



Applying the Principle of the Best Interests of the Child in Inter-Country Legal  
Guardianship and Adoption Matters:  
Experiences of the Family Court in Uganda

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This document represents part of the author's study programme while at the Institute of Social Studies. The views stated therein are those of the author and not necessarily those of the Institute.

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## Table of Contents

<i>List of Tables</i>	<i>v</i>
<i>List of Acronyms</i>	<i>vi</i>
<i>Acknowledgement</i>	<i>vii</i>
<i>Dedication</i>	<i>viii</i>
<i>Abstract</i>	<i>ix</i>
<i>Relevance to Development Studies</i>	<i>x</i>
<i>Keywords</i>	<i>x</i>
<b>CHAPTER 1: INTRODUCTION</b>	<b>1</b>
Situating the Problem	1
Inter-Country Adoption: Meaning and Trends	2
Global Trends and Concerns about Inter-Country Adoption	3
Defining the Best Interest Principle (BIP)	5
The Context: Uganda and its booming ICA Industry	6
Justification and Scope of the Study	7
The Study Objectives and Guiding Questions	8
Research Methodology	9
Using the Child Rights-Based Approach (CRBA) as an Analysis Tool	9
Qualitative interviewing as a research method	9
Research Ethics and Confidentiality	10
Limitations and Challenges	10
<b>CHAPTER 2: INTER COUNTRY ADOPTION AND THE BEST INTERESTS OF THE CHILD PRINCIPLE: EMERGING TRENDS AND PRACTICES IN A GLOBAL CONTEXT</b>	<b>11</b>
The conceptual overview of Best Interest Principle (BIP)	11
The Paramountancy of the BIP: Paradox of its Interpretation	12
The Child Rights Based Approach (CRBA) to Realising Rights	14
The relationship between the Best Interest Principle and other CRC General Principles	15
CRBA in ICA: Putting safeguards against abuse and exploitation of children	16
Power and Agency and how it relates to decisions in ICA	17
<b>CHAPTER 3: INTER-COUNTRY ADOPTIONS: THE FAMILY COURT AND THE CHILD'S BEST INTEREST PRINCIPLE IN THE UGANDAN CONTEXT</b>	<b>20</b>

Applying BIP Standards in LG/ICA Process: The role of Court examined	20
Finding an adoptable child? Examining whether the selection criteria puts into consideration tenets of BIP.	21
Granting LG/ ICA as measure of last resort and Preservation of records: What is the rationale?	24
Engaging in ICA as a Business Rather than a Service: The duty to prevent improper financial activities and inducement	27
The choices made by the court: The Pro-active Court and Liberalisation of LG and ICA	29
The impact of the decision in Alituubeera case on BIP	31
Court’s approach to application of BIP in LG/ICA: Perspectives of court users	32
The thin line between child trafficking and ICA: The duty of court to avert likely abuse in ICA	33
Uganda’s Legal and Policy Landscape: How it impacts application of the BIP	35
<b>CHAPTER 4: CONCLUSION AND RECOMMENDATIONS</b>	<b>37</b>
Revisiting the loopholes in Laws and Policies	37
Interpret and apply the BIP holistically	38
<b><i>References</i></b>	<b>40</b>
<b><i>Appendices</i></b>	<b>45</b>

## List of Tables

Figure 1 FC Applications and Yearly Trends from 2008 to 2012.....	30
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## List of Appendices

1. Annex A: List of respondents
2. Annex B: List of documents
3. Annex C: List of files
4. Annex D: Interview guide

## List of Acronyms

ACPF	African Child Protection Forum
ACWRC	African Charter on the Welfare and Rights of the Child
AG	Attorney General
ANPPCAN	African Network for prevention and Protection against Child abuse and Neglect
BIP	Best Interests of the Child Principle
CA	Court of Appeal
CRBA	Rights-based approach
CRC	Convention on the Rights of the Child
CRIN	Child Rights Information Network
FC	Family Court
GC	General Comment
HC	High Court of Uganda
HccH	Hague Conference on Private International Law
HCIA	Hague Convention on Protection of Children and Cooperation in respect of Inter- Country Adoption
JLOS	Justice Law and Order Sector
KCCA	Kampala Capital City Authority
LAP	Legal Aid Project of the Uganda Law Society
LG	Legal guardianship
MGLSD	Ministry of Gender, Labour & Social Development
OVCs	Orphans and Vulnerable children
PSWOs	Probation and Social Welfare Officers
ICA	Inter-Country Adoption
UN	United Nations
UNICEF	United Nations Children's Fund

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This Study is dedicated to my three lovely children Joshua Mukasa, Jeremiah Mukasa and Jael Jewel Mukasa. It was because you sacrificed to spend days and nights without the warmth of the mother in the house that was able to realise my dream. I appreciate your perseverance and may this be a source of happiness and inspiration to steer you to great success in life.



## Abstract

This study analyses the child's best interest principle as applied in inter-country adoptions and legal guardianship decision made in contemporary Uganda. The international human rights regime particularly the Convention on the Rights of the Child (CRC) elaborately delineates how children should be treated in particular situations to ensure that decisions or initiatives undertaken promote, rather than inhibit, their best interest. Uganda is a state party to the CRC and as such under an obligation to implement the convention. The role of courts of law in inter-country adoptions is of particular interest in this study. Firstly, as it is the courts of law that evaluate and assess the circumstances under which adoptions are made. In Uganda they are the competent authority within the meaning of the Hague convention on ICA. Secondly, courts of law, besides domestic legislations, use other subsidiary laws, international human rights law inclusive, as well as their inherent discretion in adjudication of cases. In other words the courts of law are highly empowered to promote and protect the BIP of children in ICA, more than any administrative organ in Uganda

Be that as it may, the study reveals that child's best interest principle in its broad sense receives peripheral attention in court decisions on adoption matters. Instead physical and financial related welfare and other considerations take a centre stage. The results of this have been injurious to the rights of the children because it has produced an environment that has allowed clandestine activities associated with child trafficking to flourish within the context of ICA in Uganda. This paper contends that courts of law are an indispensable organ in the dispensation of justice and thus shouldn't overlook critical issues like the child's best interest in taking critical decisions as in adoption of children. They have the duty to protect, and fulfil the children rights within the ICA settings. Adoption is a lifelong undertaking, implying that a flawed adoption process portends irreversible damage to the child's wellbeing, survival and development.

## Relevance to Development Studies

There is no trust more sacred than the one the world holds with Children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and want and that they grow up in peace. Former Secretary General Kofi Anani (UNICEF 2000)

Due to globalisation and changing societal trends more and more children who are orphans, victims of war or neglected and or abandoned are finding themselves traded across borders to live with legal families other than their birth families. Breuning and Ishiyama (2009:98) state that although adoption across borders—and continents—has the potential to successfully serve the needs of orphans by providing them with permanent and loving families, it also has the potential to turn children into an “export product.” Such commoditisation could be motivated either by a desire to genuinely help children in need of care or to profit from such children a situation which (Mezmur 2010) has related to child trafficking . The commoditisation of children compromises their best interest and violates a child’s basic human right to grow in an atmosphere of happiness, love and understanding (CRC 1989).Sen argues that when people grow up in a loving home environment, it nourishes their abilities to have self esteem that in turn empowers them to have the capability to determine their destiny and become useful citizens (Sen1999). A society will always be reflected in the way it treats and handles its children, when children grow safe, their future is well secured. It is hoped that this paper will enlighten development practitioners, state agencies and authorities especially in Uganda about the relevancy and importance of ensuring wellbeing of children across borders for adoption. It will contribute to their ability to adequately asses children’s specific circumstances and make decisions that will enhance their healthy growth, happiness and survival especially during early childhood development.

### Keywords

Inter-country adoption, legal guardianship, best interests of the child Principle, judicial officers, children rights

# CHAPTER 1: INTRODUCTION

My heart is at pain because of my child, if I knew I would not have given him up. I would live with him and he would have grown just like any other children... I was never informed by court that, I was totally giving up my right. I thought my child was being taken for education

Lamentation of a mother, Hasifa Nandawula on learning that her adopted son was taken for ever and she would never have another chance to live with him (Sserwanja NTV:2013)

## Situating the Problem

Stewart Bukenya was born to Festo Matovu and Hasifa Nandawula in the Kiwumu village near Kampala in Uganda. In 2009, Stewart aged 2years was handed over to the Hodge family in Forest County, State of Mississippi under a legal guardianship order (LGO) issued by the family court (FC) in Uganda. According to media reports (Sserwanja NTV 2013 and affidavits on court record (Stewart Bukenya 2012), Stewart's parents later contended that they gave up their child thinking that the legal guardians were merely to provide him with education and care. Reportedly, they were assured continued access to their son through telephone and regular visits. However on reaching their home country the Hodges applied for adoption and subsequently changed his name from Stewart Bukenya to Silas Hodge. To date the family is grappling and paying the price for a decision they made four years ago when they gave up their child. (Sserwanja: 2013) .The adoptive parents cut off contact and are not ready to relinquish their legal rights back to the biological parents. Hodge the adoptive father in his response to court wrote:

While I do understand that we have a legal guardianship status with Uganda, we are adoptive parents according to USA law...Stewart is now our child we would be happy to provide any documentation (Hodge, letter to court)

This is an unfortunate scenario involving a fight over a child that hardly understands what is going on around him. This case scenario is what motivated this study with the following question in mind: Where is Stewart's best interest in the decision that was made by the duty bearers? What has led to such situations where courts are prompted to grant Inter-country adoption and Legal guardianship orders in cases where children are not orphans? Whose rights should prevail in a situation where a child's rights conflict with the rights and or interests of other parties?

The vignette of Stewart is a tip of the iceberg illustrating some of the dilemmas that courts in Uganda face when determining the BIP in ICA. Particularly it is challenging for courts to assess and determine who is an adoptable child in situations where the process is marred with fraud, forgeries and inducements.

The situation is exacerbated by the fact that Uganda's child protection system is still weak as Freda Luzinda a child rights advocate observes: "we don't have a sieve to pick out an adoptable child from a non adoptable child" (Sserwanja NTV 2013). The absence of guidelines to support the sieving process coupled with circumvention of the safeguards under the children Act due to its prohibitive nature accelerates illicit activities related to ICA (CRC Committee 2008; Mezmur 2010). The result of all this has been compromising the child's interests in situations such as Stewart's case where orders were based on misrepresentation of facts by parties.

The paper is divided into four chapters with issue specific subsections. The first chapter explains the key concepts namely: inter-country adoption and best interest principle. The chapter also situates the problem and context of the study, mentions research objectives and questions, justification, scope and research methodology. The second chapter presents the conceptual and theoretical framework used to analyze the research findings with emphasis to the Child rights based approach and the best interest concept. The third chapter presents findings and analyses the interpretation and applicability of BIP in the ICA by the court. The fourth chapter draws conclusions from the study and suggest recommendations for academic, practice and policy changes.

## **Inter-Country Adoption: Meaning and Trends**

Adoption has been defined as "a multi-step legal process that culminates in the creation of a legally sanctioned parent-child relationship between the adopting parent and the adopted child" (Roby 2004: 304). Adoption was originally meant for providing an heir to childless families but has evolved over the past few decades into a method of providing a permanent loving family environment to a child (ibid). There is a thin line between adoption and legal guardianship, with the latter allowing the birth parents or care givers to maintain access rights to the child.

ICA therefore involves moving a child from his/her country of origin to another country to live with the adoptive parents (ibid). It implies the total and definitive rupture of a child's legal relationship with the biological family. ICA had its genesis in a Post-World War II climate when American soldiers returning home spotlighted attention on children orphaned by the war in Europe. It later took a markedly distinct tack when, instead of committing resources to helping orphans within the country of origin, the solution was taken to provide them with homes elsewhere. While ICA at that time was child-driven intending to find a home for orphaned children, there were seeds of the larger ICA debate that would grow in the years to come with multifaceted reasons for the practice (Martin 2007: 177). At the receiving side this was motivated by factors such as high infertility rates; decreased availability of domestic children for adoption; and increasingly established networks for ICA. On the sending side

it was driven by difficult social and economic conditions, mainly: poverty and illness; migration to urban areas; the breakdown of extended families; high pregnancy rates among unmarried women; difficulty in obtaining abortions; and increase in female-headed households; as well as high unemployment rates (Martin *ibid*: 178).

Martin and Mezmur in their analysis of current trends in ICA both present different viewpoints that bring out the good and bad related to ICA (Martin 2007; Mezmur 2010). According to Martin, proponents of ICA perceive that millions of children are in need of homes in developing and transition economy nations especially children who are abandoned, left in dismal orphanages, or living on the street. Such children in need may counter the ethical or political objections to ICA as lacking legitimacy (Martin 2007:179). Supporters of ICA according to Martin argue that: it fulfils a child's right not to be institutionalized; provides adults who wish to be parents the opportunity to do so; provides parents to children without families; alleviates the world's ills by taking children away from countries with overtaxed resources and reducing the overall number of homeless children; promotes tolerance and diversity by creating families with different national and ethnic backgrounds and provides additional opportunities for non-traditional families (Martin 2007: 179).

Critics of ICA on the other hand look at the practice as more or less a form of child trafficking because: it involves the transfer of children from poor nations to rich nations in order to meet the demands of those in rich nations; it strips children off their national identity, native culture and language and therefore represents a form of modern-day imperialism imposing a culture and set of values from the outside (Martin *ibid* 179; Mezmur 2010:4; Kapstein 2003). Given this global context, ICA must be seen within the political perspective of human rights and human dignity and answers should be sought to the questions as to why western countries adopt frequently children from countries in economic/political turmoil such as Guatemala (Herrmann 1991), and what are the drivers and mechanisms behind adoptive practices (Makomane et.al 2011).

### ***Global Trends and Concerns about Inter-Country Adoption***

Country reports and CRC Committee observations have highlighted the widespread concerns about the trafficking in children for adoption (CRC committee 2008). Academic researchers, local regional and international child rights organisations allude to these fears and speculations surrounding ICA. UNICEF in its 2004 statement had this to say:

Over the past years, the number of families from wealthy countries wanting to adopt from other countries has grown substantially. At the same time lack of regulations and oversight, particularly in the countries of origin, coupled with potential for financial gain, has spurred the growth of an industry around

adoption, where profit, rather than the best interests of the children, takes the centre stage. Abuses include the sale and abduction of children, coercion of parents and bribery as well as trafficking to individuals whose intentions is to exploit rather than care for the children (Roby 2007:59).

The African Child Protection Forum (ACPF) reports that ICA in some countries in Africa Uganda inclusive is marred with serious procedural problems, and illicit activities (ACPF Report 2012). Also Mezmur in his report to the Special committee of HCIA gave numerous examples from Ethiopia, Kenya, Malawi, Chad, South Africa Uganda and many other African countries where the practice of ICA has been put in the spotlight for illicit practices that have culminated into a number of questionable adoption orders (Mezmur 2010:4). The illicit activities highlighted include: falsification of documents; violation of “no initial contact rule”; improper financial gain, stringent residency requirements and abuse of guardianship orders (ibid4-5 &24). It is argued that although payments by adoptive couples may be made in good faith and without harm to the child, a system that puts a price on a child’s head is likely to encourage criminality, corruption and exploitation (UNICEF 2007:298). Every Child<sup>1</sup> and Mezmur confirm that such abuses is what has led to suspension of ICA in some countries such as Guatemala, Liberia etc (Every Child 2012; Mezmur 2010) shifting the focus to countries with less restrictive policies and protection measures on ICA like Uganda (Bruening & Ishiyama 2009). The practice is globally received with mixed reactions and views, with some equating it to child trafficking, modern-day imperialism and at its worst some critics calling it a “cultural genocide” (Mezmur ibid 185-186).

In spite of ICA having a correlation with child tracking and other related child abuses, it is still a viable option for the children who are in need of care and protection in absence of domestic options. To address this gap the international human rights regime came up with legislations to ensure that ICA takes place in the children’s the best interest so that only deserving children are taken across borders for adoption. Article 21 of the CRC (1989) recognizes the system of ICA and provides for conditions within which ICA can take place. Article 21(b) provides that “ICA may be considered as an alternative means of child care only as a last resort after exhausting all local remedies. This ‘last resort’ option is what has been referred to as the subsidiarity principle under The Hague Convention for Protection of Children and Cooperation in respect of Intercountry adoption (1993 Article 4; HccH guidelines 2008:46). The treaties thus obliges state parties to make efforts to have a child raised by his or her birth

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<sup>1</sup> Every Child is an international development charity based in the UK working to stop children growing up vulnerable and alone. <http://www.everychild.org.uk>

family or extended family whenever possible (Hague guidelines 47) and to mobilise resources for taking care of children in need of care and protection.

## **Defining the Best Interest Principle (BIP)**

The concept of “best interest principle” is the basis upon which this research has been formulated. The BIP was deliberately left undefined at the helm of enacting the CRC to provide room for it to be interpreted and applied in accordance with specific features of national or local circumstances and decisions to be made on a case (Arts 2010). The Hague Conference on Public International Law (HccH 1993: para16) in its guidelines to the convention added that the term was not defined in the convention because the requirements necessary to meet the best interests of the child may vary in each individual case, and the factors to be considered should not, in principle, be limited. Art 3(1)) of the CRC states that:

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

The BIP has also been given meaning in cases interpreted in different jurisdiction such as England’s case of *J vs., C* (1970) AC: 710). Lord McDermott<sup>2</sup> interpreted BIP to mean:

a process whereby, when all relevant facts and relationships, claims and wishes of parents, risks and choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interest of the child’s welfare. That is the paramount consideration because it rules upon or determines the course to be followed

The guidelines for interpretation of The Hague Convention on Cooperation and Protection of Children in ICA (HCIA) provides essential elements for consideration to include among others: efforts to maintain or reintegrate the child in his/her birth family; a consideration of national solutions first before the child is taken under ICA; ensuring the child is adoptable; matching the child with a suitable family; and imposing safeguards for protection (HccH 1993:para16)

BIP “as a primary consideration” therefore means that the child’s interest in a given matter should be a subject of active consideration because there may be competing or conflicting human rights interests of other individuals of groups. The interest of others should not be the overriding concern even though they may influence the final decision (UNICEF 2007:38; Save the children 2007:14). I discuss the BIP as a concept in depth in chapter two of the study.

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<sup>2</sup> Uganda is a former British colony that inherited the common law system, decided cases from the UK are often cited by courts in Uganda as precedents.

## The Context: Uganda and its booming ICA Industry

In Uganda today there is growing concern about the plight of children going for ICA. Media headlines like “Red flags waves over Uganda’s adoption boom” are signs that prompt cause for worry (Todd CNN 2013; Sserwanja 2013). This boom has been explained to be a result of a weak protection system and ICA becoming profitable business for the middle man. (Sserwanja 2013). In its 2008 concluding observations the CRC Committee (2008 para. 20) noted with concern the rising number of applications for LG and reduced number of adoption of children in Uganda. The Committee warned that this may be aimed at circumventing the regulations which apply to adoption and result in practices contrary to the Optional Protocol to the CRC such as the sale of children, child prostitution and child pornography. The committee recommended (ibid para, 21) that Uganda stringently scrutinizes applications for ICA and ratify the HCIA 1993. Almost 5 years after this recommendation, Uganda has not ratified the HCIA (High Court Report 2012). Justice Mukiibi (ibid: 27) in a Family Court user’s dialogue:<sup>3</sup> expressed concern about the weaknesses and said:

Uganda has no law to establish safeguards to ensure that inter-country adoption takes places in the best interest of the child. There is no systematic cooperation between Uganda and where children are taken, there is no body or person designated to be central or competent Authority to control and coordinate matters relating to inter-country adoption

This fertile ground has created an adoption landscape with well-connected network agencies, ‘manufacturing’ orphans with a lot of mushrooming unregistered orphanages to keep up a steady supply flow. Kaboggoza estimates about 30 adoption agencies with commercial relationships with orphanages (Kaboggoza 2013:4). A media report was made of about 76 children rescued from a local organisation called Active Blessing Uganda, in Northern Uganda (Natukunda NV 2013) while child earlier adopted was reported to have been dumped at a foster home (ibid). Activists (ANPPCAN)<sup>4</sup> also recently called upon the Ugandan government to issue tougher laws on ICA because they suspect child trafficking disguised under ICA practice (Natukunda 2013). The organization added that only in 2012 they had received and handled five cases of trafficking in which two children aged 17- girl and boy who were allegedly trafficked were deported back to Uganda by the Swedish Immigration Board.

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<sup>3</sup> I coordinated this meeting before coming to ISS for study. It was held on 7 September 2012 and attended by judicial officers, policy makers, representatives from the Ministry of Justice, advocates, UNICEF, DANIDA civil society, traditional leaders and media.

<sup>4</sup> ANPPCAN is the NGO African Network for Prevention and Protection against Child Abuse



The adoption law in Uganda is prohibitive in that the Children Act (Cap59 s46) provides for a minimum of 3 years of residence by foreigners and 6 months of foster care under supervision of the Probation and Social Welfare Officer (PSWO). Mezmur (2010) says this has been circumvented by applicants instead seeking for legal guardianship. The current manner in which LGO are processed has created a fertile ground to abuse. It is marred with fraud, forgeries improper financial gain, coupled with unreasonable short period of stay and acquaintance by the applicants (ibid). This has in turn led to suspicions that ICA/ LG in its current form is contributing to the unfortunate child trafficking and sale of children going on within the country. This volatile situation has consequently led to a situation where some receiving countries like Netherlands after own independent investigations have taken a decision to suspend ICA Programme until they assured and convinced that the current problem issues with the law, procedures and monitoring mechanisms have been addressed (Kaboggoza 2013:2).

## **Justification and Scope of the Study**

Research findings demonstrate that adoption is not a single life event, but a life-long process that needs careful handling and well thought through choices. The need to know one's identity is not confined to young adult adoptees only but even after childhood the dilemmas associated with choice made might keep haunting the givers and beneficiaries. It has been quoted by the Hague Conference for International Law that in one receiving country the oldest adoptee applying for his original birth certificate was 96 and the oldest birth mother searching for a child was 86 ( HccH 2008:123).

When ICA process is abused it has serious consequences to child survival and development. These consequences are manifested into children being treated as commodities for sale and trafficking; mismanagement of information leading to loss of identity; wrong choices in terms of selected families; discrimination especially during selection and rejection (Martin 2007; Mezmur 2010; Komakech 2013). ICA can also be inappropriate 'development intervention', i.e. helping one child (and often not one that's in the most need) by removing them from family and country at high cost, when significantly less could lift their family from poverty (Smolin 2007).

Although much has been written on adoption and alternative care, majority of these writings focus has been mainly on the effects of institutional care on child development, adoptive parenting, adoptee identity, and foreign policy (Brittingham 2011:7, Mezmur 2010). Not much has been written about the BIP in the context of ICA ,especially, on how it is understood and applied to ensure protection of the children involved and its connection to child survival and development ,hence my motivation for this study.

The focus of this study was put on the FC division of the High Court of Uganda because it is mandated by law (Children Act cap 59 s44) to entertain all foreign legal guardianship and adoption matters. This court therefore plays a very critical role in deciding who is an adoptable child by foreigners within meaning of the law and circumstances. The study also makes a critical review of the current regulatory and policy framework and how it enhances or constrains the application of the BIP. It examines the processes of ICA paying more attention on how the courts apply the BIP safe guard the interest of the children involved, draws conclusions and recommendations

## **The Study Objectives and Guiding Questions**

This research intends to add value to human rights and social justice studies by analyzing the interpretation and application of the BIP by courts of law in Uganda in ICA/ LG matters. The research was guided by following question:

1. How has family court in Uganda applied the principle of the best interest of the child in Inter-country legal guardianship and adoption cases?

Specific sub-research questions included:

- i) How does the Family Court in Uganda interpret the BIP of the child in ICA matters?
- ii) To what extent is the BIP manifested in the decisions and choices made by Courts in ICA cases? and
- iii) What are the gaps in the legal and policy framework of the ICA process in Uganda?

Using this question and its sub questions the study examines the interpretation and application of the BIP by individual judicial officers, as prescribed in the law, practice and own experiences. The purposes and intention of the study is mainly:

- i) to analyse how judicial officers perceive, interpret and apply the BIP in ICA and legal guardianship matters
- ii) to examine the controversies and limitations arising in choices made in ICA as well as the likely human rights issues that affect the wellbeing and development of the children adopted and
- iii) to generally review the state of the existing legal and structural framework and how it supports or impedes courts ability to exercise its discretion to apply BIP in ICA

## **Research Methodology**

The study utilised a child rights–based approach and qualitative interviewing methodology that involved processes of data collection and analysis. I wish also to note that I have used my background experience and acquaintance with the judicial process formerly as a judicial officer and advocate representing the vulnerable, especially children; to support part of the findings and analysis.

### ***Using the Child Rights-Based Approach (CRBA) as an Analysis Tool***

Interpretation and analysis of the academic and non-academic literature, court decisions and data gathered from interviews has been premised on international and national human rights framework using the lens of the CRBA. Emphasis has been put on the CRC 1989 mainly because it is the most ‘complete’ human rights treaty – that contains most the civil, political, economic, social and cultural human rights of children broadly emphasising that children are holders of rights (Save the Children 2005:12, Arts 2010). The Hague Convention on Inter-Country Adoption (1993) also features prominently because it sets benchmarks within which ICA can safely be handled between the sending and receiving country. This human rights notion of CRBA has been rather expounded on in chapter two this study.

### ***Qualitative interviewing as a research method***

Both primary and secondary data collection and analysis methods were used in this study. These methods provided a distinct process of assessing how the BIP is understood and applied by persons who are engaged with or witness the process of ICA such as the court users, court staff and judicial officers and policy makers.

The methods for qualitative primary data collection used in this research included interviews and observations. Through this method the research tapped on experiences of duty bearers. Purposeful observation was useful in getting the non verbal cues from responses received during the process of interview. Primary data was gathered using semi-structured interviews. In total 20 informants were interviewed and 5 public opinions on adoption were collected. The interviews targeted informants who included Court support staff, judicial officers, lawyers, Probations and Social Welfare officers, CSOs actors and policy makers within government institutions such as MGLSD and JLOS.

The specific institutions visited included: the Family Division of the High Court (FC), Nsambya baby’s home; and CSOs like ANPPCAN, the Legal Aid Project of the Uganda Law Society (LAP), Save the Children Uganda. The informants from these organisations shared facts and views on the BIP on ICA and how its interpretation impacts child rights outcomes.

The research also utilised secondary data which mainly included reviewing academic Articles and books, decided court cases, less conventional sources such as news paper Articles, documentaries and personal blogs on the subject matter. In addition review of court files and case statistics was also conducted. The selection of files was done randomly, in order not to bias the findings, save for Stewart Bukenya's used as a case study in this paper. A total of four files were perused.

### ***Research Ethics and Confidentiality***

To ensure authenticity and a smooth research process, I sought advance permission from the Court's registrar who designated the court supervisor to support the research process. At the FC, I was given all the support needed including authorisation to access and peruse the selected court files and case returns. However with the MGLSD and KCCA, I had to formerly introduce myself to the responsible administrators in order to win their confidence and certainty about the research purpose. In other places such as a baby's home, law chambers or CSOs, I presented myself to the respondents as a credible and dependable student researcher, seeking to gain knowledge on ICA. I promised confidentiality of their identity especially on sensitive information shared. The respondents in this paper are identified using interview numbers, titles and sometimes pseudonyms except where there was explicit permission to use names or information gathered from public records or authentic literature on the subject matter.

### **Limitations and Challenges**

During the research I was party to sensitive information especially in relation to situations and personalities who are exploiting and benefiting from this booming ICA industry. This sort of derailed the original purpose of the study because at some point the research tended to become more investigative than academic. Nonetheless I maintained focus, and isolated relevant information that will boast my academic analysis. It also turned out that the study period coincided with the court vacation. This led to missing out on key informers who included the adoptive parents, birth parents and children. It was also not possible to participate in the proceedings of the court because even when the court resumed, the substantive judges were on transfer and the newly posted judges had not taken office to have cases fixed for hearing. This was however mitigated through the experiences shared by court staff, and the lawyers who in their day-to-day work very much interact with these litigants. In addition reviewing the files and various affidavits sworn by litigants, the home study and probation reports as a well as the court proceedings on record provided me with a picture of what kind of responses I was likely get from this category of respondents.

## **CHAPTER 2: INTER COUNTRY ADOPTION AND THE BEST INTERESTS OF THE CHILD PRINCIPLE: EMERGING TRENDS AND PRACTICES IN A GLOBAL CONTEXT**

This chapter presents the conceptual and theoretical framework related to the BIP. The chapter gives a conceptual overview of BIP and CRBA and discusses relevancy and implication of these concepts in the child rights discourse. The chapter also discusses the theories of power and agency in a global context and analyses how they impact on the decisions and choices made in by the justice system that are related to ICA.

### **The conceptual overview of Best Interest Principle (BIP)**

UNICEF in its handbook stated that the concept of the best interests of children has been subject of more academic analysis than any other concept included in the Convention on the Rights of the Child 1989 (CRC). The concept is not new in international human rights law as its inclusion in some national legislations pre-dates ratification of the Convention (UNICEF 2007:36). UNICEF adds that at the heart of all legislation regarding children's rights lie the BIP which is a lynchpin of the CRC and the HCIA 1993 (ibid). The principle is also reflected in other regional and international legislations such as Article 4 of African Charter on rights and welfare of the child, the convention on Elimination of All Forms of Discrimination against Women (1979). Article 16(1) (d) of CEDAW provides that in matters relating to marriage relationship, the best interest of the children shall be the paramount consideration.

Apart from Article 3 of CRC that provides for a broad scope of what BIP entails, the concept is also spread into other Articles of the convention as well. These include Article 9(1) and (3) which bars Separation of a child from his/her parents against his/her will subject to a judicial decision; and Article 21 of the CRC which provides that the BIP shall be the "primary consideration" in relation to adoption matters. States that are member parties to the CRC have domesticated the provision of CRC in their national laws. For example Uganda's 1995 constitution Article 34 provides that all laws relating to children should be enacted in their best interests. Uganda's Children's Act (cap 59 s2 and s3) operationalizes the principle by first defining a child as one below the age of 18 years. Then its first schedule obliges the authorities to consider a child's welfare to be of paramount consideration by giving due regard to: ascertainable wishes and feelings of the child concerned in light of age and understanding; a child's physical, emotional and educational needs; likely effects of

any changes; a child's sex, age, background and any other relevant circumstances; any harm that the child has suffered or is at risk of suffering; and the capacity of guardians.

Similarly the South African Constitution and its Children Act (2005:s7) also provides for the BIP standards in a more elaborate way. The standards prescribed include: giving consideration to the nature of the personal relationship between child and parents or caregiver(s); the attitude of the parent or caregiver towards the specific child and their ability to exercise parental responsibility including the capacity to provide for needs; the likely effect on the child of any changes in circumstances including the separation from one or both parents, brothers or sisters; practical difficulties for the child in having contact with the birth parents; giving priority for the child to remain in care of parents, family or extended family, culture or tradition; the child's age, maturity and stage of development; gender, background or other relevant characteristics of the child; the child's physical and emotional security and intellectual, emotional, social and cultural development; and any disability or chronic disease that the child may have. Both the Ugandan and South African legislations are hinged on the intention of the CRC (art4) which obliges state parties to take appropriate legislative and administrative measures to implement rights as recognized under the CRC.

According to some legislation like Uganda's children Act, law text books like Bromely (1998) and decided cases the term BIP and child welfare principle are synonymous and have sometimes been interchangeably used to refer to the same concept. In Bromley it is stated "the child's welfare is the courts sole concern and other factors are relevant only to the extent that they can assist the court in ascertaining the best solution for the child" (Bromley 1998:336). Although one would argue that according to the CRC context welfare is just an element of BIP, when considering different circumstances and legislation it's imperative to give room to the local meaning attached such as in the case of Uganda where the term welfare principle has the same meaning attached to it as BIP. Therefore for purposes of clarity and analysis of the research findings, in the Ugandan context the welfare principle will be discussed and analysed with the same meaning as attached to the BIP under the CRC and other academic interpretations.

### ***The Paramountcy of the BIP: Paradox of its Interpretation***

Article 21 of the CRC makes application of BIP in ICA of a paramount consideration. What this means is that any other competing interest in consideration of whether the child is adoptable or not is subject to the rights and interest of the children involved in such matters. However this BIP as a paramount consideration in decisions affecting children has been criticised by some aca-

demicians, practitioners and anthropologists as being self defeating, individualistic, unknowable, vague, dangerous and open to abuse (see e.g. Kopelman 1997: 288; Reece 1992). It has also in some cases been applied with prejudices of the decision-maker especially in adoption related matters by judges who often perceive adoption as humanitarian intervention rather than as right (Carldarello 2012). Davies in his Article (2011:50) notes:

Although the principle recognises children as having ‘agency’, the universality to which it aspires fails to account for the ambiguities involved in its application. This dilemma is exemplified by the politics of rescue, referring to the complex web of interests and relationships that lie behind the perceived altruism of ‘rescuing’ children from a life of poverty, often exacerbated by humanitarian emergencies, to one of wealth, security and opportunities

Davis’s view is that commoditisation of the children in need, the manufacture of orphans and orphanages, creation of orphan identity in children leads to formation of a social rapture intervention model and rescue discourse (Davies2011), which in turn bleeds various competing interest as adult care givers use the children’s rights for own interest (Cheney 2013: 163).A birth parent can for example be forced to relinquish her birth rights due to loss of confidence in the extended family network, extreme poverty and or HIV AIDS. Such cases scenario featured in the study on birth families and ICA conducted in Ethiopia by Brittingham (2010).

And so Davies (2011:52) concludes that: while the principle has been applied easily in other areas of domestic and international law, notably in the context of custody battles involving children it is especially problematic when applied to ICA owing to the distinctive set of circumstances in which such adoptions occur – not only crossing cultures but also involving motivations and interests of particular individuals, sending and/or receiving states. The wording “best interest as the primary consideration” it’s self very much suggest that the interest of the child will not always be the single overriding factor to be considered. There may be competing or conflicting human rights interests which often may override the interests of the child (Goeman et. al 2011)

On the other hand it has also been argued by other academicians that the BIP rests on solid consensus (Reece 1996), some of these scholars and practitioners have made attempts to deconstruct the concept by offering a practical approach to its interpretation. Kopelman proposes in his writing that the best interest of the child threshold applies if circumstances warrant intervention especially in situations where parents or guardians have abrogated their duty; for as long as the decision is ideal and taken with a good standard of reasonableness(Kopelman 1997:276). Practitioners’ like UNHCR commissioner as quoted in the core standards for guardians of separated children advocates for determination and application of the best interest assessment in regard to

individual children on a day-to-day basis focusing on the important decisions affecting the life of the child (Goeman et.al 2011:17)

In its General Comment (GC) No 14 the CRC Committee advised that the content of the BIP must be determined on a case-by-case basis depending on the particular context and needs of the child. It is through the interpretation and implementation of CRC Article 3, in line with the other provisions of the Convention, that the legislator, judge, administrator, social or educational authority can clarify the concept and make concrete use of it with flexibility and adaptability to the unique circumstances of the child (CRC Committee 14:9; UNICEF 2007). The CRC Committee moved a step further and offered an in-depth interpretation of what is entailed in the BIP underpinning the fact that the child's best interests are a threefold concept. Firstly, it is a substantive right that should be taken as a primary consideration when different interests are being considered. Secondly, it is a fundamental interpretative legal principle meaning that when a legal provision is open to different interpretations the one which effectively serves the best interests of the child most should prevail. Thirdly, it involves a rule of procedure: whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned (CRC Committee's GC/14:4). The Committee also rather emphatic to application of this principle in adoption-related matters and stated that it "is not simply to be "a primary consideration" but "the paramount consideration "(CRC Committee 2013: 10).

Although the Child rights Information Network avers that framework for assessing and determining a child's best interests is provided for within the existing legal framework (CRIN 2013), I would say it can only become meaningful if its paramountcy is well digested and understood by the implementers, and the three phases applied namely as substantive, interpretative and procedural right (GC14 *ibid*) is hitherto followed through the process of decision making. All this rests on making a well-informed judgement based on a comprehensive analysis of a given situation on a case by case basis because their circumstances differ in a given context as emphasised by actors (Save the Children 2005)

## **The Child Rights Based Approach (CRBA) to Realising Rights**

According to a former member of the CRC Committee Norberto (Save the Children 2007):

The CRC recognises a child as an active subject of rights, and the state parties as bearers of non-transferable responsibility for creating the necessary conditions for full exercise of these rights as enshrined in the UN instrument



and other enabling national laws...Legitimacy of the CRC thus lies in the capacity of states to employ a rights based approach to policy making.

The CRC puts children at the centre of any legal and administrative action undertaken by authorities. It recognises children as rights holders that need to be engaged in their own development. It promotes accountability to the citizens by making government the main duty bearer in fulfilling children's rights (Save the children 2007: 1). Any action to be undertaken therefore requires having a child rights situational analysis that is asking the 'right' questions so that children stay at the centre of the analysis (Ibid). Specifically on the BIP, the CRC Committee advised:

"... Every legislative, administrative and judicial body or institution is required to apply the BIP by systematically considering how children's rights and interests are or will be affected by their decisions and actions..." (CRC Committee 2003 para 12)

The UNHCR, in its guidelines (2008.5) mentions that although the BIP has been given extensive consideration by academia and practitioners' explaining what it entails, its application has remained a challenge to many actors and implementers. To solve this puzzle it is important to appreciate that the BIP touches on every aspect of a child's life and emphasises the holistic approach to children and their development (Save the Children 2005: 30). A CRBA would therefore bear in mind the tenet of BIP further elaborated on below

### ***The relationship between the Best Interest Principle and other CRC General Principles***

The CRC Committee has repeatedly stressed the interrelations between each of the CRC's general principles. The principles of non-discrimination (Article 2), child participation (Article 12), and child survival and development (Article 6) are all relevant when determining the best interests of a child in a given case scenario (UNICEF 2007:33 & 45).

The principle of child participation for example is a key pillar in ensuring the best interests of a child because it affirms children as rights holders putting them at the centre of decision making. It is associated with other rights such as the right to information; expression and participation in decision-making (Save the Children, 2005:31). It also emphasizes rights related such as freedom of thought conscience and religion on the freedom of association, and cultural expressions (Articles 14,15,30,31 of CRC). Other regional instruments like ACRWC (art 4) also give prominence to this principle and provide that in all judicial or administrative proceedings affecting a child who is capable of communicating his or her views an opportunity to that extent should be provided directly or indirectly through an impartial representative as a party to the proceedings.

In its GC No.7 the CRC Committee stated:

The principle of best interests applies to all actions concerning children and requires active measures to protect their rights and promote their survival, growth, and well-being, and for children to be heard in all cases where they are capable of expressing their opinions or preferences (UNICEF 2007:37)

It has been emphasized therefore that any interpretation of BIP must be consistent with the spirit of the entire Convention and in particular with its emphasis on the child as an individual with views and feelings. In addition it also gives prominence to a child as the subject of civil and political rights as well as special protections (Save the Children 2005; UNICEF 2007 38). Article 21 on adoption should not be considered in isolation but with regard to other principles and other Articles such as those which attach importance to maximum survival and development; family relationships, child's identity, protection from abuse and exploitation; parental guidance and respect to child views in line with the child's evolving capacities UNICEF (2007). All these provisions should be read together, given similar weight in interpretation and application to ensure safeguards to children in ICA proceedings and placements.

### ***CRBA in ICA: Putting safeguards against abuse and exploitation of children***

Cheney (2013: 163) wrote that “orphans have been commoditized in a chain of local and global support that makes them both potential burdens and opportunities for kinsmen”. This leads to their being traded across the globe as commodities by those who seek to benefit from their vulnerability (Kapstein 2003).

In a bid to save children from being commoditised the CRC (art 21 & 35) and HCIA (art. 8, 29 & 32) all prohibit improper financial gains and initial contact of adoptive parents with birth parents or care givers of children. The provisions makes it a duty for state parties to put in place measures to prevent improper financial gain connected with ICA and to prevent the sale of children for any purpose. The attendant guidelines to the HCIA against improper financial gain are more explicit. They provide for the Central Authority with a critical role to prevent and regulate against corrupt tendencies. The guidelines implore states to set up structures and procedures to monitor activities of institutions; put in place policies regarding fees and penalties for those involved in illicit activities, a child protection and funding strategy with post follow up mechanism to support children adopted (HccH: 1993: Par 89, 91, 92 and 616). In a situation where children are a highly desirable commodity and ICA is being arranged on a commercial basis or by illicit means, protection from violence and exploitation is vital to the children's survival and development (UNICEF 2007). Without very stringent regulation, supervision and monitoring mechanisms, children can be trafficked for adoption for nefarious purposes, such as child prostitution or forms of slavery or they can be adopted without regard to their best interests. States are therefore called upon to put in

place measures that criminalize as an extraditable offence any sort of trafficking in children, including: improperly inducing consent (UNICEF 2007).

Adding to what is recommended in Hague guidelines UNICEF (2007:302) proposes specific benchmarks for state parties to adopt. First it emphasise the requirement for adoption to be a last resort measure granted by competent authorities, who should base their decision on pertinent and reliable information, views of all children involved including those of prospective adopters . Secondly that child's right to know and be cared for by his or her parents should be emphasized and; priority should be given to preservation of the child's identity, continuity of the child's ethnic, religious, cultural and linguistic background. Thirdly the authorities should be satisfied that the adoption is permissible and all consents required by law have been given by the persons concerned with proper counselling is administered. Fourthly that all adoption placements are centrally monitored and periodically reviewed by the authorities .And lastly that, if a country has ratified the HCIA all its provisions relating to law or administrative procedures have been implemented as well those related to the Optional Protocol to the Convention on the Rights of the Child on the sale (UNICEF 2007: 302)

While the Uganda Children Act (s48 (1) (c) (d) legislated against payment in favour of adoption, mechanism to support the courts to assess and prevent such errors is not evident in the law and procedure. The study puts into consideration the law and practice and how courts have played their duty to protect and actualise the conditions set for ICA in view of the increasing illicit activities related to ICA in Uganda.

## **Power and Agency and how it relates to decisions in ICA**

Walsh argues that when individuals have potential, are socially and economically empowered; they are more likely to exercise their agency over the powered relationship effectively. The assumption by Walsh is that human beings can and do make themselves into what they are. They are able to take charge of their own lives and shape the social world into forms which meet their own needs (Walsh 1998: 12). The reality is often different, especially in situations of the disadvantaged. Since the process of ICA involves many actors with different levels of power and agency, the determination of the child's destiny and protection of his/her best interests very much depends on the interplay of these two concepts. The BIP presents to the courts a complex situation of many issues and competing rights which stretches their sense of judgement and discretion. This kind of dilemma was illustrated by Davis (2011 59) when he stated that:

Human rights legislation has expanded to consider the rights of children as individuals in need of protection but also with agency and a voice of their own. The result is a complex mix of ethical and legal dilemmas bound up with the tension between the welfare and the best interests of the child. Despite being enshrined in recent human rights law, these interests are still not easy to define, particularly in relation to questions of culture, race, identity and belonging which, along with the dangers of trafficking, tend to inform opposition to ICA.

Writing about the relationship between power and knowledge Foucault in Sara Mills (2003) argues that once one has knowledge then he has power to subdue those without knowledge. The Ugandan judicial function and the exercise of the judicial power in the administration of justice is provided for under chapter 8 Article 136(1) of the 1995 Constitution. It prescribes that:

Judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people.

This is the notion of power assumed from bottom to top as Foucault describes in Sawicki (1991). In practice though this assumed authority of the people over the judicial function is normally non evident when it comes to its application. Decision making is retained by the institution through laws established, practice and procedure which are normally a privy to a few who privileged like lawyers and judges reinforcing Foucault's notion of power that institutionalised knowledge is an abstract processes at work (Mill Sara 1993:67). His argument is that it is impossible to exercise power without knowledge because knowledge is an integral part of power (ibid 69). The judicial decisions are thus shaped by institutionalised power as derived from laws and policies and are affected by views characterised with power relations and struggles that trade upon the dangers and effects of globalisation. The ICA practice for example has been labelled "imperialistic, self-serving, and a return to a form of colonialism in which the west exploit and steal natural resources" the "baby trade" (Kakz1995; Kapstein 2003). It is ideas like these that shape and determine the support or resistance to the current ICA practice in Uganda.

Using this theory of power and agency the study analyses the power relations and dynamics between the caregivers, birth parents, lawyers as well as the adoptive parents. It questions the level of agency which the poor and vulnerable in the south can exercise against the wealthier individuals from the north and analyses how the court use their most powerful tools the "law" and discretion" to balance these power relations. As Foucault argues once one is powered institutionally or with wealth they have access to knowledge that can be used to the disadvantage of the powerless whose agency to make independent choices will definitely be affected (Mills, Sara 2003). This study situates this

power notion within the context of the central authority (state) and analyses the role and function of the judiciary in ensuring adequate interpretation and protection of the most vulnerable and marginalised within the adoption process, bearing in mind the politics of rescue, diplomacy, and the power dynamics of the haves and have-nots.

## **CHAPTER 3: INTER-COUNTRY ADOPTIONS: THE FAMILY COURT AND THE CHILD'S BEST INTEREST PRINCIPLE IN THE UGANDAN CONTEXT**

This chapter presents findings and analysis based on the research questions namely, how court interpret and apply BIP, choices made in ICA and existing legal frameworks. The chapter highlights the views and choices made by courts in ICA setting. It also analyses controversies and illicit activities surrounding the ICA processes in Uganda and how they impact the realisation of rights specifically in relation to the best interest of the child.

### **Applying BIP Standards in LG/ICA Process: The role of Court examined**

According to the Ugandan context the BIP has been defined as welfare principle under Children Act (s3) with its ingredients enumerated in the first schedule of the Children Act mentioned earlier in the paper. Justice Mukiibi interprets applicability of welfare principle as three rule dimension: First as a paramount consideration in determining matters related to children's development; secondly that it considers the issue of time to be of essence, any delay might be prejudicial to a child's welfare and thirdly that the criteria for any decision should have regard to the wishes and feelings of the child, her/his physical and emotional and educational needs, any harm the child has suffered or is likely to suffer and the capacity of parents, guardians or others involved to meet the needs of the child (Mukiibi 2013:1-2). The policy makers state that applicability of BIP in ICA to mean that:

Efforts should be made to ensure that the person applying for adoption is really the right person, having lived with the child for some time, and after being satisfied that he or she is the right person. It must be ascertained that the child in question has no other alternative locally. It is a right for the child to remain Ugandan explains the commissioner (Interview 17).

The study findings do show that the justice system actors are cognisant of what is entailed in BIP however due to other factors at play its application in practice is limited consideration of current needs of the child. In the study analysis I argue that the FC in Uganda has applied a narrow interpretation of BIP in their ICA decision. They have taken a less stringent approach to interpretation and application of the principle by using more of needy lenses, than the wider context of the principle when making their decisions. As explained by many of persons interviewed, courts have anchored their decisions more on the welfare aspects of BIP that emphasize economic and physical well being of

the child, paying less attention to other aspects embedded in the principle, such as emotional, psychological, religious and cultural identity. In the rest of the chapter I present supporting evidence to the argument advanced above.

***Finding an adoptable child? Examining whether the selection criteria puts into consideration tenets of BIP.***

The CRC (Article 21) and the HCIA, sets up standards and obligations for states to follow in order to ensure that ICA /LG take places in the best interest of the child. Such standards among others include: ensuring that the child is adoptable after exhausting all domestic options, the adoptive parents are competent and eligible; no improper financial gain by parties involved; no prior contact between adoptive and birth parents. The courts therefore are obliged to consider the circumstances of the child and satisfy themselves by law and procedure that the child is adoptable within the meaning of Article 21 of the CRC and section 45 and 46 of the Children Act. In practice the FC arrives at their decisions basing on affidavits sworn by applicants, caretakers and birth parents, consent documents, PSWO's and home study reports. According to some of the reports and responses from the field the reliability of this process is doubted because probation reports are often cut and paste, home study reports often one-sided, consent of the parties normally induced with coached affidavits. There are no deliberate efforts to verify the authenticity and suitability of applicants because the court process is missing out on independent child representations (Kaboggoza 2013; Sserwanja 2013; Interview 7; interview 18; interview 10).

I noticed from court files I perused that the reports had similarities in wording and content. In most of the reports children were presented either as abandoned, destitute, or from very poor background with recommendations that they deserve adoption. It is on basis of these facts that courts refer and grant orders sought, irrespective of the fact that the child has a birth parent in the background and does not necessarily fall within the meaning of an adoptable child if independent verification was to be done. Kaboggoza (2013: 4) confirmed these scenarios in his justification for suspension of adoption by stating:

Courts need to be a little more proactive in scrutinizing beyond doubt. Many probation reports present similar patterns emphasising the destituteness of the children. The home studies report the same, full of praises for intending applicants. For courts to rely fully on such information in my view would be subjecting themselves to manipulations of persons with vested interest.

His version was reinforced by another PSWO who said:

It is important to look into the circumstances of the child, where he has been, whether they have close relatives, trace for their homes and establish if relatives are there and how can they be supported. All these options are ignored intentionally by PSWO to make the situation look so bad (Interview 16).

It is important to note that the children Act does not give poverty as a reason to relinquish a child otherwise if it were so many parents would have given up their children to rich families from the west. Therefore destituteness in the reports should be highly questioned by the courts of law to minimise the rate of parents relinquishing their parental responsibilities in favour of foreigners.

It is contended though that courts are challenged by the fact that the system has become sophisticated and those who forge documents have mastered the game. According to Judge 1 (interview 1):

All documentation will be produced and everything will look very ok on the face of the record, the courts are at the tail end, applicants tell court what they want court to hear they will tell you a story and you sympathise.

This state of affairs is what Justice Mukiibi (2013) described as “a dilemma for courts”. The JLOS advisor blames the court’s limitation to make a deeper analysis of who is an adoptable child on the insufficiency in the law adding that with right documentations in place, court’s hands are tied, they cannot challenge the grounds presented to have the child for ICA. She says:

Inwardly the judge senses the something is wrong but the birth mother has signed and is present in court because they have been paid off or information has been misrepresented. It is such a dilemma to balance inequality in status and remain independent in adjudication of cases (Interview 18).

To her the root cause is the power relations and difference between the birth and adoptive parents. “Wealth people in certain countries who have the means to shop for children and poor people who cannot afford the welfare and when the two meet it is simply a transaction “(Interview 18). This kind of situation is reinforcing the argument that inequality affects agency, its only when individual are socially and economically empowered that they can exercise their agency (Walsh 1998).

Other respondents working with court also supported the argument that courts are at times constrained to have an active role in advising parties. The birth parents are often times coached on what to say before they come to court and even believe in the lawyers more than the court. There are judges who explain everything, including consequences and some birth parents after hearing can easily back off while others will remain adamant to advice and surrender the child (Interview 3,&4).It is also believed that sometimes lawyers use fake parents to sign off consent documents (respondent anonymized).This creates a very difficult situation to the judge at the bench on the choice of decision to make especially that they cannot be seen to descend into the arena (Interview 3)



Therefore despite efforts by courts the processes remain challenged and full of flaws. There is no conventional hearing where parties can testify in open court; the process is through miscellaneous applications that rely mainly on documentary evidence filed on court record, judicial observations and questions to parties and submissions of lawyers. This procedure is also challenged by lack of independent children representation (friends of court). The fact that the PSWO's function has been compromised presents a delicate situation where orphanages and birth parents are representing own interest; ICA agencies and lawyers motivated by the monetary gains and the applicants by selfish or benevolent interest. It is true on record the application will be well supported by documentary evidence to prove that child is adoptable, but beneath the surface there are more possibilities that the child has a network of surviving kinship who the parties with vested interests will ensure never appear anywhere near during court proceeding.

The challenges notwithstanding Registrar 1 has a different view and believes the courts can be more pro-active to address the current gaps in assessment. She averred that:

You cannot rely on documentation without checking on ground, these documents are prepared by advocates who are gaining financially, parents are also sometimes compromised and a child's interest is not represented. The advocates tell parents about the good things living out the other side and consequences of adoption. In this regard court has to act judiciously and exercise its supervisory role rather than keeping a close eye saying their hands are tied (Interview 7)

She justifies her argument by referring to a case in which a mother had presented herself as an aunt to the child. Through her own independent verification she unearthed the facts and the matter was withdrawn (Interview 7). I also read through one of the files in which an application was rejected because the judge was not satisfied with the probation report (Atima295/2011). According to the details on file, the probation report was made by Wasswa Thompson, a PSWO from the KCCA, who relied on information obtained from the grandmother of the child. The judge took the information as hearsay and rejected the application because it was missing vital information. I followed up with KCCA to trace for the said PSWO but was informed they did not have him in their records. Thus exercising due diligence by the presiding judicial officer can save many non adoptable children just as it happened in the above mentioned cases. It should now be judicial notice that many birth parents are relinquishing their children due to inducement, ignorant or lack equal bargaining power to make right and informed choices for their children as the child specialist explains:

The level of understanding between the two parties is incomparable. They either ride on the ignorance of the giver who signs off the child only to wake up one day after three years later and the child is gone ( Interview 13)

Registrar 1 believes that the courts have a key role to play to avert miscarriage of justice in interpretation of BIP. She says

Court is obliged to explain to the parents what is entailed in adoption.... That you are giving away your natural and biological rights...Role of court is very crucial because they need to explain the consequences. ...because in this process applicants just fly in when you probe the adoptive parents you find that they don't know the history of the child( Interview 7).

Ensuring a child is adoptable in my opinion a combination of law and procedure. It calls for a combination of evidence, weigh choices and assessing their future implications and these calls for an adoption of CRBA that puts children and not adult interest at the centre. The courts are placed in the right position with discretion and knowledge to support the powerless against those with knowledge, resources and power. This was the intention behind the constitution when provided "that judicial power is for the people and it shall be exercised for the people, which is empowering from below" (Constitution art 136(1)). Judges and lawyers need to understand the social implication of the decisions they make about children. As noted by the commissioner "lawyers are not grounded in issues of social justice and the implications of failure to address the best interests in relation to children" (interview 17). Qualifying who an adoptable child is under ICA to me therefore requires much more than having documents filed there is need for more pro-activeness and judicial activism that necessitates further inquiries into the circumstances of the child than what is provided on the surface by the records and legal arguments.

### ***Granting LG/ ICA as measure of last resort and Preservation of records: What is the rationale?***

The intention of the subsidiarity principle under the HCIA 1993:Art 4 ) is to uphold the right of a child to belong to a biological family and enjoy the other accompanying rights as enshrined under the CRC such as the right to a name and nationality, family relations, culture and religion ( CRC Art 7,8,9,10).

The grant of ICA as a last resort was supported by most of the respondents contacted during the research because they felt cross cultural adoptions have implications and consequences on the child's right to survival and growth, identity and belonging. One respondent had this to say:

ICA as an option severs family ties and is challenged by a lack of mechanism to know what is happening; a child leaves as Helen Nakate and ends up being Helen Brown. Whether done deliberately or because of system weaknesses, the connection cannot be made after a number of years. This is because a child in the Ugandan system will be Helen Nakate while in the receiving country system she is a Helen Brown, the two persons then don't meet. Best interest should ensure linkages between the two systems (Interview 13).

She added that their instances of discrimination within ICA and made reference to the ACPF (2012) report whose findings revealed that adopted children who grow up to become unruly, are often rejected by the adoptive parents and placed in rejected children's home leaving them in the middle of nowhere. To substantiate her claim she shared a case scenario aired on the documentary at the ACPF conference in which a child who attempted to kiss his adopted parents was rejected in the public. She regrets to say that unfortunately courts when making decisions fail to assess the basics that you cannot attach to money such as love and more. Having witnessed these worst case scenarios at ACPF the first a lady of Uganda Mrs Janet Museveni then called upon foreign prospective parents to support the children within their families noting that if a person can reject a child in public how much more can happen behind curtains (Interview 13). But to their surprise a high profile delegate from the USA had this in response "We shall continue to receive the children when we get them because we assume your system has cleared them" (interview 13). This demonstrates abrogation from the duty attached to receiving countries by Hague convention which calls upon receiving countries to promote reciprocal arrangements to support post adoption monitoring follow ups. This laid back position sometimes has occasioned situations where children have even lost lives such as the case of manslaughter of a child of Ethiopian background by her adoptive family the Cali Williams Family reported on BBC (2013).

Safety of the children aside, religion is also another human right issue that should prompt the courts to grant ICA as last resort. Advocate 2 specialised in ICA, explained that the majority of applicants who come to Uganda for ICA are from the Pentecostal movement in the USA but who end up taking children with Muslim background. He said "The nature of applicants is 95% born again Christians who state their reasons for adoption as a calling upon their lives to come to Uganda and adopt children" (interview12). This driving factor behind ICA is what Davis in his article has called the rescue discourse (Davis 2010). Advocate 2 admits that not much is done to prepare the adoptive parents on the facts relating to child's religion because Judges more often raise the issue in passing. The challenge I find with this kind of approach is that it undermines the agency of the child to participate in the choice of his or her religion as enshrined under Article 14 of CRC because the court's procedures take it as trivial. There is no attempt to assess the impact of change of religion without the child consent or deliberate efforts for courts to include such term in the order to safeguard the child's status-quo at the time of adoption until when they are of age to make own choices. What matters at that moment is the need to have the child rescued from neglect, hunger, poverty (Davis2011).

The CRC and other laws makes it an obligation to courts as the competent authority to ensure ICA happens as a measure of last resort and when it happens that the child background is preserved for future reference. As the child specialist advises the child's right to family preservation, religion and culture

are an integral elements of BIP and all efforts should be made to have them reserved as she explains:

The African child will always ask do I have grandparents, the African context issues of belonging are not the same as in western countries, there is a risk of dating own sister because you are have grown separate which are very much feared in Africa. It is in the best interest of the child to grow with information about his or her culture and religion. The fact that majority of applicants are Christians and they are taking children with Muslim background, which they don't respect and will start nurturing the children with own values and norms. The same applies to culture, the children lose identity, Helen will become a Hodge and if no records are kept, then they lose their cultural identity and this is not in their best interest, efforts to preserve this should be maintained until the child is of age to determine own destiny (interview 13).

Registrar 2 agreed to the dilemma faced in tracing for identity and loss of roots by saying that adopters change names of the children while the LGO is still running, a decision which has cultural and identity implications. She had this to say: "Applicants don't honour court conditions such as the requirement not to change names until child is 18 years old or to report to the Ugandan embassy after every year" (Interview 2). Her view is that this is sometimes not done in good faith; the intention is to cut off family ties citing the example of Stewart whose records reflected that the mother had abandoned him.

Keeping proper records of the child is another essential element of BIP because it is meant to preserve identity and facilitate future re-unification as enshrined in the CRC and HCIA. My individual assessment was that this was not sufficiently done because there is lack of a streamlined procedure for record management and follow ups. The orders issued provides for a condition for periodic reporting to embassies, filing of reports with registrar which conditions are never followed through to ensure compliance. The information management on every child stops at the time when the matter is concluded. A look at the court's computerised records indicated status as at the last time the matter was handled. The records reflect; "ruling delivered, file closed" or "case dismissed, file closed". The court computerised register has no provision to capture information indicating progress of child in the receiving country meaning even when the adoptive parents file reports; the system is not well developed to sufficiently update child case progress. And of course reciprocal arrangements are lacking because Uganda is not a signatory to the HCIA. The FC records staff informed me that applicants take pictures during the good time to suit their intentions, there are no contrary reports to buttress what the children go through while in the adoption homes (interview 2). This in a way violates the CRC requirement and HCIA guidelines and undermines the rationale for granting adoption as last report and ensuring consistent follow ups.

### ***Engaging in ICA as a Business Rather than a Service: The duty to prevent improper financial activities and inducement***

A review of secondary data and findings from the field reveal that ICA in Uganda has been commercialised with corruption tendencies mainly benefiting the middle man. The beneficiaries range from adoption agencies, high level government officials, lawyers, PSWOs, court officials, orphanages and baby homes and birth parents (Sserwanja 2013; Kaboggoza 2013; Farmer's wife 2013). It is a booming business particularly for lawyers that are putting a lot of pressure on the judges to expedite the process. Most of the respondents estimated a single adoption case going for between 25, 000 to 30,000 USD usually paid to meet the adoption costs including travels, orphanage fees, court fees, legal and agency fees (Briton, Sserwanja *ibid*) This money is usually received through the processing law firms, Kaboggoza says lawyers are paid up to 30,000 USD (Kaboggoza 2012) This improper financial gain is in contravention of the provisions of CRC Article 21, HCIA, and the Uganda's Children Act section 48 .Ethically and professionally no money should be exchanged because it is a non profitable service to children. If any money should be paid it should be a small fee determined by courts of law, as advised by the Assistant Commissioner MGLSD (Interview 17), approaching it from a profitable point of view is a violation for the children's rights because it is an abuse and exploitation of the sanctity of childhood. This is what one of the judges in a whisper called "baby theft" confirming Kapstein's view that ICA is a global business in a "baby trade" (Kapstein2003:115 However despite this questionable operating environment judicial officers have continued to exercise their discretion by increasingly granting LGO as Judge 2 confirms:

When I joined the FC I found uncertainty about how to handle ICA matters. People were not sure they were doing the right thing; a lot of stigma surrounded the issue. I reviewed the circumstances, law available and learnt of what was happening elsewhere and now we are certain on what happens and nobody can challenge us to do otherwise because when you find challenges you study and come up with a solution (Interview 8).

This decision to continue granting orders amidst abuse of the process by actors was rather questioned by some respondents. The JLOS advisor says the process as it is now makes children more vulnerable; courts of law are part of the state machinery and therefore obliged to act cautiously as they consider the BIP of the children placed for ICA:

It should not be a life risk because some children have been lucky in some cases. Why continue to have a relaxed system especially in this day and age where there is too much human trafficking. If one walks in shopping malls almost every white person you will find will have a black child. There is need to have a very clear system stipulating how children are taken. The implications are not explained to the parents, all they know is what the muzungu (white) tell them, I will take your child to live in America which

comes with excitement. They build on the ignorance of these parents, plus the illusion for a better life out there. It is the responsibility of the state to protect these children. The advisor explains.

There also other illicit activities associated with improper financial gain such inducements of parents to relinquish their children, both perceived and real corruption tendencies. This has been manifested in situations when probation forge reports to support applicants, forgeries of death certificates such as what happened with Stewart's case, failure of lawyers to exercise due diligence and disclose the right information to the birth parents and court support staff coniving with applicants to facilitate quick disposal of cases. To confirm some of these allegations a court clerk informed me how she overheard an applicant advising a lawyer to give a bribe to expedite the matter "I understand these people can be compromised why can't we bribe the judge and go away" (interview 3). Also a court administrator (anonymized) narrated to me a story of one of the court clerk who used to bank about USD 400 per day on his account and have the money withdrawn regularly. No one would explain the source of this daily amount of money for a staff who earns a monthly salary of 100 USD. The efforts to transfer the staff faced resistance, until evidence was produced to the higher authorities who intervened and had the court staff transferred. The challenge in all this is the power dynamics involved because in essence transferring a staff when they are in breach of the law other than reprimand does not solve the problem! Instead it gives leeway for corruption to continue to flourish. There is no doubt individuals participating in ICA process are benefiting from the booming ICA industry with no specific guidelines regulating the fees to be paid to the adoption agents and neither a provision to penalise offenders a situation that impairs courts judgment to adequately address the flaws. All this contravenes CRC which emphasizes that placing of children for adoption should not result in improper financial gain for those involved (Kapstein Ibid 121).

This problem is further aggravated by lack of independent representation of children's interests. As advocate1 notes the right to participate and be informed of the implications of the actions especially by birth parents and children is not guaranteed during the process because they are not fairly represented. For example in the case of Stewart the fact that one lawyer acted for all parties indeed raised the question of his impartiality. The record does not show that the court went out of its way to explain to the mother the implication of her decision. Though not a legal requirement exercising due diligence calls for pro-activeness to probe and ascertain that no form of inducement or misrepresentation is involved in the transaction. This is because individuals in the process like the adoptive parents and their advocate have the power to affect the agency of the birth parents because they are privy to the institutional knowledge of the law and its procedures. This power /knowledge as argued by Foucault works in the interest of this powered group (Foucault quoted in Mill, Sara

2003:79), putting the ignorant class at a disadvantage of easily getting excited to relinquish their natural parental rights.

This volatile environment discussed above is what has led to some receiving countries like Netherlands putting to a hold the ICA Programme. The reasons advanced include: failure to inform birth parents the repercussions of ICA; probation services still lacking in content and structure; lack of due diligence by courts of law and Corrupt practices (Interview 19, Kaboggoza 2013). The MGLSD (Kaboggoza 2013) has similar concerns and highlights the compromised probation function as one of the reasons justifying suspension of ICA.

These measures notwithstanding, I wish to add that in absence of guidelines to support assessment and regulation of the fees structure in relation to ICA, the BIP of the children is left to the whims of adoption agencies and other actors involved who will continue take centre stage in the whole process to the disadvantage of the children.

### **The choices made by the court: The Pro-active Court and Liberalisation of LG and ICA**

Inter-country LG is now a precursor for foreigners to get adoption orders in their own countries following the Court of Appeal (CA) decision in the case of Alitubeera (2011). The MGLSD officials consider LG for purposes of adoption child trafficking as conceptualised by (Muzmer 2010). By reversing its earlier decisions in the case of Amani and Palmer respectively, where it had imposed conditions requiring legal guardians to make an application for adoption in Uganda, the CA opened the door for foreign guardians to apply for adoption in their country where the law is perhaps more relaxed (Mukiibi 2013). According to research conducted by ANPPCAN in 2007 the courts then registered almost 97% success rate of cases of LG as handled. Further verification through case returns for the period of 2008 to 2012 confirmed an increasing trend in cases of LG with the highest number in 2011 though with a slight reduction of 25 % in 2012 probably explained by the fact that the issue was becoming a public concern from child rights activists using the media as an advocacy tool. The majority of all such cases are applications for LG with minimal failure rate registered. Details of this case trend are illustrated in the table below:-

**Figure 1 FC Applications and Yearly Trends from 2008 to 2012<sup>5</sup>**

Year	Total No of cases	LG cases	%	Adoption cases	%	Others <sup>6</sup>	%	Success rate	%	Failure rate <sup>7</sup>	%
2008	124	106	85.5	17	3.7	1	0.8	117	94.4	7	5.6
2009	141	129	91.5	11	8	1	0.7	123	87.2	18	12.8
2010	198	145	73.2	52	6.3	1	0.5	176	88.9	22	11.1
2011	206	195	94.7	11	5.3	0	0	155	75.2	51	24.8
2012	165	152	92.1	10	6.1	3	1.8	156	94.5	9	5.5
<b>Total</b>	834	727	87.2	101	12	6	0.8	727	87.2	107	12.8

This case trend especially in terms of success rate brings this question to into play: whether it is possible that all foreign applicants are eligible adopt from Uganda, if the majority of children presented pass the adoptability sieve. I don't think so especially given the challenges earlier on mentioned in relation to the illicit practices involved. What is surprising is the fact that the courts were fully aware of the volatile situation but continued to do otherwise. Judge1 had this to say:

Legal guardianship requires careful consideration because the experience is that there are adoption agencies dealing with applicants who visit villages to match families and use lawyers to facilitate the process without knowing much about the details of applicants and the children they seek to help. They hunt for children, tell lies and if you engage them you end up with cases such as Stewart Bukenya (Interview 1).He agreed that Stewart's case was definitely not well handled.

This state of affairs is partly explained by the current existing conflicting legal position on LG mentioned earlier above. The judges in FC find themselves bound by the welfare or BIP as was re-emphasized by CA in the case of Ali-tubeera (CA 70 / 2011) which I discuss in detail in the next section. My conclusion though based on the operating fragile environment is that the family Justice System in Uganda has made a wrong choice to liberalize the procedural requirements for children in ICA/LG and are indirectly contributing to fraudulent dealings in the business.

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<sup>5</sup> Source provided as at 2nd August 2013 by information and technical office Jemba Ismail.The High Court Family Division handles all ICA cases and the Chief Magistrates Courts handle domestic adoptions

<sup>6</sup> Such as custody and maintenance cases ( domestic cases

<sup>7</sup> Includes cases withdrawn , dismissed and transferred



### ***The impact of the decision in Alitubeera case on BIP***

Deborah Alitubeera just like Stewart had both parents living though in separation. The father was unable to care for Deborah properly and he was placed by local authorities in a children's home and later an American couple applied for LG in the High court. The presiding judge rejected the application and said:

If the courts were to grant the orders sought it would inevitably lose jurisdiction over them and would, therefore be incapable of supervising the welfare of the child (Alitubeera 2011:2).

Explaining the welfare fare principle Justice Lugayizi said It is “not a magic wand which a conjurer waves around to deceive the unsuspecting and make them admit that they saw what was actually not in place” (Ibid).His conclusion was that the said principle applies only when everything which would lawfully support a LGO or any other related order, is without doubt in place and not otherwise” (Ibid: 8).

The matter went on appeal and the CA set aside the decision of the High Court stating that the Judge was in error when he undermined the BIP as primary consideration. They granted another LGO with stringent conditions namely returning the child to Uganda for adoption proceedings and making the children retain Uganda citizenship until 18 years. However, the applicants were denied visa by the American embassy on grounds that the order of returning to Uganda for the process of adoption was not implementable. An application was made for review a few days after and the CA, in a unanimous decision revisited their earlier decision and agreed that: “The intention of their judgement could not be fully implemented unless they deleted the conditions requiring legal guardians to come back and file applications for adoption in Uganda” (Alitubeera 38/2012)

The decision in Alitubeera case was received with mixed reaction. Some of the respondents talked to express their dissatisfaction of the precedent set by CA. They take note of the fact that unlike adoption, in the LG arrangement the birth parents retain their right over a child; therefore the guardians would need prior consent to adopt the child. This right has been compromised by the change of terms in the order that rendered the consent of caretakers and birth parents redundant, consent is now the LGO granted by courts. Registrar 1 explained:

The court changed a very good decision that was intended to protect a Ugandan By altering their decision hardly a few days after judgement, the Courts of appeal made a very fundamental change in their decision and rendered all the other terms useless and widened the door of abuse especially in view of increasing human trafficking (interview7).

It is further argued that this decision opened flood gates for LG and subsequent application for adoption in the countries of residence of the adoptive

parents. The decision is binding on the lower courts in terms of interpreting BIP in similar circumstances which affects the discretion and control of Uganda's courts over ICA in terms of follow ups and creating safeguards. It is therefore a close demonstration of what has been theorised as the "politics of ICA" advancing the view that the root of this movement of children across borders is the political decision-making and diplomacy that makes it possible (Bruening; Ishiyama 2009:98). It is also an illustration of sending and receiving countries as well as institutional and individual power relations in ICA. As long as you are poor you can as well lose out on your parental rights in favour of the rich and powerful such as what happened in the Alitubeera and Stewart's cases. The institutional power relations also constrain individual judicial officer ability to exercise their discretion since their positions are likely to be challenged when matters go for appeal in a higher court. The original judge in Alitubeera case for example is now every reluctant to handle ICA and only entertains such matters when they involve domestic applicants (Interview 3& 5)

This decision by CA liberalised LG/ICA rather than making it a last resort contravenes the spirit of the CRC and HCIA. To address the impact this case has had on the ICA jurisprudence in Uganda the courts have to revisit this position and restore the more stringent terms as made in an earlier case of Aman and Palmer (CA 32&33 2006) quoted in Mukibi (20013).

### ***Court's approach to application of BIP in LG/ICA: Perspectives of court users***

The success rate at which children are being taken across borders is based on an assumption that almost every applicant is competent, and eligible to adopt a child from Uganda. The court faces criticism from the court users as reflected through the various interview responses. Some respondents argue that the success rate of LG application is a reflection that the courts have negated the intention of the 3 year residence requirement that ensures that only substantial and deserving applicants take the children (Interview 18). The policy makers also decried the easy procedure with LG and argued that it is not in the best interest of the children involved. The commissioner argues:

Courts no longer follow the long procedure provided by the law; they use the guardianship process which has no well prescribed procedures. It is the judge sitting that determines, applicants just fly in for one week, the lawyers go through procedures and they take the child. We feel it is very easy and not in the best interest of the child. Courts look only at lack of care by parents and probation officers reports are normally prepared by lawyers (interview 17).

Registrar 1 supports this concern and regrets that it only satisfies the interests of the applicants as she explains:

Applicants get in touch with lawyers on internet, fix hearing dates, fly in, and use dolls and sweets to get bonded with the children. When you probe the

adoptive parents you find that they don't know the history of the child. When you ask them to offer assistance to the children for the three years as they foster the children they refuse, which means they don't qualify to become parents because a parent with natural love would do anything for their child irrespective of where they are living (Interview7).

According to Registrar 1 this practice of the FC granting LGO has weakened the supervision and follows up mechanisms of the safety of the children involved. The courts are rendered impotent to make further orders in case something came up that would require revocation of the LGO (Interview 7). This kind of dilemma is what we see in the case of Stewart. The adoptive family is very reluctant to cooperate with the court to have his matter revisited Hodge said in his letter "we applied for adoption under the USA law and now Stewart is our son" (FC 0213/2012). Registrar1 regrets the response and says:

it is clear the adoption process in USA did not get the consent of parents the process was full of deception and this is a social problem that needs to be addressed and it is not an excuse for Uganda's Court to say, this is an American child and they cannot entertain the USA case ( Interview 7)

The lawyer handling the review process considers this current situation a miscarriage of justice on side of the child whose adoption was subject of a fraudulent process, it is child's best interest to be given access to his parents even though he remains in custody of the adoptive parents (Interview 10). Unfortunately the Ugandan law is silent on the procedure in such matters and this creates an ambiguous position complicated by the fact that adoption was done in USA with no reciprocal arrangements to address such anomaly.

Furthermore it has also been argued by Justice Mukiibi that the LG process undermines the importance of familiarity of adoptive parents to the Uganda, its people and culture. He says the process as it is makes it easy for the "stranger" to the country who has not demonstrated love to the orphan by overt acts to get control and move the child abroad. This severs off all connections and denies the child an opportunity to have pride in their background (Mukiibi 2013: 19-20). This perspective from a senior judicial officer actively been involved in issuance of LGO affirms that his agency as an individual judicial officer is affected by institutionalised power

### ***The thin line between child trafficking and ICA: The duty of court to avert likely abuse in ICA***

ANPPCAN in its research associated a possible link between adoption practices and child trafficking (ANPPCAN 2007). Mezmur in his paper to the Hague Conference makes similar assertions. He refers to child trafficking or baby selling as "the sins of the 'saviours'" citing irregular activities undertaken by those presumably involved in, or tasked with, the "life saving" act, who instead contribute towards the trafficking of children in the context of

ICA in Africa. He makes references to practices such as child abduction, stealing, buying and selling, improper financial gain, corruption, private adoptions, falsification of documents and circumventing adoption procedures as all attributes to trafficking (Mezmur 2010:4).

Uganda is considered as destination, transit and sending point for human trafficking. The process is fraudulent and because of its clandestine nature there is no reliable documentation (Interview 13, Mezmur 2010). Respondents who preferred anonymity equated ICA to broad day theft of children facilitated sometimes by high level prominent personalities:

The chain is strong because children start getting lost from hospitals with medical officer getting involved, if you have twins one can easily get lost, especially mothers who go into labour on their own, can easily be told the child was lost. Sometimes the process is steered by well connected persons in the country. remarks one respondent.

Media reports continue to confirm such fears. NTV Uganda (2013) reported a Czech National who was apprehended alongside a Ugandan on suspicion of attempting to illegally take a three month baby out of the country. The documents they had in possession said to be adoption papers were not verified.

Even within the local leadership these fears are re-echoed. Kisembo Alaari<sup>8</sup> made an observation in his closing remarks at a workshop I was facilitating<sup>9</sup> and said

According to his little intelligence the mushrooming orphanages and care institutions ferry children make them live in appalling conditions and later deliver them for adoption. We need to carefully review adoption otherwise we may be handing over our children to criminals in the name of Christian Bazingu (Whites).

While there are situations when it is in child's best interest to be adopted by a foreigners, such as in cases of abandoned, total orphans, children in abuse family relationship as it is the case with children in well regulated homes like Nsambya (Interview 14), there are also wrong reasons for earlier alluded to in the section on illicit activities and improper financial gain. I wish to note that the practice of continued issuance of LGO orders by the FC while the necessary supportive monitoring mechanisms are missing is not in the best interest of the child. It does not guarantee safety of children before, during and after post grant, it endangers children and facilitates child trafficking within meaning of ICA as argued in Mezmur (2010). Rightly so Justice Mukiibi calls it is a situation of needy children enjoying benefits of ICA with no assurance of safety and protection (Mukiibi: 2013).

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<sup>8</sup> He is a Resident District commissioner Kyenjojo, responsible for security details in district

<sup>9</sup> This was a workshop on justice for children conducted on 16<sup>th</sup> August 2013. on the side lines of my research

## **Uganda's Legal and Policy Landscape: How it impacts application of the BIP**

Uganda ratified the CRC which it domesticated through the 1995 constitution and enactment of the children Act cap 59. The Children Act is the substantive law providing for the rights of the children. It outlines the duty to protect by specified duty bearers as well as the procedure to enforce these rights. Despite this legal framework in place respondents decried the gaps and weaknesses in its application particularly in the case of ICA. The gaps identified included the restrictive nature of section 46 requiring 3 years residence and 6 month fostering before a foreigner can adopt; failure of Uganda to ratify the HCIA and lack of an explicit law and guidelines for LG. They said such limitations weaken the court's ability to properly interpret and apply the BIP leaving it to the whims of their discretion which is easily manipulated by other interest. Advocate1 (interview 10):

With no clear guidelines, the child's best interest is left at the whims of courts and this discretion is subject to manipulations. Indeed putting safeguards in place to ensure LG doesn't end up in adoption automatically is the way to go. This can only be realised when the right procedures and guidelines are put in place, like the courts were given sentencing guidelines, in the same vein there should be guidelines and benchmarks within which the courts can interpret and apply the BIP in ICA

Advocate 2 on the other hand stated that the adoption law as provided for under the Children Act is prohibitive, making it impossible to have foreigners adopting from Uganda. To him it is unconstitutional because it denies many children a right to live in a family environment. He cited the USA as an example of a country which provides for only 6 months of fostering because the earlier you put a child in a permanent home the better. The longer this is delayed, the longer the uncertainties it has on the child's future and trauma associated with long period of institutionalisation. The Advocate gave an example of a child fostered by an American family and claimed seven years later. He also cited another case of a child thrown in a pit latrine and claimed after one and half years, adding that if the foster period was short the mother would have surfaced after the process is concluded. This argument has been convincing to the extent that the courts have often invoked their discretion and disregarded the requirements for 3 years residence under the children Act by issuing LGO which have been heavily criticised as circumventing the legal procedure intended to ensure protection of the children in ICA setting (CRC committee 2008). In their interpretation they feel the adoption law is inconsistent with the BIP. Hence they invoke their powers under the Constitution and Judicature Act to determine the BIP. This may be in line with the CRC Committee's guidelines in GC No 14, to interpret the law in favour of a child's circumstances and interests. But, in Uganda's case less regard is given to other surrounding facts. It is not possible that all applicants would have bonded with

the children in a short period as is currently foreseen in LG applications, and not all children would be adoptable within the meaning of the law given the increasing clandestine nature of sourcing for such children. Nonetheless this argument that the adoption law is restrictive has somehow gained consensus and support from policy makers, the MGLSD has agreed to push to have the 3 years requirement reduced to at least 1 year in the proposed amendment to the Children Act (interview 12).

In his booklet, Justice Mukiibi also enumerated the gaps in the legal and policy framework that impede justice and assurance of protection of children in ICA in Uganda (Mukiibi 2013: IV). He agrees to the contention in Gyngall case that all abandoned children are wards of court. “The court is placed in a position by reason of the prerogative of the crown to act as supreme parent of the children and must exercise that jurisdiction in the manner in which a wise affectionate and careful parent would act for the welfare of the child” (Mukiibi 2013:13-14). Justice Mukiibi therefore concluded his argument by saying that the duty to protect requires control and supervision; checks to detect lapses and to resolve problems.

He adds that it is in the best interest of the child that when courts make LGO, it should have residual powers to prevent or correct abuses by legal guardians such as calling legal guardian to account. (Mukiibi 2013:14). True the Judge has all the ideas and information relating to the desirable interpretation of BIP, but in practice its application gets complicated. The inability of the FC for example to call the Hodge family to account in Stewart’s case demonstrates how courts have been rendered impotent and powerless. This undermines the CRBA that requires putting the child at the centre of all decisions. It is in Stewart’s best interest that the orders are revisited to provide for a balanced situation that will maintain his wellbeing and as well as preserve his right to identity and nationality.

All these gaps policy and legal combined impede effective application of the BIP and saving child Right now there is a lacuna in the legal framework especially in absence of reciprocal arrangements. It has been noted that applicants from west especially USA exploit this weak legal system and undertake LG as means of conveying children to their respective states and rendering meaningless the requirement for adoption to take place in Uganda (Mukiibi ibid 37). The weaknesses in legal and structural landscape has a direct bearing on the BIP exposing dangers of trafficking and other forms of abuse .

## **CHAPTER 4: CONCLUSION AND RECOMMENDATIONS**

This paper has demonstrated that effective application of BIP requires courts to adequately and procedurally weigh all choices and likely risks for the child and other irreparable damages associated with child trafficking. This is in conformity with the spirit of the CRC that makes the BIP a primary consideration in all decision taken by administrative bodies, courts of law or legislature (CRC Art 3, UNICEF 2007). The study has also revealed that although the courts are required to make adoption orders based on well informed judgement and with terms and conditions that allow sufficient follow up and monitoring (UNICEF 2007) due to the broadness of BIP, competing interest, gaps in law and practice, often the criteria for decision making is disjointed focusing on physical and economic needs and is dependent on individual perceptions of a judicial officer.

It is my conclusion therefore that the FC in Uganda to a greater extent has applied a narrow and less stringent approach to interpretation of BIP in their ICA/ LG decisions. And it is my considered view that the continued issuance of ICA/LGO by the FC in Uganda, while the necessary supportive monitoring mechanisms are missing is not in the best interest of the child as it does not guarantee safety and wellbeing before, during and after post grant. From the information gathered I did not come across conclusive evidence either by practice or on record to show a clear stand from the courts point of view and procedure stipulating in detail what constitutes their interpretation and application of the principle in ICA. What is evident is that courts depend on individual assessment and vigilance as well as documentation provided on record whose authenticity in most cases is highly doubtful. There were no specific procedural guidelines to support their discretion and vetting process. ANPPCAN (2007:23) arrived at a similar conclusion on the situational analysis of child adoption in Uganda.

### **Revisiting the loopholes in Laws and Policies**

The existing international, regional, national legal and policy framework is intended to ensure that adoption takes place in the safest terms possible. Uganda has ratified most of these instruments namely the CRC, ACWRC and is not reinventing the wheel. It has to build upon the existing platform to address the structural and legal gaps affecting the courts effective application of BIP. This would call for ratifying the HCIA and domesticating it to provide for a national framework with sufficient safeguards.

In addition there is a need to harmonise the exiting legal framework and put in place guidelines on how ICA/LG matters should be processed; in addition to building capacity of duty bearers on CBRA implementation of the law and policies. Authorities need to fully internalise the general principles under the CRC 1989 to effectively the BIP using the CRBA which is in conformity with other International and national legal instruments. The idea by the Commissioner MGLSD of having law enforcement agencies, the judiciary and lawyers trained in aspects of social justice and the relevancy of the BIP to child survival and development, would be very useful in ensuring effective and meaningful application of law and procedure to the interest of the children. The government policy on an alternative care framework (2013) should be first tracked, with sufficient mobilisation of resources for its implementation. There is a need to look at the extended family option through regulation of fostering by relatives as a mechanism to promote domestic adoption option which should be utilised before the ICA is exercised in extreme cases (interview11). There should be unequivocal consent and participation through provision of independent child rights advocates (friends of court), fraud and inducement should not feature in ICA adoption process where BIP is of paramount consideration.

## **Interpret and apply the BIP holistically**

Judge Kay J in the Gyngall case<sup>10</sup> stated that: “The term” welfare” must be read in the largest possible sense, that is to say, as meaning every circumstance must be taken into consideration and courts must do what under circumstances a wise parent acting for the interest of the child would or ought to do” (Mukiibi 2013: 13).

The BIP as applied in Uganda is now hinged on financial and health features of the child. In addition to the economic factors, the court should satisfy itself that the adoptive parents have the ability to provide for other emotional needs of the child. Love and care should feature prominently in the assessment criteria with the child’s wishes and aspiration put into consideration. Issues of culture, identity, religion the child’s sex and that of applicants should all surface prominently in the selection criteria. In other words, interpretation and application should give meaning to all surrounding circumstances of the child and prospective adoptive parents. As Advocate1 recommends defining the BIP, even from a lawyer’s point of view should go beyond economic factors and holistically look at the child’s wellbeing that ensures that the applicants are vetted and found competent, the parties are counselled and have made a free and informed choice and records are well managed to inform the child in future (Interview 10).

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<sup>10</sup> English case ( 1893) 2Q.B,233 (CA) :248



Finally I re - echo the obligations that the CRC places on the state and duty bearers to be accountable to promote, protect and fulfil children rights by adopting a child rights-based approach that looks at children as rights holders and active participants in safeguarding their rights. In the exercise of its powers courts should be cognisant of the negative elements and grant ICA as a measure of last resort after exploring all local remedies. The state should support the courts by putting in place a framework supports their discretion such as assessment guidelines. The ongoing alternative care framework according to the MGLSD will do the magic only when it provides regulatory benchmarks. It should be understood that if the courts in Uganda do not adequately appreciate BIP as a paramount consideration and apply it with consistency, they open doors for life risks that hampers meaningful development of the children. The Ugandan legal systems should guard against case scenarios like Stewart's in which the child loses his identity because of ignorance on part of his birth parents. It may have been innocently done, but for as long as it is legally sanctioned it has far consequences that violate children's human rights. The main concern would not be to seek to outlaw ICA, because definitely we have children deserving, but to act judiciously, streamline the shortfalls and establish safeguards to ensure that ICA takes place in the best interest of the child giving respect to his or her fundamental rights.

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## Appendices

### ANNEX A List of respondents

Interview No	Position Interviewee	Name Interviewee	Official Title Interviewee	Place of Interview	Date of Interview
1	Judge 1	His Lordship Billy Kainamura	Judge	High court Family Division	17 July 2013
2	Registrar 2	Anonymized	Deputy Registrar	High Court Family Division	17 July 2013
3	Clerk 1	Ms Irene Nalunkuuma	Court Clerk	Family Division	17 July 2013
4	Information officer/ office supervisor	Mr Ismail Jjemba	Systems Information officer/ Office supervisor	Family Division	17 July 2013
5	Clerk 3	Miss Cissy	Court clerk	Family Division of High court	22 July 2013
6	Researcher 1	Ms Shiphrah Nandudu	Assistant Researcher to the Judge	Family Division of the High Court	22 July 2013
7	Registrar 1	Anonymized	Deputy Registrar	High Court building	23 July 2013
8	Judge 2	His Lordship Moses Mukiibi	Judge	High Court Family Division	1 August 2013
10	Advocate1	Mr Aaron Besigye	Legal Aid Project Advocate	Uganda Law Society Secretariat	6 August 2013
11	Programme officer	Mr Marlon Agaba	Senior Programme officer, Information and Policy Advocacy	ANPPCAN Secretariat	6 August 2013
12	Advocate 2	Mr Isaac Ekirapa	Private practitioner specialised in ICA	MS Ekirapa and co advocates	7 August 2013
13	Child Specialist	Ms Helena Namulwana	Child Protection advisor	Save the Children Head office (Uganda)	9 August 2013
14	Welfare officer	Ms Justine Mpagi	Social welfare officer	Nsambya Babies home	27 August 2013

15	Judge 3	His Lordship Edmund Lugayizi	Judge	High Court Family Division	29 August 2013
16	Probation and Social Welfare officer	Anonymized	Probation and Social welfare officer	Kampala city council Authority	29 August 2013
17	Commissioner	Mr Kaboggoza Ssembatya	Assistant Commissioner for Children Affairs	Ministry of Gender Labour, and Social Development building	5 September 2013
18	JLOS Advisor 1	Ms Rachael Odoi	Technical Advisor Civil matters	Ministry of Justice and constitutional affairs building	5 September 2013
19	JLOS Advisor 2	Mr Paul Gadenya	Senior Technical Advisor	Ministry Of justice and constitutional affairs	5 September 2013
20	Development officer	Ms Hope Amayo	Social worker /community mobilizer	Home	5 September 2013
<b>Other primary sources</b>					
<b>NTV live talk show “Let’s talk “Topic: What do you think of adoption as a response to the growing problem of child abandonment. Date:7<sup>TH</sup> September 2013</b>					
2 Panellists	From Chid I foundation ( Advocating for domestic adoption				
Participants on face book	<ul style="list-style-type: none"> <li>• Joshua Senyange</li> <li>• Asiimwe Joseph</li> <li>• Edith Nakato</li> <li>• Kavirli Alli</li> <li>• Solome Nambafu</li> </ul>				



## ANNEX B

### List of Documents on File with the Author

No	Name	Source
1	Letter to the Assistant Commissioner Children Affairs MGLSD dated 28 <sup>th</sup> August 2013	Personally generated
2	Letter to the Director Gender and Community Development KCCA dated 28 <sup>th</sup> August 2013	Personally generated
3	Guardianship order in respect of Stewart Bukenya Infant made by Hon Justice Egonda Ntende	Stewart Bukenya's file 0213/2012
4	Affidavit supporting application for review of Stewart's case	“
5	Letter by the Hodge family to the Registrar FC	“
6	Letter of authorisation to access court files and records	Deputy Registrar Family Division of the High Court
7	Interview guide for different categories of respondents namely judges, lawyers, PSWOs, CSO	Personally generated and attached
8	Copy of justification for temporary suspension of ICA	Author : Mr Kabbogoza Assistant Commissioner for Children Affairs MGLSD see list of reference
9	A sample of probation report supporting application for LGO in the matter of Shamilah Dorcus and anor	Family Court Records
10	A sample of home study Report in the matter of Atima Bilari	FC 295/2011
11	A sample of post care placement Report in the matter of Anne Marie Rose line	FC 23/2012
12	Case returns for the period 2008- 2012	Systems Administrator Mr Jjemba Ismail: Family court
<b>Annexure C:</b>		
<b>Court files reviewed</b>		
No	File Name	File Number

1	Stewart Bukenya	HCT-00-FD-MA-0213-2012
2	Atima Birali	FC 295/2011
3	Roselinne Anamarie	FC 23/2012
4	Juma Kateregga and Anor	FC 46/2012

**ANNEX D**

**General interview guide**

1. Particulars ( Age group, profession or institution)  
.....  
.....  
.....
2. How long have you been working with courts on adoption related matters  
.....  
.....
3. What exactly do you do to support the process of inter-country adoption  
.....  
.....
4. How often do you handle cases of ICA? do you think they are increasing if yes why  
.....  
.....
5. What is the nature of children eligible for ICA?  
.....  
.....
6. In your course of work how do you determine this eligibility?  
.....  
.....
7. How do you interpret the term best interest of the child in course of your work  
.....  
.....
8. How do you support the courts in ensuring that the best interest of the child in ICA adoption is upheld by court and prospective adoption parents  
.....  
.....
9. Do you involve the children, birth parents and foster parents, if so how?  
.....  
.....
10. Do you feel satisfied that the best interest of the child is promoted by courts of law in ICA process? if yes why , if not why

- .....
11. Do you meet any challenges in ensuring promotion of children’s best interest? If yes what kind of challenges do you face and how do you mitigate these challenges?
- .....
- .....
11. What is your candid opinion about ICA? Do you think it promotes the best interest of the child in development if yes why and if no why?
- .....
- .....
12. Do you have any other comment related to best interest principle and how it is being applied in ICA?
- .....
- .....
13. What is the average cost of a single adoption matter? What is the nature of disbursements / fees in such transactions and who benefits in such transaction?
- .....
- .....
14. Do you also benefit from such transaction if so how?
- .....
- .....
15. What would you recommend as strategies that can ensure that the best interest of the children in adoption related matters especially ICA are always given paramount consideration by government, adoption agencies and courts in particular?
- .....
- .....
16. Kindly provide any other information you find relevant to this research including documentation
- .....
- .....

**Thank you for sharing your views with me on ICA, your input in this research is highly appreciated**