

## Inter-country Adoption from a Southern and Eastern African perspective

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This paper reviews recent developments pertinent to inter-country adoption in Southern and Eastern Africa. In particular, it focuses on the tripartite roles of governments, the judiciary and the international community, including the international media. It argues that a concerted effort towards awareness-raising is required in order to harmonise the respective roles of the above players, and in order to better regulate the practice.

Of course, the UN Convention on the Rights of the Child 1989 (UNCRC) has been ratified by all African countries with the exception of Somalia. The countries under discussion are therefore bound by Art 21 of the UNCRC.<sup>1</sup> Further to this, 48 of the 53 Member States of the African Union, including those that have ratified the Hague Convention on Protection of Children and Co-Operation in respect of Inter-Country Adoption (29 May 1993) (Hague Adoption Convention), are also signatories to the African Charter on the Rights and Welfare of the Child, 1990 (African Children's Charter). This Charter contains a provision similar to, but not on all fours with, the UNCRC.<sup>2</sup> However, these

international instruments are not the main focus of this paper, as the Hague Adoption Convention is widely regarded as the more detailed implementing mechanism<sup>3</sup> to give effect to the relevant provisions of the UNCRC and the Charter.

### Ratification of the Hague Adoption Convention and Domestic Legislation on Inter-country Adoption in Southern and Eastern Africa

As is common knowledge, a growing number of African countries have ratified, or are in the process of ratifying, the Hague Adoption Convention. At this point South Africa, Kenya, Burundi, Guinea, Madagascar, Seychelles, Burkino Faso, Mali, Togo, Cape Verde, and Mauritius (11 countries in all) have acceded. But, for some of these countries, ratification has not, at the time of writing, been followed by implementation at the domestic level, due largely to the slow passage of legislation designed to achieve this. The South African Children's Act 38 of 2005, for example, which contains a dedicated chapter on inter-country adoption (chapter 16), awaits a final date of promulgation, the regulations and forms having been finalised in late 2008. In Kenya, regulations to provide for inter-country adoption and to flesh out the provisions of the Children's Act 2001 were adopted in 2008, and Madagascar was one of the first countries in Africa to pass implementing legislation, which came into effect in 2007.

Drafting of comprehensive and dedicated children's statutes is a trend that is under way across the

<sup>1</sup> Article 21 provides that:  
 'States parties that recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:  
 (a) ensure that the adoption of a child is authorised only by competent authorities who determine, in accordance with applicable law and procedure and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons have given their informed consent to the adoption on the basis of such counselling as may be necessary;  
 (b) recognise that inter-country adoption may be considered as an alternative means of child's care if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;  
 (c) ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoptions;  
 (d) take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;  
 (e) promote, where appropriate, the objectives of the present article by concluding bi-lateral or multi-lateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.'

<sup>2</sup> Mezmur, 'From Angelina (to Madonna) to Zoe's Ark: What are the "A-Z" lessons for international adoptions in

Africa?' [2008] *International Journal of Law, Policy and the Family* 1, at p 6, notes that Art 24 of the African Children's Charter provides for a special obligation on states 'to establish competent authorities' while the UNCRC seems to take the existence of such authorities for granted. Further, the African Children's Charter (Art 24(a)) expressly requires the consent of 'the appropriate persons concerned' whereas the UNCRC refers only to 'the persons concerned' in this context. In addition the African Children's Charter introduces the notion of the avoidance of 'trafficking' in inter-country adoptive processes (Art 24(d)), and obliges states to provide for machinery 'to monitor the [post-adoption] well being of the adopted child' (Art 24 (f)). [Emphasis added]

<sup>3</sup> So, for example, the preamble to the Hague Adoption Convention refers expressly to the principles set forth by (inter alia) the UNCRC relating to inter-country adoption.

subcontinent. A brief overview of this phenomenon, and the details relevant to inter-country adoption, are provided next.

In Malawi, the Children's Bill 2005 sanctions inter-country adoption as an alternative means of care for a child who cannot be placed under foster care or with an adoptive family, or cannot in any suitable manner be cared for in Malawi, and provides for the usual requirements of eligibility of the applicants, counselling, and authority for the child to enter and reside permanently in the receiving country.<sup>4</sup> Of note is a provision requiring the applicant or one of the applicants, if not a relative of the child, to have fostered the child in Malawi for a period of one year (clause 3A(2)(d)).<sup>5</sup> Furthermore, the Bill then goes on to require that 'the receiving country is a signatory to and has implemented the [Hague] Convention on Protection of Children and Co-operation in Respect of Inter-Country Adoption.'<sup>6</sup>

Malawi, of course, is an African country which is at the epicentre of inter-country adoption debates due to several high profile cases that have entered the public domain. As will be discussed below, in the absence of promulgated statutory provisions,<sup>7</sup> the development of rules and standards governing inter-country adoption in this country has thus far been the preserve of the judiciary.

The South African Children's Act purports to regulate inter-country adoption in considerable detail, with the aim of giving full effect to the Hague Adoption Convention in order to make it law in the Republic. So for instance, various sections detail the functions of the Central Authority; the accreditation of child protection organisations to provide inter-country adoption services; the approval of adoption working agreements; the prescribing of fees and payments, as well as the annual submission of financial statements to the Central Authority of fees received and payments made, and so forth. Section 261, which is titled 'Adoption of child from Republic by person in Convention country' sets a minimum standard for applicants to be 'fit and proper' to adopt, with no minimum period of residence in South

Africa, or prior fostering of the child required. Indeed, from a close examination of both the inter-country adoption provisions and those pertaining to domestic adoption,<sup>8</sup> it is not evident that the prospective adoptive parent whose application has been approved by the respective Central Authorities has to appear in person in the Republic at all!<sup>9</sup>

In the South African legislation, by contrast to that of Malawi noted above, it is expressly provided that the President may 'enter into an agreement with a foreign state that is not a State Party to the Hague Convention on Inter-Country Adoption in respect of any matter pertaining to the inter-country adoption of children.'<sup>10</sup> This possibility is elaborated fully in s 262, titled 'Adoption of child from republic by person in non-Convention country'. In the lower court decision in *De Gree and Another v Webb and another (Centre for Child Law, University of Pretoria, Amicus Curiae)*,<sup>11</sup> the Chief Director: Children in the Department of Social Development deposed as follows:

'Most of the working agreements currently in place are with other Hague countries that have also ratified the Convention. The only exception is a working agreement between Johannesburg Child Welfare and Botswana. This agreement was supported by the Department of Social Development for the following reason:

Although the culture of the population in Botswana differs from the population in South Africa, it is not as radical as other countries.'<sup>12</sup>

Clearly the provisions related to inter-country adoptions from non-Convention countries are

<sup>4</sup> Clause 3A(1) and (2)(a)–(c) of the Draft Bill.

<sup>5</sup> In the case of the new Children's Act of Southern Sudan (2009), s 90 requires not only residence for a period of 3 years prior to a foreigner adopting a Southern Sudanese child, but in addition, fostering for a period of one year as well. The Lesotho Child Welfare and Protection Bill (2005) provides that a person who is not a Lesotho citizen may only adopt a Mosotho child if he or she has stayed in Lesotho for at least three years and has fostered the child for at least 2 years under the supervision of a social worker.

<sup>6</sup> Despite the fact that Malawi itself is not yet a state party to the Hague Adoption Convention nor is there, as far as can be ascertained, any process of ratification underway.

<sup>7</sup> Of course, there is an old Adoption of Children Act (Cap 26:01), which was the subject of judicial interpretation in the first 'Madonna case' (see Mezmer, 'As painful as giving birth': A Reflection on the Madonna Adoption Saga' (2008) XLI(3) *Comparative and International Law Journal of Southern Africa* 383–403).

<sup>8</sup> Chapter 15 of the Act.

<sup>9</sup> In Ethiopia, inter-country adoption can also be effected without the applicant appearing in person in the country and, in practice, after the adoption order has been made, any authorised person can escort the child to the receiving country (mostly the US). The above interpretation of the South African position is reinforced by the as yet unpromulgated regulations to Chapter 16 of the Children's Act, in particular reg 128, which sets out the requirements for the report on the applicant to be prepared by the Central Authority of the receiving country. Regulation 28(1)(l) requires the report to include 'plans for relocation of the children from the Republic to the place where the applicant [from a Convention country] resides.' A similar provision (reg 132) applies where the applicant is from a non-Convention country. Presence of the prospective adoptive parents is indeed not an absolute requirement under the Hague Adoption Convention – Art 19(2) reads thus: 'The Central Authorities of both States shall ensure that this transfer [ie of the child] takes place in secure and appropriate circumstances and, *if possible*, in the company of the adoptive or prospective adoptive parents.' [Emphasis added]

<sup>10</sup> Section 255(1)(a).

<sup>11</sup> 2006 (6) SA 51 (W).

<sup>12</sup> At pp 57–58.

# Features

inspired by the possibility of intra-African adoption, which from a policy perspective the South African government appears to regard more favourably than inter-continental adoptions.

A third feature of the South African inter-country adoption provisions which is worthy of mention is to be found in s 261(6)(a), which provides that: 'The Central Authority of the Republic may withdraw its consent to the adoption of the child within a period of 140 days [four and a half months] from the date on which it has consented to the adoption, if it is in the best interests of the child to do so.'

Moreover, in terms of s 261(7), the adoption order issued by the South African court 'takes effect only after the period referred to in subs (6) has lapsed, and the Central Authority has not withdrawn its consent within the stated period'. The draft Regulations contain details concerning the manner in which consent must be withdrawn (by letter setting this out, and stipulating the time and place where the child has to be handed over to an identified representative of the Central Authority of the Republic). Further, provision is made for a suitably qualified or experienced person (employed by the Department of Social Development or by a child protection organisation accredited to provide inter-country adoption services) to act as escort to accompany a child on his or her return to the Republic. Finally, the travel arrangements for the child and escort must be made by the Central Authority of the Republic, and the costs for such travel are to be borne by the Central Authority. Exactly the same provisions apply to the return of a child from a non-Convention country if the Central Authority withdraws its consent.

There are two issues wrapped up in these provisions. They may, on the one hand, give rise to some consternation on the part of receiving countries and would-be adoptive parents, who may fear capricious withdrawal of consent by the South African Central Authority. However, this fear is not necessarily well-founded, as the possibility of withdrawal must be seen in the light of both s 261(5) of the South African Children's Act and Art 17 of the Hague Adoption Convention in its totality. Article 17 reads as follows:

'Any decision in the State of origin that a child should be entrusted to prospective adoptive parents may only be made if –

- a) the Central Authority of that State has ensured that the prospective adoptive parents agree;
- b) the Central Authority of the receiving State has approved such decision, where such approval is required by the law of that State or by the Central Authority of the State of origin;
- c) the Central Authorities of both States have agreed that the adoption may proceed; and
- d) it has been determined, in accordance with Article 5, that the prospective adoptive parents are eligible and suited to adopt and that the child

is or will be authorized to enter and reside permanently in the receiving State.'

Section 261(5) confirms that a court may make an order for the adoption of the child only where (amongst other requirements) the arrangements for the adoption of the child are in accordance with the requirements of the Hague Adoption Convention,<sup>13</sup> where the Central Authority of the receiving country has agreed to the adoption of the child,<sup>14</sup> and where the Central Authority of the Republic has agreed to the adoption of the child.<sup>15</sup> In short, the prior agreement of Central Authorities must be seen as a significant bar to unjustified withdrawal of consent. It must further be noted that the jurisprudence of the Committee on the Rights of the Child (UNCRC Committee) looks with disfavour upon legislative scenarios which provide for the possibility of revocation of adoption orders.<sup>16</sup>

Further to this, the best interests standard must be the paramount concern of the Central Authority who may be considering withdrawal, hence mere irregularities in the process, or even outright deception or trickery, may not in themselves constitute sufficient grounds to withdraw consent, if they are overridden by the child's best interests.

The second issue relates to the possible limbo situation created by the 140-day window period provided for in the Act. It raises the question as to what the legal status of the adoptive parents before the order 'takes effect' actually is: as 'not yet' adopters, they potentially do not yet have any legal relationship with the child. Legally therefore, they would not be in a position to make important decisions with regard to the child (such as, for example, consenting to medical or surgical procedures, applying for a passport for the child, etc). By the same token, however, the 'return' procedures contemplate that the child has in the interregnum left the country, and is residing abroad. In effect, the child is without any legal parents outside his or her state of origin.<sup>17</sup> This position seem irresolvable as the provision now reads, since this is not a scenario where the adoption takes provisional effect, subject to what might be called a 'resolutive condition'<sup>18</sup> of withdrawal of consent by the Central Authority. We would propose that the wording of the Act in this

<sup>13</sup> Section 261(5)(d).

<sup>14</sup> The competent authority must have agreed in the instance of an inter-country adoption to a non-Convention country: s 262(5)(e).

<sup>15</sup> Section 261(5)(f).

<sup>16</sup> See, for instance, UNCRC Committee, Concluding Observations: Ethiopia, (CRC/C/ETH/CO/3) (2006), at para 43.

<sup>17</sup> In the spirit of the co-operation envisaged by Art 1(b) of the Hague Adoption Convention, one would imagine that the Central Authority of the receiving state would have to play an in loco parentis role if this becomes necessary.

<sup>18</sup> As presently worded, the non-withdrawal of consent is effectively a suspensive condition.

regard requires amendment in order to clarify the child's position before the expiry of the 140-day period.

The 1998 Children's Act of Ghana permits only an interim order to be made where the child is being adopted by an applicant who is not a citizen of Ghana, and such interim order must subsist for a period of 'not less than two years' (s 73). So too, clause 65(4) of the Child Welfare and Protection Bill of Lesotho (2005) authorises the High Court to make an interim inter-country adoption order for a period of not less than two years on condition that supervision of the child be done by social workers of the country where the adoptive parents reside and to postpone the determination of the application.

## Contact

The Hague Adoption Convention, in Art 29, provides that:

'... 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 inter-country adoptions in article 4 – notably adoptability, fulfilment of the best interests criterion, compliance with the subsidiarity principle, and obtaining of the necessary consents – and article 5 – eligibility and counselling of the adoptive parents, and authority for the child to enter the receiving state and reside there permanently] have been met, unless the adoption takes place within a family or unless the contact is in compliance with the conditions established by the competent authority of the state of origin.'

The *Guide to Good Practice*<sup>19</sup> states that:

'... some parents travel to the country of origin to choose a child, and sometime even bargain directly with the biological mothers. This practice creates risks for the child's rights and violates article 29 of the Hague Convention. Contracting states should have laws or procedures in place to prevent such contact before matching<sup>20</sup> and to give effect to article 29.'<sup>21</sup>

This implicit 'no contact' rule in relation to any prior meeting between would-be adoptive parent(s) and a potential adoptee is reinforced by the logic of the

transmission procedure set out in Art 16 of the Hague Adoption Convention, which clearly contemplates a report-writing and decision-making process in relation to the child by the Central Authority of the state of origin *before* such decision is communicated to the Central Authority of the receiving state, which only then, in turn, is required (in Art 17(a)) 'to ensure that the prospective adoptive parents agree'.

This 'no contact with the child principle'<sup>22</sup> is bolstered by para 431 of the *Guide to Good Practice*, in terms of which:

'... it is generally accepted that the prospective adoptive parents should not be permitted to contact the Central Authority of the State of origin directly, or travel there to try to make contact with the child or the child's carers without invitation, before agreements under Article 17 are given. Such practices open the possibility for pressure on States of origin. In some cases, such as special needs cases, direct contact may be appropriate and does not violate Article 29, when the competent authority in the State of origin has authorised the contact'.

So too, the *Guide* emphasises that states of origin need to make a clear statement in their country profile about exactly when they want prospective adoptive parents to travel there:

'433. . . . Some States of origin may want to interview prospective adoptive parents before making a final decision on a proposed match, e.g., if a child to be adopted has special needs, the state of origin may need assurance that the prospective adoptive parents understand the child's condition and are capable of caring for him or her ...

434. Where possible, adoptive parents should escort the child to the receiving state following the adoption or grant of custody.

435. It may be valuable for the prospective adoptive parents to spend time in the state of origin, as their experience there may enable them to know and understand the child's life and living conditions before the adoption and to understand something of the background of the child. Indeed, some States of origin require the prospective adoptive parents to spend time there.'

<sup>19</sup> *The implementation and operation of the 1993 Hague Inter-Country Adoption Convention: Guide to good practice*, Guide no 1 (Hague Conference on Private International Law, 2008).

<sup>20</sup> Although the term 'matching' does not appear in the Convention, it refers to the factors that go into the determination whether a particular child should be placed with a particular adoptive family: *Guide to Good Practice*, at para 7.2.5.

<sup>21</sup> Paragraph 4.2.1.

<sup>22</sup> Sloth-Nielsen and Mezmur assume in relation to the South African *De Gree* case, without arguing or debating this point, that the 'no contact' principle applies pertinently to the child, since one aspect of the applicants' argument in support of their claim to be awarded guardianship in that case was that they had already built up a relationship with the child in question (Sloth-Nielsen and Mezmur 'Illicit transfer by De Gree' (2007) 11 *Law, Democracy and Development* 81, at p 96).



The South African Act and regulations in relation to inter-country adoption are silent on this issue of contact with either birth parent or other carers, or the child. In the light of this lacuna, it must be taken that the Hague provisions, as explicated further in the *Guide to Good Practice*, govern. It is, however, important to remember that the legal status of the guidelines per se is not clear.

The ‘prohibition’ of prior contact with the child would also impact on practices such as ‘photo listing’<sup>23</sup> and advertising of children for adoption. This of course is a violation of the child’s right to privacy, as entrenched in Art 16 of the UNCRC and Art 10 of the African Children’s Charter, respectively. The assurance of privacy regarding the identity of the birth parents (and extended family members) also enables them to place the child for adoption with an agency, secure in the knowledge that their actions will not enter the public domain. In Kenya, the law prohibits the advertisement of a child for adoption.<sup>24</sup> In South Africa, s 252(1) of the Children’s Act provides that no person may publish or cause to be published in any form or by any means an advertisement dealing with the placement for adoption of a specific child. However, this does not apply in respect of an advertisement by a child protection organisation accredited to provide adoption services for purposes of recruitment according to prescribed guidelines, or other forms of advertisements specified in regulation.<sup>25</sup> Taking into account the importance of privacy in adoptions, s 69(1)(a) of the Children’s Welfare and Protection Bill (2004) of Lesotho proposes that ‘[w]hen the High Court hears adoption applications, the High Court shall . . . proceed in camera unless open proceedings will be in the best interests of the child ...’.

## The Role of the Judiciary

In the absence of completed legislation processes in the region, the judiciary has played a significant role in inter-country adoption rulings. Whilst the well-publicised judgements of Malawian courts continue to occupy the international press, some other judgements are rather less well known.

An interesting 2004 case from Namibia is worth noting. *JD and Another and Minister of Health and Social Services and Two Others*<sup>26</sup> concerned an application to declare s 71(2) of the Children’s Act

No 53 of 1960 to be unconstitutional. The application was brought by two German nationals (husband and wife), who wanted to adopt a Namibian child – which child was already in their foster care – but who were unable to do so on account of s 71(2)(f) of the Act, which provides that:

‘Save as provided in section twenty-two, a Children’s Court to which application for an order of adoption of a child is made shall not grant the application unless –

...

- (f) in the case of a child born of any person who is a Namibian citizen, that the Applicant or one of the Applicants is a Namibian citizen resident in Namibia: Provided that the provisions of this paragraph shall not apply –
- i) where the applicant or one of the applicants is a Namibian citizen or a relative of the child and is resident outside Namibia; or
  - ii) where the applicant is not a Namibian citizen or where both applicants are not Namibian citizens but the applicant or the applicants have the necessary residential qualifications for the grant to him or them under the Namibian Citizenship Act, (Act 14 of 1990), of a certificate or certificates of naturalization as a Namibian citizen and *has or have made application for such certificate or certificates*

and the Minister has approved of the adoption.’  
[Emphasis added]

The applicants alleged that ‘the limitation imposed by the impugned provision upon their right to adopt the child and upon the rights of the child to be adopted’ due to their non-citizen status did not fulfil the criteria of the limitations clause of the Namibian constitution (s 22). They contended that it was not justifiable in that there was no rational connection to a legitimate government purpose for this differentiation between foreigners and nationals.<sup>27</sup>

In striking down this provision as unconstitutional on two grounds – namely, as a violation of the rights to found a family and to protection of the family, and as a violation of the principle of non-discrimination (against foreigners) – a number of disturbing dicta pepper the judgment.

In relation to the first ground on which constitutional invalidity was premised, the court agreed that the impugned provision deprived a child born of Namibian parents of the possibility of a ‘loving and stable family life’ through adoption by a

<sup>23</sup> Lists of children available for adoption, usually through public agencies, with photos and descriptions: see Mezmur, fn 5 above, at p 21.

<sup>24</sup> See [www.attorney-general.go.ke](http://www.attorney-general.go.ke). See too, s 178(1) of the Kenyan Children’s Act 2001, which requires every member or officer of an adoption society and every person having any official duty in relation to adoption to treat any document or information in relation to the adoption or proposed adoption of a child as secret and confidential.

<sup>25</sup> In the regulations as presently framed, no such exceptions are provided for.

<sup>26</sup> Case No (P) A 261/2002.

<sup>27</sup> The applicants were permanently resident in Namibia, but were unwilling to forego the benefits of their German nationality by acquiring Namibian citizenship, and hence having to renounce their German citizenship.

non-Namibian: '[i]t ignores the stark reality that foreigners may well be able to provide the best "family" environment for a child born of a Namibian parent and given up for adoption, if compared to Namibian nationals.'

Further, whilst agreeing that the best option for a child is a family made up of the biological parent(s) of the child, the court opined that 'the next best thing to a biological family . . . is an adoptive family'.

Finally, in the context of this argument, the judge alluded to the right of the child 'to a "family" ' as a constitutional right in the Namibian context.

There are at least three wrong, contestable, or otherwise alarming, propositions in the court's reasoning. First, the idea that non-Namibian adoptive parents may be preferable to Namibian nationals able and willing to adopt the same child is directly contrary to the subsidiarity principle contained in the Hague Adoption Convention, the African Children's Charter and the UNCRC. And, whilst patently wrong, this line of thinking unfortunately indicates a view not uncommonly held, even amongst some Africans themselves.

Second, it is debatable whether the 'next best thing' to a biological family is indeed an adoptive family, as opined by the court. Unless the biological family is broadly defined to include the extended family,<sup>28</sup> which is particularly important in an African context,<sup>29</sup> the statement does not hold water. Even then, some would argue that long term in-country fostering arrangements are preferable to an out-of-country adoption. Indeed the wording of Art 21(b) of the UNCRC and Art 24(b) of the African Children's Charter appear to reinforce the notion that inter-country adoption should be resorted to only if the child cannot be placed in 'a foster or adoptive family . . . in the child's country of origin'.

Finally, just as there is no 'right' to adopt a child, so too a child does not have the 'right' to a family in international law. The Namibian constitutional provision in Art 15(1), cited by the court, refers to the children's right, 'subject to legislation enacted in the best interests of the child, as far as possible . . . to know and be cared for by their parents.'<sup>30</sup> Reliance is also placed on Art 14(3) of the Namibian Constitution which provides that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.'<sup>31</sup> This does not take the matter any further, however, and the substantive content of the child's right is to parental or family care or to appropriate alternative

care when deprived of a family environment: there is a distinction between the right to a *family environment*, and the right to a family, which privileges inter-country adoption above, for instance, foster care or small cottage-style alternative care settings in the country of origin.

And the court's restrictive interpretation of the application of the best interests of the child to the narrow confines of the article in question (ie that the best interests standard permits only legislation limiting the child's right to know and be cared for by his or her parents) is dubious. The judge expressly disallowed the possibility of a more extensive application of the best interests standard, stating that 'I see nothing in the language of article 15(1) of our constitution that its framers intended to elevate the best interests of the child standard to a constitutional imperative against which all legislation, except that dealing with the child's right to know and to be cared for by its parents, is to be measured'.<sup>32</sup> This stance is contrary to international law: both the UNCRC and the African Children's Charter emphasise that 'in all actions concerning children' the best interests of the child must be a primary (and in the African Children's Charter 'the primary') consideration. South African Constitutional Court Justice Albie Sachs expresses this idea thus:

'The word paramount [in relation to the best interests principle] is emphatic. Coupled with the far reaching phrase 'in every matter concerning the child', and taken literally, it would cover virtually all laws and all forms of public action, since very few measures would not have a direct or indirect impact on children, and thereby concern them.'<sup>33</sup>

In sum, the reasoning of the court in the Namibian judgment is not child-centred, but rather focussed on granting the prospective adoptive parents the outcome that they sought.

Could a similar sentiment be raised in relation to the first 'Madonna case' in Malawi, the inter-country adoption of David Banda?<sup>34</sup> In October 2006, a Malawian High court granted an interim order, valid for 18 months, permitting Madonna and her then husband to take custody of the child, who at the time lived in an orphanage, and to remove him from the country. The intention was to consider making an order of adoption after expiry of the interim order. Upon expiry of the requisite period, the court was

<sup>28</sup> See Art 5 of the UNCRC.

<sup>29</sup> See Art 20(1) of the African Children's Charter, which refers to 'parents or other persons responsible for the child ...'.

<sup>30</sup> This wording is taken directly from Art 7(1) of the UNCRC; Art 9 is also in point, insofar as separation from parents against their will can only take place when so determined by competent authorities subject to judicial review and where such separation is in the best interests of the child.

<sup>31</sup> See, too, para 5 of the Preamble to the UNCRC.

<sup>32</sup> See p 11 of the judgment.

<sup>33</sup> See *M v S* 2008 (3) SA 232 (CC) para 25. See, too, M Freeman, 'Article 3: the best interests of the child' in A Allen et al (eds), *A commentary on the United Nations Convention on the Rights of the Child* (2007), at p 46, who adopts a similar position.

<sup>34</sup> 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)*.

faced with a significant obstacle in the form of s 3(5) of the Malawi Adoption of Children Act (Cap 26:01) which provides that ‘an adoption order shall not be made in favour of any applicant who is not resident in Malawi’.<sup>35</sup> The judge was mindful of the UNCRC and the African Children’s Charter, referring to them in detail in his judgment. Moreover, he commenced by stressing that the residence requirement ‘was and is intended to protect the child and to ensure that the adoption is well intended’.<sup>36</sup> Nevertheless, the judge had no difficulty ultimately in overriding the residency requirement, posing the question ‘whether “residence” is an end in itself in the context in which it is used, especially bearing in mind that we are dealing with welfare of children. Or is residence merely a means to an end?’<sup>37</sup> and concluding that ‘I am left in no doubt that the best interests of the infant would . . . be achieved by granting this petition’.<sup>38</sup>

We would argue that the judgement effectively gives primacy to both the best interests principle and the subsidiarity principle. The judge noted that:

‘The infant in the instant case was among our many materially deprived children whose only remaining parent was forced, because of his circumstances, to place him at an orphanage . . . This was the closest to a local solution that the only surviving parent and relatives could get. In seeking to adopt the infant the petitioners are not therefore in the way of any permanent domestic solution for the infant’.<sup>39</sup>

It certainly cannot be said that the judgement was motivated solely by the desire to accommodate the needs of the celebrity petitioners.

Madonna (2) is of recent provenance, judgment having been delivered on 3 April 2009.<sup>40</sup> Here Madonna applied to adopt a 3-year-old girl, whose mother had died shortly after her birth and who was at the time of application residing in an orphanage in Malawi. Once again the judge was confronted by the provisions of s 3(5) of the Adoption of Children Act. Contrary to the earlier ruling of the High Court, the court held that residence – which she describes as the bedrock of adoption – involved some degree of

permanence, which could not be ascribed to Madonna who had ‘jetted into the country during the weekend just days prior to the hearing ...’.<sup>41</sup> The judge was not prepared to waive this requirement, stating that:

‘it is necessary that we look beyond a particular petitioner, and maybe even a particular benefactor . . . and consider the consequences of opening the doors too wide. Anyone could come to Malawi and quickly arrange for an adoption that might have grave consequences on the very child that the law seeks to protect.’<sup>42</sup>

The judgment cited Art 24 of the African Children’s Charter and emphasised that, in terms of Art 24(b), inter-country adoption may be considered only as a last resort if the child cannot be placed in a foster or adoptive family or cannot in any suitable manner be cared for in the child’s country of origin. Rather strangely, the judge then did not answer her own question as to whether the child could possibly ‘be placed in a foster or adoptive family’, stating rather that:

‘It is evident however that CJ is no longer subject to the conditions of poverty of her place of birth . . . since her admission at Kondanani Orphanage. In the circumstances, can it be said that CJ cannot in any suitable manner be cared for in her country of origin? The answers to my questions are negative. In my view “in any suitable manner” refers to the style of life of the indigenous or as close a life to the one that the child has been leading since birth.’<sup>43</sup>

This case sets an unfortunate precedent, privileging long-term institutional care in an unwarranted fashion,<sup>44</sup> and in a way which we believe runs directly contrary to the ‘any suitable manner’ requirement under both the UNCRC and the African Children’s Charter.<sup>45</sup> In our view, placement in an orphanage as a permanent solution for a three-year-old child does not appear to serve the child’s best interests, and is based on a somewhat distorted understanding of suitable care.

<sup>35</sup> See above, Mezmur fn 10, at pp 387–388.

<sup>36</sup> At p 18 of the unreported judgment.

<sup>37</sup> Ibid, at p 16.

<sup>38</sup> Ibid, at p 26.

<sup>39</sup> At pp 24–25. The Malawi Human Rights Commission (which intervened as *amicus curiae*) had submitted that the practice of inter-country adoption should ordinarily follow the following path: family-based solutions over institutional placement; permanent solutions over inherently temporary solutions; and national (domestic) solutions over those involving other countries (see the judgment at p 23).

<sup>40</sup> 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)*.

<sup>41</sup> At p 4 of the unreported judgment.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid, at p 6.

<sup>44</sup> It is to be noted that the UNCRC Committee, in its concluding observations on the State party report of Malawi, raised concern about the increasing number of orphanages and children’s homes, recommending to the State party, inter alia to promote and support family-type forms of alternative care for children deprived of parental care, including foster care in order to reduce the resort to residential care. See UNCRC Committee, *Concluding Observations: Second Periodic Report of Malawi* (January 2009), at para 44.

<sup>45</sup> See Art 24(b) of the African Children’s Charter and Art 21(b) of the UNCRC.

Madonna (2) resulted in two directly conflicting judgements from the High Court of Malawi, thus creating not only confusion, but compromising the best interests of children.<sup>46</sup> Divergent judicial approaches to inter-country adoption are becoming characteristic of regional developments in this sphere, and this underpins some of our final conclusions, set out below.

However, the Madonna saga did not end here, as Madonna immediately appealed to the Supreme Court of Appeal against the refusal of the adoption order.<sup>47</sup> The court (per Chief Justice Munlo, SC, with whom two other judges of appeal concurred) handed down judgment on 12 June 2009, allowing the appeal and granting the adoption order. The judgment focussed mainly on the meaning of the word 'residence' in s 3(5) of the Act. The court held that the question of residence 'is a factor to be considered in adoption cases even though it is not the only factor.' The duration of the stay is only one of the matters the court must consider. Whether there is residence is a question which:

'is no longer tied to the notion of permanence as a deciding factor. The legal notion of residence is distinct from that found in the dictionary and is constituted by the fact of physical presence in a place as is not fleeting and transitory. Any period of physical presence however short may constitute residence if it shown that the presence is no transitory; if the period has just begun, this will be a question of intention of the party. There is even no need for one to own property in a place in order for him to be capable of residing there.'<sup>48</sup>

According to the court, Madonna specifically came to Malawi for the purpose of the application for adoption, and was not in the country by chance or as a mere sojourner.<sup>49</sup> As a result, it was concluded that, at the time of the application, Madonna was resident in Malawi.<sup>50</sup>

A cursory look at this conclusion would practically mean that, for the purpose of inter-country adoption, prospective adoptive parent(s) need only be physically present in Malawi at the time of the adoption application to qualify as being a resident of 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'.<sup>51</sup> By the same token, in Morocco, official residence certificates must be produced to prove resident status.<sup>52</sup>

However, rather creating confusion for future cases, the SCA added further elaboration to the grounds for its finding that Madonna's presence at the time of the adoption petition should qualify her as a resident. The SCA added:

'And on that day she [Madonna] had already adopted another infant known as David Banda from Malawi. The Appellant has plans to travel to Malawi frequently with her adopted children in order to instill in them a cultural pride and knowledge of their country of origin. The Judge in the court below had evidence before her indicating that the Appellant had a project in Malawi which had noble and immediate ideas of investing in the improvement of the lives of more disadvantaged children in Malawi. It is clear from this evidence that the Appellant in this case is not a mere sojourner in this country but has a targeted long term presence aimed at ameliorating the lives of more disadvantaged children in Malawi.'<sup>53</sup>

In this regard, it is far from the truth to suppose that the approach to defining who is a resident in respect of inter-country adoption in Malawi is put to rest. Questions abound, such as: Does a prospective adoptive parent need further connection to Malawi, like a project, to be declared a resident for the purpose of inter-country adoption? Does a prospective adoptive parent also need to have plans to bring a child back to Malawi in order to qualify as a resident? What does a 'targeted long term presence' mean? Or is a 'targeted long term presence' an additional requirement for status as a resident? Only future practice related to the issue will shed light on these questions.

Turning to the question of the welfare (best interests) of the child, the court pointed out that, in its view, a court of law dealing with the adoption of an infant opined that, under the Act, inter-country adoption cannot be said to have been the last resort in this case. On the facts, no Malawian family had come forward to adopt the child, nor had there been any attempt to place her in a foster family:

<sup>46</sup> It has been alleged that after the first Madonna case, a veritable flood of applications for inter-country adoptions of children in Malawi has served before the High Courts. This has led to the development of draft guidelines for judges dealing with inter-country adoption applications (personal communication, Judge Edward Twea, 13 March 2009).

<sup>47</sup> MscA Adoption Appeal No 28 of 2009 *In Re: The Adoption of Children Act CAP 26:01; In Re: CJA Female Infant of c/o P.O.Box 30871, Chichiri, Blantyre 3* [2009] MESC 1.

<sup>48</sup> At p 16 of the unreported judgment.

<sup>49</sup> *Ibid.*, at p 17.

<sup>50</sup> *Ibid.*

<sup>51</sup> US Department of State, *Intercountry Adoption: Tanzania*, (March 2009) available at: <http://adoption.state.gov/country/tanzania.html>.

<sup>52</sup> US Department of State, *Intercountry Adoption: Morocco*, (February 2007) available at: <http://adoption.state.gov/country/morocco.html>.

<sup>53</sup> SCA infant CJ case, above fn 47.



‘The question whether in these circumstances it can be said that the infant CJ cannot in any suitable manner be cared for in her country of origin depends on what options she has on the ground. On the evidence infant CJ can hardly be said to have many options. As a matter of fact there are only two options. She can either stay in Kondonani Orphanage and have not family life at all or she can be adopted by the Appellant and grow up in a family that the Appellant is offering.’<sup>54</sup>

This being the case, the welfare (best interests) of the child indicated clearly that she should be adopted by the foreign parent.

As observed above, the treatment of the residency requirement by the Supreme Court of Appeal, while very liberal, still leaves a few questions unanswered. It is hoped that future practice related to the issue will shed light on these questions, and that the meaning of residence would not stand in the way of promoting children’s best interests. In retrospect, the approach the judge took in the infant DB case, which viewed the residency requirement as being merely a means to an end – the end being the best interests of the child,<sup>55</sup> is more instructive, and should still carry a lot of weight in approaching the issue in a child-friendly fashion.<sup>56</sup>

The final judgment to which we would like to refer is the South African Constitutional Court decision in *AD and another v DW and others (Centre for Child Law as amicus curiae and Department of Social Development as Intervening Party)*.<sup>57</sup> The matter arose from an application for sole custody and sole guardianship of a South African child by American citizens. Eschewing the conventional adoption route before a children’s court, they instead pressed their claim in the High Court, with the intention of thereafter taking the child home to the United States and formally adopting her there. The High Court found that the Child Care Act<sup>58</sup> and children’s court adoption procedures were available to the applicants and provided the appropriate safeguards. These procedures should, according to the court, be viewed

as the standard accepted procedure by which South African children are to be adopted, including inter-country adoptions.<sup>59</sup>

This reasoning was by and large upheld by the majority of the Supreme Court of Appeal, to which court the applicants then resorted.<sup>60</sup> In brief, the majority held that it was not in the child’s best interests that she be removed from South Africa in terms of a custody and guardianship order without the protection and safeguards of an adoption first effected in the South African children’s court. The court was not prepared to sanction an adoption procedure which was in conflict with international treaties which South Africa had ratified and which are designed to safeguard the child’s welfare.<sup>61</sup> Not satisfied with this outcome, the prospective adoptive applicants pressed their suit further in the Constitutional Court.

Prior to the hearing of the case, the parties (after some active encouragement by the court) reached an agreement in terms of which adoption proceedings would be instituted and finalised in the Johannesburg children’s court. However, this did not preclude a consideration by the court of two key issues, ‘in the interests of the many children whose future will be at stake in days to come ...’.<sup>62</sup> These issues were whether the High Court had jurisdiction to hear applications for sole custody and sole guardianship intended as a precursor to adopting a South African child abroad, and the constitutionally correct application of the subsidiarity principle.

The Constitutional Court confirmed the inherent jurisdiction of the High Court to act as the upper guardian of all children, and stated that, in this capacity, it had not been dispossessed of its jurisdiction to make a sole custody and sole guardianship order to foreigners desirous of effecting an adoption in a foreign jurisdiction. The Child Care Act should not be interpreted as creating by implication an inflexible jurisdictional bar in this regard. This was not, however, one of the exceptional cases where bypassing the children’s court procedure could have been justified. The majority of the Supreme Court of Appeal had thus been correct in deciding that the granting of a sole custody and sole guardianship order, either by the High Court or by itself, would not have been the appropriate judicial response.<sup>63</sup>

In our view, however, bearing in mind the international instruments concerning cross-border

<sup>54</sup> At p 18 of the unreported judgment.

<sup>55</sup> See infant DB case, above fn 34, at p 18.

<sup>56</sup> See Mezmur, ‘From Angelina (to Madonna) to Zoe’s Ark’ (fn 2 above), at pp 161–163.

<sup>57</sup> 2008 (3) SA 183 (CC).

<sup>58</sup> This Act, No 74 of 1983, will be repealed when the new Children’s Act 38 of 2005 comes into full operation, hopefully later this year. As stated above, the latter Act incorporates the Hague Convention principles and procedures into South African domestic law, the entire text of the Hague Adoption Convention forming one of the schedules to the Act.

<sup>59</sup> *De Gree and Another v Webb and Others (Centre for Child Law, University of Pretoria, Amicus Curiae)* 2006 (6) SA 51 (W).

<sup>60</sup> For a detailed discussion of the four different judgments handed down in the Supreme Court of Appeal, see Sloth-Nielsen and Mezmur (fn 22 above).

<sup>61</sup> *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 (5) SA 184 (SCA).

<sup>62</sup> Paragraph [20].

<sup>63</sup> See paras [23]–[34].

adoptions to which South Africa has acceded, the jurisdictional barriers to the High Court exercising its powers as upper guardian in this type of case are insurmountable.<sup>64</sup> The lack of the guarantees of independent background reports; the absence of involvement of the designated Central Authorities and of a framework for inter-state co-operation and mutual recognition of adoption orders; the lack of safeguards guaranteeing respect for fundamental rights (such as the child's right to privacy and the need for proper counselling for biological parents, adoptive parents and the child, if appropriate), and the aim of preventing improper financial gains and combating child trafficking, not to mention the need to keep proper records of the background of the child – all of these considerations militate against the use of the High Court mechanism to confer parental status upon a prospective adoptive parent from another country via a guardianship and custody order.

Turning to subsidiarity, the Constitutional Court held that the principle should be adhered to as a 'core factor' governing inter-country adoptions, but that it is not 'the ultimate governing factor in inter-country adoptions'.<sup>65</sup> There can be few who would quibble with this. However, clearly alluding to the primacy of the best interests principle, the court went on to note that '[d]etermining the best interests of the child cannot be circumscribed by mechanical legal formulae or through rigid hierarchical ranking of care options.' According to the court, this in practice requires:

'that a contextualised case-by-case enquiry be conducted by child protection practitioners and judicial officers versed in the principles involved in order to find the solution best adjusted to the child, taking into account his or her individual emotional wants and the perils innate to each potential solution.'<sup>66</sup>

This statement does not really address the problem: what is the true role of subsidiarity and how are the mentioned experts supposed to assess whether it has been met or not? Surely the second Madonna case, discussed above, illustrates clearly how differences of opinion regarding subsidiarity can arise.

This case leaves one with a niggling uneasiness that the nettle was not properly grasped, and future litigants may well, in the reasoning of the Constitutional Court, find loopholes to bypass the carefully engineered structure – national and international – governing inter-country adoptions.

Our concerns are not mere theoretical ones. It is sobering to have to report that, three protracted,

time-consuming and expensive court cases notwithstanding, about six months after the child at the heart of the *AD v DW* case returned to the United States with her adoptive parents, the adoptive mother suffered an undisclosed health crisis and the little girl was placed in the custody of, and was to be adopted by, another American family.<sup>67</sup> This outcome illustrates poignantly that, if the 'first set' of adoptive parents had succeeded in taking the child out of South Africa under a sole guardianship and sole custody order, the adoption in their favour might not have gone through in the United States because of the 'health crisis' of the prospective adoptive mother. Had that happened, the child would have been in a rather precarious legal position in the United States pending an order of adoption being applied for there by the 'second set' of adoptive parents. However, as there was already a South African adoption order in place before the child arrived in the USA with the first set of adoptive parents, that order stood and the child's legal status as the adopted child of US citizens was secure pending the granting of a new adoption order in favour of the second set of adoptive parents.

## International Dimensions

The above discussion of case law brings to the fore the role of the international players, notably the Hague Permanent Bureau staff, Central Authorities, foreign adoption agencies, treaty bodies and the international media. This is because, in the absence of a uniform approach and because legislation in the Southern and Eastern African sub-region has not been finalised, judge-made law in this region is resulting in inconsistencies (and sometimes incoherence) in the interpretation and application of the principles and rules governing inter-country adoptions. Moreover, developments are seemingly taking place in the absence of a clear role for Central Authorities and other governmental structures, which is highly undesirable. As previously stated:

'... inter-country adoption is not purely a matter for private legal regulation . . . [it] adds the foreign Central Authority, the foreign accredited adoption service provider, the local Central Authority and local accredited inter-country adoption service provider to the equation. Hence it is a status changing event which falls properly within the sphere of the executive branch of government.'<sup>68</sup>

However, simply urging governments to ratify the Hague Adoption Convention is, in our view, not enough. For instance, Namibia is intending, in the

<sup>64</sup> The new Children's Act provides, in s 25, that when application for guardianship of a child is made by a non-South Africa citizen, the application must be regarded as an inter-country adoption application for the purposes of the Hague Adoption Convention and Ch 16 of the Act.

<sup>65</sup> Paragraph [49].

<sup>66</sup> Paragraph [50].

<sup>67</sup> See K Maughan, 'New Home for Baby R', The Star, posted on the Web by Independent Online on 29 September 2008 (see [www.iol.co.za/index.php?set\\_id=1&click\\_id=13&art\\_id=vn20080929054659804C21138](http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20080929054659804C21138)) (last accessed on 5 February 2010).

<sup>68</sup> See Sloth-Nielsen and Mezmur, above fn 22, at 88–89.

child law reform process that is underway, to ratify the Hague Adoption Convention. In October 2009, Professor William Duncan, Deputy Secretary General of the Hague Conference on Private International Law, visited Namibia to consult with those persons and bodies involved in the child law reform process, including UNICEF, the Legal Assistance Centre and the Ministry of Gender Equality and Child Welfare, on (inter alia) its proposed ratification of the Hague Adoption Convention. This consultation is provided for in the *Detailed pathway to signature and ratification/accession*, which appears as Annex 1 to the *Guide to Good Practice*. Professor Duncan made suggestions to the drafting team (the Legal Assistance Centre) on the contents of the chapter in the draft Child Care and Protection Bill which deal with inter-country adoption on the implementation of the Hague Adoption Convention, as also on the contents of the draft Adoption Regulations designed to place some further regulations in the inter-country adoption process, pending the coming into operation of the Convention. It would appear that the Hague Permanent Bureau will consider to communicate with and assist Namibia in respect of implementation of the Convention – one possible area identified already is the need for training of the key players, including the Central Authority and the Judiciary. This is most encouraging and should certainly be a route to be followed by to her countries considering ratification.

What we therefore conclude is that there needs to be proper co-ordination between all the relevant role players in the inter-country adoption arena. Governments, the judiciary and the international community need to harmonise efforts to embed good practices based on sound principles and experience. In this endeavour, staff of the Hague Permanent Bureau should play a leading role.

Proper guidance and clarification from treaty bodies, notably the UNCRC and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the central concepts of inter-country adoption (and alternative care in general) is also crucial. For instance, unfortunately, the UNCRC Committee has been sending confusing (if not contradictory) messages as far as what is to be generally considered a measure of last resort in the alternative care scheme for children deprived of their family environment.

To illustrate: the UNCRC Committee on a number of occasions has labelled inter-country adoption to be a measure of last resort.<sup>69</sup> Despite this position, that continues to surface in its concluding observations on

state party reports in terms of the UNCRC, in General Comment No 3, titled ‘HIV/AIDS and the rights of the child’, the same Committee remarked that:

‘... any form of institutionalized care for children should only serve as a measure of last resort, and that measures must be fully in place to protect the rights of the child and guard against all forms of abuse and exploitation.’<sup>70</sup>

In the context of children with disabilities, the UNCRC Committee has reiterated a similar position.<sup>71</sup> This leaves the UNCRC Committee’s position as regards the question, ‘is it inter-country adoption or institutionalisation that should *generally* be considered as a measure of last resort?’ unanswered.<sup>72</sup>

Finally, an extensive education campaign to promote ethical reporting in the international media may be warranted. For instance, it must be noted that, contrary to many international media reports, orphans are not necessarily ‘adoptable’ children, and it is not necessarily in the interests of an orphan child to be internationally adopted.<sup>73</sup> The fact that the media often uses the words ‘orphanhood’ interchangeably with ‘adoptability’ continues to contribute towards existing misconceptions about inter-country adoption.

<sup>70</sup> UNCRC Committee, General Comment No 3 *HIV/AIDS and the rights of the child* (CRC/GC/2003/3) (2003), at para 35.

<sup>71</sup> Under General Comment No 9 on the *The rights of children with disabilities* (CRC/C/GC/9) (2007), at para 47, it is stated that the UCR Committee ‘urges States parties to use the placement in institution only as a measure of last resort, when it is absolutely necessary and in the best interests of the child’.

<sup>72</sup> [Emphasis added] ‘Generally’ because it is the conventional (non-exceptional) cases that are being taken into account when determining the general preference to be adopted in making decisions between alternative care options.

<sup>73</sup> Graff contends that Westerners have been sold the myth of a world orphan crisis. She challenges the assumption that there exist millions of children who are waiting for their ‘forever families’ to rescue them from lives of abandonment and abuse. See Graff, ‘Foreign Policy: The lie we love’ (2008) 69 *Foreign Policy* 1, available at: [http://www.crin.org/docs/lie\\_we\\_love.pdf](http://www.crin.org/docs/lie_we_love.pdf) (accessed 10 May 2009). Moreover, Cantwell reminds us that caution needs to be exercised not to confuse ‘adoptable children’ with ‘children in out of home care’. See Cantwell, ‘Intercountry Adoption: A Comment on the Number of ‘Adoptable’ Children and the Number of Persons Seeking to Adoption Internationally’ (2003) 5 *Judges’ Newsletter (Hague Conference on Private International Law)* 70, at p 71.

<sup>69</sup> See introduction section above.