THE PROTECTION OF THE RIGHTS OF FAMILIES OF ORIGIN IN INTER-COUNTRY ADOPTION: AN AFRICAN CONTEXT

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DECLARATION

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ABSTRACT

The thesis addresses the question: how can the rights of parents be adequately protected in inter-country adoption in an African context?

Inter-country adoption is recognised as one of the alternative care options for children deprived of parental or family care. However, it is only considered as a 'last resort' when the child cannot be cared for in his or her country of origin. Although children deprived of parental or family care have the right to alternative care, international human rights law also recognises that parents have rights that should be protected. These rights include, among others, the right to found a family and to enjoy their family life. This creates a potential of conflict between the rights and interests of parents and the rights and interests of the child.

Drawing from theories of the parent-child relationship and parenthood, international human rights law and private international law, this thesis provides a framework for inter-country adoption that serves the rights and interests of parents. The thesis argues that the principles of consent, adoptability and post-adoption procedural rights, taken together with the recommendation for a broad conception of parenthood which protects all forms of family relationships are key to a robust system of inter-country adoption that respects the rights of parents in inter-country adoption in an African context. To ensure that the rights of parents are protected in inter-country adoption, the law must sufficiently incorporate these principles.

The thesis identifies three components that a legal framework ought to incorporate to protect the rights of parents in inter-country adoption. It argues that first, there must be clear provisions establishing the grounds in which children could be considered in need of alternative care or adoption. The law should establish the conditions under which children are considered adoptable and provide a clear and detailed definition of children to be declared genuinely adoptable. In addition, questions on who should give consent, how should consent be given and counselling must be made very clear in the law.

Second, the legal framework must provide the procedures by which such a determination can be made. Questions of who determines the adoptability of a child, family tracing and the criteria for children to be declared genuinely adoptable must be made clear in the law.

Third, the legal framework ought to provide mechanisms in which the validity of an adoption can be challenged in case of disputes and grievances.

Three countries: Ghana, South Africa and Uganda are used as examples to demonstrate African countries experiences. The thesis demonstrates that to a considerable extent the regulatory framework governing inter-country adoption in the countries under study supports the legal framework proposed in this study. However, inter-country adoption practices have been done in ways that do not adequately protect the rights of parents. These relate to pre-adoption counselling, the requirement for consent in child adoption procedures, the requirement to ensure that consent has been freely given, effective tracing of the child's family before a declaration of adoptability and ensuring that parents have access to justice. As such, this thesis contributes to the legal discourse on inter-country adoption in an African context in protecting the rights of parents.

DEDICATION

This study is dedicated to my father, Amos Jesmiel Rushwaya who sadly passed away in 2016 when I had just started my PhD journey. Thank you so much for always believing in me when I doubted myself. You were certainly my motivation to complete the PhD. I know you would have been proud of me. Dad, I finally did it!!!

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ABBREVIATIONS

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Charter on Human and People's Rights
ACRWC	African Charter on the Rights and Welfare of the Child
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
NGOs	Non-Governmental Organizations
UNICEF	United Nations Children's Emergency Fund
USA	United States of America

TABLE OF CONTENTS

DECLARATION I

ABSTRACT II

DEDICATION IV

ACKNOWLEDGEMENTS V

ABBREVIATIONS VI

CHAPTER ONE: INTRODUCTION 1

1. INTRODUCTION 1

2. PROBLEM STATEMENT 3

3. RESEARCH QUESTIONS AND OBJECTIVES 8

4. LITERATURE REVIEW 9

5. SIGNIFICANCE OF THE STUDY 16

6. METHODOLOGY AND SELECTION OF COUNTRY STUDIES 17

7. CONCLUSIONS AND CHAPTER OUTLINE 20

CHAPTER TWO: THEORETICAL MODELS OF THE PARENT-CHILD RELATIONSHIP AND THEIR APPLICATION IN PROTECTING THE RIGHTS OF PARENTS IN INTER-COUNTRY ADOPTION 23

1. INTRODUCTION 23

2. THE FIDUCIARY THEORY 24

2.1. Definition and justification 24

2.2. Applicability of the fiduciary principles to inter-country adoption 28

3. THE PATERNALISM THEORY 33

3.1. Definition and justification 33

3.2. Critical appraisal of the paternalism theory and its application to inter-country adoption 35

4. THEORETICAL APPROACHES TO UNDERSTANDING THE NOTION OF PARENTS 36

4.1. The integrative model 36

4.1.1. Definition and justification 36

4.1.2. Critical appraisal of the integrative model and applicability to inter-country adoption 37

4.2. The diversity model 40

4.2.1. Definition and justification 40

4.2.2. Critical appraisal of the diversity model 42

4.2.3. Applicability of the diversity model to inter-country adoption 45

5. CONCLUSION 46

CHAPTER THREE: INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK FOR THE PROTECTION OF THE RIGHTS OF PARENTS IN INTER-COUNTRY ADOPTION 49

1. INTRODUCTION 49

2. PARENTS RIGHTS IN INTERNATIONAL LAW 51

2.1. The right to family life 51

2.2. Applicability of the right to family life to inter-country adoption 56

2.3. The limitation of parental rights 57

3. THE CONCEPT OF PARENTS IN INTERNATIONAL LAW 61

3.1. Who is a parent? 61

3.2. The problem with a broad interpretation of the term 'parents' 67

4. INTER-COUNTRY ADOPTION: GENERAL INTRODUCTION 69

5. PRE-ADOPTION PROCEDURES AND PRINCIPLES FOR AUTHORISING AN ADOPTION 69

5.1. Background 69

5.2. Consent to adoption 70

5.2.1. Background 70

5.2.2. Legal basis for consent 71

5.2.3. Is consent a prerequisite or discretionary? 71

5.2.4. Who should give consent? 74

5.2.5. How should consent be given? 76

5.2.6. Is counselling a prerequisite or discretionary? 78

5.2.7. Options counselling or adoption counselling? 80

5.3. The adoptability principle 82

5.3.1. Background 82

5.3.2. Legal basis of the adoptability principle 83

5.3.3. Critical analysis of the adoptability principle under the CRC, ACRWC and Hague Convention 83

5.3.4. Who determines the adoptability of a child? 90

6. POST-ADOPTION PROCEDURES 93

7. CONCLUSION 99

CHAPTER FOUR: INTER-COUNTRY ADOPTION IN AFRICA: 102

BACKGROUND 102

1. INTRODUCTION 102

2. SELECTION OF COUNTRY STUDIES 103

3. A HISTORY OF INTER-COUNTRY ADOPTION LEGISLATION IN GHANA, SOUTH AFRICA AND UGANDA 105

3.1. Legal provisions on consent to adoption in the countries under study 105

3.1.1. South Africa 105

3.1.2. Ghana 109

3.1.3. Uganda 110

3.2. Legal provisions on the adoptability principle in the countries under study 110

3.2.1. South Africa 110

3.2.2. Ghana 111

3.2.3. Uganda 112

4. LEGAL PROVISIONS ON POST-ADOPTION PROCEDURES 113

4.1. South Africa 113

4.2. Ghana 114

4.3. Uganda 115

5. RECOGNITION OF PARENTAL RIGHTS UNDER THE CONSTITUTION AND CHILDREN'S ACT 115

5.1. South Africa 115

5.2. Ghana 117

5.3. Uganda 117

5.4. Applicability to inter-country adoption 118

5.5. Limitation of parental rights under the domestic laws of the countries under study 119

6. THE CONCEPT OF PARENTS: CONSTITUTIONAL AND LEGISLATIVE PROVISIONS 121

6.1. Who is a parent? 121

6.2. The implications of a broad interpretation of the term 'parents' 123

7. CONCLUSION 124

CHAPTER FIVE: CONSENT TO ADOPTION IN GHANA, SOUTH AFRICA AND UGANDA 126

1. INTRODUCTION 126

2. WHO SHOULD GIVE CONSENT TO AN ADOPTION? 126

2.1. South Africa 127

2.2. Ghana 130

2.3. Uganda 131

3. HOW SHOULD CONSENT TO AN ADOPTION BE GIVEN? 131

3.1. South Africa 131

3.2. Ghana 132

2.3. Uganda 133

4. COUNSELLING THOSE WHO ARE EXPECTED BY THE LAW TO CONSENT TO AN ADOPTION 137

4.1. South Africa 137

4.2. Ghana 137

4.3. Uganda 138

5. WHEN IS PARENTAL CONSENT NOT REQUIRED? 141

6. CONCLUSION 143

CHAPTER SIX: THE ADOPTABILITY PRINCIPLE IN GHANA, SOUTH AFRICA AND UGANDA 145

1. INTRODUCTION 145

2. DEATH OF PARENTS 145

2.1. South Africa 146

2.2. Uganda 149

2.3. Ghana 151

3. ABANDONED CHILDREN 153

3.1. South Africa 153

3.2. Ghana 154

3.3. Uganda 156

4. NEGLECTED CHILDREN 159

4.1. South Africa 159

4.2. Ghana 161

4.3. Uganda 162

5. CONCLUSION 163

CHAPTER SEVEN: POST-ADOPTION PROCEDURES IN GHANA, SOUTH AFRICA AND UGANDA 165

1. INTRODUCTION 165

2. RESCISSION OF ADOPTION ORDERS 165

2.1. South Africa 165

2.2. Uganda 169

2.3. Ghana 172

3. APPEAL AND REVIEW 173

3.1. South Africa 173

3.2. Uganda 174

3.3. Ghana 175

4. CONCLUSION 176

CHAPTER EIGHT: CONCLUSION AND RECOMMENDATIONS 177

1. THESIS RESEARCH QUESTIONS 177

2. KEY FINDINGS 177

2.1. Theoretical model for the protection of the rights of parents in inter-country adoption 177

2.2. The fundamental principles of international human rights law and private international law for the protection of the rights of parents in inter-country adoption 179

3. ASSESSMENT OF THE PRINCIPLES AND PROCEDURES GOVERNING INTER-COUNTRY ADOPTION IN GHANA, SOUTH AFRICA AND UGANDA 181

3.1. Consent to adoption 181

3.2. Adoptability Principle 182

3.3. Post-adoption procedures 183

4. RECOMMENDATIONS 183

4.1. Legal provisions on pre-adoption counseling 184

4.2. Review of legal provisions on consent to adoption 184

4.3. The need for holistic counselling that respects the fundamental rights of parents 184

4.4. Training of social workers 184

4.5. The need for clear legal definition for children to be declared adoptable 185

4.6. The need for detailed criteria to determine the adoptability of a child 185

4.7. The need for family support measures 185

4.8. Ratification of the Hague Convention on the Protection of Children and Cooperation in Respect of Inter-country Adoption 185

4.9. Access to Justice 185

REFERENCES 186

CHAPTER ONE: INTRODUCTION

1. INTRODUCTION

In international human rights law, parents have rights that should be respected and protected.[1] These include the right to found a family and to enjoy their family life among others.[2] To ensure that parents right to enjoy their family life is protected, states should not only refrain from actions that could result in family separation,[3] but should take measures to preserve the family unit.[4] Furthermore, the state should refrain from arbitrary interference in the right to family life.[5]

Although parents have the right to enjoy their family life, this does not mean that they have the right to abuse, neglect and exploit their children. Where parents fail to act in the best interests of their children, the state as *parens patriae* of all children in its jurisdiction has a duty to intervene in the family to protect the child and to provide alternative care in accordance with its domestic laws.[6] Such care includes institutional care, foster care placement, adoption or *kafalah* of Islamic law.[7] Inter-country adoption is also recognised as one of the alternative care options for children deprived of parental or family care.[8] However, it is only considered as a 'last resort' when the child cannot be cared for in his or her country of origin.[9]

Controversy surrounds the practice of inter-country adoption. While others view it as a means of care that fulfils a child's right to grow up in a family environment and provides a means to realising other rights, there are some who argue that it undermines the rights of poor parents

[1] For instance, parents have the right to make decisions concerning their child's education and health.
[2] Articles 17 and 23 of the International Covenant on Civil and Political Rights (ICCPR); article 18 of the African Charter on the Rights and Welfare of the Child (ACRWC); article 18 of the African Charter on Human and Peoples' Rights (ACHPR) and article 8 of the European Convention on Human Rights (ECHR).
[3] Article 9 of the CRC and article 19 (2) of the ACRWC.
[4] Articles 9 (3) and 10 (1) of the CRC.
[5] Articles 17 (1) and (2) of the ICCPR and 8 (2) of the ECHR.
[6] Article 20 of the CRC.
[7] Article 20 (3) of the CRC and article 25 (2) (a) of the ACRWC.
[8] Article 21 of the CRC and article 24 of the ACRWC.
[9] Article 24 (b) of the ACRWC.

who are seen as incompetent parents not worthy of being parents and that it is used as a mechanism for child trafficking and other illicit activities.[10]

In response to some of these concerns, several African countries have either imposed stricter regulations, banned or suspended the processing of inter-country adoptions pending the review of their adoption laws and procedures.[11] This has resulted in a significant decline in the number of inter-country adoptions.[12]

To ensure that the rights of children and ultimately the parents involved in inter-country adoption are protected, the Convention on the Rights of the Child (CRC),[13] the African Charter

[10] S Dillon 'Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption' (2003) 21 *Boston University International Law Journal* 179, 187; J Martin 'The Good, The Bad & The Ugly? A New Way of Looking at the Intercountry Debate' (2006-2007) 13 *University of California Davis Journal of International Law & Policy* 173, 185; R Carlson 'Seeking the Better Interests of Children with a new International Law of Adoption' (2010/11) 55 *New York Law School Law Review* 734, 746; D Smolin 'Intercountry Adoption as Child Trafficking' (2004) 39 (2) *Valparaiso University Law Review* 281, 283; B D Mezmur 'The Sins of Saviours: Child Trafficking in the Context of Intercountry Adoption in Africa' (2010) Information Document No. 2 for the Attention of the Special Commission of June 2010 on the Practical Operation of the Hague Convention on 29 May 1993 on the Protection of Children and Co-operation in respect of Intercountry Adoption 1, 4; D M Smolin 'Intercountry Adoption and Poverty: A Human Rights Analysis' (2007) *Capital University Law Review* 413; B Mezmur 'Inter-country Adoption as a Measure of Last Resort in Africa: Advancing the Rights of the Child Rather Than a Right to a Child' (2009) *International Journal of Human Rights* 82; D M Steltzner 'Intercountry Adoption: Toward a Regime that Recognizes the Best Interests of Adoptive Parents' (2003) 35 (1) *Case Western Reserve Journal of International Law* 113, 113; L Hills 'Intercountry Adoption under the Hague Convention: Still An Attractive Option for Homosexuals Seeking to Adopt' (1998) 6 (1) (8) *Indiana Journal of Global Studies* 237, 239-240; J L Wilkening 'Intercountry Adoption Act Ten Years Later: The Need for Post-Adoption Requirements' (2011) 72 (5) *Ohio State Law Journal* 1043; J Oreskovic and T Maskew 'Red Thread or Slender Reed: Deconstructing Prof Bartholet's Mythology of International Adoption' (2008) 14 *Buffalo Human Rights Law Review* 71; E Bartholet 'International Adoption: Propriety, Prospects and Pragmatics' (1996) 13 (2) *Journal of the American Academy of Matrimonial Lawyers* 181, 181; E Bartholet 'International Adoption: The Human Rights Position' (2009) 1(1) *Harvard Law School* 1, 7- 9; D M Blair 'Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers' (2005) 34 *Capital University Law Review* 348, 349-350; D E Jonson 'Adoption and the Effects on Children's Developments' (2002) 68 *Early Human Development Journal* (2002) 39; J Bhabha 'Moving Babies: Globalization, Markets and Transnational Adoption' (2004) 28 *Fletcher Forum of World Affairs* 181, 181; J Lewis 'Adoption: The Nature of Policy Shifts in England and Wales' (2004) 18 *International Journal of Law, Policy and Family* 235, 237-238; M Neagu 'Children by Request: Romania's Children between Rights and International Politics' (2015) 29 *International Journal of Law, Policy and Family* 215, 220 and K S Bergquist 'International Asian Adoption: In the Best Interests of the Child?' (2004) 10 *Texas Wesleyan Law Review* 343, 347.

[11] International Adoptions have dropped 72 percent since 2005, available at https://theconversation.com/international-adoptions-have-dropped-72-percent-since-2005-heres-why, accessed on 29 July 2019. See also Kenyan Adoption Agencies Fight Ban on Inter-country Adoptions, available at https://africa.cgtn.com/2019/04/08/kenya-adoption-agencies-fight-ban-on-inter-country-adoptions, accessed on 29 July 2019 and https://www.bbc.com/news/world-africa-42635641, accessed on 2019. Some of these countries include Ethiopia, Kenya and Ghana.

[12] HCCH '1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption: 25 Years of Protecting Children in Intercountry Adoption' (1993-2018) 10.

[13] Adopted and Opened for Signature, Ratification and Accession by the General Assembly Resolution 44/25 of 20 November 1989, entry into force on 2 September 1990.

on the Rights and Welfare of the Child (ACRWC)[14] and the Hague Convention on Protection and Co-operation in respect of Intercountry Adoption (Hague Convention)[15] have developed several principles and procedures governing inter-country adoption. By ratifying these treaties, states are bound to ensure that parental rights are fully protected in inter-country adoption.

2. PROBLEM STATEMENT

While much has been debated about inter-country adoption, less attention has been paid to the rights of parents (or families of origin) in inter-country adoption in the African context. Because of the lack of attention given to parents in inter-country adoption, they have often been described as the 'forgotten members of the international adoption triad'.[16]

Adoption is a complex process that involves balancing the rights and interests of many parties: the adopted child, parents, and the prospective adoptive parents, also known as the adoption triad.[17] However, it appears inter-country adoption practices in Africa have been done in ways that undermine the rights of parents. It has been reported that many parents have complained that at the time of giving consent to adoption, they did not fully appreciate the legal consequences of their actions and demanded the return of their children.[18] When Madonna adopted the first child from Malawi, for instance, it was speculated that his father was not aware

[14] Adopted by the Organization of African Unity in 1990 and entered into force in 1999.
[15] Adopted by the Hague Conference on Private International Law on 29 May 1993 and entered into force on 1 May 1995.
[16] K L Manley 'Birth Parents: The Forgotten Members of the International Adoption Triad' (2005) *Capital University Law Review* 627, 627. See also K S Rotabi and J L Gibbons 'Does the Hague Convention on Intercountry Adoption Adequately Protect Orphaned and Vulnerable Children and their Families? (2012) 21 *Journal of Child Family Studies* 106, 112 noting that birth families 'remain the most neglected members of the adoption triad'; J Vich-Betran 'International Approaches to Origin Countries and Birth Parents' in C Callahan *The Bibliographies Issues: Adoption Studies Research* (2014) 218-226 referring to birth parents as 'the silenced part of the triad' and A L Baden; J L Gibbons; S L Wilson and H McGinnis 'Pre- and Post-Adoption Counselling needs in International Adoption: Understanding the Social Ecology of Triad Members' in R L Ballard; N H Goodno; R F Cochran and J A Milbrandt *The Intercountry Adoption Debate: Dialogues across Disciplines* (2015) 83 noting that birth parents of inter-country adoptees 'remain the most under-represented members of the adoption triad'.
[17] E B Donaldson Institute 'Safeguarding the Rights and Well-Being of Birth Parents in the Adoption Process' (2006) The Evan B Donaldson Institute 1, 13.
[18] G L Hiwa 'The Law and Intercountry Adoption: The Malawi Experience'(2012) Fifth International Law Policy Conference on African Child, available at http://www.africanchildforum.org/ipc, accessed on 30 October 2018; E Willmott-Harrop 'Intercountry Adoption: Illicit Activities' available at libertyandhumanity.com/themes/human-trafficking/intercountry-adoption-illicit-activities/, accessed on 30 October 2018 and CNN 'International Adoption: I Was Stolen from my Family' (2013), available at https://edition.cnn.com/201/09/16/opinion/international-adoption-tarikuwa-lemma-stolen-children/index.html, accessed on 30 October 2018.

that his parental rights were being permanently severed.[19] Many parents reportedly mistake inter-country adoption for informal fostering or shared parenting, which does not entail the permanent termination of parental rights and responsibilities.[20] This misconception is often exploited by some adoption agencies who fail to explain the legal implications of adoption to parents.[21] This raises questions as to whether the rights of parents are adequately protected in inter-country adoption.

There have also been reports that many, if not most children who are placed for adoption are not orphans and have at least one or both surviving parent/s, including relatives.[22] For instance, in April 2012, Sierra Leone reopened an investigation into the 1997 illegal adoptions of children during the country's civil war. It was found out that all 'orphans' had living parents who were demanding for the return of their children.[23] Again, in Uganda, an investigation of inter-country adoptions by the Ministry of Gender, Labour and Social Development found only a fifth of all adopted children it surveyed had lost both parents and that relatives had given them up for adoption in the belief that they would receive financial incentives from adoptive parents.[24]

In examining State Party reports, the Committee on the Rights of the Child (CRC Committee) has also expressed concern about legislation on adoption that does not consider the rights of the parents and recommended that states take the necessary measures to ensure that the rights of parents are protected in adoption.[25]

Although the best interests of the child should clearly be paramount in adoption,[26] this does not mean that the rights and interests of the parents should be ignored and that the child's best

[19] Associated Press 'Malawi's Boy's Father Concerned about Madonna Adopting His Son', available at http://www.usatoday.com.life/people/200-10-22-madonna-adoption_x.html, accessed on 30 October 2018 and V Root 'Angelina and Madonna: Why All The Fuss? An Exploration of the Rights of the Child and Intercountry Adoption within African Nations' (2007) 8 (1) *Chicago Journal of International Law* 323, 343.
[20] R Hogbacka 'Intercountry Adoption, Countries of Origin, and Biological Families' (2014) Working Paper No. 598 1, 14.
[21] Ibid.
[22] Save the Children 'International Adoption' (2012) Policy Brief 1, 2.
[23] African Child Policy Forum 'Africa: The New Frontier for Intercountry Adoption' (2012) 5.
[24] Uganda's Adoption 'Racket', available at www.lol.co.za/news/africa/ugandas-adoption-racket-1866592 (2 June 2015), accessed on 24 June 2016.
[25] Committee on the Rights of the Child, Concluding Observations: Belarus, UN Doc CRC/C/BLR/3-4, 8 April 2011, para 47-48 and Committee on the Rights of the Child, Concluding Observations: Republic of Serbia, UN Doc CRC/C/SRB/1, 16 June 2008, para 43 (a).
[26] For instance, article 21 of the CRC provides that '[s]tates Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration' and the Preamble

interests cannot be reconciled with the rights and interests of the parents. As Vite and Boechat have noted, 'the interests of the child should not be separated from the interests of his or her birth family'.[27] This is consistent with article 3 (2) of the CRC which requires States Parties in providing protection and care for the child to consider the 'rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her'. Therefore, it is crucial for decision-makers to consider other competing rights and interests, especially those of the child's parents.

A second related difficulty with inter-country adoption lies in the very fact that while it is unquestionable that children have the right to alternative care, international human rights law also recognises that parents have the right to have their family life respected. Whereas articles 20 and 21 of the CRC and articles 18, 19 and 20 of the ACRWC protect the child's right to alternative care, articles 3 (2), 5, 18 and 27 of the CRC and articles 24 and 25 of the ACRWC also acknowledge that parents have rights and interests which warrant legal protection.[28] These provisions create the potential of conflict between the rights and interests of parents and the rights and interests of the child. This prompts the questions: how do you create an appropriate balance between the rights and interests of the parents on the one hand and the rights and interests of the child on the other? What is the relationship between articles 20 and 21 of the CRC and articles 18, 19 and 20 of the ACRWC on the one hand and articles 3 (2), 5, 18 and 27 of the CRC and articles 24 and 25 of the ACRWC on the other?

These questions are brought to the fore in the context of inter-country adoption. For instance, if the requirements for adoption are too stringent, does that mean greater protection of parental rights on the one hand and weaker protection of children's best interests on the other hand? Furthermore, if the requirements for adoption are too lenient, does that mean greater protection

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of the Hague Convention, para 4, which provides that '[c]onvinced of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights'. See also articles 1 (a) and 4 (b) of the Hague Convention which also stress the importance of the best interests of the child in adoption and CRC Committee, General Comment No. 14 (2013) on the Right of the Child to have his or her Best Interests taken as a Primary Consideration (art. 3, para. 1), UN Doc CRC/C/GC/14, 29 May 2013, para 38, noting that '[i]n respect of adoption (art.21), the right of best interests is further strengthened; it is not simply to be a "primary consideration" but "the paramount consideration". Indeed, the best interests of the child are to be the determining factor when taking a decision on adoption, but also other issues'.

[27] S Vite and H Boechat *A Commentary on the United Nations Convention on the Rights of the Child, Article 21: Adoption* (2008) 41.

[28] See also articles 18; 19; 20 and 25 of the ACRWC; articles 17 and 23 of the ICCPR; article 18 of the ACHPR and article 8 of the ECHR.

of children's best interests and weaker protection of parental rights? How then do you create an appropriate balance?

One could also argue that an adoption system that weighs heavily in favor of protecting the rights of parents runs the risk of undermining the child's right to alternative care. This could result in significant delays in the placement of children in desperate need of alternative care, and ultimately result in decisions that may not be in the best interests of the child. On the other hand, an adoption system that weighs too heavily in favor of the child's right to alternative care could also result in decisions that undermine the rights of parents and the child's right to know and be raised by his or her parents.

A third related difficulty lies in the fact that inter-country adoption is used as a mechanism to exploit poor families who are seen as incompetent parents not worthy of being parents. While others view inter-country adoption as a means of rescuing children from poverty, there are also those who argue that it undermines the rights of poor parents.[29] Smolin has noted that not only is there 'a palpable cruelty to taking away the children of the poor' but also 'such an act exploits the vulnerability of those deprived of their basic human right to an adequate standard of living, and uses this deprivation of rights as a justification for a further deprivation of rights: the rights of parents to retain the care and custody of their children'.[30] Along the same lines, Fuentes, Boechat and Northcroft state that 'it is essential to put an end to the reasoning that poverty alone is sufficient for relinquishment'.[31]

Another pertinent issue concerns the fact that the practice of inter-country adoption is used as an avenue for illicit activities and improper financial gain. Due to the large sums of money involved in inter-country adoption, children, families of origin and prospective adoptive parents are at risk of being exploited for financial gain.[32] Dillon contends that 'the high demand for children has created rings of entrepreneurs who find and sell children by any means without due regard for the best interests of the child' and that 'the danger is that children become

[29] Smolin (n10 above) 413 and Martin (n10 above) 13.
[30] Smolin (n10 above) 437.
[31] F Fuentes, H Boechat and F Northcroft 'Investigating the Grey Zones of Intercountry Adoption' (2012) International Social Services, Geneva 1, 20.
[32] African Child Policy Forum 'Intercountry Adoption: Alternatives and Controversies' (2012) The Fifth International Policy Conference on the African Child, Conference Report, 29-30 May 2012 (United Nations Conference Centre Addis Ababa, Ethiopia) 1, 9-10; noting that amounts between US$10 000-US$30 000 are paid for a single inter-country adoption.

products valued only for financial gain that can be realized from their sale on the international market'.[33] It is therefore questionable whether these adoptions serve the rights and interests of parents as in a number of cases the motivation appears to be financial gain.

A fifth related problem with inter-country adoption is that it is used as a vehicle for finding children for families as opposed to finding families for children. Smolin contends that 'everyone understands that prospective adoptive parents are, in crude terms "in it for the baby"'.[34] Although inter-country adoption emerged as a humanitarian act to the plight of millions of children in need of alternative care, it has evolved into a 'widely accepted' option for parents or individuals who wish to create a family.[35] Over the years, the number of families in need of children has increased in western countries. Families may want to adopt a child for several reasons particularly infertile couples, gay and lesbian couples and single persons.[36] Furthermore, a number of social, political and economic factors have also contributed to a decline in the number of children available for domestic adoption. These include the increased use of birth control and other contraceptives, high infertility rate and the legalisation of abortion.[37] Consequently, it has motivated prospective adoptive parents to explore other nations for adoptable children. This raises questions as to whether such adoptions are carried out in the best interests of the child or to serve the interests of the adoptive parents.

Lastly, while others view inter-country adoption as a means of fulfilling a child's right to grow up in a family environment, there are also those who contend that the practice violates a child's right to a cultural identity. For instance, Olsen argues that 'rather than promoting a child's identity, the practice strips it away and replaces it with a name and identity chosen by the adoptive parents'.[38] In support of this argument, Woodhouse reiterates that 'culture of origin, no matter how hard to define with satisfying logic do[es] matter to children and should therefore matter in adoption law'.[39] Hodge further notes that 'removing a child from its country of birth is so harmful to the child that no benefits of inter-country adoption could outweigh its

[33] Dillon (n10 above) 18.
[34] Smolin (n10 above) 304.
[35] African Child Policy Forum (n23 above) 1.
[36] Martin (n10 above) 177.
[37] African Child Policy Forum (n23 above) 1.
[38] L Olsen 'Live or Let Die: Could Intercountry Adoption Make the Difference?' (2004) *Penn State International Law Review* 483, 490.
[39] B Woodhouse 'Are You My Mother? Conceptualising Children's Identity Rights in Transracial Adoptions' (1995) 2 *Duke Journal of Gender, Law and Policy* 107, 114.

costs' and that 'irreparable loss' is created when a child is deprived of his or her cultural identity and that 'lack of cultural, ethnic or racial identity may continue throughout the adopted child's life, possibly causing problems during adolescence when children are of a different background than their adopted parents'.[40]

3. RESEARCH QUESTIONS AND OBJECTIVES

The central question that this study seeks to explore is: how can the rights of parents be adequately protected in inter-country adoption in an African context? To answer this question, the thesis addresses the following sub-questions:

(i) What is the theoretical model for the protection of the rights of parents in inter-country adoption in an African context?

(ii) What are the fundamental principles of international human rights law and private international law that should underpin a robust system of inter-country adoption that protects the rights of parents in inter-country adoption?

(iii) What are the components that a legal framework ought to incorporate to foster the protection of the rights of parents in inter-country adoption in practice?

(iv) How does the regulatory framework on inter-country in the selected African countries fare regarding the protection of the rights of parents in inter-country adoption in an African context?

The thesis seeks to demonstrate two basic aspects: that thus far, inter-country adoption practices in Africa have been done in ways that do not adequately serve the rights and interests of parents (families of origin). It will analyse and examine the experiences of selected African countries and propose interventions to uphold the rights of parents in inter-country adoption.

The thesis argues that the principles of consent to adoption, adoptability and post-adoption procedures, taken together with the recommendation for a broad conception of parenthood

[40] J Hodge 'The Intercountry Adoption Argument: Variation in Policy and Perspective' (2005) *University of Tennessee Honors Theses Projects* 1, 6.

which protects all forms of family relationships are key to a robust system of inter-country adoption that respects the rights of parents in inter-country adoption in an African context. To ensure that the rights of parents are protected, the law should incorporate these principles.

The thesis identifies three components that a legal framework ought to incorporate to protect the rights of parents in inter-country adoption. It argues that first, there must be clear provisions establishing the grounds in which children could be considered in need of alternative care or adoption. The law should make clear the conditions under which children are considered adoptable and provide a clear and detailed definition of children to be declared genuinely adoptable. In addition, questions on who should give consent, how should consent be given and counselling must be made very clear in the law.

Second, the legal framework must provide the procedures by which such a determination can be made. Questions of who determines the adoptability of a child, family tracing and the criteria for children to be declared genuinely adoptable must be made clear in the law.

Third, the legal framework ought to provide mechanisms in which the validity of an adoption can be challenged in case of disputes and grievances.

4. LITERATURE REVIEW

Inter-country adoption has attracted a number of publications in various disciplines, which have focussed on various issues such as the best interests of the child, child trafficking and children's rights.[41] Scholars have also written about cross-cultural concerns in inter-country adoption, the

[41] N Cantwell 'The Best Interests of the Child in Intercountry Adoption' (2014) UNICEF 1; B D Mezmur 'Intercountry Adoption in an African Context: A Legal Perspective' (Unpublished LLD Thesis, University of Western Cape, 2009); Mezmur (n10 above) 82; Blair (n10above) 349; Carlson (n10 above) 733; C Fenton-Glynn *Children's Rights in Intercountry Adoption: A European Perspective* (2014); D M Smolin 'Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping and Stealing Children' (2005) 52 *The Wayne Law Review* 113; D M Smolin 'Of Orphans and Adoption, Parents and the Poor, Exploitation and Rescue: A Scriptural and Theological Critique of the Evangelical Christian Adoption and Orphan Care Movement' (2012) 8 *Regent Journal of International Law* 267; S I Strong 'Children's Rights in Intercountry Adoption: Towards a New Goal' (1995) 13 *Boston University International Law Journal* 163; Smolin (n10 above) 281; L M Yemm 'International Adoption and the "Best Interests" of the child: Reality and Reactionism in Romania and Guatemala' (2010) 9 (3) *Washington University Global Studies Law Review* 555; P Selman 'Global Trends in Intercountry Adoption: 2003-2013' in R L Ballard; N H Goodno; R F Cochran and J A Milbrandt *The Intercountry Adoption Debate: Dialogues across Disciplines* (2015) 9-48 and K S Rotabi and J L Gibbons 'At this Critical Juncture in the Era of Reform: Reviewing 35 Years of Social Work Literature on Intercountry Adoption' in R L Ballard; N H Goodno; R F Cochran and J A Milbrandt *The Intercountry Adoption Debate: Dialogues across Disciplines* (2015) 49-80.

link between inter-country adoption and poverty and the rights of same-sex partners in inter-country adoption.[42] None of these authors, however, directly addresses the issue of protecting the rights of parents of origin, a subject of this study.

Of course, some scholars have rightly acknowledged that the rights of the child cannot be analysed without considering the rights of parents. For example, Vite and Boechat contend that 'the interests of the child should not be separated from the interests of his or her birth family'.[43] This thesis brings much more to the academic comprehension on the use of inter-country adoption in the interests of parents. Country studies, theoretical models of the parent-child relationship and international law will also offer a better understanding of how the rights of parents can be better protected in inter-country adoption.

While there is a plethora of literature on inter-country adoption in general, only a few scholars have written about the rights of parents of origin in inter-country adoption.[44] Indeed, Manley notes that birth parents are 'the forgotten members of the international adoption triad'.[45] Rotabi and Gibbons also argue that 'birth families remain the most neglected members of the adoption triad'.[46]

In an article entitled 'Does the Hague Convention on Intercountry Adoption Adequately Protect Orphaned and Vulnerable Children and their Families in Intercountry Adoption',[47] Rotabi and Gibbons assessed whether the Hague Convention adequately protects children and their families in inter-country adoption. The authors highlight the importance of consent and family preservation in the context of inter-country adoption. They recommend that there should be sound and strong domestic laws with congruent practices to ensure that the rights of parents and their children are protected in inter-country adoption. The authors, however, fail to make

[42] E Bartholet 'Where Do Black Children Belong? The Politics of Race Matching in Adoption' (1999) 139 (5) *University of Pennsylvania Law Review*1163; F Bowie *Cross-Cultural Approaches to Adoption* (2004) 1; Bartholet (n10 above) 181; Bartholet (n10 above) 1; Dillon (n10 above) 179; Smolin (n10 above) 413 and Hills (n10 above) 237.
[43] Vite and Boechat (n27 above) 41.
[44] J L Roby and T W Brown 'Birth Parents as Victims of Trafficking in Intercountry Adoption' in R L Ballard; N H Goodno; R F Cochran and J A Milbrandt *The Intercountry Adoption Debate: Dialogues across Disciplines* (2015) 303; J P Simov 'The Effects of Intercountry Adoptions on Biological Parents Rights' (1999) 12 (1) *Loyola of Los Angeles International and Comparative Law Review* 251, 251; C E Szejner 'Intercountry Adoptions: Are the Biological Parents' Rights Protected?' (2006) 5 (1) *Washington University Global Studies Law Review* 211, 217; Root (n19 above) 343 and Manley (n16 above) 634.
[45] Manley (n16 above) 627.
[46] Rotabi and Gibbons (n16 above) 21.
[47] Ibid.

any recommendations on what an appropriate regulatory model would be that would ensure that the rights of parents and their children are protected in inter-country adoption. The thesis takes up the issue further by interrogating what legal measures can be put in place to protect the rights and interests of parents in inter-country adoption.

The writings of Baden, Gibbons, Wilson and McGinnis are equally illuminating.[48] The authors highlight the challenges for counselling birth mothers in inter-country adoption such as culture and culturally appropriate interventions. They highlight the need for effective counselling strategies which addresses the challenges faced by birth parents in inter-country adoption. Baden, Gibbons, Wilson and McGinnins further address some of the issues that birth parents deal with after the adoption of their child such as grief and loss. However, the authors do not go far enough in the context of this study. Neither do they recommend what sort of counselling strategies would effectively ensure that the rights of parents are protected in inter-country adoption.

Some of the work written by leading academic scholars on the rights of parents in inter-country adoption focuses on foreign law. Manley, Simov and Szejner, for instance, examine the protection of the rights of parents in inter-country adoption under American, Hungarian and Chinese law.[49] This thesis differs from the approaches taken in the literature in that it brings in an African perspective on protecting the rights of parents in inter-country adoption.

Manley examines the effectiveness of the Hague Convention and the American adoption laws in protecting the rights of birth parents. She concludes that both the Hague Convention and the American laws do not go far enough to protect the rights of birth parents in inter-country adoption as they fail to protect parents from being misinformed about the rights that they are surrendering. Although Manley raises valid arguments, she does not recommend an appropriate regulatory model that would make sure that the rights of parents are protected in inter-country adoption.

Simov also assesses the effects of inter-country adoptions on biological parents' rights. The author discusses the rights of biological parents under federal law, California statutes and Hungarian law. She concludes that the rights of parents are inadequately protected but fails to

[48] Baden, Gibbons, Wilson and McGinnis (n16 above) 81-108.
[49] Manley (n16 above); Simov (n44 above) and Szejner (n44 above).

provide any guidance on the legal framework that would serve the rights and interests of the parents in inter-country adoption.

In addition, Szejner questions whether the rights of biological parents are protected in inter-country adoption. The author argues that the focus of the Hague Convention is to protect the rights of the child rather than the biological parents. Szejner further contends that the discussion on the rights of the biological parents in the Hague Convention is extremely limited. She concludes that the Hague Convention and the American adoption laws have failed to protect the fundamental rights and interests of the biological parents in inter-country adoptions. The research by Szejner is insightful but falls short of suggesting how the regulation of inter-country adoption can be improved to protect the rights of parents.

The research by Roby and Brown is instructive.[50] It demonstrates very clearly how birth parents are victims of trafficking in the context of inter-country adoption. Nevertheless, this study does not address the question of how the rights of parents can be adequately protected in inter-country adoption, but deals with the issue of trafficking of birth parents.

A review of research reports on inter-country adoption also shows that the issue of protecting the rights of parents in inter-country adoption has not been addressed comprehensively. In her article entitled '*Intercountry Adoption, Countries of Origin, and Biological Families'*,[51] Hogbacka examined the challenges affecting biological families in China, South Korea, Latin America, Marshall Islands, India, Ethiopia and South Africa. The aim of the study was to examine how the perspectives of first mothers of internationally adopted children could be considered in the recommendations of the Hague Convention. According to Hogbacka, biological families faced many challenges, which include lack of assistance from the state, poverty, and multiple oppression, all of which make them vulnerable to relinquish their children for adoption.[52]

Further, Hogbacka argued that families of origin lacked alternatives and were marginalised in the implementation of the Hague Convention.[53] Hogbacka also expressed concern at the absence from research of parents of internationally adopted children, that the rights of families

[50] Roby and Brown (n44 above).
[51] Hogbacka (n20 above) 3.
[52] Hogbacka (n20 above) 2.
[53] Ibid.

of origin are not adequately protected and questioned whether the rights of parents and their children can be separated.[54] Although the article highlighted some of the challenges affecting first parents in South Africa in inter-country adoption, it lacked sufficient detail. Furthermore, the article does not address sufficiently what measures would better protect the interests of parents in inter-country adoption.

Several other papers and studies on inter-country adoption seem to take the rights of parents for granted. For example, in a 31 paged article on inter-country adoption in Africa, Root only dedicates one page to discussing the rights of parents in inter-country adoption.[55] Although Root highlights the importance of parental consent, the discussion is extremely limited and does not offer any recommendations on what an appropriate model would be which renders the work to be of limited value to this study.

In another work on inter-country adoption, Hogbacka conducted an empirical study on inter-country adoption, with a particular focus on the experiences of first mothers through interviews with South African first mothers and adoption social workers. From interviews with first mothers who had relinquished their children for inter-country adoption, the study revealed that socio-economic factors such as poverty, HIV/AIDS, lack of housing, unemployment coupled with lack of assistance by the state were the prime motivators for relinquishment of children for inter-country adoption.[56] Hogbacka points out that under such conditions, adoption is seen as the only option for parents who cannot afford to raise their children.[57] She argues that poverty and inequalities make principles of the Hague Convention such as consent and choice 'frivolous' and that first mothers are the least protected members of the adoption triad.[58]

From interviews with adoption social workers, the study found that although adoption social workers had a role to play in providing first mothers with counselling, assistance and other services to enable parents to keep their children, the adoption system does not do much to assist parents who would like to raise their children.[59] Hogbacka further observed that due to lack of resources, adoption social workers felt that their only option was to encourage first mothers to

[54] Ibid.
[55] Root (n19 above).
[56] R Hogbacka *Global Families, Inequality and Transnational Adoption: The De-Kinning of First Mothers* (2016) 95; 120; 125; 130; 140 and 152.
[57] Hogbacka (n56 above) 96.
[58] Hogbacka (n56 above) 95 and 231.
[59] Hogbacka (n56 above) 96.

relinquish their children for adoption.[60] Thus, adoption is seen as a solution to poverty as opposed to providing the necessary assistance to parents to keep their children.[61] The findings of both studies are useful to this study insofar as they provide a useful insight into the experiences of first mothers in South Africa and what exists in practice.

Several studies on inter-country adoption practices in Uganda have also been conducted by various academics. For instance, Among in collaboration with UNICEF commissioned an empirical study on adoption and guardianship practices in Uganda.[62] Although the study highlighted some of the unethical practices in the adoption procedures such as the avoidance of adoption procedures using legal guardianship orders and considers some provisions of the adoption laws, his work, however, was not specific to the rights of parents in inter-country adoption. Furthermore, the study also fails to make any recommendations on what an appropriate regulatory model which protects the rights of parents in inter-country adoption would be.

In another work from Uganda, Riley discusses his experiences with birth mothers in Uganda.[63] Riley highlights some of the challenges that birth mothers face such as power imbalances, abuse and injustice. However, he does not go further to discuss how the adoption laws in Uganda best protect parental rights in inter-country adoption.

Babyire[64] also discusses the changes brought about by the Ugandan Children (Amendment) Act.[65] Among these include the introduction of rescission of adoption orders, shortening the period required for residence in Uganda and for fostering the child from three years to one year. While the study analyses the changes in the law, it does not discuss in detail the impact of the law on the protection of parental rights in inter-country adoption.

[60] Hogbacka (n56 above) 99.
[61] Hogbacka (n56 above) 118.
[62] H Among 'Study on Legal Guardianship and Adoption Practices in Uganda' (2015) UNICEF 1-120.
[63] M Riley 'An Imbalance of Justice: Birth Mothers in Uganda' in R L Ballard; N H Goodno and R F Cochran *The Intercountry Adoption Debate: Dialogues Across Disciplines* (2015) 619-626.
[64] D L N Babiyre 'The Long Search for Family: An Analysis of Intercountry Adoption under the Children (Amendment) (No. 2) Act 2016 of Uganda' (2018) *Makerere Law Journal* 121, 135.
[65] Act No 2 of 2016.

Mmane and Sarpong have also authored an incisive article on how inter-country adoption practices in Ghana fuel child trafficking.[66] The article, however, did not go far enough to discuss the rights of parents in inter-country adoption. Unlike the available literature on inter-country adoption, this research will be an important study that will specifically investigate the extent to which the rights of parents in inter-country adoption are protected. There does not seem to be any comprehensive study that has tackled this issue.

A review of academic studies on inter-country adoption that allude to inter-country adoption in the African context revealed that none of them has engaged the rights of parents of origin robustly. For instance, Mezmur's[67] doctoral thesis analysed how the best interests of the African child can be promoted in inter-country adoption. Although the thesis did not specifically address the rights of parents of origin, it highlights the importance of consent and of ensuring that the child is eligible for adoption. Mezmur concludes that Africa's views should be considered to achieve a legally sound inter-country adoption system that respects the rights of the child. The thesis takes up this issue further by looking at how to protect the rights of parents in an African context. It will examine other complex parental rights and interests, for example putative fathers, surrogacy motherhood and members of the extended family in the context of consent to adoption and adoptability. It seeks to investigate how the rights of all persons considered as the child's parents are considered in relation to consent to adoption. The thesis will further discuss what sort of counselling would ensure that the rights of parents are adequately protected in inter-country adoption. The thesis will also investigate the issue of access to justice for parents. In particular, the thesis will discuss the mechanisms that are available for parents when an irregularity has been alleged for inter-country and whether such mechanisms adequately protect the rights of parents. It will examine whether in practice parents have access to justice. The thesis also highlights some of the potential conflicts that could arise between the child, birth families and prospective adoptive parents in contested adoptions and how these can be resolved. Lastly, the thesis will consider how the rights of all persons considered as the child's parents should be protected when determining the adoptability of a child. These are some of the issues that this thesis will interrogate further from the perspective of the parents of origin.

[66] R Mmane and O Sarpong 'Adoption Practices Fuelling Child Trafficking in Ghana' (2018) *Electronic Journal* 1, 1-25.
[67] Mezmur (n41 above).

In another doctoral thesis, Mawudoku[68] examines how the rights of the child can be protected and promoted in inter-country adoption in Ghana. Madowuku also investigates the effectiveness of services offered by the Department of Social Welfare in protecting the rights of the child in inter-country adoption. The thesis, however, does not pay any attention to the rights of parents of origin or recommend any legal framework that would serve the rights and interests of parents in inter-country adoption.

The analysis of Ghana, South Africa and Uganda (discussed in Chapters Five to Seven), international human rights law and private international law standards (discussed in Chapter Three) will contribute to this literature gap by furthering the understanding of the use of inter-country adoption in protecting the rights of parents.

Considering the above observations, the relevance of this study is justified.

5. SIGNIFICANCE OF THE STUDY

This study is important in several respects. First, the discussion takes place in the context of the rights of parents in inter-country adoption in an African context. The main reason for this discussion is that as demonstrated above,[69] parents are the 'most neglected' or 'forgotten members' of the inter-country adoption triad. Adoptions which violate the rights of parents pose grave dangers to the rights and interests of both the parents and the children involved. For instance, illegal adoptions expose children to illicit activities such as child trafficking and abduction. Furthermore, it may violate the rights of parents to found a family and enjoy their family life. It is therefore necessary to investigate how the rights of parents in inter-country adoption can be better protected in inter-country adoption. The study is also important in that it seeks to fill the gap relating to the rights of parents in inter-country adoption in an African context.

From an academic standpoint, the study fills a gap created by the dearth of literature on the rights of parents in inter-country adoption. As demonstrated in the literature review, while there is a plethora of literature on inter-country adoption, there is a shortage of such literature on the

[68] A K Madowuku 'Child Rights Promotion and Protection: The Department of Social Welfare and Inter-country Adoption in Ghana' (Unpublished LLD Thesis, University of Ghana, Legon, 2018).
[69] See section 2 of Chapter One.

rights of parents in an African context. This study will therefore provide academic insight into an area of inter-country adoption that has not been addressed in legal scholarship.

Finally, it is important that those involved in policy-making, legal reform, social work and state agencies understand how to best protect and promote the rights of parents in inter-country adoption. The study intends to provide guidance on how the rights of parents can be best protected in inter-country adoption.

6. METHODOLOGY AND SELECTION OF COUNTRY STUDIES

In addressing the research questions posed in this study, the methodology employed will be primarily desktop research including a literature review of the primary and secondary sources relevant to the subject of discussion. The primary sources include international and regional human rights treaties (both hard law and soft law), private international law and jurisprudence such as the CRC, ACRWC and the Hague Convention, General Comments of treaty monitoring bodies, Concluding Observations of treaty monitoring bodies and State Party reports of various countries. These primary sources will be relied on to the extent that they shed light on how the rights of parents can be protected in the context of inter-country adoption and the safeguards that need to be put in place to ensure that the rights of parents are adequately protected. Further, a review of primary sources provides guidance on the components that a legal framework ought to incorporate for the protection of the rights of parents in inter-country adoption. Although some of the sources are soft law, they provide useful insights into the content and meaning of many rights and principles that are enshrined in the binding instruments.

Other primary sources include relevant pieces of national legislation, regulations, policies and case law. These will be consulted with a view to assess and critique how the regulatory frameworks on inter-country adoption in the selected African countries fare with respect to the protection of the rights of parents in inter-country adoption. Further, court decisions are reviewed to understand what exists in practice and how some of the rules and procedures are being implemented. The focus on domestic instruments and case law is particularly important in discussions for chapters specifically tackling issues relating to the legal regulation of inter-country adoption in Africa.

The study also relies on secondary sources on inter-country adoption. These include books, academic articles and journals. These will be relied on to the extent that they also provide valuable information on the topic. Various internet sites, special reports, working papers, empirical studies and newspaper articles have also been consulted for relevant information pertinent to the subject of discussion. In addition, empirical studies are relevant to this thesis as far as they provide evidence of what actually exists in practice or how some rules and procedures are being implemented.

In addressing questions concerning the theoretical models for the protection of the rights of parents, the study draws inspiration from theories on the parent-child relationship and parenthood. An examination of these theories helps to determine which model would ensure that rights of parents are sufficiently protected in inter-country adoption. Further, an analysis of the theoretical models, international human rights law and private international law will provide a basis for constructing a suitable system for inter-country adoption against which regulatory frameworks of the selected African countries will be assessed.

Although the thesis is not presented as a comparative study, three countries whose regulatory frameworks have contributed to shaping this thesis have been chosen for the purposes of this study: Ghana, South Africa and Uganda. The primary reason for choosing these countries is that Ghana, South Africa and Uganda are among the few African countries that have adopted inter-country adoption regulatory frameworks relevant to this study. Furthermore, the countries were selected on the basis that they assist the thesis to make the argument that thus far, inter-country adoption practices in Africa have been done in ways that do not adequately protect the rights of parents.

Of the three countries, South Africa was the first to ratify and domesticate the Hague Convention.[70] Uganda has not yet done so although the country is reportedly in the process of ratifying the treaty. However, it has amended its laws on inter-country adoption.[71] Therefore, this study seeks to examine the extent to which the relevant legal framework protects the rights of parents in inter-country adoption. Ghana has just ratified the Hague Convention and

[70] See the Status Table, available at www.hcch.net/en/instruments/conventions/status-table/?cid=69, accessed on 3 December 2019.

[71] Ugandan President Signs into Law Amendments to Children's Act, available at travel.state.gov/content/travel/en/News/Intercountry-Adoption-News/ugandan-president-signs-into-law amendments-to-children-act.html, accessed on 3 December 2019. See also the Children (Amendment) Act, 2016.

amended its laws on inter-country adoption.[72] Whether the ratification of the Hague Convention and the amendment of its inter-country adoption laws has an impact on protection of the rights of parents in adoption is a point of interest in this thesis.

There are further reasons for selecting these countries as the focus countries of this study. All the three countries have ratified various international and regional human rights instruments such as the CRC and the ACRWC, which impose legally binding obligations on them to protect the rights of children and their parents.[73] Therefore, one can expect that the countries must have developed norms, practices and procedures that ensure that the rights of parents are respected in all decision-making concerning the care and adoption of children.

The fact that these countries have all experienced illicit activities in the context of inter-country adoption such as child trafficking, coercion and manipulation of birth parents stands as another reason for the focus on these countries.[74] Furthermore, Ghana, South Africa and Uganda are among the top sending African countries to the USA.[75] This means that these countries must have developed norms, practices and procedures governing inter-country adoption, which make sure that the rights of parents are protected in inter-country adoption.

Finally, all the three countries experience significant levels of poverty and HIV/AIDS, which have led to a population of orphans and abandoned children in need of alternative care.[76]

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[72] 'Ghana accedes to the 1993 Hague Convention on Intercountry Adoption' available at https://www.hcch.net/en/news-archive/details/?varevent=524, accessed on 23 May 2019; noting that on 16 September 2016, Ghana acceded to the Hague Convention and that the Hague Convention had entered into force for Ghana on 1 January 2017. See for instance, the Children's (Amendment) Act, 2016 and the Adoption Regulations, 2018.

[73] See for instances articles 3 (2); 5; 18 and 27 of the CRC and articles also articles 18; 19; 20 and 25 of the ACRWC which protect parental rights and responsibilities.

[74] Mezmur (n10 above) 4; K Frimpong-Manso and A K Mawudoku 'Social Work Practice in Child and Family Welfare in Ghana' in M Grey *The Handbook of Social Work and Social Development in Africa* (2016) 100; African Child Policy Forum 'Intercountry Adoption: An African Perspective' (2012) ACPF 1, 10-11 and African Child Policy Forum (n32 above).

[75] Statistical Data on Adoptions was Based on, or Compiled and/or Derived from Official Sources. For adoptions to the USA: http://adoption.state.gov/about_us/statistics.php; accessed on 17 December 2019.

[76] United Nations Development Programme 'Human Development Indices and Indicators, 2018 Statistical Update: South Africa' (2018) UNDP 1, 1-8; The World Bank, STATS SA and NDP 'Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities' (2018) The World Bank, STATS SA and NDP 1, 1-114; United Nations Development Programme 'Northern Ghana Human Development Report: Bridging the Poverty Gap and Fostering Socio-Economic Transformation and Empowerment to contribute to Human Development For All (2018) UNDP; United Nations Development Programme 'Ghana Millennium Development Goals Report' (2015) UNDP; The World Bank in Ghana, available at worldbank.org/en.country/Ghana/overview; USAID 'Ensuring Escapes from Poverty are Sustained in Uganda' (2016) Report No. 27 USAID 1, 1-51; United Nations Development Programme 'Human Development Indices and Indicators, 2018 Statistical Update, Briefing Note for countries on the 2018 Statistical Update: Uganda'

Therefore, inter-country adoption might be a preferred solution to the plight of these children. This requires the development of laws and procedures that protect parental rights in adoption.

7. CONCLUSIONS AND CHAPTER OUTLINE

This chapter has shown that the thesis will examine how the rights of parents in inter-country adoption can be protected in an African context. By demonstrating that thus far inter-country adoption practices in Africa have been done in ways that do not adequately serve the rights and interests of parents, this thesis contributes to an in-depth understanding of how the rights of parents can be better protected in inter-country adoption.

The rest of the thesis is set out as follows:

Chapter Two discusses the theoretical models of the parent-child relationship and their application in inter-country adoption. These include the fiduciary theory and the paternalism theory. This discussion is relevant to the thesis in that it provides a model that would ensure that the rights of parents are protected in inter-country adoption. It also sets the foundation for reviewing the legal framework governing inter-country adoption in the selected African countries. The chapter also discusses the theoretical perspectives to the notion of "parents". This discussion is relevant to the thesis in that it defines whose rights should be protected in inter-country adoption. Furthermore, it sets the foundation for reviewing the legal framework governing inter-country adoption in the selected African countries.

Chapter Three examines international human rights law, private international law and jurisprudence for the protection of the rights of parents in inter-country adoption. Particular attention is given to the CRC, ACRWC and the Hague Convention. Reference will also be made to the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with specific reference to Foster Placement and Adoption Nationally and Internationally (Declaration on Foster Placement and Adoption),[77] General Comments by the CRC Committee, Concluding Observations of treaty monitoring bodies, State Party reports and

(2018) UNDP1, 1-8; The World Bank 'The Uganda Poverty Assessment Report' (2016) World Bank 1, 1-178 and UNICEF 'The Status of the Child Protection System in Uganda' (2013) Report of the Child Protection Systems Mapping Uganda 1, 4.

[77] Adopted by the General Assembly Resolution 41/85 of 3 December 1986.

other soft laws. The first aim of this chapter is to examine the fundamental principles that should underpin an inter-country adoption system that protects the rights of parents to compare them with the principles in the selected African countries. The second aim is to investigate the components that a legal framework ought to incorporate to foster the protection of the rights of parents in inter-country adoption in practice. The chapter also examines how the theories discussed in Chapter Two have influenced this body of law.

Chapter Four traces the development of the legal framework governing inter-country adoption in the selected African countries and examines if it places the rights of parents at its core. The chapter also describes the current legal framework on inter-country adoption, laying the foundation for the detailed analysis in the later chapters. The potential of domestic laws to protect the rights of parents in inter-country adoption can best be appreciated through a nuanced understanding of what the term 'parents' practically means in those countries. Therefore, the chapter will also discuss the concepts of 'parents' and 'parents rights' and its implications for the protection of the rights of parents in inter-country adoption.

Chapter Five examines the principle of consent to adoption in the selected countries. It answers the question whether the legal framework regulating consent in the selected countries adequately protects the rights of parents in inter-country adoption. The answer to this question is obtained by using the analytical tool identified in Chapter Two and elaborated in Chapter Three. It interrogates whether the domestic laws in the countries under study adequately make provision for who should give consent to an adoption, how consent should be given for the purposes of adoption and counselling the persons whose consent is required by the law. Particularly, this discussion seeks to reveal that inter-country adoption practices in Africa have not been done in ways that adequately serve the rights and interests of parents.

Chapter Six discusses the adoptability principle in the selected countries. Placing particular emphasis on the common grounds of adoptability: death of parents, abandoned children and neglected children, the chapter investigates whether the domestic laws establish the conditions under which children are considered adoptable and the procedures in which such a determination can be made. The chapter also looks at whether the legal frameworks address the issue of who determines the adoptability of a child and family tracing and reunification measures. In addressing these issues, the chapter lays bare how inter-country adoption practices fail to adequately protect the rights of parents in inter-country adoption.

Chapter Seven examines the issue of post-adoption procedural rights in the countries under study. It considers how the laws make provision for mechanisms in which an adoption decision can be challenged in cases of disputes and grievances. Subsequently different themes are discussed: rescission of adoption orders, appeal and review. In addressing these issues, the chapter demonstrates how inter-country adoption practices in Africa do not adequately serve the rights and interests of parents.

Chapter Eight concludes the study and makes recommendations.

CHAPTER TWO: THEORETICAL MODELS OF THE PARENT-CHILD RELATIONSHIP AND THEIR APPLICATION IN PROTECTING THE RIGHTS OF PARENTS IN INTER-COUNTRY ADOPTION

1. INTRODUCTION

The aim of this chapter is to examine the relevance and the role of the theories of the parent-child relationship and their application in protecting the rights of parents in inter-country adoption. There are several models of the parent-child relationship but for our discussion, the study shall confine itself to only two which are relevant to inter-country adoption. These include: the fiduciary theory and the paternalism theory. The chapter therefore seeks to answer two interrelated issues: first, what is our theory of inter-country adoption? Second, which model would ensure that the rights and interests of parents are adequately protected in inter-country adoption?

The chapter also discusses the theoretical perspectives to the notion of parenthood. These include: the integrative model and the diversity model. A discussion on the theoretical perspectives to parenthood is important for the thesis on four grounds. First, it defines whose rights should be protected in the context of inter-country adoption. Second, it determines who benefits from the protection rights in the context of inter-country adoption. Third, since the thesis is concerned about protecting the rights of parents in inter-country adoption, it is vital to examine the theoretical perspectives of what the concept of 'parents' entails. Fourth, it assists the thesis to make an argument that a robust system of inter-country adoption for the protection of the rights of parents in inter-country adoption in an African context should adopt a broad concept of the term 'parents' which protects all forms of family relationships.

The chapter ends with a conclusion that demonstrates that the fiduciary theory and the diversity model are the best models to guarantee that the rights of parents are adequately protected in inter-country adoption. The chapter also concludes by highlighting conceptual issues that are further discussed in Chapter Three and analysed in Chapters Five to Seven of the thesis.

2. THE FIDUCIARY THEORY

2.1. Definition and justification

The origins of the fiduciary theory can be traced to the writings of John Locke. Locke, a leading proponent of the fiduciary theory argued that God was true owner of children and that he entrusted them into the care of their parents. Therefore, parental powers are a form of trusteeship over God's property.[1] Under the fiduciary theory, children are treated as persons (not objects) in need of guidance and protection on the road to adulthood.[2] Although the fiduciary exercises power and authority, the intention is to further the interests of the child and not the fiduciary's own self interests.[3] In determining how to exercise this authority, the fiduciary is obliged to focus on furthering the interests of the child.[4]

The fiduciary theory views the child as a separate person from his or her parents. It recognises children as individuals with rights and interests distinct from those of their parents. This means that parental rights and responsibilities cannot be exercised in such a manner that causes harm or damage to the child's development.[5] According to the fiduciary theory, parental rights and responsibilities exist so that children can be nurtured and protected until they reach adulthood or independence.[6] Locke observes that:

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[1] J Locke *Two Treatises of Government P Laster* (ed) (1998) para 15, noting that 'from Adam and Eve the world is peopled with his descendants, who are all born infants, weak and helpless, without knowledge or understanding. But to supply the defects of this imperfect state, till the improvement of growth and age hath removed them, Adam and Eve, and after them all parents, were by the law of nature under an obligation to preserve, nourish, and educate the children they had begotten, not as their workmanship, but the workmanship of their own maker, the almighty, to whom they were to be accountable to them'.

[2] B B Woodhouse 'A Delicate Balance: The Role of Government in Protecting Children's Rights within the Family' (November 1999) Key Note Address International Conference on Children's Rights, Ministry of Education, Tokyo, Japan, 1, 314.

[3] R Noggle 'Special Agents: Children's Autonomy and Parental Authority' in D Archard and C M Collins (eds) *The Moral and Political Status of Children* (2002) 97-98, noting that '[t]he parent-child relationship does bear a strong resemblance to the family relationship. For in both cases we have a principal and an agent, and the agent is charged with protecting the rights and promoting the interests of the principal'.

[4] Ibid.

[5] C Barton and G Douglas Law and Parenthood (1995) 23. See also E Page 'Parental Rights' (1984) 1 (2) *Journal of Applied Philosophy* 187, 187; A Borkowski *Textbook on Roman Law* (1994) 102-105; H Gamble *Law for Parents and Children* 2ed (1986) 7; G Jameson *Parental Responsibilities and Rights* (1995) 2; M Fineman 'Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision Making' (1998) 101 *Harvard Law Review* 727, 737-739; K T Bartlett 'Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family has Failed' (1984) *Virginia Law Review Journal* 879, 884 and K T Bartlett 'Re-Expressing Parenthood' (1988) 98 *Yale Law Journal* 293, 295.

[6] Ibid. Citing also *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 at 170D, noting that 'parental rights to control a child do not exist for the benefit of that parent. They exist for the benefit of the child and they are justified only in so far as they enable the parent to perform his duties towards the child'. See also

> The power then, that parents have over their children, arises from that duty which is incumbent on them, to take care of their off-spring, during the imperfect state of childhood. To inform the mind, and govern the actions of their yet ignorant nonage, till reason shall take its place, and ease them of that trouble, is what the children, and the parents are bound to.[7]

The fiduciary theory places a responsibility on parents acting as fiduciaries or trustees to act with due diligence in the performance of their fiduciary duties towards their children (beneficiaries/principal) and allows the state to intervene when parents fail to provide reasonable care that is expected from them.[8] Parents as fiduciaries have the right to enjoy their family life. Parents also have a duty to raise their children, to provide for their psychological and physical needs and to act with due diligence towards the interests of their children.[9] The main reason for entrusting the care of children into their parents is because they lack the capacity to care for themselves.[10] Where parents fail to provide reasonable care expected of them, the state acting as *parens patriae* has the duty to intervene and may provide alternative care to the child.[11] Schene succinctly makes this point as follows:

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para 172H and 186D, noting that 'parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind'.

[7] Second Treatise of Civil Government in P Laslett (ed) *Two Treatises of Government* (1963) para 58.

[8] M Bryan 'Parents as Fiduciaries: A Special Place in Equity' (1995) 3 (2) *International Journal of Children's Rights* 227, 227; C Beck 'The Rights of Children: A Trust Model' (1978) 46 (4) *Fordham Law Review* 669, 669-780; F Olsen 'Children's Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child' (2009) 6 *International Journal of Law and Family* 192, 194-195 and 208; M F Brinig 'Parents: Trusted But Not Trustees or (Foster) Parents as Fiduciaries' (2011) 91 *Boston University Law Review* 1231, 1246 and R Gavison 'Feminism and the Public/Private Distinction' (1992) 45 (1) *Stanford Law Review* 1, 1-45. See also A McGillivray 'Children's Rights, Paternal Power and the Fiduciary Duty: From Roman Law to the Supreme Court of Canada' (2011) 19 (1) *International Journal of Children's Rights* 21, 31 noting that 'the fiduciary must act with utmost faith and loyalty, and in the best interests of the beneficiary of the relationship. The governing standard of all fiduciary relationships is the best interests standard'.

[9] E S Scott 'Parents as Fiduciaries' (1995) 81 *Virginia Law Review* 2401, 2418 arguing that 'the fiduciary has two paramount obligations: responsibility and loyalty. The responsibility- that is, the care and the diligence required of an agent or of a fiduciary, is proportioned to the occasion. It is a concept that has, and necessarily so, a wide penumbra of meaning…'. See also N Bouwman 'An Appraisal of the Modification of the Director's Duty of Care and Skill' (2009) 21 (4) *South African Mercantile Law Journal* 509, 509 and M J Loewestain 'The Corporate Director's Duty of Oversight (1998) 27 *The Colorado Lawyer* 33, 33.

[10] Brinig (n8 above) 1235, noting that 'the laws concept of a fiduciary rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions'. See also Scott (n9 above) 2420, noting that 'furthermore, children are particularly vulnerable and unable to protect and assert his own interests'; Bryan (n8 above) 227; Beck (n8 above) 669-780; Olsen (n8 above) 194-195 and Gavison (n8 above) 1-45.

[11] Ibid. See also A P Derdeyn, M D Walter and J Wadlington 'Adoption: The Rights of Parents Versus The Best Interests of their Children' (1977) 16 (2) *Journal of the American Academy of Child Psychiatry* 238, 238-255; A R Appell and B A Boyer 'Parental Rights vs Best Interests of the Child: A False Dichotomy in the Context of Adoption' (1995) 2 (63) *Duke Journal of Gender Law and Policy* 63, 64; M Joyce Schlosser 'Third Party Child-Centred Disputes: Parental Rights vs Best Interests of the Child' (1984) 3 (XXII) *Alberta Law Review* 394, 394-395 and S Choudhry and H Fenwick 'Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act' (2005) 25 (3) *Oxford Journal of Legal Studies* 453, 455.

> The doctrine known as *parens patriae* was viewed as a justification for governmental intervention into the parent-child relationship. Children of the 'unworthy poor' were saved by separation from their parents through, indenture or placement in institutions. Actions taken on behalf of neglected or abused children were typically justified on moral grounds, but they also served as potent instruments of social control.[12]

Under the fiduciary theory, the state has an obligation to protect children from harm, abuse or neglect by their parents. It promotes the state's role as *parens patriae* and state intervention in private relations between the parent and the child.[13] The fiduciary theory does not allow the abuse of parental rights and responsibilities. In terms of the fiduciary theory, parents who abuse or neglect their children can be removed from the office of parenthood (fiduciary/trustee) if they fail to act in the best interests of their children or fail to perform their parental duties adequately, including termination of their parental rights resulting in the placement of their children for adoption.[14] As in most fiduciary contexts, a violation of the duty of care results in dismissal and replacement with a new fiduciary.[15] Courts generally have a broad discretion to

[12] P A Schene 'Past, Present and Future Roles of Child Protective Services' (1998) 8 *Future of Child* 23, 25.
[13] Ibid.
[14] Scott (n9 above) 2442 and 2455 noting that 'parents whose children are found to be abused or neglected will be subject to formal judicial and agency supervision. In this way, parents whose precommitments prove unreliable are more carefully monitored until the deficient behaviour is cured. If the parents' default is judged to be irremediable, further sanctions can be imposed, including termination of parental rights (after an appropriate judicial proceeding), followed by placement with substitute adoptive parents' and '[c]ourts may authorise formal agency supervision of abusive or neglectful parents. Moreover, regular judicial supervision is used to determine whether these parents are progressing in remediating performance deficiencies'. See also L Smith 'Parenthood is a Fiduciary Relationship' (2017), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3007812, accessed 12 November 2019, noting that 'the court has the power to remove an office holder. As in general fiduciary law, a parent can be removed from the office against their wishes in cases of serious misconduct, or if it is in the best interests of the beneficiaries. The court will remove a trustee if it judges that this will be best for the beneficiary. Trustees can be removed for dishonesty or other grave breach of trust, but they may also be removed if they are unfit to act, or in an unmanageable conflict of interests. So too with parents, it is clear that only serious neglect or misconduct will justify the withdrawal of children from the authority of their parents, and when this step is taken, it is because the court believes that this course will be in the best interests of the child'; E S Scott and B Chen 'Fiduciary Principles in Family Law' in E J Criddle, P B Miller and R H Sitkoff *The Oxford Handbook of Fiduciary Law* (2019) 245, noting that 'a parent or guardian may be removed from her office if she has neglected her duties'; A W Scott, W F Fratcher and M L Ascher *Trusts* (2006) 10 and D Clarry *The Supervisory Jurisdiction over Trust Administration* (2019) 224-225, noting that 'the court has an inherent jurisdiction to remove a trustee or executor from office if it is in the best interests of the beneficiary. Trustees can be removed for dishonesty or other grave breach of trust, but they may also be removed if they are unfit to act, or in an unmanageable conflict of interest. Parenthood is an office inasmuch as at any time there must be someone with parental authority. If there is no parent, the state takes on the role. A parent can be removed from the office against their wishes in cases of serious misconduct, or if it is best for the beneficiaries. So too, the court will remove a trustee if it judges that this will be best for the beneficiary. With parents, it is clear that only serious neglect or other misconduct will justify the withdrawal of children from the authority of their parents, and when this step is taken, it is because the court believes that this course will be in the best interests of the child'.
[15] Scott and Chen (n14 above) 234.

remove and replace fiduciaries if it is in the best interests of the child to do so.[16] Smith notes that:

> The court has the power to remove an office holder. As in general fiduciary law, a parent can be removed from the office against their wishes in cases of serious misconduct, or if it is in the best interests of the beneficiaries. The court will remove a trustee if it judges that this will be best for the beneficiary. Trustees can be removed for dishonesty or other grave breach of trust, but they may also be removed if they are unfit to act, or in an unmanageable conflict of interests. So too with parents, it is clear that only serious neglect or misconduct will justify the withdrawal of children from the authority of their parents, and when this step is taken, it is because the court believes that this course will be in the best interests of the child.[17]

Other grounds that would justify taking away the child and putting him or her up for adoption is when the parents have abandoned the child or are incapable of providing for the child.[18] A child can also be put up for adoption if it is in the best interests of the child to do so or if the parents have voluntarily relinquished their parental rights (or given their consent to the adoption). As in general fiduciary law, parents can also choose to resign from the office of parenthood either by voluntarily relinquishing their parental rights subject to appropriate procedures and placing their children for adoption.[19]

The fiduciary theory gives preference to finding permanent care for children either by making it possible for them to return to their own parents or putting them up for adoption.[20] Parents whose children are found to be neglected or abused will be subject to judicial and state supervision and may be ordered to participate in programs to support improved parenting before the child is placed for adoption or alternative care.[21] Therefore, parents whose actions

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[16] Ibid.
[17] Smith (n14 above).
[18] E S Scott and R E Scott 'Parents as Fiduciaries' (1995) 81 *Virginia Law Review* 2401, 2407-2408. See also *Parham v J.R* 442 U.S 584, 602 (1979) and *Troxel v Granville* 530 U.S 57, 68-69 (2000), noting that 'accordingly, so long as a parent adequately cares for his or her children (ie; is fit) there will normally be no reason for the state to interject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of children. In order to overcome this presumption, parents must be found at least temporarily unfit (to have neglected, abandoned or abused the child). This finding, in turn requires the use of substantial due process protections'.
[19] Ibid.
[20] Scott (n9 above) 2442 noting that 'an abused or neglected child removed from the custody of the parents should either be returned upon remediation by parents or placed permanently in an adoptive home following termination of parental rights' and that the fiduciary theory seeks to 'lessen the emphasis on foster care placement and to encourage greater efforts to find permanent homes for children either by making it possible for them to return to their own families or by placing them in adoptive homes'.
[21] Ibid.

prove unreliable are monitored until the deficient behaviour is remedied.[22] Scott and Chen have stated that 'this response is appropriate if parents are likely to resume parental responsibilities in a reasonable time or if maintaining the relationship with a deficient parent has value for the child'.[23] It is only when the necessary support is not effective to avoid a risk of neglect or a risk to the child's safety that parental rights may be terminated and the child placed for adoption.[24] Because of the importance of maintaining the parent-child relationship, termination of parental rights is considered an 'extreme measure', even when the parents have defaulted on their parental duties.[25] Thus, the termination of parental rights is subject to substantive and procedural requirements, which recognise the importance of the parent-child relationship and which respects the rights and interests of both the parents and their children.[26]

In terms of the fiduciary theory, parents whose children have been placed in alternative care or adoption have the right to access a court to contest a care order in cases of grievances and disputes.[27] This approach is consistent with the principles of access to justice and fairness. It is therefore a right that is to be respected in all cases involving the adoption of children. Although parents are not compelled to challenge an adoption decision, they should be given an opportunity to do so. Thus, parents should be informed of their right to challenge an adoption decision and have access to legal services to enable them to effectively access justice.[28]

2.2. Applicability of the fiduciary principles to inter-country adoption

Applying the fiduciary principles discussed above to the context of inter-country adoption raises three fundamental issues: who can be adopted? what are the procedural requirements to determine the eligibility of a child for the purposes of adoption? and what are the rights of parents following an adoption order?

[22] Ibid.
[23] Scott and Chen (n14 above) 2452.
[24] Ibid. See also Scott (n18 above) 2455 noting that '[c]ourts may authorise formal agency supervision of abusive or neglectful parents. Moreover, regular judicial supervision is used to determine whether the parents are progressing in remediating performance deficiencies' and Scott (n14 above) 2468, noting that 'an abused or neglected child removed from the custody of a parent should either be returned quickly upon remediation by parents or placed permanently in an adoptive home following termination of parental rights'.
[25] Scott and Chen (n14 above) 234-235, noting that 'if the likelihood that parents can resume responsibilities is remote, the children's interests may be promoted by termination, along with assumption of parental duties by another adult who will act with due diligence to provide care'.
[26] Ibid.
[27] Ibid.
[28] Ibid.

With respect to the first question, generally speaking, for a child to be adopted, he or she must be eligible for adoption. As Chapters Three and Six demonstrate, an inter-country adoption system that serves the rights and interests of parents should establish the conditions under which a child is considered adoptable and effectively identify those children potentially adoptable.[29] A discussion of the fiduciary theory has revealed that a child can be put up for adoption in cases of abuse, neglect and child abandonment. A child can also be put up for adoption if the parents have voluntarily relinquished their parental rights and responsibilities in respect of the child or consented to the adoption of their child. Therefore, it is contended that the law should regulate the conditions under which a child is considered adoptable. Not only does such regulation serve the rights and interests of parents in inter-country adoption, but is also one means of protecting the rights of the children involved and the adoptive parents who might find themselves involved in custody disputes with the parents of the child.

The second question relates to the procedure to determine the eligibility of a child for the purposes of adoption. As Chapters Three and Six demonstrate, states should determine the adoptability of a child in accordance with applicable laws and procedures.[30] This brings to the fore the question: what are the procedural requirements necessary for an inter-country adoption system that protects the rights of parents?

The fiduciary theory outlines the procedural requirements that must be satisfied to determine the adoptability of a child. First, the adoption of a child should not be made unless prior efforts have been made to maintain family ties or unless family tracing and reunification efforts have failed. Although the fiduciary theory recognises the importance of protecting children from abuse and neglect, it stresses the importance of family preservation measures before a child can be placed for adoption. This requirement complements the adoptability principle discussed in Chapters Three and Six of the thesis. In this context, Scott notes with respect to the fiduciary theory that:

> Parents whose children are found to be abused or neglected will be subject to formal judicial and agency supervision. In this way, parents whose precommitments prove unreliable are more carefully monitored until the deficient behaviour is cured. If the parents" default is judged to be irremediable, further sanctions can be imposed, including termination of parental rights (after an appropriate judicial

[29] See section 5.3.3 of Chapter Three and Chapter Six.
[30] Ibid.

> proceeding), followed by placement with substitutive parents". Courts may authorise formal agency supervision of abusive or neglectful parents. Moreover, regular judicial supervision is used to determine whether parents are progressing in remediating performance deficiencies.[31]

It is therefore crucial that states exhaust all means to prevent termination of parental rights, including providing parents with appropriate support and assistance to enable them to care for their child before placing the child for adoption. Thus, adoption should only be used as a measure of last resort.

One of the practical, as well as legal, implications of the recognition of family preservation measures is that all decision-making concerning the care (or adoption) of a child should consider the rights and duties of the child's parents. This approach gives effect to the parents right to enjoy their family life as discussed in Chapter Three.[32] It also stresses the fact that priority should be given to parents to care for their children before resorting to alternative care, unless it is not in the best interests of the child to do so.[33] This suggests that a child should not be placed for adoption if there is a possibility that he or she can be cared for by his or her parents unless it is not in the best interests of the child to do so.

Another ramification that the recognition of family preservation measures would have on the adoption process is that as shown in Chapters Three and Six, the fact that a child has been abandoned, abused or neglected by the parents does not automatically qualify the child as adoptable.[34] Therefore, efforts to maintain links between the child and his or her family should be explored before a child is placed for adoption. It is submitted that a mandate requiring family reunification and preservation measures prior to adoption is most supportive of the rights and interests of parents.

Furthermore, it ensures that the parent-child relationship is not prematurely severed. As shown in Chapter Six, it is a widespread practice on the continent for parents living in poverty to place their children in temporary care without the intention to relinquish their rights, interests and claims in respect of the child.[35] Parents struggling to care for their sometimes place their children in institutional facilities not because they have abandoned their children, but because

[31] Scott (n9 above) 2442 and 2455.
[32] See section 2 of Chapter Three.
[33] Ibid.
[34] See Chapter Six.
[35] See section 3.2 of Chapter Six.

of their inability to care for them. Therefore, this procedural requirement is intended to cater for the needs of parents, and ultimately the children involved in inter-country adoption.

The second procedural requirement outlined by the fiduciary theory relates to which authority determines the adoptability of a child? As noted above, the task of determining the adoptability of a child should be carried out by the courts (judicial body). Commenting on the fiduciary principle, Scott, Fratcher and Ascher state that:

> The court has an inherent jurisdiction to remove a trustee or executor from office if it is in the best interests of the beneficiary. Trustees can be removed for dishonesty or other grave breach of trust, but they may also be removed if they are unfit to act, or in an unmanageable conflict of interest. Parenthood is an office inasmuch as at any time there must be someone with parental authority. If there is no parent, the state takes on the role. A parent can be removed from the office against their wishes in cases of serious misconduct, or if it is best for the beneficiaries. So too, the court will remove a trustee if it judges that this will be best for the beneficiary. With parents, it is clear that only serious neglect or other misconduct will justify the withdrawal of children from the authority of their parents, and when this step is taken, it is because the court believes that this course will be in the best interests of the child.[36]

The reference to the 'court' indicates that the task of determining the adoptability of a child should be carried out by the courts. These procedural measures are often prescribed to protect the rights of parents in inter-country adoption, and it is argued, they are congruent with the spirit and letter of international standards as shown in Chapter Three.[37] However, as Chapters Three and Six demonstrate, although the task of determining the adoptability of a child is done by the courts, it should also be supported by a social worker's or professional assessment.[38] This is intended to assist the court in determining the eligibility of a child for the purposes of adoption. In the best interests of the families of origin, the judicial and administrative frameworks set in place to regulate adoptions are critical.

A key issue in protecting the rights of parents is what happens when an irregularity has been alleged in inter-country adoption. As Chapters Three and Seven demonstrate, parents have the right to contest an adoption order in cases of disputes and grievances.[39] The above discussion has shown that the fiduciary theory recognises that parents whose children have been placed

[36] Scott, Fratcher and Ascher (n14 above) 10.
[37] See section 5.3.4 of Chapter Three.
[38] Ibid. See also Chapter Six.
[39] See section Six of Chapter Three and Chapter Eight.

for adoption have the right to challenge an adoption order in cases of disputes and grievances. This approach is important considering the parents right to enjoy their family life. In addition, it gives effect to the parents right to access to justice. The fiduciary theory creates mechanisms such as courts and access to legal services to ensure that parents have access to justice.

The above discussion has also shown that the fiduciary theory acknowledges that parents have the right to enjoy their family life. As Chapters Three and Five demonstrate, the recognition of the parents right to enjoy their family life has implications for adoptability, consent to adoption and post-adoption procedural rights. For instance, one of the implications that the recognition of the parents right to enjoy their family life would have on the adoption process is that priority should be given to parents to care for their children before resorting to alternative care, unless it is not in the child's best interests to do so. Therefore, family tracing and reunification efforts should be considered before placing a child for adoption. This approach resonates with the adoptability principle discussed in Chapter Three.

Furthermore, as Chapters Three and Five demonstrate, an adoption should not be authorised without the consent of the parents unless such consent is not required. In addition, as shown in Chapters Three and Seven, it implies that parents have the right to contest an adoption order in cases of grievances and disputes. It is submitted that access to justice gives effect to parents' duty to care for their children.

With respect to the adoptability of a child, Chapter six demonstrates that the fact that the child has been abandoned or neglected does not automatically qualify the child for adoption. Thus, efforts to preserve the family unit should be explored before a child is placed for adoption. More importantly, it underscores the fact that all decision-making concerning the care of the child should consider the rights and duties of the child's parents. It is therefore argued that an adoption system that respects the rights of parents should give due respect to the primary responsibility of parents to care for their children.

The fiduciary theory brings with it essential elements of an inter-country adoption system for the protection of the rights of parents. It recognises and accommodates the idea that an inter-country adoption system that respects the rights and interests of parents should establish the grounds in which children could be considered in need of alternative care or adoption, the procedures in which such a determination can be made and challenged in cases of disputes and

grievances. Moreover, it recognises that parents have the right to enjoy their family life. The downside of this theory is that it does not provide any theoretical guidance in terms of the grounds in which an adoption decision can be challenged. Furthermore, although the fiduciary theory acknowledges that a child can be placed for adoption if the parents have consented to the adoption, it is silent on the way consent should be given to ensure that the rights of parents are protected. The fiduciary theory is also silent on the issue of counselling parents prior to consenting to an adoption. Nevertheless, Chapter Three takes up the issue further and elaborates on these issues as will be shown in the next chapter.

For the reasons noted above, this thesis argues that the fiduciary theory is the best model to guarantee that the rights of parents are adequately protected in inter-country adoption.

3. THE PATERNALISM THEORY

3.1. Definition and justification

Paternalism refers to the 'exercise of power over an individual and an interference with an individual's free will'.[40] Other scholars define paternalism as 'acting for the good of another person against their will or without their consent'.[41] Like the fiduciary theory, paternalism recognises that parents have the right to enjoy their family life, the duty to care for their children and to make important decisions on their behalf until such a time that the child can do so. This theory is premised on the belief that children lack the capacity and maturity to care for themselves and to make important decisions concerning their lives. Archard notes: 'children are thought to merit paternalism because they have not yet developed the cognitive capacity to make intelligent decisions in light of relevant information about themselves, and because they are prone to emotional inconstancy such that their decisions are likely to be wild and variable'.[42]

[40] K Brace and L VandeCreek 'The Justification of Paternalistic Actions in Psychotherapy' (1991) 1 (2) *Ethics and Behaviour* 87, 87-103.
[41] Ibid.
[42] D Archard *Children: Rights and Childhood* (2004) 78. See also J Drerup 'What Exactly (If Anything) is Wrong with Paternalism Towards Children' (2017) 24 (4) *Philosophical Inquiry in Education* 348, 349, noting that 'paternalistic interventions are justified in cases in which the child is (probably) not sufficiently competent and autonomous'.

Another justification for this theory was the view that parents are in a better position to know what is in the best interests of their children. Mullin asserts that:

> The chief factors relevant to justifying paternalism towards children are: (a) the intervention must be reasonably aimed at the child's own good and the child must lack the ability to make a good decision about the matter at hand. This could be because of lack of understanding about the impact of one's actions and choices, inability to guide actions to conform with goals, or because the child has formed goals that can reasonably predicted to conflict with his or her long-term interests. (b) The intervention should respect the capacities the child does have. (c) The intervention should recognize the deficits the child might have. (d) Finally, the intervention should not hamper the development of autonomy, unless justified by a larger good connected to the child's well-being. It should be aimed at the child's own good as opposed to promote the adult's interests where they conflict with the plans of the child.[43]

A further justification for paternalistic interventions is that children need to be protected against their own actions and from inflicting harm upon themselves. Mill observes that 'children require to be protected against their own actions as well as against external injury'.[44] Mullin similarly notes that 'paternalistic interventions by one person (the 'intervener') in the activities of another (the 'intervened') that is aimed at achieving significant good for avoiding significant harm to the intervened is justified'.[45]

Although the paternalism theory recognises that parents have the right to enjoy their family life and to make decisions on behalf of their children, it also acknowledges that they do not always act in their children's best interests. Therefore, paternalism stresses the need for child protection and the state's role to intervene in parent-child relations.

Under the paternalism theory, the state has a duty to provide alternative care to children who are abused or neglected by their parents.[46] This approach is consistent with the requirement to establish the conditions in which children could be considered in need of alternative care or

[43] A Mullin 'Children, Paternalism and the Development of Autonomy' (2014) 17 (3) *Ethical Theory and Moral Practice Journal* 413, 419-420. See also J Giesinger 'Paternalism and the Justification of Education' (2019) 26 (1) *Philosophical Inquiry in Education* 49, 63, noting that 'the welfarist model was used to justify paternalistic acts as these are directed at the promotion of welfare' and G Dworkin 'Paternalism' in R Wasserstrom (ed) *Minority and the Law* (1971) 107, noting that 'interference with a person's liberty of action is justified by reasons, referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced'.
[44] J S Mill *On Liberty* (1963) 73.
[45] A Mullin 'Children, Paternalism and the Development of Autonomy' (2014) 17 (3) *Ethical Theory and Moral Practice Journal* 413, 414.
[46] M S Merry 'The Well-being of Children, the Limits of Paternalism, and the State: Can Disparate Interests be Reconciled' (2007) 2 (1) *Ethics and Education* 39, 48-49. See also M Cader 'Child Protection: Balancing Paternalism and Partnership' (1995) 25 *British Journal of Social Work* 749, 752.

adoption discussed in Chapter Three.[47] It also ensures that the rights of parents are protected in inter-country adoption.

Neglectful and abusive parents have the potential to cause physical and emotional harm to the child and the state may intervene by providing alternative care to the child to address the problem. The paternalism theory concedes that the state has an important paternalistic role to play because parents do not always act in the best interests of their children. While many children grow up in family environments that function relatively well, paternalism recognises that 'for some, the family does not constitute a safe and supportive institution'.[48] Thus, the state is obliged to intervene and to provide alternative care to the child.

3.2. Critical appraisal of the paternalism theory and its application to inter-country adoption

One of the advantages of the paternalism theory is that like the fiduciary theory, it acknowledges that parents have the right to enjoy their family life. As noted above, the recognition of the parents right to enjoy their family life has implications for adoptability, consent to adoption and post-adoption procedural rights.

The paternalism theory also establishes the grounds in which children could be considered in need of alternative care or adoption. For instance, the above discussion has shown that a child can be placed in alternative care in cases of abuse or neglect by the parents. This approach is consistent with the adoptability principle discussed in Chapters Three and Six of the thesis.[49] However, apart from these grounds, the paternalism theory fails to provide any theoretical guidance on other conditions in which a child could be considered in need of alternative care or adoption.

Another shortcoming of the paternalism theory is that it is silent on the procedural requirements to determine the eligibility of a child for alternative care or adoption. More importantly, the paternalism theory fails to address the issue of post-adoption procedural rights.

[47] Ibid.
[48] Ibid.
[49] See section 5.3.3 of Chapter Three and Chapter Six.

For the reasons noted above, this thesis argues that the paternalism theory is not the best model to guarantee that the rights of parents are adequately protected in inter-country adoption.

4. THEORETICAL APPROACHES TO UNDERSTANDING THE NOTION OF PARENTS

This section discusses the theoretical approaches to understanding the notion of parents. This discussion is important because it defines whose rights should be protected in inter-country adoption. Furthermore, as the thesis is concerned about protecting the rights of parents, it is vital to examine who benefits from the protection rights in the context of inter-country adoption. It seeks to answer the question: which model ensures that the rights of parents are adequately protected in inter-country adoption?

4.1. The integrative model

4.1.1. Definition and justification

The integrative model views parenthood as a 'natural relation following from biological reproduction by one man and one woman within marriage'.[50] It is referred to as an integrative or conjugal model because it views marriage between a man and a woman as the 'central social institution for integrating sexuality, reproduction and parenthood' so that children grow up with both their biological parents.[51] The integrative model links parenthood with marriage between a man and a woman and, in doing so prescribes a heterosexual order. Therefore, it emphasises the importance of marriage as the basis for parenthood.[52]

The integrative model underscores the importance of biological or genetic connection, sex difference, marriage and the need for children to grow up with both biological parents.[53] Proponents of the integrative model argue that a child needs both biological parents, a mother and father for optimal development.[54] Another justification for the integrative model is that every child has the right to know his or her two biological parents. Marquardt observes that

[50] D Cere 'Towards an Integrative Account of Parenthood' in L C McClain and D Cere *What is Parenthood? Contemporary Debates about the Family* (2013) 4 and 47.
[51] Ibid.
[52] J Bowlby *Attachment and Loss* (1969-1982) 435.
[53] Ibid.
[54] Ibid.

'children have a basic right to be raised whenever possible by the two people whose physical union made them'.[55] Marquardt further argues that children have a right to know their genetic origins and identity.[56]

Advocates of the integrative model also emphasise that biological and sex difference provides a child 'with two differently sexed parents who provide models for being male and female and who parent in different ways'.[57] In support of this view, Hernandez states that 'intuition and experience suggest that a child benefits from having before his eyes, every day, living models of what a man and woman are like'.[58] Thus, proponents of the integrative model are concerned with families headed by both biological parents of the child within marriage.

The integrative model is critical of other forms of families and parenthood because of the separations it introduces between marriage and parenthood and biology and parenthood.[59] Other proponents of the integrative model cite religion to justify the integrative model stressing the importance of marriage between a man and a woman.[60] Overall, the main aim of the integrative model is to enhance the rights of the child.

4.1.2. Critical appraisal of the integrative model and applicability to inter-country adoption

The integrative model means that the parental rights and interests to be protected in the context of adoption are those of the biological parents of the child within marriage. This model can therefore be criticised for being too narrow in its approach to parenthood.[61] It ignores other forms of families and parenthood. The integrative model advocates the view that parenthood is only associated with marriage between a heterosexual couple and biological or genetic connection between the biological or natural parents and the child. As a result, the integrative

[55] E Marquardt *Commission on Parenthood's Future, and Institute for American Values, the Revolution in Parenthood: The Emerging Global Clash between Adult Rights and Children's needs* (2006) 15-16.
[56] Ibid.
[57] J Stacey 'Toward Equal Regard for Marriages and other Imperfect Intimate Affiliations' (2003) 32 *Hosfra Law Review* 331.
[58] Ibid. See also Cere (n50 above) 47.
[59] Bowlby (n52 above) 3.
[60] Cere (n50 above) 47-49.
[61] L C McClain and D Cere 'Introduction' in L C McClain and D Cere *What is Parenthood? Contemporary Debates about the Family* (2013) 4.

model ignores other forms of families and parenthood such as single-parent families or families formed by two unmarried biological parents.

The integrative model also claims that parenthood is only associated with reproduction or procreation. This approach fails to consider interventions in assisted reproductive technologies, adoption and fostering. As Boyd observes, 'it is no longer possible to rely on old legal assumptions that genetic parenthood is congruent with birth or the fact that a man is married to or in a relationship with a birth mother'.[62]

A further criticism of the integrative model relates to its claim that a child needs to grow up with both biological parents for optimal development. While many children grow up in family environments that function well, 'for some the family does not constitute a safe and supportive' environment.[63] Therefore, growing up with both biological parents does not always guarantee the child's development or that the biological parents will provide adequate care to the child.

Another criticism of the integrative model is its claim that parenthood is only linked to marriage between a man and a woman. Due to the influence of globalisation and migration, family life has changed and new forms of families and parenthood now exist. The traditional idea of a nuclear family made up of a married couple and their children is fading away. For example, single parenthood or families formed by two unmarried biological parents is now common in most societies.

Biological or genetic connection between the parent and the child within marriage has long shaped the law of the family. Traditionally, parenthood was understood to be a natural relation based on marriage, biological reproduction between a man and a woman, and legal status as parent followed easily from the recognition of the natural parent-child relationship.[64]

[62] S Boyd 'Gendering Legal Parenthood: Bio-genetic ties, Intentionality Responsibility' in *Windsor Yearbook of Access to Justice* (2007) 3 and R Mykitiuk 'Beyond Conception: Legal Determinations of Filation in the Context of Reproductive Technologies' (2001) 39 *Osgoode Hall Law Journal* 771, 782.
[63] Committee on the Rights of the Child, General Comment No. 4 (2003) Adolescent Health and Development in the Context of the Convention on the Rights of the Child, UN Doc CRC/GC/2003/4, 1 July 2003, para 15 and Committee on the Rights of the Child, General Comment No. 9 (2006) The Rights of Children with Disabilities, UN Doc CRC/C/GC/9, 27 February 2007, para 42.
[64] D NeJaime 'The Nature of Parenthood' (2018) *The Dukeminier Awards* 283, 293; D D Meyer 'Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood' (2006) 54 *The American Journal of Comparative Law* 125, 125 and G Fuscaldo 'What Makes a Parent? It's Not Black or White' (2003) 29 (2) *Journal of Medical Ethics* 66, 66.

Therefore, only persons that were married and had a biological or genetic connection to the child were considered as the child's parents.

Under the integrative model, parental rights and responsibilities in respect of the child are grounded on marriage between a man and a woman and biological or genetic connection between the parent and the child. Advocates of this model argue that because a child is 'derived from the genetic material of an individual or is tied by blood to that individual' is what grounds parental rights and obligations.[65] Accordingly, all decision-making concerning the child under the integrative model is the exclusive preserve of the married biological or natural parents of the child.

In the context of adoption, all decision-making in relation to the care and adoption of the child is the exclusive preserve of the married biological parents of the child. This is because only those persons who are married and have a biological connection to the child have rights and responsibilities in respect of the child. Thus, under the integrative model, unmarried fathers or fathers of children born outside marriage, extended family members or other persons caring for the child in a parental way have no right to make decisions or to participate in matters concerning children born out of wedlock regardless of biological connection to the child.

Overall, the integrative model promotes the idea that only persons who have a biological connection with the child and are married have the rights in respect of the child's care and adoption. It has a narrow understanding of parenthood that fails to recognise that parenthood is separable from marriage and does not reflect the reality of the child and the family.

For the reasons noted above, it is contended in this thesis that the integrative model is not the best model for the protection of the rights of parents in inter-country adoption.

[65] J Hill 'What Does it mean to be a "Parent"?: The Claims of Biology as a Basis for Parental Rights' in S Gilmore Parental Rights and Responsibilities (2017) 32 and M Cholbi 'How Procreation Generates Parental Rights and Obligations' in J Ahlberg and M Cholbi *Procreation, Parenthood, and Educational Issues: Ethical and Philosophical Issues* (2017) 1.

4.2. The diversity model

4.2.1. Definition and justification

The diversity model acknowledges that there are diverse ways to parenthood and various family forms in which people parent a child.[66] Unlike the integrative model, the diversity model defines parenthood by focusing more on the quality of the relationship between the adult and the child as opposed to whether there is a marriage relationship between two opposite sex adults or a biological tie between the adult and the child.[67] It recognises that parent-child relationships form and develop outside of marriage or biological ties with the child.[68]

The diversity model tends to focus on the functions of the family as opposed to the family form.[69] Therefore, the definition of parent under the diversity model includes persons who function or operate as parents even if their relationship has not been legitimised by marriage or who lack a biological or genetic connection to the child.[70]

In contrast to the integrative model, the diversity model supports the diverse contexts in which parent-child relationships arise. It stresses the fact that parenthood may exist independent of marriage between two adults of different sexes or biological ties to the child.[71] The diversity model is critical of the integrative model's focus on marriage and urges society to support and protect different forms of families and parenthood.[72] According to the diversity model:

> There are diverse pathways to becoming a parent and diverse family forms in which people parent. Thus, along with the nuclear family-the marital, two biological parent family, but also a marital family with adopted children are families formed by a single parent (whether due to divorce or the absence of marriage), families formed by two unmarried biological parents, by lesbian and gay parents, and by foster parents, blended families formed when divorced parents remarry or cohabit with new partners, and extended

[66] L C McClain 'A Diversity Approach to Parenthood in Family Life and Family Law' in L C McClain and D Cere *What is Parenthood? Contemporary Debates about the Family* (2013) 4 and 47.
[67] Ibid.
[68] Ibid.
[69] Ibid.
[70] Ibid.
[71] D D Meyer 'Parenthood in a Time of Transition: Tensions between Legal, Biological and Social Conceptions of Parenthood' (2006) 54 *The American Journal of Comparative Law* 125, 125 and E Marquardt 'Of Human Bonding: Integrating the Needs and Desires of Women, Men and the Children their Unions Produce' in L C McClain and D Cere *What is Parenthood? Contemporary Debates about the Family* (2013) 325.
[72] McClain (n66 above) 47.

families (where a grandparent or other relative serves as caretaker, with or without the biological parents present in the household.[73]

The diversity model acknowledges that traditionally the concept of family and parenthood focused on the nuclear family consisting of a married heterosexual couple and their children, but now includes other family forms such as 'a marital family with adopted children, single-parent families, lesbian and gay families, foster parents, blended families and extended families (where grandparents or other relatives serve as a caretaker, with or without biological parents present in the household'.[74] This understanding of family and parenthood allows a child to have multiple parents.[75]

Proponents of the diversity model argue that diverse family forms and parenthood further the best interests of the child.[76] This is because it focuses on the quality of the relationship between the adult and the child and the relationships that are most important to the child. It suggests a set of relationships that are more encompassing to the child. The diversity model does not necessarily undermine the role of biological parents in raising their children. However, it emphasises function over form. Thus, family structure becomes unimportant.

Compared to the integrative model, the diversity model recognises that children have a right to good parenting and healthy attachments rather than a right to two biological parents who have to meet certain requirements.[77] It criticises the significance of sex, marriage and gender difference and is critical of claims that every child needs both biological parents for his or her optimal development.[78] The diversity model regards diversity in family forms and parenthood not 'as evidence of deviance or decline but as inevitable by-product of persons exercising their

[73] Ibid.
[74] C Suarez-Orozco and M M Suarez-Orozco 'Transnationalism of the Heart: Familyhood Across Borders' in L C McClain and D Cere *What is Parenthood? Contemporary Debates about the Family* (2013)280.S Frelich Appleton 'Parents by the Numbers' (2008) 37 *Hosfra Law Review* 1, 11; K K Baker 'Bionormativity and the Construction of Parenthood' (2008) 42 *Georgia Law Review* 649; N E Dowd 'Multiple Parents/Multiple Fathers' (2007) 9 *Journal of Law and Family Studies* 237; M B Jacobs 'My Two Dads: Disaggregating Biological and Social Paternity' (2006) 38 *Arizona State Law Journal* 809; L T Kessler 'Community Parenting' (2007) 24 *Washington University Journal of Law and Policy* 47, 50 and E Buss 'Parental Rights' (2002) *Virginia Law Review* 635.
[75] Ibid.
[76] McClain (n66 above) 48.
[77] McClain (n66 above) 46. See also Marquadt (n71 above) 325.
[78] Ibid.

greater freedom to live out their vision of a good life, facilitated by changes in constitutional, criminal and family law and women's economic status in society.'[79]

Proponents of the diversity model however differ in their views. For instance, some are of the view that family law should recognise and support the marriage institution in ways that are 'consistent with sex equality and opened up to include same-sex couples'.[80] On the other hand, some argue for disestablishing marriage and creating and regulating an 'intimate caregiving union status including parents and children (biological and de facto); husband and wife; long-term cohabiting hetero and homosexual lovers and partners; 'lesbigay' units; nonsexually intimate adult units or groups; adult siblings; adult children and aging parents'.[81]

4.2.2. Critical appraisal of the diversity model

The diversity model has many advantages over the integrative model. First, it acknowledges that there are different forms of families and parenthood. The diversity model recognises parenthood outside marriage between two sexes and biological ties. This serves to ensure that all family forms and parenthood are accommodated.

The diversity model is flexible enough to accommodate both biological parents of the child whether they are married. It stresses the fact that marriage is not the 'exclusive source of parental rights and responsibilities'.[82] As a result, it embraces and protects parental rights and responsibilities outside of marriage. The fact that marriage is not the 'exclusive source of parental rights and responsibilities' is evident from the 'unwed father jurisprudence' which accords rights to biological fathers who take responsibility for their children to participate in decisions affecting the care of their children.[83]

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[79] Ibid.

[80] C Grant Bowman *Unmarried Couples, Law and Public Policy* (2010) 221-230; J Stacey 'Uncoupling Marriage and Parenting' in L C McClain and D Cere *What is Parenthood? Contemporary Debates about the Family* (2013)79 and M Albertson Fineman *The Autonomy Myth: A Theory of Dependency* (2004) 450.

[81] T Metz *Untying the Knot: Marriage, the State, and the Case for their Divorce* (2010) 120.

[82] McClain (n66 above) 50. See also M Eichner *The Supportive State: Families, Government, and America's Political Ideals* (2010) 101; Bowman (n80 above) 221-230; L C McClain *The Place of Families: Fostering Capacity, Equality and Responsibility* (2006) 45 and J Carbone 'The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity' (2005) 65 *Louisiana Law Review* 1295, 1295.

[83] See for instance, *Fraser v Children's Court, Pretoria North and Others* CCT 31/96. See also *Stanley v Illinois* 405 U.S. 645 (1972) where the Supreme Court stated that 'the Constitution protects all family relationships, whether or not they are legitimized by a marriage ceremony' and that 'all parents are entitled to a hearing on their fitness before their children are removed from their custody'; *Quilloin v Walcott* 434 U.S. 246 (1978) noting that

Another advantage of the diversity model of parenthood is that it also accommodates the realities of the situation of the family and parenthood in Africa. Traditionally, child rearing was not only the primary responsibility of the biological parents, but of the extended family members and the community.[84] Extended families were highly beneficial because they led to a more effective way of raising children.[85] Due to the communitarian nature of the African traditional family, child care was considered a communal activity with biological parents relying on the extended family members and the community at large for support.[86] The adage 'it takes a village to raise a child' or 'a single hand cannot nurse a child' modelled the communitarian philosophy of the African traditional family.[87] These phrases stem from a

'when an unwed father has established a substantial relationship with a child and admitted paternity, the state may not treat the father differently from the mother' and *Lehr v Robertson* 463 U.S. 248 (1983) noting that 'the potential relationship is based on the biological connection that affords a father a unique opportunity to develop a relationship with his child. If a father "grasps that opportunity" and accepts responsibility for the child, then the Constitution will protect the relationship. If he fails to grasp his opportunity, the Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie'. See also T M Zdon 'Putative Fathers' Rights: Striking the Right Balance in Adoption Laws' (1994) 20 (3) *William Mitchell Law Review* 929, 929-965; A R Dalopito 'The Failure to Notify Putative Fathers of Adoption Proceedings: Balancing the Adoption Equation' (1993) 42 (4) *Catholic University Law Review* 979, 979-1026 and J Mills 'Unwed Birthfathers and Infant Adoption: Balancing a Father's Rights with the States Need for a Timely Surrender Process' (2002) 62 (2) *Louisiana Law Review* 615, 615-641.

[84] J Sloth-Nielsen 'Children's Rights and Parental Authority: African Perspective' in J Eekelar and R George *Handbook of Family Law and Policy* (2014) 281; D M Chirwa 'Children's Rights, Domestic Alternative Care Frameworks and Judicial Responses to Restrictions on Inter-Country Adoption: A Case Study of Malawi and Uganda' (2016) 16 *African Human Rights Law Journal* 117, 118; S Madhavan, P Mee and M Collinson 'Kinship in Practice: Spatial Distribution of Children's Kin Networks' (40) 2 *Journal of Southern African Studies* 401, 403; M Ntarangwi 'Introduction: Parents' Involvement in Children's Lives in Africa' (2012) 37 (3) *Africa Development* 1, 1; W C Chirwa 'Social Exclusion and Inclusion: Challenges to Orphan Care in Malawi' (2002) 11 (1) *Nordic Journal of African Studies* 93, 98; S Madhavan and M Gross 'Kin in Daily Routines: Time Use and Childrearing in Rural South Africa' (2013) 44 (2) *Journal of Comparative Family Studies* 175, 176-178; S Madhavan 'Early Childhood and Kin Connectivity in Rural South Africa' (2010) 36 (2) *International Journal of Sociology of the Family* 139, 141; H Verhoef 'A Child has many Mothers: Views of Child Fostering in Northwestern Cameroon' (2005) 12 (3) *Childhood* 369, 369-390; T Meyiwa 'Constructing an Alternative Family Unit: Families living with HIV/AIDS redefine African Traditional Parenting Patterns' (2011) 37 (1) *Social Dynamics* 165, 165-166; B T Rwezaura 'Competing Images of Childhood in Social and Legal Systems of Contemporary Sub-Saharan Africa' (1998) 12 *International Journal of Law, Policy and the Family* 255-278; A Fleischer 'Family, Obligations, and Migration: The Role of Kinship in Cameroon' (2006) Max Planck Institute for Demographic Research Working Paper1, 6; G Van Bueren *The International law on the Rights of the Child* (1995) 68; M Baloyi 'The Impact of the Extended Family on One's Marriage: An African Study' (2014) *Journal of Theology for Southern Africa* 18, 25; M J S Masango 'African Spirituality that Shapes the Concept of Ubuntu' (2006) 3 *Verbum et Ecclesta* 930, 931; C Bledsoe 'Strategies of Child Fosterage among Mende grannies in Sierra Leone' in R J Lesthaeghe (ed) *Reproduction and Social Organization in Sub-Saharan Africa* 442-444; C Oppong 'Attitudes towards Family Type and Family Size in West Africa: A Study of Norms among a Ghanaian Student Population' (1974) 4 (2) *International Journal of Sociology of the Family* 170, 172; O Wusu and U C Isiugo-Abanihe 'Changing Family Structure and Childrearing: Implication for Male Fertility Behaviour among the Ogu, Southwestern Nigeria' (2006) 14 (8) Demographic Research 141, 141 and C Kithinji 'The Individual in Society: Focus on the African Family' (1989) 4 (4) *Wajibu* 4, 275.

[85] A Armstrong 'A Child Belongs to Everyone: Law, Family and the Construction of the Best Interests in Zimbabwe' (1995) Innocenti Occasional Papers, Child Rights Series 1, 1.

[86] Ibid.

[87] Ntarangwi (n84 above) 1.

context where a child was part of a wider network of people that extended beyond the nuclear and extended families to include members of the child's community.'[88] The implications of these African proverbs were that once a child was born, he or she automatically belonged to the wider family, clan or community.[89] The cultural practice of parental role sharing ensured the continuity and solidarity of the family. Furthermore, it ensured that children developed a keen sense of responsibility from an early age.[90]

The notion that the child belonged to a wider family and not just the biological parents is also expressed in the African idiom 'a child belongs to everyone' or 'a child belongs to a village.'[91] Thus, the African conception of 'parenthood' was wide in scope to include not only the biological parents of the child, but the extended family members and the community members.[92] As Hogbacka rightly pointed out 'there is the mother who gave birth to you, but a mother is also whoever brings you up'.[93]

Whereas labour migration and globalisation have had an impact on the structure and functions of the African traditional family, the extended family still exists and continues to play its role as the pillar of childcare in Africa. In the African context, it has been argued that practices such as customary or informal adoption,[94] child fostering[95] and the role that the extended family

[88] Ibid.
[89] Baloyi (n84 above) 25; A Norman 'Children's Rights in the Time of AIDS in Kwazulu-Natal, South Africa' in A Twum-Danso Imoh and N Ansell *Children's Lives in an Era of Children's Rights: The Progress of the Convention on the Rights of the Child in Africa* (2014) 39 and P M Amos 'Parenting and Culture: Evidence from Some African Communities' in M L Seidl-de-Moura *Parenting in South American and African Contexts* (2013) 68.
[90] Amos (n89 above) 68-69.
[91] R Songca 'Evaluation of Children's Rights in South African Law: The Dawn of an Emerging Approach to Children's Rights' (2011) XLIV *Comparative Law Journal of Southern Africa* 340, 340; Armstrong (n85 above) 11 and T Kaime *The African Charter on the Rights and Welfare of the Child: A Socio-Legal Perspective* (2009) 114.
[92] M Jokhan 'Parental Absence as a Consequence of Migration: Reviewing the Literature' (2008) 57 (2) *Crisis, Chaos and Change* 89, 90.
[93] R Hogbacka 'Intercountry Adoption, Countries of Origin, and Biological Families' (2014) Working Paper No. 598, Report for Thematic Area 2: International Forum on Intercountry Adoption and Global Surrogacy 1, 5.
[94] Committee on the Rights of the Child, State Party Report: Ghana, CRC/C/3/Add.39, 19 December 1995, para 74; Committee on the Rights of the Child, State Party Report: Burkina Faso, CRC/C/3/Add.19, 15 July 1993, para 46 (b); Committee on the Rights of the Child, State Party Report: South Africa, CRC/C/ZAF/2, 17 March 2015, para 202; Committee on the Rights of the Child, State Party Report: Swaziland, CRC/C/SWZ/1, 16 February 2006, para 270; Committee on the Rights of the Child, State Party Report: Ethiopia, CRC/C/8/Add.27, 12 September 1995, para 81. Committee on the Rights of the Child, Concluding Observations: South Africa, CRC/C/15/Add.122, 22 February 2000, para 26 and Committee on the Rights of the Child, Concluding Observations: Liberia, CRC/C/15/Add.236, 1 July 2004, para 38 and 39 (a).
[95] L K Bachan 'Anticipatory Child Fostering and Household Economic Security in Malawi' (2014) Demography 1157, 1157-1188; M J Grant and S Yeatman 'The Relationship between Orphanhood and Child Fostering in Sub-Saharan Africa, 1990s-2000s' (2012) 66 (3) *Population Studies Cambridge* 279, 279-295; E Nyasani, E Sterberg

plays as a form of informal social security[96] are evidence of the continuation of the broader conception of parenthood in many African societies.

Another merit of the diversity model is that it focuses on relationships that are beneficial to the child. This ensures that the child's best interests are adequately protected. Furthermore, it focuses on the functions of the family as opposed to the family form.

4.2.3. Applicability of the diversity model to inter-country adoption

The diversity model has implications for adoptability. For instance, as Chapters Three and Six demonstrate, the orphan status of a child does not automatically qualify the child as adoptable, but that there should be no extended family members who are willing to adopt the child.[97] It can therefore be argued that the right to alternative care (or adoption) does not immediately apply upon the loss of parental care, but only becomes applicable when there are no available, willing or suitable relatives that have taken responsibility of the child upon the loss of parental care. This is particularly significant in the African context where orphans are normally cared for by members of the extended family. Thus, an assessment should be undertaken to determine whether there are relatives or other family members who would take permanent responsibility of the child.

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and H Smith 'Fostering Children affected by AIDS in Richards Bay, South Africa: A Qualitative Study of Grandparents' Experiences' (2009) 8 (2) *African Journal of AIDS Research* 181, 181; S Beck, P De Vreyer, S Lambert, K Marazyan and A Safir 'Child Fostering in Senegal' (2014), available at http://www.cepremap.fr/depot/docweb/docweb1403.pdf, accessed on 21 September 2018 and R Serra 'A Theoretical Framework for Child Fostering Arrangements in Sub-Saharan Africa' (2000), available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.196.7821&rep=rep1&type=pdf, accessed on 21 September 2018.

[96] E. Kaseke, 'Informal Social Security in Southern Africa: Developing a Framework for Policy Intervention' (2008) Paper Prepared for Presentation at the International Conference on Social Security 1 at 3, noting that most countries in the SADC region, with the exception of Mauritius, do not have comprehensive social security systems in place; E. Kaseke, 'Informal Social Security in Southern Africa: Developing a Framework for Policy Intervention' (2008) Paper Prepared for Presentation at the International Conference on Social Security1, 1; C.I. Tshoose 'The Impact of HIV/AIDS regarding Informal Social Security: Issues and Perspectives from a South African Context' (2010) 13 (3) *Potchefstroom Electronic Law Journal* 408 at 423, observing that 'many of the poor in South Africa live in rural areas, where there is an acute shortage of basic social services and infrastructure'; E. Kaseke 'Social Exclusion and Social Security: The Case of Zimbabwe' (2008) 18 *Journal of Social Science Development in Africa* 33, 33, noting that many of the poor in Zimbabwe reside in rural areas and are engaged in subsistence farming. G Foster 'Under the Radar: Community Safety Nets for AIDS-affected Households in Sub-Saharan Africa' (2007) 19 (1) AIDS Care 54, 55; Z. Mokomane, 'Role of Families in Social and Economic Empowerment of Individuals' (2012) Report Presented at the United Nations Expert Group Meeting on Promoting Empowerment of People in Achieving Poverty Eradication, Social Integration and Full Employment and Decent Work For All 1, 4; D. Canning, M. Mitchell, D. Bloom and E.L. Klein, 'The Family and Economic Development' (1994), available at http://info.worldbank.org/etools/docs/library.pdf, accessed 20 January 2018.

[97]

Another ramification that the recognition of the extended family members would have on the adoption process is that willing kinship caregivers would need to be informed that a child who is a relative is being placed for adoption. A mandate requiring relatives to be informed is most supportive of the rights and interests of the parents.

The diversity model also has implications for consent to adoption. Chapters Three and Five of the thesis show that consent for the purposes of adoption should be obtained from both parents of the child irrespective of the nature of the union that brought about the child, and where there are no biological parents, other persons in charge of the care of the child. Given that the diversity model protects both biological parents of the child whether they are married, the law should regulate whether the father of the child born out of wedlock can participate in the adoption proceedings. Not only is such regulation in the interests of the father and the child, it also protects the rights of adoptive parents from contested adoptions.

Under the diversity model, decision-making in respect of the child is shared among or can be exercised by all persons considered as the child's parents regardless of whether they are married or not or if there is a biological or genetic connection to the child. Part of the reason is that the diversity model gives legal status to all persons considered as the child's parents. In the context of inter-country adoption, it is important to note all persons considered as the child's parents have the right to participate in all decision-making concerning the care and adoption of the child. This means that all decision-making concerning the care and adoption of the child must consider the rights and interests of all persons recognised as the child's parents.

For the reasons noted above, this thesis argues that the diversity model is the best model for guaranteeing the protection of the rights of parents in inter-country adoption in an African context.

5. CONCLUSION

This chapter set out to review the theories of the parent-child relationship to adapt a model that would guarantee that the rights of parents are protected in inter-country adoption. It was established that the fiduciary theory is the best model for the protection of the rights of parents in inter-country adoption. In relation to inter-country adoption, this insight revealed three fundamental issues: that an adoption system for the protection of the rights of parents should

establish the conditions in which children could be considered in need of alternative care or adoption, the procedures in which such a determination can be made and challenged in case of disputes and grievances. This approach is consistent with the principles of adoptability, consent to adoption and post-adoption procedural rights discussed in Chapters Three and Five to Seven of the thesis.

The fiduciary theory also recognises that parents have the right to enjoy their family life. In relation to inter-country adoption, the point was made that the recognition of the parents right to enjoy their family life has implications for adoptability and consent for adoption. In respect of the latter, as Chapters Three and Five demonstrate, an adoption should not be authorised without the consent of the parents unless such consent is not required. Furthermore, priority should be given to parents to care for their children before resorting to adoption. In addition, as Chapter Six demonstrates, the point was made that child abandonment or neglect does not automatically qualify the child for adoption, but that efforts to preserve the family should be explored before adoption. Finally, the recognition of parents right to enjoy their family life would have on the adoption process is that parents have the right to contest an adoption order in cases of disputes and grievances.

The downside of this theory is that it does not provide any theoretical guidance in terms of the grounds in which an adoption decision can be challenged. In addition, the fiduciary theory is silent on the way consent should be given to ensure that the rights of parents are protected. Furthermore, the fiduciary theory is silent on the issue of counselling parents prior to consenting to an adoption. Nevertheless, Chapter Three takes up the issue further and elaborates on the issue of consent to adoption.

The chapter also examined the theoretical approaches to the notion of parenthood to adapt a model that serves the rights and interests of parents in inter-country adoption. It was established that the diversity model is the best model for the protection of the rights of parents in inter-country. This is because it adopts a broad conceptualisation of the notion of parents which protects all forms of family relationship including extended family members and fathers of children born out of wedlock. This approach is consistent with international law as the next chapter demonstrates.

In the context of inter-country adoption, this insight revealed three fundamental issues with respect to adoptability and consent for the purposes of adoption. First, as shown in Chapters Three and Six, the orphan status of a child does not automatically qualify the child as adoptable, but that there should be no extended family members who are willing to care for the child. Therefore, the right to alternative care (or adoption) does not immediately apply upon the loss of parental care, but only becomes applicable when there are no available, willing or suitable relatives that have taken responsibility of the child upon the loss of parental care.

Second, that willing kinship caregivers would need to be informed that a child who is a relative is being placed for adoption.

Third, as Chapters Three and Five demonstrate, consent for the purposes of adoption should be obtained from both biological parents of the child and where such parents are not available, other persons in charge of the care of the child.

The next chapter engages the international and regional legal framework for the protection of the rights of parents in inter-country adoption. The chapter will also examine the extent to which it draws upon the theories discussed in this chapter.

CHAPTER THREE: INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK FOR THE PROTECTION OF THE RIGHTS OF PARENTS IN INTER-COUNTRY ADOPTION

1. INTRODUCTION

In Chapter Two, the discussion on the theoretical perspectives of the parent-child relationship underscored three crucial elements of an inter-country adoption system that respects the rights of parents: that it should establish the grounds in which children could be considered in need of alternative care or adoption, the procedures by which such a determination can be made and challenged in case of disputes and grievances. Furthermore, it was noted that the diversity model is the best model to ensure that the rights of parents in inter-country in an African context are adequately protected. This is because it adopts a broad conception of parenthood which protects all forms of parenthood.

This chapter examines the international and regional legal framework for the protection of the rights of parents in inter-country adoption. It seeks to answer two important questions: What are the fundamental principles that should underpin an inter-country adoption system that protects the rights of parents in inter-country adoption in an African context? What are the components that a legal framework ought to incorporate to foster the protection of the rights of parents in inter-country adoption? Answers to these questions would advance the thesis as far as they provide the standards and principles necessary for a robust system of inter-country adoption which protects the rights of parents in inter-country adoption in an African context.

The chapter will also examine the extent to which international law draws upon the theories discussed in the previous chapter. It demonstrates that the international legal framework on inter-country adoption reflects the aspirations of the fiduciary theory and diversity model in several ways. First, the adoptability principle gives effect to the fiduciary model in that it establishes the conditions under which children could be considered adoptable and the procedures in assessing the adoptability of a child.

The international legal framework also builds upon the fiduciary theory in that it elaborates on issues such as how consent should be given for the purposes of an adoption and counselling the persons whose consent is required for the adoption of a child. Thirdly, the international

legal framework underscores that there should be mechanisms in which an adoption decision can be challenged in cases of disputes and grievances (post-adoption procedural rights). It also clarifies the grounds in which an adoption decision can be challenged. Lastly, the diversity model is reflected in the broad conception of parents in international law, the wide range of persons who can consent to the adoption of the child and the adoptability principle.

The chapter first discusses parents' rights in international law, with a particular focus on the right to family life, and its implications for protecting the rights of parents in inter-country adoption. This discussion is relevant to the thesis because it lays the foundation for protecting the rights of parents in inter-country adoption. Furthermore, it has a bearing on protecting the rights of parents in inter-country adoption. This is followed by a discussion on how international law conceives of the term 'parents' and explains the implications for the protection of the rights of parents in inter-country adoption in an African context. This discussion is relevant to the thesis on three grounds. First, it defines whose rights should be protected in inter-country adoption and determines the scope of application of the international standards on inter-country adoption. Second, it determines who benefits from the protection rights in the context of inter-country adoption. Third, it assists the thesis to make an argument that an inter-country adoption system that respects the rights of parents should adopt a broad conceptualisation of the notion of 'parents' which protects all forms of family relationships. Then, an examination of the principles and rules for the protection of the rights of parents in inter-country adoption.

This Chapter concludes by highlighting the conceptual issues that are further discussed in Chapters Five to Seven, extrapolated from the country studies. The conclusion reveals that the principles of consent to adoption, adoptability and post-adoption procedural rights are critical to protecting the rights of parents in inter-country adoption in an African context. These are consistent with the fiduciary theory discussed in Chapter Two. The conclusion further highlights that to ensure that the rights of parents are protected in inter-country adoption, the law must sufficiently incorporate these principles.

In particular, there has to be clear provisions establishing the grounds in which children could be considered in need of alternative care or adoption. The law should establish the conditions under which children are considered adoptable and provide a clear and detailed definition of

children to be declared genuinely adoptable. In addition, questions on who should give consent, how should consent be given and counselling have to be made noticeably clear in the law.

Second, the legal framework must provide the procedures by which such a determination can be made. Questions of who determines the adoptability of a child, family tracing and the criteria for children to be declared genuinely adoptable have to be made clear in the law.

Third, the legal framework ought to provide mechanisms in which the validity of an adoption can be challenged in case of disputes and grievances.

2. PARENTS RIGHTS IN INTERNATIONAL LAW

Under international human rights law, parents have rights that should be respected and protected.[1] In the category of parents' rights include the right to respect for their family life. The right to family life has direct implications for the protection of the rights of parents in inter-country adoption. Below is a discussion of the right to family life and its implications in the context of inter-country adoption.

2.1. The right to family life

The right to family life is the right of all individuals to have their established family life respected and to maintain family relationships. This right is recognised in several international and regional human rights instruments, including the Convention on the Rights of the Child (CRC),[2] the International Covenant on Civil and Political Rights (ICCPR),[3] the African Charter on the Rights and Welfare of the Child (ACRWC)[4] and the African Charter on Human and Peoples' Rights (ACHPR).[5] At the regional level, in Europe, article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[6] establishes a fundamental right to respect for private life and family life. Therefore, states have

[1] Some of these rights include the right to privacy, the right to make decisions concerning the child and the right to equality within the family.
[2] Adopted and Opened for Signature, Ratification and Accession by the General Assembly Resolution 44/25 of 20 November 1989, entry into force on 2 September 1990, preamble, para 5.
[3] Adopted and Opened for Signature, Ratification and Accession by the General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, articles 17 and 23.
[4] Adopted by the Organization of African Unity in 1990 and entered into force in 1999, article 18.
[5] Adopted by the 18th Assembly of Heads of State and Government of the Organization of the African Unity on 27 June 1981, entered into force on 21 October 1986.
[6] Adopted and Opened for Signature in Rome on 4 November 1950 and came into force on 3 September 1953.

the obligation to ensure that this right is fully protected, respected and fulfilled in relation to parents.

The protection of the right to family life requires that states not only refrain from actions which could result in family separation, but also take positive measures to maintain the family unit, including the reunion of separated family members.[7] This is why article 9 of the CRC limits the power of the state to separate children from their parents against their will (unless such separation is in accordance with applicable laws and procedures and is authorised by competent authorities subject to judicial review).[8] In cases of separation, such separation must be for the 'shortest period of time'.[9] This approach is consistent with parents right to respect for their family life. The fact that separation of a child from his or her parents should be for the shortest possible duration has been repeatedly affirmed by the jurisprudence of the European Court of Human Rights (ECtHR). In *Kutzner v Germany*,[10] the ECtHR held that 'a court order removing children from their parents who had an intellectual disability should be regarded as a temporary measure only and that the state must work towards reunification'.[11]

Further, article 19 (2) of the ACRWC provides that 'every child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis'. Under article 9 (3) of the CRC, States Parties bear the obligation to

[7] Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and the CRC Committee, Joint General Comment No 4 (2017) of the Committee on the Protection of Migrant Workers and their Families and No 23 (2017) of the Committee on the Rights of the Child on State Obligations regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return, UN Doc CMW/C/GC/4-CRC/C/GC/23, 16 November 2017, para 27.

[8] Article 9 (1) of the CRC and article 19 (1) of the ACRWC. See also Committee on the Rights of the Child, Concluding Observations: Belarus, UN Doc CRC/C/BLR/CO/3-4, 8 April 2011, para 43 where the CRC Committee recommended that 'the State party strengthen measures to provide support services to parents and legal guardians in order to enhance their capacities for the performance of their child-rearing responsibilities, recognizing the family unit as the natural environment for the growth and well-being. Moreover, Presidential Decree No. 18 should be transformed into a law, which should establish all the necessary safeguards to ensure that children are not separated from their parents except when such separation is necessary for the best interests of the child' and Committee on the Rights of the Child, Concluding Observations: Ukraine, UN Doc CRC/C/UKR/CO/3-4, 21 April 2011, para 45 where the Committee on the Rights of the Child recommended that 'the State party amend article 143, paragraph 3, of the Family Code in order to bring it into line with article 9 of the Convention. It urges the State party to intensify its efforts to provide the necessary support and resources to strengthen the family, in particular by moving from punitive measures with respect to neglect of parental duties to strengthening support systems and social benefits for families with children in order to enhance their capacity for the performance of their child-rearing responsibilities'.

[9] Guidelines for the Alternative Care of Children, Resolution Adopted by the General Assembly, UN Doc A/RES/64/142, 24 February 2010, para 14.

[10] (2002) 35 EHRR.

[11] Para 76.

'respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests'. Moreover, article 10 (1) of the CRC requires States Parties to facilitate family reunification in a 'positive, humane and expeditious manner' and to ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of the family'.[12]

In its General Comment on the right of the child to have his or her best interests taken as a primary consideration, the Committee on the Rights of the Child (CRC Committee) has also underscored the importance of family preservation and reunification measures.[13] It has explained that:

> Given the gravity of the impact on the child of separation from his or her parents, such separation should only occur as a last resort measure, as when the child is in danger of experiencing imminent harm or when otherwise necessary; separation should not take place if less intrusive measures could protect the child. Before resorting to separation, the State should provide support to parents in assuming their parental responsibilities, and restore or enhance the family's capacity to take care of the child, unless separation is necessary to protect the child. Economic reasons cannot be a justification for separating a child from his or her parents.[14]

Similarly, the jurisprudence of the European Court of Human Rights (ECtHR) has stressed the importance of preventing family separation and preserving family unit.[15] For instance, in *KA v Finland*,[16] the ECtHR held that 'the failure to take sufficient steps to reunite a family was a violation of article 8'.[17] Similarly, in *Saviny v Ukraine*,[18] the ECtHR noted that a state has a 'positive obligation to make serious and sustained efforts to facilitate the reuniting of children

[12] See also Committee on the Rights of the Child, Concluding Observations: Norway, UN Doc CRC/C/15/Add.126, 28 June 2000, para 33 where the CRC Committee recommended that 'the State party establish a standard procedure through which children and other concerned persons such as their parents or legal guardians, are informed of the possibilities and procedures for family reunification and for these procedures to be implemented systematically in accordance with set guidelines'.
[13] Committee on the Rights of the Child, General Comment No 14 (2013) on the Right of the Child to have his or Best Interests
[14] Para 61.
[15] *Marckx v Belgium* Application No 6833/74, ECtHR, 13 June 1979, paras 31 and 45. See also Airey v Ireland (1979) 2 EHRR 305 (ECtHR) para 32; *Abudulazi Calabes and Balkandali* v United Kingdom Application No 9214/80, 9473/81, 9474/81 (28 May 1985) (ECtHR); Sen v The Netherlands Application No 31465/96 (21 December 2001) (ECtHR) and *Tuquab-Tekle v The Netherlands* Application No 60665/00 (1 December 2005).
[16] Application No 27751/95 (14 January 2003).
[17] Ibid.
[18] Application No 39948/06.

with their natural parents'.[19] In *Marckx v Belgium*,[20] the ECtHR emphasised that ensuring respect for family life 'implies an obligation for the state to act in a manner calculated to allow these ties to develop normally' and 'to allow those concerned to lead a normal family life'.[21] Also, in *Olsson v Sweden*,[22] the ECtHR held that 'declaring that the mutual enjoyment by parents and children of each other's company constitutes a fundamental element of family life' and 'it is an inference of a very serious order to split up a family'.[23]

The protection of the right to family life also requires states to refrain from arbitrary interference in the right to family life. Thus, article 17 of the ICCPR and article 8 (2) of the ECHR establish a prohibition on arbitrary or unlawful interference with the family. Further, article 17 (2) of the ICCPR affirms the right of everyone to 'protection of the law against such interference or attacks'. States should therefore refrain from actions which undermine the enjoyment of the right to family life and family unity.

Although the possibility to interfere with this right exists, for it to be legal, it should not be applied arbitrarily, should be necessary in a democratic society and should have a legitimate aim.[24] In *Vavricka and Others v the Czech Republic*[25] and *Klaus Muller v Germany*,[26] the ECtHR further noted that 'any interference by a public authority with an individual's right to respect for private and family life must be in accordance with the law'.

The obligation to respect which is contained in several human rights instruments is related to an obligation to refrain from interference with the enjoyment of a person's rights, a so-called negative obligation.[27] The obligation to respect the right to family life includes non-interference

[19] Para 52.
[20] Application No 6833/74, paras 31 and 45.
[21] Ibid.
[22] (No 1) (1988) 11 EHRR 259.
[23] Paras 59 and 72.
[24] Article 8 (2) of the ECHR. See also article 17 (1) and (2) of the ICCPR.
[25] Application No 47621/13, paras 266-269.
[26] Application No 24173/18, paras 48-51.
[27] Human Rights Committee, General Comment No. 31 [80] The Nature of General Legal Obligations Imposed on States Parties to the Covenant, CCPR/C/21/Rev1/Add.13, 26 May 2004, para 6, noting that 'the legal obligation under article 2, paragraph 1, is both negative and positive in nature. States Parties must refrain from violation of the rights recognized by the Covenant'. See also J Tobin and S Varadan 'Article 5: The Right to Parental Direction and Guidance Consistent with a Child's Evolving Capacities' in J Tobin *The UN Convention on the Rights of the Child: A Commentary* (2019) 164.

with and non-violation of rights.[28] It requires states to refrain from arbitrary or unlawful interference with the rights of parents to enjoy their family life.[29]

To further ensure that parents fully enjoy their right to family life, the state is required to assist parents in their child rearing responsibilities. In terms of article 18 of the CRC and article 20 (2) of the ACRWC, states shall 'render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children'. Some of the measures recommended by the CRC Committee include 'education, counselling and community-based programmes for parents'[30] and 'financial assistance, psychological and social support and guidance to parents' to prevent abandonment and the need for children to be removed from their families'.[31] The CRC Committee also recommends 'appropriate assistance and support services to parents in the performance of their child-rearing responsibilities', 'universal and targeted services for families in vulnerable situations to strengthen their parenting skills and include them in social assistance programmes'.[32]

The UN Guidelines for the Alternative Care of Children (UN Guidelines),[33] also indicate that family support measures should 'address the root causes of child abandonment, relinquishment and separation of a child from his or her family' by ensuring 'the right to birth registration, and access to adequate housing and to basic health, education and social welfare services, as well as by promoting measures to combat poverty, discrimination, marginalization and stigmatization'.[34] These measures are intended to maintain family relationships.

[28] G Kamchedzera *A Commentary on the United Nations Convention on the Rights of the Child, Article 5: The Child's Right to Appropriate Direction and Guidance* (2012) 26.
[29] Tobin and Varadan (n27 above) 164.
[29] Kamchedzera (n28 above) 26.
[30] Committee on the Rights of the Child, Concluding Observations on the Combined Third and Fourth Periodic Report of Canada, UN Doc CRC/C/CAN/CO/3-4, 6 December 2012, para 56.
[31] Committee on the Rights of the Child, Concluding Observations on the Fifth Periodic Report of Pakistan, UN Doc CRC/C/PAK/C0/5, 11 July 2016, para 41.
[32] Committee on the Rights of the Child, Concluding Observations on the Combined Third and Fourth Periodic Report of China, UN Doc CRC/C/CHN/CO/3-4, 29 October 2013, para 49.
[33] Guidelines for the Alternative Care of Children, Resolution Adopted by the General Assembly, UN Doc A/RES/64/142, 24 February 2010.
[34] Guidelines for the Alternative Care of Children, para 32.

2.2. Applicability of the right to family life to inter-country adoption

In the context of inter-country adoption, the recognition of parents right to respect for their family life has implications for adoptability, consent to adoption and post-adoption procedural rights. For instance, as shown in Chapter Six, the fact that the child has been abandoned or neglected does not automatically qualify the child for adoption. In the context of abandoned or neglected children, ensuring that family preservation and reunification measures are explored is an essential initial step to protecting the rights of parents before placing the child for adoption. Therefore, an adoption should not be considered where there is a reasonable possibility of successful tracing and family reunification is in the child's best interests.

One of the legal as well as practical implications of the recognition of the right to family life is that that priority should be given to parents to care for their children before resorting to alternative care, unless it is not in the child's best interests to do so.[35] This means that family tracing and reunification efforts should be explored before a child is placed for adoption. This approach resonates with the fiduciary theory discussed in Chapter Two and the adoptability principle. In this context, the Resolution on the Rights of the Child adopted by the General Assembly urges States to take effective action to provide the necessary support to families, to prevent the unnecessary separation of children from their parents and to ensure that the removal of children from the care of their family is seen as a measure of last resort.[36]

Another ramification that the recognition of the right to family life would have on the adoption process is that an adoption should not be authorised without the consent of the parents (or if it is contrary to the expressed wishes of the parents) unless such consent is not required. For instance, in cases where the parents of the child are dead, unknown, have abandoned the child and their whereabouts are unknown.

Furthermore, as shown in Chapter Seven of the thesis, it also suggests that parents have the right to participate in adoption proceedings and to challenge the adoption in case of grievances and disputes. Finally, it encourages interventions that preserve the family unit unless it

[35] See section 4.2.3 of Chapter Two.

[36] Resolution adopted by the General Assembly on 18 December 2019 on the Rights of the Child, UN Doc A/RES/74/133, 20 January 2020, para 34 (e). See also Committee on the Rights of the Child, General Comment No 14 on the Right of the Child to have his or her Best Interests taken as a Primary Consideration (n13 above) paras 61 and 63.

threatens the best interests of the child. Accordingly, the right to family life serves to limit interferences with the family unit. More importantly, it underscores the fact that all decision-making concerning the care of the child should consider the rights and duties of the child's parents.

In sum, the parents right to respect of their family life has a direct bearing on inter-country adoption. Any robust system for the protection of the rights of parents in inter-country adoption should give due respect to the rights of parents to enjoy their family life.

2.3. The limitation of parental rights

International law recognises that parents do not always act in the best interests of their children and that children may be exposed to acts of violence, abuse or neglect by their parents.[37] This explains why, for instance, article 19 (1) of the CRC requires States Parties to 'take all appropriate legislative, administrative, social and educational measures' to protect children from all forms of violence, abuse, neglect or exploitation 'while in the care of parent(s), legal guardian(s) or any other person who has the care of the child'.[38] Furthermore, article 7 (1) of the CRC protects the child's right 'as far as possible' to 'know and be cared for by his or her parents'. In addition, article 18 (1) of the CRC and article 20 (1) of the ACRWC require parents in providing the necessary care for their children to ensure that 'the best interests of the child will be their basic concern'. Acknowledging the need to protect the best interests of the child, the CRC Committee has noted that '[a]ll decision-making concerning a child's care, education, etc. must take account of the best interests of the child principle, including decisions by parents, professionals and others responsible for children'.[39] Thus, any act or omission on the part of the parents that is inconsistent with the rights of the child will be contrary to the best interests of the child.

[37] Committee on the Rights of the Child, General Comment No. 13 (2011) The Right of the Child to be Free from All Forms of Violence, UN Doc CRC/C/GC/13, 13 April 2011, para 36 (a) entitled 'perpetrators of violence' noting that 'children may be subjected to violence by primary or proxy caregivers and/or by others against whom their caregiver does not provide protection (for example neighbours, peers and strangers'. See also G Lansdown 'The Evolving Capacities of the Child' (2005) UNICEF Innocenti Research Centre 1, ix.
[38] See also articles 33; 35; 37; 40 of the CRC and 16 (1); 17; 22 and 29 of the ACRWC.
[39] Committee on the Rights of the Child, General Comment No. 7 (2005) Implementing Child Rights in Early Childhood, UN Doc CRC/C/GC/7, Rev.1, 20 September 2006, para 13 (a).

The concept of the best interests of the child has profound implications for the parent-child relationship. First, it acknowledges that children are holders of rights entitled to protection by the state. It disaggregates the rights of children from the rights of their parents. This creates a direct relationship between the child and the state, which challenges the presumption that parents have absolute rights over their children.[40] The fact that parental rights and responsibilities are not absolute is further stressed by the jurisprudence of the European Court of Human Rights (ECtHR) in *Nielsen v Denmark*[41] where it was held that 'parental rights and responsibilities protected by the European Convention on Human Rights and Fundamental Freedoms (ECHR) within the ambit of the right to family life, are not unlimited, and a parent is not entitled to use his/her right to family life in ways that could harm a child's development'.

The best interests of the child principle empowers the state to intervene to protect children if parents undermine the rights of the child.[42] For example, article 9 (1) of the CRC and 19 (1) of the ACRWC prohibits the separation of a child from his or her parents against their will unless 'such separation is necessary for the best interests of the child'. A child who is separated from his or her parents has the right 'to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests'.[43] Moreover, children who are 'temporarily or permanently deprived' of their family environment or 'in whose best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State'.[44]

Under international human rights law, the state has an obligation to protect children from violence, abuse, neglect or exploitation while in the care of their parents.[45] Abusive and neglectful parents have the potential to cause physical, emotional and psychological harm to their children, and the state may intervene by taking away the child and putting him or her up for adoption or alternative care.[46] Although international law acknowledges that parents have

[40] M Couzens 'Autonomy Rights versus Parental Autonomy' in A Alen; H Bosly; M De Bie and J Vande Lanotte *The UN Children's Rights Convention: Theory meets Practice* (2007) 425.
[41] [1998] ECHR 23, paras 61 and 72. See also *Johansen v Norway* [1996] ECHR 31, para 78.
[42] Ibid.
[43] Article 9 (3) of the CRC.
[44] Article 20 (1) of the CRC and article 25 (2) (a) of the ACRWC.
[45] Articles 3 (2); 19 (1); 33; 35; 37; 40 of the CRC and 16 (1); 17; 22 and 29 of the ACRWC.
[46] See sections 2.1 and 3.1 of Chapter Two.

rights that should be protected, it allows the state to intervene when parents fail to provide reasonable care that is expected from them.

In its General Comment on the right of the child to have his or her best interests taken into account, the CRC Committee has further noted that when determining the best interests of the child, the need to protect children from harm should be taken into consideration.[47] Furthermore, the best interests of the child also includes consideration of the child's safety and protection from all forms of violence, abuse, injury and exploitation.[48] Thus, where parents fail in their duties, abuse or neglect the child, the state should intervene to restrict parental rights and the child may be placed in alternative care (or adoption) when circumstances so require.

In line with the fiduciary theory discussed in Chapter Two of this study, the best interests of the child principle underlines the fact that the state as *parens patriae* of all children in its jurisdiction shares the responsibility of parenting with parents.[49] As such, it has an interest in protecting the welfare of children.[50] Thus, where parents endanger the well-being of the child, the state has a duty to intervene to protect the child. In such a case, the state, as *parens patriae*, is permitted to remove the child from the care of his or her parents and to provide alternative care.[51] Protection rights therefore allow the state, acting in the best interests of the child, to intervene to protect children from harm caused by their parents. Other grounds that would justify providing alternative care is if the child has been abandoned, orphaned or if the parents have voluntarily consented to the adoption of their child.[52]

Although the state has a duty to protect children from parental harm, article 9 of the CRC limits the power of the state to separate children from their parents unless such a decision is made by 'competent authorities subject to judicial review' and 'in accordance with applicable law and procedures'. This means that there should be clear laws and procedures in which such a

[47] Committee on the Rights of the Child, General Comment No 14 (n13 above) para 71.
[48] Committee on the Rights of the Child, General Comment No 14 (n13 above) para 73.
[49] E M Chiu 'The Culture Differential in Parental Autonomy' (2008) *University of California Davis Journal* 1773, 778.
[50] See sections 2.1 and 3.1 of Chapter Two.
[51] Article 20 (2) of the CRC and article 25 (2) (a) of the ACRWC. See also CCPR, General Comment No. 17: Rights of the Child, para 6, noting that '[m]oreover, in cases where the parents and the family seriously fail in their duties, ill-treat or neglect the child, the state should intervene to restrict parental authority and the child may be separated from his family when circumstances so require'. See also section 4.2 of Chapter Two.
[52] See section 2.1 of Chapter Two and section 5.3.3 of Chapter Three.

determination can be made.[53] It is submitted that this approach reinforces the fiduciary theory discussed in Chapter Two.[54] In its concluding observations to Lithuania's State Party report, the CRC Committee expressed concern at the large number of children removed from parental care.[55] It recommended that 'the State party take all possible measures, including the establishment of precise criteria for the limitation of parental rights, in order to adequately protect parental rights and the parent-child relationship'.[56]

The decision to separate a child from his or her parents should be made by 'competent authorities subject to judicial review'. The term 'competent authorities' is undefined. However, the CRC Committee in its concluding observations to national reports has recommended that social services should be given the opportunity to remove children from their parents and that the authority should have the necessary skills to determine on the basis of the evidence what is in the best interests of the child.[57] In addition, the decision should be reviewed by a judicial body to ensure that the rights of all interested parties are protected.[58]

Article 9 (2) of the CRC further requires all interested parties' to be given an opportunity to participate in proceedings involving the separation of a child from his or her parents and to make their views known. As noted above, this means that both parents of the child or members of the extended family have the right to participate in the proceedings and to challenge the decision.[59]

[53] R Hodgkin and P Newell *Implementation Handbook for the Convention on the Rights of the Child* (2007) 127.
[54] See section 2 of Chapter Two.
[55] Committee on the Rights of the Child, Concluding Observations: Lithuania, UN Doc CRC/C/LTU/CO/2, 17 March 2006, para 39.
[56] Committee on the Rights of the Child, Concluding Observations: Lithuania (n55 above) para 40.
[57] Committee on the Rights of the Child, Concluding Observations: St. Vincent and Grenadines, UN Doc CRC/C/15/Add. 184, 13 June 2002, para 39 (d) and Committee on the Rights of the Child, Concluding Observations: Slovenia, UN Doc CRC/C/15/Add. 230, 26 February 2004, para 31.
[58] Ibid.
[59] Guidelines for the Alternative Care of Children (n33 above) para 47 noting that parents should be assured of the right to appeal and to appropriate legal representation; *W v United Kingdom Series* (1987) 10 EHRR 29 para 64 where the European Court held that 'the parents must have been involved in the decision-making process seen as a whole to a degree sufficient to provide them with the requisite protection of their interests'; *MD v Malta* App no 64791/10 (17 July 2012) where the European Court found that 'parents' and children's rights to a fair hearing were violated by not being able to access a court to contest a care order'; *B v Romania (No 2)* App no 1285/03 (19 February 2013) where the European Court found that 'a mother's right to participate in the decision-making process concerning the placement of her children in residential care because she was admitted to a psychiatric hospital were violated'.

In the context of inter-country adoption, it could be argued that the establishment of precise criteria and procedures for the limitation of parental rights is crucial in order to adequately protect the rights of parents in inter-country adoption.

3. THE CONCEPT OF PARENTS IN INTERNATIONAL LAW

Since the thesis is interested in protecting the rights of parents, it is worthwhile to understand how international law conceptualises the notion of 'parents' and its implications for the protection of the rights of parents in inter-country adoption in an African context.

3.1. Who is a parent?

International law adopts a broad and diverse conception of parenthood, which takes into account diverse cultural, social, political and local systems. In the context of the CRC, article 5 provides as follows:

> States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

What immediately emerges from article 5 is that the CRC distinguishes between parents on the one hand and members of the extended family or community, legal guardians or persons legally responsible for the child on the other. Thus, the CRC recognises that the duty to provide 'direction and guidance' is not solely the responsibility of the biological parents, but also of members of the extended family or community, legal guardians or persons legally responsible for the child. It could therefore be argued that the expression 'parents' in article 5 is wide enough to include not only the biological or natural parents irrespective of the nature of the union that brought about the child's birth, but also those performing the social role of parents, including broader communal definitions such as grandparents, other relatives, guardians, care providers, neighbours and siblings. This is consistent with the diversity model discussed in

Chapter Two of the thesis.[60] According to the CRC, such a responsibility may emanate from local custom.

The CRC's *travaux préparatoires* show that contrary to earlier proposals to limit the scope of article 5, delegates ultimately decided to adopt a broader interpretation of the relevant article, which accommodates diverse family structures and cultures.[61] They further reveal that the notion of the extended family was included in order to accommodate the role that it plays as the 'main pillar of childcare' in many cultures and communities.[62] This is why States Parties, for instance, in determining the adoptability of a child are bound to ensure that 'the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians'[63] or 'parents, relatives or guardians'.[64]

Article 2 (2) of the CRC prohibits discrimination 'on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians or family members'. Article 22 (2) of the CRC also requires States Parties to 'trace the parents or other members of the family of any refugee child'. The approach taken by the CRC is flexible enough to accommodate the realities of the child and family in Africa.[65] Such flexibility is reflected in the way the Committee on the Rights of the Child (CRC Committee) has interpreted 'the term 'parents' broadly to include 'biological, adoptive or foster parents, or, where applicable, the members of the extended family or community as provided for by local custom'.[66]

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[60] See section 4.2 of Chapter Two.

[61] G Van Bueren *The International Law on the Rights of the Child* (1995) 71; S Detrick *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Preparatoires" (*1992) 161 and para 180 and S Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 118-119. See also Consideration 1989 Working Group E/CN.4/1989/48, pp 31-32 noting that at the conclusion of the first reading, several delegates voiced their support for the idea of giving recognition in the CRC to the concept of the extended family or community responsibility for the child. During the second reading, states acknowledged that 'the definition was restrictive, lacked conformity with social realities, and as such would have severely impeded the potential impact of the Convention. See also Committee on the Rights of the Child, General Comment No. 9 (2006) The Rights of Children with Disabilities, UN Doc CRC/C/GC/9, 27 February 2007, para 45.

[62] Detrick (n61 above) 161 and Detrick (n61 above) 122.

[63] Article 21 (a) of the CRC.

[64] Article 24 (a) of the ACRWC.

[65] M Ssenyonjo *Economic, Social and Cultural Rights in International Law* (2016) 399.

[66] Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and the Committee on the Rights of the Child, Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and No. 23 (2017) of the Committee on the Rights of the Child on state obligations regarding the human rights of children in the context of international migration in the countries of origin, transit, destination and return (n7 above) para 27. See also Committee on the Rights of the Children, General Comment No. 14 (2013) on the Right of the Child to have his or her Best Interests taken as a Primary Consideration (n13 above) para 59 and 60, noting that a child's right to 'maintain personal

In their analysis of article 5 of the CRC, Tobin and Varadan argue that the term 'parents' has three dimensions: the child's biological or genetic parents, persons with legal authority to care for the child, and social parents.[67] This understanding of parenthood allows a child to have multiple parents, including the possibility of having social parents.

A comparable provision can also be found in article 9 (2) of the ACRWC, which provides that '[p]arents, and where applicable, legal guardians shall have the duty to provide guidance and direction in the exercise of these rights having regard to the evolving capacities, and best interests of the child'. Unlike the CRC, there is no mention of members of the extended family or community in the ACRWC. The ACRWC only refers to the role of parents and legal guardians to provide 'guidance and direction'. However, it could be argued that the reference to the term 'parents' in article 9 (2) is wide enough to include the child's biological parents, as well as those caring for the child in a parental way.

In addition to article 5 and 9 (2) of the CRC and ACRWC, the term 'parents' can be found in several other provisions of the CRC and ACRWC.[68] For instance, article 7 of the CRC protects the child's right 'as far as possible' to 'know and be cared for by his or her parents'. Article 19 (1) of the ACRWC provides that every child has the right 'to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents'. Further, article 3 (2) of the CRC requires states in providing protection and care to the child to take 'into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her'. States are also required to recognise that parents

relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests' also 'extends to any person holding custody rights, legal or customary primary caregivers, foster parents and persons with whom the child has a strong personal relationship'; Committee on the Rights of the Child, General Comment No. 7 (2005) Implementing Child Rights in Early Childhood (n39 above) para 15 where it was observed that ' "family" here refers to a variety of arrangements that can provide for young children's care, nurturance and development, including the nuclear family, the extended family, and other traditional and modern community-based arrangements, provided these are consistent with children's rights and best interests' and Committee on the Rights of the Child, Day of General Discussion on Violence against Children, within the Family and in Schools (2001) para 701; noting that 'the references to 'family' (or to 'parents') must be understood within the local context and may mean not only the 'nuclear' family, but also the extended family or even broader communal definitions including grandparents, siblings, other relatives, guardians or care providers, neighbours, etc.'

[67] Tobin and Varadan (n27 above) 169. See also A Bainham 'Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions' in A Bainham; S D Sclater and M Richards *What is a Parent? A Socio-Legal Analysis* (1999) 37; C Barton and G Douglas *Law and Parenthood* (1995) 50-51 and J Tobin and F Seow 'Article 7: The Right to Birth Registration, a Name, Nationality, and to Know and be Cared for by Parents' in J Tobin *The UN Convention on the Rights of the Child: A Commentary* (2019) 327.

[68] For instance, articles 2 (2); 9; 10; 14(2); 19; 21; 22; 23; 24; 27; 29 and 40 of the CRC and articles 3; 11 (4); 19; 20; 23; 24 and 25 of the ACRWC.

or legal guardians have the primary responsibility for the child's upbringing and development.[69] According to the CRC Committee, 'any reference to parents' must be taken to include 'other caregivers'.[70]

The wider conception of 'parent' is also evident in provisions governing *loco parentis*. For instance, States Parties are obligated to 'take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child'.[71] They are also are bound to 'recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child'.[72] Further, article 27 (2) of the CRC provides that 'the parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development'. The expressions 'any other person who has the care of the child', 'those responsible for his or her care' as well as 'others responsible for the child' could be interpreted to include other persons caring for the child in a parental way.

Article 20 of the CRC also uses the expression 'family environment' in the context of children deprived of their family environment. It provides that 'a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance'. The phrase 'family environment' has been interpreted by Banda and Eekelaar to refer to a 'complex of relationships in which the family is situated'.[73]

[69] Article 18 (1) of the CRC.
[70] Committee on the Rights of the Child, General Comment No. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art. 24) UN Doc CRC/C/GC/15, 17 April 2013.
[71] Article 19 (1) of the CRC.
[72] Article 23 (2) of the CRC.
[73] F Banda and J Eekelaar 'International Conceptions of the Family' (2017) 66 *International and Comparative Law Quarterly* 1, 14.

The drafting history of article 20 of the CRC reveals that consideration was given to several proposals to clarify the scope of article 20.[74] Some of the proposals included terms such as 'parental care', 'biological family', 'natural family environment' or 'normal family environment'.[75] It was argued by delegates that the term 'parental care', and not 'family environment', was restrictive in that it failed to take into account kinship and extended family relations, which are prevalent in many cultures.[76] The final decision to include the least prescriptive terms 'family environment' and not 'parental care' can therefore be taken as an indication of the intention to look beyond 'parental care'.[77] This interpretation takes cognizance of the fact that in some cultures there are persons other than the biological parents that are responsible for childcare. To quote the CRC Committee:

> When considering the family environment, the Convention reflects different family structures arising from various cultural patterns and emerging familial relationships. In this regard, the Convention refers to the extended family and the community and applies in situations of the nuclear family, separated parents, single-parent family, common-law family and adoptive family.[78]

It can therefore be argued that the right to alternative care (or adoption) does not immediately apply upon the loss of parental care, but only becomes applicable when there are no available, willing or suitable relatives that have taken responsibility of the child upon the loss of parental care. Cantwell and Holzcheiter contend that 'the state has no obligation under article 20 to ensure alternative care for a child, who for whatever reason, is not in the care of his or her parents but is being looked after by a member of the extended family, whether spontaneously or at the behest of the parents'.[79]

In the context of inter-country adoption, the fact that the term 'parents' should be interpreted in a broad sense has implications for issues such as whose rights should be protected in the context of inter-country adoption and who benefits from the protection rights incorporated in international law. Kamchedzera and Henderson assert that the term 'parents' when properly

[74] Travaux Preparatoires (UN Doc E/1982/12/Add.1, pp 56-59, 1982), reproduced in Detrick (n61 above) 298.
[75] Ibid.
[76] N Cantwell and A Holzcheister *A Commentary on the United Nations Convention on the Rights of the Child, Article 20: Children Deprived of Their Family Environment* (2008) 59.
[77] Cantwell and Holzcheister (n76 above) 32.
[78] Committee on the Rights of the Child, Day of General Discussion on the Role of the Family in the Promotion of the Rights of the Child, para 2.1 and Committee on the Rights of the Child, Day of General Discussion: Children without Parental Care, UN Doc CRC/C/153, 17 March 2006, para 644.
[79] Cantwell and Holzcheiter (n76 above) 31.

implemented could provide legal protection to members of the extended family or other persons caring for the child in a parental way to care for the child or to have contact with the child.[80]

As noted in Chapter Two, one of the legal as well as practical implications of the recognition of the extended family in the context of inter-country adoption is that willing family members would need to be informed that a child who is a relative is being placed for adoption.[81] Accordingly, such an interpretation serves to ensure that the rights of all persons considered as the child's parents are sufficiently protected in inter-country adoption.

The recognition of the extended family also has implications for adoptability. As shown in Chapter Two and Six, the orphan status of a child does not automatically qualify the child for adoption, but that there should be no caregivers willing to adopt a child.[82] Therefore, the right to alternative care (or adoption) does not immediately apply upon the loss of parental care, but only becomes applicable when there are no available, willing or suitable relatives that have taken responsibility for the child upon the loss of parental care.

In addition, it also has implications for consent to adoption. For instance, it means that consent for the purposes of adoption should be obtained from both biological parents of the child irrespective of the nature of the union that brought about the child, and where such persons are not available, other persons in charge of the care of the child.

More importantly, it implies that all decision-making concerning the care and adoption of a child must consider the rights and duties of the child's parents and other persons responsible for the child. This is consistent with article 3 (2) of the CRC which requires States Parties in providing the necessary protection and care to the child to consider 'the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her'.

[80] Kamchedzera (n28 above) 20. See also T L Henderson 'Grandparents Visitation Rights: Justices' Interpretation of the Best Interests of the Child Standard' (2005) 26 (5) *Journal of Family Issues* 638, 638-644 and T L Henderson 'Grandparent Visitation Rights: Successful Acquisition of Court-Ordered Visitation' (2005) 26 (1) *Journal of Family Issues* 107, 107-137.
[81] See section 4.2.3 of Chapter Two.
[82] See section 4.2.3 of Chapter Two and section 2 of Chapter Six.

3.2. The problem with a broad interpretation of the term 'parents'

While a broad and diverse conception of 'parents' may be beneficial to the child in terms of emotional and financial support and ensures that the rights of all persons considered as parents are protected, it also has the potential to create confusion in relation to children.[83] For instance, in the context of adoption, does it mean that consent should be sought from the entire extended family including social parents? Does it also mean that all decisions concerning the child should be made by all persons defined by law as the child's parents? There is a real danger that such an approach might cause significant delays and confusion in the placement of children in desperate need of alternative care, and ultimately result in decisions that may not be in the child's best interests.

A further implication of adopting such a broad concept of the term, discussed by Jacobs, is that there will essentially be 'too many cooks in the kitchen'.[84] Jacobs, correctly in my view, has argued that 'it is hard enough for two parents to agree on the best way in which to raise and support a child, so how will three or four or more negotiate the difficulties of custody, visitation and financial support'.[85] This is likely to cause significant difficulties in making decisions concerning the child.

Another related challenge is that informal or traditional mechanisms of support for children and their parents are gradually diminishing.[86] This has the potential to leave children without appropriate care from both the child's parents and extended family.[87] Acknowledging this challenge, the CRC Committee has expressed concern that the recognition of various forms of families and parenthood could have a negative impact on children. It has therefore encouraged

[83] Tobin and Varadan (n27 above) 169.
[84] M B Jacobs 'More Parents, More Money: Reflections on the Financial Implications of Multiple Parentage' (2009) 1 (1) *Cardozo Journal of Law and Gender* 217, 223.
[85] Ibid.
[86] D M Chirwa 'The Merits and Demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 157, 167 and General Comment No. 7 (n39 above) para 19 noting that 'in practice family patterns are variable and changing in many regions, as is the availability of informal networks of support for parents, with an overall trend towards greater diversity in family size, parental roles and arrangements for bringing up children'.
[87] Ibid.

states to take the necessary measures, including those of a legal nature, to ensure that the rights of children are protected accordingly.[88]

International law recognises some of the potential implications of extending the concept of parents too far. This is why, for instance, international law requires states to take appropriate steps to ensure equality of the rights and responsibilities of spouses with regard to children during and after the dissolution of marriage.[89] For instance, article 16 (1) (d) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[90] protects the right to equality in marriage and family relations in all matters concerning children such as childcare, adoption and guardianship. A similar obligation is contained in article 18 (1) of the ACRWC. The CRC also emphasises that 'States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child'.[91]

The effect of these provisions is that the primary responsibility to care for the child is placed on the child's biological parents and only alternatively on other persons caring for the child in a parental way. This means that all decisions concerning the child, such as the adoption of a child, should be made as a priority by the child's biological parents, and where such parents are not available, other persons in charge of the care of the child. This serves to avoid some of the difficulties associated with extending the concept of parents too far.

In conclusion, it is clear that international law adopts a broad interpretation of the term 'parents', which is consistent with the diversity model. Such interpretation brings under its scope both biological parents regardless of whether they are married or not, adoptive or foster parents, and members of the extended family or community. This broad interpretation of 'parents' has implications for the adoptability of children and for consent to adoption. In the

[88] Committee on the Rights of the Child, Concluding Observations: Burundi, UN Doc CRC/C/15/Add.133, 16 October 2000, para 46; Committee on the Rights of the Child, Concluding Observations: Denmark, UN Doc CRC/C/15/Add. 151, 10 July 2001, para 32; Committee on the Rights of the Child, Concluding Observations: St Kitts and Nevis, UN Doc CRC/C/15/Add. 104, 24 August 1999, para 21 and Committee on the Rights of the Child, Concluding Observations: Grenada, UN Doc CRC/C/15/Add. 121, 28 February 2000, para 17.
[89] See for instance, article 23 (4) of the ICCPR.
[90] Adopted and Opened for Signature, Ratification and Accession by General Assembly Resolution 34/180 of 18 December 1979, entry into force 3 September 1981, in accordance with article 27 (1).
[91] Article 18 (1) of the CRC.

best interests of the families of origin, the legal frameworks set in place to regulate adoptions need to take this into account.

The next section provides a discussion on the international and regional legal framework for the protection of the rights of parents in inter-country adoption.

4. INTER-COUNTRY ADOPTION: GENERAL INTRODUCTION

International human rights law and the Hague Convention on Protection and Co-operation in respect of Intercountry Adoption (Hague Convention)[92] have developed several principles and procedures governing inter-country adoption. These include the principle of consent to adoption, the adoptability principle and post-adoption procedural rights. The following sections interrogate the extent to which these principles and rules protect the rights of parents in inter-country adoption.

5. PRE-ADOPTION PROCEDURES AND PRINCIPLES FOR AUTHORISING AN ADOPTION

5.1. Background

The rights of parents should be protected in the whole adoption process- before and after adoption. This section focuses on the procedural guarantees and the principles relevant to the pre-adoption stages of the adoption. These relate to consent to adoption and the adoptability principle. It discusses the meaning, scope and implications of these principles and procedures or the protection of the rights of parents in inter-country adoption. It also highlights the extent to which the international legal framework draws upon the theories discussed in Chapter Two.

[92] Adopted by the Hague Conference on Private International Law on 29 May 1993 and entered into force on 1 May 1995.

5.2. Consent to adoption

5.2.1. Background

In international human rights law, the parent-child relationship enjoys a high degree of protection and security. It is generally presumed that the best interests of the child are best fulfilled when children are raised by their parents. As a matter of principle, an adoption should only be authorised if parental consent has been given.[93] The principle of consent to adoption is consistent with the fiduciary theory discussed in Chapter Two.[94] Biological parents, relatives or other persons legally responsible for the child therefore, hold the primary right of consent to the adoption of their child. This is a crucial legal step, as once parental rights are relinquished, the legal relationship between the parents and the child is completely severed.

However, there may be instances, strictly defined by law, in which parental consent may be dispensed with. For instance, if the parent cannot be found or the parental rights and responsibilities have been terminated.[95] This means that a fair balance needs to be struck between the rights and interests of the parents in maintaining their family life on the one hand and the rights and interests of the child in favour of alternative care in the form of adoption on the other.

Generally, consent in the context of adoption refers to an agreement, permission or approval by a parent, guardian or agency acting as a parent to relinquish a child for adoption and to extinguish all rights and duties with respect to that child.[96] The importance of obtaining consent for adoption has been summed up by Hollinger as follows:

> … the clear purposes behind the consent requirements for adoptions are to protect children from unnecessary and traumatic separations from the adults who are caring for them, to protect biological

[93] S Vite and H Boechat *A Commentary on the United Nations Convention on the Rights of the Child, Article 21: Adoption* (2008) 41.
[94] See section 2.2 of Chapter Two.
[95] H K Bevan *The Law Relating to Children* (1973) 341-342 and L Schafer *Child Law in South Africa* (2011) 297.
[96] Child Welfare 'Consent to Adoption' (2017) State Statutes 1, 2, available at https://www.childwelfare.gov.topics/systemwide/laws-policies/statutes/consent/ accessed on 4 April 2018.

> parents from hurried, uninformed or coerced decisions, and to protect adoptive parents from needless anxiety about the legality of the adoption.[97]

This section discusses the meaning, scope and implications of the principle of consent for the protection of the rights of parents in inter-country adoption.

5.2.2. Legal basis for consent

Article 21 (a) of the CRC provides that States Parties that permit adoption should 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'.[98] The ACRWC, similarly, provides that States Parties that permit adoption should ensure, 'if necessary', that 'the appropriate persons concerned have given their informed consent to the adoption on the basis of appropriate counselling'.[99] The Hague Convention also provides that 'an adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin have ensured that the persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary'.[100]

5.2.3. Is consent a prerequisite or discretionary?

Although both the CRC and the ACRWC recognise the importance of obtaining informed consent, the formulation of this provision is problematic in several respects. Firstly, the provision on consent is qualified by the terms 'if necessary' or 'if required', suggesting that it is merely directory and not mandatory. It is entirely left to the discretion of States Parties to determine in accordance with their national laws whether to make it necessary or a requirement to obtain consent for adoption. It is submitted that this approach is intended to allow flexibility thereby catering for varying cultural, social and political differences amongst states.

The absence of a mandatory obligation to obtain consent has the potential to undermine the rights of parents in inter-country adoption. Adoptions which are authorised without the consent of the parents often carry heavy consequences for both the parents and their children. For

[97] J H Hollinger 'Intercountry Adoption: A Frontier without Boundaries' in N R Cahn and J H Hollinger *Intercountry Adoption* (2004) 2-1.
[98] Article 21 (a) of the CRC.
[99] Article 24 (a) of the ACRWC.
[100] Article 4 (c) (1) of the Hague Convention.

instance, children may be exposed to child trafficking and other illicit activities. Furthermore, it may violate the rights of parents to found a family and enjoy their family life. In examining State Party reports, the Committee on the Rights of the Child (CRC Committee) has expressed concern about legislation on adoption that 'does not take into account the need to obtain informed consent of the biological parents or guardians' and recommended that states ensure that parents or guardians give their informed consent in all cases of adoption.[101]

Some leading scholars argue that a possible justification for the absence of a mandatory obligation to obtain consent to adoption is that there may be no persons capable of providing consent.[102] From what the candidate has reviewed for the purpose of this thesis, neither the CRC nor the jurisprudence of the CRC Committee provides any guidance as to when such circumstances may arise to ensure that the rights of parents are protected.[103] It is therefore left to the discretion of states to determine the circumstances in which consent is required or not required for the purposes of adoption.[104] This flexibility allows state**s** to determine the circumstances in which consent is required in their domestic laws.

A further justification for the lack of a mandatory obligation to obtain consent under article 21 (a) of the CRC is that there may be circumstances when consent is not necessary for the purposes of adoption. In this context, the Explanatory Report on the Hague Convention has noted that consent is not necessary for the validity of the adoption if the parents are dead, have abandoned their child or if parental rights have been terminated.[105] Consent is also not required if a parent or guardian fails to respond to a notice of the proposed adoption.[106] Because of the child's need for stability and early placement coupled with the best interests of the child, there may be instances where parental consent is not required for the purposes of adoption.

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[101] Committee on the Rights of the Child, Concluding Observations: Belarus (n8 above) para 47-48 and Committee on the Rights of the Child, Concluding Observations: Republic of Serbia, UN Doc CRC/C/SRB/1, 16 June 2008, para 43 (a).

[102] P Alston, N Cantwell and J Tobin 'Article 21: Adoption' in J Tobin *The UN Convention on the Rights of the Child: A Commentary* (2019) 793.

[103] I have reviewed several Concluding Observations of the CRC Committee but could not find any that addresses this issue.

[104] Hodgkin and Newell (n53 above) 296 noting that article 21 (a) of the CRC leaves the circumstances under which consent will be required to domestic legislation.

[105] G Parra-Aranguren 'Explanatory Report on the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption' (1994) para 155.

[106] Guidelines for Action on Intercountry Adoption in Africa, Adopted at the Fifth International Policy Conference on the African Child (IPC) on 29-30 May 2012, United Nations Conference Centre Addis Ababa, Ethiopia, para 45.

In addition, there may be instances when it may be in the best interests of the child to be placed for adoption without parental consent.[107] Such circumstances should, however, be exceptional and, in all cases where this is possible, consent of the biological family should be a prerequisite for an inter-country adoption system that respects the rights of parents.[108]

The general obligation under article 21 (a) of the CRC to ensure that the best interests of the child is the paramount consideration in adoption implies that there may be instances where consent is not required if it is in the best interests of the child to be placed for adoption.[109] Thus, the best interests of the child principle may allow for parental consent to be dispensed with if it is necessary for the child's best interests.

In their analysis of article 21 (a) of the CRC, Alston, Cantwell and Tobin correctly argue that the lack of a mandatory obligation to obtain consent ensures that the child's right to alternative care is not undermined or compromised by the wishes of the child biological parents, guardians or relatives where this would be contrary to the best interests of the child.[110] Therefore, the absence of a mandatory obligation to obtain consent in international human rights law allows flexibility and ensures that the child's right to alternative care is not compromised.

To ensure due process, the decision to dispense with parental consent should be determined by a judicial body, with the persons concerned being assured of the right to be heard and to appeal or review the decision.[111]

The phrase 'if required' has also been interpreted to imply that 'if required by law'.[112] In this context, Hodgkin and Newell have noted that although article 21 of the CRC leaves the circumstances under which consent will be required to domestic laws, 'any gross violation of

[107] Alston, Cantwell and Tobin (n102 above) 793.
[108] Ibid. See also L Dixon; D F Perkins; C Hamilton-Giachritsis and L A Craig *The Wiley Handbook of What Works in a Child Maltreatment: An Evidence Based Approach to Assessment and Intervention in Child Protection* (2017) 119 noting that 'severance of family ties inherent in an adoption without parental consent is an extremely draconian step and one that requires the highest level of evidence'.
[109] Article 21 (a) of the CRC provides that '[s]tates Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration'. See also article 24 of the ACRWC.
[110] Ibid.
[111] Alston, Cantwell and Tobin (n102 above) 792-793.
[112] Alston, Cantwell and Tobin (n102 above) 792.

either the child's or natural parents right to a family life would amount to a breach of the Convention'.[113]

Unlike the CRC and the ACRWC, the Hague Convention makes consent a mandatory requirement to adoption.[114] This requirement offers better protection to parents and families in inter-country adoption.

5.2.4. Who should give consent?

Both instruments are silent on who is entitled to give consent. These questions are left entirely to be determined by each state. As noted above, the CRC Committee has suggested the actors from whom consent should be sought include biological parents or guardians.[115] Guardians in this case could include *defacto* guardians, not just legal guardians. This commodious interpretation could provide protection to children who are cared for by guardians who do not have formal legal custody of the children. It also reinforces the diversity model discussed in Chapter Two in that it recognises a broad conception of parenthood which protects all forms of family relationships.[116]

To ensure that consent is obtained from the biological parents or guardians, the CRC Committee in its concluding observations to State Party reports has recommended that states should establish legal safeguards to guarantee parents or guardians consent to the adoption of their child.[117] Article 21 (a) of the CRC also requires the competent authorities, such as courts, to make sure that 'if required' the persons concerned have given their consent before authorising an adoption.[118] The Guidelines for Action on Intercountry Adoption in Africa[119] further state that when a child becomes available for adoption, the competent authorities must serve a notice on each person whose consent is required by national law.[120] Such a notice must

[113] Hodgkin and Newell (n53 above) 296.
[114] Article 4 (c) (1) of the Hague Convention.
[115] Committee on the Rights of the Child, Concluding Observations: Belarus (n8 above) para 47-48 and Committee on the Rights of the Child, Concluding Observations: Republic of Serbia (n101 above) para 43 (a).
[116] See section 4.2 of Chapter Two. See also section 2.1 of Chapter Three.
[117] Committee on the Rights of the Child, Concluding Observations: Cameroon, UN Doc CRC/C/CMR/CO/2 (2012), 18 February 2010, para 48 (c).
[118] See also article 24 (b) of the ACRWC and section 5.3.4 which discusses what the term 'competent authorities' means.
[119]Adopted at the Fifth International Policy Conference on the African Child (IPC) on 29-30 May 2012, United Nations Conference Centre Addis Ababa, Ethiopia.
[120] Guidelines for Action on Intercountry Adoption in Africa (n119 above) para 44.

inform the person whose consent is required of the proposed adoption and request that person either to consent to or withhold their consent for the purposes of adoption.[121] Furthermore, the notice should specify a reasonable time frame to respond.[122]

Despite the fact that the Guidelines for Action on Intercountry Adoption in Africa are non-binding, they provide guidance to states in respect of the implementation of their binding obligations under the CRC, ACRWC and the Hague Convention.[123] Furthermore, they apply to 'all procedures of an administrative, judicial, or other nature where children are or may be concerned in the context of intercountry adoption'.[124] In addition, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) has recommended that states should take into account or consult the Guidelines for the Action on Intercountry Adoption in Africa in the measures they adopt on inter-country adoption.[125]

Although not expressly stated, it has been argued that consent in the context of the Hague Convention is required from the child's biological parents, relatives and legal guardians.[126] This fits perfectly with the diversity model of parenthood discussed in Chapter Two of the thesis.[127] In order to ensure compliance with this requirement, article 16 of the Hague Convention obligates central authorities of the states of origin to ensure that the necessary consents have been obtained and to provide proof to that effect to the relevant central authority of the receiving state.

The Guidelines for Action on Intercountry Adoption in Africa further provide that the court may require the consent of any additional person if it considers that such person has rights or obligations concerning the child under a court order or an agreement.[128]

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[121] Ibid.
[122] Guidelines for Action on Intercountry Adoption in Africa (n119 above) para 45.
[123] Guidelines for Action on Intercountry Adoption in Africa (n119 bove) para 4.
[124] Guidelines for Action on Intercountry Adoption in Africa (n119 above) para 3 (a) and 5.
[125] African Committee of Experts on the Rights and Welfare of the Child, Concluding Observations: Guinea, Considered during the First Extra-Ordinary Session, para 25; African Committee of Experts on the Rights and Welfare of the Child, Concluding Observations: Kenya, Considered at the 14th Ordinary Session, para 32; African Committee of Experts on the Rights and Welfare of the Child, Concluding Observations: Mozambique, Considered during the First Extra-Ordinary Session (6-11 October 2014) para 21 and African Committee of Experts on the Rights and Welfare of the Child, Concluding Observations: Zimbabwe, Considered at the 25th Ordinary Session (21-24 April 2015) para 33.
[126] Parra-Aranguren (n105 above) para 129.
[127] See section 4.2 of Chapter Two.
[128] Guidelines for Action on Intercountry Adoption in Africa (n119 above) para 47.

5.2.5. How should consent be given?

Both the CRC and the ACRWC lack detailed provisions on the manner in which consent should be given. However, both instruments provide that when consent is required, it should be informed consent and that it should be done on the basis of counselling. In order to ensure protection of parents and families, the Hague Convention imposes a duty on Contracting States to ensure that consent has been freely given, in the required legal form, reduced in writing and has not been withdrawn.[129] Poverty presents a primary challenge to obtaining free and voluntary consent in inter-country adoption. Acknowledging this challenge, the CRC Committee has noted that 'separation is in many cases involuntary due to economic and social strains'.[130] This holds true particularly in situations where poverty has left birth parents and families with no other option but to surrender their children for adoption. An empirical study in South Africa on biological parents who had relinquished their children for inter-country adoption found that due to high levels of poverty coupled with lack of state assistance, many biological parents felt that inter-country adoption was their only option.[131] This study lends support to Hogbacka's view that, 'in the context of deprivation and discrimination, consent is so severely restricted as to be no real choice'.[132] To prevent involuntary separation, states should ensure that family support measures are available. This does not necessarily mean that children of poor parents should not be adopted simply because their parents cannot give consent, but that poverty should not be the sole factor.

An important element of free consent is to ensure that consent is not induced by payment or compensation.[133] Consent is free when it is not caused by coercion, financial inducement, undue influence or fraud. This position is confirmed by the CRC Committee in its concluding observations to State Party reports. For instance, in its 2002 concluding observations on Saint Vincent and Grenadines State Party report, the CRC Committee expressed concern at inter-country adoptions in which 'children are handed over for money or with promises of financial

[129] Article 4 (c) (2) of the Hague Convention. See also Guidelines for Action on Intercountry Adoption in Africa (n109 above) para 42.
[130] Committee on the Rights of the Child, Day of General Discussion: Children without Parental Care (n78 above) para 658.
[131] R Hogbacka 'Maternal Thinking in the Context of Stratified Reproduction: Perspectives of Birth Mothers from South Africa' in J Gibbons and K Rotabi (eds) *Intercountry Adoption, Policies, Practices and Outcomes* (2012) 143-159.
[132] R Hogbacka 'Intercountry Adoption, Countries of Origin, and Biological Families' (2014) Working Paper No. 598, Report for Thematic Area 2: International Forum on Intercountry Adoption and Global Surrogacy 1, 12.
[133] Article 4 (c) (3) of the Hague Convention.

assistance to those giving up the child'[134] and recommended that the State Party give particular attention to abuse of adoption procedures.[135] The CRC Committee has also expressed concern at the practice of forcing single adolescent mothers to relinquish their children for adoption and recommended that the State Party ensure that the consent of single adolescent mothers is not given under duress.[136] The CRC Committee expressed similar concerns in the concluding observations for Kyrgzstan.[137] To prevent financial inducement, the Guide to Good Practice[138] has recommended that costs related to medical, legal, documentation and travel matters should be regulated.[139]

In addition, article 29 of the Hague Convention prohibits contact between the prospective adoptive parents and the child's parents or any other person caring for the child unless the necessary consents have been obtained. Lastly, Contracting States are bound to ensure that the consent of the mother 'where required' is given after the birth of the child.[140] This serves to ensure that the mother is not driven by strain, anxiety or stress to relinquish her child for adoption.[141] Even when a state is not a Contracting State to the Hague Convention and therefore without an obligation to ensure that the consent of the mother is given after the birth of the child, the CRC Committee seems to be of the view that there is an obligation to make sure that consent is given after the birth of the child. For instance, despite the fact that Hungary was not a Contracting State to the Hague Convention in 1998, the CRC Committee recommended that the State Party 'consider reviewing its legislation and practice relating to the possibility of placing a child up for adoption before birth.'[142] It could then be argued that, by interpretation, the requirement to ensure that the consent of the mother is given after the birth of the child is

[134] Committee on the Rights of the Child, Concluding Observations: Saint Vincent and Grenadines (n57 above) para 32 (c).
[135] Committee on the Rights of the Child, Concluding Observations: Saint Vincent and Grenadines (n57 above) para 33 (c).
[136] Committee on the Rights of the Child, Concluding Observations: Republic of Korea, UN Doc CRC/C/KOR/CO/3-4, 2 February 2012, paras 49 (c) and 50 (c).
[137] Committee on the Rights of the Child, Concluding Observations: Kazakhstan, UN Doc CRC/C/KAZ/CO/3, 19 June 2007, paras 41 and 42.
[138] Permanent Bureau 'The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice' (2008) Guide No 1 1, 34.
[139] Permanent Bureau (n138 above) 34.
[140] Article 4 (c) (4) of the Hague Convention. See also Guidelines for Action on Intercountry Adoption in Africa (n119 above) para 38.
[141] W Nicholson 'The Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption' in C J Davel (ed) *Introduction to Child Law in South Africa* (2000) 249 and Parra-Aranguren (n105 above) para 153.
[142] Committee on the Rights of the Child, Concluding Observations: Hungary, UN Doc CRC/C/15/Add.87, 24 June 1998, para 33. Hungary became a Contracting State to the Hague Convention in 2005.

also an obligation under the CRC. The CRC Committee, similarly, has encouraged States Parties to establish minimum periods before biological parents can consent to the adoption of their child.[143]

To further make sure that consent to an adoption is obtained with regard to the rights of parents, the Guide to Good Practice recommends that states should have ethical and reliable personnel to oversee the consent procedure.[144] The Guidelines for Action on Intercountry Adoption in Africa have also recommended that states should ensure that the parent of the child who has given consent to the adoption has the right to withdraw consent within a minimum period of 90 days after such consent has been given.[145] It should be noted that the provisions on how consent should be given build on the fiduciary theory discussed in Chapter Two of the thesis.

5.2.6. Is counselling a prerequisite or discretionary?

Both the CRC and the ACRWC require the persons who are expected by the law to give consent to receive counselling 'as may be necessary'. The potential danger of not counselling parents is that they may give their consent without fully understanding the effects of consenting to adoption. It has been reported that many birth parents go back to the orphanages and Non-Governmental Organizations (NGOs) which deal which children's rights to complain that at the time of giving consent to adoption, they did not fully appreciate the legal consequences of their actions and to demand the return of their children.[146] When Madonna adopted the first child from Malawi, for instance, it was speculated that his father was not aware that his parental rights were being permanently severed.[147] Many birth parents reportedly mistake inter-country

[143] Committee on the Rights of the Child, Concluding Observations: Burkina Faso, UN Doc CRC/C/BFA/CO/3-4, 9 February 2010, para 48 where the CRC Committee expressed concern regarding 'the lack of legal provisions on the minimum duration before consent to adoption can be given by the biological parents' and Committee on the Rights of the Child, Concluding Observations: Hungary, UN Doc CRC/CHUN/CO/2, para 34 where the CRC Committee expressed concern 'over the short period of time after birth during which the mother may withdraw her consent'.

[144] Permanent Bureau (n138 above) 35.

[145] Guidelines for Action on Intercountry Adoption in Africa (n119 above) para 46.

[146] G L Hiwa 'The Law and Intercountry Adoption: The Malawi Experience' (2012) Fifth International Law Policy Conference on African Child, available at http://www.africanchildforum.org/ipc, accessed on 30 October 2018 and E Willmott-Harrop 'Intercountry Adoption: Illicit Activities' available at libertyandhumanity.com/themes/human-trafficking/intercountry-adoption-illicit-activities/, accessed on 30 October 2018 and CNN 'International Adoption: I was stolen from my family' (2013), available at https://edition.cnn.com/201/09/16/opinion/international-adoption-tarikuwa-lemma-stolen-children/index.html, accessed on 30 October 2018.

[147] Associated Press 'Malawi's Boy's Father Concerned about Madonna Adopting His Son', available at http://www.usatoday.com.life/people/200-10-22-madonna-adoption_x.html, accessed on 30 October 2018 and V

adoption for informal fostering or shared parenting, which does not entail the permanent termination of parental rights and responsibilities.[148] This misconception is often exploited by adoption agencies who fail to explain the legal implications of adoption to biological parents.[149] The CRC Committee in its concluding observations to State Party reports has stressed the importance of ensuring that when required 'consent to adoption is a free and informed act on the part of the biological parents and that of the children being adopted'[150] and that 'biological parents are fully informed of the process and implications of their consent to their child's adoption'.[151]

The Hague Convention also makes counselling a mandatory requirement to adoption.[152] This requirement corresponds with article 15 of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally (Declaration on Foster Placement and Adoption).[153] The significance of this obligation cannot be over-emphasised. Africa has witnessed too many problems in the context of inter-country adoption as noted above. The Hague Convention deserves much credit in this respect as it addresses one of the most relevant issues affecting African parents in the context of inter-country adoption. Counselling, is

Root 'Angelina and Madonna: Why All the Fuss? An Exploration of the Rights of the Child and Intercountry Adoption within African Nations' (2007) 8 (1) *Chicago Journal of International Law* 323, 343.

[148] Hogbacka (n132 above) 14. See also J L Roby 'Understanding Sending Country's Traditions and Policies in International Adoptions: Avoiding Legal and Cultural Pitfalls' (2004) 6 *Journal of Law and Family Studies* 303, 308 and J L Roby and S Matsumura 'If I Give You My Child Aren't We Family? A Study of Birth Mothers Participating in Marshall Islands-US Adoptions' (2002) 5 *Adoption Quarterly 7* where the authors 'warned the dangers of biological parents misunderstanding the actual consequences of adoption due to different cultural conceptions of traditions around adoption within sending states'.

[149] Ibid.

[150] Committee on the Rights of the Child, Concluding Observations: Democratic Republic of Congo, UN Doc CRC/C/COD/CO/2, 10 February 2009, para 48 (c).

[151] Committee on the Rights of the Child, Concluding Observations: Ukraine, UN Doc CRC/C/UKR/CO/3-4, 21 April 2011, para 49. See also Committee on the Rights of the Child, Concluding Observations: Cameroon, UN Doc CRC/C/CMR/CO/2 (2012), 18 February 2010, para 48 (c), noting that the State Party should 'establish safeguards to guarantee that parents are informed of all the legal and social effects of the adoption'.

[152] Article 4 (c) (1) of the Hague Convention provides that 'an adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin have ensured that the persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effects of their consent'. See also Guidelines for Action on Intercountry Adoption in Africa (n119 above) paras 42 and 43.

[153] Adopted by the General Assembly Resolution 41/85 of 3 December 1986, article 15 which provides that 'sufficient time and adequate counselling should be given to the child's own parents, the prospective adoptive parents and, as appropriate, the child in order to reach a decision on the child's future as early as possible'.

however, not required for institutions and authorities and should only be given 'as may be necessary' as it is presumed that they do not need it.[154]

Although counselling is a mandatory obligation under the Hague Convention, it falls short of prescribing the exact nature, form and content of such counselling to ensure that the rights of parents are adequately protected in inter-country adoption. Furthermore, the Hague Convention does not provide any guidance on which authority is competent to provide counselling and how such counselling should be provided to make sure that the rights of parents are protected.

The Hague Convention can also be criticised for failing to provide any safeguards to ensure that the persons whose consent is required for the purposes of adoption have been counselled. However, the CRC Committee in its concluding observations to State Party reports has recommended that states should establish legal safeguards to guarantee that parents are informed of all the social and legal effects of the adoption.[155] It has also recommended that states should enact legislation to ensure that parents are fully informed of the process and implications of their consent to the adoption of their child[156] and that parents have sufficient information prior to consenting to the adoption of their child.[157] Article 21 (a) of the CRC also requires competent authorities, such as courts, to ensure that 'if required' the persons giving consent have been counselled and informed of the effects of their consent before authorising the adoption of a child. It should be noted that the provisions on counselling build on the fiduciary theory discussed in Chapter Two of the thesis.

5.2.7. Options counselling or adoption counselling?

The CRC Committee has urged States Parties to 'promote adoption counselling'.[158] To ensure compliance with this obligation, article 9 (c) of the Hague Convention further requires central authorities to 'promote the development of adoption counselling'. The Convention, however,

[154] Parra-Aranguren (n105 above) para 131 noting that that the words 'as may be necessary' were included because previous counselling does not always have to be given in cases where institutions or authorities intervene, because they are not supposed to need it.
[155] Committee on the Rights of the Child, Concluding Observations: Cameroon (n117 above) 48 (c). See also Committee on the Rights of the Child, Concluding Observations: Ukraine (n151 above) paras 48 and 49 and Committee on the Rights of the Child, Concluding Observations: Albania, UN Doc CRC/C/ALB/CO/2-4, 7 December 2012, paras 56 (b) and 57 (b).
[156] Committee on the Rights of the Child, Concluding Observations: Ukraine (n151 above) para 49.
[157] Committee on the Rights of the Child, Concluding Observations: Republic of Serbia (n101 above) para 43 (a).
[158] Committee on the Rights of the Child, Concluding Observations: Republic of Serbia (n101 above) para 43 (e).

appears to give preference to 'one-way counselling' that only favours adoption. This is evident from article 4 (c) (1) which stipulates that the purpose of counselling is to inform the persons whose consent is required 'of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin'. Some commentators have argued that an adoption system that protects the rights of parents should lean towards 'options counselling' as opposed to 'adoption counselling'.[159]

The concept of 'options counselling' refers to counselling that informs parents of all the options and resources that are available, including adoption and parenting as well as the legal implications of their decision to relinquish their child for adoption.[160] It requires adoption professionals to inform parents of the support systems and resources that are available to assist them even if they wish to relinquish their child for adoption. On the other hand, 'adoption counselling' or 'one-way counselling' only focuses on informing parents of the legal implications of their decision to place their child for adoption. Several empirical studies on birth families who relinquished their children for adoption have shown that parents who receive 'options counselling' as opposed to 'adoption counselling' are likely to choose to parent their children.[161]

The need for holistic counselling (or options counselling) that respects the fundamental rights of parents is underscored by the UN Guidelines, which provide under the heading 'Preventing Family Separation' that 'when a public or private agency or facility is approached by a parent, legal guardian or caregiver wishing to relinquish a child permanently, the State should ensure that the family receives counselling and social support to enable them to continue to care for the child'.[162] Unlike the Hague Convention, the purpose of counselling in the UN Guidelines is not necessarily to promote relinquishment but to give parents, legal guardians and care-givers all possible options including 'social support to encourage and enable them to continue to care

[159] Evan B Donaldson Institute 'Safeguarding the Rights and Well-Being of Birth Parents in the Adoption Process' (2006) The Evan B Donaldson Institute 1, 30.
[160] Donaldson (n159 above) 15 and 31.
[161] Donaldson (n159 above) 31. See also R Hogbacka *Global Families, Inequality and Transnational Adoption: The De-Kinning of First Mothers* (2016) 96-99 and 118.
[162] Guidelines for the Alternative Care of Children (n33 above) para 44 and R R Carlson 'A Child's Right to a Family Versus a State's Discretion to Institutionalize the Child' (2016) *Georgetown Journal of International Law* 937, 963.

for their child'.[163] The approach adopted by the UN Guidelines reflects that 'options counselling' and not 'adoption counselling' should be a prerequisite for an inter-country adoption system that respects the rights of parents. If 'options counselling' is grounded in a rights framework, it might include providing relevant information on the legal rights and duties the consent givers have.

Although a legally non-binding international instrument, the CRC Committee in its concluding observations to State Party reports has repeatedly endorsed and recommended that states should take into account the UN Guidelines when making decisions concerning the alternative care of children.[164] Furthermore, the UN Guidelines are designed to enhance the implementation of the CRC and other international instruments relating to the alternative care of children.[165] Therefore, the combination of the CRC, ACRWC and the Hague Convention form a comprehensive package of law, policy and implementation guidelines on the practical realisation of the right to alternative care. The importance of the UN Guidelines lies in the fact that they build on the provisions of the CRC, ACRWC and the Hague Convention and provide more detailed standards for filling the implementation gaps.

In the next section, this study considers the adoptability principle and examines how this principle protects the rights of parents in inter-country adoption.

5.3. The adoptability principle

5.3.1. Background

Apart from consent to adoption, the adoptability principle is key to the protection of parental rights in inter-country adoption. The concept of adoptability generally refers to who is eligible for adoption. It requires states of origin to consider the adoption of a child once it has been established that the child is in fact eligible for adoption. This is a crucial legal step in the

[163] Guidelines for the Alternative Care of Children (n119 above) paras 44 and 45.
[164] Committee on the Rights of the Child, Concluding Observations: Denmark, UN Doc CRC/C/DNK/CO/4, 7 April 2011, para 44 (e). See also Committee on the Rights of the Child, Concluding Observations: Afghanistan, UN Doc CRC/C/AFG/CO/1, 8 April 2011, para 44 (f).
[165] Guidelines for the Alternative Care of Children (n33 above) para 1.

adoption process. The adoptability principle gives effect to the fiduciary theory discussed in Chapter Two.[166]

5.3.2. Legal basis of the adoptability principle

Article 21 (a) of the CRC provides that States Parties that permit adoption should ensure that the 'the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures 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'. A similar provision is contained in article 24 (a) of the ACRWC which provides that States Parties that permit adoption should 'establish competent authorities to determine matters of adoption and ensure that the adoption is carried out in conformity with applicable laws and procedures and on the basis of all relevant and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and guardians'. However, the ACRWC refers to the child's parents, relatives or guardians. A central pillar of the diversity model,[167] the idea that the term 'parents' should be interpreted broadly has also influenced the international and regional framework on inter-country adoption.

Article 4 (a) of the Hague Convention also provides that '[a]n adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin a) have established that the child is adoptable'.[168]

5.3.3. Critical analysis of the adoptability principle under the CRC, ACRWC and Hague Convention

International human rights law requires states to determine the adoptability of a child in 'accordance with applicable law and procedures'. It is argued that this means that states must enact laws and procedures to govern the adoption process. This line of argument has textual support as will be demonstrated below. It should be noted that this approach resonates with the

[166] See section 2 of Chapter Two.
[167] See section 4.2 of Chapter Two.
[168] See also article 22 of the Declaration on Foster Placement and Adoption which states that '[n]o intercountry adoption should be considered before it has been established that the child is legally free for adoption'.

central tenets of the fiduciary theory.[169] Although this requirement is an established principle of international human rights law, both the CRC and the ACRWC are silent on the exact nature of the laws and procedural safeguards for determining the eligibility of a child for adoption. States have the discretion to determine the form and content of such laws and procedures. It is submitted that this flexibility allows states to make their own laws and procedures to regulate the adoption process.

However, the CRC Committee in its concluding observations to national reports has identified procedures that may not be adequate for the purposes of adoption. It has expressed concern regarding 'vague adoption procedures',[170] procedures with 'legislative ambiguity and protection gaps'[171] and procedures which may result in practices that do not pay adequate attention to the rights of children and their families.[172]

The CRC Committee has also stressed that adoption procedures should be simplified and expedited.[173] In view of the obligation to act in the best interests of the child, the CRC Committee's recommendations are consistent with research indicating that the older the child is at placement, the greater the chances of developing emotional, psychological or behavioural problems.[174] Furthermore, such laws and procedures should comply with the principles and provisions of article 21 of the CRC and the Hague Convention,[175] provide protection against

[169] See section 2 of Chapter Two.
[170] Committee on the Rights of the Child, Concluding Observations: Armenia, UN Doc CRC/C/15/Add.119, 24 February 2000, para 30.
[171] Committee on the Rights of the Child, Concluding Observations on the consolidated second to fourth periodic reports of Bosnia and Herzegovina, UN Doc CRC/C/BIH, CO/2-4, 29 November 2012, para 50 (a).
[172] Committee on the Rights of the Child, Concluding Observations: Gabon, UN Doc CRC/C/15/Add.171, 3 April 2002, para 37.
[173] Committee on the Rights of the Child, Concluding Observations: Bosnia and Herzegovina (n171 above) para 50 (a) and Committee on the Rights of the Child, Concluding Observations: Latvia, UN Doc CRC/C/15/Add.142, 21 February 2001, para 34. In both concluding observations, the CRC Committee expressed concern at the low adoption rates due to 'complex and time consuming procedures' for adoption and recommended that the 'adoption procedures should be simplified and expedited'. See also Guidelines for the Alternative Care of Children (n33 above) para 43.
[174] Alston, Cantwell and Tobin (n102 above) 787.
[175] Committee on the Rights of the Child, Concluding Observations: Mongolia, UN Doc CRC/C/NOR/CO/4, 29 March 2010, para 45; Committee on the Rights of the Child, Concluding Observations: Bosnia and Herzegovina (n171 above) para 51; Committee on the Rights of the Child, Concluding Observations: Namibia, UN Doc CRC/C/NAM/CO/2-3, 16 October 2012, para 50 (a); Committee on the Rights of the Child, Concluding Observations: Cameroon (n117 above) para 48; Committee on the Rights of the Child, Concluding Observations: Canada (n30 above) para 58 (a) and Committee on the Rights of the Child, Concluding Observations: Guatemala, UN Doc CRC/C/15/Add.154, 9 July 2001, para 34. See also *Malone v United Kingdom* (1984) 7 EHRR 14, para 67 and *Hewitt and Harman v UK* (1991) 14 EHRR 657, para 39.

violations of internationally protected rights,[176] should be comprehensive, not out of date and comply with other relevant provisions of the CRC.[177] For instance, articles 5, 18 and 27 of the CRC (parental rights and responsibilities provisions).

The importance attached to adopting laws regulating inter-country adoption is also evident from the CRC Committee's recommendations to stop adoptions until legislative measures are put in place. For instance, in its concluding observations to Guatemala, the CRC Committee recommended that the State Party 'suspend adoptions in order to take adequate legislative measures'.[178] In some cases, the CRC Committee has strongly recommended that the State Party expedite the finalisation of its adoptions laws and regulations.[179] The CRC and the ACRWC must therefore be applauded for not taking the rights of children and their parents for granted and specifically requiring states to enact laws and procedures to regulate inter-country adoption.

A child is considered eligible for adoption if competent authorities determine 'on the basis of all pertinent and reliable information' or 'relevant and reliable information' that the 'adoption is permissible in view of the child's status concerning parents, relatives and legal guardians'.[180] Thus, States Parties have an obligation to undertake a thorough and comprehensive investigation of the child's background and family structure before an adoption is authorised.[181] The information gathered as part of the investigation must be thorough, verified and

[176] Committee on the Rights of the Child, Concluding Observations: Latvia (n173 above) para 33; Committee on the Rights of the Child, Concluding Observations: Austria, UN Doc CRC/C/AUT/CO/3-4, 3 December 2012, para 42 and Committee on the Rights of the Child, Concluding Observations: Kenya, UN Doc CRC/C/KEN/CO/2, 19 June 2007, para 41 (a). See also Alston, Cantwell and Tobin (n102 above) 789.

[177] Committee on the Rights of the Child, Concluding Observations: Kazakhstan (n137 above) para 44 (b); Committee on the Rights of the Child, Concluding Observations: Bosnia and Herzegovina (n171 above) para 51; Committee on the Rights of the Child, Concluding Observations: Namibia (n175 above) para 50 (a); Committee on the Rights of the Child, Concluding Observations: Cameroon (n117 above) para 48 and Committee on the Rights of the Child, Concluding Observations: Canada (n30 above) para 58 (a).

[178] Committee on the Rights of the Child, Concluding Observations: Guatemala (n175 above) para 34; Committee on the Rights of the Child, Concluding Observations: Republic of Korea (n136 above) para 49 (a); Committee on the Rights of the Child, Concluding Observations: Mongolia (n166 above) para 45; Committee on the Rights of the Child, Concluding Observations: Kazakhstan (n137 above) para 45; Committee on the Rights of the Child, Concluding Observations: Kenya (n176 above) paras 41 (a) and 41 (b); Committee on the Rights of the Child, Concluding Observations: Austria (n176 above) para 42 and Committee on the Rights of the Child, Concluding Observations: Costa Rica, UN Doc CRC/C/CRI/CO/4, 3 August 2012, para 52 (a).

[179] Committee on the Rights of the Child, Concluding Observations: Ghana, UN Doc CRC/C/GHA/CO/3-5, 9 June 2015, para 46 (a).

[180] Article 21 (a) of the CRC and article 24 (a) of the ACRWC.

[181] Committee on the Rights of the Child, Concluding Observations: United Kingdom of Great Britain and Northern Ireland, UN Doc CRC/C/GBR/CO/5, 12 July 2016, para 53 (b). See also Alston, Cantwell andTobin (n102 above) 789.

comprehensive[182] and should focus on the child's parents, relatives, guardians or legal guardians.

The requirement that the adoption should be 'permissible in view of the child's status concerning parents, relatives and legal guardians' or guardians suggests the order in which the care options for a child should be considered under international human rights law before a child is put up for adoption.[183] The first priority is for a child to be cared for by his or her biological parents as required by articles 5, 7, 9, 18 and 27 of the CRC.[184] This implies that a child should not be placed for adoption if there is a possibility that he or she can be cared for by his or her parents unless it is not in the best interests of the child to do so.[185] When care by the child's biological parents is inappropriate or unavailable, care by the relatives should be considered as required by article 5 of the CRC.[186] This approach is consistent with the diversity model in that it underscores the fact that the right to alternative care does not immediately apply upon the loss of parental care, but when there are no available relatives that have assumed the responsibility of the child upon the loss of parental care.[187]

To ensure that the child is cared for by his or her biological parents or relatives, the state should conduct a thorough investigation about the child's family, their capacity to care for the child and the reasons why they are unable to do so before a declaration of adoptability is made.[188] This is required to determine whether the state can reunite the child with his or her biological family or to provide assistance to the family in meeting their responsibilities towards the child as required by articles 18 and 27 of the CRC and 20 (2) of the ACRWC. Where, despite assistance, the parents, relatives or guardians are unable to care for the child, the child can be placed in alternative care in the form of adoption.[189] In this regard, the CRC Committee has expressed concern about states using vague criteria to determine the adoptability of a child,

[182] Ibid. See also N Cantwell 'The Best Interests of the Child in Intercountry Adoption' (2014) UNICEF 1, 63, noting that the information should be 'accurate and comprehensive report about child's background using sources such as case notes, legal records and medical evaluations'.
[183] Alston, Cantwell and Tobin (n102 above) 789.
[184] See also article 3 of the Declaration on Foster Placement and Adoption.
[185] See for instance article 9 (1) of the CRC, which prohibits the separation of a child from his or her parents unless 'such separation is necessary for the best interests of the child'.
[186] See also article 4 of the Declaration on Foster Placement and Adoption.
[187] See section 4.2.3 of Chapter Two.
[188] Ibid. See also Guidelines for the Alternative Care of Children (n33 above) para 39.
[189] See articles 20 and 21 of the CRC and articles 24 and 25 of the ACRWC.

such as 'evident lack of interest on the part of the parents' and urged states to 'establish clearer standards'.[190]

The adoption of a child should only be considered if family tracing and reunification efforts have failed. This approach is congruent with the fiduciary theory discussed in Chapter Two.[191] In its concluding observations to State Party reports, the CRC Committee has urged states to make sure that 'prior efforts have been made to maintain family ties' before a child is placed for adoption.[192] Expanding on this, the UN Guidelines provide that '[s]tates should formulate clear policies to address situations where a child has been abandoned anonymously, which indicate whether and how family tracing should be undertaken'.[193] The CRC Committee further recommends that the competent authority deciding on the adoptability of a child should confirm that all efforts have been made for the child to maintain links with his or her family before a child is placed for adoption.[194] In this context, Hodgkin and Newell have noted that 'any legislation that permits adoptions under less stringent conditions would probably amount to a breach of both children's and parents' rights under the Convention'.[195]

In addition, a declaration of adoptability should not be made unless a reasonable period of time is given to parents, relatives or guardians or until efforts to trace the parents or relatives has been carried out.[196] States are expected to ensure that a reasonable time is given for an effective tracing of the child's family before a child is placed for adoption.[197] The requirement to allow a reasonable period of time to lapse before a declaration of adoptability is made is most supportive of the rights and interests of the parents. It serves to ensure that the parent-child

[190] Committee on the Rights of the Child, Concluding Observations: Albania (n155 above) para 56 (c) and 57 (c).
[191]
[192] Committee on the Rights of the Child, Concluding Observations: Democratic Republic of Congo (n150 above) para 48 (c).
[193] Guidelines for the Alternative Care of Children (n33 above) para 43.
[194] Committee on the Rights of the Child, Concluding Observations: Mexico, UN Doc CRC/C/MEX/CO/3, 8 June 2006, para 42 (d). See also Guidelines for Action on Intercountry Adoption in Africa (n119 above) para 40.
[195] Hodgkin and Newell (n53 above) 296.
[196] See for instance, Committee on the Rights of the Child, General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children Outside of their Country of Origin, UN Doc CRC/GC/2005/6, 1 September 2005, para 80. See also Guidelines for Action on Intercountry Adoption in Africa (n119 above) para 31 (g).
[197] Committee on the Rights of the Child, Concluding Observations: Nepal, UN Doc CRC/C/NPL/CO/3-5, 8 July 2016, para 29 (a).

relationship is not severed prematurely, while at the same time ensuring that the child's right to alternative care in the form of adoption is not compromised or delayed.

The importance of family tracing and reunification measures is that as shown in Chapter Six, the fact that a child has been abandoned or neglected does not automatically qualify the child for adoption. Thus, efforts to maintain family ties should be explored before a child is placed for adoption.

Both articles 21 (a) and 24 (a) of the CRC and ACRWC do not recommend the conditions of adoptability. In its concluding observations to States Party reports, the CRC Committee has recommended that states should establish conditions under which a child is considered adoptable,[198] effectively identify those children potentially adoptable[199] and ensure that the best interests of the child is the paramount consideration in the adoption process in assessing the adoptability of the child.[200] To find these, one has to consider article 20 (1) of the CRC.

Article 20 (1) of the CRC provides that "[a] child temporarily or permanently deprived of his or her family environment, or in whose best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State".[201] This provision has been interpreted to suggest that children who are deprived of their family environment as a result of the death of their parents, abandonment or relinquishment are adoptable.[202] In addition, children could be separated from their parents in order to protect their best interests. For instance, in cases involving child abuse or neglect of the child by the parents. The best interests of the child might dictate that the child should be separated from his or her parents permanently. The adoptability principle also reinforces the fiduciary theory since it

[198] Committee on the Rights of the Child, Concluding Observations: Serbia (n101 above) para 43 (b).
[199] Ibid.
[200] Committee on the Rights of the Child, Concluding Observations: Mongolia (n175 above) para 28 (b).
[201] J Tobin 'Special Protection for Children Deprived of their Family Environment' in J Tobin *The UN Convention on the Rights of the Child: A Commentary* (2019) 731. See also article 25 (2) (a) of the ACRWC which provides that "[s]tate Parties to the present Charter: (a) shall ensure that a child who is parentless, or who is temporarily or permanently deprived of his or her family environment, or in who in his or best interest cannot be brought up or allowed to remain in that family environment shall be provided with alternative family care, which could include, among others, foster placement, or placement in suitable institutions for the care of children" and articles 9 and 19 of the CRC and ACRWC respectively which deal with children separated from their parents.
[202] See also Committee on the Rights of the Child, Concluding Observations: China, UN Doc CRC/C/15/Add.56, 7 June 1996, para 38 where the CRC Committee recommended that 'further measures should be taken by the State Party to promote the possibilities for children particularly those who have been abandoned to grow up in a home like environment through inter alia fostering and adoption'.

emphasises the need to establish the grounds in which children could be considered adoptable or in need of alternative care.[203]

Apart from establishing the conditions of adoptability, the Guidelines for Action on Intercountry Adoption in Africa further require states to 'provide a clear and detailed definition and criteria for children to be declared genuinely adoptable'.[204]

The Hague Convention also states that an adoption should take place if competent authorities have determined that the child is adoptable.[205] However, the Hague Convention falls short of prescribing the conditions in which a child is considered adoptable and how such a determination can be made. All it says is that '[a]n adoption within the scope of the Convention shall take place only if the competent authorities of the State of Origin- a) have established that the child is adoptable'. It is left to the discretion of states to determine in accordance with their national laws. The absence of a fixed definition of what adoptability entails is expected to allow some level of flexibility thereby accommodating varying cultural and social differences among states. Despite the discretion accorded to states, some guidance is provided in the Guide to Good Practice. According to the Guide to Good Practice, children deprived of parental or family care as a result of the death of their parents, abandonment or voluntary relinquishment could be considered adoptable.[206]

The Guide to Good Practice also provides further guidance on how to determine the eligibility of a child for adoption. For instance, in the context of abandoned or orphaned children, the Guide to Good Practice recommends that an investigation of the child's background and circumstances should be carried out in order to locate the child's family and effect a reunification before the child is placed for adoption.[207] This is consistent with the CRC and the ACRWC as discussed above. The Guide to Good Practice also stresses the importance of finding a balance between family preservation, making a decision that is in the child's best interests and shortening the procedures to allow a child to be placed for adoption.[208] In the case

[203] See section 2.2 of Chapter Two.
[204] Guidelines for Action on Intercountry Adoption in Africa (n119 above) para 34.
[205] Article 4 (a) of the Hague Convention. See also article 16 of the Hague Convention which requires the matching of a child to be done after the child has been declared adoptable.
[206] Permanent Bureau (n138 above) 81.
[207] Ibid.
[208] Ibid.

of voluntary relinquishment, it should be established that the decision was made freely and without financial inducement or undue pressure.[209]

In addition, the adoptability of a child should consider legal, social, medical and psychological factors.[210] Therefore, it should be established that a child is legally adoptable, that the child is medically and psychologically fit to benefit from the adoption and that the child is in need of alternative care in the form of adoption since he or she cannot be kept in or reunited with his or her birth family.[211]

The Guide to Good Practice also stresses the fact that the adoptability of a child should be determined in accordance with 'applicable laws and procedures'.[212] These requirements complement the provisions of the CRC and the ACRWC, which also require the adoptability of a child to be determined on the basis of 'applicable law and procedures'.

5.3.4. Who determines the adoptability of a child?

A critical issue in inter-country adoption is what authority can better protect the rights of parents? Article 21 (a) of the CRC provides that States Parties that permit adoption should ensure that the 'the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures 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'. A comparable provision is contained in article 24 (a) of the ACRWC which provides that States Parties that permit adoption should 'establish competent authorities to determine matters of adoption and ensure that the adoption is carried out in conformity with applicable laws and procedures and on the basis of all relevant and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and guardians'. This means that the adoptability of a child is to be determined by competent authorities.[213]

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[209] Ibid.
[210] Ibid.
[211] Policy Department, Citizen's Rights and Constitutional Affairs 'Adoption without Consent' (2015) Policy Department 1, 11.
[212] Permanent Bureau (n138 above) 81.
[213] Committee on the Rights of the Child, Concluding Observations: Mexico (n194 above) para 42 (d). See also Committee on the Rights of the Child, Concluding Observations: Republic of Korea (n136 above para 49 (a); Committee on the Rights of the Child, Concluding Observations: Singapore, UN Doc CRC/C/SGP/CO/2-3, 4

Both the CRC and the ACRWC do not provide a definition of the term 'competent authorities'. However, the fact that there is no definition of the term "competent authorities" is not by default but by design. It is argued that this approach is intended to allow some flexibility thereby catering for varying cultural, social and political differences amongst states. For instance, if the country has a federal arrangement or is a small population, state practice indicates that the task of determining the adoptability of a child could be given to administrative structures, government authorities or courts.

One possible understanding of the term 'competent authorities' is that the authority must have competency, that is, it should have an official mandate to perform this task.[214] Furthermore, it should have the necessary expertise and skills to determine the adoptability of a child.[215] Consistent with this interpretation, the Guidelines for the Alternative Care of Children have noted that decisions regarding the 'removal or reintegration' of children should be made by 'suitably qualified and trained professionals'.[216] Doek has further explained that the expertise of these decision makers should extend to 'knowledge of child psychology and child development, parent-child attachment and existing alternative ways and means to address the problems in the parent-child relationship without resorting to separation'.[217]

Despite the lack of a treaty definition of the term 'competent authorities', the CRC Committee in its concluding observations to State Party reports has recommended that states should ensure that all adoptions are subject to judicial and court authorisations in accordance with the best interests of the child.[218] In line with the fiduciary theory discussed in Chapter Two of this study,

May 2011, para 48; Committee on the Rights of the Child, Concluding Observations: Guatemala (n175 above) para 34; Committee on the Rights of the Child, Concluding Observations: Mongolia (n175 above) para 45; Committee on the Rights of the Child, Concluding Observations: Kazakhstan (n137 above) para 44 (c); Committee on the Rights of the Child, Concluding Observations: Kenya (n176 above) para 41 (a); Committee on the Rights of the Child, Concluding Observations: Austria (n176 above) para 43; Committee on the Rights of the Child, Concluding Observations: Costa Rica (n178 above) para 52 (c); Committee on the Rights of the Child, Concluding Observations: Democratic Republic of Congo (n179 above) para 48 (a) and Committee on the Rights of the Child, Concluding Observations: Ghana (n179 above) para 45 (c); Committee on the Rights of the Child, Concluding Observations: France, UN Doc CRC/C/FRA/CO/4, 22 June 2009, para 63.

[214] J Tobin and J Cashmore 'Article 9: The Right Not to Be Separated from Parents' in J Tobin *The UN Convention on the Rights of the Child: A Commentary* (2019) 316.

[215] Ibid.

[216] Guidelines for the Alternative Care of Children (n33 above) para 40.

[217] J Doek 'A Commentary on the United Nations Convention on the Rights of the Child, Article 8-9: The Right to Preservation of Identity and The Right not to be Separated from his or her Parents (2006) 17-18.

[218] Committee on the Rights of the Child, Concluding Observations: Korea, UN Doc CRC/C/KOR/CO/5-6, 24 October 2019, para 33. See also Committee on the Rights of the Child, Concluding Observations: Japan, UN Doc CRC/C/JPN/CO/4-5, 5 March 2019, para 30 (a).

the adoptability principle underscores the fact that the adoption of a child should be authorised by the court.[219] To assist the court in determining the adoptability of the child, the CRC Committee recommends that in all cases of adoption, the decision of the court should be supported by a social worker's or psychologist's assessment.[220]

The involvement of the courts in determining the adoptability of a child is significant in protecting the rights of parents in inter-country adoption. Given that inter-country adoption involves the termination of parental rights and responsibilities in respect of the child as well as the rights and responsibilities the child had in respect of his or her parents before adoption, the involvement of the courts is crucial.

The Hague Convention also requires an adoption to take place only if the competent authorities have determined that the child is adoptable.[221] Like the CRC and the ACRWC, the Hague Convention does not define the meaning of 'competent authorities'. Nonetheless, the Explanatory Report on the Hague Convention states that '[t]he State of origin is at liberty to determine which are the competent authorities, either administrative, judicial or even the Central Authority'.[222]

The term 'competent authorities' suggests that there may be several competent authorities within a state dealing with adoption matters.[223] However, there must be 'a clear understanding of their respective responsibilities and relationships between them'.[224] Where there are several competent authorities within a state, the CRC Committee in its concluding observations to State

[219] See section 2.2 of Chapter Two.
[220] Committee on the Rights of the Child, Concluding Observations: Mauritius, UN Doc CRC/C/MUS/CO/3-5, 27 February 2015, para 46.
[221] Article 4 of the Hague Convention provides that '[a]n adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin- a) have established that the child is adoptable'.
[222] Parra-Aranguren (n105 above) para 111. See also Permanent Bureau (n138 above) 39.
[223] See the Special Commission on the Practical Operation of the Hague Convention 'Report and Conclusions of the Special Commission on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption' (28 November-1 December 2000) 10 noting that '[e]ach Contracting State should provide a description of the manner in which the various responsibilities and tasks under the Convention are divided between Central Authorities, public authorities and accredited bodies, so that the entities responsible to act under particular articles if the Convention are clearly defined, as well as the mechanisms by which they interact with one another'.
[224] Ibid. See also Alston, Cantwell and Tobin (n102 above) 784.

Party reports has recommended that there should be coordination among the different institutions dealing with inter-country adoption.[225]

Although the task of determining the adoptability of a child could be given to courts, government authorities or administrative structures, the Guidelines for Action on Intercountry Adoption in Africa require states to make sure that the declaration of adoptability is made by an 'independent and professional qualified body, such as a court'.[226]

Commenting on article 21 (a) of the CRC, Alston, Cantwell and Tobin assert that an assessment of adoptability should be carried out by a judicial body (courts) to give due consideration to the numerous rights under the CRC and to ensure impartiality and accuracy of the investigations.[227]

In the next section, this study considers post-adoption procedures in the protection of the rights of parents in inter-country adoption.

6. POST-ADOPTION PROCEDURES

Post-adoption procedures refer to the adoption process after the child has been placed for adoption. As noted earlier,[228] the rights of parents should be protected not only before the adoption, but after adoption. Post-adoption procedural rights give effect to the fiduciary theory.[229]

A key issue in protecting the rights of parents is what happens when an irregularity has been alleged for inter-country adoption? Both the CRC and the ACRWC are silent on the issue of post-adoption procedural rights. Nor is there any evidence that such an issue was discussed during the drafting stages of the CRC. These omitted rights are particularly pertinent to parents given that there may be irregularities alleged in inter-country adoption. Some of the common problems that have continued to confront the African continent in the context of inter-country

[225] Committee on the Rights of the Child, Concluding Observations: El Salvador, UN Doc CRC/C/SLV/CO/3-4, 17 February 2010, para 50. See also Committee on the Rights of the Child, Concluding Observations: Costa Rica (n178 above) para 52 (c).
[226] Guidelines for Action on Intercountry Adoption in Africa (n119 above) para 36.
[227] Alston, Cantwell and Tobin (n102 above) 789.
[228] See section 5 of Chapter Three.
[229] See section 2.2 of Chapter Two.

adoption are illicit activities such as child trafficking, coercion and manipulation of parents to relinquish their children for adoption, improper inducement of consent through coercion and bribery.[230] Granted, the omitted rights could serve to prevent illicit activities in inter-country adoption and to remedy violations of parents rights in inter-country adoption.

However, the CRC Committee in its concluding observations to national reports has recommended that states should ensure that there are avenues for redress in the context of inter-country adoption and that such measures should take into account the best interests of the child.[231] In particular, in its concluding observations to Tuvalu, the CRC Committee expressed concern that the Tuvalu Lands Code allowed the annulment of adoptions without taking into account the best interests of the child.[232] It recommended that the State Party revise its laws for the annulment of adoptions to take into account the best interests of the child.[233]

Similarly, the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography has recommended that states should ensure that there is redress for victims of illegal adoptions through remedies such as reparations for victims.[234] States are also expected to provide mechanisms for addressing the concerns of parents and children about the circumstances of an adoption.[235]

Post-adoption procedural rights give effect to parents rights to access to justice. Access to justice also offers parents the opportunity to exercise their right to family life. The concept of

[230] Human Rights Council: Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, UN Doc A/HRC/34/55, 22 December 2016, para 28. See also E W Harrop 'Adoption Trade sets up shop in Africa- Pan African Conference addresses emerging Crisis in Child Rights'(12 July 2012); B Mezmur 'The Sins of Saviours: Child Trafficking in the Context of Intercountry adoption in Africa' (2010) Information Document No. 2 for the Attention of the Special Commission of June 2010 on the Practical Operation of the Hague Convention on 29 May 1993 on the Protection of Children and Co-operation in respect of Intercountry Adoption 1, 4; K Frimpong-Manso and A K Mawudoku 'Social Work Practice in Child and Family Welfare in Ghana' in M Grey *The Handbook of Social Work and Social Development in Africa* (2016) 100; African Child Policy Forum 'Intercountry Adoption: An African Perspective' (2012) ACPF 1, 10-11 and African Child Policy Forum 'Intercountry Adoption: Alternatives and Controversies' (2012) The Fifth International Policy Conference on the African Child, Conference Report, 29-30 May 2012 (United Nations Conference Centre Addis Ababa, Ethiopia).

[231] Committee on the Rights of the Child, Concluding Observations: Tuvalu, UN Doc CRC/C/TUV/CO/1, 30 October 2013, para 45 (d).

[232] Committee on the Rights of the Child, Concluding Observations: Tuvalu (n231 above) para 45.

[233] Committee on the Rights of the Child, Concluding Observations: Tuvalu (n231 above) para 46 (a). See also Committee on the Rights of the Child, Concluding Observations: Tuvalu, UN Doc CRC/C/TUV/CO/2-5, 31 March 2020, para 36 (a).

[234] Human Rights Council (n230 above) para 85 and 95.

[235] Human Rights Council (n230 above) para 95 (i).

access of justice requires the legal empowerment of parents. Parents should have access to relevant information and effective remedies to assert their rights, including through legal and other services, counselling and through mechanisms such as courts.[236]

Unlike the CRC and the ACRWC, the Hague Convention puts in place measures to deal with irregularities in inter-country adoption. Article 24 of the Hague Convention provides that '[t]he recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, considering the best interests of the child'. This provision, it must be observed, probably presents the highest watermark of the Hague Convention. In this provision, one sees an attempt to protect the rights of parents and the children involved when an irregularity has been alleged in inter-country adoption.

While it is commendable that the Hague Convention protects the rights of parents, the terms 'manifestly contrary to its public policy' are not defined in the Convention and it is not at all clear what criteria or guidelines should be used to determine whether an 'adoption is manifestly contrary to its public policy'. This is an unwelcome omission considering that the ultimate decision to recognise an adoption depends on whether it is 'manifestly contrary to its public policy'. However, some guidance is provided in the Guide to Good Practice. The Guide to Good Practice has explained that 'non-recognition of the adoption would be an extreme sanction for very exceptional cases, for example, where there has been a violation of the fundamental rights of the natural family'.[237] For instance, if consent for the purposes of adoption was false, coerced or fraudulent.[238] To this end, the Hague Convention builds on the fiduciary theory which fails to provide any guidance on the grounds in which an adoption decision can be challenged in cases of disputes and grievances.

Although the non-recognition of an adoption is a necessary inroad in protecting parental rights in inter-country adoption, it also raises several issues. It is no surprise that it is reserved for exceptional cases, considering the best interests of the child. Children need stable and secure family relationships in order to grow and develop fully.[239] The non-recognition of an inter-

[236] Human Rights Council: Access to Justice, UN Doc A/HRC/25/35, 16 December 2013, paras 5; 8 and 9. See also Human Rights Committee, General Comment No. 31 (80) The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (n27 above) para 16.
[237] Permanent Bureau (n138 above) 116.
[238] Parra- Aranguren (n105 above) para 423.
[239] See Preamble of the CRC, para 5, noting that '[r]ecognising that the child, for the full and harmonious development of his or her personality should grow up in a family environment, in an atmosphere of happiness,

country adoption has the potential to undermine the child's right to alternative care and more importantly, the stability that an adoption would bring to the child. Therefore, the decision not to recognise an adoption should consider the best interests of the child.

The Hague Convention recognises that even when an adoption is 'manifestly contrary to its public policy', it should not be set aside unless it is in the child's best interests to do so. In considering the best interests of the child, consideration should be given to the likely effect of the change in circumstances on the child, the damage to the child and the importance of stability in the child's life even at the expense of the parents' rights.

The general obligation to ensure that 'the best interests of the child shall be the paramount consideration' in adoption implies that while the best interests of the child may not be the sole consideration, it should take precedence over other interests in the context of adoption.[240] In its General Comment on the right of the child to have his or her best interests taken as a primary consideration, the CRC Committee has stressed that the best interests of the child are to be the determinant factor in any decision on adoption.[241] The Hague Convention therefore gives paramountcy to the best interests of the child.

The practical effect of article 24 of the Hague Convention is that an adoption which is manifestly contrary to public policy, or which violates the rights of parents can be upheld if it is in the best interests of the child and despite non-compliance with certain requirements. Given that the non-recognition on an adoption is likely to cause more damage to the child than the parents, states are therefore obliged to consider the effect that the non-recognition of an adoption would have on the child's best interests. It is evident that in weighing the rights of the child and the parents that the best interests of the child should be given paramount

love and understanding'. See also Preamble of the Hague Convention, para 1, noting that '[r]ecognising that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding' and that 'intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of Origin'; Preamble of the ACRWC, para 5 and Preamble of the Declaration on Foster Placement and Adoption, para 3.

[240] See article 21 of the CRC, article 24 of the ACRWC and preamble of the Declaration on Foster Placement and Adoption, para 5. See also Vite and Boechat (n93 above) 24 and Hodgkin and Newell (n53 above) 285.

[241] Committee on the Rights of the Child, General Comment No. 14 (n13 above) para 38, noting that 'in respect of adoption (art 21), the right of the best interests of the child is further strengthened; it is not simply to be 'a primary consideration' but 'the paramount consideration'. Indeed, the best interests of the child are to be the determining factor when taking a decision about adoption and other issues'.

consideration.[242] In this way, the Hague Convention attempts to balance parents' rights with the rights of the child. Thus, the rights of parents are only protected as far as they do not conflict or undermine the best interests of the child.

A conflict could arise between the interests of the child, biological parents and adoptive parents especially in contested adoptions. To demonstrate these conflicts, the following discussion highlights the highly publicised American cases of Baby Richard[243] and Baby Jessica.[244]

The facts of the Baby Jessica are as follows: Cara Clausen gave birth to Baby Jessica on 8 February 1991. She was not married at the time and decided to give up the child for adoption. She relinquished her parental rights on 14 February 1991 and made another man named Scott Seefeldt sign the release of custody form terminating his parental rights. Subsequently, the court awarded temporary custody of the child to Roberta and Jan De Boer who returned to Michigan with the child. Nine days after the De Boers took custody of the child, Ms Clausen filed a motion to rescind her release of custody claiming that she lied about the identity of the father and that the child's real father was Daniel Schmidt.

Mr Schmidt also filed a petition challenging the adoption proceedings in Iowa District Court. The Juvenille Court denied Ms Clausen's request and she appealed. In the meantime, the Iowa District Court found that Daniel Schmidt was the real father of the child and that he had not relinquished his parental rights or abandoned the child. The court denied the adoption of the child and ordered the De Boers to return the child to Mr Schmidt. However, the De Boers obtained a stay of that order pending further appeal of the case in Iowa.

After several trials and appeals, the De Boers were ordered to return the child to the Schmidts, almost three years after they had taken custody of Baby Jessica. The court ruled that the natural father's rights had not been terminated in accordance with the law and that there was no indication that the natural father was an unfit parent.

The facts of the Baby Richard case are as follows: Otaka Kirchner and Daniella Janikova came to the United States of America in 1986 from the former Czechoslovakia and moved in

[242] See section 21 of the CRC stating that in adoption the best interests of the child shall be the paramount consideration and not a primary consideration.
[243] *In re Doe*, 627 N.E. 2d 648, 649 (III. App Ct. 1993), rev'd, 683 N.E. 2d 181 (III. 1994).
[244] *De Boer v Schmidt* 501 NW 2d 193, 194 (Mich.Ct. App. 1993).

together. Soon after, Daniella became pregnant. In January 2991, Mr Kirchner travelled to Czechoslovakia for 13 days for family related matters. While he was away, Daniella found out that he had married an old girlfriend and was on his honeymoon. Daniella became upset and decided that she would put up the child for adoption after he was born without telling the father. She asked her friends and family to tell Mr Kirchner that the baby had died. On 8 February 1991, Mr Kirchner returned to the United States of America and, after seeing that Daniella had moved out of their apartment began looking for her. Daniella finally met up with Mr Kirchner and told him that she never wanted to see him again.

On 16 March 1991, Daniella gave birth to Baby Richard. Four days later, she gave up the child for adoption and lied to Mr Kirchner that the baby had died three days after birth. In May 1991, a mutual friend told Mr Kirchner that the baby was in fact still alive and that he had been given up for adoption. Daniella later confessed to Mr Kirchner that she had put up for adoption. On 23 December 1991, Mr Kirchner challenged the legality of the adoption at the Cook County Circuit Court. The court ruled that it would not be in the best interests of the child to rescind the adoption since at that time the child had been with the adoptive parents for nearly three years. However, the Illinois Supreme Court reversed the Cook County Circuit Court's decision on the basis that the courts could not even consider the best interests of the child until they found Mr Kirchner to be an unfit parent.

In both cases, the court ordered that the children be returned to their biological parents because the biological fathers of the children were never consulted before the adoptions were finalised. The common thread that runs through these cases is that the best interests of the child standard was not applied, but the interests of the parents.

Article 33 of the Hague Convention also deals with irregularities in inter-country adoption. It provides that '[a] competent authority which finds that any provision of the Convention has not been respected or that there is a serious risk that it may not be respected, shall immediately inform the Central Authority of its State. This Central Authority shall be responsible for ensuring that appropriate measures are taken'. Although this provision has the potential to address irregularities in inter-country adoption, it is not clear what sort of 'appropriate measures' would need to be taken to deal with violations of the Hague Convention.

7. CONCLUSION

The chapter started with discussing parents' rights in international law, with a particular focus on the right to family life. In the context of inter-country adoption, this discussion demonstrated that the recognition of the parents right to respect for their family life has implications for adoptability, consent to adoption and post-adoption procedural rights. Accordingly, six main issues were underscored. First, the point was made that the legal implications of the recognition of the parents right to family life is that priority should be given to parents to care for their children before resorting to alternative care, unless it is not in the child's best interests to do so.

Second, another implication that the recognition of the parents right to family life would have on the adoption process is that an adoption should not be authorised without the consent of the parents unless such consent is not required.

Third, that parents have the right to participate in adoption proceedings and to challenge the adoption in case of grievances and disputes. Fourth, that it encourages interventions that preserve the family unit unless it threatens the best interests of the child. Fifth, that all decision-making concerning the care of the child should consider the rights and duties of the child's parents.

Finally, the point was made that child abandonment or neglect does not automatically qualify the child for adoption. Therefore, ensuring that family preservation and reunification measures are taken is an important initial step in protecting the rights of parents in inter-country adoption.

The circumstances in which parental rights may be limited were also discussed in detail. In relation to inter-country adoption, this insight revealed that the establishment of criteria and procedures for the limitation of parental rights is crucial for the protection of the rights of parents in inter-country adoption.

The chapter also discussed how international law conceives of the term 'parents'. With regards to the term 'parents', it was demonstrated that international law adopts a broad interpretation of parenthood which is consistent with the diversity model. In relation to inter-country adoption, this insight revealed four key issues: First, that the implications of the recognition of

the extended family in the context of inter-country adoption is that willing family members would need to be informed that a child who is a relative is being placed for adoption.

Second, that the recognition of the extended family has implications for adoptability. As Chapter Six demonstrates, the orphan status of a child does not automatically qualify the child for adoption, but that there should be no caregivers willing to adopt a child. Therefore, the right to alternative care (or adoption) does not immediately apply upon the loss of parental care, but only becomes applicable when there are no available, willing or suitable relatives that have taken responsibility for the child upon the loss of parental care.

Third, that consent for the purposes of adoption should be obtained from both biological parents of the child irrespective of the nature of the union that brought about the child, and where such persons are not available, other persons in charge of the care of the child.

Fourth, that all decision-making concerning the care and adoption of a child must consider the rights and duties of the child's parents and other persons responsible for the child.

The international and regional legal framework for the protection of the rights of parents in inter-country adoption was also accorded great attention. It was established that the principles of consent to adoption, adoptability and the post-adoption procedures are critical to protecting the rights of parents in the context of inter-country adoption. These principles reinforce the central tenets of the fiduciary theory.

In conclusion, this thesis argues therefore, that the principles of consent, adoptability and post-adoption procedural rights identified above, taken together with the recommendation for a broad conception of parenthood which protects all forms of family relationships are key to a robust system of inter-country adoption that respects the rights of parents in inter-country adoption in an African context. To ensure that the rights of parents are protected in inter-country adoption, the law must sufficiently incorporate these principles.

In particular, the law should establish the conditions under which children are considered adoptable and provide a clear and detailed definition of children to be declared genuinely adoptable. In addition, questions on who should give consent, how should consent be given and counselling have to be made clear in the law.

Equally important, the legal framework must provide the procedures by which such a determination can be made. Questions of who determines the adoptability of a child, family tracing and the criteria for children to be declared genuinely adoptable have to be made clear in the law.

Third, the legal framework ought to provide mechanisms through courts in which the validity of an adoption can be challenged in case of disputes and grievances. For instance, if consent for the purposes of adoption was false, coerced or fraudulent.

Chapters Five to Seven present three African countries: Ghana, South Africa and Uganda in order to examine how the principles and procedures identified in Chapter Two and elaborated upon in this chapter find expression in the domestic laws governing inter-country adoption. It is apposite to first provide an overview of the evolution of the inter-country adoption system in Ghana, South Africa and Uganda before assessing how the domestic regulation of inter-country adoption best protects the rights of parents in inter-country adoption.

CHAPTER FOUR: INTER-COUNTRY ADOPTION IN AFRICA: BACKGROUND

1. INTRODUCTION

Having identified the core elements that should underpin an inter-country adoption system for the protection of the rights of parents, the study will in the next three chapters examine how the regulatory framework on inter-country adoption in the selected African countries fare with regard to the protection of the rights of parents. Before proceeding with such an analysis, it is important to discuss the development of the legal framework governing inter-country adoption in the selected countries.

The chapter first explains why Ghana, South Africa and Uganda were selected for the purposes of this study. Thereafter, it examines the history of legislation on inter-country adoption and whether it places the rights of parents at its core. The chapter also provides a brief overview of the current legal framework on inter-country adoption in relation to the rights of parents. This will lay the background to the detailed analysis of the implications of these provisions for the protection of the rights of parents in inter-country adoption (Chapters Five to Seven of the thesis).

The potential of domestic laws in Ghana, South Africa and Uganda to protect the rights of parents in inter-country adoption can best be appreciated through a nuanced understanding of how the laws define the concept of parental rights. As shown in Chapter Three, the protection of the rights of parents in inter-country adoption is inextricably linked to parents right to enjoy their family life.[1] In the fifth section, this chapter investigates how and to what extent the domestic laws of Ghana, South Africa and Uganda protect parental rights. It examines which elements of parents right to enjoy their family life under the domestic laws of the countries under study would ensure that the rights of parents are protected. This includes an analysis of the implications for the protection of the rights of parents in inter-country adoption.

A holistic understanding of how the rights of parents can be protected in inter-country adoption in Ghana, South Africa and Uganda should include an appreciation of what the notion of

[1] See section 2 of Chapter Three.

'parents' practically means in those countries. In the sixth section, this chapter investigates what the concept of 'parents' means under the domestic laws of Ghana, South Africa and Uganda and the implications for the protection of the rights of parents in inter-country adoption are discussed in this chapter.

2. SELECTION OF COUNTRY STUDIES

The reasons for selecting these countries were explained in the introductory chapter of this thesis. As noted in Chapter One,[2] the primary reason for choosing these countries is that Ghana, South Africa and Uganda are among the few African countries that have adopted inter-country adoption regulatory frameworks relevant to this study. Furthermore, the countries were selected on the basis that they assist the thesis to make the argument that thus far, inter-country adoption practices in Africa have been done in ways that do not adequately protect the rights of parents.

Of the three countries, South Africa was the first to ratify and domesticate the Hague Convention on Protection and Co-operation in respect of Intercountry Adoption (Hague Convention).[3] Uganda has not yet done so although the country is reportedly in the process of ratifying the treaty. However, it has amended its laws on inter-country adoption.[4] Therefore, this study seeks to examine the extent to which the relevant legal framework protects the rights of parents in inter-country adoption. Ghana has just ratified the Hague Convention and amended its laws on inter-country adoption.[5] Whether the ratification of the Hague Convention and the amendment of its inter-country adoption laws has an impact on protection of the rights of parents in adoption is a point of interest in this thesis.

[2] See section 6 of Chapter One.

[3] Adopted by the Hague Conference on Private International Law on 29 May 1993 and entered into force on 1 May 1995. See the Status Table, available at www.hcch.net/en/instruments/conventions/status-table/?cid=69, accessed on 3 December 2019. South Africa ratified the Hague Convention. South Africa ratified the Hague Convention on 21 August 2003.

[4] Ugandan President Signs into Law Amendments to Children's Act, available at travel.state.gov/content/travel/en/News/Intercountry-Adoption-News/ugandan-president-signs-into-law amendments-to-children-act.html, accessed on 3 December 2019. See also the Children (Amendment) Act, 2016.

[5] 'Ghana Accedes to the 1993 Hague Convention on Intercountry Adoption' available at https://www.hcch.net/en/news-archive/details/?varevent=524, accessed on 23 May 2019; noting that on 16 September 2016, Ghana acceded to the Hague Convention and that the Hague Convention had entered into force for Ghana on 1 January 2017. See for instance, the Children's (Amendment) Act, 2016 and the Adoption Regulations, 2018.

There are further reasons for selecting these countries as the focus countries of this study. All the three countries have ratified various international and regional human rights instruments such as the Convention on the Rights of the Child (CRC)[6] and the African Charter on the Rights and Welfare of the Child (ACRWC),[7] which impose legally binding obligations on them to protect the rights of children and their parents.[8] Therefore, one can expect that the countries must have developed norms, practices and procedures that ensure that the rights of parents and their children are respected in all decision-making concerning the care and adoption of children.

The fact that these countries have all experienced illicit activities in the context of inter-country adoption such as child trafficking, coercion and manipulation of parents stands as another reason for the focus on these countries.[9] Furthermore, South Africa, Ghana and Uganda are among the top sending African countries to the United States of America (USA).[10] This means that these countries must have developed norms, practices and procedures governing inter-country adoption, which make sure that the rights of parents and their children are protected in inter-country adoption. This is the subject of further investigation in the chapters that follow.

Finally, all the three countries experience significant levels of poverty and HIV/AIDS, which have led to a population of orphans and abandoned children in need of alternative care.[11]

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[6] Adopted and Opened for Signature, Ratification and Accession by the General Assembly resolution 44/25 of 20 November 1989, entry into force on 2 September 1990. See the Status Table available at https://indicators.ohcr.org/, accessed on 7 June 2021. South Africa ratified the CRC in 1995; Ghana and Uganda in 1990.

[7] Adopted by the Organization of African Unity in 1990 and entered into force in 1999.

[8] See for instances articles 3 (2); 5; 18 and 27 of the CRC and articles also articles 18; 19; 20 and 25 of the ACRWC which protect parental rights and responsibilities. See the Status Table available at https://www.acerwc.africa/ratifications-table/, accessed on 7 June 2021. Ghana ratified the ACRWC on 10 June 2005; South Africa on 7 January 2000 and Uganda on 17 August 1994.

[9] E W Harrop 'Adoption Trade Sets up Shop in Africa- Pan African Conference Addresses Emerging Crisis in Child Rights'(12 July 2012); B Mezmur 'The Sins of Saviours: Child Trafficking in the context of Intercountry adoption in Africa' (2010) Information Document No. 2 for the Attention of the Special Commission of June 2010 on the Practical Operation of the Hague Convention on 29 May 1993 on the Protection of Children and Co-operation in respect of Intercountry Adoption 1, 4; K Frimpong-Manso and A K Mawudoku 'Social Work Practice in Child and Family Welfare in Ghana' in M Grey *The Handbook of Social Work and Social Development in Africa* (2016) 100; African Child Policy Forum 'Intercountry Adoption: An African Perspective' (2012) ACPF 1, 10-11 and African Child Policy Forum 'Intercountry Adoption: Alternatives and Controversies' (2012) The Fifth International Policy Conference on the African Child, Conference Report, 29-30 May 2012 (United Nations Conference Centre Addis Ababa, Ethiopia).

[10] Statistical Data on Adoptions was Assessed on, or Compiled and/or Derived from Official Sources. For adoptions to the USA: http://adoption.state.gov/about_us/statistics.php; accessed on 17 December 2019.

[11] United Nations Development Programme 'Human Development Indices and Indicators, 2018 Statistical Update: South Africa' (2018) UNDP 1, 1-8; The World Bank, STATS SA and NDP 'Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities' (2018) The World Bank,

Therefore, inter-country adoption might be a preferred solution to the plight of these children. This requires the development of laws and procedures that protect both parental rights and children's rights in adoption.

3. A HISTORY OF INTER-COUNTRY ADOPTION LEGISLATION IN GHANA, SOUTH AFRICA AND UGANDA

This section traces the historical evolution of inter-country adoption laws in South Africa, Ghana and Uganda. It will also provide a brief overview of the legislative frameworks regulating inter-country adoption within which parental rights are given legal protection. Chapter Three has shown the fundamental principles and procedures that should underpin an inter-country adoption regime that protects the rights of parents. Therefore, this section assesses the domestic legislation of the selected countries against the prescribed principles and procedures in order to assess whether the rights of parents involved are protected. The specific ways in which the laws have done so or failed to do so is the subject of critical discussion in Chapters Five to Seven of the thesis.

3.1. Legal provisions on consent to adoption in the countries under study

3.1.1. South Africa

Prior to 2000, inter-country adoptions in South Africa were illegal in terms of section 18 (4) (f) of the Child Care Act.[12] The constitutionality of section 18 (4) (f) of the Child Care Act was

STATS SA and NDP 1, 1-114; United Nations Development Programme 'Northern Ghana Human Development Report: Bridging the Poverty Gap and Fostering Socio-Economic Transformation and Empowerment to contribute to Human Development For All (2018) UNDP; United Nations Development Programme 'Ghana Millennium Development Goals Report' (2015) UNDP; The World Bank in Ghana, available at worldbank.org/en.country/Ghana/overview; USAID 'Ensuring Escapes from Poverty are Sustained in Uganda' (2016) Report No. 27 USAID 1, 1-51; United Nations Development Programme 'Human Development Indices and Indicators, 2018 Statistical Update, Briefing Note for countries on the 2018 Statistical Update: Uganda' (2018) UNDP1, 1-8; The World Bank 'The Uganda Poverty Assessment Report' (2016) World Bank 1, 1-178 and UNICEF 'The Status of the Child Protection System in Uganda' (2013) Report of the Child Protection Systems Mapping Uganda 1, 4;

[12] Act 74 of 1983, section 18 (4) (f) of the South African Child Care Act. See also L Schafer *Child Law in South Africa: Domestic and International Perspectives* (2011) 512; S Human 'Inter-country Adoption' in C J Davel and A M Skelton *Commentary on the Children's Act* (2007) 16-3; T Boezaart *Child Law in South Africa* (2009) 376-377 and A Skelton; M Carnelley; S Human; J Abraham Robinson and B S Smith *Family Law in South Africa* (2010) 305.

challenged in *Minister of Social Welfare and Population Development v Fitzpatrick*.[13] The Constitutional Court found section 18 (4) (f) of the Child Care Act to be unconstitutional and inconsistent with the best interests of the child.[14] Following *Fitzpatrick*, inter-country adoptions in South Africa were treated in the same manner as domestic adoptions under the Child Care Act.[15]

Parents rights were codified under Chapter Four of the Child Care Act. For instance, the Child Care Act required an adoption to be guided by the consent of both parents of the child whether or not the child was born out of wedlock.[16] The state was obliged to ensure that the persons whose consent was required for the purposes of adoption were notified of the proposed adoption and to afford them the opportunity to either give or withhold their consent, give reasons why their consent should not be waived or in the case of a natural father of the child, to apply for the adoption of the child.[17]

The Child Care Act also specified the manner in which consent for the purposes of adoption should be given. It required consent to be reduced in writing and given in the presence of a Commissioner of Child Welfare.[18] It was also a legal requirement for consent to be freely given and not induced by payment.[19]

Parents also had the right to withdraw their consent within 60 days after the consent was given.[20] More importantly, consent to adoption was a mandatory requirement under the Child Care Act.[21] These were notable safeguards in favour of parents.

Consent was however not required in case of a child whose parents were dead, who deserted the child or who as a result of mental illness were incapable of giving their consent to

[13] 2000 (3) SA 139 (C) and 2000 (3) SA 422 (CC).
[14] Para 20 noting that '[t]he provisions of Section 18 (4) (f) are too blunt and all-embracing to the extent that they provide that under no circumstances may a child born to a South African citizen be adopted by non-South African citizens. To that extent they do not give paramountcy to the best interests of children and are inconsistent with the provisions of Section 28 (2) of the Constitution and hence invalid'.
[15] Boezaart (n12 above) 377. See also Skelton; Carnelley; Human; Abraham Robinson and Smith (n12 above) 305 noting that 'the Court was of the view that there were sufficient safeguards in the Child Care Act to allow inter-country adoptions to take place safely until the legislature could promulgate more comprehensive legislation'.
[16] Section 18 (4) (d) of the South African Child Care Act.
[17] Section 19A of the South African Child Care Act.
[18] Section 18 (5) of the South African Child Care Act.
[19] Section 24 (1) of the South African Child Care Act.
[20] Section 18 (8) of the South African Child Care Act.
[21] Section 18 (4) (d) of the South African Child Care Act.

adoption.[22] In addition, consent was not required from a parent who was withholding his or her consent unreasonably.[23] Although the Child Care Act allowed the court to dispense with parental consent where the parent unreasonably withheld their consent, it did not provide any criteria or guidelines to determine what would be considered 'unreasonable' for the purposes of adoption.[24] However, in *SW v F*,[25] the High Court decided that the refusal of the mother to consent to an adoption was unreasonable on the basis that the mother had made no efforts to bond with her child after she was released from prison and that the adoption was in the best interests of the child.[26]

However, the Child Care Act had some flaws. Among other things, the Child Care Act did not protect parent-child relationships that formed outside of marriage or biological ties.[27] It adopted a narrow interpretation of parenthood, which reflected the integrative model of parenthood. In *Fraser v Children's Court, Pretoria North and Others*,[28] the Constitutional Court declared that section 18 (4) (d) of the Child Care Act was unconstitutional in that it discriminated unfairly against unmarried fathers on the basis of gender and marital status and that it also discriminated against fathers in non-Christian marriages.[29]

The Child Care Act was also silent on counselling those who are expected by the law to give their consent to an adoption.[30] It also lacked detailed criteria on the manner in which consent should be given and the safeguards to ensure that consent is freely given.

[22] Section 19 (a); (b) (i) and (ii) of the South African Child Care Act.
[23] Section 19 (b) (vi) of the South African Child Care Act.
[24] A Louw 'Adoption' in T Boezart *Child Law in South Africa* (2009) 149.
[25] 1997 (1) SA 796 (O) AT 805C-D. See also Louw (n24 above) 149.
[26] Ibid.
[27] Section 18 (4) (d) of the South African Child Care Act provided that 'a children's court to which an application for an order for adoption is made shall not grant the adoption unless it is satisfied that consent to the adoption has been given by both parents of the child, or if the child is illegitimate, by the mother of the child, whether or not such mother is a minor or married woman and whether or not she is assisted by her parent, guardian or husband as the case may be'. This provision was, however, amended by the Adoption Matters Amendment Act 56 of 1998 so as to require natural fathers to consent to the adoption of their children in certain circumstances. See also South African Law Commission 'Review of the Child Care Act' (2002) Report1101, 240 and T L Mosikatsana 'Is Papa a Rolling Stone?: The Unwed Father and his Child in South African Law- A Comment on *Fraser v Naude*' (1996) 29 (2) *Comparative and International Law Journal of Southern Africa* 152, 154-155. See also section 2.1 of Chapter Five.
[28] CCT 31/96.
[29] Para 52 (1).
[30]This was however cured by regulation 19 of the Regulations to the Child Care Act, published under GNR 26121 in GG 1054 of 12 December 1986, which required the Commissioner before attesting to the consent to inform the person consenting to an adoption of the legal consequences of the adoption.

The Child Care Act was repealed in its entirety and replaced by the Children's Act.[31] Although the process of law reform was already underway, it took several years before the legislature passed the comprehensive Children's Act. In the interim, the Department of Social Development drafted guidelines that were used to facilitate inter-country adoptions.[32] Although the guidelines had no legal status, they were used by adoption practitioners to facilitate inter-country adoptions.[33] The draft guidelines contained many provisions that protected the rights of parents in inter-country adoption. Among other things, the draft guidelines stressed the fact that the rights of parents should be respected in all decision-making concerning the placement of a child.[34] In addition, the draft guidelines required parents to receive counselling prior to consenting to an adoption[35] and to be made aware of the implications of relinquishing their child for adoption before consenting to an adoption.[36]

Unlike its predecessor, the Children's Act has comprehensive provisions regulating inter-country adoption. Among other things, the Children's Act provides for who should give consent, how consent should be given and counselling the persons who are expected by the law to consent to an adoption.[37] Provision is also made for the circumstances in which parental consent is not required for the validity of an adoption.[38] These are all pertinent to protecting the rights of parents involved in inter-country adoption.

However, the Children's Act is not without flaws. For example, there is no provision, which explicitly requires the consent of the mother to be given after the birth of the child as required by private international law (as shown in Chapter Five). Furthermore, despite the requirement that consent to an adoption should be freely given, in practice, this remains a challenge in inter-country adoption. The specific ways in which it remains a challenge are discussed in detail in Chapter Five of the thesis.[39]

[31] Act 38 of 2005.
[32] Human (n12 above) 16-3 and Skelton; Carnelley; Human; Abraham Robinson and Smith (n12 above) 306.
[33] Skelton; Carnelley; Human; Abraham Robinson and Smith (n12 above) 306.
[34] See section 6.1.4 of the Draft Guidelines.
[35] See section 6.1.3 of the Draft Guidelines.
[36] See sections 6.1.1 and 6.1.2 of the Draft Guidelines.
[37] Section 233 of the South African Children's Act.
[38] Section 236 of the South African Children's Act.
[39] See Chapter Five.

3.1.2. Ghana

Previously the Children's Act,[40] now repealed, dealt with both domestic and inter-country adoption. Parents rights relevant to the thesis were protected in Part IV of the Children's Act. The Children's Act required the consent of the parents, guardian or any other person who had rights or obligations in respect of the child.[41] More importantly, the Children's Act required the court before making an adoption order to ensure that the consent required for the purposes of adoption has been obtained and that the persons concerned understand the effects of an adoption order.[42]

Consent was not required under the Children's Act if the court was satisfied that the parent or guardian neglected or ill-treated the child, if the parent or guardian was incapable of giving consent, cannot be found or if consent was unreasonably withheld.[43]

Despite the above-mentioned provisions, the Children's Act fell short of many important elements of an inter-country adoption system that respects the rights of parents. For example, the Children's Act did not explicitly make it a mandatory requirement to counsel those who are expected by the law to consent to an adoption. Furthermore, the Children's Act lacked detailed criteria on how consent should be obtained for the purposes of adoption.

To ameliorate some of these concerns, Ghana repealed the Children's Act, replacing it with the Children's (Amendment) Act.[44] More recently Ghana promulgated the Adoption Regulations.[45] Guided by the Hague Convention and international standards, the Children's (Amendment) Act and the Adoption Regulations make it clear who should give consent, how consent should be given and counselling.[46] To realise this right, the Children's (Amendment) Act states that an adoption order should not be made without the consent of the child's parents or guardian.[47] The circumstances in which consent is not required are also made clear in law.[48]

[40] Act 560 of 1998.
[41] Sections 68 (1) and 69 (1) of the Ghanaian Children's Act.
[42] Section 70 (1) of the Ghanaian Children's Act.
[43] Section 68 (2) of the Ghanaian Children's Act.
[44] Act 937 of 2016. The Preamble states that the purpose of the Act is 'to make further provisions in respect of foster-care and adoption and to provide for related matters'.
[45] 2018.
[46] Section 81 (1) and (2) of the Ghanaian Children's (Amendment) Act.
[47] Ibid.
[48] Section 81 (6) (a)-(d) of the Ghanaian Children's (Amendment) Act.

The extent to which these provisions protect the rights of parents are discussed fully in Chapter Five.

3.1.3. Uganda

As for Uganda, previously the Adoption Act[49] made provision for both domestic and inter-country adoption under strict terms but with minimal regulatory procedures.[50] The ratification of the CRC and the ACRWC in 1989 and 1990 respectively provided the impetus for the review of all child-related laws in Uganda.[51] In 1990, Uganda established the Child Law Review Committee to review all child-related laws and to harmonise them with these treaties.[52] In 1992, the Child Law Review Committee produced its report, which culminated in the adoption of the Children Act.[53]

Among other things, the Children Act provides for who should give consent and how consent should be given.[54] It also provides the circumstances in which parental consent is not required.[55] In the next section, this study examines the legal provisions on the adoptability principle in protecting parental rights in inter-country adoption.

3.2. Legal provisions on the adoptability principle in the countries under study

3.2.1. South Africa

Prior to the promulgation of the Children's Act, the Child Care Act paid scant attention to the question of the adoptability of children. There was a lot of uncertainty as to when a child could be placed for adoption.[56] Furthermore, the Child Care Act did not specify any concrete

[49] Chapter 216 Laws of Uganda, repealed.
[50] D M Chirwa 'Children's Rights, Domestic Alternative Care Frameworks and Judicial Responses to Restrictions on Inter-country Adoption: A case study of Malawi and Uganda' (2016) 16 *African Human Rights Law Journal* 117, 128.
[51] Ibid.
[52] Ibid.
[53] Act 59 of 1997.
[54] Section 47 (1) of the Ugandan Children Act.
[55] Section 47 (2) of the Ugandan Children's Act.
[56] Louw (n24 above) 140.

adoptability criteria related to the need to protect the rights of parents in inter-country adoption.[57]

To address these shortcomings, the Children's Act provides detailed criteria to determine the eligibility of a child for adoption. It specifies the grounds in which a child is considered adoptable.[58] For instance, in terms of section 230 (3) of the Children's Act, a child is considered adoptable if the child is an orphan and has no guardian or caregiver willing to adopt the child, has been abandoned, abused or neglected by his or her parents. Of importance in protecting the rights of parents is that key terms such as an orphan or abandoned child for the purposes of adoption have been defined.[59] The fact that the Children's Act specifies the grounds in which a child is considered adoptable and defines key terms such as an 'orphan' is commendable in protecting the rights of parents in inter-country adoption (discussed further in Chapter Six).[60]

The regulations[61] to the Children's Act further prescribe how to determine if a child is an orphan or has been abandoned for the purposes of adoptability. More importantly, the task of determining the adoptability of a child is undertaken by the courts subject to an assessment by the adoption social worker.[62] This ensures that the rights of parents are protected in inter-country adoption (as shown in Chapter Six).

3.2.2. Ghana

Before the adoption of the Children's (Amendment) Act and the Adoption Regulations, the Children's Act paid little attention to the question of adoptability of children.[63] All it said is that 'a child under a care order whose parent, guardian or relative does not show an interest in the welfare of the child within a period stipulated by the Family Tribunal may be put up for adoption'.[64] There were no clear substantive and procedural requirements to ensure that the rights of parents are protected.

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[57] Ibid.
[58] Section 230 (3) of the South African Children's Act.
[59] Section 1 of the South African Children's Act.
[60] See Chapter Six for a detailed discussion.
[61] General Regulations Regarding Children, 1 April 2010.
[62] Rule 56 of the General Regulations Regarding Children.
[63] R Osei Sarpong and C Mensah-Ankrah 'Adoption Practices Fuelling Child Trafficking in Ghana' (2018) Eban Centre for Human Trafficking Studies 1, 2-5.
[64] Section 26 of the Ghanaian Children's Act.

To address these shortcomings, the Adoption Regulations deal with the adoptability of children. The Adoption Regulations specify the grounds in which a child is considered adoptable.[65] Key terms such as an abandoned child are defined.[66] The Adoption Regulations also provide clear and detailed criteria for children to be declared adoptable.[67] Of importance is that the declaration of adoptability is made by the court subject to an assessment by the Technical Committee of the Central Authority.[68] The extent to which these provisions protect the rights of parents is discussed in detail in Chapter Six.

3.2.3. Uganda

As was the case in South Africa and Ghana, the law prior to adoption of the Children (Amendment) Act paid little attention to the question of adoptability of children.[69] It did not specify any concrete adoptability criteria to ensure that the rights of parents are protected.

The Children (Amendment) Act addresses these shortcomings by specifying the grounds in which a child is considered adoptable. For instance, section 46 (6) of the Children (Amendment) Act provides that 'inter-country adoption shall be considered as the last option available to orphaned, abandoned or legally relinquished children, along a continuum of comprehensive child welfare services'. Although not explicitly stated, abused or neglected children may also be considered adoptable and placed for adoption.[70] The criteria to determine if a child can be placed for adoption is also provided for.[71] More importantly, the task of determining the adoptability of a child is carried out by the court subject to an assessment by the Probation and Social Welfare Officer.[72] While these are notable safeguards in favour of parents in inter-country adoption, there are still some protection gaps (discussed fully in Chapter Six).

Having discussed the adoptability principle, the next section addresses the issue of post-adoption procedural rights.

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[65] Rule 31 of the Adoption Regulations.
[66] Rule 27 (3) of the Adoption Regulations.
[67] Ibid.
[68] See for instance, section 86ZG (2) (d) of the Ghanaian Children's (Amendment) Act.
[69] Chirwa (n50 above) 128 and 144.
[70] See Chapter Six for a detailed discussion on the adoptability of abused or neglected children.
[71] Section 46 (6) of the Ugandan Children (Amendment) Act.
[72] Section 46 (5) of the Ugandan Children (Amendment) Act and section 48 of the Ugandan Children Act.

4. LEGAL PROVISIONS ON POST-ADOPTION PROCEDURES

This section examines the legal provisions on post-adoption procedural rights and whether they provide for the rights of parents in inter-country adoption. The specific ways in which the laws do so or have failed to do so is discussed in Chapter Seven.

4.1. South Africa

Parental rights directly relevant to the thesis were protected in terms of section 21 of the Child Care Act. The Act allowed parents whose rights had been violated to apply for rescission of an adoption order. Such an application could be made if the adoption order was made without parental consent.[73] Furthermore, such an application could be lodged within six months from the date upon which the parent became aware of the adoption order, but not later than two years after the adoption order was made.[74] Given the negative effects of rescinding an adoption order on a child, an adoption order could only be rescinded if it was in the best interests of the child. Although, the Child Care Act protected the rights of parents when an irregularity was alleged in inter-country adoption, it only allowed the child's parents (birth) to apply for rescission of an adoption order.

To address the shortcomings of the Child Care Act, the Children's Act now allows a parent or other persons who had guardianship in respect of the child before the adoption order was made to apply for the rescission of an adoption order.[75] The Act requires such an application to be lodged within a 'reasonable time', which should not exceed two years from the date the adoption order was made.[76]

In terms of the grounds for rescission of an adoption order, section 243 (3) of the Children's Act provides that an application for rescission of an adoption order can only be made if the rescission of the order is in the child's best interests[77] and if the adoption was made without

[73] Section 21 (1) of the South African Child Care Act.
[74] Section 21 (2) of the South African Child Care Act.
[75] Section 243 (1) of the South African Children's Act.
[76] Section 243 (2) of the South African Children's Act.
[77] Section 243 (a) of the South African Children's Act.

the parents' consent.[78] The effectiveness of these provisions in protecting the rights of parents is discussed in Chapter Seven of the thesis.

The Children's Act recognises that although parents have rights that should be protected, such rights can be limited by the best interests of the child. Rescinding an adoption order has the potential to undermine the stability that an adoption would bring to the child.[79] Therefore, an adoption order will only be rescinded if it is in the best interests of the child. In this way, the Children's Act tries to balance parental rights and responsibilities with the rights of children (as discussed in Chapter Seven).

Section 51 of the Children's Act also provides for the right to appeal. The right to appeal signifies that the rights of parents are respected and protected. Provision is also made for the right to review.[80]

4.2. Ghana

Previously, the Children's Act was silent on post-adoption procedural rights. To address the shortcomings of the Children's Act, section 86B (1) of the Children's (Amendment) Act makes provision for revocation of adoption orders on the following grounds: fraud,[81] misrepresentation of facts leading to an adoption order[82] and discovery of new information about the adoptive parents which if previously known would have disqualified the adoptive parents from obtaining the adoption order.[83] Furthermore, the Children's (Amendment) Act states that the court shall consider the child's best interests when revoking an adoption order.[84] The Children's Act also provides for the right to appeal and review.[85] This signifies an attempt to protect the rights of parents in inter-country adoption.

[78] Section 243 (3) (b) of the South African Children's Act.
[79] Louw (n24 above) 153.
[80] Superior Courts Act No 10 of 2013.
[81] Section 86B (1) (a) of the Ghanaian Children's (Amendment) Act.
[82] Section 86B (1) (b) of the Ghanaian Children's (Amendment) Act.
[83] Section 86B (1) (c) of the Ghanaian Children's (Amendment) Act.
[84] Section 86B (2) of the Ghanaian Children's (Amendment) Act.
[85]Section 38 (4) of the Ghanaian Children's Act.

4.3. Uganda

Previously, the Children's Act made no provision for post-adoption procedural rights.[86] To address these shortcomings, the Children (Amendment) Act allows the court in 'exceptional circumstances' to rescind an adoption order on application by a parent or guardian where it is in the best interests of the child in cases of fraud or misrepresentation.[87] The amendment of the law in this regard reflects an increased commitment to protect the rights of parents in inter-country adoption. As an additional measure of protection of parents, the Children's Act provides for the right to appeal and review.[88]

In the next section, the chapter discusses how the concept of 'parental rights' under the domestic laws of the countries under study.

5. RECOGNITION OF PARENTAL RIGHTS UNDER THE CONSTITUTION AND CHILDREN'S ACT

This section investigates how and to what extent the domestic laws of the countries under study protect parental rights, particularly the right of parents to enjoy their family life. It examines which elements of parental rights would ensure that the rights of parents are protected in inter-country adoption and how the three countries perform in light of those criteria. This includes an analysis of the implications for the protection of the rights of parents in inter-country adoption.

5.1. South Africa

The Constitution[89] of South Africa does not expressly entrench the right to family life as do several international human rights instruments. However, courts have derived a right to family life from section 10 of the Constitution.[90] In *Dawood v Minister of Home Affairs*,[91] Van

[86] D L N Babiyre 'The Long Search for Family: An Analysis of Intercountry Adoption under the Children (Amendment) (No. 2) Act 2016 of Uganda' (2018) *Makerere Law Journal* 121, 135.
[87] Section 13 of the Ugandan Children (Amendment) Act.
[88] Section 50 (1) (1) of the Ugandan Children Act.
[89] Act No 108 of 1996.
[90] Section 10 of the South African Constitution provides that '[e]veryone has inherent dignity and the right to have their dignity respected and protected'.
[91] 2000 (1) SA 997 (C).

Heerden J held that the right to dignity protects the 'core elements' of the institutions of marriage and family life. In *Dawood v Minister of Home Affairs*[92], the Constitutional Court confirmed this finding and held that the right to dignity protects the rights of persons freely to marry and raise a family and that legislation preventing couples from establishing lasting family relationships 'impairs the ability of the individual to achieve personal fulfilment' and that such legislation infringes upon the right to dignity.[93] Therefore, the state has an obligation to ensure that the right to family life is respected and protected.

The right to family life is supported by various court judgments and provisions in the Children's Act.[94] The later states that some of its aims are to 'promote the preservation and strengthening of families' and to give effect to the child's constitutional right to 'family care or parental care'.[95] Further, in determining the best interests of the child, the need for the child to remain in the care of his or her parents, extended family or family are some of the factors that should be taken into consideration.[96]

The importance attached to the right to family life is also underscored by the fact that even where a court finds that a child is in need of protection and care, the orders it makes must first be aimed at family support, family preservation and reunification before the child is placed in alternative care or adoption.[97] According to section 157 of the Children's Act, this may require the participation of parents and children in family preservation or reunification programmes. Furthermore, section 18 of the Children's Act which deals with parental responsibilities and rights provides that 'the parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right (b) to maintain contact with the child'.[98] These provisions underscore the importance of the protection of the right to family life.

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[92] 2000 (3) SA 936 (CC).
[93] Paras 28 and 37.
[94] See for instance, in *Government of the Republic of South Africa v Grootboom and Others* 2001 1 SA 46 (CC) paras 77-79; *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)* 2003 2 SA 363 (CC), where the Constitutional Court held that the responsibility to care for the child rests primarily with the parents or the family and only alternatively on the state if the parents or the family are unable to care for the child. To guarantee that parents or families meet their responsibilities towards their children, the state has a duty to ensure that there are legal obligations, which compel parents or families to meet their responsibilities towards their children. See also *Minister of Health v Treatment of Action Campaign* 2002 5 SA 721 (CC).
Section 11 (1) of the Children's Act.
[95] Section 2 (a) and (b) of the South African Children's Act.
[96] Section 7 (1) (f) (i) of the South African Children's Act.
[97] Section 157 (1) (a) (ii) of the South African Children's Act.
[98] See sections 18-41 of the South African Children's Act.

5.2. Ghana

Section 28 of the Ghanaian Constitution recognises that the family is the natural and fundamental group of society and is entitled to protection by the state. The protection of the family and the right to family life is also guaranteed, directly or indirectly, by other provisions of the Constitution. For instance, section 18 (2) of the Constitution establishes a prohibition on unlawful interference with the family. Although the possibility to interfere with the right to family life exists, it should be 'in accordance with the law and as may be necessary in a free and democratic society for public safety or the economic well-being of the country..'[99] The fact that the Constitution entrenches the right to family life is significant in protecting the rights of parents.[100]XX

Protection of the right to family life requires that the state not only refrain from actions which could result in family separation, but also take measures to maintain the family unit, including family reunification. Thus, even where a court finds that a child needs protection and care, the orders it makes must first be aimed at family support, family preservation and reunification before the child is placed in alternative care or adoption.[101] In cases of separation, such separation must be for the shortest period of time.[102] These provisions create a basis for making sure that the rights of parents are protected in inter-country adoption.

5.3. Uganda

In Uganda, the Ugandan Constitution expressly protects the rights of the family. Section 31 of the Ugandan Constitution entitled 'rights of the family' protects the rights of parents to found a family and to enjoy their family life.[103] Therefore, this right should be fully respected and protected in relation to parents.

Protection of the right to family life is also guaranteed by other provisions of the Constitution. For instance, section 27 (2) of the Ugandan Constitution establishes a prohibition on unlawful interference with a person's family and home. Furthermore, section 31 (5) of the Ugandan

[99] Section 18 (2) of the Ghanaian Constitution.
[100] See section 4.1 above.
[101] Sections 16-26 of the Ghanaian Children's Act.
[102] Section 19 (3) of the Ghanaian Children's Act.
[103] Section 31 (1) of the Ugandan Constitution.

Constitution prohibits the separation of children from their families or other persons entitled to bring them up against the will of their families, except in accordance with the law.

In *Adijiru v Anguzu and Anor*,[104] the High Court also confirmed that parents have the right to protection of their family life. To give effect to the constitutional right to protection of family life, Part V of the Ugandan Children (Amendment) Act limits the separation of children from their parents and families. In cases of separation, such separation should be temporary and for the shortest period of time unless it is not in the best interests of the child.[105] Moreover, where a court finds that a child is in need of protection and care, the orders it makes must first be aimed family preservation and reunification before the child is placed in alternative care or adoption.[106] According to section 42B of the Ugandan Children (Amendment) Act, family preservation measures must focus on avoiding the removal of children from their families, enhancing the capacity of parents to care for their children and developing parenting skills.

5.4. Applicability to inter-country adoption

As shown in Chapter Three, the recognition of the right to family life has implications for adoptability, consent to adoption and post-adoption procedural rights. For instance, in the context of abandoned or neglected children, ensuring that family preservation and reunification measures are taken is an important initial step to protecting the rights of parents before placing the child for adoption.

One of the legal, as well as practical implications of the recognition of the right to family life is that an adoption should not be authorised without the consent of the parents (or if it is contrary to the expressed wishes of the parents) unless such consent is not required.

[104] (Miscellaneous Civil Application No. 0031 of 2016) [2016] UGHCCD 36 (28 June 2016). See also *Nassuna Agnes (an infant)* Family Cause No. 199 of 2010 [2010] UGHC 82 (20 October 2010); *Nyangoma Veneranda and Anor (Infants)* and *In Re*: *An Application of Legal Guardianship by Daniel Tarrant and Anor* (HCT-00-FD-FC-0193-2008) ((Infants)) [2009] UGHC 26 (27 January 2009); *Fenzi v Nabbosa* (MISC. CAUSE NO 6 of 2012) [2013] UGHCD 7 (6 September 2013); *In Re: Adriko Reuben (a Minor*) (MISCELLANEOUS CIVIL APPLICATION NO. 0008 of 2016) UGHCD 10 (13 July 2016); *In Re: Nziawaheka (an infant)* (Family Cause No. 207 of 2013) [2013] UGHCFD 14 (5 November 2013); *Rwabuhemba Tim Musinguzi v Harriet Kamakume* ((Civil Application No. 142 of 2009)) [2009] UGCA 34 (25 August 2009) and *Baguma v Mbabazi* (HCT-01-CV-MA-NO.0018 of 2017) [2017] UGHCCD (30 November 2017).
[105] Section 24 of the Ugandan Children Act.
[106] Section 42B of the Ugandan Children (Amendment) Act.

Another implication of the recognition of the right to family life is that priority should be given to parents to care for their children before resorting to alternative care, unless it is not in the child's best interests to do so. Therefore, family tracing and reunification efforts should be explored before a child is placed for adoption.

In sum, it could be asserted that parents right to enjoy their family life has a direct bearing on inter-country adoption. Any inter-country adoption system for the protection of the rights of parents should give due respect to the rights of parents to enjoy their family life.

5.5. Limitation of parental rights under the domestic laws of the countries under study

Both the Constitutions[107] and the Children's Acts[108] of South Africa, Ghana and Uganda confer on every child the right to be protected from abuse, neglect, violence and exploitation while in the care of their parents. Parents who are incapable of providing adequate care to their child invite the state to intervene in order to protect the child from harm. In such a case, the state acting as *parens patriae* of all children in its jurisdiction, has the responsibility to remove the child from the care of his or her parents and to provide alternative care.[109] Thus, the domestic laws support taking away the child from the care of his or her parents and putting him or her up for adoption or alternative care.

The domestic laws of the countries under study recognise that although parents have the right to enjoy their family life, they do not always act in the best interests of their children. For example, the South African Children's Act states that '[a] child is in need of care and protection if, the child- (i) is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibilities and rights or a family member of the child'.[110] The fact that parents may be responsible for acts of harm against their children is also apparent from the factors to be considered in determining what is in the child's best interests.

[107] Section 28 (1) (d)-(f) of the South African Constitution; section 34 (3) and (4) of the Ugandan Constitution and sections 28 (1) (d), 28 (2)-(4) of the Ghanaian Constitution.
[108] See for instance sections 1 (b)-(c); 2 (b) (iii); 2 (f); 7 (l) (i)-(ii), 7 (m) and 32 of the South African Children's Act; sections 5; 6 and 18 of the Ghanaian Children's Act of Ghana and sections 4 (2) of the Ugandan Children (Amendment) Act and sections 17-37 and 21 of the Ugandan Children Act.
[109] See section 28 (1) (b) of the South African Constitution and section 2 (b) (i) of the South African Children's Act. See also section 20 (2) of the Ghanaian Children's Act and section 4 (2) of the Ugandan Children Act.
[110] Section 150 (1) of the South African Children's Act; section 18 of the Ghanaian Children's Act; section 4 (2) of the Ugandan Children (Amendment) Act; sections 17-37 of the Ugandan Children Act.

Some of the factors include the personal relationship between the child and his or her parents, the parents attitude towards the child, the child's physical, emotional, social and cultural development, the need to protect the child from physical or psychological harm caused by exposing the child to abuse, neglect and maltreatment and whether there has been 'any family violence involving the child or family member of the child.[111] Accordingly, these provisions require the state to remove children from the care of abusive, neglectful or incompetent parents.

The constitutional and statutory protection of children from harm empowers the state, acting in the best interests of the child, to remove the child from the care of his or her parents and to place the child in alternative care or adoption.[112] For instance, courts have the authority to decide whether a child involved in court proceedings is in need of care and protection.[113] Where 'a children's court finds that a child is in need of care and protection', it has the authority to make an order, which is in the child's best interests.[114] Overall, these provisions combined with the child's best interests empower the state to intervene to protect children and to provide alternative care.[115]

Although the state has a duty to intervene to protect children from parental harm, the three legal frameworks limit the power of the state to separate children unless such a decision is made by competent authorities subject to judicial review.[116] This is consistent with international law.[117] Furthermore, parents or other persons in charge of the care of the child have the right to participate in the proceedings and to challenge the decision.[118]

In the context of inter-country adoption, it could be argued that that the establishment of criteria and procedures for the limitation of parental responsibilities is crucial for the protection of the rights of parents in inter-country adoption.

[111] Section 7 and 236 (1) of the South African Children's Act.
[112] See section 2.1 of Chapter Two and section 3.2 of Chapter Three.
[113] See sections 29 (7) and 155 of the South African Children's Act; section 20 (1) - (2) of the Ghanaian Children's Act and sections 19 and 43-46 of the Ugandan Children Act.
[114] Section 156 (1) of the South African Children's Act. See also section 29 (7) of the South African Children's Act.
[115] See section 2.1 of Chapter Two and section 3.2 of Chapter Three.
[116] See sections 151-157 of the South African Children's Act; sections 16-26 of the Ghanaian Children's Act and section 17-37 of the Ugandan Children Act.
[117] See section 3.2 of Chapter Three.
[118] Ibid.

6. THE CONCEPT OF PARENTS: CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

Since the thesis is interested in how the rights of parents can be protected in inter-country adoption, it is worthwhile to understand what the term 'parents' practically means under the domestic laws of the countries under study and its implications for the protection of the rights of parents in inter-country adoption.

6.1. Who is a parent?

The domestic laws of South Africa, Ghana and Uganda recognise a broad notion of 'family' and 'parents' in a way that reflects the diversity model of parenthood and international law, which has the potential to better protect the rights of parents in inter-country adoption. In the context of Ghana, section 124 of the Ghanaian Children's Act provides that 'parent means natural parent and includes a person acting whatever way as parent'. It could therefore be argued that the expression 'parent' is wide enough to include not only the biological parents of the child irrespective of the union that brought about the child's birth, but other persons caring for the child in a parental way.

The fact that the term 'parents' should be interpreted broadly is also evident from section 4 of the Ghanaian Children's Act which protects the child's 'right as far as possible to know his natural parents and extended family' and section 5 of the Act which protects the child's right to 'live with his parents and family and grow up in a caring and peaceful environment'. The approach taken by the Ghanaian Children's Act is flexible enough to accommodate all forms of families and parenthood.

In Uganda, both the Ugandan Constitution[119] and the Children Act[120] adopt a wider notion of 'parents'. Section 31 (5) of the Ugandan Constitution provides that '[c]hildren may not be separated from their families or the persons entitled to bring them up against the will of their families or of those persons, except in accordance with the law'. Furthermore, section 34 (1) of the Ugandan Constitution states that '[c]hildren have the right to know and be cared for by their parents or those entitled by law to bring them up'. The fact the Constitution, Uganda's

[119] Constitution of the Republic of Uganda, 1995.
[120] Chapter 59.

supreme law, entrenches a broad conception of parenthood is significant in protecting the rights of parents in inter-country adoption. This is because 'constitutional guarantees provide the vehicle for the implementation and protection of rights at the domestic level'.[121]

The wider notion of parenthood in the Ugandan Constitution is further supported by an array of provisions in the Ugandan Children Act. For instance, section 1 of the Ugandan Children Act explicitly defines a parent to mean 'the biological mother or father or adoptive mother or father of a child'.[122] Section 4 (1) (a) of the Children (Amendment) Act protects the child's right to live with his or her parents or guardian. In addition, section 5 (1) of the Children Act states that 'it shall be the duty of a parent, guardian or any person having custody of a child to maintain that child'. Furthermore, section 6 (2) of the Ugandan Children Act provides that '[w]here the natural parents of a child are deceased, parental responsibility may be passed on to the relatives of either parent'. In determining the welfare of the child, decision-makers should consider 'the capacity of the child's parents, guardian or any other person involved in the care of the child, and in meeting the needs of the child'.[123]

South African law, similarly, adopts a broad interpretation of the term 'parents'.[124] For instance, in determining the best interests of the child, some of the factors to be taken into consideration include 'the nature of the personal relationship between the child and the parent, or any specific parent',[125] 'the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs',[126] 'the attitude of the parents, or any specific parent towards the child'[127] and 'the need for the child to remain in the care of his or her parent, family and extended family'.[128]

These provisions have been bolstered by statutory provisions in various fields of the law and amplified by court judgments. For instance, section 1 of the South African Schools Act[129]

[121] J Sloth-Nielsen 'Chicken Soup or Chainsaws: Some Implications of the Constitutionalisation of Children's Rights in South Africa' (1996) *Acta Juridica* 6, 25.
[122] Section 1 of the Ugandan Children Act.
[123] Section 3 (3) (f) of the Ugandan Children (Amendment) Act.
[124] Section 1 of the South African Children's Act. See also sections 13 (1) (d); 18 (3); 129 (4), (5) and (10); 150 (1); 151 (7) (a); 157 (1) (b) (i); 230 (3) (b) and (d); 243 (1) (b) and 243 (3) (b) of the South African Children's Act.
[125] Section 7 (1) (a) (i) of the South African Children's Act.
[126] Section 7 (1) (c) of the South African Children's Act.
[127] Section 7 (1) (b) of the South African Children's Act.
[128] Section 7 (1) (f) (i) of the South African Children's Act.
[129] Act 84 of 1996.

defines a parent as meaning '(a) the parent or guardian of the learner; (b) the person legally entitled to the custody of the learner; and (c) the person who undertakes to fulfil the obligations of a person referred to in paragraphs (a) and (b)'. In interpreting the term 'parents' under section 1 of the South African Schools Act, the Supreme Court of Appeal in *Fish Hoek Primary School v GW*[130] held that 'the definition of parent in the South African Schools Act is wide enough to include any parent of the child regardless of the relationship between the parents of the child and regardless of whether the parent has any authority over the child'.[131] This view resonates with the diversity model of parenthood.[132] This is an improvement from previous decisions in which the definition of parent under the South African Schools Act was narrowly defined.[133] Generally, courts have tended to endorse a narrow approach to parenthood, which ignored other pathways to parenthood.[134] Nonetheless, later cases demonstrate a shift in the approach of judges to endorse a broader conception of parenthood.[135] The recognition of a broader conception of parenthood demonstrates a gradual movement towards a diversity model of parenthood, which takes into consideration various forms of families and parenthood.

6.2. The implications of a broad interpretation of the term 'parents'

The broad interpretation of the term 'parents' has implications for the protection of the rights of parents in inter-country adoption. As noted in Chapter Two and Three, it ensures that the rights of all persons considered as the child's parents, irrespective of the nature of the union that brought about the child or biological ties are protected in inter-country adoption.[136] Furthermore, it provides legal protection to all persons considered as the child's parents and requires decision-makers to take into account the rights of parents in all decision-making concerning the child.[137] More importantly, it has implications for the adoptability of children

[130] 2008 JOL 24624 (SCA).
[131] Ibid.
[132] See section 4.2 of Chapter Two.
[133] See for instance, *Bestuursraad van die Laerskool Sentraal, Kakamas v Van Kradenburg* 2008 JOL 21631 (NC) para 13, where the Northern Cape High Court held that 'with regard to the payment of fees, the term 'parent' in the South African Schools Act includes only the custodian parent and not both parents' and *Bestuursliggaamvan Gene Louw Laerskook v Roodtman* 2003 2 ALL SA 87 (C) where it was found that 'the term 'parent' in the (now repealed) Education Affairs Act (House of Assembly) 70 of 1988 should be interpreted to mean only the custodian parent'. See also M Carnelley 'Liability for the Payment of Public School Fees' (2011) 14 (6) *PER/PELJ* 34/217, 34/217.
[134] Ibid.
[135] See for instance, *J v Director General, Department of Home Affairs* 2003 (5) SA 605 (D) and *Heystek* v *Heystek* 2002 (2) SA 754 at 757C-D.
[136] See section 4.2.3 of Chapter Two and section 2.1 of Chapter Three.
[137] Ibid.

and consent to adoption as shown in Chapters Two and Three. Where the rights of parents are not protected, the state should take the necessary measures to remedy this.

However, there are dangers of extending the concept of 'parents' too far.[138] The primary responsibility of parents to care for their children means that all decision-making concerning the adoption of a child should be made as a priority by the child's biological parents, and where such parents are not available, other persons in charge of the child.[139]

In sum, it is clear that the domestic laws adopt a broad interpretation of the term 'parents', which is consistent with the diversity model. Such interpretation brings under its scope both biological parents regardless of whether they are married or not or other persons caring for the child in a parental way. This broad interpretation of 'parents' has implications for the adoptability of children and consent to adoption.

The next section examines the concept of parental duty to care for children and what it means for the protection of the rights of parents involved in inter-country adoption.

7. CONCLUSION

The chapter traced the historical development of the inter-country adoption legal system in the countries under study and provided a general overview of the legislative framework within which the rights of parents are given legal protection. In the discussion of the former laws on inter-country adoption, it was shown that the three legal frameworks paid little attention to the rights of parents.

In the discussion of the current legal framework regulating inter-country adoption of the countries under study, there is an attempt to domesticate the principles and procedures of inter-country adoption in a way that protects the rights of parents. The extent to which these legal provisions protect the rights of parents is discussed fully in Chapters Five to Seven.

The issue of parental rights, in particular the right to family life was also accorded great attention. In the context of inter-country adoption, this discussion demonstrated that the

[138] See section 2.2 of Chapter Three.
[139] Ibid.

recognition of the right to family life has implications for adoptability, consent to adoption and post-adoption procedural rights.

The circumstances in which parental rights may be limited under the domestic laws were also discussed in detail. In the context of inter-country adoption, this insight revealed that the establishment of criteria and procedures for the limitation of parental rights is crucial for the protection of the rights of parents in inter-country adoption.

The chapter also set out to examine how the domestic laws of the countries under study conceive of the terms 'parents'. First, it was shown that the three legal frameworks adopt a broad notion of 'parent' in a way that is consistent with the diversity model of parenthood and international law which has the potential to better protect the rights of parents in inter-country adoption. In relation to inter-country adoption, it was established that a broad conceptualisation of parents has implications for adoptability and consent to adoption.

In the next chapter, this study investigates how the principle of consent to adoption finds expression in the rules governing inter-country adoption in Ghana, South Africa and Uganda.

CHAPTER FIVE: CONSENT TO ADOPTION IN GHANA, SOUTH AFRICA AND UGANDA

1. INTRODUCTION

So far, the thesis has demonstrated that the principle of consent to adoption is critical to protecting the rights of parents in inter-country adoption. This approach is consistent with the fiduciary theory and international law discussed in previous chapters. The aim of this chapter is to examine how the principle of consent to adoption finds expression in the domestic laws governing inter-country adoption in Ghana, South Africa and Uganda. In order to do so, the chapter focusses on who has the right to consent to an adoption, the manner in which consent should be given, counselling those who are expected by the law to consent to an adoption and the circumstances in which parental consent is not required for the validity of an adoption.

The chapter will also examine the extent to which the domestic laws of the countries under study are consistent with the theories discussed in Chapter Two and international law. It demonstrates that the domestic laws reinforce the theories and international law in several ways. First, the domestic laws reflect the aspirations of the diversity model and international law with their wide range of persons who can consent to the adoption of the child. Second, the domestic laws also make provision for the manner in which consent should be given and counselling of parents as required by international law. Despite these notable legal provisions on consent to adoption, the thesis demonstrates that inter-country adoption practices have not been done in ways that adequately protect the rights and interests of parents.

2. WHO SHOULD GIVE CONSENT TO AN ADOPTION?

Chapter Three established that international human rights law and the Hague Convention on Protection and Co-operation in respect of Intercountry Adoption (Hague Convention)[1] recommend that the persons who are entitled to consent to an adoption include the child's biological parents, guardians, relatives or legal guardians. The Guidelines for Action on

[1] Adopted by the Hague Conference on Private International Law on 29 May 1993 and entered into force on 1 May 1995.

Intercountry Adoption in Africa[2] further provide that the court may require the consent of any additional person if it considers that such person has rights or obligations concerning the child under a court order or an agreement.

To ensure that consent is obtained, the Committee on the Rights of the Child (CRC Committee) recommends that states should establish legal safeguards to guarantee that parents or guardians consent to the adoption of their child. Furthermore, competent authorities, such as courts, should ensure that 'if required' the persons concerned have given their consent before authorising an adoption.

2.1. South Africa

In South Africa, the Children's Act[3] confers on each parent of the child the right to consent to an adoption.[4] It should be noted, at the outset that these provisions are a significant development from the provisions of the now repealed Child Care Act.[5] In terms of section 18 (4) (d) of the Child Care Act, fathers of children born out of wedlock were not accorded the legal right to consent to an adoption.[6] In *Fraser v Children's Court, Pretoria North and Others,*[7] the Constitutional Court declared that section 18 (4) (d) of the Child Care Act was unconstitutional in that it discriminated unfairly against unmarried fathers on the basis of gender and marital status and that it also discriminated against fathers in non-Christian marriages.[8]

Section 233 (1) (a) of the South African Children's Act is also unique in that it states that consent to an adoption is required from 'each parent of the child, regardless of whether the parents are married or not'. The statutory reference to 'regardless of whether the parents are

[2] Adopted at the Fifth International Policy Conference on the African Child (IPC), 29-30 May 2012, United Nations Conference Centre Addis Ababa, Ethiopia.
[3] Act 38 of 2005.
[4] Section 233 (1) (a) of the South African Children's Act.
[5] Act 74 of 1983. See also section 3.1.1 of Chapter Four.
[6] Section 18 (4) (d) of the Child Care Act. This provision was, however, amended by the Adoption Matters Amendment Act 56 of 1998 so as to require natural fathers to consent to the adoption of their children in certain circumstances. See also South African Law Commission 'Review of the Child Care Act' (2002) Report1101, 240 and T L Mosikatsana 'Is Papa a Rolling Stone?: The Unwed Father and his Child in South African Law- A Comment on *Fraser v Naude*' (1996) 29 (2) *Comparative and International Law Journal of Southern Africa* 152, 154-155. See also section 3.1.1 of Chapter Four.
[7] CCT 31/96.
[8] Para 52 (1).

married or not' is significant in protecting the rights of parents in inter-country adoption. It symbolises a revolutionary departure from the integrative model, which associates parenthood with marriage between a man and a woman.[9] This means that parental rights and interests to be protected in the context of adoption are those of both parents irrespective of the nature of the union that brought about the child's birth. This assertion, however, is usually informed by heterosexual relationships leading to the birth of a child. There may be more complex parental rights and interests such as surrogate motherhood.

One of the legal questions which often arises is who the child's legal parents are. The issue of legal parentage has implications for who can consent to the adoption of the child. In South Africa, the child born out of a surrogate arrangement is deemed to be the child of the commissioning parents for all purposes as from the moment of the child's birth. Thus, the surrogate mother and her partner have no parental rights and responsibilities in respect of the child.[10] However, section 298 of the South African Children's Act allows a surrogate mother who is also a genetic parent of the child to terminate a surrogate agreement by filing a written notice with the court within 60 days after the child's birth. If the court finds that the termination of the agreement is voluntary and that the surrogate mother understands the effects of the termination, the surrogate motherhood agreement is terminated and the surrogate mother becomes the child's parent.[11] If the surrogate mother has a spouse, civil union partner or partner in a permanent relationship, that person also becomes the child's parent.[12] This means that parental rights and responsibilities in respect of the child vest in the surrogate mother and her partner.[13] In such a case, consent for the purposes of adoption is given by the surrogate mother and her spouse, civil union partner or partner in a permanent relationship.

The statutory reference to 'regardless of whether the parents are married or not' also enables decision-makers to ensure that both parents enjoy protection in the context of inter-country adoption. More importantly, the South African Children's Act is consistent with international

[9] See section 4.1 of Chapter Two.
[10] Section 297 (1) (c) of the South African Children's Act.
[11] Section 299 of the South African Children's Act.
[12] Section 299 (a) of the South African Children's Act.
[13] Ibid.

law in that it recognises that both parents have rights and responsibilities in respect of their children. It enshrines the right to equality in all matters concerning children such as adoption.[14]

It is submitted that the involvement of fathers of children born out of wedlock in the adoption process is commendable. This serves to ensure that the interests of the father and the child are protected, and ultimately the adoptive parents who might find themselves involved in a custody dispute. However, the extent to which the father of a child born out of wedlock is involved in the adoption process depends on whether he has acknowledged paternity of the child and taken some responsibility for the child. Section 236 (4) of the South African Children's Act, for instance, requires that an adoption be with the consent of the father if he has paid maintenance in respect of the child or caused particulars of himself to be entered in the registration of the child's birth. Thus, the rights of a putative father are only protected when he assumes duties of parenthood in respect of the child.

Where there is no parent, decisions concerning the adoption of a child may be made by a guardian.[15] This is consistent with international standards. In a manner consistent with the diversity model and international law, the South African Children's Act reiterates the idea that the term 'parents' includes both parents of the child, irrespective of the nature of the union that brought about the child's birth or other persons caring for the child in a parental way.[16] It recognises that parent-child relationships form and develop outside of marriage and biological ties.[17] This provision is clearly meant to cater for other persons other than the biological parents, who are in charge of the care of the child.

The South African Children's Act also contains legal safeguards as required by international standards to guarantee that consent is obtained from all the persons who are entitled by the law to consent to an adoption. First, the court is enjoined to ensure that the consent of the parents or any other person whose consent is required by the law has been given before authorising the adoption of a child.[18] It also requires the persons whose consent is required to be notified of the proposed adoption so that they can either consent or withhold their consent to the

[14] Section 3 of Chapter Three.
[15] Section 233 (1) (b) of the South African Children's Act.
[16] See section 4.2 of Chapter Two and section 2 of Chapter Three.
[17] Ibid.
[18] Section 240 of the South African Children's Act.

adoption.[19] Furthermore, section 238 (3) of the South African Children's Act requires the persons whose consent is required to act within 30 days from the date of receiving the notice. These provisions signify an attempt to protect the rights of parents in inter-country adoption.

The requirement to give notice of the proposed adoption is derived from the rule that:

> the state may not cut off people's constitutional interests without letting them know of its proposed action so that they may have an opportunity to argue against the loss of their interests' and that 'if a parent has a viable opportunity interest in establishing a relationship with his or her child, the state may not terminate his or her interest by decreeing adoption without giving the parent an opportunity to make his or her claim.[20]

2.2. Ghana

In Ghana, the Ghanaian Children's (Amendment) Act[21] requires consent of both parents of the child.[22] Where there is no parent, decisions concerning the adoption of a child may be made by the guardian.[23] This approach is consistent with the diversity model and international law. The court is also given a discretion where it appears that such a person has rights or obligations concerning the child, to require that person's consent before making an adoption order.[24].

To guarantee that consent is obtained from all the persons who are entitled by the law to consent to an adoption, the court is enjoined to ensure that the consent of the parents or any other person whose consent is required by the law has been given before making an adoption order.[25]

[19] Section 238 of the Children's Act. Regulation 104 of the Children's Act, 2005: General Regulations Regarding Children, 1 April 2010.
[20] T M Zdon 'Putative Fathers' Rights: Striking the Right Balance in Adoption Laws' (1994) 20 (3) *William Mitchell Law Review* 929, 950. See also E Buchanan 'The Constitutional Rights of Unwed Fathers Before and After Lehr v Robertson' (1984) 45 *Ohio State Law Journal* 313, 353-356 and 367 and J R Hamilton 'The Unwed Father and the Right to Know of His Child's Existence' (1987-1988) *Kentucky Law Journal* 949, 978.
[21] Act 937 of 2016.
[22] Section 81 (1) of the Ghanaian Children's (Amendment) Act.
[23] Section 81 (2) of the Ghanaian Children's (Amendment) Act.
[24] Section 47 (7) of the Ugandan Children's Act and section 81 (3) of the Ghanaian Children's (Amendment) Act.
[25] Section 86 (1) and 2 (a) of the Ghanaian Children's (Amendment) Act.

2.3. Uganda

In Uganda, the Ugandan Children Act[26] requires the consent of the parents of the child.[27] The court is also given a discretion where it appears that such a person has rights or obligations concerning the child, to require that person's consent before making an adoption order[28] or to request a probation and social welfare officer to prepare a report that may assist the court to decide whether there is any other person whose consent for the purposes of adoption should be obtained.[29] It is submitted that this is consistent with the diversity model and international law. It is also an obligation of the court before making an adoption order to ensure that every person whose consent is required has consented to the adoption.[30]

The next section examines the manner in which such consent should be given for the purposes of adoption.

3. HOW SHOULD CONSENT TO AN ADOPTION BE GIVEN?

Chapter Three established that consent for the purposes of an adoption should be freely given, in the required legal form and expressed in writing. Furthermore, such consent should not be induced by payment or compensation and has not been withdrawn. To ensure that consent is freely given, the Hague Convention states that there should be no contact between the prospective adoptive parents and the child's parents or other person who has the care for the child until the required consents have been given and that the consent of the mother 'where required' should be given after the birth of the child. States are also required to establish minimum periods before parents can consent to the adoption of their child. The manner in which consent is executed varies considerably in the three countries.

3.1. South Africa

The South African Children's Act requires consent to be freely given and not induced by payment or compensation.[31] Section 249 (1) of the South African Children's Act further

[26] Chapter 59.
[27] Section 47 (1) of the Ugandan Children Act.
[28] Section 47 (7) of the Ugandan Children At.
[29] Section 47 (8) of the Ugandan Children Act.
[30] Section 48 (1) (1) of the Ugandan Children Act.
[31] Section 249 (1) (a) and (b) of the South African 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. This prohibition, however, does not apply to compensation to the birth mother for reasonable medical expenses related to the pregnancy, birth and follow up, reasonable counselling expenses and other prescribed expenses.[32] Similarly, the prohibition does not apply to fees for professional services to lawyers, psychologists and other professionals involved in the adoption process.[33] Couzens raises valid concerns as to whether compensation paid to biological mothers living in conditions of poverty does not influence consent for the purposes of adoption.[34]

In addition, such consent should be given and signed in the presence of the presiding officer of the children's court.[35] Provision is also made for the persons who have given their consent to withdraw their consent within 60 days after such consent has been given.[36]

The South African Children's Act is silent on the no contact rule and the requirement for the consent of the mother to be given after the birth of the child. Some schools of thought, correctly argue, that the incorporation of the Hague Convention under the domestic laws of South Africa makes these requirements applicable.[37] Although the requirement that the consent of the mother should be given after the birth of the child applies to South Africa, what is still missing are legal provisions on the minimum duration before consent to adoption can be given by the parents. As a result, the risk of violating the rights of parents is high.

3.2. Ghana

In Ghana, consent must be freely given and not induced by payment or compensation. [38] Such consent must be in writing and sworn under oath before a Notary Public.[39] Consent can be withdrawn at any time before the adoption order is granted.[40] Rule 29 (6) (c) of the Adoption

[32] Section 249 (2) (a) of the South African Children's Act.
[33] Section 249 (2) (b) of the South African Children's Act.
[34] M Couzens 'A Very Long Engagement: The Children's Act 38 of 2005 and the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption' (2009) 1 *PER* 54, 70.
[35] Section 233 6) of the South African Children's Act.
[36] Section 233 (8) of the South African Children's Act.
[37] Couzens (n34 above) 64-65. See also J Sloth-Nielsen and B D Mezmur 'Inter-country Adoption from a Southern and Eastern African Perspective' (2010) *International Journal of Family Law* 86, 90.
[38] Regulation 29 (7) (c) and 29 (6) (a) of the Ghanaian Adoption Regulations; section 86ZF of the Ghanaian Children's (Amendment) Act.
[39] Regulation 29 (7) (c) (i) and (ii) of the Ghanaian Adoption Regulations
[40] Section 81 (8) of the Ghanaian Children's (Amendment) Act.

Regulations[41] requires the consent of the mother to be given within a minimum period of 30 days after the birth of the child.[42] This serves to ensure that the birth mother is not motivated by stress to relinquish her child for adoption. As an additional measure of protection, the Adoption Regulations further grants the birth mother an additional 30-day period to confirm the decision to surrender a child for adoption.[43] It is submitted that laws that require a significant period of time to elapse after childbirth before relinquishment of the child for adoption are most supportive of the interests of the parents and their children. In addition, the Ghanaian Children's (Amendment) Act prohibits contact between the prospective adoptive parents and the child's parents before placement.[44] Accordingly, the Ghanaian Children's (Amendment) Act is in full compliance with international standards.

2.3. Uganda

The Ugandan Children Act requires consent to be freely given and not induced by payment or compensation.[45] Such consent should be written and witnessed by the commissioner of oaths.[46] The importance of ensuring that consent for the purposes of adoption is reduced in writing was underscored by the High Court in the *Adoption of Asobola Praise and Kwagala Martha by Kathleen Sue Bowman*.[47] In addition, rule 7 of the Ugandan Adoption of Children Rules[48] further requires all statements and allegations contained in the petition for adoption to be verified by affidavits.

Provision is also made for consent to be withdrawn at any time before the adoption order is granted.[49] What is clearly missing is the requirement for consent to be withdrawn within a minimum period of 90 days after such consent has been given.

The Ugandan Children's Act is silent on the no contact rule and the requirement for consent of the mother to be given after the birth of the child. It could be argued that as a non-Contracting

[41] 2018.
[42] Regulation 29 (6) (c) of the Adoption Regulations.
[43] Regulation 29 (6) (d) of the Adoption Regulations.
[44] Section 86L (6) of the Ghanaian Children's (Amendment) Act.
[45] Section 48 (3) and (4) of the Ugandan Children Act.
[46] Rule 7 of the Ugandan Adoption of Children Rules.
[47] (Adoption Cause No. 002 of 2019) [2019] UGHCFD 203 (18 June 2019). See also *In the matter of a Petition for the Adoption of Gift Inziku (Infant) by Ross Alan Games and Lindsey Marey Games* (Adoption Cause No. 07of 2018) [2019] UGHCFD 201 (13 July 2019) and *In Re MHN, HHN and AZN* (Adoption Cause No. 002 of 2018) [2018] UGHC 34 (6 July 2018).
[48] 1997.
[49] Section 41 (1) of the Ugandan Children Act.

State to the Hague Convention, Uganda is not obligated to apply the provisions of the Hague Convention. However, it was established in Chapter Four that even when a state is not a Contracting State to the Hague Convention and therefore without an explicit obligation to ensure that the consent of the mother is given after the birth of the child, the CRC Committee seems to be of the view that there is an obligation to ensure that consent is given after the birth of the child. For instance, in 1998, the CRC Committee in its concluding observations to Hungary recommended that the State Party 'consider reviewing its legislation and practice relating to the possibility of placing a child up for adoption before the birth of the child' and to 'consider accession to the Hague Convention of 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption'.[50] Hungary only became a Contracting State to the Hague Convention in 2005.[51] It could then be argued that, by interpretation, the requirement to ensure that the consent of the mother is given after the birth of the child is also an obligation under the CRC, to which Uganda is a party.

Despite the fact that legal provisions requiring consent to be freely given are in existence in Ghana, South Africa and Uganda, the practice in utilising them is different. The findings from an empirical study on inter-country adoption in South Africa show that separation is in many cases involuntary due to poverty and economic strains. This holds true particularly in situations where poverty has left parents or families with no other option but to place their child for adoption. It was shown that due to high levels of poverty coupled with lack of state assistance, many biological parents felt that inter-country adoption was their only option.[52] Hogbacka found out that 'many first mothers lacked a job or any means of creating income, and many did not even have a place to live. They were often faced with the sudden crisis of a surprise pregnancy, lack of support and/or HIV status'.[53] The study also found out that '99 percent of

[50] Committee on the Rights of the Child, Concluding Observations: Hungary, UN Doc CRC/C/15/Add.87, 24 June 1998, para 33.
[51] See Status Table available at hcch,net/en/instruments/conventions/status-table/?cid=69, accessed on 15 August 2020.
[52] R Hogbacka 'Maternal Thinking in the Context of Stratified Reproduction: Perspectives of Birth Mothers from South Africa' in J Gibbons and K Rotabi (eds) *Intercountry Adoption, Policies, Practices and Outcomes* (2012) 143-159. See also R Hogbacka *Global Families, Inequality and Transnational Adoption: The De-Kinning of First Mothers* (2016) 96.
[53] R Hogbacka 'Intercountry Adoption, Countries of Origin, and Biological Families' (2014) Working Paper No. 598, Report for Thematic Area 2 1, 2-3.

mothers giving up their children for adoption are purely due to poverty, helplessness and hopelessness and destitution'.[54]

In another study on birth mothers in South Africa, the same researcher found out that due to high levels of poverty and lack of state support, poverty was the main reason for relinquishing their child for adoption.[55] This places doubt on whether consent given under conditions of poverty is free and voluntary consent.

Practice, in Uganda, also casts serious doubt on Uganda's compliance with respect to ensuring that consent is freely given for the purposes of adoption. The findings from the study on legal guardianship and adoption practices in Uganda show that in some cases consent is obtained after the commencement of the adoption process.[56] It has also been reported that some parents' consent is mainly influenced by parents who had previously relinquished their children for adoption, children's homes or the probation and social welfare officer.[57] This raises concerns regarding the free will of parents to consent to the adoption of their child.

In addition, an investigation by Thomas Reuters Foundation found out that many poor Ugandan families have been tricked, bribed or coerced into relinquishing their children to US citizens and other foreigners for adoption.[58]

Although the Ugandan Government amended the Children Act in 2016 to better protect children and their families, a recent investigation by the Investigative Fund and The Nation which involved a review of hundreds of court records on inter-country adoption cases and interviews with about 50 social workers, judges, agents and families shows that the amended

[54] Ibid.
[55] Hogbacka (n52 above) 143-159 and Hogbacka (n52 above) 33 and 93-118.
[56] H Among 'Study on Legal Guardianship and Adoption Practices in Uganda' (2014) UNICEF 1, 25.
[57] Ibid.
[58] T Esslemont and K Migiro 'Fraud and Deceit at the Heart of Uganda Adoptions to United States', available at http://www.dailymail.co.uk/wires/reuters/article-3101833/Fraud-deceit-heart-Ugandaadoptions-United-States.html#ixzz4SUxHq28V, accessed 22 October 2019. See also Babirye (n86 above) 122; Uganda Tightens Foreign Adoption Rules to Thwart Child Trafficking, available at http://www.reuters.com/article/us-uganda-children-idUSKCNOW6101, accessed 22 October 2019; Bribery and Graft: Ugandan Families Tricked into Giving Up Children for US Adoption, available at http://www.catholic.org/news/international/african/story.php?id=60825, accessed on 22 October 2019 and Uganda's Child Adoption 'Market' brings Misery and Confusion, available at https://www.theguardian.com/world/2014/oct/06/uganda-child-adoption-market-confusion, accessed on 22 October 2019.

law has not done much to protect the rights of families in inter-country adoption.[59] In 12 inter-country adoption cases to the United States of America (USA) between 2010 and 2018, the birth mothers of the adopted children said that they had been tricked or coerced into relinquishing their parental rights.[60] Most of the birth mothers that were interviewed said that they believed that they were agreeing to let their children's education be sponsored, only to realise later that they had relinquished their parental rights by putting marks on documents that they could not read.[61] These examples illustrate how the inter-country adoption system fails to adequately protect the rights of parents.

Further, despite the fact that rule 7 of the Adoption of Children Rules require all statements and allegations to be verified by affidavits, certificates and any other documentation, the findings from the study on legal guardianship and adoption practices in Uganda show that 17 of the 19 applications for inter-country adoptions and 52 of the 59 applications for legal guardianship orders for the purposes of inter-country adoptions attached affidavits of consent as required by the law.[62]

Similarly, the findings from the study on alternative care systems in Ghana show that many Ghanaian families have been coerced to relinquish their children for adoption often with promises of food and education for their children.[63]

Having established what the three legal frameworks say about the manner in which consent should be given, the next section examines how the three countries deal with the issue of counselling those who are expected by the law to give their consent to an adoption.

[59] A Cavell 'Those Kids Are No Longer Yours': An Investigation into Uganda's Adoption Market, available at https://www.thenation.com/article.archive/those-kids-are-no-longer-yours-ugandas-adoption-market/, accessed on 17 May 2020.
[60] Ibid.
[61] Ibid.
[62] Among (n56 above) 23-24.
[63] Better Care Network and UNICEF 'Country Care Profile: Ghana' (2015) UNICEF 1, 24.

4. COUNSELLING THOSE WHO ARE EXPECTED BY THE LAW TO CONSENT TO AN ADOPTION

It was established in Chapter Three that the Hague Convention and the CRC Committee require counselling for the persons who are expected by the law to give their consent to an adoption.[64] To ensure that parents are counselled prior to consenting to an adoption, the CRC Committee recommends that states should establish legal safeguards to guarantee that parents are informed of all the social and legal effects of the adoption. Furthermore, states should enact legislation to ensure that parents are fully informed of the process and implications of their consent and that parents have sufficient information prior to consenting to the adoption of their child. In addition, competent authorities, such as courts, should make sure that 'if required' the person giving consent has been counselled and informed of the effects of the adoption and consent before authorising an adoption.

4.1. South Africa

South Africa makes explicit provision for counselling the persons who are required by the law to consent to an adoption.[65] It should be noted, at the outset that these provisions are a significant improvement from previous laws, which were silent on counselling prior to consenting to an adoption.[66] Counselling for parents serves the interests of not only the parents, but also the children involved in inter-country adoption. The law, however, does not require the court before making an adoption order to ensure that the parents have been counselled.

4.2. Ghana

In Ghana, rule 29 (6) of the Adoption Regulations require the persons who are required by the law to be counselled. The Ghanaian Children's (Amendment) Act further requires the court before making an adoption order to ensure that 'the parent or guardian of the child understands that the adoption order permanently deprives the parent or guardian of rights and responsibilities towards the child'. [67]

[64] See section 5.2.6 of Chapter Three.
[65] Section 233 (4) of the South African Children's Act.
[66] See section 3.1.1 of Chapter Four.
[67] Section 86 (2) (a) of the Ghanaian Children's (Amendment) Act.

4.3. Uganda

Uganda does not explicitly highlight the need to ensure that those who are expected by the law to give consent receive counselling. The defective nature of the law on counselling those who are expected to consent to an adoption has created practical problems. For instance, *In the matter of application for legal guardianship by Jonathan Adam and Jill Renae Hodge*,[68] the applicants, Adam and Jill Hodge took Stewart Bukenya, born to Hasifa Nakiwala and Festos Matovu to the United States after they had obtained a legal guardianship order from the Family Division of the High Court. The legal guardianship order was premised on the falsified death certificate of the child's father and that the mother was planning on abandoning her children to go and live with another man.[69] The child was subsequently adopted in the United States and his name was changed to Silas Hodge.[70] The truth was later revealed in 2011 when the child's parents claimed that 'they did not understand the papers they signed as they were not translated into their language, that they were promised that their son would return every two years for a holiday and that there would be frequent communication, but that they had only received a few photographs through the lawyer that finalized the process'. [71]

Freda Luzinda, Director of *A Child's Voice*, a children's rights organisation in Uganda, also affirmed that '[m]any birth parents do not understand that adoption is permanent. They believe that they may get their children back later. These misconceptions are part of the problem, but not the only problem'.[72] There have also been reports that many parents have been scammed by fraudulent people and adoption agencies.[73] Findings from the study on legal guardianship and adoption practices in Uganda also show that there were some parents or guardians who did not fully understand the implications of their consent and the adoption orders.[74] These practical

[68] HCT-000 MA 0213, Family Division Court of Uganda.
[69] See Taken & Never Returned: When Adoption Profits the Middleman and Taken & Never Returned: Family Accused of Selling Son to American Family, published on 19 April 2013, available at https://www.youtube.com/watch?v=yEeDL70WKOA and https://www.youtube.com/watch?v=kTy6vtcxMg, accessed on 22 October 2019.
[70] S Sserwanja 'Taken & Never Returned: Tracing Little Stuart Bukenya in the US, published on 22 April 2013, available at https://www.youtube.com/watch?v=wv7hnlcF9qQ, accessed on 22 October 2019.
[71] Ibid.
[72] T Schwarzschild 'Red Flags Wave Over Uganda's Adoption Boom', published on 2 March 2013, available at http://www.cnn.com/2013/02/27/world/africa/wus-uganda-adoptions/, accessed on 22 October 2019.
[73] Ibid.
[74] Among (n56 above) 25.

examples emphasise the need to ensure that parents receive adequate counselling prior to consenting to the adoption of their children.

Despite the lack of an explicit legal obligation to provide counselling, section 48 of the Ugandan Children's Act requires the court before making an adoption order to be satisfied that every person who has consented to an adoption understands the effects of the adoption and that it will permanently deprive the person of parental rights in respect of the child.[75]

While it is clear that both South Africa and Ghana generally enshrine the right to counselling prior to consenting to an adoption, what they do not is to prescribe both counselling and social support to encourage parents to continue to care for their children. For instance, section 233 (8) of the South African Children's Act states that 'the adoption social worker facilitating the adoption of the child must counsel the parents of the child and, where applicable, the child on the decision to make the child available for adoption'. Similarly, rule 29 (6) (e) of the Ghanaian Adoption Regulations require the Department to ensure that the parent or guardian 'understands the implications of relinquishment including the fact that (i) by relinquishing parental rights and responsibilities, the parent severs all legal, social and personal ties with the child' and that '(ii) the child may be placed in adoption within the country or in inter-country adoption'. It could be argued that the two legal frameworks seem to promote one-way counselling that favours relinquishment as opposed to holistic counselling that respects the fundamental rights and interests of the parents and their children

This view is further supported by an empirical study in South Africa on birth mothers who had relinquished their children for inter-country adoption. Actually, one adoption social worker who was interviewed testified that:

> [t]he difficulty is that we cannot offer employment, we cannot offer housing and we cannot offer a financial solution. And that is what most of them need. So we get into a situation very often where adoption or relinquishment of the child is actually the only option, and there is a real sense of desperation in the moms that we work with because we cannot offer them what's needed most'.[76]

The empirical study cited factors such as poverty and lack of resources as some of the reasons why birth mothers receive counselling that encourages relinquishment as opposed to

[75] Section 48 (1) (1) of the Ugandan Children's Act.
[76] Hogbacka (n52 above) 143-159 and Hogbacka (n52 above) 96.

counselling and social support to enable them to continue to care for their child.[77] Adoption is therefore seen as a solution to poverty, instead of providing the necessary support to parents to continue to care for their child.[78]

Several studies have shown the importance of holistic counselling (options counselling) and social support in adoption. For instance, an empirical study by the Evan B Donaldson Institute on American birth mothers who relinquished their children for adoption found that two-thirds of parents who receive counselling and social support (holistic counselling) decide to parent their children.[79] In another study on birth mothers in South Africa who relinquished their children for inter-country adoption, Hogbacka found that 'many first mothers in South Africa who, if provided with support would have been able to keep their children'.[80] Accordingly, these studies underscore the importance of holistic counselling that respects the fundamental rights and interests of parents in adoption.

Inter-country adoption will always be an option for children who cannot be cared for by their parents. However, it needs to be a viable option for those parents who believe that it serves their interests and those of their children.

A further shortfall from international standards is that in practice, parents are not always given sufficient information prior to consenting to the adoption of their child. In Uganda, it has been reported that at the time of giving consent to the adoption of their child, many parents did not fully appreciate the legal consequences of their actions.[81] Similar reports were made in Ghana and South Africa.[82] It has also been reported that many parents mistake inter-country adoption for shared parenting or informal fostering which does not entail the permanent termination of parental rights and responsibilities in respect of the child.[83] This suggests that in practice parents are not given sufficient information to enable them to fully understand the effects of adoption and consenting to the adoption of their child.

[77] Ibid.
[78] Ibid.
[79] Ibid. See also Evan B Donaldson Institute 'Safeguarding the Rights and Well-Being of Birth Parents in the Adoption Process' (2006) The Evan B Donaldson Institute 1, 31.
[80] Hogbacka (n53 above) 11.
[81] Among (n56 above) 25.
[82] Better Care Network and UNICEF (n63 above) 24 and Hogbacka (n52 above) 93-118.
[83] Among (n56 above) 25.

5. WHEN IS PARENTAL CONSENT NOT REQUIRED?

As shown in Chapter Three, the CRC, ACRWC and the Hague Convention recognise that there may be circumstances where consent is not required for the validity of an adoption if it is in the best interests of the child. None of the treaties provide any guidance on the circumstances in which consent is not required for the purposes of adoption. Therefore, states have the discretion to determine in accordance with their national laws when parental consent is not required for the validity of an adoption.

South Africa, Ghana and Uganda have established the grounds in which parental consent is not required. The laws of Ghana and Uganda are very brief in this regard. For instance, section 47(2) of the Ugandan Children Act simply provides that '[t]he court may dispense with the consent if the parents are incapable of giving it'. In contrast, South Africa is detailed in terms of the circumstances in which parental consent is not required.

In Ghana, South Africa and Uganda, the court may determine that consent is not necessary if the parent or guardian is mentally impaired,[84] has abandoned the child,[85] unknown[86] or dead.[87] Consent is also not required if the parent or guardian has failed to respond to a notice of the proposed adoption proceedings.[88] In South Africa, an unwed father's consent is not required if he has failed to take responsibility for the child.[89] These grounds are straightforward justifications for dispensing with parental consent and are not discussed any further below.

Parental consent is also not required if the parent or guardian is found to have abused or neglected the child. Section 236 (c) of the South African Children's Act and section 81 (6) (a)

[84] Section 236 (1) (a) of the South African Children's Act. See also *In the matter of an Adoption of Asobola Praise and Kwagala Martha by Kathleen Sue Bowman* (Adoption Cause No 002 of 2019) [2019] UGHCCD 203 (18 June 2019).
[85] Section 236 (1) (b) of the South African Children's Act.
[86] Section 236 (1) (b) of the South African Children's Act, section 81 (6) (b) of the Ghanaian Children's (Amendment) Act. See also *In Re A M (A Minor)* (Adoption Cause No 252 of 2013) [2014] UGHCFD 30 (8 May 2014); *In the matter of Kirabo (Infant)* (Adoption Cause No 205 of 2014) (2014) UGHCFD 8 (2 April 2015); *In the matter of a Petition for Adoption of Edson Mugaga (Child) by Anastasios Moutafis and Geogia Nelli Giannioti* (HCT-14-FD-AD-0015-2019) [2019] UGHCFD 11 (8 October 2019) and *In Re Tusabiri (An Infant)* (Adoption Cause No 252 of 2013) [2014] UGHCFD 30 (8 May 2014).
[87] Section 236 (2) of the South African Children's Act. See also *In the matter of Jjuko and Magezi (Infants)* Adoption Cause No 200 of 2014) (2014) UGHCFD5 (18 March 2015) and *In the matter of Kakembo (Infant)* (Family Cause No 169 of 2014) (2014) UGHCFD 10 (14 April 2015).
[88] Section 236 (1) (f) of the South African Children's Act.
[89] Section 236 (3) of the South African Children's Act.

of the Ghanaian Children's (Amendment) Act authorise the court to dispense with parental consent if the parent or guardian has abused, neglected or ill-treated the child. These provisions are relevant where the child needs protection and alternative care. They recognise that although parents have the primary responsibility to care for their children, they do not always act in their best interests.[90] Thus, section 236 (c) of the South African Children's Act and section 81 (6) (a) of the Ghanaian Children's (Amendment) Act allow the state to intervene to protect children by providing alternative care in the form of adoption to children who cannot be cared for by their parents. As noted in earlier chapters, state intervention arises from the need to protect children from harm caused by their parents.[91]

Section 236 (c) of the South African Children's Act and section 81 (6) (a) of the Ghanaian Children's (Amendment) Act correctly portray parents or guardians as fiduciaries to be removed from the office of parenthood if they act in ways that cause harm to their children resulting in the placement of their children for adoption.[92] They acknowledge that children have separate rights and interests from their parents, which deserve legal protection.[93] More importantly, both provisions reiterate that parental rights are not absolute and may be limited by the best interests of the child.[94]

Section 241 of the South African Children's Act also authorises the court to grant an order for adoption in the absence of consent if such consent is unreasonably withheld and where it is in the best interests of the child. This provision is relevant where it is in the best interests of the child to be placed for adoption notwithstanding a lack of consent by the child's parent or guardian. It recognises that although parents have rights in respect of their children, such rights may be limited by the best interests of the child. Parental rights are therefore subject to permissible limits where it is in the best interests of the child to be placed for adoption.

In determining whether consent is being unreasonably withheld, the court should consider 'the nature of the relationship during the last two years between the child and the person withholding consent' and 'the prospects of a sound relationship developing between the child

[90] See section 3.2 of Chapter Three and section 6.4 of Chapter Four.
[91] Ibid.
[92] See section 2.1 of Chapter Two.
[93] Ibid.
[94] Ibid.

and the person withholding consent in the immediate future'.[95] These provisions recognise that parents sometimes fail to perform their parental duties resulting in the placement of their children for adoption.

Like South Africa, section 81 (6) (d) of the Ghanaian Children's (Amendment) Act allows the court to dispense with consent if 'that consent is unreasonably withheld.' The Ghanaian Children's (Amendment) Act does not define the terms 'unreasonably withheld'. Similarly, there is no guidance on the list of factors to be considered in determining whether consent is being unreasonably withheld for the purposes of adoption. This is an unwelcome omission considering that the ultimate decision on whether to dispense with the consent of the child's parent or guardian depends on whether such consent is being 'unreasonably withheld'. The lack of clarity on what the terms 'unreasonably withheld' means leaves wide room for decision-makers and may lead to variations in determinations of whether consent should be dispensed with. This has the potential to undermine the rights of parents. Further guidance may be necessary to ensure that the rights of parents are protected in inter-country adoption.

6. CONCLUSION

This chapter set out to review the regulatory framework in Ghana, South Africa and Uganda in order to examine how the principle of consent to adoption finds expression in the domestic laws governing inter-country adoption. Subsequently, different themes were discussed including: who should give consent for the purposes of adoption, how consent should be given and counselling the persons who are required by the law to consent to an adoption.

With regards to the issue of who should give consent to the adoption, the general observation was that the domestic laws of the countries under study reflect the aspirations of the diversity model and international law with their wide range of persons who can consent to the adoption of the child. However, there are no legal provisions in South Africa and Uganda on the minimum duration before consent to adoption can be given after the birth of the child as required by international standards. Furthermore, provisions requiring the court before making an adoption order to ensure that parents receive pre-adoption counselling are lacking in South

[95] Section 241 (2) (a) and (b) of the South African Children's Act.

Africa. Uganda is also silent on the requirement that consent of the mother should be given after the birth of the child.

The manner in which consent should be given was also accorded great attention. It was established that although the domestic laws of the countries under study contain provisions requiring consent to be freely given as required by international law, the practice in utilising them is different. It was shown that separation is in many cases involuntary due to poverty and economic strains. It was also established that in some cases parents are coerced, tricked or bribed to relinquish their children for adoption and that consent is also influenced by probation and social welfare officers or children's homes. This discussion highlighted that generally consent obtained for the purposes of adoption is not always free and voluntary consent.

With respect to the issue of counselling, it was demonstrated that with the exception of Uganda, the domestic laws explicitly make provision for counselling the persons who are required by the law to consent to an adoption. However, the chapter also highlighted some of the practical problems regarding the issue of counselling. First, it was shown that in practice, parents are not always given sufficient information prior to consenting to the adoption of their child to enable them to fully understand the effects of the adoption. Second, that parents often receive 'one-way counselling' that encourages relinquishment as opposed to holistic counselling that enables them to make a fully informed decision. This discussion highlighted the inadequate nature of the counselling given to parents prior to consenting to the adoption of their child.

Finally, the circumstances in which parental consent is not required for the purposes of adoption was also discussed in detail. In conclusion, this chapter has demonstrated that inter-country adoption practices in the selected countries have not always been done in ways that adequately serve the rights and interests of parents. The next chapter examines the regulatory framework in Ghana, South Africa and Uganda on the adoptability principle.

CHAPTER SIX: THE ADOPTABILITY PRINCIPLE IN GHANA, SOUTH AFRICA AND UGANDA

1. INTRODUCTION

The previous chapter has established that although the domestic regulation of consent to adoption in Ghana, South Africa and Uganda supports the legal framework proposed in this study, there are still some protection gaps. This chapter seeks to examine how the adoptability principle finds expression in the domestic laws governing inter-country adoption in Ghana, South Africa and Uganda. The discussion in this chapter is limited to a discussion of the following grounds of adoptability: death of parents, child abandonment and neglected children. The main reason for selecting these themes is that these are the common grounds for adoptability in the countries under study. Secondly, the orphan status of a child and child abandonment raise concerns regarding the protection of the rights of parents. For instance, does the mere orphan status of a child automatically qualify such a child as adoptable? Does the mere deprivation of a child of his or her family environment temporarily or permanently make such a child adoptable? These are some of the issues that this chapter interrogates in detail.

The chapter will also investigate the extent to which the domestic laws of the countries under study draw upon the theories discussed in Chapter Two and international law discussed in Chapter Three. It demonstrates that the domestic laws are consistent with the fiduciary theory and international law in that they establish the grounds in which children could be considered in need of alternative care or adoption and the procedures by which such a determination can be made. The issue of who determines the adoptability of a child, family tracing and reunification measures are also made clear in the domestic laws. Notwithstanding these notable legal provisions, the chapter exposes some of the inadequacies in the procedures and how they fail to adequately protect the rights of parents.

2. DEATH OF PARENTS

Chapter Three identified several measures states are expected to take to determine the adoptability of a child. First, states are required to ensure that the adoptability of a child is determined in accordance with applicable laws and procedures. Second, states are required to determine the adoptability of a child on the basis of pertinent, reliable and relevant information.

Third, international human rights law and jurisprudence stresses the need for family tracing and reunification efforts before a child is placed for adoption. States are expected to ensure that prior efforts have been made to maintain family times and that the competent authority deciding on the adoptability of a child confirms that all efforts have been made to maintain family ties. Furthermore, a declaration of adoptability should not be made unless a reasonable period of time has passed during which all steps to trace the parents or family has been carried out.

Equally important in protecting the rights of parents is the requirement to indicate how family tracing and reunifications should be undertaken. Finally, the adoptability of a child should be determined by the courts. Of importance in the determination of adoptability is the requirement that states should ensure that in all cases of adoption, the decision of the court is supported by a social worker's or other professional assessment. This section discusses how the legal provisions regulating the adoptability of orphans protect the rights and interests of parents in inter-country adoption.

2.1. South Africa

In South Africa, a child is considered adoptable if he or she is an 'orphan and has no guardian or caregiver who is willing to adopt the child'.[1] Section 1 of the South African Children's Act[2] defines an orphan to mean 'a child who has no surviving parents caring for him or her'. On the positive side, the definition of an orphan under the South African Children's Act recognises that both biological parents have the primary responsibility to care for their children and that they have equal rights and responsibilities in all matters concerning their children such as adoption.[3] This approach avoids situations whereby children that are not necessarily orphans are placed for adoption. As stated in the introductory section of this chapter, there have been reports that many children that are given up for adoption are not orphans and have at least one or both surviving parents.[4] It is submitted that the approach taken by the South African Children's Act offers greater protection to parents in inter-country adoption given that many children in South Africa are not orphans and have at least one surviving parent residing elsewhere. The General Household Survey conducted by STATS SA between 2004 and 2016

[1] Sections 157 (3) and 230 (3) (a) of the South African Children's Act.
[2] Act 38 of 2005.
[3] See section 3.1 of Chapter Three and section 6 of Chapter Four.
[4] See also section 2 of Chapter One.

of children aged between seven and 17 years indicated that the majority of South African children lived with their biological mothers as compared to their biological fathers.[5] It was further reported that the percentage of children who lived with their biological mothers had increased from 36.2% in 2004 to 37.4% in 2016, as well as those who lived without their biological parents increased by 2%.[6]

With specific reference to black children, the General Household Survey indicated that 39.6% (nearly two-fifths) of black children aged between seven and 17 years in South Africa lived only with their biological mothers, 27.7% lived with both biological parents and 29.0% (which is almost a third) lived with neither biological parent.[7] This, however, does not mean that such children are either paternal, maternal or double orphans. Factors such as low marriage rates, poverty, migration among other factors have contributed to these family dynamics and living arrangements for children.[8]

The definition of an orphan under the South African Children's Act also creates some degree of legal certainty for decision-makers when determining whether or not a child is an orphan for the purposes of adoption. This further guarantees that the rights of parents are protected. The significance of the orphan definition cannot be overemphasised. The continent has witnessed too many problems in the context of inter-country adoption. South Africa deserves much credit in this respect as it addresses one of the most relevant issues in inter-country adoption.

It is commendable that under the South African Children's Act, the death of parents does not automatically qualify a child as adoptable. One of the strengths of the current legal framework is that it recognises that the mere fact that a child is an orphan does not automatically mean that the child is adoptable. This means that a child who is an orphan also needs to pass the second stage of the inquiry and the question becomes whether or not there is 'no guardian or caregiver who is willing to adopt the child'. This approach recognises that orphans could be cared for by their relatives and therefore not qualify as adoptable. More importantly, it underscores the diversity model and international law standards.

[5] STATS SA 'Vulnerable Group Series III Report: The Social Profile of Children aged 7-17 years 2002-2016' (2016) STATS SA Report 03-19-04 1, 26-28.
[6] Ibid.
[7] Ibid.
[8] K Hall and W Sambu 'Demography of South Africa's Children' (2016) *South African Child Gauge* 106, 107.

To determine whether a child is an orphan for the purposes of adoption, the South African Children's Act makes provision for family tracing and reunification efforts to determine if a child is an orphan for the purposes of adoption.[9] Provision is also made for how and how long family tracing measures should be carried out before a declaration of adoptability is made.[10] In particular, rule 56 of the General Regulations Regarding Children of South Africa[11] requires family tracing to be carried out for a period of at least three months before a child can be placed for adoption. Some children's rights organisations have argued that the three-month period is too long and that it favours parental rights over the rights of the child.[12] However, I am of the view that considering that adoption involves the complete severance of the parent-child relationship, the three-month period is reasonable and justifiable. Furthermore, it ensures that both parents rights and children's rights are protected in inter-country adoption. The time limit ensures that the rights of parents are protected, while at the same time ensuring that the child's need for stability and early placement is not compromised.

Of importance in protecting the rights of parents is who determines the adoptability of a child. In South Africa, the adoptability of a child is determined by the court subject to an assessment by the adoption social worker.[13] This approach is consistent with the requirement that the decision of the court should be supported by a social worker's assessment. The involvement of the courts in determining the adoptability of a child offers better protection to parents in inter-country adoption. Furthermore, it ensures that there is impartiality, veracity and accuracy of the investigations carried out by social workers.[14]

The court's powers when presented with an application to determine whether a child is an orphan for the purposes of adoption, are, firstly, to be satisfied that the child has been orphaned.[15] Secondly, rule 56 (2) (b) (ii) of the General Regulations Regarding Children provides that the presiding officer should be provided with a copy of the advertisement and be

[9] Rule 56 of the General Regulations Regarding Children.
[10] Ibid.
[11] General Regulations Regarding Children, Government Gazette, 1 April 2010.
[12]Anon 'Failing the Abandoned' (2011) Independent Online, 17 November 2011, available at http:/www.iol.co.za/mercury/failing-theabandoned1.1180763?ot=immsa.ArticlePrintPageLayout.ot, accessed on 1 December 2019.
[13] Rule 56 (1) and (2) of the General Regulations Regarding Children. See also section 230 (2) of the South African Children's Act.
[14] P Alston, N Cantwell and J Tobin 'Article 21: Adoption' in J Tobin *The UN Convention on the Rights of the Child: A Commentary* (2019) 791.
[15] Rule 56 (2) (a) of the General Regulations Regarding Children.

satisfied that 'a period of at least three months has lapsed since the publication of the advertisement and that no person has claimed responsibility for the child'. It is submitted that these provisions draw from the international standards with respect to the requirement that the competent authority should confirm that all efforts have been made to maintain family ties.

Finally, the court should have regard 'to the death certificate or certificates of the child's parent or parents, guardian or care-giver, obtained by the social worker concerned or, if such certificate cannot be obtained, to an affidavit by a person or persons who can testify to the death of the child's parent, guardian or care-giver'.[16] This is also consistent with the requirement that the competent authority should ensure that family tracing efforts have been made before a declaration of adoption and that the decision is based on pertinent, reliable and relevant information.

2.2. Uganda

In Uganda, orphanhood is also a ground for adoptability.[17] Uganda does not provide a legal definition of an orphan for the purposes of adoption. However, case law seems to suggest that a child is considered an orphan for the purposes of adoption if he or she has lost both parents (or has no surviving parents caring for him or her) and has no guardians or relatives willing to adopt the child. For example, *In the matter of Sharon Asige (An Infant),*[18] the case involved the adoption of a seven-year-old child, Sharon Asige, who was considered a "total orphan" on the basis that she had lost both parents when she was of tender age. The child was placed for inter-country adoption on the basis that there were no relatives who were willing to adopt the child.

Similarly, *In the matter of Teddy Nakawesa, Leticia Namanda and Ben Katongole (Minors* and *In the matter of an application by Nanfuka Harriett and Abbey Kikonyogo to adopt Teddy Nakawesa, Leticia Namanda and Ben Katongole).*[19] This case involved the adoption of three minor children who were orphans. Both of their parents had died between 2002 and 2004. There were no relatives willing to adopt the children. As a result, the children were placed for

[16] Rule 56 (2) (c) of the General Regulations Regarding Children.
[17] Section 46 (6) of the Ugandan Children (Amendment) Act.
[18] Adoption Cause No 144 of 2009. See also *In the matter of N.M (Infant)* Adoption Cause No 289 of 2013 and *Ochaya and Anor v Lamaro* (MISCELLANEOUS CIVIL APPLICATION No 0028 of 2017) [2018] UGHCFD (17 September 2018).
[19] Adoption Cause No 164 of 2011.

inter-country adoption. The approach taken by the courts offers better protection to parents in inter-country adoption and ensures that the rights of all parents considered as the child's parents are protected. This is congruent with the diversity model and international law. It also stresses the fact that the right to alternative care does not immediately apply upon the loss of parental care, but is applicable when there are no other available or willing relatives that have taken responsibility of the child.

With respect to determining whether a child is an orphan for the purposes of adoption, case law in Uganda suggests that family tracing and reunification efforts are prioritised before a child is placed for adoption.[20] Furthermore, section 10 (7) of the Ugandan Children Act makes provision for how family tracing and reunification measures should be carried out.[21] This is consistent with the fiduciary theory and international law. However, Uganda is silent on how long family tracing measures should be carried out before placing a child for adoption. This is inconsistent with international standards.

Similarly, in Uganda, the adoptability of a child is determined by the court subject to an assessment by the Probation and Social Welfare Officer and the court.[22] To assist the court to determine the adoptability of a child, section 45 (5) of the Ugandan Children's (Act)[23] provides that 'the Probation and Social Welfare Officer shall be required to submit a report to assist the court in considering the application, and the court may require some other person or the local authority to make a report in respect of the adoption application'.[24] Furthermore, the Probation and Social Welfare Officer is required to attend all proceedings in order to advise the court.[25] However, in some cases Probation and Social Welfare Officers do not attend court to assist the court as required.[26]

The findings from the study on legal guardianship and adoption practices in Uganda further show that in some cases death certificates of the deceased parents are not annexed to assist the

[20] *In the matter of Twins, Waiswa James and Nakato Immaculate* Family Cause No 185 of 2010 and *In the matter of an Application for Appointment as Legal Guardians of Samuel Lokwayi by Michael Mylius and Angela Mylius* Family Cause No 207 of 2010.
[21] Section 10 (7) of the Ugandan Children's Act.
[22] Section 46 (5) of the Ugandan Children (Amendment) Act and section 48 of the Ugandan Children Act.
[23] Chapter 59.
[24] See also rule 10 of the Adoption of Children Rules.
[25] Rule 3 (4) of the Adoption of Children Rules.
[26] *Re Peter Sebuliba alias Namansa James* (Misc Cause No 3 of 2009) (Misc Cause No 37 of 2009) [2010] UGHC 124 (2 June 2010).

court to determine if a child is an orphan.[27] It is reported that out of 53 applications for inter-country adoption, only 15 annexed death certificates of the deceased parents. This is inconsistent with the requirement to ensure that the adoptability of a child is determined on the basis of pertinent, reliable and relevant information.

Studies on adoption practices in Uganda have also found out that most children who are placed for adoption are not orphans and have at least one or both surviving parents including relatives.[28] For instance, an investigation by the Investigative Fund and the Nation on inter-country adoption practices in Uganda revealed that the majority of children that were placed for adoption between 2010 and 2018 were not orphans and that it is easy to create a "paper orphan" for the purposes of an adoption.[29] The findings from the study on legal guardianship and adoption practices in Uganda further reported that the family status of 50 of the 122 children classified as "orphans" was not known, while 72 had known relatives.[30]

2.3. Ghana

In Ghana, the orphan status of a child is also one of the grounds for adoptability.[31] Ghana does not have a statutory definition of an orphan for the purposes of adoption. It should, however, be noted that Ghana has adopted various policies and plans of action which define an orphan in various contexts.[32] Thus, although the law in Ghana is silent on the definition of an orphan, the different policies and plans of action on orphans and vulnerable children refer to it. However, policies and plans of action cannot serve as the legal definition of an orphan in

[27] H Among Legal Guardianship and Adoption Practices in Uganda (2014) UNICEF 1, 41.
[28] Among (n27 above) 40-41.
[29] A Cavell "Those Kids Are No Longer Yours: An Investigation into Uganda"s Adoption Market, How Parents Lose their Children to Families in the United States" 11 October 2018, available at thenation.com,/article/archive/those-kids-are-no-longer-yours-ugandas-adoption-market/, accessed on 15 December 2019. See also J Davis "The Orphan I Adopted from Uganda already has a Family", 14 October 2017, available at edition.cnn.com/2017/10/13/opinions/adoption-uganda-opinion-davis/index.html, accessed on 15 December 2019 and The Guardian "I Want My Kids Back: How Overseas Adoptions Splinter Uganda"s Families", available at theguardian.com/global-development/2020/may/29/I-want-my-kids-back-how-overseas-adoptions-splinter-ugandas-families, accessed on 10 August 2010.
[30] Among (n27 above) 41.
[31] Rule 31 of the Adoption Regulations of Ghana and section 18 of the Ghanaian Children's Act.
[32] For instance, in Ghana, the National Social Protection Strategy (2007), the National Policy Guidelines on Orphans and other Children made Vulnerable by HIV/AIDS (2005); the National Plan of Action for Orphans and Vulnerable Children (2010-2012). Attempts to find case law from Ghana were futile.

adoption proceedings. Adoption proceedings require a more solid legal foundation than what is found in the policies and plans of action.

To determine the adoptability of an orphan for the purposes of adoption, rule 31 (3) of the Adoption Regulations requires family tracing and reunification efforts to be carried out to determine if a child is an orphan for the purposes of adoption. Ghana also provides for how family tracing measures should be carried out.[33] Rule 28 (5) of the Adoption Regulations[34] also requires a period of six months before a child can be placed for adoption.

In Ghana, the adoptability of a child is determined by the court subject to an assessment by Technical Committee of the Central Authority.[35] Section 86 (1) of the Ghanaian Children's (Amendment) Act requires the court before making an adoption order to satisfy itself that all pre-adoption processes have been fully complied with. Furthermore, section 85 (2) of the Ghanaian Children's (Amendment) Act provides that an application for an adoption order should be accompanied by a social inquiry report. A social inquiry report is a report presented to the court, usually by a social worker to inform it of the child's situation. It is intended to assist the court in making an adoption order or deciding if a child is adoptable.[36] Such report should include, among other things, the child's background, medical information of the child's biological parents, family circumstances, the knowledge and views of the members of the extended family on the proposed adoption, the steps that have been taken to trace the family and the death certificates of the deceased parents.[37] Consideration of the report is mandatory before a declaration of adoptability is made. It is submitted that this approach follows the requirement that the determination of adoptability should be on the basis of pertinent, reliable and relevant information and that the competent authority should confirm that prior efforts have been made to maintain family ties.

Despite these notable provisions, cases where children that were not orphans for the purposes of adoption have been reported.[38]

[33] Ibid.
[34] 2018.
[35] Rule 31 (1) of the Adoption Regulations.
[36] Section 86ZG (2) of the Ghanaian Children's (Amendment) Act. See also section 124 (d) of the Ghanaian Children's (Amendment) Act.
[37] Section 85 (2) of the Ghanaian Children's (Amendment) Act. See also rule 29 of the Adoption Regulations.
[38] Better Care Network and UNICEF 'Ghana: Country Care Profile' (2015) UNICEF 1, 25.

In the next section, this chapter examines the legal provisions regulating the adoptability of abandoned children.

3. ABANDONED CHILDREN

Child abandonment is a common ground for adoptability under the domestic laws of the countries under study. This section examines whether the legal provisions that determine the adoptability of an abandoned child serve the rights and interests of parents in inter-country adoption.

3.1. South Africa

In South Africa, abandonment is expressly recognised as one of the grounds in which a child is adoptable. Section 1 of the South African Children's Act defines the term 'abandoned' to mean a child who '(a) has obviously been deserted by the parent, guardian or caregiver; or (b) has, for no apparent reason, had no contact with the parent, guardian, or care-giver for a period of at least three months'.

The grounds mentioned in section 1 of the South African Children's Act for declaring that a child has been abandoned are straightforward and are not discussed any further below. An obvious strength of this provision is that it provides guidance to decision-makers when determining whether a child has been abandoned for the purposes of adoption. This prevents situations whereby children that are not abandoned are placed for adoption without the knowledge and consent of their parents. More importantly, it ensures that both parental and children's rights are protected in inter-country adoption.

The process of determining who is an abandoned child for the purposes of adoption is the same as the one for an orphan discussed above. Just like the determination of orphanhood, the law requires family tracing and reunification efforts to be undertaken to determine if a child has been abandoned.[39] Furthermore, it makes provision for how family tracing should be carried

[39] Rule 56 of the General Regulations Regarding Children.

out.[40] The law further stipulates how long family tracing should be carried out before a declaration of adoptability is made.[41]

With respect to who determines the adoptability of an abandoned child, in South Africa, the task is carried out by the court subject to an assessment by the adoption social worker. The court's powers when presented with an application to determine whether a child has been abandoned for the purposes of adoption are, first, to be satisfied that the child has been abandoned.[42] Second, rule 56 (2) (b) (ii) of the General Regulations Regarding Children provides that the presiding officer should be provided with a copy of the advertisement and be satisfied that 'a period of at least three months has lapsed since the publication of the advertisement and that no person has claimed responsibility for the child'.

Finally, the court should have regard to an affidavit setting out the steps taken to trace the child's family by the social worker to the effect that the child's family cannot be traced and an affidavit by any other person, if any, who can confirm that the child has had no contact with his or her family for at least three months.[43] This approach is consistent with the requirement that the competent authority deciding on the adoptability of a child should confirm that all efforts have been made to maintain family ties. It also ensures that the determination of adoptability is made on the basis of pertinent, reliable and relevant information.

3.2. Ghana

Rule 27 (2) of the Adoption Regulations expressly recognises abandonment as one of the conditions under which a child could be considered adoptable. A child is considered abandoned where 'a person leaves the child with an unknown person and does not return, the child is left in a health facility without the parent, guardian or relative visiting, the child is left alone in a public space without care and the child is left in a questionable place that suggests neglect'.[44]

The abovementioned grounds are straightforward justifications for declaring a child abandoned for the purposes of adoption and are not discussed any further below. Rule 27 (3) (e) of the

[40] Ibid.
[41] Ibid.
[42] Regulation 56 (2) (a) of the General Regulations Regarding Children.
[43] Regulation 56 (2) (d) of the General Regulations Regarding Children.
[44] Rule 27 (3) (a)-(d) of the Adoption Regulations.

Adoption Regulations also provides that a child is considered abandoned where the child is left in a reasonable care facility for a period of at least a year without the child's parent, relative or guardian visiting or showing any interest in the care of the child and the Department is unable to trace the child's parent, guardian or relative or has given notice to the child's parent, guardian or relative without any response. It could therefore be argued that it must be clearly established that the abandonment was wilful and that there was an intention to permanently relinquish parental rights and responsibilities in respect of the child. This definition is indicative of the need to differentiate between those children that are "temporarily abandoned" and those that are "permanently abandoned" before such a child qualifies for adoption.

One of the strengths of the current legal framework is that it recognises that the fact that a child is left in a residential care does not necessarily mean that the child has been abandoned. Thus, the fact that the child was left in a residential facility for at least a year is not a determinant factor for the eligibility of a child for adoption. This means that a child who has been left in a residential facility for at least a year also needs to pass the second stage of the inquiry and the question becomes whether or not the Department is unable to trace the parent, guardian or relative of the child or that the Department has given notice to the parent, guardian or relative of the child to show an interest in the child without any response.

Rule 27 (3) (e) of the Adoption Regulations is particularly relevant in the context of poor parents who place their children in temporary care, a practice that is very common on the continent, without necessarily having the intention to relinquish their rights, interests and claims in respect of the child.[45] Rule 27 (3) (e) of the Adoption Regulations acknowledges that parents struggling to care for their children sometimes place their children in institutional facilities not because they have abandoned their children, but because of their inability to care for them. It is submitted that laws that require family tracing and notice to be given to parents

[45] V Root 'Angelina and Madonna: Why All the Fuss? An Exploration of the Rights of the Child and Intercountry Adoption within African Nations' (2007) 8 (1) *Chicago Journal of International Law* 323, 343; C Mbitiru 'Madonna Joins Rush to Adopt Children' available at http://www.accessmylibrary.com/article-1G1-153279526/madonna-joins-rush-adopt.html accessed on 1 December 2019; P Singer 'Madonna and Child, Project Syndicate', available at http://www.project-syndicate.org/print/madonna-and-child accessed on 1 December 2019 and J M Isanga 'Surging Intercountry Adoptions in Africa: Paltry Domestication of International Standards' (2012) 7 (1) *Brigman Young University Journal of Public Law* 229, 244. For instance, David Banda's father, a potato farmer, took him to an orphanage not because he wanted to abandon his child, but because he was too poor to take care of him.

who have left their children in residential care are most supportive of the rights and interests of the parents, and ultimately their children.

Furthermore, the conditions in terms of rule 27 (3) of the Adoption Regulations in which a child is considered abandoned provide some guidance to decision-makers in determining whether or not a child has been abandoned for the purposes of adoption. This makes certain that the rights of parents are sufficiently protected in inter-country adoption. Given that there have been concerns that many children placed in institutional care are not abandoned, the list brings some degree of certainty on what exactly is to be considered when making decisions concerning the adoptability of abandoned children.

Just like the procedure for determining the adoptability of orphan, the law requires family tracing and reunification efforts to be undertaken to determine if a child has been abandoned.[46] It further makes provision for how family tracing should be carried out and the period of time required.[47]

In terms of which authority determines the adoptability of an abandoned child, the court subject to an assessment by the Technical Committee of the Central Authority determines if a child has been abandoned. To ensure that prior efforts have been made to trace the family, section 85 (2) of the Ghanaian Children's (Amendment) Act requires the court before making an adoption order to be satisfied that all pre-adoption processes have been complied with. Further, section 86 (1) of the Ghanaian Children's (Amendment) Act requires an application for an adoption order to be accompanied by a social enquiry report. This further ensures that the decision is made on the basis of pertinent and reliable information.

3.3. Uganda

In Uganda, abandonment is also expressly recognised as one of the grounds in which a child is adoptable.[48] Case law seems to suggest that a child is considered abandoned if he or she has

[46] Rule 28 (1); (2) and (4) of the Adoption Regulations.
[47] Ibid.
[48] Rule 27 (2) of the Adoption Regulations of Ghana; sections 230 (3) (c) and 157 (3) of the South African Children's Act and section 46 (6) of the Ugandan Children (Amendment) Act.

been left alone in a public space or if the parent has left the child with an unknown person and does not return.[49]

Regarding the procedure for determining whether a child has been abandoned for the purposes of adoption, section 10 (7) of the Ugandan Children Act requires family tracing and reunification efforts to be undertaken to determine if a child has been abandoned.[50] Case law in Uganda also shows that family tracing and reunification efforts are prioritised before an abandoned child is placed for adoption.[51] For instance, in the case of *Alex Malik Hodgkins,*[52] the child was abandoned at Bugembe, Budumbuli East in Jinja. In an effort to trace the child's parents or relatives, a picture of the child was advertised in the New Vision Newspaper on 14 September 2009, but nobody claimed the child.

In *Re A M (a minor*),[53] the child was placed for adoption after numerous attempts to trace the birth family, including investigations, newspaper and radio notifications proved futile. Similarly, *In the matter of a petition for adoption by S S M and A M M*,[54] the child was found abandoned on 11 July 2012 in Kisenyi Zone, Kyebando Kawempe. The matter was subsequently reported to Kawempe Police Station. As part of family tracing efforts, several radio announcements and newspaper advertisements were made, in addition to interviewing a number of people from the neighbourhood.

Section 10 (7) of the Ugandan Children Act further provides for how family tracing should be carried out. What is missing is how long family tracing measures should be carried out before a declaration of adoptability is made. With respect to the issue of which authority determines the adoptability of an abandoned child, the court subject to an assessment by the Probation and Social Welfare Officer determines if a child has been abandoned.[55] Section 45 (5) of the

[49] *In the matter of Tusabiri Suzannah Myrthe (An Infant)* Adoption Cause No 252 of 2013, the child was abandoned in a carpentry workshop by the mother; *In the matter for a Petition as Adoptive Parents of Alex Malik Hodgkins (Aged 1 year) by Franklin Guillaume and Denise-Jo Anne Guillaume* Family Cause No 129 of 2010 and *In the matter of Twins, Waiswa James and Nakato Immaculate (Infants)* Family Cause No 148 of 2008.
[50] Section 10 (7) of the Ugandan Children Act.
[51] In *Re A M (a minor)* Family Cause No 129 of 2010*; in the matter of Stella Kirabo (an infant)* (Adoption Cause No. 205 of 2014) (2014) UGHCFD8 (2 April 2015*); in the matter between Chris Mugaisa and Seth Kirabo Jeremy (Infants)* (Family Cause No. 191 of 2010) [2010] UGHC73 (26 October 2010) *and In re Tusabiri (An Infant)* (Adoption Cause No. 252 of 2013) (2014) UGHCFD 30 (8 May 2014).
[52] Family Cause No. 129 of 2010.
[53] Family Cause No 129 of 2010.
[54] Adoption Cause No 12 of 2017.
[55] Section 46 (5) of the Ugandan Children (Amendment) Act and section 48 of the Ugandan Children Act.

Ugandan Children's (Act)[56] provides that 'the Probation and Social Welfare Officer shall be required to submit a report to assist the court in considering the application, and the court may require some other person or the local authority to make a report in respect of the adoption application'.[57]

Practice, in Uganda, however casts serious doubt on Uganda's compliance with respect to family tracing measures. Section 10 (7) of the Ugandan Children Act provides that '[e]ach local government council shall make every effort, including publication through the mass media, to trace the parents or guardians of any lost child'. However, the findings from the study on legal guardianship and adoption practices in Uganda show that most newspaper advertisements are placed by law firms representing the prospective adoptive parents and not the local government council as required by the law.[58] This has the potential to violate the rights of parents in inter-country adoption.

In addition, the findings from the study on legal guardianship and adoption in Uganda show that in some cases, children are falsely classified as 'abandoned' for the purposes of adoption.[59] For example, in Iganga, an adoptive parent claimed that he adopted the child because she had been abandoned by the parents. However, the father of the child (a well-known religious leader), disputed these allegations. This raises questions as to whether family tracing and reunification efforts are actually prioritised.

The study also indicated that there is a hasty resort to adoption for abandoned children without conducting sufficient and adequate family tracing. This could be attributed to the lack of clear legal provisions which specify how long family tracing measures should be carried out before an abandoned child can be considered eligible for adoption.

In the next section, this chapter investigates the extent to which the domestic regulation of the adoptability of neglected children best protects parental rights in inter-country adoption.

[56] Chapter 59.
[57] See also rule 10 of the Adoption of Children Rules.
[58] Among (n27 above) 43.
[59] Among (n27 above) 42.

4. NEGLECTED CHILDREN

Child neglect is one of the grounds for adoptability under the domestic laws of the countries under study. This section analyses whether the legal provisions that determine the adoptability of neglected children protect the rights of parents.

4.1. South Africa

In South Africa, child neglect is expressly recognised as one of the conditions of adoptability.[60] To ensure that the rights of parents are protected in inter-country adoption, section 1 of the South African Children's Act defines child neglect to mean 'a failure in the exercise of parental responsibilities to provide for the child's basic physical, intellectual, emotional or social needs'. On the positive side, the definition of a neglected child creates some degree of legal certainty for decision-makers when determining whether a child has been neglected for the purposes of adoption. This further guarantees that the rights of parents are protected in inter-country adoption.

With respect to the procedure, section 135 of the South African Children's Amendment Act[61] provides for the termination of parental rights and responsibilities of the parents of neglected children in statutory care leading to the adoptability of a child. This is only done when it is in the best interests of the child with a view, amongst others, to the adoption of the child.[62] For instance, if a parent's act or failure to act deprives a child, and the deprivation is currently causing or will in the future cause serious physical or mental harm. It is, however, important to note that involuntary termination of parental rights and responsibilities is an extreme measure reserved for cases of serious abuse, violence (such a corporal punishment or any other forms physical or mental violence or maltreatment) or neglect of the child.

In terms of section 135 (1) (a) of the South African Children's Amendment Act, the termination of parental rights and responsibilities can be initiated by the Director-General, a provincial head of social development or a designated child protection organisation. Such an application

[60] Section 230 (d) of the South African Children's Act.
[61] Act No 41 of 2007.
[62] Section 135 of the South African Children's Amendment Act. See also sections 155-157 of the South African Children's Act.

for termination of parental rights and responsibilities can be brought without the consent of the child's parents or guardian.[63]

In considering such an application, the court should take into account several factors including: the need for the child to be permanently settled in a family environment, the success or otherwise of any attempts that have been made to reunite the child with the person whose parental rights and responsibilities are being challenged, the relationship between the child and the person whose parental rights and responsibilities are challenged, whether there has been any contact between the parent and the child within a period of 1 year before the application, the level of commitment that the person has shown towards the child and the probability of arranging for the child to be placed for adoption or in another form of alternative care.[64] It is submitted that the consideration of these factors is crucial in order not to use the procedure to the detriment of the parents and ultimately the children involved.

The fact that 'the success or otherwise attempts that have been made to reunite the child with the person whose parental rights and responsibilities are challenged' is one of the factors a court should consider when considering an application for the termination of parental rights and responsibilities is commendable. This approach suggests that the fact that there is child neglect does not necessarily lead to the automatic adoptability of a child for the purposes of inter-country adoption, but that there should be evidence that family reunification measures have failed. It also gives effect to parents right to enjoy their family life discussed in Chapter Three of the thesis and is consistent with the view that separation of a child from his or her parents should only occur as a measure of last resort.

Furthermore, this approach is consistent with the central tenets of the fiduciary theory and international law (the adoptability principle). In addition, it also minimises compromising the interests of parents through an unwarranted termination of parental rights and responsibilities leading to the adoptability of a child. The involvement of the court is also laudable.

[63] Section 135 (2) of the South African Children's Amendment Act.
[64] Section 136 of the South African Children's Amendment Act.

4.2. Ghana

In Ghana, a cursory look at rule 31 (1) of the Adoption Regulations on adoptable children seems to discount the adoptability of neglected children. Rule 31 (2) of the Adoption Regulations provides that a child is adoptable if the child needs an adoptive family and if the child's parent, guardian or Department has consented to the child's adoption. The provision under the Adoption Regulations that could be read to offer the possibility of the adoptability of a neglected child is rule 31 (3) of the Adoption Regulations (read with section 18 of the Ghanaian Children's Act). This section provides that 'a child is in need of an adoptive family if the child is under a Care order and (a) the child cannot be kept in or reunited with the family of that child; or (b) there is a basis under the Act for severing the links of the child with the parent, guardian or relative' and 'an assessment of the child by the Technical Committee has established that the child will benefit from a family environment and adoption is the preferred option of care'.

Section 18 of the Ghanaian Children's Act[65] further states that 'a child is in need of care and protection if the child- (b) has been neglected or ill-treated by the person who has the care and custody of the child'.[66] In addition, section 26 of the Ghanaian Children's Act states that 'a child under a care order whose parent, guardian or relative does not show an interest in the welfare of the child within a period stipulated by a Family Tribunal may be put up for adoption'. These provisions suggest that children that are neglected are adoptable under the laws of Ghana. Although neglected children could be considered adoptable, there is no clear legal definition of a neglected child for the purposes of adoption.[67]

While section 5 of the Ghanaian Children's Act protects the child's right to live with and be cared for by his or her parents, a Family Tribunal may issue a care order for the removal of a child from a situation where the child is suffering or likely to suffer significant harm.[68] This

[65] Act 560 of 1998.
[66] Section 18 of the Children's Act 560 of 1998.
[67] Attempts to find a statutory definition of child neglect were unsuccessful.
[68] Section 20 of the Ghanaian Children's Act.

may happen, for instance, where the child is neglected or ill-treated by the parent or guardian.[69] In such circumstances, alternative care for the child shall be provided.[70]

The termination of parental rights and responsibilities of the parents of neglected children in statutory care leading to adoptability is briefly catered for in section 26 of the Ghanaian Children's Act. The section provides that 'a child under a care order whose parent, guardian or relative does not show an interest in the welfare of the child within a period stipulated by a Family Tribunal may be put up for adoption.' In addition, rule 31 (3) (b) states that 'a child is in need of an adoptive family if the child is under a Care Order and (b) there is a basis under the Act, for severing the links of the child with the parent, guardian or relative'. The phrase 'severing the links' connotes termination of parental rights and responsibilities.

It is also important to note that a child is considered to be in need of an adoptive family if 'the child cannot be kept in or reunited with the family of that child'. As noted above, this approach suggests that child neglect does not necessarily lead to the automatic adoptability of a child for the purposes of inter-country adoption, but that there should be evidence that family reunification measures have failed. More importantly, it is consistent with the fiduciary theory and international law. The involvement of the Family Tribunal (court) is commendable and ensures that the rights of parents are adequately protected.

4.3. Uganda

In Uganda, the Children (Amendment) Act does not explicitly provide for the adoptability of neglected children. Section 46 (6) of the Children (Amendment) Act clearly states that 'inter-country adoption shall be considered as the last option available to orphaned, abandoned or legally relinquished children, along a continuum of comprehensive child welfare services'. This provision appears to discredit the adoptability of neglected children.

In practice, neglected children are adoptable.[71] According to section 1 of the Ugandan Children (Amendment) Act, child neglect means 'the failure to provide for the basic physical, emotional

[69] Section 18 (1) (b) of the Ghanaian Children's Act.
[70] Section 20 (3) of the Ghanaian Children's Act.
[71] *In Re: Benjamin Nsubuga (An Infant) (*HCT-00-FD-FC-0088-2009*) ((An Infant)*) UGHC 38 (22 July 2009*); In the matter of the Adoption of Godfrey Ntabazi Muzeeyi Timothy, Nakamatte Jane, Patricia Mirembe and Patience Kirabo by Mark Edward Wilkins and Cynthia Elaine Wilkins,* Adoption Cause No 81 of 2017 and *In the matter*

and developmental needs of a child, in areas such as health, education, emotional development, nutrition, shelter and safe living conditions, which cause or have a high probability of causing impairment to the child's health or physical, mental, spiritual, moral or social development'.

Although section 4 (1) (a) of the Ugandan Children (Amendment) Act protects the child's right to live with his or her parents or guardian, the court may determine 'in accordance with the laws and procedure applicable that it is in the best interests of the child to separate the child from his or her parents'.[72] This may happen, for example, where a child is suffering or likely to suffer significant harm.[73] In such circumstances, 'the best substitute care available shall be provided for the child'.[74] This suggests, rather obliquely, that termination of parental rights and responsibilities could flow from this resulting in the placement of the child for adoption. It is notable that the involvement of the court is congruent with international law.

5. CONCLUSION

This chapter set out to review the regulatory framework in Ghana, South Africa and Uganda in order to examine how the adoptability principle finds expression in the domestic laws governing inter-country adoption. Subsequently, different themes were discussed. These include: death of parents, child abandonment and neglected children.

The analysis of the adoptability principle in the countries under study has highlighted some gaps and opportunities. The general observation was that the three legal frameworks contain clear provisions which establish the conditions under which children are considered in need of alternative care (adoptable) and the procedures by which such a determination can be made. This approach is compliant with the fiduciary theory and international law.

Despite these notable achievements, this chapter exposed some of the inadequacies in these procedures. For instance, it was shown that in Uganda, family tracing and reunification measures are not effectively implemented and that there is a hasty resort to adoption for abandoned children without conducting sufficient tracing of the child's birth family. It was also

of a Petition by Alicia Anna Christine Van Huizen Shinska and Ryan Christopher Shinska to adopt Ekisa Alice and Bizigo Jamil Infants, Family Cause No. 053 of 2016.

[72] Section 4 (2) of the Ugandan Children (Amendment) Act and section 21 of the Ugandan Children's Act.

[73] Section 28 of the Ugandan Children's Act.

[74] Section 4 (2) of the Ugandan Children (Amendment) Act.

shown that in some cases children are falsely classified as abandoned for the purposes of adoption. Furthermore, Uganda does not specify how long family tracing measures should be carried out to ensure that the rights of parents are adequately protected in inter-country adoption.

Practice in Ghana and Uganda also casts doubt on the measures to ensure that a child is an orphan for the purposes of adoption. It was shown that children that were not orphans were placed for adoption. In some cases, adoptions were authorised without death certificates of the deceased parents to assist the court to determine if a child is an orphan. This is inconsistent with the rule that states are required to determine the adoptability of a child on the basis of pertinent, reliable and relevant information.

The next chapter examines the legal framework on post-adoption procedures in Ghana, South Africa and Uganda.

CHAPTER SEVEN: POST-ADOPTION PROCEDURES IN GHANA, SOUTH AFRICA AND UGANDA

1. INTRODUCTION

The previous chapter has shown that in as far as the adoptability principle is concerned, the three countries under study for the most part support the legal framework proposed in this study. However, there are still some protection gaps.

So far, the study has established that post-adoption procedures are critical to protecting the rights of parents in inter-country adoption. Post-adoption procedural rights are consistent with the fiduciary theory and international law discussed in previous chapters. The aim of this chapter is to examine how the issue of post-adoption procedural rights finds expression in the domestic laws of the countries under study. Subsequently, different themes are discussed including: rescission of adoption orders, appeal and review. The chapter demonstrates that the domestic laws reflect the central tenets of the fiduciary theory and international in that they provide mechanisms for challenging an adoption decision in cases of disputes and grievances. However, access to justice for parents as a human right remains problematic.

2. RESCISSION OF ADOPTION ORDERS

Chapter Four established that states are expected to ensure that there are avenues for redress in the context of adoption and that such measures should take into account the best interests of the child. Furthermore, states should provide mechanisms through courts for addressing the concerns of parents about the circumstances of adoption. In addition, states are required to ensure that parents have access to relevant information and effective remedies to assert their rights, legal services, independent advice and counselling.

2.1. South Africa

The South African Children's Act[1] confers on a parent or other person who had guardianship of the child before the adoption, the right to apply to the High Court or Children's Court for

[1] Act 38 of 2005.

rescission of an adoption order.[2] Such an application must be lodged within a reasonable time which should not exceed two years from the date of the adoption order.[3]

In terms of section 243 (3) (b) of the South African Children's Act, parents or guardians may apply for the rescission of an adoption order if the order was granted without their consent as required by the law. This provision is relevant because it underscores the importance of parental consent to an adoption. It recognises that parents have responsibilities and duties in respect of their children and that their rights should be respected and protected in all decision-making concerning the adoption of their child.[4] Where the rights of parents have been violated, the state has a duty to ensure that their rights are protected. This provision is therefore critical to ensuring that the rights of parents are protected in inter-country adoption.

In keeping with the idea that the best interests of the child should be the paramount consideration in adoption, section 243 (3) (a) of the South African Children's Act makes the rescission of an adoption order obtained without parental consent subject to the rescission being in the child's best interests. This means that the fact that parental consent was not obtained prior to an adoption order is not the only determinant factor for rescinding an adoption order, but that the rescission must be in the best interests of the child. It is clear that courts are enjoined to consider the best interests of the child.

Previous cases such as *Y v Acting Commissioner of Child Welfare, Rooderport and Others*[5] and *Re J (an infant)*[6] were criticised for giving paramountcy to the rights of parents rather than the best interests of the child in applications for rescission of adoption orders.[7] In *Re J (an infant),* for example, the court had no difficulty setting aside the adoption order which was granted in the absence of the father's consent even though the adoption was in the best interests of the child. Similarly, in *Y v Acting Commissioner of Child Welfare, Rooderport and Others*, the court set aside an adoption order which was granted without proper notice of the proposed adoption to the mother.

[2] Section 243 (1) (b) of the South African Children's Act.
[3] Section 243 (2) of the South African Children's Act.
[4] See section 3.1 of Chapter Three and section 6 of Chapter Four.
[5] 1982 4 SA 112 (T). Attempts to find recent case law has been unsuccessful.
[6] 1981 2 SA 330 (Z).
[7] A Louw 'Rescission of Adoption Orders' (2010) *De Jure* 328, 336.

In interpreting section 243 (a) and (b) of the South African Children's Act, the High Court in *AS v Voster No and Others*,[8] held that '[i]t is clear from these provisions that the Legislature has recognized that even where an adoption order has been irregularly obtained in the absence of parental consent it should not be set aside unless it was in the best interests of the child to do so'.[9] In this case, the High Court refused to rescind an adoption order in the absence of parental consent on the basis that it would not be in the best interests of the child to do so. In considering the best interests of the child, the High Court referred to several factors mentioned in section 7 of the South African Children's Act, namely, the nature of the relationship between the child and his or her parents or any specific parent,[10] the attitude of the parent or any specific parents in respect of the child,[11] the capacity of the parent or any specific parent to provide for the child's needs,[12] the likely effect of any change of circumstances on the child and the likely effect of any separation on the child from the person with whom the child has been living with.[13]

Similar findings were made in the cases of *T v C*,[14] *Fraser v Naude and Others*[15] and *Belo v Commissioner of Child Welfare, Johannesburg and Others: Belo v Chapelle and Another*.[16] Although the above-cited cases do not deal with inter-country adoption *per se*, the effect of these court decisions is that courts may uphold an adoption in the absence of parental consent if the best interests of the child so require.[17] These judgments demonstrate the importance of maintaining stability in the adopted child's life even if the adoption was authorised without parental consent.[18]

Children need permanence and stability in their lives. Therefore, rescinding an adoption order has the potential to undermine the stability that an adoption would bring to a child. Given the effects that the rescission of an adoption order may have on the child, the stipulation that the rescission of the order must be in the best interests of the child is justifiable. This means that

[8] 2009 (4) SA 117D-E.
[9] Ibid.
[10] Section 7 (1) (a) (i) of the Children's Act.
[11] Section 7 (1) (b) (ii) of the Children's Act.
[12] Section 7 (c) of the Children's Act.
[13] Section 7 (d) of the Children's Act.
[14] 2003 (2) SA 298 (W).
[15] 1999 (1) SA 1 (CC).
[16] 2002 (3) ALL SA 286 (W).
[17] Louw (n7 above) 340.
[18] A Louw 'Adoption' in T Boezaart *Child Law in South Africa* (2009) 153.

the rights of parents and other persons vested with guardianship are only protected as far as they do not conflict with the best interests of the child. There is, however, a real danger that the confirmation of defective adoption orders or illegal adoptions may promote illicit activities in the context of inter-country adoption. This may result in decisions that are detrimental to the parents and ultimately to the children involved, especially where a child has been unlawfully removed from the parents without their consent.

A conflict could arise between the interests of the parents, adoptive parents and the child, particularly in contested adoptions where the parents and the adoptive parents fight for custody of the child. In *T v C*[19] the mother of the child deceitfully indicated the identity of the father as unknown on the child's birth registration. As a result of this misrepresentation, an adoption order was granted without the knowledge and consent of the biological father. The biological father proceeded to apply for rescission of the adoption order but was unsuccessful. He lodged an appeal against the decision at the Witwatersrand Local Division. The court found that the conduct of the mother was wrong and as a consequence of which the biological father of the child was denied of his right to consent to the adoption. The court then proceeded to determine if the rescission would be in the best interests of the child. In view of the unstable relationship between the biological father and the child, the court found that the rescission of the adoption order would not be in the best interests of the child.

Similarly, in *Swart v Voster No and Others*,[20] the court refused to set aside an adoption order despite the fact that the mother had not given her consent to the adoption. In considering the best interests of the child, the court decided that the mother's repeated change of mind regarding the adoption raised questions about her ability to commit to her child.[21] The court considered the possibility of the mother changing her mind again should the child be returned to her 'a real one especially given the lack of stability in her life'.[22]

The common thread that runs through these cases is that the interests of the parents and the adoptive parents can be accommodated if it is in the best interests of the child. Furthermore, they indicate the importance of maintaining stability in the child's life.

[19] 2003 2 SA 298 (w) 302 C.
[20] [2008] JOL 22695 (E).
[21] Ibid at 20.
[22] Ibid.

To enable parents to assert their rights, section 54 of the South African Children's Act provides that '[a] person who is a party in a matter before a children's court is entitled to appoint a legal practitioner of his or her own choice and at his or her own expense'. This means that parents or guardians have the right to legal representation in matters affecting their children. The importance of legal representation in civil proceedings cannot be overemphasised. It is designed to protect parents by ensuring that the interests of parents who are affected by litigation are adequately protected. Legal representation is also important when the interests of the parents and the adoptive parents are in conflict with the child. More importantly, legal assistance is essential for ensuring that parents are able to take action to protect their rights.

The issue of legal assistance at the parents own expense raises some concerns. In a country affected by poverty, the prospects of parents living in difficult circumstances challenging an adoption decision is minimal. Studies on inter-country adoption in South Africa have found that '99 percent of mothers giving up their children for adoption are purely due to poverty, helplessness and destitution'.[23] It has also been shown that 'many first mothers lacked a job or any means of creating income, and many did not even have a place to live. They were often faced with the sudden crisis of a surprise pregnancy, lack of support and/or HIV status'.[24] This places doubt on whether parents living under desperate economic conditions can assert their rights.

2.2. Uganda

In Uganda, the Ugandan Children (Amendment) Act[25] confers on a parent, guardian or any person who consented to an adoption the right to apply to court for the rescission of an adoption order.[26] It should be noted, at the outset, that this provision is a new feature of the law.[27] This reflects an increased commitment to protect the rights of parents in inter-country adoption.

[23] R Hogbacka "Intercountry Adoption, Countries of Origin, and Biological Families" (2014) Working Paper No. 598, Report for Thematic Area 2 1, 2-3. See also R Hogbacka "Maternal Thinking in the Context of Stratified Reproduction: Perspectives of Birth Mothers from South Africa" in J Gibbons and K Rotabi (eds) *Intercountry Adoption, Policies, Practices and Outcomes* (2012) 143-159 and R Hogbacka *Global Families, Inequality and Transnational Adoption: The De-Kinning of First Mothers* (2016) 96.
[24] Ibid.
[25] Act No 2 of 2016.
[26] Section 46A (1) of the Children (Amendment) Act.
[27] D L N Babirye 'The Long Search for Family: An Analysis of Intercountry Adoption under the Children (Amendment) (No 2) Act 2016 of Uganda' (2018) *Makerere Law Journal* 1, 121. It should, however, be noted

In terms of section 46A (2) of the Ugandan Children (Amendment) Act, an adoption order can be rescinded in 'exceptional circumstances' if it is in the best interests of the child or if the adoption order was obtained through misrepresentation or fraud.

It is clear that fraud is one of grounds in which an adoption order can be rescinded. In *Lazarus Estates Ltd v Beasley,*[28] the court held that:

> 'No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court…… can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved, but once it is proved vitiates judgments, contracts and all transactions whatsoever'.

This suggests that once fraud has been established, the adoption order should be revoked if it is in the best interests of the child. In *Re Peter Sebulila alias Namansa James*,[29] the court had no difficulty setting aside an adoption order which was fraudulently obtained without the consent of the biological mother. In this case, it was deceitfully indicated that the mother had abandoned her child. Therefore, the mother's consent for the purposes of adoption was not obtained as it was alleged that her whereabouts were unknown. The court found that the adoption was illegally obtained and that the mother's rights were ignored throughout the adoption process.[30] The court while acknowledging the effects that rescission of an adoption order would have on the child's interests noted that 'because of the grave danger posed to such children by illegal adoptions, courts need to be very firm in situations where the inadequate laws on adoption in Uganda are not respected'.[31] Accordingly, the adoption order was set aside on the basis that it was fraudulently obtained and the child was re-united with his biological mother.

In expounding on the aspect of fraud, one of the judges noted that:

> Yes, it's a cardinal principle of law that fraud vitiates a contract…..The child be brought back home as long as the parents can provide basic necessities of life. The luxuries a child enjoys abroad are immaterial for instance education in an international school. The law does not take into account such

that applications for rescission of adoption orders could be made under the provisions of section 38 of the Judicature Act and Rule 3 of the Judicature (Habeas Corpus) Rules, Statutory Instrument 13-6.

[28] (1956) 1QB702 at 712.

[29] *(Misc. Cause No. 37 of 2009) ((Misc. Cause No. 37 of 2009)) [2010] UGHC 124 (2 June 2010).*

[30] Ibid.

[31] Ibid.

> standards but considers basic standards. In cases of fraud/misrepresentation, the order should be cancelled, the child returned and the parents given the right to raise their child. Therefore, parents should not be denied this right because they are poor. We are all poor, so what is the standard of poverty?[32]

The fact that an adoption order can be rescinded in cases of fraud or misrepresentation is significant in protecting the rights of parents in inter-country adoption. This is because Uganda's adoption system has been described as 'fraudulent, exploitative and dishonest'.[33] Reports have revealed widespread corruption and fraud in inter-country adoption practices in Uganda. Thus, the rescission of adoption orders in cases of fraud and misrepresentation offers better protection to parents in inter-country adoption.

In some cases, however, the court refused to rescind an adoption order despite the fact that there was misrepresentation of the child as an orphan finding that it would not be in the best interests of the child. For instance, the findings from the study on legal guardianship and adoption practices in Uganda show that courts have generally been reluctant to set aside an adoption order citing the best interests of the child. It is reported that there is a preference for review of the adoption to allow the process to be rectified as opposed to rescission of the adoption order.[34] In all cases that were reported, the review of the adoption order did not result in the rescission of the adoption order as the court took into account the best interests of the child.[35] In considering the best interests of the child, the court considered the capacity of the child's parents or guardian in meeting the needs of the child, the effects of any change in the child's circumstances, the child's educational, physical and emotional needs and the child's background, sex and age.[36] These examples show the importance of maintaining stability in the child's life even at the expense of condoning illegal adoptions. Clearly, the permanency of

[32] Ibid.
[33] T Esslemont and K Migiro 'Fraud and Deceit at the Heart of Uganda Adoptions to United States' available at http://www.dailymail.co.uk/wires/reuters/article-3101833/Fraud-deceit-heart-Uganda-adoptions-United-States.html accessed on 27 November 2019; Ugandan Families Tricked into Giving up Children for U.S adoption, available at http://www.catholic.org.news/international/africa.story.php?id=60825 accessed on 27 November 2019 and Uganda's Child Adoption Market brings Misery and Confusion, available at https://www.theguardian.com/world/2014/oct/06/uganda-child-adoption-market-confusion accessed on 27 November 2019.
[34] H Among Legal Guardianship and Adoption Practices in Uganda (2014) UNICEF 1, 50-51.
[35] Ibid.
[36] Section 3 of the Ugandan Children Act.

the adoption placement will be given more consideration than the rights of parents. However, such lenient measures could encourage fraudulent acts in the context of adoption.

In line with the idea that the best interests of the child should be the paramount consideration in adoption, section 46A of the Ugandan Children (Amendment) Act makes the rescission of an adoption order obtained through fraud or misrepresentation subject to the rescission being in the child's best interests. This does not mean that the rights of parents are not important. It merely means that parental rights are not absolute and may be limited by the best interests of the child. In this way, the Ugandan Children (Amendment) attempts to balance parental rights and responsibilities with the rights of children.

Despite the fact that legal provisions on rescission or annulment of adoption orders are in existence, the practice in utilising them is different. An investigation by the Investigative Fund and the Nation on inter-country adoption practices in Uganda found out that there are very few cases for rescission of adoption orders partly because parents are not aware of their rights and because they do not have legal assistance.[37] Parents ability to access justice is also limited by factors such as legal costs of the proceedings and physical distance to courts.[38]

2.3. Ghana

The Ghanaian Children's (Amendment) Act[39] also provides for the revocation of adoption orders if the order was granted through fraud or misrepresentation of facts.[40] In these provisions, one sees an attempt to protect the rights of parents and their children in inter-country adoption. Furthermore, these provisions recognise that parents have responsibilities, rights and duties in respect of their children and that their rights should be respected in all decision-making concerning the adoption of their children.

However, section 86B of the Ghanaian Children's (Amendment) Act makes the rescission of an adoption order obtained through fraud or misrepresentation subject to the best interests of the child. This means that the rights of parents are only protected if they do not conflict with

[37] A Cavell 'Those Kids Are No Longer Yours': An Investigation into Uganda's Adoption Market, available at https://www.thenation.com/article.archive/those-kids-are-no-longer-yours-ugandas-adoption-market/, accessed on 17 May 2020. The writer was unable to find any cases on rescission of adoption orders.
[38] Ibid.
[39] Act 937 of 2016.
[40] Section 86B of the Ghanaian Children's (Amendment) Act.

the rights of the child. In this way, the law attempts to balance parental rights and responsibilities with the rights of the child. Attempts to find case law on rescission of adoption orders in Ghana has been unsuccessful.

Notwithstanding the existence of legal provisions on rescission of adoption orders, studies have shown that parents ability to access justice is often limited by financial challenges and lack of information about their rights.[41]

In the next section, this study examines the appeal and review mechanisms in the countries under study.

3. APPEAL AND REVIEW

Apart from rescission of adoption orders, there are other remedies available to parents when an irregularity has been alleged for inter-country adoption. These include an appeal and review. The provisions on appeal and review try to give effect to parents right to access to justice.

3.1. South Africa

In South Africa, section 51 (1) of the South African Children's Act creates a right of appeal 'against any order made or refusal to make an order, or against the variation, suspension or rescission of such order of the court to the High Court having jurisdiction'. This means an appeal from decisions of a judicial body is a right. The right to appeal signifies that the rights of parents and their children are respected and protected

An appeal against an order of the Children's Court shall be filed or noted within 20 days from the date of the judgment or order.[42] However, a person may apply to the High Court for an appeal out of time.[43] A notice of appeal shall state the grounds of appeal and the rulings of law or findings of fact appealed against.[44]

[41] Better Care Network and UNICEF "Country Care Profile: Ghana" (2015) UNICEF 1, 24.
[42] Rule 51 (3) of the Rules Regulating the Conduct of the Proceedings of the Magistrate's Court of South Africa, No R 740 of 23 August 2010.
[43] *Belo v Commissioner of Child Welfare, Johannesburg: Belo v Chapelle* [2002] 3 ALL SA 286 (W).
[44] Rule 51 (7) of Rules Regulating the Conduct of the Proceedings of the Magistrate's Court of South Africa.

Further, another legal remedy available to parents and children is a right to review or revision. Proceedings in the Children's Court can be taken on review to the High Court on the grounds mentioned in section 22 of the South African Superior Courts Act.[45] These include gross irregularity in the conduct of the proceedings[46] and the admission of incompetent or inadmissible evidence.[47] The proceedings of the Children's Court can also be taken on review on the grounds that the order was obtained by fraud.[48] In both appeal and review proceedings, the High Court has the power to reverse the findings or order of the Children's Court.[49] However, common to all three types of proceedings is the fact that the best interests of the child, including, in particular stability in the child's life, determines the outcome of the proceedings.[50]

3.2. Uganda

In Uganda, the right to appeal is protected in section 50 of the Ugandan Children's Act. The Act allows any person aggrieved by the decision of a chief magistrate's court to appeal to the High Court against the decision.[51] In the case of a decision of a High Court, such a person can appeal to the Court of Appeal and thereafter the Supreme Court.[52] Such an appeal may be both on matters of fact and of the law.[53] Furthermore, an appeal should be lodged within 30 days from the date of the order or judgment.[54] An aggrieved person may, however, apply to the High Court for an appeal out of time.[55] All orders or judgments passed may also be reviewed or revised by the High Court.[56] However, the best interests of the child determines the outcome of the proceedings.[57]

[45] Act No 10 of 2013.
[46] Section 22 (1) (b) of the Superior Courts Act. See also *Fraser v Children's Court, Pretoria North and Others* 1997 2 SA 218 (T).
[47] Section 22 (1) (d) of the Superior Court Act.
[48] *Ex Parte Kommissaris van Kindersdorg, Oberholzer: In Re AGF* 1973 2 SA 699 (T). Attempts to find recent case law was unsuccessful.
[49] *Belo v Commissioner of Child Welfare, Johannesburg: Belo v Chapelle* (n43 above).
[50] Ibid. See also *AS Voster No and Others* (n8 above).
[51] Section 50 (1) (1) of the Ugandan Children Act.
[52] Section 50 (1) (2) of the Ugandan Children Act.
[53] Rule 76 of the Ugandan Civil Procedure Act (Chapter 71).
[54] Rule 79 (1) of the Ugandan Civil Procedure Act.
[55] Ibid.
[56] Rules 82 and 83 of the Ugandan Civil Procedure Act.
[57] *Baguma v Mbabazi* (HCT-00-CV-CA-2016/3) [2017] UGHCFD 4 (23 March 2017). See also Among (n37 above) 50-51.

Despite the fact that legal provisions on appeal and review are in existence, the practice in utilising them is different. The findings from the study on inter-country adoption practices in Uganda show that parents and children rarely ever appeal, partly because they do not have legal assistance.[58] The findings also indicated that parents and children are not always aware of their rights because magistrates and other professionals working with parents do not always explain the right to appeal to them.[59]

3.3. Ghana

In Ghana, section 38 (4) of the Ghanaian Children's Act also provides for the right to appeal. Such right shall be explained to the child, parents and guardian.[60] An appeal against an order shall be filed within three months from the date of the order or judgment.[61] However, a person may apply to the High Court for an appeal out of time.[62] The rules provide that a notice of appeal shall be filed in the High Court stating the grounds of appeal.[63] On appeal, the High Court has the power to reverse the order of the children's court.[64] However, the best interests of the child determines the outcome of the court's decision.[65]

Another remedy available to parents or children is the right to review. The rules provide that a person who is aggrieved by an order or judgment may apply for a review of the judgment or order.[66] Such an application should be lodged within 14 days from the date in which the order or judgment was made.[67] The court's powers when presented with an application for review are to grant the application for review if the judge is of the opinion that it should be granted or to dismiss the application.[68] Attempts to find case law has been unsuccessful.

[58] Cavell (n37 above).
[59] Cavell (n37 above).
[60] Ibid.
[61] Order 51 Rule 3 (1) of the High Court (Civil Procedures) Rules, 2004
[62] Order 51 Rule 3 (4) of the High Court (Civil Procedures) Rules.
[63] Order 51 Rule 2 of the High Court (Civil Procedures) Rules.
[64] Order 51 Rule 14 of the High Court (Civil Procedures) Rules.
[65] *Plange v Plange* [1977] 1 GLR 312-323. See also *Tanor v Akosua Koko* (1 GLR 451), [1974] GHACA 2 (6 May 1974).
[66] Order 42 Rule 1 (a) of the High Court (Civil Procedures) Rules.
[67] Order 42 Rule 2 (2) of the High Court (Civil Procedures) Rules.
[68] Order 42 Rule 3 of the High Court (Civil Procedures) Rules.

4. CONCLUSION

This chapter set out to review the regulatory framework in Ghana, South Africa and Uganda in order to examine how the issue of post-adoption procedural rights finds expression in the domestic laws governing inter-country adoption. The general observation is that the three legal frameworks provide mechanisms in which parents can challenge an adoption decision in case of disputes and grievances. This approach reinforces the fiduciary theory and international standards. Such mechanisms include rescission of adoption orders, appeal and review.

The practice, however, has been that these mechanisms are seldom used, mainly because parents are not aware of their rights and that they do not have access to legal assistance. Parents ability to access justice is also limited by financial challenges and physical distance to courts.

The next chapter concludes the thesis and makes some recommendations.

CHAPTER EIGHT: CONCLUSION AND RECOMMENDATIONS

1. THESIS RESEARCH QUESTIONS

The thesis set out to examine how the rights of parents be adequately protected in inter-country adoption in an African context. There is dearth of scholarship on protecting the rights of parents (or families of origin) in inter-country adoption in an African context. The analysis of theoretical models of the parent-child relationship and parenthood, international human rights law, private international law, jurisprudence and country studies contributes to this literature gap by examining how the rights of parents can be best protected in inter-country adoption.

The thesis had four sub-questions:

(i) What is the theoretical model for the protection of the rights of parents in inter-country adoption in an African context?
(ii) What are the fundamental principles of international human rights law and private international law that should underpin a robust system of inter-country adoption that protects the rights of parents in inter-country adoption?
(iii) What are the components that a legal framework ought to incorporate to foster the protection of the rights of parents in inter-country adoption in practice?
(iv) How does the regulatory framework on inter-country adoption in the selected countries fare with regard to the protection of the rights of parents in inter-country adoption in an African context?

2. KEY FINDINGS

2.1. Theoretical model for the protection of the rights of parents in inter-country adoption

To appreciate which model would ensure that the rights of parents are adequately protected in inter-country adoption, the thesis has interrogated the theories of the parent-child relationship, namely, the fiduciary theory and the paternalism theory. It has established that the fiduciary theory is the best model for the protection of the rights of parents in inter-country adoption. In relation to inter-country adoption, this insight revealed three fundamental issues: that an

adoption system for the protection of the rights of parents should establish the conditions in which children could be considered in need of alternative care or adoption, the procedures in which such a determination can be made and challenged in case of disputes and grievances.

It was also established that the fiduciary theory also recognises that parents have the right to enjoy their family life. In the context of inter-country adoption, it was established that the recognition of parents right to enjoy their family life implies that parents have the right to contest an adoption order in cases of grievances and disputes, that an adoption should not be authorised without the consent of the parents, that priority should be given to parents to care for their children and that child neglect or abandonment does not automatically qualify the child for adoption, but that family preservation measures should be explored.

The downside of this theory is that it does not provide any theoretical guidance in terms of the grounds in which an adoption decision can be challenged. In addition, the fiduciary theory is silent on the way consent should be given to ensure that the rights of parents are protected. Furthermore, the fiduciary theory is silent on the issue of counselling parents prior to consenting to an adoption.

To understand who benefits from the protection rights in the context of inter-country adoption, the thesis also interrogated the theoretical approaches to the notion of parenthood: the integrative model and the diversity model. The thesis has established that the diversity model is the best model for the protection of the rights of parents in inter-country. This is because it adopts a broad conceptualisation of the notion of parents which protects all forms of family relationships including extended family members and fathers of children born out of wedlock.

In the context of inter-country adoption, this insight revealed three fundamental issues with respect to adoptability and consent for the purposes of adoption. First, that the orphan status of a child does not automatically qualify the child as adoptable, but that there should be no extended family members who are willing to care for the child. Therefore, the right to alternative care (or adoption) does not immediately apply upon the loss of parental care, but only becomes applicable when there are no available, willing or suitable relatives that have taken responsibility of the child upon the loss of parental care.

Second, that willing kinship caregivers would need to be informed that a child who is a relative is being placed for adoption.

Third, that consent for the purposes of adoption should be obtained from both biological parents of the child and where such parents are not available, other persons in charge of the care of the child.

2.2. The fundamental principles of international human rights law and private international law for the protection of the rights of parents in inter-country adoption

As part of understanding the fundamental principles that should underpin an inter-country adoption system that respects the rights of parents as well as the components that a legal framework ought to incorporate, the thesis has examined the international human rights law, private international law and jurisprudence on inter-country adoption. It has established that the principles of consent to adoption, adoptability and the post-adoption procedures, taken with the recommendation for a broad conception of parenthood which protects all forms of parenthood are key to a robust system of inter-country adoption that respects the rights of parents in inter-country adoption in an African context. These principles reinforce the central tenets of the fiduciary theory and diversity model.

The thesis has established that to ensure that the rights of parents are protected in inter-country adoption, the law must sufficiently incorporate these principles. In particular, the thesis established that first, there has to be clear provisions establishing the grounds in which children could be considered in need of alternative care or adoption. The law should establish the conditions under which children are considered adoptable and provide a clear and detailed definition of children to be declared genuinely adoptable. In addition, questions on who should give consent, how should consent be given and counselling have to be made clear in the law.

Second, the legal framework must provide the procedures by which such a determination can be made. Questions of who determines the adoptability of a child, family tracing and the criteria for children to be declared genuinely adoptable have to be made clear in the law.

Third, the legal framework ought to provide mechanisms in which the validity of an adoption can be challenged in case of disputes and grievances.

The issue of parental rights, with a particular focus on the right to enjoy their family life was also accorded great attention. In the context of inter-country adoption, this discussion

demonstrated that the recognition of the parents right to respect for their family life has implications for adoptability, consent to adoption and post-adoption procedural rights. Accordingly, six key issues were underscored. First, the point was made that the legal implications of the recognition of the parents right to family life is that priority should be given to parents to care for their children before resorting to alternative care, unless it is not in the child's best interests to do so.

Second, another implication that the recognition of the parents right to family life would have on the adoption process is that an adoption should not be authorised without the consent of the parents unless such consent is not required.

Third, that parents have the right to participate in adoption proceedings and to challenge the adoption in case of grievances and disputes. Fourth, that it encourages interventions that preserve the family unit unless it threatens the best interests of the child. Fifth, that all decision-making concerning the care of the child should consider the rights and duties of the child's parents.

Finally, the point was made that child abandonment or neglect does not automatically qualify the child for adoption. Therefore, ensuring that family preservation and reunification measures are taken is an important initial step in protecting the rights of parents in inter-country adoption.

The circumstances in which parental rights may be limited were also discussed in detail. In relation to inter-country adoption, this insight revealed that the establishment of criteria and procedures for the limitation of parental rights is crucial for the protection of the rights of parents in inter-country adoption.

To further understand who benefits from the protection rights in inter-country adoption, the thesis also examined how international law conceives of the term 'parents'. It was established that international law adopts a broad interpretation of parenthood which is consistent with the diversity model.

In relation to inter-country adoption, this insight revealed four fundamental issues. First, that the recognition of the extended family in the context of inter-country adoption is that willing family members would need to be informed that a child who is a relative is being placed for adoption.

Second, that the recognition of the extended family has implications for adoptability. It was established that the orphan status of a child does not automatically qualify the child for adoption, but that there should be no caregivers willing to adopt a child. Therefore, the right to alternative care (or adoption) does not immediately apply upon the loss of parental care, but only becomes applicable when there are no available, willing or suitable relatives that have taken responsibility for the child upon the loss of parental care.

Third, that consent for the purposes of adoption should be obtained from both biological parents of the child irrespective of the nature of the union that brought about the child, and where such persons are not available, other persons in charge of the care of the child.

Fourth, that all decision-making concerning the care and adoption of a child must consider the rights and duties of the child's parents and other persons responsible for the child.

3. ASSESSMENT OF THE PRINCIPLES AND PROCEDURES GOVERNING INTER-COUNTRY ADOPTION IN GHANA, SOUTH AFRICA AND UGANDA

3.1. Consent to adoption

Chapter Six of the thesis examined the extent to which the principle of consent to adoption finds expression in the domestic laws governing inter-country adoption in Ghana, South Africa and Uganda.

With respect to the issue of who should give consent to the adoption, it was established that the domestic laws of the countries under study reflect the aspirations of the diversity model and international law with their wide range of persons who can consent to the adoption of the child. However, the thesis has shown that both South Africa and Uganda do not have legal provisions on the minimum duration required before consent to adoption can be given after the birth of the child. South Africa also fails to make provision for the court before making an adoption order to ensure that parents have been counselled as required by international standards. Uganda is also silent on the legal requirement that consent of the birth mother should be given after the birth of the child.

The manner in which consent should be given was also accorded great attention. It was shown that although the domestic laws of the countries under study contain provisions requiring consent to be freely given as required by international law, the practice in utilising them is different. It was demonstrated that separation is in many cases involuntary due to poverty and economic strains. The thesis also established that in some cases parents are coerced, tricked or bribed to relinquish their children for adoption and that consent is also influenced by probation and social welfare officers or children's homes. Overall, the discussion highlighted that generally consent obtained for the purposes of adoption is not always free and voluntary consent.

With respect to the issue of counselling, it was demonstrated that with the exception of Uganda, the domestic laws explicitly make provision for counselling the persons who are required by the law to consent to an adoption. However, the chapter also highlighted some of the practical problems regarding the issue of counselling. First, it was shown that parents are not always given sufficient information prior to consenting to the adoption of their child to enable them to fully understand the effects of the adoption. Second, that parents often receive "one-way counselling" that encourages relinquishment as opposed to holistic counselling that enables them to make a fully informed decision. This discussion highlighted the inadequate nature of the counselling given to parents prior to consenting to the adoption of their child. It also demonstrated that inter-country adoption practices have not always been done in ways that adequately serve the rights and interests of parents.

3.2. Adoptability Principle

Chapter Six of the thesis reviewed the regulatory framework in Ghana, South Africa and Uganda in order to examine how the adoptability principle finds expression in the domestic laws governing inter-country adoption. Subsequently, different themes were discussed. These include: death of parents, child abandonment and neglected children.

The analysis of the adoptability principle in the countries under study has highlighted some gaps and opportunities. The general observation was that the three legal frameworks contain clear provisions which establish the conditions under which children are considered in need of alternative care (adoptable) and the procedures by which such a determination can be made. It was established that this approach is compliant with the fiduciary theory and international law.

Despite these notable achievements, the chapter exposed some of the inadequacies in these procedures. For instance, it was shown that in Uganda, family tracing and reunification measures are not effectively implemented and that there is a hasty resort to adoption for abandoned children without conducting sufficient tracing of the child's birth family. It was also shown that in some cases children are falsely classified as abandoned for the purposes of adoption. Furthermore, Uganda does not specify how long family tracing measures should be carried out to ensure that the rights of parents are adequately protected in inter-country adoption.

Practice in Ghana and Uganda also casts doubt on the measures to ensure that a child is an orphan for the purposes of adoption. It was shown that children that were not orphans were placed for adoption. In some cases, adoptions were authorised without death certificates of the deceased parents to assist the court to determine if a child is an orphan. This is inconsistent with the rule that states are required to determine the adoptability of a child on the basis of pertinent, reliable and relevant information.

3.3. Post-adoption procedures

Chapter Eight of the thesis reviewed the regulatory framework in Ghana, South Africa and Uganda in order to examine how the issue of post-adoption procedural rights finds expression in the domestic laws governing inter-country adoption. The general observation is that the three legal frameworks provide mechanisms in which parents can challenge an adoption decision in case of disputes and grievances. This approach reinforces the fiduciary theory and international standards. Such mechanisms include rescission of adoption orders, appeal and review.

The thesis also demonstrated that the practice, however, has been that these mechanisms are seldom used, mainly because parents are not aware of their rights and that they do not have access to legal assistance. Parents ability to access justice is also limited by financial challenges and physical distance to courts.

4. RECOMMENDATIONS

In view of the above findings, the thesis makes the following recommendations:

4.1. Legal provisions on pre-adoption counseling

- The law in Uganda should explicitly make provision for pre-adoption counselling. This would ensure that the rights of parents are adequately protected in inter-country adoption.

4.2. Review of legal provisions on consent to adoption

- South Africa, Ghana and Uganda should ensure that adequate measures are put in place to make sure that consent is freely given for the purposes of adoption.
- South Africa should review its law to include legal provisions on the minimum duration before consent to adoption can be given after the birth of the child. Furthermore, provision should be made for the court before making an adoption order to ensure that parents have been counselled prior to consenting to the adoption of their child.
- In Uganda, the law should make provision for the consent of the mother to be given after the birth of the child and to establish the minimum duration before consent for the purposes of adoption can be given.

4.3. The need for holistic counselling that respects the fundamental rights of parents

- The laws of Ghana, South Africa and Uganda should make provision for holistic counselling. This would ensure that the fundamental rights and interests of parents are adequately protected in inter-country adoption.
- The domestic laws of the countries under study should put in place measures to ensure that parents receive sufficient information prior to consenting to adoption to enable them to fully understand the implications of their consent.

4.4. Training of social workers

- Ghana, South Africa and Uganda should provide adequate training to adoption social workers. This is important because adoption social workers play a key role in inter-country adoption by providing counselling and social support services to parents (or other persons responsible for the child) wishing to relinquish their children for adoption.

4.5. The need for clear legal definition for children to be declared adoptable

- Ghana should adopt a statutory definition of an orphan and neglected child for the purposes of adoption.

4.6. The need for detailed criteria to determine the adoptability of a child

- Uganda should include legal provisions which ensure that a reasonable time is given for an effective tracing of the child's parents or relatives before a declaration of adoptability is made.
- Both Ghana and Uganda should make sure that the procedures to determine the adoptability of a child are effectively implemented.

4.7. The need for family support measures

- South Africa should ensure that family support measures are available. This is relevant in ensuring that consent for the purposes of adoption is freely given and not motivated by poverty or economic hardships.

4.8. Ratification of the Hague Convention on the Protection of Children and Cooperation in Respect of Inter-country Adoption

- Uganda should expedite its proposed ratification of the Hague Convention on the Protection of Children and Cooperation in Respect of Inter-country Adoption.

4.9. Access to Justice

- The domestic laws of the countries under study should ensure that parents have adequate access to justice through appropriate legal assistance, information and physical accessibility to courts.

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UNITED NATIONS HUMAN RIGHTS SYSTEM

Treaties

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