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ABSTRACT

The increased popularity of intercountry adoption is not anything recent. What is recent, however, is the increased attention African children are attracting from prospective adoptive parents living in other parts of the world, as exemplified by the adoptions by Angelina Jolie and Madonna. Opinions are divided over the necessity and propriety of intercountry adoption, but considering the practice as a panacea for children without parents and parents without children is a prevalent view. On the other hand, some sending states have resisted placing Third World children deprived of their family environment in homes outside of their native countries – a purportedly “imperialistic” practice. The operative language that has emerged in recent times has been that intercountry adoption should be used as a measure of last resort, but one can hardly find any research on what it actually means (or should mean), and what its implications are for child welfare policy and law in Africa. This paper intends to contribute to filling this gap.

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INTERCOUNTRY ADOPTION AS A MEASURE OF LAST RESORT IN AFRICA: ADVANCING THE RIGHTS OF A CHILD RATHER THAN A RIGHT TO A CHILD

Benyam D. Mezmur

1. Introduction

The increased popularity of intercountry adoption since its introduction to the international legal scene following World War II is not anything recent. What is recent, however, is the increased attention African children are attracting from prospective adoptive parents living in other parts of the world. Amongst other factors, there is no doubt that this recent interest is fuelled by the expanded media coverage which continues to bring the plight of abandoned and orphaned children from Africa to audiences all over the world, coupled with recent news stories that have chronicled high profile intercountry adoption cases from Africa. Here, the intercountry adoptions by Angelina Jolie (from Ethiopia) and Madonna (from Malawi) spring to mind.

Opinions are divided over the necessity and propriety of intercountry adoption. To consider the practice as a panacea for children without parents and parents without children is a prevalent view. Intercountry adoption as an opportunity to deliver children from destitute lives is a perception held by many. However, the need to place some of the Third World children who are deprived of their family environment in homes outside of their native countries has met some resistance from the sending states, who perceive such procedures as “imperialistic.” Some African countries have decided to restrict intercountry adoption to certain narrowly defined situations¹, and at the extreme end, there prevails a preference to prohibit intercountry adoption altogether².

While the debate for and against the practice is raging, the operative language that has emerged in recent times has been that intercountry adoption should be used as a measure of last resort. The Committee on the Rights of the Child (CRC Committee) re-confirmed this stance when it concluded that “intercountry adoption should be considered, in the light of Article 21, namely as a measure of last resort”

Notes to this text start on page 102.

(CRC COMMITTEE, 2004, §47). Influential organisations such as the United Nations Children's Fund (UNICEF) and the United Nations High Commissioner for Refugees (UNHCR) concur with this position. According to one of the main principles that (GUPTA, 1974, p. 311). Accordingly, on the 9th of September 1954, a three-member Commission underpin the practice of intercountry adoption - the subsidiarity principle - intercountry adoption is envisaged only when it has been established that no substitute family or other suitable caring environment is available in the child's country of origin.

While to parrot that intercountry adoption should be a measure of last resort has become commonplace, what it actually means (or should mean), and what its implications are for child welfare policy and law in Africa are issues that have hardly been researched, about which little knowledge exists. This piece is a modest attempt to contribute to filling this gap. To this end, several issues present themselves for comment: is intercountry adoption categorically supposed to be a measure of last resort? What does last resort mean anyway? Taking into account the socio-economic and cultural environment, is it fitting to ask how "last resort" should be understood and implemented on the African continent. Can biological family (parents and/or extended family) members invoke the last resort requirement to disavow intercountry adoption when it is clear that it is not in the best interests of the child to remain with its biological family? Can prospective domestic parents invoke the "last resort" requirement so that preference should be given to them categorically over and above any prospective adoptive parents abroad? Can African states defy intercountry adoption altogether under the guise that the cultural identity of the country of origin of the child trumps it? In no particular order, this article attempts to address these issues. Accompanied by tentative recommendations, a concluding section summarizes the work.

2. International legal framework

Under international law, neither the 1924 nor the 1959 Declarations on the Rights of the Child clearly provide for the principle of subsidiarity in the context of alternative care for children deprived of their family environment³. However, the three instruments that make intercountry adoption a subject of international human rights law have provisions pertaining to the principle of subsidiarity, including on intercountry adoption. These instruments are the Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child (ACRWC), and the HAGUE CONVENTION on Protection of Children and Co-operation in Respect of Intercountry Adoption.

As identified by the CRC Committee, the so called "four pillars" of the CRC accord children the right against non-discrimination; the right to have their best interests be "a primary consideration" in all actions concerning them; the inherent right to life; and the right of a child "who is capable of forming his or her own views [...] to express those views freely in all matters affecting the child" (CRC, Art. 12). According to Article 21, the CRC seeks to ensure, amongst other things, the use of the "best interests of the child" standard. In fact, it is worth noting that adoption is the only sphere covered by the CRC where the best interests of the child are to be *the* primary consideration⁴.

The CRC considers intercountry adoption appropriate only when “the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin” (CRC, Art. 21(b)). There are also other provisions of the CRC that do not directly address adoption, but nonetheless have important implications for intercountry adoption⁵. The CRC has been ratified by 193 states⁶.

In the African context, the CRC is supplemented by the ACRWC⁷. Intercountry adoption is dealt with by Article 24 of the ACRWC. A comparison between Article 24 of the ACRWC and Article 21 of the CRC highlights a number of stark similarities and very few differences. It suffices for this article’s purpose to mention that the ACRWC indicates explicitly that intercountry adoption is a measure of “last resort.” The ACRWC enjoys the ratification of 45 countries.

The HAGUE CONVENTION is the most directly applicable treaty in the intercountry adoption sphere. It states in its Preamble that the signatory parties “recognize that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.” The Preamble also states that for children who cannot remain with their family of origin, “intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.” Of more direct relevance for the hierarchy of intercountry adoption within options for children deprived of their family environment is Article 4(b), which provides that:

An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin; b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child’s best interests. (THE HAGUE CONVENTION).

Though the CRC and the ACRWC cover intercountry adoption, these instruments appear to take a very limited and unclear view of when intercountry adoption is appropriate. However, it is important to mention the compatibility of the CRC’s and ACRWC’s preference for in-country over intercountry adoption, with the Hague Convention. Nonetheless, the preference that appears in the CRC and the ACRWC for in-country foster care and institutionalisation over intercountry adoption is more controversial, and appears to be in contradiction with the Hague Convention.

3. Analysis of intercountry adoption as a measure of last resort

Whereas, under international law, children who are deprived of their family environment should benefit from alternative care, such as (to quote the relevant CRC provision) “foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children” (CRC, art. 20(3)), the hierarchy to be followed, and the place to be accorded to intercountry adoption amongst these options remains elusive. For instance, is it intercountry adoption or institutionalization that should be considered as a measure of “last resort”? What does and should “last resort” actually mean in the best interests of the child? Should domestic adoption always be preferred over other alternative care options?

Given the seemingly different hierarchy of alternative care options accorded to intercountry adoption in the implementation of the principle of subsidiarity under the CRC and the ACRWC on the one hand, and the Hague Convention on the other, a position that is legal and ultimately capable of promoting the best interests of the African child through intercountry adoption must be sought.

3.1 Spin-offs of intercountry adoption as a measure of last resort: some preliminary observations

At the outset, it is important to underscore that intercountry adoption as an alternative means of care was a contentious point during the drafting of the CRC. Citing the *travaux préparatoires*, Detrick underscored that the representative of Brazil had indicated that her country's delegation understood Article 21(b) to provide for an alternative means of care "when all other possibilities are exhausted" (DETRICK, 1999; UNITED NATIONS COMMISSION ON HUMAN RIGHTS [UNCHR], 1989, §369). As a result of this, and coupled with the non-recognition of the practice under Islamic law, an effort was made within the CRC to feature intercountry adoption as an exception rather than as a rule.

The idea of making intercountry adoption generally subsidiary to other alternative care options has its own motives that are inherently aimed at promoting the best interests of the child. The following is a brief look at some of these reasons and their implications.

3.2 Emphasis on biological family and domestic adoption

One of the first implications of making intercountry adoption generally subsidiary, under the CRC, the ACRWC, and the Hague Convention, is that a general preference towards a family environment should prevail (DOEK, 2006)⁸. And as a subset of this general preference towards a family environment, children are assumed to be better off if they grow up with their birth family or extended family, if possible, and when in the best interests of the child⁹. In concurring with this assertion, Hodgkin and Newell contend that the CRC establishes a "presumption [...] that the children's best interests are served by being with their parents wherever possible" (HODGKIN; NEWELL, 2002, p. 295). The implication of this is that, according to the CRC Committee, it is only when all other options to keep the child with his/her family have been exhausted, and proved inefficient or impossible, that adoption (or for that matter, any other alternative care option) should be envisaged (SYLVAIN; BOECHAT, 2008, p 25).

The adage that "it takes a village, to raise a child" rings more true in Africa than anywhere else. Therefore, in the African context, recognising the role of the extended family and the community is even more apposite. As a result, by considering intercountry adoption to be generally subsidiary, efforts that recognize the role of the extended family and the community to care for its children should be encouraged and supported.

Another advantage of the last resort requirement, in accordance with the principle of subsidiarity, is to encourage domestic adoption over intercountry adoption (THE INTERNATIONAL REFERENCE CENTRE FOR THE RIGHTS OF CHILDREN DEPRIVED OF THEIR FAMILY - ISS/IRC, 2006b, p. 1). Domestic adoption normally

ranks high within the general hierarchy of options available as alternative care for children deprived of their family environment. The fact that domestic adoption is a national solution, a permanent placement, and in addition offers a family environment, puts it ahead of other alternative care options. Furthermore, there is evidence that in countries where adoption is well established, there is a demonstrated high level of success rate in permanent placement, especially when decisions have been guided by the best interests of the child, and children, preferably, have been adopted at a young age (TRISELIOTIS; SHIREMAN; HUNDLEBY, 1997).

3.3 Promoting the use of other domestic solutions

Making intercountry adoption generally subsidiary and a measure of last resort would help pave the way for the development and use of other suitable domestic alternative care options. Foster care, *Kafalah* of Islamic/*Sharia* law as well as institutionalisation of children, while domestic in nature, are envisaged under international law, and could sometimes benefit children deprived of their family environment.

Foster care, which should be temporary, could nevertheless continue until adulthood, but should not preclude a child from returning to his or her biological parents. It also should not preclude adoption (VAN BUEREN, 1998, p. 103). The advantages of foster care include the fact that it offers a family environment, caters for children *temporarily* deprived of their family environment, and seems to financially contribute to the child welfare system¹⁰. In Africa, as in most of the less developed world, foster care tends to be informal (often called kinship care)¹¹. It is less developed, and highly unregulated by law and policy compared to other alternative care options.

On a related note, the practice of *Kafalah* under Islamic law entails the acceptance of children without families in what is tantamount to a permanent form of foster care, but without the children concerned taking on the family name or enjoying the right to inherit from the family with whom they are placed (HODGKIN; NEWELL, 2002, p. 295-296). There are a number of African countries with a significant portion of their populations that adhere to *Sharia* law. A good example is Nigeria. Countries on the continent (apart from those in North Africa) that apply *Sharia* law with varying degrees also include Senegal, Somalia, Mali, Chad, Sudan, Djibouti, Eritrea, Ethiopia, Tanzania, Kenya, and Uganda. Therefore, the development of *Kafalah* as a domestic and family based solution embodies the capacity to promote children's rights on the continent.

Finally, while a detailed discussion pertaining to institutionalisation is deferred for a separate section, suffice it to mention that institutionalisation could play a short term and temporary role in promoting the rights of children deprived of their family environment. For instance, institutions can serve as transition places for children awaiting adoption.

3.4 Upholding the cultural identity of the country of origin

The consideration of intercountry adoption as being subsidiary to other alternative care options has the capacity of promoting the cultural identity of the child. Cultural identity is a cross cutting theme that tends to place preference on the biological family (both parents and extended family members) and domestic adoption over intercountry adoption. The

former options generally cater for the continuity of the child's cultural identity as the child would grow up in the culture, language and background of his/her country of origin.

However, some proponents of intercountry adoption prefer a very loose interpretation of the notion of intercountry adoption as a measure of last resort. At times, under the guise of promoting the best interests of the child, this group might advance the interests of prospective adopters abroad, and prefer to give cultural identity little or no weight at all (SIMON; ALTSTEIN, 2000, p. 45-47). It is important to remember that such a loose definition should not be utilised to make intercountry adoption a "first resort" and act as a facilitator in making the child available for intercountry adoption before domestic solutions, such as adoption, are considered.

Such an approach would not be in accordance with the provisions of the CRC or the ACRWC. As Woodhouse (1995, p. 114) notes, "[...] culture of origin, no matter how hard to define with satisfying logic, do[es] matter to children and therefore should matter in adoption law." After all, Article 20(3) of the CRC reads that, when considering alternative care solutions, "due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background."

Interestingly, it is sometimes the same concept of cultural identity that is used by opponents of intercountry adoption to deny children a family environment, even when it is clear that intercountry adoption would be in the children's best interests¹². The attitude that intercountry adoption allows dominant, developed cultures "to strip away a developing country's most precious resources, its children" (KLEEM, 2000, p. 325-326) prevails in these quarters. Because a child's right to a name and nationality are crucial for his or her identity (CRC, Art. 7 and 8), "opponents of intercountry adoption argue that rather than promoting a child's identity, the practice strips it away and replaces it with a name and identity chosen by the adoptive parents" (OLSEN, 2004, p. 510). Unfortunately, it is a fact that some groups (sometimes a whole nation) consider the claiming of a right of custody or control over their children as an issue (WOODHOUSE, 1995, p. 112) that has priority over promoting the rights of these children's best interests.

However, one of the achievements of the CRC (and ACRWC, too) is to elevate children as subjects of rights. Making the claim that states have a right of custody or control over children, with no consideration for the best interests of the children, has a "children as objects" ring to it. As Woodhouse rightly advocates, "a child-centred perspective would suggest that the right to preservation of a group identity of origin is best analyzed as a right of the child, and a responsibility or trust of the group" (WOODHOUSE, 1995, p. 112).

In some instances it is the concepts of "continuity" and "background" under Article 20(3) of the CRC and Article 25(3) of the ACRWC that are used to argue the case for the primacy of cultural identity, and that serve as a ground for prohibiting or undermining inter-country adoptions as an alternative means of care. But as Cantwell and Holzscheiter correctly remind us:

[...] while connected, the questions of "continuity" and "background" should not be seen as one and the same issue. The text of article 20 does not explicitly demand "continuity [...] in the child's [...] background" but requires that due regard be paid both to continuity in upbringing and to the child's background. (CANTWELL; HOLZSCHEITER, 2008, p. 61).

This argument adds clarity to the position that culture cannot, and should not, be used as a smokescreen to deny children their right to grow up in a family environment, when that family can only be found abroad. In addition, “it is clear from the text of Article 20 that there is no absolute duty to ensure continuity or to base alternative care decisions on the child’s background, but only to have ‘due regard’ for each of these factors” (CANTWELL; HOLZSCHEITER, 2008, p. 63). However, in contrast, it is worth noting that “State Parties shall in accordance with their national laws ensure alternative care” (CANTWELL; HOLZSCHEITER, 2008, p. 63).

At the regional level, interestingly, the ACRWC purports to take into consideration “the virtues of their [African member States’] cultural heritage, historical background and the values of the African civilization which should inspire and characterize their reflection on the concept of the rights and welfare of the child” (ACRWC, 7th preamble clause). However, although it copies Article 20(3) of the CRC virtually word for word, the ACRWC omits the word “cultural” when listing the backgrounds of the child to which due regard shall be paid when considering alternative family care (ACRWC, Art. 25(3)). In this light, if the best interests of the child means anything at all, let alone being “the paramount consideration” (CRC, Art. 21; ACRWC, Art. 4), preserving cultural identity should be seen as a means, and not necessarily as an end in itself, in considering alternative care for children deprived of their family environment.

3.5 Protecting separated and refugee children

The last resort requirement in intercountry adoption also has an implication for promoting and protecting the rights of separated and refugee children. In this regard General Comment n° 6 of the CRC Committee on separated and refugee children is of great guidance. The Comment first makes the general point that:

States must have full respect for the preconditions provided under Article 21 of the Convention as well as other relevant international instruments, including in particular the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Inter-Country Adoption and its 1994 Recommendation concerning the application to Refugee and other Internationally Displaced Children when considering the adoption of unaccompanied [...] children. (CRC COMMITTEE, 2005, § 90).

Subsequently, it highlights that states should, in particular, observe that adoption of unaccompanied or separated children only be considered once it has been established that the child is in a position to be adopted. In practice, this means *inter alia*, that efforts with regard to tracing and family reunification have failed, or that the parents have consented to the adoption (CRC COMMITTEE, 2005, § 91).

Put bluntly, unaccompanied or separated refugee children must not be adopted in haste at the height of an emergency. In fact, adoption should not be considered where there is reasonable hope of successful tracing and family reunification, and unless a reasonable time has passed during which all feasible steps to trace the parents or other surviving family members have been carried out¹³. In addition, adoption

in a country of asylum should not be pursued when there is the possibility, in the near future, of voluntary repatriation under conditions of safety and dignity to the country of origin.

Both under the CRC and the ACRWC¹⁴, unaccompanied or separated refugee children should have access to basic services, an asylum procedure, temporary care, and protection. Thereafter, the relevant authorities must identify and determine the child's long term best interests and care. And even though identifying these long term best interests of the child could possibly include intercountry adoption as an option, such option should not be resorted to unless efforts with regard to tracing and family reunification have failed, in-country adoptions have been tried, and a reasonable period of time has lapsed. Therefore, intercountry adoption as a measure of last resort should be understood to severely restrict adoption for separated and refugee children.

3.6 Moving intercountry adoption from last resort to "no resort" in the best interests of the child

The very fact of being a state party to the CRC and the ACRWC does not automatically impose on any country an international obligation to allow intercountry adoption as a means of alternative care. A close reading of the carefully crafted wording of Article 21 of the CRC (as well as Article 24 of the ACRWC) reveals that the caveat to Article 21 provides that "States Parties that *recognize and/or permit* the system of adoption [...]" (my emphasis), while Article 24 of the ACRWC speaks of "State Parties *which recognise* the system of adoption [...]" (my emphasis).

The *travaux préparatoires* to the CRC indicate that this caveat was added during the negotiations in response to interventions by a number of Muslim countries (particularly Bangladesh), since Islamic law does not recognise the concept of adoption (UNITED NATIONS CENTRE FOR HUMAN RIGHTS, 1995, p. 16). Therefore, intercountry adoption as a last resort is indicative of its subsidiary nature, and by extension, that the practice is not necessarily a prioritised, or for that matter necessarily a required means of alternative care. In other words, the non-existence of intercountry adoption in, or the suspension thereof by, a state party to the CRC and/or the ACRWC as an alternative means of care would not be a violation of these instruments.

Buoyed by this fact, it could be argued that the possibility of moving intercountry adoption as a measure of last resort to a measure of "no resort" is possible and sometimes necessary. But such a possibility (and sometimes necessity) should be explored only to promote and protect the best interests of children, and not to hamper them. In other words, the fact that there is no obligation to allow intercountry adoption as a means of alternative care also implies, *albeit* remotely, the possibility of suspending the practice when the best interests of a child is compromised. Therefore, the need and possibility to impose a moratorium on intercountry adoption in instances where a country is affected by a catastrophe or where irregularities are compromising the best interests of the child, exists. As an example, the Republic of Congo, part of which is still experiencing violence and armed conflict, announced it was suspending all international adoptions because of the events in Chad (INTERNATIONAL SOCIAL SERVICE [ISS], 2008a, p. 3). The

Ministry of Social Welfare of the Government of Zambia, the Government of Togo, and just recently, the Government of Liberia have also suspended intercountry adoption (ISS, 2008b, p. 3). The official reasons provided for the suspension of intercountry adoptions in these three countries were: the need to undertake the practice in the best interests of the child; and to address dysfunctions in the adoption systems which have the potential of violating children's rights (ISS, 2008b, p. 3).

4. How last is “last resort”?

Central to this article is the attempt, if not to answer, at least to explore, the potential meanings and implications of what is, and should be, meant by intercountry adoption as a measure of last resort. Further to the above preliminary observations, such an exploration, amongst other things, requires one: to weigh the value of other alternative care options, in particular, to compare intercountry adoption with institutionalisation; to look into the position of the CRC Committee on the issue; and finally to resort to the rules of juvenile justice to draw a possible, but remote, parallel with the use of the “last resort” language in the context of deprivation of liberty, and to investigate if any guidance is forthcoming in attaining a better understanding of the concept of making intercountry adoption a measure of “last resort.”

4.1 Hierarchy of alternative care options

A number of scholars have criticised the fact that the CRC failed to successfully clarify the proper hierarchy of solutions to be provided for children deprived of their family environment (DILLON, 2008, p. 40). In a Preamble to a Draft Protocol to the United Nations Convention on The Rights of the Child (UNCRC) on Social Orphans, Dillon echoes the concern that “[...] Articles 20 and 21 of the UNCRC are not sufficiently clear about the relationship between the developing child and the urgent and time-bound need for permanency in a family setting” (DILLON, 2008, p. 85).

UNICEF sets out the following principles for the hierarchy of options which are generally held to safeguard the long term best interests of the child's care, once the need for such care has been demonstrated:

- *family-based solutions are generally preferable to institutional placements;*
- *permanent solutions are generally preferable to inherently temporary ones; and*
- *national (domestic) solutions are generally preferable to those involving another country*
(UNITED NATIONS CHILDREN'S FUND -UNICEF, 1998, p. 5).

Assessed against this list, intercountry adoption fulfils the first two principles, but not the third, while foster placement fulfils the first and last ones, and often not the second one. The same cannot be said of institutionalisation¹⁵ as it is neither family based nor permanent (often). Therefore, according to this listing of principles, intercountry adoption and foster placement are invariably to be considered subsidiary to any foreseeable solution that corresponds to all three principles - for instance, domestic

adoption. However, they must be weighed carefully against any other solutions that also meet two of these basic principles¹⁶, and should not automatically be considered excluded in favour of institutionalisation. This approach garners support from the fact that determining the best interests of the child cannot be circumscribed by mechanical legal formulae or through rigid hierarchical rankings of care options¹⁷.

It is apposite at this juncture to express some words of caution. First, it is important to understand that the last resort language is relative, and depends on what options are available as alternative care. It could be argued that all alternative care options should be considered as a measure of last resort, when compared to the option of keeping the child with the birth family. In this regard, the CRC Committee is of the view that “[...] in many States parties the number of children separated from their parents and placed in alternative care is increasing and at a high level” (CRC COMMITTEE, 2006, § 654). As a result of this, the CRC Committee has expressed concern that “[...] these placements are not always a measure of last resort and therefore not in the best interests of the child” (CRC COMMITTEE, 2006, § 654). The reference to “their parents” by the CRC Committee implies biological or adoptive parents. Furthermore, the reference to “these placements” includes all alternative care options (such as foster care, residential care, and other forms of alternative care), and highlights that all these options generally should be measures of last resort after attempts to keep the child in his or her birth family have failed.

Even when the choice is between intercountry adoption on the one hand and other national alternative care options on the other, exceptional circumstances that might require intercountry adoption to be a measure of first resort might exist. To mention one example, it would be very difficult to sustain an argument that when a child deprived of a family environment has a chance of being placed with an aunt outside his or her own country, such a child should be institutionalised simply because intercountry adoption should be a measure of last resort. In other words, the principle of subsidiarity could be subject to the best interests of the child¹⁸.

In fact, the non-overriding nature of the principle of subsidiarity is well articulated in a judgment of the Constitutional Court of South Africa. The case *AD and Another v DW and Others*¹⁹ concerned an application for sole custody and sole guardianship by citizens of the United States of America, who wished to adopt a South African child, Baby R. How to interpret and apply this principle to Baby R’s situation was debated both in the lower courts and the Constitutional Court. In its reasoning, although the Court agreed that the principle of subsidiarity “had to be adhered to as a core factor governing inter-country adoptions, and a contextualised case-by-case enquiry had to be conducted by child protection practitioners and judicial officers versed in the principles involved,” it cautioned by stating that “[t]his is not to say that the principle of subsidiarity is the ultimate governing factor in inter-country adoptions”²⁰ – rather, it is the best interests of the child principle that has been found to be the ultimate governing factor²¹.

A point worth highlighting in the context of intercountry adoption (or for that matter, any other alternative care option) is the role of child participation. As alluded to above²², the right of a child “who is capable of forming his or her own views [...] to express those views freely in all matters affecting the child” (Article 12 of CRC and Article 7 of ACRWC) is one of the four cardinal principles of both the CRC and the ACRWC.

Depending on the evolving capacity of a child, and the views of such child, there is a need to recognise that intercountry adoption could be either a measure of first or last resort.

Finally, the argument that the letter of CRC and ACRWC provisions favour national solutions above family based ones could be countered by the view that these instruments need to be interpreted progressively. After all, the CRC, as well as the ACRWC, like all human rights instruments, must be regarded as living instruments, whose interpretations develop over time. We are reminded of this fact by the CRC Committee (CRC COMMITTEE, 2007a, § 20). Pursuant to this, the initial assumption, under the CRC and the ACRWC that intercountry adoption, being a non-national alternative care, should be categorically subsidiary to other national alternative care options such as institutionalisation should not be accepted as valid, especially in the face of contemporary evidence on the serious shortcomings of the latter (EVERYCHILD, 2005; ISS/IRC, 2006a, p. 9).

4.2 Intercountry adoption versus institutionalization

In the context of alternative care for children, the word “institutions” appears in the CRC (Art. 3(3)), the ACRWC (Art. 20(2)(b)), and the Hague Convention (Art. 4(c)(1)). Nonetheless, the reference to “institutions” leaves unanswered the question of what it is intended to cover (CANTWELL; HOLZSCHEITER, 2008, p. 53). It is contended that “[r]esidential care’ or ‘institutional care’ refers to group living arrangements in which care is provided by paid adults who would otherwise not be regarded as traditional caregivers in that particular society” (UNICEF, 2006, p. 35). If “institutions” is meant to refer only to orphanages²³, the question posed then is: what role is to be played by the so-called “intermediary care options” such as “group homes”²⁴?

Since group homes by definition represent small, residential facilities located within a community, and designed to serve children, it could be argued that it is these types of homes that both the CRC (Art. 20(3)) and the ACRWC (Art. 25(2)(a)) refer to as “suitable institutions.” Therefore, while the current tendency is to put orphanages and group homes of varying sizes under the umbrella of “institutional care” (DILLON, 2008, p. 40), as opposed to orphanages, those resembling a family environment, like group homes, might better withstand scrutiny under human rights law.

The qualification of institutions with the prefix “suitable” finds its motivation in global experiences during and before the drafting of the CRC. Since the 1980s the international community has come to progressively realise the detrimental effect of institutionalisation on children (HUMAN RIGHTS WATCH - HRW, 1996). Thus, the ill-effects of institutionalisation on the emotional, psychological and developmental aspects of children are well documented (ZEANAH, 2003, p. 886-88; MARSHALL; FOX; BEIP CORE GROUP, 2004, p. 1327).

The Hague Convention’s policy on institutionalisation is not explicitly spelled out in the instrument. However, it is possible to decipher the position of the instrument on this issue through interpretation. For instance, since the Hague Convention recognises intercountry adoption as a valid alternative solution in situations where a “suitable family” (3rd preamble clause) cannot be found in the state of origin, it could

be argued that institutionalisation (which is a non-family based alternative care) under the Hague Convention is a measure of last resort ranking after intercountry adoption. The position expounded by the Hague Conference Bureau that “it is, as a general rule, not preferable to keep children waiting in institutions when the possibility exists of a suitable permanent family placement abroad” (PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, 2008, p. 30) is supported by the text of the Hague Convention.

The question of how the notion of last resort is to be interpreted when the option is between institutionalisation and intercountry adoption has been a subject of judicial scrutiny. In the recent *Madonna* case in Malawi²⁵ concerning the adoption of a child from an orphanage, the definition to be accorded to “last resort” was put on the spotlight by the High Court. The judge, after quoting in full Article 24(b) of the ACRWC, and emphasising the notion of “last resort” in the provision, reasoned that:

Clearly inter-country adoption is supposed to be the last resort alternative. [...] It is evident however that CJ no longer is subject to the conditions of poverty of her place of birth as described by the Probation Officer since her admission at Kondanani Orphanage. In the circumstances can it be said that CJ cannot in any suitable manner be cared for in her country of origin? The answers to my questions are negative. In my view “in any suitable manner” refers to the style of life of the indigenous or as close a life to the one that the child has been leading since birth²⁶.

Partly based on this reasoning, the judge declined to grant the application for the adoption of the infant.

On appeal, however, the Supreme Court of Malawi rightly disagreed with the lower court. The Court recognized that there had neither been a single family in Malawi that had come forward to adopt infant CJ nor had there been any attempts by anybody to place infant CJ in a foster family²⁷. This, in view of the Court, left only two options – the infant “can either stay in Kondanani Orphanage and have no family life at all or she can be adopted by the Appellant and grow in a family that the Appellant is offering”²⁸. In a clear preference to intercountry adoption as opposed to institutionalisation, the Supreme Court concluded that “the welfare of infant CJ will be better taken care of by having her adopted by the foreign parent rather than for her to grow up in an orphanage where she will have no family life, no love and affection of parents”²⁹ and granted the appeal and allowed the adoption order.

In Africa, it is documented that the unfortunate lack of developed family-based alternative care options has led to “un-necessary over-use of residential placements” (ISS; UNICEF, 2008, p. 7). In support of this assertion, a joint working paper by ISS and UNICEF (2008, p. 7) cites the experience of Zimbabwe. Accordingly,

[t]he average occupancy of Zimbabwean orphanages is 106% overall, and 128% in government institutions. Their experience is that one can never build enough orphanages to meet demand – those which are built are always full because they attract children, although usually for the wrong reasons. Research shows that the majority of children in institutions do not need to be

there [...] – only 25% have no known relatives [...] 45% have at least a mother alive. Most children could be reintegrated into their families with good social work. (MEETING ON AFRICAN CHILDREN WITHOUT FAMILY CARE apud ISS; UNICEF, 2004, p. 7).

There is also anecdotal evidence that the move to make institutions the primary response to, and solution for, alternative care is susceptible to being counterproductive. For instance, it could weaken a community's motivation to address orphan issues, and divert resources away from the family based solutions that are better for children (OLSON; KNIGHT; FOSTER, 2006, p. 3).

In practice, there is a tendency to misconstrue the position of the relevant human rights instruments on the institutionalisation of children. It is not uncommon to witness the systematic planning and development of new institutions as a priority to cater for children deprived of their family environment³⁰. Sometimes, such developments are justified on the basis of Article 18(2) of the CRC and Article 20(2)(b) of the ACRWC. However, the reference under Article 18(2) of the CRC (and Article 20(2)(b) of the ACRWC) that mandates states parties to “ensure the development of institutions, facilities and services for the care of children” does not mean the facilitation of a systematic policy to establish orphanages as a priority for the care of children. Rather, there is a need to make these institutions secondary and allow them to exist in a support relationship with parents. Children should not be made children of the state unnecessarily.

This whole discussion tends to point in one direction – that there is a growing trend in support of generally making institutionalisation (and not necessarily intercountry adoption) a measure of last resort. While institutionalisation should continue to play its temporary role as a transition platform for children deprived of their family environment, its use as a long term placement for children deprived of their family environment calls for serious reconsideration.

4.3 “Last resort” through the lens of the CRC Committee: clarity or confusion?

The CRC Committee, as the supervisory organ for the implementation of the CRC, has an authoritative say in the interpretation of the provisions of the Convention. Unfortunately, the CRC Committee has been sending confusing (if not contradictory) messages as regards what is to be considered a measure of last resort in the alternative care scheme for children deprived of their family environment.

To illustrate: it has already been alluded to above that the CRC Committee on a number of occasions has labelled intercountry adoption to be a measure of last resort³¹. Despite this position, that continues to surface in its concluding observations on state party reports, in General Comment No. 3 entitled “HIV/AIDS and the rights of the child,” the same Committee remarked that:

[...] any form of institutionalized care for children should only serve as a measure of last resort, and that measures must be fully in place to protect the rights of the child and guard against all forms of abuse and exploitation. (CRC COMMITTEE, 2003, § 35).

In the context of children with disabilities, the CRC Committee has reiterated a similar position³².

This leaves the CRC Committee's position as regards the question "is it intercountry adoption or institutionalisation that should *generally* be considered as a measure of last resort?" unanswered³³. In the meantime, however, the CRC Committee's stand sheds light on the fact that institutionalisation could be considered as a measure of last resort. It is also indicative of the need for the CRC Committee to clearly articulate its position on the issue (perhaps through a General Comment), and thereby contribute towards State parties' understanding of the place of intercountry adoption within the alternative care scheme.

4.4 Understanding "last resort": any lessons from the principles of juvenile justice?

In an attempt to establish the meaning of last resort, guidance can (rather remotely) be sought from Article 37(b) of the CRC, which is the only provision within the CRC that uses this phrase. Pursuant to Article 37(b) of the CRC:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

At the outset, however, it is pertinent to consider some general matters of context. The enquiry into the meaning and implications of the last resort requirement in the juvenile justice sphere does not assume that the purposes of the search for alternative care, on the one hand, and the deprivation of liberty as a measure of last resort in the context of juvenile justice, on the other, are the same. In light of the so-called 3Ps (protection, provision and participation of the CRC and the ACRWC), whereas the former is more of a blend of protection and provision, the latter fits mainly within the protection mantra. Secondly, more often than not, it is younger children who are affected by intercountry adoption, while juvenile justice often addresses older children. Thirdly, deprivation of liberty is a criminal law measure while intercountry adoption is not. Despite these differences, both the search for alternative care for children deprived of a family environment and the deprivation of liberty as a measure of last resort in the context of juvenile justice, are supposed to be undertaken in the best interests of the child. Such a common ground – the promotion and protection of the best interests of a child – is assumed to create a logical and conducive platform for comparison.

The standard for deprivation of liberty as a measure of last resort requires one to consider "whether the intended deprivation of liberty is really the last option (without any alternatives interfering less with the child's right)" (SCHABAS; SAX, 2006, p. 84). In alternative care, therefore, this could mean resorting to intercountry adoption because it has been found to be the last suitable alternative care, as there are no other alternatives that would better suit the situation of the individual child. Just recently, in 2008, Liefhard further argued that the last resort principle does not imply that all

alternatives must be pursued first, before deprivation of liberty is imposed³⁴. If “last resort” is to be interpreted in a similar fashion with regard to intercountry adoption, namely, that all alternative care options must not necessarily be pursued first, and that authorities exercise some level of discretion in accessing different options, and finally deciding which of these options is likely to have the intended effect, then the use of the term seems to maintain its capacity to promote the best interests of children who are deprived of their family environment.

Thus, the interpretation under juvenile justice that last resort does not necessarily lend itself to a structured or checklist approach that considers and pursues all alternative options before embarking on deprivation of liberty, fits well with the best interests of the child. Within an alternative care scheme, too, such an interpretation has a better potential to promote the rights of children who are deprived of their family environment. If the approach of trying every available alternative care option was to be subscribed to in order to comply with the last resort requirement in a non-flexible manner before intercountry adoption is considered, it would mean that, amongst other things, children would wait unnecessarily for a longer than usual period of time before a family environment is found for them.

In addition, if the contention, that the last resort requirement under juvenile justice implies that imprisonment may not be “imposed without a proper assessment taking into account the specific circumstances of the case and the specific needs of the individual child” (LIEFFARD, 2008, p. 195), is to be considered in another context, it may have positive implications for the application of alternative care options. Primary amongst these is the connotation for alternative care that a truly principled child-centred approach requires a close and individualised examination of the precise real life situation of the particular child involved. Accordingly, a rule that categorically requires that intercountry adoption be made a measure of last resort should not be used in such a way that would compromise the best interests of the child.

5. Concluding remarks

A range of literature exists that testifies to the tendency to construe intercountry adoption as *categorically* being a measure of last resort. It is also contended that, based on the subsidiary principle, intercountry adoption is a last resort. In Africa, the fact that Article 24 of the ACRWC explicitly requires intercountry adoption to be a measure of last resort, might give African states a further ground to treat the practice as such.

Based on the preceding discussion, it is possible to arrive at some conclusions and recommendations. The idea of making intercountry adoption generally subsidiary to other alternative care options has its own merits that are inherently aimed at promoting the best interests of the child. In the context of Africa, this would mean, for instance, giving the extended family (and communities) a greater role in the care of children deprived of their family environment, before undertaking other alternative care options. Furthermore, in Africa, financial and material poverty alone, or conditions directly and uniquely imputable to such poverty, should never be a justification for the removal of a child from parental care, for receiving a child into alternative care, or for preventing his

or her reintegration into the family³⁵. These scenarios should be seen as a signal for the need to provide appropriate support to the family. It would also help to promote domestic solutions, which could in turn contribute to maintaining the child's cultural identity.

However, while we Africans pride ourselves in our culture, it is important that the rights of individual African children are not enmeshed in discussions of the larger trends of history, of intercountry adoption being "essentially a vestige of colonialism," and of national pride. Having named children as the bearers of rights, no ideas of national pride or children as national "resources" should be used to deny children a suitable alternative form of care, even if such suitable care could only be found through intercountry adoption. "Intercountry adoption as a measure of last resort" should be read to mean "intercountry adoption as being *generally subsidiary* to other alternative means of care," but subject to exceptions. In addition, "last resort" should not mean when all other possibilities are exhausted³⁶.

A checklist approach, where all available care options are to be pursued first before intercountry adoption is considered, would go contrary to the assumption that the placement of children at a very young age is an important goal. An understanding of "last resort" that does not hinder legally appropriate early placement should be fostered. In addition, in understanding intercountry adoption as a measure of last resort, child participation, depending on the evolving capacities of the child, should be allowed to play a role.

The lack of a clear-cut formula as far as the hierarchy for alternative care options is concerned has its own, rather unintended, positive side too. This argument is validated by the fact that determining the best interests of the child cannot be circumscribed by mechanical legal formulae or through rigid hierarchical rankings of care options. As argued above³⁷, a truly principled child centred approach requires a close and individualised examination of the precise real life situation of the particular child involved. To apply a predetermined inflexible formula for the sake of certainty, irrespective of the circumstances, could in fact be contrary to the best interests of the individual child concerned.

African countries should join the international trend towards understanding institutionalisation, particularly if long-term, as a measure of last resort. It is advisable that the CRC Committee or the African Committee of Experts on the Rights and Welfare of the Child under the ACRWC give clear guidance to this effect.

In conclusion, caution (including some level of self-restraint) needs to be exercised not to misuse the phrase "last resort" disingenuously, to either promote the interests of domestic and international prospective adoptive parents, child welfare organisations, or a state's nationalistic interests. In other words, the African continent's political, social, cultural, and economic needs and priorities need not conflict with the best interests of the African child, who is deprived of a family environment or of alternative suitable care. Therefore, where intercountry adoption has been found to be in the best interests of a child, it should be considered as an alternative means of care, irrespective of the last resort requirement. States should be prudent not to provide proof to critics who view intercountry adoption as operating in the interest of a family seeking a child, rather than in the best interests of the child seeking a family.

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NOTES

1. For instance, some countries like Botswana, Malawi, Sierra Leone, and Zambia have a residency requirement for prospective adoptive parents.
2. For instance, Nigeria.
3. If anything comes close to the principle of subsidiarity under the 1959 Declaration, it is Principle 6 which, in pertinent part, states that the child shall, wherever possible, grow up in the care and under the responsibility of his parents and, in any case, in an atmosphere of affection and of moral and material security.
4. This is as opposed to being simply a primary consideration in all other fields.
5. These include Article 8, which preserves the right of the child to his or her identity, nationality, name, and family relations without illegal interference. Further, Article 18 addresses parental responsibility, while Article 20 relates to children deprived of their families.
6. Two countries, namely Somalia and the United States, have yet to ratify it.
7. It was in order to give the CRC specific application within the African context that the ACRWC was adopted by the OAU (now African Union or AU).
8. Doek (2006) describes this principle as a "leading principle for the implementation of the CRC."
9. "Removal of a child from the care of the family should be seen as a measure of last resort and for the shortest possible duration. Removal decisions should be regularly reviewed, and the child's return to parental care should be assured once the original causes of removal have been resolved or have disappeared." (UNITED NATIONS, 2007, Art. 13).
10. As research suggests, typically the cost of residential care has been shown to be three times the cost of family foster care (BROWNE, 2005, p. 1-12).
11. Providing inputs to the debate and practice of foster care, this study underscores that it contains information on foster care experiences in developing countries, which tends to be informal and undocumented.
12. See, for instance, the interview with Baroness Emma Nicholson, European Parliament's Rapporteur for Romania (CENTRUL ROMAN PENTRU JURNALISM DE INVESTIGATIE [CRJI], 2001).
13. This period of time may vary according to circumstances, in particular, those relating to the ability to conduct proper tracing; however, the process of tracing must be completed within a reasonable period of time.
14. See Article 22 of the CRC and Article 23 of the ACRWC for some of the rights that refugee children have.
15. Though this is partly arguable, as, in exceptional circumstances, institutionalisation could be considered to be permanent for children who are often referred to as "hard to place."
16. Naturally, the solution chosen, and the manner in which it is effected, must always fully respect the rights and best interests of the child.
17. SOUTH AFRICA. Constitutional Court. *M v The State*. Sentence. 26 sep. 2007a, § 24.
18. It is argued that the position the subsidiarity principle assumes is in a itself subsidiary one — one subservient to the best interests of the child (NICHOLSON, 2000, p. 248).
19. SOUTH AFRICA. CONSTITUTIONAL COURT. *AD and Another v DW and Others*. CCT 48/07. Sentence. 7 dec. 2007b.
20. SOUTH AFRICA. CONSTITUTIONAL COURT. *AD and Another v DW and Others*. CCT 48/07. Sentence. 7 dec. 2007b, § 48.
21. SOUTH AFRICA. CONSTITUTIONAL COURT. *AD and Another v DW and Others*. CCT 48/07. Sentence. 7 dec. 2007b, § 49-50.
22. See section on "International legal framework" above.
23. It is to be noted that it is usually residential care institutions for young children that are also often referred to as "orphanages."
24. By definition, group homes are small, residential facilities located within a community, and designed to serve children.
25. MALAWI. HIGH COURT, 2009a, p. 6.
26. MALAWI. HIGH COURT, 2009a, p. 6.
27. MALAWI. HIGH COURT. 2009b, p. 18.
28. MALAWI. HIGH COURT. 2009b, p. 18.
29. MALAWI. HIGH COURT. 2009b, p. 18.
30. And yet, research conducted in 2006 has found that, in Africa, there is growing concern about the burgeoning number of orphanages being established in order to respond to the perceived needs of children affected by HIV and AIDS (UNITED NATIONS, 2006).
31. See introduction section above.
32. Under General Comment n. 9, § 47, it is stated that the CRC Committee "urges States parties to use the placement in institution only as a measure of last resort, when it is absolutely necessary and in the best interests of the child" (CRC COMMITTEE, 2007b).
33. "Generally," because it is the conventional (non-exceptional) cases that are being taken into account when determining the general preference to be adopted in making decisions between alternative care options.

34. According to Liefhard, it is imperative that competent authorities exercise some level of discretion in assessing different options, and finally deciding which of these options is likely to have the intended effect. The intended effect is a result that can be considered as an appropriate and adequate response to the child's criminal behaviour (LIEFFHARD, 2008, p. 195).

35. For a discussion of poverty in the context of intercountry adoption, see SMOLIN (2007).

36. For instance, under Article 31 of the 1990 Children's Code of Brazil, international adoption is an exceptional measure after all attempts at adoption in the country of origin have been exhausted and thereby guaranteeing the right of the child to live in his own country.

37. See section on "Understanding 'last resort': Any lessons from the principles of juvenile justice?" above.

RESUMO

A crescente popularidade das adoções internacionais não é algo recente. Recente, entretanto, é a crescente atração que crianças africanas têm despertado em potenciais pais adotivos que vivem em outras partes do mundo, como exemplificado pelas adoções de Angelina Jolie e Madonna. As opiniões sobre a adoção internacional estão divididas entre a necessidade e conveniência desta prática, mas a visão que a considera uma panacéia para crianças sem pais e pais sem filhos prevalece. Por outro lado, alguns países têm se mostrado resistentes à retirada de crianças do Terceiro Mundo de seus ambientes familiares para serem alocadas em casas fora de seu país natal – prática entendida como “imperialista”. Atualmente, a idéia a qual a adoção internacional esta ligada é a de que esta seria uma medida de último recurso, mas pesquisas sobre qual o seu verdadeiro significado (ou qual deveria sê-lo), e quais as suas implicações para a política de bem-estar da criança e para a legislação africana são difíceis de encontrar. Este artigo pretende contribuir para o preenchimento desta lacuna.

PALAVRAS-CHAVE

Adoção internacional – Princípio da Subsidiariedade – Medidas de Último Recurso – Direito da Criança – África.

RESUMEN

La mayor popularidad de la adopción internacional no es nada nuevo. Pero sí lo es el mayor interés que están despertando los niños africanos en los potenciales padres adoptivos de otras partes del mundo, como es el caso de las adopciones realizadas por Angelina Jolie y Madonna. Las opiniones acerca de si la adopción internacional es necesaria y correcta están divididas, pero predomina la idea de que este tipo de adopción es la panacea para los niños sin padres y para los padres sin hijos. Por otra parte, algunos estados de origen se han resistido a colocar niños del Tercer Mundo privados de su medio familiar en hogares fuera de su país natal, por considerar que ésta es una práctica supuestamente “imperialista”. En los últimos tiempos, se ha dispuesto que la adopción internacional debería utilizarse como medida de último recurso; sin embargo, prácticamente no existen investigaciones sobre qué significa (o qué debería significar) esto en realidad, y cuáles son sus consecuencias para el derecho y la política de bienestar infantil en África. La finalidad de este artículo es contribuir a llenar este vacío.

PALABRAS CLAVE

Adopción internacional – Principio de subsidiariedad – Medida de último recurso – Derechos de los niños – África.