Children’s Rights and Intercountry Adoption
Reconstructing the African Union’s Role

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Lastly, thank you to every friend who has listened to my niche remarks about the rights of children in intercountry adoption for the past two years. I hope you now see them as important to the rights of all.
Acronyms

African Charter on Human and People’s Rights: ACHPR
African Charter on the Rights and Welfare of the Child: ACRWC
African Committee of Experts on the Rights and Welfare of the Child: ACERWC
African Union: AU
International Covenant on Civil and Political Rights: ICCPR
International Covenant on Economic, Social and Cultural Rights: ICESCR
Convention on the Rights of the Child: CRC
Declaration of the Rights of the Child, 1924: Declaration of Geneva
Declaration of the Rights of the Child, 1959: Declaration
Organization of African Unity: OAU
United Nations: UN
UN Children’s Fund: UNICEF
Chapter 1: Introduction

Discourse of human rights overwhelmingly focuses on violations and how to stop them; rightly so, as human rights aim to achieve an equal basis of life for all of humanity. In the context of the African continent, this focus on violations of rights becomes the predominant setting for constructing ideas about the continent and its people. African states become neutral to human rights discourse, at best, or horrendous violators of externally drafted human rights, at worst – both instances creating an opportunity for Western-based discourse to capitalize on overseeing the status of rights in Africa. Yet, the history of children’s rights and the normative frameworks applied in African states shows that the continent is a space of production of new rights conceptions, law, and implementation. The study of frameworks for and conceptualizations of children’s rights informs the handling of contested areas of human rights and impacts achievements of justice for children which are necessary to achieve justice for all.

The phenomenon of intercountry adoption offers an important case in the field of rights generally and children’s rights specifically because of its tangible, vulnerable, and illustrative nature. Children facing intercountry adoptions become international rights bearers by entering into a multi-national space while possessing inherent human rights. Children, in any status, and especially outside of the care of parents, challenge conceptions of autonomy in bearing rights. Children, also, matter to states as they represent youth, future adult-citizens, and the perpetuation of their culture or nation.

In reconstructing the assumptions about the framework of children’s rights in Africa, this thesis will analyze the challenges that comprise rights for children, rights in intercountry adoption, and rights within Africa. By doing so, the two normative frameworks for rights applicable to children on the continent will be explored: the UN’s Convention on the Rights of
the Child (CRC) and the AU’s African Charter on the Rights and Welfare of the Child
(ACRWC). The ACRWC was the first regional normative instrument following the CRC,
addressing concerns from and building upon its principles in a regional context. Establishing the
history of each framework and the rights they contain provides an excellent space in which to
both deconstruct the negative assumptions about African states and rights and construct the
positive reality where African states and mechanisms advance rights.

The following chapters will use the terms global north, global south, and Western as
methods of conveniently referring to groups of nations that often share similar viewpoints or
have historically been grouped as such. The use of these terms in no way indicates an assumption
of linearity, simplicity, homogeneity, or immobility within and between groupings. In fact, as
will be evident in discussing the origins of ideas in drafting the normative frameworks for
children’s rights, diverse ideas and conceptions of children and their rights come from individual
participants and combine to create the flexible and challenging instruments of universal
children’s rights that exist today. Not attempting to imply that diversity of experiences and
cultures comes solely from states deemed part of the global south, any statement that may seem
to imply this sentiment merely rests on the idea that a unifying factor of the global south is its
past exclusion from contributing on an international political level; creating a diverse universal
consensus on rights can only be achieved by the inclusion of excluded states in the discussion.
Additionally, for the sake of this thesis, presumed upon the need to counter negative assumptions
of Africa’s interactions with rights, the states of the continent will be referred to as the global
south when conjoined with other states that may have similar histories of interaction in global
politics and similar views on rights that stem from these backgrounds. The incomplete
dichotomy of north and south is particularly useful for discussing intercountry adoption in that
the typical sending and receiving countries depend as much on individual adopters and adoptees perceptions of power and wealth as they do upon reality of states’ activities in international politics. The most frequent patterns of intercountry adoption involve families from the United States or Western Europe adopting children from states experiencing natural disasters, conflict, or long-standing poverty, based upon the idea of saving a child from a ‘worse’ life in his or her home country. Therefore, as a tool for articulating a grouping of states with ease and for mirroring an aspect of the impetus for intercountry adoptions, utilizing global north, global south, and the West is helpful to be concise despite acknowledging the shortcomings of doing so.

The use of the term intercountry adoption follows throughout this thesis, assuming a modicum of familiarity with the concept, by implying that a child would be adopted into a state different than his or her birth state, at the minimum. Often, intercountry adoptions, as depicted above, involve the transfer between more than just two countries. Intercountry adoption, as a tool of analysis and example for children’s rights in African states, refers to adoptions that are most often inter-continental, inter-linguistic, inter-cultural, international, inter-ethnic, and inter-socioeconomic. There are also a large number of intercountry adoptions that are interracial and inter-religious. Although the application of the international children’s rights laws that this thesis discusses depends upon an individual child’s circumstances, for the analytical effort, the adoptions considered will be of the most theoretically difficult, in which most, if not all, of the complexities of the rights law and its application will need to be addressed.

The following chapters address states as the agents of rights. Though the opportunity for non-state actors to be agents of rights, even to be better suited agents of rights than states, exists, delving further into the choice of who is responsible for rights is a topic for further research. Rather, by analyzing international rights texts, their drafting, and their applications, the following
analysis uses states as the basic agent of rights because they are the basis of the international and regional legal sphere, in all regards addressed.\(^1\) Even if not the best agents, states still have responsibilities to follow rights laws and apply them to their citizens.\(^2\) While parents and NGOs may claim responsibility for children’s rights on a daily basis, intercountry adoption depends upon states as the interlocutors of children as they pass over state borders outside of familial care.

**Chapter Overview**

This thesis sets out to explore a scholarly history of children’s rights and intercountry adoption through the analysis of rights norms on the African continent. Writing beyond the dichotomy of adopters and adoptees, beyond the search for a solution to the global orphan ‘crisis’ that has launched intercountry adoption into the limelight, the historicity and normative claims of children’s rights culminate in a progressive basis upon which the implementation of the normative frameworks discussed can ensure that children’s best interests are upheld in their day to day lives.

Chapter 2 analyzes the theoretical emergence, tensions, and justifications for children’s rights today on the African continent. Without first exploring the past of children’s rights within human rights discourse, the following discussion of normative documents would lack historicity and fail to demonstrate the far-from-inevitable inclusion of children into the realm of human rights in its aim to depict the norm-setting power of the African Union and African states. The recent and ever-expanding body of work concerning children’s rights and intercountry adoption

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creates a powerful example of scholarly progress in handling tensions within human rights as children in intercountry adoption face the salient consequences of dependence, vulnerability, power inequality, cultural transition, and global hegemony. In cultivating the underlying discourse to situate children’s rights within human rights, the chapter explores the inherency of rights, culture’s role in rights law and implementation, and the effect of geography on rights and the assignation of responsibility.

Chapter 3 analyzes the drafting process and text of the CRC with particular respect to articles concerning intercountry adoption. Ratified by all states but the United States, the CRC enjoys vast influence over the normative bases to ensure children’s rights across the world and on the African continent. The universal principles for children’s rights present in the instrument represent long years of newly inclusive and heavily debated conceptualizations of childhood and the language of children’s rights through the late 1970s and the 1980s. Emboldened by growing inclusion of and agitation for the child’s plight within the human rights frameworks of the UN, drafters were able to incorporate the autonomy of the child and simultaneously protect children’s particular vulnerabilities. The chapter, then, begins with pre-cursors to the CRC, moves on to discuss its drafting process, and concludes by analyzing the normative claims of the framework.

Chapter 4 follows the discussion of the UN’s CRC with a comparative consideration of the Organization of African Unity’s (now, African Union’s) ACRWC. The improvements upon the CRC and the strength of its regional proximity to its members demonstrate the norm-setting power of the African Union for children’s rights on the continent. The two instruments differ in two key ways: the strength of the best interests of the child and the subsidiarity of intercountry adoption to other methods of alternative care. By exploring and testing these nuances, courts across the continent embrace the power of the ACRWC alongside the CRC to protect children
and acknowledge their rights. The culturally legitimated and universally applicable rights for children in intercountry adoptions benefit children by codifying normative standards, creating impetus for implementation, and acknowledging a basis on which advocates and children can demand their rights.

Finally, Chapter 5 summarizes the aims and results of the preceding chapters and considers what lies beyond norms for children’s rights. The history of conceptualizing children’s rights that includes the development of human rights frameworks addressing children specifically continues into the present day to include these frameworks’ implementation. Normative instruments are powerful but only insofar as they translate to and affect change in children’s realities. This concept of moving beyond normativity alone leads the work of the children’s rights activists into the future of implementation, building upon the history of children’s rights norms.
Chapter 2: Situating Children within Human Rights Discourse

Children hold a place amongst the various constituents of humanity who all strive to achieve the recognition of their inherent dignity and self-embodied humanity. The discourse that creates and surrounds human rights norms across the world cannot avoid addressing the particular complexities of children’s rights, and, in fact, children pose an illustrative challenge to notions of inherent, universal human dignity. Without simplifying children into an inevitable role for the progression of human rights discourse, the following discussion will analyze ongoing tensions in the discursive advancement of children’s rights.

Drawing on prominent themes surrounding children’s rights, the discussion focuses the claims of human rights on problems of power inequality and vulnerability more tangibly than broader human rights debates do. Children, as legally and biologically developing beings, do not have full adult rights and are often entrusted to the care of adults who have their own rights and ideas of how children’s rights translate to reality. During their development and total or partial dependence upon adults, children also face greater vulnerability to rights abuses by states or individuals. Any violations of rights in childhood can have significant, long-term impacts on the child’s future rights and functionings. The chapter will proceed by infusing children’s rights particularities into theories of the inherency of rights, culture’s role in rights law and implementation, and the effect of geography on rights and the responsibility of those rights. By touching on this selection of human rights’ debates, the complexities of children’s rights and the legal dissonance between human and children’s rights since the twentieth century come to bear with progressive concepts of children as fully human. Of course, the diverse advocacy for the inclusion of children into human rights lends example to the power of inclusive discourse in drafting international, universal rights that apply in diverse local contexts. The discussion of
normative documents in subsequent chapters builds upon the foundations of the approaches to children’s rights set in this chapter.

**Inherency of Rights – From Birth?**

As one of the key tenets of international human rights, the inherency of rights necessitates that any framework acknowledges rights, provides protection from their violation, but does not attempt to bestow the rights.\(^3\) Children’s rights, however, have not enjoyed a historic tradition of inherency and, today, still struggle to gain acknowledgement of rights rather than the granting of rights. Long viewed as the *becoming* stage of humanity, children have suffered indignities at the hands of parents, community leaders, and social systems. In recognizing the necessity to reverse the negligence of global human rights regarding children, discourse of children first turned to the ways in which they deserve charity. Early children’s rights texts such as the Declaration of the Rights of the Child (League of Nations in 1924, originally, and modified for the UN in 1959) strictly adhere to helping children that fall into the perils of adult society; the language implies subordinate status with “mankind owes to the Child,” “the child must be given,” “the child…must be fed…must be nursed…must be helped,” and “the child must be put in a position to earn a livelihood.”\(^4\) Subsequently, advocates for children’s rights slowly began to recognize the agency of children in rights documents – due to the pressing tension between human rights’ emphasis on autonomy and children’s rights’ emphasis on dependency – speaking to children’s autonomous rights in generating the current international legal frameworks. Yet, the conceptualization of the child across societies today

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\(^3\) Acknowledging that rights are inherent requires humans to embody their rights independent of any formal declaration of rights. This affects the child’s rights in two ways: a child need not be granted a right by a formal institution to possess that right and, by not categorizing a child as a human, the inherency doctrine was avoided for quite some time.

continues to include ideologies that are antithesis to recognizing children’s agency to form opinions, act independently, and claim inherent rights.

The concept of children as the possessors of rights, autonomous beings leading autonomous lives, is credited to the mid-twentieth century children’s rights activist Dr. Janusz Korczak. He developed the idea through his work with orphans in Poland, instilling a sense of identity in children, which was often discouraged as children were seen by society as merely the future of humanity. The conception that children claim inherent rights first appears in the UN’s CRC, the drafting of which began the slow evolution of depicting children as human persons in the eyes of law. Without fully divorcing the rights of children from their dependence on adults and vulnerability to their environments, the recognition of their personhood signified a late emergence of the inherency of children’s rights; the equivalent concept for adults has been overtly present since Enlightenment and implied within various ancient religious texts and traditions. The nature of this inherency of humanity’s rights developed through the concept of natural law that rose prominently during Enlightenment; yet, philosophers, without qualms about the existence of inherent human dignity, held inconsistent views on children and their place within natural law. Inherency, at its conceptual core, depends upon human demarcations of humanity itself; the scope to which humanity expands to include groupings of individuals along demarcations of difference (socio-economics, religion, language, race, etc.) impacts who has theoretical and actual access to inherent human rights. Children, whose stations in ancient

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societies and families depended upon their functions in daily life, arrived into modernity without the privileged position of full humanity, instead representing vessels of social propagation to be molded by adults. Of course, this exclusion merits no surprise from other marginalized groups such as women and sexual minorities who also embody ongoing struggles for inherent rights.

The status of children as inherent rights bearers still faces dissent today, in both practice and theory, as individuals struggle to incorporate the agency and dependency present in children into a cohesive rationale for their rights. Worldwide, parents struggle to balance between nurturing and recognizing autonomous rights when raising children. States, too, endeavor to find the balance between the wishes of citizens in favor of children as dependents and the prevalence of domestic and international legal frameworks in favor of children as autonomous rights bearers. Despite the marked assertion of children’s agency and the inherency of their rights, international legal documents such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) do not shy away from delineating the vulnerability of children and the additional attention that they deserve to have their rights realized. Rosalind Dixon and Martha Nussbaum justify the duality of agency and vulnerability in children’s rights with a capabilities approach. Through that lens, the inherency of children’s rights avoids both the pre-modern European conceptualization of children as empty vessels becoming future adults and the modern American conceptualization of children as entirely innocent and vulnerable. Rather, the ability of children to both possess autonomous rights and depend upon adult care alludes to the pre-colonial conceptualization of childhood presented by Agya Boakye-Boaten’s personal childhood and research on childhood in

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Ghana, in which children hold esteemed cultural and social roles that afford them places of value in society, often due to their connection to ancestry. Echoed by Judith Ennew, the lines between child and adult in the global south are less distinct than those of the global north, relying more heavily on social roles and experiences than strict age limits. Currently, the movement to recognize children’s inherent rights through agency that gained force in the late twentieth century seems to shift back in favor of attention to the child’s vulnerability to exploitation, as depicted in popular discourse.

The issue of children’s rights sparks continual division, pitting children’s rights against the rights of parents and families. By analyzing the normative frameworks for children’s rights in intercountry adoption on the African continent, the urge through which potential parents seek to adopt children is fueled by their underlying conceptualization of the rights of parents and families above those of children, assuming that parents are better informed of the child’s best interests than the law permits. However, in an argument in favor of the inherency of children’s rights as human rights and in opposition to the tension between parents’ and children’s rights, Martha Minow asserts that “dignity, respect, and freedom [in children’s rights] does not displace or undermine parents, but instead reminds parents and other adults of their fundamental responsibilities toward children.”

A similar sentiment emerges from Beth Swadener and Valerie Polakow in their treatment of the tension between a child’s right to a voice in his/her life decisions and the lacking reality of this voice in discourse surrounding children’s legal rights. The gap between the theoretic human rights’ necessity of a child’s right to a voice and its

incredibly sparse and cautious application stems from the possibility that children’s opinions pose a “threat to adult-controlled institutions that may include families, schools, and child care.” Thus, just as the inherency of human rights came to recognition through debated reasoning, children’s inherent rights stem from the long debates that conclude that children represent an autonomous, and not merely transitory, segment of humanity. Through such a conceptualization to include children as a group of individuals within human rights, the child necessitates the acknowledgement of his or her role in being and becoming, a process that adults also emulate.

The recent conceptualization of children and their parallel inclusion in possession of inherent human rights is justified by the capabilities approach developed by Amartya Sen and Nussbaum. Children as inherent rights bearers do not lose the traditional protections that children deserve from a state and familial perspective. As humans with distinct needs, the capabilities approach allows for the rights recognized in children to require greater input from those responsible for the rights to achieve the same ends of functioning. Sen reiterates this point, in that capabilities require a substantive freedom; children, therefore, must not only have rights but also have the opportunities of choice to which the rights allude. This concept builds on recognizing the inherency of children’s rights as a part of human rights and also grants space for the means by which those rights are secured to differ greatly from similar rights for adults. Thus, the inherency of children’s rights does not preclude the denial of certain rights to children,

in the aim of building their capabilities to enjoy fully their rights in the future.\textsuperscript{19} In making claims for the inherency of children’s rights, the work of past philosophers and legislators continually supports the concept, if indirectly. Through the teasing out of natural rights, the language of rights inherent from birth strongly asserts that the rights afforded to adults as humans must be present in children as well.\textsuperscript{20} Even so, the tenuous acceptance of children’s inherent rights does not resolve related debates over which rights children possess, when those rights are realized, and how the plurality of childhoods globally affects children’s rights.

\textbf{Culture’s Place in Human Rights Frameworks}

A large part of the contestation to children’s rights and to the penning of international frameworks for children in possession of those rights emerges from the plural experience of childhoods across the world and the intersection of factors in different localities that affect children’s rights. Children, as a global group, do not only function within characteristics of childhood but also within racial, religious, linguistic, and geographic communities. In concerns about culture, intercounty adoption exacerbates and tangibly exemplifies the importance of a culturally legitimated children’s rights framework; the very idea of an international adoption implies multi-cultural participation in the legislative process and new frontiers for discrimination of a child on the basis of difference. Benyam Mezmur, a scholar of children’s rights in intercountry adoption, asserts that, while limited in numeric significance, children involved in intercountry adoption represent a symbolic importance for the rights of children to be recognized and protected both locally and internationally, and the impact that culture has on the fulfillment

\textsuperscript{19} Dixon and Nussbaum discuss this concept in great detail, with particular attention made to the avoidance of a “spiraling need to protect” future capabilities that are damaged by current disregard for developing the proper capabilities to function. Refer to page 580, specifically.

of those rights. Additionally, the drafting process of international documents demonstrates the compromise of cultural relativism and universality through which rights are legitimized in local implementation of international legislation. As such, the relevant human rights tensions surrounding culture’s impact on children’s rights are twofold: the impact of culture on conceptions of children and their rights in any society and the child’s right to culture in adoption across state borders.

*Culture and Conceptualizing Universal Children’s Rights*

First, the suitability of a cohesive instrument of children’s rights deserves conceptual thought. Various societies not only conceptualize childhood in incredibly diverse ways today, but each society has its own history of conceptualizing childhood that encourages present discourse to focus on children’s rights differently. For Sen, the idea of a universal (children’s) right can only be valid insofar as it has passed the process of public reasoning within cultures and societies. Yet, as will become evident in the example of *kafalah*, a system of permanent guardianship, within Islamic societies, the process by which societies absorb and internalize a universal right will not follow a single path, but, rather, through public reasoning, implementing rights will involve plural and inconsistent pressures for change within the culture itself.

Abdullahi An-Na’im recognizes “culture… as the context within which human rights have to be specified and realized.” Therefore, culture not only impacts the creation of universal rights but also determines the implementation of universal rights. In effect, children’s rights form an

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hourglass figure in mapping their interactions with cultures: many cultural conceptualizations integrate into a single global standard that is then utilized in a variety of cultures to ensure the realizations of children’s rights.

Due to the “cultural terrorism” experienced throughout colonization and the exclusion of African thought from early international human rights instruments, the voices of African people in the crafting of children’s rights are multi-faceted.25 In the African context, the viability of cultural inclusion in the creation of universal human rights garners significant attention because of both the plurality of cultures and histories of their subjugation to those of colonizers. For example, not only did African states take initiative to consider the plight of children in war and racial discrimination, but they also pushed for the non-hegemonic discourse surrounding children’s rights in drafting the CRC. The importance of avoiding and correcting hegemony appears at the international and local levels and can be achieved through the inclusion of cultural thinking regarding rights while recognizing the fluctuations that constantly take place within cultures; to this effect, cultural influence on rights does not excuse the preservation of traditions that violate universally accepted human rights.26 Sen, An-Na’im, and Jeffrey Hammond assert this by stating that cultures are ever-changing and that internal pressure for human rights in line with universal rights can shape the future of a culture to oust those traditional practices often

25 Boakye-Boaten, “Changes in the Concept of Childhood,” 110; “cultural terrorism” invokes the elements of colonization and expropriation that constitute a psychological violence felt by individuals and societies in the practice and promotion of their cultures. Likewise both Frantz Fanon and Ngũgĩ wa Thiong’o speak to the psychological violence of colonialism that persists to today’s experiences of culture.
26 Hegemony as indicated in this context refers to the dominance of a certain group in transferring thought to the codification of rights. Ultimately during the emergence of rights as a concept, the hegemony resulted in European constructs superseding and nullifying the rights discourse that existed in other localities and cultural traditions. In local instances, hegemony refers to the perpetuation of ‘culturally traditional’ practices that benefit those in power; the perpetuation of practices against rights occurs on the basis of preserving culture while ignoring the premise of hegemonic interests that benefit from the practice.
used as examples of cultural incompatibility with universal values.\textsuperscript{27} Altogether, accepting culture’s validity and utilizing universal rights does not inhibit the ability of human rights to be both culturally viable and universal in nature.\textsuperscript{28}

An example of the possibility of a cultural practice opposing the premise of the universal rights of children illustrates how universal rights can work alongside the cultural reality of a specific practice to ensure that children’s rights are upheld within cultures and not dismissed because of incompatibility. *Kafalah*, the Islamic system of permanent guardianship that does not include legal absorption into the family, represents one way in which cultural differences join together in universal documents and subsequently legitimize the universal principles within local implementation. While certainly not the sole counter-example to adoption, *kafalah* remains the most institutionalized and structured alternative to the system of adoption; notwithstanding this fact, the emergence and shaping of the term adoption and its corollaries of fostering and orphanhood have broadly incorporated diverse local systems of caring for parentless children, all of which pursue the same goal of familial nurture and stability for the child. As Marijke Breuning carefully asserts, “Practices that are akin to fostering and/or adoption are familiar to a wide variety of cultures, but such arrangements generally lack the finality of a legal transfer of parental rights and responsibilities which characterize adoption in the global North.”\textsuperscript{29} Thus, the purpose for allowing alternative systems to adoption in international frameworks for children’s rights safeguards against cultural variations in the use of adoption being abused in intercountry adoption. For example, intercountry adoptions may occur in which the birth family thinks that


\textsuperscript{28} Sally Engle Merry’s work on translating global rights to local rights asserts this idea that moving from universal to local is a complex task. However, the task need not be complex because of the nature of the rights and the localities, but, rather, the context and actors involved in the process often make it complex.

the adoption entails temporary schooling in another country (in their minds, they maintain legal parental rights), while the adoptive family only knows adoption to be a legally permanent decision.  

Kafalah’s practice and implementation today reflect the ways in which cultures develop to incorporate protective measures for their participants as individuals yearn for change. Islamic majority nations that operate with shari’a remain vocal about their reservations concerning adoption, domestically or internationally, in favor of kafalah. Through the cultural mediation process that produces normative frameworks concerning children’s rights in intercountry adoption and the parallel theoretical basis, proponents of shari’a and kafalah assert that the alternative system for orphan care does not imply a disregard for children’s rights; instead, it represents a historic protection of children in Muslim cultures and legal practices. The Quranic principles of compassion and societal well-being that guide kafalah align with the rights discourse for children in adoptions, where the care of children occurs not for personal gain but for the child’s wellbeing. The practice distinctly evolved to protect orphans from adoptions that occurred solely for the adoptive family to gain from the child’s inheritance. Further reflecting modern movements to recognize children’s rights, “technicalities of the law (fiqhs) cannot be allowed to subvert the objectives of the law (sharia)” when children’s care is at risk.  

Thus, the emphasis on children’s rights as the ends of normative rights instruments concerning intercountry adoption is validated across cultures. Before the international legal framework

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around intercountry adoption and children’s rights had fully formed, the Islamic refusal of adoption and the evolution of *kafalah* promoted children’s safety and care outside of the birth family’s household. Therefore, the Shura Women’s Council concludes that present-day, legally regulated adoption fits within the framework of *kafalah* by protecting children from adoptions for adults’ gain. While many may view the denial of adoption within and from Muslim nations to ultimately be a cover for keeping children within the faith and the culture at all costs, the “desirability of ethnic, cultural, and religious continuity … however… considers the spirit of dignity and compassion of a human being as essential factors to consider when adopting rather than the general strictures of one’s faith tradition.”\(^{32}\) An emphasis for the continuity of culture and religion has been legally interpreted as the above statement concludes; cultural continuity will serve as a guideline to achieving the best interests of the child, but, as the means, it cannot replace the end which would be a functioning, socialized, healthy child’s place in any family or society. This example demonstrates that diverse cultural perspectives influenced the current language of children’s rights universally and that the historic ties that diverse localities have to ideas of children’s rights culminate in deepening the claims of modern rights discourse.

*The Child’s Right to Culture: Adoption across Borders*

Secondly, in intercountry adoptions, children are born in one culture and often grow in extremely different cultures for the remainder of their childhood. This concept of cultural transition threatens the viability of a child’s right to culture and identity in the minds of many opponents to intercultural adoptions, which may include domestic adoptions across ethnic, linguistic, religious, or racial groups. African countries especially question the benefit to a child of transitioning cultures; the majority of intercountry adoptions originating from the African

\(^{32}\) Muslim Women’s Shura Council, 15.
continent place children in the United States.\textsuperscript{33} In this way, children in intercountry adoptions are the “human face of globalization,” which today resonates with neo-colonialism – children as an asset to societies’ cultural perpetuation and future economies are lost to the Western world in a continuation of past resource expropriation.\textsuperscript{34} As such, strong consideration for children’s cultural continuity is present in both the CRC and the ACRWC, discussed in the next chapters.

Regarding children’s rights to a cultural identity independent of related adults’ rights fruitfully distinguishes children’s rights to a cultural identity from a culture’s claim to a child. Instead of allowing parents or a society to assert rights to keep a child within their culture of choice, children have an autonomous right to participate in a culture. Of course, in normal circumstances, due to the vulnerability and incomplete independence of young children, the course of a child’s life involves inclusion in the parents’ or guardians’ culture. However, in the case where intercountry adoption is deemed necessary, Dixon’s and Nussbaum’s capabilities approach supports that the transition from birth culture to a new culture can preserve a child’s capability to enjoy and participate in any culture, rather than allowing a child’s capability to do so to be atrophied by inadequate care in his or her birth culture.\textsuperscript{35} Thus, in the development of arguments to underscore the drafting of children’s rights frameworks, the ideal that children develop their capability to enjoy culture and their right to an identity in their birth community is just that: an ideal, dependent on the feasibility of remaining in the child’s birth culture. Outside of such an ideal, the capability to enjoy and participate in culture must be substantiated through

\textsuperscript{35} Dixon and Nussbaum, “Children’s Rights and a Capabilities Approach,” 561 and 563-564.
adequate upbringing in any culture, with particular regard to the ways in which transitioning cultures can introduce new forms of discrimination against children.

In considering a child’s right to culture, the complexities of ascertaining the best outcome for a child facing intercountry adoption increase as the child grows older. Here, it remains necessary to incorporate a child’s right to a voice concerning him- or her-self as this opinion will smooth the divisions over how best to implement the child’s right to culture, belonging, health, security, and ultimately his or her best interests. However, the moral and legal assertions of children’s rights to a voice far outpace implementation because of the perceived difficulty of hearing those voices. For consideration of the effects of a child changing from his or her culture of birth through an intercultural adoption, the child’s opinions become easier to listen to and stronger as the child develops oratory skills and spends greater time in a particular culture. This opinion remains influential in determining the child’s outcome in a potential intercountry adoption and cannot be glossed over in favor of the desires of potential parents, adoption agencies, legal systems, or states.

In asserting that both the evolution of children’s rights are culturally legitimated universal rights and the rights to culture are protected within the application of universalist documents, the arguments behind children’s rights in intercountry adoption relies on the idea that human rights have evolved through global involvement and compromise. The influences of human rights that lead to conceptualizations of children’s rights do, in fact, reflect non-hegemonic discourse; yet, the tensions surrounding any seemingly global values do not escape the effects of power inequality and the exclusion of voices. Human rights discourse has roots across the world, emanating from cultures and histories of distinct and diverse experiences with power and rights

36 Certainly, my encouragement of incorporating children’s voices into decisions regarding themselves does not serve to reify children’s opinions, but, rather, I aim to add the voices of children into the decision-making process.
violations. Children’s rights do not avoid this reality of diversity nor the power inequalities that influence dominant discourse.

**Geography and the Question of Assigning Responsibilities**

As culture mediates and localizes the implementation of universal children’s rights, the geographic spaces in which this occurs dictate, to a large degree, the implications the rights have on the child and the possible resistance to children’s rights. The geography of rights implementation has greater influence than culture alone; the responsibility of implementing and protecting children’s rights depends upon the spatial location of the child, the laws, and their interpretation. For example, the United States’ feet-dragging in regards to recognizing children’s rights (as the only state that has not ratified the CRC) stems from a desire to maintain parents as the responsible parties for children, keeping government out of the picture for agency in matters concerning children.\(^{37}\) However, Onora O’Neill’s work aims to complicate the decisions of agents of justice, allowing for parents and states to function in tandem to secure the rights of children, as states have greater capacity for collective action and parents have greater contact with their children.\(^{38}\) A product of the nature of the international legal structure, states fill the role of agents of children’s and human rights, being both the level of institution involved in drafting the frameworks and the level of institution under obligation to the frameworks.\(^{39}\)

In ancient societies without a nation-state government to dictate legal procedures, communal care for orphaned children eliminated the problem of parentless children.\(^{40}\) Of course, not every society upheld identical methods of communal absorption of orphans, but the

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\(^{39}\) O’Neill, 182.

relatively similar socio-economic status of the majority of families encouraged the cultivation of close, non-competitive ties and an impetus to relieve others of suffering if at all within one’s capacities. As economic diversification, competition, and political consolidation of nation-states spread globally, families and children lost many of the communal resource redistribution benefits from a shared status in life, and governments stepped in to mandate justice or the lack thereof.41 States’ responsibility to protect the rights of their citizens extended, through children’s rights movements, to include acknowledgement of children’s rights that may require the removal of a child from parental care. Children’s rights, then, face the problem of determining the responsibility of rights that David Miller presents, with the agents of their rights depending on who or what is best placed morally, communally, or in terms of capacity to remedy a violation of a child’s rights.42 In regards to intercountry adoption, current frameworks for children’s rights and their implementation follow these principles to establish a family- or community-based solution to children in need of a home before resorting to other agents who can also provide the best care for the child.

Much of the implementation of responsibility of children’s rights occurs locally, aligning with universal rights for the child while discerning the spatial particularities for individual children. This process of localizing universal rights and localizing the responsibility of justice for children involves complicated decisions regarding who or what organization best represents the arbiter of justice for the child and, accordingly, how that claim to arbitrate justice can be rationalized. Children claim inherent rights outside of their places within systems of nation-states and international law yet are legally dependent on these systems to deliver the space for

the rights to be claimed. Within intercountry adoption, the implementation of children’s rights depend all the more heavily on established institutions, whose implementation of children’s rights must satisfy both local and international standards.

In the global order of power, children’s rights in intercountry adoption must rise above the tendency for assignations of responsibility to fall into categories of helpers and the helped.43 This precaution, when voiced in opposition to allowing intercountry adoption, often dons a guise as a cultural critique to protect a child’s identity and belonging within the culture of his or her birth.44 Rightly so, as cultural hegemony coincides with traditional spatial divisions between individuals and nations who do the helping and those they help. Additionally, the concept of intent (good or bad) influences how children’s rights’ responsibilities are distributed amongst actors involved; religion, economic status, and perceived opportunity structures complicate the determination of agents of children’s justice in intercountry adoption. These factors all contribute to an understanding that “variously located people and places… are embedded in complex and uneven power relations.”45

The solution, in part, to adjust the system of complexity that defines power relations and in many ways subjugates children to the interests of others lies in the inclusion of the voices of children. Without hearing or watching for the thoughts and wishes of the children whose rights are to be acknowledged, protected, or violated, international frameworks for children’s rights fall prey to granting children’s rights to the adults who surround them, speak for them, and influence their experiences. Deconstructing the homogenized space in

44 In the case of Madonna’s contested adoptions of Malawian children, the argument from opposition rested upon legal residency requirements and questions of cultural continuity for the children. See work by Benyam Mezmur on the topic: “‘As Painful as Giving Birth’: A Reflection on the Madonna Adoption Saga,” “From Angelina (to Madonna) to Zoe’s Ark: What are the ‘A-Z’ Lessons for Intercountry Adoptions in Africa?” and “‘Acting like a Rich Bully’?: Madonna, Mercy, Malawi, and International Children’s Rights Law in Adoption.”
families and societies that children occupy requires children to have full capabilities to achieve their rights and to speak to their particularized circumstances. When given space to speak with regards to the status of their rights, children often occupy adult-dictated places and are given time to speak to reach an ends that adults involved wish to settle quickly. In line with the capabilities approach discussed above, a child’s right to voice his or her own opinions must entail the choice to do so and the space with which to make that choice; children cannot be forced to speak in settings or at times that they do not wish to speak, but they also cannot be restricted from speaking on their rights.

Conclusion

Children’s rights, inherent from birth, apply to children as autonomous individuals and vulnerable members of societies. The capabilities approach adeptly justifies the duality of rights to guarantee complete rights independent of context and to guarantee more input into attaining those rights based on the child’s context. This resolves the concern about children changing cultures due to intercountry adoptions, in that it may only occur if it is necessary for the child to attain his or her rights in the moment and the future. Additionally, the existence of universal

47 Martha Nussbaum’s work on the capabilities and rights of disabled adults is reflected in her conceptualization of children’s rights when verbal communication may not be possible. Yet, the inclusion of non-verbal communication of one’s own preferences or opinions is still a requirement by the right to express views within reason to the court’s or guardian’s ability to understand those views.
48 Amartya Sen, “Open and Closed Impartiality,” The Journal of Philosophy 99, no. 9 (Sep. 2002):445-469: Sen favors Adam Smith’s idea of an impartial spectator who (or that) can decide, in a fair and removed fashion, any matter for another group or individual. This impartial decision stands without regard for explicit context of that which is being observed and can be applied to the validity of children’s universal rights even in specific contexts that may or may not recognize those rights. Building upon this idea, Nussbaum (“Women’s Bodies” and “Children’s Rights and a Capabilities Approach”) argues against the idea of cultural relativism as a protection for the violation of capabilities with her preferred term of “context-sensitive universalism.” She also views cultures themselves as plural entities; what we think of as a culture often only represents the dominant claims of the dominant group within that culture. She certainly develops a counter to the cultural relativism critique of universal rights by posing a list of central capabilities regardless of context, and, in doing so, the effort required to actualize those capabilities will differ dependent upon a child’s specific context.
values, as tempered through diverse contributions to their creation, strengthens children’s rights globally, ensuring that an intercountry adoption could not occur legally in violation of those principles no matter the country of birth or placement. The universal nature of the principles of children’s rights also provide a clear agent of rights in that states, under international law, must provide for their adherence to the laws even if they rely on non-state actors to fulfill the commitments.
Chapter 3: Universal Norms for Children’s Rights in Intercountry Adoption: The UN’s Convention on the Rights of the Child

In this chapter, the first dominant, international, normative framework for children’s rights that applies to the African continent will be explored. The idea that powerful tools of normative coercion exist in this space that receives the brunt of international blame for noncompliance with human rights rebukes this Afro-pessimism and historicizes the broad input in crafting the documents for children’s rights at work on the continent. The UN’s CRC (1989) has a strong presence in the African space as the document with the greatest international and regional reach and as the basis upon which the ACRWC (1990, discussed in Chapter 4) made regional distinctions and improvements. The process leading up to the adoption of the CRC holds great importance for its normative sway, as both an inclusively drafted and culturally legitimized document. Additionally, the CRC represents a substantial progression in human rights frameworks globally as children gained inherent, autonomous rights, including in the previously underrepresented area of intercountry adoption. First, this chapter will discuss the documents and ideas preceding the CRC’s drafting that brought children’s rights into legislation and created a platform for universal children’s rights. Then, the CRC’s drafting process and particular text relating to intercountry adoption will be analyzed with respect to its theoretical and normative contributions. The chapter aims to present the novel ways in which children’s rights are conceptualized, presented, and protected in intercountry adoption by the CRC’s universal rights as applied on the African continent.

Pre-cursors to the Modern Children’s Rights Frameworks

While the principles of caring for orphans precede modernity, evident in religious traditions and the redistributive tendency of societies, the phenomenon of intercountry adoption
emerged recently. In addition to its modern conception, adoption between countries requires greater protections and subtlety of international rights law than domestic adoptions due to its disruptive and cross-cultural nature. As the world becomes increasingly globalized, children’s lives are integrated into the globalization as well as adults’. Children have the potential for greater access to global methods of increasing their well-being and a greater vulnerability to global harm. Within intercountry adoption, children move across country borders, becoming the “human face of globalization” as the recent phenomenon lifts children out of their localized contexts. \[49\] Before intercountry adoption’s emergence as an element of realizing children’s rights, original conceptualizations of children’s rights placed children within domestic and international legal structures focused on adults, with children as mere objects of charity and compassion. Children were seen as a family’s or local community’s responsibility, protections for their well-being only existing as addendums to rights for adults (women in particular). This marked the first step in expanding protections for children without needing to structurally alter the existing human rights framework that assumed children would be cared for to the best of a locale’s ability through their places within families and communities. However, the assumption that children were cared for within familial settings does not preclude the myriad ways in which children faced rights violations, for which the CRC now administers international law. Therefore, any early acknowledgement of rights for parentless children only successfully transferred the responsibility of providing for their necessities of life to adults of relatively localized communities. In fact, Judith Ennew claims that the first recognition of children as the subjects of their own rights came in the form of the CRC, indicating that before 1989 no child had autonomous claims to rights under international law. \[50\] Now, with new claims to rights as

\[49\] Breunig and Ishiyama, “The Politics of Intercountry Adoption,” 90.

individual agents, children facing intercountry adoption embody circumstances that challenge the bounds of normative frameworks and their implementation.

Prior to the CRC, children received no recognition of legal rights or they gained rights as small pieces of larger international texts concerning work, trafficking, or education. For example, the International Agreement for the Suppression of the White Slave Traffic, ratified in 1905, includes protections for girls as well as women found to be trafficked; similarly, the International Convention for the Suppression of the White Slave Traffic, signed in 1910, protects women and female children from trafficking, providing for their return upon discovery. The League of Nations’ Covenant of 1919 included comparable provisions for children, grouped with adults as they may face similar afflictions, but the text is notable as the first overarching organizational text including provisions for children in work (23(a)) and trafficking (23(c)). Then, in 1924 with the Geneva Declaration of the Rights of the Child (Declaration of Geneva), the League of Nations set forth explicit protections of children and their rights to non-discrimination and freedom from exploitation. As quoted in the previous chapter, the Declaration of Geneva, although innovative in its international recognition of children’s ‘rights,’ treated children as recipients of compassion, not providing autonomous, inherent rights to children apart from what adults could provide. The urge for the Declaration of Geneva and its draft came from Eglantyne Jebb, co-founder of Save the Children Fund in London – an early example of NGO involvement in the acknowledgement and protection of children’s rights locally.

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54 LoN, “Geneva Declaration of the Rights of the Child.”
and globally.\textsuperscript{55} The Declaration’s framework proved powerful and adequate for international conceptualizations of children’s rights at the time, maintaining the status as children’s rights’ only international text until the CRC, even surviving the transition to the UN.

In 1959, the UN officially adopted its slightly re-worded version of the Declaration of Geneva, the Declaration of the Rights of the Child (the Declaration), expanding it to include social welfare provisions for families with many children and defining a preference for children to grow up in a family environment when parentless.\textsuperscript{56} Significantly, these two newly emphasized norms to care for children (not quite advocating children’s \textit{rights}) point towards modern normative frameworks’ integration of children’s rights to include rights of economic security in families, aligning rights with the growing consensus that familial care benefitted children more so than any other form of care.\textsuperscript{57} Children’s rights also gained recognition in the UN framework through the 1948 Universal Declaration of Human Rights’ provisions for children alongside complementary rights for adults, including acknowledging the fundamentality of family (16(3)), the special protections and non-discrimination based on birth of children (25(2)), and rights to education (26).\textsuperscript{58}

As the international rights order underwent shifts and the world suffered from the wars and instability of the mid-twentieth century, debates surrounding children’s protections increased in tempo and necessity to produce vocal advocates of children’s rights on the international level. At the same time, the children’s rights movement is notable in that its impetus originated with


\textsuperscript{57} Barthollet, “International Adoption: Thoughts on the Human Rights Issues,” 180.


adults and not children themselves. Meanwhile, intercountry adoption surfaced as a phenomenon due to the increasing interconnection of geographic space and global awareness of crises’ effects on children. These two shifts, although not sufficient to create perfect normative frameworks for children’s rights, opened space for the productive discourse amongst expanding circles of influence that finally led to the drafting of a UN document recognizing children’s inherent and autonomous rights for the first time.

The ideological distance travelled between the Declaration and the CRC was mired with long debates and expanding concepts of humanity that moved towards reaching universal acceptance of children’s autonomous rights. For example, in 1959, Francisco Cuevas Cancino of Mexico made the following statement during the presentation of the draft Declaration to the General Assembly: “The subject of this draft Declaration is children; fundamentally, however, it is directed towards society, towards adults.” He goes on to describe that the Declaration is “an appeal on his [the child’s] behalf,” representing a document of inherent rights for a child but refraining from asserting children’s autonomy and emphasizing their dependence instead. Ultimately, this view supposes, the child’s rights matter, not for the time of childhood, but because the development of the child into a functioning adult for the world is dependent upon his or her adequate upbringing.

The views expressed by Cuevas Cancino reflect a majority of international conceptions of children’s rights at the time and highlights the theoretical stumbling blocks that children’s rights met in gaining international normative recognition. Through the three decades following the adoption of this Declaration, children’s rights moved from charitable cases to autonomous human rights recognized in the CRC. The points expressed by Cuevas Cancino fueled the

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important transformations realized in the next normative frameworks for children’s rights. For example, despite the denial of children as autonomous individuals in the middle of the twentieth century, the reality of children’s vulnerability could not be ignored in the construction of a normative framework for children’s rights. The sentiment, at the time of drafting the Declaration, that children’s rights had to wholly be defined by their dependency on adults, however, did not stand in the face of human rights discourse which necessitates autonomy and inherency as the basis for rights. The capabilities approach aptly balances vulnerability and autonomy to justify children’s inherent rights, the withholding of certain rights for future capabilities, and the special protection of children’s rights. Following the capability approach’s concepts, current children’s rights frameworks, including the CRC, move beyond conceptualizing children as merely occupying a transitory stage of life but, rather, a time of being and becoming.60

As children gained the acknowledgement of their inherent rights in the interim of 1959 and 1989, intercountry adoption and the need to regulate it arose as a new frontier for international children’s rights. In 1986, the UN adopted its Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children with Special Reference to Foster Placement and Adoption Nationally and Internationally (Declaration on Social and Legal Principles) while many countries developed bilateral agreements concerning the legal processes of intercountry adoption. The Declaration on Social and Legal Principles affirmed the cornerstone of modern children’s rights in intercountry adoption – that the child’s best interests be considered above all – and established that intercountry adoption be subsidiary to domestic

familial solutions. The text set the stage for subsequent articles concerning intercountry adoption and best practices for orphan care in children’s rights documents, touching on the social and economic implications of family welfare on vulnerable children and the necessity of cultural sensitivity in discussing cross-cultural adoptions.

Once children entered the radar of human rights, they continued to be incorporated into a greater number of non-child-specific documents as a distinct group, including the ICCPR and ICESCR of the 1980s. As time progressed, the debates surrounding children’s rights came closer to recognizing those rights autonomously from adults. By integrating rights for cultural continuity and a voice in decisions regarding their own lives, the subsequent frameworks for children’s rights, especially in intercountry adoption, could marry autonomy in children with a recognition of the preference for children to remain in their birth family, society, or culture; this includes economic implications for states to assist with familial welfare for children’s rights to be attained.

*The Convention on the Rights of the Child*

Adopted in 1989 and coming into force in 1990, the UN’s CRC altered the global conception of children, providing the first binding, universal standard for children’s rights. The following analysis of the Convention’s path to existence begins with the premise that set the framework in motion after the Second World War altered the global order. Then, the discussion turns to the decade of drafting its text in the 1980s before turning to the resultant document’s principles and novel claims for children’s rights.

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62 UN, “Declaration on Social and Legal Principles.”
The Changing World Order

Through the twentieth century emergence of children’s rights discourse, advocates for children to gain acknowledgement of inherent rights beyond social protections began pushing for a new document to further children’s rights and expand to cover new issues faced by children after the two world wars. The Polish experience in both world wars culminated in their submission of a draft for the CRC in 1978, particularly hurting from the treatment of their children and other children brought to the country for malicious purposes during the wars. The subsequent work that went into this draft and its presentation before the UN modeled a collective, non-Eurocentric initiative to keep international law in line with the emergent conception of “the child as an autonomous person who has his or her own needs, interests and rights. … He or she is not only an object of care and concern but also a subject whose interests and rights should be respected.” The CRC recognizes its own history as influenced by world events and the earlier declarations, wanting to strengthen the existing rights for children in a binding manner and maintain pace with new or unaddressed problems that children face.

After World War II, the order of the international arena changed significantly in the cementing of US power globally. Stephen James describes the ways in which labor, anti-racism, and anti-colonialism movements all occurred after the war to advance broader human rights considerations. Roland Burke uses the example of the UN’s early dealings with human rights violations’ complaints and the admittance of several states from the global south into the UN as instrumental in shaping the status of human rights in the mid-1900s. The resultant opportunity

64 Legislative History of the Convention on the Rights of the Child, xxxvii.
65 James, Universal Human Rights, 74-76.
to rework ideas of human rights, improve international laws, and incorporate a greater number of nations into discourse at the global scale opened up the possibility of crafting a children’s rights instrument with universal values and a binding mechanism.

In discussing the ways that children’s lives responded to a changing world, the universal model for recognizing human rights tested its ability to incorporate and satisfy diverse cultural perspectives related to how children function within communities, noting in particular how they are exploited or hurt in specific localities. States and communities regard children as their future, clinging strongly to the unfettered ability to raise children within their own cultural and social norms; therefore, the development of universal principles regarding children would challenge universality to incorporate diverse concepts of children and childhood. A universal document guaranteeing children their rights would have to carefully navigate children’s vulnerability, autonomy, and their role as cultural perpetuators.

The possibility for a convention on children’s rights evoked disagreements about the conceptualization of children and childhood within the UN community that had not been resolved or had not needed to be considered in drafting the nonbinding Declaration. With the Polish proposition for a convention (and the Polish draft convention) put forth in 1978, the UN Economic and Social Council became consumed with questions of the timing and the degree of specificity for the new convention. The draft presented by Poland did not vary drastically from the text of the Declaration, and in the following debates Poland advocated for the convention to merely translate the existing Declaration into a binding document.\(^6^7\) In light of the power dynamics that had pervaded international relations in the first half of the twentieth century, the Declaration and the beginning of the CRC’s drafting process centered on the ideas of childhood

\(^6^7\) *Legislative History of the Convention on the Rights of the Child*, 31-35.
from the global north that had been heard in the construction of the Declaration of Geneva, culminating in 1924, and its close successor, the Declaration.\textsuperscript{68} Throughout the process of formulating the CRC, the voices of geographic and cultural localities emerged, including the United States, Colombia, Portugal, the Federal Republic of Germany, Senegal, Libya, and Egypt, who displayed the vast diversity amongst conceptions of childhood and positions on children’s rights.\textsuperscript{69} By waiting to pursue a convention for children’s rights that could be properly debated and broadly validated, taking time and space to mull over the principles represented in (or left out of) the Declarations, the resultant children’s rights document could benefit from the changes in the world order and the changes in the UN’s human rights’ frameworks in the interim.

The most pressing issue at hand in 1978 revolved around the specifically impactful timeline for which Poland yearned: adopting a children’s rights convention on the twentieth anniversary of the Declaration and the International Year of the Child, in 1979. Opposing the authors of the draft, many states worked to preclude the allure of perfect timing from eroding the opportunity to critically analyze the changes that children and children’s conceptualizations had undergone since the Declaration’s initial adoption in 1924. Opposing Poland’s commitment to move the convention along, many states wanted to include important research findings from

\textsuperscript{68} ‘Power dynamics:’ James, \textit{Universal Human Rights}, 14, 36-38, 117, 179, and 182-183: James, throughout his book, develops the history of origins for the UN human rights body of instruments in the twentieth century. In the immediate post-Enlightenment period rights were claimed to be universal, but they were cultivated by Western Europe and America as they existed alongside slavery, colonization, and sexism. Additionally, the League of Nations’ Minorities regime was limited to European members. Even in the 1945 construction of the UN Charter, the Great Powers had great power over its contents while non-Western nations fought with great force to include human rights in the Charter. And, lastly, in drafting the 1966 Covenants, voices from outside of the West pushed for human rights of all generations’ inclusion. Anticolonial movements enabled those voices to be part of the drafting process and influenced the rights for whose inclusion their representatives fought.; and Paul Gordon Lauren, \textit{The Evolution of International Human Rights: Visions Seen}, 3rd edition (Philadelphia: University of Pennsylvania Press, 2011), 118-120: The League of Nations, in the 1920s while drafting the Geneva Declaration, turned attention to the welfare and development of African and other non-Western nation. Additionally, while the Geneva Declaration was claimed to be universal, this was only insofar as women’s groups incorporated the welfare of children in their protections of women as mothers.

\textsuperscript{69} The discourse between and opinions of the mentioned states regarding the CRC can be found within \textit{Legislative History of the Convention on the Rights of the Child}. 

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studies that would be held in the International Year of the Child and conduct broad conversations including newly independent nations about the expansion and deepening of children’s rights. Of course, within the group against adopting a convention in 1979, several states failed to see the importance of changing the already functioning Declaration, but those voices were overwhelmed by the number of countries agreeing that children’s rights were the next frontier of the UN’s human rights framework.

At the 1978 Warsaw Conference on the Rights of the Child, participants concluded that the convention should move along as quickly as possible, for a 1979 adoption; meanwhile, the conference also demonstrated that this fast-tracked conception of children’s rights still centered on adults’ ability to grant those rights to children. Just prior to the International Year of the Child, all states submitted comments on the proposed Polish draft convention; many speaking to the timeline and others pressing issues specific to their own children. Given the broad spectrum of states’ desires for the convention’s content and the quantity of literature that the International Year of the Child would see published, the convention’s timeline expanded by necessity. Allowing for lengthy discussion and the incorporation of studies completed for the International Year of the Child, the convention would grow beyond the principles of the Declaration and represent a stronger, universal document. Throughout this first round of states’ comments and collections of states’ conceptualizations of children, the lack of clarity on adoption fell by the wayside of arguments over timelines and the depth of the proposed convention; yet, Barbados and Colombia each raised concerns that the Declaration and draft convention failed to address children’s rights in adoption circumstances.

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A Long Decade of Debate: the 1980s

The United Nations General Assembly adopted the CRC on November 20, 1989; the document in its finality representing long years of debate, compromise, and cooperation by myriad states with diverse national realities concerning children. After the original debates over moving forward with the convention in 1979 or waiting, the document fell into the UN’s long list of projects in the 1980s, a problem that Poland had wished to avoid to make children’s rights law binding and enforceable on the global scale. Yet, the convention benefitted from challenging and assembling conceptualizations of childhood found in past documents and across the UN’s membership during that time. Throughout the 1980s Senegal’s delegation consistently urged that the working group’s “efforts to promote universality should take into consideration the economic, social, cultural, and religious diversity” of states worldwide. Delegations from Egypt, Algeria, and Libya additionally pushed the drafting of the convention towards language that accepted rather than invalidated Muslim legal protections for children. In doing so, the convention gained strength in its ability to uphold children’s rights in various cultures that happen to use different terms or systems for protecting the rights of children while simultaneously ensuring that those systems uphold the universal standard for children’s rights. The entire drafting process made clear the growing voice of the global south and its increasing solidarity in international settings. Continuously, states in Latin America, Central America, and Africa urged forward the indivisibility of economic, social, and cultural rights alongside those of civil and political nature and demonstrated a desire to strengthen their national laws while codifying progressive children’s rights internationally.

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Early on in the drafting process, when considering the original Polish draft of the convention in 1978, Colombia remarked that “any plan or programme which a nation may adopt in relation to children should consider the child as an active and participating member of a society in general and of a family in particular, so that his actions are not dissociated from the social environment in which he lives, and so that he is not regarded as an abstract alien to any objective reality.” As discussed in the previous chapter, the emergence of children as autonomous members of any society came about slowly and nonlinearly; Colombia’s view of childhood contrasts with the English or American views that children need to be molded before realizing their potential in society. However, in other localities such as in the previous example of Boakye-Boaten’s experience of childhood in Ghana, children play integral roles in perpetuating and shaping a society’s culture before reaching adulthood. The importance of histories and experiences of non-Western nations’ conceptions of childhood cannot be missed in analyzing the development of children’s autonomous beings represented in global children’s rights frameworks. Portugal and other nations later echoed Colombia’s call for childhood agency within the duality of childhood, as both a time of dependence and a time in which children are the agents of their own rights. In forming the CRC’s principles, distinct cultural realities aided in the accumulation of a universal childhood conceptualization that could provide standards for children’s rights across spatial differences. By extending the drafting time and deepening the debates to cultivate the universal principles of children’s rights, the CRC benefitted from shifts in thinking about children, as both the global consensus and individual countries’ conceptions of children adapted to view children as a vital element of human rights.

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The time that spanned from the UN’s adoption of the Declaration in 1959 to the passage of the 1989 CRC contained dynamic changes in voice and politics amongst the nations present in children’s rights discourse. The presence of the Soviet Socialist Republics in developing the text of the convention contributed a voice that no longer exists, per se, yet, in drafting the CRC these states were active in supporting social measures of child welfare. Also, the concurrent struggles of states in the global south to provide adequate social services to their citizens and advocate their needs amongst the historically louder voices in the international arena is well represented in the decade-long process to draft the CRC. Originally asserting opinions for the inclusion of economic and social protections for children, the demands of nations in the global south gathered momentum in the last five years of the drafting process, requiring not only the rights for children to include all rights but also that the document itself represent the diversity of realities that children face. Repeated calls from Senegal’s delegation and North African states to cultivate a universal document by allowing space for the cultural tempering of the rights led other nations to support greater inclusion of diversity within the universal text itself.

Of course, this is not to say that there are no points of contention or omissions of culturally valid concepts in the Convention today; certainly the standard that the first article normalizes (age of majority as 18) with the caveat that it may differ still stirs up controversy about preferential rhetoric for many countries’ definitions of childhood. Yet, despite the normalizing language of the cutoff age of 18, the document’s text does allow for national laws to define childhood differently. This echoes what Senegal’s delegate Samba Cor Konate poignantly stated in 1988 – that the document could not approach universality by applauding assimilation to standards of children’s rights but rather by utilizing broad participation in
creating standards of children’s rights. In drafting the articles dealing with intercountry adoption, too, the voices of the global south rose to urge forth the inclusion of culturally constructed, universal rights for children within intercountry adoption to achieve the principle of their best interests. The unwavering demands of nations in the global south pushed forward the necessity of cultural diversity’s representation in the final Convention.

The idea of adoption, while historically localized and protective of children’s vulnerability to their needs, emerged throughout the past centuries as a mechanism to care for parentless children that communities failed to absorb and also became a circumstance of child exploitation or neglect. As modern economic and social systems spread to promote individual or familial success and incomes diverged within communities, care for children became a higher cost for nuclear families with food, education, and time in greater amounts emerging as necessities to promote children’s viability in society. At the same time, community care for families who struggled economically decreased as capitalism spread globally and households adopted a more competitive mentality. These two phenomena created a dual problem for vulnerable children, children who are orphaned or otherwise out of parental care. First, families feel greater burdens to care for children, and may seek to relieve themselves of the cost of a child through alternative child care solutions. This tactic aims to preserve the remaining family members and ideally increases the child’s standard of living. Secondly, children outside of family care, for any reason, no longer have the local community absorption on which to fall back. Community members may also be hard pressed financially, not have the capacity to take on another child, or no longer feel a social responsibility to care for other families’ children. Other sentiments of difference between individuals within a state influence the options available.

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to vulnerable children. In the author’s experience with orphaned children in Nairobi, Kenya, ethnic tensions preclude families from adopting for implicit reasons. Due to these two simultaneous factors pushing children into alternative care systems, the development of adoption and, recently of greater importance, intercountry adoption regulations and acknowledgement of children’s rights within adoptions necessitates economic and social protections for children and families.

The necessity of adoption, nationally or internationally, is closely tied to economic and social realities. Without proper economic rights provisions for children in the Convention, children’s need for alternative care due to poverty would remain in compliance with international children’s rights law. Instead, by advocating for the explicit connection between family welfare and children’s rights, states across the world succeeded in legitimizing the child’s right to his or her own family, a preventative right for children who would otherwise face adoption. Although often conceptualized as the nations with the least ability to provide welfare to impoverished families, countries of the global south championed the inclusion of strong economic rights for children within families. Additionally recognizing the benefit that community absorption of orphans and vulnerable children had in protecting children’s rights in the past, non-Western nations led efforts for cultural, linguistic, and religious rights for children in general and in intercountry adoption. African states, who in the years following independence dealt in great detail with social divisions based on these identities, were strong advocates for such inclusions in a children’s rights instrument.

77 A young boy named Benaiah, around two years old, who seemed to be the perfect candidate for adoption – healthy, happy, incredibly intelligent, kind, and still very young – had resided in a Nairobi children’s home his entire life. I was told by the nurse and the social worker at the home that they both felt sympathy for him, that he would never be adopted. Upon my shock, they explained that he was markedly Sudanese, and this element of his appearance and difference would continue to make his quest for a permanent home difficult in Kenya.
The Convention’s Final Text

Adopting the CRC in 1989, the nations that throughout the drafting had been most outspoken for the inclusion of cultural diversity and protections of children in nations of the global south dubbed the convention a balanced document.\textsuperscript{78} The text of the CRC relating to children’s rights in adoption – Articles 20 and 21 – is available in the Appendix.

The original draft of the CRC merely included an article emphasizing that children thrive best in familial care and that the state must provide for children outside of familial care; the impetus for an article specifically pertaining to adoption began with its noted absence. Due to the Declaration’s neglect of adoption, especially intercountry adoption, the new drafting of the CRC required urging from Barbados and Colombia to consider the case of adoption in the children’s rights framework.\textsuperscript{79} The resultant dual article adoption clauses stem from careful consideration of alternative care methods – debates ranging from the inclusion of kafalah, reference to background continuity, methods of ascertaining the legality of adoptions, the status of intercountry adoption in relation to domestic care, and the financial aspects of adoption. For example, Spain wished to delineate any familial placement as preferable to institutionalization, while Brazil maintained that inter-country adoption should fall into the absolute last place of all forms of alternative care.\textsuperscript{80} Throughout the evolution of these two articles, the addition of ethnic, religious, cultural, and linguistic continuity preferences ensured that, by law, a child’s adoption domestically or internationally upheld the child’s right to culture and identity as far as his or her best interests would allow.

\textsuperscript{78} Legislative History of the Convention on the Rights of the Child, 207-273.
\textsuperscript{79} Legislative History of the Convention on the Rights of the Child, 537.
\textsuperscript{80} Legislative History of the Convention on the Rights of the Child, 525 and 550.
Deciding “that the best interests of the child shall be the paramount consideration” in
inter-country adoption, participating states created an incredibly flexible and challenging
expectation for future legal proceedings. Notably, in Article 21, this clause alters the
overarching statement in Article 3, that “the best interests of the child be a primary
consideration” in all circumstances concerning children, with a stronger primacy given to the
best interests during an intercountry adoption. Due to the contested discourse surrounding the
practice of adoption, this strengthening of the best interests’ consideration created a method of
ensuring the child’s rights are protected while allowing that local interpretations of the best
interests can avoid systems labelled adoption. The best interests of a child absolutely vary from
child to child across locations and circumstances, ages and capabilities. However, when a case
for adoption reaches a court and is noted in media, individuals contend the merits and demerits
of intercountry adoption for the sake of the best interests of the child. This encourages a local
and regional reckoning with precedents set in implementing the CRC and other adoption cases,
while each new case contributes a new perspective to legal precedent due to the individual
child’s circumstances. As contributors to the Convention applauded its universality that
stemmed from culturally inclusive drafting, that very universality is shaped by cultural
legitimacy as local realities set parameters for the law in adoption cases. Simultaneously
acknowledging the rights of children everywhere and creating a feedback loop for the
implementation of those universal rights for children in reality, the CRC challenges and
accommodates localized realities of children’s rights.

82 UN, “CRC,” Article 3(1).
The consideration of best interests alone cannot ensure an equal, just process for granting adoptions and determining care for children, however, due to the varying constraints of legal proceedings and power disparities both within and between nations. Intercountry adoption often involves children of a lower socio-economic standing and adults of a higher socio-economic standing, creating a double-edged complexity in verifying the adoption’s compliance with the CRC. First, the child, as a minor and often without familial ties, lacks a strong, personally attached advocate in court adoption proceedings where the implementation of Article 12’s right to a voice for a child is absent. Second, the prospective adopters often have the power of the purse and strong moral convictions aiding them in the adoption process (and often citizenship in a country in the global north). Both of the forces work in favor of granting inter-country adoptions at a rate greater than in their absence. The CRC flexes normative power to mitigate the effects of these forces by outlining children’s and families’ rights to economic well-being in Articles 4 and 5; this negates the occurrence of an impoverished child, with living, caring family, being adopted into another country. Yet, the fourth and fifth articles allow for the progressive realization of these economic rights according to a state’s capacity to meet them, leaving an opening for poverty or social trauma to render orphans internationally adoptable. On the other hand, the best interest clause in intercountry adoption necessitates immediate implementation. The gap between the realization of economic welfare for children to remain in their families and the immediacy of children’s best interests being met by intercountry adoption could allow the two above-mentioned factors to result in a non-ideal intercountry adoption. The normative framework for intercountry adoption represented by the CRC does bring to light the questions of living and capable family for vulnerable children facing intercountry adoption. Prominent cases on the African continent, like Madonna’s many adoptions in Malawi and Angelina Jolie’s
adoption in Ethiopia, show courts’ willingness to confront the complexity in finding biological family for children, obtaining consent for their adoption, and applying the principles of the CRC. Still greater effort and policies need to be implemented to eradicate poverty or perceived better opportunities as reasons for families to have to or want to give their children up for alternative care.

**Conclusion**

The CRC altered the child’s place within the framework of human rights, acknowledging the autonomy and personhood of the child while still remarking upon his or her vulnerability due to biological factors and environmental factors. The concept of children as rights bearers has found some familiarity and ease of application in the time since the 1989 adoption of the CRC with increasing media attention on the plight of children in global instability and conflict and with increasing work done by UNICEF to implement the CRC worldwide. However, the overwhelming majority of attention to children lies within the framework of their vulnerability and not within the concept of the violation of their rights. Indeed, the inclusion of children’s opinions into legal frameworks for adoption remains underutilized and understudied; many of the roadblocks to implementation stem from a lacking personnel capacity to facilitate children speaking in courts and a lacking amount of research into understanding the ways in which children communicate non-verbally at very young ages. However, simply pointing out the current gaps in implementation justifies the claims of the CRC’s normative power and novel regards for children’s rights. Without the CRC upholding the universal principles of children’s autonomy and inherency of rights, the existence of a gap between rights law and implementation for children would not be possible. The very testing of the universal principles, urging
implementation towards eliminating rights violations, is the aim of the CRC which continues to be the premier international document for children’s rights as inherent to human rights.

Through the decades, documents, and drafting leading up to the CRC, important theoretical bases for children’s rights came into the international legal sphere and critical involvement from previously voiceless localities emerged to construct a strong normative framework to acknowledge and protect children’s rights in intercountry adoption and general life. Although progressively flexible and challenging, and almost universally ratified, the areas where drafters drew a line for feasibility and universality in the text drove the Organization of African Unity to quickly develop its own regional framework. This development not only emphasizes the importance of African states in drafting the Convention, but also reiterates their commitment to upholding children’s rights to the highest degree, pushing forward where they felt the UN had not effectively delineated children’s rights in trying circumstances. In doing so, the OAU altered the intercountry adoption clauses of the CRC in enlightening ways.

In the final years of drafting the CRC, African representatives found that their specific experiences with childhood and its exploitation would not be adequately protected within the CRC and a regional document could better enforce the CRC’s principles on the continent. Only one year following the adoption of the CRC in 1989, the OAU completed the ACRWC, which entered into force in 1999. Several key distinctions alter the meaning and aims of the ACRWC from those of the CRC, and, importantly, the articles concerning intercountry adoption offer a new emphasis for the goal of adoptions and the rights of children adopted from the African continent and elsewhere. Exploring the roots of the ACRWC and its relation to the CRC, the first section of the chapter will discuss how the OAU developed its regionalization of universal rights for children. Next, the actual drafting process and distinctions of the ACRWC’s text outline the ways in which African nations asserted agency over human rights. Finally, comparing the CRC’s and the ACRWC’s articles relating to intercountry adoption and depicting the two documents’ cooperative frameworks and patterns of implementation in African intercountry adoption, the chapter concludes that the African continent thrives with strong normative frameworks and the power to implement those frameworks dynamically.

Pre-Cursors in Africa: the ACRWC

While modern discourse surrounding the rights of children in the African context depicts the ACRWC’s evolution as filling a void of African-relevant children’s rights in the CRC, the OAU was following global trends of including children’s rights into frameworks of human rights during the mid-twentieth century. As such, the OAU adopted its own Declaration on the Rights and Welfare of the African Child in 1979 as the UN drafted the CRC and celebrated the
International Year of the Child.\textsuperscript{84} While hardly revolutionary for the sphere of children’s rights, the Declaration articulates explicit care for the application of the UN’s developing framework on the continent and areas in which the OAU wanted to draw African attention beyond the limits of the UN’s Declaration – the female child, cultural promotion, and refugee (including internally displaced) children.\textsuperscript{85} From the OAU’s Declaration, African states worked to craft binding texts that would serve children’s rights in novel and complementary ways internationally and regionally.

Adopting a regional document the year after the UN passed the CRC, the OAU could be surmised to be publicly announcing its issues with the CRC’s contents and discontents. Yet, Chris Maina Peter and Ummy Ally Mwalimu remark that the regionalization of the UN’s universal, international principles aims to reinforce and strengthen the CRC to increase its translatability to the African context, not highlight its flaws.\textsuperscript{86} Still, pointing out the distinctions between the CRC and the ACRWC lends insight as to why the OAU adamantly developed its own framework. First, the CRC fails to address the specific disadvantages that female children face globally. Second, the CRC, in addressing refugee children’s rights, does not include rights for internally displaced children. Lastly, the CRC did not account for the particular distress of children within apartheid. Although this final case is technically limited to South African-resident children, the rights of those children required international assistance and advocacy to reach their full achievement, as evident in the ACRWC’s Article 26 concerning children in

apartheid and military destabilization.\textsuperscript{87} Many other differences between the CRC and the ACRWC exist, but the aforementioned could reasonably have been included in an international framework without dampening its broad applicability. Moreover, while other aspects of the ACRWC’s new concepts seem African-specific, the rights of children in all spaces must be apparent and equal in international frameworks in line with the inherency of human rights. Thus, the primary motivation for the ACRWC from the CRC could be simplified to two principles: a stronger, more specific regional instrument would increase accountability of African states to implement children’s rights and the inclusion of greater numbers of African countries in drafting ensured that the African child would be fully represented in its principles.\textsuperscript{88}

\textit{The African Charter on the Rights and Welfare of the Child}

In crafting the ACRWC, the OAU utilized the principles and discourse from drafting the CRC and the member states’ specific requests for furthering the rights guaranteed to children to produce the ACRWC. In fact, the language of the ACRWC closely mirrors that of the CRC. However, by narrowing the context in which the children’s rights framework is to be applied, the ACRWC pairs rights-enforcing African values with international rights principles that can be more easily domesticated by the ratifying nations. Not only does the ACRWC address the arguably universal shortcomings of the CRC mentioned above, but it also seamlessly merges the indivisible rights of children without making the same distinctions as previous human rights documents between the generations of rights (civil and political; economic, social, and cultural). Powerfully norm-setting in an African context so often seen as a dearth of innovation of and respect for human rights, the OAU (and now the AU), with both its ACHPR and the ACRWC,


\footnote{Peter and Mwalimu, “The African Charter on the Rights and Welfare of the Child,” 479.}
does not allow claims and provisions of human rights to be weakened based on the economic realities of states. The CRC does allow for economic capacity of a state to merit progressive realization of rights; this allowance was seen as an attempt to ensure that many countries would sign the document despite lacking economic resources to fully follow the articles’ demands. The OAU/AU, comprised of numerous countries that the drafters of the CRC would deem in need of this progressive realization clause, asserted that to allow progressive realization of certain rights is to allow those rights’ violation temporarily. Producing the ACRWC as an arm of the OAU extends accountability of its principles to member states regardless of their ratification status. This automatic inclusion of the ACRWC’s principles into the aggregate rights framework of the OAU allowed for more stringent realization timelines required of members without risking its reach. Regardless of the internal and external assumptions about the status of rights on the African continent, the ACRWC shatters claims of incapability or unwillingness to establish progressive rights norms without allowing progressively realized rights.

In areas other than intercountry adoption, the ACRWC made important contributions to the conceptualization and implementation of children’s rights. Although the grouping of African countries is often viewed by global organizations as the quintessential example of incompatible diversity of cultures, the motions to define a child relative to national legal majority rather than a strict age that were present during the drafting of the CRC were not built into the ACRWC. Instead, the ACRWC firmly defines childhood as below the age of 18. 89 The omission of the CRC’s caveat fulfills the promise of universal rights documents to protect and promote all humans’ rights to the point of equality, no matter what society s/he finds her/himself within for

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89 UN, “CRC,” Article 1: “For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier,” and OAU, “ACRWC,” Article 2: “For the purposes of this Charter, a child means every human being below the age of 18 years.”
the realization of those rights. This constructive omission, too, highlights the benefit of the OAU’s proximity to the states in which the rights framework is implemented. The well-defined age of childhood for children’s rights normatively reinforces the positive prohibition of child marriage, the protections of juvenile court laws, and the provision of education to all youth no matter if their specific locality defines them as children. Even if a culture or nation defines childhood differently, the principles present in the ACRWC are fundamentally human rights and their application to young adults in the eyes of domestic legal majority could not infringe upon the rights of those young adults. This small example of change from the CRC to the ACRWC reinforces the argument that the OAU and African countries were able to decisively handle a troublesome piece of rights law that the CRC’s drafters could only solve with ambiguity.

Movement within the OAU at the time of drafting the ACRWC focused on two major themes of the 1980s: ending apartheid and promoting medical care. Children’s rights benefitted from the emphasis on these two themes in securing the explicit text that guarantees rights and protections through apartheid and sickness. Articles 14 (Health and Health Services) and 26 (Protection Against Apartheid and Discrimination) acknowledge children’s inherent rights (no matter the socio-economic realities of family or state) and simultaneously describe the special protections afforded to children as vulnerable humans. In the areas of apartheid and health care, the particular vulnerabilities of children are exemplified. For children’s rights to health, these added measures to implement the health of children alongside a denial of

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90 The overwhelming (and necessary) attention given to South Africa, Namibia, and surrounding areas’ citizens (especially including women and children as affected by apartheid) and the simultaneous movement to increase the provision of health services to the continent’s children (and population in general) can be seen throughout the Council of Ministers’ Ordinary Sessions and the Assembly of Heads of State and Government’s Ordinary Sessions between 1979 and 1990. For example, AHG/Res. 163. (XXIII), “Resolution on Universal Immunization in Africa” at the 23rd Ordinary Session of the AHSG in 1987 and CM/Res. 1133 (XLVII), “Resolution on Southern Africa” at the 47th Ordinary Session of the Council of Ministers in 1988.
progressive realization of economically taxing rights culminates in the perfect storm of the 1980s’ focus themes to codify progressive children’s rights. The capabilities approach described in Chapter 2 is instrumental in supporting both the need for full economic, social, and cultural rights alongside civil and political rights, and the need for greater investment for children to have capabilities equitable to other less vulnerable groups of humans.

In all of the framework’s added substance for children’s rights, the ability to enforce those rights would secure them for the children they aim to serve. Perhaps the greatest achievement of the ACRWC lies within its African Committee of Experts on the Rights and Welfare of the Child (the Committee or ACERWC). The Committee upholds the standards of the ACRWC and works to promote its ratification, understanding, and domestication across members. Additionally, the Committee reviews the reports of members on the status of children’s rights within their jurisdiction and can receive complaints from anyone about violations of the ACRWC’s principles. ‘Dejo Olowu remarks that this mechanism ensures that the normative power of the document translates to implementation; individuals may claim violation of children’s rights to the enforcing body despite the rights’ (economic, for example) absence from local law.91 He further explains the ingenuity of the Committee’s mandate, in that the expansion of possible complainants and the independent nature of the Committee reinforces broadening the agents responsible for ensuring children’s rights’ implementation from states to organizations (domestically and internationally) to individuals. The capability of the Committee to respond to interpretation and implementation disputes has promise for ensuring the rights of

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children are upheld within intercountry adoptions, as the affected parties span from the children themselves, to families, communities, local and global rights organizations, states, and courts.

Despite the many ways in which the ACRWC built upon the CRC, some lapses in strengthening children’s rights do appear in the text. Danwood Mzikenge Chirwa finds the article covering a child’s expression of opinions in the ACRWC\textsuperscript{92} lacking compared to the CRC’s similar statement\textsuperscript{93} due to the ambiguity over how much weight a child’s opinion holds in the case that the child cannot communicate that view to others.\textsuperscript{94} Importantly for instances where the ACRWC seems to add ambiguity rather than clarity, the framework does not allow for its own principles to overshadow those found within the CRC, and, instead, models itself as the minimum acceptable standard of children’s rights, with all more stringent local and global legal standards superseding the ACRWC’s to better advocate for children’s rights. Therefore, any text in the ACRWC that does not increase the standard present in the CRC, other human rights frameworks, or national laws should not be factored into legally upholding children’s rights.

The articles that protect various rights of children facing a possible intercountry adoption are myriad, and the rights within the entire framework apply to each child under its jurisdiction. However, the gravity of intercountry adoption, as a possible rights violator or rights guarantor,

\textsuperscript{92} OAU, “ACRWC,” Article 4 (2). “In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.”

\textsuperscript{93} UN, “CRC,” Article 12 (1) and (2). “1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

merits its own articles (24: Adoption and 25: Separation from Parents) in the ACRWC, found in the Appendix.

Article 24 includes a claw-back clause just as the CRC does to allow countries without recognized systems of adoption to not consider the stipulations of the article. However, in line with the principles of universality and the indivisibility of rights, the caveat for adoption rights does not allow states to disregard children’s rights in orphanhood. Rather, the universally cultivated rights of the child in adoption as stated in the CRC and the ACRWC represent what Sen refers to as “publically reasoned” values.95 As such, the acknowledgement of rights for children facing the possibility of intercountry adoption necessarily covers all domestic alternative methods of care that are to be considered alongside adoption across state borders. This implies that for a country to decline to participate in adoption as a system, the alternative systems of childcare must uphold the rights present in Article 24, at the minimum. Without using the language of adoption, a country could avoid having to traverse the legal complexity of weighing intercounty adoption with domestic solutions to orphanhood to best protect the child’s interests. Yet, the alternative domestic or international options would have to withhold scrutiny of their protection of children’s rights just as adoption does. In fact, adoption’s consideration within the framework of the ACRWC indicates its contention, conceptually and in case-by-case litigation, regarding the benefit to the children involved. Through the construction of the ACRWC’s articles as universal principles of children’s rights, local variants to adoption and all practices violating orphaned children’s rights will undergo social transformation to align with the universal principles for which a majority of citizens advocate. For example, residency requirements for adoption (legally mandated durations of stay in the child’s birth country by

potential adopters) developed to ensure the pursuit of domestic orphan-care systems, exhaustion of domestic familial solutions, and the dedication of the potential adopters. Courts have applied the legal standards for children’s rights in adoption to ascertain that the residency actually secures the child’s rights. Recently, residency requirements have been central to litigation of intercountry adoptions under the guidance of the ACRWC, and there is an active presence of opposition to the adoption in these cases. Therefore, the existence of the universal standard for children’s rights does not preclude dissent, especially in the case of vulnerable children, that aims to preserve the best interests of the child.

In paragraphs (c) and (d) of Article 24, the ACRWC ensures that intercountry adoption protections do not lack compared to national adoption protections and that intercountry adoptions do not occur for financial gain. These two clauses may seem tautological in considering how to guarantee the rights of children facing intercountry adoptions; however, upon closer inspection, there could be a simple loophole. In financing and maintaining domestic systems of orphan care, such as adoption and fostering systems with proper oversight, a country may not see a viable administrative or financial benefit over that of merely cultivating a system for international adoption. Following the protections of children’s rights, which include rights to cultural and background continuity in alternative care, the state may seem to be bound to protect the domestic upbringing of a child before considering international adoption, and, indeed, the consensus of international rights frameworks and court litigation supports this. However, international adoptions, even when not over-priced so as to commodify the child’s placement abroad, cost more than domestic adoptions. This means that, despite greater work involved in intercountry

96 See Benyam Mezmur’s cited work for examples.  
97 See above.
adoptions, an increased number of individuals will be drawn to facilitate them, for the larger lump sum of payment from the family and the potential that foreign families have the ability to pay higher fees for the services. Coupled with the existence of exorbitant prices when intercountry adoption fees are not regulated properly, this can result in the erosion of or lack of incentive to develop a domestic system of orphan care. Additionally, in several countries, a lack of government capacity, an abundance of economic hardship, or a history of NGO-led systems of orphan care leaves international organizations in command of orphan and vulnerable child care systems. These organizations may not have the same desire to keep the nation’s children within their birth country and may have an extra incentive to export these children to their home countries. In total, this complexity in establishing an effective system of adoption or alternative care rests in favor of intercountry adoption over national adoption, often leaving the nation without appropriate standards for national adoptions. The result, even in light of Article 24(c)’s demand that intercountry and national adoptions follow the same standards, can leave a country with little or no national adoption standards with which to equate their standards for intercountry adoption.

The protection in Article 24(d) from “improper financial gain” aims to remedy aspects of the incentives for individuals to promote a country’s intercountry adoption system over the same country’s national adoption system. Still other benefits of intercountry adoption encourage its preferential status, one being the increased reach to potential donors for child care institutions due to the adoptive parents’ residence in a wealthier nation or their access to a network of similarly driven or financed individuals. In addition to financial gain restrictions, many African countries have residency requirements for prospective adopters that should serve to vet the commitment of the adopters and allow time for their education of the child’s birth culture. Yet,
the underside of the requirement also ensures that an adopter with the means to do so visits the nation, spending money while also paying the adoption fees. Due to the above concerns, many states have chosen to halt intercountry adoptions for a period of time in which the government increases efforts to establish a proper domestic child care system that maintains children’s rights in line with their best interests.

**Comparative Perspectives: The Resultant Framework for Children’s Rights**

By cultivating a regional instrument to augment the international children’s rights text from the UN, the OAU exerted its normative power as a leader in dictating children’s rights despite the perception of presiding over the most difficult spaces in which to implement human rights. For children outside of parental care, for any reason, the ACRWC provides a progressive, distinctive standard regarding the possibility of intercountry adoption fulfilling children’s rights. The differences in framing within the CRC and the ACRWC interact to fruitfully encourage deep discussion of the advantages of intercountry adoption for children whose rights to family and stability are violated.

Two important differences between the CRC’s and the ACRWC’s treatment of intercountry adoption affect how children’s rights are secured outside of parental care. First, concerning the rights within each framework in general, the CRC asserts that the best interests of the child be *a* primary consideration.98 The ACRWC, on the other hand, stipulates that the best interests of the child be *the* primary consideration.99 However, the relevant articles for intercountry adoption strongly posit in both the CRC and the ACRWC that “the best interests of

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99 Skelton, 486.
the child shall be the paramount consideration.”100 This word choice, by which the ACRWC protects children’s rights to have their best interests regarded as inherent and indivisible throughout the instrument, purposefully builds upon the concept that the CRC began. Meanwhile, the similarity in upholding children’s interests in adoption strengthens both frameworks’ power to translate to implementation and protection of children, even as African children face intercountry adoption to non-African nations.

Progressively asserting that children’s rights belong to children alone and shall not account for the desires of adults or institutions, the ACRWC does not allow for adoptive parents’ demand or the birth states’ desire to retain the child as an asset for its future to overwhelm the decision-making concerning children. Influenced by distinct African experiences with Western hegemony and the savior complex, the ACRWC does not allow the removal of children from the African continent to better (perceived as such by adoptive parents) nations, instead demanding that the best interests of the child and his/her rights are upheld. Indeed, experience with exploitation and conflict in African states encouraged the extension of the CRC’s claim that the best interests be the utmost principle in intercountry adoption to the OAU’s entire framework, outlining the lengths to which African states need to go to protect children from extreme rights violations.

Strong assertions of considering the best interests of the child facing a possible intercountry adoption, however, mean very little in light of the vague concept of best interests. Of course, the CRC and the ACRWC utilize this term to emphasize the importance of children’s rights while simultaneously acknowledging the wide variance of context and character of each

100 UN, “CRC,” Article 21, Paragraph 1: “the best interests of the child shall be the paramount consideration,” and OAU, “ACRWC,” Article 24, Paragraph 1: “the best interest of the child shall be the paramount consideration.”
child. In litigating, contesting, or advocating for an intercountry adoption, individuals and organizations on all sides of the debate believe that their solutions for the child’s care satisfy his or her best interests most completely. Coupling the ACRWC’s overall imposition that the best interests be the dominant consideration with its rights for familial welfare in Article 20 (2) can preclude the existence of children seen by other countries as in need of adoption due to family financial hardship. By extending the best interests clause to all of a child’s life and requiring the fulfillment of the child’s family’s right to welfare, African states have a greater standard for supporting and maintaining familial care for children than states that fall under the CRC’s norms alone.

The second important distinction between the CRC’s and the ACRWC’s articles on intercountry adoption clarifies how these best interests can be achieved when intercountry adoption is considered for a child. Reflecting contrasting opinions at the global, regional, and local levels about how children outside of parental care can best secure their rights, the CRC and the ACRWC promote different strengths of subsidiarity concerning intercountry adoption. In drafting its regionalization of the UN’s CRC, OAU members focused on two rationalizations of their wariness of intercountry adoption. Primarily, the continent burgeoned with fresh victories over outright colonialism and, during the 1980s, sought to assert independence over government, resources, and citizens (including children). The states knew Western hegemony and its detrimental effects and were keen to avoid children becoming the next exploitation of the continent. In addition, African values of family and the preservation of cultural/social practices lent to the argument that African children should remain within their families, communities,

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101 OAU, “ACRWC,” Article 20 (2). It should be noted that this right does include a clause allowing this to be met within reason as related to a state’s capacity. But, the overarching principle of the child’s best interests being the primary concern for the entirety of the framework cannot be forsaken for lack of resources.
nations, or continent, at the very least. Articles 18 (1), 25 (3), and Preamble paragraph 6 of the ACRWC demonstrate these ideas behind preserving local upbringing for children whenever possible.\(^{102}\)

The CRC reads that “inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin”; the ACRWC reads that “inter-country adoption in those States who have ratified or adhered to the International Convention on the Rights of the Child or this Charter, may, as the last resort, be considered as an alternative means of a child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin.”\(^{103}\) Intercountry adoption seems to rank in two different places amongst the options of alternative care for children outside of parental care: the CRC recognizes it as an alternative while the ACRWC demands it be the last resort.

The tension that proceeds out of this variation of framing revolves around the choice between a child living in institutional care in his or her birth country or being adopted across state borders. This stems from the universal conclusion that a child develops best when raised within his or her birth society or nation. Alternative care methods preserving this continuity of upbringing include domestic adoption, fostering, kafalah or extended family care. The ACRWC

\(^{102}\) OAU, “ACRWC,” Preamble (6): “Taking into consideration the virtues of their cultural heritage, historical background and the values of the African civilization which should inspire and characterize their reflection on the concept of the rights and welfare of the child, CONSIDERING that the promotion and protection of the rights and welfare of the child also implies the performance of duties on the part of everyone,” Article 18 (1): “The family shall be the natural unit and basis of society. It shall enjoy the protection and support of the State for its establishment and development,” and Article 25 (3): “When considering alternative family care of the child and the best interests of the child, due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious or linguistic background.”

\(^{103}\) UN, “CRC,” Article 21 (b), and OAU, “ACRWC,” Article 24 (b).
and CRC effectively prohibit socio-economic standing or the perception of a better life outside of the family as reasons for a child to be separated from his or her family. Thus, any family that is in all other ways fit to care for their children but cannot financially support the children is eligible for government assistance.104 For the state, the cost involved in supporting families at risk of giving up children to alternative care seems daunting, yet the costs of maintaining a large infrastructure for handling children outside of parental care are much higher. This leaves two options that contest for the place of last resort for vulnerable children after domestic familial and kinship solutions have been exhausted. Here, the stipulation in the CRC and the ACRWC that a “suitable manner” of care be found in the birth country, if not for adoption or fostering, means institutionalization. However, leading scholars have shown that childhood inside of an institution is detrimental to development, claiming that institutionalization does not meet the minimum standard of “suitable” care in a child’s best interests.105 Therefore, as courts continue to set the precedents of implementation within the frameworks of the CRC and the ACRWC, a consensus is emerging that grants intercountry adoptions over institutionalization as in the best interests of the child. For example, Malawi has litigated several cases for Madonna to adopt children from Malawian orphanages despite the national law requiring duration of residency by the adopter that Madonna failed to meet.106 The ability of the courts to override national law lies in the consideration of the best interests of the child, which was deemed to be fulfilled in a familial setting for childhood which the residency requirement was impeding.

Discussion of the child’s best cultural interests plays into the debates over institutionalization and intercountry adoption; many individuals feel that preservation of a child’s

104 OAU, “ACRWC,” Article 20 (2).
106 See Benyam Mezmur’s cited works that cover a rights-based approach to analyzing Madonna’s adoptions and Malawi’s situation regarding intercountry adoption.
upbringing in his/her birth culture can best secure the child’s rights: to life, culture, education, religion, and identity. An intercountry adoption almost certainly removes the child in question from his or her birth culture and restricts his or her ability to fully enjoy and participate in that culture in the future. However, Sen’s and Nussbaum’s capabilities approach breaks down the claims that a child’s rights are served by remaining in the birth culture alone. Rather, Nussbaum and Sen draw light to the necessity of developing capabilities in meaningful ways, beyond legal availability of the right to the actual ability to choose to obtain the right. As such, children’s ability to enjoy any culture could be severely harmed by growing up inside of an institution, even if that institution provided the child with access to participate in the culture of his or her birth. The capabilities approach, then, bolsters the principles in the ACRWC’s implementation that emphasize that the best interests of a child are achieved through familial upbringing, no matter the culture. Pairing this outcome with the necessity to uphold a child’s right to express his or her wishes for his or her own life, a child with longer attachments to a birth culture could express the wishes to remain in that culture despite having to reside in an institution to do so.\textsuperscript{107}

Ultimately, the best interests of that child would be required to be constructed based on the child’s expressed wishes and the discernment of which outcome would be more detrimental, institutionalization or denying the child’s wishes.

The construction of legal discourse and precedent for utilizing the ACRWC (and CRC) in cases that affirm intercountry adoptions coexists with a current movement in several nations (most recently Ethiopia)\textsuperscript{108} to completely halt intercountry adoptions. The logic for this can be read as an attempt to completely avoid fraudulent and complex adoptions. Yet, within this

\textsuperscript{107} UN, “CRC,” Article 12, and OAU, “ACRWC,” Article 7.
concept, countries that put a pause on intercountry adoption place pressure on themselves to develop robust systems of domestic alternative care and greater oversight for intercountry adoptions while removing the financially lucrative option of intercountry adoption. Of course, the moratorium on adoption can be challenged on a case-by-case basis where it may be found that a child’s best interests cannot be met within the current domestic system to care for orphans.

As the differences between the CRC’s and the ACRWC’s principles for adoption produce insightful debate and progressive implementation, the result of their recognition and protection of children’s rights crystallizes the practice of intercountry adoption as the least favorable method of ensuring a child’s best interests and the practice of institutionalization as unacceptable for securing children’s rights except in very complex circumstances.

One last, important difference between the two frameworks that impacts the implementation of children’s rights principles in intercountry adoption in African states lies in the disparity of ratifications. In the Appendix, a table of each African state and its status concerning the CRC and the ACRWC shows that the ACRWC enjoys significantly fewer ratifications than the CRC. In one regard, this would seem to support the idea that the CRC is truly a universal document. Each one of the ways in which the CRC leaves room for diverse implementation might have allowed a greater number of African states to ratify the document, promising to adhere to children’s rights, if not with the explicit system or definitions that the CRC touts. However, as an instrument of the African Union, the ACRWC would be expected to more explicitly focus on African-approved language and principles of children’s rights in ways that ought to make translation into domestic law smoother and more complete. Yet, perhaps this very closeness to the states’ implementation of the principles makes states wary of their capacity
to fully implement the principles and the consequences of not doing so.\textsuperscript{109} As discussed above, the ACERWC has incredible potential to serve as an interpreter of the principles of the ACRWC and as an implementation tool even when a state’s laws do not conform to the children’s rights laws of the ratified document. Even further, as an extension of the human rights principles of the ACHPR, the rights of children present in the ACRWC can be applied to children in non-ratifying countries on the basis of upholding the member state’s commitment to human rights in general.

**Conclusion**

The African Union’s current framework for children’s rights consists of the UN’s CRC and its integral regionalization in the OAU’s ACRWC. The normative power that these two documents provide within the African continent and ongoing application of children’s rights has merited important results for children’s rights outside of parental care. While the ACRWC profoundly deepens the CRC’s possibility of full implementation on the African continent, it provides novel and progressive elements to acknowledge and protect children’s inherent and indivisible rights. Within intercountry adoption, these rights come to meet tangible experiences of the human rights debates discussed in Chapter 2. As such, the particularities of the ACRWC’s intercountry adoption article hold symbolic significance for demonstrating the normative power of the African Union. Not only does the African Union create these normative frameworks, but also the courts, non-governmental organizations, and citizens of African nations interact with the norms set by the AU/OAU in incredibly complex and provocative ways to encourage the active fulfillment of children’s rights. Despite its normative influence, the ACRWC does not have as many ratifying states as does the CRC in Africa; the discrepancy may well be due to the greater

force of accountability and the stronger implications for nationalization of the principles in African countries. Nonetheless, the principles represented within the document strongly assert the progressive conceptions of children’s rights on the African continent and the ability of the African Union to create norms that hold member states to regional and universal principles of children’s rights.

\[\text{\textsuperscript{110}}\text{ Lloyd, 182.}\]
Chapter 5: Concluding Remarks: Norms and Beyond

The history of conceptualizing children and their childhoods led to the mid-twentieth century codification of children’s rights internationally. African concepts of children and childhood have also intertwined with children’s rights to the result of regionalizing the international framework that emerged in 1989. While regarding the initial instruments that brought child-welfare protections into the realm of human rights discourse as a stand-alone achievement for children’s rights can instruct present-day implementation of those rights for children as agents and dependents, the analysis of these instruments as landmark pieces of the broader history of conceptualizing children can better serve modern understandings of children’s rights.

This thesis explored the histories of childhood, children’s rights, and the developing and the drafting of the CRC and the ACRWC. Aiming to compare and contextualize both frameworks with the example of intercountry adoption, the analysis concludes that children’s rights as integral elements of human rights find progressive and flexible codification within the CRC and the ACRWC. Additionally, the ACRWC builds upon the CRC’s rights in a manner that counters an assumption of the African continent as merely a space for rights violations.

Throughout the history of conceptualizations of children and childhood, the need for normative guidelines that operate on the level of globalized childhood and the level of individual childhood experiences emerged as children came to be viewed within the growing limits of humanity. A necessary, yet not inevitable, step within this process came in the form of acknowledging children’s agency that coexists with their specific vulnerabilities. Crucially, the imperfect international platform of the United Nations brought to view the plurality of childhood and children’s experiences that challenged the simplistic protections of children present in the
League of Nations’ and, later, United Nations’ (Geneva) Declaration. From representatives across the globe, the child as an agent of rights became incompatible with notions of complete paternalistic dependence. As such, the CRC and the ACRWC are contingent yet significant markers in the history of conceptualizing children and childhood.

Children offer a complex ‘what if?’ component within broader human rights tensions. What if the human is, at times, wholly dependent upon another? What if the human cannot legally represent him- or her-self? What if the human cannot voice his or her opinions? What if legal courts have to decide with whom and where the human should reside? What if choosing what is best for the human is up to externally motivated parties?

Each of these questions becomes important for human rights in particular cases for adults, yet for children the answers to these questions form the foundation of their international rights instruments. Intercountry adoption further compounds the complexity and necessity of answering these questions by raising the stakes of implementing children’s rights. Indeed, children simultaneously face their agency and dependency within their human rights frameworks. The CRC and the ACRWC each addresses the ‘what if?’ questions, representing landmark inclusion of inherent rights for children, the multi-faceted ways in which culture interacts with rights and adoption, and guidelines for how geography impacts rights and their responsibilities.

The resultant frameworks for children’s rights assert that children have inherent claims to rights as humans, and their dual agency and dependency does not inhibit that. In fact, the fulfillment of their capabilities requires that, as agents of rights who require greater input to achieve those capabilities, states cater to their dependency as a means to their developing agency. For the question of culture and children’s rights, the universalist instruments in Chapters 3 and 4
combine plural concepts of children into the universal principles. These universal principles are then taken and applied in various cultures to uphold children’s rights to an international standard. Also, in intercountry adoption, the frameworks and a capabilities approach prefer that a child’s upbringing be culturally contiguous; however, both the CRC and the ACRWC grant that a child’s right to enjoy any culture be taken seriously if the child’s capabilities would be harmed (by growing up in an institution instead of in a family) in his or her culture of birth. The frameworks also safeguard against the tendency in intercountry adoption to categorize nations as helpers and the helped which would result in higher frequencies of adoptions from poorer countries to richer countries. Instead, the rights espoused in the CRC and the ACRWC become states’ responsibilities, especially when children are outside of parental care, and states rely on local implementation of children’s rights to determine what lies in the children’s best interests.

Both the CRC and the ACRWC codify the above results from considering children’s rights within the human rights’ tensions of agency and dependency, universal and cultural principles, and the question of assigning responsibility for those rights. Drawing on a greater global representation of states’ concepts of children, the CRC asserts powerful norms that apply to children globally and interact with local laws concerning children to promote children’s enjoyment of a minimum global standard of rights. The ACRWC regionalized the CRC for the sake of strengthening its standards of rights and bringing the instrument and its drafting closer to African states. The possibilities of easier integration into local laws and greater ability to oversee the fulfillment of the ACRWC’s principles were also factors in crafting the regional framework to constructively reinforce the CRC’s principles’ implementation in African states. Yet, these two benefits of the ACRWC from the eyes of those who want to improve children’s rights through the instrument have resulted in a lower number of ratifications for states who cannot or
will not agree to changing local laws quickly or being under greater surveillance during their implementation.

For intercountry adoption, the two rights instruments use different language to convey the appropriate instances in which intercountry adoption can be used over other alternative care methods. However, in the implementation of the best rights of the child, the other least desirable outcome – institutionalization – has been deemed unacceptable for child development. Thus, each instrument’s application in cases of possible intercountry adoption reaches the same conclusion that domestic familial solutions come first and, upon their exhaustion, intercountry adoption comes second.

Certainly the very existence of rights violations implies that normative instruments alone cannot solve the violations. Despite the CRC’s and the ACRWC’s norms for children’s rights and their strength of flexibility for local implementation, violations of children’s rights exist. One solution to this seeming incongruence would be to discount normative instruments as ineffective for implementation in complex realities. However, this critique of applying normative standards is merely a critique of using normativity alone, ignoring the benefits of implementing the normative principles. The basis of a normative, universal standard creates an opportunity with which to claim and enjoy rights. Additionally, the normative frameworks for children’s rights do have mechanisms built into their principles to ensure that on at least a most basic level the rights described therein are claimable. Though debates continue surrounding the utility and futility of establishing normative rights and universal rights, normative tools of securing and acknowledging rights for children, especially in the example of intercountry adoption, increase the presence of rights in countries operating within the normative frameworks. Discussion of the tensions between normative instruments and their implementation lies beyond
the scope of this thesis. However, cognizant of such tensions, there follows a highlight of several of the debates, as a conclusion and an opening.

**Normative Instruments and Substantive Impacts**

Children live incredibly transitional and rapidly developing lives. The context of children’s rights as a theoretical discussion, then, may seem to hold little practicality as the discourse presented in the preceding three chapters developed over centuries and has not yet reached unanimous conclusions nor fully realized success through implementation. However, the human rights tensions outlined in Chapter 2 and the processes of normative text formation outlined in Chapters 3 and 4 have tangibly resulted in the production of normative documents from international, regional, and local communities that contribute to the laws governing children’s rights, and more specifically, intercountry adoption. Still, the creation of normative frameworks is seen by many as making empty promises, with much effort pushed into the semantics of wording with few realized benefits for children. Of course, the critics of the arguments for children’s rights and produced normative frameworks draw upon examples of particular gravity, in which children face death, exploitation, or suffering, that exist alongside scholarly discourse and normative instruments. Yet, without a concrete basis on which to judge possible violations of children’s rights, the claims to violation would be applied asymmetrically to children globally, dependent on intersectional factors of marginalization. The value of a normative framework for children’s rights, then, emanates from the capabilities it affords children and their advocates to claim their rights while simultaneously preventing violations.

The aim of children’s rights frameworks is to close “the recurring dissonance between self-satisfied rhetoric and social reality” through progressive discourse upon which claims for
rights protections can be securely made. To wait until a particular case of grave violation of children’s rights appears, the centuries long debates teasing out the rights of children would then begin, harming children by the time they have been resolved. The language present in normative frameworks for children’s rights represents long, difficult work of culturally mediated universal principles that do, in fact, drive reality towards achieving better lives for children; however, the further necessity of discourse in children’s rights drives work such as this to continue towards greater implementation and realization of children’s rights. For Sen, the difference between a right that is not met and one that is not present summarizes the power of normative documents. For intercountry adoption, the children’s rights frameworks remain unclear and undecided on issues that continue to agitate discourse and legislation towards new insight into protecting and implementing children’s rights. This agitation begets implementation and progression, what Benyam Mezmur refers to as the “stumble forward” of children’s rights in intercountry adoption. The opportunities created by drafting, adopting, and eventually ratifying normative frameworks grant spaces for discussion and local shifts in conceptualizations of childhood, creating the cultural change that ensures the growth of rights frameworks within localities.

Important to the theoretical justification of human and children’s rights, the rights matter in their statement and declaration, yet without the appropriate capability also afforded to individuals, the rights are not achieved; here, Dixon and Nussbaum assert that each individual’s capabilities are the end that normative frameworks aim to secure. Children’s rights benefit

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112 See Benyam Mezmur’s works as they also speak to the power of normative documents to affect real claims of rights.
from this assertion that grants the individual child focus in rights discourse rather than a utopian depiction of childhood in general. The normative frameworks of the CRC and the ACRWC outline the rights of children as individuals and open the opportunity structures for children’s rights to be realized in intercountry adoption. Of course the work of norm-setting and implementation continue, a process which will be turned to briefly.

To view the existing normative frameworks for children’s rights as complete would be a tempting conclusion to centuries of their formation. Rather, as Makau Mutua argues, the creation of normative frameworks for rights will never end as the human experience is constantly in motion and understanding of that experience is also in motion.\textsuperscript{116} He goes on to remark that “norms become the signposts for future behavior, and standards – any standards – are meaningless if they remain abstract without a systemic structure for their implementation.”\textsuperscript{117} The initial step in deconstructing the dominant conception of the African continent’s relationship with rights, then, is acknowledgement of the AU’s norm-setting power in codifying and regionalizing children’s rights progressively. The next step, however, is for the rights to become realizable, enforceable, and claimable for those who embody them. In reaching beyond normative texts to the complex reality of children’s lived experiences, the CRC and the ACRWC have been constructed to fit the ever-changing reality of children’s lives and contest elements of tradition that cling to suppressing their rights. What, then, do children facing an intercountry adoption have to tangibly ensure their rights within the power structures and seemingly distant international legal systems?

\textsuperscript{117} Mutua, 10.
Answers to the broader question of how to implement rights emerge in helpful ways, to be extended for the particularity of children’s rights in spaces of dependence. First, Susan James argues that rights cannot exist outside of the enforceable claims that allow their realization to affect the individuals said to possess the rights.\(^{118}\) Markedly in line with this assertion, the capabilities approach aims to justify the lengths of freedoms that rights must impose to indeed be rights. Without both a freedom and a freedom to choose, the capability cannot be secured. However, Nussbaum and James both identify that rights exist beyond the framework of enforceable claims or capabilities.\(^{119}\) In fact, to restrict rights to a space of direct correlation to enforceable claims would be to force rights to operate within the limits of the agents of justice available in any locale. The existence of inherent human rights cannot be subjected to the test of feasibility, lest the rights become partially enforceable, denying the indivisibility of human rights.

The inherent and indivisible human rights, then, operate outside of their translation to reality; the realization of which is not to be ignored in favor of empty rhetoric. James warns that the statement of rights that are not attainable for individuals can mock the reality of life in their experiences by taunting with the unreachable.\(^{120}\) However, the argument of this thesis is that in their theoretical justification and normative power, rights, even as yet unattainable, urge agents of rights forward in ascertaining responsibility for the implementation of rights. The ACRWC and CRC institutionalize this implementation mechanism through their respective committees (the ACERWC and the Committee on the Rights of the Child) which handle promotion, status reporting, and information accumulation regarding the respective children’s rights framework.


\(^{119}\) Susan James, 80, and Nussbaum, “Women’s Bodies” 174-177.

\(^{120}\) James, 81.
Frans Viljoen and Olowu emphasize that the ACERWC has greater impact on the continent’s children’s rights due to its smaller scope of responsible states and the ability of the ACERWC to hear complaints from any individual or group under the AU.\textsuperscript{121} The UN’s committee for the CRC does not accept complaints from individuals regarding the violation of children’s rights.

The ACERWC also acts as an interpreter for the Charter’s principles to be litigated within member states and to be domesticated into national law or policy. By allowing complaints from any source under the AU’s jurisdiction, the ACERWC creates the mechanism for the ACRWC to be implemented to protect the rights of all, even if those rights are not protected by local law.\textsuperscript{122} This mechanism functions to ensure that there is a base-level of enforceable claims for the rights of children under the AU, mitigating James’ concern of rights being negligible without true enforceable claims. Yet, the ability for a child, in his or her dependent and vulnerable status, to bring a complaint before the ACERWC, or even a local court, may be significantly hindered. The process by which a child would enter legal space in many nations depends upon adult sponsorship or care. This relegation to wait for adult advocacy especially harms orphaned and vulnerable children who operate within international, financial, legal, adult-centric spaces that may not have the pathways for children’s rights litigation to involve children’s voices.

Without fully established alternative systems of childcare and adequate advocates and employees within social work and court systems, orphaned children face obstacles to claiming and achieving the rights that the ACRWC and CRC make enforceable. Rather than reinforcing


\textsuperscript{122} Olowu, “Protecting Children’s Rights in Africa,” 131.
James’ concern\textsuperscript{123} for the complacency of actors once a right is asserted in academic discourse or normative frameworks, the children’s rights present in the ACRWC and the CRC positively interact with individual circumstances to contribute to a growing body of precedent for maintaining children’s rights in the varied circumstances and furthering the normative power of justifying the rights through implementation. The rights framework and the hierarchy of acceptable methods of alternative childcare that the documents in the previous chapters construct for the African context disallow utilizing intercountry adoption as a means of avoiding domestic systems to address children’s needs, familial welfare, and domestic alternative care networks. Indeed, intercountry adoptions continue to occur outside of the standards present in the ACRWC and the CRC, but cases also occur that progressively implement their principles and add to a growing list of precedents for locating litigating in line with African interpretations of the African regional framework for children’s rights.\textsuperscript{124}

\textit{Conclusion}

The present status of children’s rights in African states has improved immensely due to the norms set by both the UN and the OAU. While the absence of a counterfactual may seem to make the previous statement an empty claim, the very drafting process of each document forced conversations of children’s rights to begin. The implementation of the principles of the children’s rights agreed upon in the texts has occurred for children facing the violation of their rights. The process of ensuring that every child has the inherent, autonomous claims to his or her rights has

\textsuperscript{123} Susan James, “Realizing Rights as Enforceable Claims,” 83.
\textsuperscript{124} Benyam Mezmur discusses this widely, referring to the resultant cases of applying and cultivating precedents from the CRC and the ACRWC representing a “stumble forward” for children’s rights in intercountry adoption in “From Angelina (to Madonna) to Zoe’s Ark,” 53, and Skelton’s “The Development of a Fledgling Child Rights Jurisprudence” addresses this concept, too.
been set in motion by the existence of the normative frameworks in the CRC and the ACRWC that operate within the long history of children’s rights. The next steps in this history involve incessant application of those instruments in children’s lives as they face intercountry adoption and myriad other experiences. Progressive conceptualization of children’s rights will use the principles of the documents to base claims for rights, working towards the perfect realization of those rights for children and the full capabilities that work alongside them.
Appendix

A. *The Convention on the Rights of the Child*\(^{25}\)

Article 20 (3)

Such care [alternative care] could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.

Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child’s status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognize that inter-country adoption may be considered as an alternative means of child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin;

(c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

\(^{25}\) UN, “CRC,” Articles 20 (3) and 21.
B. The African Charter on the Rights and Welfare of the Child\textsuperscript{126}

Article 24: Adoption

States Parties which recognize the system of adoption shall ensure that the best interest of the child shall be the paramount consideration and they shall:

(a) establish competent authorities to determine matters of adoption and ensure that the adoption is carried out in conformity with applicable laws and procedures and on the basis of all relevant and reliable information, that the adoption is permissible in view of the child’s status concerning parents, relatives and guardians and that, if necessary, the appropriate persons concerned have given their informed consent to the adoption on the basis of appropriate counselling;

(b) recognize that inter-country adoption in those States who have ratified or adhered to the International Convention on the Rights of the Child or this Charter, may, as the last resort, be considered as an alternative means of a child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin;

(c) ensure that the child affected by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) take all appropriate measures to ensure that in inter-country adoption, the placement does not result in trafficking or improper financial gain for those who try to adopt a child;

(e) promote, where appropriate, the objectives of this Article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework to ensure that the placement of the child in another country is carried out by competent authorities or organs;

(f) establish a machinery to monitor the well-being of the adopted child.

Article 25: Separation from Parents

1. Any child who is permanently or temporarily deprived of his family environment for any reason shall be entitled to special protection and assistance;

2. States Parties to the present Charter:
(a) shall ensure that a child who is parentless, or who is temporarily or permanently deprived of his or her family environment, or who in his or her best interest cannot be brought up or allowed to remain in that environment shall be provided with alternative family care, which could include, among others, foster placement, or placement in suitable institutions for the care of children;

(b) shall take all necessary measures to trace and re-unite children with parents or relatives where separation is caused by internal and external displacement arising from armed conflicts or natural disasters.

\textsuperscript{126} OAU, “ACRWC,” Articles 24 and 25.
3. When considering alternative family care of the child and the best interests of the child, due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious or linguistic background.
### C. African States’ Status of Children’s Rights Document Ratification

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Bibliography


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