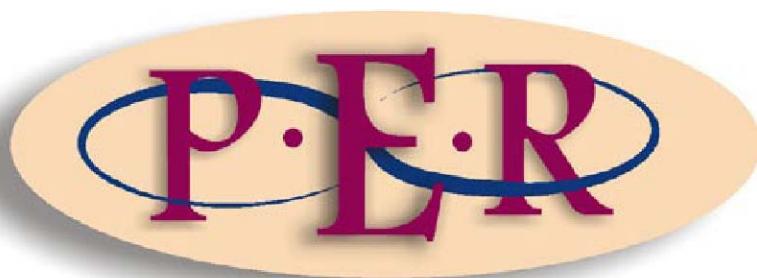


**A VERY LONG ENGAGEMENT: THE CHILDREN'S ACT 38 OF 2005 AND THE 1993  
HAGUE CONVENTION ON THE PROTECTION OF CHILDREN AND COOPERATION IN  
RESPECT OF INTERCOUNTRY ADOPTION**

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## 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

M Couzens\*

### Abstract

This article analyses the intercountry adoption provisions contained in Chapter 16 of the *Children's Act 38 of 2005*, against the standards of the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoptions, 1993. After a brief overview of the two leading South African cases on intercountry adoption, which stress the importance of having this institution statutorily regulated, the author proceeds to analyse the most significant clauses pertaining to intercountry adoption contained in the Act, in order to identify the strengths and weaknesses in this new statutory framework. The author concludes that the Children's Act is a dramatic improvement on the current regime of intercountry adoption and that it has the potential to make this institution work in the best interests of children.

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## 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

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### 1 Introduction

The 1993 Hague Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption (hereafter "the Convention") is the most comprehensive international document regulating intercountry adoptions. Following *Fitzpatrick*<sup>1</sup> and acknowledging the insufficient protection afforded to children involved in intercountry adoptions, in 2003 the South African government ratified the Convention. Various efforts have been made by the government to comply with the standards of the Convention,<sup>2</sup> the most significant being its incorporation in the national law through chapter 16 of the *Children's Act 38 of 2005* (hereafter "the CA"). Unfortunately, chapter 16 of the CA is not yet in force and the higher standards of the Convention are still not operational for South African children. However, the future application is certain and therefore an analysis of its provisions on intercountry adoption, together with its weaknesses and strengths, is useful.

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1 *Fitzpatrick v Minister of Social Welfare and Pensions* 2000 (3) SA 139 (C); *Minister for Welfare and Population Development v Fitzpatrick* 2000 (7) BCLR 713 (CC) (hereafter "the *Fitzpatrick* case").

2 See *De Gree v Webb* (Centre for Child Law, University of Pretoria, *Amicus Curiae*) 2006 (6) SA 51 (W); *De Gree v Webb* (Centre for Child Law, University of Pretoria, *Amicus Curiae*) 2007 (5) SA 184 (SCA) (hereafter referred to as "the *De Gree* case"); *AD v DW* (Department of Social Development Intervening; Centre for Child Law, *Amicus Curiae*) 2008 (3) SA 183 (CC) (hereafter referred to as "the *AD v DW* case").

This article proceeds with a brief review of intercountry adoptions in the current pre-CA context. This brief assessment emphasises the need for an urgent entry into force of the CA in order to provide adequate protection to children involved in intercountry adoptions. The article continues with an analysis of the provisions on intercountry adoptions contained in the CA in the light of the standards of the Convention. It will be shown that the CA and the Convention complement each other and that in some instances the CA improves the standards of the Convention. The article addresses issues such as the purpose and the scope of the CA, the institutional framework for intercountry adoptions in South Africa and the procedure for intercountry adoptions. The article concludes that the CA improves dramatically the quality of the national legal framework pertaining to intercountry adoptions.

Although the CA has provisions pertaining to South Africa as both a sending and a receiving country, this article will focus on the position of South Africa as a sending country, this being the position in which South Africa will find itself most often.

## **2      Brief assessment of intercountry adoptions before the entry into force of the Children's Act**

Following the *Fitzpatrick* decision in 2000, intercountry adoptions have become legal in South Africa. In this case, the Constitutional Court (hereafter "the CC") confirmed a finding of unconstitutionality pertaining to section 18(4)(f) of the *Child Care Act* 74 of 1983 (hereafter "the CCA") which prohibited the adoption of South African children by foreigners. The CC reasoned that an absolute prohibition on adoptions by foreigners was contrary to the best interests of the child because it deprived the court of the flexibility needed when assessing what is in the best interests of each child.<sup>3</sup>

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3    *Fitzpatrick* 2000 (7) BCLR 713 (CC) at 719 par 16, and 721 par 20. For more on this case see Nicholson 2001 JCRDL 496; Louw 2006 *De Jure* 506.

Although it created new alternatives for children in need of care, one worrying aspect of the judgment was the finding of applicability of the CCA to intercountry adoptions in the absence of more specific legislation. The concerns expressed by the Minister of Population and Social Development at the time were dismissed by an optimistic CC, which decided that the CCA provided the framework for an adequate protection of those involved.<sup>4</sup> The Court failed to acknowledge the complexities of the practice and the highly specialised legal provisions and institutional structure necessary for safely engaging in intercountry adoptions.<sup>5</sup>

Although South Africa ratified the Convention in 2003, the formal incorporation of its standards was not forthcoming. From 2000, intercountry adoptions have functioned in a statutory vacuum, which has raised the concern of international human rights bodies.<sup>6</sup> The negative implications of this legislative void were apparent in the recent *AD v DW* case.<sup>7</sup> The case involved an American couple who applied for a guardianship order for Baby R with a view to adopting her in the USA. The choice of forum, the order sought and the views of the CC regarding the position of the Department of Social Development (hereafter "the DSD") expose the weakness of the operation of intercountry adoptions in the absence of a statutory framework.

First, by approaching the High Court the applicants avoided the intercountry adoption procedure as established in *Fitzpatrick*. The guardianship application circumvented the children's court proceedings and implicitly its existing protective functions.<sup>8</sup> Further, the assessment of the situation of the child was

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4 The court decided that there were sufficient provisions to enable a verification of the background of the adopters; to ensure protection against trafficking; and to enable the application of the subsidiarity principle (*Fitzpatrick* 2000 (7) BCLR 713 (CC) at 721 par 23).

5 For a critical view of the case, see Mosikatsana 2004 SALJ 103.

6 The Committee on the Rights of the Child stated that there were "inadequate legislation, policies and institutions to regulate intercountry adoptions" in South Africa (Committee on the Rights of the Child 2000 [www1.umn.edu](http://www1.umn.edu)).

7 N 2.

8 In *Fitzpatrick*, the CC decided that if "appropriately and conscientiously applied by the children's courts" the provisions if the CCA give the necessary protection to children involved in intercountry adoptions (at 724 par 31). As an additional guarantee, the CC

rightly questioned by the Supreme Court of Appeal in the majority decision. Theron AJA indicated that the Roodepoort Child and Family Welfare, with whom the prospective parents had made contact, failed to make an independent assessment of the situation of the child, "aligning" itself with the prospective parents.<sup>9</sup> Critical, also, was the manner in which the subsidiarity principle was complied with.<sup>10</sup> It was only during the CC proceedings that an objective assessment of the possibility of placing the child nationally was brought before the courts, when this should have been done prior to court proceedings.<sup>11</sup>

Secondly, although the DSD took on the position of Interim Central Authority pending the incorporation of the Convention, its powers are very weak in the absence of an enabling statute.<sup>12</sup> Although the DSD issued guidelines for private practitioners and organisations involved in intercountry adoptions, incorporating standards similar to those of the Convention, the binding force of the DSD's pre-CA guidelines was disputed. The CC resolved that the role of the DSD was "limited to exercising an advisory and monitoring role",<sup>13</sup> and therefore its opposition to (or approval of) a particular application was immaterial.<sup>14</sup> It is apparent that the position of the DSD before the entry into force of the CA is weakened by the absence of a statutory mandate enabling it to exercise a meaningful control over intercountry adoptions in South Africa.

Some of the practices revealed above, such as using the guardianship procedure in the absence of sufficient safeguards; the lack of independent

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emphasised the professionalism and the expertise of the children's courts (at 723 par 30). For a discussion of the decision of the Supreme Court of Appeal in *De Gree*, see Sloth-Nielsen and Mezmur 2007 *Law, Democracy & Development* 81.

9 *De Gree* 2007 (5) SA 184 (SCA) par 23.

10 This principle makes intercountry adoption subsidiary to national adoption and arguably other forms of national care. The content and the role of this principle are subject to international dispute.

11 *AD v DW* par 15.

12 The current functioning of intercountry adoptions as well as the involvement of the DSD were revealed by various submissions and affidavits brought before the courts by the amicus curiae. See *De Gree* 2006 (6) SA 51 (W) at 54-56 & 56-59.

13 *AD v DW* par 27.

14 *Ibid.* The DSD approval will become necessary once the CA enters into force, and the Director General of DSD becomes the Central Authority in the Republic (s 257 & 261(5)(f) of the CA).

assessment of the situation of the child; and the feeble implementation of the subsidiarity principle arguably go against the values of the Convention to which South Africa is a party. They show the fragility of a patchwork regulation of intercountry adoptions, which combines outdated legislation and judicial decisions which inherently focus on the situation of each individual child, losing sight of the impact of the decision on children generally. In the context described above, the entry into force of the CA has become a necessity.<sup>15</sup>

### **3 Purpose and the scope of the Children's Act**

The CA responds to the concerns raised by the absence of a regulatory framework for intercountry adoptions by incorporating the Convention.<sup>16</sup> In addition to this, chapter 16 of the CA regulates adoptions to non-Convention countries and contains provisions which clarify the application of the Convention in South Africa. According to section 256(2), the legal regime of intercountry adoption, as established by the Convention, is complemented by "the ordinary law of the Republic".<sup>17</sup> In Convention adoptions,<sup>18</sup> where a conflict exists between the ordinary law and the Convention, the latter prevails.<sup>19</sup>

The CA makes provision for the recognition of certain foreign adoptions; creates the conditions to find "fit and proper parents for an adoptable child"; and, generally, regulates intercountry adoptions.<sup>20</sup> Like the Convention, the CA does not encourage or promote intercountry adoptions; but instead aims to

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15 For more on some critical aspects with regards to intercountry adoptions in the pre-CA context, see Louw (n 3) 503.

16 S 256(1). The Convention is attached as sch 1 to the CA.

17 An interesting effect of s 256(2) is the possibility of engaging in open intercountry adoptions, if the parties enter post-adoption agreements (see s 234).

18 Adoptions entered into by South African residents and residents of another party to the Convention.

19 Human argues that because the Constitution is not an ordinary law, it prevails over the Convention (Human "Inter-country adoption" 16-9).

20 S 254.

regulate them, eliminate abuses through cooperation, and facilitate the mutual recognition of intercountry adoptions between state parties.<sup>21</sup>

Cooperation between sending and receiving countries is an important factor in preventing and combating abuses in intercountry adoptions.<sup>22</sup> The CA contains mechanisms for facilitating this cooperation. The President may enter into agreements with Convention and non-Convention states.<sup>23</sup> These agreements must not be in conflict with the Convention,<sup>24</sup> regardless of whether they are entered into with Convention or non-Convention states. This provision reflects the South African commitment to respect the Convention standards in relation to parties as well as non-parties to the Convention.<sup>25</sup> These agreements are of particular importance in adoptions to non-Convention countries, by providing a system of judicial and administrative cooperation between South Africa and the country involved.<sup>26</sup>

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21 Hague Conference on Private International Law (hereafter "the Hague Conference") 2006 [www.hcch.net](http://www.hcch.net) par 129; Bainham 2003 *CFLQ* 230.

22 Smolin 2005 *Seton Hall LR* 476; Smolin 2006 *Wayne LR* 167; International Social Service/International Reference Centre for the Rights of Children Deprived of their Family (hereafter "the ISS/IRC") 2005a [www.iss-ssi.org](http://www.iss-ssi.org).

23 The agreements become effective upon their approval by the Parliament (s 255(4)).

24 S 255(1)(b) implements art 39(2) of the Convention. It is submitted that the agreements referred to in s 255 are not mandatory. Therefore, according to the CA adoptions can take place to countries which have not entered such agreements with South Africa. However, reg 137(2) and 138(2) of the *Consolidated Draft Regulations Pertaining to Children's Act Including Regulations Pertaining to Bill 19 of 2006* (hereafter "the Draft Regulations") imply that intercountry adoptions from Convention or non-Convention countries by South African residents can take place only if there is an agreement between the sending country and South Africa. Curiously, there is no similar requirement when South African children are adopted abroad. This seems to imply that adoptions by South African residents of children living abroad are not encouraged. The *DSD Second Draft Guidelines for Intercountry Adoptions* (Nov 2006) – guidelines 8.1.1 and 8.2.1 – require however that adoptions of South African children in Convention as well as non-Convention countries take place only in countries which have a working agreement with South Africa. There seems to be inconsistency between the primary and the secondary legislation in this case. Although limiting the number of countries with which South Africa cooperates is not contrary to the Convention (Hague Conference (n 21) 35-36), one can question whether the scope of the primary legislation may be restricted by way of secondary legislation.

25 See, eg, s 262, which provides that intercountry adoptions to non-Convention countries follow a similar procedure as intercountry adoptions in Convention countries, and benefit from the involvement of the Central Authority. In addition, as Human notes, agreements with Convention countries provide the possibility of increasing the minimum standards for adoption, as they are reflected in the Convention (Human (n 19) 16-9).

26 *Ibid* at 16-9.

An additional tool for preventing and combating abuses is the criminalisation of illegal adoptions. Under section 1 of the CA, an adoption "facilitated or secured through illegal means" constitutes child trafficking, and it is punishable by the law. Significantly, adoption agencies whose employees or agents become involved in illegal adoptions are responsible, according to section 284(3), for the acts committed. Also, they may have their accreditations revoked.<sup>27</sup> This is a powerful tool to deter breaches of the CA. In addition, according to section 287, if a court has reasons to believe that the parents or the guardians have contributed to the illegal adoption, a children's court inquiry will be held. Pending this inquiry, parental responsibilities and rights may be suspended and the child placed in temporary care. Illegal adoptions are subject to mandatory reporting; and certain professionals are under a duty to report the cases known to them to a designated social worker.<sup>28</sup>

As far as the scope of the CA is concerned, article 2(2) of the Convention states that its standards apply only to adoptions "which create a permanent parent-child relationship". South Africa has taken a slightly different approach. The CA extends the application of the intercountry adoption standards to guardianship applications with a foreign element, although these applications do not give rise to a permanent child-parent relationship. According to section 25 of the CA

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

The purpose of this section is to stop the use of guardianship as a step towards intercountry adoptions,<sup>29</sup> and to have all intercountry adoptions dealt with by

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27 S 284(4); see also reg 128(2) of the Draft Regulations.

28 S 288. The obligation accrues to immigration officials, police officials, social workers, social service professionals, medical practitioners or registered nurses. Lawyers have not been included in this list; presumably because of the near-sanctity with which legal privilege is regarded in South African law. It might have been preferable, however, to have included lawyers; with the rider that their duty be subject to the reservation of legal privilege where this is invoked.

29 The usefulness of this section is illustrated by the recent cases *De Gree/AD v DW*.

the children's courts.<sup>30</sup> It also alleviates the negative consequence of the lack of involvement of a public authority in guardianship procedures.<sup>31</sup>

Although the intention of this provision is to enhance the protection of children removed from the Republic by non-South African guardians, it raises a few problems. It equates all applications for guardianship by foreigners with intercountry adoptions, regardless of the applicants' residence. If a foreigner resides in South Africa, the intercountry element as defined in article 2 of the Convention is lacking. Also, if the foreign applicant resides in South Africa, only one Central Authority will be involved. In such situations, it is not certain how the procedure would unfold. It is not clear what consent is required of the biological parents: consent to adoption or consent to guardianship.<sup>32</sup> It is not certain how the subsidiary principle will apply in the guardianship procedure; or whether or not the child should be registered in the Register of Adoptable Children and Prospective Adoptive Parents<sup>33</sup> (hereafter "the RACAP") prior to the application for guardianship. All of these are matters to be decided on by the courts.

Further, on the scope of the CA, it is submitted that it significantly extends the reach of the Convention. The CA creates similar standards for adoptions to Convention as well as non-Convention countries<sup>34</sup> although, according to article 2, the Convention does not apply except when the adoptable child and the prospective parents reside in state parties.<sup>35</sup> Many benefits derive from the South African approach. For example, the Central Authority will be involved in adoptions to/from Convention as well as non-Convention countries.<sup>36</sup> This

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30 Dr A Skelton (for *amicus curiae*) in *De Gree* 2006 (6) SA 51 (W) at 63C.

31 Sloth-Nielsen and Mezmur (n 8) 89.

32 Normally, the consent should be consent to guardianship. However, in this case the safeguards provided by s 25 are insufficient insofar as the child can be taken abroad for adoption without the biological parent agreeing to adoption. A concern regarding this situation was raised by the SCA in *De Gree* 2007 (5) SA 184 (SCA) par 13.

33 The Register is kept by the Director-General of the Department of Social Development and it is a national record of adoptable children and "fit and proper parents" (s 232(1)).

34 This was recommended by the Hague bodies. See Hague Conference 2005a [www.hcch.net](http://www.hcch.net) at par 9.3. This was reiterated in Hague Conference 2008 [www.hcch.net](http://www.hcch.net) at par 619-622.

35 Art 2(1).

36 See part 5.1below.

enables the Central Authority to exercise control over the legality and financial aspects in both Convention and non-Convention adoptions. Intercountry adoption services can be provided only by the Central Authority and accredited agencies in both Convention and non-Convention adoptions.<sup>37</sup> By taking this approach, the CA improves the standards of the Convention by offering similar protection to children involved in Convention as well as non-Convention adoptions.

#### **4 Requirements for intercountry adoptions**

The CA regulates both the situations in which South Africa is a sending and a receiving state.<sup>38</sup> However, given the high number of children in need of care it is more likely that South Africa will be involved in intercountry adoption from the position of a sending country.<sup>39</sup> This forms the focus of the following paragraphs.

When acting as a sending country, the relevant national bodies have to establish, as required by article 4 of the Convention, the adoptability of the child; to ensure the application of the subsidiarity principle; to ensure that the relevant consents are given; and to ensure the participation of the child in the process of adoption. These criteria are going to be assessed against national standards, as discussed below.

The adoptability of the child will be established according to the CA. The same definition of adoptability applies for national as well as international purposes. Therefore, a child adoptable internationally is a child whose situation meets at least one of the criteria set in section 230(3):

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37 See part 5.2 below.

38 See s 264 and 265.

39 The participation in intercountry adoptions as a receiving country cannot be excluded, especially when parents wish to adopt white children. See *Carte Blanche* 2006 [www.mnet.co.za](http://www.mnet.co.za).

(a) the child is an orphan and has no guardian or caregiver who is willing to adopt the child; (b) the whereabouts of the child's parent or guardian cannot be established; (c) the child has been abandoned; (d) the child's parent or guardian has abused or deliberately neglected the child, or has allowed the child to be abused or deliberately neglected; or (e) the child is in need of a permanent alternative placement.

An adoptable child is registered in the RACAP by the Director-General of the DSD<sup>40</sup> (the Central Authority in the Republic) at the request of an adoption social worker, provincial head of social development, child protection organisation accredited to provide national adoption services, and organisation accredited to provide intercountry adoption services.<sup>41</sup>

The CA creates the mechanisms for the implementation of the subsidiarity principle enshrined in international law,<sup>42</sup> and strives to ensure that national adoptions are prioritised over intercountry placements.<sup>43</sup> Therefore, additional conditions need to be met for a child to be placed internationally. Before being made available for intercountry adoptions the name of the child should have been placed in the RACAP for at least 60 days and "no fit and proper adoptive parent for the child"<sup>44</sup> should be available in the Republic. By providing that the registration in the RACAP is managed by the Central Authority, as indicated above, the CA creates the conditions for the Central Authority to verify whether adequate measures have been taken to support the family of origin, to re-integrate the child, to place the child within the extended families or find alternative national placements. All of these confer control to the Central Authority over the practical application of the subsidiarity principle in individual adoption cases.

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40 Reg 111(7) of Draft Regulations.

41 Reg 111(5) of Draft Regulations read with Form 64.

42 Art 21(b) of the UN Convention on the Rights of the Child (ratified by South Africa in 1995); art 24(b) of the African Charter on the Rights and Welfare of the Child (ratified by South Africa in 2000); and art 4(b) of the Convention (ratified by South Africa in 2003).

43 This principle is explored in greater detail in Couzens *Implementing the Hague Intercountry Adoption Convention*.

44 S 261(5)(g). The RACAP is a register kept by the Director-General of the DSD, which contains information about adoptable children and fit and proper parents (declared as such by the court, and resident in the Republic). See s 232(1).

A second aspect required by the Convention is that the consent to adoption be informed and obtained without coercion, payment or compensation of any kind.<sup>45</sup> The consents to intercountry adoptions must be obtained from the parents of the child, or any other person holding the guardianship of the child.<sup>46</sup> Section 233(1) requires that a child give consent if ten years or older. The consent of a child below the age of ten is also necessary if the child is of an age, and has the maturity and stage of development which enable him or her to understand the consequences of the consent. This ensures the participation of the child in the process of adoption, as required by article 4(2) and (3) of the Convention.

According to section 233(6), the consent must be given in the presence of a presiding officer of the children's court. Section 233(8) provides that the consents (including that of the child) can be withdrawn within 60 days. Prior to giving their consent, the child and the biological parents undergo compulsory counselling, according to section 233(4). This improves the requirements of the Convention, which in article 4(c)(1) requires counselling only if necessary.

In order to prevent the inducement of consent by the offering of financial incentives, the Convention prohibits the contact between prospective adoptive parents and the biological parents or other carers until the necessary consent has been obtained.<sup>47</sup> Although no specific provision in chapter 16 of the CA

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45 Art 4(c).

46 S 233(1)(a) and (b). Although not expressly requested by the CA, as an effect of art 4(c)(4) of the Convention, the consent of the biological mother, when this is required, can be obtained only after the birth of the child. This is supposed to protect the mother from making decisions under conditions of stress and anxiety (Nicholson "The Hague Convention" 249).

47 Art 29. However, this provision specifies that the contact with the child's family is not prohibited in the case of in-family adoptions, or when the contact is made in conditions established by the competent authorities of the sending state. This is the result of a US amendment which argued that the contact with the child is not susceptible to abuse, and it is beneficial for matching. See Parra-Aranguren 1994 [www.hcch.net](http://www.hcch.net) par 499. Art 29 does not prohibit the pre-adoption contact between the biological parents and intermediaries, although this has often been associated with abuses in intercountry adoptions (Masson 2001 *Journal of International Affairs* 156).

addresses this, the incorporation of the Convention makes this provision directly applicable in South Africa.<sup>48</sup>

The CA creates the conditions for full compliance with the principle of subsidiarity. The CA creates services for supporting families in need; services for maintaining children within their families; or for re-uniting children with families of origin.<sup>49</sup> The CA recognises the use of foster care as a long-term family-type alternative as a response to the social realities of South Africa where extended families assume the care of children left without parental care due to the illness or death of their parents.<sup>50</sup> The CA also encourages national adoption. The financial means of the prospective adopters will not be a criterion to grant adoption, and national adopters may apply for a means-test adoption grant.<sup>51</sup> Further, the CA clearly states that a child can be placed internationally only if a fit and proper adoptive parent is not available nationally.<sup>52</sup> By centralising information on adoptable children and prospective adopters from around the country, the RACAP will tackle the current difficulties in cross-province adoptions, which occur because of the lack of information exchange between provinces. All of these measures contribute to prioritising the care within the family of origin, and care within families nationally.

It is apparent from the above that heavy duties are imposed by the Convention on South Africa, and acquiesced in by the Republic through ratification. The imbalanced distribution of obligations between the sending and the receiving

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48 See also Human (n 19) 16-27.

49 See, eg, ch 8 ("Prevention and Early Intervention") of the CA as amended by the *Children's Amendment Act 41 of 2007* (hereafter "the CAA"). See also s 186 of the CA as amended referring to the use of foster care as a long-term solution; s 231(7) and (8) referring to the right of the biological father, foster care or family members to be considered as prospective adoptive parents.

50 See generally s 186 and 189. For a justification of this approach, see SALRC 2002 [www.doj.gov.za](http://www.doj.gov.za) 715.

51 S 231(4) reads "[a] person may not be disqualified from adopting a child by virtue of his or her financial status". S 231(5) reads "[a]ny person who adopts a child may apply for means-tested social assistance where applicable".

52 S 261(5)(g). The availability of national parents is verified through the RACAP, where the name of the child has to be entered for at least 60 days before the child can be placed internationally.

states parties is one of the criticisms of the Convention.<sup>53</sup> However, this seems to be unavoidable since the state of origin is primarily responsible for the best interests of the children under its jurisdiction. Deciding on some of the essential elements of the adoption confers a certain degree of control on a sending country, which might otherwise feel disempowered in the process.<sup>54</sup> This is useful because it may in some cases alleviate its potential suspicions toward intercountry adoptions. Cooperation between sending and receiving states can assist in easing the burden on a sending state.<sup>55</sup>

## 5 Central Authority and accredited bodies

The implementation of the Convention requires a dedicated institutional framework. The Convention proposes a framework consisting of Central Authorities, accredited bodies and approved bodies or persons.<sup>56</sup> State parties have discretion in designing the structure of their intercountry adoption services, the only compulsory feature being the designation of a Central Authority. The paragraphs below present the institutions to be involved in intercountry adoptions according to the CA.

### 5.1 Central Authority

According to the Convention, the Central Authority ensures the exchange of information on intercountry adoptions in general as well as in specific adoptions.<sup>57</sup> It facilitates cooperation between states as well as the cooperation of competent national authorities involved in the process of adoption, with a

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53 Sending countries must draft legislation compliant with the Convention and allocate funds necessary for its implementation, despite their limited resources. They decide on the best interests of the child, match the child with a potential adoptive family, implement the subsidiarity principle, and protect the rights of the child and his/her biological family (Chadwick 1999 *Journal of International Legal Studies* 139-140; Kimball 2005 *Denver JILP* 581-582).

54 For a similar point of view see Albrecht 2005 [lawspace.law.uct.ac.za](http://lawspace.law.uct.ac.za) 45.

55 See, eg, art 7, 9 (e), 17, 18, 20 of the Convention. See also Hague Conference 2001 [www.hcch.net](http://www.hcch.net) par 24 on the obligation of receiving states to support the implementation of the subsidiarity principle by sending states.

56 Art 6, 11 and 22 of the Convention.

57 Art 7(2) (a) and 9(e). See also Nicholson (n 46) 250.

view to eliminating obstacles to the implementation of the Convention.<sup>58</sup> Central Authorities are required to take the necessary measures to prevent practices contrary to the Convention.<sup>59</sup> They are also mandated to take the appropriate measures to prevent improper financial or other gain by any person in connection with intercountry adoptions.<sup>60</sup> Central Authorities can exercise their functions directly or through public authorities<sup>61</sup> or accredited bodies.<sup>62</sup> Some of the functions of the Central Authorities cannot be delegated to any of the above bodies,<sup>63</sup> while other functions can be fulfilled by non-accredited bodies or persons.<sup>64</sup>

The institutional framework of the CA mirrors the Convention with a few differences, as discussed below. According to section 257(1)(a), the Director-General of the DSD is the Central Authority in the Republic. By designating an existing institution as Central Authority and avoiding the creation of new institutions South Africa has adopted a cost-effective solution.<sup>65</sup> The functions of the Central Authority are to be exercised after consultation with the Director-

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58 Art 7(1); Katz 1995 *Emory Int'l LR* 314.

59 Art 8. Other obligations of the Central Authorities include collecting, preserving and exchanging information regarding the child and the prospective parents; facilitating the adoption proceedings; promoting the development of adoption counselling as well as post-adoption services; exchanging evaluation reports about the experiences with intercountry adoptions in their respective states; and responding to justified requests regarding specific adoptions (art 9).

60 Art 8. Although the Convention prohibits "improper financial gain" it recognises as legitimate the payment of costs, expenses, and reasonable professional fees (art 32(2)). As the Convention does not define "improper financial gain" it remains at the discretion of the states to do so (Parra-Aranguren (n 47) par 219-220).

61 The term "public authorities" refers to judicial or administrative authorities, according to the law of each state (*ibid* par 216).

62 Art 8 refers to obligations which can be fulfilled by Central Authorities directly or through public authorities. Art 9 refers to obligations which can be fulfilled directly by the Central Authority or through public authorities or accredited bodies.

63 Art 7(2) requires that the obligations specified in this article, which refer mainly to international cooperation, be fulfilled by the Central Authorities directly.

64 Art 22(2). See Parra-Aranguren (n 47) par 196. For designating the bodies or persons referred to in art 22(2) various terms have been used interchangeably: non-accredited bodies or persons (*ibid* par 378- 385; Hague Conference (n 21) par 49-52) or authorised bodies and persons (Hague Conference 2001 (n 55) par 14-22 ). In this work, the terms will be used in parallel.

65 Interestingly, the use of "designate" instead of "create" advocates a cost-effective solution by indicating that state parties are not required to create a new institution. Instead they can assign the duties of a Central Authority to pre-existing institutions with relevant expertise and jurisdiction (see Parra-Aranguren (n 47) par 195).

General: Justice and Constitutional Development.<sup>66</sup> The CA creates a decentralised system of services which allows the exercise of some of the Central Authority functions by other organs of the state or accredited bodies. This ensures that the Central Authority is not overburdened and allows other organs of state as well as accredited bodies to use their expertise. According to section 250(1)(c) and (d), the intercountry adoption services in South Africa can be provided only by the Central Authority and the accredited child protection organisations. Any of the functions of the Central Authority can be delegated to an official in the DSD, according to section 258(1).

The CA equips the Central Authority with substantial powers. This is a positive development, a strong Central Authority being necessary for an adequate functioning of intercountry adoptions. In addition to the functions assigned by the Convention, the CA gives the Central Authority other significant powers, as discussed below.

The Central Authority has a certain degree of control in individual cases. As said above, the child's name is entered in the RACAP by the Director-General of the DSD.<sup>67</sup> This gives the Central Authority the possibility of verifying whether or not social services have attempted to maintain the child within his/her family or community of origin, and therefore of verifying compliance with the principle of subsidiarity. Further, if the Central Authority considers that the subsidiarity principle was not complied with it can refuse its consent to adoption.<sup>68</sup> The Central Authority can withdraw its consent to adoption within a period of 140 days after consenting to such, if this is in the best interests of the child.<sup>69</sup>

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66 S 257(2). Human (n 19) 16-10 explains this requirement through the multidisciplinary nature of intercountry adoption, which involves both the social work profession and the justice system.

67 S 232(1) read with reg 111(7) of the Draft Regulations.

68 S 261(5)(f). At this stage, however, it is not certain whether the Central Authority will exercise this function directly, or will delegate it according to s 258(2) read with s 261(4). Ideally, this function should be exercised directly by the Central Authority or if delegated, be delegated to an organ of the state, according to s 258(2)(a). This will ensure that this decision remains under the state control.

69 S 261(6)(a).

At a more general level, the Central Authority has various functions which allow it to exercise overall control and to regulate in more detail the functioning of intercountry adoptions. For example, the Central Authority is the accrediting agency, and in this position can subject to certain conditions the accreditation of child protection organisations wishing to provide adoption services.<sup>70</sup> The Central Authority may cancel the accreditation if the organisation breaches the provisions of the Convention or of the CA.<sup>71</sup> Placing the RACAP under the authority of the Central Authority will enable centralised decision-making on adoptability and the development of uniform practice in intercountry adoptions.

Article 32 of the Convention requires that no improper financial or other gain may be derived from intercountry adoption, and the Central Authority is required to take the necessary preventive measures to ensure this.<sup>72</sup> Although the Convention does not establish the meaning of "improper gain", the CA clarifies what constitutes legitimate expenses which may be received by some of those involved in intercountry adoptions. According to section 259(3)(a), accredited organisations may receive the prescribed fees and payments necessary in respect of intercountry adoptions. A list of fees payable to accredited organisations may be established and published in the *Gazette*.<sup>73</sup> Section 249(1) prohibits the giving and receiving of any consideration in cash or in kind for the adoption of a child, and the inducement of the consent to adoption. However, some payments are acceptable, such as the fees of the lawyers, psychologists and other professionals involved, and the prescribed fees of the Central Authority, organ of the state, accredited organisation or other prescribed persons.<sup>74</sup> Similarly, the prohibition does not apply to compensation of the biological mother for reasonable medical expenses connected to the pregnancy, birth and follow up treatment; reasonable counselling expenses and other prescribed expenses.<sup>75</sup>

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70 S 259(2). The accreditation is for a period of a maximum of 5 years according to reg 128(2) of the Draft Regulations.

71 Reg 128(4) of the Draft Regulations.

72 Art 8.

73 Reg 128(6) of the Draft Regulations. See also reg 124(2).

74 S 249(2)(b), (c), (e), (f) and (g).

75 S 249(2)(a).

Compensation paid to the biological mother raises some concerns. In a country affected by poverty the prospect of receiving compensation for medical expenses connected to the birth of the adoptable child might influence the consent to adoption given by the biological mother. It is not clear whether this compensation is payable in the case of the adoption of babies as well as older children. Is the compensation payable if the mother has abandoned, abused or neglected the child? These aspects will need further clarification either by guidelines of the Central Authority or by judicial decisions.

Another aspect which remains controversial when discussing the financial aspects of intercountry adoptions is the contribution of adoptive parents to the development of national services for children. An unwanted effect of this practice was experienced in Romania, for example. In this country child-care institutions, under-funded by the state, used intercountry adoptions as a means to supplement governmental funding. As a result, in order to obtain funds, more children were attracted into formal care in order to be placed internationally.<sup>76</sup> These contributions may therefore create the danger of the dependency of child protection organisations on funds from adoptive parents. It might also divert these organisations from providing children and their families with the wide range of prevention, early intervention, reunification or alternative care services, as provided by s 105(5)(b) of the CA as amended by the CAA, in favour of placing the child in intercountry adoption.

The position of the CA is vague on this issue. With regards to the amounts payable for intercountry adoptions, the CA uses the wide term "fees". There is no indication in the CA or its subsequent Draft Regulations of whether or not donations in favour of accredited bodies, for the development of services for

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76 Although the legislation at the time prioritised national adoptions, child-care bodies preferred to place children abroad in order to obtain resources for the development of domestic services, which were under-financed by the central government (Jerre 2005 [www.svet.lu.se](http://www.svet.lu.se) 129). See also Bainham (n 21); Teodorescu 2005 [www.cdep.ro](http://www.cdep.ro) 22. Some reports indicate that attempts to re-integrate children in their families were met with opposition by institution directors and officials, who saw these efforts as resulting in fewer children being adopted internationally and thus saw less money coming into the system (Correll, Correll and Predescu 2006 [pdf.usaid.gov](http://pdf.usaid.gov) 18).

children who are not adopted, can be included in the very general term "fees". The Draft Regulations clarify somewhat the purpose of payment which can be received by those involved in intercountry adoptions – "for adoption services".<sup>77</sup> This seems to imply that no payment should be made without a service being provided to the adopters. Payments for potential improvements of conditions for children in care are not made for services provided to the adopters, and therefore, applying the above inference, should be excluded. Further regulations by the Minister of the DSD should clarify this aspect.<sup>78</sup>

Despite the shortcomings discussed above, the CA is a substantial improvement on section 24(1) of the CCA, as it provides more detailed guidance on adoption fees. Close monitoring by the Central Authority will be necessary to ensure that the fees system is not misused. To this effect, the Central Authority may use the powers conferred by section 259(3)(b) – to receive annual audited financial statements from accredited organisations – to fulfil its obligation to take measures to prevent improper and financial gain.<sup>79</sup> The accreditation and the renewal of accreditation, as well as the submission of annual financial statements, are the means whereby article 11(c) of Convention is implemented, and ensure that accredited bodies function under the supervision of state authorities.

Further, on the subject of general control, the Central Authority exercises control over the adoption working agreements entered into by accredited South African organisations with similar foreign bodies.<sup>80</sup> The approval of these agreements by the Central Authority aims to ensure an ethical and professional provision of intercountry adoption services. Finally, the Central Authority may issue compulsory guidelines for the practice of intercountry adoptions.<sup>81</sup>

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77 Reg 124(2) of the Draft Regulations.

78 *Ibid.*

79 This provision implements art 8 and 32 of the Convention, which refer to the obligation to take measures and ensure that no improper or other financial gain is derived from intercountry adoptions.

80 S 260(2). The adoption working agreements are discussed in more detail in the part 5.2 below, referring to accredited bodies.

81 Reg 141 of the Draft Regulations.

Unfortunately, neither the CA nor its Draft Regulations provides a specific mechanism for lodging and dealing with complaints against agencies breaching the CA or the Convention.<sup>82</sup> As an effect of incorporating the Convention, the Central Authority should be able to receive "information" from a competent authority about breaches of the Convention or the serious risk of such.<sup>83</sup> No mechanism for the implementation of this article is apparent in the CA. It would have been most appropriate for the CA or the Draft Regulations to establish a complaint mechanism for abuses or serious risks thereof.

Another factor overlooked by the CA is the authorisation of the Central Authority or the government to use moratoria should such a measure become necessary.<sup>84</sup> Moratoria involve a temporary halt of intercountry adoptions from a certain country and have been often used by sending and, increasingly, receiving countries as a measure to stop abuses in intercountry adoptions.<sup>85</sup> Moratoria provide the concerned states with the time to deal with the flaws in their adoption practices before intercountry adoptions can resume. The use of moratoria for these purposes has been endorsed by the Permanent Bureau of the Hague Conference.<sup>86</sup> Despite the absence of a specific authorisation regarding moratoria, arguably there is sufficient flexibility in art 8 of the Convention to allow the Central Authority to do so should this become necessary.<sup>87</sup>

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82 It is submitted that this aspect could perhaps be addressed by the Central Authority in its guidelines, according to reg 141 of the Draft Regulations.

83 Art 33.

84 Compare this, for example, with the provisions of the English law authorising the Secretary of State to institute moratoria on adoptions from countries where adoption conditions are suspect. See ch 20 Part II of the UK *Children and Adoption Act* 2006. See comment by Walsh 2006 *Family Law* 1230.

85 Well-known examples of moratoria include Romania, Cambodia, and Guatemala. Recent moratoria have been placed by Lesotho and Nepal. See US Department of State (no date) [travel.state.gov](http://travel.state.gov).

86 Hague Conference (n 21) par 131.

87 Art 8 provides that "Central Authorities shall take, directly or through public authorities, all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention".

In conclusion, the CA creates a Central Authority whose attributions are clearly established, which retains overall control of the entire system of intercountry adoption, and which exercises control in individual adoptions.

### 5.2 Accredited bodies

A limited number of functions can be performed, to the extent determined by the Central Authority, by other organs of the state or accredited child protection organisations.<sup>88</sup> Under the CA, intercountry adoptions cannot be facilitated by private social workers.<sup>89</sup> Although the CA does not exclude the participation of individuals such as lawyers, psychologists or other professionals in the process of adoption, their participation is limited to their respective professional contributions.<sup>90</sup>

Only child protection organisations can be accredited to provide intercountry adoption services.<sup>91</sup> This is an important provision. It ensures that specialised organisations assess the possibility of keeping the child within the family or the community of origin before the child is placed internationally. As specialised

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88 S 258(2). Most functions specific of the Central Authority are currently performed by adoption agencies (answer 5(a) Hague Conference 2005b [www.hcch.net](http://www.hcch.net)). The functions which can be performed by accredited agencies under the CA include: drafting of the report on the suitability to adopt of the prospective adopters (art 15 of the Convention and s 264(2) and 265(2) of the CA); drafting the report on the situation of the child and matching of the child with suitable adopters in the best interests of the child (art 16 of the Convention and s 261(3) and 262(3) of the CA); agreeing to adoption (art 17 of the Convention and s 261(4) and 262(4) of the CA); applying to the children's court for an adoption order (s 261(4) and 262(4) of the CA); obtaining permission for the child to leave the country or reside in the Republic (art 18 of the Convention); ensuring the transfer of the child (art 19 of the Convention); keeping their counterparts informed of the process regarding the adoption process (art 20 of the Convention); performing the adequate functions in case of a failed adoption (art 21 of the Convention).

89 Prior to the implementation of the CA, social workers with a speciality in adoptions can facilitate intercountry adoptions. See, eg, answer 4(g) Hague Conference (n 88). By requesting that agencies which apply for accreditation are "child protection organisations", the CA excludes the possibility of accrediting natural persons as providers of intercountry adoption services. This is consistent with the Convention (Parra-Aranguren (n 47) par 249).

90 S 259(4). Therefore, an attorney can provide legal advice, but cannot engage in identifying adoptable children or in matching; a psychologist can provide counselling, but cannot write a report on the situation of the child; etc. The categories of professionals able to provide adoption services according to s 259(4) must be published in the *Government Gazette* (reg 128(7) of the Draft Regulations).

91 S 258(2)(b). A "child protection organisation" is an organisation designated as such according to s 107 of the CA as amended by the CAA.

child care agencies, these organisations will be able to investigate the possibility of placing the child with national adopters. Ultimately, their professional expertise will enable them to match the child with prospective parents, in the best interests of the child. However, this scheme is not without criticism. Moodley points out that the involvement of organisations which care for children in the process of intercountry adoptions might affect their objectivity.<sup>92</sup> The CA does not deal with this concern, but arguably the control exercised by the Central Authority over the RACAP and implicitly over the making of a child available for intercountry adoption, the process of renewal of accreditation and the annual presentation of audited financial statements will enable the Central Authority to identify problematic practices.

The criteria for accreditation are established in the 2008 Draft Regulations.<sup>93</sup> In compliance with article 11 of the Convention,<sup>94</sup> organisations accredited to provide intercountry adoption services must be non-profit.<sup>95</sup> In addition to the criteria to be designated a child protection organisation, the applicant organisation must present a business plan which reflects its past adoption activities, the staff profile, the recruitment plan, and the specialisation of staff in adoptions.<sup>96</sup>

It is important that the CA requires the involvement of accredited bodies in intercountry adoptions to/from both Convention and non-Convention countries.<sup>97</sup> The adoption working agreements entered into by accredited South

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92 Moodley 2007 *PER* 8. The organisation is put in a difficult situation: placing the child in intercountry adoption will provide the organisation with more money obtained from fees; while exploring local adoptions might not bring in (often much-needed) funds. Although this criticism was voiced in a comment to the *De Gree* case before the entry into force of the CA, the points made by this author remain valid.

93 S 253(f). See also reg 128 and 125(2) of the Draft Regulations.

94 Art 11 requires that an accredited body shall pursue non-profit objectives, have staff whose ethical standards and professional experience make them suitable to work in the intercountry adoption sphere, and be supervised in their composition, operation and financial situation by the competent authorities of the relevant state.

95 Reg 36(1)(b) of the Draft Regulations.

96 Reg 128(1) read with reg 125(2) of the Draft Regulations.

97 S 258(2) reads clearly that the functions of the Central Authority can be exercised only by another organ of the state and accredited organisations. It does not distinguish between Convention and non-Convention adoptions, as further revealed by s 261(3) and (4), 262(3) and (4), 264(2) and 265(2).

African organisations with accredited bodies from Convention as well as non-Convention countries need the approval of the Central Authority.<sup>98</sup> The involvement of accredited bodies, which function under the control of the Central Authority, in Convention as well as non-Convention adoptions ensures that the same quality standards apply to both categories of adoptions. One of the drawbacks of the Convention – its limited application to adoptions between contracting states – is addressed by the national legislation.

Accredited agencies may enter into adoption working agreements with accredited agencies from abroad. These must be approved by the Central Authority, according to section 260(1). Section 260 introduces a means of controlling the agreements entered into by the accredited South African bodies with adoption agencies from overseas. This is a tool to prevent abuses by ensuring the professionalism of the partnership between organisations involved in adoptions.<sup>99</sup>

It is not clear what the significance of these agreements is/will be. The use of "may" within section 260(1) suggests that they are not a pre-requisite for the involvement of accredited bodies in intercountry adoptions. However, this is problematic if the purpose of the section is to ensure an ethically and professionally sound partnership between South African and foreign agencies. If the agreement is not compulsory, many partnerships may escape the scrutiny of the Central Authority. Secondly, it seems that the adoption working agreements can be entered into by a South African accredited body only with

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98 S 260(1) does distinguish between Convention and non-Convention states.

99 This leaves open the question of whether foreign bodies can be authorised, in terms of art 12 of the Convention, to provide adoption services in South Africa, since the CA and the Draft Regulations do not seem to make provision for this. For a different interpretation of s 260, see Human (n 19) 16-14. This author argues that s 260 implements art 12 of the Convention, which states that a body accredited in a Convention country can act in another Convention country only if both states agree to it. In the interpretation of this writer, art 12 applies only when accredited agencies intend to conduct operations across the borders of the accrediting state. Parra-Aranguren states that art 12 was introduced to cater for "the case of States having more than one system of law or autonomous territorial units" (n 47 par 267). The ambit of s 260 seems wider, insofar as it applies when the foreign agencies intend to act on the territory of the Republic (as required by art 12); but also in cases where the foreign agencies do not act on the South African territory (see *ibid* par 267-270).

an accredited foreign agency.<sup>100</sup> As indicated below, the South African law does not currently prohibit cooperation with non-accredited bodies or professionals.<sup>101</sup> However, because section 260(1) makes no provision for adoption agreements with non-accredited bodies, the partnership between the accredited South African agency and the non-accredited foreign body can continue without being scrutinised by the Central Authority. The effect is that these partnerships – which arguably are the most vulnerable because of the lack of accreditation of the foreign agency – remain outside of the state's control.

In brief, despite some of the problems identified above it is submitted that the limitation of adoption services to accredited organisations is a positive development. This will ensure that adoption services are rendered by bodies whose credibility and experience in intercountry adoptions have been certified by the Central Authority.

### **5.3 Non-accredited bodies and individuals**

In addition to Central Authorities and accredited organisations, the Convention recognises the potential involvement of approved bodies and persons in the process of intercountry adoptions. This is a controversial aspect of the Convention, as it constitutes a partial endorsement of private or independent adoptions,<sup>102</sup> often associated with abuses.<sup>103</sup> The state parties reached a

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100 It seems, therefore, that the adoption working agreements are not necessary if the functions of the Central Authority are exercised directly by the Central Authority or by another organ of the state.

101 The absence of a declaration according to art 22(4) of the Convention implies that South Africa agrees that non-accredited bodies or individuals can participate, on behalf of the receiving state, in the adoption of children from South Africa. See further discussion in part 5.3 below.

102 For various definitions of private or independent adoptions see UNICEF 1999 [www.unicef-irc.org](http://www.unicef-irc.org); Lammerant 2005 *Rev Droit Univ Sherbrooke* 349. Based on art 22(2) of the Convention and on an interpretation *per a contrario* of art 11 of the Convention, a private adoption is referred to in this article as being an adoption which involves the contribution of non-accredited bodies or individuals. There are some differences between accredited bodies and approved bodies. An individual can be approved to provide adoption services but cannot be accredited for the same purposes. The approved bodies or individuals do not need to pursue non-profit objectives, while this is one of the requirements for accredited bodies.

103 Albrecht (n 54) 46 argues that private adoptions are more likely to be associated with abuses such as baby selling, or with poor professional standards, such as failure to apply

compromise and accepted the use of non-accredited bodies and persons alongside accredited bodies in order to extend the potential applicability of the Convention to major receiving countries.<sup>104</sup>

States have discretion in accepting the involvement of non-accredited bodies or persons. A state which intends using non-accredited bodies or persons must make a declaration to the depositary of the Convention.<sup>105</sup> In addition, a state may declare that child residents of that state may be adopted only if adoption services are provided by accredited bodies or organs of state.<sup>106</sup> If a state does not make the last declaration, it is assumed that the state agrees to enter intercountry adoptions with states where the functions of the Central Authority can be performed by non-accredited bodies or persons.<sup>107</sup>

Certain mechanisms of control inserted in the Convention bring adoptions facilitated by non-accredited bodies or individuals under the control of the state, thereby diminishing the risks of abuse. For example, their functions must be exercised under the supervision of competent authorities;<sup>108</sup> they must comply with the professional and ethical standards of the Convention;<sup>109</sup> and they are bound by the provision stipulating that no improper or other financial gain can be obtained in connection with adoptions.<sup>110</sup>

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the subsidiarity principle and errors in matching. See also Blair 2005 *Capital University LR* 357; Calcetas-Santos 2000 [www.unhchr.ch](http://www.unhchr.ch); Committee on the Rights of the Child 2004 [www.unhchr.ch](http://www.unhchr.ch) par 33.

104 Parra-Aranguren (n 47) par 373.

105 Art 22(2).

106 Art 22(4) of the Convention provides that any contracting state may declare to the depositary of the Convention – the Ministry of Foreign Affairs of the Kingdom of the Netherlands (art 43(2)) – that children habitually resident on their territory can be adopted only if the duties of the Central Authority in the receiving state are performed by the Central Authority, a public authority or an accredited body. These declarations have a particular importance for states which are significant sending countries. Amongst countries which have not made an art 22(4) declaration and are/have been significant sending countries are Cambodia, Guatemala, India, Philippines, Romania and Thailand (Hague Conference (no date) [www.hcch.net](http://www.hcch.net)).

107 Parra-Aranguren (n 47) par 396 interpreting art 22(4).

108 Art 22(2). The functions which can be performed by the non-accredited bodies or persons are limited to those provided by art 15-21 of the Hague Convention.

109 Art 22(2).

110 Art 32.

Closer cooperation between sending and receiving states could contribute to preventing some of the risks associated with private adoptions.<sup>111</sup> However, concerns still remain over these bodies or persons not being required to pursue a non-profit objective,<sup>112</sup> and their interest in promoting national solutions and therefore in implementing the subsidiarity principle.

There is no mention in the CA of the participation of non-accredited bodies or individuals in the process of adoption in/from South Africa.<sup>113</sup> Therefore, the functions of the South African Central Authority cannot be exercised by independent or non-accredited bodies or professionals due to the lack of authorisation by the South African law. However, South Africa did not make a declaration specifying that the adoption of children living in South Africa may take place only through accredited bodies or organs of the receiving state.<sup>114</sup> The consequence is that independent agencies or bodies can perform the functions of the Central Authority in the receiving state when the adoption of a child resident in South Africa is considered.

A different position is expressed by other writers<sup>115</sup> who argue that by not referring to the potential involvement of non-accredited bodies, the CA makes article 22 of the Convention the legal basis of their involvement in adoptions in South Africa. This writer disagrees with this interpretation. The participation of non-accredited bodies or individuals in intercountry adoptions is subject to two conditions established in article 22(2) of the Convention. First, a state party needs to make a declaration to the depositary of the Convention to inform of the intention to allow the independent bodies or persons to facilitate adoptions. Secondly, the exercise of adoption functions by independent bodies must take place according to the national law, and under the supervision of the competent

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<sup>111</sup> ISS/IRC suggested that in cooperation with sending states, receiving states should make verifications regarding the reliability of the contacts established by the private bodies in the state of origin (ISS/IRC 2005b [www.iss-ssi.org](http://www.iss-ssi.org) 7).

<sup>112</sup> Albrecht (n 54) 47.

<sup>113</sup> However, independent professionals are not excluded from rendering services within the process of intercountry adoption, if these services are connected with the adoption (s 259(4)).

<sup>114</sup> An art 22(4) declaration.

<sup>115</sup> Human (n 19) 16-13.

authorities. None of these conditions is met in the context of CA. First, the Republic has not yet made a declaration according to article 22(2) of the Convention.<sup>116</sup> Also, the South African government has indicated that it does not intend to use approved bodies or individuals in the process of adoption.<sup>117</sup> Second, there is no mention in the CA that independent bodies can facilitate intercountry adoptions, as required by the Convention.<sup>118</sup> On the contrary, section 258 specifies that the functions of the Central Authority can be exercised only by the CA itself, by a delegated official, another organ of the state, or an accredited agency.<sup>119</sup> Third, there seems to be no competent authority designated to supervise non-accredited bodies or professionals. Also, independent bodies or professionals do not seem to have access to the RACAP,<sup>120</sup> which is an indispensable tool for complying with the subsidiarity requirements for intercountry adoptions. The above seem to point to a legal regime in which there is no scope for the involvement of independent bodies or professionals for services rendered in South Africa.

## 6 Procedure for intercountry adoptions

The adoption procedure in the CA follows the pattern established by the Convention. Similar procedures apply to Convention as well as non-Convention adoptions.

In the case of Convention adoptions, according to section 261(1), the prospective adoptive parents apply to the Central Authority of their country of residence. The Authority prepares a report regarding the fitness to parent,

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116 However, it could be argued that an art 22(2) declaration is premature since the Act has not come into force.

117 Answer 6(6) in the Hague Conference (n 88).

118 The Permanent Bureau states clearly that if the state has not made an art 22(2) declaration, the functions of the Central Authority may be performed only by the Authority, an organ of the state, or an accredited body (Hague Conference (n 21) par 37).

119 Therefore the national legal provision required by art 22(2) of the Convention is not present. S 250(1)(c) and (d) of the CA reads clearly that only certain persons are allowed to provide intercountry adoption services, namely the Central Authority and accredited bodies.

120 S 232(6) excludes the access to the RACAP of any other person except officials and accredited bodies.

which is sent to the South African Central Authority, as required by section 261(2). If a child is available for adoption, a report regarding the situation of the child is drafted and sent to the Central Authority in the receiving state.<sup>121</sup> If both Central Authorities agree, according to section 261(4), the South African Central Authority refers the application, together with the documentation, to the children's court. Notably, the South African law requires that the formalisation of adoption takes place in a South African court before the child is removed from the country.<sup>122</sup>

According to section 261(5), the court will make the adoption order if the prospective parents are fit and proper to adopt; and if the cultural and religious background of the child, the biological parents and the prospective adopters have been taken into account; as well as the reasonable preferences of the biological parents; and the report of the social worker regarding the situation of the child. The court will grant the order, as required by section 262(5)(a-g), only if it is in the best interests of the child;<sup>123</sup> the child is in the Republic and is not prevented from leaving the country; the provisions of the Convention have been complied with; the central authorities have agreed to the adoption; and the name of the child has been in the RACAP for at least 60 days. After the adoption has been approved, the Central Authority issues a compliance certificate, which can be used by the adoptive parents to have the adoption recognised in their country of residence.<sup>124</sup>

If a child is adopted in a non-Convention country, the procedure stipulated by section 262 is very similar. The South African Central Authority performs the same role as in adoptions to Convention countries, while the role of the Central

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121 S 261(3). The elements which must be reflected in the report are specified by reg 130(2) of the Draft Regulations.

122 Except when the procedure employed is that of a guardianship order, according to s 25 of the CA. When prospective adoptive parents obtain a guardianship order in a South African court, an adoption application will have to be made to a court or administrative authority in the receiving state competent to formalise the adoption. This is not to say that s 25 will not provide sufficient protection to children involved in such procedures. For more details, see part 3 above (discussion on the scope of the CA).

123 The courts will apply s 7 of the CA.

124 S 263, which implements art 23 of the Convention. This certificate is issued regardless of whether a child is adopted in a Convention or non-Convention country.

Authority in the receiving state is played by a "competent authority".<sup>125</sup> Although procedurally the adoptions to non-Convention countries follow the pattern established for Convention adoptions, the children's court is not required to assess the compliance with its provisions.<sup>126</sup> However, the most important guarantees for protection are incorporated in the CA and they will benefit children adopted in non-Convention countries.<sup>127</sup> These are the quality of consent; the screening of the child and of the prospective parents; the matching with fit and proper parents; the principle of subsidiarity; the best interests of the child; and the involvement of the Central Authority.<sup>128</sup>

In order for the intercountry adoption to become effective it is necessary that the Central Authority gives and maintains its consent.<sup>129</sup> The Central Authority may withdraw its consent within 140 days from the court order, if it is in the best interests of the child.<sup>130</sup> According to section 265(7), an adoption order takes effect only after the lapse of the 140 days, provided the Central Authority has not withdrawn its consent.

Sections 264 and 265 provide the procedure to be followed when South Africa is a receiving country. In these cases, the South African Central Authority will receive the application from the prospective parents and will draft a report about the suitability to parent of the applicants. The report is forwarded to the

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125 S 262(1). According to the *DSD Draft Guidelines*, in the absence of a competent authority, the role of a Central Authority will be played by the ISS.

126 See, by comparison, s 261(5)(d) and s 262(5)(d). See, eg, the same guarantees for the application of the subsidiarity principle, especially the registration in the RACAP; the approval by the Central Authority; the possibility of the South African Central Authority's withdrawing its consent to adoption (s 262(6)). All of these requirements are identical with those in intercountry adoptions to Convention states.

127 Interestingly, there seems to be no implication in s 261 and 262 that intercountry adoptions in Convention countries should be preferred to adoptions in non-Convention countries. The DSD asked for "caution" in adoptions in non-Convention countries, arguing that the standards of the Convention do not apply in those cases. However, through the CA the South African system is better equipped to make the necessary checks and to apply the adequate standards of protection.

128 S 262(5).

129 This provision implements art 17 of the Convention.

130 S 265(6)(a). For more on the procedure to be followed in the case of the withdrawal of the consent of the Central Authority, see reg 136 of the Draft Regulations.

Central Authority or the competent authority of the sending state in order to identify an adoptable child.<sup>131</sup>

## 7 Recognition of intercountry adoptions and access to information

One of the most important consequences of the ratification of the Convention is the automatic recognition by each state party of an adoption made in compliance with the procedure of the Convention.<sup>132</sup> To prove conformity with the Convention a certificate of compliance must be issued by the state where the adoption was formalised.<sup>133</sup>

In terms of section 263, if an adoption has been approved by the children's court the Central Authority will issue a certificate of compliance. The recognition of intercountry adoptions formalised in another state can be refused if the recognition is manifestly contrary to public policy in the Republic.<sup>134</sup> In addition to the recognition of Convention adoptions, the CA contains provisions for the recognition of adoptions from countries which are not parties to the Convention.<sup>135</sup>

State parties to the Convention must preserve information regarding the child's origin and medical history, which could be accessed by the child or his/her representatives, according to the law of each state.<sup>136</sup> By creating an adoption register, according to sections 247 and 248, South Africa has created the conditions for implementing these obligations.<sup>137</sup> Access to the adoption register is managed by the Central Authority. The Central Authority may disclose to a person older than 18, who was adopted according to the

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131 More details on the procedure and the content of relevant reports can be found in reg 137 and 138 of the Draft Regulations.

132 Art 23(1) of the Convention.

133 *Ibid.*

134 S 270(1) implementing art 27 of the Convention.

135 S 268. For more on the recognition of intercountry adoptions, see Human (n 19) 16-24–16-27.

136 Art 30 of the Convention.

137 See also Human (n 19) 16-27.

Convention, any information in its records regarding the child's origins.<sup>138</sup> Two observations are necessary in this context. Firstly, limiting the access to adoption records to adoptees older than 18 years is very restrictive and seems to ignore the evolving capacities of the child.<sup>139</sup> Secondly, it seems that section 272 applies only to those adopted according to the Convention, ignoring therefore this special right to access to information of those not adopted according to the Convention.

## 8 Conclusion

By incorporating the Convention in its national law South Africa has complied with its international obligations deriving from the Convention. This is a major progress in regulating intercountry adoptions in South Africa. By incorporating the Convention the CA substantially improves the current regime of intercountry adoptions. It provides clear procedural rules and establishes the jurisdiction of the bodies involved. It assimilates guardianship applications having a foreign element with intercountry adoptions, preventing therefore the use of guardianship as a way to circumvent the legal safeguards for adoption. The CA implements a system whereby adoption services can be provided only by the Central Authority, an organ of the state, or accredited bodies. This offers the state an adequate degree of control over intercountry adoptions.

The Act aligns the South African law with the international standards on intercountry adoptions and provides South Africa with the tools for making the institution function in the best interests of children. The principle of subsidiarity is now formally contained in a statute which also provides the tools which enable the application of this principle, including measures to maintain a child in his/her family or community, provisions which enable the search for national parents, and the prioritisation of national over intercountry adoptions.

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138 S 272.

139 The age limitation does not apply when the information sought is of a medical nature; the information sought may refer to the adopted child or the biological parents (s 272 read with 247(3)).

In some instances the CA improves the standards of the Convention. Such provisions include making counselling for the child and the biological family compulsory, and the criminalisation of illegal adoptions as child trafficking.<sup>140</sup> A major achievement is the extension through the CA of many Convention standards to adoptions to/from non-Convention countries. This diminishes the risk of unscrupulous individuals or agencies' taking advantage of situations not formally regulated by the Convention. The CA contributes to increasing the security of the legal status of the children involved in intercountry adoptions. South African children involved in Convention adoptions will have their adoption automatically recognised in the receiving state. Children adopted from Convention and non-Convention countries by South African residents will also have their adoptions recognised in South Africa with a minimum of formalities.

The enhanced powers of the Central Authority set the scene for a correct and uniform application of the Convention. Functions such as the authorisation of child protection organisations, the annual assessment of the financial statements of accredited bodies and the issuing of guidelines enable the Central Authority to monitor the practice in South Africa. It is essential therefore that the Central Authority adequately fulfils its role as the supervising and monitoring body in order to identify any flaws in the application of the CA. Unfortunately, the CA missed the opportunity to set up a clear notification or complaints procedure with regards to illegal or unethical behaviour on behalf of those involved in intercountry adoptions. However, this could be addressed through the guidelines which the Central Authority is supposed to develop.<sup>141</sup>

Some concerns have been raised in this article with regards to the financial aspects of intercountry adoptions, which leave room for the practice to be exploited. More clarity is needed about the payments to the mother of the adopted child and the potential contribution of adoptive parents to the

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140 See, eg, the compulsory counselling (s 233(4)), and the recognition of the diversity in types of families (s 231).

141 Reg 141 of the Draft Regulations.

development of national services by the child protection organisation authorised to provide adoption services.

It is difficult to assess the potential impact of the CA on intercountry adoptions in South Africa. The legal recognition of intercountry adoption does not offer a complete response to all of the legal and social problems associated with intercountry adoptions. The legal framework may, however, ensure that adoptions are performed in the best interests of the child, with respect for national and international standards in the field of intercountry adoptions.

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#### ***List of abbreviations***

art	article(s)
CA	Children's Act
CC	Constitutional Court

CCA	Child Care Act
ch	chapter(s)
DSD	Department of Social Development
par	paragraph(s)
RACAP	Register of Adoptable Children and Prospective Adoptive Parents
reg	regulation(s)
s	section(s)
SALRC	South African Law Reform Commission
sch	schedule(s)