

The suspension of inter-country adoption of children orphaned as a result of natural disaster

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Abstract

Every child has the right to grow up in a family environment where they are to be known and cared for by their own family to the greatest extent possible. Unfortunately, when a child's family is unavailable or unable to care for him/her, then alternative appropriate and stable family-based solutions should be sought to enable the child to grow up in a loving, caring and supportive environment. In this situation, inter-country adoption is often regarded as the best permanent solution. It is regarded as an act which provides a secure home to vulnerable children who face an uncertain future. Inter-country adoptions are furthermore appealed to as a solution for taking care of children who are orphaned as a result of a disaster or children who find themselves in an emergency situation where they are unaccompanied or separated from their family.

In this situation, family tracing and reunification should be prioritised and inter-country adoptions should only be considered for the care of a child only once these tracing efforts have proven ineffective. The problem with this statement is that the circumstances after a natural disaster or an emergency situation are usually so atrocious that it is almost impossible to find any information on the unaccompanied or separated children. The need to provide basic care for these children is usually far greater than the need to comply with all the rules and regulations set out to protect these vulnerable children. Yet, inter-country adoptions, conducted without the necessary safeguards and competent state authorities to regulate the process, could result in these children being placed in a dangerous situation. This has resulted in the international practices surrounding inter-country adoption being inclined to the suspension thereof in post-disaster/emergency situations.

This paper discusses the provisions in international instruments for conducting inter-country adoptions in safeguarding and protecting the rights of separated or unaccompanied children, specifically referring to the best interests of the child principle, the subsidiarity principle and the duties imposed on state parties to the international instruments. Also referring to the South African position and legislation on the matter.

The purpose of this mini-dissertation is to critically analyse the suspension of the inter-country adoption of children orphaned as a result of a natural disaster in South Africa, and in doing so a brief comparison will be made with the recent suspension of inter-country adoption by the government of Liberia. During this comparison a possible *lacuna* in South African legislation will be considered. Ultimately, the comparison might be able to be used to resolve the possible *lacuna* in South African legislation on the matter and equip South Africa to be proactive should a similar emergency situation, as in Liberia, were to present itself in South Africa.

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LIST OF ABBREVIATIONS

ACRWC	African Charter on the Rights and the Welfare of the Child
AHRLJ	African Human Rights Law Journal
BIC	Best Interests of the Child
CC	Constitutional Court
DMA	Disaster Management Act
EILR	Emory International Law Review
HCCH	Hague Convention on Private International Law
IFRC	International Federation of Red Crescent Societies
IJLPF	International Journal of Law, Policy and the Family
ISS	International Social Services
PER/PELJ	Potchefstroom Electronic Law Journal
SALGA	South African Local Government Association
SALJ	South African Law Journal
SALRC	South African Law Reform Commission
SARP/PL	South African Public Law
SCA	Supreme Court of Appeal
SOP	Standard Operating Procedure
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
UNICEF	United Nations Children's Fund

1 Introduction

According to the preamble of the *United Nations Convention on the Rights of the Child* (1989)¹, every child has the right to grow up in a family environment where they are to be known and cared for by their own family to the greatest extent possible.² Unfortunately, when a child's family is unavailable, unable or unwilling to care for him/her, then alternative appropriate and stable family-based solutions should be sought to enable the child to grow up in a loving, caring and supportive environment.³ In this situation, inter-country adoption is often regarded as the best permanent solution.⁴ These children are seen as the most vulnerable members of society⁵ and inter-country adoption has proven to be able to provide loving and stable homes for children left without a family.⁶

Inter-country adoption originated as a humanitarian act of caring for children who were orphaned as a result of international conflicts.⁷ It is regarded as an act which provides a secure home to children who face an otherwise bleak future,⁸ that is not based on the sought-after family care solution. Since the 1960's there has been an increase in the number of inter-country adoptions.⁹ Concurrent with this trend, reports of exploitation and other forms of serious violations against the basic human rights of children were evident.¹⁰ There have been growing international efforts to ensure that inter-country adoptions are carried out in a transparent, non-exploitative, legal manner that benefits the children and families concerned.¹¹ Despite these efforts, depictions of inter-country adoptions include reports of child-trafficking, children being kidnapped, mothers relinquishing their children under certain circumstances and

¹ Preamble of the *United Nations Convention on the Rights of the Child* (1989). Hereafter referred to as the *UNCRC*.

² UNICEF 2013 www.unicef.org/media/media_41918.html.

³ UNICEF 2013 www.unicef.org/media/media_41918.html.

⁴ Other options include: foster care, alternative care, intra-adoption, which are excluded from this discussion.

⁵ Mosikatsana 2003 *SALJ* 112.

⁶ UNICEF 2013 www.unicef.org/media/media_41918.html.

⁷ Graff 2008 *Foreign Policy* 60.

⁸ Buck *International Child Law* 321.

⁹ UNICEF 2013 www.unicef.org/media/media_41918.html.

¹⁰ Buck *International Child Law* 321.

¹¹ UNICEF 2013 www.unicef.org/media/media_41918.html.

comments that inter-country adoption is an exploitation of poor countries and the impoverished inhabitants of those countries by wealthier and more powerful nations.¹² Therefore, inter-country adoptions should not be conducted unless the necessary safeguards are taken into account to ensure the safety of these vulnerable children. The best interests of the child (BIC) principle and the subsidiarity principle, in this regard, can be utilised as safeguards to ensure the protection of children's rights in the process of inter-country adoption.

This is important because inter-country adoptions are often appealed to as a solution for taking care of children who are orphaned as a result of a disaster or children who find themselves in an emergency situation.¹³ The International Federation of Red Cross and Red Crescent Societies (IFRC) defines that a disaster has happened when a vulnerable group of people is impacted by a hazard, and describes a disaster as being:

A sudden, calamitous event that seriously disrupts the functioning of a community or society and causes human, material, and economic or environmental losses that exceed the community's or society's ability to cope using its own resources. Though often caused by nature, disasters can have human origins.¹⁴

Therefore, a disaster includes the occurrence of a natural disaster, an armed conflict - like a civil war - or any other similar catastrophe that could lead to an emergency situation.¹⁵ Children orphaned as a result of a disaster are also referred to as unaccompanied or separated children.¹⁶ A human being below the age of 18 years is considered by law to be a child, except where it is specified otherwise, and the person is accepted as an adult at a younger age in a specific country.¹⁷ Unaccompanied children are regarded as being separated from both their parents and all other relatives,¹⁸ whereas separated children, being separated from both their parents, are

¹² Buck *International Child Law* 321.

¹³ Buck *International Child Law* 323.

¹⁴ IFRC 2020 <https://www.ifrc.org/en/what-we-do/disaster-management/about-disaster-management/>.

¹⁵ Mezmur 2009 *IJLPF* 163.

¹⁶ *United Nations Committee on the Rights of the Child General Comment No. 6 of 2005 on Treatment of unaccompanied and separated children outside their country of origin* (2005) CRC/C/GC/6. Hereafter referred to as *General Comment No 6*.

¹⁷ Article 1 of the *UNCRC* (1989).

¹⁸ Definition of unaccompanied children in *General Comment No 6*.

in many circumstances still being taken care of or can be taken care of by other adult relatives.¹⁹ Unaccompanied children are not being cared for by any adult responsible for doing so.²⁰ There are numerous reasons for children being regarded as separated or unaccompanied,²¹ but it is being observed that more children are being found in this particular vulnerable situation because of the occurrence of natural disasters, civil wars and other emergency situations.²²

Inter-country adoption, as encompassed in international human rights law,²³ is the topic of international debate.²⁴ The international legal framework applicable to inter-country adoptions, which accordingly makes it a subject of international human rights law, includes the *UNCRC* (1989),²⁵ the *African Charter on the Rights and the Welfare of the Child* (1990)²⁶ and the *Hague Convention on the Protection of Children and Co-operation in Respect of Inter-Country Adoptions* (1993).²⁷ There are numerous other international human rights law instruments, apart from these, that could be applicable in the context of inter-country adoption, but that fall outside of the scope of this study.

In order to understand and grasp the complexity of inter-country adoption it is important to establish the meaning thereof. A coherent definition for inter-country adoption cannot be found in South African legislation, but in terms of section 39(1)(b) of the *Constitution of the Republic of South Africa* (1996) international law must be considered in matters in South Africa where a right in the Bill of Rights is to be interpreted.²⁸ It is due to this provision that article 2 of the *UNCRC* will be applicable, as it reveals the nature of inter-country adoptions to be as follows:

¹⁹ Definition of separated children in *General Comment No 6*.

²⁰ Definition of unaccompanied children in *General Comment No 6*.

²¹ Including: persecution of the child or the parents; international conflict and civil war; trafficking in various contexts and forms, including sale by parents; and the search for better economic opportunities.

²² *General Comment No 6*.

²³ Mezmur 2009 *IJLPF* 148.

²⁴ Bartholet 2007 *Buffalo Human Rights Law Review* 55.

²⁵ The *UNCRC* (1989).

²⁶ The *African Charter on the Rights and the Welfare of the Child* (1990), hereafter referred to as the *ACRWC*.

²⁷ *The Hague Convention on Protection of Children and Co-operation in Respect of Inter-Country Adoptions* (1993). Hereafter referred to as the *Hague Convention*.

²⁸ Article 39(1)(b) and (c) of the *Constitution of the Republic of South Africa*, 1996. Hereafter referred to as the *Constitution*.

Where a child is habitually resident in one Contracting State ('the State of origin') has been, is being, or is to be moved to another Contracting State ('the receiving State') either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purpose of such an adoption in the receiving State or the State of origin.²⁹

To illustrate the situation where inter-country adoption is used as a solution for caring for orphaned (separated or unaccompanied) children as a result of natural disasters, there is the devastating situation caused by the earthquake in Haiti in early 2010. In the week after the earthquake hit Haiti, fifty-four Haitian-born children arrived in Pittsburgh on a flight. It was said that they had been adopted through inter-country adoption.³⁰ It was later revealed that twelve of the children were not in the process of adoption and that most of the children were not orphans.³¹ Ten days later, thirty-three Haitian children were taken across the border into the Dominican Republic without the proper paperwork conducive to inter-country adoptions.³² It was later found that all thirty-three children had parents or living relatives, with whom they were eventually reunited.³³ This could possibly result in already vulnerable children being put in a situation where they are subject to illicit child-trafficking, child abduction and other unethical practices through inter-country adoption. Serious concerns were raised by the international community because of previous incidents linked to inter-country adoption utilised as a solution for taking care of children in times of crisis.³⁴

In the immediate aftermath of the earthquake, many international organisations spoke out against the cross-border movement of Haitian children, and the Haitian government itself issued a warning that child traffickers might take advantage of the chaos to prey on vulnerable children by means of inter-country adoption.³⁵ At this time the UNCRC stated that inter-country adoptions should be regarded only as a subsidiary

²⁹ Article 2 of the *UNCRC* (1989).

³⁰ Thompson 2010 www.nytimes.com/2010/02/24/world/americas/24orphans.html.

³¹ Thompson 2010 www.nytimes.com/2010/02/24/world/americas/24orphans.html.

³² Hilborn 2010 www.familyhelper.net/news/haiti.html.

³³ Bajak 2010 www.theage.com.au/world/baptistsorphans-all-have-families-20100221-onzu.html.

³⁴ Selman 2011 *AHRLJ* 41.

³⁵ Selman 2011 *AHRLJ* 42.

means of taking care of children, and was to be considered only when all other national possibilities were exhausted.³⁶

This mini-dissertation will further focus the reader's attention on the international guidelines for promoting and protecting the rights of separated and unaccompanied children, who are often wrongfully considered to be orphans, as a result of a natural disaster or an emergency situation. The provisions of *General Comment No. 6 of the UNCRC Committee* on this matter will be discussed,³⁷ and UNICEF's position and the *Hague Conference on Private International Law* recommendations will be referred to on the matter. They are of the opinion that family tracing should be prioritised and inter-country adoptions should be considered for the care of a child only once these tracing efforts have proven ineffective, and stable in-country solutions are not available.³⁸ The problem with this statement is that the circumstances after a natural disaster or an emergency situation are usually so atrocious that it is almost impossible to find any information on the unaccompanied or separated children. The need to provide basic care for these children is usually far greater than the need to comply with all the rules and regulations set out to protect these vulnerable children. Yet inter-country adoptions, conducted without the necessary safeguards and competent state authorities to regulate the process, could result in these children being placed in a particular dangerous situation.

Taking the above into consideration, children who are separated or unaccompanied as a result of a natural disaster, civil war or similar catastrophe are without a doubt left extremely vulnerable.³⁹ Due to the fact that there are so many different factors involved in the process of inter-country adoptions, each case should be seen as unique in its own complexity. This has resulted in the international practices surrounding inter-country adoption being inclined to the suspension thereof in post disaster/emergency situations.⁴⁰ This has been more evident, especially on the African continent, in recent

³⁶ Section 21(b) of the *UNCRC* (1989).

³⁷ *General Comment No 6*.

³⁸ UNICEF 2013 www.unicef.org/media/media_41918.html.

³⁹ Mezmur 2009 *IJLPF* 163.

⁴⁰ Mezmur 2009 *IJLPF* 163.

years, with the suspension of inter-country adoptions being implemented in the Republic of Congo, Zambia and Togo, and more recently in Liberia.⁴¹ The suspension was implemented out of the felt need to safeguard the rights of separated and unaccompanied children in a post-disaster/emergency situation where the lack of regulatory legislation in these circumstances posed the thread of these children being easily exploited.

The purpose of this mini-dissertation is to critically analyse the suspension of the inter-country adoption of children orphaned as a result of a natural disaster in South Africa. In answering the research question, a study will be conducted to determine the provisions in international instruments for conducting the process of inter-country adoptions in a manner that safeguards and protects the rights of separated or unaccompanied children. Certain duties are imposed on state parties to the international instruments and the mechanisms in place to ensure the execution of the duties that are expected of state parties will be considered. Thereafter, the history of inter-country adoption in South Africa will be discussed and the current provisions for conducting inter-country adoption will be examined. The international and national approach to the inter-country adoption process will be examined in accordance with the three foremost principle relating to this process. Special focus will be placed on the BIC principle, the subsidiarity principle, and the role of the central authority of a state party in governing the process of inter-country adoption in accordance with international standards.

Finally, a brief comparison will be made with the recent suspension of inter-country adoption by the government of Liberia. The comparison with the suspension of inter-country adoption by the government of Liberia is relevant to South Africa because both countries are geographically located on the African continent. The writer specifically chose the comparison with Liberia for this reason and is of the opinion that many of the characteristics, challenges and problems faced by the two countries will

⁴¹ International Social Services of the United Nations *Guidelines for the Appropriate Use and Conditions of Alternative Care for Children: an introductory briefing on its background, core principles and scope* 2008.

be the same as a result of their being from the same region globally. Africa has a history of violence and a number of insecurities, and as a result thereof it has been reported that a child is more likely to die before the age of five years in the African continent than in any other continent.⁴² The IFRC has responded by assisting 34 emergency situations in 22 African countries in recent years.⁴³ These emergency situations are often very complex and sensitive as a result of their occurring on the African continent.⁴⁴ It is also reported that as a result of extreme weather conditions, conflict, political instability and the lack of emergency preparedness or response plans to emergency situations, African countries are often exposed to recurring emergencies.⁴⁵ Of the fifty million separated and unaccompanied people in Africa, more than half of them are children.⁴⁶ Natural disaster and war in Africa has left approximately two million children dead and one million separated or orphaned, and is also considered to be a lead cause of the loss of parents in Africa.⁴⁷ It is possible to come to the very worrisome conclusion that nowhere else in the world are people more at risk of an emergency situation than on the African continent,⁴⁸ making the need for the protection of the African child very distinct in this situation.

As already alluded to, a disaster or emergency situation can be caused either through a natural disaster or through a human activity such as a civil war. Civil war, like a natural disaster, initially leads to children's being displaced or separated from their families and homes,⁴⁹ leaving them unaccompanied and extremely vulnerable. Liberia had endured a fourteen-year long civil war which led to the reason for the suspension of inter-country adoption in the country. Many children were left unaccompanied and

⁴² Made for Minds 2010 <https://www.dw.com/en/childrens-rights-in-africa-young-but-not-powerless/9-4490452>.

⁴³ IFRC 2018 <https://media.ifrc.org/ifrc/2018/12/30/five-biggest-emergencies-africa-weve-responded-2018/>.

⁴⁴ IFRC 2018 <https://media.ifrc.org/ifrc/2018/12/30/five-biggest-emergencies-africa-weve-responded-2018/>.

⁴⁵ IFRC 2018 <https://media.ifrc.org/ifrc/2018/12/30/five-biggest-emergencies-africa-weve-responded-2018/>.

⁴⁶ LISTWAND.COM 2017 <https://liswand.com/top-10-awful-issues-facing-children-in-africa/>.

⁴⁷ LISTWAND.COM 2017 <https://liswand.com/top-10-awful-issues-facing-children-in-africa/>.

⁴⁸ IFRC 2018 <https://media.ifrc.org/ifrc/2018/12/30/five-biggest-emergencies-africa-weve-responded-2018/>.

⁴⁹ Executive Mansion 2015 https://www.emansion.gov.lr/2press.php?news_id=3336&pg=sp.

separated after the war and were being taken care of in the local orphanages.⁵⁰ Regrettably, because of the lack of regulatory legislation for inter-country adoption in post-disaster/emergency situations, soon thereafter direct links were uncovered between illicit activities and child trafficking through inter-country adoption in cooperation with the orphanages in Liberia.⁵¹ Even though civil war is caused by human activities, the devastating effect thereof is the same as an emergency situation caused by a natural disaster. The community that is a victim of the civil war endures the same disruption in the community arising from the loss of lives, loss of resources and infrastructure, and has to recover from the damage suffered, despite the devastating post-disaster/emergency situation – as with a natural disaster. Therefore, the study of the effects of the emergency situation after the civil war is relevant to the suspension of inter-country adoption as a result of a natural disaster, because the consequences and harm suffered by the separated and unaccompanied African children in both these situations are alike.

The suspension of inter-country adoption in Liberia was based on the need to safeguard the rights of separated and unaccompanied children in a post-emergency situation that was being exploited. In doing so the current position of South Africa in regard to this matter will be evaluated. The South African legislation applicable to emergency situations providing for the protection of separated or unaccompanied children will be evaluated accordingly. Thereafter, the current position of the government of Liberia, after recovering from an emergency situation, will be compared with the situation that South Africa would be in should the same emergency situation present itself. During this comparison a possible *lacuna* in South African legislation will be considered. Ultimately, the comparison might be able to be used to resolve the possible *lacuna* in South African legislation on the matter and equip South Africa to be proactive should a similar emergency circumstances present itself. This will be done in order to answer the following research question.

⁵⁰ Better Care Network and UNICEF *Country Care Profile: Liberia* 27.

⁵¹ UNICEF and Holt International Children's Services *An Assessment of the Inter Country Adoption Laws, Policies and Practices in Liberia* 4.

1.1 Research Question

In which circumstances should inter-country adoption of children orphaned as a result of natural disaster be suspended?

1.2 Research Methodology

This mini-dissertation will be concluded by means of a literature study of both primary and secondary sources. The primary sources consisting of legislation of national and international origin and as well as various case law, and the secondary sources consisting of academic articles, various textbooks, a dissertation, internet resources as well as government and international publications. These sources will firstly be used to clearly understand the South African and the international position on inter-country adoption, and secondly to conduct a brief comparison with the Government of Liberia's recent suspension of inter-country adoption. This will expose the current position that South Africa is in and where it can and should be improved.

1.3 Chapter Outline

This mini-dissertation comprises six different chapters. Chapter One is an introductory chapter and provides some much-needed context for the study. It also sets out the framework to be followed in this study.

Chapter Two contains a critical analysis of the provisions for inter-country adoption globally. The international legal framework applicable to inter-country adoption includes the *UNCRC*, the *ACRWC* and the *Hague Convention*. The analysis of these instruments will include an elaboration on the BIC principle, the subsidiarity principle and the role of the central authority of each signatory state, to ensure that they comply with the international standard.

Provided for in Chapter Three is a critical analysis of the provisions for inter-country adoptions in South Africa. The history of inter-country adoption in South Africa is

discussed at length to establish the basis of the current legal framework applicable in South Africa. This chapter also elaborates on the development of the South African approach to the BIC principle and the subsidiarity principal, and establishes the role of the central authority in South Africa governing all inter-country adoption processes and ensuring that they occur in accordance with the international standard.

Chapter Four provides a critical discussion on the suspension of the inter-country adoption of orphaned children as a result of a natural disaster. It provides an in-depth discussion on the meaning of the word disaster and everything it entails. The international approach to the suspension of inter-country adoption on this matter is discussed at length. Thereafter the South African legal framework for disaster management that will be applicable in this situation analysed. The importance of this research is to discuss how governments should deal with separated and unaccompanied children in these situations, ensuring that the BIC is considered to be of paramount importance throughout the whole process of establishing if the children are really orphaned; and if it is discovered that they are, how to act accordingly. The purpose of this chapter is to lay a basis for comparison in Chapter Five in order to be in a better position to answer the research question posed in Chapter One.

Chapter Five makes a brief comparison with the government of Liberia's recent suspension of inter-country adoption. In doing so, the information given in the previous two chapters is used as a yard-stick in order to determine whether the South Africa legislation on this matter is lacking in terms of its implementation should a similar emergency situation arise in South Africa. This comparison is used to uncover a possible *lacuna* in South African legislation in regard to protecting separated and unaccompanied children from illicit/fraudulent activities through the process of inter-country adoption in post disaster/emergency situations. This chapter focusses on resolving the possible *lacuna* in South African legislation on this matter and aims at equipping South Africa to be proactive should the same emergency circumstances present themselves.

Chapter Six concludes this study. This chapter will encompass a summary of the mini-dissertation and make concluding remarks in answering the research question posed, namely under what circumstances the inter-country adoption of children orphaned as a result of natural disaster should be suspended. Further, the chapter will make recommendations on the matter.

2 A critical analysis of inter-country adoption globally

2.1 Introduction

Inter-country adoption, encompassed within international human rights law,⁵² is as already alluded to above the topic of one of the most lively current international debates.⁵³ The international legal framework applicable to inter-country adoptions, which subjects it to international human rights law, includes the *UNCRC* (1989),⁵⁴ the *ACRWC* (1990),⁵⁵ and the *Hague Convention* (1993).⁵⁶ There are numerous other international human rights law instruments, apart from these, that could be applicable in the context of inter-country adoption, but they fall outside the scope of this study.

These international instruments require that all state parties who have ratified the instrument should conduct an extensive evaluation of all national legislation to ensure full compliance with and commitment to the provisions of that specific instrument. These international instruments are founded on the basis of cooperation between state parties, and oblige the incorporation of the principles of the instruments into national law. Article 4 of the *UNCRC* prescribes the implementation of the rights recognised by the *UNCRC* that should be implemented by state parties.⁵⁷ Article 1 of the *ACRWC* requires that the necessary amendment be made in national law to give effect to the provisions of the *ACRWC* in a state party's national law.⁵⁸ Article 1 of the *Hague Convention* requires that the practice of inter-country adoption be conducted by all state parties in accordance with the provisions of the *Hague Convention*.⁵⁹

South Africa is a signatory state party to all three of the above mentioned international instruments. As previously stated, in terms of section 39(1)(b) and (c) of the *Constitution*, international and foreign law must be considered and applied accordingly

⁵² Mezmur 2009 *IJLPF* 148.

⁵³ Bartholet 2007 *Buffalo Human Rights Law Review* 55.

⁵⁴ The *UNCRC* (1989).

⁵⁵ The *ACRWC* (1990).

⁵⁶ The *Hague Convention* (1993).

⁵⁷ Article 4 of the *UNCRC* (1989).

⁵⁸ Article 1 of the *ACRWC* (1990).

⁵⁹ Article 1 of the *Hague Convention* (1993).

in all deliberations of the court in South Africa.⁶⁰ Hence the relevance of this chapter. These international instruments are used as guiding instruments with regard to the inter-country adoption system in South African legislation.

This chapter therefore provides a critical analysis of inter-country adoption as provided for in these international instruments as well as a short survey of the origin and history of each of these international instruments. It also addresses the two foremost principles that are used as guiding principles in inter-country adoption enunciated in these international instruments. They are the BIC principle and the subsidiarity principle. The role that the central authority of a state party should fulfil with regard to inter-country adoption will also be discussed. In conclusion of this chapter, a comparison will be made with regard to the different international instruments acknowledgment of the BIC principle, the subsidiarity principle and the role of the central authority with regard to inter-country adoption, and how they differ from one another.

2.2 *International legal standards applicable to inter-country adoption*

2.2.1 United Nations Convention on the Rights of the Child

The *UNCRC* was adopted by the United Nations on 20 November 1989 and entered into force on 2 September 1990. The *UNCRC* encompasses civil, political, social, economic and cultural rights.⁶¹ Constructed to specifically protect and enhance the position of the child, the *UNCRC* is the first, comprehensive, rights-based international treaty⁶² focussing on a particularly vulnerable group in society at large – children.⁶³

The *UNCRC* recognises a child as a full human being that holds full rights just like any other human being, this reorganising our usual way of thinking about children and the

⁶⁰ Article 39(1)(b) and (c) of the *Constitution*.

⁶¹ Buck *International Child Law* 87.

⁶² Buck *International Child Law* 87.

⁶³ Mosikatsana 2003 *SALJ* 112.

way that we treat them.⁶⁴ With the United States as the only country in the world yet to ratify the *UNCRC*, it is suggested that the *UNCRC* is the most successful human rights treaty thus far.⁶⁵ This international instrument makes specific provision to protect children from all forms of violence, abuse and exploitation.⁶⁶

As previously stated, article 2 of the *UNCRC* expresses the nature of inter-country adoption. It aims to provide a more orderly regulation of inter-country adoption on an international level, in order to protect children from a range of exploitative behaviours that can surround the inter-country adoption process.⁶⁷ It sets out the obligations of the states parties which children leave for adoption, and those which receive children. It is designed to ensure ethical and transparent processes, with no exception, in the practice of inter-country adoption.⁶⁸

2.2.1.1 The UNCRC and the best interests of the child principle

The BIC principle, being incorporated into the *UNCRC*, overrides the previous system to child protection. This principle emphasises the variety of factors that should be considered when determining the BIC and acknowledges that these factors differ for every child. Owing to the multiplicity of the factors that should be taken into account when considering inter-country adoption, determining the BIC is vital.⁶⁹ A well-defined standard for the determination of the BIC is yet to be developed. Article 3 of the *UNCRC* makes the provision for the best interests for the child and clearly states that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.⁷⁰

⁶⁴ HCCH *"The sins of the saviours": Child Trafficking in the Context of Intercountry Adoption in Africa* 6.

⁶⁵ Atlas Corps 2018 <https://atlascorps.org/the-united-states-has-not-ratified-the-un-convention-on-the-rights-of-the-child/>.

⁶⁶ Article 19, 22, 32-36 and 38 of the *UNCRC* (1989).

⁶⁷ Buck *International Child Law* 174.

⁶⁸ UNICEF 2013 www.unicef.org/media/media_41918.html.

⁶⁹ UNICEF 2007 https://www.unicef.org/publications/index_43110.html.

⁷⁰ Article 3 of the *UNCRC* (1989).

Furthermore, the BIC principle should be *the* primary consideration among all other fields, as opposed to *a* primary consideration, in cases pertaining inter-country adoption. Article 21 of the *UNCRC* states that:

State parties that recognize and/or permit the system of adoption shall ensure that the BIC shall be the paramount consideration.⁷¹

The *UNCRC General Comment No 14* states that by using the words "paramount consideration" the BIC consideration is strengthened to the point where the *General Comment No 14* states that the BIC principle is to be a determining factor when it comes to decision-making pertaining to inter-country adoption. In accordance with the above, Mezmur refers to it having to take place as determined by a "child-driven" approach that both demonstrates the primacy of the child and considers what would be best for the child.⁷²

2.2.1.2 The UNCRC and the subsidiarity principle

Together with the BIC principle, the *UNCRC* recognises in article 21(b) that inter-country adoptions may be used as a means of alternative care for children who cannot be cared for by their own family or in their country of origin and therefore may be considered as a subsidiary means of caring for these children.⁷³ In the direct words of the *UNCRC*, it is to be considered only as a "measure of last resort",⁷⁴ making this the first recognition of the subsidiarity principle in relation to inter-country adoptions and how they should be conducted on an international level.⁷⁵ This principle is devoted to ensuring that all national options are considered for child care before a state party embarks on inter-country adoption.⁷⁶

Subsidiarity means that the practice is to be engaged in only when all other possibilities are exhausted, and that it should it be applied only if it is in the BIC.⁷⁷ The application

⁷¹ Article 21 of the *UNCRC* (1989).

⁷² Mezmur 2009 *IJLPF* 150.

⁷³ Article 21(b) of the *UNCRC* (1989).

⁷⁴ Article 21(b) of the *UNCRC* (1989).

⁷⁵ Couzens and Zaal 2009 *Obiter* 293.

⁷⁶ Mezmur 2009 *IJLPF* 152.

⁷⁷ Article 21(b) of the *UNCRC* (1989).

of this principle is considered to be of the utmost importance when determining the BIC. The wording used in article 21 of the *UNCRC* suggests that inter-country adoption should be used only as a measure of last resort, to provide suitable family care for those in need of it. Therefore, the option of placing a child domestically should be thoroughly investigated before considering inter-country adoption.

2.2.2 The African Charter on the Rights and the Welfare of the Child

The children of Africa have without a doubt a need for protection, and with the emergence of the application of the *UNCRC* in Africa it became clear that African children face specific challenges that are not specifically provided for in the *UNCRC*. This gave rise to the supplementary of the *UNCRC* in the African context, specifically addressing the realities of the African child. As a regional children's rights instrument, the *ACRWC* was adopted on 11 July 1990 by the Organisation of African Unity (OAU) Assembly,⁷⁸ and it was ratified by South Africa in 2000. The *ACRWC* consists of progressive provisions to address the specific problems that African countries face, inter-country adoption being a very relevant topic at this moment. The *ACRWC* addresses the concept of inter-country adoption in article 24, which is almost identical in wording to article 21 of the *UNCRC*, and also refers to the BIC as the paramount consideration in matters pertaining to the inter-country adoption of a child. It is evident that inter-country adoption should explicitly be considered as a measure of "last resort".

2.2.2.1 *ACRWC* and the best interests of the child principle

The *ACRWC* sets out the key principles of non-discrimination and the best interests of the child, and also provides that children have an inherent right to life that is protected by law. The BIC principle is codified in article 4(1) of the *ACRWC*, which states that:

In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

⁷⁸ The Organisation of Africa Unity (OAU) was substituted by the African Union (AU) in 2002.

It is noteworthy that the wording differs from the *UNCRC*, in that the BIC principle should be "the primary consideration". The phrasing in the *ACRWC* is "the primary consideration", as opposed to "a primary consideration" in the *UNCRC*, which elevates its role in the advancement of children's rights and what would be in the BIC in all actions concerning the child.

2.2.2.2 The *ACRWC* and the subsidiarity principle

The *ACRWC* shares the view of subsidiarity as explained by the *UNCRC*.⁷⁹ Inter-country adoption can be seen as a last resort option for children who cannot be cared for by appropriate local/national care options.⁸⁰ However the application thereof is much stricter because it requires state parties to take care of children through inter-country adoption to be placed only with countries which have signed both the *UNCRC* and the *ACRWC*.⁸¹ This means that the country receiving the adopted child should be a state party to both international instruments, but because African countries are usually considered to be the sending country of adoptable children, an even further considerations should be made to ensure the welfare of the adopted child.⁸² These considerations often require further international cooperation agreements protecting and enforcing the provisions made by the *ACRWC*.⁸³ Still, the *ACRWC* is very ambiguous about its consideration of the appropriateness of inter-country adoption for the purpose of taking care of children. The preference is clear that national foster-care and the institutionalisation of orphaned children are preferred care options for these vulnerable children. This view is shared by the *UNCRC*. In contradiction thereof, the *Hague Convention* views inter-country adoption as being more aligned with the BIC principle with regard to personal family-based care, as opposed to foster and institutional care.⁸⁴

⁷⁹ The *ACRWC* (1990).

⁸⁰ Preamble of the *UNCRC* (1989).

⁸¹ Article 24(b) of the *ACRWC* (1990).

⁸² Memzur 2008 *SAPR/PL* 27.

⁸³ Memzur 2008 *SAPR/PL* 27.

⁸⁴ Preamble of the *Hague Convention* (1993).

2.2.3 The Hague Convention on the Protection of Children and Co-operation in Respect of Inter-Country Adoption

The *Hague Convention* of 1993 is viewed as the international treaty that directly speaks to inter-country adoption. It was developed in supporting the provisions of article 21 of the *UNCRC*. In accordance with the *UNCRC*, the *Hague Convention* emphasises in its Preamble the importance of a family environment for taking care of a child, and is regarded as the most directly applicable international instrument providing guidelines to govern inter-country adoption.⁸⁵ It promotes an ethical and child-centred approach in the process of inter-country adoption and specifically states that children deprived of their family environment can be taken care of by inter-country adoption.⁸⁶ As the Preamble states:

Inter-country 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.⁸⁷

2.2.3.1 The Hague Convention and the best interests of the child principle

In the absence of a clear definition of what the BIC entails, a presumption can be made of the nature thereof. This can be done in considering the Preamble of the *Hague Convention*. It concurs with the need to ensure that the BIC be taken into consideration, by means of establishing what the BIC is for every individual child, and ensuring that the fundamental rights of the child are being respected and protected throughout the process of inter-country adoption. This is not done without good reason. According to the *Hague Convention's* Guide to Good Practice:

The requirements necessary to meet the best interests of the child may vary in each individual's case and the factors to be considered should not, in principle, be limited.⁸⁸

The BIC principle is specifically made mention of in relation to two articles. Firstly, article 4(b) of the *Hague Convention* specifically mentions that inter-country adoptions are in the BIC, after due consideration has been given to the possibility of the

⁸⁵ Preamble of the *Hague Convention* (1993).

⁸⁶ Preamble of the *Hague Convention* (1993).

⁸⁷ Preamble of the *Hague Convention* (1993).

⁸⁸ The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: *Guide to Good Practice* 28.

placement of the child in the State of origin of the child.⁸⁹ Due consideration means that the *Hague Convention* prefers all permanent family situations to the institutionalisation of the child or any other form of national foster care.⁹⁰ Some are of the opinion that this suggests the need for flexibility when deciding on the placement of the child, national or otherwise, and considering the alternatives.⁹¹ Secondly, article 16(1)(d) considers the BIC in relation to the prospective adoptive parents tentative match with the adoptable child.

In respect thereof; the Permanent Bureau of the Hague Conference declared that in this context, institutionalisation should be considered as a last course of action for caring for children,⁹² this coming to a conclusion that contrasts with those of the *UNCRC* and the *ACRWC*, that institutionalisation should be used only when all other forms of national care have failed to be a solution for the sufficient care for a child.⁹³

2.2.3.2 The Hague Convention and the subsidiarity principle

The *Hague Convention* thinks it to be conducive to the full physical and psychological development of a child to grow up in a familiar environment. In accordance with the Preamble of the *UNCRC*, the preamble of the *Hague Convention*⁹⁴ also recognises that:

For the full and harmonious development of his or her personality, (a child) should grow up in a family environment, in an atmosphere of happiness, love and understanding. Recalling that each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin.⁹⁵

Although there is consensus on this point between the two international instruments, there are instances where the *Hague Convention* recognises that it would be more in the BIC to be taken care of through inter-country adoption, rather than being taken

⁸⁹ Article 4(b) of the *Hague Convention* (1993).

⁹⁰ Article 4(b) of the *Hague Convention* (1993).

⁹¹ Duncan 1993 the *Hague Convention* 3.

⁹² HCCH Permanent Bureau 2008 http://www.hcch.net/index_en.php?act=text.display&tid=45#expl.

⁹³ Duncan 1993 *SAGE Publications* 12.

⁹⁴ Preamble of the *Hague Convention* (1993).

⁹⁵ Preamble of the *Hague Convention* (1993).

care of in the child's country of origin if that entails institutional care.⁹⁶ It is evident that the *Hague Convention* is in full support of inter-country adoption as it can be used as a source for securing a permanent family environment for a child who is in need thereof, where this need could not be met in the State origin of the child.⁹⁷ This is also mentioned in article 5(c) of the *Hague Convention*, which states that an inter-country adoption is to take place only when it is certain that the child will be authorised to enter and reside permanently in that State, securing the stability of the inter-country adoption.⁹⁸ The *Hague Convention* thus stresses the priority of permanent family care solutions regardless of the national or international aspect of the adoption.

Still, there is consensus between these three international instruments as to what the fundamental purpose of the subsidiarity principle is,⁹⁹ this purpose being that inter-country adoption should be taken into consideration only if there is no suitable national care available for the child, and the inter-country adoption would be in the BIC.¹⁰⁰ This places an additional obligation on state parties to implement an active search to establish the availability of sufficient care for a child within the national borders of the child's state of origin.¹⁰¹ Therefore, the need for relevant data arises. The lack of available data in all matter concerning the child is one of the main challenges faced by African countries.¹⁰² As a result, it is recommended that state parties should implement a system through which relevant data can be obtained to further support the functioning of the inter-country adoption process. This data collection can be imposed as among the responsibilities that need to meet by the central authorities of state parties.

⁹⁶ Pretorius *Inter-country adoptions and the best interests of the child* 11.

⁹⁷ Preamble of the *Hague Convention* (1993).

⁹⁸ Article 5(c) of the *Hague Convention* (1993).

⁹⁹ Couzens and Zaal 2009 *Obiter* 290.

¹⁰⁰ Couzens and Zaal 2009 *Obiter* 290.

¹⁰¹ Couzens and Zaal 2009 *Obiter* 290.

¹⁰² UNICEF and Holt International Children's Services *An Assessment of the Inter Country Adoption Laws, Policies and Practices in Liberia* 46.

2.3 Central Authorities

As mentioned in the introduction to this chapter, all state parties to the above mentioned international instruments must, after the ratification thereof, incorporate the provisions of the international instruments into the national legislation and regulations of the state in order to promote the realisation children's rights in accordance with these instruments. In theory, this would give effect to the working of the instrument within the state's national legislation, but because of the poor legislation and regulation of some state parties, efforts beyond the domestication of these international instruments should be implemented to ensure the prevention of horrific crimes against the already vulnerable children of a country.¹⁰³ This could also be achieved by state parties through establishing a central authority dedicated to assuring the effective implementation of regulations, institutions, policies and so forth and to effectively measuring the implementation of the instrument.¹⁰⁴

The *UNCRC* and the *ACRWC* adopt the same approach to safeguarding and protecting the rights of the child with regard to inter-country adoption, but give very limited direction as to how inter-country adoption should be conducted within a state.¹⁰⁵ They offer no specific guidance on the proper conduct of inter-country adoption and very limited provisions are made with regard to the implementation of institutions or central authorities, with the needed specialities, to conducting inter-country adoptions in a manner that promotes the international instruments. In contrast thereto, the *Hague Convention* stipulates in detail the undertaking of inter-country adoption in a way that is achievable.¹⁰⁶

The *Hague Convention* seeks to ensure the BIC through protecting the child from any illicit or illegal practices during the process of inter-country adoption. This goal is fulfilled through appointing a central authority in every signatory state to the *Hague*

¹⁰³ Davies 2011 *Adoption and Fostering* 52.

¹⁰⁴ Article 6 of the *Hague Convention* (1993).

¹⁰⁵ HCCH *"The sins of the saviours": Child Trafficking in the Context of Intercountry Adoption in Africa* 26.

¹⁰⁶ Chapter 3 of the *Hague Convention* (1993).

Convention, to ensure the execution of the duties that are expected of them.¹⁰⁷ The central authority may consist of public authorities, national judicial and administrative authorities and accredited or approved (non-accredited) bodies.¹⁰⁸

The main objective of the central authority is to ensure and promote cooperation between the different state party's central authorities.¹⁰⁹ This is achieved through providing general information amongst one another as to what the law is in regard to inter-country adoption in that particular country is, with particular reference to the present provisions of the *Hague Convention*.¹¹⁰ It is reported that the central authority should take the role of guardian of fundamental children's rights,¹¹¹ the purpose being to minimise any obstacles in the application of the *Hague Convention* and to eliminate *lacunae* (loopholes) where illicit practices that arise through inter-country adoption can be exploited.¹¹²

An obligation is laid upon every central authority to ensure cooperation and communication amongst one another. They are obliged to:

- a) collect, preserve and exchange information about the situation of the child and the prospective adoptive parents, so far as is necessary to complete the adoption;
- b) facilitate, follow and expedite proceedings with a view to obtaining the adoption;
- c) promote the development of adoption counselling and post-adoption services in their States;
- d) provide each other with general evaluation reports about experience with inter-country adoption;
- e) reply, insofar as is permitted by the law of their State, to justified requests from other Central Authorities or public authorities for information about a particular adoption situation.¹¹³

The *Hague Convention* provides a rigid framework in guiding the practice of inter-country adoption in a manner that promotes and protects children's rights and discourages practices contrary to the best interests of children that can arise through

¹⁰⁷ Article 6(1) of the *Hague Convention* (1993).

¹⁰⁸ HCCH *"The sins of the saviours": Child Trafficking in the Context of Intercountry Adoption in Africa* 26.

¹⁰⁹ Article 7(1) of the *Hague Convention* (1993).

¹¹⁰ Article 7(2) of the *Hague Convention* (1993).

¹¹¹ HCCH *"The sins of the saviours": Child Trafficking in the Context of Intercountry Adoption in Africa* 28.

¹¹² Article 8 of the *Hague Convention* (1993).

¹¹³ Article 9 of the *Hague Convention* (1993).

the process of inter-country adoption. However, the success thereof is dependent on the relationship and co-operation between the central authorities of state parties, and therefore the strengthening of this relationship is sought. This will ensure more than just the domestication of these international instruments into state parties' national law. It would ensure safe and successful inter-country adoption practices throughout the whole world.¹¹⁴

2.4 Conclusion

In the light of this chapter, the writer concludes with the following remarks. Constitutionally, it is required that a court, tribunal or forum must consider international law in its deliberation on certain matters and therefore the relevance of these governing international instruments on inter-country adoption, as South Africa is a signatory state to the international instruments discussed. The current international legal framework applicable to inter-country adoption, for the purposes of this study, includes the *UNCRC*,¹¹⁵ the *ACRWC*¹¹⁶ and the *Hague Convention*.¹¹⁷ This chapter has provided a critical analysis of inter-country adoption in terms of these international instruments, as well as a short survey of the origin and history of each of the instruments mentioned. It also addresses the two key principles in respect of inter-country adoption enshrined within these international instruments, focussing the discussion on the BIC principle and the subsidiarity principle, as mentioned in each of these instruments.

The writer is of the opinion that these two principles are mandatory to ensuring the protection of vulnerable children in the process of inter-country adoption. If suitable national care for separated and unaccompanied children cannot be found, inter-country adoption should be considered as a care option, but only if it is in the BIC.¹¹⁸ It is clear that the subsidiarity principle promotes the principle of the BIC and that

¹¹⁴ HCCH *"The sins of the saviours": Child Trafficking in the Context of Intercountry Adoption in Africa* 28.

¹¹⁵ The *UNCRC* (1989).

¹¹⁶ The *ACRWC* (1990).

¹¹⁷ The *Hague Convention* (1993).

¹¹⁸ Bartholet 1996 *Journal of American Academy of Matrimonial Lawyers* 193.

when these two principles are utilised together, they promote the protection of vulnerable children in inter-country adoption.

The *UNCRC* and the *ACRWC* prioritise national care through national adoption, foster care and/or the institutionalisation of orphaned children, and suggest that inter-country adoption be utilised only as a last resort. The *Hague Convention*, on the other hand, prioritises permanent family-based solutions regardless of the country in which it takes place, prioritising inter-country adoption as being in the BIC when permanent family-based solutions are sought for the care of the child.

Even though the *UNCRC*, the *ACRWC* and the *Hague Convention* are different from one another in the guidance and application of these two principles, countries like South Africa, which is party to all three of these international instruments, should apply these international instruments in such a way that they complement one another. For example, where the *UNCRC* and the *ACRWC* fall short in their guidance on the compliance of state parties with their provisions relating to inter-country adoption, the *Hague Convention* can be used for its recommendation of appointing a central authority to oblige the central authorities of contracting state parties to ensure cooperation amongst one another and provide one another with information that would promote the protection of children's rights in inter-country adoption and alleviate illicit practices against children through the process.

3 A critical analysis of inter-country adoption in South Africa

3.1 Introduction

Historically, inter-country adoption was strictly prohibited in South Africa. Section 18(4)(f) of the *Child Care Act* 74 of 1983 forbade South African-born children from being adopted by non-South African citizens or someone who possessed the necessary residential qualification but who had not yet applied for naturalisation from their country of origin.¹¹⁹ This meant that a South African child could be adopted only by a citizen or resident of South Africa through domestic adoption. This provision, and the South African child care legislation in general, needed to be reviewed because, as it were, it would be in contradiction of the newly enacted *Constitution*¹²⁰ of the Republic of South Africa, as well as recent international obligations that needed to be met after the ratification of various international instruments by the South African government.¹²¹

This chapter looks at the history and development of how inter-country adoption originated in South Africa, and will discuss the foundational court decisions it was developed from. Thereafter it will focus on how inter-country adoptions currently take place in South Africa, making special reference to the currently applicable legislation, and specifically taking into account the BIC principle that is accompanied by the subsidiarity principle in South Africa. It will also focus on the central authority in South Africa as the governing body in matters of inter-country adoptions in South Africa, and discuss the responsibilities and obligations required of them by the applicable international instruments.

¹¹⁹ Section 18(4)(f) of the *Child Care Act* 74 of 1983 which was replaced by the *Children's Act* 38 of 2005. Hereafter referred to as the *Children's Act*.

¹²⁰ The *Constitution*.

¹²¹ The *UNCRC* (1989) on 16 June 1995.

3.2 The history of inter-country adoption in South Africa

After the enactment of the final *Constitution* of South Africa, it became apparent that the citizenship requirement for the adoption of South African children was in conflict with the provisions of the *Constitution* in many ways,¹²² one being that it was inconsistent with section 28 of the *Constitution*,¹²³ where the BIC would be considered important only after the provisions of the *Child Care Act* were fulfilled. Secondly, section 9 of the *Constitution* would be infringed, as it promotes inequality among adoptive parents.¹²⁴ For inter-country adoption to become a form of alternative care in South Africa, this needed to be addressed, and it was the *Fitzpatrick v Minister of Social Welfare and Pensions* (2000)¹²⁵ case that challenged the constitutionality of prohibiting inter-country adoption of South African children by non-citizen adoptive parents.

In this case, the respondents had been living in South Africa permanently since 1997 but were still considered to be British citizens.¹²⁶ They sought to adopt a minor child who was born of a South African citizen.¹²⁷ This was not possible as the adoption of a child born to a South African citizen, in accordance with section 18(4)(f) of the *Child Care Act*,¹²⁸ was prohibited by non-citizens or by an individual who had the necessary residential qualifications to be a South African citizen but who had not applied for a naturalisation certificate,¹²⁹ the latter being the case for the respondents to this case.

To this extent, the respondents applied to the Cape High Court for an order declaring section 18(4)(f) of the *Child Care Act* to be inconsistent with the provisions of the *Constitution*.¹³⁰ The Minister of Welfare and Population Development agreed that the

¹²² Louw 2006 *De Jure* 503.

¹²³ Section 28 of the *Constitution*.

¹²⁴ Section 9 of the *Constitution*.

¹²⁵ *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC).

¹²⁶ *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 1.

¹²⁷ *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 1.

¹²⁸ Section 18(4)(f) of the *Child Care Act* 74 of 1983.

¹²⁹ *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 1.

¹³⁰ *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 2.

prohibition on adoption in terms of section 18(4)(f) was unconstitutional.¹³¹ The order suspending section 18(4)(f) of the *Child Care Act*, which was rendered invalid by the Court, offered the parliament a period of two years in which they had to correct the defect,¹³² meaning that in this two-year period the respondents would not be able to adopt the child. The respondents were appointed by the High Court as the legal joint guardians of the child for the two-year period, however.¹³³

In accordance with the relevant statutory requirements, an application was brought to the Constitutional Court to confirm the order granted by the High Court. The Court readily confirmed the order of invalidity, but a second point was raised that needed clarification.¹³⁴ The applicant raised objections as to the practical problems that would occur if the prohibition was not suspended immediately.¹³⁵ The Court appointed a *curator ad litem* to assist the court in compiling a written report to determine whether the BIC would be served if the findings of the High Court were to be confirmed by the Constitutional Court.¹³⁶ The opinion of the *curator ad litem* was that the BIC would best be served if the adoption of the child by the Respondent took place immediately, and therefore opposed the suspension order of the High Court.¹³⁷ The Court overruled the objections raised by the applicant and the suspension thereof was set aside.¹³⁸ In this case the Constitutional Court needed to consider two broad issues, one being "whether the provisions of section 18(4)(f) are in conflict with the *Constitution*, " and the other being "whether an order of invalidity should be suspended."¹³⁹

In the first instance, the Constitutional Court had to be satisfied that the provisions were unconstitutional for the Court to confirm the invalidity.¹⁴⁰ It was found by the council of the Minister that section 18(4)(f) of the *Child Care Act* was inconsistent with

¹³¹ *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 2.
¹³² *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 3.
¹³³ *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 2.
¹³⁴ *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 3.
¹³⁵ *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 3.
¹³⁶ *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 10.
¹³⁷ *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 10.
¹³⁸ *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 4.
¹³⁹ *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 4.
¹⁴⁰ *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 16.

the rights of the child as provided for in section 28 of the *Constitution*¹⁴¹ and that it was inconsistent with the equality rights as provided for in section 9 of the *Constitution*.¹⁴² Section 28(2) of the *Constitution* provides that in any matter concerning a child, whatever would be in the BIC should be the paramount consideration.¹⁴³ In this particular case, if the adoption of the child were to be refused, the BIC would be thought secondary to the policies of the Department and would not be privileged as provided for by the *Constitution*.¹⁴⁴ It was determined necessary by Goldstone J that the principle of the best interests principle should be applied in a way that was adjusted to every child's individual circumstances.¹⁴⁵ These individual circumstances would determine which factors served the BIC. This would differ in every situation. Therefore, it was decided that section 18(4)(f) of the *Child Care Act* was inconsistent to the provisions of section 28 of the *Constitution* and thus rendered unconstitutional. The court considered that the best interests of a child might well be prioritised through the child's being adopted by non-South Africans. This could be preferred to seeking national care for the child.¹⁴⁶

In the second instance, the issue before the court was the validity of the suspension order by the High Court. It was argued that there would be inadequate safeguards against child trafficking if the invalidity was not suspended.¹⁴⁷ The Constitutional Court held that in this case, the adoption of the child by the respondents would be in the BIC, and that the absence of bilateral agreements that regulate inter-country adoption would not justify the suspending of the order of invalidity.¹⁴⁸ The Constitutional Court came to the conclusion that the suspension would consider the BIC of paramount importance.¹⁴⁹ Furthermore, the court held that adequate safeguards to regulate inter-

¹⁴¹ Section 28 of the *Constitution*.

¹⁴² Section 9 of the *Constitution*.

¹⁴³ Section 28 of the *Constitution*.

¹⁴⁴ *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 16.

¹⁴⁵ *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 16.

¹⁴⁶ *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 19.

¹⁴⁷ *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 33.

¹⁴⁸ *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 33.

¹⁴⁹ *Minister of Social Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) para 36.

country adoption in South Africa were provided in the *Child Care Act*, and granted an immediate order of invalidity.¹⁵⁰

Since the citizenship requirement for prospective adoptive parents had been annulled by the Constitutional Court's decision in the *Fitzpatrick* case, inter-country adoptions became a form of "alternative care" for children in need of care. Inter-country adoption was conducted in the same manner as domestic adoptions as provided for in chapter 4 of the *Child Care Act*. This meant that there were no further provisions specifically dedicated to governing inter-country adoption in South Africa. Consequently, this gave rise to an increased concern about the serious risk that could be associated with inter-country adoption. The *SALRC* reached the conclusion that:

Children in countries such as South Africa, where legislative mechanisms governing the practice of inter-country adoption are non-existent, inadequate or filled with gaps and loopholes, tend to be at risk.¹⁵¹

Recently inter-country adoption has become more common, and with the increasing numbers of abandoned or orphaned children in South Africa a need has arisen to eliminate the risk to the safety of these children due to the lack of legislative mechanisms that govern inter-country adoption.¹⁵² Hence the development and enactment of the *Children's Act*¹⁵³ was provided for and the incorporation of the provisions of the *Hague Convention* in regard to inter-country adoption into South African legislation.¹⁵⁴

3.3 *The current legal standards applicable to inter-country adoption in South Africa*

3.3.1 *Inter-country adoption as a means of alternative care in South Africa*

¹⁵⁰ Mosikatsana 2003 *SALJ* 111.

¹⁵¹ Mosikatsana 2003 *SALJ* 103.

¹⁵² Bhabha 2004 *Fletcher Forum of World Affairs* 181.

¹⁵³ The *Children's Act* 38 of 2005.

¹⁵⁴ Section 254(a) and section 256(1) of the *Children's Act* 38 of 2005.

The current legal framework applicable to inter-country adoptions in South-Africa consists of the *Children's Act* 38 of 2005¹⁵⁵ and the *Constitution of the Republic of South Africa* of 1996.¹⁵⁶ As previously alluded to, the *Fitzpatrick* case laid the foundation for the change to come with regard to inter-country adoption in South Africa, but serious concerns were raised about the absence of a regulatory framework governing the process of inter-country adoptions. The *Children's Act* governs all rights relating to care, contact and the protection of children in South Africa and in chapter 16 provides for the concerns raised by incorporating the provisions of the *Hague Convention*. This is also considered the avenue used to incorporate the principles of the *Hague Convention* into national law in South Africa.¹⁵⁷

Chapter 16 of the *Children's Act* contains straight to the point provisions dealing with inter-country adoption in South Africa. Inter-country adoption is regulated where South Africa is either the sending or the receiving country of inter-country adoptions.¹⁵⁸ The purpose of this discussion is to recognise that the regulation of the inter-country adoption process in South Africa is in accordance with the provisions of the *Hague Convention*.¹⁵⁹ Furthermore, the *Children's Act* provides that should a conflictual situation arise in a matter of inter-country adoption, the provisions of the *Hague Convention* should prevail over South African national legislation.¹⁶⁰

The *Children's Act* embraces the spirit of the *Hague Convention* with regard to adoption and centres its attention on the child's needs and finding him or her the best suitable parents possible.¹⁶¹ The main purpose of the Chapter 16 of the *Children's Act* is to find fit and proper adoptive parents for an adoptable child.¹⁶² It is true that

¹⁵⁵ *Children's Act* 38 of 2005; the following sections contained in chapter 15 of the *Children's Act* will be considered: sections 255, 256, 260, 261, 262, 264, 265, 266, 268, 269, 270 and 271. Hereafter referred to as the *Children's Act*.

¹⁵⁶ Section 28 of the *Constitution*.

¹⁵⁷ Couzens *A very long engagement: the children's act 38 of 2005 and the 1993 Hague Convention on the protection of children and cooperation in respect of intercountry adoption* 83.

¹⁵⁸ Section 264 and 265 of the *Children's Act* 38 of 2005.

¹⁵⁹ Couzens *A very long engagement: the children's act 38 of 2005 and the 1993 Hague Convention on the protection of children and cooperation in respect of intercountry adoption* 83.

¹⁶⁰ Section 256(2) of the *Children's Act* 38 of 2005.

¹⁶¹ Section 253 of the *Children's Act* 38 of 2005.

¹⁶² Section 254(b)(c)(d) of the *Children's Act* 38 of 2005.

stringent duties are opposed in South Africa as a contracting state to the *Hague Convention*, but this ensures a successful regulatory framework for inter-country adoption in South Africa where there was previously none.

Though inter-country adoption has a brief history in South Africa, the most important provision and guiding principle in all matters concerning the child is contained in section 28(2) of the *Constitution*, which provides that "a child's best interests are of paramount importance in every matter concerning the child."¹⁶³ The BIC principle is accompanied by the subsidiarity principle, which has been addressed by our courts in numerous decisions pertaining to inter-country adoption. Inter-country adoption in South Africa is thus clearly regulated by a national legislative framework that addresses every concern previously raised. The degree of success of the regulating of inter-country adoption in South Africa will, however, be dependent of the implementation thereof

In evaluating the South African courts' application of these principles, the writer will make specific reference to three individual South African court decisions, each contributing to the establishment of the use of the above mentioned principles, which are the BIC principle and the subsidiarity principle. These decisions are *Minister for Welfare and Population Development v Fitzpatrick*,¹⁶⁴ *De Gree v Webb*¹⁶⁵ and *AD v DW*.¹⁶⁶ The reason for choosing these three court decisions is because they speak directly to the two principles at issue.

3.3.2 *The best interests of the child principle in South Africa*

The BIC principle was initially mentioned in the *Tromp v Tromp*¹⁶⁷ and the *Segal v Segal*¹⁶⁸ court cases, but was formally confirmed by the court for the first time in 1984

¹⁶³ Section 28(2) of the *Constitution*.

¹⁶⁴ *Minister for Welfare and Population Development v Fitzpatrick* 2000 7 BCLR 713 CC.

¹⁶⁵ *De Gree v Webb* 2007 5 SA 184 SCA.

¹⁶⁶ *AD v DW* 2008 3 SA 183 CC.

¹⁶⁷ *Tromp v Tromp* 1956 4 SA 738 (N).

¹⁶⁸ *Segal v Segal* 1971 4 SA 317 (C).

in the *Fletcher v Fletcher*¹⁶⁹ case, where the court disclosed the principle to be applicable in all cases involving children. The BIC principle was initially intended to be applied in all areas of law involving children and not restricted only to family law and family welfare proceedings. In *Kaiser v Chambers*¹⁷⁰ it was decided that the principle should be regarded as a golden thread that runs through the fabric of children's law in South Africa and that it should be regarded as an overriding principle in all matters concerning the child. This principle has developed into a primary provision in the Bill of Rights and has become a substantive right in itself. Section 28(2) of the *Constitution* provides that:

A child's best interests is of paramount importance in every matter concerning the child.

There are numerous factors that need to be considered when determining the BIC. This is one of the main reasons why the BIC principle has been greatly criticised. The BIC contain certain variables that are very complex and do not carry the same weight of importance in every country. These international variables include when children are seen as individuals, as parts of families, in different cultural environments, in riches or poverty, in stable or unstable environments - making the interpretation of the principle a very complicated task.

In South Africa a "checklist" for determining the BIC was initiated in the *McCall v McCall* case.¹⁷¹ The "checklist" contained certain considerations that were deemed relevant to the judicial decision-making process in all matters concerning the child.¹⁷² Used as an instructive representation of what factors need to be considered in determining the BIC,¹⁷³ the "checklist" has since been replaced by a comprehensive "checklist" set out in section 7 of the *Children's Act*, that can be utilised in determining the BIC, taking every child's individual circumstances into consideration.¹⁷⁴

¹⁶⁹ *Fletcher v Fletcher* 1984 1 SA 130 (A).

¹⁷⁰ *Kaiser v Chambers* 1969 4 SA 224 (C) 228G.

¹⁷¹ *McCall v McCall* 1994 1 SA 509 (T).

¹⁷² *McCall v McCall* 1994 1 SA 509 (T) para 205.

¹⁷³ Schäfer *Law of Access to Children* 63.

¹⁷⁴ Pretorius *Inter-country adoptions and the best interest of the child* 33.

The principle should be "taken into account as a primary consideration", meaning that the interests of the child should be the key consideration and not those of the parents, national organisations or even the national authority. This was noticeable in the Constitutional Court case of *AD v DW*, that contained a finding both in the development and in the favouring of the BIC principle in South Africa.¹⁷⁵ Yet the principle in itself can be limited through section 36 of the *Constitution*.¹⁷⁶ The BIC principle was thought to be a trump card that had the ability to override all other rights,¹⁷⁷ but this perception was countered in the *De Reuck v Director of Public Prosecution* case, where the Constitutional Court held that the BIC principle could not be applied in a manner where it could not be limited by other rights.¹⁷⁸

Therefore, section 36 of the *Constitution* can be used in justifying the infringement of the BIC principle, where the principle does not prevail in a case.¹⁷⁹ In *S v M* the Constitutional Court addressed the issue and held the importance of determining the BIC on a case-to-case basis, utilising the principle in a way to provide for every child's individual needs,¹⁸⁰ thus confirming how complicated determining the BIC can be. Establishing the best interests of the child in the process of inter-country adoption can be addressed by considering the subsidiarity principle.

3.3.3 *The subsidiarity principle in South Africa*

The subsidiarity principle is often applied parallel to the consideration of the BIC with regard to inter-country adoption.¹⁸¹ It is utilised as a measure to ensure that the BIC is considered of paramount importance with reference to inter-country adoptions and all matters concerning the child.¹⁸² The subsidiarity principle means that inter-country adoption should be considered as a means of care only where all national options have been considered, and then only if it is found to be in the best interests of the individual

¹⁷⁵ *AD v DW* 2008 3 SA 183 CC.

¹⁷⁶ Section 36 of the *Constitution*.

¹⁷⁷ Boezaart *Child Law in South Africa* 282.

¹⁷⁸ *De Reuck v Public Prosecutors* 2003 3 SA 389 (W) para 55.

¹⁷⁹ *S v M* 2007 12 BCLR 1312 (CC) para 25 and 26.

¹⁸⁰ *S v M* 2007 12 BCLR 1312 (CC) para 25 and 26.

¹⁸¹ Couzens and Zaal 2009 *Obiter* 286.

¹⁸² Couzens and Zaal 2009 *Obiter* 286.

child.¹⁸³ This clear-cut application of the subsidiarity principle by the court was not established initially.

Throughout the South African courts' application of the subsidiarity principle, there has been uncertainty about the weight that the principle carries and to what extent it compares with the importance of the best interests of the child principle.¹⁸⁴ The subsidiarity principle was not expressly mentioned in South African law before the incorporation of the *Hague Convention* into national law. Even though the principle was not expressly mentioned in national law and with reference to matters concerning the child, the application thereof was considered due to the obligations imposed upon South Africa by international standards.¹⁸⁵ Being a state party to the *Hague Convention*, South Africa now recognises that children should be raised and cared for in their country of origin whenever to the greatest extent possible.¹⁸⁶ This places a duty on South African law to protect the family unit as a whole.¹⁸⁷

The *Minister for Welfare and Population Development v Fitzpatrick* first made use of the subsidiarity principle.¹⁸⁸ In this case, as previously discussed, the principle was used as a remedy against the BIC principle with reference to the requirement of citizenship; where the courts made the prejudgement that the inter-country adoption of a child by a foreigner could never satisfy those interests.¹⁸⁹ The Constitutional Court rejected this approach and took little cognisance of the implications of the principle.¹⁹⁰ Thus, the Constitutional Court ranked inter-country adoption as subsidiary to national adoption without making explicit reference to any other form of national care.¹⁹¹

¹⁸³ The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: *Guide to Good Practice* 29.

¹⁸⁴ Couzens and Zaal 2009 *Obiter* 287.

¹⁸⁵ Article 39(1)(b) and (c) of the *Constitution*.

¹⁸⁶ Preamble of the *Hague Convention*.

¹⁸⁷ The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: *Guide to Good Practice* 29.

¹⁸⁸ *Minister for Welfare and Population Development v Fitzpatrick* 2000 7 BCLR 713 CC.

¹⁸⁹ *Minister for Welfare and Population Development v Fitzpatrick* 2000 7 BCLR 713 CC para 20.

¹⁹⁰ *Minister for Welfare and Population Development v Fitzpatrick* 2000 7 BCLR 713 CC para 23.

¹⁹¹ Couzens and Zaal 2009 *Obiter* 296.

In contrast to this position, the SCA required in the *De Gree v Webb*¹⁹² case that the applicants had to prove that there was no other suitable form of national care available to the child within the borders of the country; confirming the application of the subsidiarity principle to be very stringent.¹⁹³ The Constitutional Court held that the subsidiarity principle was relevant but that the application thereof would be secondary to that of the BIC principle.¹⁹⁴ The court stressed the importance of evaluating every case of the BIC on its own merits, taking into account that the child should be evaluated as an individual, maintaining flexibility in this regard,¹⁹⁵ concluding with the emphasis that the BIC principle and the subsidiarity principle should be assessed together and not in isolation from each other.¹⁹⁶ This position was supported by Sachs J in more recent cases.¹⁹⁷ This means that the court should always take into account that every child has his/her own special circumstances, generated through very real experiences that give rise to individual needs, which are to be taken into account when weighing the options of care available for that individual child.¹⁹⁸

On the evaluation of the South African courts' application of the subsidiarity principle, it is clear that there has been uncertainty in the initial application thereof.¹⁹⁹ This could be as a result of the principle's not being referred to expressly in national legislation, and because it finds its applicability in South Africa from international instruments. This, the writer believes, is an ongoing challenge faced by South African judges.²⁰⁰ They are constantly challenged to relate international and regional law to South African municipal law and evaluate its significance in context, without specific guidance to help them.²⁰¹ This situation is especially crucial with regard to international instruments bearing children's rights.

¹⁹² *De Gree v Webb* 2007 5 SA 184 SCA.

¹⁹³ *De Gree v Webb* 2007 5 SA 184 SCA para 24.

¹⁹⁴ *De Gree v Webb* 2008 3 SA 183 CC para 55.

¹⁹⁵ *De Gree v Webb* 2008 3 SA 183 CC para 50.

¹⁹⁶ *De Gree v Webb* 2008 3 SA 183 CC para 50.

¹⁹⁷ *AD v DW* 2008 3 SA 183 CC.

¹⁹⁸ *AD v DW* 2008 3 SA 183 CC para 49 and *Minister for Welfare and Population Development v Fitzpatrick* 2000 7 BCLR 713 CC para 19.

¹⁹⁹ Couzens and Zaal 2009 *Obiter* 287.

²⁰⁰ Mosikatsana 2000 *SALJ* 112.

²⁰¹ Mosikatsana 2000 *SALJ* 112.

3.3.4 Central authority

The position of the central authority of each signatory nation has already been discussed in great detail above. The central authority of a state may perform its functions directly or its functions may be delegated to other competent accredited bodies.²⁰² In accordance with article 10 of the *Hague Convention*, in order for these bodies to obtain accreditation, a certain minimum standard has to be complied with, that is provided for by the *Hague Convention*.²⁰³ The Director-General of Social Development plays the role of the central authority in South Africa, after receiving information and seeking advice from the Director-General: Justice and Constitutional Development. As mentioned above, and in accordance with section 258 of the *Children's Act*, the Director-General of Social Development has the authority to delegate its functions to other officials,²⁰⁴ thus giving the central authority the authority to grant or restrict the accreditation of other agencies. The Director-General of Social Development as the central authority has the duty of ensuring the exchange of all essential information regarding adoptions²⁰⁵ and of maintaining and upholding a supervisory role over all accredited bodies in South Africa.²⁰⁶

This is relevant because section 260 of the *Children's Act* permits these accredited bodies to enter into adoption agreements with foreign adoption agencies,²⁰⁷ giving them the jurisdiction to examine the eligibility of applicants and ultimately to facilitate the process of inter-country adoptions individually. The central authority and accredited bodies are thus entrusted with a considerable amount of power in the regulation of inter-country adoptions of South African children, and therefore the need arises to execute this function with immense responsibility. According to Couzens:²⁰⁸

A strict central authority is needed for an adequate inter-country adoption system.

²⁰² Boezaart *Child Law in South Africa* 382.

²⁰³ Article 10 of the *Hague Convention* (1993).

²⁰⁴ Other officials include: Section 258(1) in the department, section 258(2)(a) other organs of state, and section 258(2)(b) or to accredited bodies.

²⁰⁵ Couzens *A very long engagement: the children's act 38 of 2005 and the 1993 Hague Convention on the protection of children and cooperation in respect of intercountry adoption* 66.

²⁰⁶ Boezaart *Child Law in South Africa* 391.

²⁰⁷ Section 260 of the *Children's Act* 38 of 2005.

²⁰⁸ Couzens *A very long engagement: the children's act 38 of 2005 and the 1993 Hague Convention on the protection of children and cooperation in respect of intercountry adoption* 68.

When it comes to facilitating inter-country adoptions, the central authority has to be convinced that everything has been done to ensure that the child is taken care of in his/her country of origin. Only after this has been determined to be impossible will the central authority consent to the commencement of inter-country adoption. This situation will differ in each child's individual circumstances, giving the central authority the power to determine what would be in the BIC in that specific situation, giving it control over individual situations. Because of this, it is very important that the central authority functions as a uniform body that will ensure that inter-country adoptions services are provided for in an ethical and professional manner. The central authority of a country is given supreme jurisdiction in governing inter-country adoption in a country and therefore it is essential that the functioning thereof is controlled in a humane manner.

3.4 Conclusion

Taking the above into consideration, before the enactment of the final *Constitution*, South African children could be adopted only by South African citizens through domestic adoption. Section 18(4)(f) of the *Child Care Act*, which was applicable at that time, required adoptive parents to be South African citizens, or alternatively to who possess residential qualifications and to have applied for naturalisation from their countries of origin. Adoption that did not fulfil this requirement was strictly prohibited. After the enactment of the final *Constitution*, it became apparent that the citizenship requirement was in conflict with both section 9 and section 28 of the *Constitution* and needed to be amended accordingly. The constitutionality of the citizenship requirement was challenged in the *Fitzpatrick v Minister of Social Welfare and Pensions* case, where the court held that prohibiting inter-country adoption by non-citizen adoptive parents was indeed unconstitutional. Since the citizenship requirement had been nullified by the Constitutional Court decision in this mentioned case, inter-country adoption became a form of "alternative care" that could be utilised for children in need of care.

Since then, the *Children's Act* 38 of 2005²⁰⁹ read with the *Constitution*²¹⁰ has provided for the regulation of inter-country adoption in South Africa. Chapter 16 of the *Children's Act* contains the provisions for dealing with inter-country adoption in South Africa, incorporating the principles of the *Hague Convention* into national law in South Africa.²¹¹ The most important provision and guiding principle in all matters concerning the child is contained in section 28(2) of the *Constitution*, which provides that "a child's best interests are of paramount importance in every matter concerning the child."²¹² The BIC principle is accompanied by the subsidiarity principle, which has been addressed by our courts in numerous decisions pertaining to inter-country adoption.

Throughout the research performed in preparation for writing this paper, the writer found that the South African courts' application of the subsidiarity principle has from the very beginning been very uncertain. Questions were raised about the weight that the principle carries in comparison with the BIC principle. In the court case *Minister for Welfare and Population Development v Fitzpatrick*²¹³ the court made mere mention of this issue and as a result thereof, not much detail or guidance were provided for with regards to the future application of the principle.

A very confusing approach was adopted in the *De Gree v Webb* case, where the court separated the BIC principle from the subsidiarity principle, implying that it was possible to determine what would be in the BIC without taking into consideration the subsidiarity principle.²¹⁴ It is now clear that the courts understand that the subsidiarity principle is intended to protect the BIC and that these two principles should therefore be applied together with one another, to ensure the best possible outcome in every matter concerning the child, and have come to the conclusion that the weight that the principle carries relative to the BIC principle should not be the main consideration, but

²⁰⁹ *Children's Act* 38 of 2005; the following sections contained in chapter 15 of the *Children's Act* will be considered: sections 255, 256, 260, 261, 262, 264, 265, 266, 268, 269, 270 and 271.

²¹⁰ Section 28 of the *Constitution*.

²¹¹ Couzens *A very long engagement: the children's act 38 of 2005 and the 1993 Hague Convention on the protection of children and cooperation in respect of intercountry adoption* 83.

²¹² Section 28(2) of the *Constitution*.

²¹³ *Minister for Welfare and Population Development v Fitzpatrick* 2000 7 BCLR 713 CC.

²¹⁴ Couzens and Zaal 2009 *Obiter* 304.

rather that the subsidiarity principle should be applied accordingly to ensure that the BIC be of paramount consideration.²¹⁵

The *Children's Act* also establishes the central authority in South Africa. The central authority fulfils a pivotal role in the process of inter-country adoption, as it is responsible for ensuring the exchange of all essential information regarding adoptions, maintaining and upholding supervision over all accredited adoption bodies in South Africa, and ensuring that the process of inter-country adoption is ethical and professional. Therefore, the writer is of the opinion that the functioning of a central authority of a country determines the extent to which the functioning of a country's inter-country adoption system is effective. The *Children's Act* also provides that should a situation of conflict arise in a matter of inter-country adoption, then the provisions of the *Hague Convention* should prevail over the national law of South Africa.²¹⁶

Even though the *Children's Act* is very detailed about the approval and the process of inter-country adoption, no mention is made of the suspension thereof. There is also no provision as to how inter-country adoption should be conducted where children are orphaned (separated or unaccompanied) as a result of a disaster, either through natural causes or human activities, and therefore find themselves in need of emergency care.

²¹⁵ Section 28(2) of the *Constitution*.

²¹⁶ Section 256(2) of the *Children's Act* 38 of 2005.

4 A critical discussion of the suspension of inter-country adoption of children orphaned as a result of a natural disaster

4.1 Introduction

In order to understand the seriousness of this concept of the suspension of inter-country adoption of children orphaned as a result of a natural disaster, it is important to establish the meaning of a "disaster", and specifically the meaning of a natural "disaster". The internationally accepted definition of a "disaster" was nevertheless accepted and entered into the South African legislation. A "disaster" is described as an occurrence that is either progressive or sudden, and that causes or threatens to cause a serious social disruption in a community.²¹⁷ This disruption usually includes the disarray of human life through death, injury or disease, or through the damage of infrastructure to the country.²¹⁸ The damage caused by such an occurrence is usually far greater than the ability of the affected country to overcome the effects thereof without the assistance of other countries.²¹⁹ Disasters usually either arise from natural causes or from anthropogenic causes,²²⁰ meaning that they can be caused by human activities such as armed conflict, civil war or any other catastrophe caused by the actions of human beings. Even though this chapter focusses on disasters arising from natural causes,²²¹ it is important to note that the effect and consequences of a disaster, either through natural occurrence or human activity, are usually the same for children.

The relevance of this chapter lies in the fact that natural disasters, in an ever changing world climate, are unfortunately occurrences that cannot be controlled, and the effects thereof are usually devastating. The importance of this research is to discover how governments should deal with separated and unaccompanied children in these situations, ensuring that the BIC is considered of paramount importance throughout the whole process of identifying if the children are really orphaned and when

²¹⁷ Chapter 1 of the *Disaster Management Act* 57 of 2002. Hereafter referred to as the *DMA*.

²¹⁸ Chapter 1 of the *DMA*.

²¹⁹ Chapter 1 of the *DMA*.

²²⁰ Anthropogenic disaster, otherwise known as technological disaster, is caused by human activities. Smith *Environmental Hazards* 6.

²²¹ Smith 2013 *Environmental Hazards* 4.

established that they are orphaned, how to act appropriately. The purpose of this discussion is to lay a basis for comparison in Chapter Five so as then to be in a better position to answer the research question posed in Chapter One.

Southern Africa is currently experiencing acute ongoing weather-induced natural disasters.²²² In 2019 it was reported that cyclones, floods and landslides alone had claimed the lives of at least 1,200 people in this region.²²³ Furthermore, thousands of lives were lost to other occurrences like drought, which are not accounted for in these statistics.²²⁴ Mozambique, Zimbabwe and Malawi were hit by both Cyclone Idai and Cyclone Kenneth in the same season, where these tropical cyclones were reported to be the strongest cyclones ever to hit the African continent.²²⁵ This resulted in large numbers of people being displaced or separated from their homes and families, which created an additional risk of people and specifically of children being exposed to situations of child-trafficking, child abduction and other unethical practices.²²⁶

As previously alluded, a natural disaster often results in a lot of people being displaced or separated from their homes and families as a repercussion of the disaster.²²⁷ The most vulnerable of these people are the huge numbers of children that are displaced. Children are regarded as the most vulnerable in this situation because of their young age and level of development.²²⁸ Their opinions are not taken into account because they are seen as young beings merely in need of care and protection.²²⁹ Despite the international efforts to realise children's rights through the development of comprehensive children's right treaties, they are still not regarded as individuals who

²²² Botha and Van Niekerk 2013 *Jamba: Journal of Disaster Risk Studies* 2-3.

²²³ Save the Child 2019 <https://reliefweb.int/report/world/2019-natural-disasters-claim-more-1200-lives-across-east-and-southern-africa>.

²²⁴ Save the Child 2019 <https://reliefweb.int/report/world/2019-natural-disasters-claim-more-1200-lives-across-east-and-southern-africa>.

²²⁵ Save the Child 2019 <https://reliefweb.int/report/world/2019-natural-disasters-claim-more-1200-lives-across-east-and-southern-africa>.

²²⁶ Save the Child 2019 <https://reliefweb.int/report/world/2019-natural-disasters-claim-more-1200-lives-across-east-and-southern-africa>.

²²⁷ Todres 2011 *EILR* 1233.

²²⁸ Van Bueren *The International Law on the Rights of the Child* 2.

²²⁹ Woodhouse *Hidden in plain sight: The tragedy of Children's Rights from Ben Franklin to Lionel Tate* 114.

are to be considered as bearers of rights.²³⁰ Because of this, children's rights are being undermined and under-addressed, leaving them vulnerable to the infringement of their rights in this post-disaster setting.²³¹

In this post-disaster setting, crucial decisions are made by governments with regard to the process of the recovery of a country and the prioritisation and utilisation of the available resources to help those in need.²³² In the process, the preservation of the rights of all individuals can be very challenging. In many instances, the affected country is unable to secure the rights of people and of children in a post-disaster setting because the resources of the country have been damaged or destroyed as a result of the disaster,²³³ and usually to the extent that it is impossible to secure the provision for children's rights. In this post-disaster setting, already existing legislation can create the necessary framework that can be referred to for protecting the rights of all individuals,²³⁴ especially those of children. It has been recorded that the three areas of international law in support of the preservation of all rights in such pressing times are humanitarian law, human rights law, and international disaster relief law.²³⁵

This chapter focuses on the international legal position pertaining to the suspension of the inter-country adoption of separated or unaccompanied children. These children are often wrongfully considered to be orphans and therefor *General Comment No. 6 of the UNCRC Committee* will be referred to for the promotion and protection of the rights of the children in this situation,²³⁶ UNICEF's position on the matter will be discussed and the recommendations of the *Hague Conference on Private International Law* on the matter will also be referred to. The manner in which other countries' governments approach this situation will also be taken into account. Thereafter, the current legal position of South Africa in a post-disaster setting will be discussed with specific reference to the South African disaster management laws, which include the

²³⁰ Todres 2011 *EILR* 1238.

²³¹ Todres 2011 *EILR* 1234.

²³² Todres 2011 *EILR* 1233.

²³³ Affected resources include: financial, human and informational resources. Todres 2011 *EILR* 1234.

²³⁴ Todres 2011 *EILR* 1241.

²³⁵ Todres 2011 *EILR* 1241.

²³⁶ *General Comment No 6*.

Disaster Management Act No 57 of 2002, the *National Disaster Management Framework* of 2005 and the provisions made by our government to protect children's rights in South Africa should the same situations arise here.

4.2 The current international legal position on the matter

Many international fields of law find themselves applicable in post-disaster settings, yet they are not applicable without limitations. The *International Covenant on Economic, Social and Cultural Rights* prescribes that state parties are obliged to provide protection of social, economic and cultural rights in accordance with the resources available to that state party.²³⁷ Furthermore, article 4 of the *UNCRC*'s instructions are:

With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.²³⁸

Therefore social, economic and cultural rights should be provided for by a country only to the extent of the resources available in that specific country. As against this statement, the right to the safety and security of an individual is not dependent on the state parties' available resources. Instead, all individuals, especially children, should be ensured the right to safety and security at all times, including in a post-disaster setting and all the dangers that a child can be subjected to.²³⁹ In this instance, *General Comment No. 6* of the *CRC Committee* should be considered.

General Comment No. 6 makes special reference to the promoting and protecting of the rights of separated and unaccompanied children.²⁴⁰ With regard to post-disaster settings, there are specific regulations applicable to every situation that can cause the following problems; there is usually a lack of information and a lack of resources to acquire information about the children, so from whom do you ask for information about the children, and are there any checks and balances to be taken into account

²³⁷ *International Covenant on Economic, Social and Cultural Rights* (1966).

²³⁸ Article 4 of the *UNCRC* (1989).

²³⁹ Todres 2011 *EILR* 1248.

²⁴⁰ *General Comment No 6*.

before these children are seen as "orphans"?²⁴¹ In these matters, the children involved are not only immensely traumatised by the occurrence of the natural disaster and being separated from their parents or families, but they are also vulnerable to being seen as being "orphaned" when in reality they may still have family members alive who will be desperate to be reunited with them and to care for them with the necessary support system in place.²⁴² These children who are seen to be "orphaned", without the necessary investigations having been conducted, are especially vulnerable to child abduction, child abuse, exploitation and other forms of violence throughout the process of inter-country adoption. The suspension of inter-country adoptions of children orphaned (separated and unaccompanied) as a result of natural disasters focusses on preventing cases of child abduction, child abuse, exploitation and violence.

Accordingly, UNICEF's position on inter-country adoption makes special mention of cases where children are separated from their families and communities during or as a result of natural disasters. In this instance, tracing the family should be the first priority, and inter-country adoptions should be envisaged for the child only once these tracing efforts have proven to be ineffective, and stable intra-country solutions are not available.²⁴³

In 2005 the Indian, Indonesian and Sri Lankan governments, backed by UNICEF and the United States State Department, took steps to ensure that inter-country adoption was not entertained as a solution to the tsunami of December 2004.²⁴⁴ These governments, together with the Pakistan government, firmly rejected idea of inter-country adoptions by adopting following the approach:

We have decided to look after the thousands of orphans. We have imposed a complete ban on adoptions of these children.²⁴⁵

²⁴¹ Mezmur 2009 *IJLPF* 163.

²⁴² Mezmur 2009 *IJLPF* 163.

²⁴³ UNICEF 2013 www.unicef.org/media/media_41918.html.

²⁴⁴ Selman 2011 *AHRLJ* 41.

²⁴⁵ Beck 2005 <http://asiancorrespondent.com/15200/pakistan-prohibits-adoption-of-earthquake-orphans/>.

Referring to the previous situation in Haiti, the *Hague Conference's* information note on this matter concluded that:

A humanitarian disaster such as the earthquake should not be the reason for bypassing essential safeguards for safe adoption. In a situation where child care and protection services are down, such as in Haiti, the risks are even greater that the adoption may be "unsafe".²⁴⁶

The Hague Conference on Private International Law recommends in article 2(b) that inter-country adoption should take place only if information about the child's identity, adoptability, background, social environment, family history, medical history including that of the child's family, upbringing, ethnic, religious and cultural origins, and any special needs of the child has been collected in so far as is possible under the circumstances.²⁴⁷

The problem with such recommendation is that the circumstances after a natural disaster are usually so atrocious that it is almost impossible to retrieve such information. The need to provide basic care for these children is usually far greater than the need to comply with all the rules and regulations set out to protect them. At the same time, it is suggested that the adoption of separated children should not be permitted in the midst of an emergency,²⁴⁸ such as a post disaster setting. Relevant authorities should rather focus on protecting and promoting the long-term best interests of separated and unaccompanied children.²⁴⁹ Despite the attempts to provide better international legal regulation of inter-country adoption, concerns remain about the success of the overall approach of inter-country adoptions because of this aspect.²⁵⁰

Accordingly, inter-country adoption of this kind has been increasingly challenged by the governments of the countries of origin, as it has been regarded as an inappropriate response to attempting to address the needs of child victims of disasters.²⁵¹ A good

²⁴⁶ HCCH 2010 <https://www.hcch.net/en/news-archive/details/?varevent=183>.

²⁴⁷ Section 2(b) of the *Hague Convention* (1993).

²⁴⁸ Mezmur 2009 *IJLPF* 163.

²⁴⁹ Mezmur 2009 *IJLPF* 164.

²⁵⁰ Buck *International Child Law* 321.

²⁵¹ Selman 2011 *AHRLJ* 41.

example of such a country is Spain, which received over one hundred and fifty children from Haiti in the years before the earthquake, but took no children at the time of the earthquake, as its adoption legislation does not permit adoption from a country in crisis.²⁵² This is a form of suspension of inter-country adoption and could be used as an opportunity to teach other receiving states to ensure an agreed responsible response to any future disaster situation to protect the rights of all children. This example could also be utilised in away by the governments of sending countries, which could protect the rights of children in a post-disaster setting by providing that adoption legislation does not permit inter-country adoption if the country is experiencing a time of crisis – as suggested by UNICEF.²⁵³ If such legislation already exists, it can be referred to in a time of crisis to protect the rights of children in such circumstances,²⁵⁴ and put the long-term BIC first.

4.3 The current national position on the matter in South Africa

Being a neighbour to both Mozambique and Zimbabwe, South Africa is also subjected to severe weather conditions that could lead to a natural disaster at any time. Although South Africa is not regarded as a high risk country for sudden natural disasters, such stability is not always be guaranteed. Recently there has been an increase in the occurrence of a variety of forms of natural disasters, and this has had a great impact on the lives of South Africans.²⁵⁵ These weather-induced natural disasters include droughts, floods, hailstorms, gales, fires and earthquakes, to mention but a few.²⁵⁶ Though some of these events are progressive occurrences, which do not seem to have the same effect as the sudden occurrence of a disaster, the effects thereof are still devastating.

Section 7(2) of the *Constitution* obliges the South African government to respect, promote, promote and fulfil the rights contained in the Bill of Rights.²⁵⁷ The well-being

²⁵² ISS 2010 <http://iss-blog-iss-usa.org/earthquake-in-haiti-intercountry-adoption-cases>.

²⁵³ UNICEF 2013 www.unicef.org/media/media_41918.html.

²⁵⁴ Todres 2011 *EILR* 1241.

²⁵⁵ Botha and Van Niekerk 2013 *Jamba: Journal of Disaster Risk Studies* 2-3.

²⁵⁶ Botha and Van Niekerk 2013 *Jamba: Journal of Disaster Risk Studies* 2-3.

²⁵⁷ Section 7(2) of the *Constitution*.

of the people should also be secured by all spheres of government, as provided for in section 41 of the *Constitution*.²⁵⁸ Therefore, it can be regarded as the responsibility of the government of South Africa to intervene and protect the rights of all South Africans, including children, in a post-disaster setting.

The legal framework for disaster management in South Africa includes well-developed disaster management laws as well as policy frameworks. The *Constitution* provides for a number of obligations and duties that have to be fulfilled by the local government in the undertaking of disaster management.²⁵⁹ These disaster management laws include the *Disaster Management Act* No 57 of 2002 and the *National Disaster Management Framework* of 2005. Furthermore, the legislation provides for the management of specific types of disasters and specific sectors that might be affected by a natural disaster.²⁶⁰ These specific sectors include the environmental management sector,²⁶¹ the agricultural sector,²⁶² the mining sector,²⁶³ the energy sector,²⁶⁴ the building construction sector²⁶⁵ and the land-use and planning sector.²⁶⁶ These are all designated in prescribing the management of that specific sector if a disaster should occur.

Although the South African legal framework for disaster management seems to be all-encompassing, children's rights are not specifically provided for in this situation. No mention is made of the protection of separated or unaccompanied children, how they should be dealt with and what the situation will be with regard to the inter-country adoption of such children, as inter-country adoption is often used as a means of providing for them. Therefore, the *DMA* No 57 of 2002 and the *State of Emergency*

²⁵⁸ Section 41 of the *Constitution*.

²⁵⁹ Van der Berg 2015 PER/PELJ 995.

²⁶⁰ Specific types of disaster management legislation include for example the *National Veld and Forest Fire Act* 101 of 1998.

²⁶¹ Regulated by the *National Environmental Management Act* 107 of 1998.

²⁶² Regulated by the *Conservation of Agricultural Resources Act* 43 of 1983.

²⁶³ Regulated by the *Mineral and Petroleum Resources Development Act* 28 of 2002.

²⁶⁴ Regulated by the *National Climate Change Response White Paper* of 2001.

²⁶⁵ Regulated by the *National Building Regulations and Building Standards Act* 103 of 1977.

²⁶⁶ Regulated by the *Spatial Planning and Land Use Management Act* 16 of 2013.

Act No 64 of 1997 will be applicable, as all aspects of disaster management in South Africa are generally regulated thereby.²⁶⁷

The *DMA* provides in its Preamble for the development of disaster management policies that focus on preventing disaster-related risks, to be prepared in a situation of emergency, ensuring that the response to a disaster is rapid and effective, and to ensure the full recovery of the nation post-disaster.²⁶⁸ The *DMA* essentially provides the legal framework for dealing with disaster management, the development of policies and mandates that would be applicable in a particular situation, and the procedures, classifications and declarations of disaster management.²⁶⁹ The *DMA* also delegates disaster management responsibilities to local government.²⁷⁰ For the successful fulfilment of these responsibilities by the individual municipalities, adequate resources are required, yet it has been reported that many of the resources available to the municipalities to use in fulfilling these responsibilities are fairly inadequate.²⁷¹ The fact that local government is slow to release funds for disaster management contributes to the victims of the disaster being left without timely and adequate support in post-disaster settings.²⁷²

The *State of Emergency Act* provides for the "declaration of a state of emergency" in the country.²⁷³ This declaration empowers the government to develop new regulations as it deems fit to regulate matters connected to such a declaration.²⁷⁴ This declaration, in accordance with section 37 of the *Constitution*,²⁷⁵ may be made only where the life of the nation is threatened by war, disorder or natural disasters, or such other things.²⁷⁶ Section 27(2) of the *DMA* provides that:

If a national state of emergency has been declared in terms of subsection (1), the Minister may, subject to subsection (3), and after consulting the responsible cabinet

²⁶⁷ Humby *Analysis of legislation* 27.

²⁶⁸ Preamble of the *DMA*.

²⁶⁹ Llosa and Zodrow 2011 <http://bit.ly/1cwjV6B>.

²⁷⁰ Chapter 5 of the *DMA*.

²⁷¹ SALGA 2011 <http://bit.ly/1bhyoPA>.

²⁷² SALGA 2011 <http://bit.ly/1bhyoPA>.

²⁷³ Preamble of the *State of Emergency Act* 64 of 1997.

²⁷⁴ Preamble of the *State of Emergency Act* 64 of 1997.

²⁷⁵ Section 37 of the *Constitution*.

²⁷⁶ Preamble of the *State of Emergency Act* 64 of 1997.

members, make regulations or issue directions or authorise the issue of directions concerning a number of circumstances.²⁷⁷

In the recent High Court judgment of *De Beer v Minister of Cooperative Governance and Traditional Affairs*,²⁷⁸ Judge Davis highlighted the consequences of the declaration of a national state of emergency and the power that is afforded to the Minister together with this declaration.²⁷⁹ The Minister may, with the great public powers afforded to him/her, promulgate any regulation that directly influences the everyday lives of all South Africans.²⁸⁰

This may be perturbing, because neither of the *Act's* mentioned above provides for dealing with children's rights, and more specifically children orphaned (separated or unaccompanied) as a result of a natural disaster, in a post-disaster setting. If such a situation were to present itself, there will be no reference as to how these vulnerable children should be dealt with and how their rights should be protected. There will be no pre-existing legislation that can be utilised as a necessary framework that can be referred to when considering the protection of the rights of children, and therefore, in terms of the *State of Emergency Act*, the people effected by the disaster would be dependent on the government to make regulations in that crisis situation to dealing with children's rights in such post-disaster circumstances. This is problematic because of the previously alluded to situation where post-disaster circumstances in a country are usually so woeful that the information needed to provide such a framework would be impossible to acquire. South Africa, being slow to release disaster management funds would also contribute to the greater vulnerability of children and their rights in this post-disaster setting.

The power of the Minister, in accordance with the *State of Emergency Act*, may also not be exercised in a manner that infringes on or limits the constitutional rights of the

²⁷⁷ Section 27(2) of the *DMA*.

²⁷⁸ *De Beer v Minister of Cooperative Governance and Traditional Affairs* (HC) (unreported) case number 21542/2020 of 2 June 2020.

²⁷⁹ *De Beer v Minister of Cooperative Governance and Traditional Affairs* (HC) (unreported) case number 21542/2020 of 2 June 2020 para 4.

²⁸⁰ *De Beer v Minister of Cooperative Governance and Traditional Affairs* (HC) (unreported) case number 21542/2020 of 2 June 2020 para 5.

people, and will be assessed accordingly in terms of section 36 of the *Constitution*.²⁸¹ Section 172(1) of the *Constitution* provides that any law or conduct that is inconsistent with the *Constitution* must be declared invalid by the court.²⁸² Similarly, the court held in *Medicines Trust v Minister of Health*²⁸³ that:

The exercise of public power must comply with the *Constitution*, which is the supreme law and the doctrine of legality, which is part of that law... In this sense the *Constitution* entrenches the principle of legality and provides the foundation of the control of public power.²⁸⁴

The most important Constitutional provisions and guiding principles with regard to children rights are contained in section 28(2) of the *Constitution*, which provides that "a child's best interests are of paramount importance in every matter concerning the child."²⁸⁵ The BIC principle is accompanied by the "subsidiarity principle". These principles have been discussed in Chapter 3 of this mini-dissertation, and it is clear that the application of the principles is very complicated. There are a number of aspects that need to be taken into account in order for this constitutional right to be fulfilled and should be applied in a child-centred manner, which means that it should be applied in every situation specifically to meet the needs of the particular child in that particular situation.

No provisions are made for children's rights when dealing with children in the circumstances of a natural disaster. A clear, unfilled *lacuna* exists in regard to the safeguards and obligations of the country when it comes to children's right in post-disaster situations, and how inter-country adoption should be conducted or suspended in such a situation. Therefore, it will be required from the Minister to make regulations in that crisis situation for dealing with children's rights in accordance with the above mentioned principles. The questions that arise are whether those regulations will be able to fulfil the constitutional rights of every child, and whether the BIC will be able to be determined with the limited resources available to the country in a post-disaster

²⁸¹ Section 36 of the *Constitution*.

²⁸² Section 172(1) of the *Constitution*.

²⁸³ *Affordable Medicine Trust v Minister of Health* 2006 3 SA 247 (CC).

²⁸⁴ *Affordable Medicine Trust v Minister of Health* 2006 3 SA 247 (CC).

²⁸⁵ Section 28(2) of the *Constitution*.

setting. If this constitutional right is not fulfilled by the Minister, as per section 172(1) of the Constitution, the Minister's regulation will be declared invalid by the Court.

4.4 Conclusion

This chapter firstly focussed on the definition of a disaster and the importance thereof was discussed in detail. A disaster can be either a progressive or a sudden occurrence, the progressive occurrence being just as devastating as the sudden.²⁸⁶ It was also noted that the causes of a disaster can be either natural or anthropogenic.²⁸⁷ The difference was discussed, as well as the rest of the general definition of a disaster in accordance with chapter 1 of the *DMA*.²⁸⁸ The position of Southern Africa with regards to weather induced natural-disasters was discussed, and this served to show that we are currently in an ever changing world climate and unfortunately natural disasters in the area are on the rise, and the effects thereof are devastating. The most immediate effect of a disaster is that people are displaced or separated from their families and homes.²⁸⁹ The most vulnerable of these people are the children that are displaced, and why they are vulnerable was also discussed. Children are not seen as individuals capable of being bearers of rights.²⁹⁰ Because of this, children's rights are undermined and under-addressed, leaving them vulnerable in a post-disaster setting.²⁹¹

From the research it became clear that these separated or unaccompanied children are often wrongfully considered to be orphans due to the lack of family tracing and reunification regulations. The international legal position on the suspension of inter-country adoption of separated or unaccompanied children was discussed as a means of protecting these children. *General Comment No 6* was referred to for the promotion and protection of the rights of children in this situation.²⁹² The problem with the

²⁸⁶ Chapter 1 of the *DMA*.

²⁸⁷ Anthropogenic disaster, otherwise known as technological disaster, is caused by human activities. Smith *Environmental Hazards* 6.

²⁸⁸ Chapter 1 of the *DMA*.

²⁸⁹ Save the Child 2019 <https://reliefweb.int/report/world/2019-natural-disasters-claim-more-1200-lives-across-east-and-southern-africa>.

²⁹⁰ Todres 2011 *EILR* 1238.

²⁹¹ Todres 2011 *EILR* 1234.

²⁹² *General Comment No 6*.

recommendations made by *General Comment No 6* is that the circumstances after a natural disaster are usually so atrocious that there is a lack of information and a lack of resources to acquire information about the unaccompanied or separated children, and that there are no checks and balances in place to be taken into account before these children are seen as "orphans".²⁹³ The lack of information leaves them vulnerable to being wrongfully considered to be orphans and therefore vulnerable to child abduction, child abuse, exploitation and other forms of violence. UNICEF's position on the matter was also discussed and the *Hague Conference on Private International Law* recommendations on the matter was also referred to.

In a post-disaster setting, crucial decisions are made by governments with regard to the process of the recovery of a country and the prioritisation and utilisation of the available resources to help those in need.²⁹⁴ The preservation of the rights of all individuals can be very challenging in this atrocious situation. Already existing legislation can create a necessary framework that can be referred to in order to protect the rights of all individuals in post-disaster settings,²⁹⁵ especially those of children. Yet the need to provide basic care for these children is usually far greater than the need to comply with all the rules and regulations set out to protect them. At the same time, it is suggested that the adoption of separated or unaccompanied children should not be permitted in the midst of an emergency²⁹⁶ such as a post-disaster setting. Despite the attempts to provide better international legal regulation of inter-country adoption, concerns remain about the success of the overall approach to inter-country adoptions because of this aspect.²⁹⁷ It has been suggested that relevant authorities should rather focus on protecting and promoting the long-term best interests of the separated child.²⁹⁸ Therefore, the suspension of inter-country adoptions should be relied on as a means of protecting the rights of the children by both the sending and the receiving countries.

²⁹³ Mezmur 2009 *IJLPF* 163.

²⁹⁴ Todres 2011 *EILR* 1233.

²⁹⁵ Todres 2011 *EILR* 1241.

²⁹⁶ Mezmur 2009 *IJLPF* 163.

²⁹⁷ Buck *International Child Law* 321.

²⁹⁸ Mezmur 2009 *IJLPF* 164.

Taking the geographical position of South Africa into consideration, it was established that South Africa is also subjected to severe, changing weather conditions that can at any time lead to a weather induced natural disaster. Therefore the rights of children, especially unaccompanied and separated children, should be considered to be of the utmost importance. Although the South African legal framework for disaster management seems to be sufficient, children's rights are not specifically provided for in this situation. No mention is made in the *Children's Act* of the protection of separated or unaccompanied children, how they should be dealt with and what the situation would be with regard to their inter-country adoption, which is often used as a means of providing for them. Therefore, the *DMA* and the *State of Emergency Act* No 64 of 1997 will be applicable to all aspects of disaster management in South Africa.²⁹⁹

A clear, unfilled *lacuna* exists with regard to the safeguards and obligations of the country when it comes to children's rights in post-disaster situations and how inter-country adoption should be conducted in such a situation. If such a situation were to present itself, there would be no guidance as to how these vulnerable children should be dealt with and how their rights should be protected. The *State of Emergency Act* would enter into force, authorising the Minister to make regulations for dealing with children's rights in the post-disaster circumstances. There is no guarantee that the regulations made by the Minister would be able to fulfil the constitutional rights of every child, or even that the BIC would be able to be determined with the limited resources available to the country in such a setting.

Inter-country adoption has been regarded as unsuitable for the needs for child victims of disasters in many countries, and the suspension thereof is used to protect the children.³⁰⁰ This can be used as an example to teach other receiving states to ensure a responsible response to any future disaster situation in order to protect the rights of all children. As a sending country South Africa could use this example to protect the rights of children in a post-disaster setting. It is suggested by the writer that the

²⁹⁹ Humby *Analysis of legislation* 27.

³⁰⁰ Selman 2011 *AHRLJ* 41.

adoption legislation do not permit inter-country adoption if the country is experiencing a time of crisis – as suggested by UNICEF.³⁰¹ Already existing legislation could serve as a framework that could be referred to in protecting the rights of children in such circumstances.³⁰²

³⁰¹ UNICEF 2013 www.unicef.org/media/media_41918.html.
³⁰² Todres 2011 *EILR* 1241.

5 A brief comparison relating to the recent suspension of inter-country adoption by the Government of Liberia

5.1 Introduction

The extreme vulnerability of unaccompanied or separated children, who are often wrongfully considered to be orphans as a result of a natural disaster, armed conflict or a similar catastrophe,³⁰³ has resulted in international practices surrounding inter-country adoption being inclined to the suspension thereof.³⁰⁴ This has become more evident, especially on the African continent. In recent years the suspension of inter-country adoptions has been implemented in the Republic of Congo, Zambia and Togo, and more recently Liberia.³⁰⁵ The suspension was implemented out of a sense of the need to safeguard the rights of separated and unaccompanied children who find themselves in an emergency situation. Though the reason for the suspension of inter-country adoptions differs from country to country, the need for the suspension arose out of the same concern - to safeguard the rights of the separated and unaccompanied children and to protect the child through prioritising the BIC.³⁰⁶

The African child has a distinct need for additional protection from illicit activities in post-disaster/emergency situations. The IFRC has responded in assisting 34 emergency situations in 22 African countries specifically over the last five years. These emergency situations are often very complex and sensitive in many ways as a result of their occurring on the African continent.³⁰⁷ It is also reported that as a result of extreme weather conditions, conflict through political instability and the lack of emergency preparedness or response plans to emergency situations, African countries

³⁰³ Mezmur 2009 *IJLPF* 163.

³⁰⁴ Mezmur 2009 *IJLPF* 163.

³⁰⁵ International Social Services of the United Nations *Guidelines for the Appropriate Use and Conditions of Alternative Care for Children: an introductory briefing on its background, core principles and scope* 2008.

³⁰⁶ International Social Services of the United Nations *Guidelines for the Appropriate Use and Conditions of Alternative Care for Children: an introductory briefing on its background, core principles and scope* 2008.

³⁰⁷ IFRC 2018 <https://media.ifrc.org/ifrc/2018/12/30/five-biggest-emergencies-africa-weve-responded-2018/>.

are often exposed to reoccurring emergencies.³⁰⁸ Of the fifty million separated and unaccompanied children in Africa, more than half of them are reported to be children.³⁰⁹ Natural disasters and wars in Africa have in recent years left approximately two million children dead and one million children separated and unaccompanied, and war is considered to be one of the lead causes of the loss of parents in Africa,³¹⁰ leading one to come to the very worrisome conclusion that nowhere else in the world are people and children more at risk of an emergency situation than on the African continent.³¹¹ For this reason, the writer chose a comparison with Liberia, as both Liberia and South Africa are countries on the African continent. The writer is of the opinion that many of the characteristics, challenges and problems faced by the two countries will be the same as a result of their being from the same geographical region.

A brief evaluation will be made of the Government of Liberia's recent suspension of inter-country adoptions. The suspension arose from the need to protect the BIC and prohibit the potential violation of children's rights through inter-country adoption after the civil war had ended and many children were left separated and unaccompanied by their families. As already discussed at length, an emergency situation can be caused either through a natural disaster or through human activities, like civil war. Civil war, like a natural disaster, initially leads to children's being displaced or separated from their families and homes,³¹² leaving them unaccompanied and extremely vulnerable. Liberia endured a fourteen-year long civil war which led to the suspension of inter-country adoption in the country. Many children were left unaccompanied and separated after the war and were being taken care of in local orphanages.³¹³ Regrettably, because of the lack of regulatory legislation for inter-country adoptions in post disaster/emergency situations, soon thereafter links between criminals and the

³⁰⁸ IFRC 2018 <https://media.ifrc.org/ifrc/2018/12/30/five-biggest-emergencies-africa-weve-responded-2018/>.

³⁰⁹ LISTWAND.COM 2017 <https://liswand.com/top-10-awful-issues-facing-children-in-africa/>.

³¹⁰ LISTWAND.COM 2017 <https://liswand.com/top-10-awful-issues-facing-children-in-africa/>.

³¹¹ IFRC 2018 <https://media.ifrc.org/ifrc/2018/12/30/five-biggest-emergencies-africa-weve-responded-2018/>.

³¹² Executive Mansion 2015 https://www.emansion.gov.lr/2press.php?news_id=3336&pg=sp.

³¹³ Better Care Network and UNICEF *Country Care Profile: Liberia* 27.

orphanages were discovered, links that led to criminal activities including child trafficking through inter-country adoption.³¹⁴

Even though civil war is caused by human activities, the devastating effect thereof is as powerful as in an emergency situation caused by a natural disaster. A community that is a victim of a civil war endures the same disruption through the loss of lives, resources and infrastructure, which leaves the country in a devastating post disaster/emergency situation – the same as with a natural disaster. It needs to recover from the damage suffered. Therefore, the study of the effects of the emergency situation after the civil war in Liberia is relevant to the suspension of inter-country adoption as a result of a natural disaster, because the consequences and harm suffered by the children in post-disaster and post-emergency situations³¹⁵ are similar. This chapter will therefore evaluate the Government of Liberia's reaction to the disaster and the consequences thereof and make a briefly comparison of the South African position with the position Liberia was in, in order to get a clearer view of the position that South Africa would be in should a disaster occur, and of what needs to be improved in order to fill the *lacuna* that has been exposed.

Firstly, a brief discussion of the history of the inter-country adoptions of orphaned children in Liberia will be provided, which will suggest the reason for the suspension of inter-country adoption in the country. Then the current position of the country will be examined and the improvements that the country had to undergo in order to protect its children. Lastly, consideration will be given to how their improvements can be adapted and incorporated into South African legislation to fill the lacunae in our legislation in order to prioritise the BIC should the same situation occur in South Africa.

³¹⁴ UNICEF and Holt International Children's Services *An Assessment of the Inter Country Adoption Laws, Policies and Practices in Liberia* 4.

³¹⁵ Hereafter referred to as post-disaster/emergency situations.

5.2 History of inter-country adoption in Liberia

Liberia is renowned for its recent history of brutal civil wars. The first civil war lasted for seven years, between 1989 and 1996.³¹⁶ The second civil war started just three years after the first one ended and lasted for four years, occurring between 1999 and 2003.³¹⁷ These two wars are often considered to be one and are regarded as an ongoing fourteen-year long civil war.³¹⁸ It has been reported that as a result of the civil war as many as 250 000 people were killed and more than a third of the population was displaced or separated from their families.³¹⁹ In Monrovia, the capital city of Liberia, 78 per cent of the people were left unaccompanied or displaced during the civil war, and in addition to that 86 per cent of the people living in the rural areas were left in the same situation.³²⁰ Together with the displacement of a large number of people being, the country's infrastructure and governmental institutions were almost completely destroyed.³²¹ Infrastructure for health care services, schools and roads was demolished, both in the public and private sector.³²² As a result of this, the devastating consequences of the civil war lasted more than ten years after the end of the civil war.³²³ At the time of the civil war there was no national, government-led legislation available for the protection of children and children's rights in the form of emergency preparedness or a response plan in place in the case of an emergency occurring.³²⁴

Among the displaced or separated people after the civil war were a large number of children. These children were taken to the local orphanages.³²⁵ Prior to the first civil war in 1989, only 10 orphanages had been established in Liberia. Three years after

³¹⁶ UNCRC Committee on the Rights of the Child *Consideration of reports submitted by States parties under article 44 of the Convention* 6.

³¹⁷ UNCRC Committee on the Rights of the Child *Consideration of reports submitted by States parties under article 44 of the Convention* 6.

³¹⁸ The Schuster Institute for Investigative Journalism 2011
<https://www.brandeis.edu/investigate/adoption/liberia.html>.

³¹⁹ Houeld 2005 <http://reliefweb.int/report/liberian-orphanages-steal-and-exploit-children>.

³²⁰ Strengthening Emergency Needs Assessment Capacity, *Republic of Liberia Comprehensive Food, Security and Nutrition Survey 2*.

³²¹ United States Department of States, *Trafficking in Persons Report 2009 – Liberia*.

³²² International Monetary Fund *Liberia: Poverty Reduction Strategy* 1.

³²³ Houeld 2005 <http://reliefweb.int/report/liberian-orphanages-steal-and-exploit-children>.

³²⁴ Better Care Network and UNICEF *Country Care Profile: Liberia* 27.

³²⁵ Houeld 2005 <http://reliefweb.int/report/liberian-orphanages-steal-and-exploit-children>.

the war, in 2006, 108 orphanages were recorded, accommodating an estimate of 5 000 children.³²⁶ Many of these institutions were administered in a manner that did not succeed in fulfilling the basic hygiene, health security or protection needs of the children.³²⁷ Basic record keeping on the information on the children in the orphanage was non-existent and the most worrisome problem of all was that it was considered to be common practice to change the names of children on their arrival at the institution.³²⁸ Once the children had entered these institutions, adoption through fraudulent means was very common.³²⁹ Liberia's adoption law had been written in 1956 and provided only for domestic adoption.³³⁰ As a result thereof, when inter-country adoption became a more common practice, it was dealt with in the same manner as domestic adoption as there were no provisions dealing with inter-country adoptions or international placements.³³¹ It was reported that where uncertainty arose with reference to the procedure of inter-country adoption, it was often regulated and defined by private adoption agencies and adoptive families rather than by the government.³³² No provision was made for safeguarding the rights of the children during inter-country adoptions, and there was no guidance as to how this practice should be conducted – creating an easily accessible *lacuna* which could be exploited.³³³

The exploitation became visible in the widespread evidence of children being trafficked for labour, sex and fraudulent inter-country adoption purposes.³³⁴ Reported only one year after the civil war subsided, the number of children adopted through inter-country adoptions from Liberia to the United States only doubled from 183 children to 353 children.³³⁵ In 2008 Liberia was reported to be one of the top sending countries of

³²⁶ Orphanage Assessment Report 6.

³²⁷ Orphanage Assessment Report 6.

³²⁸ Orphanage Assessment Report 10.

³²⁹ Orphanage Assessment Report 10.

³³⁰ UNICEF and Holt International Children's Services *An Assessment of the Inter Country Adoption Laws, Policies and Practices in Liberia* 4.

³³¹ UNICEF and Holt International Children's Services *An Assessment of the Inter Country Adoption Laws, Policies and Practices in Liberia* 4.

³³² Better Care Network and UNICEF *Country Care Profile: Liberia* 26.

³³³ The Schuster Institute for Investigative Journalism 2011
<https://www.brandeis.edu/investigate/adoption/liberia.html>.

³³⁴ United States Department of States *Trafficking in Persons Report 2009 – Liberia*.

³³⁵ United States Department of State – Bureau of Consular Affairs 2006
<http://travel.state.gov/content/stravel/en/Intercountry-Adoption/adoption-statistics-esri.html?wcmode=disabled>.

inter-country adoption in the world.³³⁶ A further tranche of 1 320 children were adopted internationally from Liberia between 2004 and 2010,³³⁷ and all of this happened while Liberia's adoption law was inadequate to regulate the life-changing procedure of inter-country adoption. This gave rise to serious concerns for the safety of the children of Liberia. A review that was conducted yielded that:

The concerns centred around no legal functioning framework to ensure the legality of adoptions; lack of process to ensure children have not been abducted, trafficked or sold; and lack of informed parental consent being received in cases where biological parents are still alive.³³⁸

Based on the numerous reports of the rapidly increasing number of children in institutional care who were available for inter-country adoption over a short period of time following the civil war, illicit activities with these children were anticipated and took place. These fraudulent practice of inter-country adoption was exposed by the international community through the work of numerous organisations, and research was performed in order to inform and recommend change by the Liberian government.³³⁹ Mismanagement and corruption in the inter-country adoption procedure were exposed through the research, which ultimately led the Liberian government to recognise the legitimacy of the concern that was being raised by the international community.³⁴⁰

A newly elected democratic government came into being in 2006, led by the newly elected President of Liberia, Her Excellency Madan Ellen Johnson-Sirleaf.³⁴¹ Her main focus was to lead the country to full recovery after the two civil wars, and as part of this effort the regulatory adoption law in Liberia was considered to be obsolete and outdated.³⁴² Previously no provision had been made for the protection of children's

³³⁶ Better Care Network and UNICEF *Country Care Profile: Liberia* 25.

³³⁷ A Publication of National Council for Adoption *Global Trends in Intercountry Adoption: 2001-2010* 12.

³³⁸ Ministry of Children and Family Development 2019 https://www2.gov.bc.ca/assets/gov/birth-adoption-death-marriage-and-divorce/births-and-adoptions/adoption/intercountry-adoption/ica_alerts_non-hague_countries.

³³⁹ Better Care Network and UNICEF *Country Care Profile: Liberia* 26.

³⁴⁰ Better Care Network and UNICEF *Country Care Profile: Liberia* 26.

³⁴¹ UNCRC Committee on the Rights of the Child *Consideration of reports submitted by States parties under article 44 of the Convention* 6.

³⁴² Executive Mansion 2015 https://www.emansion.gov.lr/2press.php?news_id=3336&pg=sp.

rights in the case of a disaster occurring in the country, either through natural causes or through human activities such as the civil wars which the country had endured. Such events could lead to the separation of children from their families and homes.³⁴³ Inter-country adoptions had been conducted without any safety measures in place to protect the children from exploitation. Mismanagement and corruption in the inter-country adoption process had led to major concerns on the part of the international community.³⁴⁴ On 26 January 2009, in response to the international concerns raised, the Liberian government formally suspended inter-country adoption by placing a moratorium on all inter-country adoptions.³⁴⁵

In an assessment of the inter-country adoption laws, policies and practices in Liberia, Holt International Children's Services working together with UNICEF reported that prior to the implementation of the suspension of inter-country adoption, Liberian legislation already had existing *lacunae* through which children's rights had been endangered.³⁴⁶ Amongst these were the adoption-related records and information of the children, that were either kept poorly or were non-existent and where these records did exist, they were often inaccessible through lawful methods.³⁴⁷ Poor communication between the different branches of government made communicating about adoption-related matters impossible, and it seemed as though inter-country adoptions were being regulated by no one specific within government.³⁴⁸

The adoption law was inadequately enforced in that it provided for a third party to determine the possibility of adoption, but the suitability of the third party was not regulated by any statute or agreement as to what the manner was in which their responsibilities should be conducted and what the standard of the third party should

³⁴³ Executive Mansion 2015 https://www.emansion.gov.lr/2press.php?news_id=3336&pg=sp.

³⁴⁴ Ministry of Children and Family Development 2019 https://www2.gov.bc.ca/assets/gov/birth-adoption-death-marriage-and-divorce/births-and-adoptions/adoption/intercountry-adoption/ica_alerts_non-hague_countries.

³⁴⁵ Better Care Network and UNICEF *Country Care Profile: Liberia* 26.

³⁴⁶ UNICEF and Holt International Children's Services *An Assessment of the Inter Country Adoption Laws, Policies and Practices in Liberia* 1.

³⁴⁷ UNICEF and Holt International Children's Services *An Assessment of the Inter Country Adoption Laws, Policies and Practices in Liberia* 1.

³⁴⁸ UNICEF and Holt International Children's Services *An Assessment of the Inter Country Adoption Laws, Policies and Practices in Liberia* 6.

be.³⁴⁹ A central monitoring body provided oversight in the process of inter-country adoption through the offices of a third party, yet no review or adherence was required in order to ensure the suitability of the third party.³⁵⁰ All the while, it was reported that the separated or unaccompanied children who were subjected to these third parties for regulating the process of their inter-country adoption were usually ineligible for placement through the inter-country adoption system.³⁵¹ Many of these children had one or both of their parents still living,³⁵² but adequate family tracing was not possible because of the limited resources made available by the government after the war.³⁵³

Furthermore, prior to the suspension of inter-country adoption, direct links were uncovered between child trafficking through inter-country adoption and orphanages in Liberia.³⁵⁴ The assessment concluded that:

Liberia is in a reactive rather than proactive stance regarding Inter-country adoptions. As a result, there are few protections for children's and birth parent's rights. This absence enables the corruption and other abuses reported by many assessment participants including law enforcement personnel, children's rights advocates, and orphanages and adoption agency representatives.³⁵⁵

During the period when the suspension of inter-country adoption was in place, a commission was established by the government of Liberia in order to conduct a comprehensive investigation of inter-country adoption and all other laws, procedures and practices conducted throughout the adoption process.³⁵⁶ This was also utilised in identifying the possible *lacunae* in the process and providing recommendations on

³⁴⁹ UNICEF and Holt International Children's Services *An Assessment of the Inter Country Adoption Laws, Policies and Practices in Liberia* 5.

³⁵⁰ UNICEF and Holt International Children's Services *An Assessment of the Inter Country Adoption Laws, Policies and Practices in Liberia* 8.

³⁵¹ UNICEF and Holt International Children's Services *An Assessment of the Inter Country Adoption Laws, Policies and Practices in Liberia* 4.

³⁵² Orphanage Assessment Report 11.

³⁵³ UNICEF and Holt International Children's Services *An Assessment of the Inter Country Adoption Laws, Policies and Practices in Liberia* 4.

³⁵⁴ UNICEF and Holt International Children's Services *An Assessment of the Inter Country Adoption Laws, Policies and Practices in Liberia* 4.

³⁵⁵ UNICEF and Holt International Children's Services *An Assessment of the Inter Country Adoption Laws, Policies and Practices in Liberia* 4.

³⁵⁶ Better Care Network and UNICEF *Country Care Profile: Liberia* 26.

how to safeguard the rights of separated or unaccompanied children and protect them against fraudulent and illicit practices related to inter-country adoption.³⁵⁷

In this process, the legal framework governing children's rights was revised by the government and the new *Children's Law* of 2009 was developed to address the irregularities attached to inter-country adoptions in the country.³⁵⁸ Furthermore:

With support from UNICEF, embassies, and civil society partners, the Government of Liberia also developed a draft Adoption Bill taking in considerations of the assessments.³⁵⁹

5.3 The current legal position on inter-country adoptions in Liberia and the improvements made

The House of Representative Committee on Gender Equality and Child Development, in cooperation with the government of Liberia and UNICEF, developed the new *Children's Law* of Liberia that was unanimously passed by the House of Representative in 2009.³⁶⁰ The *Children's Law* came into effect only two years after that in September 2011. The delay was believed to be because the inter-country adoptions provisions had to be addressed specifically.³⁶¹ Mechanisms in the *Children's Law* had to be put into place in order for the provisions to be implemented, and in 2012 the *Children's law* was officially launched by the President of Liberia.³⁶² It had been founded on a combination of the *UNCRC* and the *ACRWC* principles, and is regarded as one of the most comprehensive children's rights legislation on the African continent.³⁶³

The *UNCRC* was ratified by Liberia in 1993.³⁶⁴ In accordance with the obligations thereof and in securing the rights of child, the Liberian government created the National Plan of Action for Children and the Result-Focussed Transition Framework in order to promote compliance with international law protecting children's rights, among

³⁵⁷ Better Care Network and UNICEF *Country Care Profile: Liberia* 26.

³⁵⁸ Better Care Network and UNICEF *Country Care Profile: Liberia* 26.

³⁵⁹ Better Care Network and UNICEF *Country Care Profile: Liberia* 26.

³⁶⁰ Better Care Network and UNICEF *Country Care Profile: Liberia* 26.

³⁶¹ Better Care Network and UNICEF *Country Care Profile: Liberia* 26.

³⁶² Executive Mansion 2015 https://www.emansion.gov.lr/2press.php?news_id=3336&pg=sp.

³⁶³ UNICEF 2012 https://www.unicef.org/media/media_61579.html.

³⁶⁴ United Nations Treaty Collections 2020 https://treaties.un.org/pages/ParticipationStatus.aspx?clang=_en.

other things.³⁶⁵ In addition, the Child Protection Network was established as Liberia's dedicated organisation for the protection and promotion of children's rights.³⁶⁶ The Child Protection Network consists of non-governmental organisations, international organisations and different spheres of government.³⁶⁷ Their primary reference in performing their duty is the framework set out by the *UNCRC*.³⁶⁸ Vulnerable children are also dealt with under the authority of the Ministry of Health and Social Welfare and the Ministry of Gender and Development, both of which have responsibilities as to dealing with vulnerable children.³⁶⁹

As previously mentioned, the government of Liberia had no government-led child protection emergency preparedness and response plan in place at the time of the emergency during the civil war. The suspension of inter-country adoptions was implemented as an intervention to protect separated and unaccompanied children from fraudulent inter-country adoption practices.³⁷⁰ This was implemented three years after the civil war, when a great deal of exploitation had already been reported. The Child Protection Network started a discussion on developing a national emergency child protection response plan in response to the emergency situation.³⁷¹ This plan would prevent family separation, and where a child had already been separated, effective family tracing and reintegration would be established,³⁷² and safe interim care arrangements would be made for these separated and unaccompanied children while the tracing of their family was underway.³⁷³

At this time the UN already had emergency preparedness plans in place that could be used as guidance in order to provide for the needs of separated or unaccompanied children when an emergency situation had occurred.³⁷⁴ Furthermore, the UN Refugee Agency, together with UNICEF, had an already existing draft Standard Operating

³⁶⁵ UNICEF and Holt International Children's Services *An Assessment of the Inter Country Adoption Laws, Policies and Practices in Liberia* 2.

³⁶⁶ Displaced Children and Orphans Fund of USAID *Liberia: Key Factors of Children Vulnerability* 6.

³⁶⁷ Displaced Children and Orphans Fund of USAID *Liberia: Key Factors of Children Vulnerability* 6.

³⁶⁸ Displaced Children and Orphans Fund of USAID *Liberia: Key Factors of Children Vulnerability* 6.

³⁶⁹ Displaced Children and Orphans Fund of USAID *Liberia: Key Factors of Children Vulnerability* 6.

³⁷⁰ Better Care Network and UNICEF *Country Care Profile: Liberia* 27.

³⁷¹ Better Care Network and UNICEF *Country Care Profile: Liberia* 27.

³⁷² Better Care Network and UNICEF *Country Care Profile: Liberia* 27.

³⁷³ Better Care Network and UNICEF *Country Care Profile: Liberia* 27.

³⁷⁴ Better Care Network and UNICEF *Country Care Profile: Liberia* 27.

Procedure (SOP) that specifically addressed family tracing and the reintegration of separated and unaccompanied children because of an emergency situation.³⁷⁵

In accordance with the international provisions, the government of Liberia developed and implemented a new SOP and Accreditation Guidelines in 2015 to assure that both domestic and inter-country adoptions be utilised with strong safeguards,³⁷⁶ ensuring that what happened in the years after the war would not happen again. The new SOP provides for continual monitoring of all adoptions, including inter-country adoptions, long after the adoption has taken place.³⁷⁷ The SOP also provides for the continual evaluation of adoption agencies and assessment of their compliance with the international standards set by the *Hague Convention*.³⁷⁸ Furthermore, the Ministry of Gender, Children and Social Protection had been established as Liberia's central authority in this regard. It is authorised to regulate all adoption agencies and their conduct and is to be held accountable for meeting the international standards in safeguarding children's rights.³⁷⁹

The importance of the SOP was once again confirmed where many children were left orphaned early in 2015 as a result of the devastating Ebola outbreak in Liberia, which claimed the lives of many parents.³⁸⁰ The new SOP was shortly thereafter put into place in order to provide protection for separated and unaccompanied children, should a dangerous emergency situation arise again.³⁸¹ Once this process was well established, the government of Liberia announced in June 2015 that the suspension of inter-country adoption had been lifted.³⁸² Inter-country adoptions could proceed provided the new legislation and the SOP for adoptions were strictly adhered to. In

³⁷⁵ Better Care Network and UNICEF *Country Care Profile: Liberia* 27.

³⁷⁶ Executive Mansion 2015 https://www.emansion.gov.lr/2press.php?news_id=3336&pg=sp.

³⁷⁷ Executive Mansion 2015 https://www.emansion.gov.lr/2press.php?news_id=3336&pg=sp.

³⁷⁸ Executive Mansion 2015 https://www.emansion.gov.lr/2press.php?news_id=3336&pg=sp.

³⁷⁹ Domestic and Inter-country Adoption Regulations of Liberia para 14.

³⁸⁰ Executive Mansion 2015 https://www.emansion.gov.lr/2press.php?news_id=3336&pg=sp.

³⁸¹ Executive Mansion 2015 https://www.emansion.gov.lr/2press.php?news_id=3336&pg=sp.

³⁸² Executive Mansion 2015 https://www.emansion.gov.lr/2press.php?news_id=3336&pg=sp.
Domestic and Inter-country Adoption Regulations of Liberia of 2016, hereafter referred to as the amended *Adoption Act*.

accordance with the announcement, the Domestic Relations law had been amended by the government and included the process of inter-country adoption in detail.³⁸³

Finally, in 2016 the *Domestic and Inter-country Adoption Regulations of Liberia* (the amended *Adoption Act* of Liberia) was promulgated.³⁸⁴ The purpose of the regulations is to coordinate the Constitution of Liberia, the *UNCRC* and the *Hague Convention* so that they work together with one another to ensure that both domestic and inter-country adoptions take place in terms of the BIC and safeguard the rights of the child throughout the adoption process.³⁸⁵ In recognising the *Hague Convention* in this legal framework is designed to prevent the abduction and sale of children, trafficking, illegal adoptions and child abuse, through prohibiting fraudulent adoptions.³⁸⁶ The adoption processes are firmly controlled, directed and managed by the regulations and ensure the uniform application of the amended *Adoption Act* throughout the whole country.³⁸⁷

The governing central authority as provided for in the *Adoption Act* and in regulating the whole adoption process for both domestic and inter-country adoptions is the Ministry of Gender, Children and Social Protection (the Ministry).³⁸⁸ The Ministry is responsible for ensuring that the pre-placement and post-placement investigation is conducted in accordance with the *Adoption Act*.³⁸⁹ The Ministry is to develop a mechanism to ensure the implementation of the adoption law and to strictly regulate the granting of accreditation, review and revocation of the accreditation of third parties/adoption agencies in Liberia.³⁹⁰ The Ministry also has the responsibility to protect and take special care of the rights of separated and unaccompanied children after the occurrence of an emergency situation.³⁹¹

Furthermore, in accordance with the POS for protecting children after an emergency situation has occurred, the amended *Adoption Act* suspends the adoption of separated

³⁸³ Executive Mansion 2015 https://www.emansion.gov.lr/2press.php?news_id=3336&pg=sp.

³⁸⁴ Domestic and Inter-country Adoption Regulations of Liberia.

³⁸⁵ The amended *Adoption Act* para 1.

³⁸⁶ The amended *Adoption Act* para 1.

³⁸⁷ The amended *Adoption Act* para 1.

³⁸⁸ The amended *Adoption Act* para 10.4.

³⁸⁹ The amended *Adoption Act* para 9 and 10.

³⁹⁰ The amended *Adoption Act* para 14.

³⁹¹ The amended *Adoption Act* para 14.

and unaccompanied children for a period of 12 months.³⁹² Separated or unaccompanied children may be adopted only after the 12-month period has elapsed and thorough family tracing and all reunification attempts with family members have failed. Only then will the child be considered to be "adoptable" in accordance with paragraph 5 of the amended *Adoption Act*.³⁹³

Drastic change was needed in order to protect the vulnerable children of Liberia in post-emergency situations. Since the implementation of the Children's Law and the amended Adoption Act, the central authority has been established and has been given the authority to ensure that the inter-country adoption of unaccompanied and separated children is dealt with, with the utmost gravity. Ensuring that the legislation that was put in place for this purpose was being adhered to has yielded favourable results. As a result of the outstanding function of the central authority of Liberia, the number of orphanages has been reduced from 121 in 1991 to 82 in 2009.³⁹⁴ This also makes the regulation of the functioning of the orphanages more manageable.

3.4 A brief comparison between the current position in South Africa and the statutory framework provided for in Liberia with regard to the inter-country adoption of separated and unaccompanied children

Liberia has developed its statutory provisions for the protection of separated and unaccompanied children with regard to inter-country adoptions by adopting a "to the point" proactive approach.³⁹⁵ The adoption of separated or unaccompanied children is very clearly regulated by the amended *Adoption Act* and clearly suspends the adoption of separated and unaccompanied children for a period of 12 months if they are separated or unaccompanied from their parents because of an emergency situation.³⁹⁶ During this time, in-depth family tracing and reunification is first priority, to ensure

³⁹² The amended *Adoption Act* para 5.

³⁹³ The amended *Adoption Act* para 5.

³⁹⁴ Better Care Network and UNICEF *Country Care Profile: Liberia* 29.

³⁹⁵ UNICEF and Holt International Children's Services *An Assessment of the Inter Country Adoption Laws, Policies and Practices in Liberia* 4.

³⁹⁶ The amended *Adoption Act* para 5.7.

that the child is in fact orphaned because of the emergency situation in the country, and that no living relative can be identified who can take care of the child.³⁹⁷ The suspension ensures that the child lawfully enters into the institutional care system. This prohibits illicit/fraudulent adoption practices through the application of the encompassing amended *Adoption Act*. As discussed in Chapter three, inter-country adoption in South Africa is regulated by the *Constitution*³⁹⁸ and the *Children's Act*.³⁹⁹ The following passages compare the South African position with the position in Liberia.

The first similarity is that both South Africa and Liberia are signatory states to the *UNCRC* and the *ACRWC*. These two international instruments are accordingly incorporated into national legislation in both these countries. South Africa ratified the *UNCRC* in 1995⁴⁰⁰ and the *ACRWC* in 2000,⁴⁰¹ and these have been used as guiding instruments in developing and implementing the country's children's rights legislation. Liberia ratified the *UNCRC* in 1993⁴⁰² and the *ACRWC* in 2007.⁴⁰³ Both of these international instruments require the signatory states to incorporate their provisions into their national law, and therefore both countries' children's rights legislation are founded on the same basis.

The second similarity is that the legislation of the two countries is in agreement about the importance of the BIC principle and the subsidiarity principle with regard to the inter-country adoption of children. In South Africa the most important provision and guiding principle with regard to inter-country adoption and in all other matters concerning the child is contained in section 28(2) of the *Constitution*, which provides that "a child's best interests are of paramount importance in every matter concerning the child."⁴⁰⁴ The BIC principle is accompanied by the subsidiarity principle, as

³⁹⁷ The amended *Adoption Act* para 5.7.

³⁹⁸ The *Constitution*.

³⁹⁹ *Children's Act* 38 of 2005.

⁴⁰⁰ United Nations Treaty Collections 2020 https://treaties.un.org/pages/ParticipationStatus.aspx?clang=_en.

⁴⁰¹ African Committee of Experts on the Rights and the Welfare of the Child 2020 <https://www.acerwc.africa/acerwc-full-text/>.

⁴⁰² United Nations Treaty Collections 2020 https://treaties.un.org/pages/ParticipationStatus.aspx?clang=_en.

⁴⁰³ African Committee of Experts on the Rights and the Welfare of the Child 2020 <https://www.acerwc.africa/acerwc-full-text/>.

⁴⁰⁴ Section 28(2) of the *Constitution*.

discussed in Chapter three. The subsidiarity principle is utilised as a measure to ensure that the BIC is considered of paramount importance with reference to inter-country adoptions and in all matters concerning the child. The subsidiarity principle means that inter-country adoption should be considered as a means of care only where all national options have been considered, and then only if it is found to be in the best interests of the individual child.

In Liberia the BIC principle is provided for in Chapter II of the *Children's Law*, and it should also be considered as the paramount consideration in all decisions and actions that may affect the child.⁴⁰⁵ Additionally, the main purpose of the amended *Adoption Act* is to establish safeguards to ensure that the BIC is recognised as a fundamental consideration in the process of inter-country adoption.⁴⁰⁶ It is defined as a holistic evaluation, and a number of impacting factors need to be taken into account to ensure the optimum environment for a child's life and development.⁴⁰⁷ The subsidiarity principle is not explicitly mentioned in the amended *Adoption Act* of Liberia, but the principle is definitely present and can be derived from the pre-placement investigation regulations with regard to inter-country adoptions. It is clear from the provision that inter-country adoption should be authorised only once all the national care options have been considered. The pre-placement investigation inquires discovery of:

Whether all local options have been explored, including the provisions of assistance to the biological parent(s) to allow the child to be raised in a safe and positive environment and other family and community based placements within Liberia.⁴⁰⁸

The third similarity is the regulatory position of the central authority of both countries with regard to inter-country adoptions. The central authority of a state may perform its function directly or its functions may be delegated to other competent accredited bodies.⁴⁰⁹ In accordance with article 10 of the *Hague Convention*, in order for these bodies to obtain accreditation, a certain minimum standard has to be complied with, that is provided for in the *Hague Convention*.⁴¹⁰ The Director-General of Social

⁴⁰⁵ Section 2 of the *Children's Law* of 2012.

⁴⁰⁶ The amended *Adoption Act* par 1.2.

⁴⁰⁷ The amended *Adoption Act* par 3.10.

⁴⁰⁸ The amended *Adoption Act* para 9.3.

⁴⁰⁹ Boezaart *Child Law in South Africa* 382.

⁴¹⁰ Article 10 of the *Hague Convention* (1993).

Development fills the role of central authority in South Africa, and receives information and seeks advice from the Director-General: Justice and Constitutional Development. In accordance with section 258 of the *Children's Act*, the Director-General of Social Development has the authority to delegate its functions to other officials,⁴¹¹ thus giving the central authority the authority to grant or restrict accreditation. The Director-General of Social Development, as the central authority, has the duty to ensure the exchange of all essential information regarding adoptions⁴¹² and to maintain and uphold a supervisory role over all accredited bodies in South Africa.⁴¹³ In Liberia the central authority is also defined in accordance with the provisions of the *Hague Convention* as:

The national entity designated to discharge duties to ensure the proper implementation of adoption laws in conformity with best international practices.⁴¹⁴

The governing central authority provided for in the amended *Adoption Act* and in regulating the whole adoption process, for both domestic and inter-country adoptions, is the Ministry of Gender, Children and Social Protection.⁴¹⁵ The Ministry is responsible for ensuring that the pre-placement and post-placement investigations are conducted in accordance with the amended *Adoption Act*.⁴¹⁶ The Ministry is to develop a mechanism to ensure the implementation of the adoption law and to strictly regulate the granting of accreditation, review and revocation of the accreditation of adoption agencies in Liberia.⁴¹⁷

The first difference lies in the fact that South Africa ratified the *Hague Convention* and it was entered into force in December 2003.⁴¹⁸ Liberia has not yet ratified the *Hague Convention*. At the time of developing the new *Children's Law* and amended *Adoption Act* in Liberia, a number of mechanisms had to be put in place in order for the country

⁴¹¹ Other officials include: Section 258(1) in the department, section 258(2)(a) other organs of state, and section 258(2)(b) or to accredited bodies.

⁴¹² Couzens *A very long engagement: the children's act 38 of 2005 and the 1993 Hague Convention on the protection of children and cooperation in respect of intercountry adoption* 66.

⁴¹³ Boezaart *Child Law in South Africa* 391.

⁴¹⁴ The amended *Adoption Act* para 3.13.

⁴¹⁵ The amended *Adoption Act* para 10.4.

⁴¹⁶ The amended *Adoption Act* para 9 and 10.

⁴¹⁷ The amended *Adoption Act* para 14.

⁴¹⁸ HCCH 2003 <https://www.hcch.net/en/instruments/conventions/status-table/?cid=69>.

to ratify the *Hague Convention*.⁴¹⁹ Therefore, they are not a party to the *Hague Convention*. Yet the importance of the *Hague Convention* to Liberia is showcased through the amended *Adoption Act*, that is in line with the provisions of the *Hague Convention* and makes specific reference thereto in stating the purpose and obligation of the regulations.⁴²⁰ The fundamental rights of children are safeguarded in recognising the guiding principles of the *Hague Convention*.

The second difference is the legislative provisions for children in vulnerable emergency situations as a result of a natural disaster or civil war. In article VII of the *Children's Law* of Liberia, children in vulnerable situations are described as being in a situation where there is a risk of their having their "survival, development, participation and protection endangered."⁴²¹ They are regarded as being especially vulnerable.⁴²² Because of this, section 5 specifically addresses the provision of access to basic social welfare and services for them and allocates the responsibility for the reunification of separated or unaccompanied children with their families to the Minister of Health and Social Welfare.⁴²³ No provisions are made in South Africa for the care and reunification of separated and unaccompanied children in emergency situations, either by natural disasters or civil war, and most importantly, this pivotal responsibility is not allocated to any specific governing body in South Africa.

The third difference lies in the fact that South Africa does not have a SOP to protect children in post-disaster emergency situations, whereas Liberia does. As previously stated, the legal framework for disaster management in South Africa includes well-developed disaster management laws as well as policy frameworks. The *Constitution* provides for a number of obligations and duties that have to be fulfilled by the local government in the undertaking of disaster management.⁴²⁴ The primary disaster management laws are the *Disaster Management Act* No 57 of 2002 and the *National Disaster Management Framework* of 2005. Furthermore, regulating legislation

⁴¹⁹ Better Care Network and UNICEF *Country Care Profile: Liberia* 26.

⁴²⁰ The amended *Adoption Act* para 1.

⁴²¹ Chapter VII section 1.1 of the *Children's Law* of 2011.

⁴²² Chapter VII section 1.2 (t) of the *Children's Law* of 2011.

⁴²³ Chapter VII section 5 of the *Children's Law* of 2011.

⁴²⁴ Van der Berg 2015 PER/PELJ 995.

provides for the management of specific types of disasters and specific sectors that might be affected by a natural disaster.⁴²⁵

Although the South African legal framework for disaster management seems to be all encompassing, children's rights are not specifically provided for in this situation. No mention is made of the protection of separated or unaccompanied children in an emergency situation. The *DMA* No 57 of 2002 and the *State of Emergency Act* No 64 of 1997 will therefore be applicable in protecting the rights of children in this situation, as all aspects of disaster management in South Africa are generally regulated thereby.⁴²⁶ Neither of the above mentioned *Acts* provides for dealing with children's rights and more specifically, children separated or unaccompanied through an emergency situation or as a result of a natural disaster, in a post-disaster setting.

If a similar situation were to present itself, there would be no reference as to how these vulnerable children should be dealt with and how their rights should be protected. The country would be dependent on the government to make regulations "on the spot" in the crisis situation for dealing with children's rights in terms of the *State of Emergency Act*, making South Africa reactive to the situation. Therefore, it is clear that there are no provisions made for children's rights when dealing with children if a natural disaster were to happen in South Africa. A clear, unfilled *lacuna* exists with regard to the safeguards and obligations as a country when it comes to children's right in post-disaster situations and how inter-country adoption should be conducted in such a situation.

Liberia, on the other hand, has developed SOP and Accreditation Guidelines to assure that both domestic and inter-country adoptions are utilised with strong safeguarding measures in post-disaster/emergency situations.⁴²⁷ The newly implemented SOP was specially put into place in order to provide protection for separated and

⁴²⁵ Specific types of disaster management legislation include for example the *National Veld and Forest Fire Act* 101 of 1998.

⁴²⁶ Humby *Analysis of legislation* 27.

⁴²⁷ Executive Mansion 2015 https://www.emansion.gov.lr/2press.php?news_id=3336&pg=sp.

unaccompanied children in emergency situations.⁴²⁸ Amongst other things, the SOP provides for the continuous monitoring of all adoptions, including inter-country adoptions, long after the adoption has taken place.⁴²⁹ The SOP also provides for the continuous evaluation of adoption agencies and for following up on their compliance with the international standards set by the *Hague Convention*.⁴³⁰ Furthermore, in accordance with the POS and protecting children after an emergency situation has occurred, the amended *Adoption Act* suspends the adoption of separated and unaccompanied children for a period of 12 months,⁴³¹ where the children were separated because of an emergency situation, in order to ensure thorough family tracing and all reunification attempts with family members has failed – before they are considered "adoptable" in accordance with paragraph 5 of the amended *Adoption Act*.⁴³²

5.5 Conclusion

The purpose of this chapter was to evaluate the recent suspension of inter-country adoptions by the Government of Liberia. The evaluation was used in order to make a brief comparison between the government of Liberia's reaction to protect the best interests of children in an emergency situation, safeguarding their rights from any illicit/fraudulent practices through inter-country adoptions in emergency situation and the position that South Africa would be in should the same situation arise here. Furthermore, the comparison was used to establish a clearer view of the position that South Africa would be in should an emergency situation occur in South Africa and what needs to be improved on in order to fill the possible *lacuna* that was exposed in the comparison with the government of Liberian legislation.

The chapter was initiated with a brief discussion on the history of inter-country adoptions of separated and unaccompanied children in Liberia, where children were left extremely vulnerable after the long fourteen-year civil war, which vulnerability was

⁴²⁸ Executive Mansion 2015 https://www.emansion.gov.lr/2press.php?news_id=3336&pg=sp.

⁴²⁹ Executive Mansion 2015 https://www.emansion.gov.lr/2press.php?news_id=3336&pg=sp.

⁴³⁰ Executive Mansion 2015 https://www.emansion.gov.lr/2press.php?news_id=3336&pg=sp.

⁴³¹ The amended *Adoption Act* para 5.

⁴³² The amended *Adoption Act* para 5.

the reason for the suspension of inter-country adoption in the country. Many children were left unaccompanied and separated after the war and were being taken care of in the local orphanages.⁴³³ Regrettably, soon thereafter direct links were uncovered between orphanages in Liberia and the perpetrators elsewhere of illicit activities involving children and child trafficking, who were using inter-country adoption to further their interests.⁴³⁴

During the war no national legislation was available for the protection of children and children's rights in the form of emergency preparedness or a response plan in place for use in the case of an emergency.⁴³⁵ Such an emergency could either be the result either of a natural disaster or of human agency, like the civil wars which the country had endured, that could lead to the separation of children from their families and homes.⁴³⁶ Liberia's adoption law was completely outdated and provided only for domestic adoption within Liberia.⁴³⁷ Therefore, there was no functioning legal framework prior to the war to safeguard the rights of children during inter-country adoptions, and there was no guidance as to how this practice should be conducted, leaving an easily accessible *lacuna* in the law which could be exploited for nefarious purposes.⁴³⁸ Three years after the war, it was reported that Liberian children were being exploited on a large scale. Inter-country adoptions were therefore suspended as an intervention to protect separated and unaccompanied children from fraudulent practices.⁴³⁹ This action was taken on 26 January 2009 in adherence to the international concerns raised.⁴⁴⁰ While the suspension was in place, the legal framework governing children's rights was revised by the government and the new

⁴³³ Better Care Network and UNICEF *Country Care Profile: Liberia* 27.

⁴³⁴ UNICEF and Holt International Children's Services *An Assessment of the Inter Country Adoption Laws, Policies and Practices in Liberia* 4.

⁴³⁵ Better Care Network and UNICEF *Country Care Profile: Liberia* 27.

⁴³⁶ Executive Mansion 2015 https://www.emansion.gov.lr/2press.php?news_id=3336&pg=sp.

⁴³⁷ UNICEF and Holt International Children's Services *An Assessment of the Inter Country Adoption Laws, Policies and Practices in Liberia* 4.

⁴³⁸ The Schuster Institute for Investigative Journalism 2011 <https://www.brandeis.edu/investigate/adoption/liberia.html>.

⁴³⁹ Better Care Network and UNICEF *Country Care Profile: Liberia* 27.

⁴⁴⁰ Better Care Network and UNICEF *Country Care Profile: Liberia* 26.

Children's Law of 2009 was developed to address the irregularities that had accompanied inter-country adoptions in the country.⁴⁴¹

Secondly, the current position of Liberia was examined and the innovations that the country had to introduce in order to protect its children were discussed. Both the *UNCRC* and the *ACRWC* were utilised as guiding instruments in the development of the new Children's Law of 2011.⁴⁴²

The National Plan of Action for Children and the Result-Focussed Transition Framework were established by the Liberian government in order to promote compliance with the international law protecting children's rights, amongst other things.⁴⁴³ The Child Protection Network was established and started a discussion on developing a national emergency child protection plan in response to the emergency situation.⁴⁴⁴ This plan would prevent the separation of members of a family, and where the child had already been separated, effective family tracing and reintegration would take place.⁴⁴⁵ Safe interim care arrangements for separated and unaccompanied children would be made while the tracing of their families was underway.⁴⁴⁶ Then and in accordance with the relevant international provisions, the government of Liberia developed and implemented a new SOP and Accreditation Guidelines in 2015 to assure that both domestic and inter-country adoptions could be utilised with strong safeguards in place⁴⁴⁷ to ensure that what had happened in the years after the war would not happen again.

The suspension of inter-country adoption was lifted⁴⁴⁸ and inter-country adoptions could proceed. Hence, the new legislation and SOP for adoptions had to be strictly adhered to. Furthermore, the Domestic Relations law had been amended by government and included the process of inter-country adoption in detail⁴⁴⁹ by

⁴⁴¹ Better Care Network and UNICEF *Country Care Profile: Liberia* 26.

⁴⁴² UNICEF 2012 https://www.unicef.org/media/media_61579.html.

⁴⁴³ UNICEF and Holt International Children's Services *An Assessment of the Inter Country Adoption Laws, Policies and Practices in Liberia* 2.

⁴⁴⁴ Better Care Network and UNICEF *Country Care Profile: Liberia* 27.

⁴⁴⁵ Better Care Network and UNICEF *Country Care Profile: Liberia* 27.

⁴⁴⁶ Better Care Network and UNICEF *Country Care Profile: Liberia* 27.

⁴⁴⁷ Executive Mansion 2015 https://www.emansion.gov.lr/2press.php?news_id=3336&pg=sp.

⁴⁴⁸ Executive Mansion 2015 https://www.emansion.gov.lr/2press.php?news_id=3336&pg=sp.

⁴⁴⁹ Executive Mansion 2015 https://www.emansion.gov.lr/2press.php?news_id=3336&pg=sp.

promulgating the *Domestic and Inter-Country Adoption Regulations of Liberia*, also known as the amended *Adoption Act* of Liberia.⁴⁵⁰

Special protection is afforded to separated and unaccompanied children, in accordance with the POS for protecting children after an emergency situation has occurred. The amended *Adoption Act* further suspends all adoption of separated and unaccompanied children for a period of 12 months,⁴⁵¹ in order to ensure that all reunification attempts with family members has failed before the child is considered "adoptable" in accordance with paragraph 5 of the amended *Adoption Act*.⁴⁵²

Lastly, a brief comparison was made between South Africa and the statutory framework in Liberia with regard to the inter-country adoption of separated and unaccompanied children in terms of the legislative changes made after the war. It was established that Liberia now had an unambiguous, proactive approach to dealing with unaccompanied and separated children in an emergency situation. In order to respect the paramountcy of the BIC principle, a definite 12-month suspension of the adoption of these unaccompanied and separated children was enforced. During this time, in-depth family tracing and reunification should be the first priority to ensure that the child was in fact orphaned because of the emergency situation in the country, and that no living relative could be identified.⁴⁵³ The suspension ensures that the child is lawfully entered into the institutional care system and prohibits fraudulent adoption practices through the application of the amended *Adoption Act*.

As to the similarities between the two countries, both South Africa and Liberia are signatory states to the *UNCRC* and the *ACRWC* and have incorporated the international instruments into their national legislation accordingly. Both countries are in agreement with the importance of the BIC principle and the subsidiarity principle with regard to inter-country adoption. Finally, both countries are in agreement with the regulatory position of the central authority in the country with regard to inter-country adoptions

⁴⁵⁰ The amended *Adoption Act*.

⁴⁵¹ The amended *Adoption Act* para 5.

⁴⁵² The amended *Adoption Act* para 5.

⁴⁵³ The amended *Adoption Act* para 5.7.

and adhere to the *Hague Convention's* provisions with regard to the role and responsibilities of the central authority in the country.

With regard to the differences between the two countries, which have already been discussed at length, the first is that the *Hague Convention* has been ratified by South Africa but not yet by Liberia, although the provisions of the *Hague Convention* have been incorporated into the amended Adoption Act of Liberia and were used as guiding instruments in the writing of the act. This confirms that even though it is not a signatory state to the *Hague Convention*, Liberia understands the importance of the convention and has shown respect for it through incorporating its provisions in national law.

The second difference is the legislative provisions for children in vulnerable/emergency situations, that are explicitly provided for in Liberian legislation and not in South African legislation. South Africa has no provisions for the care and reunification of separated and unaccompanied children in emergency situations.

The third difference lies in the fact that South Africa does not have a SOP to protect children in emergency situations, whereas Liberia does. Neither of the disaster management *Acts* in South Africa provides for dealing with children's rights, or more specifically, separated or unaccompanied children in an emergency situation or a post-disaster setting. A clear, unfilled *lacuna* is created with regard to the safeguards and obligations as a country when it comes to children's rights in post-disaster/emergency situations and how inter-country adoption should be conducted in such a situation.

It is the main concern of the writer that should a similar situation present itself in South Africa, there will be no guidance as to how vulnerable children should be dealt with and how their rights should be protected. South Africa is not adequately prepared to ensure the protection of unaccompanied or separated children in an emergency situation, either through natural disaster or civil war. At this point in time, it is clear that South Africa has no emergency preparedness plan for the protection of separated and unaccompanied children in an emergency situation. The fact that the disaster management *Acts* that will be applicable in an emergency situation do not clearly make

provision for the protection of children in a desperate situation makes the system ambiguous and weak. The current position focusses on the rescue of these vulnerable children rather than on preventing them from being placed in vulnerable situations through a lack of legislative preparedness. It could therefore be said that South Africa is in the same position as Liberia was in before the civil war and, regrettably, because of this legislative *lacuna*, a lot of vulnerable Liberian children were exploited in the post-disaster/emergency setting.

The long-lasting civil war had a devastating effect on Liberia that left the country in a state of emergency long after the actual war ended. The lack of an adequate legal framework to protect the vulnerable separated and unaccompanied children of the country led to a surge in the mass exploitation of the children in the country. The suspension of inter-country adoption arose from a desperate need to put a stop to the exploitation and reconsider the child-care legislation of the country.

Though the effect of the civil war was atrocious, this led to the recognition of the importance of being prepared for such an emergency situation through an already existing "anticipatory" legal framework which could protect these already vulnerable children from illicit activities through inter-country adoption. Family tracing and the reintegration of separated and unaccompanied children are now a priority in the process of protecting children who previously would just have got lost in the system of institutional care and been considered "adoptable" when in reality they were only separated or displaced. This Liberian experience could be used by South Africa as an example of understanding the importance of having a legal framework and emergency preparedness plans in place in order to prevent the same from happening in South Africa, should an emergency situation arise. South Africa could make use of the Liberian POS and provisions in the amended *Adoption Act* for separated and unaccompanied children to change the legislative provisions of South Africa in this regard and change our attitude in this matter from reactive to proactive in protecting the children of South Africa.

6 Conclusion and recommendations

The purpose of this mini-dissertation was to critically analyse the suspension of inter-country adoption of children orphaned as a result of a natural disaster in South Africa. In addressing this, a brief comparison was made to the recent suspension of inter-country adoption by the government of Liberia. The comparison with Liberia to South Africa is relevant as both countries are of the same continent – Africa. African children are exposed to severe violence and insecurities from a very young age, far beyond that of the rest of the world. Therefore, the writer specifically chose Liberia for this reason, in keeping the study regional, and is of the opinion that the African child has more stringent needs in protecting and safeguarding their rights. More than any other continent in the world. The suspension in Liberia was based on the need to safeguard the rights of separated and unaccompanied children that were greatly being exploited, in a post disaster/emergency situation. In this brief comparison the current position of South Africa with regards to this matter was uncovered. Emphasis was placed on the current position of the government of Liberia, after recovering from an emergency situation. During this comparison, a possible *lacuna* in South African legislation was uncovered. The comparison can be utilized in resolve the possible *lacuna* in South African legislation and equip South Africa to be proactive to this situation should the same post-disaster/emergency circumstances were to present itself in South Africa.

Firstly, inter-country adoption was discussed at length making special reference to the international legal framework that is applicable in governing the practice of inter-country adoption on an international level. The three main international instruments that were discussed for this purpose are the *UNCRC*, the *ACRWC* and the *Hague Convention*. This discussion was focussed on the two key governing principles in the process of inter-country adoption which is the BIC principle and the accompanying subsidiarity principle. These principles are enshrined within these instruments in order to protect vulnerable children, and therefore the importance thereof should be noted. The writer came to the conclusion that the consideration of these two principles are mandatory to ensure the protection of children through inter-country adoption.

Together with the above mentioned, brief mention was made of the prerequisites of state parties to the international instruments. Fundamental to this is establishing a governing central authority to ensure the safekeeping of children's rights throughout the process of inter-country adoption within each state party. The central authority ensures the execution of the international duties imposed upon a state party. In regulating inter-country adoption, it was established that these three instruments should be implemented in working together with one another when applied to the African continent; where the *UNCRC* and the *ACRWC* fall short in provisions of inter-country adoption, the *Hague Convention* can be used as a supplement. The central authorities of contracting states should also ensure cooperation amongst one another and provide each other with information that would promote the protection of children's rights in inter-country adoption and alleviate illicit practices against children during the process of inter-country adoption. It is the opinion of the writer that these international provisions, if implemented in working together with one another, are sufficient in protecting and safeguarding vulnerable children from illicit activities through inter-country adoption – is sound and well provided for. Having understood the process of inter-country adoption on an international level, it was possible to evaluate how it is applied nationally in South Africa.

Secondly, the history of inter-country adoption in South Africa was discussed at length. It was established that adoption and specifically inter-country adoption is currently regulated by the *Constitution* and the *Children's Act*. Chapter 16 of the *Children's Act* incorporates the provisions of the *Hague Convention* in regulating inter-country adoptions in accordance with the international standard. The provisions for regulating the whole process is all-encompassing and sound as it is. It is absolute in providing for the incorporation of the BIC principle in inter-country adoptions while considering the subsidiarity principle of equal importance throughout the process. The importance and governing role of the central authority, imposed by international instruments, was considered. The conclusion was made that there is a well-established regulatory process in providing for the process of inter-country adoption to take place in South Africa in a manner that is safe and well-regulated. Furthermore, the writer came to the conclusion that if the international and national legislative provisions for safe and

ethical inter-country adoption are well provided for by a country, ultimately that the effectiveness of the inter-country adoption system of a country will be dependent on the implementation and regulating thereof by the central authority of a country. This was evaluated in South Africa and considered to be accomplished.

Notwithstanding, one major concern raised by the writer was that no mention is made for the suspension of inter-country adoption in South Africa. Internationally, the suspension of inter-country adoption of separated or unaccompanied children is used as a means of protecting vulnerable children for illicit activities through inter-country adoption in crisis situations. Therefore, the suspension of inter-country adoption is often appealed to for the safekeeping of children in vulnerable situations. Inter-country adoptions of child victims of socially disruptive emergency situations, either by natural disaster or civil war, does not promote the protection of the best interests of the child. Hence the importance of discovering, from the study, that there are no such provisions provided for in South African legislation should the same situation arise in South Africa.

General Comment No. 6 was referred to as an example of the promoting and protecting of the rights of the children in such emergency situations.⁴⁵⁴ As argued, the problem with the recommendations made by the *General Comment No 6* is that the circumstances after a natural disaster or emergency situation, like civil war, is usually so atrocious that there is a lack of information and a lack of resources to acquire information about the unaccompanied or separated children, and that there are no checks and balances in place to be taken into account before these children are seen as real "orphans".⁴⁵⁵ Similar situations in history has alluded that the lack of information leave these children vulnerable to being wrongfully considered as orphans and therefore vulnerable to child abduction, child abuse, exploitation and other forms of violence through inter-country adoption. And therefore, the need for additional regulations are essential to regulate the situation in order to be in the long term BIC for providing care for the child reaching beyond the "quick fix" of having them taken

⁴⁵⁴ *General Comment No 6.*

⁴⁵⁵ Mezmur 2009 *IJLPF* 163.

care of through inter-country adoption, while the process is at a very vulnerable and dangerous state.

This led to the discussion on establishing what a disaster entails in South Africa. It is important to understand, as it was established, that a disaster can be caused either through natural occurrences or through an occurrence caused by the actions of humans, leaving the social setting of a country highly disrupted. Examples of a disaster include the occurrence of a natural disaster, armed conflict – like civil war or any other similar catastrophe that could lead to an emergency situation. The disaster can be a sudden or progressive occurrence, but both are classified as a disaster by the devastating consequences that the country is left with in the post-disaster/emergency situation. Apart from the devastating fact that many lives are lost in such an occurrence, the effects thereof are long lasting. Many people are separated and unaccompanied from their families and homes. Additionally, with the lack of infrastructure and government resources in this post-disaster/emergency setting – family tracing and reunification is almost impossible. Therefore, separated and unaccompanied children are usually dealt with by taking them to the orphanages where they are cared for as orphans, when in reality they are not. They are simply considered to be orphans because of the lack of information on the child and family tracing that is not accessible because of the post-disaster/emergency situation.

The legal framework for disaster management in South Africa is provided for in the *DMA* and the *State of Emergency Act*. The *Children's Act* does not provide for the protection of separated or unaccompanied children, how they should be dealt with as well as inter-country adoption of children in post-disaster/emergency situation. Therefore, the situation will be regulated by the above mentioned disaster management *Act's*. Although disaster management in South Africa seems all-encompassing by the provision of these two *Act's*, one again - children's rights of separated and unaccompanied children are not specifically provided for in this situation.

A clear unfilled *lacuna* is created with regards to the safeguards and obligations in South Africa when it comes to children's right in post-disaster/emergency situations and how inter-country adoption should be conducted in such circumstances. If a similar situation were to present itself, there will be no reference as to how these vulnerable children should be dealt with and how their rights should be protected. Therefore, the *State of Emergency Act* will enter into force authorising the Minister to make regulations for dealing with children's rights in such post-disaster/emergency circumstances. The writer is of the opinion that there will be no guarantee that these regulations made by the Minister will be able to fulfil the constitutional rights of every child, namely, in accordance with the best interests of the child. The BIC will have to be determined with the limited resources available to a country in a post-disaster/emergency setting, and the effectiveness thereof is unforeseeable. Therefore, the recommendation was made that pre-existing legislation on the matter can create the necessary framework that can be used as guidelines to protect the rights of separated and unaccompanied children for such a situation. South Africa currently does not have such provisions within its legislation - leaving an unfilled *lacuna* in its legislation.

The importance of pre-existing legislation for an emergency situation was proven to be true by the government of Liberia after direct links of illicit/fraudulent activities were discovered through inter-country adoptions after the civil war in the country. Even though civil war is caused by human activities, the devastating effect thereof on the children were the same as to an emergency situation caused by a natural disaster. The post-disaster/emergency situation initially leads to children being displaced and separated from their families, leaving them extremely vulnerable. The children that is a victim of the civil war endures the same disruption within the community by the loss of lives, loss of resources and infrastructure in order to recover from the damage suffered, leaving the country similarly in a devastating post-disaster/emergency situation – the that would be endured during a natural disaster. Therefore, the study of the effects of the emergency situation after the civil war is relevant to the suspension of inter-country adoption as a result of a natural disaster because the

consequences and harm suffered by the separated and unaccompanied African children, in both these situations, are the same.

At the time of the civil war there was no national, government-led legislation available for the protection of children and children's rights in the form of emergency preparedness or a response plan in place in the case of an emergency occurring, this included either by way of a natural disaster or civil war.⁴⁵⁶ This *lacuna* was recognised and used as a means of exploiting separated and unaccompanied children directly from orphanages.⁴⁵⁷ Three years after the civil war serious reports were announced of a large amount of exploitation that had been occurring in that time. The suspension on inter-country adoptions was implemented as an intervention to protect separated and unaccompanied children from fraudulent inter-country adoption practices.⁴⁵⁸

While the suspension was in place, the legal framework governing children's rights was revised by the government and the new *Children's Law* of 2009 was developed that address the irregularities accompanied by inter-country adoptions within the country.⁴⁵⁹ An emergency response plan was developed to prevent family separation, and where the child had already been separated, effective family tracing and reintegration was established.⁴⁶⁰ As well as safe interim care arrangements for these separated and unaccompanied children while the tracing of their family were underway.⁴⁶¹

Furthermore, a new SOP and Accreditation Guidelines of 2015 assure that both domestic and inter-country adoptions be utilized with strong safeguarding measurements,⁴⁶² ensuring that what happened in the years after the civil war would not happen again. Further safeguards are provided for in the amended *Adoption Act* that suspends all adoption of separated and unaccompanied children for a period of

⁴⁵⁶ Better Care Network and UNICEF *Country Care Profile: Liberia* 27.

⁴⁵⁷ The Schuster Institute for Investigative Journalism 2011 <https://www.brandeis.edu/investigate/adoption/liberia.html>.

⁴⁵⁸ Better Care Network and UNICEF *Country Care Profile: Liberia* 27.

⁴⁵⁹ Better Care Network and UNICEF *Country Care Profile: Liberia* 26.

⁴⁶⁰ Better Care Network and UNICEF *Country Care Profile: Liberia* 27.

⁴⁶¹ Better Care Network and UNICEF *Country Care Profile: Liberia* 27.

⁴⁶² Executive Mansion 2015 https://www.emansion.gov.lr/2press.php?news_id=3336&pg=sp.

12 months after any emergency situation,⁴⁶³ in order to ensure thorough family tracing and all reunification attempts with family members has failed – before being considered "adoptable" in accordance with paragraph 5 of the amended *Adoption Act*.⁴⁶⁴ It was established that Liberia now had an unambiguous proactive approach to dealing with separated and unaccompanied children as a result of an emergency situation and regulating the process of inter-country adoption of such children. This unfortunately only after many vulnerable children were left unprotected for a period of three years.

Taking the situation that was endured by the government of Liberia into consideration, and evaluating their desperately needed response to the emergency situation, a clear view was established of the situation that South Africa would be in, should an emergency situation, either through natural disaster or civil war, arise in South Africa. South Africa does not have the supplementary regulation for this situation. Should the disaster management legislation available in South Africa be the only provisions for this situation – serious re-evaluation of the provisions on inter-country adoption in these circumstances should be considered.

In the comparison between the two countries their similarities and differences, with regards to inter-country adoption, were uncovered. In discussing their differences, it was found that the *Hague Convention* is ratified by South Africa but not yet ratified by Liberia. Yet, Liberia incorporated the provisions of the *Hague Convention* into the amended *Adoption Act* and utilized it as a guiding instrument in the writing of the act with regards to regulating inter-country adoption. Liberia understands the importance of regulating inter-country adoption in a proactive way and therefore incorporates the *Hague Convention's* provisions in an executive manner in their country in order to safeguard the rights of their children in crisis situations. South Africa that has ratified the document, to put it bluntly, simply does not.

⁴⁶³ The amended *Adoption Act* para 5.

⁴⁶⁴ The amended *Adoption Act* para 5.

It can be regarded that South Africa is currently in the direct position where Liberia was before the civil war, and regrettably, because of this legislative *lacuna* – lost a lot of their vulnerable children to exploitation in the post-disaster/emergency setting. At this point in time, it is clear that South Africa has no emergency preparedness plan for the protection of separated and unaccompanied children as a result of a natural disaster or similar emergency situation. It is the opinion of the writer that South Africa is inadequately prepared to ensure the protection of unaccompanied or separated children should an emergency situation arise any time soon, and therefore not fulfilling the international duty of honouring the paramountcy of the BIC principle in providing for the protection of these children. With the lack of provisions for these circumstances, South Africa's current position focuses on the rescue of children, rather than the prevention of them being placed in a vulnerable situation through a lack of legislative preparedness in the first place.

Lastly, though the effect of the civil war in Liberia was atrocious, it confirms the importance of being prepared for such an emergency situation by means of predetermining already existing "anticipating" legal framework in order to protect these already vulnerable children from further illicit activities through inter-country adoption. Family tracing and reintegration of separated and unaccompanied children should be a priority in the process of protecting these children that previously would simply get lost in the system such as institutionalized care. This could result in being considered as "adoptable" when in reality they were simply displaced because of a disaster/emergency situation.

Liberia has successfully implemented family tracing and reintegration regulations for post-disaster/emergency situations. However, the effectiveness of these regulations will ultimately be dependent on the implementation thereof.

The situation endured by Liberia should be used as a learning opportunity by South Africa to understand the importance of a proactive legal framework and emergency preparedness plan for such disaster/emergency situations. As already alluded, it is accordingly the opinion of the writer that these predetermining already existing

"anticipating" legal framework can be utilized as a precautionary measure to prevent these already vulnerable children from further illicit/fraudulent activities because of an existing *lacuna* in South African legislation.

South Africa has an effective child care system with the provisions made by the *Constitution* and the *Children's Act* in protecting children's rights. It is all-encompassing and sufficient in governing all processes with regards to children's rights. Furthermore, inter-country adoption is governed in accordance with the international standards and therefore is regarded as being sound. Yet this would not be the situation for South Africa should a disaster/emergency situation arise.

Therefore, a *lacuna* in South African legislation is considered by the writer in the provision for regulating the process of inter-country adoption in post-disaster/emergency situation when it has occurred. South Africa currently has a reactive approach to the situation, where there are no regulations to manage inter-country adoption and the suspension thereof in a post-disaster/emergency situation, rather than being proactive in protecting these already vulnerable children of South Africa.

It is not the opinion of the writer that South Africa should incorporate the Liberian POS and the provisions of the amended *Adoption Act* in protecting separated and unaccompanied children after emergency situations, into South Africa legislation in exactly the same way. South Africa should rather consider the effect that was held by the government of Liberia in not being prepared for such a situation. The hardship that was endured by separated and unaccompanied children being exploited, when in reality, with the correct legal framework in place, where the promotion family tracing and reunification was prioritised, and could have been reunited with their family through an effective process to follow as they do have in place now.

Liberia was forced to undergo changes to being proactive in managing inter-country adoption of separated and unaccompanied children in order to prevent mass exploitation of the children in this vulnerable situation post-disaster/emergency. South

Africa, on the other hand, has the opportunity to be prepared for such a situation, by incorporating the suspension of inter-country adoption of separated or unaccompanied children in post-disaster/emergency situations until sufficient steps are taken to ensure family tracing and reintegration of separated and unaccompanied children are prioritised - as alluded in detail above. This would provide a fixed point of reference, so that if the need arises, the situation would be governed by a predetermining already existing "anticipating" legal framework that can be utilized as a precautionary measure to prevent these already vulnerable children from further illicit/fraudulent activities. These provisions would change the South African position from being reactive in this matter to being proactive in protecting the vulnerable children of South Africa.

In conclusion, it is not the intention of the writer to propose the over regulating of inter-country adoption in South Africa. It is rather proposed that inter-country adoptions be regulated in a manner of over anticipating illicit/fraudulent activities throughout the process of inter-country adoption. Constantly anticipating and thoroughly considering where possible legislative loopholes can emerge that can endanger the children of South Africa. This can be done, as in accordance with the purpose of this study, by investigating and addressing possible unfilled *lacunae* in South African legislation and learning from other countries experiences, such as Liberia, in order to be proactive in protecting vulnerable children. In doing so the BIC will be protected – and be considered the paramount consideration of children deprived of care, either through natural disaster or any other emergency situation, and who are in need of family care through inter-country adoption.

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