

A faint, light gray map of Europe serves as the background for the right half of the page. The map shows the outlines of the continents and major countries, with a slightly darker shade of gray for the landmasses and a lighter shade for the surrounding waters.

Illegal adoption as child trafficking:

The potential of the EU Anti-trafficking Directive
in protecting children and their original family
from abusive intercountry adoption

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Introduction

Intercountry adoption (ICA) involves the transfer of a child from his or her country of origin to another country for adoption. It is perceived as a solution to provide a child, deprived from a family in the country of origin, with a family in another country.¹ Conversely, ICA offers the opportunity for people who are unintentionally childless to fulfil their desire to found a family.² From this perspective, it seems a good solution to both problems. However, at present some scholars note that ICA is driven by the desire of prospective adoptive parents instead of the best interest of the child, as the demand for children exceeds the availability. Then, it is argued that when the demand for children exceeds supply, the likelihood of illegal activity increases.³

In recent years, cases of abuses in the system of intercountry adoption have been frequently reported. It involves cases of children obtained for intercountry adoption through i.a. abduction; recruitment; coercing, misinforming, deceiving and inducing the biological parents; and falsification of birth certificates and relinquishment documents.⁴ It also involves

¹ By some, it is therefore perceived as a child protection measure. For example, according to family law professor Paul Vlaardingerbroek, intercountry adoption contains a child protection motive. However, according to family law researcher Mr. Ad van der Linden, intercountry adoption is not a measure of child protection (since adoption is regulated by private law and not a government task).

Source: Vlaardingerbroek, P., 'Alternatieven voor (interlandelijke) adoptie', in: M.P.C. Scheepmaker ed., 'Adoptie onder vuur', *Justitiële Verkenningen*, vol. 34, no. 7 (2008), p. 58.;

- Van der Linden, A.P., 'Adoptie in het kennelijk belang van het kind?', in: M.P.C. Scheepmaker ed., 'Adoptie onder vuur', *Justitiële Verkenningen*, vol. 34, no. 7 (2008), p. 81.

² Vlaardingerbroek, P., 'Alternatieven voor (interlandelijke) adoptie', p. 58.;

It is estimated that about 95% of the prospective adoptive parents opt for ICA because of their desire to have a family. The remaining 5% is driven by the idea that a child in need can be rescued through ICA.

Source: Van der Linden, A.P., 'Adoptie in het kennelijk belang van het kind?', p. 82.

³ Council of Europe Commissioner for Human Rights, *Adoption and Children: A Human Rights Perspective*, prepared by N. Cantwell, CommDH/IssuePaper(2011)2, Strasbourg, 28 April 2011.;

- Parliamentary Assembly of the Council of Europe, *International adoption: respecting children's rights*, Recommendation 1443 (2000), 26 January 2000.;

- Selman, P., 'Trends in Intercountry Adoption: Analysis of Data from 20 Receiving Countries, 1998–2004', *Journal of Population Research*, vol. 23, no. 2 (2006), pp. 191, 201.;

- Slot, B.M.J., 'Adoptie en welvaart; een analyse van vraag en aanbod van adoptiekinderen', in: M.P.C. Scheepmaker ed., 'Adoptie onder vuur', *Justitiële Verkenningen*, vol. 34, no. 7 (2008), p. 23.;

- *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention*, Guide to Good Practice, Guide No.1 (2008), Hague Conference on Private International Law, p. 164.

⁴ *Adopting the Rights of the Child: A Study on Intercountry Adoption and its Influence on Child Protection in Nepal*, UNICEF and Terre des hommes Foundation, 2008, pp. 31, 38.;

- Court Zwolle-Lelystad (NL), 4 March 2010, LJN BP6936, Note P. Vlaardingerbroek, *Jurisprudentie Personen- en Familierecht*, no. 4, vol. 7 (2011), pp. 360-366.;

- "Fruits of Ethiopia". *Intercountry Adoption: The Rights of the Child, or the "Harvesting" of Children?*, commissioned by Wereldkinderen to Against Child Trafficking, October 2009, pp. 5, 41.;

- Netwerk, Dutch television broadcasts of 22 and 23 May 2007, and 15 and 22 June 2010.;

- Nova, Dutch television broadcast of 25 May 2007.;

cases where children were obtained through permissive laws on child relinquishment and/or rapid termination of parental rights.⁵ Next, it concerns cases where prospective parents deliberately bypassed official adoption procedures.⁶ However, it also concerns cases where, despite the fact that adoptive parents followed the official procedures, still illegal elements were involved in the adoption.⁷ Furthermore, there are cases where now grown adoptees stand up against the system of ICA and share their concerns about its impacts.⁸ Often, in these reports the words ‘illegal adoption’ and ‘trafficking in children’ appear.⁹

Recently, new international instruments have been developed in the area of criminal law on trafficking in human beings (THB). These instruments provide for a criminal justice response together with a human rights perspective,¹⁰ since THB is considered a violation of human rights.¹¹ Examples are the 2000 UN *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, and the 2005 Council of Europe *Convention on Action against Trafficking in Human Beings*. At European Union (EU) level, in 2002 the Council adopted Framework Decision 2002/629/JHA *on combating trafficking in human*

- Smolin, D.M., ‘Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping, and Stealing Children’, *Wayne Law Review*, vol. 52, no. 1 (2006), p. 121.;

- Smolin, D.M., ‘The Missing Girls of China: Population, Policy, Culture, Gender, Abortion, Abandonment, and Adoption in East-Asian Perspective’, *Cumberland Law Review*, vol. 41, no. 1 (2011), p. 59.

⁵ Post, R., *Romania for Export Only: The Untold Story of the Romanian ‘Orphans’*, Sint Annaparochie: Hoekstra 2007, p. 145.;

- Post, R., ‘De perverse effecten van het Haags Adoptieverdrag’, in: M.P.C. Scheepmaker ed., ‘Adoptie onder vuur’, *Justitiële Verkenningen*, vol. 34, no. 7 (2008), p. 26.

⁶ See for example: Mos, H.F., ‘Case illegal adoption case closed confirms prosecutor’, *St. Maarten Island Time.com*, 25 August 2011. Retrieved 12 December 2012 from <http://www.sxmistlandtime.com/component/k2/item/15308-case-illegal-adoption-case-closed-confirms-prosecutor.html>.;

- Court The Hague (NL), 12 April 2011, LJN BQ2950.

⁷ See supra note 4.;

- Smolin, D.M., ‘Child Laundering’, pp. 159-160.

⁸ Dhanda, A. and G. Ramaswamy, *On their own: A socio-legal investigation of inter-country adoption in India*, Hyderabad: Otherwise Books 2005, pp. 53-60.;

- Holt Adoption Product: girl K-6714. Retrieved 12 December 2012 from <http://holtproduct.wordpress.com/>.;

- Transracial Abductees. Retrieved 12 December 2012 from <http://www.transracialabductees.org/index.html>.;

- United Adoptees International. Retrieved 12 December 2012 from <http://www.uai-news.blogspot.com/>.

⁹ Balcom, K., *The Traffic in Babies: Cross-Border Adoption and Baby-Selling Between the United States and Canada, 1930-1972*, University of Toronto Press 2011.;

- Clair, S., *Child Trafficking and Australia’s Intercountry Adoption System*, Research paper, University of Queensland, 2011.;

- Meier, P.J. and X. Zhang, ‘Sold Into Adoption: The Hunan Baby Trafficking Scandal Exposes Vulnerabilities in Chinese Adoptions to the United States’, *Cumberland Law Review*, vol. 39, no. 1 (2008), pp. 87 – 130.;

- Parliamentary Assembly of the Council of Europe, *Disappearance of newborn babies for illegal adoption in Europe*, Report Doc. 11461, 7 December 2007.;

- Post, R., *Romania for Export Only*, i.a. pp. 49, 52.

¹⁰ Recital 7 of the Preamble to Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims.

¹¹ Preamble to the Council of Europe Convention on Action against Trafficking in Human Beings, 2005.

beings. In 2011 this framework decision was replaced by Directive 2011/36/EU *on preventing and combating trafficking in human beings and protecting its victims* (hereinafter the Anti-trafficking Directive).

The new Anti-trafficking Directive contains a broader concept of what should be considered trafficking in human beings than the previous framework decision. The new definition of THB also covers additional forms of exploitation other than for the purpose of sexual exploitation or forced labour, such as the removal of organs, forced marriage or illegal adoption.¹² It is the first time since the development of international anti-trafficking instruments in the area of criminal law that illegal adoption is explicitly mentioned as a form of THB.¹³

However, an unclear aspect of the Anti-trafficking Directive concerns the definitions. The definitions of ‘illegal adoption’ and ‘exploitation’, as one of the constitutive elements of THB, are left open. Therefore, it is unclear what is meant by illegal adoption, in what sense illegal adoption implies exploitation, and thus to what extent illegal adoption is covered by the directive. In this thesis, it is researched whether the EU Anti-trafficking Directive has the potential of protecting children and their original family from abusive practices concerning intercountry adoption. The focus in this research is on intercountry adoptions involving illegal elements despite the fact they were arranged through official procedures, and therewith formally legal.

In order to be able to answer this question, several subquestions have to be answered first with regard to defining illegal adoption and exploitation. In the first chapter, the legal position of ICA is described in accordance with three main international treaties to which EU Member States are bound. The treaties that are discussed are two in the area of human rights: the UN *Convention on the Rights of the Child* (UNCRC) and the Council of Europe *Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR); and one in the area of private law: the *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* (hereinafter the Hague Convention, HC). In accordance with these international conventions, it is estimated when ICA could be considered a lawful act. Similarly, in the second chapter it is estimated when ICA can be considered an unlawful or illegal act. It is also explored why such adoptions take place despite

¹² Recital 11 of the Preamble to Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims.

¹³ ‘Illegal adoption’ is not mentioned in the text of the 2000 UN *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, nor the 2005 Council of Europe *Convention on Action against Trafficking in Human Beings* itself.

the existence of the above-mentioned conventions. Then, for illustration, several adoption cases are evaluated. It is considered how they are in breach of the international conventions. The third chapter describes what is considered trafficking in human beings in current discourse, and whether illegal adoption falls within this scope. The fourth chapter concerns the Anti-trafficking Directive. It explores on what grounds 'illegal adoption' was included, and what is envisaged by this. Finally, an analysis is given of the potential of the Anti-trafficking Directive with regard to protecting children from being adopted through abusive practices. In addition, recommendations are given for the improvement of the EU and Member State approach to the issue.

1 Intercountry adoption in accordance with international conventions¹⁴

Introduction

Intercountry adoption (ICA) involves the transfer of a child from his or her country of origin to another country for adoption. Often, the countries involved have their own national legislation regulating it. Furthermore, many states have committed themselves to international treaties applicable to the matter. This means that actions and legislation of national states with regard to ICA have to be in accordance with the international treaties of which they are member. Therefore, in this chapter the legal position of ICA is described according to three main international treaties to which EU Member States are party. The treaties that are discussed are two in the area of human rights: the UN *Convention on the Rights of the Child* (UNCRC) and the Council of Europe *Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR); and one in the area of private law: the *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* (hereinafter the Hague Convention, HC). In accordance with these international conventions it is estimated when ICA could be considered a lawful act.

1.1 United Nations Convention on the Rights of the Child

The *United Nations Convention on the Rights of the Child* (UNCRC) was adopted by the General Assembly of the United Nations (UN) on 20 November 1989, and entered into force on 2 September 1990. According to Sharon Detrick in *A Commentary on the United Nations Convention on the Rights of the Child*, a special convention on the rights of the child was felt necessary because of the specific needs and vulnerability of children. This demanded responses from the international community that were not covered by other human rights conventions, as they had not been drawn up with children in mind. As Detrick describes, the UNCRC supplements existing provisions, it contains a number of innovative provisions that have never previously figured in a binding international human rights instrument, and it is extraordinarily comprehensive in scope.¹⁵ The UNCRC requires from states to take positive action so that children can enjoy their rights.

¹⁴ See also: De Witte, I, *Interlandelijke adoptie: Het standpunt van de EU en de wetgeving van Polen*, Bachelor thesis European Studies, UvA 2008.

¹⁵ Detrick, S., *A Commentary on the United Nations Convention on the Rights of the Child*, Kluwer Law International: The Hague 1999, pp. 1-4.

The UNCRC is a binding convention, as provided for by the 1969 *Vienna Convention on the Law of Treaties* of the UN.¹⁶ Article 26 of the Vienna Convention provides for the *pacta sunt servanda* (agreements must be kept) principle: '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.' One of the implementation mechanisms provided by the UNCRC is the system of periodic reporting by state parties to the Committee on the Rights of the Child.¹⁷ Furthermore, in December 2011 the UN General Assembly adopted a third protocol to the UNCRC.¹⁸ This protocol allows children and/or their representatives to bring individual complaints about violation of the UNCRC before the UN Committee on the Rights of the Child, after national remedies have been exhausted.¹⁹

To date, the UNCRC is the convention with the largest number of state parties. It reached almost universal ratification,²⁰ which is unprecedented in the history of the international human rights standard setting activities of the United Nations.²¹ The convention is ratified by all EU Member States and part of the *acquis communautaire*.^{22,23}

¹⁶ The Vienna Convention codifies the rules that guide treaty relations between states. It includes the rules on the conclusion and entry into force of treaties, their observance, application, interpretation, amendment and modification, and rules on the invalidity, termination and suspension of the operation of treaties.

¹⁷ Detrick, S., *A Commentary on the United Nations Convention on the Rights of the Child*, pp. 41-42.

¹⁸ The new protocol opens for signature in 2012 and will enter into force three months after it acquires ratifications or accessions from ten countries.

Source: UN News Centre. (20 December 2011). *UN rights chief welcomes new measure to stop violence against children*. Retrieved 15 January 2012 from

<http://www.un.org/apps/news/story.asp?NewsID=40802&Cr=children&Cr1=>.

¹⁹ Ibid.

²⁰ The only states that are not member of the UNCRC are Somalia and the United States (and the Republic of South Sudan, which became an independent state on 9 July 2011). Somalia is currently unable to proceed to ratification as it has no recognised government. The United States is reluctant, it is said among other reasons because of the provisions against death penalty for those under eighteen years of age. Moreover, the opinion of the US is that human rights can be viewed as limitations of state power to intervene in peoples' lives (negative rights), rather than requirements of active provision of entitlements by the state (positive rights).

Source: Nauck, B.J., 'Implications of the United States Ratification of the United Nations Convention on the Rights of the Child: Civil Rights, the Constitution and the Family', *Cleveland State Law Review*, vol. 42, no. 4 (1994), pp. 677-678.;

- Unicef. *Convention on the Rights of the Child. Frequently asked questions*. Retrieved 28 November 2011 from http://www.unicef.org/crc/index_30229.html.

²¹ Detrick, S., *A Commentary on the United Nations Convention on the Rights of the Child*, p. 1.

²² *Acquis of the European Union*, European Commission DG Justice, Freedom and Security, Consolidated and completely revised new version, October 2009. Retrieved 20 October 2011 from http://ec.europa.eu/justice/doc_centre/intro/docs/jha_acquis_1009_en.pdf. p. 51.

²³ The community *acquis* is the body of common rights and obligations which bind all the Member States together within the European Union. To integrate into the European Union, applicant countries will have to transpose the *acquis* into their national legislation and implement it from the moment of their accession.

Source: Europa. Summaries of EU legislation. *Glossary*. Retrieved 28 November 2011 from http://europa.eu/legislation_summaries/glossary/community_acquis_en.htm.

The UNCRC is accompanied by the *Implementation Handbook for the Convention on the Rights of the Child* (hereinafter the *Implementation Handbook*).²⁴ It is a reference on how to interpret and implement the provisions of the UNCRC. In this research, the *Implementation Handbook* is primarily used to explain the UNCRC's provisions.

With regard to determining when ICA could be considered a lawful act, one of the general principles of the convention²⁵ that needs to be explained first is 'the best interests of the child'. This principle is defined by article 3 UNCRC:

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

Article 3(2) outlines an active overall obligation of States, ensuring the necessary protection and care for the child's wellbeing in all circumstances, while respecting the rights and duties of parents. Furthermore, '[s]tates cannot interpret best interests in an overly culturally relativist way and cannot use their own interpretation of "best interests" to deny rights now guaranteed to children by the Convention.'²⁶ It is stressed that the convention has a holistic approach: i.e. the articles of the UNCRC should not be considered in isolation, because the convention is indivisible and its articles are interdependent. Thus, any interpretation of best interests must be consistent with the spirit of the entire convention.²⁷

According to the UNCRC, the family as the basis for raising a child enjoys priority. The fifth paragraph of the Preamble to the UNCRC states:

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Therefore, article 7 provides that the child has the right, as far as possible, to know and be cared for by its parents. Furthermore, article 9 prohibits a child's separation from its parents against their will, and only if the separation is determined to be in the child's best interests. Next, article 18 provides for state assistance so that parents can assume their responsibilities.²⁸ In addition, under article 19, the child has the right to assistance of its parents by the state

²⁴ Hodgkin, R., and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*, Unicef 2007.

²⁵ Other general principles are the principle of non-discrimination, right to life, survival and development, and respect for the views of the child.

Source: Ibid., p. 692.

²⁶ Ibid., pp. 40, 42.

²⁷ Ibid., pp. XXII, 42.

²⁸ Ibid., p. 231.

authorities when in difficulty (for example, alcohol/drug rehabilitation services, mental health services, etc).²⁹ Furthermore, article 27 provides for the child's right to an adequate standard of living assisted by the state.³⁰

Article 20 regards alternative means of child's care, and the obligation the state has towards children who cannot be cared for by their parents:^{31,32}

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be **entitled to special protection and assistance provided by the State**.
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care could include, **inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children**. When considering solutions, due regard shall be paid to the desirability of **continuity** in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

According to the *Implementation Handbook*, '[c]ontinuity of upbringing implies continuity of contact, wherever possible, with parents, family and the wider community ...'³³

The provision relating to intercountry adoption, and the question of when a child is 'adoptable', is article 21:³⁴

States Parties that recognize and/or permit the system of adoption shall ensure that **the best interests of the child shall be the paramount consideration** and they shall: (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or **cannot in any suitable manner be cared for in the child's country of origin**;

This means that, if the state recognises or permits the system of adoption, intercountry adoption as a means of alternative childcare only may be considered after the possibilities exemplified in article 20(3) have been exhausted, i.e. as a measure of *last resort*,³⁵ and if in the best interest of the child.

From the outline above, the following could be concluded. The UNCRC is based on a subsidiarity principle. This principle implies that first of all the child has the right to know and

²⁹ Browne, K. and S. Chou, 'The relationship between institutional care and the international adoption of children in Europe', *Adoption & Fostering*, vol. 32, no. 1 (2008), p. 41.

³⁰ Hodgkin, R., and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*, p. 293.

³¹ *Ibid.*, p. 279.

³² Emphasis added.

³³ *Ibid.*, p. 289.

³⁴ Emphasis added.

³⁵ Hodgkin, R., and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*, p. 298.

be cared for by its parents. If the original family is not able to care for the child, because of e.g. poverty or mental illness, first the state should offer assistance. If it is not possible for the child to remain with its original family, domestic alternative care has to be provided by the state. Only when there is no such care available, ICA can be considered as a *last resort* and if in the best interest of the child.

1.2 European Convention for the Protection of Human Rights and Fundamental Freedoms

The *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) is the first legal treaty on protecting human rights of the Council of Europe (CoE). It was inspired by the UN Universal Declaration of Human Rights (1948).³⁶ The ECHR was signed in Rome on 4 November 1950, and entered into force on 3 September 1953. Only member states of the CoE can become a party to the ECHR.

The convention is binding on the contracting states and has a strong system of enforcement. When a citizen has been victim of a violation of the ECHR, states have to allow the ‘right of individual petition’ by which individuals can take their own governments to the European Court of Human Rights (ECtHR), after all domestic legal remedies available to the citizen have been exhausted. Its decisions should be accepted by member states and failure to accept the decision leads to political or diplomatic pressure.³⁷

The convention is ratified by all EU Member States and part of the *acquis communautaire*.³⁸ Moreover, since the 1997 Treaty of Amsterdam and with the 2000 EU Charter of Fundamental Rights, the EU has committed itself to the protection of human rights.³⁹ The ECHR takes a special place therein,⁴⁰ and the Lisbon Treaty now provides for accession of the EU to this convention (article 6(2) TEU).

The ECHR does neither directly address children’s rights, nor (intercountry) adoption. Yet, in this case, especially article 8 is applicable:

Article 8 – Right to respect for private and family life

³⁶ Preamble to the ECHR.

³⁷ Davis, H., *Human Rights Law Directions*, Oxford University Press 2009, p. 19.

³⁸ *Acquis of the European Union*, European Commission DG Justice, Freedom and Security, Consolidated and completely revised new version, October 2009, p. 51.

³⁹ Croucher, S.L., *Globalization and belonging: the politics of identity in a changing world*, Maryland: Rowman and Littlefield Publishers 2004, p. 77.;

- Kearns, P., ‘The EU and human rights: an unlikely evolution’, *Amicus Curiae*, (University of London), no. 79 (2009), p. 3.

⁴⁰ Only the convention itself, but not the Court of the Council of Europe (ECtHR).

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of domestic security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

As illustrated by law professor Ursula Kilkelly, the European Court of Human Rights refers to article 8 ECHR in conjunction with the UNCRC in its jurisdiction concerning (intercountry) adoption, as the UNCRC serves as a standard.⁴¹ This means the ECtHR takes also the UNCRC's principle of subsidiarity into account. Furthermore, the general principles of the ECHR are proportionality and necessity, as expressed in article 8(2).⁴² Hence, according to the ECHR, intervention of the state with family life has to be necessary and proportionate with regard to its purpose.⁴³ Therefore, the ECtHR has emphasised that state intervention should be limited to the protection of the child's welfare.⁴⁴ According to Andrew Bainham, reader in family law and policy, '[a]ll adoption, whether domestic or international, has an uneasy relationship with the right to respect for family life.'⁴⁵ Intercountry adoption is the most drastic form of intervention with family life because in general terminates the legal relationship between the parents, the extended family, and the child. Hence, ICA is only allowed when it is a necessary and proportional solution for the problems of the child, and it may only take place when there is no other solution that could solve these problems.⁴⁶

Additionally, the right to respect for private and family life does not imply 'the right to a family'.⁴⁷ As argued by Isabelle Lammerant, expert on adoption and children's rights, there is

⁴¹ Kilkelly, U., *The Child and the European Convention on Human Rights*, Ashgate/Dartmouth: Aldershot, 1999, pp. 263, 302-303.;

- Kilkelly, U., 'The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child', *Human Rights Quarterly*, vol. 23, no. 2 (2001), pp. 308-326.

⁴² Bainham A., 'International adoption from Romania: why the moratorium should not be ended', *Child and Family Law Quarterly*, vol. 15, no. 3 (2003), p. 232.

⁴³ Council of Europe. The Lisbon Network. *The Margin of Appreciation*. Retrieved 29 November 2011 from [http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/ECHR/Paper2_en.asp#P133_12471](http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/ECHR/Paper2_en.asp#P133_12471;).;

- Davis, H., *Human Rights Law Directions*, p. 21.

⁴⁴ Bainham A., 'International adoption from Romania', p. 232.

⁴⁵ *Ibid.*, p. 235.

⁴⁶ *Ibid.*, p. 233.

⁴⁷ Council of Europe. (8 November 2007). *PACE Social Affairs Committee urges respect for children's international adoption rights and refutes the 'right to a child'*. Retrieved 20 October 2011 from [https://wcd.coe.int/wcd/ViewDoc.jsp?id=1207791&Site=DC](https://wcd.coe.int/wcd/ViewDoc.jsp?id=1207791&Site=DC;).;

neither the right for adoptive parents to a child, nor does alternative childcare have to be fulfilled by adoption.

Legally, from the point of human rights, the right to a family does not exist. This is because in the ethics of law no one can claim to have a right that would deny another human being. Nobody has the right to another human being, because then you would be depriving him of what makes him a human being. You would be turning him into an instrument, into an object of somebody else's right.⁴⁸

The right to respect family life only applies to an already existing family, and it seeks to protect from disproportional intervention from the state (article 8(2)).⁴⁹

An illustration of the applicability of article 8 on intercountry adoption by the ECtHR is the case *Pini and others v. Romania* (2004). The case concerned the objection of two Romanian girls, Florentina and Mariana, to their adoption in Italy. When adopted by two Italian couples, the girls were nine years old and in the care of the institution of the former tennis player Ioan Tiriac in Braşov. The Italian couples started proceedings to adopt the girls through an adoption intermediary. The Braşov District Court made the adoption orders on 28 September 2000 and ordered the children's birth certificates to be amended. An appeal against that decision by the Romanian Adoptions Board was dismissed and the orders became final. However, the Tiriac institution refused to deliver up the children's birth certificates or to transfer custody of the children to the adoptive parents. Tiriac said that none of the children at the centre would leave as they had all become members of his family and that it was time to put a halt to the export of Romanian children. Furthermore, the girls wanted to stay in Romania. Next, articles in the local Braşov press echoed statements made by Baroness Nicholson of Winterbourne, rapporteur at the European Parliament, that children in the care of the institution should not travel abroad to join their adoptive families.⁵⁰

- Parliamentary Assembly of the Council of Europe, *International adoption*, Recommendation 1443 (2000), 26 January 2000, par. 1.

⁴⁸ Presentation of Isabelle Lammerant, expert on adoption and children's rights, *The right to a family: analysis of the existing legal framework*, Joint Council of Europe and European Commission Conference, *Challenges in adoption procedures in Europe: Ensuring the best interests of the child*, 30 November - 1 December 2009, Strasbourg. Retrieved 20 October 2011 from http://ec.europa.eu/justice/civil/files/brochure_conference_adoption_en.pdf. p. 56.

⁴⁹ Ibid.

⁵⁰ European Court of Human Rights. Press release issued by the Registrar. *Chamber Judgment in the Case of Pini and Bertani & Manera and Atripaldi v. Romania*, 22 June 2004. Retrieved 6 December 2011 from <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=801296&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

The adoptive parents filed a complaint before the ECtHR because Romania had approved the adoption, but the parents did not receive the children.⁵¹ They considered this to be a breach of article 8: ‘the Romanian authorities’ failure to enforce final judicial decisions had deprived them of all contact with their adopted children.’ The ECtHR, however, decided it was clearly apparent that Florentina and Mariana now preferred to remain in the socio-family environment in which they had been raised at the institution, where they considered themselves to be fully integrated and that was able to afford them physical, emotional, educational and social development rather than the prospect of being transferred to a different environment abroad. Furthermore, it was not in the interest of the children to bond emotionally with new people with whom they had no original relationship and who they saw as strangers. Next, in adoption cases the interest of the child enjoys priority over the interest of the adoptive parents, because adoption means ‘giving a family to a child and not the child to a family’. Moreover, because of the ‘conscious opposition’ of the children to the adoption it was not possible to integrate harmoniously into the new family.⁵²

Normally the ECtHR condemns governments for non-execution of their national court decisions.⁵³ In this case, however, the court found that the Romanian authorities could legitimately and reasonably have considered that the right of the adoptive parents to create ties with the adopted children could not take priority over the children’s interest.⁵⁴

1.3 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption

Unlike the ECHR and the UNCRC, the *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* (the Hague Convention, HC) is not a human rights instrument. The HC is a private law treaty of the Hague Conference on Private International Law (hereinafter the Hague Conference). It solely addresses intercountry adoption and provides for measures ‘to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children’, thereby ‘taking into account the principles set forth in international instruments, in particular the *United Nations Convention on the Rights of*

⁵¹ Post, R., *Romania for Export Only*, pp. 163, 169, 171.

⁵² European Court of Human Rights. Press release issued by the Registrar. *Chamber Judgment in the Case of Pini and Bertani & Manera and Atripaldi v. Romania*, 22 June 2004.

⁵³ Post, R., *Romania for Export Only*, p. 171.

⁵⁴ European Court of Human Rights. Press release issued by the Registrar. *Chamber Judgment in the Case of Pini and Bertani & Manera and Atripaldi v. Romania*, 22 June 2004.

the Child'.⁵⁵ The convention sets out to build on article 21 UNCRC (see p. 11) and is a reaction on article 35 UNCRC:⁵⁶

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

The creation of the convention started in 1988. The topic had first been brought up by the Permanent Bureau of the Hague Conference and it had been formally proposed by Italy. It attracted great interest among the experts, who agreed that international adoption was posing at present very serious problems in particular because substantial numbers of children from economically developing countries are being placed for adoption with families in industrialised countries⁵⁷ (predominantly Western Europe, Canada, the USA, Israel and Australia). The final language was approved in 1993, and it entered into force on 1 May 1995.

The Hague Convention is binding upon state parties and its provisions have to be implemented in their national law. The convention aims to provide strict control and procedures for intercountry adoption, such as supervision by state authorities (article 6), accredited intermediary bodies (article 11), and a procedure to establish whether a child is adoptable and to arrange the adoption. This strict control and procedures would give countries the control they need to trust their partners. The HC does not include other provisions than this principle of mutual trust, and there are no measures designed in cases of malpractice.⁵⁸

The convention is ratified by all EU Member States. However, unlike the ECHR and the UNCRC, the HC is not on the *acquis communautaire* list.⁵⁹ The EU is also a member to the Hague Conference, to which the European Commission (also hereinafter the Commission) participates as contact organ of the EU.⁶⁰

⁵⁵ Preamble to the Hague Convention.

⁵⁶ Smolin, D.M., 'Abduction, Sale and Traffic in Children in the Context of Intercountry Adoption', Information Document No 1 for the attention of the Special Commission of June 2010 on the practical operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption, 2010, p. 11.

⁵⁷ Van Loon, J.H.A., *Report on Intercountry Adoption*, paper presented at Hague Conference on Private International Law Intercountry, The Hague, April 1990, pp. 2-4.

⁵⁸ Smolin, D.M., 'Abduction, Sale and Traffic in Children in the Context of Intercountry Adoption', pp. 7-8, 13.

⁵⁹ *Acquis of the European Union*, European Commission DG Justice, Freedom and Security, Consolidated and completely revised new version, October 2009.

⁶⁰ Council Decision 2006/719/EC of 5 October 2006 on the accession of the Community to the Hague Conference on Private International Law, OJ L 297 of 26 October 2006.

In the second paragraph of the Preamble to the Hague Convention, it is recalled ‘that each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin’. Article 4 concerns the ‘adoptability’ of the child:⁶¹

An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin –

- a) have established that the child is adoptable;
- b) have determined, **after possibilities for placement of the child within the State of origin have been given due consideration**, that an intercountry adoption is in the child’s best interests;

In this article, together with the second paragraph of the Preamble, the principle of subsidiarity of ICA of the convention is expressed. At first, article 4.b seems to correspond with article 21.b UNCRC. However, ‘due consideration’ sounds different than article 21.b UNCRC stating ‘or cannot in any suitable manner be cared for in the child’s country of origin’, and article 20(3) UNCRC giving examples of such suitable manners (i.a. foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children).⁶²

This difference might be caused by the fact that the Hague Convention is based on the idea that ICA, after domestic adoption, is actually the best alternative for permanent care. This is expressed by the third paragraph of the Preamble, recognising

... that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.

This idea is emphasised and explained by the *Explanatory Report* to the Hague Convention:

⁶¹ Emphasis added.

⁶² Although in the case of the Hague Convention, there is made a suggestion on this matter (emphasis added): ‘In this respect, it is to be recalled that, in the second reading, Egypt submitted Working Document No 124 suggesting the addition of a new par. to the Preamble, reading as follows: ‘*Taking into account the other alternatives and forms of child care, e.g. foster placement - kafalah as enshrined in Islamic law, and the need to promote international co-operation therein*’. In support of his proposal, the Egyptian Delegate insisted on **the need for international co-operation with regard to various forms of child care other than adoption, such as custody, foster placement and kafalah**, mentioned in the UN Declaration of 3 December 1986 on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, and in the CRC. **He also stressed the fact that such alternatives are accepted all about the world, and notwithstanding that falling short of full legal adoption, they often provide for the same health, social and educational care for the child as that obtained through adoption. Besides, the consideration of such alternatives within the Convention would permit the avoidance of trafficking and abuse, and to take appropriate care of children in countries where adoption is not recognized.** However, the Egyptian proposal could not be considered for lack of enough support.’ Source: *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, drawn up by G. Parra-Aranguren, 1993, par. 42.

The third paragraph of the Preamble, in referring to permanent or suitable family care, does not deny or ignore other childcare alternatives, but highlights the importance of permanent family care as the preferred alternative to care by the child's family of origin.⁶³

And

... it being also recalled that the right to a family is a fundamental right of the child that has to be fulfilled by intercountry adoption, but as an alternative and subsidiary solution.⁶⁴

According to the *Explanatory Report*, the idea behind this is that the placement of a child in a family, also by means of ICA, 'is the best option among all forms of alternative care, in particular to be preferred over institutionalization.'⁶⁵

In sum, it appears that the principle of subsidiarity of the Hague Convention means that if the child cannot be cared for by its original family, it should be cared for by a family through (intercountry) adoption.⁶⁶ Therewith, the principle of subsidiarity of the HC seems to differ from the provisions of the UNCRC.

Conflict between treaties?

The apparent conflict with regard to the interpretation of the subsidiarity principle between the UNCRC and the ECHR on the one side, and the Hague Convention on the other, might be the result of the difference in perception of alternative care of several countries. For example, the United States, which is member to the HC, but not to the UNCRC, believes 'that adoption is the best solution for children without families.'⁶⁷ At the other end of the spectrum of opinion are the states that operate in accordance with Islamic law and therefore do not recognise adoption, because the legal implication of adoption is that it disguises the true parentage and blood relationships of a child.⁶⁸ Instead, Islamic law recognises *kafalah*, which is comparable to the system of foster care.⁶⁹

With regard to Europe, according to Nicola Madge in *Children and Residential Care in Europe* the general idea of child protection in Western Europe is as established in legislation in the Netherlands:

⁶³ Ibid., par. 43.

⁶⁴ Ibid., par. 46.

⁶⁵ Ibid.

⁶⁶ Ibid., par. 43 and 44.

⁶⁷ Hodgkin, R., and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*, p. 294.

⁶⁸ Ibid., pp. 280, 294.

⁶⁹ Vlaardingerbroek, P., 'Alternatieven voor (interlandelijke) adoptie', pp. 61-62.

These are that: assistance should be as timely as possible; assistance should be in the 'lightest' form (that is, with the least intervention) possible; assistance should be as close to home as possible; and assistance should be of the shortest duration possible.⁷⁰

With regard to the European Union, in 2002, an Independent Panel was set up by the Commission in order to report on the Romanian reforms with regard to child protection. The panel consisted of experts on family law and children's rights from Member States. The panel reported to the Commission on whether the Romanian draft legislative package complied with international standards laid down in the UNCRC and the ECHR. Furthermore, the panel considered i.a. whether the proposed legal framework would ensure respect of children's rights at a level comparable to that provided by legislation in the 'old' EU Member States.⁷¹ The Romanian adoption law of 1997 was in conformity with the Hague Convention and ICA had become a child protection measure. This led to so many abuses in the system, that Romania was ordered by the EU to change its child protection system as a condition for EU membership.⁷² The Panel stated:

Romania's situation is in this regard exceptional, as no EU Member State expatriates its children. Other Member States protect their children and deal with the issues in-country. Out of home placement is available, guidance to parents given and family allocations provided. It is therefore not necessary to abandon children.⁷³

Furthermore, the panel agreed that 'children's psychological need for permanency and individual attachments can be met without the formality of adoption.'⁷⁴ The panel stated that adoption is rather a civil order, which creates new relationships with the adoptive family and severs the relationship between the child and his or her birth family. Therefore, the panel was of the opinion that intercountry adoption cannot be considered as a child protection measure.⁷⁵

What about the difference between the UNCRC and the HC? As international consultant on child protection Nigel Cantwell explains, first of all, the Hague Convention is a private law treaty and not a standard-setting human rights instrument like the UNCRC. He states that the

⁷⁰ Madge, N., *Children and Residential Care in Europe*, London: National Children's Bureau 1994, p. 137.

⁷¹ Annex: Independent Panel of Family Law Experts of EU Member States, *Summary of opinion on the matter of adoptions*, Brussels, 19 May 2004, p. 1.

⁷² This process is extensively described in Post, R., *Romania for Export Only : The untold story of the Romanian 'orphans'*.

⁷³ Annex: Independent Panel of Family Law Experts of EU Member States, *Summary of opinion on the matter of adoptions*, p. 3.

⁷⁴ *Ibid.*, p. 4.;

- Hodgkin, R., and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*, p. 297.

⁷⁵ Annex: Independent Panel of Family Law Experts of EU Member States, *Summary of opinion on the matter of adoptions*, pp. 1, 3.

HC sets out to build on, and not to trump, the UNCRC. Second, the Preamble to the HC states that intercountry adoption may ‘offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin’. This means that also other solutions can be considered. According to Cantwell, it implies that efforts should have been made to find a family (and not just an adoptive family) at national level before ICA is considered. Therefore, ‘despite appearances, the wording of the Hague Convention is rather akin to that of the [UN]CRC, even though it approaches the issue from a slightly different standpoint.’⁷⁶

Bainham writes that the HC does not *oblige* states to make children available for intercountry adoption. All that it attempts to do is to regulate, for the benefit of the children and the families concerned, the process of ICA in such a way that it is consistent with the best interests of the child.⁷⁷ Similarly, in *Abduction, Sale and Traffic in Children in the Context of Intercountry Adoption*, David Smolin argues that the HC does not in any way *mandate* that ratifying nations send their children for intercountry adoption in any particular circumstance. According to Smolin, the HC creates neither the right for a child in an institution to intercountry adoption, nor the right to a family. Officially, the convention only seeks to facilitate intercountry adoptions by safeguarding them from abusive practices. Furthermore, the HC leaves unaddressed significant principles of child welfare or child rights at stake in intercountry adoption. Therefore, as a principle it should be taken that the HC is designed to function within a broader context of other legal instruments, including the UNCRC with regard to children’s rights. When ICA is considered in accordance with the UNCRC provisions, the HC can be applied.⁷⁸

Conclusion

In this chapter, the legal position of ICA is described according to three main international treaties to which EU Member States are party, namely the UNCRC, the ECHR and the Hague Convention. According to the UNCRC and the principle of subsidiarity, the state is required to take measures to keep the child with its family of origin by means of different forms of social assistance. If the child cannot remain with the original family, the state is required to provide for alternative care in the country of origin. In considering such solutions, due regard should be paid to the continuity in the child’s upbringing. Only after domestic solutions have

⁷⁶ Cantwell, N., ‘The challenges of out-of-home care’, *Early Childhood Matters*, Bernard van Leer Foundation, no. 105 (2005), p. 11.

⁷⁷ Bainham, A., ‘International adoption from Romania’, p. 230.

⁷⁸ Smolin, D.M., ‘Abduction, Sale and Traffic in Children in the Context of Intercountry Adoption’, pp. 5, 8.

been exhausted and after paramount consideration of the best interest of the child (i.e. consistent with the spirit of the entire convention), intercountry adoption as a measure of child protection may be considered as a *last resort*.

The ECHR endorses the subsidiarity principle of the UNCRC. Furthermore, following the ECHR with its principle of proportionality and necessity, both intercountry and domestic adoption are considered as a rather far-reaching measure, because it creates new relationships with the adoptive family and severs the relationship between the child and its birth family. In accordance with the principle of proportionality and necessity, ICA should be only allowed when it is a proportional and necessary solution for the problems of the child.

The Hague Convention sets out to build on article 21 UNCRC, but appears to differ with regard to the principle of subsidiarity. Different from the UNCRC and the ECHR, the HC regards (intercountry) adoption as the preferable solution if the original family is not able to care for the child. However, it is also argued that the HC does not *mandate* states to send their children for intercountry adoption and that the HC does not set out to amend the UNCRC.

To conclude, when all measures have been exhausted by the state to keep the child with its family of origin, and if the child cannot remain with the original family, all measures have been exhausted by the state to provide for alternative care in the country of origin, and after paramount consideration of the best interest of the child, intercountry adoption as a measure of alternative childcare may be considered as a *last resort*. In accordance with the above-mentioned international conventions, if these conditions have been fulfilled, ICA could be regarded as a lawful act.

2 Illegal adoption

Introduction

In 2011, the European Parliament and the Council adopted Directive 2011/36/EU *on preventing and combating trafficking in human beings and protecting its victims* (hereinafter the Anti-trafficking Directive), which includes illegal adoption as a form of trafficking in human beings (THB).⁷⁹ Nevertheless, the directive does not provide for a definition of illegal adoption. Therefore, in the previous chapter it is considered when intercountry adoption (ICA) could be regarded as a lawful act in accordance with three main international conventions to which the EU Member States are party. Similarly, in this chapter it is considered under which circumstances ICA could be regarded as an unlawful act. Firstly, a definition of illegal adoption is given. Secondly, it is described why unlawful or illegal adoptions take place despite conventions regulating ICA. Lastly, for illustration several adoption cases are evaluated. It is examined how they are in breach with the *United Nations Convention on the Rights of the Child* (UNCRC)⁸⁰ and the *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* (hereinafter the Hague Convention, HC).

2.1 Definition of illegal intercountry adoption

In chapter 1 it was illustrated that, in accordance with the UNCRC, ICA could be regarded as a lawful act when all measures have been exhausted by the state to keep the child with its family of origin, and if the child cannot remain with the original family, all measures have been exhausted by the state to provide for alternative care in the country of origin, and after paramount consideration of the best interest of the child, intercountry adoption as a measure of alternative childcare has been considered as a *last resort*. With regard to the definition of illegal adoption, in this research intercountry adoptions that are a violation of the UNCRC are labelled 'illegal'.

In recent years, cases of abuses in the system of intercountry adoption have been frequently reported. The character of the reported illegal adoptions is threefold. First, cases are known where prospective parents deliberately bypassed official adoption procedures by getting a child in or from a foreign country, without having had the permission and outside the control of state authorities of country of origin and/or country of destination. Then, they

⁷⁹ Recital 11 of the Preamble to Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims.

⁸⁰ As pointed out in the first chapter, the *Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) endorses the UNCRC. Therefore, the ECHR is not re-elaborated in this chapter.

pretend to be the original parents of a child.⁸¹ This is actually is not an adoption following any legal procedure.

The second type of cases is similar to the previous example. The difference is that, sometimes after a certain period in which family life is established or with falsified papers, the prospective parents have the intention to request the court to formalise the adoption.⁸²

The third type of abusive adoptions is when, although arranged through the official channels, and although prospective adoptive parents acted in good faith, still the adoptions involved e.g. falsified documents, abduction, fraud, and persuasion of the original family.⁸³ Thus, although certain adoptions have been formally declared legal, still they contain illegal, unlawful, fraudulent or at least unethical elements. As Cantwell defines illegal adoption:

*But what is an 'illegal adoption'? A decision on adoption is made in a court of law. The 'illegality' of that decision could thus result from situations where, variously, the required procedures have not been followed, documents have been falsified, the child has been declared adoptable without due cause or as a result of manipulation, money has changed hands... but if it is truly an adoption, rather than some other form of transfer or removal, it will necessarily and by definition have been approved by a judge. It follows that all events and acts that would make it 'illegal' must therefore have taken place up to and including, but not after, the judgement.*⁸⁴

In sum, a purely illegal adoption does not exist, since an adoption can only be established in court. Therewith, children are always adopted legally. However, if the adoption process contains illegal elements up to and including the judgement, this adoption still can be termed 'illegal'.⁸⁵ In this research, such 'legalised' illegal adoptions are labelled 'illegal'.

2.2 Why illegal adoptions take place

In accordance with article 21.b UNCRC (as discussed in section 1.1), intercountry adoption can be considered as an alternative means of child's care if the child cannot be cared for in its

⁸¹ Court The Hague (NL), 12 April 2011, LJN BQ2950.;

- Court Leeuwarden (NL), 29 September 2009, LJN BJ8794.;

- Court Zwolle (NL), 2 December 2008, LJN BG5827.;

- Mos, H.F., 'Case illegal adoption case closed confirms prosecutor', *St. Maarten Island Time.com*, 25 August 2011.

⁸² Vlaardingerbroek, P., 'Alternatieven voor (interlandelijke) adoptie', p. 55.

- Boele-Woelki, K., et al., *Draagmoederschap en Illegale Opneming van Kinderen*, Utrecht Centre for European Research into Family Law (UCERF) of the University of Utrecht, 2011, pp. 200-201.

⁸³ Smolin, D.M., 'Abduction, Sale and Traffic in Children in the Context of Intercountry Adoption', pp. 4-5.

⁸⁴ Cantwell, N., 'Editorial', *ISS, Monthly Review*, no. 11-12 (2005). Retrieved 3 November 2011 from

<http://www.iss-ssi.org/2009/assets/files/editorial-monthly-review/Editorials/2005/Edito%202005%2011%2012eng.pdf>. pp. 1- 2.

⁸⁵ Ibid.

country of origin. At the same time, ICA offers the opportunity for people who are unintentionally childless to fulfil their desire to found a family.⁸⁶ At present, some scholars note that ICA is actually driven by the desire of prospective adoptive parents instead of the best interest of the child, as the demand for children exceeds the availability.⁸⁷ It is also argued that when the demand for children exceeds supply, the likelihood of illegal activity increases.⁸⁸

The issue as expressed by Chantal Saclier of International Social Service (ISS) in *Children and Adoption: Which Rights and Whose?:*

In the last two decades, intercountry adoption has progressively changed. From its initial purpose of providing a family environment for children, it has become more demand-driven. Increasingly in industrialized countries, intercountry adoption is viewed as an [option] for childless couples . . . To meet the demand for children, abuses and trafficking flourish: psychological pressure on vulnerable mothers [to give up their children]; negotiations with birth families; adoptions organized before birth; false maternity or paternity certificates; abduction of children; children conceived for adoption; political and economic pressure on governments . . . Indeed, a booming trade has grown in the purchase and sale of children in connection with intercountry adoptions.⁸⁹

Below, the phenomenon of illegal adoptions is explored, together with the question why they occur despite the existence of international conventions aiming to prevent such abuses.

Market in children

A general explanation for illegal adoptions is the existence of a market in children,⁹⁰ since the system of intercountry adoption involves demand of prospective parents, offer of children deprived from a family, intermediaries such as adoption agencies, and money paid for the adoption.⁹¹ Hans van Loon, Secretary General of the Hague Conference, describes in his 1990

⁸⁶ Van der Linden, A.P., 'Adoptie in het kennelijk belang van het kind?', p. 82.;

- Vlaardingerbroek, P., 'Alternatieven voor (interlandelijke) adoptie', p. 58.

⁸⁷ Council of Europe Commissioner for Human Rights, *Adoption and Children*, prepared by N. Cantwell.;

- Selman, P., 'Trends in Intercountry Adoption', pp. 191, 201.;

- Slot, B.M.J., 'Adoptie en welvaart', p. 23.

⁸⁸ Parliamentary Assembly of the Council of Europe, *International adoption*, Recommendation 1443 (2000), 26 January 2000.;

- Slot, B.M.J., 'Adoptie en welvaart', p. 23.;

- *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention*, Guide to Good Practice, Guide No.1 (2008), p. 164.

⁸⁹ Saclier, C., 'Children and Adoption: Which Rights and Whose?', *Innocenti Digest*, Unicef, no. 4 (1999), p. 12.

⁹⁰ For example: Slot, B.M.J., 'Adoptie en welvaart', pp. 11-24.;

- For a full economic overview: Landes, E.M. and R.A. Posner, 'Economics of the Baby Shortage', *The Journal of Legal Studies*, vol. 7, no. 2 (1978), pp. 323-348.

⁹¹ Slot, B.M.J., 'Adoptie en welvaart', p. 14.

*Report on Intercountry Adoption*⁹² that the number of children available for domestic adoptions in industrialised countries started to decline around 1970. This was the result of social and demographic changes such as lowering birth rates, birth control, legal abortions, acceptance of single parenthood and the availability of social benefits. Because of the restricted supply in these countries, children became a highly desirable commodity.⁹³ At the same time, adoption became more widely accepted as an institution. Therefore it was looked for adoption from other countries where it was believed there were children structurally deprived of their family and therefore available for adoption (for example as the result of World War II, the Korean War, the Vietnam War, war orphans, and biracial children for example created by American soldiers and Vietnamese women).⁹⁴ Next to this structural ‘supply’, a structural ‘demand’ arose in industrialised countries. ‘The language of economics made its appearance and intercountry adoption became a more complex and controversial social phenomenon.’⁹⁵

Fig. 1: Countries that Send and Receive the Most Adoptive Children



Source: Greenblatt, A., ‘International adoptions: The Issues’.⁹⁶

Currently, the demand for children of aspirant parents exceeds the availability of children in need for intercountry adoption. By the end of the 90s, Unicef estimated there were 50

⁹² Van Loon, J.H.A., *Report on Intercountry Adoption*, paper presented at Hague Conference on Private International Law Intercountry, The Hague, April 1990.

⁹³ Hodgkin, R. and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*, p. 297.

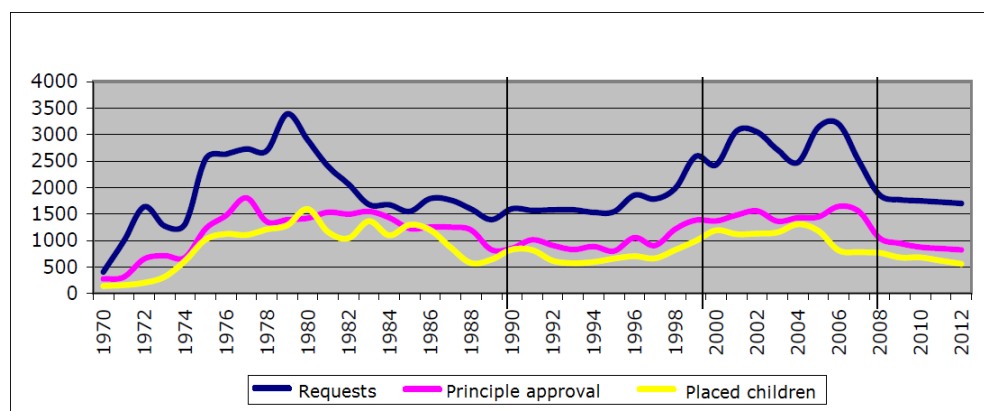
⁹⁴ Coles, R.L., *Race & Family: A Structural Approach*, California: Sage 2006, p. 251.

⁹⁵ Van Loon, J.H.A., *Report on Intercountry Adoption*, pp. 56-58.

⁹⁶ Greenblatt, A., ‘International adoptions: The Issues’, *Global Researcher*, vol. 5, no. 23 (2011), p. 576.

prospective adopters for every available child.⁹⁷ Although the number of ICA has fallen since 2004,⁹⁸ according to Cantwell ‘this is not a reflection of lessening interest on the part of prospective adopters.’⁹⁹ He illustrates this by the examples of China and France: in 2009, 30 000 families were awaiting a match with a Chinese adoptee, while less than 6000 intercountry adoptions had been processed the previous year. In France, in 2008 over 1100 applications had been received to adopt from Cambodia, whereas only 26 adoptions from that country to France had taken place in 2007.¹⁰⁰

Fig. 2: Adoption data of the Netherlands



Source: HccH Publications. Statistics. *Netherlands: annual adoption statistics 2005-2009*.¹⁰¹

Because the demand for children exceeds the availability, it is stated that ICA is driven by prospective adoptive parents wishing for a child.¹⁰² The ‘supply’ of children has tended to respond to the ‘demand’. This demand is expressed by prospective adoptive parents, through adoption agencies or via their governments. These authorities invite countries to make more

⁹⁷ As included in: Parliamentary Assembly, Council of Europe, *International adoption: respecting children's rights*, Doc. 8592, 2 December 1999.

⁹⁸ According to Cantwell, the worldwide trend in ICA was one of fairly systematic growth until 2004. Selman estimates, ‘based on relatively complete data’, that in 2004 almost 45.000 children were adopted through ICA. Source: Council of Europe Commissioner for Human Rights, *Adoption and Children*, prepared by N. Cantwell.; - Selman, P., ‘Trends in Intercountry Adoption’, pp. 184-185.

⁹⁹ Council of Europe Commissioner for Human Rights, *Adoption and Children*, prepared by N. Cantwell.

¹⁰⁰ Ibid.

¹⁰¹ HccH Publications. Statistics. *Netherlands: annual adoption statistics 2005-2009*. Retrieved 27 September 2011 from http://www.hccch.net/upload/wop/adop2010pd05_nl.pdf. p. 10.

¹⁰² Selman, P., ‘Trends in Intercountry Adoption’, pp. 191, 201.

children available for ICA.^{103,104} Also, the reduction in numbers from some sending countries leads to pressure on other countries to make (more) children available for adoption.¹⁰⁵ As illustrated by Van Loon:

The picture of 'source countries' of children is one of continuous fluctuation. When one country closes its borders or restricts the possibilities of intercountry adoption, another country may liberalize its policies.¹⁰⁶

However, notwithstanding the fluctuation, the pattern is a 'one way flow of children'¹⁰⁷ from developing countries to industrialised countries.¹⁰⁸ Furthermore, it is important to note that it is not the case that developing or 'supplying' countries have a tradition of intercountry adoption. Rather, pressure from 'demanding' countries¹⁰⁹ and for example the ratification of the Hague Convention opens these countries up for ICA.¹¹⁰

¹⁰³ Browne, K. and S. Chou, 'The relationship between institutional care and the international adoption of children in Europe', p. 41.;

- Council of Europe Commissioner for Human Rights, *Adoption and Children*, prepared by N. Cantwell.;

- Saclier, C., 'Children and Adoption', p. 12.

¹⁰⁴ See for example the Annexes.;

In the newspaper article 'Flanders is in need for more adoption countries' it is called for more countries that want to give children for adoption to Belgium. Also, the Belgium government should not be too strict in search for new adoption canals, it is said. This call is made because a lot of prospective adoptive parents are waiting, and because some sending countries are making it more difficult to give up children for adoption.

Source: Knack.be. (25 september 2011). *Vlaanderen heeft nood aan meer adoptielanden*. Retrieved 27 September 2011 from <http://www.knack.be/belga-algemeen/vlaanderen-heeft-nood-aan-meer-adoptielanden/article-1195110054098.htm>.;

One of the recommendations in a report from July 2002 of KPMG (an international network of member firms offering audit, tax and advisory services) was to examine whether there is indeed a structural lack of children eligible for adoption. During a general consultation of the Dutch parliamentary committee on Justice with the Minister, one of the MPs asked whether the Dutch government would give a follow-up to this recommendation. Furthermore, during the same consultation, it was asked whether there was a role for the Dutch government in its dealings with other countries to promote growth of the number of children available for adoption, or whether this was solely a task for private holders.

Source: House of Representatives (NL), *Report of a general consultation*, established 13 January 2004, TK 2003–2004, 28 457, no. 13, pp. 2, 4.;

'During Nastase's visit to the US, Colin Powell, US Secretary of State, met with him to discuss Romania's accession to NATO. After a short introduction, Powell switched to the subject of intercountry adoptions. These had to be resolved, before accession to NATO could be further discussed.'

Source: Post, R., *Romania for Export Only*, p. 107.

¹⁰⁵ Selman, P., 'Trends in Intercountry Adoption', p. 191.

¹⁰⁶ Van Loon, J.H.A., *Report on Intercountry Adoption*, p. 60.;

See also: Post, R., 'De perverse effecten van het Haags Adoptieverdrag', p. 33.

¹⁰⁷ Parliamentary Assembly of the Council of Europe, *International adoption*, Recommendation 1443 (2000), 26 January 2000, par. 2.

¹⁰⁸ Slot, B.M.J., 'Adoptie en welvaart', pp. 15-18.

¹⁰⁹ Browne, K. and S. Chou, 'The relationship between institutional care and the international adoption of children in Europe', p. 41.;

- Council of Europe Commissioner for Human Rights, *Adoption and Children*, prepared by N. Cantwell.

¹¹⁰ Post, R., 'De perverse effecten van het Haags Adoptieverdrag', p. 35.

An important feature of a market is money. Van Loon stated:

Health, weight, sex, colour of eyes, social origin, all may influence the price of a child.
Prices may vary between \$ 10,000 and 15,000 but can sometimes be substantially higher.
[Also total costs of USD 200,000 are known.]¹¹¹ The profiteers are generally neither the biological parents nor the adopters but the intermediaries - lawyers, doctors and others.¹¹²

The money can be categorised in 'prices' and 'costs'. With regard to prices, the UN Committee on the Rights of the Child noted that 'a system that puts a price on a child's head is likely to encourage criminality, corruption and exploitation.'¹¹³ Therefore, both the UNCRC (article 21.d) and the HC aim to prevent 'improper financial gain'. In adoption arranged through the official procedures, only payment of 'costs' are allowed, which are regarded as 'reasonable costs' (article 32(2) HC).¹¹⁴ Below, an estimation of these 'reasonable costs' is given.

For example, in Australia, in 2009 the total costs of an adoption were estimated to range between AUD 15 000 and 40 000.¹¹⁵ In the Netherlands, the mediation costs of the Dutch accredited intermediary body *Wereldkinderen* amount to EUR 7500 of the total sum and the registration fee to 250. For the adoption of one child,¹¹⁶ the procedural costs are approximately between EUR 1600 and 3000, and the costs of the child approximately between 1200 and 5300.¹¹⁷ The total sum would thus be EUR 10 550 as a minimum.

The costs per adoption differ from country to country and adoption service. Mainly it is about compensation costs for the care of the child in the country of origin, medical research, procedural costs in both the country of origin and the country of destination, translation costs, compensation for the staff and local contact persons, contribution to support projects in the country of origin, a *forfaitaire* grant asked for by the government, travelling and stay-costs, and after care and follow up.¹¹⁸

Next to these official costs it is known that some money involves corruption and

¹¹¹ Vlaardingerbroek, P., 'Alternatieven voor (interlandelijke) adoptie', p. 56.

¹¹² Van Loon, J.H.A., *Report on Intercountry Adoption*, p. 90.

¹¹³ Hodgkin, R., and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*, p. 300.

¹¹⁴ According to Van Loon: 'The use of the words "improper financial gain", implying that a proper financial gain resulting from intercountry adoption is permissible, have been vigorously contested by some delegates [in the preparation of the UNCRC].'

Source: Van Loon, J.H.A., *Report on Intercountry Adoption*, p. 92.

¹¹⁵ Clair, S., *Child Trafficking and Australia's Intercountry Adoption System*, p. 18.

¹¹⁶ The adoption of more children, for example siblings, is also possible.

¹¹⁷ Wereldkinderen. (2011). *Bemiddelingstarieven*. Retrieved 27 September 2011 from <http://www.wereldkinderen.nl/site.php?id=48>.

¹¹⁸ *Wegwijs in adoptie, procedures in Vlaanderen*, Kind en Gezin, Vlaamse Centrale Autoriteit Adoptie. Retrieved 20 October 2011 from <http://www.kindengezin.be/brochures-en-rapporten/brochures/broch-adoptie.jsp#/0/>. p. 22.

bribes; either fully illegal¹¹⁹ or seemingly more or less accepted as the following shows. In the *Kalsbeek report*,¹²⁰ the Kalsbeek committee notices that in certain countries of origin it is customary to pay a small fee to the persons or bodies involved in adoption. In the Netherlands, this is punishable. However, it is not prosecuted in cases of so-called ‘facilitation payments’: small payments aimed at government officials to urge them to perform their duties. The committee states that accredited bodies should be allowed to pay them to the extent that is common in countries of origin, if the payments are small and could be considered acceptable. In considering this, the committee cites of the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*.¹²¹ Seemingly the Kalsbeek committee acknowledges ICA as an international business transaction, for this convention does not concern adoption or child protection.

Despite the fact that the above-mentioned costs are defined as ‘reasonable costs’, it still concerns large sums of money. As anthropologist Pien Bos argued in her study on relinquishment procedures in India, ‘legal adoptions are represented as a non-profit undertaking ... Yet, many people [working for licensed NGOs], both in sending and receiving countries, earn their income from adoptions and these jobs exist because of the flow of adoptive children.’¹²² Thus in this context of a market in children, as Bos puts it, babies are not just ‘children in need’, but also commodities.¹²³

Illegal adoption despite or because of regulation?

As mentioned in section 2.1, abuses in the system of intercountry adoption take place with regard to adoptions arranged outside as well as through the official channels. It is explored in

¹¹⁹ It has been revealed by the Indian Central Bureau of Investigation (CBI) that former Chairman of the Indian Central Authority, CARA, had entered into criminal conspiracy and corruption regarding intercountry adoption and orphanage Preet Mandir during the period 2002 to 2010.

Source: Final report, in the court of Hon’ble Special Judge, CBI, Pune. FIR. No. – BS1/2010/S/0005, 12 May 2010, on file with author.

¹²⁰ In 2004 the Dutch Minister of Justice stated that the current imbalance between supply and demand causes the risk that a real market and forms of child trafficking are created (TK 2003–2004, 28 457, no. 13). Partly for that reason, at the request of the Minister of Justice in 2007, an independent committee chaired by Ms. Mr. N. A. Kalsbeek addressed the question of how a balanced interpretation can be given to the interests of adopted children on the one hand and the needs of adoptive parents to a family* on the other hand, and the task and role of government this represents (TK 2006–2007, 30 551 and 30 800 VI, no. 9).

* This is stated despite the fact that in human rights the right to a family does not exist. There is neither the right for adoptive parents to a child, nor has alternative childcare to be fulfilled by adoption (see also p. 15).

¹²¹ Kalsbeek, N. A., *Rapport interlandelijke adoptie - “alles van waarde is weerloos”*, Commissie lesbisch ouderschap en interlandelijke adoptie, 29 May 2008, p. 50.

¹²² Bos, P., *Once a mother: Relinquishment and adoption from the perspective of unmarried mothers in South India*, Enschede: Ipskamp 2007 (diss.), p. 237.;

See also: Van Loon, J.H.A., *Report on Intercountry Adoption*, p. 92.;

For a description of the economics of adoption in India: Dhanda, A. and G. Ramaswamy, *On their own*, pp. 46–50.

¹²³ Bos, P., *Once a mother*, p. 241.

this chapter why abusive adoptions take place despite being arranged through the official procedure. As explained in chapter 1, the Hague Convention sets out to build on article 21 UNCRC and is a reaction on article 35. The HC aims to prevent the abduction of, the sale of or traffic in children for intercountry adoption. To do so, it aims to provide for safeguards, such as: (article 4) the competent authorities of the state of origin have to establish the child is adoptable and that the adoption is in its best interests; the consent of the adoption has to be given freely and not induced by compensation of any kind; the consent by the mother has to be given only after the birth of the child; and the child – with regard to his age – has to be counselled and duly informed and his consent has to be given freely. Other examples of safeguards are the determination by the state that prospective adoptive parents are eligible and suited to adopt (article 5); designation of a Central Authority (CA) to discharge the duties which are imposed by the convention (article 6); adoption agencies have to be accredited by the CA (article 10) and pursue only non-profit objectives (article 11). Thus, the convention facilitates intercountry adoptions by safeguarding them from abusive practices.¹²⁴

However, it is argued by critics that by providing a legal procedure and therewith facilitating ICA, the Hague Convention could very well be the cause of ‘legalised’ illegal adoptions.¹²⁵ In *Abduction, Sale and Traffic in Children in the Context of Intercountry Adoption*, David Smolin gives an analysis of why the ratification of the HC does not guarantee prevention of abuses, and why ‘legalised’ illegal adoptions take place. ‘Legalised’ illegal adoption is in Smolin’s words ‘child laundering’.¹²⁶

The term ‘child laundering’ expresses the claim that the current intercountry adoption system frequently takes children illegally from birth parents, obtains children illicitly through force, fraud, or funds (financial inducement), creates falsified paperwork to hide the child’s history and origins and identifies the child as a legitimately abandoned or relinquished ‘orphan’ eligible for adoption, and then uses the official processes of the adoption and legal systems to ‘launder’ them as ‘legally’ adopted children.¹²⁷

¹²⁴ Smolin, D.M., ‘Abduction, Sale and Traffic in Children in the Context of Intercountry Adoption’, p. 5.

¹²⁵ Bainham, A., ‘International adoption from Romania’, p. 226.;

- Dohle, A., ‘Inside Story of an Adoption Scandal’, *Cumberland Law Review*, vol. 39, no. 1 (2008), pp. 131, 183-184.;

- Post, R., ‘De perverse effecten van het Haags Adoptieverdrag’, pp. 25-37.;

- Smolin, D.M., ‘Child Laundering’, pp. 113-200.

¹²⁶ Smolin, D.M., ‘Abduction, Sale and Traffic in Children in the Context of Intercountry Adoption’, p. 14.

¹²⁷ Smolin, D.M., ‘Child Laundering’, p. 115.;

- Smolin, D.M., ‘Abduction, Sale and Traffic in Children in the Context of Intercountry Adoption’, p. 5.;

- Smolin, D.M., ‘Child Laundering as Exploitation: Applying Anti-Trafficking Norms to Intercountry Adoption Under the Coming Hague Regime’, *Vermont Law Review*, vol. 32, no. 1 (2007), pp. 2-3.

One of the alleged shortcomings of the HC is that the safeguards established by the convention created the principle of mutual trust, i.e. states acting in accordance with these safeguards would be able to trust each other.¹²⁸ Because of this sole principle of mutual trust, however, it is acknowledged that abuse of adoption provisions cannot be excluded.¹²⁹ For example, Smolin explains that under the system of the HC the sending country is responsible for ensuring that children are truly orphans eligible for adoption, ‘despite the fact that many sending countries have significant problems with corruption, large-scale document fraud, and inadequate legal, administrative, or governmental processes.’¹³⁰

If receiving countries thereby loosen their own mechanisms for reviewing the validity of a child’s claimed status as an orphan eligible for adoption and immigration, but instead give automatic, unreviewed credence to such determinations within sending countries, the Hague regime can actually lessen the safeguards against child laundering and child trafficking.¹³¹

Furthermore, Smolin states that receiving nations have failed to effectively implement the safeguards of the HC, even when operating in countries where corruption and abusive adoption practices were known. At the same time, even if relinquishment or abandonment documents are reviewed as part of the adoption procedure provided by the HC, this might be of very little regulatory meaning in cases where the original parents are not capable of reading and understanding the documents in question. Furthermore, creating false relinquishment or abandonment documents could be done systematically anyway.¹³²

Next, even though the goal of the HC is combating abuses in the intercountry adoption system, it is not designed to address criminal law responses to these practices. At most, the HC would facilitate the reporting of criminal offenses to appropriate authorities.¹³³

In addition, Smolin describes that receiving nations have failed to create a credible protocol for dealing with cases of possible child laundering, particularly where the child has arrived in the receiving country. According to Smolin, even when the original family comes forward or when the original family is identified, receiving country authorities and the legal

¹²⁸ Dutch State Secretary of Justice and Security, Answering a parliamentary question regarding illegal adoptions from China, 5700299/11, submitted 13 May 2011, 30 June 2011, pp. 2, 4.;

- Post, R., ‘De perverse effecten van het Haags Adoptieverdrag’, p. 34.;

- Smolin, D.M., ‘Abduction, Sale and Traffic in Children in the Context of Intercountry Adoption’, pp. 7, 14.

¹²⁹ Debate in the Dutch House of Representatives, ‘Vragenuur adoptie uit Ethiopië’, MP Khadija Arib (PvdA) to the Minister of Justice, 11 January 2011.;

- Vlaardingerbroek, P., ‘Alternatieven voor (interlandelijke) adoptie’, p. 56.

¹³⁰ Smolin, D.M., ‘Child Laundering as Exploitation’, p. 54.;

- See also: Dohle, A., ‘Inside Story of an Adoption Scandal’, pp. 181, 183.

¹³¹ Smolin, D.M., ‘Child Laundering as Exploitation’, p. 54.

¹³² Smolin, D.M., ‘Abduction, Sale and Traffic in Children in the Context of Intercountry Adoption’, pp. 14, 17.

¹³³ Ibid., p. 7.

system do the contrary of investigating and intervening. He states this creates a sense of impunity, as there is no accountability even in identified cases of child laundering. Moreover, Smolin states that Central Authorities and placement agencies in receiving countries take a ‘see no evil’ approach.¹³⁴ Investigation is left to the adoption triad (i.e. the original family, the child, and the adoptive parents), the media and NGOs.¹³⁵

Another alleged shortcoming is that the HC fails ‘to sharply and effectively limit the monetary aspects of intercountry adoption’,¹³⁶ for the convention does not estimate where to draw the line between proper and improper financial gain.¹³⁷ Furthermore, Smolin describes that the participation of for-profit individuals and agencies in the intercountry adoption system is still permitted for independent adoptions thanks to negotiations of the US. It seemed that for the US it was not mainly about anti-trafficking concerns, but that the US entered the negotiations from the perspective of trying to maintain the availability of children for ICA.¹³⁸

Roelie Post, official at the European Commission, also noted that the intercountry adoption system of the HC has primarily the effect of maintaining the availability children for ICA. When she was involved in the Romanian reform of the child protection system during Romania’s accession process to the EU, Post experienced that the Hague Convention offers a regulated adoption procedure which makes the adoption process between contracting parties more flexible.¹³⁹ In practice, it causes a regulated¹⁴⁰ and constant offer of and demand for children.¹⁴¹

Another problem seems the decision of the ‘adoptability’ of the child. It is alleged ICA is practiced contrary to the subsidiarity principle of article 4.b HC and UNCRC articles 20(3) and 21.b of ICA as *last resort* (i.e. if the child cannot in any suitable manner be cared for in the child's country of origin). Even the most basic subsidiarity principle that the child should remain with its original family where possible, has not been viewed as a principle of requiring

¹³⁴ See also: Dohle, A., ‘Inside Story of an Adoption Scandal’, p. 184.

¹³⁵ Smolin, D.M., ‘Abduction, Sale and Traffic in Children in the Context of Intercountry Adoption’, pp. 13, 16.

¹³⁶ Ibid., p. 18.;

- See also: Dohle, A., ‘Inside Story of an Adoption Scandal’, pp. 180-181.

¹³⁷ Smolin, D.M., ‘Abduction, Sale and Traffic in Children in the Context of Intercountry Adoption’, pp. 9, 18.

¹³⁸ Ibid., pp. 9-11, 16, 18.

¹³⁹ Post, R., ‘De perverse effecten van het Haags Adoptieverdrag’, p. 35.

¹⁴⁰ The Hague Convention provides for accredited bodies that mediate between provider and recipient (article 9), and a database of prospective adoptive parents and adoptable children (article 15 and 16) who are matched by the accredited body. Furthermore, adoption agencies have quotas. For example, the license of the Belgian agency ‘De Vreugdezaaiers’ was revoked because it did not place at least 30 children per year.

Source: De Coninck, K., ‘Vreugdezaaiers moeten stoppen’, *De Standaard*, 4 November 2010. Retrieved 4 November 2011 from <http://www.standaard.be/artikel/detail.aspx?artikelid=E13HSUS2>.

¹⁴¹ Bainham, A., ‘International adoption from Romania’, p. 226.

active implementation. Smolin writes that ICA practices that do not include family preservation efforts have been viewed as mainstream and licit.¹⁴² Relinquishment because of poverty has become accepted practice (while the money spent on adoption is an amount of money the original family could also be plenty assisted with). Then, ICA as a response to poverty in developing countries is 'in service of the desire of persons in rich countries for children rather than a genuinely humanitarian response to the best interests of children.'¹⁴³

A problem according to Smolin is that although the Preamble to the HC recognises that the first priority of states should be to take appropriate measures to enable the child to remain in the care of his or her family of origin, the convention itself does not explicitly require such efforts to be made as a condition before intercountry adoption is considered. Furthermore, the HC does not make mention of the kinds of family preservation efforts the state should make before ICA is considered;¹⁴⁴ such efforts as mentioned by the UNCRC. Similarly, Bainham describes that the HC does not tell the kinds of measures that states are obliged to take in supporting the birth family, seeking reunification of the child with the family, or providing foster care or possibilities of domestic adoption. Although it could be argued that these alternatives are implicit to the notion of subsidiarity, Bainham argues that the HC provides scant protection for the child and the families concerned. 'It leaves states under much too imperfect an obligation.'¹⁴⁵

Another factor could be, as pointed out in chapter 1, the difference in perception of the principle of subsidiarity of different countries, and between the Hague Convention and the UNCRC. This principle regards the position of ICA as an alternative means of childcare. Critics say that in practice, the reasoning of subsidiarity reflected by the Hague Convention, i.e. not intercountry adoption, but measures of temporary care are the *last resort*, together with the amount of money, has the consequence that sending state parties make children in residential care available for adoption as an attractive source of income.¹⁴⁶ At the same time, with regard to the demand, it is alleged that sending countries are encouraged by receiving countries to perceive only adoption as a suitable measure in offering a permanent family to a child deprived of its original family.¹⁴⁷ Then, residential and foster care are only regarded as

¹⁴² See also: Dhanda, A. and G. Ramaswamy, *On their own*, p. 63.;

- Dohle, A., 'Inside Story of an Adoption Scandal', p. 182.

¹⁴³ Smolin, D.M., 'Abduction, Sale and Traffic in Children in the Context of Intercountry Adoption', p. 17.

¹⁴⁴ Ibid., pp. 5-6.

¹⁴⁵ Bainham A., 'International adoption from Romania', p. 230.

¹⁴⁶ Bos, P., *Once a mother*, p. 237.;

- Post, R., 'De perverse effecten van het Haags Adoptieverdrag', p. 26.

¹⁴⁷ Post, R., 'De perverse effecten van het Haags Adoptieverdrag', p. 30.

temporary care.^{148,149} It is alleged this perception causes a deterioration or neglect of national child protection systems. As described by Smolin, this is because ICA shifts the focus away from (financially less attractive) domestic solutions.¹⁵⁰

As is stated by Browne and Chou in *The relationship between institutional care and the international adoption of children in Europe*, in countries where children are available for ICA, state provisions for family assistance and alternative childcare are limited. Even when such provisions exist, 'parents in difficulty are rarely helped in countries undergoing economic transition due to the poor development of community, health and social services.'¹⁵¹ When ICA is used as a childcare measure in such countries, less effort is made to develop or use domestic alternative care such as proper residential and foster care. Furthermore, since ICA is more profitable than domestic adoption, also this possibility is often neglected.¹⁵² Therefore, Browne and Chou state, 'to encourage international adoption under these circumstances is a failure to uphold international legislation on the rights of parents and their children, which is rarely in the best interests of the child(ren).'¹⁵³ As the Independent Panel was of the opinion in the case of Romania in advising the European Commission:

Especially with intercountry adoption, there is a risk that the institutions responsible for children may impose adoption in cases ... to compensate for their own lack of resources.¹⁵⁴ ... Intercountry adoptions lead to a vicious circle: too many intercountry adoptions will mean that Romania will not see the need for proper child protection. And as long as the child protection is not at European level, Romania risks continuing to use intercountry adoptions.¹⁵⁵

As Bos describes, for a child a family could provide advantages over an institution. Nevertheless, she also saw how adoption as an intervention for children in institutional care meant to enforce an outflow of children from institutions, while simultaneously children were

¹⁴⁸ Foster and residential care is temporary in nature because it leaves the option open of the return of the child to its original family. However, if necessary it may continue until adulthood.
Source: Hodgkin, R., and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*, p. 281.

¹⁴⁹ *Joint Council on international services, Summary Report The Hague Convention's Guide to Good Practice – Permanent Family Care vs. Temporary Care*, 2009. Retrieved 7 December 2011 from <http://jointcouncil.org/wp-content/uploads/2011/02/Summary-Report-on-the-Hague-Convention-Guide-to-Good-Practice-v.f.pdf>.

¹⁵⁰ Smolin, D.M., 'Abduction, Sale and Traffic in Children in the Context of Intercountry Adoption', p. 17.;
- See also: Dhanda, A. and G. Ramaswamy, *On their own*, pp. 46-47.

¹⁵¹ Browne, K. and S. Chou, 'The relationship between institutional care and the international adoption of children in Europe', p. 46.

¹⁵² *Ibid.*;

See also: Dhanda, A. and G. Ramaswamy, *On their own*, p. 63.

¹⁵³ Browne, K. and S. Chou, 'The relationship between institutional care and the international adoption of children in Europe', pp. 41, 46.

¹⁵⁴ Annex: Independent Panel of Family Law Experts of EU Member States, *Summary of opinion on the matter of adoptions*, p. 1.

¹⁵⁵ *Ibid.*, p. 3.

sucked into residential care.¹⁵⁶ Bainham argued as well that, in the case of Romania ‘children are abandoned *precisely because* of the availability of international adoption.’¹⁵⁷ This is also illustrated by the study of Browne and Chou. This study explored the link between institutional care for young children and intercountry adoption. Their results indicate an association between ICA (both incoming and outgoing) and a high number of young children in institutional care. Thus, they state that, rather than a solution to reduce the number of children in institutions as some argue it to be, ICA may contribute to the continuation of the harmful practice of the institutionalisation of children.¹⁵⁸ As Bos experienced in India, this is because of the existence of a market for children and the fact that numerous institutions exist thanks to selling children for adoption, being it their source of income. Bos showed that the system of adoption ‘in its contemporary legal form, puts pressure on [mothers] as potential baby suppliers. Hence, adoption, as it is legally organized, induces a flow of children towards institutions.’¹⁵⁹

The fact that regulations are not the right instruments to prevent illegal adoption is also addressed by Bos. In India, she saw a discrepancy between what the Hague Convention aims to achieve and how this works out in practice. According to Bos:

Conventions, Regulations and Guidelines are not the appropriate instruments because they do not address the main concerns. ... [T]he formal controlling process is counterproductive. Instead of taking away threats, it takes away transparency and causes a mystification of reality. The more adoption is regulated and monitored, the more politically correct objectives get distanced from daily practices [and] employees in the field are transformed into gatekeepers, protecting dossiers and covering up politically unwelcome facts.¹⁶⁰

In sum, as outlined above, critics argue that an intercountry adoption system based on the HC, despite its purpose, could be even more vulnerable to ‘legalised’ illegal adoptions than the adoption system before the convention was implemented. This is because of the market influences on adoption, which the HC does not seem to tackle despite its intentions, together with the fact that the HC facilitates and legalises ICA. As an illustration, below several cases¹⁶¹ of ‘legalised’ illegal adoptions are given. It is analysed how they are formally declared legal, while at the same time based on illegal elements.

¹⁵⁶ Bos, P., *Once a mother*, p. 237.

¹⁵⁷ Bainham, A., ‘International adoption from Romania’, p. 234.

¹⁵⁸ Browne, K. and S. Chou, ‘The relationship between institutional care and the international adoption of children in Europe’, p. 40.

¹⁵⁹ Bos, P., *Once a mother*, pp. 237-238.

¹⁶⁰ *Ibid.*, p. 241.

¹⁶¹ With ‘cases’ it is meant ‘examples’, not ‘court cases’.

2.3 Cases of illegal adoption

*Case Betty*¹⁶²

Countries: the Netherlands (UNCRC and HC) and Ethiopia (UNCRC)

Betty from Ethiopia was taken for adoption to the Netherlands in 2005, together with her younger sister. At the time of adoption, Betty was 6.5 years old. She was mediated through the Dutch adoption agency *Wereldkinderen* (WK). In relation to the preparation of their adoption, Betty and her sister resided in a foster home, the Ethiopian partner of WK, for approximately six months. Their mother sent them here because their father was suffering from HIV and she did not know how to cope with this. The family received financial assistance from *Ossa*, an Ethiopian Humanitarian NGO, but not sufficient to survive on. Instead, the mother was advised to send the children to the foster home and have them adopted, because in the West there would be people who were able to care for the children better. In 2005 the adoptive parents received the children in accordance with Ethiopian law. The Dutch Court gave the recognition to the adoption in 2008. Because there were problems with Betty's integration into the adoptive family, since 2009 Betty is in foster care in the Netherlands. Betty's foster mother arranged that Betty could meet her biological parents in Ethiopia in 2010.

It was discovered that Betty's adoption file stated both her parents had died. This was declared so by court. However, the representative of the foster home, responsible for the case, had not straightened this and thus had been lying in court. Furthermore, the mother agreed to declare Betty one year younger of age because she was told younger children are more attractive for adoption. The mother had signed the papers in which she declared to give her children up for ICA freely. Both the father and the mother were conscious about the consequences of adoption, i.e. that the family relationship would be legally broken. The parents hoped to be informed and to maintain contact. Moreover, the Ethiopian Representative of WK had told Betty's parents that when the children would turn 18 years old, they would have the possibility to get back their Ethiopian nationality and return. Their

¹⁶² Based on: Brandpunt, Dutch television broadcast of 9 January 2011.;

- Debate in the Dutch House of Representatives, 'Vragenuur adoptie uit Ethiopië', MP Khadija Arib (PvdA) to the Minister of Justice, 11 January 2011.;

- File of the Council for Child Protection (Raad voor de Kinderbescherming), on file with author.;

- "*Fruits of Ethiopia*", pp. 53-56.;

- House of Representatives, *Letter from the Dutch Minister of Justice*, 16 February 2010, TK 2009–2010, 31 265, no. 32.;

- Netwerk, Dutch television broadcast of 17 September 2009.

decision was driven by their social, economic and health problems. When Betty visited Ethiopia, her mother told her that at that time she did not know what to do, felt she had no other choice and thought her children would have a better life.

Wereldkinderen was aware that the original parents were alive and of the wrong information in Betty's file. However, WK claims it is only an administrative error of the court; the adoption itself, they say, was arranged on legitimate grounds. WK admitted they were indeed not able to check the facts behind their cases.

In 2009 a research report had been prepared by the organisation *Against Child Trafficking*, made on behalf of WK, which revealed abuses such as illustrated above. After that, WK decided to shut down adoptions from Ethiopia temporarily, and the Dutch government conducted an investigation. In February 2010 the Dutch House of Representatives was informed about the conclusion of the investigation. It stated that there is no reason to reconsider the current adoption relationship between Ethiopia and the Netherlands, because the accredited bodies *Wereldkinderen* and *Stichting Afrika* have taken additional measures. In October 2011 the representative of the foster home was charged in Ethiopia. On 22 November, the Ethiopian court found that the limitation period had expired.¹⁶³ After that, the Ethiopian Public Prosecutor lodged an appeal.¹⁶⁴

This adoption case involves falsification of documents and lying in court. Furthermore, in the country of origin intercountry adoption was arranged, while no other domestic alternative care solutions had been exhausted. Hence, ICA is not arranged as a last resort solution. Next, the adoption agency in the receiving country appears incapable of properly checking on the legitimacy of its mediated cases. In addition, money was made with the adoption by the mediating agencies in both countries. With this money, the children might also have been able to remain within the original family, which gave up the children for adoption because of social, economic and health problems. To conclude, although this adoption is arranged through the official adoption procedures, it could be considered not to be in accordance with the UNCRC and the HC.

¹⁶³ Ethiopian court order November 2011, on file with author.

¹⁶⁴ Email correspondence with Ethiopian lawyer, dated 9 January 2012, on file with author.

Case Rahul¹⁶⁵

countries involved: the Netherlands (UNCRC and HC) and India (UNCRC and HC)

During the night in Chennai, India, Satish, son of Nagarani and Kathirvel, was kidnapped in 1999. Five years later the kidnappers were arrested and they confessed that Nagarani's son had been sold to the orphanage *Malaysian Social Services* (MSS). Subsequently he was given for adoption in the Netherlands, through the mediation of the Dutch adoption agency *Meiling*. The relinquishment documents had been falsified and the boy was given a different name, Anbu. A fictional mother relinquished him. The Dutch adoptive parents, that received their child in 2000, were not aware of these facts and had properly complied with all adoption procedures.

The alleged son of Nagarani and Kathirvel, called Rahul by the Dutch media, has been retraced in the Netherlands with his adoptive family. A civil court case was filed in the Netherlands on behalf of the original parents, which took place in June 2010. To prove that the child indeed is the son of Nagarani, the exclusive method is DNA testing. The court rejected the request for a DNA test primarily because it was not considered in the best interest¹⁶⁶ of Rahul to undergo this test. It was established by a psychologist that he was not ready to be confronted with his adoption background. Because of a lack of evidence as a result, the judge did not respond to the matter whether there is family life (ECHR article 8) between the original parents and Rahul, whether they are his biological parents, and whether they have the right to parental access. The appeal hearing was held in January 2012.¹⁶⁷

Following disclosure of the abuses concerning the adoption, in 2007 the Dutch Minister of Justice asked for an investigation that was threefold. The first two have been concluded. The Youth Care Inspectorate investigated the role of adoption agency *Meiling*, and *Commission Oosting* examined the actions of the Ministry of Justice. This showed that the supervision by the government on foundation *Meiling* had been insufficient. The adoption agency itself in the past did not check sufficiently whether the relinquishment procedures of the mediated children were followed correctly. The Dutch Minister of Justice claimed that the

¹⁶⁵ Based on: ACT. *Parents Nagarani and Kathirvel*. Retrieved 19 January 2012 from <http://www.againstchildtrafficking.org/category/pap/nagarani/>;

- Court Zwolle-Lelystad (NL), 4 March 2010, LJN BP6936, Note P. Vlaardingerbroek, pp. 360-366.;
- House of Representatives (NL), *Report of a general consultation*, TK 2003–2004, 28 457, no. 13.;
- Netwerk, Dutch television broadcasts of 22 and 23 May 2007, and 15 and 22 June 2010.;
- Nova, Dutch television broadcast of 25 May 2007.

¹⁶⁶ However, this explanation of 'best interest' is limited. In the scope of the UNCRC it would mean that, e.g. also the rights and duties of the original parents and the child's right to know his identity have to be considered. Any interpretation of best interests must be consistent with the spirit of the entire Convention (article 3 UNCRC).

¹⁶⁷ According to non-profit organisation *Against Child Trafficking*.

third investigation, on what happened in India, to date has not brought up any results.¹⁶⁸ However, a criminal investigation is running in India by India's Central Bureau of Investigation (CBI) and the charge sheets have been filed in court.¹⁶⁹

The Indian authorities claim that Rahul is not an isolated adoption case from MSS; according to them there are at least 50 such cases.¹⁷⁰ Different experts, i.a. professor Hoksbergen, claimed it had long been known that MSS could not be trusted and that *Meiling* should have been aware of that.¹⁷¹

In the Dutch newspaper *De Telegraaf*, criminal law experts, professor international criminal law Geert-Jan Knoops and criminal justice lawyer Frank van Ardenne, said in 2007 that the Dutch Public Prosecutor should investigate the case. According to them, it should be investigated whether board members of agency Meiling are suspects in the case. The newspaper article says that specialists in adoption doubt whether the investigation of the Ministry of Justice is independent and objective because the ministry, being the Central Authority (as provided by the HC), is party in adoption cases. Van Ardenne stated that the government therefore could be accessory to violation of Dutch criminal law.¹⁷²

In 2010 after the civil court case, the biological parents of Rahul tried to file the case at the police Almere. The head officer of the police called his hierarchy and after that replied that there would be no case. The crime had not taken place at Dutch soil, but in India, he claimed.¹⁷³

This adoption case involves kidnapping of a child and falsification of documents. Furthermore, the foster home in sending country appears to be involved in more adoptions that have been alleged to be abusive. Next, the adoption agency in the receiving country appears incapable of properly checking its mediated children. Moreover, it involves insufficient supervision by the Ministry of Justice on its accredited bodies. In addition, it appears there are insufficient legal provisions to deal with criminal offences in this civil matter of adoption.¹⁷⁴ To conclude,

¹⁶⁸ House of Representatives, *Letter from the Dutch Minister of Justice*, 22 December 2011, TK 2011–2012, 31 265, no. 41.

¹⁶⁹ In the Honourable Court of Additional Chief Metropolitan Magistrate, Egmore, Charge Sheet no. & date: SBS /2009/ RC 51/2007, on file with author.

¹⁷⁰ Netwerk, Dutch television broadcasts of 23 May 2007.

¹⁷¹ Nova, Dutch television broadcast of 25 May 2007.

¹⁷² Van der Graaf, J., 'OM moet eigen onderzoek doen in adoptiezaken', *De Telegraaf*, 28 May 2007.

¹⁷³ According to non-profit organisation *Against Child Trafficking*.

¹⁷⁴ For example, the Netherlands and India are parties of the Hague Convention. By this convention, there is an adoption agreement between the two countries. However, the Dutch Ministry of Justice claims there are no criminal law agreements between the countries. Or as Smolin writes: 'Even within this goal [of the HC] of combating child traffic in the intercountry adoption system, the Hague Convention is not designed to be

although this adoption is arranged through the official adoption procedures, it could be considered not to be in accordance with the UNCRC and the HC.

Case Schröder¹⁷⁵

countries involved: Germany (UNCRC and HC) and Russia (UNCRC)

In section 2.1 an adoption was defined generally illegal when arranged outside the official channels. Here follows an example of such an adoption while at the same time officially not being illegal. It concerns the two adoptions of former Bundeskanzler Gerhard Schröder.

Schröder, at the age of 60 and 62,¹⁷⁶ has adopted two children from Russia: Viktoria in 2004 and Gregor in 2006. Former president of the Russian Federation and friend of the Schröder family, Vladimir Putin has helped to arrange the adoptions. Putin, who claims to be committed to Russian orphans, thought Schröder would be a suitable adoptive father. Following Russian consent to the adoption, after a visit from Schröder and his wife to St. Petersburg they brought Viktoria to Germany in the government jet. The second child has been claimed to be a gift of Putin after the Nord Stream agreement between Russia and Germany.¹⁷⁷

Although Germany is contracting party of the Hague Convention, the HC procedure has not been followed. Terre des Hommes (TdH) Germany had been criticising Schröder's adoption in 2004 because the official procedure was violated. 'After careful research we have the impression that this adoption was done without professional preparation and support,' said Bernd Wacker, adoption expert of TdH. In addition, the Central Authority of the Bundesland concerned was not informed about the adoption. In the name of his daughter, Schröder asked

comprehensive. Thus, ... the Convention is not designed to address criminal law responses to these practices; at most, the Convention would facilitate the reporting of criminal offenses to appropriate authorities.'

Source: Smolin, D.M., 'Abduction, Sale and Traffic in Children in the Context of Intercountry Adoption', pp. 7, 13, 16.

¹⁷⁵ Based on: Familienrecht: Adoption ohne Richtschnur, *Der Spiegel*, no. 38 (2004), p. 20.;

- Von Fröhlingsdorf, M., W. Mayr, C. Meyer, et al., 'Familien: Tochter aus der Fremde', *Der Spiegel*, no. 35 (2004), pp. 46-49.;

- Hipp, D., *Kein Diskussionsverbot*, 27 September 2004, Spiegel Online. Retrieved 2 November 2011 from <http://www.spiegel.de/panorama/0,1518,320186,00.html>.;

- Pravda.ru. (17 August 2004). *Gerhard Schroeder and his wife adopted Russian girl from President Putin's hometown*. Retrieved 2 November 2011 from <http://english.pravda.ru/russia/politics/17-08-2004/6589-schroeder-0/>.;

- Spiegel Online. (11 September 2004). *Schröder-Adoption: Kritische Fragen von Terres des Hommes*. Retrieved 2 November 2011 from <http://www.spiegel.de/panorama/0,1518,317650,00.html>.

¹⁷⁶ Generally under adoption laws it would not have been possible for Schröder to adopt the children because it is considered there is a too big difference in age between the adoptive parent and the child.

¹⁷⁷ Currently Schröder is Chairman of the Board of Nord Stream AG, formed by i.a. Gazprom, which is building the Nord Stream gas pipeline.

the court for an injunction to prevent TdH from making further public statements about the case. The lawyer of TdH then stated the organisation was free to criticise the matter.

Schröder's adoptions are *Volladoptions*. This means that Russian adoption law provides that the adopted child receives the legal status of the natural child of the adoptive parent. Because the children are adopted under Russian adoption law, and therewith became Schröder's 'full' children, perhaps a German review by the court was not necessary.¹⁷⁸

In this case, it concerns a private adoption, which is allowed in Germany. Then, however, authorities in the receiving country are not involved, and are not in the position to establish whether the adoption was arranged on the right grounds, whether it took place in the best interest of the child and whether domestic solutions have been exhausted. In addition, because the welfare of children requires an ethical approach, one could consider there is a wrong signal from the adoptions arranged at such high levels. In accordance with the UNCRC, if its family is not able to care for the child, alternative domestic childcare is the responsibility of the state. In this case, the state gave the child away in a foreign country. To conclude, it could be considered not to be in accordance with the UNCRC and the HC.

Case adoption from Poland¹⁷⁹

countries involved: the Netherlands (UNCRC and HC) and Poland (UNCRC and HC)

In 1999 a Dutch couple adopted two children, siblings from Poland, born in 1994 and 1995. They opted for children with a minor disability that could be remedied by an operation. Prior to their adoption, the children successively lived with their parents, in a children's home, with their grandmother, and in the children's home again. They have two older sisters, still living with their mother.

¹⁷⁸ Bundesamt für Justiz. Auslandsadoption. *Die rechtlichen Wirkungen einer im Ausland oder nach ausländischem Recht ausgesprochenen Adoption eines minderjährigen Kindes*, Staatenliste betreffend die rechtlichen Wirkungen einer im Ausland oder nach ausländischem Recht ausgesprochenen Adoption eines minderjährigen Kindes, Bundeszentralstelle für Auslandsadoption, August 2010. Retrieved 19 January 2012 from http://www.bundesjustizamt.de/cln_115/nn_2043228/DE/Themen/Buergerdienste/BZAA/Adoptionswirkungen/Adoptionswirkungen_Laenderliste.templateId=raw.property=publicationFile.pdf/Adoptionswirkungen_Laenderliste.pdf, p. 81.;

- Bundesamt für Justiz. Auslandsadoption. *Häufig gestellte Fragen. 10. Was versteht man unter einer Volladoption bzw. einer starken oder schwachen Adoption?* Retrieved 19 January 2012 from http://www.bundesjustizamt.de/cln_115/nn_2043186/DE/Themen/Buergerdienste/BZAA/Fragen/Fragen_node.html?_nnn=true#doc257860bodyText10.

¹⁷⁹ Email correspondence with adoptive father, dated 30 August 2009 and 1 November 2011; and interview, dated 26 September 2009, on file with author.

At the time of the adoption, the two children lived in the children's home. Their father was in prison and their mother lived, together with the two elder sisters, in a shelter home because she could not pay the rent anymore. According to the adoptive father, the children's home was a suitable place, with around eight children per room, and the children were provided with education and medical care.

When the adoptive parents visited Poland in 1999, the paediatrician of the hospital told them that the children were healthy. Back in the Netherlands soon it became clear that something was wrong with them. After several examinations it turned out the children were not having minor disabilities, but that they were suffering from FAS (foetal alcohol syndrome), which causes permanent central nervous and brain damage and other deficiencies.

Years later, after a roots trip to Poland that included a visit to the original parents, the adoptive family became aware that the original parents felt injustice was done to them. The adoption has been mediated by the adoption agency *Stichting Kind & Toekomst*.

In accordance with the UNCRC, if the original family is not able to care for the child, alternative domestic childcare is the responsibility of the state. Only if there is no suitable domestic solution available, intercountry adoption may be considered. In this case, the children resided in a children's home. As indicated in chapter 2, p. 34, it is alleged that the system of ICA causes the national childcare system to deteriorate. This might be also of influence on the Polish system of coping with FAS. Although this adoption could be in accordance with the HC and its perception of preferring ICA over institutional care, this adoption could be considered not to be in accordance with the UNCRC.

Case adoption procedures of Bulgaria, Poland, Ethiopia

countries involved: Bulgaria (UNCRC and HC), Poland (UNCRC and HC), Ethiopia (UNCRC)

In Bulgaria it is regulated that every child placed in alternative care is registered first in the national database. After six months, the child is also available for ICA.¹⁸⁰ In Poland, an intercountry adoption may be arranged after two periods of three months searching for a suitable family in Poland (first on the regional level, then on the national level from the

¹⁸⁰ Email correspondence with representative SOS Children's Villages International to the EU, dated 11 October 2011, on file with author.

central database). After these six months, the child is also qualified for ICA.¹⁸¹

According to Ethiopian law, children from Ethiopia who are eligible for intercountry adoption are either foundlings, children with no caregivers or family members available to care for them, or children of whom it is identified that the parents are not able to care for them due to medical or economic circumstances. If it is established that the children were given up voluntarily and out of legitimate reasons, the child is placed in a children's home. After that, generally a period of three months is taken into account before the child is eligible for ICA. With regard to the Netherlands, after this period of three months, the mediation procedure enters into force in which the Dutch adoption agency and the Ethiopian children's home come to a proposal for the matching of the child with prospective adoptive parents.¹⁸²

These procedures could be in accordance with the HC and its perception of preferring ICA over institutional care. However, this procedure could be considered not to be in line with the UNCRC, since after a period of several months the child is available for ICA, although in alternative care and without exhausting other forms of alternative care and family assistance. Furthermore, medical and economic circumstances are considered legitimate reasons for putting a child up for adoption.

Case Dutch-American adoption procedure¹⁸³

United States (HC) and the Netherlands (UNCRC and HC)

The United States (US) belongs to the group of receiving countries of children through intercountry adoption.¹⁸⁴ At the same time, the country offers children for ICA. In 2009, the Dutch Minister of Justice let the adoption partner in the US know that adoptions from that country to the Netherlands were only possible if they were in accordance with the subsidiarity principle of article 21 UNCRC. However, in 2011 the Dutch Ministry of Justice informed prospective adoptive parents that there were new rules with regard to adoptions from the US. In its letter of 17 October 2011, a new explanation of the principle of subsidiarity is given.

¹⁸¹ Articles 9(1) and (2). Dz. U. Nr. 84, poz 394, Rozporządzenie Ministra Edukacji Narodowej, w sprawie ośrodków adopcyjno-opiekuńczych, 1993.

Retrieved 1 February from <http://e-prawnik.pl/akty/e/b/ccd2b857c4d8660deb67800a464c2c34.pdf>.

¹⁸² Based on: House of Representatives, *Letter from the Dutch Minister of Justice*, 16 February 2010, TK 2009–2010, 31 265, no. 32.

¹⁸³ Based on: Letter of the Dutch Minister of Justice, 'Aan aspirant-adoptiefouders die vanuit de VS willen adopteren', 5713067/11/DJJ, 17 October 2011.;

- Letter of the Dutch Minister of Justice to US adoption contact, 'Adoption regulations in the Netherlands, 20 April 2009, on file with author.

¹⁸⁴ Council of Europe Commissioner for Human Rights, *Adoption and Children*, prepared by N. Cantwell.

Currently, domestic alternative care solutions do not have to be exhausted anymore before ICA is considered. The new conditions are in conformity with American law, which means that the parent who relinquishes the child is allowed to choose the adoptive parent(s); also if it concerns adoptive parent(s) in a foreign country.

This new procedure is in accordance with US law. However, it could be considered not to be in accordance with the UNCRC and the HC. The US indeed is not member to this convention, but the Netherlands is. Therefore, in 2009 the Netherlands required ICA from the US to be in accordance with the UNCRC. With its letter in 2011 another approach is chosen, and preference is given to the right of US birth parents to chose adoptive parents, instead of the right of the child to domestic alternative care.

Case child relinquishment in India¹⁸⁵

countries involved: India (UNCRC and HC)

Pien Bos, Dutch anthropologist, dedicated her dissertation to relinquishment procedures in Tamil Nadu, India. Although it has been claimed that most children available for adoption from India concern children relinquished by unwed mothers, Bos found out this was not the case; the majority of relinquished children were unwanted girls from married couples. For her research Bos chose for the former category. She did fieldwork for two years. Why did the mothers relinquish their child? Apart from cultural and social influences, the decision-making process of the mothers was influenced by NGOs where they sought help. Bos experienced that, once an unwed pregnant woman found herself within the walls of an NGO, there was no way back.¹⁸⁶ The irreversible decision to relinquish the child was made sometimes within a few hours. The women were told that adoption was a good solution to rehabilitate them. In addition, mothers saw their baby as a gift to the NGO because they felt indebtedness for the services they had received. Furthermore, mothers were aware of the NGOs urge to sell babies to rich parents and they were conscious of their role as ‘baby-suppliers’. Moreover, the mothers saw how many foreigners paid for the child, and presumed this amount of money they would also have to pay to keep the child. Sometimes giving the baby away was the condition for receiving the NGO’s services.

¹⁸⁵ Based on: Bos, P., *Once a mother*, pp. 223-241.

¹⁸⁶ Bos makes the comparison with a funnel shaped net used to trap fish. The American word is *fyke*; in Dutch *fuik*.

Source: Ibid., p. 220.

The mothers who relinquished their child continued to see themselves as the real mothers. For them, the relinquishment of their child meant only that they handed over the care of their children, not their motherhood. The relinquishment documents were read out to the mothers before signing. It serves to inform them about the legal consequences of this act. However, Bos states ‘just reading the document is inadequate and incomplete information with regard to the life-long implications of this act.’ Strikingly, the unwed mothers Bos interviewed that had not sought help from an NGO, all had been able to keep their child.¹⁸⁷

In sum, the children were relinquished at an NGO that arranged adoptions following the official adoption procedures provided for by the HC. An adoption was possible because these children were officially relinquished. However, also these adoptions could be considered not to be in accordance with the UNCRC.

Conclusion

A decision on adoption is always made in court, and therewith all adoptions are formally legal. In this chapter, an illegal adoption is defined as an adoption that involves illegal elements up to and including the judgement. The illegal elements are violations of the law and fundamental rights. Next, it is explored why illegal adoptions take place. The explanation given is the existence of a market in children: it involves demand of prospective parents, offer of children deprived from a family, intermediaries such as adoption agencies, and money paid for the adoption. It appeared that this ‘market’ is demand driven, as currently demand exceeds supply. This results in pressure from ‘richer’ receiving countries on ‘poorer’ sending countries to make children available for intercountry adoption.

Another aspect is the adoption procedures of countries provided by Hague Convention that appear unable to prevent abuses. On the one hand, this might be because the UNCRC and the HC are not properly implemented. On the other hand, in fact, it is alleged that the problem of adoption procedures seems that children are ‘laundered’ just because of the regulated adoption process offered by the HC. This is because the HC brings together demand and supply in order for an adoption match. Pressure of the market and the amount of money involved, which is allowed under the HC, makes it attractive for sending state parties from developing countries to make children in residential care available for adoption.¹⁸⁸ This is

¹⁸⁷ Ibid., pp. 196, 233.

¹⁸⁸ Post, R., ‘De perverse effecten van het Haags Adoptieverdrag’, p. 26.

further strengthened by the perception that ICA is to be preferred over temporary forms of childcare. At the same time, the principle of mutual trust lessens strict control of adoptions.

Finally, an illustration of these theories is given by different cases of ICA that are arranged in accordance with a formal procedure, while involving illegal elements. It is showed that these cases involved elements that were in breach of the HC, e.g. the abduction of a child, and the UNCRC, e.g. solutions of family assistance and alternative domestic care have not been exhausted prior to the intercountry adoption. The cases were all examples of 'legalised' illegal adoptions, which are labelled 'illegal' in this research.

3 Illegal adoption as child trafficking

Introduction

Trafficking in human beings (THB) is commonly regarded as a contemporary form of slavery.¹⁸⁹ It is fundamentally considered a criminal act,¹⁹⁰ and a violation of human rights.¹⁹¹ THB is also connected with globalisation, i.e. deterritorialisation of trade¹⁹² but also of crime,¹⁹³ and possibly inequality and vulnerability as a result.¹⁹⁴ People are trafficked often because of vulnerability related to the conditions in the country of origin.¹⁹⁵ The pull factor is that in the countries of destination demand¹⁹⁶ exists for e.g. sex workers, cheap labour,¹⁹⁷ organs,¹⁹⁸ and children for adoption.¹⁹⁹ The high level of profits generated is a major underlying driver for traffickers.²⁰⁰

This chapter describes what is considered trafficking in human beings, and whether illegal adoption – as defined in the previous chapter – falls within this scope. Different definitions of THB in legal instruments and ideas in the literature are examined. First, the definition of trafficking in human beings *for the purpose of exploitation* is outlined.

¹⁸⁹ As described by described by Tom Obokata in *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach*, slavery and slave trade can be seen as the origins of modern day trafficking. However, because it involves practices distinct from slavery and slave trade, it has also been dealt with separately under international law.

Source: Obokata, T., *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach*, Leiden: Martinus Nijhoff Publishers 2006, pp. 17, 18.;

- See also: Council of Europe. *Action against trafficking in human beings*. Retrieved 2 December 2011 from http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Convntn/FSConv_en.asp.

¹⁹⁰ Touzenis, K., *Trafficking in Human Beings: Human rights and trans-national criminal law, developments in law and practices*, UNESCO migration studies, no. 3, 2010, p. 52.

¹⁹¹ Obokata, T., *Trafficking of Human Beings from a Human Rights Perspective*, pp. 3-4.;

- Preamble to the Council of Europe Convention on Action against Trafficking in Human Beings, 2005.

¹⁹² Brenner, N., 'Globalisation as Reterritorialisation: The Re-scaling of Urban Governance in the European Union', *Urban Studies*, vol. 36, no. 3 (1999), p. 439.;

- Croucher, S.L., *Globalization and Belonging*, pp. 10-12.

¹⁹³ Smartt, U., 'Human Trafficking: Simply a European Problem?', *European Journal of Crime, Criminal Law and Criminal Justice*, vol. 11, no.2 (2003), p. 164.

¹⁹⁴ Shifman, P., 'Trafficking and women's human rights in a globalised world', *Gender and Development*, vol. 11, no. 1 (2003), pp. 126-127.

¹⁹⁵ UN.GIFT Trafficking an overview. UN 2008, p. 6.

¹⁹⁶ Aronowitz, A.A., 'Smuggling and Trafficking in Human Beings: the Phenomenon, the Markets that Drive it and the Organisations that Promote it', *European Journal on Criminal Policy and Research*, vol. 9, no. 2 (2001), p. 185.;

- Shifman, P., 'Trafficking and women's human rights in a globalised world', pp. 125-126.

¹⁹⁷ Touzenis, K., *Trafficking in Human Beings*, p. 99.

¹⁹⁸ Pearson, E., *Coercion in the Kidney Trade? A background study on trafficking in human organs worldwide*, Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH, Eschborn, April 2004, pp. 1-40.

¹⁹⁹ Smolin, D.M., 'Child Laundering', p. 134.

²⁰⁰ *Proposal for a Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA*, COM(2010)95 final - 2010/0065 (COD), 29 March 2010, p. 2.

Subsequently, the definition of trafficking in human beings *for any purpose* is discussed. Based on these two definitions, it is estimated when illegal adoption can be considered child trafficking.

3.1 Trafficking in human beings for the purpose of exploitation

International legal instruments against THB

Recently, new international instruments have been developed in the area of criminal law on trafficking in human beings. Examples are the 2000 UN *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, and the 2005 Council of Europe *Convention on Action against Trafficking in Human Beings*. At European Union (EU) level, in 2011 the European Parliament and Council adopted Directive 2011/36/EU *on preventing and combating trafficking in human beings and protecting its victims*. In this section the definition of THB and the position of intercountry adoption therein according to the legal instruments on THB of the United Nations, the Council of Europe, and the European Union are described.

The UN Trafficking Protocol, entitled *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, was adopted in 2000, Palermo, Italy. The protocol supplements the *UN Convention against Transnational Organized Crime*.²⁰¹ The convention and the protocol entered into force in 2003. It is the first legally binding UN instrument in the field of crime.²⁰² The UN Trafficking Protocol provides for a holistic approach. This means it is not only a criminal justice response, but the issue is also viewed from a human rights perspective. Therewith consideration is given to the wider issues such as causes and consequences of THB. Next, the focus is not only on the supply side in countries of origin (i.e. people in a vulnerable position related to the conditions in the country of origin),²⁰³ but also on the demand side in countries of destination.²⁰⁴

In addition, the Council of Europe created a legal instrument on action against trafficking in human beings: the *Council of Europe Convention on Action against Trafficking in Human Beings* (hereinafter the CoE Convention against Trafficking). The Council of Europe considered trafficking in human beings to have become a major problem in Europe. The organisation brings together, among its 47 member states, countries of origin, transit and

²⁰¹ Obokata, T., *Trafficking of Human Beings from a Human Rights Perspective*, p. 18.

²⁰² Aronowitz, A.A., 'Smuggling and Trafficking in Human Beings', p. 164.

²⁰³ Touzenis, K., *Trafficking in Human Beings*, p. 7.

²⁰⁴ Obokata, T., *Trafficking of Human Beings from a Human Rights Perspective*, pp. 4, 6.

destination of the victims of trafficking. Therefore, the Council of Europe considered that it was necessary to draft a legally binding instrument.²⁰⁵ The CoE Convention against Trafficking takes account of the UN Trafficking Protocol.²⁰⁶ The convention entered into force on 1 February 2008.

Also at EU level, efforts are made in the area of THB. On 19 July 2002 the Council of Ministers of the European Union adopted the 2002/629/JHA *Council Framework Decision on combating trafficking in human beings*. With this framework decision, the European Commission wished to complement the existing instruments used to combat trafficking in human beings, i.a. the UN Trafficking Protocol, and strengthen the commitment of the EU to preventing and combating trafficking in human beings.²⁰⁷ Because the Commission considered the framework decision to fall short as a comprehensive anti-trafficking policy, in 2009 the Commission submitted to the Council a proposal for a new Framework Decision on trafficking. Because of the entry into force of the Lisbon Treaty the proposals were inactivated. Since the Lisbon Treaty, the system of framework decisions is not longer used. Under this treaty, new decision-making processes are put in place. For the area of criminal law, the European Parliament and the Council, after the proposal of the Commission, adopt a directive with each other's assent. On 29 March 2010 the Commission made a proposal for the *EU Directive on preventing and combating trafficking in human beings and protecting its victims* (hereinafter the EU Anti-trafficking Directive).²⁰⁸ The directive entered into force on 5 April 2011.

Definition of THB

The instruments created after the UN Trafficking Protocol adopted its definition of THB. To avoid repetitions, only the definition of the EU Anti-trafficking Directive is given here²⁰⁹ (additions to the UN Trafficking Protocol are indicated in *italics*):

1. Member States shall take the necessary measures to ensure that the following intentional acts are punishable:

²⁰⁵ Council of Europe. *Action against trafficking in human beings*. Retrieved 2 December 2011 from http://www.coe.int/t/dghl/monitoring/trafficking/docs/convntn/FSConv_en.asp.

²⁰⁶ Preamble to the Council of Europe Convention on Action against Trafficking in Human Beings, 2005.

²⁰⁷ Europa. Summaries of EU legislation. *Combating trafficking in human beings*. Retrieved 2 December 2011 from http://europa.eu/legislation_summaries/justice_freedom_security/fight_against_trafficking_in_human_beings/l33137_en.htm.

²⁰⁸ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, Official Journal of the European Union, L 101/1, 15 April 2011.

²⁰⁹ Emphasis added.

[**activity**] The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by **means** of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the **purpose** of exploitation.

2. *A position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved.*

3. Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, *including begging*, slavery or practices similar to slavery, servitude, *or the exploitation of criminal activities*, or the removal of organs.

4. The consent of a victim of trafficking in human beings to the exploitation, whether intended or actual, shall be irrelevant where any of the means set forth in paragraph 1 has been used.

5. When the conduct referred to in paragraph 1 involves a child, it shall be a punishable offence of trafficking in human beings even if none of the means set forth in paragraph 1 has been used.

In sum, the constitutive elements of trafficking in human beings are²¹⁰

- 1) **Activity:** recruitment, transportation, transfer, harbouring or receiving of persons.
- 2) **Means:** threat or use of force, or other forms of coercion, abduction, fraud, deception, abuse of power or a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person.
- 3) **Purpose:** to exploit the person, as a minimum for prostitution, for sexual exploitation, forced labour, or services, slavery and slavery-like practices, servitude, begging, exploitation for criminal activities, or the removal of organs.

Illegal adoption as a form of THB

Illegal adoption as a form of THB is considered during the preparations of the legal instruments. In the *Travaux Préparatoires* of the UN Trafficking Protocol it is noted that, for the purpose of exploitation, ‘at a minimum’ was added because two delegations wanted to ensure that the protocol would cover trafficking for other purposes than ‘slavery, forced labour or servitude, including through sexual exploitation’, such as illegal adoption and

²¹⁰ Touzenis, K., *Trafficking in Human Beings*, p. 24.

trafficking in body organs.²¹¹ It was approved in the *Travaux Préparatoires* that if illegal adoption amounts to a practice similar to slavery as defined in article 1.d of the 1956 UN Supplementary Convention on the Abolition of Slavery²¹² it will also fall within the scope of the protocol.²¹³ This article states:²¹⁴

Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the *exploitation* of the child or young person or of his labour.

The *Explanatory Report* to the CoE Convention against Trafficking endorses article 1.d of the UN Supplementary Convention on the Abolition of Slavery, and states that the definition of trafficking in human beings does not refer to illegal adoption as such.²¹⁵

The EU Anti-trafficking Directive is based on the above-mentioned conventions. It provides that the definition of trafficking in human beings also covers ‘behaviour such as illegal adoption or forced marriage insofar as they fulfil the constitutive elements of trafficking in human beings’, i.e. activity, means and the purpose of exploitation.

In sum, in accordance with the above-described international legal instruments, illegal adoption is considered a form of THB when a child is illegally adopted for the purpose of exploitation. However, the term ‘exploitation’ is not clearly defined.

Illegal adoption and the constitutive elements

It is described next how the above-mentioned constitutive elements of THB could be applied to illegal adoption.

Illegal adoption and ‘activity’

The recruitment, transportation, transfer, harbouring or receiving of a child for ICA.

Since intercountry adoption involves the transfer of a child from his or her country of origin to another country for adoption, the *transportation, transfer, and receiving* of children are inherent elements of ICA. Furthermore, residence of children in an institution prior to the adoption could be considered *harbouring* of children, in case the institution has the policy of

²¹¹ *Travaux Préparatoires* of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (2006), p. 342.

²¹² United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956

²¹³ *Travaux Préparatoires* of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (2006), p. 347.

²¹⁴ Emphasis added.

²¹⁵ *Explanatory Report* of the Council of Europe Convention on Action against Trafficking in Human Beings, par. 94.

putting children up for ICA instead of offering child's care. With regard to *recruitment*, in an investigation of adoption cases from Ethiopia it is written that in Ethiopia children are recruited for adoption:

It appears that there is a system of collecting children from villages. Orphanages send their busses. Child recruiters are paid monthly salaries. These recruiters are also active in health centres and other places where families go for help.²¹⁶

Hence, the element 'activity' of THB could apply to illegal intercountry adoptions.

Illegal adoption and 'means'

The use of threat or force, or other forms of coercion, abduction, fraud, deception, abuse of power or a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person.

In the current international definition of THB, when the conduct involves a child, it concerns the offence of trafficking even when none of the means are used. However, in section 2.3 an example is given where the child was obtained through abduction, as well as examples of fraud, e.g. the falsification of birth papers and relinquishment documents. Furthermore, examples were given of abuse that is made of the vulnerable position of mothers or families. Sometimes, certain benefits are offered to these families, e.g. by means of assistance from NGOs in exchange for the child. Hence, the element 'means' of THB could apply to illegal intercountry adoptions.

Illegal adoption and 'purpose'

The exploitation of a person, as a minimum for prostitution, for sexual exploitation, forced labour, or services, slavery and slavery-like practices, servitude, exploitation for criminal activities, or the removal of organs.

The cases of illegal adoptions described in section 2.3 have the character of being arranged through the official adoption procedure while involving illegal elements. These cases are not examples of illegal adoptions that involved subsequent exploitative purposes as included in the current international definition of THB. However, according to Anne Gallagher in *The International Law of Human Trafficking*,

The question whether abusive, illegal, unethical or otherwise undesirable adoption practices fall within the international definition of trafficking has been periodically raised since the definition was finalized, without satisfactory resolution. While adoption is not included in

²¹⁶ "Fruits of Ethiopia", p. 41.

the list of exploitative purposes, the open ended nature of that list means that the omission is not conclusive.²¹⁷

In accordance with the international instruments against THB, illegal adoption is regarded as a form of THB when a child is illegally adopted for the purpose of exploitation as defined by article 1.d of the UN Supplementary Convention on the Abolition of Slavery. As Gallagher states, this provision is obscure as it does not define ‘exploitation’. Furthermore, it is unclear whether the intent to exploit must be held by the guardian or parent, the receiver, or both. However, it seems to point out that illegal adoption is not exploitation per se.²¹⁸ Such a result would mean that an illegal adoption that involves the activity and means of THB, for purposes of non-exploitative adoption would not be trafficking. According to Gallagher, elements that are involved in illegal adoption and the commodification of children in the international adoption market are intuitively associated with THB, but the legal aspects of that link have not been explored in great depth.²¹⁹

To conclude, illegal adoption would fall within the scope of the current international definition of THB if subsequent exploitation is involved. Examples of exploitative behaviour are i.a. for sex, labour or organs. However, the definition of exploitation includes ‘as a minimum’ and is therewith left open. Thus, it could be argued that illegal adoption also falls within its scope. This is further explored in section 3.3. Another question that is part of debate is whether the element of exploitation is required with regard to illegal adoption and THB. This is explored in section 3.2.

3.2 Trafficking in human beings for any purpose

In defining illegal adoption as a form of trafficking, it is the question whether exploitation should be a key element as provided by the definitions of THB above. For example, according to Tom Obokata in *Trafficking of human beings from a human rights perspective*, the element of subsequent exploitation may turn out problematic, because not all trafficked people are exploited afterwards. Under such circumstances, the act may not be considered trafficking even when victims experienced human rights abuses during the process. Obokata proposes to treat subsequent exploitation as a sufficient but not necessary element of trafficking.²²⁰

²¹⁷ Gallagher, A.T., *The International Law of Human Trafficking*, Cambridge University Press 2010, p. 40.

²¹⁸ Ibid., p. 41.

²¹⁹ Ibid., pp. 41-42.

²²⁰ Obokata, T., *Trafficking of Human Beings from a Human Rights Perspective*, pp. 20, 28, 82.

Moreover, the UNCRC provides for a broader approach of trafficking. Article 35 UNCRC:²²¹

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children **for any purpose** or in any form.

As illustrated by Cantwell with regard to the question '[i]s intercountry adoption linked with trafficking for exploitation?' Cantwell states:

While some children are certainly 'trafficked **for** the purpose of adoption', there is no evidence, as far as we know, that children have been 'trafficked **through** adoption for subsequent exploitation.'²²²

Cantwell states that according to the UNCRC no exploitative aim is necessary for an act to be qualified as trafficking. Therefore, under the terms of the UNCRC, trafficking can also be deemed to take place for a legal purpose such as adoption.²²³

Abduction, sale and trafficking

Article 35 UNCRC requires that states take action to prevent the abduction, sale or trafficking of children for any purpose or in any form, i.a. for intercountry adoption (article 21), exploitative or harmful work (article 32), involvement in drug trafficking (article 33), use in sex trade (article 34), and all other forms of exploitation (article 36). In the *Implementation Handbook* it is recognised that children are a desirable commodity for adoption. Therefore, article 21 provides that intercountry adoption does not result in improper financial gain for those involved. Article 35 then serves as a 'fail-safe protection'.²²⁴

The UNCRC does not provide for a clear distinction between abduction, sale and trafficking. Thus, according to this provision, children can be abducted for the purpose of adoption. In addition, children can be sold for the purpose of adoption. In 2002 the Optional Protocol of the UNCRC on the sale of children, child prostitution and child pornography entered into force. The protocol obliges states to take measures to criminalise and prosecute all forms of sale of children, and thus reinforces article 35. The sale of children for any purpose, also for the purpose of adoption, is defined in article 2:

Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.

²²¹ Emphasis added.

²²² Cantwell, N., 'Editorial', *ISS, Monthly Review*, p. 1.

²²³ Ibid.

²²⁴ R. Hodgkin and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*, pp. 531-532.

The protocol requires that states cover under it criminal or penal law, with regard to adoption (article 3(ii)):

Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption;

In the handbook of this protocol it is said that although trafficking and sale of children are similar concepts, they are not identical.²²⁵ Children can be sold at each stage of the trafficking process as defined by the Palermo Protocol. However, a child can also be trafficked without any elements of sale in these stages. The sale of children is therefore not a necessary element of the definition of child trafficking, and vice versa: in the handbook it is stated that the sale of a child is not necessarily linked to the purpose of exploitation by those who pay for the child. In addition, the sale of a child can take place without physical movement of the child. However it may be, '[i]n some cases, child trafficking and the sale of children overlap, and differences in the definition do not have any effect on the actual experience of a child and his or her exploitation.'²²⁶

According to the UNCRC *Implementation Handbook*, children can also be trafficked for the purpose of adoption. It says the Hague Convention is now the main international tool for preventing the international trafficking of children for the purposes of adoption.²²⁷ The HC elaborates on article 35 by aiming to prevent the abduction of, the sale of or traffic in children *for the purpose of adoption*. Also the HC does not provide for a clear distinction between abduction, sale and trafficking. The Implementation Guide to Good Practice of the HC (2008) explains:

74. The traffic in children ... may lead to an illegal adoption. The abduction or sale of a child for adoption could occur as a single event. The abduction or sale of children which amounts to trafficking in children for adoption is likely to be done as a systematic organised operation. The term 'trafficking' refers to the payment of money or other compensation to facilitate the illegal movement of children for the purposes of illegal adoption or other forms of exploitation.²²⁸

Behind the HC is the 1990 working document *Report on Intercountry Adoption*. Van Loon writes in section *E: Abuses of intercountry adoption: international child trafficking*, 2:

²²⁵ *Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*, Unicef Innocenti Research Centre 2009, p. 9.

²²⁶ *Ibid.*, p. 10.

²²⁷ R. Hodgkin and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*, pp. 532, 535.

²²⁸ *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention*, Guide to Good Practice, Guide No.1 (2008), p. 33.

General features of child trafficking that the purpose of trafficking may serve the purpose of intercountry adoption, but may also be carried out for purposes of exploitation abroad. The author states that it is not always possible to draw a sharp line between these different practices, because for example, ‘the biological parents may be told that their child will be adopted and cared for abroad, while in reality the child will be forced into prostitution.’²²⁹

As regards to the means, Van Loon distinguishes three principal methods: (1) the sale of children, (2) consent obtained through fraud or duress and (3) child abduction. He states that ‘[c]ombinations are possible (e.g. selling of a child under pressure) and, in addition, it may be difficult in some cases to say whether the child was abducted or whether the biological parents gave their consent.’²³⁰

About the organisation of the trafficking Van Loon writes that often child traffickers are part of extensive networks, in which even lawyers and notaries, social workers, hospitals, doctors, and children’s institutes (‘baby farms’), and others are involved. Together they obtain children and make profit out of the despair of families in difficult situations or by deceiving them. Through the adoption process (getting access to children, looking after the children before they leave abroad, searching for clients in the receiving countries, bribing the authorities) the ‘commodity’ (child) is ‘washed’ (in the words of Smolin ‘laundered’). According to Van Loon, this takes place in the sending country as well as the receiving country. Finally, ‘[in] order for the trafficking to be successful it is essential that the child leaves the country of origin in a legal or seemingly legal way.’²³¹

According to Van Loon, child trafficking means profit making by adoption intermediaries at the expense of the original parents, the adoptive parents – to the extent that they acted in good faith – and the child.²³²

In sum, it appears that the UNCRC and the HC do not provide for a clear distinction between child abduction, child selling and child trafficking. The conventions consider adoption as child trafficking when payment of money or other compensation and illegal elements are involved. Therewith, illegal adoption and child trafficking are interrelated in accordance with these conventions. In this case, the child is not necessarily trafficked *through* adoption for subsequent exploitation, but the child can also be trafficked *for* the purpose of adoption.

²²⁹ Van Loon, J.H.A., *Report on Intercountry Adoption*, p. 86.

²³⁰ Ibid.

²³¹ Ibid., p. 88.

²³² Ibid., p. 92.

3.3 Adoption as exploitation

In section 3.2 it is argued that the purpose of exploitation is not a necessary element with regard to illegal adoption as child trafficking because the illegal elements and the money involved make it trafficking per se. Nevertheless, in accordance with the current international definition of THB, the element of exploitation is required. Indeed, forms of exploitation such as sexual exploitation might be involved subsequent to certain adoptions.²³³ However, it is argued by Smolin that illegal adoption itself is also a form of exploitation, and hence qualifies as a form of human trafficking. Although it is difficult to believe a child is exploited when adopted into a loving family, Smolin argues that even this can be a form of exploitation where the child's path into that family involves illegal elements.²³⁴ This section is primarily based on Smolin's article *Child Laundering as Exploitation: Applying Anti-Trafficking Norms to Inter-country Adoption Under the Coming Hague Regime*, since he is the only author who describes illegal adoption as a form of exploitation so accurately.

According to Smolin, the difficulty with the definition of exploitation is that it depends on the definition of 'unjust' or 'improper'. Furthermore, exploitation implies 'use' or 'taking advantage' in a negative sense. According to Smolin, the reason it is difficult to consider adoption a form of exploitation, is that people are conditioned to consider adoption as an inherently good, rather than harmful act. But what does exploitation include? For example, labour and sex are clearly included in the definition of THB even when they are not inherently exploitative. However, if they are accompanied by the 'commodification' of a person, they become unjust uses of the person for the benefit of another person (see also p. 14 'nobody has the right to another person'). In this case, labour and sex, through the 'commodification' involved in the sale of persons, is transformed into exploitative acts.²³⁵

Smolin distinguishes exploitation of the birth family and exploitation of the child. From the perspective of the birth family, adoption is not considered an inherently good act, because often adoption is built upon the destruction and denigration of birth family relationships. Under what circumstances would the activity of taking a child from the birth family for the purpose of adoption be considered exploitation of that family? According to Smolin, it could be considered exploitation when a child is taken without consent whatsoever, and then sold for profit to an organisation that will place the child for adoption. In this case the child is used to fulfil the desire of the adoptive parents and thereby loses its original

²³³ ACT. Jennifer Haynes. Retrieved 20 January from <http://www.againstchildtrafficking.org/category/pap/jennifer-haynes/>.

²³⁴ Smolin, D.M., 'Child Laundering as Exploitation', *Vermont Law Review*, vol. 32, no. 1 (2007), pp. 3-4.

²³⁵ Ibid., pp. 10-12.

family and identity. Also the fertility of the birth family is being used by others for profit, ‘in the sense that a deeply personal aspect of their being was used by others without any choice on their own part’ and by taking away their right to nurture their child.²³⁶

Also when the child is purchased from the birth parents, this constitutes exploitation. The child is then exploited in the same manner as when taken without consent. In some circumstances it would also be exploitation of the birth parents, for example in cases of extreme poverty. The question is whether in this case there was a real consent from the birth family or whether it was felt there was no other choice. Especially when held against the light of the amount of money that is paid by the adoptive parents for the child, while the birth family would only need a fraction of this amount to survive.²³⁷

Next to the birth family, Smolin argues that the child is exploited when ‘laundered’ through the adoption system. An obvious case is where a child was adopted following the legal procedure by a pedophile for the purpose of sexual exploitation. However, according to Smolin, this serves as a mere case to illustrate that the current adoption system with its procedures is not functioning adequately for the protection of the child.²³⁸

Apart from this example, where the child has been trafficked *through* adoption for subsequent exploitation, there are cases where the child has been trafficked *for* the purpose of adoption.²³⁹ Although legally the ties between the child and the birth family are severed through adoption, the emotional tie is not. As Smolin states, this is even the case in infant adoption where the child has no knowledge or contact with the birth family. Many such adoptees eventually wish to obtain information or have contact with their birth family. According to Smolin, once this permanent connection between adoptees and birth families is understood, it is plausible that harming the birth family also harms the adoptee. As Smolin puts it:

when the adoptee’s loss of her birth family was illicit, unnecessary, and unjustified and occurred to benefit others financially [e.g. the intermediaries] or emotionally [the adoptive parents], then the loss becomes a form of exploitation. What could be more exploitative than to harm a child through unnecessarily ripping her from her birth family for purposes of financial or emotional gain of others?²⁴⁰

²³⁶ Ibid., pp. 13-14.

²³⁷ Ibid., pp. 15-18.

²³⁸ Ibid., pp. 18-27.

²³⁹ Cantwell, N., ‘Editorial’, *ISS, Monthly Review*, p. 1.

²⁴⁰ Smolin, D.M., ‘Child Laundering as Exploitation’, *Vermont Law Review*, vol. 32, no. 1 (2007), p. 34.

As Smolin argues, the fact that a child could be ‘better off’ with richer parents is no justification for depriving a child from its original family.²⁴¹ Furthermore, even when the child that is ‘laundered’ or trafficked never learns of these facts and is placed into a loving adoptive family it would involve exploitation. This is because the UNCRC states that the child has the right to preserve its identity (article 8) and the child has the right to be cared for by its parents (article 7). ‘These are objective rights, and the fact that the child is unaware that it has been deprived of such rights does not alter the fundamental wrong involved.’²⁴²

According to Smolin, adoption becomes exploitative when the children are taken illicitly from their birth families and ‘used’ by the adoptive parents to satisfy their need for a child with someone else’s children, even when the child is being nurtured. ‘In such an instance, the very capacity of the infant for nurture is exploited for the gain of others.’²⁴³

In sum, Smolin argues that illegal adoption involves exploitation, even if the child is adopted into a loving family. The definition of exploitation is when a person makes use of another human being, and thereby violating its fundamental rights. As considered in chapter 2, an illegal adoption is an adoption in violation of human rights. Thus, an illegal adoption involves exploitation because in that case a child is ‘used’; first by the adoption intermediaries that make profit for putting the child up for adoption, then by its adoptive parents for their desire to found a family. It concerns a violation of the rights of the child as laid down in the UNCRC, as well as the rights of the child’s original family to respect for family life. Therefore, according to Smolin, illegal adoption can be subsumed within the term child trafficking.²⁴⁴

Conclusion

In this chapter it is considered whether illegal adoption can be regarded as a form of trafficking in human beings. The definition of THB in accordance with the UN Trafficking Protocol, the CoE Convention against Trafficking and the EU Anti-trafficking Directive involve the constitutive elements of *activity*, *means* and *purpose*. In this chapter, it is considered that the cases of illegal adoption as outlined in chapter 2 clearly fit in the definition of THB with regard to the elements *activity* and *means*. However, part of current debate appears the element of *purpose*, i.e. exploitation. Following this definition, it seems that if considering illegal adoption a form of trafficking, it should concern traffic *through*

²⁴¹ Ibid., pp. 35-37.

²⁴² Ibid., p. 45.

²⁴³ Ibid.

²⁴⁴ Ibid., pp. 31-32, 39, 46.

adoption for subsequent exploitation (e.g. sexual exploitation or forced labour). However, the UNCRC and the HC use a broader definition of trafficking, which means that a child can also be trafficked *for* the purpose of adoption. This definition does not regard exploitation as a necessary element when it comes to illegal adoption as child trafficking, because illegal elements and money involved make it trafficking per se.

In addition, it is argued by Smolin that illegal adoption concerns exploitation as well. He argues that illegal adoption involves exploitation, since in this context a person makes use of another human being, thereby violating its fundamental rights (although not with the intention to harm the child). Therefore, according to Smolin, illegal adoption and the act of buying children are exploitative, which can be subsumed within the term child trafficking. Since the current international definition of THB leaves the definition of exploitation open, this might permit the addition of Smolin's definition that illegal adoption itself constitutes the act of exploitation.

4 **Illegal adoption and the EU Anti-trafficking Directive**

Introduction

In the previous chapters it is illustrated that the UNCRC and the HC aim to prevent the child from being adopted against its best interests and from being abducted, sold or trafficked for the purpose of adoption. Nevertheless, it is also illustrated that still abuses take place. There are several reasons for this. One of the problems seems ineffective implementation of the UNCRC with regard to childcare in its broadest sense and the HC with regard to intercountry adoption specifically. Another problem is that the conventions so far have not been able to hold states accountable for actions that go against the rights of children and its family.

Furthermore, because adoptions take place in the context of civil law, the conventions do not include criminal law provisions in case of breaches. Moreover, in chapter 2 it is showed that certain adoptions, although arranged through the official adoption procedures of sending and receiving countries, still contain elements that are not in accordance with the UNCRC and the HC. Because the official procedure has been followed, these adoptions easily fall outside the scope of ‘illegal adoption’. Hence, with regard to intercountry adoptions at EU level (i.e. the sending and receiving of children to and from other EU Member States as well as third countries) national law of EU Member States seems to fall short in preventing the child from being adopted against its best interests or from being abducted, sold or trafficked for the purpose of adoption.

A criminal law response with regard to intercountry adoption might be offered by Directive 2011/36 EU *on preventing and combating trafficking in human beings and protecting its victims* (hereinafter the Anti-trafficking Directive), adopted on 5 April 2011. In order to tackle recent developments in the phenomenon of trafficking in human beings (THB), the directive contains a broad definition of what should be considered as such. In this definition, illegal adoption is also included. To be able to estimate the potential of the directive in preventing abuses in the system of ICA at EU level, it is explored in this chapter on what grounds ‘illegal adoption’ was included in the directive, and what is envisaged by this. In order to do so, first, the creation of the directive and the inclusion of the term ‘illegal adoption’ is described. Then, it is estimated how EU Member States and the Commission currently deal with the issue, i.e. what is understood by illegal adoption with regard to THB and how it must be prevented.

4.1 Illegal adoption and the creation of the directive

On 5 April 2011, the European Parliament (EP) and the Council adopted the Anti-trafficking Directive. It is the first directive that is agreed in accordance with the ordinary legislative procedure in the area of criminal law after the entry into force of the Lisbon Treaty.²⁴⁵ Before, decisions in this area were made generally by unanimity by the Council. The Lisbon Treaty facilitates that action in the area of freedom, security and justice is now possible at the European level through the ordinary legislative procedure, or the ‘community method’. This method is laid down in article 294 TFEU.²⁴⁶ In short, the procedure is as follows: after a proposal of the European Commission, the EP and the Council have to approve each other’s position on the proposal in a first, second or third reading. Therewith, the role of the EP is enhanced. Moreover, decisions are now made by qualified majority. Next, the Lisbon Treaty provides for increased democratic control of national parliaments (article 12 TFEU) and the Court of Justice of the European Union (ECJ) has now competence in the area of freedom, security and justice.

On 29 March 2010 the Commission made its proposal for an Anti-trafficking Directive.²⁴⁷ The legal bases of the directive are articles 82(2) and 83(1) of the TFEU. In order to ‘facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension,’ article 82(2) provides to establish minimum rules, for example concerning the rights of victims of crime. Article 83(1) provides to establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension (e.g. trafficking in human beings) that needs to be combat on a common basis.

The grounds and objectives for the proposal were as follows:

Trafficking in human beings is considered one of the most serious crimes worldwide, a gross violation of human rights, a modern form of slavery, and an extremely profitable

²⁴⁵ Council of the European Union. (21 March 2011). *Trafficking in Human Beings*. Retrieved 1 September 2011 from http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/jha/120073.pdf. p. 1.

²⁴⁶ In short: after a proposal of the Commission, in this case on 29 March 2010, the European Parliament and the Council have to approve each other’s position in a first, second or even third reading. When during the first and second reading the parties do not agree with each other, there is also a role for the Commission. Before the third reading a Conciliation Committee is composed.

²⁴⁷ *Proposal for a Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA*, COM(2010)95 final - 2010/0065 (COD), 29 March 2010.

business for organised crime. ... Therefore, the response to trafficking must be robust, and aimed at preventing and prosecuting the crime, and protecting its victims.²⁴⁸

The context was that:²⁴⁹

Several EU Member States are major destinations for trafficking in human beings from non-EU countries. In addition, there is evidence of flows of trafficking within the EU. ... Social vulnerability is arguably the principal root cause of trafficking in human beings. Vulnerability derives from economic and social factors such as poverty, gender discrimination, armed conflicts, domestic violence, dysfunctional families, and personal circumstances such as age or health conditions or disabilities. Such vulnerability is used by international organised crime networks to facilitate migration and subsequently severely exploit people ... In fact the high level of profits generated is a major underlying driver. The demand ... is a concurrent driver.²⁵⁰

The proposal states that the objectives cannot be sufficiently achieved by the Member States alone, because the fight against trafficking in human beings requires coordinated efforts by Member States, as well as cooperation at an international level in order to achieve the aims. Moreover, the proposal states that differences in legal treatment in the different Member States hinder coordinated efforts and hamper international law enforcement and judicial cooperation. Therefore, action by the European Union will better achieve the objectives of the proposal, because the proposal will approximate Member States' substantive criminal law and procedural rules more extensively. Next, the proposal states to be confined to the minimum required in order to achieve the stated objectives at European level.^{251,252}

The existing provisions in the area of the proposal are the UNCRC, the UN Trafficking Protocol, the CoE Convention against Trafficking, the EU Directive for assistance and residence status for victims who are third country nationals, and the 2002 EU Anti-trafficking Framework Decision.²⁵³ The directive goes further than its predecessor, the Framework Decision, because i.a. it contains a broader definition of trafficking, non application of penalties to the victim, broader and more binding extraterritorial jurisdiction

²⁴⁸ Ibid., p. 2.

²⁴⁹ Emphasis added.

²⁵⁰ *Proposal*, COM(2010)95 final - 2010/0065 (COD), 29 March 2010, p. 2.

²⁵¹ That means the proposal takes into account the EU principles of subsidiarity (article 5(3) TEU) and proportionality (article 5(4) TEU). Under the principle of *subsidiarity*, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. Under the principle of *proportionality*, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

²⁵² *Proposal*, COM(2010)95 final - 2010/0065 (COD), 29 March 2010, p. 8.

²⁵³ Ibid., pp. 2-3.

rule, special measures for children, and action aimed at discouraging the demand. For the same reasons, the proposal says to have added value to the CoE Anti-trafficking Convention.²⁵⁴

The Directive constitutes a holistic approach (prevention, prosecution, protection of victims, and monitoring)²⁵⁵ of THB, which is based on respect for human rights. Therefore, the proposal emphasises that any action of the EU in this field must respect fundamental rights and observe the principles recognised in particular by the ECHR and the EU Charter,²⁵⁶ article 5(3) ‘trafficking in human beings is prohibited’; and article 24 on the rights of the child.²⁵⁷

During the consultation period prior to the proposal, Member States, stakeholders and the European Commission's Group of Experts on Trafficking in Human Beings were consulted.²⁵⁸ Expert groups on Trafficking in Human Beings were hired by the Commission; the first group between 2003 and 2007, and the second group between 2007 and 2011. The issue of illegal adoption was only specifically mentioned in the 2004 Report of the Experts Group on Trafficking in Human Beings. The report recommends that although ‘most attention has been placed on trafficking into sexual exploitation, ... states should ensure that counter trafficking legislation and policies cover all forms of trafficking of women, men and children.’²⁵⁹ In the report it is said the definition of exploitation should also include illegal adoption.²⁶⁰ According to the report, with regard to the activity of trafficking: the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation should be defined as ‘trafficking in children’ whether transnational or national, and whether or not involving organised criminal groups.²⁶¹

The Expert Group recommended a child rights approach as a normative framework in the development of policies and measures against trafficking in human beings, at both the European and national level. Therefore, all actions undertaken in relation to trafficked

²⁵⁴ Ibid., pp. 6-7.

²⁵⁵ Ibid., p. 7.

²⁵⁶ 2000 Charter of Fundamental Rights of the European Union.

²⁵⁷ *Proposal*, COM(2010)95 final - 2010/0065 (COD), 29 March 2010, pp. 3-4.

²⁵⁸ Ibid., p. 4.

²⁵⁹ Ibid., p. 16.

²⁶⁰ Ibid., pp. 20-21.

²⁶¹ *Report of the Experts Group on Trafficking in Human Beings*, European Commission, DG Justice, Freedom and Security, Brussels, 22 December 2004, p. 21.

children should be based on the principles set out in the UNCRC, among which the ‘best interests’ principle (see p. 10).²⁶²

With regard to the countries of origin, the Expert Group recommended that EU development cooperation programmes should explicitly address the root causes of trafficking in children. Elements of such programmes should be i.a. ‘reduction of the number of children abandoned by their families and promotion of alternative solutions to institutional care, including foster-care and adoption, preferably in the country of origin (consistently with the principle of subsidiarity, see p. 11) in order to improve their living conditions, along with imposing stricter controls on institutions, foster-families and on international adoption’, and the improvement of the system for birth registration. With regard to the countries of destination, in addressing the demand side, Member States should take specific measures to address the different kinds of child exploitation, among which also illegal adoption.²⁶³

However, many persons and organisations had participated in the consultative workshop or provided written comments on the draft report. The president of the first expert group acknowledged that within the expert group the issue of illegal adoption had not really been discussed.²⁶⁴

The term ‘illegal adoption’ was not introduced in the proposal of the Commission, but was included after the first reading of the EP. So how did it end up in the directive? After the proposal of the Commission on 29 March 2010, the committee of the European Parliament responsible for this subject, i.e. the *Committee on Civil Liberties, Justice and Home Affairs* (Libe) together with the *Committee on Women's Rights and Gender Equality* (Femm), published its draft report on 28 June 2010 in the framework of the first reading (article 294(3)). One of the amendments of the Commission proposal, relevant to the matter of intercountry adoption, is that ‘[t]he Directive must result also in action involving third countries.’²⁶⁵ This is important since adoption often concerns children from receiving countries outside the European Union. The term illegal adoption was not mentioned in the amendments yet. It was only mentioned in the explanatory report to this draft report:

Trafficking in human beings is also an extremely profitable business for organised crime, with high profit possibilities and limited risk-taking and may take many forms, relating for

²⁶² Ibid., p. 21.

²⁶³ Ibid., pp. 31-32.

²⁶⁴ Email correspondence with former president of the first expert group, dated 26 October 2011, on file with author.

²⁶⁵ *Proposal*, COM(2010)95 final - 2010/0065 (COD), 29 March 2010, pp. 7-8.

example to sexual exploitation, forced labour, illegal trade in human organs, begging, including the use of a dependent person for begging, **illegal adoptions**²⁶⁶ and domestic work.²⁶⁷

On 21 October 2010 the Economic and Social Committee (EESC) delivered its opinion report.²⁶⁸ Also in this report, ‘illegal adoption’ is not specifically mentioned. However, relevant to the matter of intercountry adoption, the committee stated the following:

Specific comments (3):

3.4 The Preamble of the directive contains clear specifications related to what encompasses the term particularly vulnerable persons. Since children are more vulnerable and at greater risk of falling victim to trafficking, special attention should be given to this category of victims. The EESC considers that a child’s best interests must be a primary consideration, as stipulated in the UN Convention on the Rights of the Child and the Charter of Fundamental Rights of the EU.

3.20 Assistance and support for child victims of human trafficking should consist primarily of reuniting children with their families, if the latter have not been involved in trafficking.

On 2 November 2010 during the plenary sitting of the committees Libe and Femm, ‘illegal adoption’ was added to the amendments on the proposal in the report of the European Parliament.²⁶⁹ Subsequently, it was included in the position of the EP, adopted at first reading on 14 December 2010 with a view to the adoption of the directive.²⁷⁰

According to the Libe Committee, the outcome of negotiations on proposals for EU legal instruments is the result of a balance between the position of the EU institutions and, inside the European Parliament, between the political groups. The ALDE group, supported by the other political groups, raised the issue of illegal adoption. According to the committee, ‘no other consideration but the obvious relevance of the topic was behind that.’²⁷¹

²⁶⁶ Emphasis added.

²⁶⁷ *Proposal*, COM(2010)95 final - 2010/0065 (COD), 29 March 2010, p. 38.

²⁶⁸ *Working Document of the Section for Employment, Social Affairs and Citizenship on the Proposal for a directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims*, SOC/378, Rapporteur: Mr Sibian, 3 June 2010.

²⁶⁹ European Parliament, *Report on the proposal for a directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA, (COM(2010)0095 – C7-0087/2010 – 2010/0065(COD))*, text tabled A7-0348/2010, Rapporteur: Edit Bauer, Anna Hedh, 2 November 2010.

²⁷⁰ *Position of the European Parliament adopted at first reading on 14 December 2010 with a view to the adoption of Directive 2011/.../EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, (EP-PE_TC1-COD(2010)0065)*, 14 December 2010.

²⁷¹ Email correspondence with EP Libe Committee, dated 9 November 2011, on file with author.

According to the Femm Committee, fighting ‘new’ forms of exploitation was an important element of the draft directive. To the draft report, several amendments were tabled in the committee that mentioned ‘illegal adoption’ and which were then discussed during the negotiations and incorporated in the final agreement on the text. The idea was that the directive would include also non-sexual forms of exploitation, and the scope of anti-trafficking legislation would be broadened in order to improve the effectiveness of policy in this area. Consequently, recital 11 of the position of the EP provides that the definition also covers ‘other behaviour such as illegal adoption or forced marriage insofar as they fulfil the constitutive elements of trafficking in human beings.’²⁷²

On 14 December 2010, the EP voted with a strong majority in favour (643)²⁷³ of the directive and the Commission accepted the amendments adopted by the EP. On 21 March 2011 the Council approved the first reading and adopted the directive.²⁷⁴ On 5 April 2011 the EP and the Council signed it. Member States have two years to transpose the new rules into their national legislation.²⁷⁵

4.2 Current action and interpretation

EU directives lay down certain goals that must be achieved in every EU Member State. National authorities have to adapt their laws to meet these goals, but are free to decide how to do so. Directives are used to bring different national laws into line with each other. The Anti-trafficking Directive aims to prevent and combat THB, and to protect its victims. It aims provide for a common response to the fight against THB at the EU level, and thus to bring national laws of EU Member States into line with each other. However, the definitions of ‘illegal adoption’ and ‘exploitation’, as one of the constitutive elements of THB, are left open. Therefore, it is unclear what is meant by illegal adoption, in what sense illegal adoption implies exploitation, and thus to what extent illegal adoption is covered by the directive. In this section, first it is described how EU Member States included illegal adoption and/or THB in their national law, prior to the implementation of the directive. Second, an outline is given

²⁷² Email correspondence with EP Femm Committee, dated 8 November 2011, on file with author.

²⁷³ Legislative Observatory European Parliament. 2010/0065(COD) - 14/12/2010 Text adopted by Parliament, 1st reading/single reading. Retrieved 23 January 2012 from <http://www.europarl.europa.eu/oeil/popups/summary.do?id=1135205&t=d&l=en>.

²⁷⁴ Council of the European Union. (21 March 2011). 3079th Council meeting General Affairs Brussels. Retrieved 23 November 2011 from <http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/11/69&format=HTML&aged=0&lg=en&guiLanguage=en>.

²⁷⁵ Directive 2011/36/EU, Article 22(1): Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 6 April 2013.

of how illegal adoption and exploitation could be interpreted in accordance with other legal instruments to which the EU Member States are bound and how the European Commission is currently approaching the issue.

Provisions of EU Member States

In the country reports of 2008 on the European Union Agency for Fundamental Rights (FRA) Report *Child Trafficking in the EU - Challenges, perspectives and good practices*,²⁷⁶ of the 27 EU Member States, it is reported how child trafficking is defined by national law. Below it is outlined whether EU Member States adopted provisions on illegal adoption and whether it falls within the scope of THB before implementation of the Anti-trafficking Directive.

- Austria: in the provision on exploitation sexual exploitation, removal of organs and exploitation of labour force are mentioned, but not trafficking for illegal adoptions. In order to embrace illegal adoption as a form of exploitation, the agency of (intra- and inter-state) adoptions of minors is punishable if the agent is 'improperly inducing consent' of a person whose permission is required.²⁷⁷
- Belgium: according to sp.a-senator Bert Anciaux, the definition of THB will be extended to situations where children are sold for illegal adoption.²⁷⁸
- Bulgaria: it is punishable to persuade a parent by different means to abandon the child. The same counts for the person who persuades a child of the age 14-18 to give consent to his adoption. In addition, a person who mediates for improper financial gain between the parent who relinquishes the child, or the woman who bears and delivers the child, and the parent who receives the child is punishable. When a (pregnant) mother gives consent for selling her child, in Bulgaria or abroad she commits a crime.²⁷⁹ It is concerned exploitation when a pregnant woman is trafficked with the purpose of sale of the unborn child.²⁸⁰
- Czech Republic: the penal code criminalises trafficking for adoption.²⁸¹
- Denmark: providing children for adoption is a punishable offence if carried out by persons other than the authorised private agencies. Inter-country adoption may only take place if consent to the adoption has been given by the individuals, institutions and authorities required to give such consent under the legislation of the child's country of origin. Depending

²⁷⁶ Child Trafficking in the European Union: Challenges, perspectives and good practices, FRA, July 2009.

²⁷⁷ Nowak, M., Thematic Study on Child Trafficking – Austria, FRA, July 2008, p. 9.

²⁷⁸ Politics.be. (24 November 2011). *sp.a : Strengere, waterdichte wetten tegen mensenhandel*. Retrieved 23 January 2012 from <http://www.politics.be/persmededelingen/30872/>.

²⁷⁹ Kukova, S., Thematic Study on Child Trafficking – Bulgaria, FRA, August 2008, p. 14.

²⁸⁰ Bilger, V., et al., *Study on the assessment of the extent of different types of Trafficking in Human Beings in EU countries*, International Centre for Migration Policy Development (ICMPD), April 2010, p. 276.

²⁸¹ Sturma, P., and V. Honuskova, Thematic Study on Child Trafficking – Czech Republic, FRA, July 2008, p. 3.

on the child's age and maturity, the child must also give consent. The consent must be given voluntarily and not be provoked by payment. Anyone who pays a fee as a mediator in order to obtain consent for adoption may be punished.²⁸²

- Finland: at the time of the report, an amendment was to be adopted by the parliament relating to inappropriate intercountry adoption.²⁸³

- France: to prevent trafficking, the persons wishing to adopt needs to have an official authorisation to receive the child. The adoption organisation that mediates for the persons wishing to adopt needs to be authorised.²⁸⁴

- Germany: the criminal code contains provisions on trafficking for illegal adoption. It criminalises natural or adoptive parents, who, in return for payment, leave or commit their (adoptive) child below the age of 18 to another person. Next, any person who facilitates the adoption of a person under the age of 18 with the purpose of achieving a financial gain is punishable with imprisonment. This is supplemented by provisions on e.g. the illegal facilitation of adoptions, the search for and offer of children or surrogate mothers as well as assisting a pregnant woman in arranging the giving away of her (future) child.²⁸⁵

- Hungary: the law does not punish illegal adoption, prostitution or related actions as trafficking.²⁸⁶

- Italy: no explicit mention is made of the exploitation of minors for sexual purposes other than prostitution, or for purposes of illicit activities (such as drug dealing), adoption or forced marriages. However, it is stated in the report that all these purposes are implied by the wide-ranging definition of 'servitude' of the penal code. In the eighties, the Italian constitutional court 'moved the adoption's "centre of gravity" from the adopting parents to the adopted child'.²⁸⁷

- Lithuania: trafficking in human beings as a separate criminal offence is criminalised since 1998. Since 2003 a new penal code is in force and the article on sale or purchase of a child is devoted to trafficking in children. The report states that its current wording in general is in line with conventional definition of trafficking in human beings (in children). However, there are some doubts expressed whether it covers, e.g. trafficking for illegal adoption purposes. This is due to some aspects of the article's wording and quite constrictive legal

²⁸² Badse, C., ed., Thematic Study on Child Trafficking – Denmark, FRA, July 2008, pp. 12, 14, 19.

²⁸³ Orama, K., ed., Thematic Study on Child Trafficking – Finland, FRA, 2008, pp. 13-14.

²⁸⁴ Benoit-Rohmer, F., ed., Thematic Study on Child Trafficking – France, FRA, 2008, p. 20.

²⁸⁵ Lauth, M., Thematic Study on Child Trafficking – Germany, FRA, July 2008, pp. 3, 11.

²⁸⁶ NEKI and ETC, Thematic Study on Child Trafficking – Hungary, FRA, August 2008, p. 5.

²⁸⁷ Cartabia, A., ed., Thematic Study on Child Trafficking – Italy, FRA, 2008 pp. 11-12.

interpretation of it in court, which according to the report results in a factual contraction of its scope.²⁸⁸

- Luxembourg: there is no definition or standard for exploitation or trafficking; neither with respect to human beings in general, nor children in particular. Thus, the report states the law does not contain the internationally accepted standard for child trafficking that includes trafficking for economic exploitation, and other illicit activities such as drug dealing, trafficking for adoption, forced marriages, removal of organs, etc.²⁸⁹

- Latvia: the criminal law stipulates liability for unlawful acts in adoptions, i.a. consent to the adoption for the purpose of acquiring property; or asking of consent through an intermediary by means of violence, threat, fraud, bribes, etc.²⁹⁰

- Netherlands: although criminalised, illegal adoption as such is not classified as trafficking by law, except if the adoption is carried out for the very purpose of exploitation. Illegal adoption concerns the situation in which a child is adopted, or offered for adoption, outside official channels.²⁹¹

- Poland: it is punishable to organise the adoption of children in violation of the law, in order to gain material benefits.²⁹²

- Portugal: regarding trafficking for adoption, the penal code establishes that it is a crime to offer, deliver, and request or receive a child and consent to his/her adoption against payment or other benefit.²⁹³

- Romania: adoption is not mentioned in the report.²⁹⁴ The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation should be considered an offence and punished by imprisonment. Exploitation does not constitute illegal adoption.²⁹⁵

- Spain: trafficking for adoption is criminalised. Adoption outside the legal procedures is punishable. Adoption from countries undergoing armed conflict or from countries that lack a special adoption authority is prohibited.²⁹⁶

- Sweden: the general legal framework to combat child trafficking includes legal provisions regarding the purchase of sexual services from a child, illegal adoptions, and child

²⁸⁸ Ziobiene, E., Thematic Study on Child Trafficking – Lithuania, FRA, 2008, pp. 3, 7.

²⁸⁹ Moyse, F., Thematic Study on Child Trafficking – Luxembourg, FRA, July 2008, p. 11.

²⁹⁰ Thematic Study on Child Trafficking – Latvia, FRA, 2008, p. 11.

²⁹¹ Lawson, R., ed., Thematic Study on Child Trafficking – Netherlands, FRA, July 2008, p. 13.

²⁹² Hořda, Z., ed., Thematic Study on Child Trafficking – Poland, FRA, July 2008, p. 8.

²⁹³ Thematic Study on Child Trafficking – Portugal, FRA, August 2008, p. 8.

²⁹⁴ Iordache, R., Thematic Study on Child Trafficking – Romania, FRA, 2008, pp. 1-44.

²⁹⁵ Bilger, V., et al., *Study on the assessment of the extent of different types of Trafficking in Human Beings in EU countries*, p. 326.

²⁹⁶ Freixes Sanjuán, T., ed., Thematic Study on Child Trafficking – Spain, FRA, July 2008, pp. 3, 12-13.

marriages.²⁹⁷

- Slovakia: child trafficking encompasses illicit adoption of children and commending a child to a third person for using the child to work or for other purposes. The rest of the activities regarding ‘child trafficking’ are incorporated into the general provisions concerning trafficking in human beings.²⁹⁸

- Illegal adoption as child trafficking is not mentioned in the reports of Belgium,²⁹⁹ Cyprus,³⁰⁰ Estonia,³⁰¹ Greece,³⁰² Ireland,³⁰³ Malta,³⁰⁴ Slovenia,³⁰⁵ and the United Kingdom.³⁰⁶

As can be concluded from the country reports, several EU MSs have certain provisions with regard to illegal adoption and child trafficking. Some countries included illegal adoption in the definition of child trafficking. There are also countries without (clear) provisions on illegal adoption and/or child trafficking. In sum, child trafficking and illegal adoption lack a uniform definition at the Member State level.³⁰⁷

Illegal adoption and the Commission’s approach

Illegal adoption is not defined in the EU Anti-trafficking Directive. Adoption is regulated by EU Member States national law and an illegal adoption would be an adoption in violation of the adoption laws of that specific Member State. Definitions of what an illegal adoption entails would thus vary from country to country. There is no common EU definition, as the Commission does not have official competences in the area of (intercountry) adoption. For example, in 2009 the Stockholm Programme was adopted, which sets out the European Union’s priorities for the area of justice, freedom and security for the period 2010-2014. It has identified the Rights of the Child as a priority area and called for an EU strategy on the rights of the child. Since then the protection and the promotion of children's rights has become one of the Commission’s political priorities. On February 2011, the Commission adopted the Communication on the Rights of the Child, where concrete actions in areas of EU competence for the period 2011-2014 are presented.³⁰⁸ Legislation on intercountry adoption is not part of

²⁹⁷ ECPAT, Eriksson, M.J., Thematic Study on Child Trafficking – Sweden, FRA, 2008, pp. 5, 15.

²⁹⁸ Via Iuris and ETC, Thematic Study on Child Trafficking – Slovakia, FRA, August 2008, p.3.

²⁹⁹ Verbruggen, F., ed., Thematic Study on Child Trafficking – Belgium, FRA, September 2008.

³⁰⁰ Trimikliniotis, N., and C. Demetriou, Thematic Study on Child Trafficking – Cyprus, FRA, August 2008.

³⁰¹ Haruoja, M., ed., Thematic Study on Child Trafficking – Estonia, FRA, August 2008.

³⁰² Kalantzi, E., Thematic Study on Child Trafficking – Greece, FRA, August 2008.

³⁰³ O’Connell, D., ed., Thematic Study on Child Trafficking – Ireland, FRA, August 2008.

³⁰⁴ Comodini Cachia, T., Thematic Study on Child Trafficking – Malta, FRA, 2008.

³⁰⁵ Mavcic, A.M., and M. Avbelj, Thematic Study on Child Trafficking – Slovenia, FRA, 2008.

³⁰⁶ Harris, D., ed., Thematic Study on Child Trafficking – United Kingdom, FRA, 2008.

³⁰⁷ Child Trafficking in the European Union: Challenges, perspectives and good practices, FRA, July 2009, p. 13.

³⁰⁸ European Commission, Justice. *An EU agenda for the rights of the child*. Retrieved 23 January 2012 from http://ec.europa.eu/justice/fundamental-rights/rights-child/eu-agenda/index_en.htm.

these actions, as the Stockholm Programme also did not mention adoptions as an area of future Commission work.³⁰⁹

However, a standpoint could be taken in the light of article 3 TEU ‘the Union shall offer its citizens an area of freedom, security and justice’ and certain obligations in the area of human rights protection. For example, the ECHR and the UNCRC, as part of the *acquis*, must be taken fully into account. Moreover, the Lisbon Treaty recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights and makes the charter legally binding. This means that when the EU proposes and implements laws it must respect the rights set down in the charter. Also the EU Member States must do so when implementing EU legislation. The article relevant to the matter of intercountry adoption is article 24 of the Charter, ‘the rights of the child’:

... .

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Although there is no EU competence in the area of (intercountry) adoption, the Commission has not remained silent about this subject. The first position on intercountry adoption can be derived from the *Opinion of the Independent Panel of Family Law Experts of EU Member States*. In 2002, the Independent Panel was set up by the Commission in order to report on the Romanian reforms with regard to child protection. The panel consisted of experts on family law and children's rights from Member States. The panel reported to the Commission on whether the Romanian draft legislative package complied with international standards laid down in the UNCRC and the ECHR. Furthermore, the panel considered i.a. whether the proposed legal framework would ensure respect of children's rights at a level comparable to that provided by legislation in the ‘old’ EU Member States.³¹⁰

In Romania adoption was seen as a child special protection measure. However, the panel was of the opinion that this is not the case and that it is important it should not be seen as such:

Adoption is rather a civil order, which creates new relationships with the adoptive family and severs the relationship between the child and his or her birth family. It is one of the available options if a child cannot be returned to his or her family (and attempts to

³⁰⁹ Email correspondence with European Commission DG Justice, dated 14 December 2011, on file with author.

³¹⁰ Annex: Independent Panel of Family Law Experts of EU Member States, *Summary of opinion on the matter of adoptions*, pp. 1-2.

rehabilitate the child with his or her family must be thorough and not token), but there are other options which also need to be considered viz long term placement with the wider family or foster parents.³¹¹

The panel recalled that according to article 20 UNCRC, state parties should ensure alternative care to children who are deprived of their family environment, like e.g. foster placement, placement in institutions suitable for the care of children or adoption. The panel was of the opinion that intercountry adoption is a very last resort and should only be considered if any suitable means of foster, adoptive or residential care cannot be found in the country of origin of the child and only if it is manifestly in the best interests of the child. The panel stated that it must be clear that residential care comes also before ICA.³¹² The Commission took over the advice of the Independent Panel and Romania reformed its child protection law accordingly.³¹³

On the other side of the spectrum is the position presented by Patrizia De Luca, team leader at the Civil Justice Unit of the Commission, in a joint conference on ICA of the Commission and the CoE in 2009. In this presentation, she stated that, following the Preamble to the UNCRC, one of the rights of children is to be brought up in a family environment, and intercountry adoption is part of alternative childcare solutions as recognised in article 21 UNCRC.³¹⁴ However, according to De Luca, the principle of subsidiarity of the UNCRC ‘sometimes lent itself to uncertain interpretations’. She states that, in line with the HC and the Unicef statement of 2007, it is confirmed that ICA should not be considered as a last resort solution. Rather, institutionalisation of children should be considered as a last resort. Furthermore, De Luca states that the HC refers to *possibilities* for placement of a child in the

³¹¹ Ibid.

³¹² Ibid.

³¹³ Annex: Wikileaks cable 04BRUSSELS2496.;

- Annex: Correspondence between the European Commission and Mrs Robak (2006).;

Law 272/2004 on the protection and promotion of the rights of the child provides that state assistance is offered in helping the parents to care for their child. Otherwise there is searched for child care solutions up to the fourth degree within the family, or foster and residential care. Law 273/2004 on the legal status of adoption provides that only adoption of Romanian children by their grandparents in another country is allowed, and only after every attempt has been made to find domestic solutions.

Source: Lege nr. 272/2004, din 21/06/2004 Publicat in Monitorul Oficial, Partea I nr. 557 din 23/06/2004, privind protectia si promovarea drepturilor copilului. Retrieved 1 February 2012 from http://s3.amazonaws.com/rcpp/assets/attachments/92_177_EN_original.pdf;

- Article 39, Lege nr. 273/2004, din 21/26/2004, Publicat in Monitorul Oficial, Partea I nr. 557 din 23/06/2004, privind regimul juridic al adopției. Retrieved 1 February 2012 from <http://www.agapedia.ro/resources/Law%20273-2004.pdf>.

³¹⁴ Presentation of Patrizia de Luca, team leader at the European Commission, *The results of the study carried out by the European Commission, Joint Council of Europe and European Commission Conference, Challenges in adoption procedures in Europe: Ensuring the best interests of the child*, 30 November - 1 December 2009 – Strasbourg. Retrieved 20 October 2011 from http://ec.europa.eu/justice/civil/files/brochure_conference_adoption_en.pdf. p. 246.

state of origin. However, she argues that the HC does not require that all possibilities should be exhausted. According to De Luca, this would be unrealistic, because it would place an unnecessary burden on authorities, and it may delay indefinitely the possibility of finding a permanent family home abroad for the child. De Luca stated that

the child needs to be brought up in a family environment which is able to assure the permanency of the relationship. If national adoption is not possible, intercountry adoption has to be considered as a possible alternative for the care of the child. Institutionalisation and foster care should be seen, where possible, only as temporary measures.³¹⁵

As also can be read in chapters 1 and 2, these two opinions are a clear example of the difference between interpretation of the HC and the UNCRC with regard to the principle of subsidiarity and intercountry adoption. The opinion of the Independent Panel was based on the UNCRC and the ECHR, being it part of the *acquis*, and child protection traditions of the ‘old’ EU Member States. In contrast, the position presented by De Luca evidently advocates the perception of ICA in accordance with the HC. However, it is not clear how this position is established, as the HC is not part of the *acquis communautaire*. Therefore, the ‘position’ De Luca outlined, cannot officially be based on the HC. Second, the Commission has not distanced itself from the position of the Independent Panel based on the UNCRC.

In sum, the European Commission has no official competence in the area of (intercountry) adoption, and therefore no official position. However, in accordance with article 3 TEU (the Union shall offer its citizens an area of freedom, security and justice) and the obligations of human rights protection, there might be possibilities for a common position on ICA at EU level. Although this is not yet the case, two opinions can be distinguished: one in which ICA is positioned as a last resort, the other in which ICA is preferred over foster and residential care. This shows the Commission struggles with the principle of subsidiarity as defined by the HC and the UNCRC.

With regard to the EU Anti-trafficking Directive, there is no common definition of ‘illegal adoption’ that could guide EU Member States in the implementation of the Anti-trafficking Directive. It is not clear what is meant with illegal adoption as included in the directive and therefore it is not clear what the EU Member States should do when implementing illegal adoption as a form of THB.

³¹⁵ Ibid., p. 247.

Illegal adoption as THB and the Commission's approach

The term 'illegal adoption' is mentioned in the Preamble, recital 11, to the EU Anti-trafficking Directive. It states that the definition of trafficking in human beings also covers trafficking for the purpose of illegal adoption to the extent it fulfils the constitutive elements of trafficking in human beings. As outlined in chapter 3, these constitutive elements are activity, means, and purpose. It is illustrated illegal adoption could fall within the scope of the activity as well as the means of trafficking. However, there are different viewpoints on whether illegal adoption falls within the scope of the purpose of trafficking, namely exploitation. The question is whether illegal intercountry adoption is trafficking per se, whether it is inherent exploitation, or whether it only falls within the scope of trafficking when the child is exploited e.g. in the sex industry or for labour activity. Put differently, does the Anti-trafficking Directive include child trafficking *for* intercountry adoption, or child trafficking *through* adoption for subsequent exploitation?

As described above, the existing provisions in the area of the EU Anti-trafficking Directive are the UNCRC, the UN Trafficking Protocol and the CoE Convention against Trafficking.³¹⁶ It adopted the same definition of THB as the UN Trafficking Protocol and the CoE Convention against Trafficking, which state that the definition of THB does not refer to illegal adoption as such. It refers only to illegal adoption with a view to the exploitation of a child. Although the term 'exploitation' is not defined, it seems that illegal adoption is considered THB when the child is trafficked *through* adoption for subsequent exploitation, e.g. in the sex industry, forced labour, or for its organs. In this view, illegal adoption without such exploitation would not be considered child trafficking.

However, another legal basis for the EU Anti-trafficking Directive is the UNCRC. In accordance with article 35, states should take measures to prevent traffic in children for any purpose or in any form. Hence, article 35 UNCRC includes traffic in children for the purpose of adoption. This article does not require the purpose of exploitation as the constitutive element of trafficking. The convention considers adoption as child trafficking when payment of money or other compensation and illegal elements are involved in the adoption.³¹⁷ Therewith, illegal adoption and child trafficking are interrelated in accordance with these conventions. In this case, the child is not necessarily trafficked *through* adoption for subsequent exploitation, but the child can also be trafficked *for* the purpose of adoption.

³¹⁶ *Proposal*, COM(2010)95 final - 2010/0065 (COD), 29 March 2010, pp. 2-3.

³¹⁷ *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention*, Guide to Good Practice, Guide No.1 (2008), p. 33.

Furthermore, in chapter 3 the view on exploitation and illegal adoption of Smolin was described. According to Smolin, illegal adoption also concerns exploitation when improper financial gain is involved. Moreover, Smolin argued that it concerns exploitation when a person, by making use of another human being for its own interests, deprives him from his fundamental rights. With regard to illegal adoption, a child is ‘used’ by adoption intermediaries to make money, and then by the adoptive parent to be its child. This is in breach of the fundamental rights of the child – such as the right to be cared for by the original parents, family and community, or other alternative forms of childcare and state assistance (UNCRC). Not only is illegal adoption in breach of the rights of the child, but also in breach of the fundamental rights of the original family. Therefore, Smolin considers illegal adoption inherent exploitation of both the child and the original family. Furthermore, since ‘exploitation’ is not clearly defined in the EU Anti-trafficking Directive, illegal adoption might as well be subsumed within the term THB.

As mentioned before, directives are used to bring different national laws into line with each other to achieve certain goals. Although EU Member States are free to decide how they implement the directive, the Commission intends to facilitate Member States in its implementation.³¹⁸ In order to contribute to a coordinated and consolidated common EU strategy against THB, an EU anti-trafficking coordinator (article 20 of the directive) is established. In December 2010, the Commission appointed Ms Myria Vassiliadou to the position of European Anti-Trafficking Coordinator. Her task is to improve coordination and coherence between EU institutions, EU agencies, Member States, third countries and international actors in the field of anti-trafficking.³¹⁹

Furthermore, for the first quarter of 2012, a new EU strategy on the fight against trafficking in human beings will be adopted. This will update the 2005 EU Action Plan on best practices, standards and procedures for combating and preventing trafficking in human beings. Consultations with NGOs, international organisations and national rapporteurs will precede this strategy. In this new strategy, the Commission will first of all seek to complement the directive, initiate new actions in the areas which are not (or to a limited extent) covered in the directive and thereby develop an integrated strategic approach in

³¹⁸ Email correspondence with European Commission’s expert on THB, 20 December 2011, on file with author.

³¹⁹ Europa.eu, Press Release. (14 December 2010). *The Commission appoints an EU Anti-Trafficking Coordinator*. Retrieved 23 January 2012 from <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1715&format=HTML&aged=1&language=EN&guiLanguage=fr>.

tackling human trafficking in as broad a manner as possible.³²⁰ Perhaps this strategy will elaborate further on the issue of illegal adoption as child trafficking and how this should be dealt with at EU level. However, by the end of 2011, one of the experts on THB in the Commission stated that up to that moment illegal adoption as a form of child trafficking had not been discussed for the strategy.³²¹ He stated that the Anti-trafficking Directive regards illegal adoption for *subsequent* exploitation rather than trafficking *for* illegal adoption, since he was not aware of any jurisprudence in the Member States on this specific issue.

Conclusion

In order to tackle recent developments in the phenomenon of trafficking in human beings, Directive 2011/36 EU *on preventing and combating trafficking in human beings and protecting its victims* contains a broad definition of what should be considered as such. In this definition, illegal adoption is also included. Therefore, in this chapter it is explored on what grounds ‘illegal adoption’ was included, and what is envisaged by this. However, the directive does not give a definition of illegal adoption, nor exploitation as a constitutive element of THB as laid down in the directive.

When illegal adoption was included in the definition of THB through amendments of the EP, this was because of the ‘obvious relevance’ of it, and because of the wish to include also non-sexual forms of exploitation. However, no definition was given. With regard to illegal adoption, it is shown in chapter 2 that the true definition is rather complicated, and that illegal adoptions until now have not been sufficiently prevented at the national level. In this chapter it is shown that in accordance with the Lisbon Treaty there might be possibilities for a common position on ICA at EU level, and although the Commission has not yet formed an official position on the matter, two opinions can be distinguished: one in which ICA is positioned as a last resort, the other in which ICA is preferred over foster and residential care. Since the Commission not yet has a position, and so far different positions, for the sake of efficient implementation of the directive the Commission cannot yet give a guiding principle.

With regard to exploitation, as chapter 3 showed, also the definition of illegal adoption as a form of exploitation is rather complicated. The question is whether the Anti-trafficking Directive aims to prevent illegal adoption as trafficking for adoption, or adoption as a cover for subsequent exploitation. The Commission currently assumes the latter.

³²⁰ Take 5 – Myria Vassiliadou, EU Anti-trafficking Coordinator in Conversation, Balticness, 2011, p. 8.

³²¹ Interview with European Commission’s expert on THB, 27 October 2011, on file with author.

Conclusion and recommendations

In this thesis, it is researched whether the new EU Anti-trafficking Directive, adopted on 5 April 2011, has the potential of protecting children and their original family from abusive practices with regard to intercountry adoption (ICA). The focus in this research is on intercountry adoptions that involve illegal elements, despite the fact they were arranged through official procedures, and therewith formally legal.

The opportunity for this research is offered by the directive's definition of trafficking in human beings (THB), which covers illegal adoption in so far as it fulfils the constitutive elements of trafficking in human beings. However, an unclear aspect of the Anti-trafficking Directive concerns the definitions. The definitions of 'illegal adoption' and 'exploitation', as one of the constitutive elements of THB, are left open. Therefore, it is unclear what is meant by illegal adoption, in what sense illegal adoption implies exploitation, and thus to what extent illegal adoption is covered by the directive.

In the first chapter, it is estimated when ICA could be considered a lawful act in accordance with three main international treaties to which EU Member States are bound: the human rights conventions UNCRC and ECHR; and, in the area of private law, the Hague Convention (HC). In accordance with these international conventions, it could be estimated that when all measures have been exhausted by the state to keep the child with its family of origin, and if the child cannot remain with the original family, all measures have been exhausted by the state to provide for alternative care in the country of origin, and after paramount consideration of the best interest of the child, intercountry adoption as a measure of alternative childcare may be considered as a *last resort*. It is also pointed out that there might be a difference in approach between the UNCRC and the Hague Convention, since the latter seems to give preference to ICA over domestic foster and residential care.

In the second chapter, it is estimated when ICA could be considered an unlawful or illegal act. It is difficult to define when an adoption is illegal. First, a decision on adoption is always made in court, and therewith all adoptions are formally legal even if illegal elements were involved in the adoption. Second, adoption is regulated by national law, and therewith the illegality of an adoption depends on national law. In this research, an adoption is defined illegal if it concerns an adoption arranged in violation of the law and in violation of human rights. This chapter also explores why such adoptions take place. One of the reasons explained is the existence of a market in children. Another problem seems that children can be

adopted in violation of human rights just because of the regulated adoption process, together with the perception that ICA is to be preferred over temporary forms of childcare.

The third chapter concerns the definition of trafficking in human beings (THB) and whether illegal adoption falls within this scope. In accordance with current international legal instruments in the area of criminal law, it appears that illegal adoption has many features with THB in common, but can only be considered a form of THB if it constitutes illegal adoption *for subsequent exploitation*, e.g. for sex or labour. However, the definition of trafficking of the UNCRC and the Hague Convention do not require exploitation as a constitutive element of child trafficking. According to these conventions, illegal adoption is a form of trafficking as it involves illegal elements and financial gain. The definition of the UNCRC and the HC leads to the definition of trafficking *for illegal adoption*. In addition, the view is outlined that illegal adoption is regarded as inherent exploitation, as exploitation is then defined as a violation of human rights of a person, while being used by another person (commodification).

The fourth chapter explores why illegal adoption was included in the EU Anti-trafficking Directive, what was envisaged by this, and what action currently is taken. It appears that, when the EP amended the Commission's proposal, no other consideration lie behind the inclusion of illegal adoption but the relevance of the subject. A definition of illegal adoption is not given. Since the Commission does not have competence in the area of adoption, the definition of illegal adoption will depend on EU Member States' national law. It is also not clear in what sense it implies exploitation, as no exact definition is given. However, currently the Commission considers illegal adoption as a form of THB if the child is subsequently exploited. There are no policy developments with regard to child trafficking for illegal adoption.

The research question of this thesis is whether the new EU Anti-trafficking Directive has the potential of protecting children and their original family from abusive practices with regard to intercountry adoption. It is estimated in this research that one of the directive's weaknesses is the fact that the definitions of 'illegal adoption' and 'exploitation' are left open. This leads to uncertainties. Contrary to what the directive aims for, the undefined concepts might have the result that after its implementation there still is a disharmony in definitions of EU Member States' national law.

In addition, in this research not only adoptions that are arranged in violation with national law are labelled 'illegal', but especially those arranged in violation of human rights of the child and its original parents. The question is whether this will be the case with regard

to the national definitions. This might entail the risk that such adoptions do not fall within the scope of the directive. Next, the current interpretation of ‘exploitation’ as one of the constitutive elements of THB is when subsequent exploitation is involved. Illegal adoption is considered to fall within the scope of the directive if it concerns subsequent exploitation of the child, e.g. for sex or labour. Then, illegal adoptions that do not lead to such exploitation are not covered by the directive.

In sum, currently only illegal adoptions, as defined by EU Member States national law, fall within the scope of the Anti-trafficking Directive if subsequent exploitation is involved. Intercountry adoptions that are arranged through the official adoption procedure, while violations of law and of human rights are involved, currently do not fall within the scope of the directive. Thus, the EU Anti-trafficking Directive does not have the potential of protecting children and their original family specifically from this type of abusive adoptions.

Although the EU directive does not provide protection to children and their original family from abusive intercountry adoptions in general, it is recommended here that also such adoption are to be included within the directive’s scope. This is because illegal adoption has many features with THB in common, such as the demand and profits as a driver; the supply of vulnerable people; the elements of activity, e.g. transfer, and means, e.g. fraud. In addition, since money is involved as well as a violation of human rights, it could be considered a form of exploitation.

The opportunity exists to include abusive intercountry adoptions within the directive. For example, although Member States are free to decide how to implement the directive, the European Commission intends to facilitate Member States in its implementation. With regard to ‘illegal adoption’ the EU has no official competence in the field. Therefore the definition will depend on Member States’ national law. However, since the UNCRC is part of the *acquis communautaire* and since the EU has certain obligations in the area of human rights protection, the Commission might want to consider defining an illegal adoption as in breach of the UNCRC. This might lead to a uniform definition, as well as contribute to a further implementation of the UNCRC.

With regard to ‘exploitation’, the EU might want to consider trafficking for the purpose of (illegal) adoption a form of THB without requiring subsequent exploitation as provided by the UNCRC and the HC. The current interpretation of the EU Anti-trafficking Directive is not in accordance with the UNCRC, and also this step would contribute to its

further implementation. Illegal adoption could also be considered as a form of THB since a conclusive definition of exploitation is not given.

In addition, since the Lisbon Treaty the Court of Justice of the European Union has competence in the area of Justice and Home Affairs. Taking account of human rights, the court might develop jurisprudence that gives a broader definition of illegal adoption as a form of THB.

To conclude, it is recommended that abusive adoptions as discussed in this research will be included within the scope of the directive, since to date such adoptions have not been sufficiently prevented and combated. At least it is important that the legal aspects of the link between illegal adoption and THB are explored by the EU institutions and Member States.

List of acronyms

AUD	Australian dollar
CA	Central Authority
CBI	Central Bureau of Investigation, India
CoE	Council of Europe
ECHR	European Convention on Human Rights; Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe
ECtHR	European Court of Human Rights of the Council of Europe
ECJ	Court of Justice of the European Union
EESC	European Economic and Social Committee
EP	European Parliament
EU	European Union
EUR	Euro
FRA	European Agency for Fundamental Rights
HC	Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption
HccH	Hague Conference on Private International Law
ICA	Intercountry adoption
ISS	International Social Service
MSS	Malaysian Social Services
NGO	Non-governmental organisation
OECD	Organisation for Economic Co-operation and Development
TEU	Treaty on European Union
TFEU	Treaty on the functioning of the European Union
TdH	Terre des Hommes
THB	Trafficking in Human Beings
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
USD	United States dollar
WK	Dutch adoption agency Wereldkinderen

Glossary

Adoption

Accredited body For example an adoption agency. The Hague Convention requires that an adoption agency is accredited by the CA to arrange adoptions. It fulfils an intermediary role.

Adoption Where the new parents assume full parental rights and obligations over the child, one speaks of adoption. Adoption is a civil order that creates legally new family ties, and severs the relationship between the child and the birth family.

Central Authority (CA) The Hague Convention requires contracting states to designate a Central Authority to discharge the duties that are imposed by the convention. For the protection of children CAs have to prevent improper (financial) gain, deter all practices contrary to the objects of the convention, collect, preserve and exchange information about the situation of the child and the prospective adoptive parents, facilitate, follow and expedite proceedings with a view to obtaining the adoption, promote the development of adoption counselling and post-adoption services in their states, provide each other with general evaluation reports about experience with intercountry adoption, reply to requests from other CAs or public authorities for information about a particular adoption situation, etc.

Child protection The UNCRC provides the right for a child deprived from a family to protection rendered by the state. One speaks of foster care when foster parents obtain temporary custody (usually being partially compensated for their custodial services by the state). An alternative to foster care in a home is foster care in an institution.³²² There are also other forms of alternative child's care such as kinship care, or *kafalah* (similar to foster care) by Islamic law.

Intercountry adoption (ICA) ICA involves the transfer of a child from his or her country of origin to another country for adoption.

³²² Landes E.M. and R.A. Posner, 'Economics of the Baby Shortage', p. 323.

Principle of proportionality In the context of ICA, the principles of proportionality and necessity are reflected by the ECHR. It means that intervention of the state with family life has to be necessary and proportionate with regard to its purpose. Thus, the protection of the child's welfare should be achieved with the least possible intervention.

Principle of subsidiarity In the context of ICA, the principle of subsidiarity means that all forms of domestic alternative child's care have to be exhausted before ICA is considered, i.e. as a solution of *last resort*. The debate is on whether ICA should be considered a solution of last resort (UNCRC), or whether ICA is to be preferred over 'permanent' measures such as foster and residential care (as the HC seems to reflect).

Receiving countries Countries that receive children through ICA; predominantly Western Europe, Canada, the USA, Israel, and Australia.

Sending countries Countries that send children for ICA; predominantly economically developing countries.

Legal

Convention A convention is international agreement between sovereign states and international organisations by which they agree to be bound by the terms of the convention. See also 'treaty'.³²³

Directive EU directives lay down certain goals that must be achieved in every Member State. National authorities have to adapt their laws to meet these goals, but are free to decide how to do so. Directives may concern one or more Member States, or all of them. Each directive specifies the date by which the national laws must be adapted, which gives national authorities the room for manoeuvre to take account of differing national situations. Directives are used to bring different national laws into line with each other.³²⁴

Legal instrument A document that states a contractual relationship or grants a right. For example a convention, treaty, directive, regulation, protocol.

³²³ Davis, H., *Human Rights Law Directions*, p. 15.

³²⁴ European Commission. Application of EU law. *What are EU directives?* Retrieved 25 January 2012 from http://ec.europa.eu/eu_law/introduction/what_directive_en.htm.

Protocol A protocol is a treaty that supplements (amends or modifies) the main treaty and it has the same legal force. Some protocols are voluntary (e.g. optional). Other protocols are compulsory in the sense that all signatories of the main treaty must agree to them.³²⁵

Treaty A treaty is an agreement under international law between sovereign states and international organisations, for example a protocol, covenant, and convention. All of these forms of agreements are under international law equally considered treaties.

Principle of proportionality In the context of action at EU level, article 5(4) TEU states that the content and form of EU action shall not exceed what is necessary to achieve the objectives of the Treaties.

Principle of subsidiarity In the context of action at EU level, article 5(3) TEU states that in areas which do not fall within its exclusive competence, the EU shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at EU level.

³²⁵ Davis, H., *Human Rights Law Directions*, p. 20.

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INDEPENDENT PANEL OF FAMILY LAW EXPERTS OF EU MEMBER STATES

Summary of opinion on the matter of adoptions

Brussels, 19 May 2004

The Independent Panel was set up by the European Commission in December 2002 and consists of experts on family law and children's rights from Member States (civil servants). The Panel reports to the Commission on whether the Romanian draft legislative package complies with international standards laid down in the UN Convention on the Right of the Child and the European Convention on Human Rights. In making its assessments, the Panel considers inter-alia whether the proposed legal framework would ensure respect of children's rights at a level comparable to that provided by legislation in the present EU Member States.

In Romania adoption was seen as a child special protection measure (Law 25/1997). However, it is not the case and it is important it should not be seen as such. Adoption is rather a civil order, which creates new relationships with the adoptive family and severs the relationship between the child and his or her birth family. It is one of the available options if a child cannot be returned to his or her family (and attempts to rehabilitate the child with his or her family must be thorough and not token), but there are other options which also need to be considered viz long term placement with the wider family or foster parents. The assessment process will need to determine the child's best interests and how these can best be met. Even if it is decided a child should be placed for adoption, reviews must be continuous both while the child is not yet placed and during the placement. Especially with intercountry adoption, there is a risk that the institutions responsible for children may impose adoption in cases, which are unsuitable, so as to compensate for their own lack of resources.

In this context it is important to recall that according to Article 20 of the UN Convention on the Rights of the Child, States Parties shall ensure alternative care to children who are deprived of their family environment. This provision goes further giving examples of different types of alternative care, like for example foster placement, placement in institutions suitable for the care of children or adoption. This enumeration does not imply that adoption is to be regarded as a “special protection measure” of a similar nature to the other ones. It does neither favour one option to the others. The aim of Article 20 is to give States Parties the spectrum of some possible solutions for children deprived of their family environment – and one of these possibilities is adoption, which is regulated in more depth under Article 21 of the UN Convention.

Intercountry adoption is a very last resort and should only be considered if any suitable means of foster, adoptive or residential care cannot be found in the country of origin of the child and only if it is manifestly in the best interests of the child. It must be clear that residential care comes also before (intercountry) adoption – see article 21(b) of the UN Convention on the Rights of the Child.

The reasons and motivation for intercountry adoption should be clearly stated in the law. In this respect it is also of importance that there should not be other ways to avoid the new regime on intercountry adoptions. Examples of how the new law and system can be prevented from working properly are: recognition of a child by a foreign (married) man of a Romanian child of which he clearly is not the father. Another example would be to consider a poor and/or minor Romanian mother not able to raise her child with as a consequence that the child will be available for adoption in Romania or even for intercountry adoption.

There is also concern about the 5.400 children who the Romanian Adoption Committee apparently has on the list of children approved for adoption. Clarification is required on what is happening to those children now and whether their cases are being reviewed. It would be unacceptable for these children to be “available for” inter-country adoption.

The need for hundreds of international adoptions which persists in Romania is uncommon when we compare the situation with the other States of the European Union. Without strict limitations in the law, it is to be feared that children could be adopted by foreign residents too easily. International adoption besides adoption between relatives is a deliberate choice for a State. Preference should always be given, and in conformity with the UNCRC, to alternatives like foster care and suitable institutional care.

Summary

The Panel's position is a legal and not a political opinion. The reference, guide and basis for its opinion are the UN Convention on the Rights of the Child (CRC) and the European Convention on Human Rights (ECHR). Also the practices in the EU Member States served as reference.

Intercountry adoption **cannot be considered as a protection measure**. Romania's situation is in this regard exceptional, as no EU Member State expatriates its children. Other Member States protect their children and deal with the issues in-country. Out of home placement is available, guidance to parents given and family allocations provided. It is therefore not necessary to abandon children.

The objective of the new legislation is that Romania becomes like other Member States and does not export its children anymore. Intercountry adoptions lead to a vicious circle: too many intercountry adoptions will mean that Romania will not see the need for proper child protection. And as long as the child protection is not at European level, Romania risks continuing to use intercountry adoptions.

To resolve this paradox, intercountry adoptions need to become legally more difficult, exceptional and truly a measure of last resort.

The Convention on the Rights of the Child

The Convention on the Rights of the Child remains neutral about the desirability of adoption even within the child's country of origin, though article 20 mentions it as one of the possible options for the care of children without families. It is clear that children's psychological need for permanency and individual attachments can be met without the formality of adoption, but where it is used it should be properly regulated by the State to safeguard children's rights.

In adoption the best interests of the child must be "the paramount" consideration rather than simply "a primary" consideration. No other interests should take precedence over or be considered equal to the child's **(whether economic, political, state security or those of the adopters)**.

Article 20 of the Convention on the Rights of the Child concerns children who are temporarily or permanently unable to live with their families, either because of circumstances such as death, abandonment or displacement, or because the State has determined that they must be removed for their best interests.

Such children are entitled to «special protection and assistance». Paragraph 3 of article 20 determines that «Such care should include, *inter alia*, foster placement, *kafalah* of Islamic law, adoption or, if necessary, placement in suitable institutions for the care of children».

It is important to note that during the negotiations of article 20, there was a proposal that States should have to «facilitate permanent adoption» of children in care. The proposal was rejected on the grounds that adoption is not the «only solution» when children cannot be cared for by their families. Even the weaker proposal that children should have a right to a «stable family environment» did not survive to reach the final text.

Paragraph 3 of Article 20 also determines that when considering child protection solutions, due regard be paid to «the desirability of continuity in a child's

upbringing and to the child's ethnic, religious, cultural and linguistic background». This provision relates to article 7 (right to know and be cared for by parents) and article 8 (preservation of the child's identity) of the CRC.

According to UNICEF's Handbook on the Implementation of the CRC, «Continuity of upbringing implies continuity of contacts, wherever possible, with parents, family and the wider community – achievable even when the child is adopted». The Panel notes that of course, in cases of intercountry adoption it will be much harder – and in most cases even impossible – to respect this provision of the UN Convention on the Rights of the Child.

On the other hand, article 21 of the Convention on the Rights of the Child, stipulates that the system of adoption «shall ensure that the best interests of the child shall be **the** paramount consideration» and in this context it asks States to «recognise that intercountry adoption may be considered as an alternative means of child's care, **if the child cannot be placed in a foster or adoptive family or cannot in any suitable manner be cared for in the child's country of origin**».

Again according to UNICEF's Handbook, article 21 of the Convention states that «intercountry adoption is only to be considered if the child cannot be suitably placed in his or her country» and «the Convention on the Rights of the Child remains neutral about the desirability of adoption even within the child's country of origin, though article 20 mentions it as one of the possible options for the care of children without families»

On the question of intercountry adoption the Handbook on the Implementation of the CRC says that « the rising number of intercountry adoptions has been the cause of much concern. Children are a highly desirable commodity in countries where low birth rates and relaxed attitudes towards illegitimacy have restricted the supply of babies for adoption. [...] This has led an apparently increasing number of adoptions to be arranged on a commercial basis or by illicit means. Without very stringent regulation and supervision children can be trafficked for adoption or can be adopted without regard for their best interests [...] ».

The United Nations Committee on the Rights of the Child has openly stated that intercountry adoption shall be seen as a solution of last resort. When examining Mexico's Initial Report the Committee stated the following

«intercountry adoption should be considered in the light of article 21, namely as a measure of last resort».

States must therefore take measures to ensure that all possible efforts have been deployed to provide suitable care for the child in his or her country of origin. This «last resort» provision is in conformity with article 20 (3) which refers to the «the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background». This provision relates to article 7 (right to know and be cared for by parents) and article 8 (preservation of the child's identity).

Finally, it is interesting to remember the statement made by the Holy See to the Hague Conference, where a fundamental principle was confirmed, *i.e.*, **that "children are not isolated individuals but are born in and belong to a particular environment. Only if this native environment cannot, in one way or another, provide for a minimum of care and education should adoption be contemplated. The possibility of providing a better material future is certainly not, of itself, a sufficient reason for resorting to adoption".**

Wikileaks cable 04BRUSSELS2496

Source: <http://wikileaks.org>

Viewing cable 04BRUSSELS2496, VERHEUGEN RESPONSE TO DEPUTY SECRETARY ON ROMANIAN

If you are new to these pages, please read an introduction on the structure of a cable as well as how to discuss them with others. See also the FAQs

Reference ID Created Released Classification Origin

04BRUSSELS2496 2004-06-10 12:56 2011-08-30 01:44 CONFIDENTIAL Embassy
Brussels

This record is a partial extract of the original cable. The full text of the original cable is not available.

101256Z Jun 04

C O N F I D E N T I A L BRUSSELS 002496

SIPDIS

E.O. 12958: DECL: 06/10/2014

TAGS: PREL CASC CVIS RO EUN USEU BRUSSELS

SUBJECT: VERHEUGEN RESPONSE TO DEPUTY SECRETARY ON ROMANIAN
ADOPTIONS

Classified By: Rick Holtzapple, PolOff, Reason 1.4 B/D

¶1. (U) The cabinet of Enlargement Commissioner Gunter Verheugen has faxed us a letter from the Commissioner to Deputy Secretary Armitage, replying to the Deputy Secretary's letter of May 4 on the issue of Romanian adoptions. The full text of the letter is in para 3 below, and a copy of the original fax with signature has been faxed to EUR/ERA and Embassy Bucharest.

¶2. (C) The letter confirms what we already know from the copy of the report from the Commission to the GoR on the issue that was provided to Embassy Bucharest. The Commission's legal experts have told the Romanian government that the "proposed approach to pursue on the policy of intercountry adoptions with a very limited exception" is seen as "essentially in line" with the EU's demands.

¶3. (U) Beginning of Text:

Dear Mr. Secretary of State,

Thank you for your letter of 4 May 2004 on the issue of intercountry adoptions from Romania. I would like to clarify that the European Commission is not against intercountry adoption as such. However, the UN Convention on the Rights of the Child foresees that intercountry adoption may be considered only if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin. This "last resort" provision is consonant with the provision in the UN convention that refers to the "desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background."

All Member States of the EU have ratified the UN Convention on the Rights of the Child and therefore should respect the above mentioned principles. Therefore the Commission considers that the moratorium on intercountry adoptions is necessary as long as no legislation is in force that fully complies with this convention, and as long as no administrative capacity exists to implement this legislation.

Following Prime Minister Nastase's request for legal advice on children's rights and adoption, the Commission set up an Independent Panel of EU Member State experts on family law. In its latest report, which I have forwarded to Prime Minister Nastase, the Panel noted the fundamental change made by Romania on the issue of intercountry adoption. The proposed approach to pursue on the policy of intercountry adoptions with a very limited exception was considered essentially in line with the UN Convention on the Rights of the Child.

Our primordial focus must be on getting the system of child care in Romania right so that we get to the usual situation in the Member States of the EU where international adoptions are the exception. Therefore, the EU has supported Romania in its efforts to improve the quality of public care for children. This meant that large residential establishments were closed down and replaced with a selection of child protection alternatives ranging from smaller homes and foster care to day-care centres. Of course there remains work to be done, but Romania surely has come a long way in resolving the issue of children in public care.

I have been informed that recently a videoconference on this issue was held between the Washington State Department and my services, and that it was considered useful to have both sides express their respective positions.

Yours sincerely,

/S/



February 28, 2006

Dear Commissioner:

I write to you today about an issue of tremendous importance to hundreds of children in state care in Romania, an issue to which the European Commission holds the key.

On 1 January 2005, a new law went into effect in Romania forbidding international adoption of Romanian children. I believe this law is tragically mistaken, but the purpose of this letter is not to contest this legislation. Rather, it is to ask that the European Commission officially inform the Government of Romania that it should not apply this law retroactively to the approximately 1,100 "pipeline children" whose international adoptions were already in process before 1 January 2005.

These 1,100 children have families who want to adopt them from countries such as Spain, France, Italy, Greece, Ireland, the United States, Israel and others. The cases have been pending for 3 to 6 years, and many of the children have long known they have foreign parents waiting to adopt them. Most of the children are now at least five years old, and many are suffering the effects of long-term institutionalization and foster care. About two-thirds of them are Roma. Some are disabled, and all have been found to have severe developmental delays when formally tested. Nearly all of them are suffering severe psychological consequences of this long-term ban on their adoptions. For all of the above reasons, they are unlikely to find homes if their international adoptions are not allowed.

This problem has arisen because of the European Union. In June 2001, Romania instituted a moratorium on international adoption that, contrary to promises made at the time, lasted until the law forbidding adoptions went into effect. While the moratorium may have been justified as a temporary measure to correct abuses in the system, both the undue length of the moratorium and the new law are the result of pressure from the European Parliament and the European Commission, applied by officials and MEPs who believe, erroneously, that international adoption is forbidden by the UN Convention on the Rights of the Child and violates a child's biological, cultural and linguistic identity. Here, though, are the most relevant facts about international adoptions and the situation of abandoned children in Romania:

--In a February 2004 statement on intercountry adoption, UNICEF said that, "For children who cannot be raised by their own families [or be placed in a permanent family setting in their countries of origin]....Inter-country adoption...may indeed be the best solution."

--According to UNICEF, there are approximately 110,000 children in state care or abandoned in Romania, and to this day, 9,000 children are abandoned every year in maternity wards or pediatric hospitals.

--According to the Government of Romania, the average number of Romanian domestic adoptions per year since 2000 has been approximately 1,200. As of January 2006 only 533 domestic adoptions were in process.

--Many of the pipeline children, though they have been abandoned since birth, are being declared not available for adoption while their cases are re-evaluated under the new law, with signatures needed from all relatives up to the 4th degree confirming they don't want the children in order for them to be re-declared adoptable.

--There are numerous reports from Romania that foster parents and potential Romanian adoptive parents are being pressured to adopt -- or to say they will adopt -- the pipeline children, thereby depriving other, non-pipeline children, of adoptive homes just to make the pipeline cases appear solved.

--Contemporary child development research has unequivocally shown that in infancy, hospital or orphanage care for longer than 4-6 months can cause permanent losses in cognitive, emotional and behavioral development. Foster care, though preferable to institutionalization, has been shown to be a stopgap measure that rarely provides the permanent caregivers needed to optimize development.

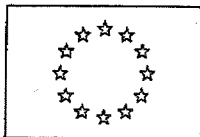
This has been a shameful chapter in the history of the European Union. Now, however, the story could change. On 15 December 2005 the European Parliament, in its resolution on the extent of Romania's readiness for accession to the European Union, urged Romania "to settle the cases of applications for international adoption made during the moratorium of June 2001...with the goal of allowing inter-country adoptions to take place, where justified and appropriate, in those special cases." If the European Commission would do the same, Romania would have the assurance it needs that allowing these adoptions would not impede its accession to the EU -- and hundreds of children who have been waiting so long, many of whom know their prospective families and consider themselves to be a part of those families, could grow up in a permanent family environment.

Romania is reviewing the pipeline cases, and a final decision on them is expected in March or April. Both Romania and Commission sources from DG Enlargement have said that they expect no adoptions will be allowed for the pipeline cases. This would be equivalent to a second abandonment of these children. It is unconscionable, because it is completely unnecessary. It is in no one's interest to choose arbitrarily not to give these children a chance to grow up in a loving family. It goes against the most important values upon which the European Union is based. Please work within the College of Commissioners to help these children.

Thank you for your urgent attention to this matter. Please feel free to contact me at lrobak1@yahoo.com or 001-203-571-8705 if you desire any additional information or supporting documentation.

Sincerely,

Linda Robak
Executive Director, For the Children SOS



EUROPEAN COMMISSION

Cabinet of Vice President Franco Frattini

Carlo Presenti
Head of Cabinet

- 3 AVR. 2006

Brussels,
D(2006) /SZ/av/4291

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Monsieur,

Thank you for your letter of 28 February to Vice President Frattini. The Vice President has asked me to respond on his behalf.

Allow me first of all to underline that the Rights of the Child in general are an issue to which we attach utmost importance. You refer in your letter to the fact that Romania adopted new legislation on child protection with effect from 1 January 2005. This legislation is now aligned with the European acquis in this area and it transposes the UN Convention on the Rights of the Child. According to this new legislation, inter-country adoption is a last resort, if suitable solutions ranging from smaller homes to foster care cannot be provided in Romania. Inter-country adoption is also strictly limited to the natural grandparents and is no longer foreseen as a child protection measure. This rather strict measure must be understood within the context of former abusive practices relating to international adoptions in Romania. Moreover, the new law does not foresee any special cases which would be open for international adoptions. This represents a firm reaction to past irregularities and a measure conducive to the developing intra-country alternatives in the best interest of the child.

The new law also contains transitional provisions. According to Article 72 (1), "cases which are in the process of being examined by the courts of law, at the time when the present law comes into force" had to be treated "according to the legal provisions which had been already enforced at the time when the petition was filed." Paragraph 3 of this law stipulates that for "all other cases the whole adoption procedure must be in accordance with the provisions of the present law."

According to the information given by the Romanian government all cases pending in court at the entry in force of the new legislation are already completed.

Mrs Linda Robak
Executive Director "For the Children SOS"
488 Home Avenue 3 F
Shelton CT 06484
USA

This means that if the competent court approved the petitions for international adoption according to the previous transitional provisions, then these children have already left Romania.

The remaining petitions for international adoption by foreign citizens registered between October 2001 and December 2004 which are not examined by courts by 1 of January 2005 are currently under investigation. A national working group was set up in Romania to examine each pending international adoption request. This screening is about to be completed. However, after a first analysis it seems clear that the new legislation applies to all cases. Consequently it is highly unlikely that any of the requests will be accepted. The only exception may be the case of international adoption by the natural grand-parents.

I hope that this information is useful to you and the organisation you preside.

Yours sincerely
Al Pint.

Congress of the United States
Washington, DC 20515

May 5, 2009

The Honorable Cristian Diaconescu
Aleea Alexandru nr. 31,
Sector 1, București, cod 011822

Dear Mr. Foreign Minister:

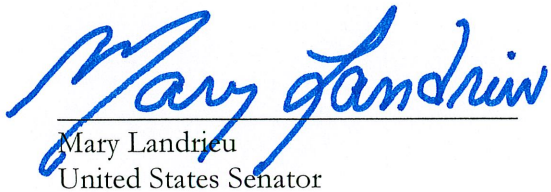
As you well know, the relations between the United States and Romania have become increasingly strong over the past decade and we look forward to continuing to strengthen the ties between our two nations in decades to come. One area that has and will continue to be of great importance to us and the 215 Members of Congressional Coalition on Adoption is the safety and well being of Romania's children. We applaud the Government of Romania's work to prevent the abandonment of children and offer our continued support of your concerted efforts to move away from the use of institutionalization.

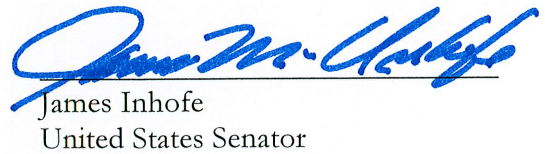
That being said, we remain concerned that according to your own estimates 86,000 children remain in state care. We strongly believe that the best interests of these children can only be served through policies and programs aimed at either timely reunifying them with their birth family when safe and appropriate or connecting them with a safe, loving and permanent family through safe and viable kinship and guardianship care, or domestic and international adoption. Interventions such as foster and day care are meant to serve as temporary measures while permanent placements can be secured. They are not and should not be relied on as long term alternatives to biological or adoptive parental care.

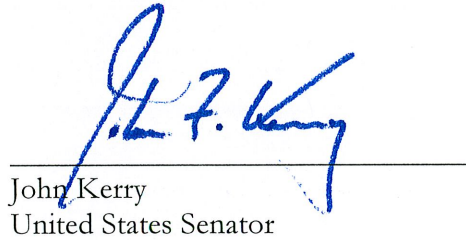
To this end, we urge you to reform current law in Romania to more fully promote and support permanent parental care for children. This reform process must include a reevaluation of your decision to remove international adoption as an important permanency option for children who cannot find permanent homes in Romania. While child welfare reform legislation was passed in 2004, it is widely agreed that the new law creates additional issues for abandoned children and as noted above, eliminates inter-country adoption as a permanency option. We continue to support your goal of developing a reformed system for international adoption, but the delay in reform should not occur at the expense of children already matched with adoptive families in the United States or elsewhere.

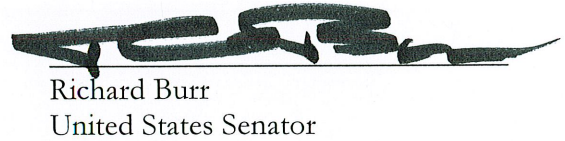
Please know that Romania is not the only nation faced with the challenge of securing a brighter future for its orphaned children. In the United States, approximately 60,000 foster children are still in need of a permanent family to call their own. Because U.S. law remains focused on the best interests of the individual child, these children are allowed to be adopted outside when appropriate. As U.S. lawmakers, we are committed to doing what we can to remove barriers that hinder U.S. children from realizing their basic right to a family. We welcome your leadership in securing this same right the children of Romania and the world.

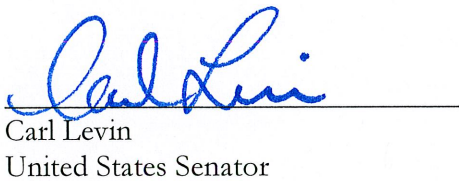
Sincerely,

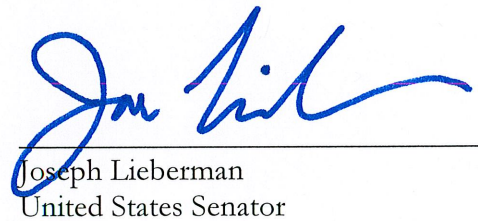

Mary Landrieu
United States Senator

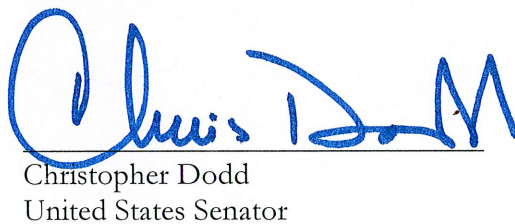

James Inhofe
United States Senator

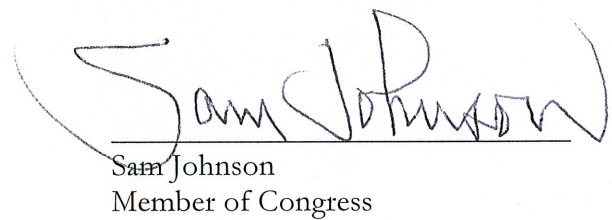

John Kerry
United States Senator


Richard Burr
United States Senator

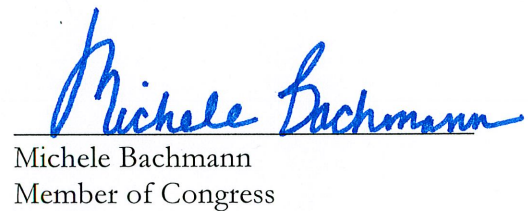

Carl Levin
United States Senator

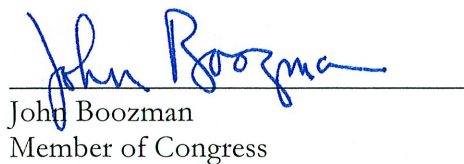

Joseph Lieberman
United States Senator


Christopher Dodd
United States Senator


Sam Johnson
Member of Congress

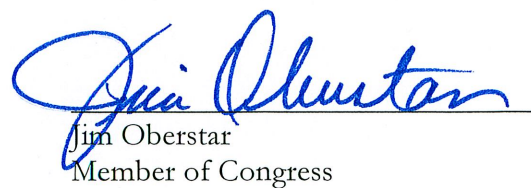

Dennis Moore
Member of Congress

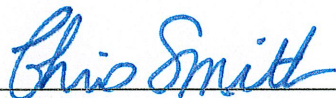

Michele Bachmann
Member of Congress


John Boozman
Member of Congress


Jim Himes
Member of Congress


Barney Frank
Member of Congress

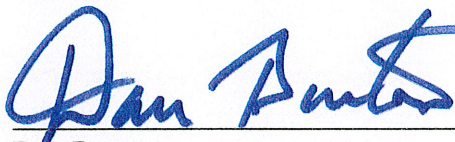

Jim Oberstar
Member of Congress



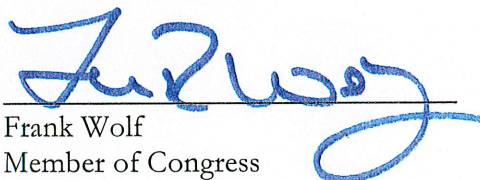
Chris Smith
Member of Congress



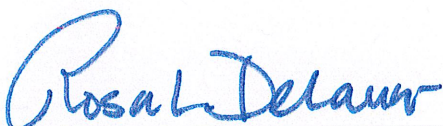
Daniel B. Maffei
Member of Congress



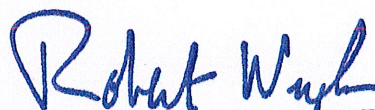
Dan Burton
Member of Congress



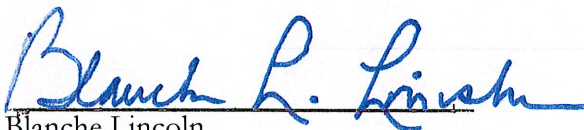
Frank Wolf
Member of Congress



Rosa L. DeLauro
Member of Congress



Robert Wexler
Member of Congress



Blanche Lincoln
United States Senator

Zijne Excellentie
De Eerste Minister Jean Max Bellerive,
Port-au-Prince.

Ik sluit mij aan bij de condoleancebetuiging van de Koningin van Nederland, Hare Majesteit Beatrix van Oranje, waarin het diepste medeleven van de Nederlandse Regering en van het Nederlandse volk wordt uitgedrukt met betrekking tot de verschrikkelijke ramp die uw land en uw volk heeft getroffen.

Hierbij doe ik u mijn persoonlijke condoleances toekomen en wens ik u tevens de bereidheid van mijn Regering kenbaar te maken om hulp te bieden bij de redding van uw volk en bij de wederopbouw van uw land om zo het lijden van het volk van Haïti te lenigen in de vorm van reddingsteams en een eerste hulpkapitaal van 2 miljoen euro.

Wij betreuren ten zeerste het verscheiden van de Nederlandse burgers die zich ten tijde van de aardbeving in Villa Thérèse bevonden. Deze Nederlandse gezinnen waren net met hun Haïtiaanse adoptiekinderen herenigd en zijn allen in het hotel omgekomen.

Sinds vrijdag 15 januari is de Nederlandse humanitaire hulp in Haïti volop op gang gekomen. Gelet op de ook dramatische situatie voor de kinderen in kinderdagverblijven, heeft de Nederlandse Regering een evacuatieprogramma opgezet voor kinderen waarvan de procedure voor adoptie door Nederlandse gezinnen loopt. Het betreft in totaal 102 kinderen in drie verschillende kinderdagverblijven. De dossiers van 60 kinderen zijn door de Rechtbank van Eerste Aanleg van Port-au-Prince behandeld; 52 dossiers liggen of bij het IBESR [*Haïtiaanse kinderbescherming*] of op het Parket voor de nodige vervolgfomaliteiten. De behandeling van deze 52 dossiers aan Haïtiaanse zijde is derhalve nog niet afgerond.

Ik verzoek u uit mijn eigen naam en uit naam van mijn Regering ons toestemming te verlenen om de 102 kinderen op maandag 18 januari 2010 naar Nederland over te brengen en ze met hun adoptiefamilies te herenigen. U biedt deze kinderen zo de kans om hun trauma van de afgelopen dagen te verwerken; u geeft hun zo een nieuw leven in veiligheid; zij zullen zich uw goedgunstigheid blijven herinneren en op een dag zullen zij terugkeren naar hun geboorteland om een bijdrage te leveren aan de ontwikkeling van Haïti.

Ik kan u garanderen dat de Nederlandse Regering, bij aankomst van de kinderen in Nederland, de adoptieprocedure van deze kinderen opstart in nauwe samenwerking met de Haïtiaanse Regering. Ik bied u eveneens de garantie van het verstrekken van follow-uprapporten na zes (6) maanden en na een (1) jaar.

Ik verzoek u uit naam van mijn Regering en uit naam van 102 adoptiekinderen mij zo spoedig mogelijk over uw besluit te informeren. Wij hebben uw schriftelijke akkoordbevinding nodig of uw goedkeuring door ondertekening van deze brief.

Met de meeste hoogachting,

[handtekening + stempel]

Rita Dulci Rahman,

[onleesbaar gedeelte] Majesteit te Saint Domingue en te Port-au-Prince.

[onleesbaar gedeelte] Consul-generaal van Nederland

[onleesbaar gedeelte] Lele, Pétion-Ville

Son Excellence
Monsieur le Premier Ministre Jean Max Bellerive,
Port-au-Prince.

Handwritten signature and date: 30/1

Je me rejoins à la lettre de condoléance de la Reine des Pays-Bas, Sa Majesté Béatrice de l'Orange, formulant la profonde sympathie du Gouvernement des Pays-Bas et du peuple Néerlandais, concernant le désastre horrible qui a touché votre pays et votre peuple.

Veuillez y recevoir ma condoléance personnelle et l'assurance de la volonté de mon Gouvernement de l'aide dans le sauvetage de votre peuple et dans la reconstruction de votre pays en vue de diminuer la souffrance du peuple Haïtien par des équipes de sauvetage d'urgence et par un premier fonds d'aide de 2 millions Euros.

Nous déplorons profondément la disparition des citoyens Néerlandais qui se trouvaient à Villa Thérèse pendant le tremblement de terre. Ces familles Néerlandaises venaient à peine se réunir avec leurs enfants Haïtiens adoptifs et ont tous trouvés la mort dans l'hôtel.

Depuis Vendredi 15 janvier, l'aide humanitaire des Pays-Bas est en plein mouvement en Haïti. Vu la situation dramatique aussi pour les enfants dans des crèches, le Gouvernement des Pays-Bas a mise en place un programme d'évacuation des enfants en procédure d'adoption par des familles Néerlandaises. Il s'agit en totale de 102 enfants dans trois crèches différentes. Les dossiers de 60 enfants ont passés le Tribunal de Première Instance de Port au Prince ; 52 dossiers se trouvent ou bien au IBESR ou au Parquet pour des suites nécessaires. Ainsi, l'adoption Haïtien de ces 52 dossiers n'est pas encore finalisée.

Je vous demande à mon propre nom et au nom de mon Gouvernement de nous donner votre permission d'évacuer les 102 enfants aux Pays-Bas et de les réunir avec leurs familles adoptives le Lundi 18 Janvier 2010. Vous leurs donnerez la chance de guérir leur traumatisme des derniers jours ; vous leurs donnerez une nouvelle vie en sécurité ; ils se souviendront de votre grâce et un jour ils reviendront dans leurs pays natale pour contribuer au développement du pays d'Haïti.

Je peux vous garantir que le Gouvernement Néerlandais, dès l'arrivée des enfants aux Pays-Bas, commencera la procédure d'adoption de ces enfants en étroite coopération avec le Gouvernement Haïtien. Egalement les rapports de suivi après six (6) mois et après une (1) année seront garantis.

Je vous prie au nom de mon Gouvernement et au nom de 102 enfants adoptifs de m'informer au plus vite possible de votre décision. Nous aurions besoin de votre accord écrit ou votre approbation par la signature de cette lettre.

Nous vous prions d'agréer, Excellence, nos salutations les plus respectueuses.

Rita Dulci Rahman,

Ambassadrice de son Majesté à Saint Domingue et à Port au Prince.

Rob J. Padde, Consul Général des Pays-Bas

Hôtel Lele, Pétion-Ville



Pour accord,

Handwritten signature of the official.