

**Inter-country adoptions and the best
interests of the child**

by

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LLB

**Submitted in accordance with the requirements for the degree Master Legum
in Comparative Child Law at the North-West University (Potchefstroom
Campus), South Africa**

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2012

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Aan my Ma en Pa (Andre en Joyce)

Dankie vir Alles

ABSTRACT

The concept of inter-country adoptions was reintroduced into the South African legal sphere in *The Minister of Social Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC), where the constitutionality of section 18(4)(f) of the *Child Care Act* 74 of 1983, which prohibited inter-country adoptions, was successfully challenged. The decision evoked criticism from all around the world, some in favour of inter-country adoptions and others not.

In considering this decision, one also has to keep in mind section 28(1)(b) of the *Constitution of the Republic of South Africa, 1996* which affords every child the right to family care or parental care, or to appropriate alternative care when removed from the family environment.

The aim of this paper is to investigate the inner workings of inter-country adoptions, which are regulated by the *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* of 1993 and, nationally, the *Children's Act* 38 of 2005. These findings will then be relayed back to the 'best interests of the child' principle to determine whether inter-country adoption is in the best interests of the child, or not.

Key words: Best interests of the child; Inter-country adoption; Hague Convention; Child law; Family law; Adoption; Cultural identity.

OPSOMMING

Die konsep van interstaatlike aanneming is hernu in die Suid Afrikaanse regsfeer in die saak *The Minister of Social Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) toe artikel 18(4)(f) van die *Wet op Kindersorg* 74 van 1983, wat interstaatlike aannemings verbied het, ongrondwetlik verklaar was. Hierdie beslissing het kritiek van regoor die hele wêreld ontlok, sommige ten gunste van interstaatlike aannemings en ander nie.

Met in ag neming van die bogenoemde, is dit ook belangrik om artikel 28(1)(b) van die *Grondwet van die Republiek van Suid Afrika*, 1996 ingedagte te hou, wat bepaal dat elke kind 'n reg het op familie sorg of ouer sorg, of op gepaste alternatiewe sorg wanneer die kind uit die gesinsomgewing weggeneem word.

Die doel van hierdie skripsie, is om ondersoek in te stel na die prosedures en effektiwiteit van interstaatlike aannemings, wat gereguleer word deur die *Haagse Konvensie* en, nasionaal, deur die *Kinderwet* 38 van 2005. Alle relevante faktore, wetgewing en instrumente sal in ag geneem word om sodoende te bepaal of interstaatlike aannemings in die beste belange van die kind is, aldan nie.

Sleutel Terme: Beste belange van die kind; Interstaatlike aanneming; Haagse Konvensie; Familiereg; Kinderreg; Aanneming, Kulturele identiteit.

1. Introduction

The *Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoptions* of 1993¹ is the leading authority on inter-country adoptions and the best interests of the child. The main aims of the *Hague Convention* are to promote the best interests of the child, to eradicate any form of child abduction or trafficking and to address the serious problem of geographical as well as social relocation.² The *Hague Convention* does this by setting international standards with which all state parties must comply. It requires that all states party to the *Hague Convention* establish a central authority which will serve as a foundation for the regulation of all inter-country adoptions.³ South Africa has done so by incorporating the relevant provisions of the *Hague Convention* into national legislation through chapter 16 of the *Children's Act* 38 of 2005⁴, which came into force in 2009.

Statistics show that over 30 000 children are moving between more than a hundred countries each year. As pointed out by the *Hague Convention*⁵, an important aspect to consider with regard to inter-country adoptions is the best interests of the child.⁶ Section 28(2) of the *Constitution of the Republic of South Africa*, 1996⁷, article 3 of the *United Nations Convention on the Rights of the Child*⁸ and article 4 of the *African Charter on the Rights and Welfare of the Child*⁹, to both of which South Africa is a state party, clearly state that the best interests of the child is of paramount importance in any matter concerning the child. It follows that when it comes to inter-country adoptions the best interests of the child should be the primary concern and this again raises the question of to what extent the best interests of the child can be ensured in the case of inter-country adoptions. This study will focus on the factors which have to be taken into account to ensure that the best interests of the child are served.

1 *Hague Convention on the Protection of the Child and Co-operation in Respect of Inter-country Adoptions* of 1993 (hereafter the *Hague Convention*).

2 Preamble of the *Hague Convention*.

3 Article 6(1) of the *Hague Convention*.

4 Chapter 16 of the *Children's Act* 38 of 2005 (hereafter *Children's Act*).

5 See footnote 2.

6 Selman 2002 *Population Research and Policy Review* 206.

7 Section 28(2) of the *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*).

8 Article 3 of the *United Nations Convention on the Rights of the Child* (hereafter CRC).

9 Article 4 of the *African Charter on the Rights and Welfare of the Child* (hereafter the ACRWC).

2. Historical overview of inter-country adoptions in South Africa

Before 2000, inter-country adoption in South Africa was unlawful. In 2000, however, the constitutionality of such unlawfulness was challenged in the *Minister of Social Welfare and Population Development v Fitzpatrick*.¹⁰ The Respondents were British citizens who had been living permanently in South Africa since 1997. The Respondents sought to adopt a minor child who was born to a South African citizen. However section 18(4)(f) of the *Child Care Act*¹¹ prohibited the adoption of a child born of a South African citizen by a non-citizen or by an individual who had the necessary residential qualifications for South African citizenship but who had not applied for a neutralisation certificate.¹²

The Respondents applied to the Cape High Court¹³ for an order declaring section 18(4)(f) of the *Child Care Act* inconsistent with the provisions of the *Constitution*.¹⁴ In the High Court, the Minister of Welfare and Population Development agreed that the provisions of section 18(4)(f) of the *Child Care Act* were unconstitutional to the extent that they prohibited the adoption of children born of a South African citizen. However, the Minister sought and was granted an order suspending, for a period of two years, the declaration that section 18(4)(f) of the *Child Care Act* was invalid, in order for Parliament to correct the defective legislation.¹⁵ This suspension of two years meant that the Respondents would not be able to adopt the child. The High Court did, however, in the interim, appoint the Respondents as joint guardians of the child.¹⁶

Based on sections 167(5)¹⁷ and 172(2)(a)¹⁸ and (d)¹⁹ of the *Constitution*, the Minister then approached the Constitutional Court to confirm the order granted by the High

10 *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC).

11 *Child Care Act* 74 of 1983 which was replaced by the *Children's Act* 38 of 2005.

12 *Fitzpatrick v Minister of Social Welfare and Population Development* 2000 3 SA 139 (C) para 1 (hereafter the *Fitzpatrick* case).

13 *Fitzpatrick* para 1.

14 *Fitzpatrick* para 2.

15 *Fitzpatrick* para 3.

16 *Fitzpatrick* para 2.

17 Section 167(5) of the *Constitution* states: "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."

18 Section 172(2)(a) of the *Constitution* reads as follows; "The Supreme Court of Appeal, a High Court or a Court of similar status may make an order concerning the constitutional validity of

Court. The Court invited the curator *ad litem* of the child to furnish it with a written report on whether the best interests of the child would be served if the Constitutional Court were to confirm the findings of the High Court.²⁰ The curator *ad litem* of the child was of the opinion that the child's best interests would best be served by an immediate adoption order in favour of the Respondents. The curator therefore opposed the suspension order of the High Court.²¹

Two broad issues needed consideration by the Constitutional Court, namely:

- (a) whether the provision of section 18(4)(f) of the *Child Care Act* was in conflict with the *Constitution*; and
- (b) if so, whether the suspended High Court order should remain or another order should have been made altogether.

In respect of the first question, the Constitutional Court stated that in order for it to confirm the invalidity, it first had to be satisfied that the provision was unconstitutional. Counsel for the Minister submitted that the provisions of section 18(4)(f) were inconsistent with the rights to equality (section 9 of the *Constitution*)²² and the rights of the child (section 28 of the *Constitution*)²³. The Constitutional Court

19 an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.”
Section 172(2)(d) of the *Constitution* reads: “Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of Constitutional invalidity by a court in terms of this subsection.”

20 *Fitzpatrick* para 10.

21 *Fitzpatrick* para 4.

22 Section 9 of the *Constitution* states: “(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.”

23 Section 28 of the *Constitution* states: “(1) Every child has the right-(a) to a name and a nationality from birth; (b) to family care or parental care, or to appropriate alternative care when removed from the family environment; (c) to basic nutrition, shelter, basic health care services and social services; (d) to be protected from maltreatment, neglect, abuse or degradation; (e) to be protected from exploitative labour practices; (f) not to be required or permitted to perform work or provide services that- (i) are inappropriate for a person of that child's age; or (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development; (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be- (i) kept separately from detained persons over the age of 18 years; and (ii) treated in a manner, and kept in conditions, that take account of the child's age; (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and (i) not to be used directly

stated that it was concerned with both the rights of the prospective adoptive parents on the one hand, and the rights of the child on the other. It was argued by the Applicants that if the application was to be refused it would place the best interests of the child secondary to the policies of the department. Goldstone J made the following statement:

...it is necessary that the best interests standard should be flexible as individual circumstances will determine which factors secure the best interests of the child.²⁴

The Constitutional Court came to the conclusion that section 18(4)(f) of the *Child Care Act* was indeed inconsistent with the provisions of section 28 of the *Constitution* and thus unconstitutional. The Constitutional Court stated that section 28(2) of the *Constitution* requires that the best interests of the child be granted paramount importance in every matter concerning the child.²⁵ The court made it clear that the facts of the case clearly illustrated that the best interests of the child born to South African parents may well lie in such child being adopted by non-South African parents.²⁶

With regard to the question of the validity of the suspension order granted by the High Court, the Constitutional Court stated that it would be in the best interests of the child and the Respondents for the status of the child to be determined before they finally left South Africa. This notion was also confirmed by the Minister.²⁷ The Minister however argued that if the invalidity was not suspended, there would be inadequate safeguards against child trafficking. The Constitutional Court on the other hand held that the absence of bilateral agreements that regulate inter-country adoptions was not a justification for suspending the order of invalidity.²⁸

The Constitutional Court came to the conclusion that such suspension would be prejudicial to the health of the child as the status of the child would be suspended with obvious unfavourable consequences, such as the prolonged institutionalisation

in armed conflict, and to be protected in times of armed conflict. (2) A child's best interests are of paramount importance in every matter concerning the child. (3) In this section "child" means a person under the age of 18 years."

24 *Fitzpatrick* para 16.

25 *Fitzpatrick* para 16.

26 *Fitzpatrick* para 19.

27 *Fitzpatrick* para 22.

28 *Fitzpatrick* para 33.

of the child and the lack of a loving and caring family environment, which is essential to the wellbeing of the child. There were also material advantages, which a child in institutional care would never be able to obtain.²⁹ Taking this into consideration, it was held that the public interests and the best interests of the child would not be served if a suspension order was granted³⁰ and that the order of the High Court suspending the order of invalidity was thus not warranted and should be set aside.³¹ In deciding that it would be in the best interests of the child to be adopted by the Fitzpatrick's the judge made the following statement:

South African nationality is no guarantee that adoptive parents will continue to reside within the jurisdiction of South African social welfare services. What is more, the protection conferred by section 18(4)(f) does not extend to children, orphaned or abandoned in South Africa, but born of non-South African parents.³²

Judge Goldstone further stated that:

The provisions of section 18(4)(f) are too blunt and all-embracing to the extent that they provide that under no circumstance may a child born to a South African citizen be adopted by a non-South African citizen. To that extent they do not give paramountcy to the best interests of the child and are inconsistent with the provisions of section 28(2) of the Constitution and hence invalid.³³

The Constitutional Court granted an immediate order of invalidity: the rationale being that a suspension order of invalidity was unnecessary as there were adequate legislative safeguards in the *Child Care Act* to regulate inter-country adoptions.³⁴ Thus it is clear from the discussion above that inter-country adoption in South Africa is fairly uncharted territory. The *Fitzpatrick* case, however, laid the foundation for inter-country adoptions in South Africa and the *Children's Act* has, since then, come a long way towards complying with the foundations laid down in the *Fitzpatrick* case.³⁵

29 In *Du Toits v Minister and Population Development and Others* 2003 2 SA 198 (CC) para 3, it was stated that where the best interests of a child are at stake, it is important that their best interests are fully aired before the court so as to avoid injustice to them and possible others.

30 *Fitzpatrick* para 36.

31 *Fitzpatrick* para 36.

32 *Fitzpatrick* para 19.

33 *Fitzpatrick* para 20.

34 Mosikatsana 2003 *South African Law Journal* 111.

35 Boezaart *Child Law in South Africa* 377.

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

The preamble of the *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoptions* states:

...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.

...intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin...

It is clear from the preamble of the *Hague Convention* that it recognises the important role that growing up in a family environment plays in ensuring the harmonious development of the child's personality. It continues by stating that while it is important for a child to remain in the care of his or her country of origin, it recognises that inter-country adoption can offer advantages to a child by providing the child with a permanent home and family environment.

The *Hague Convention* is the product of long, drawn-out negotiations and the introduction thereof was welcomed across the world as evidenced by its unanimous approval at the seventeenth session of the Hague Conference on Private International Law.³⁶ The reasons for the establishment of this *Convention*, according to the *Explanatory Report on Protection of Children and Co-operation in Respect of Intercountry Adoption*, were three-fold: firstly,³⁷ because there had been a dramatic increase in international adoptions in many countries since the late 1960's, to the extent that inter-country adoptions had become a worldwide phenomenon involving the geographical relocation of children over long distances; secondly,³⁸ because there were serious and complex human rights problems, some already known but now aggravated as a result of the substantial increase in inter-country adoptions,

36 Boezaart *Child Law in South Africa* 378; Pfund *Family Law Quarterly* 53. *The Hague Convention* was adopted during the 17th Session of the Hague Conference on Private International Law 29 May 1993.

37 Parra-Aranguren 1993 *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* para 6(i).

38 Parra-Aranguren 1993 *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* para 6(ii).

while others were new with complex legal aspects; and thirdly,³⁹ because of insufficient domestic and international legal instruments to address the issues relating to inter-country adoptions.

The *Hague Convention* saw the need for binding into existence principles, co-operation and communication between countries with regard to inter-country adoptions. Inter-country adoptions are seen as a very valuable tool in contributing to the alleviation of poverty in cases where a child cannot be cared for in his or her country of origin.⁴⁰ The *Hague Convention* sees inter-country adoption as one possible subsidiary to suitable domestic arrangements.⁴¹ It can thus be said that the main objectives of the *Hague Convention* are to establish safeguards to ensure that inter-country adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised by international law; to establish a system of co-operation amongst contracting states; and to ensure that the safeguards that are in place are respected.⁴² The *Hague Convention* requires that all state parties must establish a central authority that will serve as the leading authority in every case concerning inter-country adoptions.⁴³

3.1 The scope of the Hague Convention

The scope of the *Hague Convention* is clearly set out in article 2 of the *Convention* itself. Article 2 states:

The *Convention* shall apply where a child habitually resident in one contracting state ('the State of origin') has been, is being, or is to be moved to another Contracting State ('the receiving State') either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin.

The *Hague Convention* only covers adoptions which will create a permanent parent-child relationship.⁴⁴ The *Hague Convention* sets forth administrative as well as

39 Parra-Aranguren 1993 *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* para 6(iii).

40 Aguetant 2008 www.childtrafficking.com/.../adopting_rights_child_unicef29.

41 Boezaart *Child Law in South Africa* 379.

42 Article 1 of the *Hague Convention*.

43 Article 6 of the *Hague Convention*.

44 Article 2 of the *Hague Convention*.

procedural rules to divide the responsibilities in respect of inter-country adoption between the receiving state and state of origin.⁴⁵ Article 2 clearly governs and permits adoptions by married couples, as well as by individuals, habitually resident in the receiving state. Although homosexual adoptions are not expressly addressed in the *Hague Convention*⁴⁶, the neutral provision of the *Convention*, which states that a child must be placed in a 'family' environment, could possibly be interpreted as an endorsement.⁴⁷ Each contracting state has the competency to determine whether a couple or an individual is fit to adopt a child. Article 41 stipulates, unequivocally, that the *Hague Convention* will be applied to every inter-country adoption.⁴⁸

3.2 The objectives of the Hague Convention

The main aim of the *Hague Convention* is to establish a safeguard for children and to ensure that inter-country adoptions take place in the best interests of the child, that is, to ensure that all adoptions are in line with the human rights of the child, as guaranteed and protected by international law.⁴⁹ The *Hague Convention* further aims to ensure that contracting states conduct inter-country adoptions in accordance with the regulations set forth by the *Convention*.⁵⁰ In terms of article 2(1), a child need not be a national of the contracting state to be adoptable; the child must only be a habitual resident in the contracting state. However, if a child is a national of a contracting state but not a habitual resident, then the *Convention* will not be applicable.⁵¹ The *Hague Convention* thus only applies to children who are refugees or internationally displaced where the child and the prospective adoptive parents habitually reside in different contracting states.⁵² However, the Special Commission on the Implementation of the *Hague Convention*⁵³ proposed that the *Convention* should also be applicable in more widespread cases, for instance where the child and the adoptive parents are habitually resident in the same contracting state. It is, however, important to note that the proposals made by the Special Commission do

45 Boezaart *Child Law in South Africa* 380.

46 Parra-Aranguren 1993 *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* para 14-15.

47 Wardle 2008 *Indiana International and Comparative Law Review* 136.

48 Pfund *Family Law Quarterly* 54.

49 Bojorge 2002 *Queensland University of Technology Law and Justice Journal* 269.

50 Article 1(c) of the *Hague Convention*.

51 Article 2(2) of the *Hague Convention*.

52 Bojorge 2002 *Queensland University of Technology Law and Justice Journal* 269.

53 *Conclusions and Recommendations and Report of the Special Commission on the Practical Operations of the 1993 Hague Intercountry Adoption Convention* (hereafter the Special Commission Report).

not obligate contracting states to follow them and, in many instances, the contracting states refuse to implement these recommendations.⁵⁴

3.3 Central authorities

Each signatory nation is required to establish a central authority, which must carry out the duties imposed on it by the *Hague Convention*.⁵⁵ The main goal of the central authorities is to realise the objectives of the *Hague Convention* and to ensure that they are properly implemented.⁵⁶ The central authority is required to implement suitable legislation to combat the trafficking of children.⁵⁷ The *Hague Convention* requires that the central authority:

- (i) collect, preserve or exchange all information necessary to an adoption matter;
- (ii) facilitate the process to obtain a speedy and successful adoption;
- (iii) promote adoption counselling and follow-up services in their state;
- (iv) prepare and exchange evaluation reports on inter-country adoptions; and
- (v) respond to legitimate requests for information pertaining to specific adoptions.

Contracting states may perform their functions directly or delegate their functions to other competent accredited bodies.⁵⁸ These bodies must comply with certain minimum standards before accreditation or renewal will be granted.⁵⁹ All state parties are obligated to send reports of all designated Central Authorities and their functions, as well as details of accredited bodies, or any other body permitted to perform Central Authority functions, to the *Bureau of the Hague Convention on Private International Law*.⁶⁰ The accredited bodies must satisfy certain minimum requirements as stipulated in article 11, namely they must:

- (a) pursue only non-profit objectives... within such limits as may be established by the competent authorities...;
- (b) be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption; and

54 Bojorge 2002 *Queensland University of Technology Law and Justice Journal* 270.

55 Article 6 of the *Hague Convention* states: "(1) A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the *Convention* upon such authorities. (2) Federal states, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and to specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State."

56 Article 7 of the *Hague Convention*.

57 Article 8 of the *Hague Convention*.

58 Boezaart *Child Law in South Africa* 382.

59 Article 10 of the *Hague Convention*.

60 Boezaart *Child Law in South Africa* 383.

(c) be subject to supervision by the competent authorities of the State as to its composition, operation and financial situation.

(d)

Conversely, in terms of article 22, non-accredited bodies or persons are not limited to the pursuance of non-profit objectives.⁶¹ These non-accredited bodies are, however, still required to abide by the requirements of integrity, professional competence, experience and accountability to the state, and to the standards of training and experience set forth by the *Hague Convention*.⁶²

3.4 Duties of the state of origin as set forth by the Hague Convention

Article 4 of the *Hague Convention* imposes certain duties on contracting states. It states that an adoption can only take place if the competent authorities of the state of origin comply with the following principles:

3.4.1 Adoptability of the child

The term 'adoptable' is not defined in the *Hague Convention*. Parra-Aranguren⁶³ in his commentary stated that the term 'adoptable' refers to legal, social and cultural factors. The contracting state must take appropriate steps to ensure that a child is declared abandoned or orphaned before the child can be considered adoptable. Bojorge⁶⁴ is of the opinion that it would be advisable for the *Hague Convention* to define the term 'adoptable' and to outline clearly the circumstances under which a child can be considered adoptable and under which such adoption will be considered to be in the best interests of the child.

3.4.2 Subsidiary principle

The subsidiary principle can be seen as a central issue in the fortification of children deprived of a family life. This principle must be used as a directive when it comes to planning the future of a child. The preamble of the CRC clearly states that a family

61 Bojorge 2002 *Queensland University of Technology Law and Justice Journal* 270.

62 Article 22(5)(a) and (b) of the *Hague Convention*.

63 Parra-Aranguren 1993 *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* 117.

64 Bojorge 2002 *Queensland University of Technology Law and Justice Journal* 271.

solution must be sought before any other solution is considered. This will enable the child to grow up in a familiar environment which is beneficial to the physical and psychological development of the child.⁶⁵ Article 21 of the CRC requires that all measures must be taken to place the child nationally before placing a child abroad. However, when the *Hague Convention* was drafted, it was decided by delegates that there are certain instances where it would be in the best interests of the child to resort to inter-country adoption even though a family is available in the child's country of origin.⁶⁶ Examples of such a situation would be where a child is adopted by a family abroad or the child is handicapped and he or she cannot receive sufficient care in his or her own country.⁶⁷

3.4.3 Parties to the adoption

According to article 4(c) of the *Hague Convention* it is required that:

- (1) persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effect of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin;
- (2) such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing;
- (3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn; and
- (4) the consent of the mother, where required, has been given only after the birth of the child.

It is important to note that the counselling given to those who have given consent at this point is only general, as the prospective parents are not yet known. Article 9(c) of the *Hague Convention* states that Central Authorities and public or accredited bodies are to promote the development of adoption counselling and post-adoption counselling.⁶⁸ A minimum amount of counselling must be provided to all parties

65 International Reference Centre for the Right of Children Deprived of their Family Life 2007 <http://.iss-ssi.org>.

66 Parra-Aranguren 1993 *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* para 40.

67 Bojorge 2002 *Queensland University of Technology Law and Justice Journal* 271.

68 Article 29 of the *Hague Convention* prohibits any contact between adoptive parents and relinquished parents until articles 4(a)-(c) and 5(a) have been complied with.

concerned. This will enable parties to be duly informed of the implications of inter-country adoptions.⁶⁹

Advising the parties as to their legal position and relationship with the child is also a very important aspect that has to be addressed before an adoption can commence. This is a very important step because it will prevent parents from relinquishing their child under false pretences. It is important that consent to the adoption be given freely and not under duress or fraud. This is seen as a vital part of combating the trafficking and sale of children.⁷⁰ Article 32 of the *Hague Convention* states clearly that no one is to derive improper financial or other gain from an activity related to inter-country adoption.⁷¹ An inherent weakness in this article, however, is the fact that the *Hague Convention* does not outline any consequences if there is a breach of this stipulation. Bojorge⁷² clearly states that the *Hague Convention* only indirectly aims to prevent the sale and trafficking of children by establishing safeguards for countries to abide by when conducting adoptions.⁷³

3.4.4 *The voice of the child*

Article 4(d) of the Hague Convention states the following:

An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin-

69 Bojorge 2002 *Queensland University of Technology Law and Justice Journal* 272.

70 Bojorge 2002 *Queensland University of Technology Law and Justice Journal* 274.

71 Article 4(c)(2) of the *Hague Convention*: "An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin... have ensured that such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing." Equally important, is that consent is not induced by payment or compensation of any kind. Article 8 of the *Hague Convention* requires the Central Authorities and public authorities to take all appropriate measures to prevent improper financial or other gain in connection with the adoption. Bojorge states that neither 'improper financial gain' nor 'other gain' is defined in the *Hague Convention*, which leaves room for a diverse interpretation of what improper financial gain constitutes.

72 Bojorge 2002 *Queensland University of Technology Law and Justice Journal* 273.

73 Other international and regional instruments aimed at the protection of children against trafficking include: *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*; *United Nations Convention Against Transnational Organized Crime*; *The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*; *The Rome Statute of the International Criminal Court*; *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*; and *The International Labour Organisation Convention No. 182 - Concerning the Prohibition and Immediate Action for Elimination of the Worst Forms of Child Labour*; *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*.

- (d) have ensured, having regard to the age degree of maturity of the child, that:
 - (1) he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required;
 - (2) consideration has been given to the child's wishes and opinions;
 - (3) the child's consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing; and
 - (4) such consent has not been induced by payment or compensation of any kind.

The age at which a child must consent to his or her adoption was fiercely debated during the drafting of the *Hague Convention*. Many delegates suggested a minimum age.⁷⁴ It was however decided that competent authorities have discretion in determining the minimum age at which a child can consent.⁷⁵ Article 12(1) of the CRC states that:

State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, those views of the child being given due weight in accordance with the age and maturity of the child.

3.5 The duties of receiving states

The *Hague Convention* identifies certain minimum responsibilities with which receiving states have to comply. According to article 5 of the *Hague Convention*, the competent authorities of the receiving state must determine the eligibility and sustainability of adoptive parents, counsel the prospective adoptive parents and lastly authorise the entry of the child into the receiving state.

3.5.1 Eligibility and suitability of adoptive parents

When ascertaining whether prospective adoptive parents should be allowed to adopt a child, it is important to distinguish between two principles, namely eligibility and suitability. These principles are the two key preconditions for a successful adoption. Eligibility concerns the question of whether couples may qualify as prospective adoptive parents.⁷⁶ Suitability on the other hand goes a bit further and asks the question of whether prospective adoptive parents will be suited parents for a

74 Parra-Aranguren 1993 *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* para 157.

75 Bojorge 2002 *Queensland University of Technology Law and Justice Journal* 274.

76 Murphy *International Dimensions in Family Law* 191.

particular child. The *Hague Convention* in this regard does not elaborate on what exactly constitutes eligibility or suitability. It is the duty of the central authorities of the state parties to establish and impose their own criteria for what eligibility and suitability entail.⁷⁷

When determining whether adoptive parents are eligible and suitable to adopt, the preamble of the *Hague Convention* and the fact that the best interests of the child is the paramount consideration, should be kept in mind.⁷⁸ The central authority must be satisfied that the prospective adoptive parents are eligible and suitable to adopt.⁷⁹ The central authority must then compile an assessment report and send the report to the country of origin.⁸⁰ This report must include the identities, eligibility and suitability of the applicants to adopt, their medical and family history, their social environment, their reasons for wanting to adopt, the applicants' ability to undertake an inter-country adoption and the characteristics of the children whom they wish to adopt.⁸¹ It is important to note that any contact is prohibited between the prospective adoptive parents and the parents of the child or another person who is responsible for the child until this step is completed to ensure that undue influence is kept at bay and that the biological parents are free to make important decisions.⁸²

3.5.2 *Counselling of adoptive parents*

The counselling of prospective adoptive parents is extremely vital⁸³ because it will inform prospective adoptive parents about and prepare them for the adoption before eligibility and suitability are determined, as well as allow them to meet other applicants who are also at the early stage of the process to develop a support base.⁸⁴ The receiving state is obligated, either directly or through a public authority or through accredited private bodies, to provide counselling and to promote the

77 Murphy *International Dimensions in Family Law* 192.

78 Bojorge 2002 *Queensland University of Technology Law and Justice Journal* 278.

79 Article 5(a) of the *Hague Convention*.

80 Article 15 of the *Hague Convention*.

81 Article 15 of the *Hague Convention*.

82 Parra-Aranguren 1993 *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* 180.

83 Africa; The New Frontier for Intercountry Adoptions; The African Child Policy Forum 2012 <http://www.africanchildforum.org>.

84 Bojorge 2002 *Queensland University of Technology Law and Justice Journal* 279.

development of adoption counselling.⁸⁵ The counselling will allow prospective parents to explore their expectations and also provide an opportunity for prospective parents to learn more about the child's possible experiences in the child's country of origin. Parents will be able to determine at an early stage in the adoption whether they are able to take on the responsibilities or opt out of the adoption.⁸⁶ Applicants can thus be better prepared and informed about the adoption before eligibility and suitability are determined.⁸⁷

3.5.3 Authorisation for child to enter into and reside in receiving state

Article 17 of the *Hague Convention* determines that any decision in the state of origin that a child should be entrusted to the prospective adoptive parents may only be made if:

- (a) the Central Authority of that State has ensured that the prospective adoptive parents agree; and
- (b) the Central Authority of the receiving State has approved the decision; and
- (c) the Central Authorities of both States have agreed that the adoption may proceed; and
- (d) it has been determined, in accordance with article 5, that the prospective adoptive parents are eligible to adopt and suited to adopt and that the child is or will be authorised to enter and reside permanently in the receiving State.

The central authorities of both states are then required to take all essential steps to obtain authorisation for the child to leave the state of origin and to enter and reside permanently in the receiving state.⁸⁸ Keep in mind that these requirements are only minimum safeguards to protect the child and that receiving states are free to impose more stringent requirements. Article 19 of the *Hague Convention* then allows for the transfer of the child to the receiving state. This is, however, under secure and appropriate circumstances, namely, under the supervision of the prospective adoptive parents.⁸⁹

85 Parra-Aranguren 1993 *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* 184.

86 Cantwell 2011 www.commissioner.coe.int 16.

87 Bojorge 2002 *Queensland University of Technology Law and Justice Journal* 279.

88 Article 18 of the *Hague Convention*.

89 Bojorge 2002 *Queensland University of Technology Law and Justice Journal* 280.

3.6 Recognition of adoption

The *Hague Convention* has universal consequences and any certified adoption performed in a contracting state will automatically be recognised by other contracting states.⁹⁰ The *Hague Convention* applies to two types of adoptions:

- (i) 'full adoptions' where the legal relationship between the child and the biological parent is completely severed; and
- (ii) 'simple adoptions' where the legal relationship between the child and the biological parents is not completely severed.⁹¹

Considering the latter, the question that needs to be answered is whether severing the contact between biological families and the adopted child is in the best interests of the child. When looking at sections 242(1)⁹² and 242(3) of the *Children's Act*, which clearly state that an adopted child must for all purposes be regarded as the child of the adopted parent and an adoptive parent must for all purposes be regarded as the parent of the adopted child, one tends to get the idea that the *Children's Act* wants to make adoptions more permanent in nature.⁹³ It is, however, possible for a court to issue an order that the biological parents can still play an active role in their child's life. Whether this is in the best interests of the child is a case-sensitive question and requires intensive investigation. Ferreira⁹⁴ states that if the biological parents have been part of a child's life prior to the adoption, then a relationship after the adoption is important, especially in relation to protecting the culture of the child. She is further of the opinion that, no matter what any of the parties involved in the adoption might think, the reality is that the adopted child has two sets of parents, and biological ties, if possible and in the best interests of the child, must not be severed.

90 Article 23 of the *Hague Convention*.

91 International Reference Centre for the Right of Children Deprived of their Family Life 2007 <http://.iss-ssi.org>

92 Section 242(1) of the *Children's Act* states: "Except when provided otherwise in the order or in the post-adoption agreement confirmed by the court, an adoption order terminates- (a) all parental responsibilities and rights any person, including a parent, step-parent or parent in a domestic life partnership, had in respect of the child immediately before the adoption; (b) all claims to contact with the child by any family member of a person referred to in paragraph (a)."

93 Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 130.

94 Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 149.

Considering the latter, one must also take into account Africa's unique situation. In 2005 it was estimated South Africa had around 3.4 million orphans. That amounts to 18.6% of all children in South Africa. Nationally, there are 25 000 new foster cases being handled by Child Welfare every month.⁹⁵ These children do not have biological parents. The need for a child to maintain contact with his or her roots nevertheless remains an imperative part of the child's wellbeing.⁹⁶

3.7 The Hague Convention: Culture, race, religion and language

A growing body of opinion has of late emphasised the value of and the need for stability in a child's cultural and ethnic background and there is an accepted notion that the cultural heritage of a child is critical to his or her development.⁹⁷ Article 16(1)(b) of the *Hague Convention* states clearly that the country of origin is to give due consideration to the child's upbringing and to his or her ethnic, cultural and religious background. All children, especially older children, go through an adjustment period during which the child has to adapt to changes in cultural and religious aspects, as well as grieve the loss of family members left behind.⁹⁸ This adapting and grieving process is precisely the reason why critics object to inter-country adoptions, arguing that it deprives a child of his or her cultural roots.⁹⁹ The argument thus goes that it is in the best interests of the child to keep the trauma of adjustment to a minimum and to do this, children (where possible) should be placed in a familiar cultural environment.¹⁰⁰ This is, however, not always achievable and one has to consider facets such as the socio-economic position of the child, the cultural environment of the child, and the language and religion of the child.¹⁰¹

Religion is also a matter that requires a great deal of consideration. Article 14(1) of the CRC states that state parties are to respect the right of a child to freedom of

95 Thokomala 2012 <http://www.thokomala.org.za/statistics.aspx>.

96 Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 132.

97 Van Epps 2010 <http://www.adoptivefamiliescircle.com>.

98 Bojorge 2002 *Queensland University of Technology Law and Justice Journal* 281.

99 Chang *Creating a Cultural Identity* 8 states that transracial adoption refers to the joining of racially different parents and children together in adoptive families; Steinberg and Hall *Inside Transracial Adoption* 21 define transracial adoption as a connection across races, i.e. children who are adopted by parents of a race different from their own.

100 Chang *Creating a Cultural Identity* 8.

101 Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 256.

thought, conscience and religion. The adoptive parents' approach to how they are going raise the child and respect the child's religion is a very important aspect to consider, especially in the cases concerning older children. Adoptive parents should maintain and respect the religious link if that is the wish of the child and in his or her best interests.¹⁰²

Although adoption at any age may, for some children, be an advantageous option, it remains a fact that children who are placed early in their life experience less disruption in relation to the transition from former caregivers, they adapt much quicker to their new language and culture and are less likely to suffer from the developmental stumbling blocks which so often accompany inadequate institutional care.¹⁰³ Taking into consideration the latter, Dillon¹⁰⁴ makes a point by stating that it is important to implement the *Hague Convention* using a regulatory system that fosters, rather than hinders, early placement. Adequate infrastructure is needed to put in place methods of determining that abandoned children are eligible for adoption at an early age, so as not to be inconsistent with the provisions of the *Hague Convention*.¹⁰⁵

Another important factor to consider is the language of the child, especially older children or children who would like to keep their first language. The language aspect can be extremely important to the child because the child can possibly see it as the last link to his or her past.¹⁰⁶

3.8 Conclusion

The *Hague Convention* strongly endorses the process of inter-country adoptions as a means of providing children without homes with permanent families of their own.¹⁰⁷

The *Hague Convention* permits and regulates adoptions for which the central

102 UNHCR 2000 <http://www.unhcr.org/refworld/country>.

103 Blair 2005 *Capital University Law Review* 349.

104 Blair 2005 *Capital University Law Review* 350.

105 Blair 2005 *Capital University Law Review* 350.

106 Article 30 of the CRC states: "In those states in which ethnic, religion or linguistic minorities or people of indigenous origin exist, a child belonging to such minority or who is indigenous shall be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion or to use his or her own language."

107 Pfund *Family Law Quarterly* 74.

authorities, other public authorities, accredited agencies, lawyers and social workers provide the adoption services. There are, however, serious limitations to the effectiveness of the *Hague Convention*. An evident flaw in the *Hague Convention* is the fact that there are no penalties or sanctions in place for non-compliance. The *Convention* is based in the principle of co-operation and it is essential that there is efficient co-operation and communication between all bodies concerned, but if there is no accountability, the chance of full compliance becomes very unlikely. According to Bojorge,¹⁰⁸ the *Hague Convention* has failed to establish and provide mechanisms for the protection of children and has therefore not addressed or considered the best interests of the child. She further states that it could be a lot more effective if it ensured that adoptions took place in the best interests of the child, which would have been the case if financial gain had been prohibited under articles 8 and 32 of the *Hague Convention*. Another aspect that deserves consideration is the fact that the *Convention* has no individual complaint system, which in turn drastically limits the scope and effectiveness of the *Hague Convention*. The only system in place is the Hague Convention's Special Commission on Inter-country Adoption, which only convenes at five-year intervals and is not permanently staffed or able to conduct fact-finding missions, which drastically limits the effectiveness of the *Hague Convention*.¹⁰⁹

Furthermore, it has been argued that the *Convention* does not address the cultural and religious needs of children in sending countries but rather creates a false perception of transnational identities. There is no provision made regarding the duty of adoptive parents to help the adopted child with issues regarding race or the willingness of adoptive parents to accommodate the child's cultural practices and language. These are extremely important aspects that can possibly have a drastic effect on whether the adoption is successful or not. Although inter-country adoptions have provided thousands of children with loving homes, there still remains much scepticism about the inadequacies which open the door for many unwanted consequences.¹¹⁰

108 Bojorge 2002 *Queensland University of Technology Law and Justice Journal* 291.

109 Blair 2005 *Capital University Law Review* 401.

110 Blair 2005 *Capital University Law Review* 381.

One also has to take into account the socio-economic circumstances of children, which play, or rather should play, a major role when considering inter-country adoption. In its *Social Profile of South Africa* report,¹¹¹ which uses general household survey data from 2002 to 2010, Statistics South Africa estimated that children comprise 40% of the total population.¹¹² Further, that approximately 19.6% of all children in South Africa, representing approximately 3,6 million individuals, are orphaned; approximately 0,5% of children (approximately 100 000) live in child-headed households; 18,6 % of children live in households that experience hunger; and 19,9% of all children aged 15 years have not completed primary school.¹¹³ It is thus clear that South Africa is in desperate need of resources and help to alleviate these hardships. The *Hague Convention* is considered to be one of these resources and, although flawed in some aspects, it still has the potential to provide children with a loving home and food in their stomachs.¹¹⁴

Thus when one considers the role of the *Hague Convention* in prescribing the process that needs to be followed for a successful inter-country adoption, one must also keep in mind that this process is considerably defective, which begs the question of whether the best interests of the child can be placed solely in the hands of an already flawed system and, if not, what the alternatives are.

111 Statistics South Africa 2002-2009 *Social profile of South Africa* report no: 03-19-00.
108 Statistics South Africa 2011, www.statssa.gov.za, estimates the current population at approximately 50.59 million in mid-2011.
113 Statistics South Africa 2002-2009 *Social profile of South Africa* report no: 03-19-00.
114 Boezaart *Child Law in South Africa* 304.

4. *Children's Act 38 of 2005*

4.1 Introduction

The *Children's Act 38 of 2005* (hereafter *Children's Act*) addresses the concerns raised by the absence of a regulatory framework for inter-country adoptions by incorporating the provisions of the *Hague Convention* in chapter 16 of the *Children's Act*. Chapter 16 contains clear-cut provisions dealing with inter-country adoptions in South Africa and is seen as the medium through which the principles of the *Hague Convention* are applied in South Africa.¹¹⁵ The *Children's Act* regulates situations in which South Africa is a sending as well as receiving country.¹¹⁶ Where there is any conflict between the laws of the Republic and the *Hague Convention*, the *Convention* shall apply.¹¹⁷ The decision to enforce the *Hague Convention* in South African law was the product of long, drawn-out discussion by the South African Law Reform Commission, which compiled both a discussion paper and a report recommending that the provisions of the *Hague Convention* be incorporated into South African law through the *Children's Act*.¹¹⁸ The ethos of the *Hague Convention*, as adopted by the *Children's Act*, is that adoptions should always focus on the child and finding him or her the best possible parents.¹¹⁹ It is evident that the *Hague Convention* imposes some serious duties on South Africa. This is, however, deemed necessary to protect the best interests of the child.¹²⁰ It is thus clear that there is a national legislative framework in place which regulates inter-country adoptions in South Africa. The true test of its effectiveness will, however, lie in the implementation thereof.

115 Couzens 2009 *PER* 83.

116 Sections 264 and 265 of the *Children's Act 38 of 2005* (hereafter *Children's Act*)

117 Section 256(2) of the *Children's Act* states that the *Hague Convention* is to be applied in circumstances where there is any conflict between South African domestic law and the *Hague Convention* principles. Human, in *Commentary on the Children's Act 16*, however states that the *Constitution* remains the supreme law of the country and as such, in instances where the *Convention* principles conflict with the *Constitution*, the *Constitution* will prevail.

118 Boezaart *Child Law in South Africa* 389.

119 Section 254 of the *Children's Act*.

120 Couzens 2009 *PER* 65.

4.2 Central authority

The South African central authority, as required by the *Hague Convention*,¹²¹ is the Director-General of Social Development, whose duty it is to ensure the exchange of vital information about adoptions, generally and specifically.¹²² It is the responsibility of the Director-General to perform the duties under the *Hague Convention* after consulting with the Director-General: Justice and Constitutional Development. In this respect section 258 of the *Children's Act* also plays an important role by determining that the Director-General can delegate functions to officials within the department,¹²³ other organs of state¹²⁴ or to accredited bodies.¹²⁵ It is however important to take note of the fact that accreditation takes place in accordance with the provisions of the *Hague Convention*, which establishes the minimum requirements.¹²⁶ The central authority's main role is to examine the eligibility of applicants, to supervise accredited bodies and to maintain a supervisory role.¹²⁷ Section 260 of the *Children's Act* permits accredited bodies in South Africa to enter into adoption agreements with other foreign adoption agencies¹²⁸. A certified copy of such an agreement must, however, be supplied by an accredited body or by the central authority. The *Children's Act* thus grants the Central Authority a substantial degree of power and this can be seen as a positive development due to the fact that a strict Central Authority is needed for an adequate inter-country adoption system.¹²⁹

The Central Authority also has an assured degree of control over individual cases. The Central Authority must give its consent before an adoption can commence and if it is not convinced that social workers have done everything within their power to keep a child within his/ or her country of origin, it can refuse to consent to the adoption.¹³⁰ It is also possible for the Central Authority to withdraw its consent within

121 See paragraph 3.3.

122 Couzens 2009 *PER* 66.

123 Section 258(1) of the *Children's Act*.

124 Section 258(2)(a) of the *Children's Act*.

125 Section 258(2)(b) of the *Children's Act*.

126 Section 259(2) of the *Children's Act* clearly empowers the Central Authority to grant accreditation for a restricted time or conditionally.

127 Boezaart *Child Law in South Africa* 391.

128 Section 260(1) of the *Children's Act*.

129 Couzens 2009 *PER* 68.

130 Section 261(5)(f) of the *Children's Act*. At this stage it is however not clear whether the Central Authority will exercise this right directly, or will delegate it in accordance with section

a period of 140 days after originally consenting to the adoption, if said withdrawal is in the best interests of the child.¹³¹

The reason that the central authority has general control of inter-country adoptions is to ensure ethical and professional inter-country adoption services. In conclusion, it can be said that the Central Authority plays a pivotal role in inter-country adoptions and for inter-country adoptions to be above board, it is essential that the workings of the Central Authority function at optimal level.¹³²

4.3 Adoptability

It is the duty of the Central Authority to ensure that competent authorities assess the adoptability of the child.¹³³ In this regard it is also important to pay special attention to section 230 of the *Children's Act*, which establishes whether children may be adopted. Section 230 of the *Children's Act*¹³⁴ states the following:

- (1) Any child may be adopted if-
 - (a) the adoption is in the best interests of the child;
 - (b) the child is adoptable; and
 - (c) the provisions of this charter are complied with.
- (2) An adoption social worker must make an assessment to determine whether a child is adoptable.
- (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 parents 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.

The child who is deemed to be adoptable will then be registered in the Register of Adoptable Children and Prospective Adoptive Parents (hereafter RACAP) by the

258(2) read together with section 261(4) of the *Children's Act*. Ideally, this function should be exercised by the Central Authority directly, or if delegated, by an organ of state. This will ensure that the decision of whether to approve or disapprove the adoption will remain under state control. This is ideal because the Central Authority will be in a better position to determine whether social services have made attempts to keep the child within his or her family or community of origin, whether the subsidiary principle has been complied with and whether any improper financial gain took place.

131 Section 261(6)(a) of the *Children's Act*.

132 Couzens 2009 *PER* 73.

133 Sections 258 and 259 of the *Children's Act*.

134 Section 230 of the *Children's Act*.

Director-General of the central authority. The registration will usually take place if a request is made by an adoption social worker, or accredited adoption agency, or accredited child protection organisation or the provincial head of social development. This mechanism will ensure that children are made available for national adoption before inter-country adoption is considered, which is seen as a vital aspect when considering whether or not a child is adoptable.¹³⁵

4.4 Eligibility of prospective parents

The receiving state incurs the responsibility of ensuring that all prospective parents are eligible and suited for adoption.¹³⁶ There are different categories of prospective parents which are stipulated by section 231 of the *Children's Act*, namely, a husband and wife; parents in a permanent domestic life partnership; other persons sharing a common household and forming a permanent family unit; a widower, widow, divorced or unmarried person; a married person whose spouse is the parent of the child or whose permanent domestic life partner is the parent of the child; or biological father and the child was born out of wedlock; or the foster parents of a child.¹³⁷ The *Children's Act* in this respect is a lot more descriptive when it comes to individuals who can adopt and makes room for individuals from all walks of life.¹³⁸

4.5 Consent

A vital part of making an inter-country adoption order is obtaining the required informed consent without coercion or any form of financial incentive.¹³⁹ Consent must be obtained from the parents of the child or any other person who has been appointed as guardian of the child. It is also a prerequisite that the consent of the child is obtained, if the child is ten years or older.¹⁴⁰ It is important to note, however, that consent is also required if a child below the age of ten is of an age and maturity

135 Couzens 2009 *PER* 73 notes that a child must be placed on the RACAP for a minimum of 60 days and only if no fit and proper adoptive parents are available in the Republic can inter-country adoption then be considered.

136 Section 261(4) and (5) of the *Children's Act*.

137 Section 231(1)(i-vii) of the *Children's Act*.

138 See paragraph 3.5.1.

139 Sections 626(5), 264(5) and 265(5) of the *Children's Act*.

140 Section 233(1) of the *Children's Act*.

to understand the consequences of the proposed adoption.¹⁴¹ This requirement will ensure that the child's voice is heard in all matters that concern him or her.¹⁴² This notion of the child's right to be heard is supported by the CRC, the ACRWC and the *Children's Act*. Article 12 of the CRC establishes a child's right generally to express his or her views in all matters that affect that child and article 12(2) of the CRC more specifically provides that a child must be heard in all proceedings that affect him or her. The ACRWC, through article 4(2), gives all children the right to be heard in judicial and administrative matters that affect them. National legislation, in the form of the *Children's Act*, also states that every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate¹⁴³ way and views expressed by the child must be given due consideration. Thus it is clear that the voice of the child should play a vast role in any adoption proceeding and the opinion of the child should be given due consideration.¹⁴⁴

The consent of both the Central Authority of the Republic and the Central Authority of the Convention country (or non-Convention country) must be obtained before the adoption can commence.¹⁴⁵ Section 233(6) of the *Children's Act* explicitly requires that consent be given before a presiding officer of the Children's Court. This section will in turn enable the presiding officer to evaluate for himself whether the consent was given freely.¹⁴⁶ While it is worrisome that Chapter 16 of the *Children's Act* contains no provision which prohibits contact between biological and prospective adoptive parents, the incorporation of the *Hague Convention* into South Africa National law makes this provision automatically applicable.¹⁴⁷ With regard to consent, it is important to note that the parents or guardians of the child (as well as

141 Couzen 2009 *PER* 64.

142 Boezaart *Child Law in South Africa* 93.

143 Section 6(2)(a) of the *Children's Act*.

144 In *French v French* 1971 4 SA 298, *Manning v Manning* 1975 4 SA 659 (T) and *Martens v Martens* 1991 4 SA 287 (T) it was noted that if the court is satisfied that the child has the necessary intellectual and emotional maturity to give an expression and a real accurate reflection of his or her feelings, then a judgment should be given in accordance with the wishes of the child, if such wishes are in the child's own best interests.

145 Sections 261(5)(e) and 262(5)(e) of the *Children's Act*.

146 Couzens 2009 *PER* 64.

147 Couzens 2009 *PER* 65.

the child him or herself) are allowed to withdraw their consent within 60 days after such consent is given.¹⁴⁸

4.6 Procedure

4.6.1 South Africa as a sending country

The prospective adoptive parents who are interested in adopting a child from South Africa must contact the Central Authority in their own country.¹⁴⁹ The authority will prepare a report regarding the fitness of the prospective adoptive parents and this report will be sent to South Africa.¹⁵⁰ A report regarding the situation of the child concerned will be drafted and sent back to the receiving country. If an agreement can be reached by both Central Authorities, then the application, together with all relevant documents, is sent to the Children's Court.¹⁵¹ Couzens¹⁵² states that it has become general practice in South Africa to finalise an adoption before a child is sent to another country. The Children's Court will then determine if the prospective adopting parents are fit and proper to adopt. The court will also consider the cultural and religious background of the child and whether the biological parents have been taken into consideration,¹⁵³ as well as the report of the social worker appointed to handle the adoption.¹⁵⁴ The court will only grant an adoption order if such an order serves the best interests of the child and if all the provisions set forth by legislation have been complied with.¹⁵⁵ After the adoption has been approved, the Central Authority will issue the adoptive parents with a compliance certificate, which the parents can then use to recognise the adoption in their own country.¹⁵⁶ The procedure followed when a child is adopted by parents residing in a non-Convention country is very similar to the process discussed above and the South African Central

148 Section 233(8) of the *Children's Act*.

149 Section 261(1) of the *Children's Act* correlates with Article 14 of the *Hague Convention*.

150 Section 261(2) of the *Children's Act* correlates with Article 15(1) of the *Hague Convention*.

151 Section 261(4) of the *Children's Act* correlates with Article 16(1) of the *Hague Convention*.

152 Couzens 2009 *PER* 80.

153 See para 4.5.

154 Section 261(5) of the *Children's Act*.

155 The Children's Court will apply section 7 of the *Children's Act* to determine the best interests of the child.

156 Section 263 of the *Children's Act*.

Authority performs the same function as in an adoption by parents in a Convention country.¹⁵⁷

4.6.2 South Africa as a receiving country

The South African Central Authority will receive an application from the prospective parents and will then compile a report concerning the suitability of the applicants. This report will then be sent to the Central Authority of the country of origin in order to identify an adoptable child.¹⁵⁸ Inter-country adoptions to South Africa are treated as a last resort and all local options must be exhausted before pursuing international alternatives.¹⁵⁹

4.7 Birth information

In terms of the *Hague Convention*, all information regarding the adoption must be stored and a child may have access to the information when he or she reaches an age determined by the law of the receiving state.¹⁶⁰ In South Africa, according to chapter 15 of the *Children's Act*, it is compulsory for authorities to keep and update adoption registers. Section 272, read together with chapter 15 of the *Children's Act*, as a whole, empowers Central Authorities to disclose information to adopted children when they reach the age of majority, which is currently 18.¹⁶¹

4.8 Conclusion

It is evident from the discussion above that inter-country adoptions play a prominent role in South Africa and that the minimum standards stipulated by the *Hague Convention* are now firmly entrenched into South Africa's national legislation. South Africa, in this regard, can typically be identified as a sending country. This is mainly

157 Interestingly, there seems to be no implication in section 261 and section 262 of the *Children's Act* to suggest that inter-country adoptions in a Convention country should be preferred to inter-country adoptions in non-Convention countries.

158 Couzens 2009 *PER* 82.

159 Human 2007 "Inter-country Adoption" in *Commentary on the Children's Act* 16-24.

160 Article 30(1) of the *Hague Convention*.

161 Section 272 of the *Children's Act*.

due to the increasing number of orphaned or abandoned children which in turn can be attributed to the rapid spread of HIV/AIDS and poverty.¹⁶²

162 Boezaart *Child Law in South Africa* 373.

5 The Best Interests of the Child

5.1 The historical development of the 'best interests of the child' principle in South Africa

The 'best interests of the child' principle had already been introduced at the turn of the 20th century.¹⁶³ In 1984 the Appellate division in *Fletcher v Fletcher*¹⁶⁴ confirmed this principle and made it applicable to all cases involving children. There are numerous factors to consider when determining the best interests of the child. It is a case-sensitive question and will depend on the circumstances of each individual distinctive case.¹⁶⁵

The 'best interests' principle is seen as an overriding principle that runs like a golden thread through the fabric of South African law relating to children,¹⁶⁶ a principle enshrined in section 28(2) of the *Constitution*.¹⁶⁷ The 'best interests' principle has, however, been greatly criticised.¹⁶⁸ It has been said that the principle is indeterminate, unduly subjective and so opaque that it makes the objective decision-making process very difficult.¹⁶⁹ This flaw leaves the 'best interests' principle vulnerable to widely divergent conclusions by lawyers, social workers, child psychologists and other decision-makers regarding the best interests of the child.¹⁷⁰

163 *Fletcher v Fletcher* 1984 1 SA 130 (A); *Segal v Segal* 1971 4 SA 317 (C); *Tromp v Tromp* 1956 4 SA 738 (N).

164 1984 1 SA 130 (A).

165 Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 86.

166 *Kaiser v Chambers* 1969 4 SA 224 (C) 228G.

167 The 'best interests' principle was given paramountcy in custody and access disputes by the Appellate division in *Fletcher v Fletcher* 1984 1 SA 130 A.

168 See paragraph 5.2.

169 These difficulties have been noted by the House of Lords in England. As Lord Fraser explained in *G v G (Minors: Custody Appeal)* 1985 FLR 894 HL at 898-899: "The jurisdiction is one of great difficulty, as every judge who has to exercise it must be aware. The main reason is that in most of these cases there is no right answer. All practicable answers are to some extent unsatisfactory and therefore to some extent wrong, and the best that can be done is to find an answer that is reasonably satisfactory. It is comparatively seldom that the Court of Appeal, even if it would itself have preferred a different answer, can say that the judge's decision was wrong and unless it can say so, it will leave his undisturbed...[T]he appellate court should only interfere when they consider that the judge for the first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible."

170 Schäfer 2007 *Law of Access to Children* 61.

Keeping in mind the *Fitzpatrick* case discussed earlier,¹⁷¹ Judge Goldstone,¹⁷² in relation to the best interests of the child, made the following statement:

Section 28(2) requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of section 28(2) cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be interpreted to extend the beyond those provisions. It creates a right that is independent of those specified in section 28(1).

The Constitutional Court made an important enunciation, namely that section 28(1)(b) of the *Constitution*, which affords a child the right to family care or parental care, or to appropriate alternative care when removed from the family environment, is not just a guiding principle, but a fundamentally entrenched right which is also strengthened by other rights.¹⁷³

Section 28(1)(b) is, however, not always interpreted as a right. In *S v M*¹⁷⁴ the court construed section 28(1)(b) as a principle, rather than a right. The court stated that section 28(1)(b) does not impose any obligations on courts when it comes to the sentencing of an accused who is a primary caregiver. All that is required, is for courts to give due regard to the circumstances of affected children and minimise the damage as much as possible.¹⁷⁵ The purpose of taking into consideration the position of the children, when considering sentence does not permit misbehaving parents to avoid appropriate sentences, it rather protects innocent children as far as possible.¹⁷⁶

171 See para 2.

172 *Fitzpatrick* para 17.

173 Other cases relating to the best interests of the child: in *Bannatyne v Bannatyne* 2003 2 SA 363 (CC), the court held that the best interests requirement obligated parents to properly care for their children, but also obligated the state to create the necessary legal and administrative measures to ensure appropriate care; in *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232, 2007 2 SACR 539 (CC), the court considered the 'best interests' principle together with the right to family and parental care in situations where the children might be deprived of such care if their primary caregivers were imprisoned. The court found that section 28 requires the law to make all efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk. Similarly, in situations where rupture of the family becomes inevitable, the state is obligated to minimise the consequent effect on children as far as it can.

174 *S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 CC (hereafter *S v M* case).

175 *S v M* case para 35.

176 *S v M* case para 64.

Bonthuys¹⁷⁷ stated that the jurisprudence of the Constitutional Court in this regard, tends to be puzzling. This is due to the fact that the aforementioned court has a tendency to refer to the 'best interests of the child' principle as an 'independent right of the child', yet in the very same breath, refer to it as a 'standard' or 'principle'.¹⁷⁸

5.2 Difficulties with the 'best interests' principle

There are a few concerns attached to the 'best interests' standard that need mentioning. The first difficulty is that while everybody advocates the best interests of the child, not everybody's agendas are in line with the child's interests.¹⁷⁹ An example of this can be where prospective parents come to South Africa to adopt a child, advocating that it is in the best interests of the child, but fail to consider the impact that such a decision will have on the child once removed, with specific reference to the culture, language and race of the child.¹⁸⁰

The second is that sympathetic statements about the best interests of the child appear to be ironic when viewed against the background that the 'best interests of the child' principle is very vague.¹⁸¹ The third difficulty is the fact that our social order lacks the capability of establish what is best for a child and, even where it is identifiable, social science does not provide a clear-cut guide for achieving it. In addition to the vagueness of the 'best interests' principle and the lack of specific guidelines for determining a child's best interests, the South African judicial system does not have the necessary skills and manpower to assess each individual child.¹⁸²

A further point of criticism is the fact that one cannot indisputably determine what is in the best interests of the child. There are two very clear stumbling blocks when making a determination. The first is the inability to predict the consequences and the second is the lack of consensus on what criteria to use in evaluating the alternatives. A decision made by a court may only serve the best interests of a child under a

177 Strous 2007 *South African Journal of Psychology* 225.

178 *Christian Education South Africa v Minister of Education* 2000 10 BCLR 1051 (CC) para 41.

179 Strous 2007 *South African Journal of Psychology* 224.

180 See para 9 for a detailed discussion of the problems associated with intercountry adoption i.e. race, culture and language.

181 Bonthuys 2006 *International Journal of Law, Policy and the Family* 6.

182 Strous 2007 *South African Journal of Psychology* 226.

specific set of circumstances.¹⁸³ Another problem in this respect is that members of various professions, in dealing with the best interests of a child, have different perceptions of what it actually entails. The different value systems of decision-makers can have a detrimental effect on the wellbeing of a child.¹⁸⁴ For example, some decision-makers may be of the opinion that inter-country adoption is in the best interests of the child, due to the fact that it offers a child a stable family environment, while others may argue that the removal of a child from his or her environment and culture is traumatic. Thus, it remains an uncertain question and the Constitutional Court's jurisprudence in this regard does not contribute to resolving the confusion.¹⁸⁵

5.3 Best interests of the child 'checklist'

The best interests of the child 'checklist' was initiated in the *McCall v McCall* case.¹⁸⁶ The following considerations were seen as relevant in the judicial decision-making process in all matters concerning the welfare of the child:¹⁸⁷

- (a) The love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
- (b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
- (c) the ability of the parent to communicate with the child and parent's insight into, understanding of and sensitivity to the child's feelings;
- (d) the capacity and disposition of the parent to give the child the guidance which he requires;
- (e) the ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing, and the other material needs - generally speaking, the provision of economic security;
- (f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
- (g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
- (h) the mental and physical health and moral fitness of the parent;
- (i) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the *status quo*;
- (j) the desirability or otherwise of keeping siblings together;
- (k) the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration;
- (l) The desirability or otherwise of applying the doctrine of same sex matching;

183 Parker 1994 *International Journal of Law and the Family* 29.

184 Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 112.

185 See footnote 173.

186 *McCall v McCall* 1994 1 SA 509 (T).

187 *McCall v McCall* 1994 1 SA 509 (T) para 205.

- (m) any other factor which is relevant to the particular case with which the Court is concerned.

This checklist has been cited in numerous judgements and is regarded as an instructive and invaluable guide.¹⁸⁸ The checklist established in the *McCall v McCall* case can be seen as a good representation of what factors to consider when determining the best interests of the child.¹⁸⁹

Section 7 of the *Children's Act* has since replaced the list of factors established by *McCall v McCall*. The *Children's Act* sets forth a comprehensive 'checklist' to determine the best interests of the child. The factors are the following:

- (a) the nature of the personal relationship between-
 - (i) the child and the parents, or any specific parent; and
 - (ii) the child and any other care-giver or person relevant in those circumstances;
- (b) the attitude of the parents, or any specific parent, towards-
 - (i) the child; and
 - (ii) the exercise of parental responsibilities and rights in respect of the child;
- (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
- (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from-
 - (i) both or either of the parents; or
 - (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
- (e) the practical difficulties and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
- (f) the need for the child-
 - (i) to remain in the care of his or her parent, family and extended family; and
 - (ii) to maintain a connection with his or her family, extended family, culture or tradition;
- (g) the child's-
 - (i) age, maturity and stage of development;
 - (ii) gender;
 - (iii) background; and
 - (iv) any other relevant characteristics of the child;
- (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
- (i) any disability that a child may have;
- (j) any chronic illness from which a child may suffer

188 Schäfer *Law of Access to Children* 63.

189 Examples of case law where the *McCall v McCall* 'check list' was accepted include *Bethell v Bland* 1996 2 SA 194 (W); *Krasin v Olge* 1997 1 All SA 557 (W); *Madiehe v Madiehe* 1997 2 All SA 153 (B); *Ex parte Critchfield* 1999 3 SA 132 (W); *Meyer v Gerber* 1999 3 SA 650 (O); *V v V* 1998 4 SA 169 (C); *Lubbe v Du Plessis* 2001 4 SA 57 (C).

- (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
 - (l) the need to protect the child from any physical or psychological harm that may be caused by -
 - (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
 - (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
 - (m) any family violence involving the child or a family member of the child; and
 - (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.
- (2) In this section “parent” includes any person who has parental responsibilities and rights in respect of the child

These two checklists differ, in the sense that the *Children’s Act* checklist is more comprehensive and gives the decision-makers a lot more to consider when making a determination.¹⁹⁰ In the *De Groot v De Groot*¹⁹¹ case, the aforementioned list was used to determine whether it was in the best interests of the child in question to have his mother declared the primary caregiver. Furthermore, in *Swart v Vorster and Others*,¹⁹² the court decided that it was not in the best interests of the child to rescind an adoption order. The courts, in coming to their conclusions, referred to several factors contained in section 7 of the *Children’s Act*.¹⁹³ Lastly, it would be beneficial to note that the *McCall v McCall* list was not a closed list of factors: it was open-ended, which is not currently the case with the section 7 list. Section 7 tends to be more fixed. It was, however, recently stated by the Constitutional Court that section 7 should not be seen or interpreted as a predetermined checklist.¹⁹⁴

5.4 International instruments and the best interests of the child

5.4.1 Introduction

Section 39(1)(b) of the *Constitution* states that a court, tribunal or forum must consider international law and may consider foreign law in deliberations. It is thus evident that international instruments play a very important role in the interpretation

190 Schäfer *Law of Access to Children* 63.

191 *De Groot v De Groot* unreported case no 17189/08, South Gauteng High Court, 6 May 2009.

192 *Swart v Vorster and Others* 2008 JOL 22695 (E).

193 *Swart v Vorster and Others* 2008 JOL 22695 (E) 14.

194 *S v M* Case para 24.

of the *Constitution*. When one considers section 28(2) of the *Constitution* and one takes a closer look at international law, it is clear that South Africa's constitutional values are in keeping with international standards. By ratifying conventions such as the CRC and the ACRWC South Africa has confirmed its commitment to international human rights.¹⁹⁵

5.4.2 United Nations Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child hereafter the CRC has played an invaluable role in establishing and protecting children's rights. It is a comprehensive treaty on the rights of the child and the most universally accepted human rights treaty document in history.¹⁹⁶ What makes the CRC unique, is not the fact that it is the most ratified human rights treaty in history, but rather the record speed at which ratification took place.¹⁹⁷

The CRC is based on the fundamental principles of non-discrimination,¹⁹⁸ the best interests of the child,¹⁹⁹ the right to survival and development²⁰⁰ and respecting the views of the child.²⁰¹ The overall classification of these rights is known as the four P's. The four P's refer to provision,²⁰² protection,²⁰³ prevention,²⁰⁴ and participation.²⁰⁵

The CRC was not, however, responsible for developing the 'best interests of the child' principle. The development of this principle can be attributed to the 1959 *Declaration of the Rights of the Child*²⁰⁶ and the *Convention on the Elimination of All Forms of Discrimination against Women* (1979),²⁰⁷ which predate the CRC.²⁰⁸

195 Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 89.

196 Boezaart *Child Law in South Africa* 309.

197 Boezaart *Child Law in South Africa* 310.

198 Article 2 of the CRC.

199 Article 3(1) of the CRC.

200 Article 6 of the CRC.

201 Article 12 of the CRC.

202 Articles 24, 26 and 28 of the CRC.

203 Articles 2, 3, 4, 6, 9 of the CRC.

204 Articles 16, 19, 34, 36, 11, 35 and 37 of the CRC.

205 Articles 12 and 14 of the CRC.

206 *United Nations Declaration of the Rights of the Child* (10 December 1959).

207 *United Nations Convention on the Elimination of All Forms of Discrimination against Women* (3 September 1979).

Nevertheless, the CRC still had a hand in transforming the best interests of the child principle, which can be found in numerous articles of the CRC. Article 3 of the CRC states that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

General Comment No. 5²⁰⁹ states that legislative, administrative and judicial bodies or institutions are required to apply the 'best interests' principle by systematically considering how children's rights are or will be affected by their decisions or actions.²¹⁰ It is also important to note that the 'best interests' principle must be applied in the context of other rights contained in the CRC.

The CRC recognises the importance of a child's relationship with his or her family and this notion is also contextualised in the preamble of the CRC, which states that the family is the fundamental unit of society and the natural environment for the growth and wellbeing of all its members, in particular of children. The preamble of the CRC further recognises the importance of children growing up in a family environment, in an atmosphere of happiness, love and understanding. In this respect the preamble refers to the importance for all children of being cared for by their biological parents.²¹¹ Article 9(1) of the CRC unequivocally states that a child's separation from his or her parents should be a last resort and should only happen where such separation is in the best interests of the child.²¹²

Furthermore, the CRC created new rights in relation to the identity of the child which merit special attention. Article 8 of the CRC states clearly that:

- (1) State Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference.

208 Boezaart *Child Law in South Africa* 318.

209 *United Nations Committee on the Rights of the Child: General measures of implementation of the Convention on the Rights of the Child* (27 November 2003).

210 *United Nations Committee on the Rights of the Child: General measures of implementation of the Convention on the Rights of the Child* (27 November 2003) 4 para 12. Buergenthal 2001 *Max Planck Yearbook of United Nations Law* 388 stated that it is important to note, that general comments are not binding and serve mainly as an 'advisory option' to contracting states.

211 Article 7 (1) of the CRC.

212 See paragraph 7.2.2.

- (2) Where a child is illegally deprived of some or all the elements of his or her identity, State Parties shall provide appropriate assistance and protection, with a view to speedily re-establish his or her identity.

Article 8 of the CRC established two new concepts that need to be emphasised. Firstly, that it is mandatory for states to respect the right of a child to preserve his or her own identity. The identity of a child plays an important role in determining whether a child should be adopted or not. Africa is a continent rich with culture and a child's cultural heritage is seen as part of his or her identity. Subjecting a child to inter-country adoption will possibly rob said child of such an identity.²¹³ This is precisely why inter-country adoption is supposed to be a measure of last resort. However, in many cases, the cultural identity of a child is given little or no thought.²¹⁴ A loose definition of the best interests of the child should not be used to make inter-country adoptions a first resort. Woodhouse²¹⁵ notes that the child's culture of origin does matter to the child and therefore must be a matter in adoption law. On the other hand, this notion of a child's identity has also been used by the critics of inter-country adoption to deny a child a family environment. Mezmur²¹⁶ clearly states that a child's identity and cultural background should not be used as a smoke screen to deny a child a family environment. Children have an inherent right not to be subjected to the conditions which characterise orphanages, street life and foster care.²¹⁷ It will, however, remain up to national legislation and the courts to determine what weight, if any, to attach to the cultural identity of a child, when determining adoptability.²¹⁸

Article 3(1) of the CRC notes that the best interests of the child is 'a' primary consideration. This is troublesome in the sense that this section clearly indicates that there are other competing aspects that also have to be considered.²¹⁹ The phrasing of the ACRWC in this regard is in sharp contrast with the CRC. The ACRWC states that the best interests of the child are 'the primary consideration' in all actions concerning the child.²²⁰ Thus when one compares the ACRWC with the CRC, it is

213 Carlson 2010 *New York Law School Review* 746.

214 Mezmur 2009 *Sur – International Journal on Human Rights* para 3.4.

215 Woodhouse 1995 *Duke Journal of Gender Law and Policy* 114.

216 Mezmur 2009 *Sur – International Journal on Human Rights* para 3.4.

217 Bartholet 2010 *Global Policy* pre-peer reviewed version 9.

218 Cerda 1991 *Human Rights Quarterly* 119 also see para 3.4.1.

219 McAdam 2006 *International Journal of Children's Rights* 254.

220 Article 4 of the ACRWC.

clear that the ACRWC appears to set the best interests of the child on a higher standard compared to the CRC.

Considering the provision of the CRC, it is also important to mull over the fundamental nature and importance of a child's right to life, survival and development.²²¹ Survival and development are extremely important aspects to take into account when considering inter-country adoption. Inter-country adoption under controlled circumstances has enormous potential to improve the lives of many orphaned and abandoned children around the world.²²² Considering the latter, it can be said that inter-country adoption can serve as a valuable mechanism in accomplishing and respecting a child's right to life, survival and development. The realisation of other survival rights is of extreme importance for realising a child's right to life, survival and development. The term 'survival rights' refers to the most basic rights needed to survive, which includes an adequate standard of living, shelter, nutrition and access to medical services.²²³ It can be said that a child's right to survival incorporates all steps taken to ensure the healthy development of the child. General Comment No. 5 explains that development should be seen from a broader point of view and should embrace a child's physical, mental, spiritual, moral, psychological and social development.²²⁴

The influence that the CRC has had on children's rights internationally, regionally and nationally is unprecedented and although there is some room for improvement, it still remains one of the most comprehensive mechanisms in place.²²⁵

5.4.3 African Charter on the Rights and Welfare of the Child

Almost a decade of hard work and negotiations went into the drafting and implementation of the CRC. It fell short, however, in the sense that it did not address the needs of all children. All over the world, communities differed in their

221 Article 6 of the CRC.

222 Blair 2005 *Capital University Law Review* 349.

223 Boezaart *Child Law in South Africa* 321.

224 General Comment No. 5 (Eleventh session, 1994) par 12.

225 Boezaart *Child Law in South Africa* 330.

understanding of the normative recommendations set out by the CRC.²²⁶ The main reasons for this were the economic, social and cultural differences, especially in Africa. Africa needed an instrument that addressed its unique situation and diversity and hence, the ACRWC was developed. The ACRWC came into force on 29 November 1999 and is seen as one of the most comprehensive instruments that affords children with definite rights.²²⁷

The preamble of the ACRWC clearly recognises that a child has the right to the full and harmonious development of his or her personality and that a child should grow up in a family environment, in an atmosphere of happiness, love and understanding. The family is seen as the natural basis of society and a child should enjoy the support of the state to help develop and protect this family basis.²²⁸ Every child shall be entitled to the enjoyment of parental care and protection.²²⁹ Article 20 of the ACRWC states that the primary responsibility for the upbringing and development of children rests upon the parents of the child, who are required to ensure that the best interests of the child are their primary concern.²³⁰ The state must, however, assist and support parents in the fulfilment of their task.²³¹

It is very precarious that the ACRWC does not provide a definition for the term 'family'. Whether this was done on purpose is not clear. What is clear, however, is that the concept of 'family' in western communities differs greatly from that of traditional African communities. According to the Department of Social Development,²³² South Africa consists mainly of two types of families, namely the nuclear family (mostly white, Indian and coloured) and the extended family (mostly black and Asian). Extended families tend to be much larger than nuclear families. It is estimated that around 90% of white children live with their parents, whilst the figure for black children is around 50%, as many live with grandparents, aunts or uncles.²³³ These relationships should be protected through a wide definition of

226 Kaime *The African Charter on the Rights and Welfare of the Child: A Socio-legal Perspective* 2.

227 Chirwa 2002 *The International Journal of Children's Rights* 157.

228 Article 18(1) of the ACRWC.

229 Article 19(1) of the ACRWC.

230 Article 20(1)(a) of the ACRWC.

231 Article 20(2) of the ACRWC.

232 GN 756 in GG 34657 of 3 October 2011.

233 Schäfer *Law of Access to Children* 67.

'family'. The focus should be more on caring relationships, than on family ties.²³⁴ In *Krasin v Olge*²³⁵ the judge emphasised the importance of the relationships between children and those who contribute to their upbringing. In *Lubbe v Du Plessis*,²³⁶ the court recognised the important role played by paternal grandparents with whom three boys had built a strong relationship. These cases clearly demonstrate the importance of extended family and it is evident that when considering inter-country adoption, the views and opinions of the extended family can play a pivotal role.

It may be stated that the ACRWC centres around two ideas. The first is the need to protect the rights and welfare of the child, and the second is to preserve the cultural integrity of communities. Kaime²³⁷ states that culture plays a very important role in all human societies, whatever their level of development and religious, ideological or political orientations. Culture touches every part of human existence. Geertz²³⁸ makes the following observation with relation to culture and the important role it plays:

[Human beings] would be unworkable monstrosities with very few useful instincts, fewer recognisable sentiments, and no intellect: mental basket cases. As our central nervous system... grew up in great part in interaction with culture, it is incapable of directing our behaviour or organising our experience without the guidance provided by systems of significant symbols... Such symbols are thus not mere expressions, instrumentalities, or correlates of our biological, psychological and social existence; they are prerequisites of it.

One can thus see that culture plays a very important role in determining the best interests of the child. In order to promote and protect the welfare of the child, the African Committee of Experts on the Rights and Welfare of the Child (hereafter the African Committee) was established. The African Committee consists of 11 members.²³⁹ It is the duty of the African Committee to monitor the implementation of the provisions of the ACRWC and to formulate rules and principles that are aimed at protecting the child.²⁴⁰ The African Committee has the power to investigate any

234 Currie and de Waal *The Bill of Rights Handbook* 607.

235 *Krasin v Olge* 1997 1 All SA 557 (W).

236 *Lubbe and Du Plessis* 2001 4 SA 57 (C).

237 Kaime *The African Charter on the Rights and Welfare of the Child: A Socio-legal Perspective* 33.

238 Geertz *The Interpretation of Cultures* 49.

239 Article 33 of the ACRWC

240 Article 42(b) of the ACRWC.

matter falling within the ambit of the Charter.²⁴¹ It may also receive and consider any report from any individual, government or non-governmental organisation.²⁴² This means that a child can lay an individual complaint in relation to any breach of his or her rights. Human ²⁴³ in this regard, stated that the biggest challenge that faces the committee, is determining which elements of the South African culture should be retained and which should be done away with. The *Children's Act* supplies a long list of social, cultural and religious practices which should not be performed if they are detrimental to the health and wellbeing of the child.²⁴⁴ This list includes forced marriage,²⁴⁵ genital mutilation or the circumcision of females,²⁴⁶ virginity testing²⁴⁷ and the circumcision of males under the age of 16.²⁴⁸ Where customary practices cannot be harmonised with the best interests of the child principle, they will either have to be developed with the best interests of the child or declared unconstitutional. This is the only way to ensure that the paramountcy of the best interests of the child prevails.²⁴⁹

5.5 Limitation of rights and the best interests of the child

The 'best interests' principle plays two very distinct roles. Firstly, it can be used to limit other rights and secondly, the principle itself can be limited through section 36 of the *Constitution*.²⁵⁰ With relation to the first role, it was established in *De Reuck v Director of Public Prosecution* (hereafter *De Reuck case*)²⁵¹ that the ban on pornography did not contravene the applicant's right to privacy and freedom of expression because of the paramountcy of the best interests of the child, which limited the ambit of the right.²⁵² The Constitutional Court used the best interests of the child to limit the ambit of the right to freedom of expression, thus justifiably limiting other rights. What is also important, however, is the fact that, in the *De*

241 Article 45 (1) of the ACRWC.

242 Article 44(1) of the ACRWC.

243 Human 2000 SAPL 383.

244 Section 12(1) of the *Children's Act*.

245 Section 12(2) of the *Children's Act*.

246 Section 12(3) of the *Children's Act*.

247 Section 12(4) of the *Children's Act*.

248 Section 12(8) of the *Children's Act*.

249 Boezaart *Child Law in South Africa* 242.

250 Currie and de Waal *The Bill of Rights Handbook* 163

251 *De Reuck v Public Prosecutors* 2003 3 SA 389 (W) (hereafter *De Reuck case*).

252 *De Reuck case* para 10.

Reuck case,²⁵³ the Constitutional Court also made it very clear that the word 'paramount' did not mean that the 'best interests' principle could not be limited by other rights. This notion laid to rest the idea that children's best interests could act as a trump card, always overriding other rights.²⁵⁴

The *De Reuck* case created much uncertainty in relation to the role of the best interests of the child. The Constitutional Court in *S v M*²⁵⁵ addressed this issue by attempting to define the meaning of the phrase 'paramount importance'. Judge Sachs held that the word 'paramount' is emphatic and that if it is spread too thinly, it risks being transformed from an effective instrument of child protection, into an empty rhetorical phrase of weak application, thereby defeating rather than promoting its objective. The Constitutional Court emphasised the importance of determining the best interests of the child on a case-to-case basis. In his minority judgement, Judge Madala stated that the 'best interests' principle must prevail unless the infringement of those rights can be justified in terms of section 36 of the *Constitution*.²⁵⁶ Ferreira²⁵⁷ stated in this regard, that there can be no doubt about the significance of children's rights and predominantly the 'best interests' principle. The main issue is, however, to guarantee that the provisions protecting children are actually being applied.

5.6 Attachment and the best interests of the child

Attachment can be defined as a bond that exists between the child and familiar people who have responded to the physical care and stimulation of the child.²⁵⁸ Attachment is a very important aspect in the emotional maturity of the child and is regarded a pivotal developmental need. It is very important and in the best interests of the child that attachment with a parent is formed whilst the child is still very young. The sooner the child is attached, the better he or she will adjust, not just socially but also emotionally and psychologically.²⁵⁹ The way and ease with which a child forms

253 *De Reuck* case para 55.

254 Boezaart *Child Law in South Africa* 282.

255 *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC).

256 *M v S* 2007 12 BCLR 1312 (CC) para 25 and 26.

257 Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 110.

258 Finlay *Exploring Challenges Specific to Cross Racial Adoption in Gauteng* 34.

259 Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 124.

an attachment with his or her adoptive parents will serve as a guide for all future relationships through childhood, adolescence and adulthood.²⁶⁰ In the *De Gree v Webb* case, Judge of Appeal Heher referred to a worldwide phenomenon in which the prospect of a successful adoption diminishes as a child reaches the age of 5. The latter is due to the fact that an older child already formed an attachment with his/her biological parents which is very difficult to sever without psychologically and emotionally damaging the child.²⁶¹ This does not mean that children cannot be adopted when they are older studies have shown that even older adoptees developed much better than children placed into the welfare system.²⁶²

Howe²⁶³ was of the opinion that the speedy finalisation of adoptions is extremely important, because late placement can have a dire effect on the mental, behavioural and psychiatric health of the child. It is thus clear that there are many advantages to adopting a child who is still very young and that the majority of prospective adoptive parents prefer to do so. However, it is not always possible.²⁶⁴ According to Howe,²⁶⁵ research indicates that children who are placed later in their lives have a much bigger chance of developing behavioural issues. This study implies that a child who is adopted at an older age may have greater obstacles to overcome when faced with emotional, social and behavioural challenges. It is rare for adoptive parents to choose to adopt an older child. Whether the prospective adoptive parents will be able to do so, will have to be determined when the 'adoptability of the child'²⁶⁶ and 'eligibility of prospective parents'²⁶⁷ are assessed. Naturally, the 'voice of the child' will also play a much bigger role and a child should voice his or her opinion and give his or her consent on whether or not he or she wants to be adopted.²⁶⁸

260 Finlay *Exploring Challenges Specific to Cross Racial Adoption in Gauteng* 34.

261 Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 126.

262 Berk *Child Development* 576-577.

263 Howe *Patterns of Adoption* 82.

264 Finlay *Exploring Challenges Specific to Cross Racial Adoption in Gauteng* 25.

265 Howe *Patterns of Adoption* 82.

266 See para 4.4.

267 See para 4.3.

268 Johnson & Zappala 2009 www.adoptioncouncil.org 2. The majority of children adopted are adopted by Americans. In 2001 it was estimated that 89% of children subjected to inter-country adoption were under the age of 5. This left a mere 11% of children adopted over the age of 5. While hundreds of thousands of children need loving homes, many of the children are sick, disabled, traumatised and over the age of 5. There are just not enough healthy babies to go around.

5.7 Conclusion

Although the 'best interests' principle has been entrenched in the South African law for a few years, there is still a lot of uncertainty and controversy. What is clear from the discussion is that children need special protection to address their uniquely vulnerable position in society. This is especially the case with inter-country adoptions. An intensive assessment is vital to ensure that the adoption is done in the best interests of the child and not in the best interests of the adoptive parents.

6. International instruments and adoption

6.1 The CRC and inter-country adoption

The CRC states that children who are deprived of their family environment, or whose own best interests cannot allow them to remain in that environment, are entitled to special protection.²⁶⁹ State parties under the CRC are obligated to provide their children with alternative care in accordance with their national laws. Due to globalisation, national borders have opened up and inter-country adoptions today are seen as a viable choice for children in need of care.²⁷⁰ In recent times, the number of children in dire need of protection has increased dramatically, mainly due to the HIV/AIDS pandemic and poverty which have left millions of children orphaned.²⁷¹ Van Bueren,²⁷² states in this respect, however, that an inter-country adoption which is solely motivated by the poverty of the biological parents is contrary to international legal principles.

In this regard it is also important to consider article 21 of the CRC, which specifically deals with intra and inter-country adoptions and which states the following:

State Parties which recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the primary consideration and they shall:

- (a) ensure that the adoption of a child is authorised only by competent authorities who determine, in accordance with applicable law and procedure and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary.
- (b) recognise that inter-country adoption may be considered as an alternative means of child care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- (d) take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
- (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and

269 Article 20(1) of the CRC.

270 Article 20(2) of the CRC.

271 Sloth-Nielsen *Children's Rights in Africa* 257.

272 Van Bueren *The International Law on the Rights of the Child* 100.

endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Sloth-Nielsen²⁷³ gives a very informative summary of article 21:

States parties who recognise inter-country adoptions, must ensure that the best interests of the child shall be the paramount consideration.

- (1) States parties to the CRC must ensure that inter-country adoptions are authorised by competent authorities in accordance with legislation, both National and International.
- (2) State parties must ensure that the required consent is given and that the consent is informed and given on the basis of counselling.
- (3) State parties must adhere to the subsidiary principle.
- (4) State parties must ensure that children are safeguarded against harmful inter-country adoption practices, by implementing standards equivalent to intra-country adoption.
- (5) State parties must implement the necessary measures to ensure that inter-country adoptions do not result in improper financial gain.
- (6) State parties must ensure that the placement of children in another country is carried out by competent authorities.

Article 21 of the CRC thus provides children with new rights by establishing procedures to ensure that, before inter-country adoption is considered, all possible resources have been used to ensure that the child remains in his or her country of origin. The main idea of article 21 is to establish legal obligations in an area where the available research has shown that illegal adoptions are on the increase.²⁷⁴ This provision protects children against two practices, namely the sale and trafficking of children, and the blatant disregard of vital factors in respect of the best interests of the child.²⁷⁵ The manner in which countries apply these standards will be the determining factor when it comes to ethical inter-country adoptions.

6.2 ACRWC and adoption

Another important international human rights instrument to consider is the CRC's counterpart, the ACRWC. The ACRWC was drafted mainly to address the unique position of African children and is very closely linked to inter-country adoption. Article

273 Sloth-Nielsen *Children's Rights in Africa* 258.

274 Cerda 1990 *Human Rights Quarterly* 118.

275 Cerda 1990 *Human Rights Quarterly* 119 Article 21 sets forth a lot of different stages that have to be complied with before an inter-country adoption case can be finalised.

24 of the ACRWC specifically deals with inter-country adoptions and stipulates the following:

- (1) State parties which recognize the system of adoptions shall ensure that the best interests of the child shall be the paramount consideration and they shall:
 - (a) establish competent authorities to determine the matter of adoption and ensure that the adoption is carried out in conformity with applicable laws and procedures and on the basis of all relevant and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and guardians and that, if necessary, the appropriate persons concerned have given their informed consent to the adoption on the basis of appropriate counselling;
 - (b) recognize that inter-country adoption in those States who have ratified or adhered to the International Convention on the Rights of the Child or this Charter, may, as the last resort, be considered as an alternative means of a child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
 - (c) ensure that the child affected by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
 - (d) Take all appropriate measures to ensure that in inter-country adoption, the placement does not result in trafficking or improper financial gain for those who are trying to adopt a child;
 - (e) promote, where appropriate, the objectives of this article by concluding bilateral or multilateral arrangements or agreements, and endeavour within this framework to ensure that the placement of the child in another county is carried out by competent authorities or organs;
 - (f) establish a machinery to monitor the well-being of the adopted child.

Many of the developing countries, especially in Africa, desperately need an instrument that addresses their specific needs and situation. They are of the opinion that inter-country adoption is depriving them of their most precious possessions - their children - who are slowly being bought, coerced and stolen away from them.²⁷⁶

6.3 Conclusion

It is clear that both the CRC and ACRWC promote the best interests of the child. In situations of adoption, state parties must ensure that the best interests of the child is the paramount consideration in all matters concerning the child. The ACRWC and the CRC both clearly refer to inter-country adoptions as the last resort and stipulate that a child can only be subjected to inter-country adoption if a suitable foster or adoptive family cannot be found in the child's country of origin.²⁷⁷ The ACRWC imposes special obligations on state parties to establish competent authorities, whilst

276 Bartholet 2010 *Global Policy* 92.

277 Sloth-Nielsen *Children's Rights in Africa* 260.

the CRC seems to take the reality of such authorities for granted. One can thus see when comparing the CRC and the ACRWC with one another that the ACRWC is a lot more comprehensive where inter-country adoptions are concerned and puts forward an array of requirements that are not even mentioned by the CRC.²⁷⁸ Another big difference between the CRC and the ACRWC is the fact that the ACRWC provides for the appropriate monitoring of the wellbeing of the adopted child.²⁷⁹ This provision does not appear in the CRC.²⁸⁰ Gose²⁸¹ states that the reason for this is that African states will, in reality, mainly be the countries of origin, whilst the western countries will predominantly be the receiving countries, which effectively means the provision is well intended, but useless.²⁸²

278 Gose *The African Charter on the Rights and Welfare of the Child* 108.

279 Article 24(1)(f) of the ACRWC.

271 Baimu 2011 *Max Planck Institute for Comparative Public International Law: "Children, International Protection"* 4 para 25: "While the CRC does not have the mandate to consider individual complaints alleging violations of the CRC, its regional counterpart the African Committee of Experts on the Rights and Welfare of the Child have an established body to monitor the implementation of the ACRWC. The ACRWC can receive communication alleging violations of the charter from any person, group or recognised non-governmental organisation. Likewise other treaty based bodies such as the *Human Rights Committee of the United Nations* or the *African Court on Human and People Rights*, have a mandate to receive and consider complaints and are not precluded from considering cases alleging violations of provisions of the respective treaties protecting children."

281 Gose *The African Charter on the Rights and Welfare of the Child* 112.

282 Gose *The African Charter on the Rights and Welfare of the Child* 112.

7. The human rights approach on inter-country adoption

7.1 Introduction

Inter-country adoption is perceived in two contrasting ways. On the one hand it is seen as a heart-warming act of goodwill, but on the other some see it as modern day imperialism, which allows developed countries to strip developing countries of their children.²⁸³ In the last five years there have been two highly publicised adoption cases concerned with the rights of children involved in inter-country adoption.²⁸⁴ These cases are the Angelina Jolie case²⁸⁵ in Ethiopia (which was a media reported matter) and the Madonna²⁸⁶ case in Malawi. The negative publicity that accompanied these cases evoked fierce criticism from the international society.

Inter-country adoption has evolved from its roots as an act of compassion to an accepted option for those who cannot conceive. There is, however, a dark side to inter-country adoptions - and in its worst form, it can be portrayed as child trafficking or baby selling.²⁸⁷

7.2 Summary of cases

7.2.1 The Angelina Jolie case

In 2005, media reports indicated that the actress Angelina Jolie was in the process of adopting a baby girl named Zahara from Ethiopia. She was planning on doing this through a private adoption agency. An Ethiopian official pointed out that Jolie complied with the two most important conditions, which are (i) economic capability and (ii) passing a background check with police.²⁸⁸ Ethiopia is predominantly known

283 Bartholet 2010 *Global Policy* 92.

284 *In the matter of David Banda a male infant, Adoption case no 2 of 2006 in the Matter of the Adoption of Children Act* (Cap. 26:01).

285 (Media report) West 2005 *Angelina Jolie Adopts Ethiopian Girl* USA Today http://www.usatoday.com/life/people/2005-07-06-jolie-baby-girl_x.htm?csp=34.

286 *Adoption case no 2 of 2006 in the matter of the Adoption of Children Act* (Cap. 26:01) and in the matter of David Banda a male infant in the High Court 28 May 2008 (hereafter Madonna judgement).

287 Van Bueren 1998 *The International Law on the Rights of the Child* 96.

288 Root 2007 *Chicago Journal of International Law* 323.

as a county crippled by disease, HIV and poverty.²⁸⁹ Jolie was unintentionally placed in the middle of an inter-country adoption scandal when an Ethiopian teenager came forward claiming to be the mother of baby Zahara. In fact, although the adoption papers showed that the baby's mother was deceased, a British newspaper tracked down Mentaweb Dawit, the alleged mother of the baby. It was stated by the actress that she was under the impression that Zahara's parent had died of HIV/AIDS.²⁹⁰

7.2.2 *The Madonna Louise Richie case*²⁹¹

David Banda was born on 24 September 2005. His mother died seven days after his birth. Other members of the family tried to assist his father in taking care of him. This, however, did not work out and the family was forced to place David in an orphanage.²⁹² In 2006, Madonna lodged a petition at the Malawi High Court to be appointed David's guardian. The Malawi High Court granted an interim order declaring Madonna the legal guardian of David.²⁹³ This move by the Malawi High Court received much criticism. One of the main aspects that raised eyebrows was section 3(5) of the Malawian *Adoption of Children Act*²⁹⁴ which requires adoptive parents to be residents of Malawi before being able to adopt a child.²⁹⁵

The common view with regard to 'residence' is that it has to be durable. The Court, however, asked the question whether 'residence' in itself should be the determining factor when dealing with the welfare of children.²⁹⁶ The court stated that the requirement of residency was solely meant to protect children and to ensure that the adoption is well intended. The 'residence' requirement is only a means to an end, and that 'end' is the best interests of the child.²⁹⁷ The Court stated further that Malawi has signed both the ACRWC and the CRC which clearly indicate that the best

289 Mezmur 2009 *International Journal of Law and the Family* 146.

290 Root 2007 *Chicago Journal of International Law* 324.

291 *In Re: Adoption of Children Act (Cap. 26:01); In Re David Banda Adoption Case No. 2 of 2006*: Malawi High Court (hereafter *David Banda case*).

292 *David Banda case* 3.

293 *David Banda case* 4.

294 *Adoption of Children Act, Cap. 26:01, Laws of Malawi*.

295 *David Banda case* 15.

296 *David Banda case* 16.

297 *David Banda case* 18.

interests of the child must be the primary consideration in all matters concerning the child.

The Malawi High Court agreed that inter-country adoption should be the last resort. It was stated that a family-based or national solutions should be considered first before resorting to international solutions.²⁹⁸ However, it was taken into consideration that the socio-economic hardships of children in Malawi and stated that millions of children in Malawi are orphaned and without basic nutrition.²⁹⁹ The conclusion was made that the solution at hand was the closest to a local answer and could not be deterred by the 'residence' requirement.³⁰⁰ The Malawi High Court granted a final adoption order in favour of Guy Stuart Richie and Madonna Louise Richie on the basis that it was in the best interests of David Banda.³⁰¹

The blatant disregard for procedures and requirements is of concern. The only reason these cases were made public was because the adopting parents were celebrities with vast financial means. It certainly raises the question of just how many children the Malawian Government has handed over to individuals without following the correct procedures.

7.3 Lessons on inter-country adoption

7.3.1 Subsidiary principle

'Subsidiary' in this context means that State Parties to the *Hague Convention* acknowledge the fact that children should be raised in their country of origin, by their own family or extended family.³⁰² It entails a duty on contracting states to do anything within their power to preserve the family unit.³⁰³ As already observed, it is

298 *David Banda* case 23.

299 *David Banda* case 24.

300 *David Banda* case 25.

301 *David Banda* case 26.

302 *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention* <http://www.hcch.net> 29 para 46.

303 *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention* <http://www.hcch.net> 29 para 48.

widely agreed that three principles should govern any decision regarding inter-country adoption:

- (i) family-based solutions are generally preferred to institutional placements;
- (ii) permanent solutions are generally preferable to inherently temporary ones; and
- (iii) national solutions are generally preferable to those involving another country.³⁰⁴

When taking into consideration these three principles it is clear that inter-country adoptions fulfil the first two principles, but not the third. The Commissioner of Human Rights stated that there are critics who contend that inter-country adoption is, at the end of the day, a better solution than family-based foster care or other forms of traditional coping strategies. Supporters of this view go even further and are of the opinion that children in various informal care arrangements should not be seen as being in a suitable family or as being cared for in a suitable manner. Inter-country adoption should thus be subsidiary to anything other than domestic adoptions.³⁰⁵ However, this argument does not hold water: firstly, this notion conveys the idea that adoption is not a viable measure to protect children; and secondly, it sees any other solution that is not formal or legally binding as an automatically inferior measure, when considering the long term best interests of the child.³⁰⁶

In the Jolie and Madonna cases there are some important lessons to be learned about the subsidiary principle. Firstly, it is important to remember that in both the Jolie and the Madonna cases the biological parents of babies Zahara and David gave them up for adoption. Although the subsidiary principle was not raised in either of the two cases it is important to note that the law, in both of the countries, seemed to suggest that inter-country adoption was a suitable way of promoting the best interests of the child rather than placing the child in an institution.³⁰⁷ The authorities in Ethiopia and Malawi seemed to appreciate the fact that inter-country adoptions served as viable solutions when compared with institutionalising a child. What these

304 Mezmur 2009 *International Journal of Law and the Family* 150.

305 Cantwell 2011 www.commissioner.coe.int 14.

306 Cantwell 2011 www.commissioner.coe.int 14.

307 Mezmur 2009 *International Journal of Law and the Family* 153.

two cases failed to answer is whether inter-country adoption is a viable subsidiary to intra-country adoption and in-country foster care.³⁰⁸

Contracting States have a duty to ensure that the subsidiary principle does not harm the child in the sense that it delays permanent placement. A child should be placed as soon as possible when the child has been removed or is no longer part of a family.³⁰⁹ Policies should be put in place to promote the family unit rather than hinder it. According to *The Implementation and Operation of the 1993 Hague Inter-country Adoption Convention: Guide to Good Practice*, the term 'subsidiary' does not imply that all possibilities for the placement of the child should be exhausted, it merely implies that the placement of the child should be in line with the best interests of the child and on a permanent basis.³¹⁰

7.3.2 *The child's country of origin*

Despite the fact that both the Malawian and the Ethiopian governments have signed the ACRWC their respective reactions to the adoptions were very different. These differences can be attributed to the different adoption processes in each respective country.³¹¹ In Ethiopia it is possible for prospective parents (with the right paperwork) to finalise an adoption within two days. This is to a great extent thanks to the Ethiopian government which has taken great strides to make inter-country adoptions easier, thereby alleviating the extremely high number of orphans, currently estimated at about 5 million. Most of these children are sent to the United States of America, which is considered to be the top receiving country of children from Ethiopia.³¹² The Madonna case is, however, seen in a completely different light. This is the result of the general belief in Malawi that inter-country adoptions are forbidden. It is important to note, however, that Malawi is a signed partner to the ACRWR which allows inter-country adoptions by parents who are citizens of a country that has signed the CRC

308 Mezmur 2009 *International Journal of Law and the Family* 154.

309 The Implementation and Operation of the 1993 Hague Inter-country Adoption Convention <http://www.hcch.net> 29 para 49.

310 The Implementation and Operation of the 1993 Hague Inter-country Adoption Convention <http://www.hcch.net> 29 para 50.

311 Root 2007 *Chicago Journal of International Law* 337.

312 Mezmur 2009 *International Journal of Law and the Family* 165.

or the ACRWC.³¹³ The criticism that has been voiced against inter-country adoptions stems from the idea that African children should be kept and raised in their own communities.³¹⁴

7.3.3 *The problems with inter-country adoptions*

Inter-country adoptions, as with any other domain of law, are not without problems. While most of these problems are portrayed as being isolated occurrences,³¹⁵ the problems are manifold. The systems in place to determine the adoptability of a child are neither transparent nor thorough. There is no system in place to scan the facilitators involved in the adoption process. Systems allow prospective parents or their agencies direct contact with institutions, which in turn leads to child selection. Evidence shows that prospective adoptive parents will only select the healthiest children, which results in a disproportionate number of children with mental and physical disabilities being left behind.³¹⁶ In many cases, prospective parents are required or allowed to make donations to child care institutions, which, inevitably, encourages illicit activities.³¹⁷ Other problems include the fear that inter-country adoptions will enable biological parents to abandon their children with much more ease.³¹⁸ Lastly, inter-country adoptions have the effect that, once a child is removed from South Africa the courts lose any authority they had over the child as upper guardian. The child will be left entirely dependent on the prospective adoptive parents. The problems mentioned here are just a few. Ultimately, it is the duty of the courts to assess whether inter-country adoption is in the best interests of the child by taking into account whether the rights of the birth parents are being protected, the implications of trans-racial adoption, the implications of gender preference, concerns regarding the possibility of child trafficking, the reasons behind the adoption and the adoptability of the child.³¹⁹

313 Root 2007 *Chicago Journal of International Law* 338.

314 See paragraph 7.3.5.

315 See paragraph 7.2.

316 Root 2007 *Chicago Journal of International Law* 342.

317 Cantwell 2011 www.commissioner.coe.int 14.

318 Root 2007 *Chicago Journal of International Law* 342.

319 Cantwell 2011 www.commissioner.coe.int 22.

There are many changes still required before it can be said that inter-country adoptions are foolproof. It is also evident that these changes cannot be brought about by one party but require a collective effort.

7.3.4 Inter-country adoption under attack

For some, the sale of children from a developing country to a rich developed country is considered to be unjust and immoral.³²⁰ UNICEF and other international human rights organisations are of the opinion that children should rather be kept in their country of origin.³²¹ This stance supports the value placed on families and implies that the contracting states must provide support to these families in need, in supporting their children.³²² Although UNICEF acknowledges that a child should not be kept in a state-run institution, they emphasise that a country should develop local solutions to the orphan problem, rather than resorting to international solutions.³²³ Bartholet³²⁴ makes a compelling statement when she says:

In many 'sending countries' national pride has led to calls to stop selling, or giving away, 'our most precious resources,' and to claims that the country should 'take care of our own.'

The above statement, although well intended, makes one wonder about its feasibility, especially when considering the current socio-economic hardships faced by South Africa and other African countries.³²⁵

7.3.5 Position taken by critics on inter-country adoptions

Critics of inter-country adoption see it as a direct violation of a child's human rights because it deprives a child of his or her heritage and birthrights. Van Bueren³²⁶ speaks out against inter-country adoption by stating that it facilitates a child growing up in an alien culture far away from any living members of their biological families.

320 Christian 2010 *University of the Peace Law Review* 55.

321 UNICEF Guidance Notes on Intercountry Adoptions in the CEE/CIS/Baltic Region 2003 <http://www.unicef.org>.

322 Christian 2010 *University of the Peace Law Review* 56.

323 Bartholet 2010 *Global Policy* 92.

324 Bartholet 2010 *Global Policy* 92.

325 See paragraph 3.6.

326 Van Bueren *The International Law on the Rights of the Child* 96.

Keeping these statements in mind, consider the following: all accepted human rights principles require that the best interests of the child principle must govern any decision affecting the child. It has been argued that institutions fail to provide paternal care for a child, which is critical for the child's mental and emotional development.³²⁷ Bartholet³²⁸ also stresses the importance of placing a child with a family at an early age.³²⁹ She emphasises the devastating effect that institutionalising a child can have on the child's wellbeing. Research has shown that even the better institutions fail to provide a child with the personal care that is needed to thrive physically and emotionally.³³⁰ Bartholet further emphasises that street children today are often faced with a choice between life and death in orphanages or on the streets in their home country. The possibilities for adoption in a child's home country are drastically limited because of poverty, while inter-country adoption to more wealthy countries can serve as a real solution to alleviating the hardships faced by children, especially in African countries.³³¹ It is estimated by UNICEF that about 2.6 million children worldwide live in institutional care.³³²

Bartholet³³³ remarks that opponents of inter-country adoptions never weigh the evils on both sides. Instead they focus on the evils of inter-country adoption abuses and then argue for restrictive regulations to counter such evils. These critics do not consider the evils of failing to place a child in an international adoptive home and the possible good that could come from placing a child in such a home. Inter-country adoption is there to provide tens of thousands of children with homes with people who want to and are able to provide for them.

Varnis³³⁴ provides some valuable insight regarding the problems of inter-country adoptions when pointing out what he perceives to be lacking in the *Hague Convention*. Firstly, he states that the *Hague Convention* aims to maximise the roles of governments involved in inter-country adoption, while it is clear that, in many

327 Bartholet 2010 *Global Policy* 94.

328 Bartholet 2007 *Buffalo Human Rights Law Review* 180.

329 See paragraph 5.6.

330 Bartholet 2007 *Buffalo Human Rights Law Review* 180.

331 Bartholet 2007 *Buffalo Human Rights Law Review* 181.

332 UNICEF's Position on Intercountry Adoption 2010 <http://www.unicef.org>.

333 Bartholet 2007 *Buffalo Human Rights Law Review* 188.

334 Varnis 2001 *Social Science and Public Policy* 44.

cases, the government is the main problem. Secondly, the *Hague Convention* will, at the end of the day, increase the involvement of money in the inter-country adoption process, which is already extremely high, as it authorises fees as well as new fees to be implemented by government. This will, in turn, result in fewer children being adopted. Thirdly, the *Hague Convention* relies too much on bureaucratic professionals and underestimates the important role played by facilitators. Lastly, the *Hague Convention* puts too much emphasis on private adoptions and thus discourages innovative thinking regarding methods to address the growing orphan problem.

Despite the obvious flaws and problems with inter-country adoptions and the *Hague Convention*, the intention represents steps being taken in the right direction.

7.3.6 *The rights of the birth parents*

The ability of parents to consent knowingly to inter-country adoption is a very important aspect to take into account. By ensuring that the biological parents of an adopted child are more informed when it comes to the consequences of adoption, society will be more at ease when determining whether or not inter-country adoptions violate the human rights of the parents involved.³³⁵ There is further concern, however, regarding the policies and practices in different African countries when it comes to inter-country adoptions. For example in Ethiopia if a child is living with his or her parents who have been diagnosed with HIV/AIDS the state declares the child an orphan and assumes legal guardianship over the child.³³⁶ This will have the effect that the consent of the parents is no longer required to conclude an inter-country adoption. One can thus clearly see that cases of adoption raise questions on both sides of the inter-country adoption spectrum.³³⁷ Taking into consideration the discussion above, one can see the importance of explaining to parents exactly what the termination of their rights entails. According to Parra-Aranguren³³⁸ this is precisely the reason why consent to an adoption must be obtained only after proper

335 Root 2007 *Chicago Journal of International Law* 343.

336 Inter-country Adoption Bureau of Consular Affairs-U.S. Department of State 2011 <http://adoption.state.gov>

337 Root 2007 *Chicago Journal of International Law* 343.

338 Parra-Aranguren 1993 <http://www.hcch.net> para 133.

counselling. If such consent is not obtained, a child cannot be considered 'adoptable'.³³⁹ It must be explained that there is a more than likely chance that they will never see their child again and that they are no longer responsible for the care of the child.³⁴⁰

It is a matter of good practice that contracting states implement laws and procedures to help families in crisis and, if necessary, provide for the temporary care of the child. If these steps fail,³⁴¹ the family must be counselled fully on the effect of their decision to put their child up for adoption.³⁴²

7.3.7 Implications of trans-racial adoptions

Trans-racial inter-country adoption can be defined as the placing of a child of one race or culture in a family of another race or culture or when a child is adopted by a family of a different race.³⁴³ Cross-racial adoption in this context refers to the adoption of a black child by a white parent or the assumption by such a parent of the parental rights and responsibilities of the biological parents, who terminated their parental rights by choosing to give their child up for adoption or by way of abandonment. A new and unique family unit is therefore formed by the bringing together of individuals from two racially different families.³⁴⁴ South Africa's annual inter-country adoption report, which was submitted to the Hague Conference on Private International Law in response to a 2005 questionnaire, indicated that in 2003 South Africa completed 213 inter-country adoptions as a sending country.³⁴⁵

The question as to whether race should be a determining factor remains unanswered. Morrison³⁴⁶ is of the opinion that skin colour is not a deciding factor when determining the successfulness of an adoption. Trans-racial adoptions could

339 See paragraph 3.4.1.

340 Root 2007 *Chicago Journal of International Law* 344.

341 See paragraph 4.

342 The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention <http://www.hcch.net> 71 para 268.

343 Platt 1994 *Valparaiso University Law Review* 475.

344 Finlay *Exploring the Challenges Specific to Cross Racial Adoption in Gauteng* 17.

345 Hague Conference on Private International Law; South Africa's annual adoption statistics 2001-2003 http://www.hcch.net/index_en.php?act=conventions.publications&tdid=32&cid=69.

346 Morrison 2004 *Harvard Blackletter Law Journal* 199

contribute to a reduction of prejudice and racial hatred, which in turn would result in a healthier society. Some have argued that matching a child with prospective adoptive parents based solely on race violates the equal protection rights of other individuals seeking to adopt.³⁴⁷ While adoptive parents and children are often not of the same race, it seems that the main concern with inter-country trans-racial adoption is the child's loss of identity with his or her country of origin.³⁴⁸ Racial discrimination is a particular point of interest when determining the best interests of the child, especially when adoptive parents come from western countries such as the United States of America.

There are many arguments against trans-racial adoption. One of the arguments is the fact that the ethnic communities (especially in African communities) will lose their identities and valuable future resources, namely their children.³⁴⁹ However, it is stated by Church³⁵⁰ that the number of children involved in such cases is so small that it would barely make any difference to the cultural growth of the communities concerned. Bowen³⁵¹ argues that white parents are unlikely to provide black children with the necessary survival skills needed. Woodhouse³⁵² in this regard made the remark that race and culture, no matter how hard to define, matter to children and therefore must matter in adoption law. One must, however, always remember that inter-country adoption provides a child, who would have otherwise been left in institutional care, with a home.³⁵³ And one tends to agree with Stark³⁵⁴ when she states that while children subjected to inter-country adoption will lose their families, culture, religion and friends, for some of them this is not a major loss when compared to the alternative of hardship, slavery and death.

It is thus important to ensure that each child is adopted by the correct person. It is vital that the child in question is matched with prospective parents by a professional.

347 Root 2007 *Chicago Journal of International Law* 345.

348 Yngvesson 2007 *Anthropological Quarterly* 560 The premises of liberal legal adoption policy is based on the idea of cancelling the original identity of the child and replacing it with a new identity.

349 Bartholet 2010 *Global Policy* 91.

350 Church *Cross-cultural Adoption in Constitutional Perspective* 28.

351 Stark 2003 *Saint Louis University Public Law Review* 290.

352 Stark 2003 *Saint Louis University Public Law Review* 291.

353 Church *Cross-cultural Adoption in Constitutional Perspective* 29.

354 Stark 2003 *Saint Louis University Public Law Review* 292.

Prospective parents have an ideal image of the child they wish to adopt in their head. This ideal image, however, does not always correspond with reality. The race and culture issues need to be addressed head-on and prospective adoptive parents need to be assessed to determine whether they will be up to the challenge.³⁵⁵ Bojorge³⁵⁶ states that the importance of continuity in a child's ethnic or cultural background has been acknowledged and accepted, as the child's cultural heritage is extremely important to the development of his or her identity..

7.3.8 Determining why the child is in need of adoption

There are reasons why a child may be in need of adoption and it is very important to consider these reasons to determine whether the adoption is in the best interests of the child.³⁵⁷ The first case is where the child's parents and extended family are deceased. This creates the easiest case for determining that the child is in need of inter-country adoption. Another easily determined case is where the child's parents and family are alive, but they have made it very clear that they have no intention of caring for the child. These cases are clear examples of situations where inter-country adoption can occur with very little disruption.

The cases of adoption that have to be examined more closely are those cases where there are parents, extended family or members of the community who are willing to care for the child, but who do not have the necessary means to do so. This situation corresponds with the Madonna adoption case where baby David had a father who was willing to provide for him, but who did not have the means to do so.³⁵⁸ Root³⁵⁹ makes a vital point in this regard, stating that all potential local remedies should be exhausted before splintering a family, and that, when making a decision as to whether a family should be split, it is very important that the welfare of the child should be measured not in terms of the western perception of 'better' resources, but rather with the acuity of 'necessary resources'. The main consideration must be whether greater economic opportunities are in the best interests of the child. It must

355 Cantwell 2011 www.commissioner.coe.int 22

356 Bojorge 2002 *Queensland University of Technology Law and Justice Journal* 282.

357 Root 2007 *Chicago Journal of International Law* 350.

358 Root 2007 *Chicago Journal of International Law* 350

359 Root 2007 *Chicago Journal of International Law* 351.

be noted that more opportunities do not necessarily translate into better opportunities.

7.4 Conclusion

The adoptions in the Jolie and Madonna cases were concluded in a matter of days - a process which normally should have taken a few months. Consequently, on the one hand, it can be argued that these cases were shameful examples of inter-country adoption, but on the other, one can also argue that they are good examples of developed countries doing their part to alleviate poverty and the hardships faced by African children. At the end of the day, the question as to whether or not inter-country adoptions should be allowed, boils down to the best interests of the child. Inter-country adoption cases have to be assessed on a case-by-case basis to assess the interests of all parties concerned.³⁶⁰

Bartholet³⁶¹ states unmistakably that inter-country adoptions are under attack from those claiming that it infringes on the human rights of children. She goes further and says that it is a child's most fundamental right to be nourished and cared for in a family environment and often the only option available to the child is inter-country adoption. Neither adoption abuses nor heritage concerns can be seen as a justifiable reason to restrict inter-country adoptions, because inter-country adoptions ultimately recognise a child as a citizen of the global community who has fundamental rights and entitlements.

360 International Adoption Guide 2011 <http://www.internationaladoptionguide.co.uk>.
361 Bartholet 2010 *Global Policy* 92

8. Family care, parental care or appropriate alternative care

8.1 Introduction

The importance of a child growing up in a stable family environment cannot be over-emphasised. This is mainly because it is the primary duty of parents (and the extended family in some cultures) to ensure that children develop into responsible adults who contribute positively to the community.³⁶² The main reason that so much emphasis is placed on the family unit is because children are regarded as a vulnerable group of society. It is the duty of families to protect their children from all forms of exploitation. This is, however, not always possible because many families, especially in South Africa and other African countries, face severe challenges in protecting and caring for their own children.³⁶³

This right to family care is so important that it is even enshrined in the *Constitution*, which gives every child the right to family care or parental care, or appropriate alternative care.³⁶⁴ The ensuing paragraphs will examine what specifically constitutes 'family care', 'parental care' and 'appropriate alternative care', because while it is seen to be in the best interests of the child to grow up as part of a family, this is not always possible.³⁶⁵

8.2 When is a child in need of care and protection?

Section 150(1) of the *Children's Act* stipulates the grounds on which a child can be considered to be in need of care, including situations where the child:

- (a) has been abandoned or orphaned and is without visible means of support;
- (b) displays behaviour that cannot be controlled by the parent or caregiver;
- (c) lives or works on the streets or begs for a living;
- (d) is addicted to a dependence-inducing substance and is without treatment or support;
- (e) has been exploited or lives in circumstances that expose the child to exploitation;

362 Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 40.

363 UNICEF Protection for orphans and vulnerable children
<http://www.unicef.org/southafrica/protection>.

364 Section 28(1)(b) of the *Constitution*.

365 Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 41.

- (f) lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being;
- (g) is at risk of serious harm if returned to the custody of the parent, guardian or caregiver;
- (h) is neglected; or is being neglected or abused by a caregiver or other person controlling the child.

With regard to (a) above, note that proof that a child has been abandoned or orphaned is inadequate grounds: proof must also be provided that there is an absence of means of support.³⁶⁶ It is important note that family or parental care is seen as the first right of the child and enjoys preference over removing the child or placing the child in institutional care. It also costs a government much less to maintain a child within the care of his or her parents, than to institutionalise the child.³⁶⁷

The preamble of the *Hague Convention* states:

...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...

According to the *Guide on Good Practice*,³⁶⁸ the only way the abovementioned can be realised, is if states are able to identify children in need. In most cases, the identification takes place only when the child enters the child care system. It is, however, essential to put in place formal criteria to prevent inappropriate intervention.

8.3 What is a family in the South African context?

It is not an easy task to define the word 'family'. The reason for this, according to Ferreira,³⁶⁹ is that there is no consensus in South Africa as to what exactly constitutes a family. The term 'family' in the family law context is not an independent term. It changes over time and can only be understood within the particular socio-context in which it is used.³⁷⁰ Taking into account the difficulty in defining the word

366 Boezaart *Child Law in South Africa* 175.

367 Boezaart *Child Law in South Africa* 175.

368 The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention <http://www.hcch.net> 70 para 256-259.

369 Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 42.

370 Introduction to family law 2012 <http://www.oup.com/uk/orc/bin> 3.

'family', one must understand that in a traditional African community this task becomes even harder. An important statement was made in *Dawood v Minister of Home Affairs; Thomas v Minister of Home Affairs; Shalabi v Minister of Home Affairs*³⁷¹ where it was held that:

...the family is a natural and fundamental unit of society, but the definition of family also changes as social practices and traditions change and we must take care not to entrench particular forms of family at the expense of other forms...³⁷²

8.4 The Constitution and family

Robinson³⁷³ submits that the need of the child for family or parental care can only be appreciated if one considers this right in the correct socio-economic background. This right is protected by section 28(1)(b) of the *Constitution* which affords every child the right to family care or parental care, or to appropriate alternative care when removed from the family environment.. The apartheid policies had a particularly devastating effect on black communities and their children. These Constitutional provisions are specifically aimed at correcting the wrongs of the past. The word 'care' used in the *Constitution* acknowledges the fact that children are a vulnerable group of society that require special protection. The care is owed to the child to assist the child in overcoming his or her vulnerability.³⁷⁴ The right to family care is a typical social right that can be enforced against the State. This section places a positive obligation upon the State to ensure the realisation of the right to family care.³⁷⁵

Considering the latter, it is also important to mention *Government of the Republic of South Africa and Others v Grootboom and Others*,³⁷⁶ where the Constitutional Court made it very clear that the primary duty of caring for children lies with the parents or families of the children. The court found that the state only incurs a secondary duty to provide these families with the legal and administrative tools to ensure that

371 *Dawood v Minister of Home Affairs; Thomas v Minister of Home Affairs; Shalabi v Minister of Home Affairs* 2000 3 SA 936 (CC).

372 *Dawood v Minister of Home Affairs; Thomas v Minister of Home Affairs; Shalabi v Minister of Home Affairs* 2000 3 SA 936 (CC) para 960.

373 Robinson 2003 *Potchefstroom Electronic Law Journal* 18.

374 Robinson 2003 *Potchefstroom Electronic Law Journal* 26.

375 Robinson 2003 *Potchefstroom Electronic Law Journal* 27.

376 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 CC (hereafter the *Grootboom* case).

children are protected.³⁷⁷ In the *Minister of Health and Others v Treatment Action Campaign and Others*,³⁷⁸ the state relied on the interpretation in the *Grootboom* case by stating that parents, and not the state, bore the responsibility to provide basic health care services. The court, however, did not agree with this argument and found that, in the case where parental or family care is lacking, the state incurs a primary duty to protect the rights of children.³⁷⁹ It is thus clear from the two cases that parents have a primary duty to provide for and protect their children and only when they are not able to do so will the obligation fall upon the state.

Considering the above cases and bringing the argument back to inter-country adoption, it can be said that where a child has been orphaned or abandoned, the state incurs a primary duty to protect and provide for these children. Inter-country adoption can serve as a viable way for a state such as South Africa to do so.

The right of the child to appropriate alternative care when removed from his or her family environment is clearly a provision that operates against the state. This section imposes a duty on the state to respect existing family care environments and to limit their interference.³⁸⁰ The right to alternative care includes adoptive or foster care and the right to be cared for by the state.³⁸¹ Currie and de Waal³⁸² argue in this respect that the right to family care also includes the right of the child to be cared for by his or her extended family.

8.5 The Children's Act and family

The *Children's Act* does not define the term 'family'. It does, however, define the term 'family member', which in this context in relation to a child means a parent of the child, any other person who has parental responsibilities and rights in respect of the child, a grandparent, brother, sister, uncle, aunt or cousin of the child, or any other person with whom the child has developed a significant relationship, based on

377 *Grootboom* case para 15.

378 *Minister of Health and Others v Treatment Action Campaign* 2002 5 SA 721 CC (hereafter TAC case).

379 TAC case para 79.

380 Robinson 2003 *Potchefstroom Electronic Law Journal* 27.

381 Robinson 2003 *Potchefstroom Electronic Law Journal* 28.

382 Currie and de Waal *The Bill of Rights Handbook* 825.

psychological or emotional attachment³⁸³, which resembles a family relationship.³⁸⁴ The preamble of the *Children's Act* states unequivocally that a child, for the full and harmonious development of his or her personality, should grow up in an atmosphere of happiness, love and understanding.³⁸⁵ Section 7 of the *Children's Act* confirms the need of the child to remain in the care of his or her parents, family and extended family.³⁸⁶ This section once again corroborates the importance of a child growing up in a family environment.

8.6 International instruments and family

International law recognises the family both as the basic unit of society as well as the natural environment for a child to grow up in.³⁸⁷ The definition of a 'family' in the context of international law is important because it needs to be flexible enough to accommodate a wide range of different families, community structures and values, whilst at the same time enshrining international standards concerned with the protection of the child.³⁸⁸ Internationally, there are many different concepts of what constitutes a family. Van Bueren³⁸⁹ sees the family as a concept in transitional development which consists of single parents, the nuclear family, the polygamous family and the extended family, and each one of these units has profound implications for the upbringing of the child. In this context, the extended family forms a single unit and all the members of the family have responsibilities which contribute towards the upbringing of the child. The members of the extended family are each assigned a role which enables the family to work as an economic, reproductive and social unit. Furthermore, in many countries, especially African countries, child care is seen as a communal activity which requires minimum state interference.³⁹⁰

The 'family' concept and the relationship between the child and his or her family can be found in the preamble of the CRC, which states that the family is the fundamental

383 See paragraph 5.6.

384 Section 1 of the *Children's Act*.

385 Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 57.

386 Section 7(1)(f)(i) of the *Children's Act*.

387 Article 18 of the ACRWC and Article 8 of the CRC.

388 Van Bueren *The International Law on the Rights of the Child* 67.

389 Van Bueren *The International Law on the Rights of the Child* 68.

390 Foster 2010 *Monograph* 67.

group of society and the natural environment for the growth and wellbeing of all its members and, in particular, children.³⁹¹ This notion is also evident when one examines article 20 of the CRC, which seeks to place a child who is without a family with a family, in preference to an institution. Alternative care measures, according to article 20(3), include adoption and fostering, although it must be pointed out that the CRC does not see these two forms as the only solutions. Ferreira³⁹² makes a valid point when she states that a child is primarily dependant on those who are closest to him or her. The CRC in this respect recognises that the primary responsibility to provide for a child rests upon the shoulders of his or her parents.

The ACRWC in its preamble also acknowledges the fact that a child should grow up in a family environment, in an atmosphere of happiness, love and understanding for the full and harmonious development of his or her personality. The ACRWC, just like its counterpart, stipulates that the parents of the child or other persons responsible for the child should have the primary responsibility for providing care.³⁹³ Van Bueren³⁹⁴ makes the remark that both international and regional human rights laws are slowly recognising the different cultural approaches when it comes to the concept of a family. While the ACRWC does not define the term 'family', it does, however, recognise the family as the basis of society.

Relating the latter to inter-country adoption, one can come to the conclusion that family plays an invaluable role in the upbringing of a child and is essential in ensuring that a child becomes a contributing member of society. What is clear is that every child has the right to grow up in a family environment. When the child's family is unable to care for him or her, inter-country adoption, irrespective of race, culture and religion, can prove to be a valuable tool in providing a child with a permanent home and family.

391 Van Bueren *The International Law on the Rights of the Child* 68.

392 Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 55.

393 Article 20 of the ACRWC.

394 Van Bueren *The International Law on the Rights of the Child* 71.

9. Child's language and culture

9.1 Constitutional provisions

South Africa has 11 official languages. One can, therefore, imagine that there is a great need to protect the cultural heritage of the individual, especially children.³⁹⁵ Another important constitutional right that must be weighed up against inter-country adoption is a child's right to use the language and practise the cultural life of his or her choice,³⁹⁶ as expressed in the right that every person has to practise their religion, to use their language and to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.³⁹⁷

It is clear that a great deal of importance is attached to a person's language, culture and religion which must be protected from unlawful intrusion. This section will investigate the legislation and international instruments that protect a person's language, religion and culture, which will then be weighed up against the child's right to family, parental or appropriate alternative care. Pieterse³⁹⁸ makes a valuable contribution when he states:

...the Constitutional right to culture mandates the accommodation of cultural principles, practices and values in the legal system in a manner that promotes the spirit, purpose and objectives of the Bill of Rights.

Culture is seen as playing an integral part in developing a child's identity and in *MEC for Education v Pillay*³⁹⁹ it was established that a person's cultural identity is one of the most important parts of an individual's identity. This is because it comes from belonging to a community and not from personal choice or achievement. It can thus be said that a person derives his cultural identity from the group or community with whom he or she associates.⁴⁰⁰ Currie and de Waal⁴⁰¹ define a community as

[a]t its most general, ...an aggregation of people. ...More precisely ... an aggregation of people with a particular quality of relationship, held together by something in common. It is the quality of relationship that is crucial.

395 Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 170.

396 Section 30 of the *Constitution*.

397 Section 31 of the *Constitution*.

398 Pieterse 2001 *SAJHR* 402.

399 *MEC for Education v Pillay* 2008 2 *BCLR* 99 (CC).

400 *MEC for Education v Pillay* 2008 2 *BCLR* 99 (CC) par 116

401 Currie and de Waal *Bill of Rights Handbook* 626.

Ferreira⁴⁰² states that section 31 of the *Constitution* must be aimed at protecting the ties of similarity rather than of lineage and that culture is more a matter of shared experiences than genetics. This notion of Ferreira correlates with Heaton's⁴⁰³ point of view that an infant child has not yet formed a link with his or her own culture, and thus no objections can be raised against the adoption of a child by individuals of a different culture. One can agree with the notion that a child who is still very young will not have been able to form or share any experiences, thus not forming part of a culture. Considering the latter, can it still be argued that inter-country adoption robs children of their heritage and culture?

The situation with an older child is, however, different. The *Children's Act*⁴⁰⁴ determines that a child aged ten years or older has to consent to his or her own adoption. This indicates that there is a stage in a child's life when he or she forms ties with other individuals in his or her community which should not be interrupted.⁴⁰⁵ It is clear that the older the child is and the stronger the cultural bond between the child and his or her community becomes, the more difficult inter-country adoption will become.

Ferreira⁴⁰⁶ states that culture should not be over-emphasised and should never override the best interests of the child principle. Considering a child's culture when determining where to place a child will, in the end, lead to racial matching which should not be used as criterion when determining potential adoptive parents. A child will form his or her own culture with the family with whom he or she is placed.

9.2 International instruments

The CRC protects a child's culture by not denying the child the right to practise his or her culture in community with other members of the community and to enjoy his or

402 Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 176.

403 Heaton *The meaning of the concept 'best interests of the child' as applied in adoption applications as applied in South African Law* 79.

404 Section 233(1)(c) of the *Children's Act*.

405 Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 181.

406 Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 185.

her culture and practise his or her own religion or to use his or her own language.⁴⁰⁷ One can see that a child's cultural life has to be taken into account when determining the best interests of the child. It should, however, be noted that a child's cultural life should not be given more weight than other factors when determining the best interests of the child.⁴⁰⁸

The second important international instrument to consider is the ACRWC. The preamble of the ACRWC acknowledges that children in Africa occupy a unique and privileged position in African society. The preamble takes the virtues of African children into account and sees children as Africa's wealth. The ACRWC respects and promotes the cultural lives of children and encourages them to participate freely in their cultural lives.⁴⁰⁹ The ACRWC also obligates children to strengthen African cultural values. One can thus clearly see that the ACRWC attaches a different dimension of culture to the discussion and once again it emphasises the importance of culture in African communities.

407 Article 30 of the CRC.

408 Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* 204.

409 Article 12 of the CRC.

10. Conclusion and recommendations

It is clear that determining whether inter-country adoption is in the best interests of the child is no easy task.⁴¹⁰ Although inter-country adoption has many flaws, it can still be seen as a viable option for vulnerable or orphaned children. The question of whether inter-country adoption deprives children of their culture and religion remains a sensitive one. Irrespective of the criticism against it, it remains a stable care option for children who cannot be cared for by their own family. Inter-country adoption may just be the best option for a permanent solution. It is, however, extremely important that adoptions are closely regulated and monitored to ensure that they coincide with the principles of the *Hague Convention* and the *Children's Act*. Also important, is strengthening the co-operation between contracting states to ensure that the best interests of the child are always the primary consideration.

Southern Africa finds itself in a very peculiar position. According to the *United Nations Human Development Program Index*, South Africa is ranked 121 out of 177 countries. The poverty index places South Africa at number 55 out of 108 developing countries. Furthermore, one must consider that 44.2 percent of South Africa's population consists of children.⁴¹¹ South Africa, as well as the rest of Africa, is faced with a real problem and available solutions are few. Inter-country adoption, if correctly regulated, can address these poverty issues effectively and possibly alleviate the hardships faced by so many children.⁴¹²

One tends to agree with the approach followed in the *David Banda* case, in which the court made its judgment based solely on the best interests of the child and in the end ensured that David Banda received the necessary care. The logical step for impoverished countries would be to resort to inter-country adoption, especially if there are no local solutions. The arguments of critics against inter-country adoption tend not to be as watertight.⁴¹³ Those who argue that inter-country adoption deprives

410 See paragraph 5.2 above.

411 United Nations Development Programme (UNDP's) human development index 2007/2008.

412 See paragraph 3.8.

413 See paragraph 7.3.4.

children of their cultural heritage do not take into account the basic socio-economic needs of children.⁴¹⁴

What is clear from the discussion is that the current inter-country adoption procedures and monitoring mechanisms are anything but fool proof. Children slip through the cracks on a daily basis and it is evident that stricter policies are needed to ensure that the best interests of the child are upheld. Another aspect in terms of improving the procedures would be the implementation of harsher sanctions for non-compliance: merely implementing legislation is not enough. International co-operation, in this respect, is key.⁴¹⁵

Formulating solutions to a complex practice like inter-country adoption is hard, but not impossible. What is evident from the investigation is that inter-country adoption can be in the best interests of the child and should be a viable option. The choice to resort to inter-country adoption should, however, only be considered if all of the requirements as set forth by the *Hague Convention* and other relevant legislation have been complied with.⁴¹⁶ Individuals who abuse the process and influence officials through financial means, irrespective of their motives, at the end of the day contribute to the problem rather than the solution.

414 See paragraph 9.

415 See paragraph 7.3.5.

416 See paragraphs 3 and 4.

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