

## PROMISING PRACTICE: RAISING AWARENESS ABOUT FALSE BIRTH REGISTRATION PRACTICES, KNOWN AS THE BRAZIL BABY AFFAIR

Patrick Noordoven, the Managing Director of the NGO Brazil Baby Affair<sup>206</sup>, describes his work advocating for the right to identity, especially in violations of ICA practices.

This contribution aspires to provide considerable insights into the human right to identity from an international human rights perspective. The insights put forward in this article attempt to contribute to the human rights debate about the fundamental importance of the UNCRC and three other treaties<sup>207</sup> for ICA. From this perspective, this contribution focuses on human rights violations committed through false birth registration practices in Brazil for the purpose of ICA, known as the Brazil Baby Affair.

The human right to know one's origins and identity, in particular in cases of illegal deprivation of identity, are safeguarded in the UNCRC<sup>208</sup> and the ECHR<sup>209</sup> (see *Chapter 2: Legal considerations*), making State parties legally accountable for these human rights. Nonetheless, in order to prevent the illegal deprivation of identity, particularly through illicit practices in ICA, no provisions are stipulated in either the UNCRC or the 1993 Hague Convention to address this violation of human rights. Likewise, neither enforcement nor recovery of the right to identity is organised by means of any respective convention or its optional protocols. Institutionalised expertise, in the form of an international competent body, to deal with these issues, has yet to be established.

### BIRTH REGISTRATION, CIVIL REGISTRATION, BIRTH CERTIFICATE AND THE RIGHT TO IDENTITY

Deprivation of the right to identity for the purpose of an illegal ICA – known within Brazil as *adoção à brasileira*<sup>210</sup> – is relatively easy to conduct by falsely declaring the birth of a baby during civil registration<sup>211</sup>. This kind of illegal adoption practice represents the main characterisation of the Brazil Baby Affair.<sup>212</sup>

<sup>206</sup> See: Brazil Baby Affair – Researching Informing Tracing, <http://www.brazilbabyaffair.org>.

<sup>207</sup> ICCPR, ECHR and the 1993 Hague Convention.

<sup>208</sup> See: Article 8 of the UNCRC.

<sup>209</sup> See: Article 8 of the ECHR.

<sup>210</sup> 'As consequências do jeitinho brasileiro na adoção ilegal de crianças', Superior Tribunal de Justiça, (2014).

<sup>211</sup> Presidente Deputado Arnaldo Jordy and Relatora Deputada Flávia Moraes, 'Comissão Parlamentar de Inquérito Destinada a Investigar o Tráfico de Pessoas no Brasil, Suas Causas, Consequências e Responsáveis no Período de 2003 a 2011, Compreendido na Vigência da Convenção de Palermo (Cpi – Tráfico De Pessoas No Brasil)', 127-128, Brasília, 2014; available at: <http://www2.camara.leg.br/camaranoticias/noticias/SEGURANCA/468351-CPI-DO-TRAFICO-DE-PESSOAS-APROVA-RELATORIO-FINAL.html>.

<sup>212</sup> Bronkhorst, M and Oost, J (1984). 'Problemen rond interlandelijke adoptie. Kinderen op bestelling?', in *Algemeen Politieblad*, 3, p. 52.

Unfortunately, (inter)national human rights law does not allow for effective prevention of this human rights violation because it is not yet universally recognised that the right to birth registration, as put forward in article 24(2) of the ICCPR, includes a right to a birth certificate<sup>213</sup>.

The right to birth registration, provided for by Article 7(1) of the UNCRC, essentially does not protect the right to identity. The benefits of birth registration, according to the CRC, in practice, depend on a birth certificate, which is issued upon civil registration. Hence, the provision of a birth certificate is conceived by the CRC as a fundamental component of a complete and veracious birth registration process<sup>214</sup>. However, this process should be accompanied by establishing, implementing and enforcing proper checks and balances.

Thus, the right to birth registration, being of fundamental importance for civil registration and resulting in a birth certificate, should be based on a *certificate of birth registration* (e.g. issued by the hospital of birth) to safeguard the right to identity. The aim is to prevent the deprivation of the right to identity for the purpose of – illegal – ICA, and thereby the reoccurrence of the Brazil Baby Affair<sup>215</sup>.

### THE BRAZIL BABY AFFAIR

In 1981, the Dutch national Police started an international criminal investigation on illegal ICA practices from Brazil, liaising with, *inter alia*, West German, British, French and Spanish police authorities<sup>216</sup>. The investigations, officially known as the Brazil Baby Affair<sup>217</sup>, disclosed *de facto* illegal ICAs of Brazilian babies to several European countries and the USA. In most of the investigated Dutch cases, no ICA procedure was started and the ‘adoptive’ parents confessed to being guilty of acts, which constitute the violation of the human right to identity<sup>218</sup>.

Due to the extraterritorial jurisdiction principle, they were prosecuted for crimes such as violation of Article 236 of the Dutch Criminal Code (*Verduistering van staat*), because they registered the Brazilian babies as their biological children. The intermediaries, through whom they acquired the Brazilian newborns, set up the deliberately false birth registration, as suggested by officials from the Embassy, Consulate or Chamber of Commerce<sup>219</sup>. In this way, the ‘adoptive parents’ erased any reference to the baby’s original identity, intentionally depriving them of their identity by creating a false one.

<sup>213</sup> Gerber, P, Gargett, A and Castan, M (2011). ‘Does the right to birth registration include a right to a birth certificate?’, in *Netherlands Quarterly of Human Rights* 29.4, p. 435.

<sup>214</sup> *Ibid.*, p. 454 – 455.

<sup>215</sup> For further information on safeguarding the right to identity, see: Brazil Baby Affair, Position Paper: ‘Double Subsidiarity Principle and the Right to Identity’; available at: <http://www.brazilbabyaffair.org/publications-and-resources/papers/double-subsidiarity-principle/>.

<sup>216</sup> *Supra* 212, p. 54.

<sup>217</sup> J Oost, personal communication, 17 April 2013.

<sup>218</sup> *Supra* 212.

<sup>219</sup> ‘Illegale adoptie in Brazilië’, *Achter het nieuws*, 22 February 1982.

While the final recommendations of the 2014 Brazilian Parliamentary Commission on Trafficking of Persons qualify illegal adoption as trafficking of persons, the provisions have yet to be adopted and put into effect<sup>220</sup>. From a Criminal Law perspective, Articles 241 and 242 of the Brazilian Criminal Code specify respectively an inexistent birth registry<sup>221</sup> and a supposed birth<sup>222</sup>. Article 238 specifies the sale of a child<sup>223</sup>, whereas Article 239 specifies sending a child abroad without observance of the legal formalities or with the purpose of financial gain<sup>224</sup>. Finally, Article 299 mentions false declarations<sup>225</sup>, which could be held against persons involved in false birth registration witness declarations.

The crux of the right to identity lies within the Law on Public Records, Chapter IV, relating to birth. Article 52 states who must declare birth and Paragraph 1 provides for a veracious birth registration process, which can be undertaken through the declaration of two witnesses who have seen the newborn<sup>226</sup>. Common practice in Brazil during the past several decades has been the delivery of births in hospitals. Nonetheless, falsely declaring, during the civil registration, that the newborn was born at home, without medical assistance, makes it possible to circumvent the necessity of birth registration, in order to obtain a birth certificate based on a false identity.

### CONSEQUENCES OF THE BRAZIL BABY AFFAIR IN FAMILY TRACING WORK

The consequences of the shortcoming of appropriate provisions stipulated in the UNCRC, the 1993 Hague Convention and Brazilian domestic law, in respect of safeguarding the right to identity, have resulted in a lack of identity-defining knowledge for the Brazil Baby Affair adoptees. At the same time, the birth families are deprived of any information about the false identity of the Brazil Baby Affair adoptees, making it virtually impossible for both parties to search for one another. Brazil Baby Affair adoptees consequently do not hold any information concerning their place of birth, date of birth and names at birth. As a result, they also lack any ancestry and medical birth information due to their false identities.

In the absence of a legal ICA procedure and proof of the deprivation of identity, no accountability claims (e.g. requesting assistance to access the right to identity) may be submitted<sup>227</sup>. Because of the human rights violations committed by the intermediaries<sup>228</sup> and the hospitals, where the births took place, responsible parties are reluctant to provide any form of cooperation to the Brazil Baby Affair adoptees, fearing self-incrimination. The only option these adoptees have left is to resort to the specialised family tracing assistance of the NGO Brazil Baby Affair.

As the NGO Brazil Baby Affair undertakes tracing work, multiple challenges are faced. No complete timeframe or total cost indication can be given to Brazil Baby Affair adoptees beforehand. Success in each individual family tracing case depends on many variables. It also differs widely from one hospital to another when it comes to accessing their archives – provided these still exist<sup>229</sup> – and the region and number of possible birth hospitals that may be determined and narrowed down sufficiently to start a family tracing process. The right to privacy of

<sup>220</sup> *Supra* 211.

<sup>221</sup> 'Registro de nascimento inexistente'.

<sup>222</sup> 'Parto suposto. Supressão ou alteração de direito inerente ao estado civil de recém-nascido'.

<sup>223</sup> 'Prometer ou efetivar a entrega de filho ou pupilo a terceiro, mediante paga ou recompensa'.

<sup>224</sup> 'Promover ou auxiliar a efetivação de ato destinado ao envio de criança ou adolescente para o exterior com inobservância das formalidades legais ou com o fito de obter lucro'.

<sup>225</sup> 'Omitir, em documento público ou particular, declaração que dele devia constar, ou nele inserir ou fazer inserir declaração falsa ou diversa da que devia ser escrita, com o fim de prejudicar direito, criar obrigação ou alterar a verdade sobre fato juridicamente relevante'.

<sup>226</sup> 'Quando o oficial tiver motivo para duvidar da declaração, poderá ir à casa do recém-nascido verificar a sua existência, ou exigir a atestação do medico ou parteira que tiver assistido o parto, ou o testemunho de duas pessoas que não forem os pais e tiverem visto o recém-nascido'.

<sup>227</sup> In these cases, State authorities refer to the CA under the 1993 Hague Convention, which has neither legal competence nor professional expertise to deal with these matters.

<sup>228</sup> Related research and case studies by Brazil Baby Affair disclose the involvement of (foreign) government officials (*i.e.* diplomats).

<sup>229</sup> See: Article 8 of Resolution CFM No. 1.821/07.

hospital patients listed in medical archives infringes on the right to identity of the Brazil Baby Affair adoptees. In such cases, lawsuits aimed at accessing the right to identity are likely to inherently become part of these infringing rights situations. In some cases, a Brazil Baby Affair adoptee might actually have two officially registered identities. By establishing and accessing public information on the original identity, it is possible to locate the Brazil Baby Affair adoptee's birth family. For the birth families, especially for the birth mothers, it is possible to establish the false identity of the Brazil Baby Affair adoptee by accessing public civil registries, provided the false birth registration was effected in the same place as the one, in which the mother gave birth to her child, or if the false place of birth can be established.

In order to effectively initiate a Brazil Baby Affair family tracing process, adequate resources and support are required. In terms of support, Brazil is a relatively expensive country, facing complex administrative obstacles, and institutionalised support for individual family tracing cases is unavailable. In practice, without sufficient support of any kind from any responsible party, Brazil Baby Affair family tracing processes are unlikely to succeed. Thus, to achieve the best possible outcome in any Brazil Baby Affair family tracing process, it is of utmost importance to obtain the fundamental support of the Brazilian government. In order to achieve this, the NGO Brazil Baby Affair engages in vital advocacy work.

### ADVOCACY WORK

The NGO's support to Brazil Baby Affair adoptees consists primarily of demanding comprehensive accountability, and attaining full and unconditional cooperation from all responsible State and non-State parties for the illegal adoptions from Brazil until 1999<sup>230</sup>. This principally encompasses advocating for full implementation of the UNCRC, with special emphasis on the child's 'right to know and be cared for by his or her parents', as far as possible, and the right not to be illegally deprived of one's identity. This corresponds to the NGO's vision that the deprivation of identity through false birth registration practices should never occur again.

To achieve this vision, the NGO strives for complete avoidance of any kind of illegal adoption practice through the recognition of the right to a birth certificate to be included in the human right for birth registration. The NGO advocates for the right to a birth certificate to be accompanied by safeguarding measures to ensure the authenticity of the registration (e.g. obligatory civil registration of birth within the hospital of birth). The NGO also aims to raise – local community – awareness, amongst others, through grass-roots projects, to prevent illegal – intercountry – adoption from happening again.

Lamentably, the Brazilian State is not concerned with the – reoccurrence of – the Brazil Baby Affair: according to Rodrigo Torres, from the Brazilian Secretariat for Human Rights, who was representing Brazil at the 70<sup>th</sup> session of the CRC on 21 and 22 September 2015 in Geneva, '[w]e do not have a specific policy to avoid babies being kidnapped in maternities. Unfortunately, this is not considered to be a priority for us'. The absence of the Brazilian Secretariat, throughout the 2015 Special Commission meeting on the practical operation of the 1993 Hague Convention held in The Hague – and during the session on 'Preventing and addressing illicit practices' – can be seen in this light.

The CRC and the Special Commission meetings on the practical operation of the 1993 Hague Convention form an exceptional opportunity for advocacy work and to share the NGO's questions and concerns regarding the right to identity. The NGO challenges the Brazilian State on two issues: (1) preventing violations of Article 8 of the UNCRC, in particular for the purpose of illegal domestic adoption and ICA; and (2) implementing measures to guarantee access to the right to identity for adults who were deprived of their identity.

<sup>230</sup> The 1993 Hague Convention entered into force in Brazil on 1 December 1999.

Ultimately, the NGO advocates its vision universally, as stressed during its intervention at the 2015 Special Commission meeting, following the statement by Susan Jacobs, the United States Ambassador at the 2015 Special Commission meeting that 'birth registration should be as complete as possible to know who the child is':

Birth registration should be accompanied by adequate checks and balances in order to prevent false birth certificates from being issued, which were and still are being used in illegal domestic adoption and ICA practices.

Patrick Noordoven has a Bachelor's Degree in Political History and International Relations, with specialisation in human rights. He has written his BA thesis on the United Nations Convention on the Rights of the Child. Patrick Noordoven, who holds Brazilian and Dutch nationality, is the full-time Managing Director of the NGO Brazil Baby Affair, a registered non-profit organisation, which he founded in 2014, and is headquartered in Zurich, Switzerland. He has over 15 years of experience in family tracing cases in Brazil, during which he has been helping others overcome the problems resulting from the deprivation of identity that comes with illegal adoption practices. During his investigation into his own illegal ICA, Patrick developed a determination to unveil the international scale, context and impact of the practice, as well as to support fellow victims around the world. To this end, he founded the international NGO Brazil Baby Affair.

The NGO Brazil Baby Affair was established specifically to provide assistance in family tracing requests from all victims of illegal ICAs through the Brazil Baby Affair. The NGO works with a worldwide team of dedicated experts who aspire to generate awareness about the Brazil Baby Affair through the organisation's core activities of researching, informing and tracing of all cases in which Brazilians, mainly as newborns, were deprived of their identity, advocating for their human right to retrieve their identity.