continued unqualified use of the term “orphan” to describe children who are deprived of their parent(s), but who are not necessarily deprived of their family environment and in need of care.

Poverty as a ground for adoptability alone has been identified as highly controversial. Thus, when poverty is the main reason why parental responsibility is terminated or abandonment or relinquishment is chosen, the rule requiring family preservation dictates that families should be offered support in keeping their children. The point was made that poverty should lead to the adoptability of a child only when the poverty the child lives under is found to be below local standards, and that such poverty has made it impossible to care for the child in any meaningful manner. It was also commented that,

as much as poverty alone should not be a sole ground for declaring a child adoptable, prioritising adoptions by rich families too would be in violation of the provisions of the CRC and the ACRWC.

Various measures that would facilitate the adoptability of hard-to-place children were proposed. The adoptability of HIV positive children was singled out for detailed discussion. Although very slow, progress made in rendering HIV positive children adoptable in some of the countries in the study was examined. The point was also made that any declaration of adoptability is not an end in itself - but a means to an end; therefore, a clear distinction needs to be made between the adoptability of hard-to-place children in theory, and their adoption in reality. As a result, in order to promote the best interests of hard-to-place children, not only should legal rules avoid directly and unfairly disallowing their adoptability, they should also not hamper, *de jure* or *de facto*, the actual adoption of this group of children.

The adoptability of refugee children was identified as an issue that requires a high level of caution. The general non-adoptability of Muslim children was also underscored, and it was argued that such a position would not be in violation of international law. Finally, the analysis of adoptability in the countries in the study has highlighted some gaps and opportunities. The general observation was that the legislation of the majority of the countries in the study did not have clear guidance on adoptability. As a result, the risk that those children who are genuinely in need of adoption (for instance, disabled children) might be falling between the cracks while those that fit the expressed preference of prospective adoptive parents' requirements (for instance, girls below the

age of one) are adopted is real. Finally, whether or not a child is adoptable through intercountry adoption is an issue that is determined by the application of the equally essential principle of subsidiarity, which forms the focus of the next Chapter.



CHAPTER 5

EXPLORING THE PRINCIPLE OF SUBSIDIARITY FOR THE PURPOSE OF PROTECTING THE BEST INTERESTS OF THE CHILD IN AFRICA

5.1 INTRODUCTION

There are a number of principles that underpin the practice of intercountry adoption.¹ Central amongst these is the principle of subsidiarity, to which this Chapter is devoted.

The key formulation of the principle is found, directly or indirectly, in all the three instruments under consideration - namely the CRC,² the ACRWC,³ and the Hague Convention. While the word “subsidiarity” does not appear anywhere in the CRC and the ACRWC, the Hague Convention explicitly refers to it.⁴

The principle of subsidiarity is so important that it has been described as “a central issue in the protection of children deprived of their family, and its respect should guide the preparation of every life plan”.⁵ Sharing this view is Bainham, who says that the principle is, “in many ways, the crux of the matter”.⁶ According to Masson, the principle is key to ensuring that intercountry adoption is a service for children rather than for prospective adopters.⁷

¹ Some of these include the best interests of the child, adoptability, suitability of prospective adoptive parents, recognition, and intercountry cooperation. All these principles and concepts have been covered in this thesis in varying degrees. For instance, on adoptability, see Chapter 4.

² Art. 21(b) of the CRC.

³ Art. 24(a) of the ACRWC.

⁴ Art 4(b) of the Hague Convention makes the determination of “the respect for the principle of subsidiarity” as one of the duties assigned to the state of origin.

⁵ ISS/IRC, (April 2007), 1.

⁶ Bainham, (1998), 235.

⁷ Masson, (October 2001).

However, it is important to first understand what the principle means before appreciating its crucial role and value within the intercountry adoption scheme. The principle of subsidiarity means, in the words of the CRC Committee, “that intercountry adoption should be considered, in the light of Article 21, namely as a measure of last resort”.⁸ This is understood to have placed the option of intercountry adoption after all possible domestic care arrangements for children.⁹ In other words, the possibility of intercountry adoption as an alternative means of care is put behind just about every conceivable child care situation available within the child's country of origin.¹⁰

However, this interpretation is a very simplistic understanding of the principle (and not really an authoritative one).¹¹ Firstly, it only relates to the interpretation of the principle as incorporated in the CRC. Second, what is provided by the CRC Committee is a very narrow view as it does not indicate how the other alternative care options (apart from intercountry adoption) should fare amongst each other. Third, as will be shown below, the interpretation of the notion of “last resort” is unclear and subjective. The theory and implementation of the principle of subsidiarity triggers a number of more complex questions than that which this interpretation of the principle by the CRC Committee seems to connote.

⁸ See, for instance, CRC Committee, Concluding Observations: Brazil, (November 2004), para. 47. It is to be noted that Art. 24 of the ACRWC explicitly mentions that intercountry adoption is a measure of last resort.

⁹ Graff, (2000), 417; Katz, (1995), 304.

¹⁰ Graff, (2000), 417.

¹¹ This is partly because, as will be demonstrated further below, the CRC Committee has given contradictory views as to the general place of intercountry adoption in the hierarchy of alternative care options. See section 5.4.2.5 below.

For the Permanent Bureau of the Hague Conference on Private International Law, “subsidiarity” means that:

... States Party to the Convention recognise that a child should be raised by his or her birth family or extended family whenever possible. If that is not possible or practicable, other forms of permanent family care in the country of origin should be considered. Only after due consideration has been given to national solutions should intercountry adoption be considered, and then only if it is in the child’s best interests.¹²

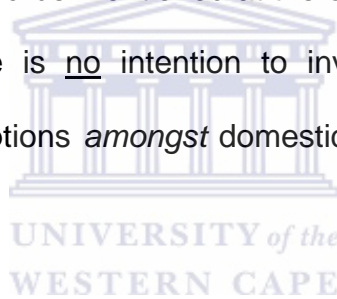
From this passage, it is possible to decipher that there is some degree of disparity in the way the principle of subsidiarity is envisaged in the CRC and the ACRWC, on the one hand, and the Hague Convention, on the other. This disparity seems to suggest that while the former instruments give primacy to national based solutions, the Hague Convention is more favourable to family based ones, even if such family is found outside of the child’s country of origin.

As a central principle in intercountry adoption, some of the implications of subsidiarity call for a detailed investigation. In this regard, several issues present themselves for comment in this chapter: for instance, based on the second chapter which outlined the African context that is relevant for intercountry adoption, how should the principle of subsidiarity be understood and implemented on the African continent?; Is a different form of understanding of the principle called for on the African continent?; If so, how?; In addition, given the seemingly different hierarchies to be followed in the implementation of the principle under the CRC and the ACRWC, on the one hand, and the Hague Convention, on the other, how can a position that is legal, and ultimately capable of promoting the best interests of the African child be formed?; How must countries that have ratified both the CRC and ACRWC on the one hand, and the Hague Convention,

¹² Permanent Bureau, Guide to Good Practice, (2008), 29.

on the other, resolve the disparity of priority in the subsidiarity principle between the instruments?; What priority may be assigned to intercountry adoption as compared to foster care and institutional care?; What is the synergy that exists between the best interests of the child principle and the principle of subsidiarity?; What is the role of the views of the child in defining the principle of subsidiarity?; What is the role of the views of the biological family?; It is also a logical line of enquiry to investigate if the principle of subsidiarity, however interpreted, is open to any exceptions. In no particular order, these issues are interrogated in the sections that follow.

As a disclaimer, one point should be mentioned at the outset. As the focus of this study is intercountry adoption, there is no intention to investigate in detail the general hierarchy of alternative care options *amongst* domestic adoption, foster care, *kafalah*, and institutionalisation.



This Chapter proceeds in seven sections. After this introduction, section two highlights briefly the importance of understanding the principle of subsidiarity. Section three addresses the historical background of the principle of subsidiarity. An attempt is made to trace the initial endeavours made to introduce the principle of subsidiarity in international law.¹³ The incorporation of the principle under the CRC and the ACRWC, on the one hand, and the Hague Convention, on the other, forms the focus of a subsequent section.

¹³ "International law" is understood in this context as both soft and hard law.

Section five explores three complex matters related to the implementation of the principle of subsidiarity. These issues are complex partly because they do not have a concrete precedent to which anyone could turn for guidance. For instance, how States that are parties to all these three instruments can comply with these seemingly different, if not contradicting, hierarchies of alternative care options to be followed before embarking upon the process of intercountry adoption will be discussed.

Section six addresses an important aspect of this study - the African context. This section deals with the domestication of the principle of subsidiarity under the municipal legislation of the countries under this study. In this regard, bills, Acts, as well as court cases are analysed. A concluding section sums up the chapter.

5.2 IMPORTANCE OF THE PRINCIPLE OF SUBSIDIARITY

The importance of the principle of subsidiarity in alternative care schemes is multifold. In the interest of brevity, this section highlights some of the general advantages of adhering to the principle of subsidiarity, while the detailed implications and advantages are deferred to a latter discussion in section four below.

The first advantage of the principle of subsidiarity is that it allows children to remain with their family of origin. It helps to re-confirm the assertion that “children’s best interests are served by being with their parents wherever possible”.¹⁴

¹⁴ Hodgkin and Newell, (2002), 295.

The principle of subsidiarity also facilitates the promotion of the cultural identity of the child. Cultural identity is a cross cutting theme that tends to place preference for the biological family (both parents and extended family members) and domestic adoption above intercountry adoption: The former options generally cater for the continuity of the child's cultural identity as the child would grow up in the culture, language and background of his or her country of origin.

In this regard, not only would the child be allowed to enjoy the benefits of his or her cultural identity, he or she would also be allowed to maintain a relatively close relationship with "significant others". These include parents, members of the extended family, and friends.

The application of the principle also offers an opportunity to the authorities of the child's country to respond to the needs of their children first. As the authorities with the responsibility to provide child welfare services, they are better placed to analyse and respond to the needs of children within their jurisdiction.

5.3 HISTORICAL BACKGROUND TO THE PRINCIPLE OF SUBSIDIARITY

In international law, neither the 1929 nor the 1954 Declarations on the Rights of the Child clearly provide for the principle of subsidiarity.¹⁵ If anything comes close to the principle of subsidiarity in the 1959 Declaration, it is Principle 6 which in pertinent part states that the child shall, "...wherever possible, grow up in the care and under the

¹⁵ Neither of these instruments deal with adoption. See Vite and Boechat, (2008), 7.

responsibility of his parents and, in any case, in an atmosphere of affection and of moral and material security”.¹⁶

Including the UDHR,¹⁷ a number of other (subsequent) general as well as specific human rights instruments do not explicitly address the principle of subsidiarity in the context of children deprived of their family environment. These include, the ICCPR, ICESCR, CEDAW, and at the regional level, the ACHPR.¹⁸

What stands out, however, is the 1986 Declaration.¹⁹ The 1986 Declaration appears to be the first instrument that laid down internationally the type and form of alternative care, as well as the different ways this may be effected, in situations where care by the child’s own parents is unavailable or inappropriate.²⁰

In this regard, it is pertinent to quote Article 4 of the 1986 Declaration which provides that:

When care by the child's own parents is unavailable or inappropriate, care by relatives of the child's parents, by another substitute--foster or adoptive-- family or, if necessary, by an appropriate institution should be considered.

¹⁶ Principle 6 of the 1959 Declaration on the Rights of the Child provides in part that “[s]ociety and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable”.

¹⁷ Art. 25(2) of the UDHR specifically addresses the welfare of children: “[m]otherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection”. Art. 25(2) of the UDHR is the only provision that specifically addresses the rights of children.

¹⁸ The only “child rights specific” provision under the ACHPR is Article 18(3) which states that “[t]he State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions”.

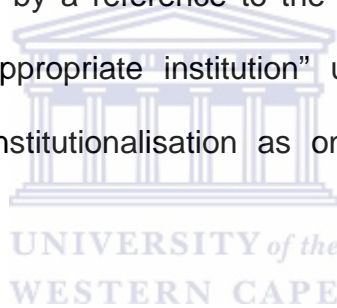
¹⁹ See Vite and Boechat, (2008), 7-8.

²⁰ Preamble para. 6 of the 1986 Declaration.

This provision reaffirms the fact that the family is a fundamental unit of society, and recognises that, as incorporated in the CRC, that “the child, for full and harmonious development of his or her personality, should grow up in a family environment”.²¹ Doek describes this principle as a “leading principle for the implementation of the CRC”.²²

Institutionalisation as a means of alternative care seems to be accorded a very limited role in Article 4 of the 1986 Declaration.²³ To borrow the words of Cantwell and Holzscheiter, Article 4 of the 1986 Declaration seems to give “an inferred subsidiarity” to institutional care over family type alternative care such as foster care and adoption.²⁴

This argument is substantiated by a reference to the use of the words “if necessary” which precedes the terms “appropriate institution” used in Article 4 of the 1986 Declaration while proposing institutionalisation as one of the options available as alternative care.²⁵



²¹ Preamble to the CRC. It is to be noted that Art. 3 of the 1986 Declaration explicitly provides that “[t]he first priority for a child is to be cared for by his or her own parents”. The stance that parents are the first-line providers of the rights and best interests of the child is vividly evident in the CRC. For instance, the CRC requires state parties to “respect the responsibilities, rights and duties of parents,” (Art. 5) and to “ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child” (Art. 18) because “[p]arents ... have the primary responsibility for the upbringing and development of the child.” (Art. 18).

²² Doek, (2006b), 205.

²³ Some of the reasons why children might need to be placed in temporary care (in particular foster care or an institution) include:

- During a family crisis, when the parents are unable to care for the child;
- to protect the child from a violent or abusive family situation;
- while the family receives counseling pending reunification;
- if the child is abandoned, and attempts are made to locate the family;
- as an interim measure while permanency planning is undertaken;
- as an interim measure before a declaration of adoptability is made;
- if the parents are deceased, or have been found unfit to care for the child.

²⁴ See Permanent Bureau, Guide to Good Practice, (2008), 74.

²⁴ Cantwell and Holzscheiter, (2008), 16.

²⁵ As above.

In addition, it is submitted that by taking into account the structure of the Article which first recognises biological parents, and ends with institutions, the provision lists the proposed alternative care options in the order of their generally preferred hierarchy.²⁶ The explicit preference towards the biological parents' care of a child flows from the Preamble to the Declaration,²⁷ and followed through by Article 3, which expressly provides that "[t]he first priority for a child is to be cared for by his or her own parents".

As far as adoption is concerned, Section C of the 1986 Declaration specifically addresses the practice.²⁸ In particular, in the context of subsidiarity, Article 17 proclaims a preference for finding the child an adoptive family in the child's home country and only "[i]f a child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the country of origin, intercountry adoption may be considered as an alternative means of providing the child with a family".²⁹

A general criticism of the 1986 Declaration maintains that "[a] closer look at the language of the Declaration ...shows pervasive use of the auxiliary verb 'should'".³⁰ While this language is to be credited for "properly giving states the flexibility to establish their own laws and procedures regarding orphans, [it] also gives states a little too much flexibility in deciding whether to follow or disregard the guidelines" (insertion mine).³¹

²⁶ Accordingly, if this argument is to be accepted, it means that the hierarchy of alternative care to be followed is care by extended family, foster care or adoption, and finally, institutionalisation.

²⁷ Para. 3 of the Preamble states that "[r]eaffirming principle 6 of that Declaration, which states that the child shall, wherever possible, grow up in the care and under the responsibility of his parents and, in any case, in an atmosphere of affection and of moral and material security".

²⁸ Comprised of 12 Arts (Arts 13-24), it forms half of what the 1986 Declaration provides in full.

²⁹ In addition, of interest is Art 13 which states that "[t]he primary aim of adoption is to provide the child who cannot be cared for by his or her own parents with a permanent family".

³⁰ Olsen, (2004), 495 citing Saulle and Kojanec, (1995), 249-254.

³¹ As above.

Interestingly, and arguably, this criticism does not necessarily hold water at least as far as Article 4 of the Declaration is concerned. Although the provision uses the word “should”,³² there does not seem to be “too much flexibility in deciding whether to follow or disregard the guidelines” that the Declaration attempts to set in place. As is evident from the preceding discussion, for instance, the use of the words “if necessary” under Article 4 seem to have established the hierarchy between institutionalisation on the one hand, and other family type alternatives, on the other. In addition, the preference towards the extended family over foster or adoptive family is expressly entrenched.

In other words, States enjoy a limited margin of appreciation when deciding the hierarchy of alternative care options between care by extended family, foster or adoptive family, and finally, placement in institutions. It seems, the only flexibility, which is in fact called for in the promotion of the best interests of the child is in deciding the hierarchy to be followed between adoption (including intercountry adoption) and foster care. In other words, it is submitted that, in so far as context-specific application is accommodated, the general preference seems to be in favour of family based options over non-family based ones.

It is pertinent to note that the 1986 Declaration obviously precedes, but also coincides, with the drafting of the CRC.³³ As a result, it is possible to glean some of the influence of the former on the wording of the latter. In particular, Articles 20 and 21 of the CRC

³² Art. 4 provides in its entirety that “[w]hen care by the child's own parents is unavailable or inappropriate, care by relatives of the child's parents, by another substitute--foster or adoptive--family or, if necessary, by an appropriate institution *should* be considered” (emphasis mine).

³³ The drafting of the CRC took place between 1979 and 1989. See Cohen, (1993), 12. At the time of the adoption of CRC in 1989, its drafters were already aware that the Hague Conference had decided to take the matter up in the Final Act of its Sixteenth Session in 1988. See Van Loon, (1995), 464.

display a substantial overlap concerning the wording and standards of the 1986 Declaration.³⁴ There is also merit in noting that the Preamble to the CRC explicitly mentions the 1986 Declaration.³⁵ There is recognition that the 1986 Declaration was partly the origin of Article 21 of the CRC.³⁶ As a result, a comprehensive understanding on the principle of subsidiarity in the CRC (and ACRWC) requires an appreciation of this historical background outlined above.

5.4 THE PRINCIPLE OF SUBSIDIARITY IN THE CRC, THE ACRWC, AND THE HAGUE CONVENTION: AN APPRAISAL

5.4.1 A brief overview of the issues

Subsequent to the 1986 Declaration, the principle of subsidiarity has found its way into the CRC, the ACRWC and the Hague Convention. In this regard, Article 21(b) of the CRC provides in full that:

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

...

(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

This provision of the CRC appears to take a very limited and unclear view of when intercountry adoption is appropriate.³⁷ The choice of hierarchy between the various

³⁴ Nonetheless, despite these overlaps, it is argued that “some of the standards of the Declaration are stronger than those relating to children without parental care in the CRC”. See Cantwell and Holzscheiter, (2008), 17. To reinforce this argument, see Art. 5 of the 1986 Declaration. While the applicable best interests clause under the CRC refers to the best interests of the child as “a primary consideration”, the 1986 Declaration speaks of the best interests principle as being “the paramount consideration”. See Cantwell and Holzscheiter, (2008), 17.

³⁵ Para. 11 of Preamble to the CRC.

³⁶ Vite and Boechat, (2008), 7.

³⁷ Smolin, (2005), 407-419 (reviewing relevant international law materials concerning relative prioritisation of the various alternative care options); Smolin, (2007), 423-424.

forms of alternative care implicit in this vague formulation could prove to be contentious.³⁸

In fact, some scholars have criticised the fact that the CRC failed to successfully clarify the proper hierarchy of solutions to be provided for children deprived of their family environment.³⁹ In the Preamble to a Draft Protocol to the UNCRC on Social Orphans, Dillon echoes the concern that "...Articles 20 and 21 of the UNCRC are not sufficiently clear about the relationship between the developing child and the urgent and time-bound need for permanency in a family setting".⁴⁰

The corresponding ACRWC provision on subsidiarity is very similar to the CRC, and perpetuates the lack of clarity on the principle of subsidiarity. However, as already discussed in Chapter 3,⁴¹ one can discern a few differences. Article 24(b) of the ACRWC entrenches that:

States Parties which recognize the system of adoption shall ensure that the best interest of the child shall be the paramount consideration and they shall:

...

(b) recognize that inter-country adoption in those States who have ratified or adhered to the International Convention on the Rights of the Child or this Charter, may, as the last resort, be considered as an alternative means of a child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

³⁸ Smolin, (2005), 407-419.

³⁹ See, for instance, Dillon, (2008), 40; Smolin, (2005), 423-424.

⁴⁰ Dillon, (2008), 85.

⁴¹ See section 3.4.3.3 highlighting this difference.

Conspicuously, this provision adds the requirement that intercountry adoption should be used as a measure of last resort.⁴² This is not expressly provided for under the CRC.

As alluded to above, the most directly applicable treaty in the intercountry adoption sphere, the Hague Convention, also entrenches the subsidiarity principle. The Preamble to the Hague Convention recognises that for children who cannot remain with their family of origin, “intercountry adoption may offer the advantage of a permanent family to a child for whom *a suitable family* cannot be found in his or her State of origin” (emphasis mine).⁴³ However, of more direct relevance is Article 4(b) which provides that:

An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin

...

b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests;

At this juncture, it is worth mentioning the compatibility of the CRC's and the ACRWC's preference for in-country over intercountry adoption with the Hague Convention.⁴⁴ This means in particular that, domestic adoption, being a national permanent family based solution, enjoys the textual support of all the three instruments over intercountry

⁴² It is worth noting that this provision prescribes the use of the last resort requirement not only to States Parties to the ACRWC but also States Parties to the CRC. However, its implications are unclear, and under the principles of international law, the ACRWC can only place obligations on its own States Parties, unless it achieves a customary law status. For a discussion of the implication of the use of the concept “last resort” see section 5.4.2.5.4 below which discusses it in the context of juvenile justice and transposes it to intercountry adoption.

⁴³ Para. 3 of the Preamble to the Hague Convention. See Parra-Aranguren, (1994), paras. 45-46 (describing the drafting history of this paragraph, and part of the thinking that went into its formulation.)

⁴⁴ Smolin, (2005), 405.

adoption. Arguably, foster care might also be said to be compatible with the CRC and ACRWC, on the one hand, and the Hague Convention, on the other, provided that it is undertaken as a permanent measure.⁴⁵ As discussed further below, however, the general preference that appears in the CRC and the ACRWC for in-country foster care and institutionalisation over intercountry adoption is more controversial and appears to contradict the Hague Convention.

Clearly, paragraph 3 and Article 4(b) of the Hague Convention espouse a preference for permanent family care. According to the *Explanatory Report* of the Hague Convention drawn up by Parra-Aranguren, however:

[t]he third paragraph of the Preamble, in referring to permanent or suitable family care, does not deny or ignore other child care alternatives, but highlights the importance of permanent family care as the preferred alternative to care by the child's family of origin.⁴⁶

Thus, even within the Hague Convention, it seems that there is some room for alternative care options that fall short of being family placements.

Recourse to an internationally recommended policy concerning different child care measures could shed some light⁴⁷ on our understanding of the hierarchy of alternative care options to be prioritised generally. According to UNICEF's study on intercountry adoption, next to the best interests of the child, it is widely agreed that three principles which form an internationally recommended policy should guide decisions regarding

⁴⁵ So that it meets the "permanent family" notion entrenched in the Preamble to the Hague Convention.

⁴⁶ Parra-Aranguren, (1994), para. 43. Permanent Bureau, *Guide to Good Practice*, (2008), 29.

⁴⁷ But it does not necessarily give complete answers.

long-term substitute care for children.⁴⁸ This internationally recommended policy is as follows:

- family-based solutions are generally preferable to institutional placements;
- permanent solutions are generally preferable to inherently temporary ones, and
- national (domestic) solutions are generally preferable to those involving another country.⁴⁹

Judging by this policy, intercountry adoption fulfils the first two principles but not the third, while foster placement fulfils the latter two. This seems to put foster placement and intercountry adoption on a similar footing. However, the same cannot be said of institutionalisation, since it only satisfies one requirement - namely being a domestic solution.⁵⁰ Therefore, intercountry adoption and foster placement are invariably to be considered subsidiary to any envisaged solution that corresponds to all three principles - for instance, domestic adoption. However, it is submitted that intercountry adoption and foster placement must be weighed carefully against any other solutions that also meet two of these three basic principles,⁵¹ and should not automatically be considered to be excluded in favour of institutionalisation. This approach garners support from the fact that determining the best interests of the child cannot be “circumscribed by mechanical legal formulae” or through “rigid hierarchical rankings” of care options.⁵²

⁴⁸ UNICEF Innocenti Digest, (1998), 5.

⁴⁹ As above.

⁵⁰ Though this is partly arguable, in exceptional circumstances, institutionalisation could be considered to be permanent for children who are often referred to as “hard to place”. In that case, institutionalisation might also appear to fulfil two of the three principles outlined, namely being a domestic and permanent solution.

⁵¹ Naturally, the solution chosen and the manner in which it is effected must always fully respect the best interests of the child.

⁵² As was stated in *S v M* (2008) (3) SA 232 (CC) para. 24.

5.4.2 Deconstructing subsidiarity under the CRC, ACRWC, and the Hague Convention: Specific alternative care options

With the foregoing discussions as a backdrop, the following sections undertake a detailed appraisal of the principle of subsidiarity. The implications of the principle, and the generally preferred hierarchy of alternative care options for children deprived of their family environment under the CRC, the ACRWC, and the Hague Convention will be investigated. The principle of subsidiarity, at first glance, poses the question “subsidiary to what”? Therefore, the starting point for the discussion should be the birth or extended family, to which all alternative care options are generally subsidiary.

5.4.2.1 Birth and extended family as the first resort of care

It is part of conventional wisdom that children do best if they are brought up by their own family. At the centre of this belief is the internationally accepted rule of child welfare policy and law that children should preferably grow up in a family environment.⁵³ There is no intention here to recount the discussion on the importance and place of the family

⁵³

At the regional level, a similar policy and practice can be detected in Europe and South America. Within Europe, the Explanatory Report to the Follow-up to Recommendation N° R(2005)5 of the Committee of Ministers to member States on the rights of children living in residential institutions has as one of its basic principles that the “... biological family is the best place for the development and well-being of the child”. In addition, according to Art. 1 of the Ethical Rules of Euradopt, “Parents who relinquish their child for adoption must be given all the necessary information concerning the implications of their decision and also reasonable time to reflect upon their decision....” available at <<http://www.euradopt.org/Ethical-rules.htm>>. Moreover, a range of instruments have been adopted in Europe, which directly or indirectly highlight the importance of the family and underscore the child's right to contact. These include the 1950 ECHR; the 1996 European Convention on the Exercise of Children's Rights (ECECR); the 2003 European Convention on Contact Concerning Children (ECCC); the Council Regulation (EC) No. 2201/2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility (Brussels II bis). Under European human rights legislation, parents unable to cope also have the right to be supported and treated to help them develop a “good enough capacity” to care for their child(ren) before losing their parental rights. See Chou and Browne, (2008), 41 (this study was generally a preliminary attempt to explore the link between international adoption and institutional care for young children. The evidence does not support the notion that international adoption reduces institutional care. On the contrary, survey data suggest that it may contribute to the continuation of institutional care with resulting harm to children).

in international law. A detailed account of this, particularly in the context of the CRC and the ACRWC, has been provided in Chapter three above.⁵⁴

The Hague Convention too echoes the importance of the family environment in the care of children. In fact, the Hague Convention's position on the primacy of family care is consonant with other provisions of the CRC and the ACRWC. Paragraph 6 of its Preamble, stating that a child should grow up in a family environment, and the numerous Articles addressing aspects of the parent-child relationship that evidence an overwhelmingly pro-family stance lend support to this assertion.⁵⁵ In addition, as commented above, paragraph 3 of the Preamble to the Hague Convention entrenches that "intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin".⁵⁶ This paragraph has been read to mirror Article 3 of the 1986 Declaration that "[t]he first priority for a child is to be cared for by his or her own parents".⁵⁷ Furthermore, paragraph 2 of the Preamble to the Hague Convention contains an aspect of the principle of subsidiarity in so far as "[e]ach state should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin".⁵⁸

⁵⁴ In particular sections 3.4.1 and 3.4.2. See, too, Rios-Kohn, (1998), 146-147 (highlighting the role of the family in the CRC).

⁵⁵ These Arts. include 1(2), 4(c)(1), and 16(1)(a).

⁵⁶ Despite the fact that it is the Preamble of the Hague Convention that lends recognition to this, this does not "rise to the status of explicit obligation". Marvel, (1997), 566. However, the Preamble assists to read other positive obligation provisions in context, (such as Art 4, which deals with the best interests of the child, adoptability, consent and other safeguards) and leads to the conclusion that biological parents are accorded heightened protection in a child's life.

⁵⁷ See Parra-Aranguren, (1994), para. 44.

⁵⁸ See Parra-Aranguren, (1994), paras. 44, 38-39.

As part of this general preference towards the family environment,⁵⁹ the preference for the birth or extended family as the environment that children should grow up in is evident under all the three instruments under consideration.⁶⁰ But while the importance and preference towards parents is obvious, the preference towards the extended family might appear less evident. However, it is submitted that there is room for interpretation in the CRC and the ACRWC that the extended family forms part of the definition of “family”. Within the Hague Convention too, it is submitted that the notion of “family of origin” includes the extended family of the child.⁶¹ As a result, those children who are being cared for by the extended family are generally not in need of alternative care.

The implication of this preference towards the birth and extended family is that, according to the CRC Committee, it is only when all other options to keep the child remaining with his or her family have been exhausted and proved inefficient or impossible that adoption (or for that matter, any other alternative care option) should be envisaged.⁶² In other words, this is part of what is referred to as “prevention of alternative care”.⁶³ In this respect, the subsidiarity principle requires that States provide

⁵⁹ See discussion in Chapter 3, section 3.4.2.2 for the implications and potential meaning of “family environment”.

⁶⁰ For a discussion of how the Hague Convention views the importance of a family environment and “attempts to straddle the fence by discussing the necessity of maintaining an adoptee in a family of origin but not in staying in the country of origin” see Martin, (2007), 199-200; See too Permanent Bureau, Guide to Good Practice, (2008), 29, 30, 72.

⁶¹ See, Permanent Bureau, Guide to Good Practice, (2008), paras. 47 and 51.

⁶² Vite and Boechat, (2008), 25. For instance, in the context of indigenous families and communities, the CRC Committee has maintained that “States parties should ensure effective measures are implemented to safeguard the integrity of indigenous families and communities by assisting them in their child-rearing responsibilities in accordance with articles 3, 5, 18, 25 and 27 (3) of the Convention”. CRC Committee, General Comment No. 11, (2009), para. 46. This also reflects an understanding of the role of communities, as well as the extended family, in the care of children and its general preference for the care of children over all alternative care options.

⁶³ States Parties to the CRC are requested to ensure the upbringing of children in their families and communities of origin or, as a last resort, in alternative care centres. See, for instance, CRC Committee, Concluding Observations: Djibouti, (October 2008), para. 41.

services, according to the United Nations Guidelines on the Alternative Care of Children that promote parental care, the prevention of family separation, and family reintegration.⁶⁴

At the centre of prevention of alternative care lies family preservation measures.⁶⁵ Simple logic dictates the importance of providing comprehensive, long term family-focused services as critical if a public policy goal is to enable children who run the risk of being deprived of their family environment to remain in their families.⁶⁶ This is the main reason why States Parties are advised to develop, adopt and implement a comprehensive national policy on families and children which supports and strengthens families.⁶⁷ This policy should be developed and implemented in collaboration with non-governmental organisations, communities, families and children.⁶⁸ In the interest of comprehensiveness, apart from State subsidies and material assistance to families, there is also a need “to provide families with support in the form of so-called service plans, including access to social and health services, child-sensitive family counselling services, education and adequate housing”.⁶⁹

⁶⁴ See, generally, Baglietto, (2007).

⁶⁵ Internationally, five core principles underpin family preservation programmes. These are strengthening the capacity of families, mobilizing and strengthening community-based responses, ensuring access to essential services, strengthening government’s role in protecting the children, and raising awareness. See UNAIDS, UNICEF, and USAID, (2002); UNAIDS, UNICEF, and USAID. (2004); Beyer, (1996), 311 (arguing that, since most families can meet their children’s safety and attachment needs, agencies can successfully design family support if they craft services with families. However, too little assistance provided too late puts children at risk).

⁶⁶ This same argument is deployed in the context of children with disabilities and their out-of-home placement. See Tomkins and Weisz, (1995), 942.

⁶⁷ CRC Committee, Day of General Discussion, (2005), para. 645

⁶⁸ As above.

⁶⁹ As above.

Once separation of children from their family takes place, when in the best interests of the child, family reunification measures should be pursued.⁷⁰ Family reunification programmes assist children to reunite with parents or the extended family.⁷¹

The absence of adequate support for families in need in Africa is the rule rather than the exception.⁷² Improved assistance to extended families who care for children deprived of their parents care is also often required.⁷³

In sum, if a general hierarchy for child care is to be made within the treaties under consideration, it is obvious that the birth and extended family should be given first consideration before resort is had to alternative care options such as adoption. The importance of supporting birth and extended families cannot be overstated. In other words, it is submitted that the subsidiarity principle maintains that the preservation of children within the birth or extended family should be a measure of first resort.

5.4.2.2 Domestic adoption

Domestic adoption is one of the alternative care options available for children permanently deprived of their family environment.⁷⁴ However, as a preliminary point, it

⁷⁰ Art. 10 of CRC. In addition, “while it has been argued that family reunification is best understood as a humanitarian principle and not as a human right”, there is a high level of consensus that there is a right to family reunification under international law. For a nuanced discussion of this see Jastram and Newland, (2003), 576 and Nessel, (2008), 1277.

⁷¹ Permanent Bureau, Guide to Good Practice, (2008), 72.

⁷² CRC Committee, Concluding Observations: Mauritania, (June 2009), paras. 42 and 43; Niger (advanced unedited version), (June 2009), paras. 41 and 42; Eritrea, (June 2008), paras. 42 and 43; Sierra Leone, (June 2008) paras. 39 and 40; Mali, (May 2007), para. 42(a); The Republic of the Congo, (October 2006), 42 and 43; Swaziland, (October 2006), para. 39.

⁷³ CRC Committee, Concluding Observations: Mauritania, (June 2009), para. 47; Eritrea (June 2008), para. 45(a); Mali, (May 2007), para. 42(b); The Republic of the Congo, (October 2006), para. 47(a); Swaziland, (October 2006), para. 41(c)

⁷⁴ Art. 20(3) of the CRC and Art. 24 of the ACRWC.

should be mentioned that while many take it for granted that adoption is one form of alternative care, a few authors do take issue with the idea of categorising adoption in general as alternative care. In this regard, it is illuminating to recount the position of Cantwell and Holzscheiter. According to these writers:

The inclusion of adoption itself in this [Article 20] listing deserves comment. From many standpoints, adoption could in fact be considered more as a potential outcome to be sought for a child in alternative care than a form of such care *per se*. It would therefore be more on par with reintegration into the parental home than with foster care in that, once adopted, a child once again has parental care. This distinction is reinforced by the fact that alternative care placements with, for example, foster families, and in institutions, are to be subject to periodic review (Article 25), whereas adoption clearly is not. (insertion mine)⁷⁵

This position is partly valid in that when adoption is compared to the other alternative care options, it could be said that it resembles much closely an end in itself than constituting a means to an end. However, part of the validity of the quoted argument above depends on the kind of definition that one attaches to alternative care. If one subscribes to UNICEF's definition that alternative care is "care for orphans and other vulnerable children who are not under the custody of their biological parents",⁷⁶ the inclusion of adoption as a form of alternative care would be valid.

In addition, it is true that according to Article 25 of the CRC, alternative care placements (in particular foster care and placement in institutions) are to be subjected to periodic review.⁷⁷ Although not backed to the same extent by a clear normative

⁷⁵ Cantwell and Holzscheiter, (2008), 52.

⁷⁶ UNICEF, (July 2006).

⁷⁷ .A closer reading of Article 25 highlights that there is neither the mention of review only for foster care and institutions nor the explicit prohibition on the review of adoptions. Therefore, arguably, the assertion by Cantwell and Holzscheiter that adoption clearly is not subject to periodic review, arguably, betrays a very limited appreciation of the notion and scope of "periodic review".

framework, sometimes even adoption is required to be reviewed, for instance, through post-adoption placement reports (that are sometimes required by domestic legislation).⁷⁸ Such a requirement might also enjoy the support of the ACRWC. Thus, that Article 24(f) of the ACRWC requires States Parties to “establish a machinery to monitor the well-being of the *adopted child*” (emphasis mine) could also be construed to mean to require the review of adoptions through various means, including post-adoption follow-up reports as necessitated by the best interests of the child.⁷⁹

These issues notwithstanding, the general hierarchy enjoyed by domestic adoption amongst the alternative care options available is the least contested one. The fact that domestic adoption is a national solution, a permanent placement, and in addition, offers a family environment, puts it ahead of other alternatives. Furthermore, there is evidence that in countries where adoption is well established,⁸⁰ there is a demonstrated high level of success rate in permanent placement, especially when decisions have been guided by the best interests of the child and children are adopted at a young age.⁸¹

However, this general preferential position towards domestic adoption needs qualification so as to accommodate exceptional circumstances. General preference for domestic adoption should not be interpreted to mean that there should be “a general

⁷⁸ See Chapter 3, section 3.4.3.3.2 for a discussion on post-adoption follow up.

⁷⁹ In this regard, it is helpful to describe the experience of Ethiopia. Ethiopia requires post placement reports on Ethiopian orphans at 3 months, 6 months, and one year after the adoption. U.S. Department of State, “Intercountry adoption: Ethiopia”, (December 2008). For the role of post-placement reports (particularly in the context of Madonna’s and Angelina’s adoptions from Africa) see Mezmur, (2009a), 165.

⁸⁰ It is to be noted that domestic adoption as defined above is not a widely practiced way of providing children a family environment in the African context. As discussed in detail in the previous chapter, informal kinship care and informal foster care are more widely practiced in communities in Africa than formal domestic adoption.

⁸¹ See, generally, Triseliotis *et al.*, (1997).

approach that would consider adoption as the best solution whenever parents are not able or willing to care for their child".⁸² Were such an approach was to be embraced, it would stand the potential danger of ill-serving the best interests of some children whose rights would better be protected and served under other alternative care options.⁸³

An example here could illustrate this point better. While it is estimated that about three-fourths of the *Tswana* people live in South Africa,⁸⁴ they also constitute the majority ethnic group living in Botswana.⁸⁵ A *Tswana* orphan from South Africa could be adopted by, for argument's sake, a white South African family from the Free State province. Such an adoption would fall within the definition of domestic adoption, and hence enjoy general preference under the principle of subsidiarity. If a *Tswana* orphan deprived of his or her family environment from South Africa is adopted by a *Tswana* family in Botswana, the nature of the adoption would automatically change to an intercountry one, enjoying less support under the principle of subsidiarity when compared to domestic adoption.⁸⁶ Assuming that all things are equal (between the situation of the adoptive family in South Africa and the prospective adoptive family in Botswana), as far as culture, language, religion, and continuity in the child's upbringing are concerned, the *Tswana* family in Botswana might be better equipped to cater for the needs of the child. However, a strict application of the principle of subsidiarity that

⁸² Vite and Boechat, (2008), 25.

⁸³ For instance, older children who have demonstrated a resistance to adapt to a family environment cannot be placed for adoption against their best interests and views.

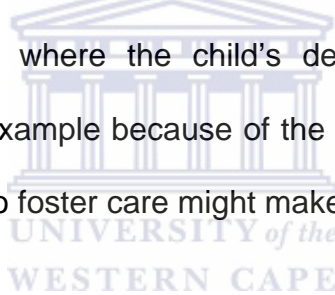
⁸⁴ See <<http://www.encounter.co.za/article/94.html>>. Some records show that the *Tswanas* are a tribe who migrated from East Africa to Southern Africa during the 14th century. Today there are 59 different groups in South Africa who now accept the overall name of *Tswana*.

⁸⁵ See <<http://encyclopedia.farlex.com/Tswanas>>. Only about one-fourth live in Botswana, the country named after them.

⁸⁶ Art. 21 of the CRC and Art. 24 of the ACRWC.

favours domestic adoption over other alternative care options might bar the prospective adoptive family in Botswana from having the child placed with them. This example clearly shows that the principle of subsidiarity should only be applicable with some level of flexibility which employs as its guidepost the best interests of the child on a case by case basis.⁸⁷

Furthermore, adoption in general should be treated in a more sensitive manner. The fact that adoption usually⁸⁸ results in severing ties with the child's entire birth and extended family, and that it therefore represents an extreme measure of intervention in the child's rights to know and be brought up by his or her own family, should be taken into account. In other words, where the child's deprivation of his or her family environment is temporary, for example because of the temporary imprisonment of sole custodian parent, options akin to foster care might make domestic adoption subsidiary.



Unfortunately, in Africa, domestic adoption (as defined in Chapter 1) is a little utilised alternative means of care for children deprived of their family environment.⁸⁹ As has been found to be the case in parts of South America,⁹⁰ social analysis in Africa indicates that adoption of an unrelated child is not a readily accepted cultural practice.⁹¹ Thus,

⁸⁷ Therefore, despite the general consensus that domestic adoption ranks higher than other alternative care options, a scheme that values the subsidiarity principle over the best interests of the child is not concordant with the CRC, ACRWC and the Hague Convention.

⁸⁸ I consciously use the term "usually", because open adoptions do not necessarily result in severing ties with the child's entire birth and extended family.

⁸⁹ This is the case in Zimbabwe, for instance, where a strong cultural resistance to the concept of adoption prevails. See, Powell *et al.*, (2004), v and 6. Even when a similar act of adoption takes place, it is informal, unofficial and unregistered and takes place outside of the private and/or judicial adoption systems.

⁹⁰ For instance, Guatemala. See Families Without Borders, (2003).

⁹¹ See, Powell *et al.*, (2004), v and 6.

since the culture of adopting domestically is lacking, building awareness of the need for adoptive families may require a change in public attitudes.⁹²

There is no clear indication from the interpretation of the CRC Committee that “informal adoptions” are inherently in violation of the provisions of the CRC. Despite this, on few occasions the CRC Committee has called upon States Parties to prevent informal adoptions.⁹³ On the majority of occasions, the Committee does not call for its abolition but rather for its regulation. The Republic of the Congo, for instance, was requested to

...conduct a child rights-based assessment of the practice of “informal” adoption, involving all stakeholders, in order to ensure that this practise is in full compliance with the principles and provisions of the Convention.⁹⁴

A similar position was echoed in the context of Samoa.⁹⁵ After reviewing the report of Kiribati, the Committee recommended that the State Party take appropriate measures to ensure that the best interests of the child are fully respected in the practice of so-called “informal adoption”.⁹⁶ Similarly, as a result of the large extent of the practice of customary adoption within the extended family and the community in Senegal, the CRC Committee recommended to the State Party to regulate the practice with a view to strengthening the protection of the rights of the adopted child.⁹⁷ It also requests States

⁹² In this regard, the experience of India which has managed to significantly increase the number of domestic adoptions could be investigated and emulated.

⁹³ CRC Committee, Concluding Observations: Niger, (June 2009), paras. 49 and 50.

⁹⁴ CRC Committee, Concluding Observations: The Republic of the Congo, (October 2006), para. 49(d).

⁹⁵ CRC Committee, Concluding Observations: Samoa, (October 2006), paras. 39 and 40.

⁹⁶ CRC Committee, Concluding Observations: Kiribati, (September 2006), para. 43(a).

⁹⁷ CRC Committee, Concluding Observations: Senegal, (October 2006), paras. 34 and 35(a).

Parties to redirect traditional adoptions towards measures of protection of the children like legal adoption or other types of guardianship.⁹⁸

Fleisher furnishes a number of suggestions on how the decline of domestic adoption could be countered within the context of the U.S..⁹⁹ Generally, these suggestions are geared towards providing policies and laws that would be fair to biological parents, adoptive parents and children alike. They include limiting the rights of birth mothers to reclaim adopted children; and removing barriers such as the age, race, sexual orientation and marital status of prospective adoptive parents.¹⁰⁰ Providing for a requirement that calls for the registration in a national paternal registry so that biological fathers can oppose the adoption before it takes place is another mechanism advanced in order to increase the number of domestic adoptions.¹⁰¹ Whether or not these experiences and suggestions could be emulated and followed in the context of Africa, though, is highly doubtful.¹⁰²

When domestic adoptions are not prioritised and many children remain in institutions,¹⁰³ a possible violation of the subsidiarity principle could be deduced.¹⁰⁴ A strategy to

⁹⁸ CRC Committee, Concluding Observations: Democratic Republic of Congo, (January 2009), paras. 48(g) and 45(a); Benin, (October 2006), para. 45(a); The Republic of the Congo, (October 2006), para. 49(b).

⁹⁹ Fleisher, (2003), 171.

¹⁰⁰ Fleisher, (2003), 171. See, too, Manley, (2006), 627 (providing for arguments in which the rights of birth parents could be protected. The arguments provided in order to protect the rights of biological parents could be transposed for the protection of their rights in domestic adoption too).

¹⁰¹ Fleisher, (2003), 171; Beck, (2002), 1031; Caswell, (2002), 271.

¹⁰² This is mainly because the socio-economic context of Africa is vastly different from the U.S.

¹⁰³ CRC Committee, Concluding Observations: Dominican Republic, (February 2008), para. 54.

¹⁰⁴ CRC Committee, Concluding Observations: Eritrea, (June 2008), para. 45(a); Dominican Republic, (February 2008), para. 54. The presence of a close to equivalent number of intercountry adoptions to that of domestic adoptions, has raised the concern of the CRC Committee that adequate priority is not given to domestic adoptions. CRC Committee, Concluding Observations: El Salvador, (June 2004), para. 39.

promote domestic adoptions requires, amongst others, awareness-raising campaigns and regulations that facilitate access to adoption, such as free or inexpensive costs for documents needed for the adoption process.¹⁰⁵ Awareness raising campaigns need to emphasise the needs and rights of children to a family.¹⁰⁶ In addition, unnecessarily restrictive eligibility requirements for prospective adoptive parents also tend to minimise children's chances of being domestically adopted. For instance, in the case of Chile, the CRC Committee recommended that the State Party should increase the possibility of domestic adoption by considering the introduction of rules allowing unmarried couples to adopt a child.¹⁰⁷ Research into what factors are inhibiting domestic adoptions in a country is crucial. Methods and incentives for encouraging families to adopt domestically should be investigated.

5.4.2.3 Foster care

A working definition (or rather, a description) of foster care is provided by the International Organization of Foster Care.¹⁰⁸ In its Guidelines for Foster Care¹⁰⁹ it is provided that foster care:

... implies temporary care or alternative family care. The period of care can vary in different countries to meet the specific needs of a child. It could be pre-adoption care;

¹⁰⁵ CRC Committee, Concluding Observations: DRC, (January 2009), para, 48(d).

¹⁰⁶ CRC Committee, Concluding Observations: Romania, (June 2009), para. 54.

¹⁰⁷ CRC Committee, Concluding Observations: Chile, (April 2007), para. 47.

¹⁰⁸ In this regard, for a discussion of the terms or concepts often confused with foster care see International Association of Youth and Family Judges and Magistrates, (January 2008), 2 (highlighting that foster care is not the same as “pre-adoptive care”, “family placement”, “substitute family”, “wardship”, and “transient family”). Accordingly, it is argued that:

...instead, FOSTER CARE is a RIGHT; it is a cooperative, fraternal answer from one member of a community to another, from one family to another in need, providing a place within a family—for as long as needed—to children and adolescents...The key word is COMPLEMENTARY, based on cooperation and fraternity.

¹⁰⁹ See International Association of Youth and Family Judges and Magistrates, (January 2008), 2.

These Guidelines are based on the 1986 Declaration and on the CRC.

weekend care or vacation care; respite care for handicapped children; care of a group of children in one family; or long-term care for a child who cannot be adopted.¹¹⁰

Children can be removed from their parents if they are abused, neglected or abandoned. Therefore, even if each child's situation is different, the general purpose of foster care is often the same: to return the child to his or her natural family,¹¹¹ to a permanent alternate family, or help towards preparing the child to live independently.¹¹²

According to Van Bueren, “[f]oster placement should be regulated by law and there should be a competent agency responsible for supervision to ensure the child’s welfare”.¹¹³ Foster care, which should be temporary, could nevertheless continue until adulthood, but should not preclude a child returning to his or her biological parents. It also should not preclude adoption.¹¹⁴

Foster care as an alternative means of care has its own advantages. To start with, unlike institutionalisation, it offers a family environment. Where potential foster care parents are identified and the system works in a well-coordinated way with the ultimate goal of promoting the best interests of the child, it would contribute to the financial efficacy of child welfare system. Where the biological family of a child is present and

¹¹⁰ IFCO, (1995). In other words, foster care is the placement of child, who requires out-of home placement and who is capable of functioning in a family setting, into the custody of a suitable family or person willing to be a foster parent.

¹¹¹ In this framework, respect for a child’s identity and family attachment are favoured and protected at a time when the child’s family is experiencing a difficult situation.

¹¹² Press Release, (2003), 2.

¹¹³ Van Bueren, (1998), 103. Amongst other alternative care measures, foster care is one means of care where the CRC Committee has recommended that States Parties ensure that the placement of children in foster care “is based on a carefully conducted assessment of the needs and best interest of the child by a competent and multidisciplinary group of experts and that a short- and long-term plan, including the goals of the placement and the measures to achieve these, is available at the time of the placement and is regularly adapted to the development of the child”. CRC Committee, Day of General Discussion, (2005), para. 654.

¹¹⁴ Van Bueren, (1998), 103.

contact exists between the foster parents and the biological family, a possibility exists for a (trained) foster parent to provide a role model of sensitive and positive parental care to the biological family leading to the rehabilitation of the family.¹¹⁵

Assessed against the general preference towards family-based, permanent and national (domestic) solutions, foster placement (along with intercountry adoption) is invariably to be considered subsidiary to any envisaged solution that corresponds to all three principles - for instance, domestic adoption. Preference towards foster care over institutionalisation is often expressed by the CRC Committee.¹¹⁶

It is important to recognise that depending on the attendant circumstances of a child, foster care could be subsidiary to adoption, intercountry adoption, and very exceptionally, institutionalisation. For instance, its non-permanent nature when compared to adoption makes it subsidiary to the latter for children who are definitively deprived of their family environment.¹¹⁷ However, if deprivation of a family environment is temporary, and the possibility of family reunification is present and planned for,

¹¹⁵ See European Commission Daphne Programme, (2007), 15. Other advantages include that, unlike adoption and intercountry adoption (closed), foster care does not result in severing ties with the child's entire birth and extended family, and therefore represents a temporary measure of intervention. In fact, where present and in the best interests of the child, biological parents/family are made part of the overall care plan in which the biological parents / relatives participate as partners in the process.

¹¹⁶ See, CRC Committee, Concluding Observations: Romania, (June 2009), para. 51; Democratic People's Republic of Korea, (January 2009), para, 37(b); The Netherlands, (January 2009), para. 41; Republic of Moldova, (January 2009), para. 45(c); Chad, (January 2009), para. 50; Slovak Republic, (July 2007), para. 43; Chile, (April 2007), para. 45.

¹¹⁷ In this regard, note the development within social work of "a *diversification of foster care services*, to include emergency, short-term, long-term, respite and specialist services has been established in order to respond to the needs of children who cannot live (either temporarily or permanently) with their birth or extended family, but for whom maintaining relationships with the family is deemed appropriate". See European Commission Daphne Programme, (2007), 18 -19.

adoption (both domestic and international) should be subsidiary to foster care.¹¹⁸ In addition, if a psycho-social analysis of a child determines that a child cannot benefit from a family environment, such a situation would make foster care subsidiary to institutionalisation.

In Africa, as in most of the less developed world, foster care tends to be informal (often called kinship care).¹¹⁹ It is less developed than other alternative care options such as institutionalisation, and is highly unregulated by law and policy.¹²⁰

5.4.2.4 Institutional care

5.4.2.4.1 Understanding the notion of “institutions”

In the context of alternative care for children,¹²¹ the word “institutions” appears in the CRC,¹²² the ACRWC,¹²³ and the Hague Convention.¹²⁴ For instance, the CRC speaks of the obligation on the part of States Parties to “...render appropriate assistance to

¹¹⁸ This is related to the fact that all alternative care measures should be subsidiary to family reintegration and that the separation of a child from his or her family should be considered as a measure of last resort. See section 5.4.2.1 for further details.

¹¹⁹ George and Oudenhoven, (2005) (providing inputs to the debate and practice of foster care, the report contains information on foster care experiences in developing countries, which tends to be informal and undocumented).

¹²⁰ At times, the CRC Committee seems to encourage the development of traditional foster care systems, such as family/community-based alternative care, paying particular attention to the rights recognised in the Convention, including the principle of the best interests of the child. See CRC Committee, Concluding Observations: Maldives, (July 2007), para. 61; Honduras, (May 2007), para. 48(b).

¹²¹ It is to be noted that the word “institutions” also appears in contexts different from alternative care such as educational institutions. See, for instance, Art. 11(7) of the ACRWC.

¹²² For instance, see Art. 3(3) of the CRC on the best interests of the child.

¹²³ Art. 20(2)(b) reads that “States Parties to the present Charter shall in accordance with their means and national conditions the (sic) all appropriate measures;
(b) to assist parents and others responsible for the child in the performance of child-rearing and ensure the development of institutions responsible for providing care of children;...”.

¹²⁴ For instance, Art. 4(c)(1) provides that “[a]n adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin –...have ensured that ... such persons, *institutions* and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing” (emphasis mine).

parents and legal guardians in the performance of their child-rearing responsibilities...¹²⁵ and their duty to “ensure the development of institutions, facilities and services for the care of children”.¹²⁶ The ACRWC also mentions institutions in the same context as the CRC.¹²⁷

Nonetheless, in the context of child care, the reference to the word “institutions” leaves unanswered the question of what it is intended to cover.¹²⁸ It is contended that “‘[r]esidential care’ or ‘institutional care’ refers to group living arrangements in which care is provided by paid adults who would otherwise not be regarded as traditional caregivers in that particular society”.¹²⁹ If “institutions” is meant to refer only to orphanages,¹³⁰ the question posed then is what role is to be played by the so-called “intermediary care options” such as “group homes”.

Since group homes by definition represent “small, residential facilities located within a community and designed to serve children”,¹³¹ it could be argued that it is these types

¹²⁵ Art. 18(2) of the CRC.

¹²⁶ Art. 18(2) of the CRC.

¹²⁷ Art. 20(2) (b) of the ACRWC.

¹²⁸ Cantwell and Holzscheiter, (2008), 53. There is a common tendency to copy the language of previous instruments and declarations without a fresh and concrete discussion of the meanings and implications of terms. As far as the CRC is concerned, Arts. 20 and 21 are classical examples. A number of terms are directly imported either from the 1986 Declaration or the ICCPR and the UDHR. The term “institutions” is but one example of this.

¹²⁹ UNICEF Innocenti Insight, (2006), 35. It is further provided that the “...form and quality of such care vary widely. Arrangements range from large, typically impersonal, public institutions to smaller centres, often run by NGOs or faith-based organizations, and ‘children’s villages’, in which children are grouped in small family-style units”. UNICEF Innocenti Insight, (2006), 35.

¹³⁰ It is to be noted that it is usually residential care institutions for young children that are also often referred to as “orphanages”. See European Commission Daphne Programme, (2007), 13.

¹³¹ These homes usually have very few occupants and are often staffed 24 hours a day by trained caregivers. For the definition and description of group homes in the context of mental disorder, see “Group homes” available at <<http://www.minddisorders.com/Flu-Inv/Group-homes.html>>.

of homes that both the CRC¹³² and the ACRWC¹³³ refer to as “suitable institutions”. The current tendency is to lump orphanages and group homes of varying sizes under the umbrella of “institutional care”.¹³⁴ Nonetheless, it is submitted that whereas the classical orphanages enjoy little support from the international normative standards, those resembling a family environment like group homes might withstand a better scrutiny under human rights law.¹³⁵

5.4.2.4.2 The role and place of institutions

The qualification of institutions with the prefix “suitable” in the CRC and the ACRWC finds its motivation from global experiences during and before the drafting of the CRC. Since the 1980s, the international community has come to progressively realise the detrimental effect of institutionalisation on children.¹³⁶ Thus, the ill-effects of institutionalisation on the emotional, psychological and developmental aspects of children are well documented.¹³⁷

¹³² Art. 20(3) of the CRC.

¹³³ Art. 25(2)(a) of the ACRWC.

¹³⁴ Dillon, (2008), 40.

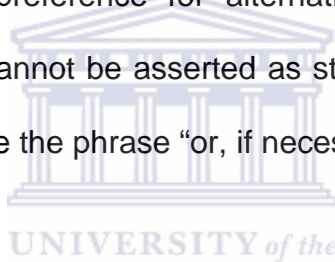
¹³⁵ See, for instance, the standards in the UN Guidelines on Alternative Care.

¹³⁶ See, for instance, Human Rights Watch, (1996). For a review of this work, see Stone, (1996), 846; Levy and Khan, (1991); Waterhouse, (2000).

¹³⁷ See, for instance, Zeanah *et al.*, (2003), 886-88 (summing up previous research on deleterious effects of institutional rearing, including recent research on many problems of children adopted out of institutions in Eastern Europe, Russia, and other countries, as well as ameliorating effects of early intervention. This article describes the Bucharest Early Intervention Project (BEIP), an ongoing randomised controlled trial of foster placement as an alternative to institutionalisation designed to document scientifically both the effects of institutionalisation and the degree of recovery that foster care can provide, and to assist the government of Romania in developing alternative forms of care beyond institutionalisation. See, too, Parker and Nelson, (2005) 54; For other recent research see the St. Petersburg-USA Orphanage Research Team, (2005), 477 (giving a comprehensive, empirical description of orphanage environments, describing the most salient deficiencies as in social-emotional environment, and describing harmful impact on children, all consistent with reports on other countries' orphanages); Yagmurlu *et al.*, (2005), 521 (documenting the harmful impact of institutionalisation on “theory of mind” development of children in Turkey, relevant to social, cognitive and language development, and psychological adjustment, all related to the deprivation of normal adult-child interaction, and all consistent with other research findings).

Recent studies continue to criticise the institutionalisation (in particular, long term) of children who are deprived of their family environment. In a study conducted by *EveryChild*, the state of institutionalised children in the former “Eastern Bloc” has been condemned.¹³⁸ Other studies conducted in Africa reveal similar findings.¹³⁹

It could be argued that, in the CRC, at least one area of hierarchical consensus that has emerged relates to the priority to be accorded to family-based alternative care over institutions. Quoting Van Bueren,¹⁴⁰ Detrick highlights the fact that the words “or, if necessary” between “adoption” and “placement in suitable institutions...” are inserted in Article 20(3) to indicate the preference for alternative care by another substitute family.¹⁴¹ However, the same cannot be asserted as strongly in connection with Article 25(2)(a) of the ACRWC because the phrase “or, if necessary” are lacking from the text.



However, the Hague Convention’s policy on institutionalisation is not explicitly spelt out in the instrument. Despite this, it is possible to decipher the position of the instrument on this issue through interpretation. For instance, paragraph 3 of the Preamble¹⁴² to the Hague Convention prescribes intercountry adoption for “a child for whom a suitable

¹³⁸ Apart from the living conditions of children in these institutions, the fact that the proportion of institutionalised children in the region increased by 3% since the collapse of Communism has been found to be a matter of grave concern. See, generally, *EveryChild*, (2005). See too ISS/IRC Monthly Review, (January 2006), 9.

¹³⁹ See, Chinake *et al.*, (2004). In Zimbabwe, the fact that the average age of the institutionalised population had increased with a significant number of children remaining institutionalised after the statutory age limit of 18 years, has been interpreted as proof that institutions have failed to make adequate preparation for the transition of youth to the outside world. See, Powell, *et al.*, (2004), vi.

¹⁴⁰ Van Bueren, (1998), 95.

¹⁴¹ Detrick, (1999), 336.

¹⁴² Para. 3 of the Preamble to the Hague Convention. Some might question the value to be accorded to the notion “permanent care” which, in any case, is part of the Preamble and does not appear in the substantive provisions of the treaty. However, it is worth noting that the drafters of the Hague Convention have explicitly indicated that the Preamble is “very important for the appropriate interpretation of the Convention, in particular of its Article 4”. Parra-Aranguren, (1994), para. 47.

family cannot be found in his or her State of origin" instead of "a child who cannot in any suitable manner be cared for in his or her country of origin".¹⁴³ Pierce labels this "a significant shift" in language.¹⁴⁴ This is because in the seven years between the 1986 Declaration and the 1993 Hague Convention, the change in choice of words from caring for a child "in a suitable manner" in the 1986 Declaration¹⁴⁵ to finding "a suitable family" in the Hague Convention is patent.¹⁴⁶ This has been interpreted to highlight the need to ensure that a child should always be placed in a family rather than in an institution.¹⁴⁷ A similar position is set forth in Article 4(b) of the Hague Convention. Hence, it could be argued that institutionalisation (which is non-family based alternative care) under the Hague Convention is a measure of last resort, behind intercountry adoption.¹⁴⁸

Paragraph 3 of the Preamble to the Hague Convention also recognises that "intercountry adoption may offer the advantage of a *permanent* family" (emphasis mine). Since institutionalisation is generally not intended to be permanent,¹⁴⁹ alternatives such as intercountry adoption seem to enjoy priority over institutionalisation in this respect. The position expounded by the Hague Conference Bureau that "it is, as a general rule, not preferable to keep children waiting in institutions when the possibility

¹⁴³ See too ISS/IRC, (1999a).

¹⁴⁴ Pierce, (1996), 538.

¹⁴⁵ As well as the CRC and the ACRWC.

¹⁴⁶ Pierce, (1996), 538-539.

¹⁴⁷ Parra-Aranguren, (1994), para. 45.

¹⁴⁸ See Vite and Boechat, (2008), 45-46 citing Dillon, (2003), 208-215 and Kaufmann, (undated).

¹⁴⁹ This does not deny the fact that institutionalisation could be considered as "permanent" for some children such as those who are labeled as "hard to place". The Permanent Bureau contends correctly that "[i]nstitutionalisation as an option for permanent care, while appropriate in special circumstances, is not as a general rule in the best interests of the child". Permanent Bureau, Guide to Good Practice, (2008), 30.

exists of a suitable permanent family placement abroad”¹⁵⁰ is supported by the text of the Hague Convention.

In practice, there is a tendency to misconstrue the position of the relevant instruments on the institutionalisation of children. It is not uncommon to witness the systematic planning and establishment of new institutions as a priority to cater for children deprived of their family environment.¹⁵¹ Sometimes, such developments are justified on the basis of Article 18(2) of the CRC.¹⁵² However, the reference under Article 18(2) that mandates States Parties to “ensure the development of institutions, facilities and services for the care of children” does not mean the facilitation of a systematic policy to establish orphanages as a priority for the care of children. Rather, there is a need to make these institutions secondary and allow them to exist in a support relationship with parents.¹⁵³ Caution should be exercised not to make children “children of the state” unnecessarily.¹⁵⁴ In this respect, children’s best interests require that literal interpretation is avoided. In other words, there is need to interpret the provisions of the CRC and the ACRWC purposefully.¹⁵⁵

¹⁵⁰ Permanent Bureau, *Guide to Good Practice*, (2008), 30.

¹⁵¹ Research conducted in 2006 has found that, in Africa, there is growing concern about the burgeoning number of orphanages being established in order to respond to the perceived needs of children affected by HIV and AIDS. See, Pinheiro, (2006), 184. See, too, Save the Children, (2009), which shares a similar view.

¹⁵² The ACRWC version of this provision, Art. 20(2)(b), provides that:
States Parties to the present Charter shall in accordance with their means and national conditions the all appropriate measures;

...
(b) to assist parents and others responsible for the child in the performance of child-rearing and ensure the development of institutions responsible for providing care of children;...

¹⁵³ Freeman, (2007a), 71.

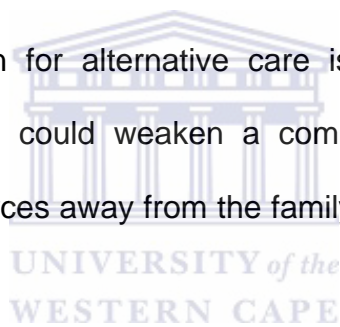
¹⁵⁴ As above.

¹⁵⁵ See the VCLT of 1969 in this regard.

In Africa, it is documented that the unfortunate lack of developed family-based alternative care options has led to “un-necessary over-use of residential placements”.¹⁵⁶ In support of this assertion, a joint working paper by ISS and UNICEF cites the experience of Zimbabwe.¹⁵⁷ Accordingly,

[t]he average occupancy of Zimbabwean orphanages is 106% overall, and 128% in government institutions. Their experience is that one can never build enough orphanages to meet demand – those which are built are always full because they attract children, although usually for the wrong reasons.... Research shows that the majority of children in institutions do not need to be there ... – only 25% have no known relatives. 45% have at least a mother alive. Most children could be reintegrated into their families with good social work.¹⁵⁸

Unfortunately, there is also anecdotal evidence that the move to make institutions the primary response and solution for alternative care is susceptible to being counter productive. This is because it could weaken a community’s motivation to address orphan issues and divert resources away from the family-based solutions that are better for children.¹⁵⁹



The limited recognition of institutions within the CRC and the ACRWC is indicative of the fact that they could (and sometimes should) play some role in child care. One aspect of the role of institutions is that they often are central in the domestic and intercountry adoption schemes, as well as in the placement of children in foster care. When children are deprived of their family environment, there is often a transition period between the deprivation of their family environment and the placement of a child in

¹⁵⁶ ISS and UNICEF, (August 2004), 7. Parwon, (June 2006). See too UNICEF Sierra Leone, (2008) which recommends the need to prioritise community based solutions for caring for orphans in order to prevent children from entering into children’s institutions in the first place.

¹⁵⁷ ISS and UNICEF, (August 2004), 7.

¹⁵⁸ Meeting on African Children Without Family Care, (2002), as cited in ISS and UNICEF (August 2004), 7.

¹⁵⁹ Olson *et al.*, (2006), 3.

alternative care such as adoption and foster care. In such circumstances, the role of institutions is crucial in keeping children off the streets and within an environment that caters for their basic needs such as shelter, clothing, food and health care.

In other words, a proper understanding of the principle of subsidiarity, especially in the context of institutionalisation, demands an appreciation of the distinction between the long term and short term placement needs of a child.¹⁶⁰ If the placement of a child who is deprived of a family environment is required for a short period of time (for example, due to imprisonment of care giver), the result of what would be in the best interests of the child in applying the principle of subsidiarity might be completely different from the long term placement needs of a child (for example, due to the death of care givers).¹⁶¹

There is no refuting the fact that in very exceptional circumstances, institutions would also serve the long term best interests of the child.¹⁶² This is the case for children who can neither be reintegrated into their birth or extended family nor be placed in a foster

¹⁶⁰ This could also be construed as the “temporary care” and “permanent care” needs of a child deprived of a family environment.

¹⁶¹ It is argued, therefore, for instance, for separated refugee children who have been temporarily deprived of their family environment, it might often be in the best interests of these children to either be placed in foster care or institutions as opposed to being adopted domestically- which would constitute a measure cognisant of their short term best interests. This is because, in this circumstance, family reunification could still be a viable option, long term measures such as adoption might not be appropriate.

¹⁶² This distinction between the long term and short term placement needs of children is supported by the understanding of the long term and short term best interests of the child. Under the principle of the best interests of the child, a child’s best interests could vary depending on whether the short term or long term interests of the child are in consideration. It is argued that “[i]n certain special cases, long term placement in an institution or in a foster family may meet the best interests of the child. Indeed, some children, given certain of their personal characteristics (adolescence, effective links with birth parents ...) or the traumas they have lived through, are unable to reinsert themselves in their family of origin or in an adoptive family”. See, generally, Cabral, (2004).

home or with adoptive families. The reasons for such impossibility may range from psychological barriers to developmental, physical and emotional deficiencies.¹⁶³

Therefore, this fact (exceptional circumstances calling for institutionalisation) might change the tone of the arguments advanced by those who categorically criticise the existence and role of orphanages in the implementation of child welfare policies. To transpose one of the common juvenile justice principles used in the context of deprivation of liberty, orphanages could have a meaningful role especially if used as a “last resort” and “for the shortest period of time”.

5.4.2.4.3 Standards for the use of institutions

The CRC Committee welcomes State parties efforts to enhance the provisions and capacity of shelters, orphanages, baby homes and similar institutions to accommodate more children deprived of their family environment.¹⁶⁴ Despite this, there is also often the need to make a concerted effort to de-institutionalise children. In the context of Romania, for instance, the CRC Committee has commended the State party for closing down institutions and replacing them with family type homes,¹⁶⁵ and expanding its foster care programmes.

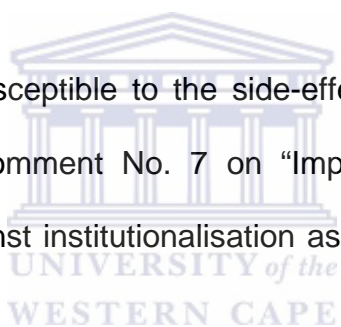
¹⁶³ In the mean time, the longer one waits to take this step, the more risk of damage that could be done to the developing child.

¹⁶⁴ CRC Committee, Concluding Observations: Bangladesh, (June 2009), para. 53; Chad, (January 2009), paras. 47, 48, 50; Eritrea, (June 2008), para. 45(b).

¹⁶⁵ CRC Committee, Concluding Observations: Romania, (June 2009), para. 51.

Within the ambit of institutions, the importance of family-type care arrangements is strongly emphasised.¹⁶⁶ In the context of Malaysia, for instance, the Committee welcomed the cottage system children's homes where these Homes provide an innovative alternative to institutional care by placing children in groups of eight to ten in specially built homes under the care of married couples selected from the community to act as their foster parents.¹⁶⁷ In a contrary vein, the Committee has criticised the non-existence of family-type care arrangements in State parties.¹⁶⁸ The Committee also encourages the State parties to create small-scale alternative care institutions to be used as a last resort when other alternative care options are not possible.¹⁶⁹

Younger children are more susceptible to the side-effects of institutionalisation. The CRC Committee's General Comment No. 7 on "Implementing child rights in early childhood" strongly warns against institutionalisation as being particularly inappropriate



¹⁶⁶ CRC Committee, Concluding Observations: Chad (CRC/C/TCD/CO/2) (January 2009), paras. 47, 48, 50; Swaziland, (October 2006), para. 41(d); Djibouti, (October 2008), para. 42.

¹⁶⁷ CRC Committee, Concluding Observations: Malaysia, (June 2007), para. 52; See too CRC Committee, State Party Report: Malaysia, (December 2006), para. 225.

¹⁶⁸ See, for example, CRC Committee, Concluding Observations: Bangladesh, (June 2009), para. 53.

¹⁶⁹ CRC Committee, Concluding Observations: Chad, (January 2009), para. 50; Venezuela, (October 2007), para. 48.

for young children.¹⁷⁰ In this respect, laws that put the minimum age for institutionalisation of children as an alternative means of care could be necessary.¹⁷¹

Even when institutions are used as a measure of last resort, there is a dire need to undertake standard-setting efforts and ensure, including through effective inspections, that these standards are fully implemented.¹⁷² The General Guidelines for Periodic Reports prepared by the CRC Committee are unequivocal in this regard.¹⁷³ Accordingly, States Parties must establish (and ensure compliance with) appropriate standards for all institutions, services and facilities responsible for the care or protection of children.¹⁷⁴

These standards should also include the provision of independent (confidential) complaints and consultation mechanisms for children in alternative care institutions.¹⁷⁵ In the light of Article 25 of the CRC, there is also a need to ensure the periodic review of

¹⁷⁰ CRC Committee, General Comment No. 7, (2005), para. 36. This paragraph in particular observes that:

...research suggests that low quality institutional care is unlikely to promote healthy physical and psychological development and can have serious negative consequences for long term social adjustment, especially for children under 3 but also for children under 5 years old. ... States Parties are encouraged to invest in and support forms of alternative care that can ensure security, continuity of care and affection, and the opportunity for young children to form long term attachments... .

¹⁷¹ See, for instance, Law No. 272/2004 of Romania which forbids the placement of children under the age of 2 in residential care. CRC Committee, Concluding Observations: Romania, (June 2009), para. 51(d).

¹⁷² CRC Committee, Concluding Observations: Mali, (May 2007), para. 42(c); Suriname, (June 2007), para. 40; The Republic of the Congo, (October 2006), paras. 44 and 45; Swaziland, (October 2006), para. 41(e).

¹⁷³ (1996), para. 37. Unfortunately, the Guidelines for Initial Reports of States prepared by the African Committee (available at <http://www.africa-union.org/child/Guidelines%20for%20Initial%20reports%20_%20English.pdf>) are not as clear as the CRC counterpart.

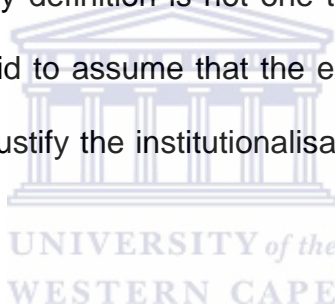
¹⁷⁴ CRC Committee, General Guidelines for periodic reports, (1996), para. 37.

¹⁷⁵ CRC Committee, Concluding Observations: Suriname, (June 2007) para. 41; Honduras, (May 2007), para. 48(d); Benin, (October 2006), para. 43(d); Oman (September 2006), para. 37(d); The Republic of the Congo, (October 2006), para. 46; Swaziland, (October 2006), para. 41(f).

the treatment provided to the child and all other circumstances relevant to his or her placement.¹⁷⁶

5.4.2.4.4 Concluding remarks

It is not difficult to envisage that some might argue that institutionalised children are more fortunate than street children, of whom there are estimated to be millions.¹⁷⁷ However, the counter argument to this is that, for the purpose of the discussion at hand, the question revolves around the subsidiarity principle with a particular focus on intercountry adoption versus institutionalisation as a form of alternative care. Therefore, a child who is a “street child” by definition is not one that benefits (but should benefit) from alternative care. It is invalid to assume that the existence of worse scenarios like street children can be used to justify the institutionalisation of other children contrary to their best interests.



As shown above, the exceptional use of institutions is justified, and sometimes even necessary. However, compared to alternative care options such as foster care and domestic adoption, institutionalisation of children should generally be considered subsidiary. What is controversial is whether it is institutionalisation or intercountry adoption that should generally be considered as a measure of last resort. This issue is addressed in detail in the next section.

¹⁷⁶ CRC Committee, Concluding Observations: Honduras (May 2007), para. 48(e); Benin, (October 2006), para. 43(d).

¹⁷⁷ See, generally, Ennew, (2003).

5.4.2.5 Intercountry adoption

Opinions are divided over the necessity and propriety of intercountry adoption. While the debate for and against the practice is raging, the operative language that has emerged in recent times has been that intercountry adoption should be used as a measure of last resort. As already mentioned in the introduction to this Chapter, whereas, under international law, children who are deprived of their family environment should benefit from alternative care, the hierarchy to be followed, and the place to be accorded to intercountry adoption amongst these options remains elusive. Therefore, while to argue that intercountry adoption should be a measure of last resort has become commonplace, what it actually means (or should mean), and what its implications are for child welfare policy and law are issues that have not fully been researched and about which little knowledge exists. This sub-section is a modest attempt to contribute to filling this gap.

5.4.2.5.1 Intercountry adoption as a measure of “last resort”: General overview

A range of literature exists that testifies to the tendency to construe intercountry adoption as categorically being a measure of “last resort”. A recent report on intercountry adoption indicates that “[b]ased on the so-called subsidiarity principle, intercountry adoption is a last resort”.¹⁷⁸ A 2008 research paper argued that “more stringent guidelines for monitoring policy and practice are implemented to ensure that international adoption really is used as a last resort”.¹⁷⁹ It is also not uncommon to come

¹⁷⁸ Committee on Lesbian Parenthood and Intercountry Adoption, (2008), 8.

¹⁷⁹ Research Intelligence, (2008), 5.

across scholars who read Article 21 of the CRC as indicating that intercountry adoption should be used as a measure of “last resort”.¹⁸⁰

Influential organisations concur with this position. UNICEF is one such body,¹⁸¹ while UNHCR is another.¹⁸² The latter, for instance, shares the position that "placing children in an adoptive family in another country . . . may be considered only if the child, in the words of the CRC, 'cannot in any suitable way be cared for' in the country where the refugee child lives".¹⁸³ In some countries, domestic law is following suit in legislating for intercountry adoption as a measure of “last resort”.¹⁸⁴

While the CRC provisions do not employ the “last resort” terminology, the ACRWC is explicit in this regard. To reiterate, for ease of reference, Article 24(b) of the ACRWC in relevant part provides that State parties shall:

recognize that inter-country adoption in those States who have ratified or adhered to the International Convention on the Rights of the Child or this Charter, may, as *the last resort*, be considered as an alternative means of a child's care, if the child cannot be placed in a

¹⁸⁰ See, for instance, Wittner, (2003), 611, 613, and 625 (writing in three places in one document that intercountry adoption, according to article 21, should be a measure of last resort). Van Bueren too highlights that “[t]he convention implicitly incorporates the principle that inter-country adoptions should only be the last resort...”. See Van Bueren , (1995), 102.

¹⁸¹ Dillon observes that:
[t]he idea that intercountry adoption is a "last resort" has been misused by international child welfare bodies, notably UNICEF. Although it is true that article 21 of the UNCRC sets out a hierarchy of solutions for children without their families of origin, a hierarchy clarified to some degree by the Hague Convention on Intercountry Adoption, the often-repeated phrase "last resort" is used disingenuously to imply a defective, inferior child welfare solution.

Dillon, (2003), 198.

¹⁸² Apart from intergovernmental organisations working on children, some regional organisations too have adopted a similar position. See, for instance, Council of Europe, Parliamentary Assembly, (December 2007), which states in its preamble that “[t]he Assembly recalls that international adoption should constitute the very last option and restates the principle that there should be no right to parenthood”.

¹⁸³ See generally, UNHCR, (1994), 2 (quoting CRC, Art. 21(b)) as cited in Stark, (2003), 281.

¹⁸⁴ For example, an earlier law in Romania (Law No. 48, amendment to Law No. 11/1990) promoted international adoption as a last resort, and only if the child could not be placed domestically.

foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin; (emphasis mine)¹⁸⁵

This provision seems to give the impression that there is a need to exhaust all alternative care options available for a child deprived of a family environment before intercountry adoption is considered. The “last resort” requirement under the ACRWC has been interpreted to imply preference for institutionalisation over intercountry adoption.¹⁸⁶ Even though the CRC provisions do not employ the “last resort” terminology, the CRC Committee has occasionally used the terms to describe the place of intercountry adoption in the hierarchy of alternative care options.

5.4.2.5.2 “Last resort” through the lens of the CRC Committee: Some confusion

Some of the concluding observations of the CRC Committee have used the “last resort” terminology in recommending to States Parties what the hierarchy of the practice should be amongst the available alternative care options.¹⁸⁷ In this respect, for instance, the CRC Committee recommended to Brazil that intercountry adoption should be

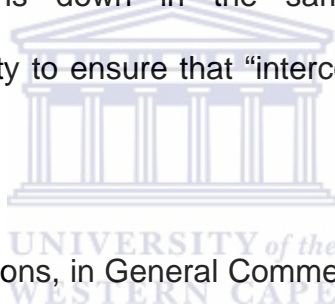
¹⁸⁵ Art. 24(b) of the ACRWC.

¹⁸⁶ Stark, (2003), 435 (arguing that the “preference for institutionalization in the country of origin over intercountry adoption is echoed in the African Charter on the Rights and Welfare of the Child. Under Article 24(b), intercountry adoption is a last resort, considered only if the child cannot be placed in a foster or adoptive family or ‘in any suitable manner’--including institutionalization--be cared for in the country of origin”).

¹⁸⁷ It is notable that the CRC Committee has used the “last resort” language in other contexts too. For instance, in its Concluding Observations to Djibouti, the CRC Committee noted “with concern the high numbers of vulnerable and orphaned children that need special attention from the State party to ensure upbringing in their families and communities of origin or, as a last resort, in alternative care centres”. (emphasis mine) CRC Committee, Concluding Observations: Djibouti, (October 2008), para. 41. In the context of “abuse and neglect” too, the CRC Committee highlighted “the creation of appropriate infrastructure in cases where, as a last resort, children have to be separated from their parents due to abuse and neglect and the introduction of mandatory reporting of abuse and neglect of children”. (emphasis mine) CRC Committee, Concluding Observations, Djibouti, (October 2008), para. 46. In addition, pursuant to Art. 37 of the CRC, States Parties are also often reminded to “[t]ake all necessary measures to ensure that persons under the age of 18 are only deprived of liberty as a last resort...”. See, for instance, CRC Committee, Concluding Observations, Tanzania, (June 2006), para. 70(d); Eritrea, (June 2008), paras. 78 and 79(e).

considered, in the light of Article 21, namely as a measure of last resort.¹⁸⁸ It has made a similar recommendation to Mexico.¹⁸⁹

However, during its 42nd session, the same time it concluded that Mexico should ensure that “adoption is used in last resort”,¹⁹⁰ the CRC Committee has recommended to Colombia,¹⁹¹ Latvia,¹⁹² and Uzbekistan¹⁹³ that institutionalisation should be used as a measure of last resort. What is even more confusing is that, in its Concluding observations on Brazil’s State party report, the CRC Committee urged the State party to “consider the placement of children in institutions as a measure of last resort”.¹⁹⁴ However, just two paragraphs down in the same document, the Committee recommended to the State Party to ensure that “intercountry adoption is a measure of last resort”.¹⁹⁵



Apart from concluding observations, in General Comment No 3 titled “HIV/AIDS and the rights of the child”, the same Committee remarked that:

... any form of institutionalized care for children should only serve as a measure of last resort, and that measures must be fully in place to protect the rights of the child and guard against all forms of abuse and exploitation.¹⁹⁶

In the context of children with disabilities, the CRC Committee has reiterated a similar position that State parties “use the placement in institution only as a measure of last

¹⁸⁸ See, CRC Committee, Concluding Observations: Brazil, (2004), para. 47(a).

¹⁸⁹ CRC Committee, Concluding Observations: Mexico, (June 2006), para. 42(d).

¹⁹⁰ As above.

¹⁹¹ CRC Committee, Concluding Observations: Colombia, (June 2006), para. 55.

¹⁹² CRC Committee, Concluding Observations: Latvia, (June 2006), para. 33(c).

¹⁹³ CRC Committee, Concluding Observations: Uzbekistan, (June 2006), para. 39(d) and (f).

¹⁹⁴ CRC Committee, Concluding Observations: Brazil, (November 2004), para. 45(c).

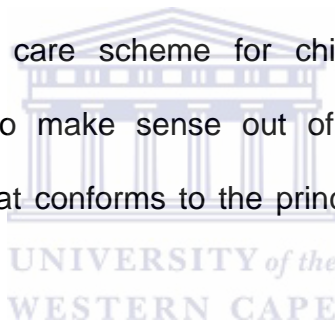
¹⁹⁵ CRC Committee, Concluding Observations: Brazil, (November 2004), para. 47(a).

¹⁹⁶ CRC Committee, General Comment No. 3, (2003), para. 35.

resort, when it is absolutely necessary and in the best interests of the child”.¹⁹⁷ This leaves the CRC Committee’s position as regards the question “is it intercountry adoption or institutionalisation that should *generally* be considered as a measure of last resort?” unanswered.¹⁹⁸

5.4.2.5.3 “Last resort” through the lens of the CRC Committee: Some clarity

Although it is the body with the authoritative interpretation of the provisions of the Convention, as shown above, the CRC Committee has been sending confusing (if not contradictory) messages as regards what is to be considered generally a measure of last resort in the alternative care scheme for children deprived of their family environment. It is important to make sense out of this confusing message, and understand it in such a way that conforms to the principle of the best interests of the child.



The Committee regards the CRC as a “living instrument, whose interpretation develops over time”.¹⁹⁹ It is notable that the CRC Committee has not recommended to any State Party in the last three years (2007-2009) to use intercountry adoption as a measure of last resort. Therefore, on a purely speculative basis, it is submitted that this general preference for intercountry adoption over institutionalisation by the CRC Committee may have been informed by the overwhelming recent and conclusive research that points out that institutionalisation is detrimental for children’s development.

¹⁹⁷ CRC Committee, General Comment No. 9, (2007), para. 47.

¹⁹⁸ “Generally”, because it is the conventional (non-exceptional) cases that are being taken into account when determining the general preference to be adopted in making decisions between alternative care options.

¹⁹⁹ CRC Committee, General Comment No. 8, (2006), para. 8.

This position may be corroborated further by the recent Concluding Observations from the CRC Committee. In this respect, the evidence from the last three years is overwhelming and consistent that, according to the CRC Committee, institutions should be used as a measure of last resort,²⁰⁰ and for the shortest possible time.

It could be argued that it is in General Comments on thematic issues that the CRC Committee publishes its authoritative interpretation of the content of human rights provisions, and that General Comments have more authoritative interpretative weight than concluding observations. In this light, there is no General Comment that recommends that intercountry adoption should be used as a measure of last resort.

However, as quoted above, there are at least two General Comments (General Comments No 3 and 9) from the CRC Committee that urge State parties to use institutionalisation as a measure of last resort. From this stems the point that it is institutionalisation that should generally be subsidiary to intercountry adoption for children who are definitively deprived of their family environment.

Nonetheless, the preceding discussion does not shed light on the meaning to be attached to the terms “last resort”. Understanding this meaning is still crucial, for instance, in the context of the ACRWC that explicitly refers to intercountry adoption as an alternative means to be considered as a measure of last resort. Besides, as shown above, the CRC Committee refers to intercountry adoption to be a measure of last

²⁰⁰ CRC Committee, Concluding Observations: Democratic People’s Republic of Korea, (January 2009), para. 37(c); Uruguay, (July 2007), para. 41; Chile, (April 2007), para. 45; Honduras, (May 2007), para. 48(c); Mali, (May 2007), para. 42(c).

resort. As a result, it still remains crucial to establish a nuanced understanding of the notion of last resort in relation to intercountry adoption.

5.4.2.5.4 Understanding “last resort”: Any lessons from the principles of juvenile justice?

One potential effort to understand the meaning of “last resort” is to draw a parallel between the use of these terms under juvenile justice and intercountry adoption. In this respect, guidance can (rather remotely) be sought from Article 37(b) of the CRC, which is the only provision within the CRC that uses this phrase.²⁰¹ Pursuant to Article 37(b) of the CRC:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;²⁰²

The standard for deprivation of liberty as a measure of last resort requires one to consider “whether the intended deprivation of liberty is really the last one option (without any alternatives less interfering with the child’s right)”.²⁰³ In alternative care, therefore, this could mean resorting to intercountry adoption because it has been found to be the

²⁰¹ At the outset, however, it is pertinent to consider some general matters of context. The enquiry into the meaning and implications of the last resort requirement in the juvenile justice sphere does not assume that the purposes of the search for alternative care, on the one hand, and the deprivation of liberty as a measure of last resort in the context of juvenile justice, on the other, are the same. In light of the so called 3Ps (protection, provision and participation of the CRC and the ACRWC), whereas the former is more of a blend of protection and provision, the latter fits mainly within the protection mantra. Secondly, more often than not, it is younger children who are affected by intercountry adoption while juvenile justice often addresses older children. Thirdly, deprivation of liberty is a criminal law measure while intercountry adoption is not. Despite these differences, both the search for alternative care for children deprived of a family environment and the deprivation of liberty as a measure of last resort in the context of juvenile justice, are supposed to be undertaken in the best interests of the child. Such a common ground – the promotion and protection of the best interests of a child - is assumed to create a logical and conducive platform for comparison.

²⁰² This provision does not have a counterpart within the ACRWC. In general, the ACRWC provision pertaining to juvenile justice has been identified by many writers as one of its shortcomings when compared to the CRC provisions. See Gose, (2002); Chirwa, (2002); Mezmur, (2008a).

²⁰³ Schabas and Sax, (2006), 84.

last suitable alternative care method, as there are no other alternatives that would better suit the situation of the individual child. Just recently, in 2008, Liefwaard argues that the last resort principle does not imply that all alternatives must be pursued first, before deprivation of liberty is imposed.²⁰⁴

Thus, the interpretation under juvenile justice that the requirement of last resort does not necessarily lend itself to a structured or checklist approach that considers and pursues all alternative options before embarking on deprivation of liberty, fits well with the best interests of the child. Within an alternative care scheme, too, such an interpretation possibly has a better potential to promote the rights of children who are deprived of their family environment. If the approach of trying every available alternative care option was to be subscribed to in order to comply with the last resort requirement in a non-flexible manner before intercountry adoption is considered, it would mean that, amongst other things, children would wait unnecessarily for a longer than usual period of time before a family environment is found for them.

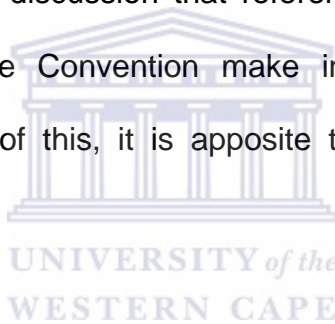
In addition, if the contention that the last resort requirement under juvenile justice implies that imprisonment may not be “imposed without a proper assessment taking into account the specific circumstances of the case and the specific needs of the

²⁰⁴ Liefwaard, (2008), 195. According to Liefwaard, it is imperative that competent authorities exercise some level of discretion in accessing different options, and finally deciding which of these options is likely to have the intended effect. The intended effect is a result that can be considered as an appropriate and adequate response to the child’s criminal behaviour. If “last resort” is to be interpreted in a similar fashion with regard to intercountry adoption, namely, that all alternative care options must not necessarily be pursued first, and that authorities exercise some level of discretion in accessing different options, and finally deciding which of these options is likely to have the intended effect, then the use of the term seems to maintain its capacity to promote the best interests of children who are deprived of their family environment. Liefwaard, (2008), 195.

individual child”,²⁰⁵ this may have positive implications for the application of alternative care options. Primary amongst these is the connotation for alternative care that a truly principled child centred approach requires a close and individualised examination of the precise real life situation of the particular child involved. Accordingly, a rule that categorically requires that intercountry adoption be made a measure of last resort should not be used in such a way that would compromise the best interests of the child.

5.4.2.5.5 Is intercountry adoption a measure of last resort under the Hague Convention?

It is evident from the previous discussion that references to “permanent family” and “suitable family” in the Hague Convention make institutionalisation subsidiary to intercountry adoption. In light of this, it is apposite to investigate what “permanent family” care encompasses.



The Guide to Good Practice, which often refers to “national adoption or permanent family care”²⁰⁶ seems to give the inference that there are other permanent family care options other than adoption. Of course, the first port of call as permanent family care is the birth family or extended family.²⁰⁷ However, it is questionable if alternative care options such as *kafalah*, and foster care that take place in-country satisfy the elements of “permanent family” care.

²⁰⁵ Lieffoord, (2008), 194.

²⁰⁶ See, Permanent Bureau, Guide to Good Practice, (2008), 67,

²⁰⁷ See, for instance, Permanent Bureau, Guide to Good Practice, (2008), 29.

It may be easy to dismiss foster care outright as being subsidiary to intercountry adoption under the Hague Convention. For instance, that is what Pierce does.²⁰⁸ The challenge lies in providing the substantiating arguments for such a conclusion based on the provisions of the treaty and secondary sources.

In child welfare language, “permanency” implies, amongst others, long term care for the child.²⁰⁹ “Permanency planning”, which often leads to permanent family placement, involves the policy and practice of securing for children ongoing positive relations with caring adults.²¹⁰ It is contended, often correctly, that central to permanency planning is the belief that all children belong in families.²¹¹ It is not quite clear whether the notion of “permanent” requires the presence of a legal bond which leads to the creation of legally created filiations. However, it is argued by this writer that permanency planning connotes “the opportunity to establish lifetime relationships”²¹² and hence the presence of a legal bond could be taken to be one of the elements of a “permanent family”.

²⁰⁸ Pierce writes that “[t]he Hague Convention places intercountry adoptions before foster and institutional care in the child’s country of origin”. Pierce, (1996), 540.

²⁰⁹ For a detailed discussion of permanency see Maluccio *et al.*, (1982). The principles to take into account in elaborating a permanent life plan include: the recognition that every child is a unique being; responsibility for raising a child, and for ensuring his or her upbringing is initially incumbent upon his or her parents; the protection of a child must always be considered from a dynamic perspective with the final objective, in principle, of permanent integration in a family capable of covering his/her needs independently; the child’s participation is guaranteed; work is done in a coordinated fashion so as to guarantee continuity in the course of the child’s life. See ISS/IRC, (2005), 7-8 (presenting a set of global policy guidelines for the protection of children without parental care. It recommends the need for a global understanding of best practices within the legal framework of the CRC).

²¹⁰ See American Academy of Pediatrics, (2000), 106.

²¹¹ Kanter, (2008), 2.

²¹² Maluccio and Fein defined permanency planning as:

The systemic process of carrying out, within a brief time-limited period, a set of goal-directed activities designed to help children live in families that offer continuity of relationships with nurturing parents or caretakers and the opportunity to establish lifetime relationships.

Maluccio and Fein, (1983), 197.

According to this understanding, it is possible to discern that, arguably, *kafalah*, and foster care (including institutionalisation) are two alternative care options that would be considered subsidiary to intercountry adoption under the Hague Convention. Neither *kafalah* nor foster care create legal filiations whereby the children in these practices are given the same status as biological children.

A description of the principle of subsidiarity by the Permanent Bureau, which is quoted in full in the introduction to this Chapter, states in part that “[o]nly after due consideration has been given to national solutions should intercountry adoption be considered, and then only if it is in the child’s best interests”.²¹³ Therefore “due consideration” implies that there is no absolute duty to adhere to national solutions or to base alternative care decisions solely on the criteria of making international solutions subsidiary to national ones all the time. The use of the phrase “due consideration” adds some leverage and flexibility in making decisions about available alternative care options.²¹⁴

From this stems the assertion that there is no assumption under Article 4(b) of the Hague Convention that the existence of placement options within a State of origin would necessarily guarantee the best interests of a child. In other words, even if possibilities such as domestic adoption, foster care and the like might be available as a possibility

²¹³ Permanent Bureau, *Guide to Good Practice*, (2008), 29.

²¹⁴ In 1990, before the Hague Convention was adopted, the Special Commission of the Permanent Bureau on Intercountry Adoption concluded that:

[A] child's best interests are in general best served if the child is raised by his or her own parents or, alternatively, by a foster or adoptive family in the child's own country; intercountry adoption is to be seen as a solution of a subsidiary nature for ensuring the welfare of the child.

See Permanent Bureau, *Conclusions of the Special Commission*, (1990), 13. However, through the adoption of the Hague Convention, and the interpretation of its provisions on subsidiarity, this earlier position seems to have faded into the background as foster care does not seem to be preferable over intercountry adoption.

for placement of the child within the state of origin, other compelling reasons in the best interests of the child could override the applicability of these possibilities.

Despite this, there is still some dilemma that Article 4(b) of the Hague Convention does not address directly upon first reading. To illustrate this point and sum up, the following observation by the ISS is instructive:

Sometimes, the evaluation criteria contradict each other. What happens, for example, when a child without parents has a chance of either being placed with an aunt outside his/her own country? Does priority have to be given to the child's family ties abroad or to the continuity of his/her education, as well as ethnic, religious, cultural and linguistic origin. Consequently should the child be placed with the aunt, running the risk of creating in him/her emotional development, or opt for a domestic solution, to the detriment of his/her ties?²¹⁵

5.5 SOME COMPLEX ISSUES IN THE APPLICATION OF THE PRINCIPLE OF SUBSIDIARITY

5.5.1 The voice of the biological family (including the child) in defining the application of the principle of subsidiarity

A point worth highlighting in the context of intercountry adoption (or for that matter, any other alternative care option) is the role of child participation.²¹⁶ In the context of the principle of subsidiarity, a child, especially an older one, might express the view that his or her best interests would be promoted through an intercountry adoption placement rather than a domestic one. In this respect, it is difficult to rule out the possibility that this view must be taken into consideration, and may in fact be determinative depending

²¹⁵ ISS/IRC, (April 2007).

²¹⁶ For a discussion of child participation under the CRC and the ACRWC, see Chapter 3, section 3.3.6.

upon the child's maturity.²¹⁷ As a result, intercountry adoption as a placement option could over-ride other alternatives.

Related to this, and more complicated, is the extent to which the views of birth parents might define the application of the principle of subsidiarity. An example that epitomises this is evident from the U.S. The final Regulations to implement the Hague Convention, as a rule, require an agency to meet the recruitment requirements to the satisfaction of a State judge, before a child from the U.S. is placed with an adoptive family abroad.²¹⁸ However, the Regulations provide for an exception where reasonable efforts to place a child in the U.S. are not required in cases where birth parents have identified prospective adoptive parents abroad.²¹⁹ More often than not, this exception will be upheld to ensure that the birth parent's decision is honoured even when domestic parents are qualified and interested in the child.²²⁰ Commenting on the final Regulations, Ethica has argued that:

The regulations disregard the subsidiarity principle of the Convention in outgoing Hague cases by allowing children to be placed outside the country without considering alternatives inside the U.S. if the birth parent has identified a person abroad—which will happen in virtually every case because agencies or attorneys will locate a person for the birthmother. Other provisions already provided judicial discretion for relative placements or those in which the parent personally knew someone abroad, making this allowance wholly unnecessary.²²¹

²¹⁷ See, CRC Committee, General Comment No. 12, (2009), para. 28-31 for an explanation of what it means for a child's views to be "given due weight in accordance with the age and maturity of the child".

²¹⁸ See Avitan, (2007), 505-506 for a discussion of the notion of "reasonable efforts".

²¹⁹ As above.

²²⁰ Avitan, (2007), 517.

²²¹ Ethica, (March 2006), 4.

It is not within the scope of this study to investigate why birth parents choose to place their children abroad rather than in their countries of origin.²²² However, it is apposite to proffer a few observations about the potential implications of this exceptional practice.

This practice has put the spot light on the potential conflict that might result between the views of biological family and the implementation of the principle of subsidiarity. For instance, it has the potential to undermine the role of the extended family. To elaborate, even in situations where there is an equally suitable member of the extended family (for instance an uncle or an aunt) who is willing and able to care for the child, the child could be placed abroad under the guise of honouring the views of the biological parents.

Furthermore, there is merit in making a distinction between a situation where biological parents have identified prospective adoptive parents abroad, on the one hand, and when they just simply give a general preference for the placement of the child abroad, on the other. In the former case, there is a high likelihood that Article 29 of the Hague Convention dealing with the “no initial contact rule” would be violated.

In general, the concern raised by Ethica, as quoted above is valid. In particular, in countries where poverty is rife, and the regulatory framework for intercountry adoption

²²² Some birth parents choose foreign families because they believe their child will experience less racism abroad than in the U.S.. Avitan, (2007) 500. For instance, a mother living in a small culturally homogenous country, where religion is a dominant force in social life and is supported by the institutions of the state, non-marital births can result in the social exclusion of the parents and the child. A classical example of this was Ireland in the 1970s. See O'Halloran, (2009), 137.

is weak, the possibility that intermediaries would abuse such a practice to circumvent the application of the subsidiarity principle is a real one.

In sum, since the practice of allowing birth parents to choose intercountry adoption has the potential to thwart some of the main goals the principle of subsidiarity attempts to achieve, its implementation and implications should be closely scrutinised. Where this practice is embraced by law or practice, it is advisable to keep it as exceptional as possible,²²³ and consider it only on a case by case basis to determine whether it promotes the best interests of the child involved.

5.5.2 The scope of application of the principle of subsidiarity on prospective adopters

The classification of countries as “sending countries” and “receiving countries” should be qualified with the prefix “traditionally”. This is for the obvious reason that even if a country is a country of origin for a majority of intercountry adoption cases that it is involved in, there might still be few cases where it serves as a receiving country when its habitual residents adopt children from abroad, and vice versa. It is not far-fetched to forecast that, with economic, social and cultural developments, some countries that are traditionally sending countries might also increasingly become receiving countries in the medium and long term.

In connection to this, a question has been posed:

²²³ Keeping the practice as exceptional as possible also entails limiting its application to biological parents only, and not expanding it, for instance, to institutions. To illustrate, it should not be possible for faith based organisations that have the care of children to circumvent the subsidiarity principle under the guise of their need to place children abroad with prospective adoptive parents who share the religious background of the child and the organisation.

if a receiving country which carries out several thousands of intercountry adoptions each year, is also a country of origin for part of 'its' children, does this country respect the principle of subsidiarity?²²⁴

At the heart of this question, put bluntly, is whether or not a country can oblige its citizens to adopt domestically before setting their sights on children abroad. This brings with it the question of the scope of application of international treaties, like the CRC, the ACRWC, and the Hague Convention, upon individuals. As is clear from the language employed in these instruments, the nature of obligations entrenched in the treaties are upon States Parties and not upon individuals. As a result, prospective adoptive parents do not have a direct obligation to comply with the principle of subsidiarity.

Many interrelated factors explain why prospective adoptive parents turn to intercountry adoption when adoptable children are available in the country of their habitual residence. Taking measures that facilitate domestic adoptions, such as awareness raising, provision of various incentives, programmes that encourage adoption of older children and groups of siblings, and addressing other social and structural hurdles (for instance, racism) remain the obligation of States Parties to the CRC, the ACRWC and the Hague Convention to address in their efforts to implement the principle of subsidiarity. These measures could promote domestic adoption and further encourage prospective adoptive parents to consider the adoption of a child from their country prior to looking abroad.²²⁵

²²⁴ ISS/IRC Monthly Review, (March-April/2009), 1.

²²⁵ ISS/IRC Monthly Review, (March-April/2009), 2.

5.5.3 Reconciling the approach to subsidiarity under the CRC and the ACRWC, and the Hague Convention

The central question posed here is: How can States Parties to the CRC and the ACRWC, and the Hague Convention comply with their obligations on the principle of subsidiarity while being States Parties to instruments with slightly different statements on one of the most fundamental principles of intercountry adoption?

This question is mainly an issue of treaty interpretation. While there is no generally accepted definition of what constitutes a conflict between treaties, a divergence between treaties need not always be a conflict.²²⁶ A conflict in the strict sense occurs when a State party to two treaties cannot simultaneously honour its obligations under both treaties.²²⁷ This said, recourse to Article 30 of the Vienna Convention on the Law of Treaties dealing with “Application of successive treaties relating to the same subject matter” sheds some light on this issue. The main thrust of this provision for the case at hand is that, as between parties to one treaty who become parties to a second, the general trend is that the second governs any point where it is incompatible with the first.²²⁸

This general trend in interpretation is validated by the fact that both the CRC and the ACRWC explicitly recognise that the standards incorporated in the respective treaties are the minimum standards that are to be adhered to by State parties. Article 41 (b) of the CRC states that:

²²⁶ Borgen, (2005), 575.

²²⁷ See, for instance, Pauwelyn, (2003), 167.

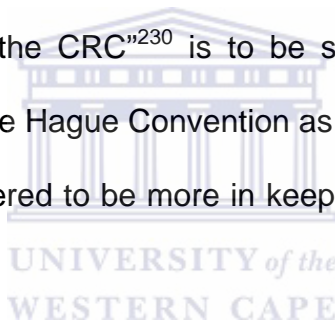
²²⁸ Borgen, (2005), 577. Art. 30(2) of the VCLT states that “[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail”.

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in...

(b) International law in force for that State.

A similar position is echoed by Article 1(2) of the ACRWC.²²⁹

However, Article 41(b) of the CRC, and Article 1(2) of the ACRWC, do not become operational automatically. As a preliminary condition for their operation, an understanding by States Parties that the manner in which the principle of subsidiarity is incorporated in the Hague Convention is more conducive to the realisation of the rights of the child is required. If Graff's argument that "[t]he Hague Convention has clearly remedied the textual flaws of the CRC"²³⁰ is to be subscribed to, adherence to the principle of subsidiarity under the Hague Convention as opposed to under the CRC (and the ACRWC) should be considered to be more in keeping with the best interests of the child.



This understanding could be reinforced by the fact that, despite its recognition of the departure of the Hague Convention's approach to that from the CRC on the subsidiarity principle, the CRC Committee has consistently and systematically recommended to States Parties to the CRC to ratify the Hague Convention. It has done this since early

²²⁹ Art. 1(2) of the ACRWC states that:

Nothing in this Charter shall affect any provisions that are more conducive to the realization of the rights and welfare of the child contained in the law of a State Party or in any other international Convention or agreement in force in that State.

²³⁰ This conclusion is arrived at based on the premises that:

The Hague Convention does not make the mistake of according the family unit superior rights to the child. It further makes intercountry adoption a viable and more readily reached option for child care placement. By placing this stamp of legitimization upon intercountry adoption, the Hague Convention created in itself the power to regulate and control the practice.

Graff, (2000), 425-426.

1994, before the coming into force of the Hague Convention.²³¹ In fact, in its recommendations, the CRC Committee's language has partly shifted with time emphasising the increasing importance of ratifying the Hague Convention. This shift in emphasis is notable starting from "the hope that the State party will become a party"²³² to recommending that "the State party... [r]atify",²³³ to "recommends that the State party:... [s]peedily ratify",²³⁴ to the CRC Committee "notes *with regret* that the State party has *still not ratified*"²³⁵ the Hague Convention (emphasis mine).

5.6 CONSIDERATION OF THE PRINCIPLE OF SUBSIDIARITY IN THE COUNTRIES UNDER THE STUDY

5.6.1 Ethiopia

Mainly as a result of the economic challenge that Government faces, measures to promote family preservation are almost non-existent in Ethiopia. There is still a need for more focus on community based care, too. The legal framework as entrenched in the RFC fails to promote community based care.

Government often uses institutional care as a measure of first resort for children deprived of their family environment both permanently and temporarily. The quality of service in institutions is compromised due to the lack of budget, the lack of qualified

²³¹ See CRC Committee, Concluding Observations: Belarus, (February 1994), para. 13 and CRC Committee, Concluding Observations: Romania, (February 1994), para. 18 as the first two countries to which the CRC Committee expressed its support for the ratification of the Hague Convention. The Hague Convention entered into force in May 1995.

²³² CRC Committee, Concluding Observations: Belarus, (February 1994), para. 13.

²³³ See CRC Committee, Concluding Observations: Benin, (October 2006), para. 45(c).

²³⁴ CRC Committee, Concluding Observations: Kazakhstan, (June 2007), para. 44(a).

²³⁵ CRC Committee, Concluding Observations: Chad, (January 2009), para. 51.

staff, lack of supervision and lack of accountability.²³⁶ For instance, while Article 36(3) of the Constitution of Ethiopia provides that "... children under government fostership, and children in public or private orphanages shall be kept separate from adults", it does not provide for the separation of these children from children in conflict with the law. There are indications that the increased use of institutions as alternative care has created a positive perception on the part of society about institutional care.²³⁷ There is anecdotal evidence that this in turn is motivating parents to abandon their children to be placed in institutional care.²³⁸

Informal adoption, which is known locally as *Gudifecha* is an age old practice²³⁹ that exists in Ethiopia. It is reported that the practice is "a highly valued and socially endorsed act".²⁴⁰ Children who are a subject of *Gudifecha* are often "legally and socially considered to be on a par with biological offspring".²⁴¹ However, domestic adoption is almost non-existent and intercountry adoption is prevalent.

The figures submitted by Government to the CRC Committee are telling. Government has reported that between 1999/2000 and 2002/2003, a total of 2,760 children have been adopted through intercountry adoption while the figure for domestic adoption was

²³⁶ See, generally, CIFF, FHI/Ethiopia and UNICEF (December 2008); Interview with Yenealem Mersha, Adoption Team Leader, MOWA, (25 September 2009); Biniyam Eshetu, Legal Expert, MOWA, (25 September 2009); Tsewaye Muluneh, Lawyer (and former judge), (24 September 2009).

²³⁷ As above.

²³⁸ As above.

²³⁹ See, generally, Beckstrom, (1972), 145-168.

²⁴⁰ CRC Committee, State Party Report: Ethiopia, (October 2005), para. 121.

²⁴¹ As above.

130.²⁴² In the 2003/2004 and 2004/2005 the figure for intercountry adoption was 1415 and 1855 respectively.²⁴³

Data available on domestic adoptions is highly limited, and the Government reckons that this is partly due to the cultural perception that “reporting adopted children to third parties as a form of discrimination abominable to God and man”.²⁴⁴ However, it is worth noting that as far as domestic adoptions are concerned, there is hardly any awareness raising; no financial incentives to encourage domestic adoption; or any form of promotion being done either by civil society or Government. There is no domestic adoption strategy by the MOWA, too. Therefore, it comes as no surprise that it is reported that the adoption of an Ethiopian child by Ethiopians domestically “is practically impossible compared to non-Ethiopians”²⁴⁵ or intercountry adoption.

Article 192(2) of the RFC entrenches that “Government or private orphanages may give any child under their custody to adopters”. While this provision does not indicate if this is also true for intercountry adoption, it at least gives the indication that domestic adoption is preferable to institutional care. In addition, of direct relevance is Article 194 (3)(d) of the RFC, which indicates that before a court approves the agreement of adoption where the adopter is a foreigner, it shall take into consideration “the absence of access to raise the child in Ethiopia”.

²⁴² CRC Committee, State Party Report: Ethiopia, (October 2005), para. 122.

²⁴³ CRC Committee, Additional information to the Third Periodic Report of Ethiopia, (August 2006), 11.

²⁴⁴ CRC Committee, State Party Report: Ethiopia, (October 2005), para. 122.

²⁴⁵ The Ethiopian Reporter, (27 June 2009).

Section 6(2)(a) of the Guidelines of MOWA indicate that, a child is available for intercountry adoption only when:

...proof confirmed by authorised government organs is adduced to the effect that the child cannot benefit from other alternative care options such as foster care, community care programmes, institutional care, sponsorship or domestic adoption, and if the child is older than ten years, if it is proved that the child does not object to the intercountry adoption.

This position seems slightly different from the response the Government gave to the CRC Committee in 2006 by stating that “[c]hildren are given for inter-country adoption when there are no opportunities for in-country adoption”.²⁴⁶ Indeed the practice seems to conform with this approach expressed by Government.

However, a look at the practice of intercountry adoption in Ethiopia clearly demonstrates that preference is given to intercountry adoption than institutionalisation. What is problematic is that, in practice, almost every child (except for those whose family of origin has expressly objected to intercountry adoption) who is in an institution is considered available for intercountry adoption. This has led to instances where children who are not deprived of their family environment permanently are adopted internationally.²⁴⁷

5.6.2 Kenya

In Kenya, some measures that promote family preservation are underway. A good example of this is a limited social cash transfer scheme that is benefitting poor children

²⁴⁶ CRC Committee, Additional information to the third periodic report of Ethiopia, (August 2006).
²⁴⁷ Interview with Biniam Eshetu, Legal Expert, MOWA, (25 September 2009); Deresse Bezawork, adoption lawyer, (25 September 2009);

and their families.²⁴⁸ The number of the target beneficiaries of this cash transfer are expected to rise to 100,000 by 2011.²⁴⁹

Despite the continued role the extended family is playing to provide children with a family environment, it is criticised that this system was “made invisible” in the Children Act.²⁵⁰ The review of the Children Act is expected to address this shortcoming.

The use of institutions cannot be labelled as a measure of last resort. Similar problems that are experienced in Ethiopia are present in Kenya, too. Overcrowding of children’s homes and lack of trained personnel working in them is also reported.²⁵¹

It is commendable that the Children Act²⁵² and the Children (CCI) Regulations (2005) regulate institutions in detail. However, the challenge remains on the implementation side. As a 2009 report vividly portrays, there is a need to put a moratorium on the burgeoning CCI’s in the country for proper regulation.²⁵³

There is nothing in the Children Act that entrenches the subsidiarity nature of intercountry adoption. The only provision entitled “International Adoptions”, which is Section 162 of the Children Act is silent on the issue of subsidiarity. However, the

²⁴⁸ See Sloth-Nielsen, (2008c), 14 and sources cited therein (discussing the social cash transfers in Kenya).

²⁴⁹ As above.

²⁵⁰ See, generally, Zilliox, (2006), 376.

²⁵¹ OMCT, (2006), 26.

²⁵² For instance, Sec. 58 of the Children Act defines a charitable children’s institution; Sec. 68 of the Children Act creates the inspection committees that are appointed by the Minister to inspect rehabilitation schools, children’s remand home and charitable children’s institutions; Sec. 67 of the Children Act enables the Director of the Children’s Services to appoint officers to inspect CCIs.

²⁵³ Parry-Williams, J. and Njoka, J. (March 2009) 26, 72, and 76.

number of children adopted through domestic adoption and intercountry adoption is very close to each other.²⁵⁴

In its report to the CRC Committee, the Government of Kenya has identified a number of constraints that characterise the adoption system. These include expenses for adoption; lack of clear information about adoption; and the fact that the adoption system is monopolised by few adoption agencies as many children's organisations are "ignorant of the fact that they can be registered as adoption agencies".²⁵⁵

There are, however, measures underway in order to minimise recourse to intercountry adoption as an alternative means of care. NGOs are undertaking various campaigns to promote domestic adoption.²⁵⁶ Efforts to train prospective adoptive parents (for domestic adoption purposes) to represent themselves in court and avoid a lawyer's fee are producing tangible results.²⁵⁷

5.6.3 Malawi

In Malawi, the principle of subsidiarity finds expression only through case law. The Judge in the *Infant CJ High Court* case emphasised that, in terms of Article 24(b) of the ACRWC, "[c]learly inter-country adoption is supposed to be the last resort alternative".²⁵⁸ For the Judge, infant CJ was being cared for in a suitable manner in an

²⁵⁴ Parry-Williams, J. and Njoka, J. (March 2009), 17-18.

²⁵⁵ CRC Committee, State Party Report: Kenya, (July 2006), para. 313.

²⁵⁶ Interview with Irene Mureithi, Child Welfare Society of Kenya, (22 June 2009); Interview with Susan Otuoma, Little Angels Network, (22 June 2009).

²⁵⁷ See, generally, the findings in Mureithi, I. *et al.* (2009).

²⁵⁸ High Court *Infant CJ* case, 7.

orphanage since “‘in any suitable manner’ refers to the style of life of the indigenous or as close a life to the one that the child has been leading since birth”.²⁵⁹

This is, indeed, a distorted view of the notion of care in a “suitable manner”. Put bluntly, it seems to insinuate that, for instance, if a child was abandoned at birth and has been living in an orphanage, institutionalisation constitutes a suitable means of care because, in any case, the institutional lifestyle is what the child knows. This approach shows a clear disregard to the CRC Committee’s General Comment No. 7 on “Implementing child rights in early childhood”, which strongly warns against institutionalisation as being particularly inappropriate for young children.²⁶⁰ The fact that the High Court wrongly envisaged long-term institutionalisation to be in the best interests of infant CJ is apparent from the judgment when the Judge positively noted the lack of evidence to indicate Kondanani Orphanage’s “inability or unwillingness ... to *continue* looking after CJ” (emphasis mine).²⁶¹

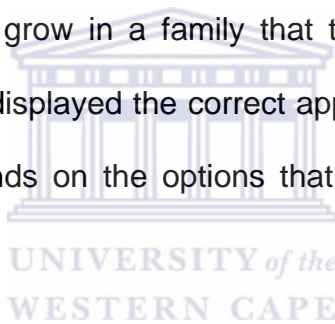
If the *Infant CJ* High Court judgment was allowed to stand, it would have set an unfortunate precedent (which could have been elevated to a status of rule), privileging

²⁵⁹ High Court *Infant CJ* case, 7.

²⁶⁰ CRC Committee, General Comment No. 7, (2005), para. 36. This paragraph in particular observes that “[r]esearch suggests that low quality institutional care is unlikely to promote healthy physical and psychological development and can have serious negative consequences for long term social adjustment, especially for children under 3 but also for children under five years old. To the extent that alternative care is required, early placement in family based or family like care is more likely to produce positive outcomes for young children. States Parties are encouraged to invest in and support forms of alternative care that can ensure security, continuity of care and affection, and the opportunity for young children to form long term attachments based on mutual trust and respect, for example through fostering, adoption and support for members of extended families”.

²⁶¹ High Court *Infant CJ* case, 7.

long-term institutional care in an unwarranted fashion,²⁶² and in a way which runs directly contrary to the “any suitable manner” requirement under both the CRC and the ACRWC.²⁶³ However, on appeal, the SCA rightly disagreed with the lower court’s appreciation of the subsidiarity principle. Under the Adoption Act, the SCA wrote, “we do not think that ...inter country adoption is a last resort alternative”.²⁶⁴ The SCA recognised that neither had there been a single family in Malawi that had come forward to adopt infant CJ, nor had there been any attempt by anybody to place infant CJ in a foster family.²⁶⁵ This, in the view of the Court, left only two options – the infant “can either stay in Kondanani Orphanage and have no family life at all or she can be adopted by the Appellant and grow in a family that the Appellant is offering”.²⁶⁶ By taking this approach, the SCA displayed the correct appreciation that the application of the subsidiarity principle depends on the options that are in actual fact available as alternative care.



The SCA found a notable Indian case, *Lakshmi Kant Pandey v. Union of India: [(1984) 2 SCC 244; AIR 1984 SC 469]*, to be instructive. This is a case where, in the absence of legislation, the Supreme Court of India framed elaborate guidelines in respect of

²⁶² It is to be noted that the CRC Committee, in its Concluding Observations on the State party report of Malawi, raised concern about the increasing number of orphanages and children’s homes, recommending to the State party, inter alia to promote and support family-type forms of alternative care for children deprived of parental care, including foster care in order to reduce the resort to residential care. See CRC Committee, Concluding Observations: Malawi, (January 2009), para. 44.

²⁶³ See Art. 21(b) of CRC, and Art. 24(b) of ACRWC.

²⁶⁴ SCA *Infant CJ* case, 18.

²⁶⁵ As above.

²⁶⁶ As above.

adoption.²⁶⁷ The SCA underscored a paragraph from this judgment that read, in part, that:

If it is not possible to find suitable adoptive parents for the child within the country, *it may become necessary* to give the child in adoption to foreign parents rather than allow the child to grow up in an orphanage or an institution where it will have no family life and no love and affection of parents... (emphasis mine).²⁶⁸

The phrase “it may become necessary” is indicative of the fact that this is just a general rule, and should be approached on a case by case basis.²⁶⁹ The SCA seemed to appreciate this reality when it wrote that:

...*the welfare of infant CJ* will be better taken care of by having her adopted by *the foreign parent* rather than for her to grow up in an orphanage where she will have no family life, no love and affection of parents (emphasis mine).²⁷⁰

This evinces an approach that displays an appreciation that the principle of subsidiarity could be subject to the best interests of the child principle.²⁷¹

The reasoning of the SCA has also shed some light, albeit obliquely, on the general position to be taken when the option of alternative care available is between foster care or domestic adoption, on the one hand, and intercountry adoption, on the other. This can be deciphered from the SCA’s observation that:

It is a fact that since the case of infant CJ surfaced itself there has not been a single family in Malawi that has come forward to adopt infant CJ neither has there been any attempt by anybody to place infant CJ in a foster family.²⁷²

²⁶⁷ For a related subsequent case, see *Indian Council for Social Welfare v. State of A.P.*[(1999) 6 SCC 365].

²⁶⁸ SCA *Infant CJ* case, 18.

²⁶⁹ The presence of this phrase, for instance, still leaves room for the role institutionalisation could play as a temporary solution in promoting the rights of children deprived of their family environment. For instance, institutions can serve as transition places for children awaiting adoption.

²⁷⁰ SCA *Infant CJ* case, 18.

²⁷¹ It is argued that the position the subsidiarity principle assumes is an in itself subsidiary one — one subservient to the best interests of the child. See Nicholson, (2000), 248.

²⁷² SCA *Infant CJ* case, 18.

Reading into this statement, it is implied that domestic adoption and foster placement, being family based solutions in the country of origin, would generally enjoy preference over intercountry adoption, which is also family based, but not a domestic solution. This interpretation is congruent with the current position under international law, and generally bodes well for the best interests of the child principle.

5.6.4 South Africa

The principle of subsidiarity has found its way into South African legal system. Not only has it been incorporated (indirectly) in legislation, it has been interrogated by the different levels of the South African courts. Since the principle appears in slightly different form and method of implementation before and after the promulgation of the Children's Act, the following discussion is divided accordingly.

5.6.4.1 Principle of subsidiarity before the Children's Act

As already pointed out above,²⁷³ intercountry adoption was not allowed in South Africa until the *Fitzpatrick* case. This is because Section 18(f) of the Child Care Act generally excluded non-South African citizens from adopting.²⁷⁴

²⁷³ See Chapter 1, section 1.8.2.

²⁷⁴ Sec. 18(f) of the Child care Act provided that:

A children's court to which application for an order of adoption is made in terms of subsection (2), shall not grant the application unless it is satisfied- ...

(f) in the case of a child born of any person who is a South African citizen, that the applicant, except an applicant referred to in section 17(c), or one of the applicants is a South African citizen resident in the Republic, or the applicant has or the applicants have otherwise the necessary residential qualifications for the grant to him or them under the South African Citizenship Act, 1949 (Act No. 44 of 1949), of a certificate or certificates of naturalisation as a South African citizen or South African citizens and has or have made application for such a certificate or certificates.

The two central issues in the *Fitzpatrick* case were whether Section 18(4)(f) of the Child Care Act was in conflict with the Constitution, and if so, the form of the order that should be made and, in particular, whether an order of invalidity should be suspended.²⁷⁵ One of the concerns raised by the Minister and the *amicus curiae* in relation to the invalidity taking immediate effect was the lack of adequate regulation and infrastructure to implement the subsidiarity principle.²⁷⁶ It was the submission of the Minister that a redrafted Section 18(4)(f) should contain the kind of safeguards and standards, including the subsidiarity principle, found in the Hague Convention.²⁷⁷

In this respect, the Court asserted that regardless of the fact that it was not expressly provided for in South African law, the subsidiarity principle had to be respected.²⁷⁸ Article 21(b) of the CRC was mentioned as the relevant provision to be complied with, since according to Section 39(1)(b) of the Constitution, it had to be considered when interpreting the Bill of Rights. The Court held that:

[t]he concerns that underlie the principle of subsidiarity are met by the requirement in section 40 of the Act that courts are to take into consideration the religious and cultural background of the child, on the one hand, and the adoptive parents, on the other.²⁷⁹

As a result, the Court was of the opinion that the provisions of the Child Care Act enable the children's court to prevent the abuses and meet the concerns expressed by the Minister and the *amicus curiae*.²⁸⁰

²⁷⁵ *Fitzpatrick* case, para. 13.

²⁷⁶ *Fitzpatrick* case, para. 23.

²⁷⁷ *Fitzpatrick* case, para. 26.

²⁷⁸ *Fitzpatrick* case, para. 32, footnote 33.

²⁷⁹ *Fitzpatrick* case, para. 32.

²⁸⁰ *Fitzpatrick* case, para. 34. In the final analysis, the Court confirmed the unconstitutionality of the provision, and concluded that there was no need to suspend the invalidity.

This reasoning of the Court betrayed its limited appreciation of what the application of the principle of subsidiarity entails. This has been a subject of criticism by some.²⁸¹ Louw notes that “section 40 would be of no assistance in deciding, for example, between the desirability of an intracountry transracial adoption and an intercountry transracial adoption”.²⁸² The Court’s reasoning does not also offer any guidance whatsoever on the preferred hierarchy of alternative care options. In conclusion, as Couzens notes, “[t]he Court failed to acknowledge the complexities of the practice and the highly specialised legal provisions and institutional structure necessary for safely engaging in intercountry adoptions”.²⁸³

5.6.4.2 Principle of subsidiarity under the Children’s Act

The word “subsidiarity” does not appear anywhere in Chapters 15 and 16 of the Children’s Act. However, mechanisms for the implementation of the principle of subsidiarity are entrenched in the Children’s Act.

The Children’s Act makes it compulsory that before a child is made available for intercountry adoption, the name of the child should have been placed in the Register on Adoptable Children and Prospective Adoptive (RACAP) for at least 60 days.²⁸⁴ In addition, within these 60 days, it should be evident that “no fit and proper adoptive parent for the child”²⁸⁵ is available in South Africa. In the *AD v DW* case, the *amicus* has

²⁸¹ For a discussion and critical view of the case, see Mosikatsana, (2004), 103. See too, Moodley, (2007), 7.

²⁸² Louw, (2006), 517. See too, Couzens, (2009), 56.

²⁸³ Couzens, (2009), 56.

²⁸⁴ Secs. 261(5)(g) and 262(5)(g) of the Children’s Act.

²⁸⁵ Sec. 261(5)(g) of the Children’s Act.

rightly submitted that “[s]ubsidiarity is not a passive principle”.²⁸⁶ Therefore, what is envisaged in the Children’s Act through the RACAP is a limited time frame within which reasonable efforts in South Africa are undertaken to establish whether there are any other suitable local placement options for a child.²⁸⁷ In practice, reasonable efforts include networking with other agencies that do intercountry adoption in order to find a suitable local placement for a child. The RACAP, as a properly managed centralised database, fills the gap that existed in the past for establishing the availability of local families beyond informal checks by agencies and adoption social workers.²⁸⁸

The fact that the Children’s Act requires the Central Authority to manage the RACAP²⁸⁹ is advantageous in a number of respects. Amongst other advantages, this arrangement:

...creates the conditions for the Central Authority to verify whether adequate measures have been taken to support the family of origin, to re-integrate the child, to place the child within the extended families or find alternative national placements. All of these confer control to the Central Authority over the practical application of the subsidiarity principle in individual adoption cases.²⁹⁰

In the *AD v DW* case, the Constitutional Court has examined the principle of subsidiarity in some detail. One major point of contention in this case was how to apply the principle in the case of Baby R’s situation,²⁹¹ who had already strongly bonded with the Appellants, and was almost reaching her third birthday.

²⁸⁶ *Amicus* brief, *AD v DW*, para. 106.

²⁸⁷ See *amicus* brief, *AD v DW*, para. 111.

²⁸⁸ Mosikatsana and Loffell, (2007), 15-10.

²⁸⁹ Sec. 232(1) of the Children’s Act.

²⁹⁰ Couzens, (2009), 63.

²⁹¹ *AD v DW* case, para. 38.

The Constitutional Court found the view by the majority in the SCA that the principle of subsidiarity acted as an insurmountable bar to the granting by the High Court of an order of sole custody and sole guardianship in favour of the applicants²⁹² as a “proposition ... stated in terms that were too bald”.²⁹³ The Constitutional Court held that the principle of subsidiarity should be adhered to as a “core factor” governing intercountry adoptions, but that it is not “the ultimate governing factor in intercountry adoptions”.²⁹⁴ While cognisant “that there are powerful considerations favouring adopted children growing up in the country and community of their birth”,²⁹⁵ the Constitutional Court indicated that “the subsidiarity principle itself must be seen as subsidiary to the paramountcy principle”.²⁹⁶

Further alluding to the primacy of the best interests principle, the Court went on to note that “[d]etermining the best interests of the child cannot be circumscribed by mechanical legal formulae or through rigid hierarchical ranking of care options”.²⁹⁷ It was recommended “that a contextualised case-by-case enquiry be conducted ... in order to find the solution best adjusted to the child...”.²⁹⁸

The emphasis placed by the Constitutional Court on the best interests of the child being the consideration that overrides the subsidiarity principle is very welcome. However, it is submitted that, as argued in Section 3.3.3.4, demanding compliance with legal requirements should generally not be viewed as circumscribing the paramountcy of

²⁹² *AD v DW* case, para. 54.

²⁹³ *AD v DW* case, para. 54.

²⁹⁴ *AD v DW* case, para. 49.

²⁹⁵ *AD v DW* case, para. 55.

²⁹⁶ *AD v DW* case, para. 55.

²⁹⁷ *AD v DW* case, para. 50.

²⁹⁸ *AD v DW* case, para. 50.

children's best interests to legal necessities. Moreover, the Constitutional Court criticised "*rigid* hierarchal ranking of care options" (emphasis mine) and not "general hierarchical ranking of care options" (that, by definition, is open to exceptions), which is not only allowed but is also important.

As observed elsewhere,²⁹⁹ it is argued that:

[t]he *AD v DW* case leaves one with a niggling uneasiness that the nettle was not properly grasped, and future litigants may well, assisted by the reasoning of the Constitutional Court, find loopholes to bypass the carefully engineered structure, national and international, governing inter-country adoptions.

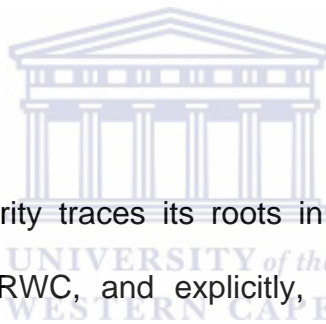
All stakeholders should be on the watch to safeguard against such abuses. In addition, the *AD v DW* case does not give guidance on the preference to be given amongst other alternative care options, for instance, between foster care versus institutionalisation.

In light of the Constitutional Court's position that the best interests of the child overrides the subsidiarity principle, it is argued that the RACAP's 60 days requirement is subject to the best interests principle. In addition, the Children's Act makes room for a biological parent to express any reasonable preference in respect of the child's placement to be taken into account.³⁰⁰ Such a preference, if considered to be in the best interests of the child, might be allowed to override the subsidiarity principles. However, as argued in section 5.5.1 above, the implementation of such a preference should be closely monitored so that children's best interests are not compromised.

²⁹⁹ Sloth-Nielsen, Mezmur, and Van Heerden, (2009), 16.
³⁰⁰ Sec. 240(1)(b) of the Children's Act.

Finally, what is important to highlight here is the fact that the Children's Act places the principle of subsidiarity within an integrated system of alternative care options. It incorporates measures to ensure that national adoptions are prioritised over intercountry placements. National adopters may apply for a means-test (adoption) grant.³⁰¹ At the time of writing, an adoption strategy is being developed which further promotes the implementation of the principle of subsidiarity. The Children's Act also establishes and regulates foster care and institutionalisation of children. More importantly, measures that facilitate family preservation are provided by the South African government.³⁰²

5.7 CONCLUSION



While the principle of subsidiarity traces its roots in the 1986 UN Declaration, it is incorporated in the CRC, ACRWC, and explicitly, in the Hague Convention. The advantages of the implementation of the principle of subsidiarity include allowing children to remain with their family of origin; facilitating the promotion of the cultural identity of the child; and also offering an opportunity to the authorities of the child's country to respond to the needs of their children first. It is indeed a central principle for the protection of children who are deprived of their family environment.

Whereas, under international law, children who are deprived of their family environment should benefit from alternative care, the hierarchy to be followed, and the place to be accorded to intercountry adoption amongst these options remains elusive. It was shown

³⁰¹ See Secs. 231(4) and 231(5) of the Children's Act.

³⁰² For instance, the child support grant.

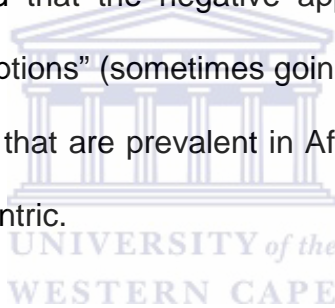
that the principle of subsidiarity as incorporated in the Hague Convention (and elaborated in its Guide to Good Practice) appears more child-centred and clear than the provisions of the CRC and the ACRWC. It was also demonstrated that even the general policy that family-based solutions are preferable over institutional placements; permanent solutions are preferable over inherently temporary ones; and national (domestic) solutions over those involving another country has its own inherent limitations.

Some general observations, however, were made in regard to the hierarchy of alternative care options. The starting point was that, the principle of subsidiarity should be interpreted broadly as reinforcing the conventional wisdom that children do best if they are brought up by their own family, and preservation of families was emphasised as a measure of first resort. It was submitted that there is room for interpretation in the CRC, the ACRWC, and the Hague Convention that the extended family forms part of the definition of “family”. As a result, those children who are being cared for by the extended family are generally not in need of alternative care.

While the general hierarchy enjoyed by domestic adoption amongst the alternative care options available is the least contested one, examples that might make domestic adoption subsidiary to other alternative care options were proffered. Recognising the fact that domestic adoption is not well-developed in Africa, various strategies to promote domestic adoption have been proposed. An example of good practice from Kenya that helps to reduce the cost of lawyers for domestic adoption proceedings was highlighted.

Foster care, which might mean different things among cultures and jurisdictions in Africa, is another alternative care option. It is important to recognise that depending on the attendant circumstances of a child, foster care could be subsidiary to adoption, intercountry adoption, and very exceptionally, institutionalisation.

Meanwhile, the point has also been made that instead of trying to impose practices (domestic adoption or foster care) which do not enjoy much cultural support as an alternative means of care in Africa, it might be more successful to build on alternative care options that are acceptable culturally (for instance, kinship care or *kafalah*). In this respect, it has been submitted that the negative approach of the CRC Committee towards so-called “informal adoptions” (sometimes going as far as asking African States Parties to prevent the practice) that are prevalent in Africa (often in the form of kinship care) can be labelled as Eurocentric.



Generally speaking, it has been argued that institutionalisation should be a measure of last resort for children who are definitively deprived of their family environment. It was also submitted that Article 18(2) of the CRC that mandates States Parties to “ensure the development of institutions, facilities and services for the care of children” does not mean the facilitation of a systematic policy to establish orphanages as a priority for the care of children. Rather, there is a need to make these institutions secondary and allow them to exist in a support relationship with parents. Unfortunately, making institutions the primary response and solution for alternative care, although prevalent in Africa, has been found to weaken a community’s motivation to address orphan issues and divert resources away from the family-based solutions that are better for children. The *Infant*

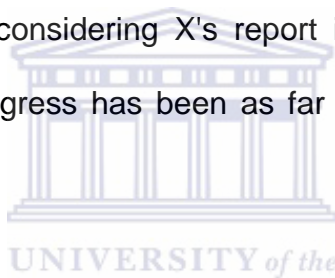
CJ High Court case in Malawi which would have privileged long-term institutional care in an unwarranted fashion was criticised. Nonetheless, the limited recognition of institutions within the CRC and the ACRWC is indicative of the fact that they could (and sometimes should) play some role in child care, especially for respite care for children whose family is undergoing a temporary difficulty in caring for them. In other words, a proper understanding of the principle of subsidiarity, especially in the context of institutionalisation, demands an appreciation of the distinction between the long term and short term placement needs of a child.

Apart from the range of literature that construes intercountry adoption as categorically being a measure of last resort, in Africa, the fact that Article 24 of the ACRWC explicitly requires intercountry adoption to be a measure of last resort, might give African states a further ground to treat the practice as such. The notion of last resort in the ACRWC countries should be interpreted to impose an obligation on States Parties to develop other suitable alternative care options that would help them make the practice indeed a last resort.

However, a word of caution is required here. No state in Africa should interpret the clause “last resort” in Article 24 of the ACRWC as a hurdle to the ratification of the Hague Convention (as was recently observed in Namibia³⁰³) or as an excuse to bar intercountry adoption completely in the face of a number of adoptable children. First, Article 24 recognises intercountry adoption as a potential alternative means of care. Second, the complementary nature that exists between the CRC and the ACRWC

³⁰³ A copy of the presentation (October 2009) made to various stakeholders in Namibia is on file with the writer.

should be emphasised, which is partly reflected in the Guidelines for Initial Reports of States Parties to the ACRWC. These make provision for the re-submission of a report made to the CRC Committee to the African Committee (after highlighting the areas of rights that are specific to the ACRWC).³⁰⁴ In addition, the report "must specify the action taken by the State Party in response to any recommendations made to it by the UN Committee on the Rights of the Child".³⁰⁵ This means that (apart from a complementary relationship), as far as concluding observations are concerned, the African Committee not only supports those made by the CRC Committee, but it also wants to follow-up on them. So if the CRC Committee told country X in 2007 to ratify the Hague Convention, the African Committee, when considering X's report in 2009, does indeed have the mandate to know what the progress has been as far as the ratification of the Hague Convention is concerned.



Third, African countries can ratify the Hague Convention without compromising their obligations under the ACRWC, provided that, according to Article 1(2) of the ACRWC, they view the Hague Convention as "more conducive to the realization of the rights and welfare of the child". These show clear evidence that the phrase "last resort" in Article 24(b) of the ACRWC should be interpreted in a fashion that promotes children's rights and should not be seen as a bar to the ratification of the Hague Convention.

Although the CRC Committee's stance on the notion of "last resort" is to an extent confusing, the study explains that this jurisprudence has also shed some light on the fact that institutionalisation could be considered as a measure of last resort. There is

³⁰⁴ African Committee, Guidelines for initial reports, (2004), para 24.

³⁰⁵ African Committee, Guidelines for initial reports, (2004), para 25.

nevertheless a need for the CRC Committee to clearly articulate its position on the issue (perhaps through a General Comment), and thereby contribute towards State Parties' understanding of the place of intercountry adoption within the alternative care scheme.

It is submitted that the notion of "intercountry adoption as a measure of last resort" should be read to mean "intercountry adoption as being generally subsidiary to other alternative means of care", but subject to exceptions. Furthermore, it is important to understand that the "last resort" language is relative, and depends on what options are in fact available as alternative care.

In addition, "last resort" should not mean "when all other possibilities are exhausted". A checklist approach, where all available care options are to be pursued first before intercountry adoption is considered, would go contrary to the assumption that the permanent placement of children at a very young age is an important goal. An understanding of "last resort" that does not hinder legally appropriate early placement should be fostered.

If the experience from Ethiopia is of any guidance, the theory and practice of implementing the subsidiarity principle is faced with a number of challenges in Africa. The risks posed by the practice in Ethiopia through which almost every child in an institution is considered as being available for intercountry adoption was highlighted. Such practice highlights a failure to look at subsidiarity, as was observed in the context of South Africa, as constituting an active principle that requires reasonable efforts to find a child suitable domestic placements and make intercountry adoption a measure of last

resort. Unfortunately, in Ethiopia, Kenya, and Malawi, the principle of subsidiarity cannot be said to have been placed within an integrated system of alternative care options (including support to vulnerable families, kinship care, domestic adoption and so forth). In South Africa, the limited view in respect to the scope of the principle of subsidiarity that was initially patent in the *Fitzpatrick* case (highlighting the risk of judge made law) is worth noting, too.

On a positive note, in Kenya, Efforts to train prospective adoptive parents (for domestic adoption purposes) to represent themselves in court and avoid a lawyer's fee are producing tangible results. The creation of the RACAP under the Children's Act of South Africa as a means of implementing the subsidiarity principle may be worth emulating in other African countries. The recognition by the Constitutional Court that the principle of subsidiarity is itself subsidiary to the best interests of the child is congruent with the international legal framework. In all of these respects, the possibility of sharing of good practices regionally is patent.

In sum, the lack of a clear-cut formula as far as the hierarchy for alternative care options is concerned has its own, rather unintended, positive side too. This argument is validated by the fact that to apply a pre-determined inflexible formula for the sake of certainty, irrespective of the circumstances, could in fact be contrary to the best interests of the individual child concerned. Meanwhile, abusing (the flexibility of) the principle of subsidiarity contrary to children's best interests constitutes an illicit activity, a topic discussed in the next Chapter.

CHAPTER 6

PREVENTING AND ADDRESSING ILLICIT ACTIVITIES RELATED TO INTERCOUNTRY ADOPTION IN AFRICA: LEGISLATIVE AND INSTITUTIONAL RESPONSES

6.1 INTRODUCTION

Generally, intercountry adoption is presented as a heart-warming act of goodwill that benefits both a child and an adoptive family.¹ Contrasted with the positive face of adoption, there have been scandals and irregularities concerning the practice – and at its worst, adoption is portrayed as child trafficking or baby selling.² The best interests of the child principle demands that adoptions do not subvert the rights of children through illicit practices, such as abducting, selling, and trafficking of children.

Dillon is of the view that it is a cause of frustration that so much writing on the subject suggests that intercountry adoption is inherently corrupt, and, therefore, that it must be eliminated.³ She contends that there is a tendency to denounce intercountry adoption as an institution generally when unethical adoption takes place.⁴ However, it is submitted that the risks posed by illicit activities in respect of intercountry adoption are so immense that general denunciation is understandable.

The “illicit activities” in respect of intercountry adoption envisaged in this chapter include: child trafficking, child abduction, and child stealing, buying and selling; improper financial gain and corruption; private adoption; falsification of documents; and

¹ Smolin, (2005), 403.

² Smolin, (2004), 281; Smolin, (2005), 404; Van Bueren, (1998), 96.

³ Dillon, (2003), 207.

⁴ Dillon, (2003), 198; Bartholet, (1993), 96.

circumventing adoption procedures, for instance, through guardianship orders.⁵ Smolin, who has written extensively on the subject,⁶ uses the phrase “child laundering”⁷ to collectively describe: child trafficking; child abduction; and child buying, selling and stealing. Similar terminology is used in this Chapter.

The international community is becoming more conscious of the ways in which intercountry adoption is vulnerable to questionable, illegal, and sometimes criminal activities. The presence, and subsequent threats, of illicit activities pertaining to intercountry adoption are real. According to Ethica, an organisation that seeks to be an impartial voice for ethical adoption practices worldwide,⁸ between 1988 and 2003, 43% of the 40 largest intercountry adoption programs had been temporarily or permanently closed because of rampant corruption, including child trafficking and abduction.⁹ In recent times, countries such as, Cambodia,¹⁰ Chad, China,¹¹ Ethiopia,¹² Ghana,¹³ Guatemala,¹⁴ India,¹⁵ Kenya,¹⁶ and Vietnam,¹⁷ have experienced instances of illicit activities in relation to intercountry adoption.

⁵ Such illicit activities, apart from violating the best interests of the child, have the potential to infringe on the rights of biological families and prospective adoptive parents.

⁶ See Smolin, (2004); Luo and Smolin, (2004-2005), Smolin (2005); Smolin (2006); Smolin (2007); Smolin, (forthcoming 2010).

⁷ See, for instance, Smolin, (forthcoming, 2010), 5.

⁸ See <<http://www.ethicanet.org/about-ethica>>.

⁹ Ethica, (undated), as cited in Bartholet, (2007), 158.

¹⁰ See, for instance, Wittner, (2003); Smolin, (2006), 125.

¹¹ See, for instance, Zhang, (2008-2009); Smolin, (2006), 125;

¹² See section 6.2.1.4.1 below for some instances.

¹³ See, for instance, 570 News, (04 November 2009).

¹⁴ See, for instance, Daly, (2007), 620; Long, (2009), 641-647; Banks, (2004), 31.

¹⁵ See, for instance, Dohle, (2008-2009); Smolin, (2005); Luo and Smolin, (2004-2005), 605.

¹⁶ See section 6.2.1.4.2 below for some instances.

¹⁷ See, for instance, Worthington, (2009), 578-580; Carlberg, (2007), 144-145; Meier, (2008), 189-190.

The CRC and the ACRWC recognise the potential risk intercountry adoption might pose for children's best interests especially if it is not properly regulated. As a result, according to the CRC, States Parties are obligated to "[t]ake all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it".¹⁸ The counterpart provision of the ACRWC is more elaborate in that it explicitly mentions "trafficking": States Parties shall take "...all appropriate measures to ensure that in inter-country adoption, the placement does not result *in trafficking* or improper financial gain for those who try to adopt a child" (emphasis mine).¹⁹

The drafting of the Hague Convention was partly premised on the need to address the highly unregulated intercountry adoption system prevailing, which had been characterised by child laundering. As a result, one of the three objectives of the Hague Convention is "to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children".²⁰

For intercountry adoption to be conducted in compliance with the best interests of the child, it is important to prevent and address illicit activities that are associated with it. Preventing and addressing illicit activities in intercountry adoption requires a multi-pronged approach which includes legislative and institutional responses. These two responses are the main focus of this chapter.

¹⁸ Art. 21(d) of the CRC.

¹⁹ Art 24(d) of the ACRWC.

²⁰ Art 1(b) of the Hague Convention.

The adoption and implementation of legislation that prevents and addresses illicit activities in intercountry adoption are very crucial for the protection of the best interests of the child. For instance, if legislation on trafficking of children is lacking in a country, the institutions tasked with implementing intercountry adoption related activities find it difficult to play a meaningful role in upholding children's rights in adoptions.

The absence, or incompetency, of institutional structures might result in the best interests of the children involved in intercountry adoption being compromised. After all, the implementation of adoptability, the principle of subsidiarity, giving valid consent, and, generally, the upholding of the best interests of the child in intercountry adoption are dependent on competent authorities that are able to fulfil the task.²¹ It is this recognition of the strong link between competent institutional structures, and their role in upholding the best interests of the child, and combating illicit activities, that leads to the decision to deal with these issues together in this chapter.

As alluded to in Chapter 3, this chapter provides a more detailed exposition of the international legal framework that regulates illicit activities pertaining to intercountry adoption. The instruments of focus for this purpose are not limited to the CRC, the ACWRC, and the Hague Convention, only. They also include the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OPSC), and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United

²¹ Where there is an indication of improper inducement, fraud, misrepresentation, or prohibited contact associated with a case of intercountry adoption, adoptability is compromised and questioned.

Nations Convention against Transnational Organised Crime (Palermo Protocol). In section 6.3, this chapter highlights the necessary institutional structures for preventing and addressing illicit activities in intercountry adoption. This section is not intended to be a comprehensive guide to the role and responsibilities of the various institutional structures, and mainly underscores the crucial role of these institutions in the suppression of illicit activities. The experience of the four countries under the study is also included in this section. Section 6.4 concludes the Chapter.

Indeed, in the past, African countries had held the view that illegal adoptions and trafficking in the context of adoptions were not present in their respective countries.²² However, now the assumption that Africa is somehow immune from these illicit activities represents misplaced optimism. By way of example, illegal adoptions and child trafficking (with the involvement of intermediaries) were already detected in Mauritius in the 1980s,²³ a situation that led to the establishment of the National Adoption Council to monitor the practice.²⁴ The Government of Rwanda has also reported incidents of Rwandan children trafficked to Europe and adopted illegally.²⁵ In particular, the Government has reported the case of “41 Rwandan children ... adopted in this manner in the Italian town of Brescia”.²⁶ The implications of these human rights violations are immense. With globalisation, the shortage of adoptable children in other parts of the world, the shifting focus of intercountry adoption on Africa, increasing poverty in Africa, and accompanying weak institutional law enforcement capacity of State institutions,

²² For this view, see, for instance, CRC Committee, State Party Report: Namibia, (1993) para. 206; Chad, (2005) para. 294.

²³ CRC Committee, State Party Report: Mauritius, (October 1995), paras. 68-69.

²⁴ CRC Committee, State Party Report: Mauritius, (October 1995), para. 68.

²⁵ CRC Committee, State Party Report: Rwanda, (October 2003), para. 209.

²⁶ As above.

there are indications that illicit activities on the African continent are on the rise. As a result, addressing illicit activities in respect of intercountry adoption on the African continent has become a necessity.

6.2 ESTABLISHING SUBSTANTIVE SAFEGUARDS TO PREVENT AND ADDRESS CHILD LAUNDERING AND OTHER ILLICIT ACTIVITIES RELATED TO INTERCOUNTRY ADOPTION

Intercountry adoption suffers from bad press. This is often so because illicit activities, such as, child trafficking, child buying, child selling, and child stealing mar the practice. The kidnapping and selling of children for adoption purposes has been recorded in countries such as Honduras, Guatemala, and Romania.²⁷

Advocates of intercountry adoption might argue that "...buying or abducting children is so rare as to be virtually irrelevant, and hence that regulations aimed at eliminating such practices would needlessly slow adoptions, doing more harm than good".²⁸ However, this writer argues that the trend in Africa should be aimed towards a more comprehensive policy and legislative response. In fact, ILO Convention 182 classifies trafficking as one of the worst forms of child labour – hence, states need to take measures for its immediate abolition.²⁹ In addition, so grave are the human rights abuses associated with trafficking that the Statute of the International Criminal Court includes "enslavement" in its definition of "crimes against humanity". It further defines "enslavement" as "the exercise of any or all of the powers attaching to the right of

²⁷ Kimball, (2005), 567.

²⁸ Smolin, (2007), 32 citing Bartholet, (1993), 96.

²⁹ Art. 3(a) of ILO Convention 182.

ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children”.³⁰

However, the main instruments that regulate and prohibit child laundering (in the context of adoption) are the CRC, ACRWC and the Hague Convention. In addition the OPSC and the Palermo Protocol contribute significantly.

6.2.1 Child laundering and intercountry adoption under the international legal framework

6.2.1.1 Child buying, child selling, and child stealing, and intercountry adoption

Articles 32 - 34 of the CRC cover the specific forms of exploitation of children, such as, economic exploitative use of children (in particular child labour), illicit use of narcotic drugs, and the use of children for prostitution and pornography.³¹ What Article 35 of the CRC heralds in is “a double protection for children”, as it requires blanket action on the abduction, sale or traffic of children.³² Article 35 stipulates that “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form”.³³

Article 29(a) of the ACRWC entrenches similar standards by stipulating that:

States Parties to the present Charter shall take appropriate measures to prevent:

³⁰ See Art. 7(2)(c) of the Rome Statute.

³¹ For a detailed exposition of Art 34 of the CRC, see Muntarhorn, (2007).

³² Hodgkin and Newell, (2007), 532. One main factor that differentiates Art. 35 of the CRC from Art. 11 of the CRC is that the latter is focussed on the illicit “transfer or non-return of children abroad” (usually undertaken by relatives, not for profit) while the former’s application is wider in scope as it also covers the illicit activities within a State Party’s territory. Hodgkin and Newell, (2007), 143.

³³ Art. 36 of the CRC entrenches that “States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare”.

(a) the abduction, the sale of, or traffick of children for any purpose or in any form, by any person including parents or legal guardians of the child;...

The phrases “for any purpose” and “in any form” in both the CRC and the ACRWC include illegal adoptions. The explicit inclusion of the phrase “by any person including parents or legal guardians of the child” in the ACRWC echoes the understanding that, with the introduction of the CRC and the ACRWC, the notion of children as their parents’ property is contrary to children’s rights discourse.

In the context of the Hague Convention, too, one of the three objectives of the treaty is to prevent illicit activities, such as, child laundering. It is notable that the Hague Convention does not intend to prevent illicit activities directly.³⁴ Rather, the assumption is that “the observance of the Convention’s rules will bring about the avoidance of such abuses”.³⁵ The Hague Convention mirrors the view that the decision to place a child for adoption should not be “induced by payment or compensation of any kind”.³⁶

Apart from Article 21(e) of the CRC and Article 24(e) of the ACRWC,³⁷ the CRC mandates States Parties to “take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form”.³⁸ The adoption of the OPSC seems partly the result of this mandate, and reinforces Article 35 of the CRC.³⁹

³⁴ Parra-Aranguren, (1994), para. 52.

³⁵ As above.

³⁶ Arts. 4(c)(3) and (4)(d)(4).

³⁷ See Chapter 3, section 3.4.3.3.3 for further details on bilateral or multilateral agreements.

³⁸ Art. 35 of the CRC. Para 1 of the Preamble to OPSC stipulates that “Considering that, in order further to achieve the purposes of the Convention on the Rights of the Child and the implementation of its provisions, especially Arts. 1, 11, 21, 32, 33, 34, 35 and 36, it would be appropriate to extend the measures that States Parties should undertake in order to guarantee the protection of the child from the sale of children, child prostitution and child pornography”

³⁹ Hodgkin and Newell, (2007), 531.

Articles 2 and 3 of the OPSC must be considered together. In Article 2, the OPSC defines the conduct prohibited in the Protocol, and Article 3 lists acts that, as a minimum, should be covered by the criminal laws of States Parties. Of direct relevance to this chapter in Article 2 of the OPSC is sub-article (a) which defines “Sale of children” to mean “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration”.

Another directly relevant provision of the OPSC is Article 3(1)(a)(ii). It provides that:

Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether such offences are committed domestically or transnationally or on an individual or organized basis:

(a) In the context of sale of children as defined in article 2:

...

(ii) Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption;

In Article 3 of the OPSC, attempt to commit, complicity in, or participation in, acts relating to the sale of children should also be criminalised. In addition, punishment by appropriate penalties should take into account the "grave nature" of the offence. Unfortunately, however, Article 3(1)(a)(ii) of the OPSC seems to suggest that States Parties are obliged to punish intermediaries only, and that “buyers” and “sellers” of children fall beyond its scope. This is premised on the wording of the Article that States Parties shall ensure that, “[i]mproperly inducing consent, as an *intermediary*, for the adoption of a child...” is covered under their criminal law.⁴⁰

⁴⁰ Art 3(1)(a)(ii) of the OPSC.

Fortunately, often the view of the CRC Committee on this matter is that States Parties should criminalise and prosecute all actors involved in the sale of children for the purpose of adoption.⁴¹ This can be inferred from its concluding observations on States Parties Reports.⁴² Furthermore, the Committee's interpretation gathers support from Article 3(5) of the OPSC in terms of which States Parties have to take "measures to ensure that *all persons involved in the adoption* of a child act in conformity with applicable international legal instruments" (emphasis mine).⁴³

Unfortunately, it is submitted that there seems to be a tendency by States to assume that criminal law provisions on trafficking are sufficient for addressing child buying and selling. However, this is not always the case. While child trafficking and the sale of children might sometimes overlap, the sale of children is not a necessary element of the definition of "child trafficking". By way of example, recruitment of a child can take place using deceit and with no element of sale involved. Therefore, children who are recruited through deceit can be trafficked for, or through, adoption without any element of sale occurring throughout the entire process.⁴⁴ As a result, it is advisable to have legislation that explicitly criminalises child selling and buying, as well as the conduct of other persons who are involved in such a process in different capacities, for example, as intermediaries.

⁴¹ Innocenti Working Paper, (2009), 7.

⁴² See, for instance, CRC Committee, Concluding Observations: United States of America, (2008), para. 31(d). It is to be noted that while the U.S. is not a State Party to the CRC, it has ratified the OPSC.

⁴³ There seems to be a general understanding that the term "applicable international legal instruments" refers to the Hague Convention. See for instance, U.S. Declaration on the issue.

⁴⁴ For instance, recruitment can take place using deceit.

6.2.1.2 Child trafficking and intercountry adoption

Intercountry adoption is sometimes associated with child trafficking.⁴⁵ Cases of child trafficking for, and (very exceptionally) through, adoption have been reported in countries such as Chad, Greece,⁴⁶ Romania,⁴⁷ and Albania.⁴⁸

It is vital to distinguish systematically between children “trafficked for the purpose of adoption”, and those supposedly “trafficked through adoption for subsequent exploitation”.⁴⁹ Cantwell rightly questions the prevalence of the latter form of trafficking (trafficking through adoption) because of the alleged total lack of evidence thereof.⁵⁰ He further states that:

...it is hard to imagine why anyone would take on both the costs and risks involved in using a very public judicial process like intercountry adoption to “traffic” children – as opposed to kidnapping or smuggling them, for example – in order to remove their organs.⁵¹

It is submitted that, since the majority of cases that associate intercountry adoption with trafficking relate to “children trafficked for the purpose of adoption”, this section focuses on that practice.

⁴⁵ See for instance, UNICEF Innocenti Research Centre, (February 2009), VII.

⁴⁶ Petit, Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography: Greece, (2006), para. 14

⁴⁷ Petit, Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography: Romania, (2005), paras. 21 and 25.

⁴⁸ See, generally, Amici dei Bambini, (2005), 7.

⁴⁹ ISS/IRC, (November-December/2005), 2.

⁵⁰ As above. Other writers who share a similar views include Carro, (1994), 128-31 (documenting the history of the rumor that internationally adopted children were being used as organ banks, while noting that the U.S. government has extensively investigated such claims and found them “baseless”); Carp, (1998), 228 (noting, but dismissing as false, “rumors” of intercountry adoption being used to run organ transplant rings).

⁵¹ ISS/IRC, (November-December/2005), 2. While some cases of abuse and rejection of children on the part of individual adopters once they have returned home with the child are reported, these situations do not really fit within the definition of trafficking provided below. ISS/IRC, (November-December/2005), 2. 3.

By way of example though, the Zoe's Ark case in Chad that was mentioned in Chapter 2,⁵² epitomises a situation of trafficking for adoption. According to the Reuters News Agency, on 25 October 2007 police arrested nine French and seven Spanish nationals in Chad, near the Sudanese border, as they prepared to fly 103 African children to France.⁵³ Among those detained were six members of the French organisation, Zoe's Ark, which had said it intended to rescue orphans from Sudan's violent Darfur region and take them to France for adoption by families there. While some of those arrested and charged were subsequently released, on 21 December 2007 the remaining six accused stood trial in N'Djamena charged with kidnapping and fraud. They were sentenced to eight years imprisonment.⁵⁴ Subsequent investigations have revealed that the majority of the children were not from Darfur but from Chad.⁵⁵ In addition, it was reported that the majority of the children had parents who were willing and able to care for them, but that "the aid workers misled them into believing the youngsters would be offered temporary local school places".⁵⁶

A definition of "trafficking" is lacking in the CRC, the ACRWC, and the OPSC. In relation to the Hague Convention, according to the Permanent Bureau, the term "trafficking" connotes the "payment of money or other compensation to facilitate the illegal

⁵² Section 2.2.2.

⁵³ Reportedly a number of parents were waiting in an Airport in France in the hope of getting a child to adopt. See Reuters, (31 March 2008).

⁵⁴ Subsequently, on the basis of a previous bilateral prisoners exchange agreement between Chad and France, the six were flown home to France to serve their jail sentences there. On 31 March 2008, however, Chadian President Idriss Deby granted them an official pardon.

⁵⁵ See, for instance, Aljazeera, (07 March 2008); UNICEF Newslines, (19 March 2008).

⁵⁶ BBC, (22 December 2007).

movement of children for the purposes of illegal adoption”.⁵⁷ According to the Palermo Protocol “trafficking in persons” shall mean:

...the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.⁵⁸

The CRC Committee recommends to States Parties that they ratify the Palermo Protocol, and in particular, adequately define and criminalise trafficking of children in accordance with this instrument.⁵⁹

Some hold the view that acts such as the selling, buying, or illegally transferring of children for the purpose of adoption, do not constitute trafficking under international law - because the ultimate aim is adoption, which by definition is not exploitative (exploitation tends to connote labour or sexual exploitation).⁶⁰ It is argued that this is questionable. Instead, as Smolin observes, it is possible to recognise three different scenarios in international law: (i) providing no clear distinction between child selling and child trafficking; (ii) considering child buying/selling for adoption as one of several aggravated forms of child selling/trafficking, based on the premise that such child buying is exploitative and harmful; or (iii) leaving open ended the question of whether child buying for purposes of adoption is sufficiently exploitative to constitute trafficking or an aggravated form of child selling.⁶¹

⁵⁷ Permanent Bureau, Guide to Good Practice, (2008), 33.

⁵⁸ Art. 3(a) of the Palermo Protocol.

⁵⁹ See, for instance, CRC Committee, Concluding Observations: Spain, (2007), para. 26.

⁶⁰ A case in point is the U.S. Department of State. See, generally, for instance, U.S. Department of State, (2002); U.S. Department of State, (2006); Kassan, (2007).

⁶¹ Smolin, (2007), 31.

The first approach is illustrated by the CRC, the ACRWC, and the Hague Convention.⁶² These instruments name both the sale of children and child trafficking as rights deprivations without providing any clear definitions or differentiating between them.⁶³

Here it is important to note that Article 21(d) of the CRC only expressly requires States Parties to ensure that “in inter-country adoption, the placement does not result in improper financial gain for those involved in it”. The addition that Article 24(d) of the ACRWC makes over the CRC explicitly highlights that States Parties have to take all appropriate measures to ensure “that in inter-country adoption, the placement does not result in trafficking”, too.⁶⁴ This has various implications.

First, the explicit mention of “trafficking” in Article 24(d) reflects the recognition by the drafters that trafficking for, and through, intercountry adoption is a real concern on the African continent. Secondly, the reference to “trafficking”, it is argued, should put to rest the views of sceptics that the element of exploitation is a necessary requirement for illicit activities in intercountry adoption to constitute trafficking. Thirdly, Article 24(d) should be read in conjunction with Article 29(a) of the ACRWC which requires States Parties to take appropriate measures to prevent “the abduction, the sale of, or traffick of children for any purpose or in any form, by any person...”. As a result, irrespective of the

⁶² See Smolin, (2007), 31.

⁶³ For instance, see Art. 35 of CRC.

⁶⁴ It is further argued that the reference “in inter-country adoption” (emphasis mine) encompasses all the processes leading to the placement of a child for intercountry adoption. These processes include the stage at which the child is identified; the child’s parent’s or guardian’s give their consents, as appropriate; the stage at which the child enters the child care system; the identification of the prospective adoptive parents; the matching of the child with the prospective adoptive parents, and so forth.

intention to exploit a child, the sale or trafficking of a child by anyone, including parents and guardians (such as orphanage personnel), amounts to a violation of the ACRWC.

The OPSC illustrates the second approach, in which buying and selling of children for purposes of adoption are considered aggravated forms of child selling.⁶⁵ Under this approach, buying children for purposes of adoption is included among the acts which are typically deemed exploitative, such as, sexual and labour exploitation.

The Palermo Protocol represents the third approach, in so far as it requires some form of “exploitation” in its definition of “trafficking in persons”, but leaves the definition of such exploitation open.⁶⁶ The Palermo Protocol states that “[e]xploitation shall include, at a minimum, sexual exploitation, exploitation of the prostitution of others, forced labor, slavery or practices similar to slavery, servitude or the removal of organs”.⁶⁷

Contrary to what some⁶⁸ assert, it is correctly argued that, when a birth family’s child is lost to the family through any illicit means, the birth family’s capacity to bear, raise, and nurture a child has been exploited.⁶⁹ In addition, taking a child away from the family in an illicit manner could be labelled as exploitation.⁷⁰

⁶⁵ See Art. 3 of the OPSC. See Smolin, (2007), 32.

⁶⁶ See Art. 3 of the Palermo Protocol. See Smolin, (2007), 32.

⁶⁷ Article 3(a) of Palermo Protocol.

⁶⁸ See, for instance, Kassan, (2007), 18-11 – 18-13. Kassan argues that “[a]n ‘illegal adoption’ amounts to an exploitation of the adoption system and laws and not necessarily the exploitation of the adopted child”.

⁶⁹ Smolin, (2007), 33. For a detailed discussion of the notion of “exploitation”, see Smolin, (2004), 294-298.

⁷⁰ As above.

In the context of the Palermo Protocol, too, the list of what constitutes exploitative acts provided in Article 3(a) is open ended, and only provides a “minimum”. Since the list is not exhaustive, it is argued it would permit the addition of other unnamed forms of exploitation, such as purchasing or trafficking children for the purpose of adoption. In a paper that regularly refers to the “Interpretative Notes” of the Palermo Protocol, Ollus shares the view that “illegal adoption also falls under the scope of the Protocol”.⁷¹

Some of the main advantages of including activities, such as child buying and child selling for the purpose of adoption, within the definition of the crime of child trafficking, relate to prosecutability, and (potential/subsequent) deterrent, purposes. In the Zoe’s Ark case described in Chapter 2,⁷² for instance, the absence of any comprehensive trafficking legislation, which, criminalises the practice in particular, has been identified as a major shortcoming.⁷³ As a result, the prosecutor in the Zoe’s Ark case could charge the accused only with abduction.⁷⁴

This is unfortunately similar to the prosecutions of Americans operating in Cambodia for systematically obtaining children for adoption through purchase and fraud. There, too,

⁷¹ Ollus, (undated), 22.

⁷² Section 2.2.2.

⁷³ See for instance IRIN News, (1 November 2007), where Chadian and UN Officials argued that the absence of a child trafficking law in Chad would hamper efforts to prosecute members of the Zoe’s Ark.

⁷⁴ The main difference between “abduction” and “trafficking” as a criminal offence is that the latter carries a more severe penalty as it is usually classified as “organised crime”. In addition, in the context of the particular case at hand, charges of abduction would not only result in more lenient sentences in the case of a conviction but also be harder to convict in the first place. It might be easier for an investigator to prove human trafficking than to prove abduction. Although the information has not been verified, there was speculation in this case that the children were willingly handed over, in which case abduction would have been more difficult to prove. This is in contrast to the crime of trafficking where legislation usually encompasses the illegal recruitment of children from “vulnerable” parents, who may agree to give up their children because they cannot care for them, and whose consent to the recruitment is irrelevant at law.

prosecutors have had to rely on statutes criminalising visa fraud and money laundering.⁷⁵ While the prosecutions in Cambodia secured convictions, the inability to charge the accused with any form of trafficking violations allowed the principal accused, Lauryn Galindo, to characterise her actions as mere regulatory or technical violations.⁷⁶

Experience from countries in South America substantiates the value of including activities such as child buying and child selling for the purpose of adoption, within the definition of the crime of child trafficking in order to prevent or address illicit activities in intercountry adoption. For instance, in Costa Rica,⁷⁷ El Salvador,⁷⁸ and Nicaragua,⁷⁹ legislation has recently criminalised trafficking of children for adoption purposes, thereby leading to convictions.

In sum, it seems that trafficking in general, and trafficking for adoption purposes in particular, have started to strike a resonant chord in the African region with its otherwise weak legislation and erratic state enforcement. Therefore, although the Zoe's Ark activities in Chad were made public, it is safe to assume that other facilitators are undertaking similar illicit activities on the continent with less or no scrutiny. For instance, still within Chad, reports that at least 74 children were kidnapped in Chad and flown to a military airport outside Paris on 17 September 2007 are disconcerting.⁸⁰ One could also

⁷⁵ Smolin, (2006), 137-138.

⁷⁶ See Government Memorandum on Sentencing, (2004), as cited in Smolin, (2006) 138, arguing that the court should reject Galindo's characterisation of her crime as a visa fraud infraction and not the trafficking of children who did not fall under the statutory definition of "orphan",.

⁷⁷ UNODC, (2009), 138.

⁷⁸ UNODC, (2009), 142.

⁷⁹ UNODC, (2009), 148.

⁸⁰ See, for instance, Prauda, (11 August 2007).

mention reports of orphanages and adoption agencies involved in child trafficking in Liberia.⁸¹

6.2.1.3 Child laundering and falsification of documents for intercountry adoption

The falsification of documents that are relevant for intercountry adoption is one of the illicit activities that is associated with the practice. These documents include birth certificates, paternity declarations, passports, identity documents, letters of consent, and letters declaring abandonment of a child.

For example, a field investigation in Vietnam by U.S. authorities has revealed incidents of serious adoption irregularities, including, forged or altered documentation.⁸² This had subsequently led to the U.S Embassy in Hanoi temporarily suspending the issuance of visas until the completion of investigations into almost finalised cases presented before the Embassy.⁸³

Recently, a case from Egypt involving child buying and falsification of birth documents has been in the spotlight.⁸⁴ Two U.S. couples have been convicted for illegal adoption. A third U.S. couple, believed to be already in the U.S., were tried and convicted in absentia for obtaining a forged birth certificate for a child and trying to use it to obtain a U.S. visa.⁸⁵ It is reported that “the [first two] couple[s] agreed with an orphanage worker

⁸¹ U.S. Department of State, “Intercountry adoption: Liberia” (December 2008).

⁸² See Meir, (2008), 189-190 and the accompanying citations.

⁸³ As above.

⁸⁴ See Associated Press, (17 September 2009); Reuters, (19 February 2009).

⁸⁵ Reuters, (17 September 2009).

'to buy two newborn infants, a girl and a boy, in exchange for 26,000 pounds', or \$4,673, and received forged papers for the children" [insertion mine].⁸⁶ In addition to the couples, three other defendants including an orphanage worker and a doctor were sentenced to five years in jail while two other Egyptians received jail terms of two years.⁸⁷ According to newspaper reports, the case came to light after one of the couples approached the U.S. embassy in Cairo to arrange to take two babies out of Egypt using forged papers indicating the infants were their biological children.⁸⁸

Directly associated with the falsification of documents is the notion of "simulated birth", which involves the fictitious registration of the birth of a child under the name(s) of a person(s) who is(are) not his or her biological parent(s). In the Philippines, it is reported that the high cost of adoption proceedings forces many to resort to "simulated birth" to avoid the adoption process.⁸⁹ As a good practice, it could be mentioned that some countries explicitly criminalise this act.⁹⁰

Apart from the usual punishment and deterrence roles that criminal law plays, various other measures can be undertaken to prevent or address illicit activities in the form of falsification of adoption related documents. In suspicious cases, arranging an interview with the child's birth parent/family might be commendable. Where possible, it is

⁸⁶ As above.

⁸⁷ See Associated Press, (17 September 2009); Reuters, (19 February 2009).

⁸⁸ As above.

⁸⁹ CRC Committee, Concluding Observations: Philippines, (October 2009), paras. 49-50.

⁹⁰ See Art. 347 of the Revised Penal Code and Section 21 (b) of the Domestic Adoption Act of 1998 (Republic Act No. 8552) of the Philippines.

advisable for competent authorities to require evidence through DNA testing.⁹¹ As is the current practice in Vietnam, it is also possible to require the verification of documents by issuing authorities, and maybe use this in conjunction with primary and contemporaneous secondary evidence.⁹²

6.2.1.4 Child laundering in the countries under the study

6.2.1.4.1 Ethiopia

In Ethiopia, instances of child laundering for adoption purposes have come to light in recent years. In one instance, traffickers were allegedly caught transporting a group of children from one administrative locality (the authorities of which refused to issue a declaration of abandonment letters) to another administrative locality.⁹³ The Federal First Instance Court which deals with intercountry adoption cases has recently traced the letters of declaration of abandonment of 16 children to one police officer (all written at the same time) raising concerns of child laundering.⁹⁴ A case involving two Ethiopian children that were stolen, sold (allegedly for a 100 USD), and adopted by a family in Austria through the assistance of false documentation was also put under the spotlight in 2007.⁹⁵ This latter case involved intermediaries, orphanage workers, and relevant government administration personnel working at the *kebele* level (which is the lowest administrative level) who played a role in the ultimate adoption of the children.

⁹¹ There is an established practice where the costs for DNA testing and interview expenses shall be borne by prospective adoptive parents.

⁹² U.S. Department of State, "Intercountry adoption: Vietnam", (October 2008).

⁹³ Interview with Deresse Bezawork, Adoption lawyer, (25 September 2009; and Biniam Eshetu, Legal Expert, MOWA, (25 September 2009).

⁹⁴ As above.

⁹⁵ Documentation on file with writer.

While they are not always reliable, media reports of child laundering in Ethiopia are also on the rise.⁹⁶ Just recently, a Dutch adoption agency stopped adoption from Ethiopia pending investigations of illegal activities, such as false documentation.⁹⁷ These included cases where “mothers of the children were still alive, while being listed as deceased”.⁹⁸ A recent detailed ABC News report has highlighted some of the irregularities that are happening in Ethiopia, arriving at the conclusion that “[c]orruption, fraud and deception are rife” in the adoption system.⁹⁹ A petition asking for concrete measures to stop child trafficking for the purposes of adoption in Ethiopia is circulating on the web.¹⁰⁰

In the RFC of Ethiopia, there is hardly any mention of provisions that address child laundering issues. The only provision that comes close to being related to child laundering is Article 194(3)(e). This Article requires the court, before approving an agreement of adoption, to consider the “availability of information which will enable the court to know that the adopter will handle the adopted child as his own child and will not abuse him”. In cases where the adopter is a foreigner, “the court shall take special care in investigating the conditions provided in Sub-Art (3)(e)” of Article 194.

Furthermore, while the Revised Penal Code of 2004 has generally improved on the provisions of its predecessor, the 1957 Penal Code of Ethiopia, in the context of child

⁹⁶ See for instance, CBC News Canada (19 March 2009) where adoptive parents challenged the validity of the documentation and information they have on their adopted children from Ethiopia.

⁹⁷ UAI News, (23 September 2009).

⁹⁸ UAI News, (23 September 2009).

⁹⁹ ABC News, (09 September 2009).

¹⁰⁰ Beyene, (2009).

laundering, the relevant provisions also leave much to be desired. Government has reported that “child trafficking for any purpose is punishable by a rigorous prison term”.¹⁰¹ However, Article 597 of the Revised Penal Code, entitled “Trafficking in Women and Children”, limits its scope of application to trafficking “for the purpose of forced labour” only. As a result, cases of child laundering for adoption purposes fall outside its ambit. Another relevant provision, Article 596(1)(a) entitled “Enslavement”, prohibits anyone who “forcibly enslaves another, sells, alienates, pledges or buys him, or trades or traffics in or exploits him in any manner”. While child buying and selling might fall within this provision, the interpretation of the phrase “exploits” could prove controversial.¹⁰²

Under Section 12 of the MOWA Guidelines, a list of prohibited acts in relation to intercountry adoption is provided. These include, giving or receiving bribes or gifts in order to give a child for adoption or to have a child given for adoption.¹⁰³ The use of adoption as a trade is also prohibited.¹⁰⁴ Furthermore, an adoption conducted by duress or without the consent of parents or the Minister’s office responsible for adoptions is prohibited.¹⁰⁵ However, the MOWA Guidelines do not regulate child laundering in a comprehensive manner. In addition, these Guidelines neither have the force of law, nor provide for any penalties.

¹⁰¹ CRC Committee, State Party Report: Ethiopia, (October 2005), para. 118.

¹⁰² See section 6.2.1.2 above for a discussion of the notion of “exploitation”.

¹⁰³ Para. 12(1) of the MOWA Guidelines.

¹⁰⁴ As above.

¹⁰⁵ As above.

In Ethiopia, the law pertaining to child laundering is inadequate, thereby making prosecution very difficult. Therefore, it is no surprise that this writer could not come across a single court case where either individuals or organisations were found guilty of child laundering for adoption purposes. The rise in the number of reports of child laundering in Ethiopia could partly be attributed to the inadequacy of the legal framework.

6.2.1.4.2 Kenya

Kenya acceded to the Palermo Protocol on 5 January 2005. However, although Kenya has signed the OPSC on 8 September 2000, it has not ratified the instrument.

In 2007, the CRC Committee expressed its concern over reports indicating that irregular intercountry adoptions and possible trafficking of children for that purpose still exist.¹⁰⁶ Reports of children who disappear from hospitals immediately upon birth persist.¹⁰⁷ Allegations of child trafficking and stealing partly for adoption purposes also came to the fore when a Kenyan church evangelist based in the U.K. was found with several young children in his home.¹⁰⁸ This incident was associated with the disappearance of babies from Nairobi's Pumwani Maternity Hospital and involved suspects in Britain, Ghana, Nigeria, Uganda and Kenya.¹⁰⁹

A judge of the High Court has also reported a suspicious instance where a group of Italians had been awarded 27 adoption orders by a single Magistrate on a single day

¹⁰⁶ CRC Committee, Concluding Observations: Kenya, (June 2007), para. 40.

¹⁰⁷ CRC Committee, State Party Report: Kenya, (July 2006), para. 505; Interview with Jude Nalyanya, Advocate, The Cradle, the Children's Foundation, (13 November 2009).

¹⁰⁸ CRC Committee, State Party Report: Kenya, (July 2006), para. 506; BBC, (12 November 2004).

¹⁰⁹ BBC, (12 November 2004).

sitting.¹¹⁰ All the children were from one children's home, and they were all allegedly abandoned.¹¹¹ The High Court judge declared the adoption orders null in suspicion of irregularities in the way in which the children came into the child care system, and how the adoption orders were secured.¹¹²

In the past the concern has been raised that legislation in Kenya does not expressly deal with child trafficking, stealing, and abduction.¹¹³ In particular it was reported that:

...legislation fails to cover the range of ways through which trafficking occurs and does not include all persons that actually may be involved in trafficking especially as regards transnational trafficking.¹¹⁴

The Kenyan Government admits that penalties provided under the Children Act¹¹⁵ are not severe enough to deter persons who target children for purposes of abduction, trafficking and sale, or other forms of exploitation.¹¹⁶ It is also observed by the Kenyan Government that the fact that the "legal process of adoption is lengthy and complicated ... may be a contributing factor to abductions".¹¹⁷

The comprehensive human trafficking legislation - the Counter Trafficking in Persons Bill - still remains in draft form.¹¹⁸ The Bill provides a definition of the term "exploitation" which does not explicitly mention adoption.¹¹⁹ However, as argued above, it remains possible to interpret illicit adoptions so as to constitute some form of exploitation. The

¹¹⁰ Koome, (2009).

¹¹¹ As above.

¹¹² As above.

¹¹³ CRC Committee, State Party Report: Kenya, (July 2006), para. 507(1); UNODC, (2009), 114.

¹¹⁴ CRC Committee, State Party Report: Kenya, (July 2006), para. 507(2).

¹¹⁵ Such as Secs. 14, 15 and 16 of the Children Act.

¹¹⁶ CRC Committee, State Party Report: Kenya, (July 2006), para. 6.

¹¹⁷ CRC Committee, State Party Report: Kenya, (July 2006), para. 507(4).

¹¹⁸ UNODC, (2009), 114; U.S. Department of State, Trafficking in Persons Report, (2009), 175.

¹¹⁹ See ANPPCAN, (2008), 19.

Bill also increases the penalty for trafficking.¹²⁰ In addition, the Bill, in its definition of “Trafficking in Persons”, indicates that “[a] person who for the purpose of trafficking adopts a child or offers a child for adoption ... commits an offence”.¹²¹ It is submitted that, while this definition is commendable, it fails to incorporate the main focus of this section - which is trafficking for the purpose of adoption.

Under the Children Act, before making an adoption order, the court shall be satisfied:

that the applicant has not received or agreed to receive, and that no person had made or given or agreed to make or give to the applicant, any payment or other reward in consideration of the adoption.¹²²

Ordinarily, it is not applicants (prospective adoptive parents) that receive or agree to receive payments for adoption. This fact makes the capacity of this provision to counter child laundering very limited.

On a positive note, however, “[a]ny person who makes or agrees to give to ... any parent or guardian of the child any payment or other reward in consideration of the adoption of any child” commits an offence under the Act.¹²³ The same is true for any person who “makes arrangement for the adoption of a child and receives or makes or gives any payment or other reward in connection with the making of the arrangements”.¹²⁴ Nonetheless, it is submitted that the accompanying penalty of imprisonment for a term not exceeding three years, or a fine not exceeding one hundred

¹²⁰ A person who traffics another person, for the purpose of exploitation, commits an offence and is liable upon conviction to imprisonment for a term of not less than fifteen years or to a fine of not less than five million shillings or to both and upon subsequent conviction, to imprisonment for a term of not less than twenty years without the option of a fine.

¹²¹ See ANPPCAN, (2008), 20.

¹²² Sec. 63(c) of the Children Act.

¹²³ Sec. 179(1)(b)(i) of the Children Act.

¹²⁴ Sec. 179(1)(b)(ii) of the Children Act.

thousand shillings, or both,¹²⁵ seems to fall short of appreciating the grave nature of the offence.

6.2.1.4.3 Malawi

Malawi ratified the OPSC on 7 October 2009, and the Palermo Protocol on 17 March 2005. However, there is no specific provision or legislation that criminalises trafficking of children, child buying, selling, and stealing.¹²⁶ The Penal Code provisions on abduction are sometimes used for prosecution purposes.¹²⁷

The Child Care, Protection and Justice Bill, while it remains in draft form, defines child trafficking and sets a penalty of life imprisonment for traffickers.¹²⁸ However, offences such as child buying and stealing, are not expressly covered in the Bill. Proposed amendments to the Penal Code only address the trafficking of women and children for prostitution.¹²⁹ Neither the Issues Paper nor the Discussion Paper prepared by the Special Law Commission on the Review of the Adoption of Children Act (2009) identify child laundering for the purposes of intercountry adoption as a challenge worthy of exploration. The absence of clear provisions on child trafficking and other illicit activities pertaining to adoption has hindered prosecutions and convictions.¹³⁰

¹²⁵ Sec. 179(1)(b) of the Children Act.

¹²⁶ UNODC, (2009), 124; Chirwa and Kaime, (2008), 111; CRC Committee, State Party Report: Malawi, (July 2008), para. 163.

¹²⁷ UNODC, (2009), 124; CRC Committee, State Party Report: Malawi, (July 2008), para. 163.

¹²⁸ UNODC, (2009), 124; Malawi Special Law Commission, (2005), 111.

¹²⁹ Chirwa and Kaime, (2008), 111; CRC Committee, State Party Report: Malawi, (July 2008), para. 163.

¹³⁰ UNODC, (2009), 124; Chirwa and Kaime, (2008), 111; CRC Committee, State Party Report: Malawi, (July 2008), para. 166.

Section 10 of the Adoption Act provides for restriction on payments. Accordingly, it shall not be lawful for the adopter or guardian, except with the sanction of the court, to receive any payment or other reward in consideration of an adoption under the Adoption of Children Act. However, no further guidance is provided in the law in respect of the consequences of a violation. The position of this provision on indirect payments and contributions is also not clear.

6.2.1.4.4 South Africa

South Africa has had its share of cases of child laundering in respect of adoption.¹³¹ In South Africa, there is not yet comprehensive legislation which focuses specifically on trafficking in persons.¹³² The Prevention and Combating of Trafficking in Persons Bill has been published in the Government Gazette on 8 May 2009 for public comment. However, South Africa has ratified both the Palermo Protocol¹³³ and the OPSC.¹³⁴

On a positive note, the Children's Act provides a more advanced definition of child trafficking as it explicitly includes also the adoption of a child through illegal means.¹³⁵

¹³¹ Human, (2007), 16-29; There are rumours that indicate that children were adopted from South Africa and taken abroad even before the Constitutional Court allowed intercountry adoption.

¹³² The Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 (Act No. 32 of 2007) serves as the basis to fight the trafficking of persons for purposes of sexual exploitation, while the Children's Act can be used to prosecute cases of child trafficking. See UNODC, (2009), 127.

¹³³ On 20 February 2004.

¹³⁴ On 30 June 2003.

¹³⁵ Trafficking, in relation to a child

(a) means the recruitment, sale, supply, transportation, transfer, harbouring or receipt of children, within or across the borders of the Republic

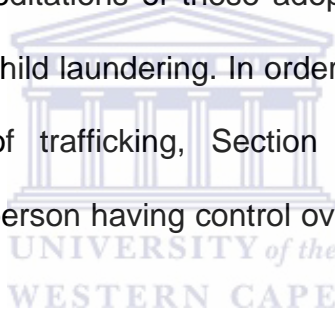
(i) by any means, including the use of threat, force or other forms of coercion, abduction, fraud, deception, abuse of power or the giving or receiving of payments or benefits to achieve the consent of a person having control of a child; or

(ii) due to a position of vulnerability, for the purpose of exploitation; and

(b) includes the adoption of a child facilitated or secured through illegal means.

Child buying, and selling for the purpose of adoptions also fall within this provision. The fact that the Children's Act has extended the definition of trafficking to include "the adoption of a child facilitated or secured through illegal means" implies that all the relevant provisions on trafficking are applicable to children adopted through illegal means.

Both natural and juristic persons who "traffic a child or allow a child to be trafficked" could face liability.¹³⁶ In this regard, Article 284(3) implies that adoption agencies whose employees or agents become involved in illegal adoptions could be responsible. The possibility of revoking the accreditations of these adoption agencies exists,¹³⁷ thereby serving as a deterrent against child laundering. In order to facilitate the prosecution and punishment of perpetrators of trafficking, Section 284(1) of the Children's Act disqualifies the consent of the person having control over the child from being raised as a defence.¹³⁸



Section 287 of the Children's Act allows a court which has reason to believe that the parents or the guardians have contributed to the illegal adoption to hold a children's court inquiry.¹³⁹ It is also noteworthy that illegal adoptions are subject to mandatory reporting.¹⁴⁰ Professionals, such as, police officers, immigration officials, and social

¹³⁶ Sec. 284(1) of the Children's Act.

¹³⁷ Sec. 284(4) of the Children's Act.

¹³⁸ Sec. 284(2)(a) of the Children's Act.

¹³⁹ Kassan, (2007), 18-19;

¹⁴⁰ Sec. 288 of the Children's Act. See Couzens, (2009), 60 for further discussions on this.

workers, are under a duty to report the cases known to them to a designated social worker.¹⁴¹

Despite some criticisms,¹⁴² the provisions of the Children's Act that are intended to combat child laundering are laudable. It is submitted that the fact that South Africa is a State Party to the OPSC and the Palermo Protocol partly explains why national legislation on child trafficking, child selling and child buying in the context of adoption is relatively congruent with international law.

6.2.3 Failure to ensure that informed and free consent(s) is(are) given

The requirement to secure informed and free consents to adoption from the appropriate persons and organs is a fundamental element for an intercountry adoption regime that upholds the best interests of the child, and prevents and combats illicit activities. Standards are necessary to prevent consents from being induced by fraud or misunderstanding, and to prevent baby buying. Article 21(a) of the CRC requires States Parties to ensure that "...if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary". Article 24(a) of the ACRWC uses similar wording, but makes "appropriate counseling" compulsory when consent is necessary. Compared to the Hague Convention's provisions, these two provisions do not provide further details on the requirements of consent.

¹⁴¹ Sec. 288 of the Children's Act. See Couzens, (2009), 60 (arguing that "[i]t might have been preferable, however, to have included lawyers; with the rider that their duty be subject to the reservation of legal privilege where this is invoked"); Kassan, (2007), 18-20.

¹⁴² For a view of some of the shortcomings of the provisions of the Children's Act in respect of trafficking, see Kreston, (2007), 43.

According to the Hague Convention, consent must be obtained from “the persons, institutions and authorities whose consent is necessary for adoption ...”.¹⁴³ Prior to consenting, the party must be counselled and fully informed about a number of issues, including, whether adoption will terminate the legal relationship between the child and his or her natural family.¹⁴⁴ The competent authorities of the State of origin should also ensure: that consent is given “in the required legal form, and expressed or evidenced in writing”;¹⁴⁵ that there is neither withdrawal nor inducement of consent by payment or compensation of any kind;¹⁴⁶ and that the consent of the mother has been given only after the birth of the child.¹⁴⁷

The importance of the views of the child in the adoption process has already been argued in Chapter three.¹⁴⁸ The Hague Convention explicitly recognises this importance, and requires States of origin, after having “regard to the age and degree of maturity of the child”,¹⁴⁹ to apply the necessary safeguards for consent mentioned in the preceding paragraph. It is advisable for legislation to explicitly provide for these standards.

However, cases exist where consents for adoption were either not secured from the relevant persons, or were secured without them being free and informed. To illustrate the latter scenario: U.S. embassy officials investigating Romanian adoptions have

¹⁴³ Art. 4(c)(1) of Hague Convention.

¹⁴⁴ Art. 4 of Hague Convention. Art 4(c)(3) requires that “such persons, institutions and authorities have given their consent freely, in the required legal form and expressed or evidenced in writing”.

¹⁴⁵ Art 4(c)(2) of Hague Convention.

¹⁴⁶ Art 4(c) (3) of Hague Convention.

¹⁴⁷ Art 4(c) (4) of Hague Convention.

¹⁴⁸ Section 3.3.6.

¹⁴⁹ Art. 4(d) of Hague Convention.

discovered “incidents where Romanian mothers believed that they were merely ‘loaning’ their children to foreign parents and not relinquishing them permanently”.¹⁵⁰ Instances where Romanian nuns coerced single mothers to give consent in relation to their children, allowing the nuns to make up to \$15,000 profit per child, have also been recorded.¹⁵¹ In the Zoe’s Ark case in Chad, the families of the children who were involved in the trafficking have reportedly stated that they were misled into giving their consent.¹⁵²

Recent news from Sierra Leone highlights the importance of counselling and securing informed consents.¹⁵³ The news involved a group of parents who accused a charity of sending more than 30 children abroad for adoption without their consent during the country's civil war.¹⁵⁴ On the one hand, the charity - Help a Needy Child International (HANCI) - insists that the parents have signed documents giving permission for intercountry adoption.¹⁵⁵ On the other hand, the parents argue that they have no idea of what happened to their children after they were handed over to HANCI.¹⁵⁶ Some of the parents claim that the “... children were accepted into HANCI in 2004, with the understanding that they were incorporated into the welfare home programme and not for adoption”.¹⁵⁷

¹⁵⁰ Carro, (1994), 144.

¹⁵¹ See Kales, (2004), 484;

¹⁵² See, for instance, Spiegel, (27 December 2007).

¹⁵³ BBC News, (4 November 2009); Sierra Express Media, (09 November 2009).

¹⁵⁴ As above.

¹⁵⁵ As above.

¹⁵⁶ As above.

¹⁵⁷ Sierra Express Media, (09 November 2009).

The law should also attempt to regulate whether to allow the so-called “payment of expenses of birth family”. Many Contracting States to the Hague Convention have recognised the existence of this practice.¹⁵⁸ Such payments have the potential to improperly induce or solicit birth family’s consent to the adoption. In other words, such payments make it difficult to determine whether consent was given freely.

In the context of the U.S., the CRC Committee has expressed concern at the information that, according to the current Regulations, the payment of prenatal and other expenses to birth mothers abroad would still be possible.¹⁵⁹ The State Party has been advised to “[e]xpressly prohibit all forms of possible active solicitation for children, including the payment of pre-natal and other expenses”.¹⁶⁰

In Ethiopia, Article 191 of the RFC, entitled “Consent of Parents of the Adopted Child” indicates that “[b]oth the father and the mother of the adopted child must give their consent to the adoption where they are alive and known”.¹⁶¹ In addition, “where one of the parents is not willing to give his consent and the child is ten and above years of age, the court may approve the adoption upon hearing the opinion of the other parent and of the child”.¹⁶² These provisions are not further concretised either by other provisions of the RFC, or the MOWA Guidelines. For instance, the need to secure free and informed consent is not an explicit part of Ethiopian law. Furthermore, a time frame by when

¹⁵⁸ Permanent Bureau, Guide to Good Practice, (2008), 36.

¹⁵⁹ CRC Committee, Concluding Observations: United States of America, (June 2008), para. 30.

¹⁶⁰ CRC Committee, Concluding Observations: United States of America, (June 2008), para. 31(c).

¹⁶¹ Art. 191(1) of the RFC.

¹⁶² Art. 191(3) of the RFC.

consent could be withdrawn is not provided. Safeguards to prevent improper inducement in obtaining consents are also lacking.

The inadequate nature of the law on consent to adoption has created practical problems. For instance, there are mothers who change their minds about their consent once an adoption order has been issued.¹⁶³ This is sometimes because families give their consent without appreciating the nature of intercountry adoption. Intercountry adoptions that are disrupted as a result of the lack of free and informed consent are also present.¹⁶⁴ In Ethiopia, reports that adoption agencies making members of the family of origin rehearse responses to potential questions before appearing in court, continue to characterise the practice.¹⁶⁵ Instances of parents approaching the relevant Ministries and challenging the adoption of their children are on the rise.¹⁶⁶ It is submitted that unscrupulous individuals and organisations find it easy to abuse the gap created in the law in respect of consent for adoption.

In Malawi, during the initial stages of the *Infant DB* case, questions of consent were raised. This was as a result of reports that "... Mr Banda has flip-flopped in interviews, first supporting Madonna, then saying he did not understand what he was doing ..." when he consented to the adoption.¹⁶⁷ However, the letter of the law in Malawi governing consent is relatively better than that of Ethiopia. Section 4(a) of the Adoption of Children Act requires the court, before making an adoption order, to be satisfied:

¹⁶³ Interview with Deresse Bezawork, Adoption lawyer, (25 September 2009); and Biniam Eshetu, Legal Expert, MOWA, (25 September 2009).

¹⁶⁴ As above.

¹⁶⁵ As above.

¹⁶⁶ As above.

¹⁶⁷ Daily Mail, (26 October 2006).

... that every person whose consent is necessary under this Act and whose consent is not dispensed with has consented to and understands the nature and effect of the adoption order for which application is made, and in particular in the case of any parent understands that the effect of the adoption order will be permanently to deprive him or her of his or her parental rights.

In Kenya, consents for adoption must be written.¹⁶⁸ It is also the explicit obligation of the court, before making an adoption order, to be satisfied that every person who has given consent “understands the nature and effect of the adoption order”.¹⁶⁹ In particular, in the case of parents, the court should ensure that they understand “that the effect of an adoption order will be permanently to deprive him or her of his or her parental rights”.¹⁷⁰ Provision is also made for the withdrawal of consent prior to, and after, the filing of the application for an adoption order.¹⁷¹ In order to minimise manipulation and avoid consent given while under stress, mothers can only give consent once the child is at least six weeks old.¹⁷² A child who has attained the age of 14 should also give his or her consent.¹⁷³ The possibility of an appointment of a *guardian ad litem* to “safeguard the interests of the child pending the determination of the adoption proceedings”¹⁷⁴ plays a role in ensuring that consents are free and informed. However, there is no explicit provision made in the Children Act to address the problem of obtaining consent with an inducement, such as, paying prenatal expenses.

¹⁶⁸ Sec. 158(4) of the Children Act.

¹⁶⁹ Sec. 163(1)(a) of the Children Act.

¹⁷⁰ Sec. 163(1)(a) of the Children Act.

¹⁷¹ Sec. 159(5) of the Children Act.

¹⁷² Secs. 156(1) and 159(8)(a) of the Children Act.

¹⁷³ Sec. 158(4)(f) of the Children Act.

¹⁷⁴ Sec. 160(2)(a) of the Children Act.

Section 233 of the Children’s Act of South Africa provides for the consent requirements for adoption. Before consenting, parents and a child who is 10 years of age or older¹⁷⁵ should be counselled by an adoption social worker facilitating the adoption.¹⁷⁶ This mandatory counselling is an improvement on Article 4(c)(1) of the Hague Convention which requires counselling only if necessary.¹⁷⁷ In addition, not only should a consent be written and signed, it should also be made before, and verified by, a presiding officer of the children’s court.¹⁷⁸ Despite the absence of an explicit provision in chapter 16 of the Children’s Act, the incorporation of the Hague Convention into South African law makes Article 29 of the Hague Convention on the “no initial contact” rule directly applicable.¹⁷⁹ Thus, as discussed in section 6.2.7 below, Article 29 prohibits the contact between prospective adoptive parents and the biological parents or other carers until the necessary consent has been obtained, thereby minimising illicit activities in connection with consent. It is submitted that all these requirements contribute towards minimising consent secured by inducement, fraud, duress, and solicitation.

While both the sending and receiving countries’ Central Authorities must consent to the adoption, provision is made for the South African Authority to withdraw its consent within 140 days of the date of consent.¹⁸⁰ This withdrawal can only happen if it is found to be in the best interests of the child.¹⁸¹ Parents or the child can also withdraw their

¹⁷⁵ It is to be noted that, according to Sec. 233(1)(c) of the Children’s Act, a child who is under the age of ten years can consent provided that he or she has attained the level of maturity that enables him or her to appreciate the implications of such consent. See Mosikatsana and Loffell, (2007), 15-12 and Couzens, (2009), 64 for further details on this.

¹⁷⁶ Sec. 233(4) of the Children’s Act; See Couzens, (2009), 64.

¹⁷⁷ See Couzens, (2009), 64.

¹⁷⁸ Sec. 233(6)(a)(i-iii) of the Children’s Act.

¹⁷⁹ Couzens, (2009), 64-65; Human, (2007), 16-27.

¹⁸⁰ Sec. 261(6)(a) of the Children’s Act; Human, (2007), 16-20.

¹⁸¹ Sec. 261(6)(a) of the Children’s Act; Human, (2007), 16-20.

consent within 60 days after they have signed the consent document.¹⁸² The possibilities for withdrawal of consent provided for in the law can serve to redress situations where free and informed consents were not given in the first place.

6.2.4 Improper financial or other gain, and corruption

The financial aspects of intercountry adoption are a cause for serious concern. These financial aspects include fees, the costs of certain services or documents, the honorarium for the professionals' services, the donations to institutions, the gifts, the tips, and so forth.¹⁸³ It is acknowledged that even legitimate adoptions may also lead to wide-scale profiteering.¹⁸⁴ When an unwarranted amount of money is involved in intercountry adoption, the possibility that the adoption system might begin to tailor the available children to the stated wishes of the would-be adoptive parents is high.¹⁸⁵ Even worse, as outlined in Chapter 4 (Adoptability), children who do not need intercountry adoption would be pumped into the system in the interest of profiteering from the practice.

It is often difficult to make a differentiation between what is “proper” and “improper” financial gain in intercountry adoption. Smolin captures this challenge eloquently:

The law and practice regarding money and adoption turn out to be so mired in legal fictions and regulatory gaps as to make it extraordinarily difficult to distinguish between licit and illicit payments.¹⁸⁶

¹⁸² Secs. 233(8) and 261(6)(a) of the Children's Act; Human, (2007), 16-20.

¹⁸³ Daily Mail, (26 October 2006).

¹⁸⁴ Dillon, (2003), 197.

¹⁸⁵ As above.

¹⁸⁶ Smolin, (2004), 282.

Despite this challenge, it is possible to tease out some guidance from the international legal framework and the experience of States.

Both the CRC and the ACRWC require States to address the problem of deriving improper financial or other gain from intercountry adoption. Similarly, but in a more elaborate manner, the Hague Convention requires that the “Central Authorities” who act on behalf of contracting States “shall take ... all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention”.¹⁸⁷

Apart from prohibiting anyone from deriving “improper financial gain or other gain” from intercountry adoption,¹⁸⁸ the Hague Convention limits payments to costs, expenses, and “reasonable professional fees”.¹⁸⁹ It also forbids “directors, administrators and employees of bodies involved in adoption” from receiving “remuneration which is unreasonably high” for services rendered.¹⁹⁰

Experience indicates that structural funding (which involves linking child protection programmes with adoption fees) should be avoided as it may exert pressure on public servants and create dependency for operating a sufficient number of adoptions per year.¹⁹¹ In Romania, despite the presence of law that prioritised national adoptions, child-care bodies preferred to place children abroad in order to obtain resources for the development of domestic services, which were under-financed by the central

¹⁸⁷ Art. 8 of Hague Convention.

¹⁸⁸ Art. 32(1) of Hague Convention.

¹⁸⁹ Art. 32(2) of Hague Convention.

¹⁹⁰ Art. 32(3) of Hague Convention.

¹⁹¹ ISS/IRC (October 2007), 2.

government.¹⁹² Government cash incentives for organisations that hit pre-determined adoption targets could also prove to be a cause for concern¹⁹³ – since these incentives could work as the main motivation for removing children from their family environments unnecessarily.

In Ethiopia, allegations of improper financial gain by adoption agencies are becoming increasingly common.¹⁹⁴ The fact that the RFC (and the Revised Penal Code too) is silent on the issue is a serious shortcoming. Apart from generally prohibiting bribes, gifts,¹⁹⁵ and the use of adoption as a business,¹⁹⁶ the MOWA Guidelines, too, do not provide any concrete guidance on the regulation of fees and any financial gains in respect of intercountry adoption.

What should be required is that salaries, fees, and wages received by adoption agencies in relation to adoptions should not be contingent on the number of children placed for adoption. However, at least on one occasion, it has been reported that adoption agency workers are paid on the basis of commission,¹⁹⁷ which does not constitute good practice. In Ethiopia, there is hardly any practice of charging fees on the basis of detailed expenses. While there is the practice of asking for donations from adoptive parents that exists, there is no obligation that donations are allowed only after completion of the adoption procedure and only through an agency.

¹⁹² See Couzens, (2009), 70 and sources cited therein.

¹⁹³ See, for instance, The Sunday Telegraph, (13 April 2008).

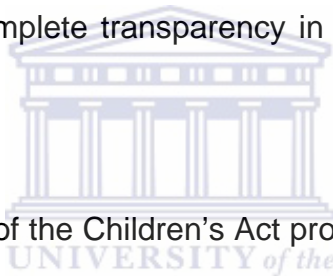
¹⁹⁴ Interview with Deresse Bezawork, Adoption lawyer, (25 September 2009; and Biniam Eshetu, Legal Expert, MOWA, (25 September 2009); The Reporter, (17 October 2009); The Reporter, (27 June 2009).

¹⁹⁵ Para. 12(1) of the MOWA Guidelines.

¹⁹⁶ Para.12(2) of the MOWA Guidelines.

¹⁹⁷ CBC, (19 March 2009).

In Kenya, neither an adopter nor any parent or guardian of a child who receives any payment or other reward in consideration of the adoption of a child under the Children Act commits an offence.¹⁹⁸ However, a list of payments, such as court sanctioned payments,¹⁹⁹ any fees prescribed by the Minister to be paid to an adoption society,²⁰⁰ payment for an advocate,²⁰¹ and maintenance related expenses made by or on behalf of an adoption society, are allowed. The efforts of the legislator to list some of the proper payments in respect of adoption are commendable. However, the fact that “any voluntary contribution made by any adopter or any parent or guardian to an adoption society”²⁰² is allowed, opens the door to abuse. In the face of the absence of a legal scale for fees that provides complete transparency in costs, allowing for contributions exacerbates the problem.²⁰³



In South Africa, Section 249(1) of the Children’s Act prohibits the giving and receiving of any consideration in cash or in kind for the adoption of a child, and the inducement of the consent to adoption.²⁰⁴ Section 249(2) also lists permissible payments in cash or in kind in respect of adoption. Since the payments mentioned in Section 249(2) refer to “prescribed” fees, some level of predictability and transparency is envisaged.

¹⁹⁸ Sec. 179(1)(a) of the Children Act.

¹⁹⁹ Sec. 179(2)(a) of the Children Act.

²⁰⁰ Sec. 179(2)(f) of the Children Act.

²⁰¹ Sec. 179(2)(d) of the Children Act.

²⁰² Sec. 179(2)(e) of the Children Act.

²⁰³ Permanent Bureau, Guide to Good Practice, (2008), 133.

²⁰⁴ Sec. 24 of the Child Care Act is also designed to deter the practice of child trafficking. According to this provision, unless exceptions exist, no person is allowed to give, undertake to give, receive or contract to receive any consideration, in cash or kind in respect of a child. It is a criminal offence to contravene this provision.

What could prove more controversial and difficult to regulate from the list of permissible payments is one made to “the biological mother of a child receiving compensation for... reasonable medical expenses incurred in connection with her pregnancy, birth of the child and follow-up treatment”.²⁰⁵ It is a reasonable construction to argue that this payment can only take place after consent has been given. In addition, the phrase “compensation” indicates a backward looking approach whereby a mother has already paid the expenses and is reimbursed at a later stage. Couzens also raises valid questions such as whether the compensation applies to babies or to older children too.²⁰⁶ It is hoped that greater guidance in regulating payments in adoptions would be achieved through the regulations promulgated in accordance with Section 253 of the Children’s Act.²⁰⁷



In Malawi, Sections 4 and 10 of the Adoption of Children Act prohibit the exchange of payment or reward as consideration for the adopted child. Section 10 provides for restriction on payments: it shall not be lawful for the adopter or guardian, except with the sanction of the court, to receive any payment or other reward in consideration of the adoption under the Adoption of Children Act. However, the Act does not penalise the exchange of payments, save for the denial of an adoption order.²⁰⁸

The *Infant DB* case has in fact helped to shed light on some of the complications that may arise pertaining to corruption and improper financial gain in adoptions. These

²⁰⁵ Sec. 249(2)(a) of the Children Act.

²⁰⁶ Couzens, (2009), 70.

²⁰⁷ Sec. 253(d) of the Children’s Act; See Mosikatsana and Lofell, (2007), 15-27–15-28.

²⁰⁸ Malawi Special Law Reform Commission, Discussion Paper, (2009), 42.

possible complications are illuminated by means of three scenarios. First, human rights groups in Malawi argued that Madonna used her celebrity status – and a £1.7 million donation to the orphanage where infant DB lived – to bypass laws governing the adoption of Malawians by foreigners, thereby implying corruption.²⁰⁹ Secondly, the fact that Madonna was reportedly paying for a Malawi Social Welfare Department official to study at a British university was placed under the spotlight.²¹⁰ Thirdly, and more importantly, in September 2007, it was reported that “... the senior Malawian child welfare official who was to go to London to assess whether Madonna could adopt a little boy from the southern African country has been removed from the high-profile case”.²¹¹ It was further reported that “[t]he removal of Penstone Kilembe, the director of Malawi’s Child Welfare Services, follows allegations that he solicited money from the singer for the trip” and that “Simon Chisale, the country’s chief social welfare officer, said the government had gone to court last week to have Kilembe replaced as the assessor in the Madonna adoption”.²¹²

These three scenarios draw attention to the fact that any irregular payment or contribution usually has the outward appearance of “buying” a baby, which is strictly against the CRC, the ACRWC, and the Hague Convention, and puts all future adoptions at risk. In the context of Zambia, the U.S. State Department discourages prospective adoptive parents from paying any fees that are not properly receipted, as well as

²⁰⁹ I Am Not Obsessed, (01 August 2007).
²¹⁰ Mail and Guardian, (4 September 2007).
²¹¹ Available through News Bank at <<http://nl.newsbank.com/nl>>.
²¹² As above.

making “donations” or paying “expediting” fees that may be requested from prospective parents.²¹³

In order to ameliorate the problem of improper financial gain and corruption, governments could forbid representatives of foreign adoption agencies working in their respective countries from “scouting for children” or receiving children directly from birth parents, in order to prevent taking of children from needy parents by offering them monetary inducement. Adoption agencies should also be called upon to maintain proper accounts which should be audited by a chartered accountant at the end of every financial year. Finally, it should be pointed out that the institutional and normative framework that the Hague Convention puts in place, if implemented properly, addresses many of these issues head on. In this regard, the Hague Convention is a commendable treaty either to which to become a signatory or from which to borrow standards and wording in the drafting of national legislation.

6.2.5 Residency requirement as a *sine qua non* for an intercountry adoption order to prevent illicit activities

Some countries in Africa, such as the Democratic Republic of Congo,²¹⁴ Mauritius,²¹⁵ and Angola, have no residency requirements for prospective adoptive parents. In stark contrast to this, there are a number of countries on the continent (for example, Botswana,²¹⁶ Sierra Leone,²¹⁷ South Sudan,²¹⁸ Tanzania,²¹⁹ Uganda,²²⁰ Zambia²²¹ and

²¹³ U.S. Department of State, “Intercountry adoption: Zambia”, (October 2009).

²¹⁴ As above.

²¹⁵ U.S. Department of State, “Intercountry adoption: Mauritius”, (August 2007).

²¹⁶ U.S. Department of State, “Intercountry adoption: Botswana”, (June 2006).

²¹⁷ Art. 108 of the Child Right Act (No 7 of 2007).

Zimbabwe²²²), that have varied forms of residency requirements. In Zimbabwe, prospective adoptive parents must be either citizens or legal residents – although this requirement may be waived by the Minister of Labour and Social Welfare.²²³

The link between illicit activities and a residency requirement emanates from the purpose to be achieved through the latter. Hence, one of the main purposes why States provide for a residency requirement before an adoption order is finalised is in order to better determine the suitability of prospective adoptive parent(s). In the context of the *Infant DB* case, it was noted that:

...the real practical way of ensuring the child was safe with the adoptive parents was for the State Administration to have known such parents among our society for a while and thereby be able to speak for their commitment from personal interaction with them.²²⁴

Thus, “the requirement as to residence ... is intended to protect the child and to ensure that the adoption is well intended”²²⁵ and does not constitute an illicit activity.

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The merits of a residency requirement are debatable. Where a country of origin decides to have a residency requirement, however, the best interests principle should be central in interpreting that notion with regard to intercountry adoption. The period of residency required should not be unreasonably long. In this regard, while Zambia²²⁶ and Sierra

²¹⁸ The new Children’s Act of Southern Sudan, Sec. 90 requires not only residence for a period of three years prior to a foreigner adopting a Southern Sudanese child, but in addition, fostering for a period of one year as well.

²¹⁹ Art. 4(5) of Adoption Act of Tanzania, Cap 335 (R.E. 2002); U.S. Department of State, “Intercountry adoption: Tanzania”, (March 2009).

²²⁰ U.S. Department of State, “Intercountry adoption: Uganda”, (April 2008).

²²¹ U.S. Department of State, Intercountry adoption: Zambia, (December 2007).

²²² U.S. Department of State, “Intercountry adoption: Zimbabwe”, (June 2006).

²²³ As above.

²²⁴ *Infant DB* case, 18.

²²⁵ *Infant DB* case, 17.

²²⁶ U.S. Department of State, “Intercountry adoption: Zambia”, (December 2007).

Leone²²⁷ require a minimum of one year and six months residency of prospective adoptive parents, respectively, the requirement of three years residency in Uganda can be labelled unreasonably long. In addition, laws providing for a residency requirement may need to be fairly flexible, for instance, to promote the best interests of the child. Such is the practice in Sierra Leone where the High Court, in its discretion, would sometimes waive the six-month residency requirement.²²⁸

A residency requirement has an impact on the application of the Hague Convention. The scope of application of the Hague Convention is provided for in Article 2. Article 2(1) entrenches that:

The Convention shall apply where a child habitually resident in one Contracting State ("the State of origin") has been, is being, or is to be moved to another Contracting State ("the receiving State") either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin.²²⁹

As can be gleaned from this provision, it is the habitual residence of the child and the habitual residence of prospective adoptive parents which are the connecting factors for the application of this Convention.²³⁰

A range of case law is available dealing with the issue of habitual residence under the Hague Convention on the Civil Aspects of Parental Abduction.²³¹ While courts have

²²⁷ U.S. Department of State, "Intercountry adoption: Sierra Leone", (December 2007).

²²⁸ As above.

²²⁹ Art. 2(1) of Hague Convention. The Hague Conference first used the term "habitual residence" in a 1954 convention dealing with civil procedure. See Convention du Premier, Arts. 21 and 32.

²³⁰ See, Bisignaro, (1994), 142.

²³¹ See for instance, the website of the Permanent Bureau of the Hague Conference on Private International Law at <http://www.hcch.net/index_en.php?act=conventions.publications&dtid=34&cid=24> for case law dealing with habitual residence. See, generally Schwartz, (2004), 691; Schuz, (2001), 101; Splugounias, (1995), 823.

failed to agree on a single definition,²³² there is some degree of consensus that there is a need to determine a child's habitual residence based on the particular facts and circumstances of each case.²³³

There is also no definition of “habitual resident” in the Hague (adoption) Convention. Despite this, it is patent that the scope of application of the Hague Convention, and, in turn, its safeguards, are potentially made irrelevant where both the adopter and the adoptee are habitual residents of the same Contracting State. This could mean that, in countries that require a residency status before an adoption order is made, a distinction between “habitual residence”, on the one hand, and “residence”, on the other, needs to be made for the application of the Hague Convention to materialise. While this distinction will be for the courts or authorities in the relevant State to determine, “habitual residence” could be described as “a factual concept denoting the country which has become the focus of the individual’s domestic and professional life”.²³⁴ However, in countries that prescribe an unreasonably long residency requirement, such distinction becomes less evident. This in turn might lead to a situation where the Hague Convention cannot apply because both the adoptee and the adopter would be considered as habitual residents of the same Contracting State.

Neither Ethiopia nor South Africa have a residency requirement. Kenya’s three months fostering period before an adoption order is made cannot be equated with residency,

²³² Splagounias, (1995), 823 (citing “Application of Ponath, 829 F. Supp. 363, 365 (D. Utah 1993); *Levesque v. Levesque*, 816 F. Supp. 662, 665 (D. Kan. 1993); *Meredith v. Meredith*, 759 F. Supp. 1432, 1434 (D. Ariz. 1991)”)

²³³ Splagounias, (1995), 828.

²³⁴ Permanent Bureau, Guide to Good Practice, (2008), 108.

too. However, Section 3(5) of the Malawi Adoption Act provides that “[a]n adoption order shall not be made in favour of any applicant who is not resident in Malawi”. In the *Infant CJ* High Court case, the requirement of residency was the main reason why Madonna’s adoption was rejected.²³⁵ In the *Infant DB* case, the issue of residency was central, too.²³⁶

The Judge in the *Infant CJ* High Court case was of the view that, since the notion of “residence” implies a degree of permanence and is concerned with something which will continue for a considerable time, Madonna’s stay in Malawi was excluded from such definition. The SCA took issue with this conclusion.

As a former British colony subscribing to the common law system, Malawian courts often refer to English court decisions. The SCA agreed with the approach to residence taken in *Matalon v Matalon* [1952] 1 All ER 1025 and in *Keserue v Keserue* [1962] 3 All E.R. 796.²³⁷ The former case concerned a wife’s petition for judicial separation (in England), while the husband was domiciled and resident at all material times in Jamaica.²³⁸ During the time of the petition, the husband had been in England for about nine weeks.²³⁹ The purpose of his visit was solely for conducting business negotiations and for claiming the custody of the child of the marriage.²⁴⁰ This case drove the point home for the SCA that neither the limited purpose of the husband’s visit to England nor

²³⁵ See *Infant CJ* High Court case.

²³⁶ See *Infant DB* case.

²³⁷ SCA *Infant CJ* case, 16.

²³⁸ SCA *Infant CJ* case,, 16.

²³⁹ As above.

²⁴⁰ As above.

his movement from hotel to hotel prevented a unanimous Court of Appeal decision holding him to be resident in that country.²⁴¹

The SCA applied the approach adopted in these cases to the *Infant CJ* case, and noted that at the date of the hearing of the application Madonna was present in the country, not by chance but by design.²⁴² It observed that Madonna specifically came to Malawi for the purpose of the application for adoption, and was not in the country by chance or as a mere sojourner.²⁴³ As a result, it was concluded that, at the time of the application, Madonna was resident in Malawi.²⁴⁴

A cursory look at this conclusion would in practical terms mean that, for the purpose of intercountry adoption, prospective adoptive parent(s) need only be physically present in Malawi at the time of the adoption application to qualify as being resident in the country. This is completely different from, for instance, the practice in Tanzania, where a prospective adoptive parent is considered as a resident only if he or she “holds a Resident Permit (Class A, B, or C), a Dependent’s Pass, or an Exemption Permit and lives in Tanzania”.²⁴⁵ Similarly, in Morocco, official residence certificates must be produced to prove resident status.²⁴⁶

²⁴¹ As above.

²⁴² SCA *Infant CJ* case,, 17.

²⁴³ SCA *Infant CJ* case,, 16.

²⁴⁴ SCA *Infant CJ* case,, 16.

²⁴⁵ U.S. Department of State, “Intercountry adoption: Tanzania”, (March 2009).

²⁴⁶ U.S. Department of State, “Intercountry adoption: Morocco”, (February 2007).

However, rather creating confusion for future cases, the SCA added further elaboration to the grounds for its finding that Madonna's presence at the time of the adoption petition should qualify her as a resident. The SCA added that:

And on that day she [Madonna] had already adopted another infant known as David Banda from Malawi. The Appellant has plans to travel to Malawi frequently with her adopted children in order to instill in them a cultural pride and knowledge of their country of origin. The Judge in the court below had evidence before her indicating that the Appellant had a project in Malawi which had noble and immediate ideas of investing in the improvement of the lives of more disadvantaged children in Malawi. It is clear from this evidence that the Appellant in this case is not a mere sojourner in this country but has a targeted long term presence aimed at ameliorating the lives of more disadvantaged children in Malawi (insertion mine).²⁴⁷

In this regard, it is far from the truth to suppose that the approach to defining who is a resident in respect of intercountry adoption in Malawi is put to rest. Questions abound, such as: Does a prospective adoptive parent need further connection to Malawi, like a project, for example, to be declared a resident for the purpose of intercountry adoption? Does a prospective adoptive parent also need to have plans to bring the adopted child back to Malawi in order to qualify as a resident? What does a "targeted long term presence" mean? Or is a "targeted long term presence" an additional requirement for status as a resident? Only future practice related to the issue will shed light on these questions.

As observed above, the treatment of the residency requirement by the SCA, while very liberal, still leaves a few questions unanswered. In retrospect, the approach the Judge took in the *Infant DB* case, which viewed the residency requirement as being merely a

²⁴⁷ SCA *Infant CJ* case, 17.

means to an end – the end being the best interests of the child,²⁴⁸ is more instructive, and should still carry a lot of weight in approaching the issue in a child-friendly fashion.²⁴⁹

From a comparative perspective, it should be noted that the current trend in Africa is to regulate intercountry adoption without a residency requirement. Save for the Child Rights Act of South Sudan, recent law reform efforts on the African continent do not actually prescribe a residency requirement for intercountry adoption.²⁵⁰ If experience in Uganda is any guidance, an unreasonably long residency requirement (in this case three years) could be counterproductive. It could be a contributing cause for prospective adoptive parents' motivation to circumvent the whole safeguard necessary for intercountry adoption – an issue that forms the focus of discussion in the next subsection.²⁵¹ Should a country decide to become a State Party to the Hague Convention, a residency requirement has the potential, at least, to complicate the application of the Convention (if not to make impossible). In the final analysis, it is submitted that the possibility of having a sound and well-regulated intercountry adoption regime without a residency requirement is still a viable option for countries of origin in Africa.

²⁴⁸ See *Infant DB* case, 18.

²⁴⁹ See Mezmur, (2009a), 161-163.

²⁵⁰ See, for instance, Children's Act 38 of 2005 of South Africa and the Child Right Act 7 of 2007 of Sierra Leone (which requires 6 months residency, though the courts, by using their discretion, often waive this requirement).

²⁵¹ ANPPCAN, (2009), 7.

6.2.6 Abuse of guardianship orders to circumvent adoption safeguards

Securing a guardianship order for the ultimate purpose of intercountry adoption is a method often employed in Muslim countries where intercountry adoption is not allowed. To illustrate, this is the case in Morocco, Jordan, and Bangladesh.²⁵² It was reported in 2004 that, since there is no adoption under Iraqi law, only guardianship is allowed; even then, “Iraqi law has not permitted foreigners to obtain legal guardianship of Iraqi children”.²⁵³

One of the most notable countries where guardianship orders are frequently abused to skirt from intercountry adoption procedures, is Uganda.²⁵⁴ This is often done to avoid the three year residency requirement prescribed by law.²⁵⁵ A review, conducted by the Uganda Chapter of the African Network for the Prevention and Protection Against Child Abuse and Neglect (ANPPCAN) in August 2007 on the status of adoption and legal guardianship trends in Uganda in the wake of growing concerns about the possible links between adoption/ guardianship processes and child trafficking, has confirmed this problem.²⁵⁶

The CRC Committee has detected a similar trend. In its consideration of Uganda’s Report under the OPSC, the Committee noted the rising number of applications for legal

²⁵² U.S. Department of State, “Intercountry adoption: Morocco”, (September 2009); Bangladesh, (November 2006); Jordan, (January 2007).

²⁵³ Olsen, (2004), 503 citing U.S. Department of State, International adoption: Iraq, available at <http://0-travel.state.gov.innopac.up.ac.za/adoption_iraq.html>.

²⁵⁴ ANPPCAN, (2009), 7.

²⁵⁵ Art. 46(b) of the Children Act of Uganda.

²⁵⁶ ANPPCAN, (2007).

guardianship of children, and the reduced number of applications for adoption.²⁵⁷ It viewed such a trend as potentially aimed at circumventing the regulations which apply to adoption, and resulting in practices contrary to the OPSC,²⁵⁸ and recommended to the State Party to “stringently scrutinize applications for legal guardianship of children in order to avoid practices contrary to the Protocol”.²⁵⁹

An attempt to supplant an intercountry adoption procedure with a less stringent guardianship order for the ultimate purpose of removing a child from the country of origin, and adopting him or her in the receiving State, has real shortcomings. It is also not congruent with international law. For instance, a “nude” guardianship order, which can be effected merely on an *ex parte* application, taking place without the knowledge, supervision or approval of a designated authority, cannot meet one of the tenets of the CRC, the ACRWC, and the Hague Convention - that intercountry adoption is a legitimate concern of public authorities.²⁶⁰

As regards the policy objective underlying the “mutual recognition” principle of the Hague Convention, it is obvious, since adoption necessarily entails a change of legal status, that such events must occur in such a way as to permit ratifying states to agree upfront about the form and content of the legal consequences in the subsequent country of destination of an adoption that has taken place in the sending country. A court faced with considering a guardianship order as a prelude to an intercountry transfer of a child

²⁵⁷ CRC Committee, Concluding Observations: Uganda, (October 2008), para. 20.

²⁵⁸ As above.

²⁵⁹ CRC Committee, Concluding Observations: Uganda, (October 2008), para. 21.

²⁶⁰ Sloth-Nielsen and Mezmur, (2007b), 88.

has no duty to enquire into the nature and status of any adoption, or adoption-like order, in the country of destination.

In addition, in view of children's identity rights discussed in chapter 3 above, it is also argued that a guardianship application takes very little account of the overall rights of a child under international law. For instance, being premised, as it is, on an internal jurisdictional issue geared only to matters incidental to the exercise of one aspect (albeit an important one) of parental responsibility, a guardianship order does not facilitate the preservation of information, such as, that relating to the child's origins, background, family, and medical history, which is often done in the case of intercountry adoption.²⁶¹

A coalition of civil societies in Uganda has recommended that the law on guardianship should be amended.²⁶² The law should provide that a guardian can only travel outside of Uganda with the child after having obtained a court order authorising such travel, and after having satisfied the court of their return (also through depositing sureties).²⁶³

To the knowledge of this writer, there has not been any case of the use of guardianship orders to circumvent intercountry adoption in Ethiopia, Kenya, and Malawi. However, in all these three countries there is nothing explicit in the law that expressly prohibits it.

In Kenya, for instance, while the possibility of a foreigner or non-resident being granted a guardianship order is not proscribed by legislation, the High Court has been

²⁶¹ Sloth-Nielsen and Mezmur, (2007b), 93.

²⁶² Uganda Child Rights NGO Network, (2007), 13.

²⁶³ As above.

consistent enough to treat adoptions with a foreign element as being intercountry adoption applications.²⁶⁴ The fact that the DCS must issue a “no objection” letter before a child can be allowed to travel out of the country serves as a safeguard, too.²⁶⁵

In South Africa, the *AD v DW* case has illuminated the various issues that may arise in connection with the attempt to use guardianship orders so as to avoid intercountry adoption procedures. In this case, an application for sole custody and sole guardianship was made to the High Court by citizens of the U.S. who wished to adopt a South African child. The applicants were advised (incorrectly) that a policy by the Department of Social Development barred citizens of the U.S. from adopting children in South Africa, and were encouraged to apply to the High Court for an order granting them sole custody and sole guardianship. They had planned to use the guardianship order to enable them to take the child to the U.S. where they could then formally adopt her. The High Court and the SCA (by majority) held that the matter should have been dealt with by the Children’s Court, which is vested with the power and capacity to entertain adoption cases.²⁶⁶ The Constitutional Court reasoned that it is only in exceptional circumstances (to promote a child’s best interests) that the High Court has jurisdiction to hear applications for sole custody and sole guardianship which were intended as a first step towards adopting a South African child abroad.²⁶⁷ Since it did not find this case to fall within the “exceptional circumstances” threshold, the Constitutional Court referred the matter to the Children’s Court where an adoption order was made.²⁶⁸

²⁶⁴ Koome, (2009).

²⁶⁵ CRC Committee, State Party Report: Kenya, (2007), para. 504.

²⁶⁶ See Sloth-Nielsen and Mezmur, (2007b) for a discussion of the SCA decision of this case.

²⁶⁷ *AD v DW*, para. 32 and 34.

²⁶⁸ As above.

In connection to this, it is worth noting that, according to Section 25 of the Children's Act:

[w]hen application is made in terms of section 24 [guardianship application] by a non-South African citizen for guardianship of a child, the application must be regarded as an inter-country adoption for the purposes of the Hague Convention on Inter-country Adoption and Chapter 16 of this Act.

This provision is commendable, and worthy of imitation in other African jurisdictions, as it has the potential to prevent attempts to circumvent intercountry adoption procedures through the use of guardianship orders.²⁶⁹

6.2.7 Violating the “no initial contact” rule

One of the central tenets of intercountry adoption is that it is a practice of finding a family for a child, rather than a child for a family. This has a number of implications, including that the needs of adoptable children in countries of origin should be given priority over the requests of prospective adoptive parents in receiving countries.²⁷⁰

Article 29 of the Hague Convention entrenches the “no initial contact” rule which envisages a similar goal of prioritising the needs of children and preventing or minimising pressures on families of origin.²⁷¹ Article 29 of the Hague Convention provides that:

...there shall be no contact between the prospective adoptive parents and the child's parents or any other person who has care of the child [such as orphanages] until the requirements [prescribed for intercountry adoptions in Article 4 – notably adoptability, fulfilment of the best interests criterion, compliance with the subsidiarity principle, and

²⁶⁹ For a discussion of some of the limitations of this provision, see Couzens, (2009), 60-61.

²⁷⁰ Vite and Boechat, (2008), 27.

²⁷¹ The “no initial contact” rule also has a role to play in minimising “detachment disorder” in cases where the child becomes attached to the prospective adoptive parent(s), and ultimately a court decides against an adoption.

obtaining of the necessary consents – and Article 5 – eligibility and counselling of the adoptive parents, and authority for the child to enter the receiving state and reside there permanently] have been met, unless the adoption takes place within a family or unless the contact is in compliance with the conditions established by the competent authority of the state of origin (insertions mine).

There is neither clear legislation nor practice in Ethiopia and Kenya that emulates the “no initial contact” rule of Article 29 of the Hague Convention. Actually, in Ethiopia, the fact that prospective adoptive parents can travel to meet members of the birth family, even before an adoption order is granted, has been reported by the media as constituting good practice.²⁷² In South Africa, too, the Children’s Act does not contain a provision addressing the “no initial contact” rule. However, as already mentioned above, the incorporation of the Hague Convention by way of an annexure to the Children’s Act into South African law makes this provision directly applicable in that State.²⁷³

Malawi, too, does not have a law enforcing the “no initial contact” rule. Before Madonna’s arrival in Malawi in 2006, it was reported that her husband at the time, film maker Guy Ritchie, had visited seven orphanages in the country “videoing the most doe-eyed children he can find” for his wife.²⁷⁴ It was further reported that, based on the video, when Madonna went to Malawi in 2006, she had initially wanted to adopt infant CJ (and not infant DB).²⁷⁵ The story locally is that the grandmother of infant CJ stood in the way of Madonna, however, and refused to give her consent to the adoption.²⁷⁶ In the years that followed, reportedly, the grandmother had to endure pressure from priests,

²⁷² See, for instance, *The New York Times*, (04 June 2007).

²⁷³ See Human, (2007), 16-27; Couzens, (2009), 65.

²⁷⁴ *The Guardian*, (12 June 2009).

²⁷⁵ As above.

²⁷⁶ As above.

village elders, people from the orphanage, and others whom she had never seen before, in an effort to persuade her to let infant CJ go.²⁷⁷ Reportedly, “after years of being told that adoption was the right thing for Mercy”, the grandmother “caved in”.²⁷⁸

If these reports are accurate, they describe exactly the same as the improper activities that Article 29 of the Hague Convention envisages to eliminate. Assessed against the ideals of Article 29 of the Hague Convention, Madonna’s adoptions leave much to be desired. In the *Infant CJ* case it seems that not only was there contact between Madonna and the child before consent for adoption was secured,²⁷⁹ but also between the biological family of infant CJ and other persons, such as workers at the orphanage where infant CJ lived, seemingly “on behalf of” Madonna.

It could be argued, however, that, since Malawi is not a Contracting State to the Hague Convention, it is not bound to apply the provisions of the Hague Convention. This argument is valid. However, as far as receiving countries that are Contracting States to the Hague Convention is concerned, it would constitute a complete disregard of the Special Commission Recommendation that calls on countries that are Contracting States to the Hague Convention to try and apply, “as far as practicable...the standards and safeguards of the Convention to the arrangements for inter-country adoption which they make in respect of non-Contracting States”.²⁸⁰

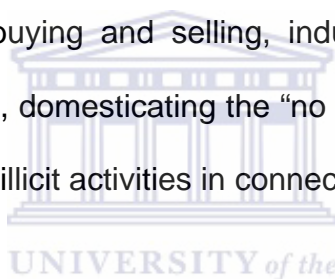
²⁷⁷ As above.

²⁷⁸ As above.

²⁷⁹ As above.

²⁸⁰ Permanent Bureau, Recommendations, (2001). However, the careful choice of words, “as far as practicable...”, is indicative of the suggestive nature of the proposal.

The practice of prospective adoptive parents visiting an institution to pick out an appealing child, or to choose a child from photo lists, is neither congruent with the spirit of the Hague Convention,²⁸¹ nor with the best interests of the child principle in the CRC and the ACRWC. Even within the context of the CRC, the CRC Committee has expressed concern when “[q]ualified officials do not select the children for adoption and *allow prospective adoptive parents to make the choice*” (emphasis mine).²⁸² A system that allows prospective adoptive parents to directly choose children for adoption also contains an element of discrimination. For instance, it has the potential to further disadvantage “special needs” children, such as, those that are disabled.²⁸³ Such a practice also facilitates baby buying and selling, inducement of consent, and other similar illicit activities. Therefore, domesticating the “no initial contact” rule in a domestic law has the potential to prevent illicit activities in connection with adoption.



6.2.8 Eligibility criteria for prospective adoptive parents to prevent illicit activities

Both the CRC and the ACRWC are silent on the question of eligibility to adopt.²⁸⁴ Article 5 of the Hague Convention also does not provide detailed rules concerning eligibility - it states, in general terms, that an adoption shall take place “only if the competent authorities of the receiving State (a) have determined that the prospective adopters are

²⁸¹ Permanent Bureau, Recommendations, (2001).

²⁸² CRC Committee, Concluding Observations: Mozambique, (October 2009), para. 55(d). Subsequently, the Committee recommended that the State Party should “[e]nsure that qualified officials are responsible for choosing the adoptive family which best responds to the needs of children”. CRC Committee, Concluding Observations: Mozambique, (October 2009), para. 56(d).

²⁸³ See Vite and Boechar, (2008), 27.

²⁸⁴ In part because they regulate intercountry adoption in a very rudimentary fashion, and also because the issue of eligibility is better left for national laws to regulate.

eligible and suitable to adopt...”.²⁸⁵ Countries of origin also have established their eligibility requirements for prospective adoptive parents in intercountry adoption.

At the centre of almost all eligibility criteria for prospective adoptive parents is the intention of those who stipulate the requirements to promote children’s best interests. This includes even those eligibility criteria that seem strange, such as, the new criteria in China which requires prospective adoptive parent(s) to be below a maximum body mass index of 40.²⁸⁶

Some eligibility criteria attempt to prevent the possibility of abuse and illicit activities in adoption (for instance, by paedophiles adopting children). To illustrate: almost all African countries do not allow homosexuals to adopt children (at least in principle). Single applicants are almost never permitted to adopt children from Burkina Faso.²⁸⁷ In a similar vein, in Ghana, a single person can only adopt if he or she is a citizen of that country.²⁸⁸ Furthermore, prohibiting single males from adopting girls is virtually a rule on the African continent.²⁸⁹

In Kenya, eligibility requirements for prospective adoptive parents that are in part intended to prevent illicit activities are incorporated in the Children Act. While a sole

²⁸⁵ See, Permanent Bureau, Guide to Good Practice, (2008), 93-96 and 112 for further details on suitability and eligibility to adopt.

²⁸⁶ Children’s Hope International, (2008).

²⁸⁷ U.S. Department of State, “Intercountry adoption: Burkina Faso”, (August 2008).

²⁸⁸ U.S. Department of State, “Intercountry adoption: Ghana”, (February 2009).

²⁸⁹ See for instance, Art. 4(2) (Cap 335) of the Adoption of Children Act of Tanzania.

male foreign applicant is not allowed to adopt,²⁹⁰ under special circumstances, a sole female foreign applicant may adopt.²⁹¹

In practice, prohibiting a single woman to adopt a male child is proving counterproductive.²⁹² Because the majority of prospective adoptive parents are women, this has led to the availability of more male children for adoption in comparison to female children. It is also commendable that a person who has been convicted previously of a child abuse offence is explicitly precluded from adopting by law.²⁹³ However, the blanket prohibition of homosexuals, joint applicants not married to each other, and sole foreign male applicant, to adopt²⁹⁴ is controversial.

In Ethiopia and Malawi, eligibility requirements are less strict. Just recently, however, the MOWA in Ethiopia is starting to refuse to accept applications by single applicants.²⁹⁵ Section 3(c) of the Malawi Adoption of Children Act also provides that “a single male applicant cannot adopt a female infant unless the court is satisfied that there are exceptional circumstances”. Judging by Madonna’s adoption of infant CJ, coupled with a reading of the provisions of the Adoption Act, Malawi could be classified as falling within the category of African countries that have very flexible eligibility requirements for adoption. Although Section 231 of the South African Children’s Act provides a long and

²⁹⁰ Sec. 158 (3) (a) and (b) of the Children Act.

²⁹¹ Sec. 158(2)(d) of the Children Act.

²⁹² Interview with Irene Mureithi, Child Welfare Society of Kenya, (22 June 2009); Interview with Susan Otuoma, Little Angels Network, (22 June 2009).

²⁹³ Sec. 158(3) Children Act. This provision includes persons who have been charged with a child abuse offence as being precluded from adopting by law, the merit of which could also be controversial.

²⁹⁴ Sec. 158(3) of the Children’s Act.

²⁹⁵ See, for instance, Australian Government’s Attorney General’s Department, (September 2009).

liberal list of persons who may adopt a child,²⁹⁶ “[a] person unsuitable to work with children is not a fit and proper person to adopt a child”.²⁹⁷

A liberal attitude to eligibility to adopt has its own advantages and disadvantages. On the positive side, it helps to increase the pool of prospective adoptive parents. This in turn has the potential to increase the chances of a child being matched with a suitable person or family that meets his or her needs.²⁹⁸ On the other hand, a highly flexible eligibility requirement poses a threat to children’s best interests as it could fail to prevent illicit activities.

Thus, States have to do a context-specific delicate balancing act: to prevent illicit activities by establishing stringent eligibility requirements and the same time not compromise the chances for children’s adoptions.²⁹⁹ Though it is a comment made in the context of domestic adoption, the CRC Committee has indicated that, by “[t]aking into account ... the high number of children in institutions, the Committee recommends that the State party increase the possibility of domestic adoption”³⁰⁰ by relaxing its eligibility requirements beyond married persons. It is argued that from this flows an observation that in the context of intercountry adoption, too, States Parties to the CRC and the ACRWC have to take into account the number of children who need adoption before establishing stringent eligibility requirements.

²⁹⁶ See Mosikatsana and Lofell, (2007), 15-6 – 15-9 for a detailed discussion of this.

²⁹⁷ Sec. 231(6) of the Children’s Act.

²⁹⁸ See for instance, Bartholet, (1996), 182 (describing international adoption as alternative to restrictive American adoption processes and highlighting that in the U.S. limitations on age, marital status, and economic situations exist in assessing satisfactory adoptive parents which forces prospective parents to frequently look toward international adoption instead of domestic adoption because of the lower restrictions on parental suitability).

²⁹⁹ Sec. 231(6) of the Children’s Act.

³⁰⁰ CRC Committee, Concluding Observations: Chile, (April 2007), para. 47.

6.2.9 Placing moratoria on intercountry adoption to prevent and address illicit activities

In Chapter 3 it has been argued that intercountry adoption is not an obligatory alternative means of care that States Parties to the CRC and the ACRWC are required to undertake.³⁰¹ The Hague Convention, too, does not oblige Contracting States to permit intercountry adoption. Therefore, placing a moratorium on intercountry adoption is generally not a violation of the CRC, the ACRWC, or the Hague Convention.³⁰² There is sufficient evidence to corroborate this position.³⁰³ In fact, imposing a moratorium on intercountry adoption is sometimes the only feasible and available measure (after exhausting the possibilities of less extreme measures) to prevent illicit activities in adoptions.³⁰⁴

In very exceptional circumstances the CRC Committee itself has recommended to States Parties to suspend intercountry adoption. This was the case with Guatemala. In 2001 the CRC Committee recommended to Guatemala that it should “suspend adoptions in order to take the adequate legislative and institutional measures to prevent the sale and trafficking of children...”.³⁰⁵ The Committee understands the need for

³⁰¹ Section 3.4.3.2.1.

³⁰² See Permanent Bureau, Guide to Good Practice, (2008), 102-103.

³⁰³ State practice surrounding intercountry adoption, for instance, from countries that are emerging from or experiencing natural or manmade catastrophes, has recently inclined towards suspension of intercountry adoption. To illustrate, this was the case, after 26 December 2004, when an underwater earthquake off the coast of the Indonesian island of Sumatra caused a tsunami tidal wave that devastated countries across Southeast Asia.

³⁰⁴ For instance, for a discussion of the role of moratorium in the context of refugee children, see Chapter 4, section 4.5.5.

³⁰⁵ CRC Committee, Concluding Observations: Guatemala, (July 2001), para. 35.

moratoria, especially until the regulatory framework for intercountry adoption is put in place.³⁰⁶

Where appropriate a blanket moratorium on intercountry adoption should be avoided. In some instances a more specific moratorium stand a better chance of promoting children's best interests. While the common practice is to place a moratorium on intercountry adoption at the national level, a moratorium could sometimes be local or region-specific. For instance, in 2005, after some systematic irregularities were spotted by Indian authorities, it was reported that adoptions in New Delhi came to a temporary standstill.³⁰⁷ A moratorium could also be placed with respect to specific orphanages that undertake intercountry adoption – for instance, on private orphanages as opposed to those run by government.³⁰⁸ Exceptionally, moratoria could be age specific and be placed on the adoption of a certain age group of adoptable children, too.

However, possibilities exist where a moratorium could be inconsistent with children's rights. Where there are adoptable children in a country who could benefit from intercountry adoption in a country, a moratorium imposed for an unjustifiably lengthy period of time has the potential to limit these children's access to growing up in a family environment. While Marx has argued that, by placing a moratorium (especially for a lengthy period of time) on intercountry adoption,³⁰⁹ Romania was hiding behind the best

³⁰⁶ This was reflected in its Concluding Observations to Kyrgyzstan when it recommended that "[w]hen the State party envisages lifting its moratorium on intercountry adoptions" it should consider ratifying the Hague Convention. CRC Committee, Concluding Observations: Kyrgyzstan, (August 2000), para. 38.

³⁰⁷ See Dohle, (2008-2009), 134 (citing two Delhi Newslines newspaper reports).

³⁰⁸ For instance, see the discussion in this section below in the context of Ethiopia.

³⁰⁹ Although the Emergency Ordinance of 8 October 2001 imposed the moratorium for 12 months, the moratorium has subsequently been maintained by a series of extensions.

interests standard and using it to justify its own narcissistic policies,³¹⁰ others contended that the moratorium should not be lifted.³¹¹ Ultimately the CRC Committee recommended to Romania that, by taking into account its new adoption laws, the State Party should “withdraw the existing moratorium as a barrier to the full implementation of Art. 21 of the Convention”.³¹²

Transitory cases – those that were already started (and sometimes almost completed) before a moratorium is imposed – are more controversial. These cases might leave children in a legal limbo. In particular, suspending cases that have reached the entrustment level (where the child is physically placed under the care of the prospective adoptive parents) of the intercountry adoption process are at a higher risk of violating children’s rights.³¹³



It is promising that the experience gained from the Zoe’s Ark case, and the need to impose a moratorium on intercountry adoption in instances where a country is affected by a catastrophe, seem to be resonating well in Africa. For example, it was reported that days after the Zoe’s Ark workers were arrested, the Republic of Congo, part of which is still experiencing violence and armed conflict, announced that it was suspending all international adoptions because of the events in Chad.³¹⁴ Furthermore, the Ministry of Social Welfare of the Government of Zambia as well as that of the Government of Togo

³¹⁰ Marx, (2007), 373.

³¹¹ See, for example, Bainham, (2003), 223-236.

³¹² CRC Committee, Concluding Observations: Romania, (June 2009), para. 55; Couzens, (2008).

³¹³ It is argued that:

In particular, it may be difficult to justify applying a moratorium to cases in which the conditions of Article 17, including agreement between the two Central Authorities that the adoption may proceed, have already been met.

³¹⁴ See Permanent Bureau, Guide to Good Practice, (2008), 102-103.

International Herald Tribune, (26 December 2007).

also suspended adoption after the Zoe's Ark case.³¹⁵ The official reasons provided for the suspension of intercountry adoption in these three countries were the need to undertake the practice in the best interests of the child, and to address dysfunctions in the adoption system which had the potential of violating children's rights.³¹⁶

Moratoria are also being imposed in a number of African countries in order to first provide for a proper regulatory framework for intercountry adoption. In this respect, the experiences of Liberia³¹⁷ and Lesotho³¹⁸ offer good examples. Experience in two of the countries under study (South Africa and Ethiopia) further shows the recognition of the role of moratoria to prevent and address illicit activities in intercountry adoption.

As far as this writer can establish, there has not been any time in Malawi and Kenya where a moratorium has been placed on intercountry adoption. In South Africa, however, in the *Fitzpatrick* case, Government had argued that it needed two years to bring legislation up to standard before commencing processing intercountry adoptions. The Constitutional Court was of the view that the provisions of the Child Care Act were sufficient to prevent illicit activities, and denied the Government's request to suspend intercountry adoption pending a legal review.

In May 2009, the Ethiopian First Instance Court had placed a moratorium on cases involving abandoned children from orphanages in Addis Ababa, citing concerns over an

³¹⁵ ISS/IRC Monthly Review, (March 2008), 3. The Republic of Togo has promulgated the Law No: 2008-014 of November 2008 for the approval of the Hague Convention.

³¹⁶ ISS/IRC Monthly Review, (March 2008), 3.

³¹⁷ CRC Committee, State Party Report: Liberia (not yet considered) (July 2009).

³¹⁸ The moratorium has now been lifted. See U.S. Department of State "Intercountry adoption: Lesotho" (November 2008).

inexplicable increase in the number of abandoned children being brought for adoption.³¹⁹ The Court later lifted the moratorium for the three government run orphanages in Addis Ababa. It subsequently lifted the moratorium after the investigation into the dramatic increase of the number of abandoned children was completed.³²⁰ The specific nature of the moratorium (targeting abandoned children), and the fact that the Court did not waste time in completing its investigation and lifting the moratorium, indicate a sound appreciation of children's best interests by the Court, and this is commendable.

There may be sound child protection reasons for the imposition of a moratorium by receiving countries, too.³²¹ In the final analysis, whether to impose a moratorium, and for how long, should take into account children's best interests. In other words, the presence of adoptable children whose chance of access to a stable family environment is only through intercountry adoption should warrant serious consideration of the nature and duration of a moratorium.

6.3 ESTABLISHING INSTITUTIONAL SAFEGUARDS TO PREVENT AND ADDRESS ILLICIT ACTIVITIES RELATED TO INTERCOUNTRY ADOPTION

6.3.1 Introduction

The CRC and the ACRWC provide limited guidance as to the kind of institutions that are required for undertaking intercountry adoption. These instruments make reference to "competent authorities". For instance, the ACRWC speaks of the need to "establish

³¹⁹ U.S. Department of State, (13 May 2009).

³²⁰ As above.

³²¹ These kinds of moratoria are often referred to as "restrictions". See, Permanent Bureau, Guide to Good Practice, (2008), 103.

competent authorities to determine matters of adoption”.³²² According to the CRC, States Parties have to “[e]nsure that the adoption of a child is authorised only by competent authorities”.³²³ This has been interpreted to mean that implementation of the CRC requires important institutional developments.³²⁴ Further details regarding the composition, functions, and other aspects of these competent authorities are not spelled out, at least in the letter of the provisions of the CRC and the ACRWC.³²⁵

To borrow the words of Hodgkin and Newell, the notion of “competent authorities” encompasses “the judicial and professional authorities charged with vetting the viability of the placement in terms of the best interests of the child”.³²⁶ This notion has been understood to be indicative of the fact that “the handling of a child’s case cannot be left to the birth parents, to prospective adoptive parents, to unqualified protagonists or those of doubtful ethics”.³²⁷ Generally, “competent bodies” have also been understood to be “bodies with the appropriate legal competence”.³²⁸ In order to display competency, the personnel of these authorities should be adequately trained, too.³²⁹

The Hague Convention, by comparison, offers a relatively detailed road map for the specific institutional structures that should undertake the various responsibilities under

³²² Art. 24(a) of the ACRWC.

³²³ Art. 21(a) of CRC.

³²⁴ Vite and Boechat, (2008), 29

³²⁵ However, through its concluding observations, the CRC Committee has elaborated the various elements a competent authority should have in order to comply with the provisions of the CRC.

³²⁶ Newell and Hodgkin, (2007), 295.

³²⁷ Vite and Boechat, (2008), 29

³²⁸ CRC Committee, General Comment No. 5, (2003), para. 44.

³²⁹ CRC Committee, Concluding Observations: Panama, (January 1997), para. 31; Panama, (June 2004), para. 38; Bulgaria, (June 2008), para. 38. See, too, General Comment No. 5, (2003), (para. 53-55) on general training and capacity building requirements necessary for the implementation of the provisions of the CRC.

the Convention. The main institutions that are envisaged under the Hague Convention, and which have the potential to prevent and address illicit activities in intercountry adoption, are Central Authorities, Accredited Bodies, and Approved (non-accredited) Persons and Bodies.³³⁰

6.3.2 Central authorities

One of the added values of the Hague Convention is the requirement to either create, or designate, a Central Authority.³³¹ Each Contracting State is expected to designate a Central Authority that acts as the point of contact, coordination, and responsibility within each country for the implementation of the various duties and activities called for by the Hague Convention.³³²

One of the main tasks of Central Authorities is to “co-operate with each other and promote co-operation amongst the competent authorities in their States to protect children and to achieve the other objects of the Convention”.³³³ And, as already highlighted above, one of the objects of the Hague Convention is “to ensure that ...safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children”. Furthermore, the role of Central Authorities in preventing illicit activities is more explicit in Article 8 of the Hague Convention:

³³⁰ An independent judiciary is a corner stone for the general promotion and protection of children's rights. Thus the role of courts in preventing and addressing illicit activities in intercountry adoptions is crucial. This is clear, for instance, from the experience in Guatemala where many intercountry adoption cases where courts were not involved had been tainted with irregularities. However, the discussion in this sub-section is limited to institutional frameworks (mainly administrative bodies) that have a direct role in intercountry adoptions namely - central authorities, accredited bodies and approved (non-accredited) persons.

³³¹ Art. 6(1) of the Hague Convention.

³³² Art. 6(1) of the Hague Convention.

³³³ Art. 7(1) of the Hague Convention.

Central Authorities shall take, directly or through public authorities, all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention.

Since generally, the successful operation of the Hague Convention depends on Central Authorities, they should be provided with sufficient powers to effectively undertake their obligations. Sufficient powers of Central Authorities should be accompanied with the placement of the Central Authority under or within the appropriate State organ or office that is closely related to intercountry adoption activities.³³⁴

In addition, there is a need to equip a Central Authority with adequate personnel and resources. Experience shows that lack of sufficient support in the form of human and financial resources generally hampers the role of a Central Authority, including with regard to suppressing illicit activities. In relation to Bolivia, for example, the CRC Committee appreciated the State Party's increased control of the adoption procedures, though, it also aired its concern "about the insufficient organizational and human resources provided to the central adoption authority in order to fulfill its function".³³⁵

Even where a State is not a Contracting State to the Hague Convention, (and hence without an explicit obligation to establish or designate a Central Authority as understood in the Hague Convention), the CRC Committee seems to be of the view that there is an obligation to establish or designate a body to oversee and coordinate intercountry adoption. For instance, in its recommendation to Russia, it stated that "the State party

³³⁴ See Permanent Bureau, Guide to Good Practice, (2008), 47.

³³⁵ CRC Committee, Concluding Observations: Bulgaria, (June 2008), para. 37; Dominican Republic, (February 2008), para. 55; Kazakhstan, (June 2007), para. 44(d).

establish a system for the accreditation and control of foreign adoption agencies”.³³⁶ The Russian Federation is not yet a Contracting State to the Hague Convention. A similar situation can be observed in the context of the Democratic Republic of Congo. Despite the fact that the country is not a Contracting State to the Hague Convention, the CRC Committee recommended that it should “[e]stablish a central authority for adoption to regulate, train and monitor all actors involved and coordinate with the relevant legal authorities”.³³⁷

It could then be argued that, by interpretation, the establishment of a central authority is also an obligation under the CRC. The same argument can be made in the context of the ACRWC as the wording in Article 24(d) is similar to Article 21(d) of the CRC.

The involvement of Central Authorities has the capacity to eliminate or to minimise independent adoptions, which, by definition, are adoptions that are conducted strictly or directly between prospective adoptive parents and the birth family without State involvement.³³⁸ As mentioned in Chapter 1,³³⁹ where independent adoptions take place, the possibility of ascertaining whether adoptability, subsidiarity, and other safeguards for intercountry adoption have been complied with, is very difficult. Furthermore, in independent adoption, since authorities in both the receiving country and country of

³³⁶ CRC Committee, Concluding Observations: Russian Federation, (November 2005), para. 43.

³³⁷ CRC Committee, Concluding Observations: Democratic Republic of Congo, (February 2009), para. 48(d).

³³⁸ Permanent Bureau, Guide to Good Practice, (2008), 115-116.

³³⁹ Section 1.3.

origin would not have any supervision of the procedure, it is not possible to regulate improper financial gain and corruption.³⁴⁰

Concern has been raised in the context of Colombia, where only half of intercountry adoptions are administered by its Central Authority, the Colombian Institute for Family Welfare.³⁴¹ The use of private “Adoption Homes” in Colombia, which operate with little or no supervision of the Central Authority and place children for intercountry adoption, has been found to be in contravention of the CRC.³⁴² “Adoption Homes” increase the risk of profit-making contrary to Article 21(d) of the CRC.³⁴³

It could be reasonably speculated that the minimal involvement of “Adoption Homes” in domestic adoptions (only 10%), and their high involvement in intercountry adoption (50%),³⁴⁴ might imply their interest in profit making in intercountry adoption. Legislation that prohibits independent adoptions seems to be congruent with, and encouraged by, the CRC,³⁴⁵ and the ACRWC.

Central Authorities can undertake a number of other measures that prevent or address illicit activities in connection with intercountry adoption. They can, for instance, decide to undertake intercountry adoption activities only to the extent that their capabilities, and the demands of the best interests of children in their jurisdiction, allow. In this respect Central Authorities can limit the number of countries they want to deal with as regards

³⁴⁰ See Permanent Bureau, *Guide to Good Practice*, (2008), 116.

³⁴¹ CRC Committee, *Concluding Observations: Colombia*, (June 2006), para. 56.

³⁴² As above.

³⁴³ As above.

³⁴⁴ CRC Committee, *State Party Report: Colombia*, (August 2005), para. 375.

³⁴⁵ CRC Committee, *Concluding Observations: Georgia*, (June 2008), para. 38; *Costa Rica*, (September 2005), para. 36.

intercountry adoption. For instance, Estonia allows intercountry adoption only to the U.S, Finland and Sweden.³⁴⁶ Similarly, the Government of Lesotho has lifted the suspension of intercountry adoptions only for 4 countries: USA, Sweden, the Netherlands and Canada, and has approved only one adoption agency for each of these countries.³⁴⁷

There is anecdotal evidence that an awareness of the importance of the role of Central Authorities to prevent or address illicit activities is taking root in Africa. For instance, in Liberia, while the outcome of an investigation into alleged irregularities in intercountry adoption by a Commission established by the President of the country was still pending, an *ad hoc* Central Adoption Authority was nevertheless established in 2009.³⁴⁸

6.3.3 Accredited bodies and approved (non-accredited) persons and bodies

According to Article 22(1) of the Hague Convention, it is possible for the functions of the Central Authority set out in Articles 14-21 to be performed by public authorities. The activities in Articles 14-21 are most of the direct, routine activities involved in intercountry adoptions, such as the selection and transfer of the child.³⁴⁹ These authorities, known as “accredited bodies”, should nonetheless meet the requirements of Articles 10, 11, and 32 of the Hague Convention.

³⁴⁶ Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Najat M'jid Maalla: Report on the Mission to Estonia (10 July 2009) para. 49.

³⁴⁷ U.S. Department of State “Intercountry Adoption: Lesotho” (November 2009).

³⁴⁸ CRC Committee, State Party Report: Liberia, (July 2009), para. 160.

³⁴⁹ Pierce, (1996), 542.

In addition, an approved (non-accredited) person might be allowed to perform the functions in Articles 15 - 21.³⁵⁰ As a result, it is important to examine accredited bodies and approved persons and their role in preventing and suppressing illicit activities in the next sub-sections.

The basic standards and requirements for accreditation are established in chapter 3 of the Hague Convention. Article 11 of the Hague Convention provides that:

An accredited body shall -

- a) pursue only non-profit objectives according to such conditions and within such limits as may be established by the competent authorities of the State of accreditation;
- b) be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption; and
- c) be subject to supervision by competent authorities of that State as to its composition, operation and financial situation.

It has been suggested that a country should consider "past practice, efficiency of existing arrangements, or availability of public resources to conduct intercountry adoptions" to determine whether or not to use accredited bodies.³⁵¹ This observation has various implications.

First, it implies that if a central authority has the capacity to undertake all intercountry related tasks effectively without the need for accredited bodies, it may do so. The reference in the above quote to "availability of public resources to conduct intercountry adoptions" seems to refer partly to this capacity of central authorities.

³⁵⁰ See Art. 22(2) of the Hague Convention.
³⁵¹ Permanent Bureau, (August 2005), 6.

Secondly, the number and profile of accredited bodies should correspond with a number of factors in a country of origin.³⁵² They should first correspond with the number and profile of children who are in need of intercountry adoption.³⁵³ This of course requires a good statistical base of these groups of children. In addition, the number and profile of accredited bodies should correspond with the capacity of the competent organ which will accredit, supervise, and/or work with accredited bodies.

Thirdly, the decision to use accredited bodies draws Article 10 of the Hague Convention into the picture. Article 10 provides that “[a]ccreditation shall only be granted to and maintained by bodies demonstrating their competence to carry out properly the tasks with which they may be entrusted”.

Here, it is worth quoting the recommendations on accreditation made by the 2000 Special Commission on the practical operation of the Hague Convention on accreditation:

The following principles should apply to the process by which accreditation is granted under Article 10, to the supervision of accredited bodies provided for in Article 11 c), and to the process of authorisation provided for in Article 12.

- a) The authority or authorities competent to grant accreditation, to supervise accredited bodies or to give authorisations should be designated pursuant to clear legal authority and should have the legal powers and the personnel and material resources necessary to carry out their responsibilities effectively.
- b) The legal powers should include the power to conduct any necessary enquiries and, in the case of a supervising authority, the power to withdraw, or recommend the withdrawal of, an accreditation or authorisation in accordance with law.

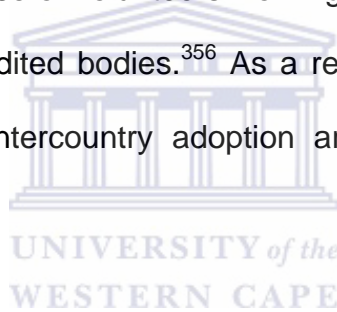
³⁵² Vite and Boechat, (2008), 30.

³⁵³ As above.

c) The criteria of accreditation should be explicit and should be the outcome of a general policy on intercountry adoption.³⁵⁴

These principles form good practice and are crucial in countering illicit activities related to intercountry adoption. It is advisable that they are adhered to by both Contracting and non-Contracting States to the Hague Convention, alike.

France's experience of a "high percentage of intercountry adoptions which are not made through the accredited bodies but through individual channels" has been a cause for concern.³⁵⁵ In addition, the fact "that intercountry adoptions are facilitated by embassies and consulates, including the use of volunteers working with them" has been viewed as undermining the work of accredited bodies.³⁵⁶ As a result it has recommended to the State Party that "[c]ases of intercountry adoption are dealt with by an accredited body".³⁵⁷



It is important to view accredited bodies as guarantors of children's rights. With and under the control of the State, they ensure the existence of professionalism and a multidisciplinary approach in providing information, preparation and support of the child, family of origin and the adoptive family.³⁵⁸ As a result, it is crucial to view the decision by prospective adoptive parents whether or not to resort to an accredited body as reflecting an element of discrimination between children.³⁵⁹

³⁵⁴ Permanent Bureau, Conclusions, (April 2001), para. 23.

³⁵⁵ CRC Committee, Concluding Observations: France (June 2004), para. 33.

³⁵⁶ CRC Committee, Concluding Observations: France, (June 2009), para. 63.

³⁵⁷ CRC Committee, Concluding Observations: France, (June 2009), para. 64(a).

³⁵⁸ Vite and Boechat, (2008), 51.

³⁵⁹ As above.

Non-accredited persons or bodies too can be allowed to arrange adoptions.³⁶⁰ While these persons or bodies are not bound by the requirement of Article 11(a) (“to pursue only non-profit objectives”), they should satisfy certain minimum standards. Even when non-accredited persons and bodies are allowed to arrange adoptions, however, the Central Authority remains responsible for the actions of non-accredited persons or bodies.³⁶¹

It is the U.S. which had vehemently insisted that the Hague Convention should contain wording that would offer sufficient flexibility to meet the needs of U.S. private service providers.³⁶² Despite the Hague Convention’s flexibility, the idea of non-accredited persons being allowed to provide intercountry adoption services while still pursuing for-profit purposes is challengeable. Thus, the fact that persons acting for-profit may be approved to perform central authority functions in the U.S. has been identified as a cause for concern.³⁶³ The State Party has been advised³⁶⁴ to ensure that not only the accredited agencies, but also the approved (non-accredited) persons pursue only non-profit objectives.

It is important to recognise the role of receiving countries in addressing the problem of private adoptions to prevent and address illicit activities on the part of accredited bodies, too. Receiving countries, such as Italy and Norway require prospective adoptive parents to go through an accredited body, except in extremely rare cases (in around 1% of all

³⁶⁰ Art. 22(2) of the Hague Convention.

³⁶¹ See Art 11(c) of the Hague Convention; CRC Committee, Concluding Observations: France, (June 2009), para. 63.

³⁶² Pierce, (1996), 547.

³⁶³ CRC Committee, Concluding Observations: United States of America, (June 2008), para. 30.

³⁶⁴ CRC Committee, Concluding Observations: United States of America, (June 2008), para. 31(b).

intercountry adoptions).³⁶⁵ These rare cases are adoptions by foreign residents in their country of origin where there is no accredited body.³⁶⁶ Unfortunately, the same cannot be said of a good number of receiving countries, such as the U.S., Spain, France, and Switzerland. The following sections highlight some of the experiences from the countries under the study.

6.3.4 Combating illicit activities through Central Authorities, Accredited Bodies and Approved Persons in the countries in the study

6.3.4.1 Ethiopia

Currently in Ethiopia, the MOWA is the central body supervising and regulating intercountry adoption. Until 2007, the MOLSA played this supervisory role. However, while MOLSA had a legislative mandate³⁶⁷ to play this role, the mandate of MOWA does not enjoy any clear backing of the law. Despite this, since MOWA is currently dealing with almost all issues pertaining to children's rights and well-being,³⁶⁸ it is appropriate that it plays the role of a central authority for intercountry adoption purposes, too.

The adoption team in the Children and Youth Affairs Office (CYAO) operating under MOWA is the primary adoption authority in Ethiopia. The team is currently composed of a maximum of four professionals and a team leader.³⁶⁹ Given the large amount of work

³⁶⁵ Terre des Hommes International Federation, (2007), 28.

³⁶⁶ As above.

³⁶⁷ Through Proclamation Nos. 10/1992, 4/1995, and 283/2002.

³⁶⁸ The MOWA has responsibility for all activities regarding children in Ethiopia, including welfare, foster care, domestic adoption, international adoption and investigation of neglect and abuse.

³⁶⁹ Interview with Yenealem Mersha, Adoption Team Leader, MOWA, (25 September 2009); Biniam Eshetu, Legal Expert, MOWA, (25 September 2009).

load, there are preliminary indications that MOWA is planning to recruit more professionals for the office.³⁷⁰

The MOWA has decided to work through adoption agencies. Given the limited human and financial resources MOWA has, the large area coverage of the country, and the magnitude of the problem of children who are deprived of their family environment, working with and through adoption agencies seems an effective *modus operandi*.

Adoption agencies in Ethiopia are registered by the Ministry of Justice. However, before engaging in any adoption services, an adoption agency should also provide a project document and sign an operational agreement with MOWA to provide child welfare and social development activities. It is laudable that the Government requires an operational agreement to be signed between MOWA and adoption agencies³⁷¹ in order to use parts of adoption fees to support the national child care and protection system. However, it is submitted that the follow-up to the implementation of the operational agreements leaves much to be desired.

Unfortunately, the MOWA Guidelines seem to require evidence of human resources, annual budget, and the adoption agency's organisational structure only after the adoption agency is registered by the Ministry of Justice.³⁷² This may have contributed to the growing number of complaints about mismanagement and incompetency in adoption agencies (for instance, country representatives only working on a part time

³⁷⁰ As above.

³⁷¹ Para. 6(4)(3) of the MOWA Guidelines.

³⁷² Para 6(4)(2) of the MOWA Guidelines.

basis, adoption agency personnel not having the pre-requisite qualifications, or adoption agencies being mainly staffed by volunteers and interns).³⁷³

The total number of adoption agencies in Ethiopia is around 75. This raises a number of questions: how can a team of four professionals at MOWA deal with 75 adoption agencies in a meaningful manner? How can they scrutinise and verify so many dossier to establish the adoptability of a child? How can they give efficient advice to the Federal First Instance Court that the adoption is in the best interests of the child (or not)? The large number of adoption agencies in Ethiopia has become an obstacle for MOWA's execution of its supervisory role, which therefore continues to contribute to illicit activities in intercountry adoption.

With around 25 American adoption agencies in Ethiopia referring children to American families, for instance, the American Government warns prospective adoptive parents that “[a]ll agencies are not created equal!”.³⁷⁴ It cautions Americans contemplating adopting in Ethiopia to take great care in selecting an agency.³⁷⁵

The absence of a Central Authority as understood under the Hague Convention has also created a gap in cooperation between Ethiopia and other States in order to prevent, but especially to address, illicit activities. In one instance involving two children who were bought and subsequently adopted to Austria, cooperation between the respective embassies has proved daunting. A series of letter correspondence between

³⁷³ Interview with Yenealem Mersha, Adoption Team Leader, MOWA, (25 September 2009).

³⁷⁴ U.S. Department of State: “Inter-country adoption: Ethiopia” (December 2008).

³⁷⁵ As above.

the embassies did not produce the requested outcome (for example, establishing the views of the children). The frustration on the part of the Ethiopian government about the gap in cooperation can be deciphered from the phrases used in some of the letters.³⁷⁶

Further fuelling the prevalence of illicit activities in adoptions is the fact that Ethiopian law does not prohibit independent and private adoptions.³⁷⁷ This is despite the fact that Article 191(1) of the RFC requires the court not to approve the adoption unless MOWA “gives its opinion that the agreement is beneficial to the child”. Cognisant of the risks that independent and private adoptions pose for children’s rights, some embassies strongly urge their citizens to work with an adoption service provider instead of arranging a direct adoption through an orphanage or family member.³⁷⁸

On a positive note, however, adoption agencies are explicitly barred from establishing or running an orphanage.³⁷⁹ This is in view of the fact that the involvement of organisations which care for children in the process of intercountry adoptions might affect their objectivity, thereby opening room for illicit activities.³⁸⁰

The MOWA Guidelines also establish complaint procedures.³⁸¹ Clients who have complaints against any of the adoption service providers (including MOWA itself) can lodge their complaints. The capacity of such complaints procedures in order to combat

³⁷⁶ Copy on file with writer.

³⁷⁷ See, for example, para. 5(1)(d) of the MOWA Guidelines allowing adoptive families to apply for the approval of an adoption agreement.

³⁷⁸ See, for instance, U.S. Department of State: Adoption processing at the U.S. Embassy in Addis Ababa <http://adoption.state.gov/news/ethiopia.html> (15 October 2009) (accessed 16 October 2009).

³⁷⁹ Para. 6(4)(4) of the MOWA Guidelines.

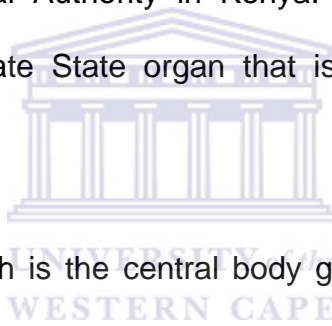
³⁸⁰ For similar comments in the context of South Africa, see Moodley, (2007), 8.

³⁸¹ Para. 11 of the MOWA Guidelines.

illicit activities in relation to intercountry adoption and address irregularities in the adoption system is crucial.

6.3.4.2 Kenya

As already mentioned in Chapter 1,³⁸² in Kenya, it is the Department of Children's Services (DCS) which is the Government agency mandated to provide services for the rights and welfare of children and as stipulated in the Children's Act. The DCS is also the focal organisation for all agencies that work in the children's sector in Kenya. The DCS is the designated Central Authority in Kenya. It is laudable that the DCS is positioned within the appropriate State organ that is closely related to intercountry adoption activities.



The Adoption Committee, which is the central body governing all adoptions in Kenya falls under the DCS, which serves as its Secretariat. Established under Section 155(1) of the Children Act, the Adoption Committee has far reaching powers including formulating the governing policy in matters of adoption;³⁸³ effecting liaison between adoption societies, the Government and NGOs;³⁸⁴ and generally monitoring adoption activities in the country.³⁸⁵ It is submitted that the composition of the Adoption Committee is commendable since it is comprised of representatives of almost all important stakeholders in adoptions.³⁸⁶

³⁸²

Section 1.8.2.

³⁸³

Sec. 155(2)(a) of the Children Act.

³⁸⁴

Sec. 155(2)(b) of the Children Act.

³⁸⁵

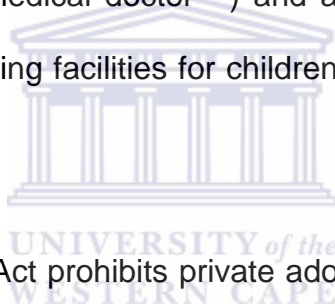
Sec. 155(2)(d) of the Children Act.

³⁸⁶

Schedule nine of the Children Act provides that members of the Adoption Committee shall be the Director of DCS; 4 representatives of Charitable Children's Institutions; 1 representative of

The powers of the Adoption Committee are further bolstered by the Adoption Regulations.³⁸⁷ Of relevance to this chapter is its mandate to register, renew, or cancel registrations of adoption societies.³⁸⁸

The Adoption Committee does not accept an application for the registration of an adoption society unless certain stringent conditions are met.³⁸⁹ These conditions include that the body must be registered as a non-profit organisation and must have undertaken child welfare activities for a period not less than 12 months;³⁹⁰ the body must have capacity (such as a qualified administrator, social worker, and support staff, and access to the services of a qualified medical doctor³⁹¹) and adequate resources (such as an office, a waiting room, and holding facilities for children offered for adoption³⁹²) to carry out adoption arrangements.



Section 177(1) of the Children Act prohibits private adoptions by making the placement of a child for adoption the preserve of registered adoption societies. This explicit prohibition, along with its accompanying penalties in case of violations, carries the potential for preventing illicit activities in adoption.

In contrast to the situation in Ethiopia, there are only five registered local adoption societies in Kenya.³⁹³ Out of these, only three – Little Angels Network, Kenya Children’s

³⁸⁷ Kenyatta National Hospital; 1 representative from a private hospital dealing with children; 1 representative of Law Society of Kenya; 1 representative of MOFA; and the Attorney General.
³⁸⁸ See Regs. 5 of the Adoption Regulations.
³⁸⁹ Regs. 10 of the Adoption Regulations.
³⁹⁰ See Regs. 10 of the Adoption Regulations.
³⁹¹ Regs.10(1)(a-b) of the Adoption Regulations.
³⁹² Regs.10(2) and (3). of the Adoption Regulations.
³⁹³ Regs.10(1)(c) of the Adoption Regulations.
³⁹³ List on file with writer.

Homes, and Child Welfare Society of Kenya - are allowed to facilitate intercountry adoption. In addition, as at 5 March 2009, there were 21 approved foreign adoption societies/agencies,³⁹⁴ all of whom are approved by the Adoption Committee, and are allowed to operate only through an agreement entered with a local adoption society.³⁹⁵

It is interesting to note that the Children Act under Section 177(3)(b)(2) explicitly allows the Adoption Committee to refuse the registration application of an adoption society if it is “not in the public interest to approve the same, having regard to the number of adoption societies already approved and functioning in the particular locality”.³⁹⁶

However, in 2006, the Kenyan Government has reported that many children’s organisations do not have the knowledge that they can be registered as adoption agencies.³⁹⁷ This in turn has reportedly led to the monopoly of adoption agency services by a few organisations who sometimes abuse the adoption system.³⁹⁸ However, it is submitted that this observation by the Kenyan government should be read to highlight the need to increase the number of domestic adoption service providers in order to minimise reliance on intercountry adoption.

Upon registration, an adoption society is supposed to set up an Adoption Case Committee of not less than three and not more than five people, one of whom shall be a social worker.³⁹⁹ In order to avoid conflict of interest, employees of the adoption society

³⁹⁴ List on file with writer.

³⁹⁵ Regs. 24 of the Adoption Regulations.

³⁹⁶ Sec. 177(3)(b)(2) of the Children Act.

³⁹⁷ CRC Committee, State Party Report: Kenya, (July 2006), para. 313(2).

³⁹⁸ As above.

³⁹⁹ Regs. 16(1) of the Adoption Regulations.

shall not be eligible to serve on the case committee.⁴⁰⁰ Adoption applications must be approved by the Adoption Case Committee, leading to an independent, transparent and accountable procedure for the determination of adoption cases.

Despite its explicit power to issue adoption fee schedules,⁴⁰¹ the Adoption Committee can be faulted for not doing so to date. In fact, in Kenya, more focus seems to have been placed on lawyers' fees for representation in adoption proceedings than those charged by adoption societies in Kenya. On a purely speculative basis, this could be because the fees charged by adoption societies are generally considered to be reasonable. Nonetheless, in order to minimise improper financial gains in adoption, the Adoption Committee needs to issue fee schedules.

In case of violations of the Adoption Regulations or relevant provisions of the Children Act, the Adoption Committee is also conferred with the power to stop ongoing adoption arrangements "at any stage"⁴⁰² which is a power crucial for preventing and addressing illicit activities. The Adoption Regulations also carry appropriate penalties, since any person convicted of violating the Regulations shall be liable to imprisonment for a term not exceeding 10 months, or to a fine not exceeding 50,000 Kenyan shillings, or to both.⁴⁰³

⁴⁰⁰ Regs. 16(2) of the Adoption Regulations. However, concerns have been raised about the determination of adoptability by an organisation's social worker without outside input (independent input). Through its work, the case committee is supposed to fill this gap.

⁴⁰¹ Regs. 5(f) of the Adoption Regulations.

⁴⁰² Regs. 28(1) and 33 of the Adoption Regulations.

⁴⁰³ Regs. 36 of the Adoption Regulations.

6.3.4.3 Malawi

In Malawi, the Government organ which is currently playing the role of a Central Authority is the Ministry of Women and Child Development (Department of Social Welfare). It is a competent authority to play such a role, amongst others because it is the main Government ministry responsible for children's affairs.

There are no adoption agencies in Malawi. Therefore, on both occasions Madonna adopted from Malawi, the adoptions were processed without the involvement of adoption agencies.⁴⁰⁴ The Draft Bill too does not envisage any roles for adoption agencies. However, the Discussion Paper and Issues Paper prepared by the Special Law Reform Commission for the review of the Adoption of Children Act identify the potential role that adoption agencies could play.⁴⁰⁵ While the Discussion Paper reckons that an adoption service can function without the assistance of adoption agencies, the effectiveness of such functioning is questioned.⁴⁰⁶ This reservation seems to emanate from the limited capacity and expertise of the Department of Social Welfare to provide effective adoption services.

In recognition of the risks that unregulated adoption agencies could pose to children's best interests, it is proposed that where adoption agencies form part of the adoption service, it should be the duty of the responsible State organ to accredit, supervise and

⁴⁰⁴ However, it is to be noted that in both adoptions, Madonna produced "home study" reports from adoption agencies in her place of habitual residence.

⁴⁰⁵ Malawi Special Law Commission, Discussion Paper, (2009), 26-29; Issues Paper, (2009), 19-23

⁴⁰⁶ Malawi Special Law Commission, Discussion Paper, (2009), 28.

monitor the adoption agencies.⁴⁰⁷ It is also argued that the State authority in charge of children's affairs should be charged with the statutory duty to ensure cooperation with adoption agencies.⁴⁰⁸ The requisite facilities that a State organ or an adoption agency should have in order to provide a child-centred adoption service are also identified.⁴⁰⁹

6.3.4.4 South Africa

The Children's Act provides detailed provisions on the designation and functions of a Central Authority in South Africa.⁴¹⁰ The rules governing the accreditation and regulation of adoption service providers is also catered for by the Children's Act,⁴¹¹ and complemented by the Draft Regulations.

The Children's Act explicitly designates the Director-General of Social Development as the Central Authority in South Africa.⁴¹² Even though the Children's Act has not entered into force fully, the Department of Social Development has been acting as the Interim Central Authority since 2004. However, in the absence of an enabling statute, its powers have been considered weak and its role limited to that of "exercising an advisory and monitoring role".⁴¹³ In accordance with Section 258(1) of the Children Act and the relevant provisions of the Hague Convention, South Africa has further designated the powers and duties of the Central Authority to the Chief Director of Children, Youth and Families, within the Department of Social Development.

⁴⁰⁷ Malawi Special Law Commission, Discussion Paper, (2009), 27

⁴⁰⁸ Malawi Special Law Commission, Discussion Paper, (2009), 26.

⁴⁰⁹ Malawi Special Law Commission, Discussion Paper, (2009), 27.

⁴¹⁰ Secs. 257-258 of the Children's Act.

⁴¹¹ Sec. 259 of the Children's Act.

⁴¹² Sec. 257(1)(a) of the Children's Act.

⁴¹³ *AD v DW* para. 27. See too Couzens, (2009), 57.

In compliance with the Hague Convention, the Children's Act confers sufficient powers and responsibilities on the Central Authority to effectively undertake its obligations. These include the power to delegate certain powers and duties,⁴¹⁴ the mandate to accredit and regulate child protection organisations, and approving adoption working agreements.⁴¹⁵

The Director-General of Social Development is expected to perform its functions as a Central Authority "after consultation with the Director-General: Justice and Constitutional Development".⁴¹⁶ This shows the recognition that issues of intercountry adoption cannot be left as the preserve of one department or government office. In this particular case, the envisaged consultation is crucial since intercountry adoption orders are granted by the children's courts which are administered by the Ministry of Justice and Constitutional Development.⁴¹⁷ By using the phrase "after consultation" which is less onerous than "in consultation with", Human argues that effective inter-sectoral planning and participation is guaranteed, "while at the same time not causing delays due to a constant requirement to consult".⁴¹⁸ It is further submitted that the phrase "after consultation" is meant to indicate that the Director-General of Social Development has the final say and ultimate responsibility in matters pertaining to the role of the Central Authority.

⁴¹⁴ Sec. 358 of the Children's Act.

⁴¹⁵ Sec. 260(2)(b) of the Children's Act.

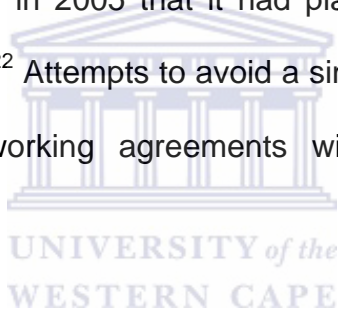
⁴¹⁶ Sec. 257(2) of the Children's Act.

⁴¹⁷ Human, (2007), 16-10.

⁴¹⁸ As above.

Given the quasi-federal arrangement of South Africa's governmental structure, and the relatively wide area coverage of the Republic, the decision to allow accredited child protection organisations to undertake some of the functions of the Central Authority as incorporated in the Hague Convention seems to be a pragmatic move. These bodies are accredited by the Central Authority after meeting the prescribed requirements.⁴¹⁹

An accredited body in South Africa can enter into an adoption working agreement with an accredited agency in another country.⁴²⁰ The adoption working agreement requires the approval of the Central Authority.⁴²¹ In order to effectively dispose its duties, the Central Authority had indicated in 2005 that it had placed a moratorium on any new adoption working agreements.⁴²² Attempts to avoid a single organisation in South Africa having too many adoption working agreements with other countries were also underway.⁴²³



Government has observed instances of improper financial gain by adoption agencies, many of which have reportedly led to disciplinary hearings.⁴²⁴ The Central Authority is empowered by Section 259(2) of the Children's Act to accredit a child protection organisation "for such period and on such conditions as may be prescribed". As a result, the Central Authority can cancel the accreditation of bodies that engage in improper financial gain.⁴²⁵

⁴¹⁹ Sec. 259(1) and (2) of the Children's Act.

⁴²⁰ Sec. 260(1) of the Children's Act.

⁴²¹ Secs. 259(1)(b) and 260(2)(b) of the Children's Act.

⁴²² See response of the South African Government to question No. 17, (2005).

⁴²³ As above.

⁴²⁴ See response of the South African Government to question No. 11(2), (2005).

⁴²⁵ See, for instance, Sec. 284(4) of the Children's Act.

In 2005, Government had indicated its intention to establish a fee cap to be charged by accredited bodies.⁴²⁶ Such a measure would have the support of Section 259(3)(a) of the Children's Act as accredited bodies "may receive the prescribed fees". As a result, Draft Regulations 107 has prescribed the maximum service fees to be charged by accredited bodies. The fact that accredited bodies "must annually submit" their audited financial statements to the Central Authority on fees received and payments made also gives the Central Authority sufficient powers to prevent or address improper financial gains.⁴²⁷

Finally, Section 255 of the Children's Act empowers the President of the Republic to enter into international cooperation agreements with both Hague Convention and non-Hague Convention countries. Cooperation agreements with countries that are not Contracting States to the Hague Convention are more crucial in order to prevent and address illicit activities such as child trafficking.⁴²⁸ Since these non-Hague countries often lack the minimum standards set by the Hague Convention, a framework of bilateral cooperation could go a long way in promoting children's rights in intercountry adoption.

One of the shortcomings of the Children's Act is its failure to explicitly prohibit independent adoptions. However, given the detailed provisions outlining the role of the Central Authority and accredited bodies, there seems to be no possibility for independent adoptions which could hope to be compliant with the provisions of the

⁴²⁶ See response the South African Government to question question No 10(2).

⁴²⁷ Sec. 259(3)(b) of the Children's Act.

⁴²⁸ See Human, (2007), 16-8; Smolin, (2005), 476; Smolin, (2006), 167.

Children's Act. In addition, despite the fact that South Africa failed to make a declaration under Article 22(4) to prohibit the involvement of approved (non-accredited) bodies or persons in intercountry adoptions, under the Children's Act, there seems to be no room for approved (non-accredited) persons (such as private social workers) to facilitate intercountry adoptions.⁴²⁹ The absence of a complaint procedure against agencies breaching the Children's Act and the Hague Convention has also been highlighted as a limitation of the Children's Act.⁴³⁰ Despite these shortcomings, the Children's Act displays the value of ratifying and domesticating the Hague Convention provisions in order to prevent and address some illicit activities that pertain to intercountry adoption.

6.4 CONCLUSION

Intercountry adoption is sometimes characterised by various forms of scandals and irregularities which take on a variety of forms. The main illicit activities involved in the practice include child laundering, which is comprised of child buying, child selling, child stealing, and falsifying paperwork.

However, as this Chapter has demonstrated, there are also subtle, but equally exploitative, illicit activities in respect of intercountry adoption, such as violating the "no initial contact" rule and circumventing adoption procedures through guardianship orders, that should be regulated by law.

⁴²⁹ See Sec. 58(2) of the Children's Act; Couzens, (2009), 73. For a contrary view on this position, see Human, (2007), 16-13.

⁴³⁰ Couzens, (2009), 72.

Various measures that are intended to prevent or address illicit activities in intercountry adoption, such as stringent eligibility criteria, the placing of moratoria on the practice, and prescribing a residency requirement have also been examined in detail. In the interest of space, other measures such as the appointment of a *guardian ad litem* and post-adoption follow up (that are practiced in some of the countries in the study) did not feature in the discussion.

The adoption and implementation of legislation that prevents and addresses illicit activities in intercountry adoption is very crucial for the protection of the best interests of the child. In addition, the absence, or incompetency, of institutional structures might result in the best interests of the children involved in intercountry adoption being compromised, too.



It is possible to decipher from the foregoing discussion that preventing and addressing child laundering in intercountry adoption requires more guidance from the international legal framework than that which the CRC, the ACRWC, and the Hague Convention presently offer. The OPSC and the Palermo Protocol seem to be vital instruments for the endeavour to prevent and address child laundering. As far as the subtle illicit activities, for instance, violating the “no initial contact” rule and securing the necessary informed and free consents are concerned, the Hague Convention seems an essential point of reference.

Some hold that acts such as the selling, buying, or illegally transferring of children for the purpose of adoption, do not constitute trafficking under international law. However, it

was submitted that, albeit through interpretation, this view lacks support from the international framework, especially in relation to the OPSC. In addition, on the basis of Article 24(d) of the ACRWC, it was contended that irrespective of any intention to exploit a child, the sale or trafficking of a child by anyone, including parents and guardians (such as orphanage personnel), amounts to a violation of the ACRWC. The point that States Parties should criminalise and prosecute all actors involved in the selling and buying of children for the purpose of adoption was also made.

Almost all the countries in the study do not have a consolidated legislation that addresses child trafficking. The fact that penalties for child laundering are not severe enough to deter persons who target children for purposes of abduction, trafficking and sale, or other forms of exploitation, compounds the problem.

While combating improper financial gain and corruption in intercountry adoption gives cause for serious concern, formulating methods of achieving this end are not easy to come by. The value of the provisions of the Hague Convention in combating improper financial gain and corruption in adoption was highlighted as worthy of note. Allegations of improper financial gain are present in all the countries in the study, although the provisions of the Children Act of Kenya and the Children's Act of South Africa offer some good examples in addressing the problem to an extent. The *Infant DB* case was used to shed light on some of the complications that may arise pertaining to improper financial gain in adoptions.

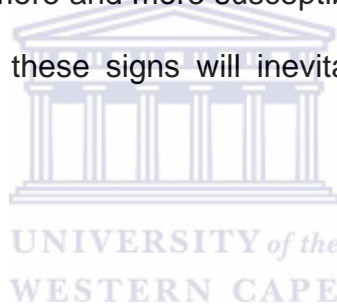
The role of moratoria (restrictions) was also highlighted. It was argued that there may be sound child protection reasons for the imposition of a moratorium, and in the final analysis, whether to impose a moratorium, and for how long, should take into account children's best interests.

The importance of Central Authorities and/or accredited bodies and the kinds of measures they can undertake that prevent or address illicit activities in connection with intercountry adoption was also the focus of this Chapter. An argument was formulated that even where a State is not a Contracting State to the Hague Convention, the CRC Committee seems to be of the view that there is an obligation to establish or designate a body to oversee and coordinate intercountry adoption. The risks posed by independent and private adoptions were also highlighted. However, one central theme that can be distilled from the last sections of Chapter 6 is that, perhaps in Africa more than anywhere else, preventing and addressing illicit activities in respect of intercountry adoption cannot be achieved without the cooperation of receiving countries.

In the past, African countries had held the view that illegal adoptions and trafficking in the context of adoptions were not present in their respective countries. Despite the fact that some commentators undermine the magnitude and impact of illicit activities in relation to intercountry adoption, it could be distilled from the foregoing discussion that illicit activities in respect on intercountry adoption on the African continent pose a great danger to the protection and promotion of children's rights. Some of the examples proffered in this Chapter drive the point home that illicit activities in relation to intercountry adoption are increasingly occurring in different parts of the continent.

Without legislation that proscribes every conceivable loophole, it cannot be asserted that the basic safeguards for undertaking intercountry adoption on the African continent are in place.

The vulnerability (especially economic) of birth families and the inadequacy of legislative and institutional frameworks on the African continent warrants the need for a regulatory framework to prevent and address illicit activities in intercountry adoption in more than the usual way. The increased and large scale (for instance, the Zoe's Ark case involving around 103 children) reported cases that have come to light in recent years are signs that the continent is becoming more and more susceptible to illicit activities in relation to intercountry adoption. Ignoring these signs will inevitably be at the cost of the best interests of our children.



CHAPTER 7

CONCLUSIONS AND RECOMMENDATIONS: TOWARDS AN INTERCOUNTRY ADOPTION REGIME THAT PROTECTS THE BEST INTERESTS OF CHILDREN IN AFRICA

7.1 INTRODUCTION

Intercountry adoption started as a North American philanthropic response to the devastation of Europe in World War II that resulted in thousands of orphaned children. By the 1980s, however, intercountry adoption had begun to be driven as a solution to the problem of childless couples. However, currently, intercountry adoption has evolved from its roots as a humanitarian act into a widely accepted option for childless persons who wish to create a family and is increasingly gaining popularity.¹

At present, there can be few who would quibble with the fact that African children are attracting increasing attention from prospective adoptive parents living in other parts of the world. As the latest figures and statements from a number of South American, Asian and Eastern European countries seem to support the notion that intercountry adoption from those quarters is waning, the African continent is getting more and more attention as a sending continent. While intercountry adoption from African countries is still quite modest compared to adoptions from the top four countries of origin,² there are concrete reasons to believe that interest in adoption from African countries will continue to increase.³ Celebrity adoptions (the adoptions of Angelina Jolie and Madonna) have

¹ Kleiman, (1997), 333.

² Namely China, Russia, Guatemala, and South Korea.

³ Breuning and Ishiyama, (March 2009), 90.

contributed to this increased interest in African children. Thus, Africa is “the new frontier” for intercountry adoption - but it is highly questionable if the continent is equipped to provide its children with the necessary safeguards in respect of the practice.

A central thesis of this study was to explore how the best interests of the African child can be upheld in intercountry adoption. In connection with this thesis, a number of related research questions were raised, such as: does the African context present any peculiar situations that are relevant to intercountry adoption? Does the ACRWC add any value to the provisions of the CRC in addressing African realities relevant for intercountry adoption? What are some of the challenges, lessons, and opportunities for the regulation of intercountry adoption on the African continent?

In order to answer these and the other related questions, the previous Chapters undertook a thematic analysis of certain issues related to intercountry adoption that were deemed to be crucial in the African context. The countries in the study (Ethiopia, Kenya, Malawi and South Africa) were used additionally to explicate the African context further in relation to this thematic analysis. In this Chapter, the main conclusions and recommendations that can be distilled from the study are provided.

7.2 THE RELEVANCE OF SOME ASPECTS OF THE AFRICAN CONTEXTS

In Chapter 2, it was argued that context matters. The Chapter provided a broad overview of the important African contexts that are relevant for children’s access to a family environment, with a focus on intercountry adoption. These included the historical,

social, cultural, religious, economic and legal contexts. These contexts have been used as cross-cutting themes throughout the study including this Chapter, and it is generally submitted that a sound and effective alternative care option, including intercountry adoption, must be grounded firmly in an African context, taking African realities into account.

7.3 CHALLENGES AND OPPORTUNITIES IN THE DISCOURSE SURROUNDING THE INTERNATIONAL LEGAL FRAMEWORK RELATED TO INTERCOUNTRY ADOPTION

The three main international instruments that have a direct bearing on intercountry adoption are the CRC, the ACRWC, and the Hague Convention. In addition to the general principles of the CRC and the ACRWC,⁴ a number of provisions within the CRC and the ACRWC draw upon, reinforce, integrate and complement a variety of other provisions, and cannot be properly understood in isolation from them.⁵ Indeed, examining intercountry adoption without looking at how it has been dealt with at the international level and by other countries outside of Africa is to see but a small portion of the overall picture.

In the context of intercountry adoption, the definition of a child, and the four cardinal principles of the CRC and the ACRWC were highlighted. It was argued that while Article 3(1) of the CRC and Article 4(1) of the ACRWC are substantially equivalent, the latter provides that the best interests of the child should be the primary consideration. As a

⁴ Also referred to as the “four cardinal principles” or the “four pillars”. See Chapter 3, section 3.3 for detailed discussion of these principles.

⁵ See, for instance, CRC Committee, General Comment No. 1, (2001), para. 6 in the context of the right to education.

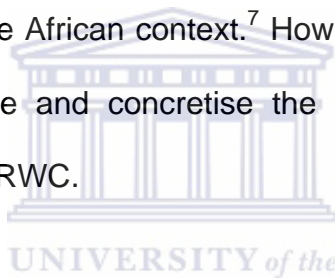
result, it was submitted that African countries that are States Parties to the ACRWC have an even greater obligation to promote the best interests of children than non-States Parties elsewhere.

Based on the premise that it is not uncommon to regard intercountry adoption as a “life saving” act for the child, the following question was posed: can not allowing intercountry adoption in a specific case lead to the inference that the right to life is violated? In this respect, the arguments in the *Infant CJ* case in Malawi were reiterated, and it was concluded that in the absence of more compelling evidence that the denial of an intercountry adoption order would truly compromise the right to life of a child, an argument invoking the right to life seems untenable.

Reiterating the interconnectedness of children’s rights, particularly the four cardinal principles of the CRC and the ACRWC, it was observed that “the ‘best interests’ of the child cannot be defined without consideration of the child’s views”.⁶ In an implicit acknowledgment that children’s levels of understanding are not uniformly linked to their biological age, the CRC and the ACRWC require that due weight be given to the age and maturity of the child. Article 12 of the CRC makes it clear that age alone cannot determine the significance of a child’s views. Despite this, a good number of African countries provide a minimum age for child participation, including for adoption purposes. It was argued that, assessed against the provisions of the CRC and the ACRWC, such minimum ages risk being non-compliant with the norms related to “the evolving capacities of the child”.

⁶ CRC Committee, General Comment No. 12, (2009), para. 56.

Other provisions of the ACRWC (than the provisions of the CRC) have been understood as recognising the role of the extended family and of communities in the care of African children. These provisions have reinforced a wider notion of a “family”, as discussed in detail in Chapter 2. In this respect, it has been argued that the care provided to African children by those who fall within the definition of “family” in terms of the ACRWC could qualify as constituting care within a “family environment”. In connection with this, the importance and implications of the recognition of child-headed households as a family environment in the African context were also broached. It was submitted that, generally, child-headed households can benefit from financial and supervisory support and can form a family environment in the African context.⁷ However, there still is a need for the African Committee to elaborate and concretise the understanding of the notion of “family” in the context of the ACRWC.



A fundamental area where clarification was crucial, as far as the international legal framework is concerned, was whether there is an international law obligation to provide for intercountry adoption as an alternative means of care; and whether there is a “right” to adopt and a “right” to be adopted. There are very influential voices, especially in the Western world, that would argue that the answer to all three questions is in the positive. In the final analysis, however, it has been demonstrated that a close reading of the carefully crafted wording of Article 21 of the CRC and Article 24 of the ACRWC reveals that no country, by virtue of it being a State Party to the CRC or the ACRWC, is under an automatic international obligation to allow intercountry adoption as a means of alternative care. The Hague Convention supports a similar interpretation. In addition,

⁷ See Chapter 3, section 3.4.2.3 for a detailed discussion of this.

the arguments for a general right to adopt and a right to be adopted have been found to lack the backing of international human rights law. It has been asserted that, even in the context of efforts to tackle discrimination on the basis of sexual orientation in relation to adoption, the proper terminology is not “the right to adopt”, but rather “the right to be assessed as a prospective adoptive parent”.

Culture, and cultural identity, occupy an elevated place in the majority of African societies. Therefore, taking culture into account in intercountry adoption is inevitable in order to protect the identity rights of African children. However, it has been argued that culture cannot, and should not, be used as a smokescreen to deny children their right to grow up in a family environment, when that family can only be found abroad. For instance, it has been argued that using the concepts of “continuity” and “background” under Article 20(3) of the CRC and Article 25(3) of the ACRWC to support the case for the primacy of cultural identity, and serve as a ground for prohibiting or undermining intercountry adoptions as an alternative means of care, is not valid. Article 25(3) of the ACRWC has been interpreted by this writer to reflect the view that if the best interests of the child mean anything at all, let alone being “the paramount consideration”, preserving cultural identity should be seen as a means, and not necessarily as an end in itself, in considering alternative care for children deprived of their family environment.

Chapter 3 generally emphasised the dynamic character of international human rights law and the evolution of rights. In other words, human rights are not static, but rather evolve and adapt to new circumstances. It is submitted that it is indisputable that the CRC and the ACRWC have benefited from this evolution. However, the need to

investigate further the normative content they embody to have a better understanding of the scope, nature, and limitations of children's rights in the context of intercountry adoption continues to exist.

7.4 ADOPTING A CLEAR DEFINITION OF ADOPTABILITY

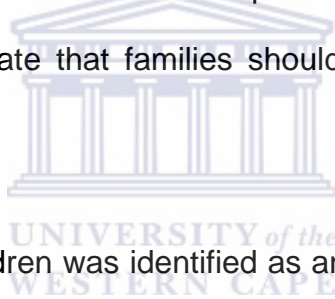
In Chapter 4, an attempt was made to arrive at a clarification of the concept of adoptability in order to serve the best interests of the African child. After a brief overview of the concept of adoptability, the main reasons why a proper determination of adoptability is very important, were investigated. This was followed by an examination of the relevant international legal frameworks pertaining to adoptability. Subsequently, different themes were discussed including: termination of parental rights including through a decision of a competent authority; abandonment; and relinquishment; orphanhood and poverty as grounds for adoptability; the adoptability of refugee children, special needs/hard-to-place children, and children who have a Muslim background formed specific points in this Chapter.

It was emphasised that a clear definition and understanding of who is adoptable is vital so that the concept of “adoptable children” is not confused with the category of “children currently in out-of-home care”. The general assertion that there are “millions on millions” of children awaiting adoptive families in Africa was challenged as misleading.

It was also submitted that, apart from the legal criteria, other factors such as medical, psychological and social aspects of adoptability need to be addressed in implementing the relevant legislation. In addition, in the determination of adoptability, one of the

central elements that the CRC and the ACRWC recognise is the importance of the views of the child.

As the discussion in Chapter 4 showed, two issues that proved to be controversial are the adoptability of so called “social orphans”, and poverty as a ground for adoptability. Domestic legislation in some countries expressly provides that poverty cannot be a sufficient ground for declaring a child adoptable. It was argued that poverty alone as a ground for adoptability is not considered to be in accordance with the provisions of the CRC and the ACRWC. Thus, when poverty is the main reason why parental responsibility is terminated or abandonment/relinquishment is chosen, the rule requiring family preservation should dictate that families should be offered support in keeping their children.



The adoptability of refugee children was identified as an issue that requires a high level of caution. Therefore, in general, it was submitted that refugee children are not adoptable. And, while some refugee children could benefit from intercountry adoption, their adoptability should be determined in a very circumspect manner. The point was made that unaccompanied or separated children must not be adopted in haste at the height of an emergency.

The general non-adoptability of Muslim children was also underscored, and it was argued that such a position would not be in violation of international law. Where Muslim

children are deprived of their family environments, they could benefit from the practice of *kafalah*.⁸

The analysis of adoptability in the countries in the study has highlighted some gaps and opportunities. The general observation was that the legislation of the majority of the countries in the study did not have clear guidance on adoptability. As a result, the risk that those children who are genuinely in need of adoption (for instance, disabled children) might be falling between the cracks, while those that fit the expressed preference of prospective adoptive parents' requirements (for instance, girls below the age of one) are adopted is real.

7.5 A PRINCIPLED APPROACH TO THE PRINCIPLE OF SUBSIDIARITY?

As one of the fundamental principles of intercountry adoption, a Chapter was devoted to the principle of subsidiarity (Chapter 5). Despite the limited meaning accorded to the principle by the CRC Committee, the discussion in Chapter 5 indicates that there is a need to accord the principle an expansive meaning. This expansive meaning should include an interpretation that requires States to strengthen families in the country of origin through various interventions, such as cash transfers and social grants.

The principle of subsidiarity, apart from providing children the opportunity to remain with their family of origin and facilitating the enjoyment of their cultural identity, offers an opportunity to the authorities of the child's country to respond to the needs of their own children first.

⁸ See Chapter 2, section 2.4 for a brief discussion of *kafalah* in Africa.

While the general ranking enjoyed by domestic adoption in the hierarchy of alternative care options available is the least contested one, it has also been cautioned that this (generally) preferential position of domestic adoption needs qualification so as to accommodate exceptional circumstances. The general preference for the adoption of a Tswana child by a family from Botswana (which would constitute intercountry adoption) over a white family from the Free State in South Africa has been but one example used to demonstrate an exceptional circumstance.⁹

It has been submitted that the negative approach of the CRC Committee towards the so-called “informal adoptions” (sometimes going as far as asking African States Parties to prevent the practice) that are prevalent in Africa can be labelled Eurocentric. There is no clear indication that “informal adoptions” are inherently in violation of the provisions of the CRC. This negative approach also loses sight of the fact that the list of alternative care options provided for in Article 20 of the CRC is not exhaustive. In fact, the inclusion of *kafalah* in this list by the drafters of the CRC should communicate the message that there is a need to accommodate various cultural and religious practices of care that are not inherently in violation of the CRC.

There is overwhelming evidence that institutionalisation, especially in the long term, has detrimental effects on children’s survival and development. This is the main reason why it has been submitted that neither the CRC and the ACRWC nor the Hague Convention generally support the use of institutionalisation as a care (especially long term) option. It was argued that the Hague Convention makes institutionalisation subsidiary to

⁹ See Chapter 5, section 5.4.2.2 for the details of this example.

intercountry adoption. The systematic planning and establishment of new institutions as a priority to cater for children deprived of their family environment, instead of supporting families or community based care options, was criticised. However, caution was urged, since the limited recognition of institutions within the CRC and the ACRWC is indicative of the fact that they could (and sometimes should) play some role in child care. Within the ambit of institutional care, the importance of family-type care arrangements are strongly emphasised, too.

In relation to the debate over the principle of subsidiarity, the operative language that has emerged has been that intercountry adoption should be used as a measure of “last resort”. It has been underscored that the CRC Committee’s stance on the notion of “last resort” is somewhat confusing, and calls for further clarification. Some light was also shed on the fact that generally it is institutionalisation that should be considered as a measure of last resort. There is a need for the CRC Committee to clearly articulate its position on the issue (perhaps through a General Comment), and thereby contribute towards States Parties’ understanding of the place of intercountry adoption within the alternative care scheme.

It was submitted that the notion of “intercountry adoption as a measure of last resort” should be read to mean “intercountry adoption as being generally subsidiary to other alternative means of care”, but subject to exceptions. Furthermore, it is important to understand that the “last resort” language is relative, and depends on what options are in fact available as alternative care. In addition, “last resort” should not mean “when all other possibilities are exhausted”. A checklist approach, where all available care options

are to be pursued first before intercountry adoption is considered, would be contrary to the assumption that the permanent placement of children at a very young age is an important goal. An understanding of “last resort” that does not hinder legally appropriate early placement should be fostered. In addition, child participation, depending on the evolving capacities of the child, should be allowed to play a role. It was also contended that a pre-determined inflexible formula for the sake of certainty, irrespective of the circumstances, could in fact be contrary to the best interests of the individual child concerned.

7.6 ILLICIT ACTIVITIES IN INTERCOUNTRY ADOPTION ARE INCREASINGLY KNOCKING ON AFRICA’S DOOR

Some commentators undermine the magnitude and impact of illicit activities in relation to intercountry adoption. There is a growing and concerted criticism that sending countries do not design their adoption laws to specifically facilitate intercountry adoption, and that the resulting laws create significant impediments to intercountry adoption.¹⁰ However, as was highlighted in Chapter 6, the practices of illicit activities in intercountry adoption in Africa is manifested in various forms and degrees, and place children’s rights in great jeopardy.

In the context of illicit activities in relation to intercountry adoption, most African countries do not even have the basic requirements in place. Trafficking legislation in a number of African countries is still in draft form. Institutional frameworks to safeguard children’s rights are either not present, or lack the necessary mandates and capacity to

¹⁰ See, for instance, Bartholet, (1993), 89-103.

perform their tasks. As a result, concerns that caution needs to be exercised to avoid over-regulation of intercountry adoption in the context of Africa are often not valid.

The question for African countries is not whether to regulate or not to regulate intercountry adoption. Rather, the regulation of intercountry adoption should address the dire need to fill every conceivable legislative loophole. It is recommended that the failure to address every possible legislative gap should be viewed as slippery slope, which inevitably leads to a chain which perpetuates of the violation of children's rights, culminating in a generally broken intercountry adoption system that is marred by irregularities. It was highlighted that, apart from child laundering, other subtle illicit activities such as violating the "no initial contact" rule, overlooking improper financial gains and corruption, and allowing independent and private adoptions, should be regulated by law. In other words, a failure to regulate intercountry adoption in Africa in a more than usually comprehensive way potentially leads to a situation where adoption can become a vast, profit-driven, industry with children as the commodity.

As was shown in Chapter 6, the capacity of the Hague Convention to address illicit activities, and in particular, child laundering, is limited. This limitation emanates mainly from the fact that the Hague Convention is predominantly a procedural treaty and does not entrench a great number of substantive rights. As a result, it was identified that in order to prevent and address illicit activities in intercountry adoption, the Hague Convention needs to be complemented, amongst other treaties, by the ratification and implementation of the OPSC and the Palermo Protocol.

The instances of illicit activities in Chad, Egypt, Ethiopia, Kenya, Rwanda, and Mauritius detailed in this thesis should be viewed as the tip of the iceberg. Therefore, the issue of illicit activities in intercountry adoption from Africa is not only about the cases we know of, but also about those of which we do not know. While the lessons from these instances have informed debate about the extent of trafficking in intercountry adoption, additional investigation by governmental and international bodies would further the discussion and knowledge of the extent to which these situations prevail, and more importantly, how to eliminate them through precise targeted legal means.

It is recommended that the recognition that the buying and selling of children for adoption purposes constitutes a serious form of exploitation, thereby making it tantamount to human trafficking, should be given serious consideration by governments. The continued perpetuation of illicit activities in intercountry adoption with impunity creates a sense of normalcy which might ultimately lead to a completely commercialised and profit-centred practice.

7.7 THE CRUCIAL ROLE OF HARMONISATION AND THE NEED FOR COMPREHENSIVE CHILD LAWS

7.7.1 Harmonisation and comprehensive child laws

In Chapter 2 (African context), it was pointed out that law reform in African countries to domesticate the CRC and the ACRWC, and to modernise and codify a myriad of outdated statutes affecting children, is, in many instances, still ongoing.¹¹ The point was made that many African countries come with diverse backgrounds that encompass

¹¹ Sloth-Nielsen, (2008b), 1.

additional hurdles to ensuring that the legacies of colonial, customary, and *sharia* laws are consistent with the principles and provisions of the CRC and the ACRWC.

States Parties are required to undertake a comprehensive legislative reform that examines the whole spectrum of legislation and regulations that affect the realisation of children's rights. Indeed, a comprehensive and consultative review of existing legislation seems the most common and effective way to begin the harmonisation process. Apart from putting the law in place, necessary measures to effectively implement the same – such as regulations, institutions, policies, and budget allocations¹² should accompany law reform.¹³

A comprehensive child law has various advantages: it is accessible; it facilitates certainty; it saves time; and it is usually relatively up to date. These are all characteristics that stakeholders, such as the judiciary, the legislator, the executive, civil society, academia and children themselves, find helpful in promoting and protecting children's rights.

It is generally considered good practice to explicitly mention the four cardinal principles of the CRC and the ACRWC in legislation. It should also be noted that harmonisation requires more than just copying the text of the CRC and the ACRWC; each CRC provision must be translated into concrete and specific rules within the context of national legislation.¹⁴ If the opportunity to constitutionalise some rights and principles of

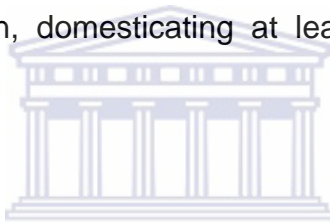
¹² See Chapter 2, sections 2.5.2 and 2.6.5 for further details on budgeting for children.

¹³ UNICEF, (2008c), 2.

¹⁴ ACPF, (2008c).

children's rights exists, it should be seized. A provision that explicitly states that where there is conflict between domestic law and the CRC and the ACRWC (or generally international law on children's rights) provisions, the latter prevails, would be highly advantageous and progressive.

In the context of child law reform to establish safeguards in intercountry adoption, efforts should go beyond domesticating only the CRC and the ACRWC. Other crucial instruments such as the OPSC, the Hague Convention, and the Palermo Protocol should also be taken into account. As the experience of Kenya shows, even before ratifying the Hague Convention, domesticating at least some of its standards pays dividends.



It is apparent from Chapter 3 that rights related to intercountry adoption cut across both civil and political rights, on the one hand, and socio-economic and cultural rights, on the other. Indeed, it has been demonstrated in Chapter 3 that children's rights in intercountry adoption provide a classic example epitomising the indivisibility and interdependence of children's rights.

As a result, for instance, the promulgation of separate legislation on adoption and/or intercountry adoption in the absence of a children's act addressing various aspects of children's rights, might be regarded as falling short of promoting and protecting children's rights fully. From the countries under the study, it is possible to discern that South Africa and Kenya seem to have improved safeguards for children in relation to intercountry adoption, not only because they have ratified the Hague Convention, but

also because each has a comprehensive child statute addressing various aspects of children's rights.

In the context of intercountry adoption (and other themes, too), as the South African experience shows,¹⁵ the domestication of justiciable socio-economic rights can go a long way to addressing the challenges posed by children's deprivation of their family environment. But on their own, social policies to address the economic challenges of vulnerable children and their families are not enough. There are indeed instances in a number of African countries where various forms of social assistance are provided for vulnerable children and families.¹⁶ It is, however, crucial to remember that social policies alone may be unsustainable in changing deep-rooted conditions, or capricious if aligned very strongly with the group in power.¹⁷ It is submitted that the incorporation of justiciable socio-economic rights in domestic jurisprudence is crucial, because social policies deriving from law can have more permanence and sustainability than those created by discretionary action within the executive branch of government.¹⁸

A consultative and participatory harmonisation process has also been identified as constituting good practice. Doek suggests making review of legislation a process in which civil society is involved as much as possible. However, he urges a word of caution about consultation: "...make sure that the process does not take years or result in a watered-down outcome. In an effort to please everybody, it is possible that nobody

¹⁵ See, for instance, Sloth-Nielsen and Mbazira, (2007).

¹⁶ Cash transfers in Kenya, school feeding schemes in Malawi and food rationing in Ethiopia for vulnerable families.

¹⁷ UNICEF, (2008c), 21.

¹⁸ As above.

will be satisfied”.¹⁹ This is a point worth heeding, especially in light of the large number of Bills in a number of African countries that await finalisation.

Indeed, no harmonisation of child law is possible unless it is politically feasible. How to get public and political agreement on the underlying issues which will support any harmonisation is not easy to facilitate. However, undertaking a consultative and participatory child law reform process does not only embed legitimacy upon the final outcome, but also serves as an opportunity to raise awareness on the part of the public of some important issues, such as the plight of children deprived of their family environment, the importance of birth registration, and so forth.

The problem of children deprived of their family environment cannot be addressed simply by the promulgation of new standards. In fact, it could be argued that continued stress only on legislation on intercountry adoption might actually serve to obfuscate the issue. Since some of the accompanying problems that lead to children’s deprivation of their family environment are social, cultural and often man-made (for instance de facto discrimination; abandonment; armed conflict etc.), ongoing efforts should be undertaken to educate communities, and improve the socio-economic conditions of vulnerable children and their families as a necessary accompaniment to adoption law reform.

¹⁹ ACPF, (2008c), 7.

7.7.2 Africanisation of child law

As argued elsewhere,²⁰ African child laws must be carefully crafted to sufficiently respond to the needs and socio-economic and cultural circumstances of the people to whom they apply. For the purpose of this study, the Africanisation of child law demands the domestication of provisions that support positive cultures and practices, as outlined in Chapter 2, and that contribute to alleviating children's deprivation of their family environment. These include recognising and supporting the role of the extended family; prioritising community based care as a form of alternative care; facilitating kinship care and, contrary to the position of the CRC Committee, providing a legal basis for supporting so-called "informal adoptions" when they are in the best interests of the child.

Even the domestication of the notion of the duties of the child,²¹ as incorporated in Article 31 of the ACRWC, has a role to play in supporting child care and contributing towards reducing the possibilities of children's deprivation of their family environment. For instance, the duties of the child could imply that older children, having regard to their capacity and without compromising the rights in the ACRWC, could take care of younger children (siblings).²²

Therefore, it is recommended that, in their efforts to harmonise child laws, African States should make a concerted effort to consult all stakeholders, and capitalise on positive African cultures that have a bearing on child care. The result of a culturally

²⁰ Sloth-Nielsen *et al.* (2009), 6-16.

²¹ See Sloth-Nielsen and Mezmur, (2008c), for a detailed discussion of Art. 31 of the ACRWC on the duties of the African child and their various positive implications for children's rights in Africa.

²² See Chapter 3, section 3.4.2.3 for a discussion on the role of children in child-headed households.

sensitive approach to harmonisation of laws could reduce the risk of children being deprived of their family environment, and the issue of intercountry adoption would therefore not arise often.

7.7.3 Child law reform as a tool for development

The comprehensive role that Sloth-Nielsen envisages for child law reform processes in Africa is also instructive. She contends that child law reform processes in most African countries have been accompanied by an implicit understanding that the law is a platform or tool for development – there would be no expectation of instant realisation.²³

Citing her previous note made in the context of South Sudan, she submits that:

...it seems that there is much benefit to be derived from starting with a clear policy concerning needs and priorities, captured in statutory form. For a start, establishing a birth registration system and introducing a compulsory registration drive may over time improve children's access to health care and education. Addressing parental responsibilities through the lens of equality may ultimately lead to enhanced women's rights – under customary law women have no rights to their children. The progressive introduction of a minimum age of marriage may slowly increase the exceptionally early age at which most girls experience their first pregnancy...²⁴

Her contention that child law reform is not only an undertaking to domesticate the CRC and ACRWC, but is in fact a key policy planning instrument which is a pre-condition to strengthening children's rights,²⁵ including of those who are deprived of their family environment, is valid in the African context.

²³ Sloth-Nielsen, (2007), 104.

²⁴ Sloth-Nielsen, (2005).

²⁵ Sloth-Nielsen, (2007), 105.

In addition to Sloth-Nielsen's observations, it is further submitted that the passage of legislation serves the purpose of demonstrating at least initial political will on the part of government. The presence of such a political will facilitates the creation of a platform for non-legal measures (such as, awareness raising and capacity building) that should indeed be considered an essential companion of the law in order to ensure that it is enforced effectively.

7.8 THE ACRWC, THE AFRICAN COMMITTEE, AND THE NEED AND POTENTIAL FOR A REGIONAL CHILD RIGHTS JURISPRUDENCE

One of the theses of this study has been to enquire as to whether the ACRWC ushers in any added value for the protection of children's rights, more particularly in respect of intercountry adoption. Based on the discussions in the preceding Chapters, it is possible to conclude that the ACRWC entrenches higher normative standards than the CRC that are relevant for intercountry adoption, and if domesticated and implemented, it has the potential to further promote children's rights.

It is not original to state that the ACRWC is a potentially powerful tool in enhancing the lives of millions of African children. As early as 1995, Van Bueren called it "the most progressive of the treaties on the rights of the child".²⁶ There are only a few areas where the CRC offers a higher normative standard than the ACRWC.²⁷ Issues pertaining to intercountry adoption are not listed among them. Nevertheless, the provisions of the ACRWC, such as definition of a child, the best interests of the child, inclusion of the

²⁶ Van Bueren, (1995), 402.

²⁷ For instance, in the sphere of juvenile justice.

phrase “last resort” in Article 24(b),²⁸ the need to find “alternative family care”,²⁹ the explicit mention of “trafficking” in Article 24(d), and the requirement to establish a post-adoption follow-up system, are progressive provisions that are tailored to address African realities.

Apart from the ACRWC’s substantive provisions, an examination of the supervision machinery that it sets in place through the African Committee (particularly by way of the individual complaints mechanism) is even more appealing for promoting and protecting children’s rights in Africa.³⁰ Although the actual work of the African Committee is still in its infancy, with the necessary financial and technical support, it can prove to be a major tool for promoting and protecting children's rights in adoptions in Africa.

One of the cornerstones for a successful reporting procedure is the willingness of governments to fulfill their reporting obligations in an accurate way, i.e. in time and via submitting a report of good quality. Clearly, the quality of the reports determines the quality of the debate between government representatives and the African Committee. In the context of intercountry adoption, the starting point for governments to be able to submit comprehensive reports is their initial understanding of the normative framework of the ACRWC. As a result, it is recommended that a concerted effort needs to be made to draw the attention of States Parties to these normative standards that the ACRWC entrenches.

²⁸ See Chapter 5, section 5.4.2.5 for a discussion of this.

²⁹ See Chapter 3, section 3.4.2.4 for a discussion on the implication of the phrase “alternative family care”.

³⁰ See, Mezmur, (2006), 550.

In connection with the African Committee, the role of regional courts for the promotion and protection of children's rights is very significant. The practice of the European Court and the Inter-American Court testifies to this fact. In Africa, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) entered into force on 25 January 2004. African intergovernmental organisations, including the African Committee, may also submit cases to the African Court. By undertaking comparative research with regard to other regional courts, it may be possible to find suggestions as to how to positively influence the jurisprudence of the African Court for the advancement of children's rights in Africa in the intercountry adoption domain.

As it is highlighted in section 7.3 above, in the face of the need for a more concrete child rights jurisprudence in relation to intercountry adoption, one struggles to find space to infuse relevant African contexts into the international jurisprudence. It is submitted that this state of affairs highlights the need to develop an “Africa specific” child rights jurisprudence through the work of the African Committee, the African Court as well as academic discourses.

7.9 THE POTENTIAL RISKS OF JUDGE-MADE LAW IN RELATION TO INTERCOUNTRY ADOPTION

Chapter 2 has alluded to the absence of comprehensive and up to date laws on intercountry adoption in most parts of the African continent. As a result of this, inevitably, the judiciary has played, and will continue to play, a significant role in intercountry adoption rulings.

The risks of judge-made law on fundamental rules and principles of intercountry adoption are manifold. To start with, this would certainly lead to divergent judicial approaches to intercountry adoption regionally and continentally. The potential for inconsistencies (and sometimes incoherence) in the interpretation and application of the principles and rules governing intercountry adoptions has already been demonstrated in the *Infant CJ* cases. “Forum shopping” is a risk that cannot be discounted, too.

It is also not possible to assume that members of the judiciary are well versed in children’s rights (let alone intercountry adoption). As has been argued elsewhere,³¹ the fact that intercountry adoption is a specialised field within children’s rights (which in itself is a specialisation within the general human rights sphere), and even within adoption generally, makes it an area that begs for detailed and comprehensive legislative guidance and regulation. For instance, the assertion by the SCA in Malawi that the Adoption Act of 1968 is sufficient to regulate intercountry adoption is an exaggeration,³² and betrays a parochial view of the more fundamental safeguards needed to undertake the practice.

It is also important to bear in mind that retrogressive forces within the judiciary might use the law contrary to children’s best interests. This risk is compounded by the fact that the subject of intercountry adoption is a sensitive area of child law. It is sometimes politicised, and is highly susceptible to a value-laden appraisal.

³¹ Sloth-Nielsen and Mezmur, (2007a), 97.

³² See CRC Committee, State Party Report: Malawi, (July 2008), para. 45 where the CRC Committee “expresses its concern over legislation on adoption which is not in compliance with article 21 and other relevant provisions of the Convention”.

In addition, even in the presence of progressive members of the judiciary, there cannot be a guarantee that its judgments will be respected. Questions of the legitimacy of judges encroaching on the mandates of other branches of government; and overturning the will of the people without representation might adversely affect the implementation of rulings. It is therefore recommended that reliance on judge made law should be avoided to the extent possible, and as argued in section 7.7 of this Chapter, domestic legislation compliant with international standards should be the preferred regulatory context.

Finally, intercountry adoption requires cooperation and mutual recognition (of the effects of an adoption) between States. There can be few who would quibble with the assertion that this system of cooperation and mutual recognition amongst Contracting States helps to ensure that those safeguards upholding the child's best interests are secured. In connection with this, as argued elsewhere,³³ the judiciary is not the appropriate organ to create comity between States in the sphere of intercountry adoption. Instead of attempting to create comity and mutual recognition on an *ad hoc* basis by courts, it is better that it is rather determined definitively in advance by the executive and legislative branches of government. Since cooperation and mutual recognition contemplates the prospect that Central Authorities might have preferred working relationships, the executive and legislative organs of government are better poised to determine these preferred working relationships which might be dictated by any number of reasons (language, culture, proximity, prior good relationships between government agencies or adoption service providers, and so forth).

³³ Sloth-Nielsen and Mezmur, (2007b), 89-92.

7.10 THE ROLE OF THE PERMANENT BUREAU

The role of the Permanent Bureau for the ratification and implementation of the Hague Convention is crucial. In this respect, just recently, the Permanent Bureau has given technical assistance to Namibia. In this regard, apart from urging States Parties to ratify the Hague Convention, the CRC Committee should also, in a more systematic and consistent manner, continue to advise States Parties to seek technical assistance from the Permanent Bureau.

The Francophone Seminar on the Hague Convention, which was organised by the Hague Conference on Private International Law (in partnership with other organisations) from 22-26 June 2009 is worthy of mention. This seminar brought together experts and judges (mainly from French-speaking African countries which are Contracting States to the Hague Convention) in order to promote a good understanding of the Hague Convention.³⁴ A similar seminar was organised in 2007.³⁵ In addition, the African Judicial Seminar at the Hague (2006) in the context of the Hague Project for International Co-operation and the Protection of Children in the Southern and Eastern African Region – which explored the role of the Hague Conventions in the practical implementation of the CRC and the ACRWC is also notable.³⁶ A planned conference for February 2010 for Eastern and Southern Africa on the Hague Children's Conventions, which will focus on the benefits of the Conventions for the Region as a whole, as well as practical aspects of implementation, is also exemplary.

³⁴ For further details see

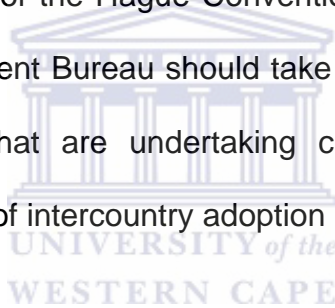
<http://www.hcch.net/index_en.php?act=events.details&year=2009&varevent=168>.

³⁵ See <http://www.hcch.net/index_en.php?act=events.details&year=2007&varevent=134>.

³⁶ See <http://www.hcch.net/index_en.php?act=events.details&year=2006&varevent=119>.

The potential of these kinds of events to improve the implementation of the Hague Convention in Africa, and attract other States to ratify the treaty, is crucial. These events also help to profile the advantages of the Hague Convention; offer a platform for networking and dialogue; and assist in identifying regional and sub-regional challenges and opportunities to improve the cross-border protection of children. Such events can also be seen as capacity building exercises, contributing to the expertise of stakeholders (such as judges) on the implementation of the Hague Convention.

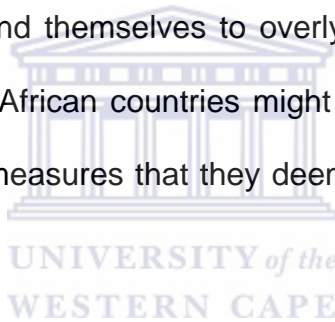
All these constitute laudable efforts that need to be sustained in order to maximise the ratification and implementation of the Hague Convention on the African continent. It is recommended that the Permanent Bureau should take further proactive steps, such as identifying African countries that are undertaking child law reforms, and offering technical assistance in respect of intercountry adoption related laws or provisions.



7.11 CAN BILATERAL AGREEMENTS ACHIEVE THE GOAL OF REGULATING INTERCOUNTRY ADOPTION?

In order to regulate intercountry adoption, one option available to States is to enter into bilateral co-operation agreements. As discussed in section 3.4.3.3.3 of Chapter 3, this does indeed enjoy legislative support. It is advisable that bilateral agreements should preferably reflect the standards of the Hague Convention. This entails using the principles, requirements, and wording of the Hague Convention in the texts of such bilateral agreement as much as possible.

Generally speaking, bilateral agreements enable mainly sending countries that are not Contracting States to the Hague Convention to attain the Convention's goals without going through all of the burdensome requirements that would inevitably prevent the country from being able to fully implement the Hague Convention. Bilateral agreements might be a viable solution for under-developed countries that cannot finance the full implementation of the Hague Convention. A bilateral agreement has the potential to address more appropriately the specific issues of individual nations, and sometimes might create an even more efficient process than the Hague Convention. This conclusion is premised on the fact that the diversity and country specific aspects of intercountry adoption do not lend themselves to overly vague solutions. For instance, through a bilateral agreement, African countries might insist on open adoption,³⁷ DNA testing,³⁸ or other appropriate measures that they deem fit in the best interests of their children.



The fairly limited number of countries with which African countries undertake intercountry adoption makes bilateral agreements an even more viable option. To illustrate: 85% of adoptions from Burkina Faso are to France; more than 50% of adoptions from Ethiopia are to the U.S; and the same can be said for Liberia. From the experience of the countries under the study, it is recommended that Ethiopia enters into a bilateral agreement with the U.S.. Not only is this supported by the fact that Ethiopia is not a party to the Hague Convention but also because it is the top sending country to the U.S. (according to 2008 data) in Africa. It would not be untoward to propose that

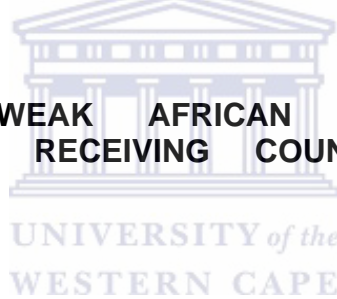
³⁷ See the brief description and advantage of open adoptions in Chapter 1, section 1.3.

³⁸ See a brief discussion of the advantages of requesting DNA testing in Chapter 6, section 6.3.1.3.

Malawi should have a similar agreement with the U.K./U.S. if future intercountry adoptions are to mainly target these countries as the major receiving countries.

On the one hand, it may be speculated that the proliferation of bilateral agreements might tend to undermine, or even discredit, the importance of implementing the Hague Convention. On the other hand, it might also prepare and inspire countries involved in bilateral agreements to ratify of the Hague Convention in the medium or long term. In the final analysis, it is the promotion and protection of the best interests of the child which is the ultimate goal. In this regard, if this is achieved through bilateral agreements, there would not be a need to focus more on form than on function.

7.12 RELATIVELY WEAK AFRICAN STATES, INTERNATIONAL COOPERATION, RECEIVING COUNTRIES, AND NON-STATE ACTORS



As demonstrated in Chapter 2, while many African governments might wield some power within the more limited “domestic” sphere, in reality much of their economies and scope in designing and implementing social development policies are not necessarily within their control.³⁹ The challenges they face, such as the impact of the HIV/AIDS pandemic, are immense too.⁴⁰ Premised on this point, it is crucial to ask how far are African governments able to deliver socio-economic rights to their children and families?

³⁹ See, for instance, Banda, 2005, 299. At least there is now some evidence in Africa that the child-friendliness of a country’s laws and policies are not necessarily dependent on its economy. See generally, ACPF, (2008). Therefore, while the extent of resources are important, the proper management of whatever resources are available is more important.

⁴⁰ Unlike other developing countries, such as, India and Brazil, African countries largely lack the power to refuse patent protection to anti-AIDS medicine by pharmaceuticals, which thereby limits their access to life saving/extending generic medicines.

How much leverage do they have in developing policies for social development? How developed and capable are their institutional frameworks in order to undertake intercountry adoption in a child-centred manner? What is their capacity to control their own public officials, let alone non-State actors, such as intergovernmental organisations and foreign adoption agencies?

7.12.1 International cooperation

International cooperation, which could be comprised of both financial and human resources, plays a significant role in the realisation of children's rights in Africa. The CRC is a powerful tool for international cooperation and solidarity between States Parties. The CRC repeatedly entrenches that "particular account shall be taken of the needs of developing countries".⁴¹ It is recommended that this particular focus on the needs of developing countries is worth reiterating to gather support for measures that address the deprivation of children of their family environment in Africa. If need be, the development of an intercountry adoption system that is compliant with international standards could be supported through international cooperation. Hence, it is concluded that there is a legal basis to submit that African countries can and should ask for and, as much as possible, be provided with international cooperation in order to develop their alternative care schemes in general.

However, not all international cooperation or development assistance is necessarily conducive to children's rights in Africa. The negative impact of actions and omissions by

⁴¹ Arts. 23, 24, and 28 of the CRC.

influential financial institutions such as the IMF and the World Bank on the realisation of the rights of children in Africa is potentially a good example.⁴² In this regard, the CRC Committee and the African Committee should devise creative ways to supervise and enforce compliance with the CRC and the ACRWC by these institutions. It is recommended that one way of achieving this goal could be to encourage alternative reports submitted to the treaty bodies to provide comment not just on government's performance and obligations, but also on the behaviour of donor countries, international financial institutions and other similarly positioned non-State actors.

7.12.2 Cooperation from receiving countries

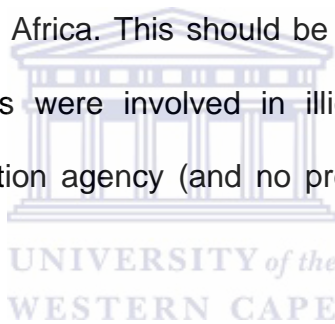
Co-operation is central to make the intercountry adoption regime in Africa work for the best interests of children.⁴³ In this regard, any intercountry adoption reform that considers the role of receiving countries as inconsequential is doomed to fail.

It is submitted that there is a need for recognition on the part of receiving countries that it is their demand for adoptable children that drives the intercountry adoption process in the main. Therefore, receiving countries should abstain from putting the authorities and organisations of countries of origin under unnecessary pressure to provide adoptable children.

⁴² See, for instance, Rishmawi, (2006), 38-42. For a discussion of the negative impact of IMF policies in the context of the right to free and compulsory primary education, see Mezmur and Sloth-Nielsen, (2008b).

⁴³ For further details on the need for administrative and judicial cooperation in intercountry adoption, see Duncan, (2001).

Receiving countries also have an important role to prevent and address illicit activities in adoption. For instance, Chapter 6 has explained the role of receiving countries in placing moratoria (restrictions) on adoption from countries where adoption irregularities have become rampant. By way of another example, if the U.S. Government was to classify trafficking for adoptions in the category of “severe forms of trafficking”, and have it proscribed in its Trafficking Victims Protection Act, the Department of State would have been able to put pressure on countries of origin to address the problem.⁴⁴ It is also recommended that receiving countries should assist in holding foreign adoption agencies registered in their State accountable for the working methods of their representatives and partners in Africa. This should be the case especially when these representatives and/or partners were involved in illicit activities in Africa with the knowledge of the foreign adoption agency (and no preventive or curative measure is taken by the agency).



It is also recommended that receiving countries should assist, and where necessary put due pressure on, countries of origin in making their laws compliant with international standards including the Hague Convention. As underscored in Chapter 6, the emerging jurisprudence of the CRC Committee in this respect is worth concretising. As already highlighted in Chapter 6 section 6.3.3, in relation to France, the CRC Committee recalled:

...its concern that the majority of intercountry adoptions are mainly carried out with countries of origin that have not ratified the Hague Convention of 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption (two thirds)...⁴⁵

⁴⁴ For further discussion on this point, see Meir and Zhang, (2009), 93 and 123.
⁴⁵ CRC Committee, Concluding Observations: France, (May 2009), para. 63.

Assuming that this view of the CRC Committee gains ground in relation to a number of other receiving countries, it might further increase the need to assist and put pressure on African non-Contracting States to the Hague Convention to ratify and implement the treaty with the necessary infrastructural support.

The role of foreign adoption agencies to ensure safeguards in the adoption processes in Africa is important, too. In practical terms, this might mean, for instance, a better preparation of the prospective adoptive parents by foreign adoption agencies about the potential risks of child buying (or other illicit activities) in Africa, which can contribute towards countering illegal adoptions. It is further recommended that foreign adoption agency representatives (including their partners and lawyers) who might influence the number of children placed for adoption should not be paid on a commission basis.

Foreign adoption agencies' associations, such as, Euradopt⁴⁶ represent a good example of how foreign adoption agencies can be held accountable to pre-determined group ethical rules. Drawing the attention of this and other similar organisations to the competent authorities of countries of origin to enable them to report irregularities is crucial.

7.12.3 Non-State actors

In relation to child law reform efforts in Africa, the influence of non-State actors is also significant. In the majority of African countries, child law reforms are mainly supported,

⁴⁶ Euradopt is an association of adoption organisations in 12 Western European countries. See <<http://portal.euradopt.org/>>.

or are at times spearheaded by non-State actors such as UNICEF. As a result, it is recommended that the relevant measures outlined in section 7.7 of this Chapter should be taken into account by non-State actors involved in law reform efforts in Africa. These non-State actors should undertake their interventions in a culturally sensitive, participatory, and bottom-up manner.

Non-State actors also play a crucial role in the designing and implementation of child rights related policies in Africa. Even if an African country decides that it wants to make institutionalisation a measure of last resort, for instance, the influence of non-State actors (especially donors) in the realisation of this goal is immense. By way of example, a recent review of alternative care facilities in Southern African countries has found that factors such as HIV prevalence rates or poverty did not substantially vary the number of children's homes between countries.⁴⁷ As a result it was concluded that a good number of "children are in homes because people build them".⁴⁸

The role of the media (both national and international) in the context of intercountry adoption related matters is also worth highlighting. As the most powerful tool of mass communication nationally and internationally, the media has the potential to either protect or violate children's rights. While the media's role in influencing child friendly attitudes in society (for instance, to promote domestic adoption) is beyond question,⁴⁹

⁴⁷ Dunn, (2009).

⁴⁸ As above.

⁴⁹ CRC Committee, "Day of General Discussion", (1996), para. 53.

Africa's media still tends to place children at the margins of its work.⁵⁰ Lack of professionalism in the media often leads to sensationalist reporting; overstating or understating the provisions of children's rights laws; failure to provide substantive analysis on issues involving children; and more emphasis on protection issues while neglecting provision and participation rights of children.⁵¹ For instance, as it was demonstrated in Chapter 4, contrary to many international media reports, orphans are not necessarily "adoptable" children. The fact that the media often uses the words "orphanhood" interchangeably with "adoptability" continues to contribute towards existing misconceptions about intercountry adoption. There is also a clear lack of knowledge (and sometimes lack of willingness) to safeguard the right to privacy of the biological families, adoptive families, as well as the privacy rights of the child. Furthermore, the general lack of capacity of African media to undertake investigative journalism to uncover issues such as illegal adoptions curtails its role in the promotion and protection of children's rights.

The furtherance of the role of the media in a professional manner to protect children's rights in general, and those involved in intercountry adoption in particular is apposite. It is recommended that an extensive education campaign and training to promote ethical reporting in the media should be undertaken.

7.13 RESEARCH AND DATA BASED INTERVENTIONS

⁵⁰ Resource constraints coupled with lack of awareness (and sometimes limitations imposed on freedom of expression) make a State's general obligation to disseminate information about children's rights in Africa highly limited.

⁵¹ See Tobin, (2004), 143 and the sources provided therein.

Research on child rights-related issues is part of the implementation requirement of both the CRC and the ACRWC. For instance, in its General Comment No 5 on the “General measures of implementation of the Convention on the Rights of the Child”, the CRC Committee states that the “[c]ollection of sufficient and reliable data on children, disaggregated to enable identification of discrimination and/or disparities in the realisation of rights, is an essential part of implementation”,⁵² and that thus “states should collaborate with appropriate research institutes and aim to build up a complete picture of progress towards implementation, with qualitative as well as quantitative studies”.⁵³

Disaggregated data on the number of children deprived of their family environment, in order to devise age, sex, and developmentally appropriate interventions should be taken as a starting point. Knowledge on the number of children in institutional care, and further research to identify reasons for entry into care, and monitor the degree to which children in care are regularly assessed, is crucial. There is also a need for research into adoptees and their life after adoption especially in the culturally disruptive milieu of intercountry adoption. Research and data in these and other areas can be used to advocate for broader policy change and findings extrapolated to legal contexts.

In accordance with the child participation and best interests of the child principles, the involvement of children in research should be given due attention.⁵⁴ This study

⁵² CRC Committee, General Comment No. 5, (2003), para. 48.

⁵³ As above.

⁵⁴ In the context of juvenile justice, the CRC Committee has suggested that children should be involved in evaluation and research, ‘in particular those who have been in contact with parts of the juvenile justice system’. See CRC Committee, General Comment No. 10, (2007), para. 99.

represents an initial attempt to identify gaps, opportunities, and, to some extent, research themes, of special relevance to the furtherance of children's rights in intercountry adoption in the African context in order to sharpen and strengthen our capacity to promote good practice and promising solutions.

7.14 FINAL REMARKS

Throughout this study, African scholarship on the topic at hand - intercountry adoption in an African context - has been in short supply. Lest it be thought that African scholars are absent in debates around alternative care in this domain, it must be pointed out that one of Africa's largest NGOs, ANPPCAN,⁵⁵ also credited as the driving force behind the adoption of the ACRWC, took the lead in co-hosting a pan-African workshop on intercountry adoption in June 2009. Joined by a range of other NGOs, intergovernmental and afro-centric donor organisations, the central themes on the table were: the need for co-ordinated response to the increasing phenomenon of Africa as a sending continent; the desire for greater understanding of the opportunities presented, and the risks and challenges posed, by the practice of intercountry adoption in an African context; and the need for mobilisation of other NGOs and child welfare agencies around the socio-political complexities thrown up by the practice.

The subjects for discussion throughout this study attempt to make a modest contribution to these developing debates, seen from the perspective of an African son.

⁵⁵ Along with the Africa Wide Movement for Children hosted at the main office of the African Child Policy Forum.

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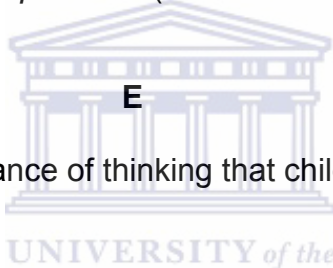
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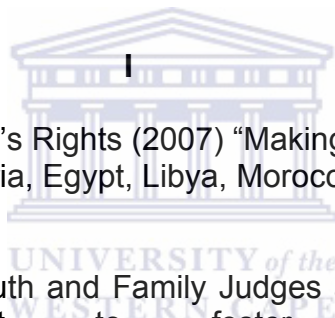
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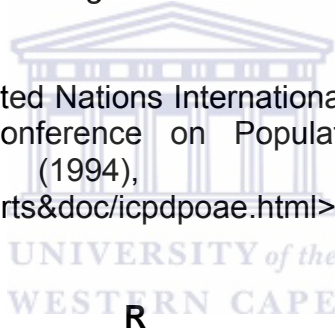
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CRC Committee, General Comment No. 8 *The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia)* (CRC/C/GC/8) (2 March 2007)

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Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children of 2000 (entered into force in 2003)

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Child Care Act 74 of 83 of South Africa

Child Care Act 74 of 1983 of South Africa
Child Right Act 7 of 2007 of Sierra Leone
Child Rights Act of Nigeria (2003)
Children's Act of the Gambia (2005)
Children's Act 38 of 2005 of South Africa
Children's Amendment Act 41 of 2007 of South Africa
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Children and Young Persons Act of 1945 of Sierra Leone
Children Act of South Sudan (2008).
Children Act No. 8 of 2001 of Kenya
Children (Adoption) Regulations of 2005 of Kenya
Children's Act No 8 of 2009 of Botswana
Consolidated Draft Regulations Pertaining to Children's Act of South Africa
Constitution of the Kingdom of Swaziland's (2005)
Comoros Act No. 84-10 of 1984 on Civil Status and the Family Code
Constitution of Federal Democratic Republic of Ethiopia (1996)
Revised Family Code of 2000 of Ethiopia
The 1943 Children and Young People's Act of Nigeria

5. SELECTED CASE LAW

Adoption Cause No. 1 of 2009 *In the matter of Adoption of Children Act (Cap. 26:01 and in the matter of Chifundo James (a Female Infant)* (unreported) (MSCA Adoption Appeal No. 28 of 2009)

Adoption Cause No. 1 of 2009 *In the Matter of the Adoption of Children Act (Cap. 26:01) and In the Matter of CJ (A Female Infant)* (unreported)

Adoption Cause No. 2 of 2006 *In the Matter of the Adoption of Children Act (Cap. 26:01) and In the Matter of David Banda (A Male Infant)*

AD v DW (Department of Social Development Intervening; Centre for Child Law, *Amicus Curiae*) 2008 (3) SA 183 (CC)

De Gree v Webb (Centre for Child Law, University of Pretoria, *Amicus Curiae*) 2006 (6) SA 51 (W)

De Gree v Webb (Centre for Child Law, University of Pretoria, *Amicus Curiae*) 2007 (5) SA 184 (SCA)

Fitzpatrick v Minister of Social Welfare and Pensions 2000 (3) SA 139 (C)

Family Cause No.81 / 05 in Matter of Adoption of Maria Hodkins an infant by Mark and Kate Skidmore (unreported)

Family Cause No 13/06 in the Matter of Jacob Mukisa Meyer-an infant; and Adoption cause No 43/06 In the Matter Jesse Bree Mays-an infant (unreported)

Minister for Welfare and Population Development v Fitzpatrick 2000 (7) BCLR 713 (CC)

M v S (Centre for Child Law *Amicus Curiae*) 2007 (12) BCLR 1312 (CC)

Re M (Child's upbringing) (1996) 2 FCR 473.

