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**"THE SINS OF THE 'SAVIOURS' ": CHILD TRAFFICKING IN THE CONTEXT OF
INTERCOUNTRY ADOPTION IN AFRICA**

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1 INTRODUCTION

It is not uncommon to regard intercountry adoption as a “life saving” act.¹ Those involved in this “life saving” act include governments; orphanages; intermediaries such as lawyers, adoption agencies; families of origin and prospective adoptive parents. However, contrasted with the positive face of adoption are some scandals and irregularities concerning the practice – and at its worst, adoption is portrayed as child trafficking or baby selling.²

With the increasing attention that African children are attracting from prospective adoptive parents living in other parts of the world, the risks associated with intercountry adoption such as child trafficking and other illicit activities are on the rise. In recent times, African countries such as, Chad, Egypt, Ethiopia, Ghana,³ Kenya, Liberia, Sierra Leone, South Africa, Sudan, and Uganda have experienced instances of child trafficking/illicit activities in relation to intercountry adoption.

Therefore, the first leg of the title of this paper – namely “the sins of the ‘saviours’” – is intended to highlight the irregular activities, particularly child trafficking in the context of adoption, that are undertaken by those presumably involved in, or tasked with, the “life saving” act, but in fact undertake or contribute towards the trafficking of children in the context of intercountry adoption in Africa.

1.1 Aims of the paper

The main aims of this paper are to:

- highlight some of the assumptions that exist about trafficking in the context of intercountry adoption in Africa;
- underline the conditions that give rise to abuses and highlight the types of abuses that occur; and
- propose some solutions to minimise and/or eliminate these abuses.

1.2 Scope of the paper

The “child trafficking” or “illicit activities” in the context of intercountry adoption envisaged in this paper include: child abduction and child stealing, buying and selling; improper financial gain and corruption; private adoption; falsification of documents; and circumventing adoption procedures, for instance, through guardianship orders.⁴ Therefore, this paper covers not only trafficking as understood in the Palermo Protocol, but adopts a wider notion of the term including practices that may lead to abduction, sale or trafficking in children in the context of adoption.

This paper does not and cannot review all 54 countries on the African continent. Rather, while relevant instances from any of the 54 countries will probably be mentioned, some of the main sending countries or those countries that have recently been on the spotlight in connection with intercountry adoption in Africa, such as Ethiopia, Chad, Liberia, South Africa,

¹ In “Live or let die: Could intercountry adoption make the difference?”, as the title itself intones, Olsen ends the article by posing the question: “Should the orphaned children of the world live, or should we let them die? Intercountry adoption could be the vehicle through which many children have the chance to live”. Olsen, L. (2004) “Lie or let die: Could intercountry adoption make the difference?” 22 *Penn State International Law Review* 525.

² Smolin, D. (2004) “Intercountry adoption as child trafficking” 39 *Valparaiso Law Review* 281; Smolin, D. (2005) “The two faces of the intercountry adoption: The significance of the Indian adoption scandals” 35 *Seton Hall Law Review* 404; Van Bueren, G. (1995) *The international law on the rights of the child* 96.

³ See, for instance, 570 News, (04 November 2009), “Ghana adoptions dropped by Imagine”, available at <http://www.570news.com/news/local/more.jsp?content=20091104_071436_9536>.

⁴ Such illicit activities, apart from violating the best interests of the child, have the potential to infringe on the rights of biological families and prospective adoptive parents.

Sierra Leone, Kenya, Burkina Faso, Malawi, Uganda, Namibia, Botswana, and Madagascar receive more attention.

The clandestine nature of child trafficking in the context of adoption makes it a difficult area to research. Admittedly, this paper has been developed against a background of an absence of reliable estimates regarding the actual levels of trafficking in Africa, especially in the context of adoptions. The paper has also had to take account of the dearth of trafficking research and methodology. As a result, this paper is based on sources such as from receiving countries, sending countries, UN Agencies, the Committee on the Rights of the Child (CRC Committee), and the African Committee of Experts on the Rights and Welfare of the Child (African Committee). Less conventional sources such as media reports are also used as appropriate.

1.3 Structure of the paper

The paper is divided into six parts. After introducing the subject matter, Section 2 proffers a brief discussion of the international legal framework that is applicable to intercountry adoption in Africa with a focus on trafficking in the context of adoption. Section 3 gives a brief background to legislative and policy responses related to trafficking of children in African countries. Section 4, which is the kernel of this paper, deconstructs some thematic issues related to trafficking of children in the context of intercountry adoption in Africa. Subsequently, Section 5 charts some potential solutions that would contribute to addressing the problem of child trafficking in the context of intercountry adoption in Africa. In Section 6, the paper offers some concluding remarks.

2. THE INTERNATIONAL LEGAL FRAMEWORK

Since human rights issues are at the core of the current debate over intercountry adoption,⁵ the three instruments that make intercountry adoption a subject of international human rights law international children's rights law are the Convention on the Rights of the Child (CRC),⁶ the African Charter on the Rights and Welfare of the Child (ACRWC),⁷ and the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption (the Hague Convention).⁸

These instruments cover issues such as adoptability, subsidiarity, improper financial gains and so forth. In addition, these instruments mandate that intercountry adoption be undertaken only when it is in the best interests of the child. In fact, it is worth noting that adoption is the only sphere covered by the CRC where the best interests of the child are to be *the* primary consideration.

The CRC and the ACRWC recognise the potential risk intercountry adoption might pose for children's best interests especially if it is not properly regulated. As a result, according to the CRC, States Parties are obligated to "[t]ake all appropriate measures to ensure that, in intercountry adoption, the placement does not result in improper financial gain for those involved in it".⁹ The counterpart provision of the ACRWC is more elaborate in that it explicitly mentions "trafficking": States Parties shall take "...all appropriate measures to ensure that in inter-country adoption, the placement does not result *in trafficking* or improper financial gain for those who try to adopt a child" (emphasis mine).¹⁰

⁵ Barthelet, E. (2007) "International adoption: Thoughts on the human rights issues", 13 *Buffalo Human Rights Law Review* 151-52.

⁶ UN Convention on the Rights of the Child (hereinafter "CRC"), entered into force 2 September 1990.

⁷ African Charter on the Rights and Welfare of the Child (hereinafter "ACRWC"), entered into force 29 November 1999.

⁸ The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption (hereinafter "the Hague Convention"), entered into force 1 May 1995. It is important to note that the Hague Convention is not a human rights convention *per se*, but is an agreement on the standards to be observed where intercountry adoption occurs.

⁹ Art. 21(d) of the CRC.

¹⁰ Art 24(d) of the ACRWC.

The drafting of the Hague Convention was partly premised on the need to address the highly unregulated intercountry adoption system prevailing, which had been characterised by child laundering. As a result, one of the three objectives of the Hague Convention is “to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children”.¹¹

Articles 32 - 34 of the CRC cover the specific forms of exploitation of children, such as, economic exploitative use of children (in particular child labour), illicit use of narcotic drugs, and the use of children for prostitution and pornography.¹² What Article 35 of the CRC heralds in is “a double protection for children”, as it requires blanket action on the abduction, sale or traffic of children.¹³ Article 35 stipulates that “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form”.¹⁴

Article 29(a) of the ACRWC entrenches similar standards by stipulating that:

States Parties to the present Charter shall take appropriate measures to prevent:
(a) the abduction, the sale of, or traffick of children for any purpose or in any form, by any person including parents or legal guardians of the child;...

The phrases “for any purpose” and “in any form” in both the CRC and the ACRWC include illegal adoptions. The explicit inclusion of the phrase “by any person including parents or legal guardians of the child” in the ACRWC echoes the understanding that, with the introduction of the CRC and the ACRWC, the notion of children as their parents’ property is contrary to children’s rights discourse.

In the context of the Hague Convention, too, one of the three objectives of the treaty is to prevent illicit activities, such as, child laundering. It is notable that the Hague Convention does not intend to prevent illicit activities directly.¹⁵ Rather, the assumption is that “the observance of the Convention’s rules will bring about the avoidance of such abuses”.¹⁶ The Hague Convention mirrors the view that the decision to place a child for adoption should not be “induced by payment or compensation of any kind”.¹⁷

Apart from the CRC, the ACRWC, and the Hague Convention, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OPSC), and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime (Palermo Protocol) are of direct application to issues pertaining to the sale, trafficking and abduction of children¹⁸ in the context of adoption.

¹¹ Art 1(b) of the Hague Convention.

¹² For a detailed exposition of Art 34 of the CRC, see Muntarhorn, V. (2007) “Article 34: Sexual exploitation and sexual abuse of children” in Alen, A. *et al.* (eds.) *A commentary on the United Nations Convention on the Rights of the Child*.

¹³ Hodgkin, R. and Newell, P. (2007) *Implementation handbook for the Convention on the Rights of the Child* 532. One main factor that differentiates Art. 35 of the CRC from Art. 11 of the CRC is that the latter is focussed on the illicit “transfer or non-return of children abroad” (usually undertaken by relatives, not for profit) while the former’s application is wider in scope as it also covers the illicit activities within a State Party’s territory. See Hodgkin and Newell, (2007), 143.

¹⁴ Art. 36 of the CRC entrenches that “States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child’s welfare”.

¹⁵ Parra-Aranguren, (1994), Parra-Aranguren, G. (1994) *Explanatory Report to the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (Hague Conference on Private International Law, Proceedings of the Seventeenth Session, Tome II), para. 52.

¹⁶ As above.

¹⁷ Arts. 4(c)(3) and (4)(d)(4).

¹⁸ Arts 34, 35, and 36 of the CRC and Art 29 of the ACRWC.

Articles 2 and 3 of the OPSC must be considered together. In Article 2, the OPSC defines the conduct prohibited in the Protocol, and Article 3 lists acts that, as a minimum, should be covered by the criminal laws of States Parties. Of direct relevance to this chapter in Article 2 of the OPSC is sub-article (a) which defines “Sale of children” to mean “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration”.

Another directly relevant provision of the OPSC is Article 3(1)(a)(ii). It provides that:

Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether such offences are committed domestically or transnationally or on an individual or organized basis:

(a) In the context of sale of children as defined in article 2:

...

(ii) Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption;

In Article 3 of the OPSC, attempt to commit, complicity in, or participation in, acts relating to the sale of children should also be criminalised. In addition, punishment by appropriate penalties should take into account the "grave nature" of the offence. Unfortunately, however, Article 3(1)(a)(ii) of the OPSC seems to suggest that States Parties are obliged to punish intermediaries only, and that “buyers” and “sellers” of children fall beyond its scope. This is premised on the wording of the Article that States Parties shall ensure that, “[i]mproperly inducing consent, *as an intermediary*, for the adoption of a child...” is covered under their criminal law.¹⁹

Fortunately, often the view of the CRC Committee on this matter is that States Parties should criminalise and prosecute all actors involved in the sale of children for the purpose of adoption.²⁰ This can be inferred from its concluding observations on States Parties Reports.²¹ Furthermore, the Committee’s interpretation gathers support from Article 3(5) of the OPSC in terms of which States Parties have to take “measures to ensure that *all persons involved in the adoption* of a child act in conformity with applicable international legal instruments” (emphasis mine).²²

Unfortunately, it is submitted that there seems to be a tendency by States to assume that criminal law provisions on trafficking are sufficient for addressing child buying and selling. However, this is not always the case. While child trafficking and the sale of children might sometimes overlap, the sale of children is not a necessary element of the definition of “child trafficking”. By way of example, recruitment of a child can take place using deceit and with no element of sale involved. Therefore, children who are recruited through deceit can be trafficked for, or through, adoption without any element of sale occurring throughout the entire process.²³ As a result, it is advisable to have legislation that explicitly criminalises child selling and buying, as well as the conduct of other persons who are involved in such a process in different capacities, for example, as intermediaries.

¹⁹ Art 3(1)(a)(ii) of the OPSC.

²⁰ UNICEF Innocenti Working Paper (2009) “The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography and the jurisprudence of the Committee on the Rights of the Child” 7.

²¹ See, for instance, CRC Committee, Concluding Observations: United States of America, (2008), para. 31(d). It is to be noted that while the U.S. is not a State Party to the CRC, it has ratified the OPSC.

²² There seems to be a general understanding that the term “applicable international legal instruments” refers to the Hague Convention. See for instance, U.S. Declaration on the issue.

²³ For instance, recruitment can take place using deceit.

3. BRIEF BACKGROUND TO LEGISLATION AND POLICY CONTEXTS RELATED TO ADOPTION AND TRAFFICKING OF CHILDREN IN AFRICA

3.1 Adoption and child laws in Africa

Many African countries have a plethora of legislation relating to matters which affect children. A number of factors characterise this legislation in Africa. Some countries which did not recognise adoptions at all before their colonial period might have been forced to recognise it during the period that colonial legislation was inherited.²⁴

It is Article 4 of the CRC and Article 1 of the ACRWC that provide an obvious basis for assuring that legal reform is a core obligation that States Parties agree to undertake. In this respect it is true that, increasingly, inherited colonial legislation is being overhauled and replaced with modern, more accessible, and often more comprehensive, dedicated children's statutes. However, a significant amount of existing legislation relating to matters which affect children in Africa is still outdated (and mostly predates the CRC and the ACRWC).²⁵

An assessment of children's rights in Central African Countries (Cameroon, Central African Republic, Chad, Congo, Democratic Republic of the Congo, Equatorial Guinea, Gabon, and Sao Tome and Principe) has found that judicial systems that are still reliant on colonial era legislation make implementation more difficult.²⁶ In relation to Botswana's Children's Act, which was enacted in 1981, questions have been raised whether "the Act fulfils the objectives that were paramount in the minds of the legislators then, or whether ...its provisions are still relevant in the light of today's circumstances".²⁷

The observation that a number of outdated laws exist is specifically true in the area of adoption laws in Africa, too. Malawi's Adoption Act, for instance, falls within this category. Enacted originally as the Adoption of Children Ordinance in 1949 in pre-independence Malawi, it was formally adopted as the Adoption of Children Act, forming part of the Laws of Malawi. Zambia's Adoption Act was enacted in 1958, before Zambia attained independence. The Zambian Government admits that the statute conforms to the requirements of the CRC only to "some extent".²⁸ The Adoption Proclamation of 1952 of Lesotho is also a colonial piece of legislation which is outdated.²⁹

One of the main recommendations of a sub-regional study involving the review of 19 Eastern and Southern African countries is that States need to undertake a holistic, multi-sectoral, and inclusive audit and review of existing legislation on children.³⁰ Even where comprehensive assessments have been undertaken, the study recommends that there is need for continuous review and revision of laws.³¹

There are examples of some child law reform processes that have been completed and the final statutes passed by parliament, too. These are statutes that have been enacted after the

²⁴ For instance, this is the case of Lesotho and Swaziland.

²⁵ See, for instance, -Nielsen, J. (2008) "Domestication of children's rights in national legal systems in African context: Progress and prospects" in Sloth-Nielsen, J. (ed.) *Children's rights in Africa: A legal perspective* 53-56 for a discussion of the outdated nature of children's rights legislation in a number of African countries and the factors that impel legal reform.

²⁶ Ngokwey, N. (2004) "Children's rights in the Central Africa sub-region: Poverty, conflicts and HIV/AIDS as context" (2004) 12 *International Journal of Children's Rights* 186.

²⁷ Maripe, B. (2001) "The recognition and enforcement of children's rights in domestic law: An assessment of the child protection laws in Botswana in light of prevailing international trends" 9 *The International Journal of Children's Rights* 340. In June 2009, the Children's Act No 8 of 2009 of Botswana was enacted and it awaits the finalisation of its regulations for its implementation.

²⁸ CRC Committee, State Party Report: Zambia, (November 2002), para 226.

²⁹ Ndumo, M. (2006) "Lesotho and the cross-border protection of children: A focus on inter-country adoption" 16 *Lesotho Law Journal* 381.

³⁰ African Child Policy Forum, (2008), *In the best interests of the child: Harmonisation of laws on children in Eastern and Southern Africa* 108. While harmonisation efforts are underway in a number of African countries such as Namibia and Tanzania, they are still absent in others such as, Ethiopia, Eritrea, Djibouti, and Libya.

³¹ As above.

adoption of the CRC and the ACRWC. Examples of this are found in Ghana, Kenya, Madagascar, Mozambique, Nigeria, and Uganda. The Children's Act 38 of 2005 of South Africa, parts of which still await promulgation, is a good example of a recently passed consolidated child statute. Others include the Child Rights Act of Nigeria (2003), the Children's Act of the Gambia (2005), the Children Act of Sierra Leone (2007) and the Children Act of South Sudan (2008).

Other pieces of legislation are not yet at the completion stage and are either in drafting or in parliamentary processes. Developments in Namibia, Swaziland, and Zanzibar fall into this category. In 2007, in both Algeria and Morocco, a Children's Code was being drafted.³² Angola, Lesotho and Malawi have also consolidated bills on children that are still pending.

These legal contexts highlighted above have a number of direct implications for intercountry adoption. Outdated legislation might mean that intercountry adoption is prohibited, at least in law. A good example of this is Namibia, where it was reported that intercountry adoption was illegal in Namibia.³³ Outdated laws might also mean, as is the case in Liberia, that there are no arrangements to regulate and monitor the practice.³⁴ In the absence of a sound regulatory framework, the possibility of compromising children's best interests while undertaking intercountry adoption is high.

On a positive note, the fact that there remain a number of bills that continue as work in progress has a spin-off, too. It implies that there is an opportunity to positively influence legislation so that its text can reflect the CRC, the ACRWC, the Hague Convention and other international law instruments relevant in the context of adoption.

3.2 Trafficking legislation in Africa

In many countries certain areas of child law and policy are specifically less developed. This is the case, for instance, in respect of child trafficking. A study conducted in 2007 found that all of the five States of North Africa have not developed a specific policy, strategy and plan of action to combat trafficking.³⁵ In fact, the 2009 UNODC report on trafficking indicates that many African countries still do not have legislation on human trafficking, or they have laws that criminalize only some aspects of human trafficking (such as trafficking for sexual exploitation).³⁶

Sometimes this is as a result of the assumption that trafficking of children, particularly for adoption purposes, is not happening within countries' respective borders. For instance, out of the 12 State Party Reports submitted to the African Committee of experts on the Rights and Welfare of the Child to date, only a couple of countries identify trafficking of children for adoption purposes as a problem.

There are, however, some notable recent instances on the African continent that are aimed at addressing the problem of trafficking in children generally and in the context of intercountry adoptions. For instance, Burkina Faso's adoption of Act No. 029-2008 on Combating Trafficking in Persons and Related Practices of 15 May 2008 and of a National Plan of Action against Trafficking in Persons in April 2007 deserve mention.

There is also a tendency not to associate illegal adoptions with child trafficking and child trafficking legislation not only fails to address illegal adoptions but does not even mention them. This is the case, for instance, in the context of the Anti-Human Trafficking Act 2005 of

³² International Bureau of Children's Rights (IBCR) (2007) "Making children's rights work in North Africa: Country profiles on Algeria, Egypt, Libya, Morocco, and Tunisia", 172.

³³ CRC Committee, State Party Report: Namibia, (February 1993), para. 108.

³⁴ CRC Committee, Concluding Observations: Liberia, (July 2004), para. 38.

³⁵ IBCR, (note 32 above), 186.

³⁶ UNODC, (2009), "Global report on trafficking in persons", 9.

Sierra Leone; the April 2006 Anti-Trafficking Act of Benin;³⁷ and an Act to Ban Trafficking In Persons within the Republic Of Liberia of 2005.

However, on a positive note, the South African Children's Act provides a more advanced definition of child trafficking as it explicitly includes also the adoption of a child through illegal means. Child buying, and selling for the purpose of adoptions also fall within this provision. The fact that the Children's Act has extended the definition of trafficking to include "the adoption of a child facilitated or secured through illegal means" implies that all the relevant provisions on trafficking are applicable to children adopted through illegal means. In Namibia, the draft Child Care and Protection Act definition of "trafficking" imitates its South African counterpart and includes "the adoption of a child facilitated or secured through illegal means".³⁸ Burkina Faso also has Law No. 038-2003/AN of 31 July 2003 relating to the definition and punishment of child trafficking. Article 3 of this Act defines child trafficking as any act by which a child is recruited, transported, transferred, lodged or hosted within or outside of Burkina by one or more traffickers for purposes including illegal adoption.

Still, despite these and other similar legislative measures, progress is frustrated as a result of a number of reasons. For instance, the fact that penalties for child trafficking are not severe enough to deter persons who target children for purposes of abduction, trafficking and sale, or other forms of exploitation, compounds the problem.³⁹

3.3 Importance of these legal contexts

African countries should take into account the legal contexts discussed above in order to have an intercountry adoption system that complies, at least, with the minimum standards prescribed by international law and practice, and combat child trafficking abuses in the context of adoption. They ignore these contexts at the risk of violating their children's rights. Receiving countries, too, by recognising some of the limitations of the legal contexts, should exercise caution in undertaking intercountry adoption with some African countries. This might, depending on the attendant circumstances, require establishing more detailed safeguards than the norm. For instance, it may mean requesting DNA tests where systematic irregularities exist in the determination of adoptable children.

States Parties to the CRC bear the obligation not only to implement the Convention within their respective territorial jurisdiction, but also to contribute, through international cooperation, to global implementation.⁴⁰ There is also a need for continuous technical assistance from organisations, such as, UNICEF and the Permanent Bureau of Hague Conference on Private International Law, in drafting, enacting and implementing children's rights (and adoption and trafficking) related legislation in Africa.

4. SOME THEMATIC ISSUES RELATED TO TRAFFICKING OF CHILDREN IN THE CONTEXT OF INTERCOUNTRY ADOPTION IN AFRICA

In the context of intercountry adoption, the best interests of the child principle demand that adoptions do not subvert the rights of children through illicit practices such as abducting, selling, and trafficking. It is vital, however, to distinguish systematically between children "trafficked for the purpose of adoption", and those supposedly "trafficked through adoption for subsequent exploitation".⁴¹ Cantwell rightly questions the prevalence of the latter form of

³⁷ Loi No. 2006-04 du 5 avril 2006 portant conditions de déplacement des mineurs et répression de la traite d'enfants en République du Bénin.

³⁸ See, Legal Assistance Centre, (2009) "Draft Child Care and Protection Act- issues for Public Debate" information available at <<http://www.lac.org.na/projects/grap/Pdf/CCPA17-ChildTrafficking.pdf>>.

³⁹ See, for instance, CRC Committee, Concluding Observations: Burkina Faso, (Jan 2010), para 74(c).

⁴⁰ CRC Committee, Resources for the rights of the child: Responsibility of States Day of General Discussion Recommendations, (unedited version) (October 2007) para. 6.

⁴¹ ISS/IRC, (November-December/2005), 2.

trafficking (trafficking through adoption) because of the alleged total lack of evidence thereof.⁴² He further states that:

...it is hard to imagine why anyone would take on both the costs and risks involved in using a very public judicial process like intercountry adoption to “traffic” children – as opposed to kidnapping or smuggling them, for example – in order to remove their organs.⁴³

It is submitted that, since the majority of cases that associate intercountry adoption with trafficking relate to “children trafficked for the purpose of adoption”, this paper focuses on that practice.

Indeed, in the past, African countries had held the view that illegal adoptions and trafficking in the context of adoptions were not present in their respective countries.⁴⁴ However, now, the assumption that Africa is somehow immune from these illicit activities represents misplaced optimism. With globalisation, the shortage of adoptable children in other parts of the world, the shifting focus of intercountry adoption on Africa, increasing poverty on the continent, and accompanying weak institutional law enforcement capacity of State institutions, there are indications that illicit activities on the African continent are on the rise. As a result, addressing child trafficking and abuses in respect of intercountry adoption on the African continent has become a necessity. What follows is a thematic consideration of some of the forms of child trafficking and abuses that take place in the context of intercountry adoption in Africa.

4.1 Child trafficking, buying, selling, and abducting in the context of adoption in Africa

Child trafficking in the context of adoption has been present on the African continent for decades. By way of example, illegal adoptions and child trafficking (with the involvement of intermediaries) were already detected in Mauritius in the 1980s,⁴⁵ a situation that led to the establishment of the National Adoption Council to monitor the practice.⁴⁶ The Government of Rwanda has also reported incidents of Rwandan children trafficked to Europe and adopted illegally.⁴⁷ In particular, the Government has reported the case of “41 Rwandan children ... adopted in this manner in the Italian town of Brescia”.⁴⁸

Instances of “kidnapping and child trafficking with unacknowledged objectives” have been reported many times in Angola.⁴⁹ Since some of these children are infants, it is reasonable to suspect that trafficking for adoption purposes might be taking place.

One could also mention reports of orphanages and adoption agencies involved in child trafficking in Liberia.⁵⁰ Conflicting data of the number of children adopted from the country have also led government to suspect that there may be cases that are processed clandestinely outside of the official process.⁵¹ In 2008, instances of child trafficking in the

⁴² As above. Other writers who share a similar views include Carro, (1994), 128-31 (documenting the history of the rumor that internationally adopted children were being used as organ banks, while noting that the U.S. government has extensively investigated such claims and found them “baseless”); Carp, (1998), 228 (noting, but dismissing as false, “rumors” of intercountry adoption being used to run organ transplant rings).

⁴³ ISS/IRC Monthly Review, (November-December 2005) (No.11-12/2005), 2. While some cases of abuse and rejection of children on the part of individual adopters once they have returned home with the child are reported, these situations do not really fit within the definition of trafficking.

⁴⁴ For this view, see, for instance, CRC Committee, State Party Report: Namibia, (1993) para. 206; Chad, (2005) para. 294.

⁴⁵ CRC Committee, State Party Report: Mauritius, (October 1995), paras. 68-69.

⁴⁶ CRC Committee, State Party Report: Mauritius, (October 1995), para. 68.

⁴⁷ CRC Committee, State Party Report: Rwanda, (October 2003), para. 209.

⁴⁸ As above.

⁴⁹ CRC Committee, State Party Report: Angola, 2nd to 4th Periodic Report, (Feb 2010), para. 172.

⁵⁰ U.S. Department of State, “Intercountry adoption: Liberia” (December 2008).

⁵¹ CRC Committee, State Party Report: Liberia (August 2009), para. 190.

context of intercountry adoption in Liberia have led the President to establish a Commission to examine domestic and inter-country adoptions and make recommendations.⁵²

In 2007, the CRC Committee expressed its concern over reports in Kenya indicating that irregular intercountry adoptions and possible trafficking of children for that purpose still exist.⁵³ Reports of children who disappear from hospitals immediately upon birth persist.⁵⁴ Allegations of child trafficking and stealing partly for adoption purposes also came to the fore when a Kenyan church evangelist based in the U.K. was found with several young children in his home.⁵⁵ This incident was associated with the disappearance of babies from Nairobi's Pumwani Maternity Hospital and involved suspects in Britain, Ghana, Nigeria, Uganda and Kenya.⁵⁶ A judge of the High Court has also reported a suspicious instance where a group of Italians had been awarded 27 adoption orders by a single Magistrate on a single day sitting.⁵⁷ All the children were from one children's home, and they were all allegedly abandoned.⁵⁸ The High Court judge declared the adoption orders null in suspicion of irregularities in the way in which the children came into the child care system, and how the adoption orders were secured.⁵⁹

The Kenyan Government admits that penalties provided under the Children Act⁶⁰ are not severe enough to deter persons who target children for purposes of abduction, trafficking and sale, or other forms of exploitation.⁶¹ It is also observed by the Kenyan Government that the fact that the "legal process of adoption is lengthy and complicated ... may be a contributing factor to abductions".⁶² The comprehensive human trafficking legislation - the Counter Trafficking in Persons Bill - still remains in draft form.⁶³ The Bill provides a definition of the term "exploitation" which does not explicitly mention adoption.⁶⁴

In Ethiopia, instances of child laundering for adoption purposes have come to light in recent years. In one instance, traffickers were allegedly caught transporting a group of children from one administrative locality (the authorities of which refused to issue a declaration of abandonment letters) to another administrative locality.⁶⁵ The Federal First Instance Court which deals with intercountry adoption cases has recently traced the letters of declaration of abandonment of 16 children to one police officer (all written at the same time) raising concerns of child laundering.⁶⁶ Just recently, a Dutch adoption agency stopped adoption from Ethiopia pending investigations of illegal activities, such as false documentation.⁶⁷ These included cases where "mothers of the children were still alive, while being listed as deceased".⁶⁸ A recent detailed ABC News report has highlighted some of the irregularities that are happening in Ethiopia, arriving at the conclusion that "[c]orruption, fraud and

⁵² CRC Committee, State party Report: Liberia, (August 2009), para. 160.

⁵³ CRC Committee, Concluding Observations: Kenya, (June 2007), para. 40.

⁵⁴ CRC Committee, State Party Report: Kenya, (July 2006), para. 505; Interview with Jude Nalyanya, Advocate, The Cradle, The Children's Foundation, (13 November 2009).

⁵⁵ CRC Committee, State Party Report: Kenya, (July 2006), para. 506; BBC News (12 November 2004) "'Miracle baby' a victim – judge", available at <http://news.bbc.co.uk/2/hi/uk_news/4006945.stm>.

⁵⁶ BBC News, (note 55 above).

⁵⁷ Koome, M. (2009) "Opening address at the workshop on intercountry adoption in Africa" (from 21-22 June 2009) (Nairobi, Kenya).

⁵⁸ As above.

⁵⁹ As above.

⁶⁰ Such as Secs. 14, 15 and 16 of the Children Act.

⁶¹ CRC Committee, State Party Report: Kenya, (July 2006), para. 6.

⁶² CRC Committee, State Party Report: Kenya, (July 2006), para. 507(4).

⁶³ UNODC, (note 36 above), 114; U.S. Department of State, (2009), "Trafficking in persons report (2009)", 175.

⁶⁴ See ANPPCAN (2008) *Child trafficking: Programme Factsheet* (Nairobi: ANPPCAN), 19.

⁶⁵ Interview with Deresse Bezawork, Adoption lawyer, (25 September 2009; and Biniam Eshetu, Legal Expert, MOWA, (25 September 2009).

⁶⁶ As above.

⁶⁷ UAI News (September 23, 2009) "Dutch agency stops adoption from Ethiopia pending investigation" <<http://www.ethiopianreview.com/news/6790>>.

⁶⁸ As above.

deception are rife” in the adoption system.⁶⁹ A petition asking for comprehensive measures to stop child trafficking for the purposes of adoption in Ethiopia is circulating on the web.⁷⁰

In the Revised Family Code of Ethiopia, there is hardly any incorporation of provisions that address child laundering issues. Furthermore, while the Revised Penal Code of 2004 has generally improved on the provisions of its predecessor, the 1957 Penal Code of Ethiopia, in the context of child laundering, the relevant provisions also leave much to be desired. Article 597 of the Revised Penal Code, entitled “Trafficking in Women and Children”, limits its scope of application to trafficking “for the purpose of forced labour” only. As a result, cases of child laundering for adoption purposes fall outside its ambit. Another relevant provision, Article 596(1)(a) entitled “Enslavement”, prohibits anyone who “forcibly enslaves another, sells, alienates, pledges or buys him, or trades or traffics in or exploits him in any manner”. While child buying and selling might fall within this provision, the interpretation of the phrase “exploits” could prove controversial. Therefore, it is no surprise that it has proved difficult to come across a single court case where either individuals or organisations were found guilty of child laundering for adoption purposes.

By far the most disconcerting recent incident that epitomises child trafficking in the context of adoption in Africa is the Zoe’s Ark case that took place in 2007 in Chad. According to the Reuters News Agency, on 25 October 2007 police arrested nine French and seven Spanish nationals in Chad, near the Sudanese border, as they prepared to fly 103 African children to France.⁷¹ Among those detained were six members of the French organisation, Zoe’s Ark, which had said it intended to rescue orphans from Sudan’s violent Darfur region and take them to France for adoption by families there. While some of those arrested and charged were subsequently released, on 21 December 2007 the remaining six accused stood trial in N’Djamena charged with kidnapping and fraud. They were sentenced to eight years imprisonment.⁷² Subsequent investigations have revealed that the majority of the children were not from Darfur but from Chad.⁷³ In addition, it was reported that the majority of the children had parents who were willing and able to care for them, but that “the aid workers misled them into believing the youngsters would be offered temporary local school places”.⁷⁴

Unfortunately, oblivious to the level and type of trafficking risks it faces, in its 2005 report to the CRC Committee, the Government of Chad states that though the country is “... long cited as a country where trafficking in children is unknown, [it] is no longer free of this problem as a result of the emergence of the use of children as herdsmen, which is regarded as a form of trafficking”.⁷⁵ However, the report indicates neither legislative nor policy interventions aimed at preventing and addressing other forms of trafficking or trafficking for other purposes. This is in clear non-compliance of the OPSC, which Chad has ratified,⁷⁶ which requires state parties to criminalise all forms of trafficking under their national laws (Article 3(1) of the OPSC).

⁶⁹ ABC News, (09 September 2009) “Fly away children” available at <<http://www.abc.net.au/foreign/content/2009/s2686908.htm>>.

⁷⁰ Beyene, (2009). Go Petition/Beyene (26 September 2009) “Stop illegal child trafficking of Ethiopian children”, (Bebye Beyene) available at <<http://www.gopetition.com/petitions/stop-illegal-child-trafficking-of-ethiopian-children.html>>.

⁷¹ Reportedly a number of parents were waiting in an Airport in France in the hope of getting a child to adopt. See Reuters (31 March 2008) “Chronology of events in the Zoe’s Ark case” available at <<http://www.reuters.com/Article/latestCrisis/idUSL31904092>> (accessed 23 April 2008)..

⁷² Subsequently, on the basis of a previous bilateral prisoners exchange agreement between Chad and France, the six were flown home to France to serve their jail sentences there. On 31 March 2008, however, Chadian President Idriss Deby granted them an official pardon.

⁷³ See, for instance, UNICEF Newline, (19 March 2008), “Zoe’s Ark children reunited with their families in Chad after five months”, available at <http://www.unicef.org/infobycountry/chad_43217.html>

⁷⁴ BBC, (22 December 2007) BBC News (22 December 2007) “Chad kidnap accused ‘were duped’”, available at <http://news.bbc.co.uk/mobile/bbc_news/top_stories/715/71579/story7157973.shtml>.

⁷⁵ CRC Committee, State Party Report: Chad, (2005) para 294.

⁷⁶ Ratified on 28 August 2002.

Some of the main advantages of including activities, such as child buying and child selling for the purpose of adoption, within the definition of the crime of child trafficking, relate to prosecutability, and (potential/subsequent) deterrent, purposes. In the Zoe's Ark case, for instance, the absence of any comprehensive trafficking legislation, which criminalises the practice in particular, has been identified as a major shortcoming.⁷⁷ As a result, the prosecutor in the Zoe's Ark case could charge the accused only with abduction.⁷⁸

In sum, it seems that trafficking in general, and trafficking for adoption purposes in particular, have started to strike a resonant chord in the African region with its otherwise weak legislation and erratic state enforcement. Therefore, although the Zoe's Ark activities in Chad and similar instances mentioned above were made public, it is safe to assume that other facilitators are undertaking similar illicit activities on the continent with less or no scrutiny. For instance, still within Chad, reports that at least 74 children were kidnapped in Chad and flown to a military airport outside Paris on 17 September 2007, if proved to be true, are disconcerting.⁷⁹

4.2 Child trafficking and falsification of documents for intercountry adoption

The falsification of documents that are relevant for intercountry adoption is one of the illicit activities that is associated with the practice. These documents include birth certificates, paternity declarations, passports, identity documents, letters of consent, and letters declaring abandonment of a child. It can safely be said that, in Africa, where record keeping is generally weak and sometimes non-existent, forgery or alteration of documentation is difficult to detect.⁸⁰ For instance, the absence of birth registration and a supporting birth certificate in a number of places in Africa may facilitate the production of false papers for illegal intercountry adoption. The notion of "simulated birth", which involves the fictitious registration of the birth of a child under the name(s) of a person(s) who is(are) not his or her biological parent(s) is also facilitated by a weak or non-existent system of birth registration.⁸¹

Recently, a case from Egypt involving child buying and falsification of birth documents has been in the spotlight.⁸² Two U.S. couples have been convicted for illegal adoption. A third U.S. couple, believed to be already in the U.S., were tried and convicted in absentia for obtaining a forged birth certificate for a child and trying to use it to obtain a U.S. visa.⁸³ It is reported that "the [first two] couple[s] agreed with an orphanage worker 'to buy two newborn infants, a girl and a boy, in exchange for 26,000 pounds', or \$4,673, and received forged papers for the children" [insertion mine].⁸⁴ In addition to the couples, three other defendants

⁷⁷ See for instance IRIN News, (1 November 2007), IRIN News (1 November 2007) "Chad-Sudan: Legal framework a hindrance in 'child-trafficking' case", available at <<http://www.irinnews.org/report.aspx?ReportId=75096>> where Chadian and UN Officials argued that the absence of a child trafficking law in Chad would hamper efforts to prosecute members of the Zoe's Ark.

⁷⁸ The main difference between "abduction" and "trafficking" as a criminal offence is that the latter carries a more severe penalty as it is usually classified as "organised crime". In addition, in the context of the particular case at hand, charges of abduction would not only result in more lenient sentences in the case of a conviction but also be harder to convict in the first place. It might be easier for an investigator to prove human trafficking than to prove abduction.

⁷⁹ See, for instance, Prauda, (11 August 2007). Prauda (8 August 2007) "At least 74 children kidnapped in Chad flown to France", available at <http://newsfromrussia.com/news/world/08-11-2007/100440-kidnapped_children-0>.

⁸⁰ See Meier, P. (2008) "Small commodities: How child traffickers exploit children and families in intercountry adoption and what the United States must do to stop them" 12 *Journal of Gender Race & Justice* 189-190 and the accompanying citations.

⁸¹ In the Philippines, it is reported that the high cost of adoption proceedings forces many to resort to "simulated birth" to avoid the adoption process. CRC Committee, Concluding Observations: Philippines, (October 2009), paras. 49-50. While there has not been any recorded evidence of these kinds of irregularities in Africa, it would be a misplaced optimism to think that the laws in many parts of the continent are well-equipped to deal with it. As a good practice, it could be mentioned that some countries explicitly criminalise this act. See Art. 347 of the Revised Penal Code and Section 21 (b) of the Domestic Adoption Act of 1998 (Republic Act No. 8552) of the Philippines.

⁸² See Associated Press, (17 September 2009) "Egypt convicts US couples for illegal adoption", available at <<http://abcnews.go.com/International/wireStory?id=8599292>>; Reuters (19 February 2009) "Egypt: US couples face trial over baby buying", available at <<http://www.stuff.co.nz/world/1750483>>.

⁸³ Reuters, (17 September 2009).

⁸⁴ As above.

including an orphanage worker and a doctor were sentenced to five years in jail while two other Egyptians received jail terms of two years.⁸⁵ According to newspaper reports, the case came to light after one of the couples approached the U.S. embassy in Cairo to arrange to take two babies out of Egypt using forged papers indicating the infants were their biological children.⁸⁶

A case involving two Ethiopian children that were stolen, sold (allegedly for a 100 USD), and adopted by a family in Austria through the assistance of false documentation that was put under the spotlight in 2007 is another example.⁸⁷ This latter case involved intermediaries, orphanage workers, and relevant government administration personnel working at the *kebele* level (which is the lowest administrative level) who helped the production of false documentation and played a role in the ultimate adoption of the children.

Apart from the usual punishment and deterrence roles that criminal law plays, various other measures can be undertaken to prevent or address illicit activities in the form of falsification of adoption related documents. In suspicious cases, arranging an interview with the child's birth parent/family might be commendable. Where possible, it is advisable for competent authorities to require evidence through DNA testing.⁸⁸ This, for instance, is currently the case in some cases in Ethiopia. In addition, as is the current practice in Vietnam, it is also possible to require the verification of documents by issuing authorities, and maybe use this in conjunction with primary and contemporaneous secondary evidence.⁸⁹

4.3 Not just “consent” but “informed and free consent”

The requirement to secure informed and free consents to adoption from the appropriate persons and organs is a fundamental element for an intercountry adoption regime that upholds the best interests of the child, and prevents and combats child trafficking and abuses. Standards are necessary to prevent consents from being induced by fraud or misunderstanding, and to prevent baby buying. Article 21(a) of the CRC requires States Parties to ensure that “...if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary”. Article 24(a) of the ACRWC uses similar wording, but makes “appropriate counseling” compulsory when consent is necessary. Compared to the Hague Convention’s provisions, these two provisions do not provide further details on the requirements of consent.

According to the Hague Convention, consent must be obtained from “the persons, institutions and authorities whose consent is necessary for adoption ...”.⁹⁰ Prior to consenting, the party must be counselled and fully informed about a number of issues, including, whether adoption will terminate the legal relationship between the child and his or her natural family.⁹¹ The competent authorities of the State of origin should also ensure: that consent is given “in the required legal form, and expressed or evidenced in writing”;⁹² that there is neither withdrawal nor inducement of consent by payment or compensation of any kind;⁹³ and that the consent of the mother has been given only after the birth of the child.⁹⁴ The Hague Convention also explicitly recognises the importance of the views of the child, and requires States of origin, after having “regard to the age and degree of maturity of the child”,⁹⁵ to apply the necessary

⁸⁵ See Associated Press, (note 82 above); Reuters, (note 82 above).

⁸⁶ As above.

⁸⁷ Documentation on file with writer.

⁸⁸ There is an established practice where the costs for DNA testing and interview expenses shall be borne by prospective adoptive parents.

⁸⁹ U.S. Department of State, “Intercountry adoption: Vietnam”, (October 2008).

⁹⁰ Art. 4(c)(1) of Hague Convention.

⁹¹ Art. 4 of Hague Convention. Art 4(c)(3) requires that “such persons, institutions and authorities have given their consent freely, in the required legal form and expressed or evidenced in writing”.

⁹² Art 4(c)(2) of Hague Convention.

⁹³ Art 4(c) (3) of Hague Convention.

⁹⁴ Art 4(c) (4) of Hague Convention.

⁹⁵ Art. 4(d) of Hague Convention.

safeguards for consent mentioned in the preceding paragraph. It is advisable for legislation to explicitly provide for these standards.

However, in Africa, a number of cases exist where consents for adoption were either not secured from the relevant persons, or were secured without them being free and informed. In the Zoe's Ark case in Chad, the families of the children who were involved in the trafficking have reportedly stated that they were misled into giving their consent. Recent news from Sierra Leone highlights the importance of counselling and securing informed consents.⁹⁶ The news involved a group of parents who accused a charity of sending more than 30 children abroad for adoption without their consent during the country's civil war.⁹⁷ On the one hand, the charity - Help a Needy Child International (HANCI) - insists that the parents have signed documents giving permission for intercountry adoption.⁹⁸ On the other hand, the parents argue that they have no idea of what happened to their children after they were handed over to HANCI.⁹⁹ Some of the parents claim that the "... children were accepted into HANCI in 2004, with the understanding that they were incorporated into the welfare home programme and not for adoption".¹⁰⁰

In Malawi, during the initial stages of the *Infant DB* case, questions of consent were raised. This was as a result of reports that "... Mr Banda has flip-flopped in interviews, first supporting Madonna, then saying he did not understand what he was doing ..." when he consented to the adoption.¹⁰¹ In Ethiopia, intercountry adoptions that are disrupted as a result of the lack of free and informed consent are also present.¹⁰² In Ethiopia, reports that adoption agencies making members of the family of origin rehearse responses to potential questions before appearing in court, continue to characterise the practice.¹⁰³ Instances of parents approaching the relevant Ministries and challenging the adoption of their children are on the rise.¹⁰⁴ It is submitted that unscrupulous individuals and organisations find it easy to abuse the gap created in the law in respect of consent for adoption.

Related to the issue of informed and free consent, the law should also attempt to regulate whether to allow the so-called "payment of expenses of birth family". Many Contracting States to the Hague Convention have recognised the existence of this practice.¹⁰⁵ Such payments have the potential to improperly induce or solicit birth family's consent to the adoption. In other words, such payments make it difficult to determine whether consent was given freely.

In the context of the U.S., the CRC Committee has expressed concern at the information that, according to the current Regulations, the payment of prenatal and other expenses to birth mothers abroad would still be possible.¹⁰⁶ The State Party has been advised to "[e]xpressly prohibit all forms of possible active solicitation for children, including the payment of pre-natal and other expenses".¹⁰⁷

One of the main problems related to consent for adoption in Africa, is the fact that legislation in a number of African countries addresses consent in a rather scant way. In Ethiopia, Article

⁹⁶ BBC News, (4 November 2009) "S Leone fury at 'forced adoption'" available at <<http://news.bbc.co.uk/2/hi/africa/8342251.stm>>; Sierra Express Media, (09 November 2009) "'Hanci sold our children abroad' angry parents claim" (Donstance Koroma) available at <<http://www.sierraexpressmedia.com/archives/2548>>.

⁹⁷ As above.

⁹⁸ As above.

⁹⁹ As above.

¹⁰⁰ Sierra Express Media, (note 96 above).

¹⁰¹ Daily Mail (26 October 2006) "Madonna's baby is Aids orphan" available at <<http://www.dailymail.co.uk/tvshowbiz/Article-412612/Madonnas-baby-Aids-orphan.html>>.

¹⁰² As above.

¹⁰³ As above.

¹⁰⁴ As above.

¹⁰⁵ Permanent Bureau of the Hague Conference on Private International Law (2008) "The implementation and operation of the 1993 Hague Intercountry Adoption Convention: Guide to good practice" 106 (Guide No. 1), 36.

¹⁰⁶ CRC Committee, Concluding Observations: United States of America, (June 2008), para. 30.

¹⁰⁷ CRC Committee, Concluding Observations: United States of America, (June 2008), para. 31(c).

191 of the Revised Family Code, entitled “Consent of Parents of the Adopted Child” fails to explicitly highlight the need to secure free and informed consent. Furthermore, a time frame by when consent could be withdrawn is not provided. Safeguards to prevent improper inducement in obtaining consents are also lacking. The inadequate nature of the law on consent to adoption has created practical problems. For instance, there are mothers who change their minds about their consent once an adoption order has been issued.¹⁰⁸ This is sometimes because families give their consent without appreciating the nature of intercountry adoption.

In Kenya, consents for adoption must be written.¹⁰⁹ It is also the explicit obligation of the court, before making an adoption order, to be satisfied that every person who has given consent “understands the nature and effect of the adoption order”.¹¹⁰ However, there is no explicit provision made in the Children Act to address the problem of obtaining consent with an inducement, such as, paying prenatal expenses.

On a positive note, section 233 of the Children’s Act of South Africa provides for the consent requirements for adoption. Before consenting, parents and a child who is 10 years of age or older¹¹¹ should be counselled by an adoption social worker facilitating the adoption.¹¹² This mandatory counselling is an improvement on Article 4(c)(1) of the Hague Convention which requires counselling only if necessary.¹¹³ In addition, not only should a consent be written and signed, it should also be made before, and verified by, a presiding officer of the children’s court.¹¹⁴ While both the sending and receiving countries’ Central Authorities must consent to the adoption, provision is made for the South African Authority to withdraw its consent within 140 days of the date of consent.¹¹⁵ This withdrawal can only happen if it is found to be in the best interests of the child.¹¹⁶ The possibilities for withdrawal of consent provided for in the law can serve to redress situations where free and informed consents were not given in the first place.

4.4 Improper financial or other gain, and corruption

Both the CRC and the ACRWC require States to address the problem of deriving improper financial or other gain from intercountry adoption. Similarly, but in a more elaborate manner, the Hague Convention requires that the “Central Authorities” who act on behalf of contracting States “shall take ... all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention”.¹¹⁷ Apart from prohibiting anyone from deriving “improper financial gain or other gain” from intercountry adoption,¹¹⁸ the Hague Convention limits payments to costs, expenses, and “reasonable professional fees”.¹¹⁹ It also forbids “directors, administrators and employees of bodies involved in adoption” from receiving “remuneration which is unreasonably high” for services rendered.¹²⁰

¹⁰⁸ Interview with Deresse Bezawork, Adoption lawyer, (25 September 2009); and Biniam Eshetu, Legal Expert, MOWA, (25 September 2009).

¹⁰⁹ Sec. 158(4) of the Children Act.

¹¹⁰ Sec. 163(1)(a) of the Children Act.

¹¹¹ It is to be noted that, according to Sec. 233(1)(c) of the Children’s Act, a child who is under the age of ten years can consent provided that he or she has attained the level of maturity that enables him or her to appreciate the implications of such consent. See Mosikatsana and Lofell, (2007), “Adoption” in Davel, C. and Skelton, A. (eds.) *Commentary on the Children’s Act* 15-12 for further details on this.

¹¹² Sec. 233(4) of the Children’s Act.

¹¹³ See Couzens, M. (2009) “A very long engagement: The Children’s Act 38 of 2005 and the 1993 Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption” 1 *Potchefstroom Electronic Law Journal* 64.

¹¹⁴ Sec. 233(6)(a)(i-iii) of the Children’s Act.

¹¹⁵ Sec. 261(6)(a) of the Children’s Act; Human, (2007), 16-20.

¹¹⁶ Sec. 261(6)(a) of the Children’s Act; Human, (2007), 16-20.

¹¹⁷ Art. 8 of Hague Convention.

¹¹⁸ Art. 32(1) of Hague Convention.

¹¹⁹ Art. 32(2) of Hague Convention.

¹²⁰ Art. 32(3) of Hague Convention.

The international law framework outlined above highlights that the financial aspects of intercountry adoption are a cause for serious concern. These financial aspects include fees, the costs of certain services or documents, the honorarium for the professionals' services, the donations to institutions, the gifts, the tips, and so forth.¹²¹ It is acknowledged that even legitimate adoptions may also lead to wide-scale profiteering.¹²² When an unwarranted amount of money is involved in intercountry adoption, the possibility that the adoption system might begin to tailor the available children to the stated wishes of the would-be adoptive parents is high.¹²³ Children who do not need intercountry adoption would be pumped into the system in the interest of profiteering from the practice, too. It is also often difficult to make a differentiation between what is "proper" and "improper" financial gain in intercountry adoption. Smolin captures this challenge eloquently:

The law and practice regarding money and adoption turn out to be so mired in legal fictions and regulatory gaps as to make it extraordinarily difficult to distinguish between licit and illicit payments.¹²⁴

Despite this challenge, it is possible to tease out some guidance from the international legal framework and the experience of States.

Experience (for instance, from Romania¹²⁵) indicates that structural funding (which involves linking child protection programmes with adoption fees) should be avoided as it may exert pressure on public servants and create dependency for operating a sufficient number of adoptions per year.¹²⁶ Government cash incentives for organisations that hit pre-determined adoption targets could also prove to be a cause for concern – since these incentives could work as the main motivation for removing children from their family environments unnecessarily.

Improper financial gains in connection with intercountry adoption on the African continent exist. For instance, in Ethiopia, allegations of improper financial gain by adoption agencies are becoming increasingly common.¹²⁷ At least on one occasion, it has been reported that adoption agency workers are paid on the basis of commission,¹²⁸ which does not constitute good practice. A 2007 UNODC document assessing the laws and measures relevant to human trafficking in Malawi, Mozambique, South Africa and Zambia¹²⁹ has found that a number of child rights organizations "have expressed concern that the adoption processes in Zambia, Malawi and Mozambique at times have been manipulated, either by fraudulent applications or through the bribery of government officials".¹³⁰

The presence of relatively large sums of money involved in intercountry adoption in a number of African countries has also posed a challenge for the implementation of the subsidiarity

¹²¹ Daily Mail, (note 101 above).

¹²² Dillon, S. (2003) "Making legal regimes for inter-country adoption reflect human rights principles: Transforming the United Nations Convention on the rights of the Child with the Hague Convention on Inter-country Adoption" 21 *Boston University International Law Journal* 197.

¹²³ As above.

¹²⁴ Smolin, (2004) (note 2 above), 282.

¹²⁵ See Couzens, (note 113 above), 70 and sources cited therein.

¹²⁶ ISS/IRC (2007) "Intercountry Adoption: the intercountry adoptability of the child and the eligibility of prospective adoptive parents" (Fact Sheet No 41), available at <<http://www.iss-ssi.org/2009/assets/files/thematic-facts-sheet/eng/41.Intercountry%20adoptability%20eng.pdf>> 2.

¹²⁷ Interview with Deresse Bezawork, Adoption lawyer, (25 September 2009; and Biniam Eshetu, Legal Expert, MOWA, (25 September 2009); The Reporter, (17 October 2009); The Reporter, (27 June 2009).

¹²⁸ CBC News Canada (19 March 2009) "Ethiopian adoption: Canadian parents raise concerns", available at <<http://www.cbc.ca/canada/manitoba/story/2009/03/19/f-ethiopia-adoption.html?ref=rss>>.

¹²⁹ UNODC, (Nov. 2007) Combating trafficking in persons: A 2005 assessment of the laws and measures relevant to human trafficking in selected SADC countries", available at <<http://www.unodc.org/documents/human-trafficking/2005%20Assessment%20on%20Laws%20and%20Measures.pdf>>, 23.

¹³⁰ As above.

principle. This, for instance, is the case in Ethiopia and Burkina Faso.¹³¹ In its Concluding Observations on Burkina Faso, the CRC Committee has highlighted that:

The Committee also urges the State party to take all necessary measures to promote domestic adoptions and ensure respect for the "subsidiarity principle" so that intercountry adoption will only be considered after all possibilities for domestic adoption have been exhausted.¹³²

The *Infant DB* case has in fact helped to shed light on some of the complications that may arise pertaining to corruption and improper financial gain in adoptions.¹³³ These possible complications are illuminated by means of three scenarios. First, human rights groups in Malawi argued that Madonna used her celebrity status – and a £1.7 million donation to the orphanage where infant DB lived – to bypass laws governing the adoption of Malawians by foreigners, thereby implying corruption.¹³⁴ Secondly, the fact that Madonna was reportedly paying for a Malawi Social Welfare Department official to study at a British university was placed under the spotlight.¹³⁵ Thirdly, and more importantly, in September 2007, it was reported that "... the senior Malawian child welfare official who was to go to London to assess whether Madonna could adopt a little boy from the southern African country has been removed from the high-profile case".¹³⁶ It was further reported that "[t]he removal of Penstone Kilembe, the director of Malawi's Child Welfare Services, follows allegations that he solicited money from the singer for the trip" and that "Simon Chisale, the country's chief social welfare officer, said the government had gone to court last week to have Kilembe replaced as the assessor in the Madonna adoption".¹³⁷

These three scenarios draw attention to the fact that any irregular payment or contribution usually has the outward appearance of "buying" a baby, which is strictly against the CRC, the ACRWC, and the Hague Convention, and puts all future adoptions at risk. In the context of Zambia, the U.S. State Department discourages prospective adoptive parents from paying any fees that are not properly receipted, as well as making "donations" or paying "expediting" fees that may be requested from prospective parents.¹³⁸

Even where there are provisions in the child laws of some countries attempting to regulate improper financial gains, these laws do not regulate improper financial gain in a comprehensive manner. For instance, this is the case in Sierra Leone Adoption Act of 1989 (No. 9 of 1989) and Botswana's Adoption of Children Act of 1952. For instance, Article 12 of the latter's Act prohibits consideration for adoption only in relation to any person who has obtained or applied for an order of adoption or a parent or a guardian.

In Kenya, neither an adopter nor any parent or guardian of a child who receives any payment or other reward in consideration of the adoption of a child under the Children Act commits an offence.¹³⁹ However, a list of payments, such as court sanctioned payments,¹⁴⁰ any fees

¹³¹ Personal discussions (for instance, with Jean-Baptiste Zoungana who works on adoption issues in the country) with various authorities working on intercountry adoption has confirmed this.

¹³² CRC Committee, Concluding Observations: Burkina Faso, (February 2010), para 49.

¹³³ In Malawi, Sections 4 and 10 of the Adoption of Children Act prohibit the exchange of payment or reward as consideration for the adopted child. Section 10 provides for restriction on payments: it shall not be lawful for the adopter or guardian, except with the sanction of the court, to receive any payment or other reward in consideration of the adoption under the Adoption of Children Act. However, the Act does not penalise the exchange of payments, save for the denial of an adoption order. Malawi Special Law Reform Commission, Discussion Paper, (2009), 42.

¹³⁴ I Am Not Obsessed (2007) "Angelina Jolie on Madonna's adoption", available at <<http://www.imnotobsessed.com/2007/01/08/angelina-jolie-on-madonnas-adoption>>.

¹³⁵ Mail and Guardian (4 September 2007) "Malawi official taken off Madonna adoption case", available at <<http://www.mg.co.za/Article/2007-09-04-malawi-official-taken-off-madonnaadoption-case>>.

¹³⁶ Available through News Bank at <<http://nl.newsbank.com/nl>>.

¹³⁷ As above.

¹³⁸ U.S. Department of State, "Intercountry adoption: Zambia", (October 2009).

¹³⁹ Sec. 179(1)(a) of the Children Act.

¹⁴⁰ Sec. 179(2)(a) of the Children Act.

prescribed by the Minister to be paid to an adoption society,¹⁴¹ payment for an advocate,¹⁴² and maintenance related expenses made by or on behalf of an adoption society, are allowed. The efforts of the legislator to list some of the proper payments in respect of adoption are commendable. However, the fact that “any voluntary contribution made by any adopter or any parent or guardian to an adoption society”¹⁴³ is allowed, opens the door to abuse. In the face of the absence of a legal scale for fees that provides complete transparency in costs, allowing for contributions exacerbates the problem.¹⁴⁴

In South Africa, Section 249(1) of the Children’s Act prohibits the giving and receiving of any consideration in cash or in kind for the adoption of a child, and the inducement of the consent to adoption.¹⁴⁵ Section 249(2) also lists permissible payments in cash or in kind in respect of adoption. Since the payments mentioned in Section 249(2) refer to “prescribed” fees, some level of predictability and transparency is envisaged.

In order to ameliorate the problem of improper financial gain and corruption, governments could forbid representatives of foreign adoption agencies working in their respective countries from “scouting for children” or receiving children directly from birth parents, in order to prevent taking of children from needy parents by offering them monetary inducement. Adoption agencies should also be called upon to maintain proper accounts which should be audited by a chartered accountant at the end of every financial year. Finally, it should be pointed out that the institutional and normative framework that the Hague Convention puts in place, if implemented properly, addresses many of these issues head on. In this regard, the Hague Convention is a commendable treaty either to which to become a signatory or from which to borrow standards and wording in the drafting of national legislation.

4.5 Survival of the cutest?: Violating the “no initial contact” rule

One of the central tenets of intercountry adoption is that it is a practice of finding a family for a child, rather than a child for a family. This has a number of implications, including that the needs of adoptable children in countries of origin should be given priority over the requests of prospective adoptive parents in receiving countries.¹⁴⁶ Article 29 of the Hague Convention entrenches the “no initial contact” rule which envisages a similar goal of prioritising the needs of children and preventing or minimising pressures on families of origin.¹⁴⁷ Article 29 of the Hague Convention provides that, save exceptions, there shall be no contact between the prospective adoptive parents and the child’s parents or any other person who has care of the child until the requirements prescribed for intercountry adoptions in Article 4 and Article 5 have been met.

There is neither clear legislation nor practice in a number of African countries that emulates the “no initial contact” rule of Article 29 of the Hague Convention. Actually, in Ethiopia, the fact that prospective adoptive parents can travel to meet members of the birth family, even before an adoption order is granted, has been reported by the media as constituting good

¹⁴¹ Sec. 179(2)(f) of the Children Act.

¹⁴² Sec. 179(2)(d) of the Children Act.

¹⁴³ Sec. 179(2)(e) of the Children Act.

¹⁴⁴ Permanent Bureau, Guide to Good Practice, (note 105 above), 133.

¹⁴⁵ Sec. 24 of the Child Care Act is also designed to deter the practice of child trafficking. According to this provision, unless exceptions exist, no person is allowed to give, undertake to give, receive or contract to receive any consideration, in cash or kind in respect of a child. It is a criminal offence to contravene this provision.

¹⁴⁶ Vité, S. and Boéchat, H. (2008) “Article 21: adoption” in Alen, A. *et al.* (eds.) *A commentary on the United Nations Convention on the Rights of the Child* 27.

¹⁴⁷ The “no initial contact” rule also has a role to play in minimising “detachment disorder” in cases where the child becomes attached to the prospective adoptive parent(s), and ultimately a court decides against an adoption.

practice.¹⁴⁸ In South Africa, too, the Children's Act does not contain a provision addressing the "no initial contact" rule.¹⁴⁹

Malawi, too, does not have a law enforcing the "no initial contact" rule. Before Madonna's arrival in Malawi in 2006, it was reported that her husband at the time, film maker Guy Ritchie, had visited seven orphanages in the country "videoing the most doe-eyed children he can find" for his wife.¹⁵⁰ It was further reported that, based on the video, when Madonna went to Malawi in 2006, she had initially wanted to adopt infant CJ (and not infant DB).¹⁵¹ The story locally is that the grandmother of infant CJ stood in the way of Madonna, however, and refused to give her consent to the adoption.¹⁵² In the years that followed, reportedly, the grandmother had to endure pressure from priests, village elders, people from the orphanage, and others whom she had never seen before, in an effort to persuade her to let infant CJ go.¹⁵³ Reportedly, "after years of being told that adoption was the right thing for Mercy", the grandmother "caved in".¹⁵⁴

If these reports are accurate, they describe exactly the same improper activities that Article 29 of the Hague Convention envisages to eliminate. Assessed against the ideals of Article 29 of the Hague Convention, Madonna's adoptions leave much to be desired. In the *Infant CJ* case it seems that not only was there contact between Madonna and the child before consent for adoption was secured,¹⁵⁵ but also between the biological family of infant CJ and other persons, such as workers at the orphanage where infant CJ lived, seemingly "on behalf of" Madonna.

It could be argued, however, that, since Malawi is not a Contracting State to the Hague Convention, it is not bound to apply the provisions of the Hague Convention. This argument is valid. However, as far as receiving countries that are Contracting States to the Hague Convention is concerned, it would constitute a complete disregard of the Special Commission Recommendation that calls on countries that are Contracting States to the Hague Convention to try and apply, "as far as practicable...the standards and safeguards of the Convention to the arrangements for inter-country adoption which they make in respect of non-Contracting States".¹⁵⁶

The practice of prospective adoptive parents visiting an institution to pick out an appealing child, or to choose a child from photo lists, is neither congruent with the spirit of the Hague Convention,¹⁵⁷ nor with the best interests of the child principle in the CRC and the ACRWC. Even within the context of the CRC, the CRC Committee has expressed concern when "[q]ualified officials do not select the children for adoption and *allow prospective adoptive parents to make the choice*" (emphasis mine).¹⁵⁸ A system that allows prospective adoptive parents to directly choose children for adoption also contains an element of discrimination. For instance, it has the potential to further disadvantage "special needs" children, such as,

¹⁴⁸ See, for instance, The New York Times, (04 June 2007) "Surge in adoptions raises concern in Ethiopia" (Jane Gross and Will Connors) available at <http://www.nytimes.com/2007/06/04/us/04adopt.html?_r=1>.

¹⁴⁹ However, the incorporation of the Hague Convention by way of an annexure to the Children's Act into South African law makes this provision directly applicable in that State. See Human, S. (2007) "Inter-country adoption" in Davel, C. and Skelton, A. (eds.) *Commentary on the Children's Act 16-27*; Couzens, (note 113 above), 65.

¹⁵⁰ The Guardian, (12 June 2009), "Madonna, Mercy and Malawi: Her fight to adopt a second African child" available at <<http://www.guardian.co.uk/music/2009/jun/12/madonna-mercy-malawi>>.

¹⁵¹ As above.

¹⁵² As above.

¹⁵³ As above.

¹⁵⁴ As above.

¹⁵⁵ As above.

¹⁵⁶ Permanent Bureau of the HCCH, (2001) "Report and conclusions of the Special Commission" (2001), available at <<http://hcch.e-vision.nl/upload/scrpt33e2000.pdf>>. However, the careful choice of words, "as far as practicable...", is indicative of the suggestive nature of the proposal.

¹⁵⁷ As above.

¹⁵⁸ CRC Committee, Concluding Observations: Mozambique, (October 2009), para. 55(d). Subsequently, the Committee recommended that the State Party should "[e]nsure that qualified officials are responsible for choosing the adoptive family which best responds to the needs of children". CRC Committee, Concluding Observations: Mozambique, (October 2009), para. 56(d).

those that are disabled.¹⁵⁹ Such a practice also facilitates baby buying and selling, inducement of consent, and other similar illicit activities. Therefore, domesticating the “no initial contact” rule in a domestic law has the potential to prevent illicit activities in connection with adoption.

4.6 Residency requirements created as a response to counter trafficking in the context of intercountry adoption

Child trafficking concerns on the African continent have led a number of countries to either establish or retain residency requirements as a *sine qua non* for the granting of an adoption order. While some countries in Africa, such as the Democratic Republic of Congo,¹⁶⁰ Mauritius,¹⁶¹ Ethiopia, South Africa, and Angola have no residency requirements for prospective adoptive parents, there are a number of countries on the continent (for example, Botswana,¹⁶² Sierra Leone,¹⁶³ South Sudan,¹⁶⁴ Tanzania,¹⁶⁵ Uganda,¹⁶⁶ Zambia¹⁶⁷ and Zimbabwe¹⁶⁸), that have varied forms of residency requirements.¹⁶⁹ In Zimbabwe, prospective adoptive parents must be either citizens or legal residents – although this requirement may be waived by the Minister of Labour and Social Welfare.¹⁷⁰

One of the main purposes why States provide for a residency requirement before an adoption order is finalised is in order to better determine the suitability of prospective adoptive parent(s). In the context of the *Infant DB* case, it was noted that:

...the real practical way of ensuring the child was safe with the adoptive parents was for the State Administration to have known such parents among our society for a while and thereby be able to speak for their commitment from personal interaction with them.¹⁷¹

Thus, “the requirement as to residence ... is intended to protect the child and to ensure that the adoption is well intended”¹⁷² and does not constitute an illicit activity.

The merits of a residency requirement are debatable. Where a country of origin decides to have a residency requirement, however, the best interests principle should be central in interpreting that notion with regard to intercountry adoption. The period of residency required should not be unreasonably long. In this regard, while Zambia¹⁷³ and Sierra Leone¹⁷⁴ require a minimum of one year and six months residency of prospective adoptive parents, respectively, the requirement of three years residency in Uganda can be labelled unreasonably long. In addition, laws providing for a residency requirement may need to be fairly flexible, for instance, to promote the best interests of the child. Such is the practice in Sierra Leone where the High Court, in its discretion, would sometimes waive the six-month residency requirement.¹⁷⁵

¹⁵⁹ See Vite and Boechat, (not 146 above), 27.

¹⁶⁰ As above.

¹⁶¹ U.S. Department of State, “Intercountry adoption: Mauritius”, (August 2007).

¹⁶² U.S. Department of State, “Intercountry adoption: Botswana”, (June 2006).

¹⁶³ Art. 108 of the Child Right Act (No 7 of 2007).

¹⁶⁴ The new Children’s Act of Southern Sudan, Sec. 90 requires not only residence for a period of three years prior to a foreigner adopting a Southern Sudanese child, but in addition, fostering for a period of one year as well.

¹⁶⁵ Art. 4(5) of Adoption Act of Tanzania, Cap 335 (R.E. 2002); U.S. Department of State, “Intercountry adoption: Tanzania”, (March 2009).

¹⁶⁶ U.S. Department of State, “Intercountry adoption: Uganda”, (April 2008).

¹⁶⁷ U.S. Department of State, Intercountry adoption: Zambia, (December 2007).

¹⁶⁸ U.S. Department of State, “Intercountry adoption: Zimbabwe”, (June 2006).

¹⁶⁹ Kenya’s three months fostering period before an adoption order is made cannot be equated with residency, 100.

¹⁷⁰ As above.

¹⁷¹ Adoption Cause 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) (Infant DB case)*, 18.

¹⁷² *Infant DB case*, 17.

¹⁷³ U.S. Department of State, “Intercountry adoption: Zambia”, (December 2007).

¹⁷⁴ U.S. Department of State, “Intercountry adoption: Sierra Leone”, (December 2007).

¹⁷⁵ As above.

A residency requirement has an impact on the application of the Hague Convention too. The scope of application of the Hague Convention is provided for in Article 2(1) which entrenches that 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")"¹⁷⁶ As can be gleaned from this provision, it is the habitual residence of the child and the habitual residence of prospective adoptive parents which are the connecting factors for the application of this Convention.¹⁷⁷

A range of case law is available dealing with the issue of habitual residence under the Hague Convention on the Civil Aspects of Parental Abduction.¹⁷⁸ While courts have failed to agree on a single definition,¹⁷⁹ there is some degree of consensus that there is a need to determine a child's habitual residence based on the particular facts and circumstances of each case.¹⁸⁰

There is also no definition of "habitual resident" in the Hague (adoption) Convention. Despite this, it is patent that the scope of application of the Hague Convention, and, in turn, its safeguards, are potentially made irrelevant where both the adopter and the adoptee are habitual residents of the same Contracting State. This could mean that, in countries that require a residency status before an adoption order is made, a distinction between "habitual residence", on the one hand, and "residence", on the other, needs to be made for the application of the Hague Convention to materialise. While this distinction will be for the courts or authorities in the relevant State to determine, "habitual residence" could be described as "a factual concept denoting the country which has become the focus of the individual's domestic and professional life".¹⁸¹ However, in countries that prescribe an unreasonably long residency requirement, such distinction becomes less evident. This in turn might lead to a situation where the Hague Convention cannot apply because both the adoptee and the adopter would be considered as habitual residents of the same Contracting State.

The complications that may arise as a result of a residency requirement are also epitomised in the case of Malawi. Section 3(5) of the Malawi Adoption Act provides that "[a]n adoption order shall not be made in favour of any applicant who is not resident in Malawi". In the *Infant CJ* High Court case, the requirement of residency was the main reason why Madonna's adoption was rejected.¹⁸² In the *Infant DB* case, the issue of residency was central, too.¹⁸³ It is worth mentioning here that the SCA noted that at the date of the hearing of the application Madonna was present in the country, not by chance but by design.¹⁸⁴ It observed that Madonna specifically came to Malawi for the purpose of the application for adoption, and was

¹⁷⁶ Art. 2(1) of Hague Convention. The Hague Conference first used the term "habitual residence" in a 1954 convention dealing with civil procedure. See Convention du Premier, Arts. 21 and 32.

¹⁷⁷ See, Bisignaro, S. (1994) "Intercountry adoption today and the implications of the 1993 Hague Convention on tomorrow" 13 *Dickinson Journal of International Law* 142.

¹⁷⁸ See for instance, the website of the Permanent Bureau of the Hague Conference on Private International Law at <http://www.hcch.net/index_en.php?act=conventions.publications&dtid=34&cid=24> for case law dealing with habitual residence. See, generally Schwartz, S. (2004) "The myth of habitual residence: Why American courts should adopt the Delvoye standard for habitual residence under the Hague Convention on the Civil Aspects of International Child Abduction" 10 *Cardozo Women's Law Journal* 691; Splagounias, G. (1995) "Habitual residence under Hague Convention equated with ordinary residence, *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993)" 18 *Suffolk Transnational Law Review* 823.

¹⁷⁹ Splagounias, (note 178 above), 823 (citing "Application of Ponath, 829 F. Supp. 363, 365 (D. Utah 1993); *Levesque v. Levesque*, 816 F. Supp. 662, 665 (D. Kan. 1993); *Meredith v. Meredith*, 759 F. Supp. 1432, 1434 (D. Ariz. 1991)")

¹⁸⁰ Splagounias, (note 178 above), 828.

¹⁸¹ Permanent Bureau, Guide to Good Practice, (not 105 above), 108.

¹⁸² See Adoption Cause No. 1 of 2009 *In the Matter of the Adoption of Children Act (Cap. 26:01) and In the Matter of CJ (A Female Infant)* (unreported) (hereinafter "High Court infant CJ case").

¹⁸³ See *Infant DB* case.

¹⁸⁴ Adoption Cause No. 1 of 2009 *In the matter of Adoption of Children Act (Cap. 26:01 and in the matter of Chifundo James (a Female Infant)* (unreported) (MSCA Adoption Appeal No. 28 of 2009) (hereinafter "SCA infant CJ case"), 17.

not in the country by chance or as a mere sojourner.¹⁸⁵ As a result, it was concluded that, at the time of the application, Madonna was resident in Malawi.¹⁸⁶

A cursory look at this conclusion would in practical terms mean that, for the purpose of intercountry adoption, prospective adoptive parent(s) need only be physically present in Malawi at the time of the adoption application to qualify as being resident in the country. This is completely different from, for instance, the practice in Tanzania, where a prospective adoptive parent is considered as a resident only if he or she “holds a Resident Permit (Class A, B, or C), a Dependent’s Pass, or an Exemption Permit and lives in Tanzania”.¹⁸⁷ Similarly, in Morocco, official residence certificates must be produced to prove resident status.¹⁸⁸

From a comparative perspective, it should be noted that the current trend in Africa is to regulate intercountry adoption without a residency requirement. Save for the Child Rights Act of South Sudan, recent law reform efforts on the African continent do not actually prescribe a residency requirement for intercountry adoption.¹⁸⁹ If experience in Uganda is any guidance, an unreasonably long residency requirement (in this case three years) could be counterproductive. It could be a contributing cause for prospective adoptive parents’ motivation to circumvent the whole safeguard necessary for intercountry adoption – an issue that forms the focus of discussion in the next sub-section.¹⁹⁰ Should a country decide to become a State Party to the Hague Convention, a residency requirement has the potential, at least, to complicate the application of the Convention (if not to make impossible). In the final analysis, it is submitted that the possibility of having a sound and well-regulated intercountry adoption regime without a residency requirement is still a viable option for countries of origin in Africa but the continued child trafficking incidents would continue to erode the realisation of this latter option.

4.7 Abuse of guardianship orders to circumvent adoption safeguards

Securing a guardianship order for the ultimate purpose of intercountry adoption is a method often employed in Muslim countries where intercountry adoption is not allowed. To illustrate, this is the case in Morocco, Jordan, and Bangladesh.¹⁹¹ However, one of the most notable countries in Africa where guardianship orders are frequently abused to skirt from intercountry adoption procedures is Uganda.¹⁹² This is often done to avoid the three year residency requirement prescribed by law.¹⁹³ A review conducted in August 2007 on the status of adoption and legal guardianship trends in Uganda in the wake of growing concerns about the possible links between adoption/ guardianship processes and child trafficking, has confirmed this problem.¹⁹⁴ The CRC Committee has detected a similar trend.¹⁹⁵ It viewed such a trend as potentially aimed at circumventing the regulations which apply to adoption, and resulting in practices contrary to the OPSC,¹⁹⁶ and recommended to the State Party to “stringently scrutinize applications for legal guardianship of children in order to avoid practices contrary to the Protocol”.¹⁹⁷

¹⁸⁵ SCA *Infant CJ* case,, 16.

¹⁸⁶ SCA *Infant CJ* case,, 16.

¹⁸⁷ U.S. Department of State, “Intercountry adoption: Tanzania”, (March 2009).

¹⁸⁸ U.S. Department of State, “Intercountry adoption: Morocco”, (February 2007).

¹⁸⁹ See, for instance, Children’s Act 38 of 2005 of South Africa and the Child Right Act 7 of 2007 of Sierra Leone (which requires 6 months residency, though the courts, by using their discretion, often waive this requirement).

¹⁹⁰ ANPPCAN Uganda, (2009) “Government should revisit law and policy on adoption”, 12 *Child Link* 7.

¹⁹¹ U.S. Department of State, “Intercountry adoption: Morocco”, (September 2009); Bangladesh, (November 2006); Jordan, (January 2007).

¹⁹² ANPPCAN, (note 190 above), 7.

¹⁹³ Art. 46(b) of the Children Act of Uganda.

¹⁹⁴ ANPPCAN (2007) Guardianship orders and adoptions in Uganda.

¹⁹⁵ CRC Committee, Concluding Observations: Uganda, (October 2008), para. 20.

¹⁹⁶ As above.

¹⁹⁷ CRC Committee, Concluding Observations: Uganda, (October 2008), para. 21.

An attempt to supplant an intercountry adoption procedure with a less stringent guardianship order for the ultimate purpose of removing a child from the country of origin, and adopting him or her in the receiving State, has real shortcomings. It is also not congruent with international law. For instance, a “nude” guardianship order, which can be effected merely on an *ex parte* application, taking place without the knowledge, supervision or approval of a designated authority, cannot meet one of the tenets of the CRC, the ACRWC, and the Hague Convention – that intercountry adoption is a legitimate concern of public authorities.¹⁹⁸

As regards the policy objective underlying the “mutual recognition” principle of the Hague Convention, it is obvious, since adoption necessarily entails a change of legal status, that such events must occur in such a way as to permit ratifying states to agree upfront about the form and content of the legal consequences in the subsequent country of destination of an adoption that has taken place in the sending country. A court faced with considering a guardianship order as a prelude to an intercountry transfer of a child has no duty to enquire into the nature and status of any adoption, or adoption-like order, in the country of destination. In addition, it is also argued that a guardianship application takes very little account of the overall rights of a child under international law such as the facilitation of the preservation of information.¹⁹⁹

In South Africa, the *AD v DW* case has further illuminated the various issues that may arise in connection with the attempt to use guardianship orders so as to avoid intercountry adoption procedures. In this case, an application for sole custody and sole guardianship was made to the High Court by citizens of the U.S. who wished to adopt a South African child. The applicants were advised (incorrectly) that a policy by the Department of Social Development barred citizens of the U.S. from adopting children in South Africa, and were encouraged to apply to the High Court for an order granting them sole custody and sole guardianship.²⁰⁰ The Constitutional Court reasoned that it is only in exceptional circumstances (to promote a child’s best interests) that the High Court has jurisdiction to hear applications for sole custody and sole guardianship which were intended as a first step towards adopting a South African child abroad.²⁰¹ Since it did not find this case to fall within the “exceptional circumstances” threshold, the Constitutional Court referred the matter to the Children’s Court where an adoption order was made.²⁰²

Unfortunately, while the majority of African countries have not reported cases of the use of guardianship orders to circumvent intercountry adoption, in many of these countries there is nothing explicit in the law that expressly prohibits it. On an exemplary note, however, it is worth mentioning that, according to Section 25 of the Children’s Act of South Africa:

[w]hen application is made in terms of section 24 [guardianship application] by a non-South African citizen for guardianship of a child, the application must be regarded as an inter-country adoption for the purposes of the Hague Convention on Inter-country Adoption and Chapter 16 of this Act.

This provision is commendable, and worthy of imitation in other African jurisdictions, as it has the potential to prevent attempts to circumvent intercountry adoption procedures through the use of guardianship orders.²⁰³

¹⁹⁸ Sloth-Nielsen, J. and Mezmur, B. (2007) “(Illicit) transfer by De Gree” 11 *Law, Democracy and Development* 88.

¹⁹⁹ Sloth-Nielsen and Mezmur, (note 198 above), 93.

²⁰⁰ See Sloth-Nielsen and Mezmur, (note 198 above) for a discussion of the SCA decision of this case.

²⁰¹ *AD v DW* (Department of Social Development Intervening; Centre for Child Law, *Amicus Curiae*) 2008 (3) SA 183 (CC) para. 32 and 34.

²⁰² As above.

²⁰³ For a discussion of some of the limitations of this provision, see Couzens, (note 113 above), 60-61.

5. THE WAY FORWARD: SOME SUGGESTIONS TO COMBAT CHILD TRAFFICKING IN THE CONTEXT OF INTERCOUNTRY ADOPTION IN AFRICA

5.1 Comprehensive law reform to combat child trafficking in the context of adoption

It was pointed out that law reform in African countries to domesticate the CRC and the ACRWC, and to modernise and codify a myriad of outdated statutes affecting children, is, in many instances, still ongoing. This is particularly the case with child trafficking laws. States Parties are required to undertake a comprehensive legislative reform that examines the whole spectrum of legislation and regulations that affect the realisation of children's rights. Indeed, a comprehensive and consultative review of existing legislation seems the most common and effective way to begin the harmonisation process. Apart from putting the law in place, necessary measures to effectively implement the same – such as regulations, institutions, policies, and budget allocations should accompany law reform.

A comprehensive child law, specifically to combat child trafficking in the context of adoption, has various advantages: it is accessible; it facilitates certainty; it saves time; and it is usually relatively up to date. These are all characteristics that stakeholders, such as the judiciary, the legislator, the executive, civil society, academia and children themselves, find helpful in promoting and protecting children's rights.

However, it is important to note that, in the context of child law reform to establish safeguards in intercountry adoption, efforts should go beyond domesticating only the CRC and the ACRWC. Other crucial instruments such as the OPSC, the Hague Convention, and the Palermo Protocol should also be taken into account. As the experience of Kenya shows, even before ratifying the Hague Convention, domesticating at least some of its standards pays dividends. It is also recommended that legislation should recognise that the buying and selling of children for adoption purposes constitutes a serious form of exploitation, thereby making it tantamount to human trafficking. The continued perpetuation of illicit activities in intercountry adoption with impunity creates a sense of normalcy which might ultimately lead to a completely commercialised and profit-centred practice.

5.2 Central authorities, Accredited Bodies, and Approved Persons in combating child trafficking in the context of adoption in Africa

While the CRC and the ACRWC provide limited guidance as to the kind of institutions that are required for undertaking intercountry adoption, the Hague Convention, by comparison, offers a relatively detailed road map for the specific institutional structures that should undertake the various responsibilities under the Convention. The main institutions that are envisaged under the Hague Convention, and which have the potential to prevent and address illicit activities in intercountry adoption, are Central Authorities, Accredited Bodies, and Approved (non-accredited) Persons and Bodies.

One of the main tasks of Central Authorities is to “co-operate with each other and promote co-operation amongst the competent authorities in their States to protect children and to achieve the other objects of the Convention”.²⁰⁴ The role of Central Authorities in preventing illicit activities is more explicit in Article 8 of the Hague Convention:

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

Even where a State is not a Contracting State to the Hague Convention, (and hence without an explicit obligation to establish or designate a Central Authority as understood in the Hague Convention), the CRC Committee seems to be of the view that there is an obligation

²⁰⁴ Art. 7(1) of the Hague Convention.

to establish or designate a body to oversee and coordinate intercountry adoption. For instance, in its recommendation to the Democratic Republic of Congo, the CRC Committee recommended that it should “[e]stablish a central authority for adoption to regulate, train and monitor all actors involved and coordinate with the relevant legal authorities”.²⁰⁵ A similar situation can be observed in the context of the Russian federation.²⁰⁶

The involvement of Central Authorities has the capacity to eliminate or to minimise private adoptions, which, by definition, are adoptions that are conducted strictly or directly between prospective adoptive parents and the birth family without State involvement.²⁰⁷ Where private adoptions and some independent adoptions²⁰⁸ take place, the possibility of ascertaining whether adoptability, subsidiarity, and other safeguards for intercountry adoption have been complied with, is very difficult. Furthermore, in private adoptions and some independent adoption, since authorities in both the receiving country and country of origin would not have any supervision of the procedure, it is not possible to regulate improper financial gain and corruption.²⁰⁹

Central Authorities can undertake a number of other measures that prevent or address illicit activities in connection with intercountry adoption. They can, for instance, establish a fee cap to be charged by accredited bodies as has been indicated by the Central Authority in South Africa in 2005.²¹⁰ Such a measure would have the support of Section 259(3)(a) of the Children’s Act as accredited bodies “may receive the prescribed fees”. They can also decide to undertake intercountry adoption activities only to the extent that their capabilities, and the demands of the best interests of children in their jurisdiction, allow. In this respect Central Authorities can limit the number of countries they want to deal with as regards intercountry adoption. For instance, the Government of Lesotho has lifted the suspension of intercountry adoptions only for 4 countries: USA, Sweden, the Netherlands and Canada, and has approved only one adoption agency for each of these countries.²¹¹ A similar situation is present in Kenya as there are only five registered local adoption societies in the country.²¹² out of which only three – Little Angels Network, Kenya Children’s Homes, and Child Welfare Society of Kenya - are allowed to facilitate intercountry adoption.

In contrast, in the absence of a “central authority” in Ethiopia, the total number of adoption agencies has reached around 75.²¹³ This has become an obstacle for the Ministry of Women’s Affairs (MOWA’s) execution of its supervisory role, which therefore continues to contribute to illicit activities in intercountry adoption. The absence of a Central Authority as understood under the Hague Convention has also created a gap in cooperation between Ethiopia and other States in order to prevent, but especially to address, illicit activities. In one instance involving two children who were bought and subsequently adopted to Austria, cooperation between the respective embassies has proved daunting. A series of letter correspondence between the two embassies did not produce the requested outcome (for example, establishing the views of the children). The frustration on the part of the Ethiopian

²⁰⁵ CRC Committee, Concluding Observations: Democratic Republic of Congo, (February 2009), para. 48(d).

²⁰⁶ CRC Committee, Concluding Observations: Russian Federation, (November 2005), para. 43.

²⁰⁷ Permanent Bureau, Guide to Good Practice, (2008), 115-116.

²⁰⁸ Permanent Bureau, Guide to Good Practice, (note 105 above), Glossary of terms, 16.

²⁰⁹ See Permanent Bureau, Guide to Good Practice, (note 105 above), 116.

²¹⁰ See response the South African Government to question question No 10(2). Government has observed instances of improper financial gain by adoption agencies, many of which have reportedly led to disciplinary hearings. See response of the South African Government to question No. 11(2), (2005).

²¹¹ U.S. Department of State “Intercountry Adoption: Lesotho” (November 2009).

²¹² List on file with writer.

²¹³ This raises a number of questions: how can a team of four professionals at the Ministry of Women’s Affairs (MOWA) deal with 75 adoption agencies in a meaningful manner? How can they scrutinise and verify so many dossier to establish the adoptability of a child? How can they give efficient advice to the Federal First Instance Court that the adoption is in the best interests of the child (or not)? The large number of adoption agencies in Ethiopia has become an obstacle for MOWA’s execution of its supervisory role, which therefore continues to contribute to illicit activities in intercountry adoption.

government about the gap in cooperation can be deciphered from the phrases used in some of the letters.²¹⁴

On a positive note, however, there is anecdotal evidence that an awareness of the importance of the role of Central Authorities to prevent or address illicit activities is taking root in Africa. For instance, in Liberia, while the outcome of an investigation into alleged irregularities in intercountry adoption by a Commission established by the President of the country was still pending, an *ad hoc* Central Adoption Authority was nevertheless established in 2009.²¹⁵

On a different but related note, it is important to view accredited bodies as guarantors of children's rights. With and under the control of the State, they ensure the existence of professionalism and a multidisciplinary approach in providing information, preparation and support of the child, family of origin and the adoptive family.²¹⁶ France's experience of a "high percentage of intercountry adoptions which are not made through the accredited bodies but through individual channels" has been a cause for concern.²¹⁷ In addition, the fact "that intercountry adoptions are facilitated by embassies and consulates, including the use of volunteers working with them" has been viewed as undermining the work of accredited bodies.²¹⁸ As a result it has recommended to the State Party that "[c]ases of intercountry adoption are dealt with by an accredited body".²¹⁹

It is important to recognise the role of receiving countries in addressing the problem of private and independent adoptions to prevent and address illicit activities on the part of accredited bodies, too. Receiving countries, such as Italy and Norway require prospective adoptive parents to go through an accredited body, except in extremely rare cases (in around 1% of all intercountry adoptions).²²⁰ These rare cases are adoptions by foreign residents in their country of origin where there is no accredited body.²²¹ Unfortunately, the same cannot be said of a good number of receiving countries, such as the U.S., Spain, France, and Switzerland.

In sum, it is by design and not by default that the great majority of African countries that are marred by child trafficking in the context of intercountry adoptions are not Contracting States to the Hague Convention and those that are Contracting States have a relatively stable and sound adoption regulatory framework. The importance of Central Authorities and/or accredited bodies and the kinds of measures they can undertake that prevent or address illicit activities in connection with intercountry adoption calls for a serious consideration by African countries.

5.3 The role of moratoria to prevent and/or minimise child trafficking and abuses in the context of intercountry adoption

International law does not impose intercountry adoption as an obligatory alternative means of care that States are required to undertake. This is true for the CRC, the ACRWC, and the Hague Convention. Therefore, placing a moratorium on intercountry adoption is generally not a violation of international law.²²² There is sufficient evidence to corroborate this position.²²³

²¹⁴ Copy on file with writer.

²¹⁵ CRC Committee, State Party Report: Liberia, (July 2009), para. 160.

²¹⁶ Vite and Boechat, (not 146 above), 51.

²¹⁷ CRC Committee, Concluding Observations: France (June 2004), para. 33.

²¹⁸ CRC Committee, Concluding Observations: France, (June 2009), para. 63.

²¹⁹ CRC Committee, Concluding Observations: France, (June 2009), para. 64(a).

²²⁰ Terre des Hommes International Federation (2007) "Adoption: At what cost?" available at <http://terredeshommes.org/pdf/publication/adoption_embargo.pdf>, 28.

²²¹ As above.

²²² See Permanent Bureau, Guide to Good Practice, (note 105 above), 102-103.

²²³ State practice surrounding intercountry adoption, for instance, from countries that are emerging from or experiencing natural or manmade catastrophes, has recently inclined towards suspension of intercountry adoption. To illustrate, this was the case, after 26 December 2004, when an underwater earthquake off the coast

In fact, imposing a moratorium on intercountry adoption is sometimes the only feasible and available measure (after exhausting the possibilities of less extreme measures) to prevent illicit activities in adoptions.

In very exceptional circumstances the CRC Committee itself has recommended to States Parties to suspend intercountry adoption. For instance, in 2001 the CRC Committee recommended to Guatemala that it should “suspend adoptions in order to take the adequate legislative and institutional measures to prevent the sale and trafficking of children...”.²²⁴ The Committee understands the need for moratoria, especially until the regulatory framework for intercountry adoption is put in place.²²⁵

Where appropriate a blanket moratorium on intercountry adoption should be avoided. In some instances a more specific moratorium stands a better chance of promoting children’s best interests. While the common practice is to place a moratorium on intercountry adoption at the national level, a moratorium could sometimes be local or region-specific.²²⁶ A moratorium could also be placed with respect to specific orphanages that undertake intercountry adoption – for instance, on private orphanages as opposed to those run by government.²²⁷ Exceptionally, moratoria could be age specific and be placed on the adoption of a certain age group of adoptable children, too. However, it is also important to also recognise that possibilities exist where a moratorium could be inconsistent with children’s rights.²²⁸

It is promising that the experience gained from the Zoe’s Ark case, and the need to impose a moratorium on intercountry adoption in instances where a country is affected by a catastrophe, seem to be resonating well in Africa. For example, it was reported that days after the Zoe’s Ark workers were arrested, the Republic of Congo, part of which is still experiencing violence and armed conflict, announced that it was suspending all international adoptions because of the events in Chad.²²⁹ Furthermore, the Ministry of Social Welfare of the Government of Zambia as well as that of the Government of Togo also suspended adoption after the Zoe’s Ark case.²³⁰ The official reasons provided for the suspension of intercountry adoption in these three countries were the need to undertake the practice in the best interests of the child, and to address dysfunctions in the adoption system which had the potential of violating children’s rights.²³¹

Moratoria are also being imposed in a number of African countries in order to first provide for a proper regulatory framework for intercountry adoption. In this respect, the experiences of Liberia²³² and Lesotho²³³ offer good examples. In May 2009, the Ethiopian First Instance Court had placed a moratorium on cases involving abandoned children from orphanages in Addis Ababa, citing concerns over an inexplicable increase in the number of abandoned

of the Indonesian island of Sumatra caused a tsunami tidal wave that devastated countries across Southeast Asia.

²²⁴ CRC Committee, Concluding Observations: Guatemala, (July 2001), para. 35.

²²⁵ This was reflected in its Concluding Observations to Kyrgyzstan when it recommended that “[w]hen the State party envisages lifting its moratorium on intercountry adoptions” it should consider ratifying the Hague Convention. CRC Committee, Concluding Observations: Kyrgyzstan, (August 2000), para. 38.

²²⁶ See Dohle, A. (2008-2009) “Inside story of an adoption scandal” 39 *Cumberland Law Review* 134 (citing two Delhi Newline newspaper reports).

²²⁷ For instance, see the discussion in this section below in the context of Ethiopia.

²²⁸ Where there are adoptable children in a country who could benefit from intercountry adoption in a country, a moratorium imposed for an unjustifiably lengthy period of time has the potential to limit these children’s access to growing up in a family environment. Transitory cases – those that were already started (and sometimes almost completed) before a moratorium is imposed – are more controversial and need to be handled with great care. See Permanent Bureau, Guide to Good Practice, (note 105 above), 102-103.

²²⁹ International Herald Tribune “Chad count sentences French aid worker to 8 years forced labor”, available at <<http://www.iht.com/Articles/2007/12/26/africa/php>>.

²³⁰ ISS/IRC Monthly Review, (March 2008) (No 3/2008), 3. The Republic of Togo has promulgated the Law No: 2008-014 of November 2008 for the approval of the Hague Convention.

²³¹ As above.

²³² See, for instance, CRC Committee, State Party Report: Liberia, (July 2009).

²³³ The moratorium has now been lifted. See U.S. Department of State “Intercountry adoption: Lesotho” (November 2008).

children being brought for adoption.²³⁴ The Court later lifted the moratorium for the three government run orphanages in Addis Ababa. It subsequently lifted the moratorium after the investigation into the dramatic increase of the number of abandoned children was completed.²³⁵ The specific nature of the moratorium (targeting abandoned children), and the fact that the Court did not waste time in completing its investigation and lifting the moratorium, indicate a sound appreciation of children's best interests by the Court, and this is commendable.

Therefore, African countries should further appreciate the fact that there may be sound child protection reasons for the imposition of a moratorium.²³⁶ In the final analysis, whether to impose a moratorium, and for how long, should take into account children's best interests.²³⁷

5.4 Cooperation from receiving countries to combat child trafficking

While co-operation is central to make the whole intercountry adoption regime in Africa work for the best interests of children,²³⁸ it is even more crucial to address child trafficking in the context of adoption. In this regard, any intercountry adoption reform to address child trafficking concerns that considers the role of receiving countries as inconsequential is doomed to fail.

It is first argued that there is a need for recognition on the part of receiving countries that it is their demand for adoptable children that drives the intercountry adoption process in the main. Therefore, receiving countries should abstain from putting the authorities and organisations of countries of origin under unnecessary pressure to provide adoptable children. The role of receiving countries in placing moratoria (restrictions) on adoption from countries where adoption irregularities have become rampant is also worthy of consideration. It is also recommended that receiving countries should assist in holding foreign adoption agencies registered in their State accountable for the working methods of their representatives and partners in Africa. This should be the case especially when these representatives and/or partners were involved in any form of child trafficking and abuse in the context of adoption in Africa with the knowledge of the foreign adoption agency (and no preventive or curative measure is taken by the agency).

It is also recommended that receiving countries should assist, and where necessary put due pressure on, countries of origin in making their laws compliant with international standards including the Hague Convention. The emerging jurisprudence of the CRC Committee in this respect is worth consolidating. In relation to France, the CRC Committee recalled:

...its concern that the majority of intercountry adoptions are mainly carried out with countries of origin that have not ratified the Hague Convention of 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption (two thirds)...²³⁹

Assuming that this view of the CRC Committee gains ground in relation to a number of other receiving countries, it might further increase the need to assist and put pressure on African non-Contracting States to the Hague Convention to ratify and implement the treaty with the necessary infrastructural support.

²³⁴ U.S. Department of State, "Intercountry adoption: Ethiopia", (13 May 2009).

²³⁵ As above.

²³⁶ These kinds of moratoria are often referred to as "restrictions". See, Permanent Bureau, Guide to Good Practice, (note 105 above), 103.

²³⁷ In other words, the presence of adoptable children whose chance of access to a stable family environment is only through intercountry adoption should warrant serious consideration of the nature and duration of a moratorium.

²³⁸ For further details on the need for administrative and judicial cooperation in intercountry adoption, see Duncan, W. (2001), "Transfrontier protection of children: Administrative and judicial co-operation and the role of the Hague Conventions" (paper delivered at a Conference on International Family Law in a Commonwealth Context) (Justice College, Pretoria, 25-26 January 2001)..

²³⁹ CRC Committee, Concluding Observations: France, (May 2009), para. 63.

In instances where there are systemic and continued irregularities in intercountry adoption in a country of origin, receiving countries could also place more procedural protection measures. For instance, the Department of State of the U.S., as a result of families' concerns about recent media reports alleging direct recruitment of children from birth parents by adoption service providers or their employees in Ethiopia, has implemented some changes to adoption visa processing.²⁴⁰ As a result, an I-604, which is the Determination on Child for Adoption, sometimes referred to as "orphan investigation") form must be completed in connection with every intercountry adoption application.²⁴¹

The role of foreign adoption agencies to ensure safeguards in the adoption processes in Africa is important, too. In practical terms, this might mean, for instance, a better preparation of the prospective adoptive parents by foreign adoption agencies about the potential risks of child buying (or other illicit activities) in Africa, which can contribute towards countering illegal adoptions. It is further recommended that foreign adoption agency representatives (including their partners and lawyers) who might influence the number of children placed for adoption should not be paid on a commission basis.

Foreign adoption agencies' associations, such as, Euradopt²⁴² represent a good example of how foreign adoption agencies can be held accountable to pre-determined group ethical rules. Drawing the attention of this and other similar organisations to the competent authorities of countries of origin to enable them to report irregularities is crucial.

5.5 The role of the media to combat child trafficking in the context of adoption

The role of the media (both national and international) in the context of intercountry adoption related matters is also worth highlighting. As the most powerful tool of mass communication nationally and internationally, the media has the potential to either protect or violate children's rights. While the media's role in influencing child friendly attitudes in society (for instance, to promote domestic adoption) is beyond question,²⁴³ Africa's media still tends to place children at the margins of its work.²⁴⁴ Furthermore, the general lack of capacity of African media to undertake investigative journalism to uncover issues such as illegal adoptions curtails its role in the promotion and protection of children's rights. Therefore, the furtherance of the role of the media in a professional manner to protect children's rights in general, and those involved in intercountry adoption in particular is apposite. It is recommended that an extensive education campaign and training to promote ethical reporting in the media should be undertaken.

²⁴⁰ US Department of State, "Intercountry adoption: Ethiopia", (13 April 2010).

²⁴¹ As above.

²⁴² Euradopt is an association of adoption organisations in 12 Western European countries. See <<http://portal.euradopt.org/>>.

²⁴³ CRC Committee, Day of General Discussion, *Recommendations: The child and the media* (1996), para. 53.

²⁴⁴ Resource constraints coupled with lack of awareness (and sometimes limitations imposed on freedom of expression) make a State's general obligation to disseminate information about children's rights in Africa highly limited.

6. CONCLUDING REMARKS

Advocates of intercountry adoption might argue that "...buying or abducting children is so rare as to be virtually irrelevant, and hence that regulations aimed at eliminating such practices would needlessly slow adoptions, doing more harm than good".²⁴⁵ However, this paper has argued that the trend in Africa should be aimed towards a more comprehensive policy and legislative response.

As highlighted above, the practices of child trafficking and other illicit activities in intercountry adoption in Africa are manifested in various forms and degrees, and place children's rights in great jeopardy. Unfortunately, most African countries do not even have the basic requirements to counter this in place. Trafficking legislation in a number of African countries is still in draft form. Institutional frameworks to safeguard children's rights are either not present, or lack the necessary mandates and capacity to perform their tasks. As a result, at this stage, the question for African countries is not whether to regulate or not to regulate intercountry adoption. Rather, the regulation of intercountry adoption should address the dire need to fill every conceivable legislative loophole. It is recommended that the failure to address every possible legislative gap should be viewed as slippery slope, which inevitably leads to a chain which perpetuates the violation of children's rights, culminating in a generally broken intercountry adoption system that is marred by irregularities. It was highlighted that, apart from child laundering, other subtle illicit activities such as violating the "no initial contact" rule, overlooking improper financial gains and corruption, and allowing independent and private adoptions, should be regulated by law. In other words, a failure to regulate intercountry adoption in Africa in a more than usually comprehensive way potentially leads to a situation where adoption can become a vast, profit-driven, industry with children as the commodity.

The instances of illicit activities in countries such as Chad, Egypt, Ethiopia, Kenya, Rwanda, and Mauritius detailed in this paper should be viewed as the tip of the iceberg. Therefore, the issue of illicit activities in intercountry adoption from Africa is not only about the cases we know of, but also about those of which we do not know. While the lessons from these instances have informed debate about the extent of trafficking in intercountry adoption in Africa, additional investigation by governmental and international bodies would further the discussion and knowledge of the extent to which these situations prevail, and more importantly, how to eliminate them through precise targeted legal and other means.

²⁴⁵ Smolin, D. (2007) "Child laundering as exploitation: Applying anti-trafficking norms to intercountry adoption under the coming Hague regime" 32 *Vermont Law Review* 32 citing Bartholet, E. (1993) "International adoption: Current status and future prospects" 3 *The Future of Children* 96.