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# Surging Intercountry Adoptions in Africa: Paltry Domestication of International Standards

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## Surging Intercountry Adoptions in Africa: Paltry Domestication of International Standards

*Joseph M. Isanga\**

### ABSTRACT

*This Article is dedicated to addressing the issues surrounding intercountry adoption, specifically in regards to Africa. In light of the dramatic increase in the number of intercountry adoptions from Africa, it has become imperative to take a critical look at the arguments for and against intercountry adoptions, the existing framework for this practice, and the jurisprudence and legislation of select African countries in this area. Through expounding on the aforementioned topics, this Article showcases the need for improved regulation. It then presents recommendations for how this system can be improved to further facilitate intercountry adoptions, a vital step for finding stable homes for orphans.*

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## CONTENTS

I. INTRODUCTION .....	231
II. PROS AND CONS OF AFRICAN INTERCOUNTRY ADOPTIONS .....	240
<i>A. Arguments Against African Intercountry Adoption</i> .....	240
<i>B. Arguments in Favor of African Intercountry Adoption</i> .....	249
III. ANALYSIS OF INTERNATIONAL REGULATORY FRAMEWORK.....	253
<i>A. The United Nations Convention on the Rights of the Child</i> .....	253
<i>B. The Optional Protocol to the Convention on the Rights of the Child on the Sale of         Children, Child Prostitution, and Child Pornography</i> .....	257
<i>C. The Hague Convention on Jurisdiction, Applicable Law, and Recognition of Decrees         Relating to Adoption (1965)</i> .....	258
<i>D. The Hague Convention on Protection of Children and Co-operation in Respect to         Intercountry Adoption</i> .....	259
<i>E. The African Charter on the Rights and Welfare of the Child</i> .....	269
IV. ANALYSIS OF SELECT AFRICAN COUNTRIES' LEGAL REGIMES .....	272
<i>A. South Africa</i> .....	276
<i>B. Malawi</i> .....	278
<i>C. Uganda</i> .....	284
<i>D. Zambia</i> .....	287
<i>E. Ethiopia</i> .....	288
<i>F. Nigeria</i> .....	290
V. RECOMMENDATIONS .....	291
VI. CONCLUSION .....	297

## I. INTRODUCTION

Immigrant adoptive children used to be almost exclusively European in origin, at least with regard to those adopted by Americans.<sup>1</sup> Then the trend shifted toward adopting Asian and Latin American children.<sup>2</sup> More recently, the trend has turned dramatically toward adopting children from Africa.<sup>3</sup> In 2003, intercountry adoptions from Africa accounted for only 5% of the worldwide total, but this figure rose to 22% in 2009.<sup>4</sup> In the past eight years, international adoptions from Africa have increased by a mind-boggling 400%.<sup>5</sup> In 2010, Ethiopia was ranked as the second most sending country in the world after China,<sup>6</sup> although its population is substantially less than that of China.<sup>7</sup> In 2008, out of 17,438 adoptions from abroad, 2399 visas were issued to African-born children adopted by Americans.<sup>8</sup> It is now acknowledged that “Africa has become the new frontier for intercountry adoption.”<sup>9</sup> Simultaneously, intercountry adoptions from other regions have consistently trended downward since 2004.<sup>10</sup>

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1. Richard R. Carlson, *Transnational Adoption of Children*, 23 TULSA L.J. 317, 318 (1988). Many prospective adoptive parents from the United States turned to international adoption in part to avoid the greater risk of pre- and post-adoption interference from birth parents in local adoptions. Elena Schwieger, *Getting to Stay: Clarifying Legal Treatment of Improper Adoptions*, 55 N.Y.L. SCH. L. REV. 825, 826–27 (2011).

2. Carlson, *supra* note 1, at 318.

3. *Out of Ethiopia: Is International Adoption an Ethical Business?*, BBC NEWS (June 25, 2012), <http://www.bbc.co.uk/news/world-africa-18506474> [hereinafter *Out of Ethiopia*] (reporting that Ethiopia alone “accounts for almost one in five international adoptions in the US” and that, since 1999, 11,524 Ethiopian children have been adopted by American families, with Angelina Jolie probably the most famous person to adopt from Ethiopia).

4. Peter Selman, *Intercountry Adoption: Trends and Perspectives*, AFR. CHILD POL’Y F. (May 29, 2012), <https://www.box.com/s/0b88aef0194db21b58b0/1/293515832/2324729458/1>.

5. *Adoption from Africa: Concern Over ‘Dramatic Rise,’* BBC NEWS (June 25, 2012), <http://www.bbc.co.uk/news/world-africa-18248007> [hereinafter *Adoption from Africa*].

6. Intercountry adoptions from Ethiopia to the United States were 2513 in 2010, whereas from China they were 3401. BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE, FY 2010 ANNUAL REPORT ON INTERCOUNTRY ADOPTIONS 3 (2010), available at [http://adoption.state.gov/content/pdf/fy2010\\_annual\\_report.pdf](http://adoption.state.gov/content/pdf/fy2010_annual_report.pdf).

7. Ethiopia is one of the “new preferred countries for adoption, partially because of its relatively cheap adoption cost of \$20,000, which is affordable compared to the prices from other nations.” Rachel J. Wechsler, *Giving Every Child a Chance: The Need for Reform and Infrastructure in Intercountry Adoption Policy*, 22 PACE INT’L L. REV. 1, 30 (2010).

8. *Eyes on Adoption: More Orphans Coming from African Countries*, CHI. TRIB., Apr. 2, 2009, at 3.

9. Intercountry adoptions with African countries as the sending states from 2000 to 2010 were as follows: 2000 (33,068); 2001 (36,391); 2002 (38,530); 2003 (41,540); 2004

The adoption trends in Africa have not been correspondingly marked by a domestication of international adoption standards. Interestingly, as non-African countries<sup>11</sup> such as China, Russia,<sup>12</sup> South Korea, and the Ukraine have tightened regulations<sup>13</sup> under which intercountry adoptions may take place,<sup>14</sup> adoptions in those countries have increased, while adoptions in the United States have declined.<sup>15</sup> Therefore, prospective Western adoptive parents have increasingly

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(45,298); 2005 (43,710); 2006 (39,460); 2007 (37,249); 2008 (34,785); 2009 (29,867); and 2010 (29,095). See AFRICAN CHILD POLICY FORUM, AFRICA: THE NEW FRONTIER FOR INTERCOUNTRY ADOPTION 1, chart 1 (2012) [hereinafter AFRICAN CHILD POLICY FORUM], available at <http://www.africanchildforum.org/ipc/documents/Africa%20-%20The%20New%20Frontier%20for%20Intercountry%20Adoption-EN.pdf>.

10. Richard Carlson, *Seeking the Better Interests of Children with a New International Law of Adoption*, 55 N.Y.L. SCH. L. REV. 733, 734 (2011).

11. In 2011 there were 9320 intercountry adoptions in the United States, 2589 of which were from China. But U.S. intercountry adoptions from Africa were 2549, almost equaling those of China. *Fiscal Year 2011 Annual Report*, U.S. DEP'T OF STATE: BUREAU OF CONSULAR AFFAIRS, 3 (Nov. 16, 2011), [http://adoption.state.gov/content/pdf/fy2011\\_annual\\_report.pdf](http://adoption.state.gov/content/pdf/fy2011_annual_report.pdf). In 2007, China enacted regulations disqualifying foreign adoption applicants who were single, overweight, over the age of fifty, or recently divorced. Calum MacLeod, *Foreign Adoptions from China Fall: More Chinese Adopting; Fewer Children Available*, USA TODAY, Nov. 21, 2007, at 1A; see also *The Adoption Morass*, ST. LOUIS POST-DISPATCH, Aug. 13, 2007, at C8, cited in Wechsler, *supra* note 7, at 3 ("In 2007, China enacted regulations disqualifying foreign adoption applicants who were single, overweight, over the age of fifty, or recently divorced.")

12. In Russia, 30% of children are designated as orphans, which is four to five times higher than the percentage of orphans in Europe or the United States. Clifford J. Levy, *Russian Orphanage Offers Love, but Not Families*, N.Y. TIMES (May 3, 2010), <http://www.nytimes.com/2010/05/04/world/europe/04adopt.html> ("Most of them are children who have either been given up by their parents or removed from dysfunctional homes by the authorities."). In 2008, 13,000 children were officially adopted from Russia, including 9000 by Russians and 4000 by foreigners. *Id.*

13. It is observed that the international community "harbors major concerns regarding the cultural displacement that seemingly occurs as part of the intercountry adoption process." George Waddington, *A New Class of Persons: Intercountry Adoptees and Postcolonial Theories of Cultural Hybridity*, 1 CREIGHTON INT'L & COMP. L.J. 81, 84 (2011).

14. *International Adoptions in Decline*, TIME, <http://www.time.com/time/interactive/0,31813,1893321,00.html> (last visited Jan. 29, 2012) (observing that with stricter requirements for prospective parents and tighter laws to crack down on illegal practices, international adoptions to the United States have fallen over 20% in the past five years, with some countries declining by nearly half).

15. In 2004 there were 22,990 total intercountry adoptions. Elizabeth Barthelet, *International Adoption: A Way Forward*, 55 N.Y.L. SCH. L. REV. 687, 688-89 (2011). In 2010 there were only 11,059 such adoptions in the United States, "which is responsible for roughly half of the world's total number of international adoptions." *Id.* Therefore, the number of international adoptions "has fallen by more than half in the last six years, after steadily rising during the prior six decades." *Id.* at 688.

looked to adopt from African countries, where less-strict regulations exist,<sup>16</sup> yet intercountry adoptions have dramatically increased.<sup>17</sup> Nonetheless, African countries remain apprehensive about the suitability of intercountry adoptions.

Even if African states are not explicitly acting on its basis, the story of Torry Hansen's ill-fated adoption serves to illustrate the reason for such African fears.<sup>18</sup> Torry Hansen, of Tennessee, sent her adopted son, seven-year-old Artyom Savelyev, back to his native Russia.<sup>19</sup> She arranged for him to fly to Moscow by himself, arriving with a note from Hansen stating, "I no longer wish to parent this child."<sup>20</sup> She was giving him up, the note explained, because he was "mentally unstable."<sup>21</sup> This extreme case of an American mother returning her adoptive child as if he was an unsatisfactory purchase<sup>22</sup> focused intense attention on the pitfalls of international adoption.<sup>23</sup> This case ultimately found resolution in a U.S. court.<sup>24</sup>

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16. See, e.g., Kayla Webley, *Why Americans Are Adopting Fewer Kids from China*, TIME (Apr. 28, 2009), <http://www.time.com/time/magazine/article/0,9171,1902824,00.html> (observing that when forty-four-year-old Texan Becky Freer decided to adopt a child from China she found out that, because she was a single woman, she was ineligible under China's new laws, enacted in May 2007).

17. *Eyes on Adoption: More Orphans Coming from African Countries*, *supra* note 8.

18. See Kate Pickert, *Russian Adoption: What Happens When a Parent Gives Up?*, TIME (Apr. 14, 2010), <http://www.time.com/time/magazine/article/0,9171,1982326,00.html>.

19. *Id.*

20. *Id.*

21. *Id.* Perhaps Hansen should not have gone as far as she did. That said, however, [a]doptive parents [are] overwhelmed by behaviors that in extreme cases can include violence, hoarding, suicidal tendencies, catatonia, inappropriate sexual behavior and pyromania. These behaviors are not the norm, but they have been reported in hundreds if not thousands of international adoptions.

Kate Pickert, *Russian Kids in America: When the Adopted Can't Adapt*, TIME (June 28, 2010), <http://www.time.com/time/magazine/article/0,9171,1997439,00.html>.

22. See Clifford J. Levy, *Russia Calls for Halt on U.S. Adoptions*, N.Y. TIMES (Apr. 9, 2010), <http://www.nytimes.com/2010/04/10/world/europe/10russia.html>. Hansen wrote, "After giving my best to this child, I am sorry to say that for the safety of my family, friends and myself, I no longer wish to parent this child." *Id.* The situation prompted the Russian government to threaten suspending all American adoptions of Russian children until preventative measures could be created. *Id.*

23. Levy, *supra* note 12.

24. Thankfully, this case ended on a happy note. Tennessee Circuit Judge F. Lee Russell ruled that Torry Hansen was responsible for child support payments to her adopted son totaling \$58,240 in arrears (the entire cost of Artem's institutional and medical care since his return to Russia) and \$1000 per month in child-support payments until he turns eighteen or is once again adopted. See *Hansen v. Hansen*, No. 12062 (17th Jud. Dist. Tenn. May 17, 2012),

Yet while intercountry adoptions remain controversial, many African countries have overly restrictive regulations, and the great majority of them are either unwilling or unable to join international treaties that could provide an additional layer of regulation and supervision. The current regulations are ineffective while also being overly restrictive; the adoption of new regulations would be a more effective approach. Additionally, prospective adoptive parents may feel more comfortable adopting from countries with clearer legal frameworks. In light of the dramatic increase in the number of intercountry adoptions from Africa,<sup>25</sup> it is imperative to take a critical look at the regulatory framework relative to intercountry adoptions from that continent. A hard look reveals that a vast number of African countries have elementary or overly restrictive regulation of intercountry adoption.<sup>26</sup> Additionally, many African countries continue to struggle with internal law enforcement and the rule of law, resulting in judicial decisions that flout international standards regarding intercountry adoptions.<sup>27</sup> If domestic regulations were brought into conformity with international regulations on intercountry adoptions, there would be a better regime on this issue. The United Nations Committee on the Rights of the Child (UNCRC) has on several occasions remarked that African countries need to develop their legal framework regarding intercountry adoption.<sup>28</sup> The UNCRC noted that even in the few cases where a legal structure exists, informal adoptions still occur.<sup>29</sup>

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<http://www.reformtalk.net/wp-content/uploads/2012/05/Hansen.pdf>.

25. *Adoption from Africa*, *supra* note 5.

26. See, e.g., Mohammed Adow, *Ethiopia's Adoption Dilemma*, BBC NEWS (Oct. 6, 2005), <http://news.bbc.co.uk/2/hi/africa/4312722.stm> ("The process of adopting children from Ethiopia is much simpler than the process in countries like China." For example, prospective adoptive parents are only required to stay in the country for two weeks "to learn something about Ethiopia.").

27. AFRICAN CHILD POLICY FORUM, *supra* note 9.

28. For example, in its remarks regarding Cameroon in 2001, the UNCRC expressed concern regarding the lack of a "legislative structure for the protection of the best interests of the child in cases of intercountry adoption," a "large number of children being sold by their parents," and the "possible use of intercountry adoption for the purpose of trafficking." Comm. on the Rights of the Child, Rep. on the 28th Sess., Sept. 24–Oct. 12, 2001, at 79, 85, 86, U.N. Doc. CRC/C/111 (Nov. 28, 2001).

29. For example, the UNCRC expressed concern in respect to Gambia that while the 1992 Adoption Act "provides for the regulation of adoptions (domestic and intercountry) . . . informal adoptions, which are generally not monitored with respect to the best interests of the child, are more widely accepted and practised." *Id.* at 95 ¶ 436. With regard to Guinea-Bissau,

Africa has many worthy cases of adoptable children. This is as a result of Africa having had more than its fair share of tragedies, notably numerous conflicts generating many refugee children, the HIV/AIDS<sup>30</sup> pandemic, which left multitudes orphaned,<sup>31</sup> as well as

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the UNCRC noted that “[t]he common use of ‘informal adoption’ procedures can lead to the violation of children’s rights.” Comm. on the Rights of the Child, Rep. on the 30th Sess., May 21–June 7, 2002, at 20, U.N. Doc. CRC/C/118 (Sept. 3, 2002). Concerning Burkina Faso, the UNCRC said it was “concerned at the very little interest in formal adoption in the State party, which may lead to the practices of conflation and customary adoption and to an increase in intercountry adoptions with no adequate monitoring mechanism.” Comm. on the Rights of the Child, Rep. on the 31st Sess., Sept. 16–Oct. 4, 2002, at 111, U.N. Doc. CRC/C/121 (Dec. 11, 2002). With regard to Zambia, the UNCRC noted, “the Adoption Act of 1958 provides for the regulation of domestic and intercountry adoptions, but remains concerned that informal adoptions, which are generally not monitored with respect to the best interests and other rights of the child, are more widely accepted and practiced within the State party.” Comm. on the Rights of the Child, Rep. on the 33d Sess., May 19–June 6, 2003, at 39, U.N. Doc. CRC/C/132 (Oct. 23, 2003). Pertaining to Madagascar, the UNCRC noted, “various types of informal adoption such as ‘godparenting’ that are not conducive to full respect for children’s rights.” Comm. on the Rights of the Child, Rep. on the 34th Sess., Sept. 15–Oct. 3, 2003, at 64, U.N. Doc. CRC/C/133 (Jan. 14, 2004). The UNCRC was also “concerned that intercountry adoptions are not properly followed up.” *Id.* In reference to Liberia, the UNCRC was concerned about “the lack of interest in domestic adoption in the State party and . . . the widespread use of informal adoption practices that are not conducive to full respect for children’s rights. The Committee is further concerned that there are no arrangements to regulate and monitor intercountry adoptions.” Comm. on the Rights of the Child, Rep. on the 36th Sess., May 17–June 4, 2004, at 73, U.N. Doc. CRC/C/140 (Sept. 27, 2004) [hereinafter Rep. on the 36th Sess.]. With regard to Botswana, the UNCRC recommended a “review of the Adoption Act in order to bring existing rules and practices regulating adoption into full compliance with the Convention to ensure that in cases of informal adoption, the rights of the child are well protected to encourage formal domestic adoptions.” Comm. on the Rights of the Child, Rep. on the 37th Sess., Sep. 13–Oct. 1, 2004, at 31, U.N. Doc. CRC/C/121 (Jan. 12, 2004). Pertaining to Togo, the UNCRC was concerned “about the vague adoption procedures, the occurrence of informal adoption and the absence of mechanisms to review, monitor and follow up adoption, especially intercountry adoption.” Comm. on the Rights of the Child, Rep. on the 38th Sess., Jan. 10–Nov. 28, 2005, at 111, U.N. Doc. CRC/C/146 (July 19, 2005).

30. According to UNICEF, by 2010 an estimated 15.7 million children—30% of the 53 million anticipated orphans from all causes in Sub-Saharan Africa—had lost at least one parent due to AIDS. *Africa’s Orphaned and Vulnerable Generations: Children Affected by Aids*, UNAIDS, UNICEF & PEPFAR, [http://www.unicef.org/publications/index\\_35645.html](http://www.unicef.org/publications/index_35645.html) (last visited Feb. 2, 2013).

31. Fifty-million children in Sub-Saharan Africa are orphans, according to UNICEF. *50 Million African Orphans Have to Fend for Themselves*, UNITED NATIONS RADIO (June 16, 2011), <http://www.unmultimedia.org/radio/english/2011/06/50-million-african-orphans-have-to-fend-for-themselves>. But UNICEF defines an orphan as a child who has lost at least one parent to death, making those figures potentially over-inclusive. Trish Maskew & Johanna Oreskovic, *Red Thread or Slender Reed: Deconstructing Prof. Bartbolet’s Mythology of International Adoption*, 14 BUFF. HUM. RTS. L. REV. 71, 79 (2008).

most of Africa's population existing in biting poverty.<sup>32</sup> Africa also has the highest number of children living in especially difficult circumstances.<sup>33</sup> In such situations, substitute homes become compelling.<sup>34</sup> In the more developed countries, the number of babies surrendered or abandoned by birth parents has been limited by contraception, abortion, and the increased tendency of single parents to keep their children. Therefore, there are very few children available for adoption in comparison with the large number of people who, for infertility and other reasons, are eager to adopt.<sup>35</sup> "In the poorer countries of the world, war, political turmoil, and economic circumstances contribute to a situation in which there are very few prospective adopters in comparison with the vast number of children in need of homes."<sup>36</sup>

As more media attention has focused on the plight of African children, intercountry adoption<sup>37</sup> has often been understood as the

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32. Fifth International Policy Conference on the African Child, Draft Guidelines for Action on Intercountry Adoption of Children in Africa 7 (May 29–30, 2012) (unpublished manuscript) [hereinafter Draft Guidelines], available at <http://www.africanchildforum.org/ipc/documents/Draft%20ICA%20Guidelines%20ACPF.pdf> (providing that intercountry adoption should not be considered "where poverty, however defined, seems to be the sole reason why the child cannot grow up in his or her biological (including extended) family environment").

33. See, UNICEF, State of the World's Children 2012 (2012), at 133, [http://www.unicef.org/sowc/files/SOWC\\_2012-Main\\_Report\\_EN\\_21Dec2011.pdf](http://www.unicef.org/sowc/files/SOWC_2012-Main_Report_EN_21Dec2011.pdf) (illustrating that African countries top the list in mortality rates: 3.8 million children under-five in 2010). Worldwide, "1 in 3 urban dwellers lives in slum conditions; in Africa, the proportion is a staggering 6 in 10." *Id.* at v.

34. What is concerning is that "[a]s international adoptions have flourished, so has evidence that babies in many countries are being systematically bought, coerced, and stolen away from their birth families. . . . And yet when a country is closed due to corruption, many adoption agencies simply transfer their clients' hopes to the next 'hot' country." E.J. Graff, *The Lie We Love*, FOREIGN POL'Y MAG., 60 (Nov. 1, 2008), available at [http://www.foreignpolicy.com/articles/2008/10/15/the\\_lie\\_we\\_love](http://www.foreignpolicy.com/articles/2008/10/15/the_lie_we_love). Graff writes that

[i]n many countries, it can be astonishingly easy to fabricate a history for a young child, and in the process, manufacture an orphan. The birth mothers are often poor, young, unmarried, divorced, or otherwise lacking family protection . . . for enough money, someone will separate these little ones from their vulnerable families, turning them into "paper orphans" for lucrative export.

*Id.* at 63.

35. Waddington, *supra* note 13, at 83.

36. Elizabeth Bartholet, *International Adoption: Propriety, Prospects, and Pragmatics*, 13 J. AM. ACAD. MATRIM. LAW 181, 182 (1996).

37. Uche Ewelukwa Ofofiele, *The Universal Declaration of Human Rights and the African Child Today: Progress or Problems?*, 25 AM. U. INT'L L. REV. 37, 40 (2010).

way to deliver these children from destitute lives.<sup>38</sup> Nevertheless, it must be stressed that

[a] demand-driven intercountry adoption system built upon the vulnerability of parents living in extreme poverty therefore undercuts, rather than facilitates, human rights. It is one thing to intervene to mitigate the negative impacts of poverty, but something else entirely to take advantage of the vulnerability of the poor to obtain their children.<sup>39</sup>

Accordingly, it has been noted that countries in which significant international adoption abuses have been alleged and documented often suffer from conditions referred to above, such as extreme poverty.<sup>40</sup>

African nations are suspicious of intercountry adoption as a solution to the problem of institutionalization and the raising of adoptable children in poverty.<sup>41</sup> In terms of abuses, the recently released 2012 U.S. Trafficking in Persons report indicated that “[b]y region, the Asia and the Pacific region (which includes South Asia) remains largest in terms of number of victims, though the estimate of trafficking victims in Africa has grown since the 2005 estimate.”<sup>42</sup> In re-

38. Benyam Dawit Mezmur, *Intercountry Adoption as a Measure of Last Resort in Africa: Advancing the Rights of a Child Rather than a Right to a Child*, 10 SUR INT'L J. HUM. RTS. 82, 83 (2009).

39. David M. Smolin, *Intercountry Adoption and Poverty: A Human Rights Analysis*, 36 CAP. U. L. REV. 413, 453 (2007).

40. Maskew & Oreskovic, *supra* note 31, at 106.

41. It has been observed that “several scandalous reports of abuse and fraud [exist] throughout the adoption process in several countries, which may have an impact on the decline in international adoptions.” *Adoption News Stories of 2011*, ADOPTION STAR, <http://www.adoptionstar.com/tag/decline-in-international-adoptions> (last visited Feb. 2, 2013).

42. *Trafficking in Persons Report 2012*, U.S. DEP'T ST., <http://www.state.gov/j/tip/rls/tiprpt/2012/index.htm> (last visited Feb. 3, 2013). There has been a steady increase in intercountry adoptions from Africa to the United States: 171 in 1998, 200 in 1999, 217 in 2000, 343 in 2001, 337 in 2002, 417 in 2003, and 580 in 2004. ADOPTION FACTBOOK IV, at 43 (Thomas C. Atwood et al. eds., 2007), available at <https://www.adoptioncouncil.org/publications/adoption-factbook.html>. By 2008, there were 1277 intercountry adoptions from Africa to the United States. U.S. DEP'T OF STATE, ANNUAL REPORT ON INTERCOUNTRY ADOPTIONS 17–18 (2009), available at [http://adoption.state.gov/content/pdf/Adoption\\_Report\\_v9\\_SM.pdf](http://adoption.state.gov/content/pdf/Adoption_Report_v9_SM.pdf). There were 2765 intercountry adoptions from Africa to the United States in 2009. U.S. DEP'T OF STATE, 2009 ANNUAL REPORT ON INTERCOUNTRY ADOPTIONS 16–17 (2009), available at [http://adoption.state.gov/content/pdf/fy2009\\_annual\\_report.pdf](http://adoption.state.gov/content/pdf/fy2009_annual_report.pdf). There were 3138 intercountry adoptions from Africa to the United States in 2010. U.S. DEP'T OF STATE, 2010 ANNUAL REPORT ON INTERCOUNTRY ADOPTIONS 3–5 (2010), available at <http://1.usa.gov/VStDoc>.

sponse, some African nations have emphasized institutionalization as the preferred option.<sup>43</sup> Yet institutionalization can have drastic consequences on a child, including reactive attachment disorder, “a condition that impairs their ability to get along smoothly in society and to relate warmly to friends.”<sup>44</sup> It is important to note that when properly regulated<sup>45</sup> and executed, intercountry adoption can provide the *only* appropriate alternative to institutionalization in circumstances where in-country adoption is not feasible.<sup>46</sup> If it is not possible to place adoptable children in-country,<sup>47</sup> then intercountry adoption should be warmly embraced as an option.<sup>48</sup> For this reason, outright prohibition of intercountry adoption has few adherents in the international community;<sup>49</sup> most favor some adoption as long as it is properly regulated<sup>50</sup> without being overly restricting.<sup>51</sup>

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43. See Barbara Stark, *Lost Boys and Forgotten Girls: Intercountry Adoption, Human Rights, and African Children*, 22 ST. LOUIS U. PUB. L. REV. 275, 280 (2003).

44. Anthony D’Amato, *Cross-Country Adoption: A Call to Action*, 73 NOTRE DAME L. REV. 1239, 1241 (May 1998).

45. Some would argue that, as long as money is involved, intercountry adoption will never be a viable option. Jena Martin, *The Good, the Bad & the Ugly? A New Way of Looking at the Intercountry Adoption Debate*, 13 U. C. DAVIS J. INT’L L. & POL’Y 173, 189 (2007).

46. Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*, 21 B.U. INT’L L.J. 179, 219 (2003). See also D. Marianne Blair, *Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers*, 34 CAP. U. L. REV. 349 (2006).

47. Some scholars argue that it is a false assumption that “blacks generally do not adopt.” Tshepo L. Mosikatsana, *Examining Class and Racial Bias in the Adoption Process and the Viability of Transracial Adoptions as a Policy Preference: A Further Reply to Professors Joubert, Pakati and Zaal*, 13 S. AFR. J. ON HUM. RTS. 602, 603 (1997) (internal quotation marks omitted). Scholars also argue against “the culturally hegemonic assumption that only black and coloured children should be adopted transracially.” *Id.* at 605. Mosikatsana argues that

[t]he assumption that blacks are not informed about adoption and that adoption is alien to the African culture is not borne out by experience. . . . Black families have always adopted the children of relatives. Most adoptions in the black communities tend to be informal and are, as a result, not recorded. This has created the incorrect impression that blacks generally do not adopt.

*Id.* at 609.

48. See Tshepo L. Mosikatsana, *Country Adoptions: Is There a Need for New Provisions in the Child Care Act?*, 16 S. AFR. J. ON HUM. RTS. 46, 63 (2000).

49. Blair, *supra* note 46, at 352.

50. Some critics of this approach maintain that focusing on the bad things that can happen, and providing adequate regulation in response, tends to “restrict rather than to facilitate international adoption.” Elizabeth Bartholet, *International Adoption: The Child’s Story*, 24 GA. ST. U. L. REV. 333, 339 (2008). There is a need for a balanced and facilitative approach.

51. It has been observed that international adoption laws are already restrictive enough.

Admittedly, ridding intercountry adoptions of abuses remains a huge challenge. Reports are rife of instances of “child-buying, coercion of vulnerable birth parents, weak regulatory structures, and profiteering,” as well as a highly problematic fee structure.<sup>52</sup> Humanitarianism can also mask abuse.<sup>53</sup> There have been instances of African children who were fraudulently taken out of Africa under the guise of humanitarianism, but even with the drawbacks of intercountry adoptions, institutionalization is still worse.<sup>54</sup>

However, emphasizing the abuses rather than the benefits of intercountry adoption amounts to scapegoating for lack of effort on the regulatory plane. The propriety and integrity of adoption should be the ultimate guide in all legislative efforts.<sup>55</sup> Enforcement and rule-of-law challenges will not be overcome overnight in Africa. But it is important to know what those are and to examine what needs to be

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Elizabeth Bartholet thus observed:

international adoption provided homes for roughly 40,000 children annually, including more than 20,000 homes in the United States. This occurred despite the severe restrictions on such adoption that have always existed. The world could easily multiply that number by 10, 100, or more by reducing those restrictions and by developing facilitative regulation.

Elizabeth Bartholet, *Permanency Is Not Enough: Children Need the Nurturing Parents Found in International Adoption*, 55 N.Y.L. SCH. L. REV. 781, 782 (2011).

52. Maskew & Oreskovic, *supra* note 31, at 76. Authors Maskew and Oreskovic observe that fees are highly problematic:

The country fees are paid to an agency’s facilitators or by the agency to government authorities in the sending country. There is no requirement that agencies itemize either the country fee or any other “service” fees it charges . . . . The prospect of earning large amounts of money, none of which needs to be accounted for, on what amounts to a contingency fee basis, creates significant incentives for individuals, particularly in desperately poor countries, to obtain children by any means possible. This creates a profound absence of transparency at the most critical level of the adoption process, making it virtually impossible to determine how a child came into care and whether the process was free of coercion, deception, or payments to induce relinquishment.

*Id.* at 87–88.

53. Dillon, *supra* note 46, at 186.

54. D’Amato, *supra* note 44, at 1240–41 (citing a TV show, a *New York Times* report, and a *Washington Post* report that documented the abuses associated with institutionalization).

55. See Congregation for the Doctrine of the Faith, Instruction, *Dignitas Personae*, at para. 13 (Dec. 8, 2008), available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20081208\\_dignitas-personae\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20081208_dignitas-personae_en.html) (“[A]doption should be encouraged, promoted and facilitated by appropriate legislation so that the many children who lack parents may receive a home that will contribute to their human development.” (emphasis omitted)).

done from a perspective of regulatory frameworks. Even if “adoption laws cannot independently prevent abuses, a sound legal framework is fundamental in establishing child-centered standards for intercountry adoption.”<sup>56</sup> If the status quo does not change, African countries could go the way of some countries in Eastern Europe and completely ban or suspend intercountry adoptions, and some have done exactly that.<sup>57</sup>

But a total ban or suspension of intercountry adoptions amounts to an abdication that would negatively impact the best interests of otherwise adoptable children. This Article is dedicated to highlighting the needs in Africa generally, and more specifically in select African countries that exemplify the magnitude of the problem. Because of the continuing controversial nature of this topic, Part I presents the arguments in favor of intercountry adoption and corresponding counterarguments to provide a foundational justification for African countries to be engaged. Part II presents the existing international framework that African countries could emulate as they try to improve their regulation. Part III analyzes the jurisprudence and legislation of select African countries to showcase the need for improved regulation. Part IV presents relevant recommendations.

## II. PROS AND CONS OF AFRICAN INTERCOUNTRY ADOPTIONS

### *A. Arguments Against African Intercountry Adoption*

One of the arguments against intercountry adoptions, and one that has particular resonance with many African countries, is that an adopted child’s cultural identity could be lost. Opponents of intercountry adoption maintain that “a child’s cultural identity trumps his or her need for a family, and that placing a child in a non-traditional

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56. Mosikatsana, *supra* note 48, at 52.

57. A case in point is Togo. “[I]n February 2008, Togo suspended intercountry adoption as a result of detected illegal adoptions.” AFRICAN CHILD POLICY FORUM, *supra* note 9, at 5. But after the adoption of Decree No. 2008-103/PR of July 29, 2008, and Regulation No. 004/2008/MASPFPEPA of October 24, 2008, which regulated the functions and membership of the National Adoption Committee, the government lifted the ban on intercountry adoption. *Id.* “In Liberia, following a number of illegal adoptions, the [p]resident suspended intercountry adoptions in 2008 and established a [c]ommission to conduct a comprehensive assessment of the laws, policies, and practices of intercountry adoption . . .” *Id.* “In June 2007, Lesotho also suspended intercountry adoptions in order to address loopholes in the law, policy[,] and practice pertaining to intercountry adoptions.” *Id.*

family structure may be more important than the traditional paradigm of the nuclear family that informs intercountry adoption.”<sup>58</sup> The traditional African proverb, “it takes a village to raise a child,” models this view of family structure and it has significant implications for intercountry adoption concerning “when a child may legally be deemed an orphan.”<sup>59</sup> “Children’s right to preservation of their cultural background has been used as an argument not only to legitimize the privileging of in-country over intercountry adoption, but also as an argument against transracial in-country adoption.”<sup>60</sup> The Evan B. Donaldson Adoption Institute argues, “[R]ace should be a factor in adoption placement, and ... agencies should be allowed to screen non-black families who want to adopt black children—for their ability to teach self-esteem and defense against racism, and for their level of interaction with other black people.”<sup>61</sup> The Supreme Court of India<sup>62</sup> and the Hague Convention<sup>63</sup> appear to have some points of agreement.

Race should be a factor even in the case of orphans. What is wrong, opponents argue, is to equate orphans<sup>64</sup> with adoptable children, because the statistics on orphans include single orphans (with one deceased parent) and double orphans (both parents deceased) in the care of extended families.<sup>65</sup> “At least four out of five children in

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58. Martin, *supra* note 45, at 195–96.

59. *Id.* at 197.

60. Shruti Johansson & Judith Lind, *Preservation of the Child’s Background in In- and Intercountry Adoption*, 17 INT’L J. CHILD. RTS. 235, 236 (2009).

61. Jeninne Lee-St. John, *Should Race Be a Factor in Adoptions?*, TIME (May 27, 2008), <http://www.time.com/time/health/article/0,8599,1809722,00.html> (construing SUSAN SMITH, ET AL., EVAN B. DONALDSON ADOPTION INSTITUTE, FINDING FAMILIES FOR AFRICAN AMERICAN CHILDREN: THE ROLE OF RACE & LAW IN ADOPTION FROM FOSTER CARE (2008)).

62. See *Laxmi Kant Pande v. Union of India*, A.I.R. 1984 S.C. 469, cited in Stacy I. Strong, *Children’s Rights in Intercountry Adoption: Towards a New Goal*, 13 B.U. INT’L L.J. 163, 172–73 (1995) (requiring foreign prospective parents “to be sponsored by a government-recognized agency that provides pre-adoption screening and ongoing supervision until the adoption is complete”).

63. See Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption, arts. 5, 9, 21, May 29, 1993, S. Treaty Doc. No. 105–51 (1998), reprinted in 32 I.L.M. 1134 (1993) [hereinafter Hague Convention].

64. Out of five million orphans in Ethiopia today, nearly half are orphaned due to HIV/AIDS. Some of the children were abandoned, “found by police patrols in dark alleys, and at times even in toilets.” See Adow, *supra* note 26.

65. AFRICAN CHILD POLICY FORUM, *supra* note 9.

orphanages around the world have a living parent.”<sup>66</sup> Further, “The majority of so-called orphans adopted from Africa have at least one living parent and many children are trafficked or sold by their parents.”<sup>67</sup> “It is a myth that children in orphanages have no parents. Most are there because their parents simply can’t afford to feed, clothe, and educate them.”<sup>68</sup> “[P]arents who hand over their children may hope to give them a better education or believe they will be returned to them when they are older.”<sup>69</sup> Not paying enough attention to these considerations can lead to difficulties such as withdrawn children and split personalities.<sup>70</sup> Opponents would argue that the American race-neutral approach does not apply, either. Notwithstanding any constitutional challenges,<sup>71</sup> opponents would insist that

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66. *Most ‘Orphans’ Have a Living Parent, Says Charity*, BBC NEWS (Nov. 24, 2009), [http://news.bbc.co.uk/2/hi/in\\_depth/8375579.stm](http://news.bbc.co.uk/2/hi/in_depth/8375579.stm) [hereinafter *Living Parent*] (quoting CORINA CSÁKY, SAVE THE CHILDREN, KEEPING CHILDREN OUT OF HARMFUL INSTITUTIONS (2009), [http://www.savethechildren.org.uk/sites/default/files/docs/Keeping\\_Children\\_Out\\_of\\_Harmful\\_Institutions\\_Final\\_20.11.09\\_1.pdf](http://www.savethechildren.org.uk/sites/default/files/docs/Keeping_Children_Out_of_Harmful_Institutions_Final_20.11.09_1.pdf)).

67. *Adoption from Africa*, *supra* note 5.

68. *Living Parent*, *supra* note 66.

69. *Id.*

70. Experiences of adoptees are not homogeneous. In a research study of Korean adoptees’ perception of international adoption, a number of respondents provided different comments in response to the question, “How did you think of yourself ethnically as you were growing up?” Some adoptees expressed difficulty in having a clear sense of ethnicity when they were growing up: “I always felt slightly like a ‘fraud’ since I was not really a Korean, nor did I feel I was accepted as an ‘American’ like Caucasians. It is real hard to feel ‘American’ when strangers constantly asked me ‘Where are you from?’ and ‘How long have been you here?’” Other adoptees struggled with being Korean or Asian versus being “white,” describing themselves as they were growing up as “Amerasian trying to be ‘white;” “Not ‘white’ enough;” and “Caucasian, except when looking in the mirror [when] I was reminded that I was Korean.” Others stated that as they were growing up, they saw themselves as Caucasian or white. These adoptees described themselves as “Caucasian who happened to look different;” “Caucasian with a difference;” “a white person in an Asian body;” and “white middle class, but adopted from Korea.” Other adoptees said that as they were growing up, they identified with their adoptive family’s or adoptive country’s heritage or culture, considering themselves to be “Irish, Italian, German and Korean;” “Scandinavian;” “Caucasian Italian American;” and “as [part of an] English, German, Jewish, White family.” Evan B. Donaldson Adoption Institute, *The Gathering of the First Generation of Adult Korean Adoptees: Adoptees’ Perceptions of International Adoption*, ADOPTION INSTITUTE (June 2000), <http://www.adoptioninstitute.org/proed/korfindings.html>.

71. See Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 104-188, § 1808, 110 Stat. 1903-1904 (1996) (mandating that an adoption may not be denied on the basis of the race of the child, or the adopting parent). As amended by the Interethnic Adoption Provisions of 1996, any agency that receives federal financial assistance is prohibited from delaying or denying a child’s foster care or adoptive placement on the basis of the child’s or the prospective parents’ race.

adopting an African American child is not the same as adopting an African child. In any case, opponents would point out that in the proper legal climate, many adoption agencies would be reluctant to place black children with white parents<sup>72</sup> because white parents are unlikely to provide black children with “Black survival skills.”<sup>73</sup>

Some critics have also argued that intercountry adoptions result

in the transfer of children from the least advantaged women to the most advantaged. At the same time, such adoptions, per se, do nothing to alleviate the conditions in the societies or communities from which the children come and thus do nothing to change the conditions that place some women in the position of being unable to care for their children themselves.<sup>74</sup>

Opponents also take note of a growing trend of celebrity intercountry adoptions from Africa and argue that the promise of a materially better life is not necessarily in the best interest of the child. One example is David Banda, the Malawian child adopted by Madonna. David Banda’s mother died soon after his birth, his parents had lost two of his siblings to malaria, and he faced the prospect of living in a country where the majority of the population live on less than a dollar a day.<sup>75</sup> Malawi is one of the least developed countries in the world, has an infant mortality rate of 94 per thousand, and about one in seven people have HIV/AIDS.<sup>76</sup> David Banda’s father was still alive at the time of his adoption.<sup>77</sup> Not only did Madonna offer to adopt Banda, she donated \$3 million to help 900,000 Malawian orphans with food, school, and shelter.<sup>78</sup> All the judges understood that David Banda would be joining Madonna in her \$15 million London home and that his life expectancy was in the process of doubling from forty years in Malawi to seventy-eight years in Britain

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72. Bartholet, *supra* note 36, at 1165.

73. James S. Bowen, *Cultural Convergences and Divergences: The Nexus Between Putative Afro-American Family Values and the Best Interests of the Child*, 26 J. FAM. L. 487, 510 (1988), cited in Stark, *supra* note 43, at 291.

74. Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101, 102 (1998).

75. Nancy Gibbs, *With Her Malawi Adoption, Did Madonna Save a Life or Buy a Baby?*, TIME (Oct. 22, 2006), <http://www.time.com/time/world/article/0,8599,1549282,00.html>.

75. Peter Singer, *Madonna and Child*, PROJECT SYNDICATE (Nov. 9, 2006), <http://www.project-syndicate.org/print/madonna-and-child>.

77. Gibbs, *supra* note 75.

78. *Id.*

almost overnight.<sup>79</sup> “Suddenly, David became the world’s best-known Malawian because it was his good fortune to be adopted by Madonna.”<sup>80</sup>

In light of this, skeptics wonder whether the best interests of Banda were the overarching considerations in the mind of the Malawian judges. Critics argue that celebrity adoptions are fueled by competition over who can do the most for the poor.<sup>81</sup> Importantly, prospective adoptive families do not have to wield the Madonna clout for the adoption to be problematic; it suffices that they come from a more developed country, as rich nations lead the way in the amount of adopters.<sup>82</sup> Strictly speaking, David was not an orphan. His father, a potato farmer, brought him to the orphanage—but that was because he was too poor and too broken to take care of him anymore. Even with the consent of David’s father, (David’s father would later say he had not understood that his son no longer belonged to him and might never return to Malawi<sup>83</sup>) consideration of the best interests of the child demands that the Courts must first consider that a father’s love is paramount and trumps the prospect of a baby being taken away to be raised in splendor.<sup>84</sup> Relatedly, some African states and opponents maintain that intercountry adoptions are “imperialistic.”<sup>85</sup>

Some opponents maintain that African States are weary of a new form of imperialism,<sup>86</sup> “allowing dominant, developed cultures to

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79. *See id.*

79. Singer, *supra* note 76.

81. Gibbs, *supra* note 75. Not that this is not a bad area to compete in, so long as the best interests of the child are not endangered.

82. Chege Mbitiru, *Madonna Joins Rush to Adopt Children*, NATION (KENYA) (Oct. 23, 2006), <http://www.accessmylibrary.com/article-1G1-153279526/madonna-joins-rush-adopt.html>.

83. Singer, *supra* note 76.

84. Gibbs, *supra* note 75. It would appear that very few parents know “they are giving up all legal rights to their children.” CsÁKY, *supra* note 66, at 8. And often, adoptive parents do not know the true background of the youngster. *Id.*; *see also* Gertrude Lynn Hiwa, *The Law and Intercountry Adoption: The Malawi Experience*, FIFTH INT’L POL’Y CONF. ON AFR. CHILD, <http://www.africanchildforum.org/ipc/> (last visited Dec. 21, 2012) (“There have been reports that after an adoption order, parents or guardians go back to the orphanages or indeed Non-Governmental Organizations which deal with children issues and complain that at the time of the adoption proceedings they did not fully appreciate the consequences of an adoption order and request the return of their child.”).

85. Mezmur, *supra* note 38, at 8.

86. These perceptions feed off statistics indicating that adoptions are overwhelmingly unidirectional. For example, 73 children were adopted from America to other countries in

strip away a developing country's most precious resources, its children."<sup>87</sup> Opponents argue that

intercountry adoption forces the adopted child to assimilate into western society in a manner that is reminiscent of colonial attempts to indoctrinate indigenous peoples into European values and learning . . . [such that] the adopted child loses an essential aspect of the child's identity by being removed from his or her birth country.<sup>88</sup>

Lemn Sissay, a high-profile former adoptee and a United Kingdom-based poet and playwright, argues that non-Africans should be closely observed when seeking to adopt African children because "taking a child from another culture is an act of aggression."<sup>89</sup> Hannah Wosene Kebam, a thirty-year-old Ethiopian who was adopted by a Norwegian family but managed to reunite with her Ethiopian family, reiterated these sentiments, stating, "Growing up in Norway has been very good . . . I grew up strong, I got what I need, and I am a happy girl, but it is difficult to grow up in a family who are white, in school they are white and even at workplaces."<sup>90</sup> Kebam felt isolated due to her race, and feels that any foster parents who claim not to care about a child's race "must be colour-blind."<sup>91</sup> In Kebam's view,

For the child it is not enough to say that the child is getting good food and education—who he is and where he comes from matter a great deal to the child. . . . It is because of the neglect of the issue of identity that you see many adopted children going down the drain despite getting the best food in the world.<sup>92</sup>

Opponents also argue that prospective adoptive parents primarily seek to satisfy their self-interest and not necessarily the best interest of the adoptable child. David Smolin maintains, for example, "Everyone understands that prospective adoptive parents are, in crude terms, 'in it for the baby.'"<sup>93</sup> This would be a consequentialist (serv-

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2011, while 9320 children were adopted into the United States. *Intercountry Adoption Statistics for 2011*, ADOPTION UNDER ONE ROOF, <http://ouradopt.com/adoption-blog/nov-2011/lisas/intercountry-adoption-statistics-2011> (last visited Feb. 2, 2013).

87. Martin, *supra* note 45, at 174.

88. Waddington, *supra* note 13, at 86.

89. *Living Parent*, *supra* note 66.

90. Adow, *supra* note 26.

91. *Id.*

92. *Id.*

93. David M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 VAL. U. L. REV. 281,

ing concrete interests of the adopter) conception of intercountry adoption,<sup>94</sup> in contrast to a deontological conception, which focuses on the need of the unparented to be adopted *per se*.<sup>95</sup> A consequentialist approach to intercountry adoptions from Africa has been traced to a number of factors.

In the 1960s, most Western countries experienced declines in the number of white babies available for adoption due to the increased use of contraception, the availability of abortion, the general acceptance of single parenthood as well as public support for single mothers. As the number of white intercountry adoptable children decreased, prospective adopters turned their attention to intracountry transracial adoptions.<sup>96</sup>

Additionally, there has been a phenomenon of “shopping” for an adoptable child—the attempt by adopters to find a child “that best fits their personal needs.”<sup>97</sup> For example, some adoption agencies, such as the European Adoption Consultants, Inc., advertise “the availability of ‘Caucasian and Eurasian children’ on their website, while Aurora International Adoptions offers ‘the unique opportunity to choose a desired child on your own,’” advertisements that appear to focus on the adopters’ desires, thus “eliminating the selfless sense of compassion previously associated with the adoption process.”<sup>98</sup> Regardless of how self-serving it seems, this is precisely the type of

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304 (2004–05). It has been observed that

[the] interest in intercountry adoption is likely to increase in the foreseeable future as demand for children, particularly infants, increases among families in the United States and other western countries. Advances in contraception, the legalization of abortion, and the increased tendency of single parents to raise their biological children have, in combination, dramatically reduced the number of children available for adoption in the United States and other western countries” and rising infertility rates have created a large population of prospective intercountry adoptive parents within the United States.

Waddington, *supra* note 13, at 83–84.

94. Paulo Barrozo, *Finding Home in the World: A Deontological Theory of the Right to be Adopted*, 55 N.Y. L. SCH. L. REV. 701, 704 (2010–2011).

95. *Id.* at 714.

96. Tshepo Mosikatsana, *Intercountry Adoptions: Is there a Need for New Provisions in the Child Care Act?*, 16 SAJHR 46, 49–50 (2000).

97. Katherine Herrmann, *Reestablishing the Humanitarian Approach to Adoption: The Legal and Social Change Necessary to End the Commodification of Children*, 44 FAM. L.Q. 409, 414 (2010).

98. *Id.*

screening that could alleviate problems of the sort experienced by the Hansen family.<sup>99</sup>

Relatedly, critics of intercountry adoption bluntly claim: “Stripped of all humanitarian justification, intercountry adoption is a commercialized and corrupt system driven by the demand of rich Western adults for children.”<sup>100</sup> “The problem is a global one, but cases are especially high in parts of Africa and Eastern Europe.”<sup>101</sup> “[C]hildren have become ‘commodities’” and “unscrupulous institutions are known to recruit children in order to profit from international adoption and child trafficking.”<sup>102</sup>

The most ardent critics of intercountry adoption, such as Baroness Nicholson, oppose it because it “has been hijacked by the child traffickers.”<sup>103</sup> These critics insist that this goes on even in countries with developed rule of law. For example, the United States has “failed to purge trafficking from intercountry adoption.”<sup>104</sup> As Smolin has observed, this happens because “[t]he law and practice regarding money and adoption turn out to be so mired in legal fictions and regulatory gaps as to make it extraordinarily difficult to distinguish between licit and illicit payments.”<sup>105</sup> The fact that private agencies charge vastly different sums for legitimate birth parent expenses based on the race of the child only augments this narrative, for “it might cost thirty-thousand dollars to adopt a white infant but only ten-thousand dollars to adopt an African-American infant.”<sup>106</sup> But critics say that birth parent expenses could turn out to be the implicit sale of children as “the distinction between assistance and inducement can be difficult to define.”<sup>107</sup> Proof of an inducement, or a *quid pro quo*, ultimately turns on the inner motivations and understanding

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99. See Pickert, *supra* note 21 and accompanying text.

100. David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnaping, and Stealing Children*, 52 WAYNE L. REV. 113, 116 (2006).

101. *Living Parent*, *supra* note 66.

102. *Id.*

103. Carlson, *supra* note 1, at 741.

104. Patricia J. Meier, *Small Commodities: How Child Traffickers Exploit Children and Families in Intercountry Adoption and What the United States Must Do to Stop Them*, 12 J. GENDER RACE & JUST. 185, 223 (2008–2009).

105. Smolin, *supra* note 93, at 282.

106. *Id.* at 305.

107. *Id.* at 311.

of the parties. “[T]he law’s current permission of ‘gifts,’ ‘expenses,’ and ‘services’ makes the law’s prohibition of selling parental rights and children largely illusory.”<sup>108</sup> Birth parents “frequently will not be cooperative with investigative authorities, given their own legal, social, and financial vulnerabilities.”<sup>109</sup>

Another criticism of intercountry adoption is that certain countries’ adoption agencies do not ensure full disclosure of potential difficulties with certain children, and only those children who are already problematic are being offered for intercountry adoption. For instance, it has been claimed that Russian agencies sometimes dump fetal alcoholic and sociopathic kids to unsuspecting American families desperate for children—this was the defense of the mother who put the Russian boy on the plane back to Russia.<sup>110</sup> In light of this, opponents would argue that it is better to find solutions at source, rather than outsource the problem.

Many political leaders and officials of sending nations also contend that adoption amounts to “a shameful admission to the world of a government’s inability to care for its own.”<sup>111</sup> Critics also maintain that “intercountry adoption is simply used to treat symptoms of social and economic issues in sending countries.”<sup>112</sup> Some critics also argue that “allowing international adoptions diverts attention, and thereby important resources, from in-country programs such as foster care and relief for struggling families.”<sup>113</sup> “Even properly conducted” intercountry adoption, some say, is meaningless. This is because “it presents an idealized life for small numbers of children, as an alternative to a global policy.”<sup>114</sup> Instead, it is suggested that “the elimina-

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108. *Id.* at 322.

109. *Id.* at 311.

110. Damien Cave & Clifford J. Levy, *Child in Adoption Case is an American Citizen, Not Russian, Experts Say*, N.Y. TIMES, Apr. 12, 2010, at A14, available at <http://www.nytimes.com/2010/04/13/us/13hansen.html>; see also Pickert, *supra* note 21.

111. Lisa A. Katz, Comment, *A Modest Proposal? The Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, 9 EMORY INT’L L. REV. 283, 291 (1995) (citing Elizabeth Bartholet, *International Adoption: Overview*, in ADOPTION LAW AND POLICY §§ 10.03[1], 10.04[1] (Joan Hollinger ed., 1988)).

112. Rachel J. Wechsler, *Giving Every Child a Chance: The Need for Reform and Infrastructure in Intercountry Adoption Policy*, 22 PACE INT’L L. REV. 1, 14 (2010).

113. Lisa Myers, *Preserving the Best Interests of the World’s Children: Implementing the Hague Treaty on Intercountry Adoption Through Public-Private Partnerships*, 6 RUTGERS J.L. & PUB. POL’Y 780, 788 (2009).

114. Damien Ngabonziza, *Moral And Political Issues Facing Relinquishing Countries*, 15:4

tion of economic disparities, the writing off of Third World debt and giving aid to Third World countries will address the problems which create the need for intercountry adoptions.”<sup>115</sup>

*B. Arguments in Favor of African Intercountry Adoption*

Regardless of where one stands in the debate regarding the merits or demerits of intercountry adoption, it is undeniable that intercountry adoption retains the potential to serve the best interests of children in certain circumstances. It is for this reason that international law has increasingly embraced the practice, even if cautiously at first. This Article urges African nations to move in this direction and, in light of the increased rate of intercountry adoptions from Africa, to do so with a sense of urgency. It is important to address some arguments raised against African intercountry adoption and to point out why, in spite of the demerits, it would still be a worthwhile practice.

On its face, the argument based on imperialism appears to have merit: after all, “[i]ntercountry adoption typically involves an exchange between a developing country and an industrialized country.”<sup>116</sup> But that alone is insufficient grounds for denying intercountry adoption because not every prospective adoptive parent is motivated by the idea of depriving African countries of their best resources—children. In actuality, intercountry adoptions appear to aid many African countries that are simply incapable of looking after children at a particularly vulnerable time in their lives. Proponents maintain that “[i]nternational adoption . . . relieves resource-starved nations of the burden of supporting unparented children and the additional costs those children will predictably exact as they graduate from childhoods of deprivation to adulthood—where they will disproportionately populate the ranks of the unemployed, the homeless, and the incarcerated.”<sup>117</sup>

Proponents also argue that “[t]hose attacking . . . [intercountry] adoption as being in conflict with children’s heritage rights are speaking a language of a past in which it was common to see people as es-

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ADOPTION & FOSTERING 75, 80 (1991), cited in Mosikatsana, *supra* note 48, at 62.

115. Mosikatsana, *supra* note 48, at 62.

116. Shani King, *Challenging Monobumanism: An Argument for Changing the Way We Think About Intercountry Adoption*, 30 MICH. J. INT’L L. 413, 425 (2008–2009).

117. Bartholet, *supra* note 51, at 783.

sentially defined by their race and national origin.”<sup>118</sup> Why, they ask, have intercountry adoptions only increased since the 1950’s despite these criticisms? It appears that globalization<sup>119</sup> has something to do with it, although other factors are also at play.<sup>120</sup> In any event, international law recognizes and addresses these cultural arguments. For example, the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption<sup>121</sup> (Hague Convention) provides that “due consideration” should be given to the child’s “ethnic, religious and cultural background.”<sup>122</sup> This would still be insufficient for critics who argue that “cultural background” designates a source of information or data rather than a determination of cultural identity in and of itself.<sup>123</sup> Notably, the drafters of the Hague Convention were of the view that “it is important that the adoptive child retains links with his or her past, and have an understanding of his or her background.”<sup>124</sup> Indeed, some adoption agencies pay attention to cultural issues and try to “arrange ‘roots trips’ to adoptees’ birth countries, culture education camps, and other gatherings with the aim of instilling in adoptees pride in their birth culture.”<sup>125</sup>

The insistence that vulnerable African children must be raised in an African culture is not defensible in every adoption, especially if the child is raised to appreciate diversity.<sup>126</sup> This line of argument insists:

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118. *Id.*

119. See generally Jini L. Roby, *Rhetoric to Best Practice: Children’s Rights in Intercountry Adoption*, 27 CHILD. LEGAL RTS. J. 48 (2007).

120. But some studies go in the opposite direction, indicating that “transracially adopted children seem to have better relationships with Whites and are more comfortable in racially integrated settings. A recent study indicates that there may not be any real connection between positive self-esteem and being adopted inracially,” and that for “inter-country adoptions to be successful from the child’s perspective, the adopting parents must have the proper attitudes and racial perspectives.” Mark Eade, *Inter-Country Adoption: International, National and Cultural Concerns*, 57 SASK. L. REV. 381, 386 (1993).

121. Hague Convention, *supra* note 63, art. 16(b).

122. *Id.*

123. Martin, *supra* note 45, at 204.

124. G. Parra-Aranguren, Explanatory Report on the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, ¶ 314 (HCCH Publications 1994) (offprint from PROCEEDINGS OF THE SEVENTEENTH SESSION (1993), TOME II, ADOPTION CO-OPERATION) available at [http://www.hcch.net/index\\_en.php?act=publications\\_details&pid=2279&dtid=3](http://www.hcch.net/index_en.php?act=publications_details&pid=2279&dtid=3).

125. Johansson & Lind, *supra* note 60, at 236.

126. Lynette Clemetson, *Adopted in China, Seeking Identity in America*, N.Y. TIMES (Mar. 23, 2006), <http://www.nytimes.com/2006/03/23/national/23adopt.html>.

[t]he fact that these families are built across lines of racial and cultural difference can be seen as a good thing, both for the parents and children involved and for the larger community. These . . . families . . . learn to appreciate one another's differences . . . while at the same time experiencing their common humanity.<sup>127</sup>

Ben Douglas, a black man adopted by white parents, said:

I'm brought up in the UK so I'm British, that should be my culture . . . I feel very blessed and very lucky to have had the childhood that I've had . . . The alternative would have been residential care. I'm sure there's [sic] great children's homes, but it's not the same as having a loving, nurturing family . . . Why should the colour of someone's skin, or their eye colour, or their hair colour, be a barrier to having a loving family?<sup>128</sup>

Proponents contend that the argument favoring the right of children to their ethnic, religious, and cultural background perhaps better serves the interests of ethnic groups than those of the child.<sup>129</sup> They maintain that what should matter is whether there is unconditional love of adoptive parents for their child regardless of the child's background.<sup>130</sup> Supporters even maintain that there is no evidence that children are genetically predisposed to a particular cultural identity.<sup>131</sup> Instead, research shows internationally adopted children do essentially as well as other adopted children.<sup>132</sup>

Proponents would concede that the argument that a child might be injured by separation from his or her cultural origin is somewhat more plausible in the case of older children.<sup>133</sup> One study, however, in comparing the outcomes of Romanian children adopted by Romanian families and Romanian children adopted by American families, showed significant differences in the behavioral outcome of the children. Children adopted within their own country showed fewer man-

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127. Bartholet, *supra* note 36, at 183.

128. *Mixed-Race Adoption: 'I Had Loving Family,'* BBC NEWS (Feb. 19, 2011), <http://www.bbc.co.uk/news/uk-12514433>.

129. Johansson & Lind, *supra* note 60, at 238.

130. *Id.* at 256.

131. See Bartholet, *supra* note 50, at 361 (“[T]he studies of children adopted across racial and national lines reveal no evidence that growing up separated from one's group of origin has any negative impact whatsoever on the child.”).

132. *Id.* at 349.

133. Carlson, *supra* note 10, at 747.

ifestations of behavioral problems and were less of a source of stress to their adoptive parents, even as the study carefully notes that the children adopted by American families were institutionalized longer during critical developmental times (pre-adoption), and tended to be older at the time of the study.<sup>134</sup>

From a purely pragmatic standpoint, it is sometimes impossible to avoid transracial adoptions. At least in the United States, a large number of the people actively looking to adopt are white, and for the most part they want white children, at least initially.<sup>135</sup> But the reality is that there are “very few *white* children by comparison to the large pool of would-be white adopters.”<sup>136</sup> This mirrors the situation of the numerous adoptable African children, but with very few prospective African adopters coming forward.

Ultimately, intercountry adoption is sometimes the only option towards securing the best interests of the child, offering justification for the practice even on ethical grounds. This seems to be the underlying premise to observations made by the Holy See during negotiations for the Hague Convention. The Holy See noted:

[C]hildren are not isolated individuals but are born in and belong to a particular environment. Only if this native environment cannot, in one way or another, provide for a minimum of care and education should adoption be contemplated. The possibility of providing a better material future is certainly not, of itself, a sufficient reason for resorting to adoption.<sup>137</sup>

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134. Roby, *supra* note 119, at 53.

135. Elizabeth Bartholet, *Where Do Black Children Belong?*, 139 U. Pa. L. Rev. 1163, 1166 (1990).

136. *Id.*

137. Parra-Aranguren, *supra* note 124, ¶ 47.

### III. ANALYSIS OF INTERNATIONAL REGULATORY FRAMEWORK

Although African countries are parties to some international treaties relevant to intercountry adoption, they have largely refrained from joining the more important international regulatory regimes. Since African countries are experiencing a surge in intercountry adoptions, it is important to analyze the safeguards and best practices to which African countries can more comfortably relate and aspire.

#### *A. The United Nations Convention on the Rights of the Child*<sup>138</sup>

At the global level, the United Nations Convention on the Rights of the Child (CRC), which became enforceable in 1990, was an effort to distinguish human rights that specifically protect children. Among other things, the CRC presented the first opportunity to regulate intercountry adoptions and, because it has been almost universally ratified, it can safely be assumed to be extremely influential. While most African states are parties to the CRC,<sup>139</sup> it does not offer a comprehensive legal framework. In a less than enthusiastic manner, Article 21 of the CRC provides that intercountry adoption *may* be considered as an alternative means of child-care if the child cannot suitably be cared for domestically. This so-called subsidiary principle requires that priority be given to placing the child with his or her family of origin and that domestic measures be given preference over intercountry adoption.<sup>140</sup>

In similar regard, the United Nations Committee on the Rights of the Child (UNCRC) stated that “[p]riority must be given to adoption by relatives in their country of residence. Where this is not an option, preference will be given to adoption within the community from which the child came or at least within his or her own culture.”<sup>141</sup>

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138. *Convention on the Rights of the Child*, UNITED NATIONS (Nov. 20, 1989), [http://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch\\_IV\\_11p.pdf](http://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch_IV_11p.pdf) [hereinafter *CRC*].

139. Fifty African States are signatories. *See id.*

140. *De Gree v. Webb* 2008 (4) BCLR 359 (CC) (S. Afr.).

141. *Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, U.N. CRC, 39th Sess., May 17–June 3, 2005, U.N. Doc. CRC/GC/2005/6, 25 ¶ 91 (Sept. 1, 2005) [hereinafter *Treatment*].

African courts have validated this principle. South African courts have held that “to ensure compliance with the principle of subsidiarity<sup>142</sup> as expressed in Article 21 of the CRC it must be established that the child cannot be cared for through foster care or adoption or other suitable care in his or her country of origin.”<sup>143</sup> In the South African case of *De Gree v. Webb*, baby R was found “abandoned a few days after her birth, head-first in a bucket, under a tree.”<sup>144</sup> By the time of the case, R’s parents and other family members had not been traced.<sup>145</sup> The appellants, who were African Americans, met R, “became extremely fond of her, and took steps towards adopting her.”<sup>146</sup> However, the court found that there was evidence “as to the availability of prospective local adoptive parents, including black South Africans, eager to adopt female children from birth to five years of age.”<sup>147</sup> Because there was a possibility of adoption to local parents, the African American couple was denied the adoption, as intercountry adoption is allowed only in last resort situations. The CRC’s “last resort language” is relative, so it “depends on what options are available as alternative care.”<sup>148</sup> Therefore, it must be viewed as complementary to the best interests principle, which considers what options are in the best interest of the child.<sup>149</sup> The South African Constitutional Court stated that while the principle of subsidiarity must be adhered to, this is “not to say the principle of subsidiarity is the ultimate governing factor in intercountry adoptions.”<sup>150</sup> It is, rather, the best interests of the child principle that has been found to be the ultimate governing factor.<sup>151</sup>

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142. *Adoption Law in Romania-In the Best Interest of the Children?*, CTR. FOR ADOPTION POL’Y, <http://www.adoptionpolicy.org/pdf/Analysis%20of%20Current%20Romanian%20Law%203.06.pdf> (last visited Feb. 2, 2013). Under the UNCRC, the principle of subsidiarity is that “intercountry adoptions is only subsidiary to a permanent family in the child’s country of origin (whether his biological family or an adoptive family) and cannot be subsidiary to institutionalized care in the country of origin.” *Id.* This means that intercountry adoption is only to be seen as a secondary option to in-country adoption, and not to institutionalized care.

143. *De Gree v. Webb* 2008 (4) BCLR 359 (CC) at 15 para. 22 (S. Afr.).

144. *Id.* at para. 2.

145. *Id.*

146. *Id.* at 2 para. 3.

147. *Id.* at 17 para. 25.

148. Mezmur, *Supra* note 38, at 92.

149. *See id.* at 90.

150. *AD v. DW* 2007 ZACC (CC) at para. 49 (S.Afr.).

151. *Id.*

Recognizing the argument based on culture, Article 20(3) of the CRC provides that, when considering alternative care solutions, “due regard ought to be taken of the desirability of continuity in a child’s upbringing and to the “ethnic, religious, cultural and linguistic background.”<sup>152</sup> For this reason, the CRC endorses intercountry adoption *only* if the child cannot be placed in “any suitable manner” in the child’s nation of origin.<sup>153</sup> In *In re M (Child’s Upbringing)*, the issue was 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.<sup>154</sup> With the parents’ consent, the foster mother took the child to Britain.<sup>155</sup> Subsequently, the biological parents initiated legal proceedings to have the child returned after they discovered that the foster mother was trying to adopt him.<sup>156</sup> At the court hearing, the boy, then ten years old, expressed a desire not to return to live in South Africa.<sup>157</sup> However, Lord Justice Neill maintained that the child “has the right to be reunited with his Zulu parents and with his extended family in South Africa,”<sup>158</sup> because the child’s development “must be, in the last resort and profoundly, Zulu development and not Afrikaans or English development.”<sup>159</sup>

To opponents of intercountry adoption, the CRC’s “suitable” placement within the nation of origin might include an institution or an undefined form of foster care.<sup>160</sup> To those who would favor institutionalization in such circumstances, the subsidiarity principle should trump the best interests principle. But, in light of the foregoing discussion, this interpretation would be inappropriate in the case of institutionalization,<sup>161</sup> simply because it is an available “last resort”

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152. *Treatment*, *supra* note 141, at 13.

153. *CRC*, *supra* note 138, at art. 21(b).

154. *In re M (Child’s Upbringing)* (1996) 2 F.L.R. 441 (CA) 2 (Eng.), *available at* <http://www.bailii.org/ew/cases/EWCA/Civ/1996/1320.html> (last visited Jan. 30, 2013).

155. *Id.* at 3.

156. *Id.*

157. *Id.* at 7.

158. *Id.* at 10.

159. *Id.* (quoting Thorpe J.).

160. Carlson, *supra* note 10, at 737.

161. In research comparing “children who had been reared in institutions until being placed in foster care at approximately three years of age and children who had mainly lived with foster families, the researchers discovered that the former group displayed more frequent problem behaviors than the latter group, including restlessness, hyperactivity, aggression, and affective impoverishment.” Wechsler, *supra* note 7, at 11 n.66 (citing William Goldfarb, *The Effects*

in the country of origin when intercountry adoption would be an option.<sup>162</sup>

Additionally, addressing a core concern, the CRC provides that parties to the CRC shall “[t]ake all appropriate measures to ensure that, in intercountry adoption, the placement does not result in improper financial gain for those involved in it.”<sup>163</sup> This was because the negotiators of the CRC recognized that “the existing situation reveals that it is not only the intermediary bodies that are attracted by improper financial gain, because as it has sometimes happened, lawyers, notaries, public servants, even judges and university professors, have either requested or accepted excessive amounts of money or lavish gifts from prospective adoptive parents.”<sup>164</sup> One way to avoid this problem is for countries of origin to strictly regulate the amount of money that is paid to organizations and persons involved in the adoption process. South Africa is a good example of how this can be done.<sup>165</sup>

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*of Early Institutional Care on Adolescent Personality*, 14 CHILD DEV. 213, 222 (1943)) (“Atypical behavior has also been identified among children living in orphanages, including aggression, hyperactivity, attention-seeking, emotional withdrawal and inhibition, and indiscriminate friendliness.”). Although not necessarily applicable to every African institution, researchers looking into effects of Russian orphanages found that “children three and under lose one IQ point for every month spent inside.” Pickert, *supra* note 21.

162. See Carlson, *supra* note 10, at 734 (“The subsidiarity principle is destructive to children’s interests in actual practice because it delays or completely prevents family placement for thousands of children in need, diverting many into unhealthy institutions or questionable ‘foster’ arrangements.”).

163. CRC, *supra* note 138, at art. 21(d).

164. Parra-Aranguren, *supra* note 124, ¶ 527 (internal quotation marks omitted). “Article 32 of the Hague Convention does not state the consequences of its violation, but undoubtedly the refusal of automatic recognition of the adoption would be too much in many cases.” For this reason, Spain and some other participants at the Hague Convention “felt that it made little sense to formulate general prohibitions without indicating the effects of their possible violation.” *Id.* ¶ 529.

165. In South Africa, for example, the state regulates the sums of money paid to accredited organizations through the Regulations of the Children’s Act 38 of 2005 and, to prevent improper financial gain, “audited financial statements of accredited organizations must be submitted to the Central Authority for control and monitoring purposes.” Hague Conference on Private International Law, *Country Profile: South Africa*, available at [http://www.hcch.net/index\\_en.php?act=publications.details&pid=5164&dtid=42](http://www.hcch.net/index_en.php?act=publications.details&pid=5164&dtid=42) (last visited Jan. 30, 2013).

*B. The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography*<sup>166</sup>

A specific concern that is associated with intercountry adoption is the possibility that adopted children, so far away and out of reach from their countries of origin, might end up being trafficked for purposes such as prostitution or pornography. The Committee on the Rights of the Child indeed noted that “there is often a link between trafficking and the situation of separated and unaccompanied children,”<sup>167</sup> and that this is usually for “purposes of sexual or other exploitation or involvement in criminal activities which could result in harm to the child, or in extreme cases, in death.”<sup>168</sup> Many African countries simply do not have the resources to follow up after an adoption has occurred.

An instrument such as the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OPCRC), which places obligations on state parties to combat such practices, can allay those concerns. Most African countries are State Parties to the OPCRC.<sup>169</sup> The OPCRC defines the “sale of children” as “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.”<sup>170</sup> Pertinently, the OPCRC prohibits “[i]mproperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption.”<sup>171</sup> The fact that forty-eight African countries have ratified the OPCRC indicates they take the issue of trafficking<sup>172</sup> and sale of children seriously and of great concern.<sup>173</sup>

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166. The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263 (LXXXV), U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/54/49, at 6 (May 25, 2000) [hereinafter OPCRC].

167. *CRC*, *supra* note 138, ¶ 23.

168. *Id.*

169. United Nations Treaty Collection, *Status of Chapter IV, 11.c*, [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-c&chapter=4&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&lang=en) (last visited Jan. 30, 2013).

170. OPCRC, *supra* note 166, at art. 2(a).

171. *Id.* at art. 3(a)(ii).

172. The United Nations Committee on the Rights of the Child expressed its concern in respect to Malawi that there was a “possible use of intercountry adoption for the purpose of trafficking.” Comm. on the Rights of the Child, Rep on the 29th Sess., Jan. 14–Feb. 1, 2002, at

The OPCRC, however, “[does] not address situations where adoptive families directly purchase children from birth parents without use of an intermediary.”<sup>174</sup> African countries cannot be said to have done enough simply by becoming State Parties to the OPCRC.

*C. The Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption (1965)*

The Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption of 1965 (“Convention on Adoption Jurisdiction”)<sup>175</sup> was the first international measure to regulate intercountry adoption in a binding manner. Under the Convention on Adoption Jurisdiction, the power to grant adoptions is vested in the adopter’s state,<sup>176</sup> but the adoptee’s state has authority over “consents and consultations,” other than those relating to the adopter and his family.<sup>177</sup>

However, the Convention on Adoption Jurisdiction was not successful in attracting membership. Only three states became State Par-

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104 U.N. Doc CRC/C/114 (2002) UNCRF, *Concluding Observations of Committee on the Rights of the Child, Malawi*, ¶ 442, U.N. Doc. CRC/C/114, at 104 (2002). In Mali, a man’s four-year-old daughter was abducted from in front of his house in September [2009]. Martin Vogl, *Fear Over Mali’s Missing Children*, BBC News (Aug. 16, 2010, 3:24 AM), <http://www.bbc.co.uk/news/world-africa-10766241>. Four months later, a friend saw the young girl in central Bamako. *Id.* The girl was with a German couple who had legally adopted her and were going to take her to Germany in a couple of days. *Id.* The agency that organized the adoption, Help A Child, said they relied on the documentation the orphanage gave them and that “it is impossible for them to do their own investigation into where a child comes from.” *Id.* This does not appear to be an isolated incident; there are serious flaws in the adoption procedures in Mali and police never take cases of missing children seriously. Additionally, in 2004 police arrested and charged eight men regarding illegal child trafficking in Madagascar. Tim Healy, *Madagascar Breaks Child Traffic Ring*, BBC News (Apr. 16, 2004, 4:36 PM), <http://news.bbc.co.uk/2/hi/africa/3633087.stm>. “The eight accused Malagasy men were alleged to be part of an illegal adoption ring that offered financial incentives of up to \$800 for every young baby they [found].” *Id.* It was observed that this could be partly attributed to “poverty as poor young single mothers were prepared to give up a child in return for cash.” *Id.* The “majority of babies were destined to be adopted by couples from France,” who in most cases were “unaware of the illegality as genuine documents [were] usually provided by corrupt government officials working with the traffickers.” *Id.*

173. See OPCRC, *supra*, note 166.

174. Smolin, *supra* note 100, at 300–01.

175. Convention on Jurisdiction, *Applicable Law and Recognition of Decrees Relating to Adoptions*, Nov. 15, 1965, 1107 U.N.T.S. 38 [hereinafter Convention on Adoption Jurisdiction].

176. *Id.* at art. 3.

177. *Id.* at art. 5.

ties to it—Austria, Switzerland, and the United Kingdom.<sup>178</sup> It still entered into force, because Article 19 provides that the “Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification.”<sup>179</sup> However, it is irrelevant in so far as most of the world is concerned. At the time it was adopted, “inter-country adoption was widely expected to develop into a mainly European phenomenon, which explains the contents of the Convention: emphasis was given to the unification of private international law rules with regard to European traditions in this field.”<sup>180</sup> Additionally, the Convention on Adoption Jurisdiction was not strong enough because it allowed contracting parties to disregard the agreement when observance with its provisions would be contrary to their public policy.<sup>181</sup> The Convention on Adoption Jurisdiction would have little relevance for most African states, except to the extent it could act as a model for their domestic legislation with regard to recognition of adoptions carried out abroad.<sup>182</sup>

*D. The Hague Convention on Protection of Children and Co-operation in Respect to Intercountry Adoption*

To date, the Hague Convention remains the most important and comprehensive instrument for international control and cooperation regarding intercountry adoption.<sup>183</sup> The development of the Hague Convention was an outgrowth of globalization and the recognition

178. *Id.* at 39 n.1.

179. *Id.* at art. 19.

180. Maarit Jänterä-Jareborg, *Protection of Children and Co-Operation in Respect of Intercountry Adoption*, 63 *NORDIC J. INT'L L.* 185, 186 (1994).

181. Convention on Adoption Jurisdiction, *supra* note 175, at art. 15.

182. *Id.* at art. 23 (in accordance with Article 23 of the Convention, it ceased to have effect as of Oct. 23, 2008).

183. Some information regarding prospective adoptive parents (PAP) would not be available to the country of origin without the cooperation of the receiving state, which the Hague Convention facilitates. For example, South Africa requires that an application by PAPs should include: a statement of “approval to adopt” issued by a competent authority; report on the PAPs including the “Home study” and other personal evaluations; copies of passports of PAPs or other personal identification documents; copies of birth certificates of PAPs and of other children residing with them; a copy of the marriage certificate (if married couple), divorce certificate (if either or both of the PAPs is divorced), or death certificate of the spouse (if one of the PAPs is widowed); health certificates; evidence of the financial circumstances of the family; employment certificates and proof of no criminal record. *See* Hague Conference on Private International Law, *supra* note 165 at 12.

that it is necessary to encourage global societal interests in protecting children.<sup>184</sup> The increased interdependency of countries with regards to adoption also created a need for the Hague Convention.<sup>185</sup>

The fundamental principles that underlie the Hague Convention are drawn from the CRC, particularly Article 21. Along with the CRC, the Hague Convention seeks to ensure that intercountry adoptions consider the best interests of the child, and that they are conducted in a responsible and protective manner with the aim of eliminating the various abuses which have plagued intercountry adoptions.<sup>186</sup> As Richard Carlson aptly observes: “[I]nternational movement of children tends to compound opportunities for corruption and circumvention of the law. Even without these problems, sending nations deserve, and increasingly want, assurance that their children are not cast into an unchannelled stream of commerce but are guarded by law and competent authorities.”<sup>187</sup> Certainly, intercountry adoptions do, or at least should, “involve[] one nation entrusting its children to the authorities of another country and relying on the country to which the child is going to protect that child.”<sup>188</sup> The Hague Convention is probably the most comprehensive means to date for allaying these concerns, as it “set[s] the stage for tackling endemic problems of corruption and profiteering in order to eliminate the profit motive from adoption-related legal structures.”<sup>189</sup>

The Hague Convention is also “meant to create rules and guidelines for countries to follow when processing intercountry adoptions, so that there can be global uniformity and consistency.”<sup>190</sup>

[T]he preamble explicitly recognizes the child’s right to grow up in a family environment and that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable fam-

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184. Annette Schmit, *The Hague Convention: The Problems with Accession and Implementation*, 15 *IND. J. GLOBAL LEGAL STUD.* 375, 377 (2008).

185. *Id.*

186. *DG & Another v. W & Others*, 2007 (379/06) ZASCA 87 (SCA) at para. 17 (S. Afr.).

187. Richard R. Carlson, *The Emerging Law of Intercountry Adoptions: An Analysis of the Hague Conference on Intercountry Adoption*, 30 *TULSA L.J.* 243, 246 (1994).

188. William L. Pierce, *Accreditation of Those Who Arrange Adoptions under the Hague Convention on Intercountry Adoption as a Means of Protecting, Through Private International Law, the Rights of Children*, 12 *J. CONTEMP. HEALTH L. & POL’Y* 535, 535 (1995–96).

189. Dillon, *supra* note 46, at 203.

190. Elizabeth Long, *Where Are They Coming From, Where Are They Going: Demanding Accountability In International Adoption*, 18 *CARDOZO J.L. & GENDER* 827, 828 (2012).

ily cannot be found in his or her State of origin. This may be seen as an acknowledgement that a properly made intercountry adoption is to be preferred to a placement of the child in an institution.<sup>191</sup>

At the same time, the Hague Convention recognizes the subsidiarity principle,<sup>192</sup> which requires that priority be given to placing the child with his or her family of origin and that domestic measures be given preference over intercountry adoption.<sup>193</sup>

Only thirteen (or 24%) African countries<sup>194</sup> have ratified the Hague Convention. This means that for most of Africa there is very little international protection, as few African countries are internationally obligated to the Convention.<sup>195</sup> To be sure, the Hague Convention does not cover every conceivable situation. For example, according to Article 2 of the Hague Convention, this treaty does not cover “the cases where the child is habitually resident in one Contracting State and the prospective adoptive parents reside habitually in a non-contracting State.”<sup>196</sup> Yet, the protections that the Hague Convention offer are so critically important and wide-ranging that there are simply not enough reasons<sup>197</sup> to justify not joining this protection regime, especially in light of the surging intercountry adoptions from Africa.

191. Jänträ-Jareborg, *supra* note 180, at 188.

192. Hague Convention, *supra* note 63, at art. 4(b).

193. *DG and Another*, 85 (379/06) 2ASCA 87 (SA), at para. 13.

194. These countries are Burkina Faso, Burundi, Cape Verde, Guinea, Kenya, Madagascar, Mali, Mauritius, Rwanda, Senegal, Seychelles, South Africa, and Togo. See Hague Conference on Private International Law, *Status Table*, HAGUE CONF. ON PRIVATE INT’L L., [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=69](http://www.hcch.net/index_en.php?act=conventions.status&cid=69) (last visited Feb. 2, 2013).

195. Admittedly, the Hague Convention is not a magic wand with regard to intercountry adoption concerns. For this reason, the Hague Convention provides that “the Convention on intercountry adoption should not be an end in itself, but rather lay the ground work for an ongoing review and amelioration of its application. Therefore, the Secretary General of the Hague Conference on private international law shall, after the Convention enters into force, convene Special Commissions, at regular intervals, to review its operation.” Parra-Aranguren, *supra* note 124, ¶ 586; see also Hague Convention, *supra* note 63, at art. 42. For an elaborate report on the effectiveness of this Convention, see the country profiles at [http://www.hcch.net/index\\_en.php?act=conventions.publications&dtid=42 &cid=69](http://www.hcch.net/index_en.php?act=conventions.publications&dtid=42 &cid=69) (last visited Feb. 2, 2012).

196. Parra-Aranguren, *supra* note 124, ¶ 77.

197. There are two main reasons given for the reluctance of African countries to join the Hague Convention: 1) a lack of capacity to put in place the necessary institutional frameworks, and 2) the African countries’ fear of being required to unnecessarily open their domestic space for intercountry adoption. See AFRICAN CHILD POLICY FORUM, *supra* note 9, at 11.

For example, the Hague Convention provides that “adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin . . . have ensured . . . consent has not been induced by payment or compensation of any kind.”<sup>198</sup> Additionally, Article 29 of the Hague Convention prohibits “personal contacts between the prospective adoptive parents and the child’s parents or any other person who has care of the child until the requirements of Article 4, sub-paragraphs *a* to *c*, and Article 5, sub-paragraph *a*, have been met.”<sup>199</sup> This is intended to “minimize the opportunities for financial inducements to influence the birth parents.”<sup>200</sup> In many African countries, there have been several instances of such abuse.

The Hague Convention establishes a critically important mechanism in requiring that “Central Authorities shall 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.”<sup>201</sup> Therefore, under the Hague Convention each “Contracting State” is obligated to set up a “Central Authority” to monitor intercountry adoptions.<sup>202</sup> The receiving State must establish that the prospective adoptive parents are (legally) eligible and suited (by their circumstances) to adopt and have been counseled.<sup>203</sup> Thus, the Central Authority acts as “a gatekeeper, with all adoptions in and out of the country channeled through its system of checks.”<sup>204</sup>

Because “[a]doptions are subjected to the control of a Central Authority on both ends, i.e., in the country origin and in the receiving country,”<sup>205</sup> it is hoped that this process can eliminate most illicit practices. Under the Hague Convention, Central Authorities are ob-

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198. Hague Convention, *supra* note 63, at art. 4(d)(4).

199. Parra-Aranguren, *supra* note 124, ¶ 115.

200. Dillon, *supra* note 46, at 211.

201. Hague Convention, *supra* note 63, at art. 7(1).

202. *Id.* at art. 6. Not many countries are able to set up these organizations because of lack of resources, but some—even some that are not particularly developed, e.g., Mali, Guinea, and Madagascar—have been able to do so. See generally AFRICAN CHILD POLICY FORUM, *supra* note 9.

203. *Id.* at art. 5.

204. Peter Hayes, *The Legality and Ethics of Independent Intercountry Adoption Under the Hague Convention*, 25 INT’L J.L. POL’Y & FAM. 288, 289 (2011).

205. Jänträ-Jareborg, *supra* note 180, at 188.

ligated to take all appropriate measures to “reply, in so far as is permitted by the law of their State, to justified requests from other Central Authorities or public authorities for information about a particular adoption situation.”<sup>206</sup> In reference to illicit practices, Central Authorities are important in preventing system abuses, including international trafficking of children, which can only be monitored and enforced by national authorities.<sup>207</sup>

“Because of the wide differences among legislations, [in] respect to methods for the structuring and exercising of control over intercountry adoptions, it was admitted” by the negotiators of the Hague Convention that “it would probably be very difficult to coordinate their use under a convention text, unless the convention established a system of Central Authorities.”<sup>208</sup> Central Authorities of contracting States are obliged to “collect, preserve and exchange information about the situation of the child and the prospective adoptive parents, so far as is necessary to complete the adoption,”<sup>209</sup> and to “provide each other with general evaluation reports about experience with intercountry adoption.”<sup>210</sup> During the negotiations, it was noted that the “system of Central Authorities would offer the possibility of reporting offenses against criminal law ‘to the appropriate department so that international police or judicial co-operation may begin, if necessary.’”<sup>211</sup> Also, the Permanent Bureau of the Hague Conference on Private International Law (Permanent Bureau) is obligated to collect information from Contracting States regarding the number of intercountry adoptions and the corresponding receiving states. As an example, the Permanent Bureau reported that Mauritius had 355 in-

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206. Hague Convention, *supra* note 63, at art. 9(e).

207. “[C]oncern over human trafficking in connection with intercountry adoption reflects a broader fear of exploiting people from poor nations to benefit affluent adoptive parents living in the United States and Europe.” Waddington, *supra* note 13, at 87 (citing Nicole Bartner Graff, Note, *Intercountry Adoption and the Convention of the Rights of the Child: Can the Free Market in Children be Controlled?*, 27 SYRACUSE J. INT’L L. & COM. 405, 405 (2000)). Abuses such as trafficking happen in part because adoption agencies operate through intermediaries. See Maskew & Oreskovic, *supra* note 31, at 86. “These intermediaries are not employees or agents of the adoption agency; thus, the agencies assume no legal responsibility for their facilitator’s negligent or criminal acts. . . . Agencies can, therefore, turn a blind eye to questionable and even illicit activities without suffering legal exposure or consequences.” *Id.* at 87–88.

208. Parra-Aranguren, *supra* note 124, ¶ 191.

209. Hague Convention, *supra* note 63, at art. 9(a).

210. *Id.* at art. 9(d).

211. Parra-Aranguren, *supra* note 124, ¶ 54 (citing Prel. Doc. No 5 of April 1991.).

tercountry adoptions between January 1988 and March 2010<sup>212</sup> and Burkina Faso had ninety-four intercountry adoptions in 2010.<sup>213</sup> However, it is important to note that only these three African Contracting States have reported to the Permanent Bureau.<sup>214</sup> As the Committee on the Rights of the Child has noted, “[i]t is the experience of the Committee that data and statistics collected with regard to unaccompanied and separated children tends to be limited to the number of arrivals and/or number of requests for asylum,”<sup>215</sup> as national authorities (countries of origin) do not track data on unaccompanied children and so cannot adequately “analyse issues that remain insufficiently addressed, such as for instance, disappearances of unaccompanied and separated children and the impact of trafficking.”<sup>216</sup>

Moreover, if more African countries joined the Hague Convention, they could benefit from the provision stating that “[a]n adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognized by operation of law in the other Contracting States.”<sup>217</sup> This provision “[supersedes] the existing practice that an adoption already granted in the State of origin is to be made anew in the receiving State only in order to produce such effects, and also prevents a revision of the contents of the foreign adoption.”<sup>218</sup> African countries can only benefit from this level of coordination as parties to the Hague Convention.

From a more normative standpoint, African countries would benefit from a level of uniformity promoted by the Hague Convention. For example, the Hague Convention regulates the effects of an adoption. The effects of adoption are dealt with in Article 26, in a complicated, but not limiting, manner. According to Article 26, paragraph 1:

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212. Annual Adoption Statistics Forms, HAGUE CONFERENCE ON PRIVATE INT’L L., (Apr. 2010), [http://www.hcch.net/upload/wop/adop2010pd05\\_mu.pdf](http://www.hcch.net/upload/wop/adop2010pd05_mu.pdf).

213. *Burkina Faso: Statistiques Annuelles d’adoption pour les Etats d’origine*, HAGUE CONFERENCE ON PRIVATE INT’L L. (2010), [http://www.hcch.net/upload/adostats\\_bf2010.pdf](http://www.hcch.net/upload/adostats_bf2010.pdf).

214. *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, HAGUE CONF. ON PRIVATE INT’L L., [http://www.hcch.net/index\\_en.php?act=conventions.publications&dtid=32&cid=69](http://www.hcch.net/index_en.php?act=conventions.publications&dtid=32&cid=69) (last visited Dec. 21, 2012).

215. *CRC*, *supra* note 138, at 26.

216. *Id.* at 27.

217. Hague Convention, *supra* note 63, at art. 23(1).

218. Parra-Aranguren, *supra* note 124, ¶ 402.

The recognition of an adoption includes recognition of

- (a) the legal parent-child relationship between the child and his or her adoptive parents;
- (b) parental responsibility of the adoptive parents for the child; and
- (c) the termination of a pre-existing legal relationship between the child and his or her mother and father, if the adoption has this effect in the Contracting State where it was made.<sup>219</sup>

Each Contracting State, in recognizing the legal effects of an adoption, applies its own choice of law.<sup>220</sup>

The Hague Convention, however, is not without its weaknesses. These weaknesses must be acknowledged even as African countries are urged to join its regime. By not providing for a global supervisory body to ensure compliance and leaving it to each State Party to monitor intercountry adoptions by means of its Central Authority, the Hague Convention leaves each Contracting State to its own resources in enforcing and policing intercountry adoptions—a serious challenge for developing countries with meager resources and infrastructure.<sup>221</sup> Some African countries' infrastructure is so undeveloped that many children even lack birth certificates. How are those authorities to avert situations where biological parents give up their child for financial gain?<sup>222</sup> African countries' poor child welfare infrastructures have led to "a lack of basic safeguards against illicit child procurement practices: births are not recorded, the state does not intervene to investigate abduction or the sale of children, and the state lacks the resources to care for vulnerable populations."<sup>223</sup> This is one

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219. Hague Convention, *supra* note 63, at art. 26(1).

220. *Id.* at art. 27(1).

221. Wechsler, *supra* note 7, at 29.

222. Take the example of the NGO Action for Social Development, operating in India, which reportedly was "selling children to rich foreign couples without verifying their antecedents or obtaining the necessary permission from the authorities concerned." Editorial, *Child Adoption Racket*, THE TRIBUNE, <http://www.tribuneindia.com/2001/20010424/edit.htm> (last visited Jan. 31, 2012). Thirty-four infants were rescued before they could be sold. *Id.* "The children were shifted to a hospital where one of them died while the condition of others was said to be critical." *Id.*

223. Maskew & Oreskovic, *supra* note 31, at 106–07.

major reason why some African countries have been unable to join the Hague Convention.<sup>224</sup>

Opponents also argue that the Hague Convention “is too flexible and does not have teeth to limit and police adoptions,” while “proponents claim that [it] is too flexible and easily manipulated to limit international adoptions.”<sup>225</sup> Flexibility, though, was key to the success of the negotiations in light of entrenched interests in both camps. “International agreements demand flexibility to allow for the widest, most successful implementation among diverse nations.”<sup>226</sup> For example, during the Hague Convention negotiations, some “participants objected to . . . proposals, based on constitutional grounds, because they could mean an interference with the sovereignty of the receiving State.”<sup>227</sup>

A risk identified in requirements of the Hague Convention is that

[t]he Hague Convention does require each country to create a Central Authority, but then permits countries to authorize non-state actors to continue to play a major role in international adoption. . . . However, many countries are likely to read the Hague’s requirement for a Central Authority as equivalent to mandating state monopoly control over international adoption, and those hostile to international adoption are likely to promote this reading.<sup>228</sup>

Critics also charge that under the Hague Convention,

control could not possibly be made by the States of origin, taking into account the amount of children yearly adopted in some of them, and that, if abuses were detected, there would be no sanction provided by the Convention, . . . because criminal law was not within the scope of the Convention.<sup>229</sup>

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224. For example, Nigeria considered whether or not it could accede to the Hague Convention, but it concluded it could not because it does not currently have the structures in place that would allow implementation. See generally Mary Orjioko, Presentation at Fifth International Policy Conference on the African Child, *Policies and Programmatic Interventions Related to Inter-country Adoption in Nigeria* (May 29, 2012), <http://www.africanchildforum.org/ipc>.

225. Myers, *supra* note 113, at 797.

226. *Id.* at 798.

227. Parra-Aranguren, *supra* note 124, ¶ 239.

228. Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 *BUFF. HUM. RTS. L. REV.* 151, 176 (2007).

229. Parra-Aranguren, *supra* note 124, ¶ 239.

These tradeoffs, however, are inevitable as “the Hague Convention attempts to standardize practices among divergent nations.”<sup>230</sup> Indeed, “the Hague Convention leaves a good deal of discretion in the hands of national bureaucracies”<sup>231</sup>—so much discretion that it is difficult to fathom how the Convention can be enforced.<sup>232</sup>

In drafting the Hague Convention the negotiators tried to make the document acceptable to the widest number of individual states, both member and non-member. As a result, the Hague Convention has “left much of the substantive law of adoption to the individual states.”<sup>233</sup> Thus, the argument that the Hague Convention is a huge success in establishing common standards must be tempered by deference to national standards and the accompanying difficulties this portends for intercountry adoptions. Therefore, it must be acknowledged that the Hague Convention is a limited as a protective instrument, as it is not intended to cover all aspects relating to intercountry adoption.<sup>234</sup> “For instance, if official documents declare that a child is an orphan but in reality the child was stolen from his [or] her parents, the Hague Convention is of little use, as it does not cover the questions of birth registration and civil registry.”<sup>235</sup>

The Hague Convention has also been criticized for its “lack of specificity on important aspects of intercountry adoption. . . . [It] does not specify characteristics that potential adopters must possess in order to qualify for intercountry adoption. Furthermore, the Hague Convention fails to define criteria for determining the ‘best interests of the child,’ a phrase that appears numerous times in the treaty.”<sup>236</sup> Generally, these objectors call for an amendment of the Convention or the adoption of a protocol that covers these details, even if the adopted protocol is optional.

One of the more serious charges against the Hague Convention—at least in the United States, which has the most intercountry

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230. Martin, *supra* note 45, at 198. In support of this proposition, Jena Martin further states, “The idea of what type of adoption would be sanctioned runs, implicitly or explicitly, throughout the debates over various provisions of the Convention.” *Id.*

231. Dillon, *supra* note 46, at 215.

232. There is a downside to overregulation. For instance, it could “stifle or delay” intercountry adoptions “to the detriment of waiting children.” Blair, *supra* note 46, at 354.

233. Martin, *supra* note 45, at 192.

234. See AFRICAN CHILD POLICY FORUM, *supra* note 9, at 11.

235. *Id.*

236. Wechsler, *supra* note 7, at 29.

adoptions—is that the Hague Convention’s “implementing regulations were heavily influenced by the adoption agency community . . . with the result that important protections envisioned by the Convention have been all but eviscerated. For example . . . ‘country fees’ still do not require itemization.”<sup>237</sup> Unfortunately, the Hague Convention is a piece of private<sup>238</sup> international law that does not explicitly spell out any consequences for Contracting States, which may decide the adoption procedures for resident children.<sup>239</sup> In the realm of family law, international law mainly deals with conflicts of law. For example, in *Application of the Convention of 1902 Governing the Guardianship of Infants*,<sup>240</sup> the International Court of Justice said the purpose was to resolve conflicts of laws,<sup>241</sup> adding that:

If the 1902 Convention had intended to regulate the domain of application of laws such as the Swedish Law on the protection of children and young persons, it would follow that that Law should be applied to Swedish infants in a foreign country. But no one has sought to attribute such an extraterritorial effect to that Law.<sup>242</sup>

The Hague Convention is unsupported by major sending countries,<sup>243</sup> which conveys the message that simply creating a unified system of intercountry adoption laws is not enough to convince some nations to comply. The Hague Convention should have stressed the need to enforce compliance of all sending and receiving countries and limit member States to intercountry adoptions through other member States, thereby creating incentives for major sending countries to ratify. At the present time, no such incentive exists. “Despite the ap-

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237. Maskew & Oreskovic, *supra* note 31, at 100–01.

238. The Hague Convention as part of “private international law” would be “particularly suited to accommodate diverse national legal systems to international transactions between private individuals.” Carlson, *supra* note 1, at 186. The Hague Convention “sets up a framework for co-operation amongst Contracting States to ensure that intercountry adoptions take place in the best interests of the child,” but “[q]uestions of choice of law are, largely, left to the law of the State where the question is decided and are not regulated in the Convention.” Jäterä-Jareborg, *supra* note 180, at 187.

239. See generally, Hague Convention, *supra* note 63.

240. *Application of the Convention of 1902 Governing the Guardianship of Infants* (Neth v. Swed.), 1958 I.C.J. 55 (Nov. 28).

241. *Id.* at 68–69.

242. *Id.* at 69.

243. Examples of major sending countries are China and Russia. Caeli Elizabeth Kimball, *Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, 33 DENV. J. INT’L L. & POL’Y 561, 561 (2005).

pearance of moving forward in intercountry adoption laws, the lack of cooperation by major sending countries keeps this forward movement from being a possibility.”<sup>244</sup>

*E. The African Charter on the Rights and Welfare of the Child*<sup>245</sup>

The African Charter on the Rights and Welfare of the Child (African Charter) is especially relevant for African countries. In many respects, though, it simply replicates the CRC on a regional level; it is not a comprehensive instrument regarding intercountry adoption. African countries would not be doing enough simply as parties to the African Charter.

With that said, article 24(b) of the African Charter is pertinent. The principle of subsidiarity is enshrined in this article, making intercountry adoptions a “last resort.”<sup>246</sup> Article 24(c) provides that every state party shall “ensure that the child affected by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption.”<sup>247</sup> It is very difficult to implement this provision as a practical matter because very few African countries have the wherewithal to monitor or supervise the post-adoption phase. Moreover, short of imposing a very prohibitive regulatory regime, many foreign adoptive parents cannot satisfy a residency requirement even if the domestic law provided for it.<sup>248</sup> For example, Malawian courts appear to appreciate the wisdom of taking such safeguards seriously, but they also understand that this has its limits. Justice Nyirenda notes that “[i]t is further acknowledged that because

244. *Id.* at 584.

245. African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (Nov. 29, 1999) [hereinafter African Charter].

246. *Id.* at art. 24(b).

247. *Id.* at art. 24(c).

248. The case law surveyed indicates that many courts struggle with the residency requirement. For example, a Malawian judge stated:

The legal notion of residence is distinct from that found in the dictionary and is constituted by the fact of such physical presence in a place as is not fleeting or transitory. Any period of physical presence *however short* may constitute residence if it is shown that the presence is not transitory; if the period has just begun, this will be a question of intention of the party. There is even no need for one to own property in a place in order for him to be capable of residing there.

*In re CJ (A Female Infant) (Adoption Appeal No. 28 of 2009)*, [2009] MWSC 1, 16 (Malawi) (emphasis added), available at <http://www.malawilii.org/mw/judgment/supreme-court-appeal/2009/1>.

intercountry adoption results in permanent deprivations of the biological family environment, permanent change in the child's ethnic, cultural, linguistic and sometimes religious settling, the process must be circumscribed by sufficient safeguards and standards."<sup>249</sup> But Justice Nyirenda had to rely almost entirely on reports from abroad regarding the suitability of the prospective adoptive parent in at least one case. He noted:

Since my interim order I have received two further reports by the Guardian Ad-Litem who has personally visited the petitioners in the United Kingdom where the infant now lives with them. The reports are complemented by several independent reports of a social welfare agency in the United Kingdom. I have meticulously read through all the reports. They are very searching and comprehensive reports about the home and circumstances of the petitioners and more importantly about the development of the infant. In all the reports, the conclusion is that the infant's development is excellent and is assured, physically and mentally. I have no reason to fault any of the reports.<sup>250</sup>

The notion of post-adoption follow-up is embodied in Article 24(f) of the African Charter, which provides that State Parties shall "establish a machinery to monitor the well-being of the adopted child."<sup>251</sup> This appears to be an improvement on the Hague Convention, which provides that receiving states can *volunteer* to provide replies to sending states regarding the post-adoption situation, but are not obligated to do so.<sup>252</sup>

One solution to the difficulties of intercountry adoptions is to impose reporting conditions. For these reporting conditions to operate as they should, states need to adopt bilateral agreements that, among other things, provide for reporting conditions. However, these conditions should not be prejudicial to the adoption process. For example, the American adoptive parents in *In re Adelynn Naomi Luckey and Janae Martha-Ann Luckey*<sup>253</sup> were directed to submit 'progress reports for the first five years, after which the court would make

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249. *In re David Banda (A Male Infant) (Adoption Cause No. 2 of 2006)*, [2008] MWHC 3, 23–24 (Malawi), available at <http://www.malawilii.org/mw/judgment/high-court/2008/3>.

250. *Id.* at 25.

251. African Charter, *supra* note 245, at art. 24(f).

252. Parra-Aranguren, *supra* note 124, ¶ 239.

253. [2009] UGHC 36 (Uganda).

a review.<sup>254</sup> The adoptive parents subsequently petitioned the court, stating that U.S. authorities had rejected the children's application for U.S. citizenship because the original adoption order wasn't considered final due to this reporting provision.<sup>255</sup> In the best interest of the children, the Uganda courts felt compelled to order that the "requirement for 5 years be reduced to 3 years and is hereby determined to have been fulfilled."<sup>256</sup>

The African Charter establishes a regional mechanism, namely the African Committee of Experts on the Rights and Welfare of the Child (ACRWC),<sup>257</sup> charged with monitoring and supervising implementation of the charter. The ACRWC receives State reports and makes concluding remarks. Some of those remarks have dealt with intercountry adoptions. For example, when Uganda reported to the ACRWC in 2010, the ACRWC noted: "Uganda was also currently in the process of ratifying the Hague Convention to ensure the effective monitoring of children adopted outside the country."<sup>258</sup> This indicates its concern for monitoring the post-adoption phase. But very little can be gathered from such brief and rare remarks regarding ACRWC's position on intercountry adoption. Still, while ACRWC has supported the Hague Convention,<sup>259</sup> a delegate to the ACRWC suggested that its main premise appears to be that "[i]n-Country Adoption, Foster Care or other alternative care options are the answer to the problem of children that are deprived of their family environment in Africa."<sup>260</sup>

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254. *Id.* ¶ 1.

255. *Id.* ¶¶ 3–4.

256. *Id.* ¶ 6.

257. African Charter, *supra* note 245, at art. 32.

258. AFR. COMM. OF EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD [ACRWC], *Report on the 15th Session of the African Committee of Experts on the Rights and Welfare of the Child*, ¶ 45(vii) (Mar. 15–19, 2012), <http://www.acerwc.org/wp-content/uploads/2012/05/English-ACRWC-Session-15-Report.pdf>.

259. See ACERWC, *Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACRWC) on the Republic of Tanzania Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child* (Nov. 2010) <http://www.acerwc.org/state-reports> (responding to Tanzania's report to the ACERWC, the Committee recommended that "efforts be made to ensure ratification of the Hague Convention, in line with best practices on adoption matters.").

260. ACERWC, *Draft Report of the 19th Session of the African Committee of Experts on the Rights and Welfare of the Child*, ¶ 30 (Mar. 26–30, 2012).

Beyond this, ACRWC has done very little to elaborate on and clarify standards and solutions regarding intercountry adoptions in Africa, or to urge African countries to adopt better regulatory frameworks.<sup>261</sup> The Committee could offer more guidance by developing a general comment on Article 24 of the African Children's Charter.

The African Charter provides that every State party shall "promote, where appropriate, the objectives of [Article 24] by concluding bilateral or multilateral arrangements or agreements, and endeavor, within this framework to ensure that the placement of the child in another country is carried out by competent authorities or organs."<sup>262</sup> In the wake of the incident with the returned Russian boy<sup>263</sup> there was talk of trying to conclude a bilateral agreement between Russia and the United States that would ensure abuses are avoided.<sup>264</sup> African countries should also be able to pursue these bilateral agreements. As the South African Constitutional Court noted, "without bilateral agreements . . . there could not be effective post-adoption monitoring in respect of intercountry adoptions."<sup>265</sup> South Africa, in fact, requires a post-adoption report, which is written by the child protection organization of the Receiving State.<sup>266</sup> Additionally, South Africa carries out country visits where possible to ensure post-adoption placements.<sup>267</sup>

#### IV. ANALYSIS OF SELECT AFRICAN COUNTRIES' LEGAL REGIMES

A majority of African countries provide in their legislation for the best interest of the child principle, and some of them specifically pro-

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261. This is based on a review of the reports of the ACERWC. *State Reports on the CRC and ACRWC*, <http://acerwc.org/document-database/state-reports-on-the-crc-and-acrwc/> (last visited Dec. 21, 2012).

262. African Charter, *supra* note 245, at art. 24(e).

263. See *supra* notes 18–21 and accompanying text.

264. See U.S. Citizenship and Immigration Services, *The Agreement Between the United States of America and the Russian Federation Regarding Cooperation in Adoption of Children Fact Sheet and QA* (July 13, 2011), <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=263554ddde321310VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

265. *Minister of Welfare and Population Dev. v. Fitzpatrick and Others*, 2000 (3) SA 422 (CC) at 23 para. 33 (S. Afr.).

266. Hague Conference on Private International Law, *supra* note 165, at 16.

267. *Id.*

vide for intercountry adoption.<sup>268</sup> But some of these regulatory regimes are simply not up to the mark as, save for a few,<sup>269</sup> the majority of African countries do not even provide an explicit and comprehensive definition of adoptability in their laws. And some countries' regulatory frameworks remain prohibitively restrictive. Faced with situations in which the best interests of adoptable children are at stake, Courts have routinely circumvented even the few existing regulatory schemes,<sup>270</sup> especially residency requirements.<sup>271</sup>

Beyond this, however, a review of the legislation of several African countries demonstrates that there is no consistent legislation across the continent with regard to intercountry adoptions. One "major impediment to intercountry adoption is often the conflict between the legislative requirements in the sending and receiving states."<sup>272</sup> One way to avoid this is to pursue common international

268. See, e.g., CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, Dec. 8, 1994, art. 36(2); Child Right Act, 2007, § 116(1) (Sierra Leone); CODE OF THE FAMILY, arts. 336, 405 (Benin); Children's Act (Part II) (Bots.); CIVIL CODE art. 353 (Mauritius); PRELIMINARY TITLE AND THE FIRST BOOK OF THE CIVIL CODE arts. 332, 335, 336. (Law No. 42/1988 of Oct. 27, 1988) (Rwanda).

269. South Africa, for example, provides that:

- (3) 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.

Children's Act 38 of 2005 § 230(3) (S. Afr.).

270. See e.g., Comm. on the Rights of the Child, *Concluding Observations: Uganda*, 49th Sess. at para. 20, U.N. Doc. CRC/C/OPSC/UGA/CO/1 (Oct. 16, 2008), cited in AFRICAN CHILD POLICY FORUM, *supra* note 9, at 34 (noting the rising number of applications for legal guardianship of children and the reduced number of applications for adoption, which is one method of circumventing adoption procedures).

271. 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. Southern Sudan requires not only residence for a period of three years before a foreigner may adopt a Southern Sudanese child, but fostering for a period of one year as well. The Child Act, 2008, c. 5, § 90 (S. Sudan). The Child Rights Act of Sierra Leone requires six months residency (though the courts, using their discretion, often waive this requirement). The Child Right Act, 2007, pt. VI, § 108 (Sierra Leone). In Malawi, "[a]n adoption order shall not be made in favour of any applicant who is not resident in Malawi." Adoption of Children Act, 1949, c. 2601, § 3(5)(Malawi). AFRICAN CHILD POLICY FORUM, *supra* note 9.

272. Eade, *supra* note 120, at 383.

standards. However, many African countries are hesitant to join the Hague Convention partly because structures for implementing its proposals are not yet in place. Thus, out of fifty-three African countries, only thirteen are contracting parties to the Hague Convention—Burkina Faso, Burundi, Cape Verde, Guinea, Kenya, Madagascar, Mali, Mauritius, Rwanda, Senegal, Seychelles, South Africa, and Togo<sup>273</sup>—and are trying to bring their laws into conformity with the Hague Convention’s resolutions.<sup>274</sup> Significantly, this list does not include at least eight of the top twelve sending African countries.<sup>275</sup> To make up for this, Ethiopia, the topmost sending country, tried to put in place “various checks to ensure that the adoptive families are thoroughly vetted. This can include visits to children in their new homes abroad.”<sup>276</sup> But this is at best tentative and *ad hoc*. Becoming parties to the Hague Convention would increase the legal responsibility of sending countries and bring on board all of the benefits discussed earlier. For example, the Hague Convention assigns responsibility for ensuring proper consent to the adoption to the country of origin.<sup>277</sup> To this end, it requires that “such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing.”<sup>278</sup>

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273. See AFRICAN CHILD POLICY FORUM, *supra* note 9, at iii; *Status Table: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, HAGUE CONF. ON PRIVATE INT’L LAW (June 1, 2012) [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=69](http://www.hcch.net/index_en.php?act=conventions.status&cid=69).

274. “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.” AFRICAN CHILD POLICY FORUM, *supra* note 9, at 18. “Similar measures are underway in Cameroon and Namibia.” *Id.* In 1996, the UNCRC expressed its concern that there were “insufficient safeguards to fully protect the rights of children in the process of international adoption.” Comm. on the Rights of the Child, Rep. on its 30th Sess., Sept. 23–Oct. 11, 1996, at para. 179, U.N. Doc. CRC/C/57 (Oct. 31, 1996).

275. From 2004–2010, this list included: Ethiopia, South Africa, Liberia, Nigeria, Madagascar, Mali, Burkina Faso, Democratic Republic of the Congo, Ghana, Cote d’Ivoire, Morocco, and Cameroon. AFRICAN CHILD POLICY FORUM, *supra* note 9, at 6, chart 4.

276. *Out of Ethiopia*, *supra* note 3.

277. Enforcement occurs mainly through a State reporting mechanism. Examples of such reports are available at <http://bit.ly/V5vf1r>. This is not a particularly effective mechanism, since it requires self-reporting and there do not appear to be any serious ramifications for lack of compliance. Nevertheless, merely being parties to an international convention such as this one raises the bar for such countries to live up to their commitments by other contracting parties.

278. Hague Convention, *supra* note 63, at art. 4(c)(2).

Perhaps the reluctance of African States can be traced to their aversion to intercountry adoption generally, culturally preferring the extended family model to the nuclear model as their framework for responding to situations that lead to the placing (and raising of) a child with non-birth parents.<sup>279</sup>

But the extended family system is not exactly what it was in the past as it has increasingly diminished in significance as more and more Africans move to urban centers.<sup>280</sup> Yet even if this system was still a vibrant and effective option, it would still be overwhelmed by “wars and other crises [that] have created huge numbers of children for whom such family care is unavailable.”<sup>281</sup>

Because only a few African countries are parties to the Hague Convention, the international protective guarantees embodied in this instrument will not be binding on those countries. One of the objectives of the Hague Convention is to establish safeguards to ensure that intercountry adoption takes place in the best interests of the child.<sup>282</sup> It is in the best interests of adoptable African children that their States of origin are parties to the Hague Convention; after all, there is an assumption that states who are signatories guarantee to prospective adoptive parents that they follow established standards. For example, one commentator advocates “that the United States permit international adoptions exclusively from countries that have approved the Hague Adoption Convention because that process ensures the parties involved will follow the maximum legal safeguards currently available.”<sup>283</sup> For example, the 2003 statistics show that there were a total of 188 children adopted into Hague States.<sup>284</sup> But

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279. Martin, *supra* note 45, at 198.

280. A UNICEF 2012 report indicates that “[d]espite a low overall rate of urbanization, Africa has a larger urban population than North America or Western Europe, and more than 6 in 10 Africans who live in urban areas reside in slums.” *The State of the World’s Children 2012: Children in an Urban World*, at 2 (Feb. 2012) [http://www.unicef.org/sowc2012/pdfs/SOWC%202012-Main%20Report\\_EN\\_13Mar2012.pdf](http://www.unicef.org/sowc2012/pdfs/SOWC%202012-Main%20Report_EN_13Mar2012.pdf).

281. Elizabeth Bartholet, *International Adoption*, in *CHILDREN AND YOUTH IN ADOPTION, ORPHANAGES, AND FOSTER CARE* 63, 65 (Lori Askeland ed., 2006).

282. However, it is important to note that “what is meant by the term ‘in the best interests of the child’ remains an open question. States, in applying their own cultural values, often devise conflicting criteria in this area, thus inhibiting successful inter-country adoptions.” Eade, *supra* note 120, at 383.

283. Long, *supra* note 190, at 828.

284. Hague Conference on Private International Law, *South Africa – Annual Adoption Sta-*

adoption into non-Hague States in the same year only numbered at twenty-five.<sup>285</sup> Apart from a few African countries,<sup>286</sup> most countries' legislation regarding intercountry adoption is simply outdated. Sometimes intercountry adoption is simply "prohibited, at least in law, or - as was the case in Liberia, and is still the case in Cameroon - there are no arrangements to regulate and monitor the practice adequately."<sup>287</sup>

#### *A. South Africa*

In 2008, for example, seventeen children were adopted from South Africa.<sup>288</sup> But South Africa had already become a party to the Hague Convention, in 2005. To domesticate the Hague Convention, South Africa enacted the Children's Act of 2005. An earlier statute, the Child Care Act of 1983, did not allow intercountry adoption unless one of the adoptive parents was a South African citizen, or had other residential qualifications and had applied for naturalization. But the inception of a new government in May 1994 and the passage of the new Constitution, along with a specific Constitutional Court decision in 2000, led to "drastic changes" regarding intercountry adoptions in South Africa.<sup>289</sup>

In terms of the Children's Act, any child may be adopted if: "The child is an orphan and has no guardian or caregiver who is willing to adopt the child; the whereabouts of the child's parent or guardian cannot be established; the child has been abandoned; 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 the child is in need of a permanent alternative placement."<sup>290</sup> In the assess-

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*tistics 2001-2003*, [http://hcch.e-vision.nl/upload/adostats\\_za.pdf](http://hcch.e-vision.nl/upload/adostats_za.pdf) (last visited Feb. 1, 2013) (statistics included in South Africa's response to the 2005 questionnaire).

285. *Id.*

286. Examples of countries that have taken on child law reform include Ghana, Kenya, Madagascar, Mozambique, Nigeria, Botswana, Lesotho, Mali, Liberia, Namibia, Angola, Swaziland, and Uganda. AFRICAN CHILD POLICY FORUM, *supra* note 9, at 12 n.62.

287. AFRICAN CHILD POLICY FORUM, *supra* note 9, at 12.

288. Hague Conference on Private International Law, *Annual Adoption Statistics Forms Drawn up by the Permanent Bureau, Statistics for States of Origin: United States of America*, [http://www.hcch.net/upload/wop/adop2010pd05\\_us.pdf](http://www.hcch.net/upload/wop/adop2010pd05_us.pdf) (last visited Dec. 21, 2012).

289. *South Africa Adoption*, INTERNATIONAL ADOPTION STORIES, <http://www.internationaladoptionstories.com/South-African-Adoption.htm> (last visited Feb. 2, 2012).

290. Children's Act 38 of 2005 § 230(3) (S. Afr.), *available at* <http://www.info.gov.za/view/>

ment, “an adoption social worker may take the cultural and community diversity of the adoptable child and prospective adoptive parent into consideration.”<sup>291</sup> Incidentally, a person’s financial status may not preclude them from adopting a child, however, it is important that prospective adoptive parents are able to provide for the adopted child.<sup>292</sup> Chapter 16 of Children’s Act provides for the regulation of intercountry adoptions. It reads: “The purposes of this Chapter are— (a) to give effect to the Hague Convention on Inter-country Adoption; (b) to provide for the recognition of certain foreign adoptions; (c) to find fit and proper adoptive parents for an adoptable child; and (d) generally to regulate inter-country adoptions.”<sup>293</sup>

“From a South African perspective, one of the most important provisions of the [Hague] Adoption Convention is to be found in [Article] 4(b), which stipulates that intercountry adoptions shall only take place after possibilities for intracountry placement of the child [have] been given due consideration.”<sup>294</sup> Accordingly, the South African Children’s Act places emphasis on the raising of South African children in the context of South African cultural traditions, even as it specifically prohibits some of the most egregious customary law practices and provides that “[e]very child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being.”<sup>295</sup> At the same time, the South African legislature included the provision that “[t]he ordinary law of the Republic [of South Africa] applies to an adoption to which the Convention applies but, where there is a conflict between the ordinary law of the Republic and the Convention, the Convention prevails.”<sup>296</sup>

A high-profile intercountry-adoption case that predates the Children’s Act of 2005 is *Minister for Welfare and Population Development v. Fitzpatrick*.<sup>297</sup> In this case, “respondents applied to the Cape of Good Hope High Court for an order declaring section 18(4)(f)” of

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DownloadFileAction?id=67892 (last visited Feb. 2, 2013) (internal numbering omitted).

291. *Id.* § 231(3).

292. *Id.* § 231.

293. *Id.* § 254.

294. Mosikatsana, *supra* note 48, at 64.

295. Children’s Act 38 of 2005 § 12(1) (S. Afr.), available at <http://www.info.gov.za/view/DownloadFileAction?id=67892> (internal numbering omitted).

296. *Id.* at § 256(2).

297. *Minister for Welfare and Population Development v. Fitzpatrick* 2000 (3) SA 422 (CC) at 23 (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/2000/6.pdf>

the existing Child Care Act of South Africa “to be inconsistent with the Constitution and therefore invalid,” because it “absolutely proscribe[d] the adoption of a child born of a South African citizen by a non-citizen or by a person who ha[d] the necessary residential qualifications for the grant of South African citizenship but ha[d] not applied for a certificate of naturalisation.”<sup>298</sup> The Constitutional Court of South Africa held as follows:

The provisions of section 18(4)(f) are too blunt and all-embracing to the extent that they provide that under no circumstances may a child born to a South African citizen be adopted by non-South African citizens. To that extent they do not give paramountcy to the best interests of children and are inconsistent with the provisions of section 28(2) of the Constitution and hence invalid.<sup>299</sup>

This case correctly prioritized the best-interests principle over the subsidiarity principle. South Africa also hosted a conference, which confirmed this same prioritization:

Subsidiarity means that a child should be raised by his or her birth family or extended family (kinship group) whenever possible. If that is not possible or practical, other forms of permanent family care in the country of origin should be considered. Only after full and proper consideration has been given to national solutions should intercountry adoption be considered, and then only if it is in the child’s best interest. The subsidiarity principle should not be applied inflexibly and at the expense of the child’s best interests.<sup>300</sup>

### *B. Malawi*

Besides South Africa, there are very few African countries to look to for best practices regarding intercountry adoptions. Malawi is an example of a country that is not yet a signatory to the Hague Convention and has thus had to deal with the complexities of intercountry adoption using a relatively elementary legal framework. The fact

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298. *Id.* at paras. 1–2.

299. *Id.* at para. 20.

300. Hague Conference on Private International Law, Pretoria, S. Afr., Feb. 22–25, 2010, *Cross-Frontier Child Protection in the Southern and Eastern African Region: The Role of the Hague Children’s Conventions*, § 2.3, available at <http://www.hcch.net/upload/afsem2010op.pdf> (last visited Feb. 2, 2013).

that Malawi is not yet a signatory may further explain why in 2008 only two adoptions to the United States were reported.<sup>301</sup>

Malawi's Adoption of Children Act is the principal legislation governing matters of adoption. This statute was originally enacted in 1949 as the Adoption of Children Ordinance, based on an old English statute of 1926.<sup>302</sup> Section 3 of this statute provides for restrictions on making the adoption orders, and it expressly provides that an adoption order should not be made except with the consent of the parent or guardian.<sup>303</sup> Section 3(5) also states that an "order shall not be made in favour of any applicant who is not resident in Malawi or in respect of any infant who is not so resident."<sup>304</sup> Unsurprisingly, section 3(5) of the Adoption of Children Act has given rise to different interpretations by the Malawi Supreme Court when trying to accommodate intercountry adoptions. Strictly interpreted, Malawi's Adoption of Children Act is simply outdated and out of line with recent developments such as those embodied in the Hague Convention. Because the regulatory framework is so insufficient, i.e., it lacks clear guidelines, hapless judges are left to their own resources to try to do the best they can to protect the interests of the child. Sometimes judges get it right and sometimes they do not. An exchange between Malawi's Chief Justice Munlo and a judge in a lower court evidence this lack of clarity. The judge from the lower court stated:

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301. Hague Conference on Private International Law, *Annual Adoption Statistics Forms Drawn up by the Permanent Bureau, Statistics for States of Origin: United States of America*, Prel. Doc. No 5 (April 2010), available at [http://www.hcch.net/upload/wop/adop2010pd05\\_us.pdf](http://www.hcch.net/upload/wop/adop2010pd05_us.pdf) (last visited on Dec. 21, 2012).

302. AFRICAN CHILD POLICY FORUM, *supra* note 9, at 12.

303. Adoption of Children Act § 3(3) (Malawi).

304. *Id.* § 3(5).

Ms Madonna may not be the only international person interested in adopting the so-called poor children of Malawi. By removing the very safeguard that is supposed to protect our children the courts by their pronouncements could actually facilitate trafficking of children by some unscrupulous individuals who would take advantage of the weakness of the law of the land. It is necessary that we look beyond a particular petitioner, and may be [sic] even a particular benefactor but go beyond them, and consider the consequences of opening the doors too wide. Anyone could come to Malawi and quickly arrange for an adoption that might have grave consequences on the very children that the law seeks to protect.<sup>305</sup>

But Chief Justice Munlo, without addressing the essential criticism of the inadequacy of the law, dismissed the lower-court judge's remark.

With the greatest deference to the Judge in the court below we think that she fell in error by looking beyond the particular petitioner and the particular benefactor that were before the court and basing her decision on some imaginary unscrupulous individuals allegedly involving themselves in child trafficking. These unscrupulous individuals were not before the court. They have not applied for an adoption order. The Appellant has. The Judge also fell into grave error in deciding to protect some imaginary children who were not parties to these proceedings thereby ignoring the particular infant CJ who was before the court. The court ought to have based its decision on the particular appellant and the particular infant that were before the court.<sup>306</sup>

In light of the lack of clarity and explicitness of Malawi's inter-country adoption legislation, the United Nations Children's Fund (UNICEF) could only say that, with regard to the Madonna-Banda adoption case, "it did not have adequate information to comment on the legality of the adoption."<sup>307</sup> In the aftermath of the Madonna-Banda case, there was an attempt to overhaul adoption laws in Mala-

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305. *In re CĴ (A Female Infant) (Adoption Cause No. 1 of 2009)*, [2009] MWHC 3, 4 (Malawi), available at <http://www.malawilii.org/mw/judgment/high-court-general-division/2009/3>.

306. *In re CĴ (A Female Infant) (Adoption Appeal No. 28 of 2009)*, [2009] MWSC 1, 20 (Malawi), available at <http://www.malawilii.org/mw/judgment/supreme-court-appeal/2009/1>.

307. *Malawi: Calls for Review of Law in Wake of Madonna Adoption*, IRIN AFR. (Oct. 17, 2006), <http://www.irinnews.org/report.aspx?reportid=61352>.

wi as quickly as possible because “the adoption laws in Malawi . . . are not in agreement with international adoption laws.”<sup>308</sup>

When the domestic legal framework is not well elaborated and facilitative enough, judges might end up circumventing some of its provisions. In Malawi, this is illustrated in the court’s maneuvers to prevent giving full effect to the country’s strict residential requirement. In *In re TM (A Female Infant)*, a case decided after *In re David Banda*, the court stated:

It is clear that courts are enjoined to look at several factors including physical presence in a country, duration thereof, motive for coming to the country; whether one came by chance or by design and intention to remain there for sometime [sic]. No one factor should take prominence over the others. In this respect therefore, whether or not one is resident in this country will be dependent on the evidence and the facts of each particular case. I will, likewise, adopt this approach in the present case.<sup>309</sup>

The Malawi Supreme Court of Appeal on appeal in *In re CƳ (A Female Infant)*<sup>310</sup> with respect to “residence,” having considered a lot of case law on the matter, decided to define “residence” on the applicant’s motive to be present in the country, i.e., whether it was by chance or design. Malawi’s judges, trying to find a way to grant adoptions, will sometimes simply ignore or downplay the significance of the residence requirement.<sup>311</sup> Thus, although Madonna did not stay in Malawi for what would normally be considered a reasonable length of time, Chief Justice Munlo noted that the residence requirement “is not the only factor” in the age of “[g]lobalisation and the global village” and that “[i]t is no longer tied to the notion of permanence as a

308. *Id.*

309. Hiwa, *supra* note 84, at 12.

310. *In re CƳ (A Female Infant)*, [2009] MWSC 1, at 18.

311. This appears to be in line with the general trend among African countries. The Fifth International Policy Conference on the African Child recommended the following:

A State can decide to provide a residency requirement for prospective adoptive parent(s). Where a country of origin decides to have a residency requirement as a condition for the eligibility of prospective adoptive parent(s), the best interests principle should be central in interpreting and applying such a requirement including the possibility of limiting or doing away with such requirements by competent authorities when considered to be in the best interests of the child.

Draft Guidelines, *supra* note 32, at 10.

deciding factor.”<sup>312</sup> He then quoted a 2006 opinion by Judge Nyirenda.

The requirement as to residence, in my view is also intended to enable the system in Malawi to verify the standing and disposition of the applicants with some degree of certainty. But all these considerations in my judgment are intended to establish that the infant child will be in safe and secure hands.<sup>313</sup>

Chief Justice Munlo went on to say:

The legal notion of residence is distinct from that found in the dictionary and is constituted by the fact of such physical presence in a place as is not fleeting or transitory. Any period of physical presence *however short* may constitute residence if it is shown that the presence is not transitory; if the period has just began, this will be a question of intention of the party. There is even no need for one to own property in a place in order for him to be capable of residing there.<sup>314</sup>

Chief Justice Munlo went on to consider Madonna’s futuristic good intentions as sufficient to satisfy the residence requirement.

She [Madonna] specifically came here for the purpose of this application for adoption. And on that day she had already adopted another infant known as David Banda from Malawi. The Appellant has plans to travel to Malawi frequently with her adopted children in order to instill in them a cultural pride and knowledge of their country of origin. . . . It is clear from this evidence that the Appellant in this case is not a mere sojourner in this country but has a targeted long term presence aimed at ameliorating the lives of more disadvantaged children in Malawi. . . . In our view it is clear that the evidence on the court record establishes that the Applicant was at the time of this application resident in Malawi. She was not in the country by chance or as a mere sojourner.<sup>315</sup>

Interpreting this residence requirement in *In re David Banda (A Male Infant)*, in which Guy Stuart Ritchie and Madonna Louise Ritchie jointly presented a petition for the adoption of an infant, David Banda, the judge asked whether “residence” is an end in itself in

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312. *In re C7 (A Female Infant)*, [2009] MWSC 1, at 5, 16.

313. *Id.* at 5 (internal quotation marks omitted).

314. *Id.* at 16 (emphasis added).

315. *Id.* at 17.

the context it is used, especially bearing in mind that the court was dealing with welfare of children, or merely a means to an end.<sup>316</sup> The judge argued that the best interests of the infant should override the requirement of residence, stating, “I am of the clear judgment that the requirement as to residence, be it important, is merely a means to an end. I also have no doubt in my mind that the ‘end’ is the best interest of the child.”<sup>317</sup> “In response to the increased applications for international adoptions, the Chief Justice of Malawi on July 1, 2009, issued Practice Direction No. 3 of 2009.”<sup>318</sup> But these are tentative and provisional measures, at best.

The jurisprudence of Malawi demonstrates a recurring concern across many African countries: whether courts grant intercountry adoption petitions because of the promise of a materially better future for the adoptable child rather than their best interest. In *In re CJ (A Female Infant)*, the Madonna-Banda case, the mother of female infant CJ had died a few days after giving birth.<sup>319</sup> The father of infant CJ was not known. After the death of her mother, infant CJ was transferred to her maternal grandmother to raise her. (It is not uncommon for this to happen to children in Malawi, even if their parents are still alive.) At the time Madonna tried to adopt infant CJ, the child was living in an orphanage. According to Justice Munlo, the orphanage was helping the grandmother and her extended family raise the infant CJ because of their “hopeless [economic] situation.”<sup>320</sup>

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316. *In re David Banda (A Male Infant) (Adoption Cause No. 2 of 2006)*, [2008] MWHC 3 (Malawi), available at <http://www.malawilii.org/mw/judgment/high-court/2008/3>.

317. *Id.* at 18.

318. Hiwa, *supra* note 84, at 13.

319. *In re CJ (A Female Infant)*, [2009] MWSC 1, at 2.

320. *Id.* (“She is very poor and depends on subsistence farming. The economic environment both at household and community level in the area where the grandmother lives is frugal, squalid and desperate and poses health hazards to normal life for people living in this community particularly, for child CJ’s survival, growth and development. This hopeless situation prompted the grandmother and other members of the extended family of infant CJ to seek help from Kondanani Orphanage.”).

*C. Uganda*

Not only is Uganda not a party to the Hague Convention, its laws on intercountry adoption have not been sufficiently elaborated to reflect international standards. Like in Malawi, this leaves judges in Uganda in a situation where they are forced to circumvent the strict letter of the law. For example, the Children Act of Uganda provides that “[a] person who is not a citizen of Uganda may in exceptional circumstances adopt a Ugandan child, if he or she . . . has stayed in Uganda for at least three years.”<sup>321</sup> Previously, Ugandan courts were less inclined to grant intercountry adoption unless the residential requirement was strictly fulfilled. That has changed for the most part, although the law itself remains prohibitively restrictive. But sometimes judges simply lament that their hands are tied. In *In re Harry John Shilling (An Infant)*, Justice Kireju had this to say about a strict prior law:

The wording of the section is mandatory; no discretion is left to the court. Generally the law relating to adoption of children is very strict, and it is regrettable that this law has not been looked at since 1964 and some of the provisions are not up-to-date with the changes which have taken place in our society. However, until the law is amended, my hands are tied. In the result, I cannot grant an adoption order as the petitioners are not resident in Uganda.<sup>322</sup>

However, under the more enabling intercountry adoption law, the courts have been more accommodating by not only expanding the scope of residential requirements, but also by taking economic circumstances into account. To do this, courts tend to gloss over or ignore the underlying purpose of the residence requirement. They are assisted in this by the impression of the statute. For example, “residence” is not defined in the Children Act of Uganda. This has allowed the courts to adopt an expansive and liberal interpretation,<sup>323</sup> although they appear at times uncomfortable in doing this. As Justice Tsekooko of the Uganda Supreme Court noted, “[T]hese applica-

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321. Children Act § 46(1)(a) (Uganda).

322. *In re Harry John Shilling (An Infant) (Adoption Cause No. 15 of 1991)* (1991) UGHC 6 (Uganda).

323. *In re M (An Infant) (Adoption Cause No. 9 of 1994)* 1995 UGSC 16 (May 3, 1995) (Justice Manyindo of the Uganda Supreme Court noting that the “word residence is not defined in the Act” and adding that “it is right to adopt a liberal interpretation of the word residence”).

tions would on moral grounds evoke sympathy and liberal approach in interpreting Section 4(5) but I am [sic] aware that Courts apply the law as it is and not morality.”<sup>324</sup> Justice Tsekooko justified the liberal interpretation as follows:

In my view the absence of the expressions “normally resident” or “ordinarily resident” or indeed “permanently resident” or “habitually resident” to S.4 of the Act opens construction of the word “Resident” to include “constructive residence.” . . . I am satisfied that the object of the Act is to promote the welfare of the Infant rather than to make it hard for prospective adopters to get Adoption Orders. . . . The provisions of the Act should be interpreted liberally so as to enhance the benefit and protection of infants to be adopted and thereby give effect to the intention of the legislature.<sup>325</sup>

In *In re Sharon Asige (An Infant)*,<sup>326</sup> the court was content with the fact that “[t]he child knows the petitioners’ family well and has been communicating with them regularly.” In this case, the petitioners were American citizens and they sought to adopt a seven-year-old Ugandan child who had lost both of her parents when she was younger and who, at the time of the adoption proceedings, was being raised by her paternal uncle. Economic considerations featured prominently in the court’s decision. The petitioners had been resident in Uganda for only 26 months. The court noted: “The first applicant is a social worker who is self employed as a licensed contractor with a monthly income of US\$ 4,300 [sic]. The second petitioner is a graduate at Michigan with a High School Diploma and has enjoyed being a home maker for several years.”<sup>327</sup> The Court concluded that:

[T]hough they have not been resident in Uganda for 3 years, they have nevertheless shown that they are able to provide the child with a home where she has an opportunity to grow up and realize her full potential in life and that this is a situation where the court can exercise its discretion to grant the order sought.<sup>328</sup>

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324. *Id.*

325. *Id.*

326. *In re Sharon Asige (An Infant) (Adoption Cause No. 144 of 2009)* (2009) UGHC 84 (Uganda).

327. *Id.*

328. *Id.*

The Sharon Asige case was by no means exceptional or atypical. In *In re Children Act Cap 50 and In re Paula Robertson and Cynthia June Robertson, an Infant*,<sup>329</sup> the court held that the provisions in section 46 of the Children Act (Uganda), including those regarding residence, are not mandatory because the welfare principle in section 3 of the Children Act is paramount. In *In re J.N (an infant)*,<sup>330</sup> where the adoption application had not been granted because of a lack of proof of residence, the Uganda Supreme Court allowed the appeal, and Chief Justice Odoki stated in his ruling that in adoption proceedings, as in matters relating to children, the guiding principle is the welfare of the child, and the appeal was granted. In *In re Michael Benjamin Pietsch and In re An Application for Adoption by Christopher John Pietsch and Sharon Pietsch*,<sup>331</sup> Justice Egonda Ntende held that although the petitioners have not been residents for all three years, the court could give a liberal interpretation of Section 46 of the Children Act while considering the circumstances of the case and that interests of the child were paramount.

In the previously mentioned case<sup>332</sup> the petitioners were Australians. The court noted while the petitioner had been with the child in Uganda for about one year and thereafter with the child in Australia, in its opinion the time spent with the child in Australia was counted towards the three-year requirement, noting that petitioners fostered this child for 35 months in total. The Court relied on the fact that the “petitioners come well recommended.” It was also argued that the “requirement for fostering the child for 36 months in Uganda is not mandatory.”

In some cases, however, the Ugandan courts have expressed concern for the risks inherent in intercountry adoptions and have been reluctant to grant adoptions where there is insufficient information, particularly with regard to criminal record of petitioners. For example, in *In re Atubaire Ivan and Namutebi Deborah (both Infants) and In*

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329. *Id.* (citing *In re Children Act Cap 50 and In re Paula Robertson and Cynthia June Robertson, an Infant, Adoption Cause No. 31/2004*).

330. *Id.* (citing *In re J.N (An Infant)*, Civil appeal No. 22/94, Uganda Supreme Court Civil Appeal case).

331. *In re Michael Benjamin Pietsch and In re an Application for an Adoption Order by Christopher John Pietsch and Sharon Pietsch, Family Cause No. 102/08*, 2008 UGHC 125 (Sept. 3, 2008) (Uganda).

332. *Id.*

*re a Petition for Adoption by Bundy Andrew Michael and Westtley Laura Anne*,<sup>333</sup> Justice Egonda-Ntende rejected an adoption petition, noting that the petitioners had not produced a report or recommendation from the Probation and Social Welfare Officer from the United Kingdom as required under Section 46(1) (d) of the Children Act of Uganda. Neither had the petitioners produced a report in respect of their criminal record in the United Kingdom. But these are precisely the sort of confounding issues that could be avoided if Uganda was party to the Hague Convention.

Uganda's legal infrastructure remains lacking in responsiveness to the practical needs of adoption legislation. In response to Uganda's report, the United Nations Committee on the Rights of the Child noted the rising number of applications for legal guardianship of children, and the reduced number of applications for adoption. It viewed such a trend as potentially aimed at circumventing the regulations that apply to adoption.<sup>334</sup>

#### *D. Zambia*

Eight children were adopted from Zambia into the United States in 2008;<sup>335</sup> that is not negligible. Yet Zambia is not a party to the Hague Convention. In fact, according to the Office of Children's Issues of the United States Department of State, a brief five-month suspension of foreign adoptions in Zambia occurred between December 2007 and May 2008, which could only be understood as evidence of lack of a sufficient regulatory framework. Zambia's Adoption Act was enacted in 1958 and is simply out of line with developments embodied in the Hague Convention. Zambia is now in the process of reviewing its child welfare laws, including those pertaining to adoption. As an example of Zambia's restrictive laws, Section 33(1)(a) and (b) of Zambia's Adoption Act provides:

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333. *In re Atubaire Ivan & Namutebi Deborah (both Infants) and In re a Petition for Adoption by Bundy Andrew Michael and Westtley Laura Anne Justice* 2009 UGHC 96 (Mar. 25, 2009) (Uganda).

334. UNRC, *Concluding Observations of Committee on the Rights of the Child, Uganda* ¶ 20, U.N. Doc. CRC/C/OPSC/UGA/CO/1 (2008).

335. Hague Conference on Private International Law, *supra* note 165.

The Commissioner may grant a licence in the prescribed form, and subject to such conditions and restrictions as he may think fit, authorising the care and possession of an infant for whose adoption arrangements have been made to be transferred to a person resident abroad, but, subject to the provisions of this section, no such licence shall be granted unless the Commissioner . . . is satisfied that the application is made by or with the consent of every person or body of persons who is a parent or guardian of the infant in question, or who has the actual custody of the infant, or who is liable to contribute to the support of the infant; and . . . is satisfied by the report of a Zambian consular officer, or any other person who appears to the Commissioner to be trustworthy, that the person to whom the care and possession of the infant is proposed to be transferred is a suitable person to be trusted therewith, and that the transfer is likely to be for the welfare of the infant, due consideration being for this purpose given to the wishes of the infant, having regard to the age and understanding of the infant.

In addition, Zambia does have the following requirement for prospective adoptive parents that is obviously geared towards providing some insurance for the best interest of the child: prospective adoptive parents must reside in Zambia for at least 12 months in order to adopt a Zambian child. But in practice this residency requirement may be reduced to three months to correspond to the typical fostering period.<sup>336</sup>

### *E. Ethiopia*

Ethiopia tops Africa in terms of intercountry adoptions.<sup>337</sup> Out of a projected population of 82.5 million in 2011, Ethiopia had an estimated 6 million orphan and vulnerable children.<sup>338</sup>

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336. See Country Specific Information for Zambia, U.S. DEP'T OF STATE: BUREAU OF CONSULAR AFFAIRS, [http://adoption.state.gov/country\\_information/country\\_specific\\_info.php?country-select=zambia](http://adoption.state.gov/country_information/country_specific_info.php?country-select=zambia) (last updated July 2012); *Intercountry Adoption, Zambia*, PASSPORTS USA (Feb. 2006), [http://www.passportsusa.com/family/adoption/country/country\\_2828.html](http://www.passportsusa.com/family/adoption/country/country_2828.html).

337. AFRICAN CHILD POLICY FORUM, INTERCOUNTRY ADOPTION: AN AFRICAN PERSPECTIVE (2012), available at <http://www.africanchildforum.org/ipc/documents/Intercountry%20Adoption%20-%20An%20African%20Perspective%20-%20EN.pdf>.

338. Yayesh Tesfahuney, *Policies, Practices and Challenges in Inter-country Adoption: Ethiopia's Experience*, FIFTH INTERNATIONAL POLICY CONFERENCE ON THE AFRICAN CHILD (IPC), (May 29, 2012), <http://www.africanchildforum.org/ipc/>.

Americans adopted 1725 Ethiopian children in the twelve-month period ending Sept. 30, 2008, which was about 70 percent of all U.S. adoptions from Africa.<sup>339</sup> “The year before, 1,255 Ethiopian children were adopted by Americans.”<sup>340</sup>

While Ethiopia has ratified the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, it has not ratified the more comprehensive, and by all counts the more significant, Hague Convention.<sup>341</sup> Notwithstanding, Ethiopia has put in place some domestic regulatory safeguards for intercountry adoptions and is also planning to approve a comprehensive child policy.<sup>342</sup> Article 36(5) of Ethiopia’s constitution provides that the state shall accord special protection to orphans and shall encourage the establishment of institutions that ensure and promote their adoption and advance their welfare and education.<sup>343</sup> But it is important to note that institutional care is not much promoted. There are more than 100 child-care institutions, but it is estimated that there are only 7000 children in institutional care centers.<sup>344</sup>

The Revised Family Code of Ethiopia dedicates Chapter 10 to the adoption process. This Code provides, *inter alia*, that “the court, before approving the agreement of adoption, shall take the following into consideration: . . . where the adopter is a foreigner, the absence of access to raise the child in Ethiopia.”<sup>345</sup> This clearly upholds the subsidiarity principle. Additionally, this Code provides that “[w]here the adopter is a foreigner, the court may not approve the adoption unless an authority empowered to follow the wellbeing of children, after collecting and analyzing relevant information about the person-

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339. Celean Jacobson, *Madonna’s African Adoptions Part of Growing Trend*, HUFFINGTON POST (April 1, 2009, 9:10 PM), [http://www.huffingtonpost.com/2009/04/01/madonnas-african-adoption\\_n\\_181902.html](http://www.huffingtonpost.com/2009/04/01/madonnas-african-adoption_n_181902.html). An Ethiopian orphanage director opined, “The good looks of Ethiopians could be another reason why Ethiopian children are preferred.” Adow, *supra* note 26.

340. *Eyes on Adoption: More Orphans Coming from African Countries*, *supra* note 26.

341. *Status Table: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, HAGUE CONVENTION ON PRIVATE INTERNATIONAL LAW, [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=69](http://www.hcch.net/index_en.php?act=conventions.status&cid=69) (last updated Aug. 2012).

342. Tesfahuney, *supra* note 338.

343. CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, Dec. 8, 1994, Art. 36(5).

344. Tesfahuney, *supra* note 338.

345. The Revised Family Code, 2000, Proclamation No.213/2000, art. 194(3)(d) (Eth.).

al, social and economic position of the adopter, gives its opinion that the agreement is beneficial to the child.”<sup>346</sup>

Significantly, this Code urges the courts to “take special care in investigating the conditions provided in Sub-Art. (3)(e) of this Article, where the adopter is a foreigner.”<sup>347</sup> Sub-article (3)(e) of Article 194 of this Code demands the “availability of information which will enable the court to know that the adopter will handle the adopted child as his own child and will not abuse him.” It is remarkable, however, that in spite of the existence of local adoptions, intercountry adoptions by far exceed local adoptions in Ethiopia, which gives rise to the suspicion that the courts may not be enforcing the subsidiarity principle as rigorously as would be expected.<sup>348</sup> Additionally, these laws, as structured and applied, appear to be simply incapable of stopping intercountry adoption abuses in Ethiopia. For example, it has been reported that “[s]ome adoption agencies appear to be soliciting children directly from families,”<sup>349</sup> as well as “orphanages or maternity homes . . . [and that they] coerce women to relinquish their newborns.”<sup>350</sup> Further, “adoptions have been shifting from ‘white’ to ‘gray’—that is, from a well-regulated humanitarian effort dedicated to children’s welfare, to a business that is taking children away from their families in order to gain profits from Western adoption fees.”<sup>351</sup> Ethiopia simply hasn’t managed its intercountry adoption process as efficiently as it should, evidenced by the absence of a comprehensive data management system.<sup>352</sup>

#### *F. Nigeria*

Under the Child’s Rights Act of 2003, an adoption order cannot be made in respect of a child unless “the applicant is a citizen or, in the case of a joint application, both applicants are citizens of Nige-

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346. *Id.* at art. 193(1).

347. *Id.* at art. 194(3)(e).

348. Local adoptions in 2010 and 2011 totaled only 2948. Meanwhile, intercountry adoptions in 2010 and 2011 totaled 6891. See Tesfahuney, *supra* note 338.

349. The Schuster Inst. for Investigative Journalism, *Capsule Overview of Adoption Issues in Ethiopia*, BRANDEIS U., <http://www.brandeis.edu/investigate/adoption/ethiopia.html> (last visited Dec. 21, 2012).

350. *Id.*

351. *Id.*

352. Tesfahuney, *supra* note 338.

ria.”<sup>353</sup> But pursuant to the Constitution of Nigeria, this statute only applies to the city of Abuja.<sup>354</sup> Not all the states of the Federation have passed this statute, and therefore they are not bound to comply with its provisions.<sup>355</sup> Under the Nigerian Constitution, the rights and welfare of children, in general, are matters within the legislative competence of individual States.<sup>356</sup> Thus, the Child’s Rights laws of Lagos State, Anambra State, and Oyo State have provisions for persons who are not citizens of Nigeria to adopt children from those States. In addition, the Lagos State law allows for an out-of-state adoption.<sup>357</sup> There is a clear need for consistency and uniformity in Nigerian law with regard to intercountry adoptions.

## V. RECOMMENDATIONS

Based on the subsidiarity principle, courts in African countries should give priority to domestic adoptions. It is important to note that even in countries where the extended family system is still vibrant, intercountry adoptions are taking place. There is undeniably a monetary element to it, and it is vital that African governments rein in this aspect of intercountry adoptions because it makes them ripe for corruption. At a meeting hosted by the Government of South Africa and the Hague Conference on Private International Law held in February 2010 in Pretoria, it was observed that a main issue is “the importance for African countries to be prepared to deal with the pressures to release more children for adoption abroad . . . It is also essential for countries to co-operate in combating the abuses, including profiteering, which sometimes arise in intercountry adoption.”<sup>358</sup>

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353. Child’s Right Act, (Act No. 26/2003) § 131(1)(d) (Nigeria).

354. CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF NIGERIA of 1999, Part I of Second Schedule, Item 61.

355. Larry O.C. Chukwu, Adoption of Children in Nigeria Under the Child’s Rights Act (2003) (July 19–23, 2005) (unpublished draft paper), <http://www.law2.byu.edu/isfl/saltlakeconference/papers/isflpdfs/Chukwu.pdf>. See also U.S. Dep’t of State, *Nigeria*, INTERCOUNTRY ADOPTION, [http://adoption.state.gov/country\\_information/country\\_specific\\_info.php?country-select=nigeria](http://adoption.state.gov/country_information/country_specific_info.php?country-select=nigeria) (last visited Feb. 12, 2013).

356. CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF NIGERIA of 1999, Part I of Second Schedule, Item 61; Chukwu, *supra* note 355.

357. Chukwu, *supra* note 355.

358. African Governments Urged to Adopt Hague Conventions on Children, UNICEF (Feb. 23, 2010), [http://www.unicef.org/emailarticle/media/media\\_52823.rhtml](http://www.unicef.org/emailarticle/media/media_52823.rhtml).

For example, while it is “common in Ethiopia for families to incorporate children of relatives into their own households, formal and legal adoptions remain the preserve of foreigners,” it is remarkable that it “costs up to \$25,000 to adopt a child to take abroad.”<sup>359</sup> By contrast, in one case it cost roughly \$300 for an in-country adoption.<sup>360</sup> In an interview for BBC, an independent consultant who works with women’s affairs organizations in Ethiopia said, “In Ethiopia adoption has become far too lucrative a business where children’s interests seem secondary.”<sup>361</sup> African nations need to ensure they have procedure for closely tracking the use of adoption fees that should be specifically itemized and should create centralized adoption authorities.

It is important that African countries develop the necessary infrastructure to handle intercountry adoptions. This is easier said than done. For example, “many African countries lack the necessary human and financial resources to even monitor and ensure that consent [to intercountry adoption] is obtained in a free and informed manner. . . .”<sup>362</sup> African governments do not even have registries to provide sufficient information on the adoptable children. “Often adoptive parents do not know the true background of the youngster.”<sup>363</sup> But African governments can at least put in place the necessary regulations and basic infrastructure to ensure that there is traceable evidence that meaningful consent to adoption was given. In Kenya, consent must be given through the correct authority, and consents for adoption must be written.<sup>364</sup> In South Africa, while the relevant 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.<sup>365</sup>

The importance of African countries joining more comprehensive international intercountry treaties, such as the Hague Conven-

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359. *See Out of Ethiopia*, *supra* note 3.

360. *Id.*

361. *See Id.*

362. AFRICAN CHILD POLICY FORUM, *supra* note 9, at 33.

363. *Most ‘Orphans’ Have Living Parent*, *supra* note 66.

364. *See* The Children Act, (2001) Cap. 248 § 158(4) (Kenya) [http://www.kenyalaw.org/Kenyalaw/Klr\\_app/frames.php](http://www.kenyalaw.org/Kenyalaw/Klr_app/frames.php) (“An adoption application shall be accompanied by the following written consents to the making of an adoption order in respect of any child.”).

365. Children’s Act of 2005, § 261(6)(a) (S. Afr.).

tion, cannot be overstated. African countries worry that adopted children “end up as sex slaves and whatever else they could be used for around the world,”<sup>366</sup> and yet can do very little follow-up. In response, some African countries have extremely restrictive legislations in place, which Courts nevertheless routinely circumvent, and other African countries have gone to the extreme of outlawing intercountry adoptions altogether. The only way to have more assurance is to join international treaties that were specifically adopted to respond to such concerns. Some prominent receiving countries, like the United States, are not party to international treaties like the Convention on the Rights of the Child and the African Charter, but they are parties to the Hague Convention. So, it is important that African countries become parties to as many international treaties as possible, particularly those in which most receiving states participate. Additionally, this step would promote common and uniform standards among African States and help prevent the equivalent of forum shopping.<sup>367</sup> The disparate and divergent national standards across the continent can be demonstrated by the Madonna and Angelina Jolie adoptions from Malawi and Ethiopia, respectively. An Ethiopian adoption can take only two days to finalize if the potential adoptive parent’s paperwork, that is, paperwork with the adoptive parent’s “Competent Authority,” (e.g., the U.S State Department) is in order.<sup>368</sup> Due to Ethiopia’s extremely high number of orphans, Ethiopia has taken great strides to make intercountry adoption easier—even as adoptive parents must provide a post-placement report after three months, again at the six-month mark, and once again on the one-year anniversary of the adoption. Then yearly reports must be provided until the child reaches the age of eighteen.<sup>369</sup> By contrast, Madonna spent almost a year attempting to adopt David Banda from Malawi. “She was granted only temporary custody of [David Banda], and child welfare

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366. Timothy Opobo, *Revisit Law, Procedures on Child Adoption*, NEW VISION (May 28, 2009), <http://www.newvision.co.ug/D/8/220/682881>.

367. See Draft Guidelines, *supra* note 32, at 2 (“Various African States are designing and implementing measures from very different starting points, in terms of existing legal, institutional and service infrastructures, cultural customs and professional competencies.”).

368. Veronica S. Root, *Angelina and Madonna: Why All the Fuss? An Exploration of the Rights of the Child and Intercountry Adoption Within African Nations*, 8 CHI. J. INT’L L. 323, 337–38 (2007).

369. *Id.* at 348.

was charged to regularly monitor and assess the family at their residence in England over a period of eighteen months.”<sup>370</sup>

It may very well be that the more stringent standards within Malawi governing adoption contribute to the lower number of adoptions in that country,<sup>371</sup> which could also mean that the divergent standards between Ethiopia and Malawi have not gone unnoticed by prospective adoptive parents.

It is important that more stringent international standards are established, while at the same time not discouraging intercountry adoptions. African countries are looking for increased assurances that intercountry adoptions are as safe as they can possibly be. The Hague Convention establishes the conditions in Article 4 that have to be complied with in all cases, no matter what the applicable law may provide.<sup>372</sup> Further, it overly defers to national standards by providing that the State of origin and the receiving State shall collaborate from the very beginning. As permitted by Article 24, either State may refuse the agreement for the adoption to continue based on public policy grounds.<sup>373</sup> However, the Hague Convention offers no explanation as to when an adoption manifestly contravenes a State’s public policy, which appears to grant national courts the power to invalidate adoptions on this basis.<sup>374</sup> The Hague Convention was “structured as an instrument of co-operation,”<sup>375</sup> but it could certainly do more than this. This deference is also noted with regard to the question as to how to determine when an “internal” or “national” adoption is not possible, which was not discussed during the negotiations. Consequently, the State of origin is not responsible for the observance of the subsidiarity principle sanctioned by the Hague Convention.<sup>376</sup>

Because the existing Hague Convention sets only “minimum standards and procedures for adoptions,”<sup>377</sup> emphasis should be put on elaborating national legislation. Domestic legislation regarding

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370. *Id.* at 374.

371. *Id.* at 339.

372. Parra-Aranguren, *supra* note 124, ¶108.

373. *Id.* ¶ 79.

374. See Malinda L. Seymore, *International Adoption & International Comity: When Is Adoption “Repugnant”?*, 10 TEX. WESLEYAN L. REV. 381, 392 (2003).

375. Parra-Aranguren, *supra* note 124, ¶ 104.

376. See *id.* ¶ 121.

377. *Intercountry Adoption Act*, CHILD ADOPTION LAWS, <http://bit.ly/IAA2000> (last visited Dec. 21, 2012).

intercountry adoption should be premised primarily on the idea of intercountry adoptions as a “last resort.” This accords well with African traditions such as “it takes a village, to raise a child,” and the idea of the extended family participating in raising the child, both of which hold particular resonance.<sup>378</sup> For example, in South Africa, the Children’s Act requires two criteria before an intercountry adoption takes place. First, the name of the child should have been placed in the register for Adoptable Children and Prospective Adoptive Parents for at least 60 days.<sup>379</sup> Second, it should be evident that “no fit and proper adoptive parent for the child”<sup>380</sup> is available locally. In crafting reforms for intercountry adoptions in Africa, a good place to look for model rules is the Draft Guidelines for Action on Intercountry Adoption of Children in Africa.<sup>381</sup>

It is important that international law regarding intercountry adoption does not emphasize permanent legal severance of ties between adoptable children and their African roots.<sup>382</sup> After all, it is argued that it is legal fiction to suggest that there would be no continuing relationship between adopted child and birth families. The contemporary experience of adoption indicates that even adopted individuals who have excellent relationships with their adoptive families yearn to know, or at least know about, their birth families. This leads to reunions attempted and arranged across the barriers of oceans, cultures, and language.<sup>383</sup> Some observers have also pointed to the fact that adoptees “speak eloquently and with great insight about their struggles with their sense of loss.”<sup>384</sup> They also maintain that:

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378. See Mezmur, *supra* note 38, at 83.

379. Children’s Act of 2005, §§ 261(5)(g), 262(5)(g) (S. Afr.).

380. *Id.* § 261(5)(g).

381. Draft Guidelines, *supra* note 32, at 7.

382. See Smolin, *supra* note 93, at 289–85. Unfortunately, the Hague Convention does not cover “adoptions’ which are only adoptions in name but do not establish a permanent parent-child relationship.” Parra-Aranguren, *supra* note 124, ¶ 94.

383. Smolin, *supra* note 93, at 285.

384. Maskew & Oreskovic, *supra* note 31, at 123.

[T]he degree of identity integration among international adoptees must be balanced against the growing body of work by international adoptees, much of which chronicles alienation both from birth and adoptive cultures, significant identity and role confusion, and profound degrees of depression and anger over the loss of identity, family and heritage.<sup>385</sup>

African countries also ought to pursue the possibility of concluding cooperation agreements with receiving States, an option that is available under the International Convention on the Rights of the Child<sup>386</sup> and the African Charter.<sup>387</sup> Additionally, like the European<sup>388</sup> and Inter-American systems,<sup>389</sup> African countries should establish a regional treaty concerning intercountry adoptions to be able to address issues relating to adoptions among African countries. Later, it could then allow non-African countries to become parties to it. The African Court of Human Rights and Justice should also be empowered to adjudicate cases regarding intercountry adoption to the extent State parties are involved.

With regard to birthparents, if one or both are still alive, it is important to make sure that they are truly relinquishing their rights as parents in order to ensure that there is no misunderstanding as to what it would mean to have their child adopted into another country.<sup>390</sup> Payments<sup>391</sup> to birth parents do sometimes occur, whether it is

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385. *Id.* at 122.

386. *CRC*, *supra* note 138, at art. 21(e).

387. African Charter, *supra* note 245, at art. 24(e).

388. *See generally* European Convention on the Adoption of Children, Apr. 24, 1967, E.T.S. No. 58.

389. *See generally* Inter-American Convention on Conflicts of Laws Concerning the Adoption of Minors art. 3, May 24, 1984, O.A.S.T.S. No. 62.

390. Kathleen L. Manley, *Birth Parents: The Forgotten Members of the International Adoption Triad*, 35 *CAP. U. L. REV.* 627, 635 (2006) (discussing the inducement of birth mothers in black market adoptions).

391. It does not appear that there are any caps on these sorts of payments, as the following explains:

The typical scenario involves some sort of recruitment scheme in which locals identify poor pregnant woman who may be willing to consent to adoption. These recruiters offer to pay parents compensation for releasing their child for adoption. Often the payments are characterized as reimbursement of 'expenses' for the pregnancy and birth or as humanitarian aid. Recruiters may promise the birth family that the child will return, that the adoptive parents will send money to the birth family, or that the child will someday sponsor the family for immigration to the U.S. The recruiter then delivers the child to an orphanage or foster home and receives compensation. Facili-

termed “assistance,” pre- or post-relinquishment.<sup>392</sup> However, it is also the case that vulnerable birth parents are still open to coercion and forced consent. Yet, at least in the United States, no one is responsible for coercive acts because the in-country agent is not a supervised provider.<sup>393</sup> This only demonstrates that improper inducement of consent by an in-country intermediary<sup>394</sup> for the adoption of children is an act to be criminalized. National legislation should also “prohibit payments to foreign providers, birthparents, and others for the purposes of inducement; and ensure full disclosure of agency and foreign fees and children’s health backgrounds to prospective parents.”<sup>395</sup> Foreign countries should follow suit to avoid imposing undue restrictions on birthparents who knowingly and voluntarily surrender rights to a child. However, a situation where the birth parents are willing to surrender a child for adoption must be distinguished from a situation where it merely *appears* that the birth parents are knowingly relinquishing their rights.<sup>396</sup>

## VI. CONCLUSION

Intercountry adoption remains a controversial practice. But, in an increasingly interconnected world, the international community has moved from a tepid to a warm embrace of the practice, as long as it is executed as a last resort and is properly regulated. Initially, African countries were reluctant to allow intercountry adoptions. They put in place virtually no legislation relating to international adoption, and refused to join international regimes, except for the more general ones like the Convention on the Rights of the Child and the African Charter. But, more recently, intercountry adoptions have surged in

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tators or attorneys who act as intermediaries between U.S. adoption agencies and the foreign orphanages, in turn, compensate orphanage directors or child recruiters for each child referred. . . . In some sending countries, bribes are paid to government officials to produce false paperwork or to obtain approvals for adoption.

Maskew & Oreskovic, *supra* note 31, at 108–09.

392. *See id.* at 105.

393. *See* Trish Maskew, *The Failure of Promise: The U.S. Regulation on Intercountry Adoption Under the Hague Convention*, 60 ADMIN. L. REV. 487, 498 (2008).

394. U.N. Dep’t of Int’l Econ. & Soc. Affairs, *Child Adoption: Trends and Policies*, at 53, U.N. Doc. ST/ESA/SER.A/292 U.N. Sales No. E.10.XIII.4 (2009).

395. Jo Daugherty Bailey, *Expectations of the Consequences of New International Adoption Policy in the U.S.*, 36 J. SOC. & SOC. WELFARE 169, 179–80 (2009).

Africa. Unfortunately, African legal regimes and infrastructure are hopelessly unprepared to handle this development. It is therefore important that African countries put aside their reservations, join the Hague Convention regime, and update their domestic laws as soon as they can.

