# Africa

## The New Frontier for Intercountry Adoption

## THE AFRICAN CHILD POLICY FORUM (ACPF)

ACPF is an independent, pan-African institution of policy research and dialogue on the African child.

ACPF was established with the conviction that putting children first on the public agenda is fundamental for the realisation of their rights and wellbeing and for bringing about lasting social and economic progress in Africa.

ACPF's work is rights based, inspired by universal values and informed by global experiences and knowledge. Its work is guided by the UN Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, and other relevant regional and international human rights instruments. ACPF aims to specifically contribute to improved knowledge on children in Africa; monitor and report progress; identify policy options; provide a platform for dialogue; collaborate with governments, inter-governmental organisations and the civil society in the development and implementation of effective pro-child policies and programmes; and also promote a common voice for children in and out of Africa.

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## LIST OF ACRONYMS

| | |
|---|---|
| ACHPR | African Charter on Human and Peoples' Rights |
| ACRWC | African Charter on the Rights and Welfare of the Child |
| ACPF | African Child Policy Forum |
| ACERWC | African Committee of Experts on the Rights and Welfare of the Child |
| ANPPCAN | African Network for the Prevention and Protection against Child Abuse and Neglect |
| AU | African Union |
| CCI(s) | Childcare institution(s) |
| Children Act | Kenyan Children Act |
| Children's Act | South African Children's Act |
| CRC | UN Convention on the Rights of the Child |
| CRC Committee | UN Committee on the Rights of the Child |
| CRPWD | Convention on the Rights of Persons with Disabilities |
| DCS | Department of Children's Services (Kenya) |
| DSD | Department of Social Development (South Africa) |
| Hague Convention | Hague Intercountry Adoption Convention of 1993 |
| HCCH | Hague Conference on Private International Law |
| ISS/IRC | International Social Service/International Reference Centre for the Rights of Children Deprived of their Family |
| MDG(s) | Millennium Development Goal(s) |
| MOWCYA | Ministry of Women, Children, and Youth 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) |
| UDHR | Universal Declaration of Human Rights |
| UNAIDS | The United Nations Joint Programme on HIV/AIDS |
| UNICEF | United Nations Children's Fund |
| US | United States |

# TABLE OF CONTENTS

ACKNOWLEDGMENT ..... i
LIST OF ACRONYMS ..... ii
FOREWORD ..... iii
PREFACE ..... iv
EXECUTIVE SUMMARY ..... v
1. INTERCOUNTRY ADOPTION: CONTEXT AND MAGNITUDE ..... 1
1.1 Introduction ..... 1
1.2 Context matters ..... 2
1.3 Magnitude of intercountry adoption in Africa ..... 6
2. THE INTERNATIONAL LEGAL FRAMEWORK: A SYNOPSIS ..... 7
3. THE LAW AND PRACTICE OF INTERCOUNTRY ADOPTION IN AFRICA ..... 12
3.1 Intercountry adoption law in Africa: An overview ..... 12
3.2 The principle of the best interests of the child ..... 13
3.3 Who is adoptable? ..... 15
3.3.1 Adoptability: An overview ..... 15
3.3.2 When intercountry adoption may be the answer ..... 17
3.3.3 When intercountry adoption is probably not the answer ..... 19
3.4 Eligibility to adopt ..... 22
3.4.1 General ..... 22
3.4.2 Sexual orientation and eligibility ..... 23
3.4.3 Residency requirement for eligibility to adopt ..... 24
3.5 The subsidiarity principle ..... 25
3.5.1 General ..... 25
3.5.2 The application of the subsidiarity principle ..... 26
3.5.3 The subsidiarity principle: some examples from Africa ..... 28
3.6 Matching ..... 30
3.7 Institutional framework ..... 31
3.7.1 General ..... 31
3.7.2 Competent Authorities and Central Authorities ..... 32
3.7.3 Accredited bodies ..... 36

4. DUTIES OF THE STATE, SOCIETY AND OTHERS: ALTERNATIVES TO INTERCOUNTRY ADOPTION ..... 39
4.1 Introduction ..... 39
4.2 Family preservation ..... 40
4.3 Family reunification / reintegration ..... 41
4.4 Domestic adoption ..... 41
4.5 Foster care, kinship care (community based care), and *kafalah* ..... 42
4.6 Children's homes and other similar institutions ..... 43

5. A WAY FORWARD ..... 44

BIBLIOGRAPHY ..... 48

LIST OF CHARTS

Chart 1: Number of intercountry adoption placements, 2000 to 2010 ..... 1
Chart 2: Top ten receiving countries, 2010 ..... 1
Chart 3: Per cent change in intercountry adoption, 2004-2010 ..... 2
Chart 4: Adoptions from Africa 2004-2010; 12 countries sending most children in this period ..... 6
Chart 5: Number of adoptions from Ethiopia 2003 and 2010 by receiving countries ..... 6

# FOREWORD

I am delighted that yet again, ACPF has come up with an important report that deals with a very critical issue for Africa: intercountry adoption.

Africa is rich, not only with resources but also in its values and culture. Africa must therefore take care of its children in need of parental care and should not rush to send its children for international adoption. As this report indicates, African governments must take upon themselves the primary duty to provide for their children so that they grow up in their own communities, in total dignity, security and happiness. Thus, African Governments must ensure that all children are accorded a family environment and have access to the basic necessities in life.

The policies and laws we adopt, the decisions we make, and the actions we undertake all have an effect on children as the custodians of this continent who will live on after we are gone. All our actions should therefore be in the best interests of the child. We must endeavour to have a regulated system for intercountry adoption where local alternatives are first fully explored before any other measure is resorted to for children in need of alternative care.

While I am happy to note that international standards for intercountry adoption have been provided for, among others, in the African Charter on the Rights and Welfare of the Child (ACRWC), the United Nations Convention on the Rights of the Child (CRC) and the Hague Convention on Intercountry Adoption, it is disturbing to note that despite being in existence for almost 19 years now, the Hague Convention on Intercountry Adoption has only been ratified by 13 African Countries. Yet, this is the treaty which provides practical guidance and standards for the protection of children in intercountry adoption both in the sending and receiving countries. I therefore appeal to African States which have not yet done so, to ratify the Hague Convention and ensure that international and regional standards for protection of children are fully implemented at all levels.

**Salim Ahmed Salim**
**Chairperson, ACPF International Board of Trustees**

# PREFACE

Africa has become the new frontier for intercountry adoption. Between 2003 and 2010, the number of children adopted from Africa increased three fold. Yet Africa seems to be ill-equipped in law, policy and practice, to provide its children with enough safeguards when they are adopted internationally. The list of issues that seem to defy consensus in the context of intercountry adoption in Africa is long, including the cultural disconnect that children are subjected to in the adoption process raises significant concern; the definition of a family environment in terms of the African Charter on the Rights and Welfare of the Child and the UN Convention on the Rights of the Child for the purpose of adoption is contentious; the basic questions of adoptability and who can adopt are critical to the African context due to varying interpretations; the implications of considering intercountry adoption as a measure of last resort continue to pose difficult legal and ethical complexities for African countries. In practice, intercountry adoption suffers from poor regulation in many African countries and where regulation exists, implementation of the same is inadequate.

In addition to the existing gaps, no comprehensive documentation on intercountry adoption exists at the regional level. This report highlights the legal and policy gaps that expose adopted children to abuse and exploitation, and also the policy options for intercountry adoption. The report also draws our attention to the racial and cultural implications of intercountry adoption, as well as the risks, challenges and good practices in intercountry adoption in Africa. Most importantly, the report emphasises the importance of developing and supporting community based mechanisms of caring for children deprived of a family environment. Children must be allowed to grow up in their own families or communities to ensure continuity in a child's upbringing in an atmosphere of happiness, love and safety. African Governments are therefore called upon to take up their responsibility of providing for all children in the continent.

This is an Africa-wide report and it has benefited from country consultations on intercountry adoption held in the Democratic Republic of Congo (DRC), Malawi and Nigeria, that involved key stakeholders from government and civil society.

This report advocates for intercountry adoption to be a measure of the very last resort for children in need of a family environment, taking place only in exceptional circumstances, guided by the best interests of the child.

**David Mugawe**
**Executive Director, ACPF**

## EXECUTIVE SUMMARY

This report provides a situational analysis of the law and practice of intercountry adoption in Africa, with the aim of informing debate on conceptualising, developing and implementing polices, laws, programmes and research in relation to intercountry adoption in Africa.

Intercountry adoption has never been free from controversy at any point in its history, from its roots as a relatively simple, legally created filiation tie to its perception as a humanitarian act, and then to its wide acceptance as an option for childless people who wish to create a family. Now, it is a major aspect of modern family law, and therefore an attractive target for a wide circle of academics, journalists, and politicians with a diversity of agendas. The attention that intercountry adoption attracts reconfirms the assertion that, though 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.

It is argued that the polarised views and debates on intercountry adoption are a function of its spreading practice and the awareness thereof, and of its extension to regions that are only beginning to develop the cultural, legal, social, and physical infrastructure for adoption. In this regard, the Africa region is a good example. A number of external factors at the international level, such as dwindling numbers of adoptable children from traditional 'sending' countries in the Western world, have increasingly directed 'receiving' countries to look for adoptable children in African countries.

As a result, despite the fact that the continent's laws, policies and practices are generally ill equipped to uphold the best interests of children, Africa is becoming the new frontier for intercountry adoption. With globalisation, there are also indications that illicit activities that violate children's best interests on the African continent are on the rise, encouraged by a shortage of adoptable children in other parts of the world, the shifting focus of intercountry adoption to Africa, increasing poverty in Africa, and accompanying weak institutional law enforcement capacity of African State institutions.

Three main international instruments regulate intercountry adoption. These are:

- The Convention on the Rights of the Child (CRC)
- The African Charter on the Rights and Welfare of the Child (ACRWC)
- The 1993 Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption (Hague Convention).

The CRC and the ACRWC interpret adoption (both domestic and intercountry) as the provision of a measure of protection for children deprived of their family environment. They clearly state that in using adoption as a form of alternative care for these children, the children's best interests must be the paramount consideration. Furthermore, the provisions of both the CRC and the ACRWC clearly indicate that intercountry adoption should be used as a measure of last resort.

A number of contexts peculiar to the African continent need to be taken into account in order to ensure children's best interests before, during, and after undertaking measures related to intercountry adoption. Both African countries and receiving countries should consider these contexts, which

are ignored only at the risk of violating the rights of children in Africa. These contexts include the historical, religious, social, economic, legal and cultural contexts.

Children's right to cultural identity is central to the question of intercountry adoption, especially from Africa. Certain critics denounce 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". 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". 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".[1]

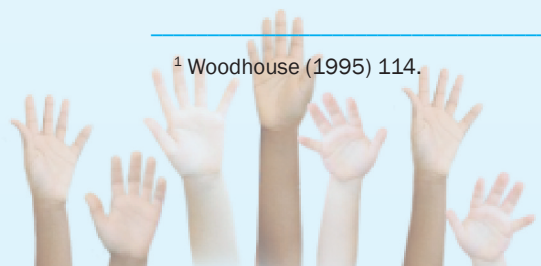
Children's cultural identity should be respected, therefore, unless the best interests of those children demand that they be adopted through an intercountry adoption process. Moreover, since names (especially family names) reflect one's cultural, ethnic, religious, or familial heritage and occupy a special place in African societies, it is important that legal systems should retain the option that adopted children (especially older ones) are able to retain or regain their original names and surnames when this is requested and is in the best interests of the child. The understanding that intercountry adoption should be used as a measure of last resort, and only when in a child's best interests, is also in compliance with respecting children's best interests.

The question of "who is adoptable", asked in the context of serving the best interests of the African child, is in need of a clear answer in law, policy and practice in many African countries. The idea of generally equating "orphans" with "adoptable" children runs the risk of compromising children's rights. Some of the issues crucial for examination by African countries include themes such as termination of parental rights, including through decisions of a Competent Authority; abandonment; relinquishment; orphanhood and poverty as grounds for adoptability; and the adoptability of refugee children, special needs/hard-to-place children, and children with a Muslim background.

The principle of subsidiarity (which in general requires that intercountry adoption should be a measure of last resort) is a critical one, but is one that African countries have struggled to understand and implement. Moreover, the legislative and institutional responses necessary to prevent illicit activities related to intercountry adoption in Africa, and the institutional structures they require, are also often lacking, and their absence or inadequacy can result in the best interests of the children involved being compromised. The role of these institutions (where they exist and are effective) in countering illegal activities in the context of intercountry adoption – such as child selling and buying, trafficking, and improper financial gains – is crucial. The increasing level of illicit activity on the African continent is a clear indication of the continent's general lack of preparedness for the number of intercountry adoption applications being sent in its direction.

Intercountry adoption is part of a continuum of care options that ensure permanency for children permanently deprived of their family environments, and is supposed to be used as a measure of last resort. Governments, communities and other stakeholders have the obligation to provide for and consolidate a range of alternative care measures; and, more importantly, there is a need to undertake

[1] Woodhouse (1995) 114.



all appropriate measures to ensure family preservation and avoid the need for alternative care as far as possible while maintaining the priority of the best interests of a child.

Family preservation measures include child support grants, cash transfers, and general social protection programmes that need to be undertaken systemically and on a larger scale. The idea of intercountry adoption as one of the main significant responses to addressing the problem of children deprived of their family environments is neither sustainable nor feasible – especially given the mammoth tasks and multi-dimensional responses needed comprehensively to address the problems associated with it. Moreover, there is anecdotal evidence from some studies that an emphasis on intercountry adoption as a response to the challenges faced by children deprived of family environments might be counterproductive – some survey data suggests that, instead of intercountry adoption helping to reduce the number of children in institutional care, it may in fact contribute to the continuation of institutional care, with resulting harm to children. As a result, this report highlights the importance of developing and supporting community-based care approaches (such as kinship care and domestic adoption) that, unlike intercountry adoption, have the potential to address the challenges faced by children deprived of their family environment on a significant scale.

This report provides sufficient background to state that, while levels of intercountry adoption from African countries are still quite modest compared to adoptions from the world's top four countries of origin, there are concrete indications that interest in adoption from African countries will continue to increase. So, while it can be argued that Africa is "the new frontier" for intercountry adoption, it is also highly questionable whether the continent is equipped to provide its children with the necessary safeguards in respect of the practice.

A central aim of this report is to assess and explore how the best interests of the African child can be upheld in intercountry adoption, and a golden thread running through it is the conclusion that the African continent in general is still ill-equipped in law, policy and practice to provide its children with the necessary safeguards in respect of intercountry adoptions. Much remains to be done. Based on this general assessment, the report offers recommendations for a way forward.

In conclusion, protecting the best interests of children in Africa is and should be, as a first responsibility, the primary obligation of African families, African communities, African governments, and African institutions. This in the main entails considering intercountry adoption as an exceptional measure where a specific child's situation necessarily demands it, to ensure permanency to a child deprived of a family environment. Where intercountry adoption of a child from Africa is considered to be in the best interests of a specific child, every effort should be made to ensure that the whole system is about finding a family for a child, as opposed to finding a child for a family.

# 1 INTERCOUNTRY ADOPTION: CONTEXT AND MAGNITUDE

## 1.1 Introduction

Intercountry adoption has evolved from its roots as a legal instrument creating a filiation tie, to perception as a humanitarian act, and then into a widely accepted option for childless people who wish to create a family.[2] With this evolution has come a polarisation of debates and views on intercountry adoption – about its appropriateness or otherwise – that are often difficult to reconcile. The overall number of intercountry adoptions increased between 2000 and 2004, but has been falling again since 2005, with the US, Italy, France and Spain as the top four receiving countries of adopted children from other countries.

Chart 1: Number of intercountry adoption placements, 2000 to 2010[3]

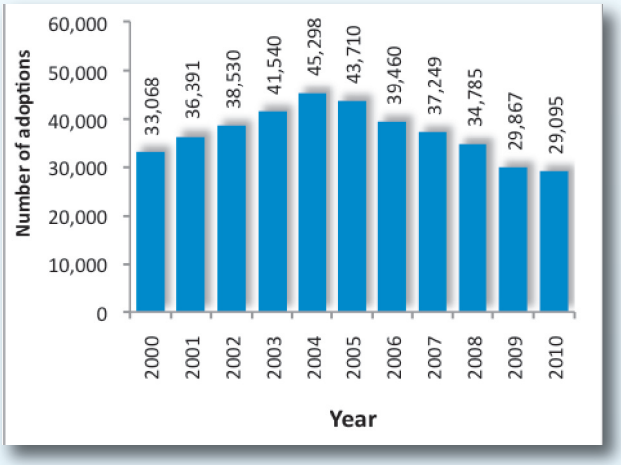
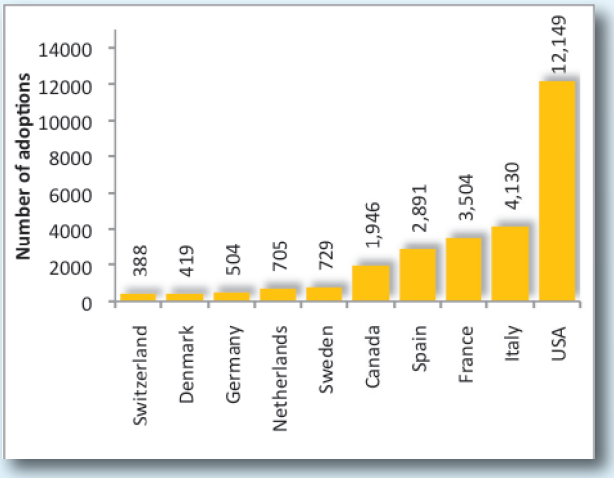


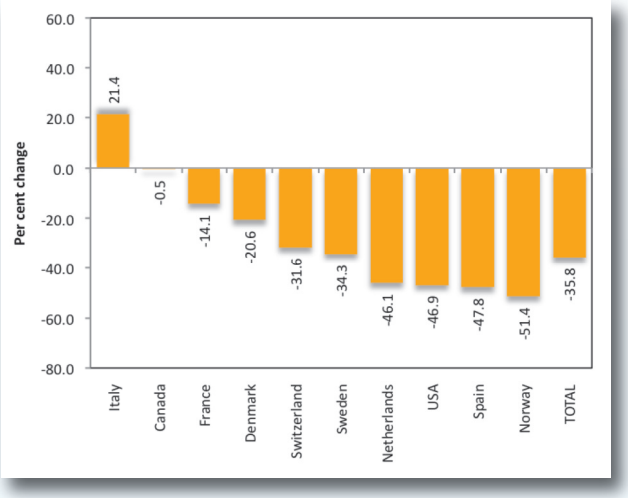

Chart 2: Top ten receiving countries, 2010




Since human rights issues are at the core of current debates on intercountry adoption,[4] international children's rights law is central to the discussion. For this purpose, international children's rights law can be taken to be composed of the Convention on the Rights of the Child (CRC),[5] the African Charter on the Rights and Welfare of the Child (ACRWC),[6] and the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption (the Hague Convention).[7] Despite the existence of these instruments, a number of important issues remain vague and controversial – for instance, how to define and implement the best interests of the child in the context of intercountry adoption. In summary, there is still considerable divergence of opinion about the nature of the relevant rights, their foundation and practical implications, their content and scope, and, increasingly, the locus of the duties and responsibilities that correlate with the rights.

[2] Kleiman, (1997), 333; Kane, (1993), 313.
[3] Data for chart taken from Peter Selman, Newcastle University, UK.
[4] Bartholet, (2007), 151-52.
[5] UN Convention on the Rights of the Child (hereinafter "CRC"), entered into force 2 September 1990.
[6] African Charter on the Rights and Welfare of the Child (hereinafter "ACRWC"), entered into force 29 November 1999.
[7] 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.

**Chart 3: Per cent change in intercountry adoption, 2004-2010[8]**




The aim of this report is to provide an overview of, and highlight trends in relation to, the law, policy and practice of intercountry adoption in Africa. It is not the aim of this research to investigate and address all issues related to intercountry adoption, let alone issues related generally to alternative care.

It should come as no surprise that there remain, more than 21 years after the adoption of the CRC and the ACRWC, and 19 years after the adoption of the Hague Convention, a number of controversial legal issues related to intercountry adoption. Obviously, most of these controversies can only be overcome through further reflection, dialogue, research, data collection, training and other capacity building measures on the part of all stakeholders, to which this report (along with the ACPF International Policy Conference it will inform) contributes its share.

This report is divided into five sections. After this section, which deals with the context and magnitude of the issue, section two focuses on some of the main international legal frameworks relevant for intercountry adoption. Section three then provides the crux of this report, addressing substantive issues such as principles, rights, and procedures, thereby highlighting the law and practice on intercountry adoption in Africa and providing an overview of the reality on the ground in the context of the practice. Section four, which complements section three, then offers a brief overview of some alternatives to intercountry adoption for which states, societies, families and other stakeholders should strive in order to realise children's best interests in the context of care in Africa. Section five then sums up the report by offering a conclusion and some points on the way forward.

## 1.2 Context matters

In order to have a good picture of most of the factors relevant to intercountry adoption in Africa, it is important briefly to appraise some of the underlying contexts on the African continent in relation to child care, adoption and other related matters. These contexts include historical, social and cultural, religious, economic and legal contexts.

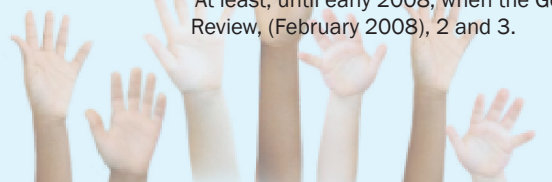
The African **historical context** (including slavery and colonialism) continues to inform perspectives on intercountry adoption. Some contend that arguments advanced by detractors of intercountry adoption, labelling it a manifestation of "imperialism" and "neo-colonialism", are not entirely baseless.[9] Current practice shows that a number of African countries of origin tend to send children being adopted predominantly to the countries that were their respective former colonisers. For instance, a significant number of adoptions from French-speaking Africa go to France[10], and there is evidence that adoptions from Guinea-Bissau are frequently destined for Spain.[11] Failure to address this sensitively leaves the process of adoption open to being labelled as "a new form of colonialism" or "imperialism".

[8] Data for chart taken from Peter Selman, Newcastle University, UK.

[9] 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.

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

[11] At least, until early 2008, when the Government of Spain decided to suspend adoptions from Guinea-Bissau. See ISS, Monthly Review, (February 2008), 2 and 3.



A recent example of this occurred in Chad, on 25 October 2007 (the "Zoe's Ark case"), when police arrested nine French citizens in eastern Chad as they prepared to fly 103 African children to France. The arrest was immediately followed by protests against the French group by Chadians chanting "no to the slave trade, no to child trafficking".[12]

The potency of culture (**cultural context**) 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 childcare in Africa. A number of studies[13] highlight the role of the extended family and kinship care on the African continent 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, though it has grown smaller through time, the extended family continues to provide support for children deprived of their family environment by the death of biological parents or other legal guardians. For instance, writing in 2008, Bessler commented that in South Africa, many children in alternative care arrangements never go through Children's Court proceedings, but rather are informally incorporated into an extended family system without an assessment as to whether or not that is in their best interest.[14] 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.[15] 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".*[16]

The practical and legal implications of recognising the role of the extended family in respect to intercountry adoption are worthy of note in other respects, too. For instance, laws that attempt to sever completely the ties between children and their families, including extended families, should be questioned. In addition, the meaningful recognition (or lack thereof) of the extended family in Africa has implications for the meaning of adoptability, consent to adoption, the nature of adoption (open or closed), cultural heritage, etc. – all of which concerns are central to intercountry adoption.

In connection with this, supporting the practice of customary adoption (also called informal adoption) through legislation and policy interventions that promote children's best interests is crucial as a strategy that African countries should adopt to cater for the needs of children deprived of their family environment. This is because 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 custom requires, and not through the courts.[17]

[12] See Reuters, (31 March 2008). NB: this very specific case originated from a French group that was acting undercover, and thus was not authorised by France to proceed with intercountry adoption.
[13] See, for instance, Drew *et al.*, (1996a) 79-86; Drew *et al.*, (1996b), 42; Foster, (2002a), 91-115; Foster, (2002b), 1907-1910.
[14] Bessler, (2008), 80 citing Davel and Mungar, (2007), 77.
[15] For instance, see Roeland and Boerma, (2004), S55-S65.
[16] Roeland and Boerma, (2004), S55-S65.
[17] See CRC Committee, State Party Report: Ethiopia, (September, 1995), para. 87.

Customary adoption continues to exist in a number of African countries, including Burkina Faso,[18] Cameroon, Ethiopia,[19] Ghana,[20] Kenya, Lesotho, Malawi, Sierra Leone,[21] South Africa, Swaziland,[22] and Uganda. In Ethiopia, for instance, while different forms and rules exist in relation to customary adoption depending upon the ethnic, religious and regional groupings involved,[23] the practice still occurs. The Government of Ethiopia has called it "a very deep-rooted... highly valued and socially endorsed act"[24], underlining 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.[25] In 1994, one writer reported that since the enactment of the Act in 1952, he had not come across a single case of formal domestic adoption.[26] The fact that customary adoption is widely practiced could be the main reason why domestic adoption is not common.

In the context of Cameroon too, 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".*[27]

In addition, it is contended that resistance to adoption has its own economic perspective – in that "statutory adoption could enable a 'stranger' to control family property, especially landed property".[28]

The issues surrounding inter-racial placement and race matching[29] of children adopted from Africa have to be approached with caution. In the world in which we live today, race, colour, religion, and national origin are issues that have significant impact on the emotional, psychological and developmental status of the adopted child.

The HIV/AIDS pandemic is one factor of the social **context** that is worthy of note. It is a critical area of concern for Africa, responsible for growing numbers of orphaned children that raise issues of children's rights to parental or family care, or to alternative care when deprived of a family environment. While the majority of orphans are absorbed by extended families, a significant number are institutionalised. The debate over the institutionalisation of HIV/AIDS orphans continues to be controversial.

Experience in countries such as Botswana and Uganda shows that timely initiation of antiretroviral therapy significantly reduces HIV-related orphanhood[30]; but the decline in funding for prevention measures in a number of countries, such as Swaziland, Lesotho, and Ghana, is also contributing to the negative impact of the epidemic.[31] Unfortunately, even with the significant gains that have been achieved through treatment scale-up, sub-Saharan Africa's HIV epidemic continues to outpace the response.[32]

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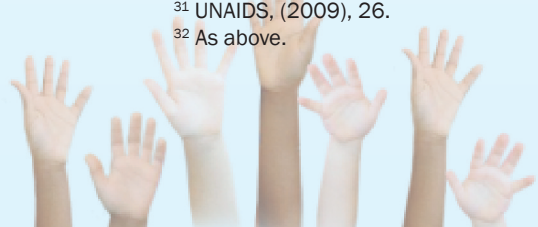
[18] CRC Committee, State Party Report: Burkina Faso, (July 1993), para. 46(b).
[19] Beckstorm, (1972), 145.
[20] CRC Committee, State Party Report: Ghana, (December 1995), para. 74.
[21] See Lisk, (1992), 28-42.
[22] Bhalla, (1994), 356-357.
[23] See, generally, Beckstrom, (1972).
[24] CRC Committee, State Party Report: Ethiopia, (October 2005), para. 121.
[25] Bhalla, (1994), 356.
[26] Bhalla, (1994), 363.
[27] Ngwafor (2006), 128 citing Kasunmu and Salacuse, (1966), 243.
[28] Ngwafor (2006), 128
[29] 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.
[30] UNAIDS, (2009), 25.
[31] UNAIDS, (2009), 26.
[32] As above.



In relation to **religious context** in Africa, Africa is home to 27% of the world's Muslim population.[33] As a result, *Sharia*, which is a religious set of principles based on the four pillars of Islam, is applicable in many countries on the continent. Adoption, which fits squarely within personal status law, remains not only an unrecognised institution in *Sharia* but, through interpretation, a prohibited one.[34] The position of *Sharia* law on adoption in African countries needs to be taken into account, with sensitivity, by both receiving and sending countries.

With regard to **economic context**, the lack of a strong economy in the majority of African countries has led to grim indicators for child well-being[35]. Lack of adequate resources can also mean weak institutional frameworks for upholding children's best interests. If the current situation – which is characterised by lack of resources, limited social security, inequality, and aid dependency – is to continue for the foreseeable future, many African countries might struggle to put in place the necessary institutional support systems for children's well-being, and to ensure the necessary prioritisation of children's rights.

As far as Africa's **legal context** is concerned, inherited colonial legislation is increasingly being overhauled and replaced with modern, more accessible, and often more comprehensive, dedicated children's statutes. A significant amount of existing legislation relating to children in Africa is still outdated, however, and most of this predates the CRC and the ACRWC.[36]

## Suspension of intercountry adoption in some African countries

A number of recent incidents have forced some African countries to suspend intercountry adoption. For instance, in February 2008, Togo suspended intercountry adoption as a result of detected illegal adoptions, including instances where courts made adoption orders on the basis of child abandonment without conducting the necessary social and legal inquiries about the background of the child. After the adoption of Decree No. 2008-103/PR of 29 July 2008 regulating the adoption procedures, as well as Decree No. 2008-104/PR of 29 July 2008 and Regulation No. 004/2008/MASPFPEPA of 24 October 2008 regulating the functions and membership of the National Adoption Committee (CNAET), the government lifted the suspension on intercountry adoption.

In Liberia, following a number of reported illegal adoptions, the President suspended intercountry adoptions in 2008, and established a Commission to conduct a comprehensive assessment of the laws, policies, and practices of intercountry adoption in the country, and to make recommendations to address loopholes.

Days after the 'Zoe's Ark' case in which workers were arrested trying to transport children illegally from Chad to France, the Republic of Congo announced it was suspending all international adoptions because of the events in Chad.[37] The Ministry of Social Welfare of the Government of Zambia has also suspended adoption since the Zoe's Ark case.[38]

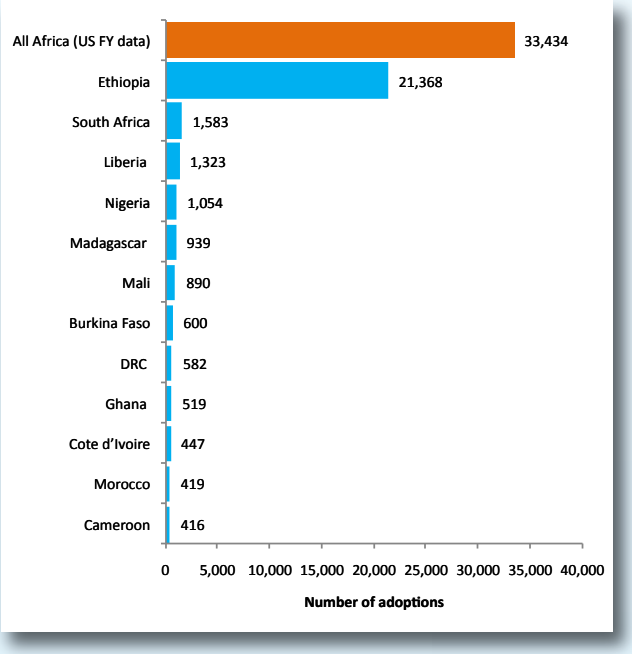
The official reason provided for the suspension of intercountry adoptions in these three countries was the need to do so in the best interests of the children, and to address dysfunctions in the adoption system that have the potential to violate children's rights.[39] In June 2007, Lesotho also suspended intercountry adoptions in order to address loopholes in the law, policy and practice pertaining to intercountry adoptions.

[33] See Kane, (2007), 64-68.
[34] Sonbol, (1995, 51; Vite and Boechat, (2008), 21.
[35] See generally, UNICEF, (2008a).
[36] 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.
[37] International Herald Tribune 'Chad court sentences French aid worker to 8 years forced labor' available at http://www.iht.com/Articles/2007/12/26/africa/php (accessed 13 January 2012).
[38] ISS Monthly Review No 3/2008 (March 2008) 3.
[39] As above.

## 1.3 Magnitude of intercountry adoption in Africa

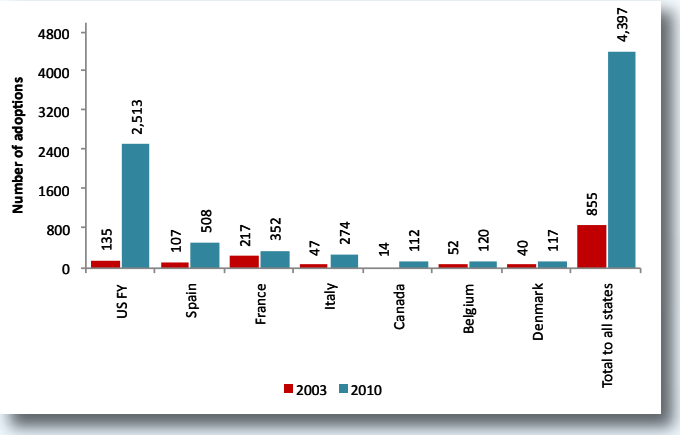
Today, a number of African countries should be considered sending countries: Africa is increasingly becoming the new frontier for intercountry adoption. African children are attracting increased attention from prospective adoptive parents in other parts of the world. This increased attention seems to have been triggered by a number of factors. In the past, prominent sending countries have included Guatemala, China and Central and Eastern European countries like Romania and Ukraine, along with Russia, Vietnam, and South Korea. However, some of these countries have since suspended, shut down, or limited intercountry adoption. Some of them, like China and Russia, have given several reasons for reducing the number of children adopted from their countries, including the introduction of stringent eligibility criteria and the promotion of domestic adoption. This international trend has directed receiving countries to look for adoptable children from African countries.

**Chart 4: Adoptions from Africa 2004-2010; 12 countries sending most children in this period[40]**




In 2010 Ethiopia was ranked the second top sending country in the world after China. The country was also the second top sending country in 2009 to the USA, to Spain and to France. France is also the major receiver of adopted children from francophone African countries, such as Burkina Faso, Burundi, Madagascar, Democratic Republic of Congo (DRC) and Mali. Additionally, between 2000 and 2006, adoptions to the US from Liberia increased tenfold.[41]

**Chart 5: Number of adoptions from Ethiopia 2003 and 2010 by receiving countries[42]**




Despite this increased focus on Africa, the debate over intercountry adoption continues to be dominated by views from the West, where the majority of traditionally receiving countries are located.[43] If a socially and legally sound, child-centred, intercountry adoption regime is to be formed on the continent, then the views of Africa – predominantly a sending continent – on intercountry adoption issues must be taken into account.

[40] Data for chart taken from Selman, P. (2012a) 'The Rise and Fall of Intercountry Adoption in the 21st Century: Global Trends from 2001 to 2010' in J. Gibbons and K. Rotabi, (eds.), *Intercountry Adoption; Policies, Practices, and Outcomes*, Farnham: Ashgate.
[41] US Department of State Office of Children's Issues: International Adoption, Liberia at <http://adoption.state.gov/country/liberia.html>.
[42] Data for chart taken directly from Selman P. (in press) The Global Decline of Intercountry Adoption: What lies ahead? *Social Policy and Society*, 11 (4)
[43] See, generally, King, (2009).

# 2 THE INTERNATIONAL LEGAL FRAMEWORK: A SYNOPSIS

The main international instruments that regulate intercountry adoption are three

1. The Convention on the Rights of the Child (CRC)
2. The African Charter on the Rights and Welfare of the Child (ACRWC)
3. The 1993 Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption ("the Hague Convention").

Though the Hague Convention is the treaty most directly applicable to intercountry adoption, it is Articles 21 and 24 of the CRC and the ACRWC respectively that precede it and address the practice explicitly. However, neither of these Articles has an independent existence[44]; therefore, it is important to read Articles 21 of the CRC and 24 of the ACRWC along with some of the relevant rights laid out elsewhere in these instruments, such as the right to non-discrimination, and the right to a name, identity,[45] and birth registration in the legal framework regulating intercountry adoption.

**Article 21 of the CRC provides as follows:**

States Parties that recognise 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 authorised 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) Recognise 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.[46]

[44] See, UNICEF Innocenti Digest, (1998), 5.
[45] See, in general, Doek, (2006).
[46] Art. 21 of CRC.

Article 21 of the CRC and Article 24 of the ACRWC deal with a number of substantive issues pertaining 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. Other issues addressed by Article 21 of the CRC and Article 24 of the ACRWC 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.

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 report.

### Article 24 of the ACRWC:

States Parties which recognise 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;

(b) recognise 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;

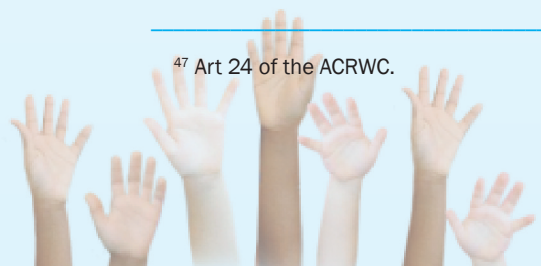
(c) ensure that the child affected by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(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.[47]

[47] Art 24 of the ACRWC.



The majority of the principles and rights provided in the CRC and the ACRWC are not a matter of discretion for States Parties.[48] However, the wording of both Articles contains no mandate requiring States to permit adoption, either nationally or internationally.[49] Indeed, both Articles 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 is under an automatic international obligation to allow intercountry adoption as a means of alternative care by virtue of it being State Party to the CRC and the ACRWC.[50] A close reading of the carefully crafted wording of the Articles in fact reveals the opposite. The caveat to Article 21 provides for "States Parties that *recognise and/or permit* the system of adoption" (emphasis added), while Article 24 of the ACRWC speaks of "State Parties *which recognise* the system of adoption" (emphasis added).

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*[51] of Islamic law, [and] adoption".[52] The use of the phrase "could include" is further proof that intercountry adoption is not imposed by international law. Moreover, the international framework does not support a general right to be adopted and to adopt.

The four cardinal principles of the CRC and the ACRWC have a direct bearing on intercountry adoption and should be respected at all times. These are: the best interests of the child; non-discrimination; the right to life, survival and development; and child participation. In particular, the best interests of the child principle is elevated to "the paramount consideration" in Article 21 of the CRC. The CRC and the ACRWC also address issues such as subsidiarity, adoptability, improper financial gain, and institutional frameworks.

Some detractors of adoption deplore the fact that once a child leaves his or her state of origin, the possibility of 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 in cases of intercountry adoption. 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 child", a requirement not apparent in the CRC.

Follow-up reports on adoptions are required by the vast majority of countries of origin worldwide. From their perspective, it is supposed to be a way to keep an eye on the evolution of the adopted child and his well-being. Follow up reports are usually useful during the first period of the adoption (from about the first six months until 2 years). Afterwards, it is the responsibility of the receiving country to protect the adopted children as it would any other child living in its territory.

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[53], but very few African countries have entered into bilateral and multilateral agreements of this nature.

[48] Most provisions require states to "ensure", "undertake", "recognise", or "respect".
[49] LeBlanc, (1995), 143-44.
[50] See, for instance, Dillon (2003), 207.
[51] *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.
[52] Art 20(3) of CRC.
[53] See Art. 21(e) of the CRC.

## The Hague Convention on Intercountry Adoption in Africa

An increasing number of African countries seem to be realising the important role of the Hague Convention in promoting children's best interests, and particularly in addressing illegal intercountry adoption practices. For instance, after experiencing and detecting a number of illegal adoptions, Togo ratified the Convention in 2009. In April 2011, the Government of Seychelles reported that ratification of the Hague Convention was "imminent".[54] The Government of Rwanda has indicated a similar position.[55]

In Namibia, partly as a result of a number of recent national media reports (in December 2011) of offers by biological parents to sell their newborn babies for intercountry adoption,[56] in February 2012, Cabinet directed that the country should ratify the Hague Convention immediately. It was indicated that such ratification should be accompanied by the passing into law of the chapter of the Child Care and Protection Bill on adoption, as an interim amendment to the Children's Act of 1960. Cabinet also directed that a Central Authority be established right away, a turnaround from the previous position, whereby the government wanted to remove the provisions on the Central Authority for consideration to some later date.[57]

The Government of Mozambique is currently (March 2012) receiving technical assistance from the Hague Conference on Private International Law in order to lay the ground work for a possible ratification of the Hague Convention. In Cameroon, it was reported in 2010 that "a campaign is to be launched to promote the ratification of the 1993 Hague Convention".[58] In Malawi, the Child Care, (Protection) and Justice Bill of 2005 had an explicit provision requiring that the receiving country of the applicants to adopt needed to be "a signatory to and [to have] implemented the [Hague] Convention on protection of Children and Co-operation in Respect of Inter-Country Adoption", in order to be able to adopt from Malawi. This was provided despite the fact that Malawi itself is not yet a State Party to the Hague Convention.

Despite these positive developments, the number of Contracting States to the Hague Convention from Africa still remains too low, at 13. Given the current increasing focus on African countries as sending countries, children's best interests demand that more African countries ratify and implement the Hague Convention.

The Hague Convention aims to uphold the best interests of the child in intercountry adoption law and practice.[59] The Hague Convention was adopted to fill the legal void that is present when intercountry adoption occurs by *ad hoc* process or in a legal vacuum.

[54] CRC Committee, State Party Report: Seychelles, (Apr 2011), para 185.
[55] For instance, during the State Party report consideration of Rwanda by the African Committee of Experts on the Rights and Welfare of the Child, Nov 2010.
[56] See, for instance, The Namibian Sun, "Young mother offers baby for sell" 8 December 2011.
[57] E-mail correspondence from Dianne Hubbard, Legal Assistance Centre, Windhoek, Namibia, (29 February 2012). Copy on file with writer.
[58] CRC Committee, State Party Report: Cameroon (Jan 2010), para 121.
[59] It features six times in the CRC - in the Preamble, and in Articles 1, 4, 16, 21 and 24.

Deciphering the objectives of the Hague Convention is not a difficult task. Article 1 establishes that the Convention seeks to lay out safeguards to ensure that the best interests of children are protected in intercountry adoption, to prevent trafficking in children, and to ensure recognition of intercountry adoptions.[60]

The Hague Convention states in its Preamble that the signatory parties:

> *"...recognise 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".*

It also states that for children who cannot remain with the 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". It addresses issues pertaining to adoptability, subsidiarity, consent, improper financial gains, and the role of Competent Authorities, Central Authorities and Accredited Bodies. As of 1 April 2012, 87 countries have become Contracting States to the Hague Convention,[61] only 13 of which are African countries. While there is no clear evidence or apparent common ground for reasons why African countries have been reluctant to ratify, anecdotal evidence exists that two key reasons are alleged - lack of capacity to put in place the necessary institutional frameworks, and African countries fear of being required to unnecessarily open their domestic space for intercountry adoption.

In any case, the Hague Convention remains a private international law instrument that does not aim to cover all issues surrounding the adoption process, and which does not address the different steps taking place before the child enters the adoption system. For instance, if official documents declare that a child is an orphan, but in reality the child was stolen from his/her parents, the Hague Convention is of no use, as it does not cover the questions of birth registration and civil registry. In addition, there are many countries (whether receiving or sending countries) that have faced the difficult experience of announcing the entry into force of the Convention while the necessary administrative services were not in place to manage the related procedures (Madagascar, for instance). In India and Guatemala, for example, ratification of the Hague Convention has not addressed many issues related to illicit activities.

[60] Hague Convention, *supra* note 11, at art. 1.
[61] *Available at* <http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=69>.

# 3 THE LAW AND PRACTICE OF INTERCOUNTRY ADOPTION IN AFRICA

## 3.1 Intercountry adoption law in Africa: an overview

Part 1 of this document addressed the legal context relevant for intercountry adoption in Africa. Some African countries have outdated laws while others have up-to-date ones; some are comprehensive while others are not.

The observation that a number of outdated laws exist is of particular relevance in Africa. For example, Malawi's Adoption Act (enacted originally as the Adoption of Children Ordinance in 1949 in pre-independence Malawi) falls within this category; Zambia's Adoption Act, likewise, was enacted in 1958. There are examples of some child law reform processes that have been completed, but with the final statutes as yet unpassed by parliament.[62] Other pieces of legislation are not yet at the completion stage and are either in drafting or in parliamentary processes. Developments in Namibia, Angola, and Swaziland fall into this category. In addition, in a number of countries, certain areas of child law and policy are less developed. This is the case, for instance, in respect of child trafficking.[63]

These legal contexts have a number of direct implications for intercountry adoption. Outdated legislation might mean that intercountry adoption is prohibited, at least in law, or that – as was the case in Liberia, and is still the case in Cameroon – there are no arrangements to regulate and monitor the practice adequately.[64] In the absence of a sound regulatory framework, the possibility of compromising children's best interests while undertaking intercountry adoption is high. For instance, even though the ACRWC and some domestic laws emphasise the important role that cultural identity plays in determining children's best interests, some intercountry adoption practices on the continent do not comply a standard that emphasises the importance of cultural identity for children.

Recently promulgated statutes also pose a challenge with respect to how they can be operationalised, especially since there is often a shortage of sufficiently qualified professionals and institutional support to support them, and a dearth of identifiable good practices as regards implementation.[65] Intercountry adoption is a field of child law that requires a significant level of cooperation and coordination, and 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. This reality on the ground undermines the intercountry adoption regime that currently exists in Africa. The following sections highlight this further in the context of specific issues related to intercountry adoption.

[62] Examples of this are found in Ghana, Kenya, Madagascar, Mozambique, Nigeria, Botswana, Lesotho, Mali, Liberia, and Uganda. Others include the Child Rights Act of Nigeria (2003), the Children's Act of the Gambia (2005), the Children Act of Sierra Leone (2007) and the Children Act of South Sudan (2008).
[63] See, for instance, IBCR, (2007), 186
[64] CRC Committee, Concluding Observations: Liberia, (July 2004), para. 38.
[65] Sloth-Nielsen and Mezmur, (2007a), 335.

## 3.2 The principle of the best interests of the child

Article 21 of the CRC stipulates that "States Parties that recognise 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 also tells of a conscious decision to make the best interests of the child "the paramount consideration".

The Hague Convention also explicitly mentions this.[66] According to the Preamble, for instance, in the best interests of the child, the ideal place for growth is in a "family environment".[67] 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:

1. Efforts to combat abduction of, sale of and trafficking in children to ensure that a child is genuinely adoptable

2. Efforts to collect and preserve as much information as possible about the child's origins, background, and medical history

3. Ensuring a matching that meets the needs of the child with the qualities of the adoptive parents and family.[68]

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.[69]

The majority of African countries have provided for the best interests of the child principle in legislation. As a result, there is no shortage of laws that entrench the best interests of the child principle in Africa. These laws provide either a general best interests guarantee, or one that is specific to adoption; at times, they provide for both. For example, Article 36(2) of the Constitution of Ethiopia and Section 28(2) of the Constitution of South Africa make children's best interests "a primary consideration" and "a paramount consideration" respectively. The Child Rights Act of Sierra Leone (2007), in Section 116 (1) indicates that a child may be "put up for adoption if it is in the best interests of the child". In Benin, in cases of parental separation or divorce, and in case of adoption,[70] the best interests of the child must be safeguarded.[71] The Botswana Children's Act (Part II), underscores the primacy of the child's best interests, including in intercountry adoption. According to Article 353 of the Civil Code of Mauritius, when dealing with an adoption case, a judge shall verify that the law is respected and "*l'adoption est conforme à l'intérêt de l'enfant*" (the adoption conforms to the child's best interests), thereby explicitly entrenching the best interests principle in the context of adoption. In Rwanda, Law N° 42/1988 of 27 October 1988 instituting the Preliminary Title and the First Book of the Civil Code governs adoption, and provides that the best interests of the child and the views of the child should be respected.[72]

[66] It features six times in the Convention - in the Preamble, and in Arts. 1, 4, 16, 21 and 24.
[67] Preamble CRC and ACRWC.
[68] Permanent Bureau, Guide to Good Practice, (2008), 31-32.
[69] Vite and Boechat, (2008), 27.
[70] Art 336 of the Code of the Family.
[71] Art 405 of the Code of the Family.
[72] Arts 332, 335, and 336.

Despite these and other similar developments, it could generally be argued that with no clear definition, description, or criteria regarding 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 detrimental to children. In fact, the absence of a fixed and inflexible definition of what constitutes best interests is supposed to allow for a case-by-case consideration, facilitating a context-dependent consideration of each individual child's case. In practice, however, this is not always so.

## The "Zulu boy" case: A case from the United Kingdom

The English case[73] 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.[74] Central to the case was the question of whether it was in a nine year old child's best interest to remain in Britain with his foster mother or to return to his biological parents in South Africa.[75] 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, among 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 he did not want to return to live in South Africa.[76] 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".[77] 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".[78]

This Judgment has been a subject of criticism.[79] Assessed against the CRC and the ACRWC, especially the requirement to make the best interests principle a primary 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. In addition, the role of the views of the child as one important element in defining his best interests was ignored. 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 override this *prima facie*

Coninued to next page...

[73] *Re M* (Child's upbringing) (1996) 2 FLR 441.
[74] In this case, amongst others, the conflicts involved were between the interests of prospective adoptive parents *versus* the interests of biological parents. For a discussion of this case, see, Fortin, (2003), 435.
[75] Freeman, (2007a), 29.
[76] Subsequently the child returned to England with his biological parents' agreement. See Freeman, (1997), 382.
[77] Re M (Child's upbringing) (1996) 2 FLR 441, 454.
[78] As above.
[79] For such media criticism, The Independent, (10 March 1996).

right. Both the CRC and the ACRWC support a child's cultural background, but these instruments do not indicate that cultural considerations trump all other rights. Measures that were less intrusive in order to ensure the "continuity in the child's upbringing",[80] such as making an order for contact with the biological family, and requiring the foster mother to obtain Zulu lessons for the child,[81] would have fulfilled some of the concerns of the Court and the biological parents.[82]

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 to comply with legal requirements and secure the necessary consents.[83] 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.[84] 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.[85] 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.[86] Such an adoption could hardly be labelled in the best interests of the child.

## 3.3 Who is adoptable?

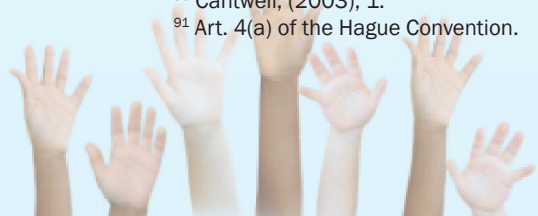
### 3.3.1 Adoptability: An overview

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". Throughout the Hague Convention, the word "adoptable" appears only twice[87] and "adoptability" appears once.[88] These terms are not defined anywhere in the treaty. This leaves the interpretation of the term to the individual sending countries.

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 important to note that most of the arguments on adoptability mentioned above in the context of the CRC (and the ACRWC) also apply to the Hague Convention, as appropriate. 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 adopted" or that "the child ought to be adopted".[89] 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",[90] seems to favour the former interpretation.

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.[91] The Hague Conference on Private International Law

[80] A phrase used in Art 20(3) of the CRC.
[81] Presumably to promote continuity with his heritage. Freeman, (1997), 382.
[82] Freeman, (1997), 382.
[83] Newell and Hodgkin, (2007), 288.
[84] As above..
[85] Vite and Boechat, (2008), 37.
[86] See Arts. 7 and 8 of the CRC.
[87] In Arts. 4 and 16(1)(c) of the Hague Convention.
[88] In Art. 16(1)(a) of the Hague Convention.
[89] See Murphy, (2005) 189.
[90] Cantwell, (2003), 1.
[91] Art. 4(a) of the Hague Convention.



(HCCH) 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 another family environment.[92] 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, and in particular parents.[93]

Although not provided for under Articles 21 of the CRC and 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".[94] Reference to Article 21(a) of the CRC shows that it 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"[95].

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.

The issue of what kind of institution could be given the task of determining adoptability is also not explicitly catered for under the CRC and the ACRWC. In the absence of this, State practice (including in Africa) indicates that the task of determining adoptability could be given to 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".[96]

## The importance of a clear understanding and determination of adoptability

A clear definition and understanding of who is adoptable is important for the following three main reasons.

First, 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".[97] Children in institutions are not necessarily adoptable.

Second, 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 this, thereby minimising the misinterpretation of adoptability that can result in flagrant abuses against, and exploitation of, a child who is adoptable.[98] In this regard, Graff contends that Westerners have been sold the myth of a world orphan crisis.[99]

Third, the availability of a clear understanding of adoptability would also facilitate compliance with the principle of subsidiarity.

[92] Permanent Bureau, Guide to Good Practice, (2008), 82.
[93] Permanent Bureau, Guide to Good Practice, (2008), 82.
[94] CRC Committee, Concluding Observations: Serbia, (June 2008), para. 43(a).
[95] This provision is similar to Art. 3(2) of the CRC.
[96] CRC Committee, Concluding Observations: Mexico, (June 2006), para. 42(d).
[97] Cantwell, (2003), 71.
[98] Thompson, (2004), 463.
[99] Graff, (2008), 1.

### 3.3.2 When intercountry adoption may be the answer

Many countries, including African countries, generally allow for termination of parental rights and responsibilities, relinquishment, or abandonment as the main grounds leading to children's adoptability. In other words, as far as legal adoptability is concerned, it is mainly "based on parental consent, death, abandonment or relinquishment".[100] A randomised look at some countries' adoptability grounds confirms that these appear to be common in Africa. For instance, this is the case in Angola, Benin, Burkina Faso, DRC, Sierra Leone, Uganda, Ghana and Senegal.

However, unfortunately – save for few countries that can offer examples of good practice – many African countries do not provide an explicit and comprehensive provision addressing adoptability in law. South Africa, which offers an example of good practice, provides the definition of adoptable children in Section 230(3) of the Children's Act 38 of 2005, stating 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;
> *(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.

Section 157 of the Children's Act of Kenya implies 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, or persistently failed to maintain the child".[101]

Abandonment does not (and should not) often automatically lead to adoptability. In Ethiopia, for instance, one of the main safeguards set in place to counter a premature determination of the adoptability of abandoned children 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, in many African countries, the nature of efforts by police or other competent bodies to trace families, and a shared acceptance of how and for how long tracing efforts are to be conducted before abandonment is declared, remain elusive.

In principle, since a child is not adoptable unless the parental rights of his/her birth parents have been properly terminated, laws impose stringent safeguards against a hasty, 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 (as with the HANCI case in Sierra Leone, for instance), the requirement that relinquishment should be made in writing and witnessed is mainly aimed at serving as a safeguard against such scenarios.

[100] Lammerant, I. Les Fondements Ethiques et Juridiques de l'Adoption des Enfants Délaissés. Contribution au Colloque « Devenir adoptable, être adoptable », November 14, 2003, Paris, p. 5 ;
[101] Sec. 159(1)(a) of the Children Act.

## Reviewing standards to address adoptability issues: Mauritius and Rwanda

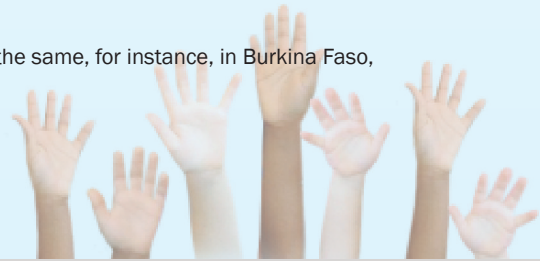
Some countries are in the process of amending their Adoption Acts to address adoptability issues. In Mauritius, for instance, the National Adoption Council Act is being reviewed in order to regulate adoptions comprehensively, and bring the law fully up-to-date with the standards of the Hague Convention. The new law is expected to provide for, among other things, clear standards on adoptability; standards on securing the views of the child; and ensuring that applications will be lodged at the level of Central Authorities that will keep a database of adoptable children and do the matching.[102] Similar measures are underway in Cameroon and Namibia.

In part with a view to reducing illicit activities and minimising the risk of non-adoptable children being presented as adoptable ones, the Ministry of Gender and Family Promotion in Rwanda has clearly designated the orphanages that are allowed to present children for intercountry adoption. Backed by the Guidelines on International Adoption (MIGEPROF, 23 April 2009), these orphanages must present documents indicating the name, date and place of birth, and parents' names (if known); the history of the child including timelines with dates and reasons; family history; medical history; emotional and intellectual status; and the views of the child on the adoption, based on his/her age and maturity level.[103] This information helps to establish whether the child is indeed adoptable, and the kind of prospective adoptive parents who would meet the needs of the specific child.

Furthermore, the general rule should be enforced that parental rights and responsibilities cannot be relinquished before the child is born. Such a legal standard is lacking in many African countries – indeed, in countries such as Ethiopia, the law explicitly allows this to happen. In most countries, laws lack clarity as to 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. To illustrate, the CRC Committee criticised Hungary for the short period of time (two months) during which the country's laws allow a biological mother to withdraw her consent to adoption.[104] The rights of biological fathers must be respected too, also in order to minimise possible disruption or dissolution when their rights are not respected in the adoption process.[105]

There is also a merit in mentioning that the distinction between abandonment and (voluntary) relinquishment of children is not only of theoretical importance: it has practical implications too. For instance, while Liberian legislation seems to recognise 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 (as long as the latter does have the necessary psycho-social skills at its disposal to receive the consent in an appropriate manner) or through abandonment.[106] The same is true for Angola and a few other African countries.[107]

[102] CRC Committee, State Party Report: Mauritius (June 2011), para 383.
[103] CRC Committee, State Party Report: Rwanda, (Jan 2011), para 183.
[104] CRC Committee, Concluding Observations: Hungary, (March 2006), para. 34.
[105] 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.
[106] U.S. Department of State, "Intercountry adoption: Liberia", (December 2008).
[107] U.S. Department of State, "Intercountry adoption: Angola", (July 2008). The situation is the same, for instance, in Burkina Faso, Sierra Leone, and Tanzania.



### 3.3.3 When intercountry adoption is probably not the answer

#### *I. Mere "orphan" status*

It is commonplace to read about the orphan crisis sweeping the African continent.[108] While the information about the crisis is hardly false, it is flawed if it is taken to equate orphans with adoptable children. Although UNICEF reports orphan numbers worldwide (approximately around 132 million, in 2007, for instance),[109] this definition includes "single orphans" who have lost just one parent, and "double orphans" being cared for by extended families – neither of which categories can be interpreted as containing children in need of alternative care (adoption).[110] Contrary to traditional or colloquial usage, UNAIDS also uses the term "orphan" to describe a child who has lost either one or both parents.[111] The possibility that some of these children could still have one surviving parent caring for them, according to the definitions provided above, is illuminative of the fact that not all so-called "orphans" are adoptable.[112]

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.[113] 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".[114] In Uganda and Rwanda, an orphan is a child below the age of 18 who has lost one or both parents.[115] In Botswana, in order for a child to be classified as an orphan, he or she must have lost one (in the case of a single parent family) or two (married couples) biological or adoptive parents.[116] These differences in definition clearly show that a certain country's statistics on orphans do not necessarily testify to the number of children who are deprived of their family environment, and who are therefore adoptable.

#### *II. Psychosocial and medical adoptability*

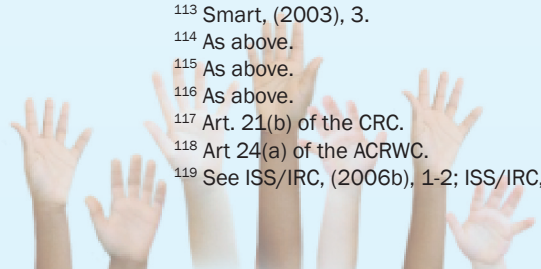
The authorisation of adoption "on the basis of all pertinent and reliable information" under the CRC[117] and "on the basis of all relevant and reliable information" under the ACRWC[118] should be read to imply that, among other considerations, it is not only legal requirements that need to be fulfilled before a child is declared adoptable. Therefore, though adoptability establishes the fact that a child is legally adoptable, determination of adoptability should go beyond the legal decision[119]: it should also establish that the child is both emotionally and medically capable of benefiting from adoption. It is wrong to assume that all children who are permanently deprived of their original family environment are ready to reap the benefits of a permanent new one.

There are a number of instances when, even though a child might be deprived of his or her family environment permanently, intercountry adoption (or adoption for that matter) might not necessarily be in their best interests (for instance, children in a sibling group, street children, etc.). African laws relevant to adoption generally lack provisions governing the psychosocial and medical assessment of adoptability of a child.

#### *III. Adoption in times of emergencies: "Misguided kindness"*

A common misconception prevails that the mere deprivation of a child of his or her family environment, temporarily or permanently, automatically makes

[108] Davis County Clipper, (18 April 2009).
[109] See, for instance, UNICEF, "Press Centre: Orphans", (2007).
[110] 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).
[111] UNAIDS "UNAIDS' Terminology Guidelines", (2008).
[112] That was the situation with the Madonna cases in Malawi.
[113] Smart, (2003), 3.
[114] As above.
[115] As above.
[116] As above.
[117] Art. 21(b) of the CRC.
[118] Art 24(a) of the ACRWC.
[119] See ISS/IRC, (2006b), 1-2; ISS/IRC, (2007), 1.



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[120], after which many people wished to adopt children who were deprived of their family environments,[121] though such deprivation might ultimately have been a temporary one. A similar scenario was witnessed immediately after the Haiti earthquake in January 2010.

As a result, many of the countries affected by the 2004 Tsunami shut their borders to adoption altogether.[122] 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.

To use refugees as an example, while a number of African refugee children have been internationally adopted in the past, the case of the "lost boys" of Sudan (where a large number of children from Southern Sudan, as it then was, were adopted) stands out. The adoptability of refugee children is an issue that requires a high level of caution. In this regard, 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* is very relevant.[123]

One incident on the African continent that shed light on the adoptability of refugee children was the previously mentioned 'Zoe's Ark' case in Chad.[124] It was the contention of the Zoe's Ark group that the children it was attempting to transport to France for adoption purposes were refugees from the Darfur conflict in Sudan.[125] In analysing the events surrounding the case, it is argued that – irrespective of whether the 103 children were from Chad or Darfur – the extended conflict in both countries should have warranted a moratorium on intercountry adoption from the affected areas.[126] In addition, the refugee status of the children, if they were refugees at all, should have caused the granting of a reasonable time (usually two years)[127] during which all feasible steps to trace the parents or other surviving family members should have been carried out.

### *IV. Poverty as a sole ground for adoptability*

Poverty is often one of the main reasons why parents abandon or voluntarily relinquish their children.[128] 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.[129] This reality is arguably more acute in Africa than in any other region in the world.

To borrow Smolin's words, "there is a palpable cruelty to taking away the children of the poor"[130]

[120] See National Post, (14 January 2005), 3.
[121] See, for instance, The Evan B. Donaldson Adoption Institute, (2005), 1.
[122] For instance, in regard to India, see Jakarta Post, (5 January 2005), 2.
[123] Permanent Bureau, Recommendations, (1994).
[124] See Reuters, (31 March 2008).
[125] As above.
[126] As above; Mezmur, (2009), 163-164.
[127] See, for instance, CRC Committee, General Comment No. 6, (2005), para. 91.
[128] See, for instance, AP, (05 February 2001).
[129] See, for the experience of Brazil in this regard, Fonseca, (2003), 111 and the citations therein.
[130] Smolin, (2007), 437.

simply because of the poverty of the parents. Domestic legislation in some countries expressly provides that poverty cannot be sufficient grounds for declaring a child adoptable (such as Article 6 of Guatemala's law, also known as Ortega's law).[131] Efforts to find similar examples in African laws have been unsuccessful.

Taking poverty alone as a ground for adoptability is also considered not to be in accordance with the provisions of the CRC. 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".[132] The CRC Committee has raised deep concern about the fact that children living in poverty are over-represented among the children separated from their parents, both in developed and developing countries.[133] The UN Guidelines for the Appropriate Use and Conditions of Alternative Care for Children take a similar position.[134] 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. This may take the form of the creation of domestic social services to aid poverty-stricken birth families in supporting their children.

**Assessing poverty as a ground for adoptability: An example from Nigeria**

The US Department of Homeland Security Board of Immigration Appeals has ruled that an inability to care for a child is 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.[135] For instance, in a 2009 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 US 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 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 added]. 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)(l)(F) of the Act.*[136]

[131] For a discussion of this law, see, generally, Sohr, (2006), 559.
[132] See CRC Committee, Concluding Observations: Nepal, (September 2005), para. 54(c).
[133] CRC Committee, Day of General Discussion, (2005), para. 658.
[134] Resolution adopted by the General Assembly A/RES/64/142.
[135] See, for instance, in the context of Guatemala, U.S. Department of State, "International adoption: Guatemala Sheet" (undated), part IV(B)(1)(a).
[136] Petition to Classify Orphan as an Immediate Relative Pursuant to Section IOl(b)(l)(F) of the Immigration and Nationality Act, 8 U.S.C. I IOl(b)(l)(F), U.S. Citizenship and Immigration Services 07 January 2009.

### *V. Children of Islamic background*

Under the CRC and the ACRWC, it is possible to argue that the adoptability of a child is dependent on the religion of the parents or guardians and/or the child. The list of countries in Africa that prohibit intercountry adoption (including domestic adoption) includes Algeria, Egypt, Somalia, Mauritania, Comoros, and Djibouti. There are provisions in national law that envisage the application of adoption legislation only to non-Muslims. While efforts to find examples from Africa have proved futile, 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.[137]

In some instances, 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.[138] 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 "[a]doption 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".[139] These, unfortunately, are isolated cases. In sum, 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 closest to adoption.

## 3.4 Eligibility to adopt

### 3.4.1 General

Both the CRC and the ACRWC are silent on the question of who is eligible to adopt.[140] While Article 5 of the Hague Convention also lacks detailed rules concerning eligibility, it generally states that an adoption shall take place "only if the Competent Authorities of the receiving State (a) have determined that the prospective adopters are eligible and suitable to adopt..." In the receiving state, adopters' suitability and eligibility are determined by compliance with specific state requirements, which usually are very simple and objective, and by a much more extensive investigation by a social worker.[141]

In fact, the determination of eligibility to adopt is a matter of national law, which has, among other consequences, the difficulty caused by the fact that African countries have adopted a wide range of criteria relating to age, residency, marriage status, sexual orientation, and income.[142] African countries provide these and other criteria in an effort to promote their children's best interests.

In countries such as Benin and Senegal, age requirements indicate that single prospective adoptive parents must be at least 35 years old. In Burkina Faso no single applicants are allowed, while in Kenya and Sierra Leone, single male applicants are explicitly declared ineligible to adopt by law. However, in Kenya, single female applicants, in instances where there are special

[137] CRC Committee, Concluding Observations: Malaysia, (December 2006), para. 97.
[138] Cuniberti, (06 February 2009).
[139] See French Civil Code, Art. 370-373.
[140] In part because it regulates intercountry adoption in a very rudimentary fashion, and because the issue of eligibility is better left for national laws to regulate.
[141] HCCH, 2008: 93-96 and 112.
[142] Unless no other citation is provided, all the country info on eligibility requirements in Africa countries is taken from the US Department of State: International adoption "Country information" available at <http://adoption.state.gov/country_information/country_specific_info.php>.

circumstances in the view of the court, can be allowed to adopt a child, including a child of the opposite sex. In Ghana, only Ghanaian citizens can apply to adopt as singles. In Cameroon, to be eligible to adopt, at least one adoptive parent (if a couple) must be older than 40 years of age. If neither parent meets the age requirement, at least one must be at least 35 years old and they must have been married for a minimum of 10 years. In Uganda, while single parents may apply to adopt, they may not adopt a child of the opposite sex (unless an exception is made). In DRC, single, widowed, and divorced individuals are prohibited from adopting a child of the opposite sex. The Kenyan law (Children's Act and Regulations) indicates that adoption orders will not be granted to joint applicants not married to each other.

In countries such as Uganda, Ghana, and Sierra Leone, applicants must be at least 25 years old and 21 years older than the child they plan to adopt. In Cote D'Ivoire the prospective adoptive parent(s) must be thirty years old and must be 15 years older than the adoptive child. To be eligible to adopt in Madagascar, at least one spouse must be over the age of 30. In countries such as Benin, Burkina Faso, Burundi, DRC, Senegal, and Cote D'Ivoire, prospective adoptive parent(s) must at least be 15 years older than the prospective adoptive child.[143] If married, adoptive parents must have been married for five years in countries such as Benin, Burkina Faso, Burundi, Senegal, DRC, and Cote D'Ivoire. Rwandan law makes it a requirement that adoptive parents be heterosexual and married for at least five years.[144]

As a rule, prospective adoptive parents must not have any biological child of their own in Benin; but in Burkina Faso, those with no biological children of their own are given priority. In Senegal, save for a grant of an exemption by the President, adoption law states that only individuals who are unable to have biological children may adopt a child. Again in Burkina Faso, save exceptions, prospective adoptive parents should be less than 60 years of age. In Kenya, this age is raised to 65 years. In Eritrea, a prospective adoptive parent must be below the age 50 to qualify as eligible to adopt.

A liberal requirement on eligibility to adopt has its own pros and cons. On the positive side, it helps to increase the pool of prospective adoptive parents. On the other hand, a highly unregulated eligibility requirement poses a potential threat to children's best interests.

### 3.4.2 Sexual orientation and eligibility

There are very few countries in the world that allow adoption by gays, and almost none these countries can be categorised as "sending countries". These countries include Denmark, the UK, Germany, Iceland, The Netherlands, Spain, Belgium, Norway, Sweden, Quebec and some States in the US.[145] One predominantly sending country in Africa that allows adoptions by gays is South Africa. The practice of homosexuality continues to be illegal in the majority of African countries, and what is commonly referred to as "state sponsored homophobia" is rife.[146] According to the International Lesbian and Gay Association (ILGA), homosexual acts are illegal in 37 African countries.[147] In some countries, such as Kenya, adoption related laws explicitly provide for the ineligibility of gays to adopt children.[148] In Ethiopia, an assessment by the US State Department indicates that "[i]n general ... openly gay or lesbian individuals or couples" may not adopt.[149]

[143] See generally the Benin adoption law, which can be found in the *Code des Personnes et de la Famille*, a copy of which is available (in French) at <http://www.ric.bj/documents/code_pf.pdf>.
[144] Office of Children's Issues, US Department of State, 'Intercountry Adoption', <www.adoption.state.gov/country/rwanda.html#who1>, accessed 1 April 2012.
[145] ISS Monthly Review, (2/2008), 2.
[146] See Ottosson, (2008).
[147] Ottosson, (2008), 45.
[148] See U.S. Department of State: Kenya (2006).
[149] U.S. Department of State, "Intercountry adoption: Ethiopia", (December 2008).

Three important observations are apposite. Firstly, 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.[150] 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.

Secondly, such a practice of evading requisite legal requirements might fall short of promoting the best interests of the child. For instance, if the pretext is uncovered at a later stage by an African country that prohibits homosexuality, the possibility of the "disruption" of the adoption might occur, which is usually not in the best interests of the child.

Thirdly, 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 UK 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.[151] Such closures, even temporarily, may 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).

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 sensitively considered.

### 3.4.3 Residency requirement for eligibility to adopt

A number of African countries provide for a residency requirement (or probationary period) before a prospective adoptive parent is eligible to adopt. Uganda, Zambia and Zimbabwe, for instance, have varied forms of residency requirements. The Children's Act of Southern Sudan, in Section 90, requires not only residence for a period of three years prior to a foreigner adopting a Southern Sudanese child, but fostering for a period of one year as well. The Child Rights Act (2007) of Sierra Leone requires six months residency, though the courts, using their discretion, often waive this requirement. In Malawi, Section 3(5) of the Adoption Act provides that "[a]n adoption order shall not be made in favour of any applicant who is not resident in Malawi".

The interpretation of residency requirement in Malawi in the Infant DB case is exemplary for African countries that have a relatively long and inflexible residency requirements. In that case, addressing the issue of the requirement of residence in section 3(5) of the Act, the judge posed the question whether "residence" is an end in itself in the context it is used, especially bearing in mind that the court was dealing with welfare of children; or is residence merely a means to an end? He argued that the best interests of the infant should override the requirement of residence.[152]

It is important, moreover, to underscore the scope of application of the Hague Convention provided for in Article 2, which entrenches the fact that the "Convention shall apply where a child habitually resident in one Contracting State ("the State of

[150] See ISS Monthly Review, (2/2008), 2.
[151] See Christian Today, (08 March 2007).
[152] See Madonna Judgment at 16–18.

origin") has been, is being, or is to be moved to another Contracting State ("the receiving State")". As can be gleaned from this provision, it is not nationality or any other ground that is the connecting factor for the application of this Convention; it is the habitual residences of the child and the prospective adoptive parents.[153] 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.

In sum, the merits of a residency requirement might be debatable. Where a country of origin decides to have a residency requirement, however, the best interests principle should be central in interpreting the notion with regard to intercountry adoption. Almost all African countries – most of which do not have an adequate legal and institutional framework to regulate intercountry adoption – continue to use a residency requirement as a safeguard to promote children's best interests. From a comparative perspective, it should be noted that the current trend in Africa in countries that have put in place the necessary legislative and institutional frameworks (for instance, South Africa and Kenya) is to regulate intercountry adoption without a residency requirement. As the practice in Kenya shows, a brief fostering period could achieve the goals envisaged for a residency requirement.[154] On the other hand, if experience in Uganda is of any guidance, an unreasonably long residency requirement (in this case three years) could be counterproductive, and lead to the circumvention of all other safeguards necessary for intercountry adoption.[155]

## 3.5 The subsidiarity principle

### 3.5.1 General

One of the central principles underpinning the practice of intercountry adoption[156] is the principle of subsidiarity. According to Masson, this principle is key to ensuring that intercountry adoption is a service for children rather than for prospective adopters.[157] The key formulation of the principle is found in all the three legal instruments under consideration in this paper (the CRC,[158] the ACRWC,[159] and the Hague Convention). 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".[160] This reflects Article 24(b) of the ACRWC, which also indicates that intercountry adoption should be used "as a last resort". 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.*[161]

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

[153] HCCH, 2008: 106.
[154] See the Children Act (Acts No. 8) 2001, at art. 157(1) which requires a 3 months fostering period before an adoption order is granted.
[155] ANPPCAN, 2009: 7
[156] Some of these include the best interests of the child, adoptability, suitability of prospective adoptive parents, recognition, and intercountry cooperation.
[157] Masson, (October 2001).
[158] Art. 21(b) of the CRC.
[159] Art. 24(a) of the ACRWC.
[160] See, for instance, CRC Committee, Concluding Observations: Brazil, (November 2004), para. 47.
[161] Permanent Bureau, Guide to Good Practice, (2008), 29.

suggest that while the former instruments give primacy to "any" 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.

### The importance of the principle of subsidiarity

The application of the principle of subsidiarity is important for a number of reasons. First, 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".[162] Secondly, the principle also facilitates the promotion of the cultural identity of the child. Thirdly, 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.

## 3.5.2 The application of the subsidiarity principle

As a general rule, there is a preference towards children growing up in their biological family environment. The implication of this preference for the birth and extended family is that, according to the CRC Committee, it is only when all other options to keep the child with his or her family have been exhausted and proved inefficient or impossible that adoption (or any other alternative care option) should be envisaged.[163] In this respect, the subsidiarity principle requires that States provide 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.[164] Once separation of children from their family takes place, when in the best interests of the child, family reunification measures should be pursued.[165]

### A general rule of thumb in applying subsidiarity

Recourse to an internationally recommended policy concerning different childcare measures could shed some light[166] on our understanding of the hierarchy of alternative care options to be prioritised generally. According to UNICEF's study on intercountry adoption (1998), next to the best interests of the child, it is widely agreed that three principles should guide decisions regarding long-term substitute care for children.[167] As a **general rule of thumb**, this internationally recommended policy provides that:

- Family-based solutions are generally preferable to institutional placements
- Permanent solutions are generally preferable to inherently temporary ones
- National/domestic solutions are generally preferable to those involving another country.[168]

The general hierarchy that places domestic adoption first among the alternative care options available is the least contested one. The fact that

[162] Hodgkin and Newell, (2002), 295.
[163] Vite and Boechat, (2008), 25.
[164] See, generally, Baglietto, (2007).
[165] Art. 10 of CRC.
[166] But it does not necessarily give complete answers.
[167] UNICEF Innocenti Digest, (1998), 5.
[168] As above.

domestic adoption is a national solution, a permanent placement, and that it offers a family environment, puts it ahead of other alternatives. Furthermore, there is evidence that in countries where adoption is well established, there is a demonstrated high 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.[169]

When domestic adoptions are not prioritised and many children remain in institutions,[170] a possible violation of the subsidiarity principle could be deduced.[171] A strategy to promote domestic adoptions requires, among other things, awareness-raising campaigns and regulations that facilitate access to adoption (such as, for example, ensuring that documents needed for the adoption process are free or inexpensive).[172]

Foster care, depending on the attendant circumstances of a child, could be of subsidiary importance 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.[173] However, if deprivation of a family environment is temporary, and the possibility of family reunification is present and planned for, adoption (both domestic and international) should be subsidiary to foster care.

The limited recognition of childcare institutions within the CRC and the ACRWC is indicative of the fact that they could (and sometimes should) play some role in childcare. When children are deprived of their family environment, there is often a transition period between the deprivation of their family environment and their placement in alternative care such as adoption and foster care. In such circumstances, the role of institutions is crucial in keeping children off the streets in the meantime 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.[174] Therefore, there is no refuting the fact that in very exceptional circumstances, institutions can also serve the long-term best interests of the child.[175]

As far as intercountry adoption is concerned, 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 only to the necessary exceptions demanded by a particular situation. 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. An understanding of "last resort" should be fostered which does not hinder legally appropriate early placement. Subsidiarity should be seen as constituting an active principle that requires **reasonable efforts** to find child-suitable domestic placements and make intercountry adoption a measure of last resort.

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[169] See, generally, Triseliotis *et al.*, (1997).

[170] CRC Committee, Concluding Observations: Dominican Republic, (February 2008), para. 54.

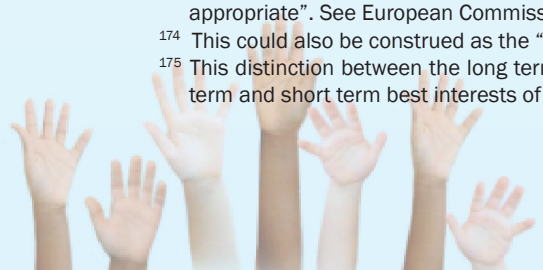
[171] CRC Committee, Concluding Observations: Eritrea, (June 2008), para. 45(a); Dominican Republic, (February 2008), para. 54. The presence of a close to equivalent number of intercountry adoptions to that of domestic adoptions, has raised the concern of the CRC Committee that adequate priority is not given to domestic adoptions. CRC Committee, Concluding Observations: El Salvador, (June 2004), para. 39.

[172] CRC Committee, Concluding Observations: DRC, (January 2009), para, 48(d).

[173] 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.

[174] This could also be construed as the "temporary care" and "permanent care" needs of a child deprived of a family environment.

[175] 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. See, generally, Cabral, (2004).



### 3.5.3 The subsidiarity principle: some examples from Africa

Examples of the conceptualisation and application of the subsidiarity principle in Africa are not abundant, especially good ones. Nevertheless, there are few examples worthy of mention.

With regard to explicitly domesticating the principles of subsidiarity, Madagascar's Adoption Law (No 2005-14) allows for intercountry adoption only if it is considered to respond to the child's best interests. This is to be determined after exploring the possibilities for suitable domestic placements, such as adoption.[176]

The fees required for domestic adoptions can contribute to the violation of the subsidiarity principle, where they make domestic adoption inaccessible to residents. For instance, while Togo indicates that "the National Adoption Committee strictly applies the principle of subsidiarity", the CRC Committee has underscored concerns that "fees imposed for domestic adoption render it almost inaccessible for nationals".[177] As a result, the State Party was urged "to consider decreasing adoption fees in order to ensure that preference is effectively given to domestic adoption over inter-country adoption, and that the best interests of the child is always the primary consideration in adoption decisions".[178]

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 and their families.[179] It is commendable that the Children Act[180] and the Children (CCI) Regulations (2005) regulate childcare 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 number of childcare institutions (CCIs) in the country, and to ensure proper regulation.[181] While the Children Act is silent on the subsidiarity or otherwise of intercountry adoption, the numbers of children adopted through domestic adoption and intercountry adoption are very close to one another.[182] 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.[183] Many sending African countries, such as DRC, Liberia, Ethiopia, and Mali, cannot say the same thing about their intercountry adoption and domestic adoption numbers.

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, "Clearly inter-country adoption is supposed to be the last resort alternative".[184] For the Judge, infant CJ was being cared for in a suitable manner in an orphanage, since "'in any suitable manner' refers to the style of life of the indigenous child, or as close a life as possible to the one that the child has been leading since birth".[185] However, on appeal, the Supreme Court of Appeal (SCA) disagreed with the lower court's appreciation of the subsidiarity principle. Under the Adoption Act, the wrote, "we do not think that... inter country adoption is a last resort alternative".[186] The SCA recognised that no single family in Malawi that had come forward to adopt

[176] Art 32.
[177] CRC Committee, Concluding Observations: Togo, (Feb 2012), para 47.
[178] CRC Committee, Concluding Observations: Togo, (Feb 2012), para 48.
[179] See Sloth-Nielsen, (2008c), 14 and sources cited therein (discussing the social cash transfers in Kenya).
[180] For instance, Sec. 58 of the Children Act defines a charitable children's institution; Sec. 68 of the Children Act creates the inspection committees; Sec. 67 of enables the Director of the Children's Services to appoint officers to inspect CCIs.
[181] Parry-Williams, J. and Njoka, J. (March 2009) 26, 72, and 76.
[182] Parry-Williams, J. and Njoka, J. (March 2009), 17-18.
[183] See, generally, the findings in Mureithi, I. *et al.* (2009).
[184] High Court *Infant CJ* case, 7.
[185] High Court *Infant CJ* case, 7.
[186] SCA *Infant CJ* case, 18.

infant CJ, nor had there been any attempt by anybody to place infant CJ in a foster family.[187] 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".[188] By taking this approach, the SCA displayed the correct appreciation that the application of the subsidiarity principle depends on the alternative care options that are available in actual fact.

In South Africa, 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 Parents (RACAP) for at least 60 days.[189] In addition, within these 60 days, it should be evident that "no fit and proper adoptive parent for the child"[190] is available in South Africa. In the *AD v DW* case, the *amicus* has rightly submitted that "[s]ubsidiarity is not a passive principle".[191] 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.[192] In practice, reasonable efforts include networking with other agencies that facilitate 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.[193]

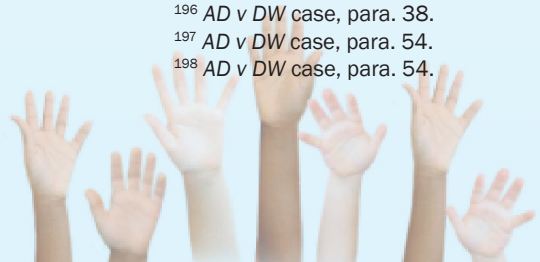
The fact that the Children's Act requires the Central Authority to manage the RACAP[194] is advantageous in a number of respects. Among other advantages, this arrangement:

> *...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.*[195]

In the *AD v DW* case, the Constitutional Court 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.[196] Baby R had already strongly bonded with the Appellants, and was almost reaching her third birthday.

The Constitutional Court found the SCA majority view, that the principle of subsidiarity acted as an insurmountable bar to the High Court's granting an order of sole custody and sole guardianship in favour of the applicants[197], as a "proposition ... stated in terms that were too bald".[198] 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

[187] As above.
[188] As above.
[189] Secs. 261(5)(g) and 262(5)(g) of the Children's Act.
[190] Sec. 261(5)(g) of the Children's Act.
[191] *Amicus* brief, *AD v DW*, para. 106.
[192] See *amicus* brief, *AD V DW*, para. 111.
[193] Mosikatsana and Loffell, (2007), 15-10.
[194] Sec. 232(1) of the Children's Act.
[195] Couzens, (2009), 63.
[196] *AD v DW* case, para. 38.
[197] *AD v DW* case, para. 54.
[198] *AD v DW* case, para. 54.



"the ultimate governing factor in intercountry adoptions".[199] While cognisant "that there are powerful considerations favouring adopted children growing up in the country and community of their birth",[200] the Constitutional Court indicated that "the subsidiarity principle itself must be seen as subsidiary to the paramountcy principle".[201]

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".[202] It was recommended "that a contextualised case–by-case enquiry be conducted ... in order to find the solution best adjusted to the child".[203] The emphasis placed by the Constitutional Court on the best interests of the child as the consideration that overrides the subsidiarity principle is very welcome; however it is submitted that demanding compliance with legal requirements should generally not be viewed as circumscribing the paramountcy of children's best interests to legal necessities. Moreover, the Constitutional Court criticised "*rigid* hierarchal ranking of care options" (emphasis ours) and not "general hierarchical ranking of care options" (which, by definition, is open to exceptions, and which is not only allowed, but is important).

## 3.6 Matching

"Matching" is the process of identifying, assessing and determining the prospective adoptive parents who would best meet the needs of the child.[204] This is differentiated from "entrustment", which is the "actual [physical] placing of the child in the care of the prospective adopters".[205] Under a section entitled "measures supporting the best interests principle", the Guide to Good Practice prepared by the Permanent Bureau identifies three main areas, one of which is ensuring a matching that matches the needs of the child with the qualities of the adoptive parents and family.[206] An accurate and comprehensive assessment of a child is a critical element for a matching process that upholds children's best interests.

While a multidisciplinary team of professionals (such as social workers, lawyers, and psychologists) should determine matching in order to uphold children's best interests, these professionals are lacking in almost all African countries. For instance, in South Africa, it was indicated that the country had a shortage of 17,000 social workers necessary in order to be able fully to implement the Children's Act 38 of 2005. Additionally, non-existent or very weak birth registration systems in a number of African sending countries make information about adoptable children inadequate, thereby limiting a matching process that should be done on the basis of comprehensive and up-to-date information on the child.

Information about prospective adoptive parents, provided through home study as well as by Central Authorities, plays a crucial role in creating a matching that promotes children's best interests. Unfortunately, it is not uncommon for a number of African countries to make decisions on the basis of false, misleading or incomplete information about the eligibility, suitability, and general child rearing skills and abilities of prospective adoptive parents. This problem partly emanates from the fact that the majority of African countries are not Contracting States to the Hague Convention on Intercountry Adoption, which explicitly requires that

[199] *AD v DW* case, para. 49.
[200] *AD v DW* case, para. 55.
[201] *AD v DW* case, para. 55.
[202] *AD v DW* case, para. 50.
[203] *AD v DW* case, para. 50.
[204] Permanent Bureau, Guide to Good Practice, (2008), 86.
[205] Permanent Bureau, Guide to Good Practice, (2008), 119.
[206] Permanent Bureau, Guide to Good Practice, (2008), 31-32.

there be a detailed and complete exchange of relevant information between the authorities in the receiving and sending countries.

On a related note, the adoptability of a child to a **specific receiving State** could depend on the definition of adoptability in that state. For instance, to adopt a child overseas and bring that child back to the US, the child must be found eligible to be adopted under US law. Therefore, even if an Ethiopian child who is 17 years old might meet the adoptability requirements in his or her country of origin,[207] as US law requires a child to be under the age of 16 to qualify for a US immigrant visa, the adoptability of such child into the US is impossible as far as US law is concerned.[208] This, however, is not an issue of adoptability as such; rather it is an issue of matching.[209] For example, the authorities in Ethiopia should abstain from matching a child who is 17 years old with prospective adoptive parents in the US. The child would still continue to qualify as adoptable under Ethiopian law for domestic adoption, and to countries that allow the adoption of older children up to the age of 18.

Some receiving (and sending) countries might not allow certain groups of children to be adopted. HIV positive children are a good example. Authorities in sending countries should not match HIV positive children with prospective adoptive parents from a state that does not allow HIV positive children to be adopted by parents who are habitual residents of that state (as was the case with the US, for instance). In this context, it is important to underscore that though very slow progress is being made in rendering HIV positive children adoptable from Africa, more remains to be done.

One example of progress is Ethiopia, which in the past did not allow the adoption of HIV positive children[210], although there was neither policy nor law that substantiated this position (a *de facto* prohibition on the adoption of HIV positive children had prevailed). However, this has changed. In 2005, the first HIV positive children to be adopted were taken in by US families; and there are newspaper reports that indicate that the adoption of HIV positive children from Ethiopia is on the rise.[211] The number of organisations that specifically promote the adoption of HIV positive children is also on the increase.[212] Nonetheless, it is important to keep in mind that the matching of HIV positive children, or children with any other special needs, must be undertaken with extra caution – and should especially be promoted in instances where home study has approved prospective adoptive parents suited specifically to the profile of children with special needs.

## 3.7. Institutional framework

### 3.7.1 General

The absence, or incompetence, of institutional structures can compromise the best interests of the children involved in intercountry adoption. After all, the implementation of adoptability, the principle of subsidiarity, the provision of valid consent, and, generally, the upholding of the best interests of the child in intercountry adoption are all dependent on Competent Authorities that are able to fulfil their tasks.[213]

The Guide to Good Practice of the HCCH provides, on page 15, definitions of "Central Authorities", "Competent Authorities" and "accredited bodies".

[207] Notably, Ethiopian law does not set an age limit on who is adoptable.
[208] However, a child can be 16 or 17 if adopted with younger siblings and will be eligible for an immigrant visa.
[209] See Permanent Bureau, Guide to Good Practice, (2008), 31-32.
[210] There are a number of news reports to corroborate this position. For instance, see Erica Noonan "Lifeline to Ethiopia: Waltham agency paves the way to adopting orphaned children" (December 7, 2006, Boston Globe).
[211] Vitabeat, (01 September 2005).
[212] 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. See Cotlands Press Release, (March 2004).
[213] 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.

A Central Authority is: "... the office or body designated by a Contracting State in accordance with Article 6, to perform certain mandatory functions in Articles 7, 8 and 33 of the Convention. The Central Authority must also perform the mandatory functions in Articles 9, and 14-21, unless another body (a public/accredited body) is authorised to perform those functions."

A Competent Authority may be "any authority appointed by a Contracting State to perform a function attributed in the Convention to this type of authority". For some functions, the Competent Authority must be a public authority.

An accredited body is: "... an adoption agency which has been through a process of accreditation in accordance with Articles 10 and 11 of the Hague Convention; which meets any additional criteria for accreditation which are imposed by the accrediting country..."

An approved (non-accredited) person is the "person (or body) who (or which) has been appointed in accordance with Article 22(2) to perform certain Central Authority functions".

Competent Authorities, Central Authorities and Accredited bodies play an immensely important role in upholding children's best interests and addressing illicit activities.

### 3.7.2 Competent authorities and central authorities

Competent Authorities play a significant role in upholding children's best interests in the adoption process. For instance, in DRC, although the Ministry of Justice has jurisdiction over adoptions, the *Tribunal de Paix* in the region where a prospective adoptive child resides is the authority that handles individual cases. In instances where countries recognise simple adoption and full adoption ("*Adoption Plénière*"), Competent Authorities have a role to play in determining which type of adoption is suitable for a specific child's best interests. A simple adoption, which can be compared to a court decision granting legal custody of the child to the adoptive parent (delegation of parental rights to a third party), because the biological parent is incapable of providing proper care, is considered a temporary arrangement and does not sever ties with the family of origin. This is the case, for instance, in Cote d'Ivoire.

Sometimes, Competent Authorities serve as Central Authorities in conjunction with relevant government ministries. For instance, in Cameroon, it is the Ministry of Social Affairs and the High Court *(Tribunal de Grande Instance)* that have jurisdiction over the place of residence of the child to be adopted.

In instances where Competent Authorities have not given their opinions on **adoptability**, violations of children's best interests are bound to take place. Related to the determination of adoptability is the obligation of the Competent Authority deciding on the adoptability of the child to ensure that "all efforts have been made for the child to maintain links with his/her [extended] family and community, and [to ensure] that adoption is used in last resort".[214]

Competent Authorities also play a significant role in ensuring that the necessary **free and informed consents** are secured before an intercountry adoption order is made. This role includes obtaining consents from the persons or organs that have the authority to give consent; ensuring that the persons giving consent understand the effect or consequence of their decision; and also ensuring that no inducement or improper financial gain is involved in securing consent. In instances where the child is of the age and degree of maturity to give consent, Competent Authorities shall also ensure that such consent is given in a free and informed manner.

[214] CRC Committee, Concluding Observations: Mexico, (June 2006), para. 42(d).

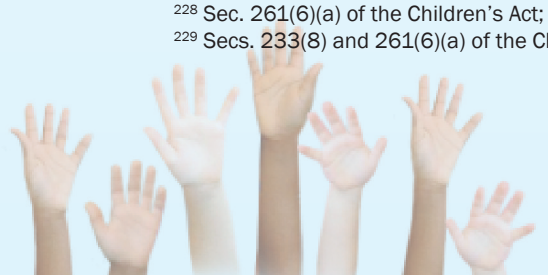
Some violations of children's rights in intercountry adoption in Africa relate to the absence of free and informed consent. For instance, a case from Sierra Leone highlights the importance of counselling and securing informed consents.[215] This case involved a group of parents who accused a charity of sending more than 30 children abroad for adoption without their consent during the country's civil war.[216] On the one hand, the charity - Help a Needy Child International (HANCI) – insists that the parents signed documents giving permission for intercountry adoption.[217] 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.[218] 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".[219]

In Kenya, which offers a good example of addressing consent also through Competent Authorities, consents for adoption must be written.[220] It is also the explicit obligation of the court, before making any adoption order, to be satisfied that every person who has given consent "understands the nature and effect of the adoption order".[221] In particular, in the case of a parent, 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".[222] Provision is also made for the withdrawal of consent prior to, and after, the filing of the application for an adoption order.[223] 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.[224] A child who has attained the age of 14 should also give his or her own consent.[225] The possibility of an appointment of a *guardian ad litem* to "safeguard the interests of the child pending the determination of the adoption proceedings"[226] plays a role in ensuring that consents are free and informed. However, there is no explicit provision in the Children Act to address the problem of obtaining consent with an inducement (such as through paying prenatal expenses).

In South Africa, while the Central Authorities in both the sending and receiving countries must consent to adoption, provision is made for the South African Authority to withdraw its consent within 140 days of the date of consent.[227] This withdrawal can only happen if it is found to be in the best interests of the child.[228] Parents or the child can also withdraw their consent within 60 days of signing the consent document.[229] The possibilities for withdrawal of consent provided for in the law can serve to redress situations where free and informed consent was not given in the first place.

However, many African countries lack the necessary human and financial resources to ensure consent is obtained in a free and informed manner, especially given the fact that consent is often given at local level. Moreover, as a number of African countries' cultures are not familiar with

[215] BBC News, (4 November 2009); Sierra Express Media, (09 November 2009).
[216] As above.
[217] As above.
[218] As above.
[219] Sierra Express Media, (09 November 2009).
[220] Sec. 158(4) of the Children Act.
[221] Sec. 163(1)(a) of the Children Act.
[222] Sec. 163(1)(a) of the Children Act.
[223] Sec. 159(5) of the Children Act.
[224] Secs. 156(1) and 159(8)(a) of the Children Act.
[225] Sec. 158(4)(f) of the Children Act.
[226] Sec. 160(2)(a) of the Children Act.
[227] Sec. 261(6)(a) of the Children's Act; Human, (2007), 16-20.
[228] Sec. 261(6)(a) of the Children's Act; Human, (2007), 16-20.
[229] Secs. 233(8) and 261(6)(a) of the Children's Act; Human, (2007), 16-20.



adoption practices leading to the termination of the original familial ties, a higher standard of consent is called for. Therefore, Competent Authorities need to be equipped to ensure that consent issues have children's best interests at their core.

In the absence of proper and vigilant efforts by Competent Authorities, especially courts, some African children might find themselves "adopted" through a process that has circumvented intercountry adoption. A good example in this regard is 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. For instance, the CRC Committee, in its consideration of Uganda's Report under the OPSC, noted the rising number of applications for legal guardianship of children, and the reduced number of applications for adoption.[230] It viewed such a trend as potentially aimed at circumventing the regulations that apply to adoption, and resulting in practices contrary to the OPSC,[231] and recommended that the State Party "stringently scrutinise applications for legal guardianship of children in order to avoid practices contrary to the Protocol".[232] Similar instances have been detected in countries such as South Africa and Liberia.

One of the added values of the Hague Convention is the requirement either to create or to designate a Central Authority.[233] Each Contracting State is expected to designate a Central Authority that acts as the point of contact, coordination, and responsibility within that country for the implementation of the various duties and activities called for by the Hague Convention.[234] Even where a State is not a Contracting State to the Hague Convention (and hence is 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 DRC, despite the fact that the country is not a Contracting State to the Hague Convention, the CRC Committee recommended that it should "Establish a Central Authority for adoption to regulate, train and monitor all actors involved and coordinate with the relevant legal authorities".[235] In the Central African Republic, the Government has established the "Adoption Committee" as a Central Authority, composed of technical experts from the Ministry of Justice, the Ministry of Family and Social Affairs, and the Ministry of Interior.

In some countries, such as Mauritius, it was violations of children's best interests – including as a result of child trafficking – that initially led to the establishment of a Central Authority. Illegal adoptions and child trafficking (with the involvement of intermediaries) were detected in Mauritius in the 1980s,[236] a situation that led to the initial establishment of the National Adoption Council to monitor the practice.[237]

In Liberia, the fact that Government noticed a high increase in the number of cases in which adoptive parents decided to terminate their parent/child relationship with Liberian adoptive children was a cause for serious concern. Additional irregular activities led to the suspension of intercountry adoptions from Liberia. In 2009, Liberia established an *ad hoc* Central Authority in order to curb on illegal activities around intercountry adoption, and to protect children's best interests.

[230] CRC Committee, Concluding Observations: Uganda, (2008), para. 20.
[231] As above.
[232] CRC Committee, Concluding Observations: Uganda, (2008), para. 21.
[233] Art. 6(1) of the Hague Convention.
[234] Art. 6(1) of the Hague Convention.
[235] CRC Committee, Concluding Observations: Democratic Republic of Congo, (2009), para. 48(d).
[236] CRC Committee, State Party Report: Mauritius, (1995), paras. 68-69.
[237] CRC Committee, State Party Report: Mauritius, (1995), para. 68.

The 2011 Children's Law of Liberia (launched in 2012), informed by the findings of the Commission established by the President in 2008 after the suspension of intercountry adoptions, lays down a conducive framework to facilitate the Central Authority's work in addressing illicit and irregular activities related to intercountry adoption.

In some instances, Central Authorities have the capacity not only to prevent, but also to rectify the violations of children's best interests. For instance, the reported incidents of Rwandan children trafficked to Europe and adopted illegally,[238] (especially of those "41 Rwandan children ... adopted in this manner in the Italian town of Brescia"[239]) could have stood a high chance of being rectified if there were well-established and functioning Central Authorities in the two countries, especially Central Authorities established under the Hague Convention. It is to be recalled that 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".[240] Article 8 of the Hague Convention states that:

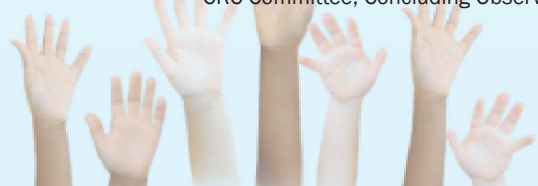
> Central Authorities shall take, directly or through public authorities, all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention.

The presence of Central Authorities has the potential to reduce, if not to eliminate, independent/private adoptions, which have resulted in violations of children's best interests in countries such as Guatemala, Colombia, and Vietnam. For countries that are Contracting States to the Hague Convention on Intercountry Adoption, independent/private adoptions are not congruent with the procedure that the treaty establishes. Where independent adoptions take place, 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 origin have no supervision of the procedure, it is not possible to regulate improper financial gain and corruption.[241]

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[242] nor with the best interests of the child principle in the CRC and the ACRWC. This is what is called the "no initial contact rule" provided for in Article 29(1) of the Hague Convention, which should be monitored by Competent Authorities and Central Authorities. Save in South Africa, it is difficult to come across a legislative measure banning this practice in many African countries.

The extent to which Competent Authorities and Central Authorities have the necessary human, technical and financial resources is critical to their capability to detect and address issues such as illegal intercountry adoptions. In February 2012, in the context of Madagascar, the CRC Committee raised serious concern that, despite the presence of legislation on criminalising illegal adoption (Act No. 2005–014 of 7 September 2005 and Decree No. 2006–596 of 10 August 2006), the limited human, technical, and financial resources of the Authority for Adoption in Madagascar, coupled with low levels of birth registration and high levels of poverty, continued to facilitate and provide incentives for illegal adoptions.[243]

[238] CRC Committee, State Party Report: Rwanda, (2003), para. 209.
[239] CRC Committee, State Party Report: Rwanda, (2003), para. 209.
[240] Art. 7(1) of the Hague Convention.
[241] See Permanent Bureau of the HCCH, (2008), 116.
[242] Permanent Bureau, Recommendations, (2001).
[243] CRC Committee, Concluding Observations: Madagascar (Feb 2012), para 43.



It is also important to mention that the extent to which a Central Authority is composed of diverse types of professionals, such as lawyers, social workers, psychologists, medical professionals etc., is crucial to dispensing its duties in a manner that protects children's best interests. While it is difficult to find good examples from Africa in this regard, the National Adoption Committee for Children in Togo (Comité National d'Adoption d'Enfants au Togo, or CNAET), which is under the jurisdiction of the Ministry of Social Welfare and Child Protection, has a membership of legal and medical professionals.[244]

Central Authorities can undertake additional 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 intercountry adoption. For instance, the Government of Lesotho has lifted the suspension of intercountry adoptions for only four countries (USA, Sweden, the Netherlands and Canada), and has approved only one adoption agency for each of these countries.[245]

### 3.7.3 Accredited 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. These, known as "accredited bodies", should nonetheless meet the requirements of Articles 10, 11, and 32 of the Hague Convention. In addition, an approved (non-accredited) person might be allowed to perform the functions in Articles 15 - 21.[246] As a result, it is important to examine accredited bodies and approved persons and their role in preventing and suppressing illicit activities.

It has been suggested that a country should consider "past practice, efficiency of existing arrangements, or availability of public resources to conduct intercountry adoptions" in order to determine whether or not to use accredited bodies.[247] 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.

Secondly, the number and profile of accredited bodies should correspond with a number of factors in a country of origin[248] (and, primarily, correspond with the number and profile of children in need of intercountry adoption).[249]

Thirdly, the decision to use accredited bodies draws Article 10 of the Hague Convention into the picture. Article 10 provides that "Accreditation shall only be granted to and maintained by bodies demonstrating their competence to carry out properly the tasks with which they may be entrusted."

Many African countries do not allow adoption agencies in the adoption process. These countries include Zambia, Malawi, Swaziland, Uganda, Cote d'Ivoire, and the Central African Republic. This situation is at times motivated by scepticism concerning the intentions of adoption agencies to apply pressure in order to have more adoptable children for prospective adopters, or to make financial gain, as opposed to the genuine promotion of children's best interests. But few countries in Africa use the services of adoption agencies.

[244] See CRC Committee, State Party Report: Togo (Jan 2011), paras 84-88.
[245] Personal communication with the head of the Law Reform Commission, Itumelene Kimane, 22 February 2012.
[246] See Art. 22(2) of the Hague Convention.
[247] Permanent Bureau, (2005), 6.
[248] Vite and Boechat, (2008), 30.
[249] As above.

In Ethiopia, the Ministry of Justice registers adoption agencies. However, before engaging in any adoption services, an adoption agency should also provide a project document and sign an operational agreement with the Ministry of Women, Children and Youth Affairs (MOWCYA) to provide child welfare and social development activities. In 2008, the total number of adoption agencies in Ethiopia was reportedly around 75. This has reportedly been brought down to around 63. This raises a number of questions: how can a limited team of professionals at MOWCYA deal with around 60 adoption agencies in a meaningful manner? How can they scrutinise and verify so many dossiers in order to establish the adoptability of a child? How can they efficiently advise the Federal First Instance Court that the adoption is (or is not) in the best interests of the child? The large number of adoption agencies in Ethiopia poses a challenge to MOWCYA's execution of its supervisory role, a situation that continues to contribute to illicit activities in intercountry adoption.[250] With around 25 American adoption agencies in Ethiopia referring children to American families, the American Government warns prospective adoptive parents that "[a]ll agencies are not created equal!".[251] It cautions Americans contemplating adopting in Ethiopia to take great care in selecting an agency.[252]

In Kenya, it is the Department of Children's Services (DCS), in the Office of the Vice President and Minister for Home Affairs, that is the Government agency mandated to provide services for the rights and welfare of children and as stipulated in the Children's Act. The Adoption Committee, which is the central body governing all adoptions in Kenya, falls under the purview of the DCS, which serves as the Committee's Secretariat. Established under Section 155(1) of the Children Act, the Adoption Committee has far reaching powers, including: formulating governing policy in matters of adoption;[253] effecting liaison between adoption societies, the Government and NGOs;[254] and generally monitoring adoption activities in the country.[255] The Adoption Committee does not accept an application for the registration of an adoption society unless stringent conditions are met.[256] 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. In contrast to the situation in Ethiopia, there are only five registered local adoption societies in Kenya.[257] Out of these, only three – Little Angels Network, Kenya Children's Homes, and Child Welfare Society of Kenya – are allowed to facilitate intercountry adoption. In addition, on 5 March 2009, there were 21 approved foreign adoption societies/agencies,[258] all of which are approved by the Adoption Committee, but which may only operate through agreements with a local adoption society.[259]

Receiving countries also have an important role to play. France's experience of a "high percentage of intercountry adoptions which are not made through the accredited bodies but through individual channels"[260] has been a cause for concern. In addition, the fact that "intercountry adoptions are facilitated by embassies and consulates, including

[250] Fully aware of the challenge posed by the large number of adoption agencies, the Government is undertaking commendable ongoing measures to fully address the challenge.
[251] U.S. Department of State: "Intercountry adoption: Ethiopia" (December 2008).
[252] As above.
[253] Sec. 155(2)(a) of the Children Act.
[254] Sec. 155(2)(b) of the Children Act.
[255] Sec. 155(2)(d) of the Children Act.
[256] See regs. 10 of the Adoption Regulations.
[257] List on file with ACPF.
[258] List on file with ACPF.
[259] Regs. 24 of the Adoption Regulations.
[260] CRC Committee, Concluding Observations: France (CRC/C/15/Add.240) (30 June 2004) para. 33.

the use of volunteers working with them" has been viewed as undermining the work of accredited bodies.[261] As a result it has recommended to the State Party that "[c]ases of intercountry adoption are dealt with by an accredited body".[262]

In sum, the adoption and implementation of legislation that prevents and addresses illicit activities in intercountry adoption is crucial for the protection of the best interests of the child. In particular, the absence, or incompetence, of institutional structures can also result in the best interests of the children involved in intercountry adoption being compromised. The vulnerability (especially economic vulnerability) of birth families and the inadequacy of legislative and institutional frameworks on the African continent warrant a need for a regulatory framework to prevent and address illicit activities in intercountry adoption. The increased numbers of African children adopted abroad in recent years due to decreases in adoptions from other continents signal that Africa is becoming more and more susceptible to illicit activities in relation to intercountry adoption.

[261] CRC Committee, Concluding Observations: France (CRC/C/FRA/CO/4) (11 June 2009) para. 63.
[262] CRC Committee, Concluding Observations: France, (CRC/C/FRA/CO/4) (11 June 2009) para. 64(a).

# 4 DUTIES OF THE STATE, SOCIETY AND OTHERS: ALTERNATIVES TO INTERCOUNTRY ADOPTION

## 4.1 Introduction

It is a well-settled rule that the family is "the natural and fundamental unit of society and is entitled to protection by society and the State".[263] As much as possible, and when in their best interests, children should grow up in their biological family environment – which includes the extended family – and in their country of origin. There is overwhelming research from all over the world that proves that, when implemented well, care provided by a family in a child's own community is generally the best option for that child. States have the obligation to strive towards making this a reality for children within their territory. This obligation is consolidated by a very long list of provisions in the CRC, composed of Articles 5, 9, 10, 18, 19, 20, 21, 25, and 27, which recognise the role of parents and the state in caring for children. The position of the ACRWC in this regard is similar.

As a logical follow-up to this, it is then no surprise that 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".[264] At the regional level, the ACRWC purports to take into consideration:

> *...the virtues of their [African member States'] cultural heritage, historical background and the values of the African civilisation which should inspire and characterise their reflection on the concept of the rights and welfare of the child.*[265]

So, while there is no rule that states that culture should over-ride children's best interests, it is crucial to emphasise that children's cultural identity, especially in the context of Africa, is actually an important element in defining their best interests.

With this understanding as a backdrop, the idea of having intercountry adoption as one of the main or significant responses to addressing the problem of children deprived of their family environments is neither sustainable nor feasible – especially given the mammoth tasks and multi-dimensional responses needed to manage the approach comprehensively and correctly. Moreover, there is anecdotal evidence from some studies that an emphasis on intercountry adoption as a response to addressing the challenges faced by children deprived of their family environments might be counterproductive – where, for instance, survey data suggests that, instead of intercountry adoption helping to reduce the number of children in institutional care, on the contrary, it may contribute to the continuation of institutional care, with resulting harm to children.[266]

As mentioned above, when allowed by law as a response to the deprivation of children's family environments, intercountry adoption must be considered only **as part of a continuum of care options** that ensures permanency to a child deprived of a family environment (i.e. as neither the sole nor the main option). This consideration requires states to undertake all necessary efforts to strengthen families to take care of their children, and also to provide for other suitable measures to

[263] 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 Search Term Begas a basic human right. Search Term Begin
[264] Art. 25(3) of the ACRWC entrenches a similar position.
[265] Para. 7 of the Preamble to the ACRWC.
[266] See, for instance, Chou and Browne, (2008), 41.

care for children in their country of origin. The following paragraphs briefly outline the measures that states should continue to provide and further consolidate in order to ensure that intercountry adoption is a measure of last resort, and an exceptional rather than a standard solution to children's difficult circumstances.

## 4.2 Family preservation

Among the principles that underpin the CRC in relation to the family environment, paragraphs 5 and 6 of its Preamble come to the fore, adding weight to the rule that the preferred environment for the growth and wellbeing of the child is the family environment. These paragraphs are not alone: apart from the Preamble, there are 19 other Articles in the CRC[267] that expressly acknowledge the role and importance of parents and the family in the promotion and protection of children's rights. This notwithstanding, Article 20 of the CRC and Article 25 of the ACRWC entrench an exception: children deprived of their family environment temporarily or permanently. They also address the steps that should be taken to provide these exceptional children with alternative care.[268]

As part of this general preference for the family environment, the specific preference for the birth or extended family as the child-rearing environment is evident in all the three legal instruments addressed in this report. In this regard, family preservation is part of what is referred to as "prevention of alternative care".

States should provide services, according to the UN Guidelines on the Alternative Care of Children, which promote parental care, the prevention of family separation, and family reintegration.[269] This is the main reason why States Parties are advised to develop, adopt and implement comprehensive national policies on families and children that support and strengthen families.[270] This policy should be developed and implemented in collaboration with non-governmental organisations, communities, families and children.[271] In the interest of comprehensiveness, alongside 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".[272]

The absence of adequate support for needy families in Africa is the rule rather than the exception. For instance, such lack of adequate support for families has been raised as an impediment to children's opportunity to grow up in their family environments in Mauritania, Niger, Eritrea, Sierra Leone, Mali, the Republic of Congo and Swaziland.[273] Improved assistance to extended families caring for children deprived of parental care is also often required.[274] However, some good examples of legislatively backed child support grants (South Africa), cash transfer schemes (Kenya, Malawi), school-feeding schemes (many African countries), and some forms of micro-financing (many countries in Africa) are helpful in family preservation efforts, and should be further strengthened. There is a need for African governments to "make a long-term commitment to building family support services and family-based alternative care", and to reflect this in budget allocations, policies, and laws that prioritise family preservation.

[267] Arts. 2,3,5,7,8,9,10,11,14,16,18,20,21,22,23,24,27,37, and 40.
[268] Art. 20(1) of the CRC.
[269] See, generally, Baglietto, (2007); Doek, (2006).
[270] CRC Committee, Day of General Discussion, (2005), para. 645.
[271] As above.
[272] As above.
[273] See CRC Committee, Concluding Observations: Mauritania, (June 2009), paras. 42 and 43; Niger, (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.
[274] See 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).

## 4.3 Family reunification/reintegration

Once separation of children from their families takes place, and when in the best interests of the child, family reunification measures should be pursued.[275] Family reunification is an obligation under the CRC and the ACRWC, as it assists children to reunite with parents or the extended family.[276] At the heart of the UN Guidelines on Alternative Care is also a call for governments to prevent unnecessary separation of children from their families, and, when separation takes place, to facilitate family reunification when it is in the best interests of the child.

The extent to which states put in place adequate institutional frameworks and procedures to reunify children with their families – for instance in the context of armed conflict and natural disasters, or abandonment – is crucial. There are instances of good practices and successful efforts on the African continent where neither institutions nor intercountry adoption were required to provide ongoing care for children separated from their parents/caregivers as a result of social disruption such as natural disaster, armed conflict, and even poverty. For example, after the post-election violence in Kenya in 2008 which led to the separation of many children from their families, it was reported by UNICEF that by the second half of 2009, a total of 7,010 children (82.3 per cent of those registered) had been successfully reunited with their families, thereby significantly reducing the number of children in need of alternative care.[277] In Sierra Leone and Liberia too, successful efforts were recorded to reunite children separated from their families as a result of civil war.[274]

## 4.4 Domestic adoption

Domestic adoption is one of the alternative care options available for children permanently deprived of their family environment.[275] The fact that domestic adoption is a national solution, a permanent placement, and in addition, offers a family environment, puts it ahead of many other alternatives. Furthermore, there is evidence that in countries where domestic adoption is well established, it has a demonstrated high 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.[280]

Unfortunately, in Africa, domestic adoption is a little-used alternative means of care for children deprived of their family environment.[281] As has been found in parts of South America,[282] social analysis in Africa indicates that adoption of an unrelated child is not a readily accepted cultural practice.[283] Thus, since the culture of adopting domestically is lacking, building awareness of the need for adoptive families may require a change in public attitudes.[284] 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, which should further be encouraged. A strategy to promote domestic adoptions requires, among other things, awareness-raising campaigns and regulations that facilitate access to adoption, such as ensuring that documents needed for the adoption process are free or inexpensive.[285] Awareness raising campaigns need to emphasise the needs and rights of children to a family.[286] In addition,

[275] Art 10 of CRC.
[276] Permanent Bureau, Guide to Good Practice, (2008), 72.
[277] Williamson, J. and Greenberg, A., (2010), 10.
[278] As above.
[279] Art 20(3) of the CRC and Art 24 of the ACRWC.
[280] See, generally, Triseliotis *et al.*, (1997).
[281] 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.
[282] For instance, Guatemala. See Families Without Borders, (2003).
[283] See, Powell *et al.*, (2004), v and 6.
[284] In this regard, the experience of India which has managed to significantly increase the number of domestic adoptions could be investigated and emulated.
[285] CRC Committee, Concluding Observations: DRC, (January 2009), para, 48(d).
[286] CRC Committee, Concluding Observations: Romania, (June 2009), para. 54.

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.[287] 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.

## 4.5 Foster care, KINSHIP care (community based care), and *KAFALAH*

Foster care, *kafalah*, and kinship care are measures supported by international law for children who need to benefit from a family environment.

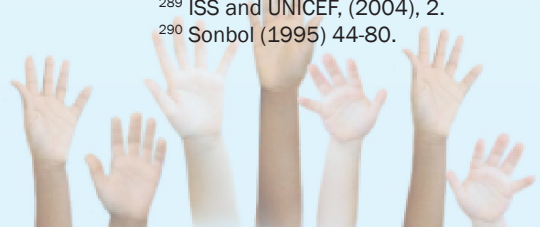
Foster care has advantages as an alternative means of care. To start with, unlike institutionalisation, it offers a family environment. Where potential foster care parents are identified and the system works in a well-coordinated way with the ultimate goal of promoting the best interests of the child, it contributes to the financial efficacy of the child welfare system. Where the biological family of a child is present and 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.[288]

Kinship care, which refers to the "full time care, nurturing and protection of children by relatives, members of their tribes or clans, godparents, step-parents, or any adult who has a kinship bond with a child"[289] is also a measure worthy of promotion in Africa. As highlighted above, the so called "informal adoptions" that are a part of a kinship care are in fact promoting children's best interests in all corners of the continent. In this context, a system that generally emphasises the role of community-based care has the potential significantly to address the challenge posed by children deprived of their family environments.

On a different note, *kafalah,* which is derived from the Arabic word *kafl,* which means "'to take care of," presupposes an "unlimited entrustment" of a child to a new family, and is the highest form of protection and alternative care for orphans and abandoned children in Islam. The practice of *kafalah* does not permit discrimination between *kafalah* children and those born to the household, in order to avoid a sense of deficiency or inferiority in the former.[290] It often results in a permanent 'bonding relationship' between the child and the family in question. This is important, since *kafalah* is seen not only as a meritorious deed but also a religious duty.

In Africa, however, apart from most of North Africa and the other states that have *Shariah* as state law, *kafalah* is neither widely known nor practiced. This is even the case in countries with large Muslim populations. It is important to address this knowledge gap, and to regulate and promote *kafalah* when it is deemed to promote a child's best interests. A good example in this regard is the Children's Act of Zanzibar of 2011, which makes provisions for the regulation and promotion of *kafalah*.

[287] CRC Committee, Concluding Observations: Chile, (April 2007), para. 47.
[288] See European Commission Daphne Programme, (2007), 15.
[289] ISS and UNICEF, (2004), 2.
[290] Sonbol (1995) 44-80.



## 4.6 Children's homes and other similar institutions

The fact that family-based care options may not yet exist in a particular setting does not make institutional care an acceptable long-term alternative. It simply means that better forms of care need to be developed. In Africa, it is documented that the unfortunate lack of developed, family-based alternative care options has lead to "unnecessary over-use of residential placements".[291]

Nonetheless, while the emphasis and priority should always be on developing and supporting family-based care alternatives, even the UN Guidelines on Alternative Care acknowledge that some residential care will be needed for some children. When the use of institutions is appropriate and necessary as an alternative means of care for a child, group homes ("small, residential facilities located within a community and designed to serve children"[292]) should be preferred over large orphanages. It could be argued that it is these types of homes that both the CRC[293] and the ACRWC[294] refer to as "suitable institutions"; efforts therefore need to made to encourage institutions resembling family environments, like group homes, in order to cater to those children whose best interests require that they be placed in an institution.[295]

In sum, it is a combination of these and other, similar measures that can deliver lasting solutions to the challenges posed by children deprived of their family environments.

[291] ISS and UNICEF, (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.

[292] 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.>.

[293] Art. 20(3) of the CRC.

[294] Art. 25(2)(a) of the ACRWC.

[295] See, for instance, the standards in the UN Guidelines on Alternative Care.

# 5 A WAY FORWARD

This report has provided sufficient background to show that, while intercountry adoption from African countries is still quite modest compared to adoptions from the top four countries of origin,[296] there are concrete indications that interest in adoption from African countries will continue to increase.[297] So, while it can be argued that Africa is "the new frontier" for intercountry adoption, it is highly questionable whether the continent is equipped to provide its children with the necessary safeguards.

A central aim of this report was to assess and explore how the best interests of the African child can be upheld in intercountry adoption. A golden thread running through the report is the conclusion that the African continent in general is still ill-equipped in law, policy and practice to provide children deprived of family environments with the family-based alternative care necessary to make intercountry adoption a measure of last resort, and to ensure that this form of adoption meets international standards and safeguards. Much remains to be done. Based on this general assessment, the following findings and recommendations are put forward.

- As highlighted, **the African context** – which includes the continent's historical, social, cultural, religious, economic and legal contexts – must be taken into account. A sound and effective alternative care option that includes intercountry adoption must be grounded firmly in an African context, taking African realities into account. All stakeholders in intercountry adoption should take these contexts into account in their work, including: governments (all three branches of government, executive, judiciary, and legislative); adoption service providers; receiving countries; development partners; NGOs and INGOs; faith-based organizations; and the media.

- The role of the **law (and law reform)** in promoting the best interests of the African child in the context of alternative care in general, but in intercountry adoption in particular, is crucial. In this respect, it is important to recall 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 result, it is concluded that African countries that are States Parties to the ACRWC have a greater obligation to promote the best interests of children.

- 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.

- African child laws must be carefully crafted to respond sufficiently to the needs and socio-economic and cultural circumstances of the people to whom they apply. The Africanisation of child law demands the domestication of provisions that support positive cultures and practices, and which 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 providing a legal basis for supporting so-called "informal adoptions" when they are in the best interests of the child.

[296] Namely China, Russia, Guatemala, and South Korea.
[297] Breuning and Ishiyama, (March 2009), 90.

- However, 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 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.

- Clarification on the conceptualisation and implementation of **the principle of the best interests of the child** in the context of intercountry adoption is needed. It is also observed "the 'best interests' of the child cannot be defined without consideration of the child's views".[298] 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. Even when the law is adequate to protect children's best interests, there remains a disconnect between what is provided in law and what is practiced.

- The majority of African countries lag behind in providing clear criteria for the conceptualisation and determination of who is adoptable. As a result, the risk is real that those children who are genuinely in need of adoption (for instance, disabled children) might fall between the cracks, while those that fit the expressed preference of prospective adoptive parents (for instance, girls below the age of one) are adopted.

- Underscoring the importance of the subsidiarity principle, it is important to note 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. A number of African countries have inadequate measures to promote family preservation, family reunification, and suitable domestic measures such as domestic adoption and foster care; and lack the legislative and institutional frameworks to ensure that intercountry adoption is a measure of last resort.

- In the context of preventing **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 mandates and capacity necessary to function. 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. Rather, the regulation of intercountry adoption should address the dire need to fill **every** conceivable legislative loophole. A failure to regulate intercountry adoption in Africa in a comprehensive way potentially leads to a situation where adoption can become a vast, profit-driven industry with children as the commodity. The continued perpetuation of illicit activities in intercountry adoption, with impunity for the perpetrators, creates a sense of normality over time that might ultimately lead to a completely commercialised and profit-centred practice.

[298] CRC Committee, General Comment No. 12, (2009), para. 56.

- The **financial aspects of intercountry adoption** remain one of the most controversial and least clear areas of the practice. For instance, what genuinely constitutes "improper financial gain"? What constitutes "reasonable, transparent, consistent fees adequate to cover all adoption procedures"? What level of guidance is available to ensure that fees a fully disclosed in advance, standard and receipted, and all recipients identified? What should be the contribution, if any, of orphanages or adoption agencies for the so-called child development/ support programmes not connected to intercountry adoption? All these and other financial aspects of the practice need further guidance in the African context.

- At the regional level, the **African Committee of Experts on the Rights and Welfare of the Child** (and at the global level, the CRC Committee) should provide further clarifications of the relevant provisions of the African Children's Charter on intercountry adoption, and elaborate on the nature of States Parties' obligations in relation to the practice. The Committee should also use its protective and promotional mandates (such as the Day of the African Child) to promote children's best interests in the context of intercountry adoption. This will help in forming an "Africa position" on the practice, and limit disparities in practice on the continent, thereby promoting the best interests of children on the continent with similar standards.

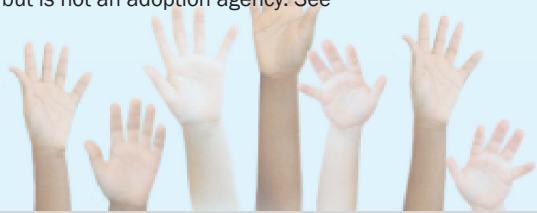
- The continued role of the **Hague Conference on Private International Law** in the ratification and implementation of the Hague Convention is crucial. It is recommended that the Permanent Bureau should continue to take further proactive steps, such as identifying African countries that are undertaking child law reforms, and offering technical assistance (including training) in respect of laws or provisions related to intercountry adoption.

- **Co-operation** is central to making the intercountry adoption regime in Africa work for the best interests of children.[299] In this regard, any intercountry adoption reform that considers the role of receiving countries as inconsequential is doomed to fail. Receiving countries should abstain from putting the authorities and organisations of countries of origin under unnecessary pressure to provide adoptable children. Receiving countries also have an important role in preventing and addressing illicit activities in adoption. It is also recommended that receiving countries should assist, and where necessary put due pressure on, countries of origin to make their laws compliant with international standards including the Hague Convention.

- The role of **foreign adoption agencies** is also important in ensuring safeguards in African adoption processes. Associations of foreign adoption agencies, such as Euradopt[300], represent good examples of how foreign agencies can be held accountable to pre-determined ethical rules. Drawing the attention of this organisation and other similar organisations to the Competent Authorities of countries of origin, to enable them to report irregularities, is crucial.

- There is a dire need to identify **good practices in law and policy development and implementation**, especially in countries of origin, in order to draw

[299] For further details on the need for administrative and judicial cooperation in intercountry adoption, see Duncan, (2001).
[300] Euradopt is an association of adoption organisations in 12 Western European countries but is not an adoption agency. See <http://portal.euradopt.org/>.



lessons from comparable contexts and situations (for instance, between countries with limited human and financial resources).

- One of the main challenges that African countries face is the **lack of African data** on: children deprived of their family environments either temporarily and permanently; adoptable children; adopted children, both through domestic and intercountry adoption; profiles of adopted children; etc. As a result, it is recommended that measures should be taken for the systematic collection of data in African countries, with the aim of deepening understanding of adoption trends in order to carve out suitable legislative, administrative and other appropriate measures. Once data (even basic) are available, African countries of origin should all take clear positions regarding their will to allow and undertake intercountry adoption (or not).

In conclusion, protecting the best interests of children in Africa is and should be, **as a first port of call**, the primary obligation of African families, African communities, African governments, and African institutions. This in the main entails considering intercountry adoption **as part of a continuum of care options** (i.e. neither the sole nor the main option) that ensure permanency to children deprived of a family environment. Where intercountry adoption of a child from Africa is considered to be in the best interests of a specific child, every effort should be made to ensure that **the whole system** is oriented towards finding a family for a child, as opposed to finding a child for a family.

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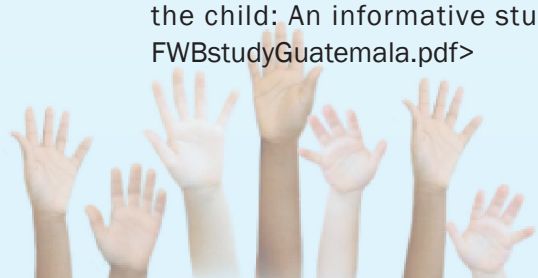

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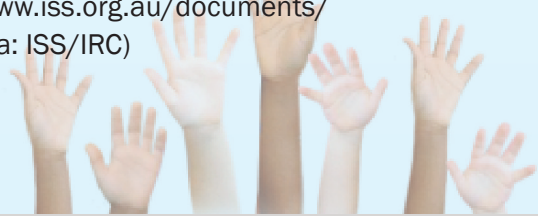

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