

## Intercountry adoption— controversies and criticisms

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### Introduction

The African Child Policy Forum (hereinafter: ACPF) organised the Policy Conference *Intercountry Adoption: Alternatives and Controversies*, in May 2012 at the United Nations Conference Centre in Addis Ababa, Ethiopia. Some 400 participants from around the globe took part in the deliberations: government officials, members of the African Committee of Experts on the Rights and Welfare of the Child and the UN Committee on the Rights of the Child, representatives of NGOs, advocacy groups and private adoption agencies as well as academics and individual children's rights activists. One of the main objectives of the conference was to raise awareness about the phenomenon intercountry adoption in relation to the protection of African children and the promotion of legal and policy action, in line with the best interests of the child.<sup>1</sup>

Although the African continent is considered to be the 'new frontier' for intercountry adoption, this phenomenon does not only affect children in Africa but also impacts on children in other parts of the world.<sup>2</sup>

In recent years, intercountry adoption has become the subject of public debate, leading to a division between those who support this form of adoption and those who view it with a jaundiced eye. The

death of a Russian boy, adopted into a family in the USA caused thousands of people to come out in support of a ban on adoption of Russian children by American citizens.<sup>3</sup> Equally topical are: the Haiti adoption scandal after the devastating earthquake in 2010, where many children were airlifted from their home country and adopted by foreigners without the required safeguards taken into consideration – also referred to as an "international adoption bonanza"<sup>4</sup> – and the controversial adoptions of children by celebrities such as Mia Farrow, Angelina Jolie and Madonna.<sup>5</sup>

In this article the relevant international and regional instruments, as well as the current status of intercountry adoption will be presented.

### 1. Legal framework intercountry adoption

The divergent views countries held on intercountry adoption, especially in relation to the best interest of the child principle, led to the organisation of the 1971 *World Conference on Adoption and Foster Placement*.<sup>6</sup> Following on this conference, the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally was drafted and subsequently adopted by the UN General Assembly in 1986.<sup>7</sup> Despite the fact that this Declaration contained a number of stipulations on intercountry adoption, the factual impact of this document was negligible. The awareness of the topic had nevertheless been raised and the two most important instruments relating to children's rights, the 1989 Convention on the Rights of the Child (hereinafter: CRC) and the 1990 African Charter on the Rights and Welfare of the Child (hereinafter: ACRWC), both contain provisions on intercountry adoption.<sup>8</sup> Articles 21 CRC and 24 ACRWC stipulate that the best interest of the child should be the paramount consideration. Furthermore, according to these articles, intercountry adoption should only be considered when there are no suitable alternatives available in the child's country of origin – such as foster care, national adoption or residential care – and intercountry adoption is to be employed as a measure of last resort.

<sup>3</sup> [Find it here](#) accessed on 18 March 2013.

<sup>4</sup> [Find it here](#) accessed on 18 March 2013.

<sup>5</sup> [Find it here](#) accessed on 18 March 2013.

<sup>6</sup> S.A. Detrick, *Commentary on the United Nations Convention on the Rights of the Child*, The Hague: Kluwer Law International 1999, p. 332.

<sup>7</sup> UN General Assembly, A/RES/41/85, 3 December 1986.

<sup>8</sup> Article 21 CRC and article 24 ACRWC respectively.

<sup>1</sup> African Child Policy Forum, *Intercountry Adoption: Alternatives and Controversies. The Fifth International Policy Conference on the African Child. Conference Report*. Addis Ababa, Ethiopia, 2012.

<sup>2</sup> African Child Policy Forum, *Africa: The New Frontier for Intercountry Adoption*. Addis Ababa, Ethiopia, 2012.

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Due to the vast increase in the number of international adoptions in the 1980s, the need for a multinational approach in addition to the aforementioned Declaration on foster placement and adoption was acknowledged by the international community.<sup>9</sup> Subsequently, the Hague Conference on Private and International Law set out to draft a convention specifically aimed at intercountry adoption and in 1993 the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption came into being (hereinafter: the Hague Convention).

The Hague Convention outlines the minimum standards for intercountry adoption procedures and contains a Preamble and 48 articles. In the Preamble, the importance of a child growing up in a family environment is underlined: should a suitable family environment not be available in the country of origin, then intercountry adoption may be considered for the child in question. Given that in the text of the Convention no reference is made to non-family based care – residential care<sup>10</sup> – as an alternative, intercountry adoption is evidently ranked above this form of alternative care and is therefore – contrary to the tenets of the CRC and the ACRWC – not recognised as a measure of last resort.<sup>11</sup>

The definition of intercountry adoption which can be derived from the Hague Convention is:

The creation of a permanent and legal child-parent relationship between a child habitually resident in one country (State of origin) and a couple/person habitually resident in another country (receiving State).<sup>12</sup>

Chapter II of the Hague Convention sets out the requirements for intercountry adoption and contains obligations for both the child's country of origin and for the receiving country. In the State of origin, safeguards should be in place with regard to the following aspects:<sup>13</sup>

- The adoptability of a child has to have been established.
- Intercountry adoption should be in the best interests of the child and other – national –

options have to have been thoroughly investigated.

- All parties involved have to be duly informed regarding the consequences of their consent to intercountry adoption; consent should be freely and voluntarily given by all and, in case of the biological mother, not before the child is born; consent may not depend on financial or other gain.
- If age and maturity of the child permit, the child should be sufficiently informed; his wishes and opinions should be taken into consideration; when applicable, his consent should be obtained freely.

The receiving State has to ensure that:<sup>14</sup>

- prospective adopters are suitable and eligible to adopt the child;
- prospective adoptive parents have received counselling where required;
- the child is able to legally enter and live permanently in the receiving country.

In chapter III of the Hague Convention the requirement of a Central Authority and Accredited Body is laid down. Every Member State should establish a Central Authority, in charge of carrying out the duties imposed on the State by the Hague Convention. Authorities from different countries should co-operate to such an extent that they provide each other with necessary information in intercountry adoption procedures and ensure that all processes involved are in line with the Hague Convention.<sup>15</sup>

Articles 14 – 22 (chapter IV) of the Hague Convention cover the legal requirements of intercountry adoption in both the country of origin and the receiving country. Prospective adoptive parents who wish to adopt a child from another country should apply to the Central Authority in their own country. The Central Authority is to establish whether the prospective parents are eligible and suitable for adoption. Furthermore, the Authority is required to prepare a report containing information on the prospective parents regarding identity, eligibility and suitability, as well as information concerning their background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, and the characteristics of the children for whom they would be qualified to care. This report should be submitted to the country of origin.<sup>16</sup> In turn, the State of origin is held to prepare a report on the prospective adoptee, covering the following aspects: identity, adoptability, background, social environment, family history, medical history (including that of the biological family), and – if applicable – any

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<sup>9</sup> G. Parra-Aranguren, *Explanatory Report on the 1993 Hague Intercountry Adoption Convention*, The Hague: HCCH Publications 1994, p. 3.

<sup>10</sup> Residential care is temporary or long-term care provided on a 24-hour basis in a group-based setting, by remunerated adult staff, in a building or buildings owned or provided by the implementing organisation, C. Phillips, *Child-headed households: A feasible way forward, or an infringement of children's right to alternative care?*, Amsterdam: Phillips 2011, p. 75.

<sup>11</sup> S. Vité & H. Boéchat, *A Commentary on the United Nations Convention on the Rights of the Child. Article 21 Adoption*, Leiden/Boston: Martinus Nijhoff Publishers 2008, p. 45.

<sup>12</sup> Article 2 Hague Convention.

<sup>13</sup> Article 4 Hague Convention.

<sup>14</sup> Article 5 Hague Convention.

<sup>15</sup> Articles 6 – 13 Hague Convention.

<sup>16</sup> Article 15 Hague Convention.

special needs. The report on the child, as well as the required consents, shall be conveyed to the Central Authority of the receiving State. Based on both reports, the decision is taken on whether adoption of the child in question by the prospective adopters is in the child's best interests, whereby due consideration should be given to the child's upbringing and ethnic, religious and cultural background.<sup>17</sup> Before the country of origin takes a decision on whether a child should be entrusted to the future adopters, the Central Authority of this country has to ensure that: 1) the prospective parents agree to the adoption, 2) the Central Authority of the receiving country has given its approval to the adoption, 3) the Central Authorities of both countries support the adoption, and 4) the prospective parents are eligible and suitable for adoption and the child is allowed to enter and reside permanently in the receiving country.<sup>18</sup> The actual transfer of the child from his home country to his adoptive parents can only take place once the aforementioned conditions have been met.<sup>19</sup>

Chapter V outlines the recognition and the effects of intercountry adoption. Member States should recognise adoptions which have taken place in accordance with the Hague Convention; recognition may only be refused by a Member State when an adoption is patently not in compliance with its public policy, whereby the best interest of the child is taken into consideration.<sup>20</sup> Recognition of an adoption includes the following aspects:<sup>21</sup>

- existence of a legal child-parent relationship
- parental responsibility of the adopters for the adoptee
- termination of previous parental relationships of the child, unless adoption does not result in a termination on the basis of the legal system of the countries in question.

A number of general provisions are covered by chapter VI. These relate to the constraints on contact between the child and his adopters when it has not yet been established that all the requirements for the adoption have been met; preservation of information with regard to the child's origin; prohibition of improper (financial) gain in relation to the adoption; the applicability of the Hague Convention.<sup>22</sup> The final clauses in chapter VII concern formalities such as signature and ratification of the Convention.<sup>23</sup>

<sup>17</sup> Article 16 Hague Convention.

<sup>18</sup> Article 17 Hague Convention.

<sup>19</sup> Article 19 Hague Convention.

<sup>20</sup> Articles 23 and 24 Hague Convention.

<sup>21</sup> Article 26 Hague Convention.

<sup>22</sup> Articles 28 – 42 Hague Convention.

<sup>23</sup> Articles 43 – 48 Hague Convention.

### **2. Current status intercountry adoption**

To date, a total of 90 countries have either ratified the Hague Convention or have acceded to it, only a handful of which are African countries.<sup>24</sup> Given that children who are adopted to or from non-member countries run a considerably higher risk of having their rights violated, countries are increasingly encouraged to sign up to the Hague Convention. For instance, in 2010, UNICEF urged African governments to adopt the Hague Convention.<sup>25</sup> In their Concluding Observations and Recommendations, both the African Committee of Experts on the Rights and Welfare of the Child and the CRC Committee on the Rights of the Child recommend that countries expedite the ratification of the Hague Convention and/or ensure that national legislation is in full conformity with the Hague Convention.<sup>26</sup>

However, countries governed by Islamic Law will not ratify the Hague Convention, as under this law adoption is prohibited. Instead, these countries provide a form of guardianship, known as *kafalah*, which is a commitment by an adult to bring up a child and take care of his education and maintenance until the child reaches adulthood.<sup>27</sup> The term *kafalah* is derived from the Arabic word *kafil*, meaning 'to take care of as a father would of his son'. Contrary to adoption, a child maintains his own family name and does not acquire inheritance rights in relation to his new caregiver(s).<sup>28</sup>

The number of inter-country adoptions has decreased significantly during a period of almost ten years. The most recent data, provided by 23 receiving States,<sup>29</sup> indicate a drop of more than 40% from 41,535 adoptions in 2003 to 23,609 in 2011. The top five receiving countries in 2011 – all of which have ratified the Hague Convention – were:

1. USA (9,320); 2. Italy (4,022); 3. Spain (2,573);
4. France (1,995); 5. Canada (1,785).<sup>30</sup>

<sup>24</sup> [Find it here](#) accessed on 21 March 2013.

<sup>25</sup> [Find it here](#) accessed on 26 March 2013.

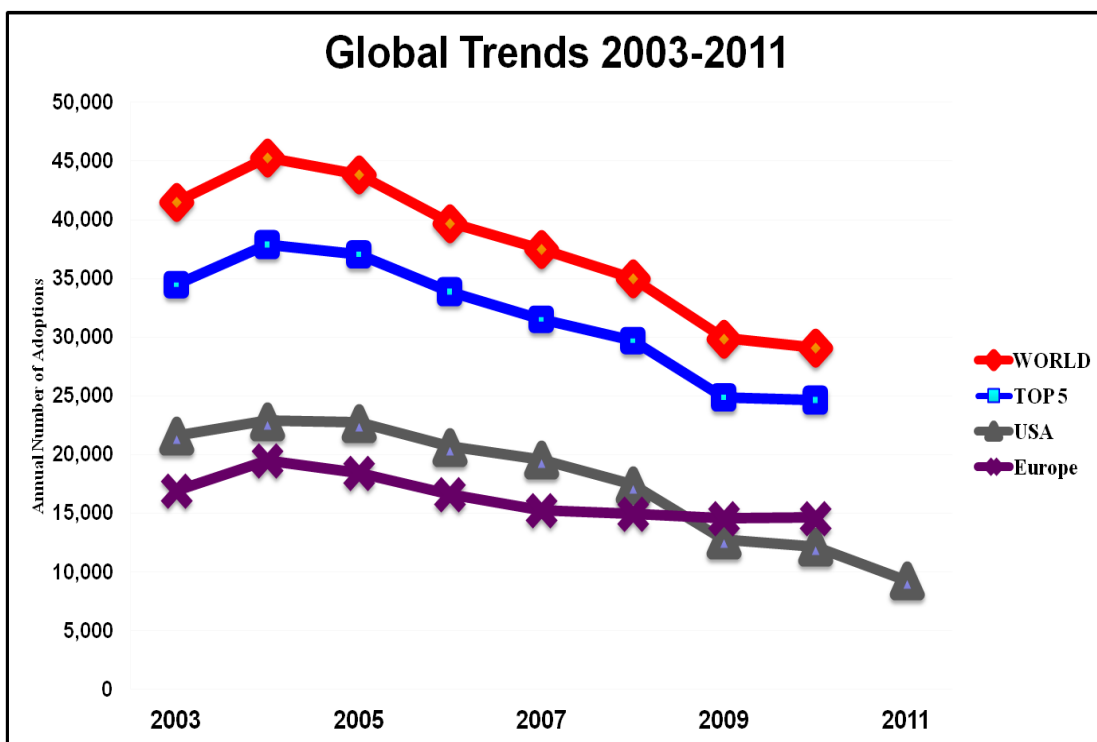
<sup>26</sup> See in this regard: Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child on the Republic of Tanzania, November 2010; Committee on the Rights of the Child, CRC/C/CAN/CO/3-4, Concluding Observations Canada, December 2012; Committee on the Rights of the Child, CRC/C/NAM/CO/2-3, Concluding Observations Namibia, October 2012; Committee on the Rights of the Child, CRC/C/BIH/CO/2-4, Concluding Observations Bosnia and Herzegovina, November 2012.

<sup>27</sup> African Child Policy Forum, *Intercountry Adoption: Alternatives and Controversies. The Fifth International Policy Conference on the African Child. Conference Report*. Addis Ababa, Ethiopia, 2012, p. 16.

<sup>28</sup> UN Department of Economic and Social Affairs, Population Division, *Child Adoption: Trends and Policies*, New York, USA, 2009 (UN DESA ST/ESA/SER.A/292 2009), pp. 26, 27.

<sup>29</sup> Andorra, Australia, Belgium, Canada, Cyprus, Denmark, Finland, France, Germany, Iceland, Ireland, Israel, Italy, Luxembourg, Malta, New Zealand, Netherlands, Norway, Spain, Sweden, Switzerland, UK, USA.

<sup>30</sup> P. Selman, *Key Tables for Intercountry Adoption: Receiving States and States of Origin 2003-2011*, available on request from the author at [pfselman@yahoo.co.uk](mailto:pfselman@yahoo.co.uk).



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The top five countries of origin in 2011 were mainly non-member countries:

1. China (4,405)
2. Ethiopia (3,455)
3. Russia (3,325)
4. Colombia (1,577)
5. Ukraine (1,070).<sup>1</sup>

These figures solely reflect registered adoptions. However, signals that numerous unregistered, illegal adoptions take place – especially from non-Hague countries – indicate that the factual number of intercountry adoptions is significantly higher.<sup>2</sup>

As stated previously, although the total number of registered intercountry adoptions has decreased during the past decade, the number of children adopted from African countries has seen an increase during this period. Whereas, in 2003 a mere 5% of all intercountry adoptions concerned African children, in 2009 this number had risen to 22%.<sup>3</sup> As most African countries have not ratified the Hague Convention and national legislation on the subject of intercountry adoption is scanty, the necessary safeguards for the protection of children who are put up for adoption are not in place. It is therefore of paramount importance that the Hague Convention be ratified where possible and the implementation of the Convention's stipulations is a vital step in combating illegal and unsafe adoptions. In recent years, concern has been raised about the adoption of thousands of Ethiopian children, mainly by American and European adopters.

It is questionable whether these adoptions are legitimate as in a number of cases the incentive appears to be financial (an adoption may be 'worth' up to \$35,000) rather than the best interests of the child.<sup>4</sup> Other frequently encountered reasons for intercountry adoption – whereby the best interest of the child is not the main consideration – are the desire of adoptive parents to form or expand their own family<sup>5</sup> and the opinion that the receiving country is better equipped to care for a child than the country of origin.<sup>6</sup> Notwithstanding the undoubted significance of the Hague Convention, ratification does not necessarily imply compatibility with domestic laws and procedures. For instance, legislation in two of the top five receiving countries, the USA and France, allow for privately-arranged intercountry adoptions, which are usually not in compliance with the Hague Convention.<sup>7</sup>

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<sup>1</sup> Ibid.

<sup>2</sup> See in this regard: Child Trafficking in East and South-East Asia: Reversing the Trend, UNICEF EAPRO, 2009; Adopting the Rights of the Child, A study on intercountry adoption and its influence on child protection in Nepal, UNICEF / Terres des Hommes9 Foundation, 2008; [Find it here](#), accessed on 27 March 2013; [Find it here](#), accessed on 27 March 2013.

<sup>3</sup> African Child Policy Forum, *Intercountry Adoption: Alternatives and Controversies. The Fifth International Policy Conference on the African Child. Proceedings Report*. Addis Ababa, Ethiopia, 2012, pp. 9 – 10.

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<sup>4</sup> [Find it here](#) accessed on 27 March 2013.

<sup>5</sup> African Child Policy Forum, *Intercountry Adoption: Alternatives and Controversies. The Fifth International Policy Conference on the African Child. Proceedings Report*. Addis Ababa, Ethiopia, 2012, p. 7.

<sup>6</sup> Ibid, p. 22.

<sup>7</sup> African Child Policy Forum, *Intercountry Adoption: Alternatives and Controversies. The Fifth International Policy Conference on the African Child. Conference Report*. Addis Ababa, Ethiopia, 2012, p. 7.

### 3. Conclusion

The foremost international instruments governing the protection of children's rights – the CRC and the ACRWC – both consider intercountry adoption to be a measure of last resort. Only in situations where a child cannot be adequately cared for in its own country, should intercountry adoption be considered and only when this is in the best interests of the child in question. Intercountry adoption is positioned last in line when options are contemplated for children without (adequate) parental care.

Contrary to the CRC and the ACRWC, the Hague Convention does not regard intercountry adoption as a measure of last resort, ranking this form of adoption higher than institutional care. However, the Preamble of the Hague Convention provides that measures be taken to ensure that intercountry adoptions are made in the best interests of the child and with respect for its fundamental rights. This implies that should there be universal consensus that intercountry adoption may not be considered to be in the best interests of children, this form of care should no longer be promoted or employed. This, however, is a utopian ideal as there are still many countries which champion intercountry adoption as a justifiable form of 'aid'. Given that intercountry adoption *does* take place, it is of paramount importance that countries in which this form of adoption is allowed – or is in any case not prohibited – be(come) party to the Hague Convention. As set out in this article, the Hague Convention provides States with guidelines as to how to best implement rules and regulations concerning necessary safeguards, processes and supervisory bodies.

However, ratification of the Hague Convention should not be embraced as a 'miracle cure' as privately-arranged and illegal adoptions currently also occur in Member States, albeit to a lesser extent than in non-Member States. Despite the safeguards provided by the Hague Convention, the risks involved in intercountry adoptions are immense: child harvesting, baby farms, child trafficking, child labour, child prostitution are only a few of the dangers potentially facing children. Implementation of and adherence to the provisions of the Hague Convention is therefore vital.

With regard to the principle of intercountry adoption being a measure of last resort, this author should like to pose the following question: Is it right to assert that there are circumstances under which children – even those in the most acute need of alternative care – cannot be looked after in their own country? In certain situations a measure of assistance – financial or otherwise – may be required in order to support extended family members or a foster family in raising the child. However, in most cases awareness that a child is in need of alternative care and adequate national policies dealing with such situations will suffice; in this regard, the promotion of national adoption possibilities has led to positive results, in that a significant increase in domestic adoptions in several countries has been achieved. The answer to the aforementioned question should therefore – to my mind – be an unequivocal 'No.' As voiced by David Mugawe, Executive Director of the ACPF, during the final session of the Policy Conference *Intercountry Adoption: Alternatives and Controversies*: "There is no place any longer for intercountry adoption; Africa can look after its own children." This is a sentiment that in my opinion does not only pertain to the African continent, but is universally applicable.

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