

## **Inter-country Adoption and Children's Rights: How the African Union Sets Norms and Confronts Challenges**

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### **ABSTRACT**

In the realm of human rights, the African continent is often framed as a violator in need of guidance and international oversight. Yet, the African Union, and before it the Organization of African Unity, set norms to protect human rights, even aligning the supposed distinct categories of primary and secondary rights into one African Charter on Human and Peoples' Rights (1981). Pertaining to the rights of children, the OAU/AU regionalized the UN Convention on the Rights of the Child in the 1990 African Charter on the Rights and Welfare of the Child (ACRWC). Now, as a hotspot for humanitarian intervention, African states in crisis and in peace deal with heightened global pressure to export the care of vulnerable children to international families through adoption to fulfill the best interests of children. To illustrate these tensions, this paper utilizes the case study of singer and international star Madonna's adoptions from Malawi and Martha Nussbaum's (2011) capabilities list. Together, these demonstrate the complexities of providing rights to African children as guaranteed by the ACRWC. The African Union's handling of various rights challenges pertaining to intercountry adoption exemplifies its role in setting norms to protect children's rights.

Keywords: intercountry adoption, Africa, children's rights, capabilities, Madonna, adoption

### **Basis for African Children's Rights Norms**

Discourse on human rights emphatically focuses on flagrant violations in an attempt to best achieve basic rights for all, and places overwhelming emphasis on the African continent and its increasingly popularized violations of human rights. Satirically highlighting the construction of the African continent as a dark violator of human dignity, Wainaina's "How to Write about Africa" states that one must include "celebrity activists" and avoid "school-going children" without serious diseases when writing about the continent. Western-based discourse about African human rights developments often emphasizes the need for external guidance and international oversight to overcome issues of disease, poverty, and abuses of rights.

To offer a counterpoint to this construction of the African continent, an analysis of the role of the African Union (AU; previously the Organization of African Unity, or OAU) shows it to be a human rights norm-setter. In many ways, the OAU forged new standards of human rights on the continent, while global international institutions struggled to overcome heated debates between members. For example, the African Charter on Human and Peoples' Rights of 1981 distinctly merged the often differentiated civil and political rights with economic, social, and cultural rights, setting the OAU apart from other contemporary supra-national human rights organizations

(Viljoen 2012, 215). Years later, the OAU responded quickly to members' grievances – that the 1989 UN Convention on the Rights of the Child (CRC) had failed to address children's issues of gravity within the continent – with its distinctly African *and* universalist regional charter. Indeed, the resultant African Charter on the Rights and Welfare of the Child – passed in 1990, one year after the CRC – contributes a stronger arm of intervention for the rights of children in ratifying states and strengthens key aspects of the CRC (Viljoen 2012, 396). Through the ACRWC's provisions on intercountry adoption (IA) and the resultant realities of its implementation and interpretation, the norm-setting power of the African Union emerges in the realm of children's rights and human rights more broadly.

Two important elements of the ACRWC concerning intercountry adoption diverge from the CRC: the primacy of consideration for the child's best interests and the strength of intercountry adoption as a subsidiary to other methods of alternative care. First, under the CRC, the best interests of the child are *a* primary consideration, while the ACRWC stipulates that the best interests must be *the* primary consideration in international adoption (Skelton 2009, 486). In changing this single article, the OAU anticipated a global movement to implement the best interests of the child as the sole motivation regarding child care decisions. This change seems obvious in light of modern conceptualizations of childhood, yet the idea of children as agents of rights beyond the need for welfare emerged in the twentieth century (Nussbaum 2012, 553). The best interests' consideration advocates for children's rights in a way that is separate from parental and adult considerations and wishes for children. Secondly, the ACRWC invokes a stronger subsidiarity clause for international adoption as an alternate form of care. The CRC regards IA as an *acceptable* form of alternative care when domestic family solutions fail (Article 21(b)) (General Assembly 1989). However, the ACRWC asserts that IA must be the *last resort*, if a suitable form of care cannot be found domestically (Article 24(b)) (Skelton 2009, 492; OAU 1990). At face value, the terminology in the two texts diverges in the case of intercountry adoption and institutionalization as the sole available options for a child, with the CRC allowing intercountry adoption to have equal weight to institutionalization and the ACRWC placing IA beneath institutionalization (CRC Article 21; ACRWC Article 24). Yet, current realities of intercountry adoption demonstrate that *both* levels of subsidiarity place IA just beneath domestic familial options and above institutionalization in terms of securing a child's best interests.

These two distinctions in the legal frameworks for adoption augment the reality of intercountry adoptions of children from developing states to developed states, in that citizens and courts of the latter more often than not press that adoption into its territory will be best for a child regardless of the availability of domestic alternatives. Additionally, African courts, citizens, and human rights groups distrust fast and expensive adoptions, in addition to those conducted while family members are still alive or when national crises occur. These reservations around accepting the adoption of African children out of their home country – mostly to Western countries – reflect a rejection of extractive, exploitative, hegemonic tendencies, where children appear as a form of resource being passed from one state to another (Breuning and Ishiyama 2009, 91–92). In the following discussion on the interpretations and challenges of implementing the AU's norms, the particular wording of the ACRWC and reservations about IA will surface, with promising conclusions.

In focusing solely on intercountry adoption, the current issues within the broader human and children's rights contexts come to light in a sharply tangible manner. Benyam Mezmur, a children's rights legal scholar, identifies international adoption's symbolic significance in its unique position at the crossroads of international and local laws and at the crossroads of many

cultures (2009, 166). Further, intercountry adoption as the “human face of globalization” brings to light the deadly effects of economic, social, and cultural rights violations, particularly when disregarded as subsidiary to civil and political rights (Breuning and Ishiyama 2009, 90). The specific vulnerability of children and the lasting effects of inadequately considering their best interests render the development of the African Union’s norms relating to intercountry adoption and orphans of especial concern to the global community (Nussbaum and Dixon 2012, 554–55). The cases of intercountry adoption within the African Union’s jurisdiction epitomize how a contested and compromised law begets further debate and interpretation to render it applicable for local legal use. Children’s place of value across the world allows for the ends to be agreed upon (i.e., children’s best interests are fulfilled), while the law and its application are teased out to determine how exactly to reach those ends.

Absent from many discussions on the African framework for children’s rights in intercountry adoption, the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption of 1993 sets minimum guidelines for adoptions between ratifying states. Although it is the most recent and most explicit international legal code on IA, only 98 countries worldwide have ratified or acceded to the convention (HCCH 2017). The convention requires intercountry adoptions between two ratified states to follow its minimum guidelines, but the institutional power and cost of implementing the requirements necessary to fulfill its domestication currently restrict its usefulness. The necessity for both sending and receiving states to ratify the convention before its guidelines can be enforced restricts its impact further as most intercountry adoptions involve at least one non-ratifying state. Additionally, only Burkina Faso and Madagascar have ratified the convention, restricting its impact on the African continent; however, Burundi, Cape Verde, Cote d’Ivoire, Ghana, Guinea, Kenya, Lesotho, Mali, Mauritius, Namibia, Rwanda, Senegal, Seychelles, South Africa, Swaziland, Togo, and Zambia have acceded to the convention, although with several objections (HCCH 2017). Yet, in developing precedents on the African continent of children’s rights in IA, the convention demonstrates a standard of protection for children that states can strive to reach without necessarily meeting the institutional qualifications for ratification. Currently, calls to oblige any ratifying state to uphold the Hague Convention’s standards in *any* adoption, whether to or from a non-ratifying state, seek to strengthen the protection of children’s best interests in states without the institutional capacity to ratify the convention. Alternatively, states that are party to the convention could restrict their intercountry adoptions to only other Hague states (O’Keefe 2007, 1638–41). Due to the limited scope of the Hague Convention’s effects, the CRC (ratified by all countries but the US) and the ACRWC (ratified by 41 out of 54 AU members) comprise the supra-national children’s rights framework for African states (OHCHR 2017; ACHPR 2017). The CRC and ACRWC do provide strong protections for children in terms of intercountry adoptions, however they lack specificity on implementation and institutional structures of adoption procedures, which the Hague Convention aims to rectify.

### **Intercountry Adoption: The Last Resort or in the Best Interest?**

The pioneering clauses of the ACRWC define the best interests of the child as the highest consideration in intercountry adoption and make IA a strong subsidiary to other alternatives. Potential contradictions in the rhetoric arise in the cases where the only choices available for a child are intercountry adoption and domestic institutionalization, similar to the case of potential contradiction between the CRC and ACRWC. If any family-based solutions are available domestically, these avenues necessarily must be pursued in compliance with the CRC, ACRWC,

and local laws. Through their use of the best interest clause's primacy, African courts have ultimately chosen intercountry adoption over domestic non-familial institutions; however, these decisions do not come without complexity, and, at times, vocal opposition by individuals, other courts, and non-state agents of human rights. Arguments to restrict IA rest on its subsidiarity in the ACRWC to *all forms* of suitable domestic care and the ACRWC's preference for children's cultural continuity (and the preference that African children grow up in African societies). Other arguments utilize rights to identity, the scandal surrounding failed adoptions, and the possibility that intercountry adoption exports the consequences of deeper domestic social problems (Mezmur 2012, 24–26, 44; O'Keefe 2007, 1624–25; Root 2007, 339). Nevertheless, courts' final interpretations of the ACRWC continually uphold IA as fulfilling the best interests of children under circumstances that render a last resort choice necessary.

The following elements of opposition to intercountry adoption from the African continent and their current handling in specific cases demonstrate the recent “stumble forward” in African states' determination of the best interests of their children under the ACRWC (Mezmur 2012, 53). In the twenty-first century, intercountry adoptions have increased in number, driven by a higher demand for adoptable children from the US, humanitarian action in response to the numbers of AIDS-orphaned children, and a variety of other global trends (O'Keefe 2012, 1633–37; Breuning and Ishiyama 2009, 90–91). This necessarily brings African countries to reconcile their local laws with the African Union's laws and international children's rights frameworks to ensure that children remain protected in intercountry adoptions. The largest areas of debate regarding the validity and implementation of intercountry adoption are residency requirements, culture and customary laws' interaction with supra-national laws, and poverty's role in orphanhood.

### ***Residency Requirements***

The existence of residency requirements in myriad African states' laws is aimed at refining the pool of families eligible to adopt, by requiring that prospective adoptive parents live in the country for a specified period of time before the adoption. Yet, these requirements, if longer than one or two weeks, make intercountry adoption incredibly difficult for potential adopters with less money and strong attachments in their own country, restricting the pool of adopters to the wealthy or the unattached. In essence, these requirements assume that full-time domestic residents can fulfill the best interests of the state's children. In some cases, in restricting residency to include only permanent citizens through a moratorium on IA, states definitively imply that the rights of the nation's children can be fully protected within domestic care options. The argument to require residency holds merit in that the process avoids discrimination against a child in another country by discouraging IA, and protects cultural continuity by enforcing prospective parents to learn about local culture by living in the country; as the adoption of a child into another state changes his or her cultural setting, it creates new possibilities for marginalization based on race, ethnicity, or birth (all forms of discrimination in violation of the rights of the child delineated in the CRC and ACRWC) (Root 2007, 336, 344–46). However, as recent cases depict, courts increasingly have decided that restricting the pool of potential adopters to nationals violates the ACRWC's order to consider each child's best interests above all else. This may eliminate the potential that a family outside of the child's state could best fulfill the child's best interests before courts are able to assess those families' suitability.

To refer now to the case study, for Madonna and her four Malawian children, the realities of IA legal frameworks in Malawi and the ACRWC's normative role in protecting children's rights

bear personal consequences. Unknowingly, Madonna has urged on the Africanization of children's rights and forced the formation of legal precedent (Skelton 2009, 499–500). Madonna, in 2006, first requested to adopt a Malawian boy, but the court, following a law requiring adoptive parents to complete a duration of residency that Madonna did not complete, granted only temporary custody (Mezmur 2008, 147, 161; Mezmur 2009, 387). Then, in 2008, the High Court of Malawi granted the adoption and set a progressive legal precedent for interpreting residency requirements as a “means to the end” in terms of the child's best interests – namely a happy, loving, understanding family environment (Mezmur 2008, 162; Mezmur 2009, 389, 392–94). Still, local human rights groups argue that Madonna's money and celebrity allowed her to complete the adoption before the Malawian government could effectively search for domestic solutions.

In 2009, Madonna initiated another adoption from Malawi that the High Court first rejected, again due to breach of residency laws, but the Supreme Court of Appeals subsequently overturned the rejection on the basis of Madonna's *purpose* in travelling to Malawi and her commitment to a “*targeted long-term presence*” (Mezmur 2012, 34; emphasis added). The first rejection of her adoption rested on the ideas that Madonna did not fulfill residency requirements, the child's orphanage met the ACRWC's definition of a “suitable manner” of domestic care (Article 24 (b)), and the possible “consequences [for other adoptable children] of opening the door too wide” to intercountry adoption (Mezmur 2012, 27; OAU 1990). However, studies have determined that institutional care damages children's psychological and social development; thus, if there exists an opportunity for acceptable familial care (in whichever country), institutionalization is not a suitable alternative for the best interests of the child (Bartholet 2007, 180). As such, while the ACRWC's best interests and last resort clauses combine to uphold intercountry adoption as the last alternative capable of ensuring a child's best interests, they remain above institutionalization as this option cannot be said to ensure a child's best interests. This second adoption was completed in 2009, and, in 2017, Madonna adopted Malawian twins in two weeks' time, signaling the Malawian court's settling on its interpretation of residency as a means to the end regarding the best interests of the child (Gonzalez 2017; “Madonna Scored Adoption” 2017).

### ***Culture and Customary Law***

This remains one of the strongest theoretical debates concerning IA – adopting a child to another country immerses him or her in a different culture. Children have the right to cultural identity and belonging as do all human beings. Accordingly, in article 25 of the ACRWC, placement of a child after separation from parental care must consider “continuity in... the child's ethnic, religious or linguistic background” alongside a preference for familial care (OAU 1990). For example, the court in Madonna's second Malawian adoption concluded that by committing to a “targeted long-term presence,” she would respect her children's right to cultural continuity; yet, since her first adoption, Madonna had not returned to the country (Mezmur 2012, 27, 34). Despite the court's use of a continued presence in Malawian culture to justify Madonna's adoptions, this commitment need not be present for an intercountry adoption to fit legally within the CRC and ACRWC frameworks.

The capabilities approach demonstrates that, in the constrained choice between domestic institutionalization and intercountry adoption, IA protects a child's capability to enjoy culture without needing strings attached to a *birth* culture (Nussbaum and Dixon 2012, 561, 563–64). The ACRWC strengthens the argument to allow IA despite the transition of cultures, through a

preference for care in an African civilization for African children that preserves as much continuity as possible. This highlights a global adoption tension in that some children will need to be adopted outside of their ethnic, racial, religious, linguistic, or cultural community of birth, both within and between countries. The result of implementing adoptions under the frameworks of the CRC and the ACRWC errs on the side of keeping a child as close as possible to their birth identity for ease of access to the culture of their biological family. In intercountry adoption, this follows from the ACRWC's preference for inter-African adoptions, but would also include a preference for adoption of a Nigerian child to a Nigerian family in the diaspora.

Children also have a right to a culture of *their choosing*, and, as appropriate according to their ability, children's rights to express their wishes for their lives are protected by the ACRWC. Research shows that IA succeeds best in adoptions of those who are younger, where the children have yet to form substantive opinions on their culture of birth (Bartholet 2007, 179–80). All youth are necessarily constrained by nature of dependency to the culture of their guardians' choosing during childhood; yet, a positive family environment can allow a child the capability to connect with any culture. The reality of the depth of dependence of adoptable children amplifies institutions' abilities to inhibit a child's capabilities to participate in culture (Bartholet 2007, 180–81). Scholars such as An-Na'im and Mezmur uphold culture as the context of discerning human rights as a means to the end of a decision that is in line with the ACRWC's paramount best interests clause (An-Na'im 2011; Mezmur 2009, 394–98; Mezmur 2012, 50–51). Interpretations by the courts in Madonna's adoptions recognized that the child's capability to enjoy and choose cultural identity holds greater importance than a capability to enjoy a *specific* culture. The capabilities approach clarifies the need to reach a universal minimum threshold of capability protection, even if a child requires IA to meet the minimum (Nussbaum 2011). Intercountry adoption, therefore, does not violate the child's right to culture, but rather ensures the child's future enjoyment of the right to culture. This teasing out of the tension within the ACRWC's cultural continuity preference and the supremacy of the best interests of the child underlines the progress that Malawi specifically has made in balancing its local laws with its implementation of the ACRWC.

### ***Poverty and Orphanhood***

Due to the pervasive nature of economic hardship on the African continent, the ACRWC recognizes the duty of the state to assist families in achieving their rights and their children's rights despite poverty (Article 20 (2); OAU 1990). As such, the construction of African nations as places of looming crisis, where external intervention is permissible, does not merit intercountry adoption of children to areas of *better* stability and socio-economic conditions if the state can meet the minimum threshold of capabilities (O'Keefe 2007, 1615–19; Root 2007, 350). This being stated, the realities of poverty and lack of welfare assistance in areas of the African continent render many families and nations unable to care for their children. As such, many scholars hesitate in condoning IA, as it can become a way of masking the underlying absences of rights protection for families and children on the part of the state (O'Keefe 2007, 1624–25; Root 2007, 339; Mezmur 2012, 44; Skelton 2009, 494–95). Yet, the CRC and ACRWC documents, in categorizing intercountry adoption separately from adoption, kafalah (a system of orphan care similar to adoption that does not include the transfer of legal rights of parenting in terms of lineage or inheritance; practiced under Islamic law), fostering and other institutions, imply the necessity of cultivating and maintaining in-state methods of child care. Additionally, the psychological and social detriments of non-familial care for children necessitate viable in-state

adoption and fostering procedures to provide for the best interests of children (Bartholet 2007, 180).

Today, several African countries have chosen to halt international adoption completely or have residency requirements to the same effect, which can allow time for a government to ascertain the adoptability of children, promote domestic alternative care, or implement welfare programs to eliminate poverty as a cause of orphanhood (for example, Ethiopia most recently ended intercountry adoption) (BBC 2018). The drawback to this approach is that some children may need to rely on institutional care as the country sorts out its orphan care framework, and this has been proven to adversely affect children's health and psychological well-being (Bartholet 2007, 154). However, given the popularity of debates surrounding Madonna's adoptions and the moratoriums on intercountry adoption, African governments are cognizant of the issues of IA and are using the ACRWC progressively to fulfill the rights of children in challenging circumstances. The analysis of these tensions arising in the ACRWC's framework for international adoption amplifies the need for oversight of adoptions, promotion of domestic familial solutions, and culturally mediated and realized universalism.

### **The Capabilities Approach and Intercountry Adoption**

From the above analysis of the African Union's norm-setting for children's rights through the ACRWC and its implementation, it is clear that intercountry adoption must be closely evaluated on a case-by-case basis to ensure that the best interests of the child will be fulfilled through the adoption. The capabilities of each child will vary depending on their individual circumstances and the input of effort on the state's part to ensure a child achieves his or her best outcome must vary accordingly. However, in real practice, the trend of interpretation of the ACRWC and the CRC by African states implies the following hierarchy of care options for the best interests of the child: biological familial care > community-based familial care > domestic familial care (adoption, fostering, or kafalah) > intracontinental adoption > intercountry adoption > institutional care. The next question to review, then, is: Does this hierarchy have a theoretical basis in human rights discourse? Making use of Martha Nussbaum's capabilities approach, international adoption can in fact fulfill the capabilities of a child where all other domestic avenues have been fully explored and found impracticable (2011).

A capability defined within the framework of human rights represents an ability to do and an ability to choose to do (Sen 2005, 152–53). For a human right to be realized successfully, an individual must have the option to claim human dignity and the freedom to choose to claim that human dignity. For children's rights, capabilities present an argument in favor of modern shifts toward children's agency over their own rights, and allow for a distinction of children's capabilities from adults' and the extension of such capabilities to infants (Nussbaum and Dixon 2012, 552–53). A child's capabilities vary from case to case, while the support of universal equality of human rights necessitates the particularity of meeting children's best interests in the CRC and ACRWC. Vulnerability and unequal power structures present justifications of greater protection for some children over others, a theory that holds for adults of various capabilities as well (Nussbaum and Dixon 2012, 573–78; Nussbaum 2011, 24). Also, the protection of children's rights deserves special priority when their disadvantages are greater than adults' due to their heightened vulnerability and dependence – for example, a child orphaned due to AIDS needs greater input from the government to reach its capabilities than does an adult widowed because of AIDS (Nussbaum and Dixon 2012, 561). Nussbaum and Dixon strongly assert that attention to children's best interests in intercountry adoption cannot render consideration of these

children higher than that of children or adults in a state of similar deprivation of capabilities (2012, 555). For poverty-induced orphanhood, the capability approach emphasizes that the capabilities of families, parents, and children are best protected when states support the equity of capabilities for all citizens. This reflects the ACRWC's provisions of family rights and a state's role in social welfare to eliminate poverty as a reason for orphanhood, by striving for all citizens to meet the minimum threshold of capabilities (Nussbaum and Dixon 2012, 554).

The capabilities approach is also useful in supporting the ruling of courts in favor of intercountry adoption over institutionalization. Nussbaum distinguishes between internal capabilities and the circumstances surrounding a person that allow or restrict capabilities (Nussbaum 2011, 21–24); institutionalization of a child harms internal capabilities and restricts external capabilities out of necessity. Intercountry adoption, which may also harm internal capabilities of cultural identity and belonging and restricts the child's ability to participate in his or her birth culture, saves the child from the damages of institutionalization that would inhibit his or her full capability of enjoyment of any culture. As much as possible, the capabilities approach values the expression of children's views on their own lives, and thus in determining what lies within the best interests of the child, the state must focus on a child's expressed opinions – a right supported by both the CRC and the ACRWC.

The capabilities approach allows for the restriction of children's capabilities at certain times to encourage the development of their full dignity and adult capabilities. A distinction in law or parenting can restrict children's rights to vote, for example, in order to cultivate future capabilities of political participation. Children also receive special priorities to claim their rights based on avoiding “a spiraling need to protect more and more capabilities,” as the violation of certain capabilities at crucial times in a child's life can inhibit the development of more capabilities in the future (Nussbaum and Dixon 2012, 580). Even expensive mechanisms and agencies put in place to regulate the determination of adoptability must be provided for by a state to ensure that the children's capabilities are protected and to avoid unnecessary damage to their future capabilities.

Nussbaum's list of Central Human Capabilities offers a concrete baseline of human rights beneficial to assessing international adoption. The list includes the capabilities of life; bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation; other species and the environment; play; and control over one's own environment (Nussbaum 2011, 33–34). Orphans' capabilities, without recourse to domestic familial care of any sort, are therefore best protected by international adoption, in order to avoid the state needing to provide increasing levels of protection in the future. In the following paragraph, the consideration of capabilities will pit the last resort methods of care, intercountry adoption and domestic non-familial institutional care, against one another from the view of capabilities. Domestic non-familial institutions include orphanages, children's homes, year-round state boarding schools, and a number of other phrases used to soften the rhetoric of orphanages' connotations.

Institutional care restricts each one of the capabilities for children.<sup>1</sup> Given the destitution and constraints in staffing surrounding orphanages, children's capabilities for leading a normal *life* are compromised and the limited resources available to many institutions violates children's

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<sup>1</sup> Information regarding the following negative effects of institutionalization can be found in Bartholet, 2011. Additionally, the author's experiences in a children's home in Nairobi inform much of the analysis, from the perspectives of older orphans, social workers, caregivers, volunteers, orphanage owners, and the author herself.

*bodily health* capability. Although children do not generally have full capabilities in terms of bodily integrity because of guardian dependence and authority structures, institutional care further violates children's *bodily integrity* by necessitating greater regulated rules and procedures for the smooth management of large numbers of children. The often sterile and needs-based objectives of orphanages harm children's ability to fully utilize their *imagination* and distort their conceptions of attachment and love. The psychological effects of the institutional setting on children's development limits their capacity to *think*. In orphanages, children experience separation from family or trauma leading to their placement in the institution – a disruption which may also occur in international adoption. Yet, the trauma and loneliness perpetuates in orphanages as new children bring their own reflections of pain and the general absence of familial love – affecting the children's capability of *emotions*. Children in institutional care suffer especially from attachment trauma as caretakers and volunteers come and go as their own lives necessitate, leaving children to repeatedly form vital adult attachments that are broken outside of the children's control. Children's ability to *practically reason* in the form of reflecting on one's own life may be seen in institutionalized children; however, children must always seek out love and basic needs within the institution, which preoccupies their time, away from future life planning. Orphans in institutional care also cannot depend on the continual presence of the orphanage in their lives, as they may be transferred, adopted, or fostered, or may age out of the system, affecting their capability for practical reasoning. Without the stability of forming solid attachments, institutional care also restricts children's perceptions of *affiliation* and limits their interactions with others to those facilitated by the institution. The capability to live with concern for *other species and the environment* remains tenuous due to institutionalized children's necessary concern for the basic necessities of their own lives. Similarly, with inadequate resources in terms of materials and human interaction, children's capability to *play* is severely curtailed by institutionalization and the constrained freedoms allowed them within the institution. Lastly, children in institutional care have virtually no *control over their own environment* and do not have access to typical familial support for future planning. Arguably, intercountry adoption also limits a child's capability to control his or her life, but IA should only be condoned in line with the child's expressed views in whatever ways possible, in light of the ACRWC's guarantee of a child's right to expression.<sup>2</sup>

This inability of institutional care to fulfill the capabilities of children renders the current implementation of the ACRWC's best interests and subsidiarity clauses appropriate. By meeting children's capabilities through intercountry adoption or domestic familial placement over institutionalization, African countries can avoid the greater degradation of children's capabilities and meet the ones most fertile for the future. The development of one capability at the related crucial time in a child's life can foundationally strengthen other capabilities given their indivisible nature, thus ensuring that fewer state protections of the child's capabilities are required later on (Nussbaum and Dixon 2012, 580–83).

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<sup>2</sup> The idea to utilize the compact list of capabilities to analyze how institutionalization measures up is drawn from Nussbaum's own use of her list to evaluate violence against women in her 2005 piece "Women's Bodies: Violence, Security, Capabilities" on pages 171–73. Additionally, for more details on the full meaning of each of her listed capabilities used here, see the second chapter of her book *Creating Capabilities* (Nussbaum 2011).

## Conclusion

As shown through this discussion of Malawi's decisions surrounding Madonna's adoptions and Martha Nussbaum's capabilities approach, the African Union's norms for children's rights actively mold the African approach to alternative child care. Intercountry adoption highlights the need for realistic and inclusive human rights discourse, and the use of the CRC and ACRWC in the African context validates, localizes, and strengthens children's rights globally. Of course, the existence of a flexible and growing children's rights framework for the continent cannot preclude violations of children's rights in totality, especially in intercountry adoption. However, the existence of violations of children's rights in intercountry adoption as measured against the norms of the ACRWC should urge on the process of strengthening and validating implementation procedures; this process can be observed in Madonna's case, as courts and human rights groups became involved to tease out the ruling that would apply the law to best serve the children involved. Amidst reservations and tensions surrounding the benefits of intercountry adoption, the best interests of the child and the best capabilities of the child are met through IA when proper oversight allows adoptable children to avoid institutionalization. Yet, the debate can never reach a totalizing settlement, given the variability of each child's particular experience and the necessity to meet each child's particular needs to achieve enjoyment of their human rights to the fullest. The framework of children's rights norms on the African continent shows promise and follows the work of previous scholars, lawyers, courts, activist groups, and individuals to ensure greater implementation of domestic child care systems and oversight of intercountry adoptions, creating societies of children and adults who realize their best interests.

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