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**INTERCOUNTRY ADOPTION AND THE RIGHT TO IDENTITY:  
THE APPLICATION OF THE SUBSIDIARITY PRINCIPLE IN BRAZIL**

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BRASÍLIA

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*LLM Thesis submitted to the School  
of Law, University of Brasília, as  
per prerequisite to obtain the  
Masters in Law title. Line of  
Research: Society, Conflict and  
Social Movements – Law Found on  
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Brasília & Zürich, August 10, 2019.

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*This thesis is dedicated to all persons who are deprived of their right to identity through intercountry adoption. You*

*all deserve access to your origins, as recognized by*

*human rights law and jurisprudence.*

*I wish you all good luck in the process of claiming ownership of your right to identity – I hope that our suffering will become socially recognized and that our loss of identity will be met with sensitivity, understanding and respect.*

## **ACKNOWLEDGEMENT**

I would like to mention a few people and some groups of people to whom I owe recognition and thanks. First of all, my wife, without whom I would never have been able to accomplish any of my most significant adulthood achievements in life, including this particular milestone. Thank you for your great trust, sound patience and caring encouragements.

I would also like to thank all the professors who shared their knowledge and experience with me and who, without exception, were all very welcoming and adapted to my outsider status as a non-jurist and non-Brazilian educated student. I would also like to recognize the efforts of the administrative and faculty staff, without whom it would have been impossible for me to study. Of course, I also thank my fellow post-graduate students in law and those from the Masters in Human Rights with whom I attended classes for their inspiration and encouragement. In particular, I would like to thank Felipe Farias and Suellen Flores who introduced me to and connected me with respectively the Federal Supreme Court and the Nacional Justice Council.

Special thanks also goes to my supervisor Fabiano Hartmann, who has been very constructive and supportive and whose contribution has been of great significance to the Defense of this Thesis. I would also like to pay special thanks to thesis-defense committee professors, José Geraldo de Sousa Junior and Daniela Marques de Moraes. I greatly respect you all and I'm grateful to have learned from you.

*We all tend to measure and judge history in the light of our own existence; let us now try to do this from the perspective of the adoptee who is deprived of his identity.*

## ABSTRACT

This thesis is written for the University of Brasília (UnB) its School of Law (FD); it fits the FD's Graduate Program in Law (PPGD) line of research: Society, Conflict and Social Movements – Law Found on the Street, Legal Pluralism and Human Rights. Part of the completed courses for the FD's Masters in Law were taken at the UnB's Masters in Human Rights Program (PPGDH), which is part of the Center of Advanced Multidisciplinary Studies (CAEM) of the UnB.

The author of this research has a personal background related to intercountry adoption (ICA) from Brazil. That background is the basis for his curiosity about the right to identity for intercountry adoptees. This research therefore focuses on the right to identity for intercountry adoptees from Brazil and essentially addresses the following questions:

Do the Convention on the Rights of the Child and the Intercountry Adoption Convention safeguard the right to identity for intercountry adoptees? What other law provisions exist and how is the right to identity situated in the legal hierarchy of the Brazilian state? Is there a difference between the eligibility of a child to be domestically or internationally adopted? Which legal considerations, if any, are used to justify the balance of interests of an ICA ruling and the right to identity? What are the consequences of the application of the subsidiarity principle for adult intercountry adoptees from Brazil for their right to identity?

The findings of this research provide human rights guidance and conflict management reference, in particular for Brazilian judges and other professionals dealing with ICA. This research presents a view of latent infringement of the wide range of fundamental rights in respect of ICA, caused by narrow private international law interpretations of international human rights law and jurisprudence.

**Keywords:** Intercountry adoption. Right to identity. Subsidiarity principle. Access to origins. Human rights. Adoptee-rights movements. Law found on the streets.

## RESUMO

Esta dissertação foi escrita para a Faculdade de Direito (FD) da Universidade de Brasília (UnB). Ela enquadra-se na linha de pesquisa “Sociedade, Conflito e Movimentos Sociais – Direito Achado na Rua, Pluralismo Jurídico e Direitos Humanos” do Programa de Pós-Graduação da FD (PPGD). Uma parte dos cursos atendidos para o Mestrado em Direito da FD foi feita no Programa de Mestrado em Direitos Humanos da UnB (PPGDH), o qual é parte do Centro de Estudos Avançados Multidisciplinares (CEAM) da UnB.

O autor dessa pesquisa tem um histórico pessoal relacionado à adoção internacional oriunda do Brasil. Esse histórico é a base para o interesse sobre o direito à identidade para adotados internacionais. Essa pesquisa, assim, tem como foco o direito à identidade para adotados internacionais oriundos do Brasil e, essencialmente, trata das seguintes questões:

A Convenção sobre os Direitos da Criança e a Convenção sobre Adoção Internacional salvaguardam o direito à identidade para adotados internacionais? Quais outras previsões legais existem e como o direito à identidade está situado na hierarquia jurídica do estado brasileiro? Há uma diferença entre a elegibilidade de uma criança ser adotada domesticamente ou internacionalmente? Quais considerações jurídicas, se alguma, são usadas para justificar a ponderação de interesses de uma decisão de adoção internacional e o direito à identidade? Quais são as consequências da aplicação do princípio de subsidiariedade a adotados internacionais adultos oriundos do Brasil para seu direito à identidade?

Os achados dessa pesquisa proveem orientação em direitos humanos e referenciais em administração de conflitos, em particular para juízes brasileiros e outros profissionais que lidam com adoção internacional. Essa pesquisa apresenta uma visão da latente infração da ampla gama de direitos fundamentais no que respeita à adoção internacional, causada pela interpretação restritiva de direito privado internacional às normas e à jurisprudência de direitos humanos internacionais.

**Palavras-chave:** Adoção internacional. Direito à identidade. Princípio da subsidiariedade. Acesso às origens. Direitos Humanos. Movimentos de direitos dos adotados. Direito achado na rua.

## **LIST OF ACRONYMS**

ACER	Association for at Risk Children
ACHR	American Convention on Human Rights
ADI	Direct Action of Inconstitutionality
CAPES	Coordination for the Improvement of Higher Education Personnel
CEAM	Center of Advanced Multidisciplinary Studies
CF	Constitution of the Federative Republic of Brazil
CNJ	National Justice Council of Brazil
CNA	National Adoption Registry
CNPq	National Council for Scientific and Technological Development
CONANDA	National Council of the Rights of the Child
CRC	United Nations Committee on the Rights of the Child
DPU	Federal Public Defender
ECA	Child and Adolescent Statute of Brazil
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FD	Law Faculty of the Federal University of Brasília
HC-1993	Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption
HCCH	Hague Conference on Private International Law
IACtHR	Inter-American Court of Human Rights
ICA	Intercountry Adoption
ISS	International Social Service
LLB	Bachelors in Law
LLM	Masters in Law
NEIJ	UnB's Research Group on the Rights of the Child
NGO	Non-Governmental Organization
OHCHR	United Nations Office of the High Commissioner for Human Rights
OPSC	Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography
PAPs	Prospective Adoptive Parents
PGR	Office of the Prosecutor General
PPGD	UnB's Masters in Law Program
PPGDH	UnB's Masters in Human Rights Program
STF	Federal Supreme Court
STJ	Superior Court of Justice
UnB	Federal University of Brasília
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child 1989
UNICEF	United Nations Children's Fund
UNGA	United Nations General Assembly

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## FOREWORD

When I finished my studies in Political History and International Relations in 2015, I told myself I would not pursue a Masters degree. It had taken me more than a decade to obtain my BA<sup>1</sup>, and that was reason enough not to continue with any academic aspirations I still had. Except that it wasn't: I could not have foreseen that in June 2017 I would respond to the call for applications from the School of Law of the University of Brasília, and return once more to academia.

By then I had founded an international human rights Non-Governmental Organization (NGO), and had been working there as a volunteer, defending the right to identity for intercountry adoptees. Having taken ten years to attain my BA, it took less than two to decide that I wanted to pursue a Masters degree, and even less time to figure out that it should be in law. During my BA courses, I had learned that the meeting of politics, international relations and law is endlessly fascinating. Law, that essential mechanism to facilitate justice, seemed to be the one binding factor that could provide clarity to complex international issues. However, this insight may be more applicable to geopolitics: my personal experience is that law, in and of itself, does not uphold human rights very well.

In my experience, there is little objectivity in law in general, and there are no indisputable, juridical facts. I believe that this important aspect of justice is particularly lacking in human rights cases *from the perspective of access to justice*. After eight years of personal involvement in international lawsuits concerning the right to identity and obtaining access to justice, I can only conclude that the result of juridical argumentation, which is such an important tool for facilitating justice, is as unreliable as juridical verdicts are unpredictable. So far, sixteen judges and appeal judges in two countries have ruled on the merits of the lawsuits I presented to them and, in short, *none of them agreed with each another*. This indicates to me that justice concerning the right to identity is highly relative.

Based on this personal experience and numerous debates on political philosophy during my Masters courses, I believe that law has only present-day, practical meaning when there are mechanisms in place to safeguard rights as put forward by and derived from the law, in the sense that laws should be enforced. The form of these mechanisms, or 'checks and balances'

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<sup>1</sup> Because of suffering from "special circumstances of a structural nature", as per Dutch law, due to the consequences of being deprived of the right to identity.

depend on the type of government in a given country but, as a bare minimum, they should protect children, as the most vulnerable individuals in society, in some shape or form. Such protection should make redundant any need to access justice concerning their childhood as adults<sup>2</sup>.

In order to raise awareness about the significance of adults who are in need of access to justice concerning their childhood, my research cares about protecting the right to identity of the most vulnerable lives (in their fullest extent) of our societies: children, who are typically born in the global south or otherwise in countries in development and/or affected by natural disasters or dire humanitarian circumstances, who might be confronted with an ICA ruling of a judge (i.e. in Brazil). Those children who become intercountry adoptees eventually are all trying to cope with their loss of identity, and they are all challenged by problematic access to justice concerning the right to identity. Raising awareness about their situation is essentially the reason why I chose to do research for my thesis in Brazil.

When I arrived in Brazil in early January 2018, I was therefore fascinated by the real-life meaning of law for Brazilian children who might have to confront the intercountry loss of identity. However, my presence in and experience of Brasília was not necessarily representative: after eighteen years of regular visits to Brazil<sup>3</sup>, I feel confident in saying that the capital is not like the rest of Brazil and the rest of Brazil is not like its capital. This was one of the few things I knew before following up on my application to one of Brazil's most renowned universities.

It should be stated that this renown depends on controversial<sup>4</sup> rankings and the area of studies. The School of Law I attended in 2018 was given the highest score in the country (6 out of 7) by the Ministry of Education. As far as I know, no other School of Law for post-graduates has achieved this. Also, no other Federal School of Law offers such easy access to the country's judicial institutions. This was arguably the single most important aspect of the opportunity I had to study law in Brazil: both the quality of the education and the unique cultural and historical setting of the University of Brasília are strong reasons to study law there.

<sup>2</sup> I do realize that a critical reader might draw an utopian conclusion from this, to which I would respond that laws are written the way they are for a reason – this should never be utopia, I think. I like to believe that any self-respecting lawmaker is part of his or her respective society and familiar with real-life challenges his or her fellow citizens face, and wants his or her children to be protected by the law.

<sup>3</sup> In the past 18 years I have been visiting Brazil and I have experienced most of its different regions with cultural, linguistic and geographical differences.

<sup>4</sup> A lot of the controversy around university rankings has been said by professors and students from the day I arrived at the UnB; more has been published; none of that in particular matters to my informed opinion shared in this paragraph.

Through an internship<sup>5</sup> offered to international law students at the UnB by the Federal Supreme Court (STF), I acquired a backstage pass to Brazil's judiciary, to several of its high-and low-ranking civil servants and its impressive bureaucracy<sup>6</sup>. I believe this is a relatively rare opportunity, as there are hundreds of thousands of law students in Brazil<sup>7</sup>, who all have a certain level of ambition to practice law in some way<sup>8</sup> and to be professionally involved with the country's legal institutions.

For reasons not fully clear to me, it seems to be considered natural that foreigners should have this opportunity, whereas nationals rely on the extremely rare chance of being accepted as an intern, being contracted through a standardized national selection process, or the occasional external and limited-contract vacancy that comes along. I do have to add, however, that the most valuable learning experience, in respect of my thesis, may have been with the National Justice Council (CNJ), which was an exchange about ICA that I initiated before I visited the CNJ through the internship.

Other relevant and valuable academic experiences gained during my time at the UnB include being a member of the research group on the Rights of the Child (NEIJ)<sup>9</sup>. In addition, being invited to give a guest lecture at the Human Rights Masters course *Criança, Adolescente, Direitos Humanos e Estado* at the University Ritter dos Reis in Porto Alegre was a significant experience. I also valued highly the opportunity to engage in *Vez e Voz*<sup>10</sup>, the University of Brasília's project for raising preventive awareness of the trafficking of persons. The meeting I attended at the university's legal clinic was probably one of the most important events to which I contributed my personal, professional and academic experience.

<sup>5</sup> PROGRAMA TEIXEIRA DE FREITAS - STF. **Assessoria de Assuntos Internacionais, Universidade de Brasília.** Available in: <http://www.int.unb.br/br/estude-na-unb/intercambio/programa-teixeira-de-freitas-stf>. Accessed on 27 Apr. 2019.

<sup>6</sup> I leave it to the eye of the beholder which connotation one prefers to give to the adjective "impressive"; either way. Note here that the country of Brazil has close to 210 million inhabitants. See: [ftp://ftp.ibge.gov.br/Estimativas\\_de\\_Populacao/Estimativas\\_2018/estimativa\\_TCU\\_2018\\_20190213.pdf](ftp://ftp.ibge.gov.br/Estimativas_de_Populacao/Estimativas_2018/estimativa_TCU_2018_20190213.pdf)

<sup>7</sup> Law studies are the most popular and desired university courses in Brazil, as conveyed during the 2018 Congress on Brazilian Law Education ABEDI (*Associação Brasileira de Ensino de Direito*) I attended: "There are more than 1300 public and private law faculties in Brazil (and only 5 programs in Brazil to learn how to teach law, to become a teaching professor) producing more law students than there are in the US and China combined. More than 75% of all Brazilian graduates in law never pass the bar-exam".

<sup>8</sup> It is my understanding that, contrary to other countries, a jurist is hardly a respected or acknowledged professional in Brazil (on the contrary: it seems to be a failed lawyer, except if he or she managed to become a judge or a prosecutor without having been a lawyer).

<sup>9</sup> NÚCLEO DE ESTUDOS DA INFÂNCIA E DA JUVENTUDE. **Universidade de Brasília.** Available in: <http://neij.unb.br>. Accessed on 27 Apr. 2019.

<sup>10</sup> PROJETO VEZ E VOZ. Programas e Projetos do Polo Estrutural. **Decanato de Extensão da UnB.** Available in: <http://www.dex.unb.br/projetosestrutural>. Accessed on 27 Apr. 2019.

Finally, I feel the need to share the following course of events that unfolded in Brazil and its capital in 2018, which by the end of the year made me feel devastated and terrified<sup>11</sup>.

When I arrived in Brasília, I was immediately confronted with a news report on the collapse of part of an upper-class apartment building not far from the university, which had destroyed a number of extremely expensive and rare cars. Living in an apartment building that had recently gone through several construction problems, after which the builder faced multiple lawsuits, the news made me very uncomfortable. A second collapse in Brasília, this time of the main artery road's bridge in the middle of the city, was much worse because although, miraculously, no one died, it disrupted the lives of all the capital's residents. As revealed after an investigation, it could have been avoided had the contents of several alarming inspection reports been addressed more thoroughly. Throughout the rest of the year, I got an impression of what the capital, its elite society, and its elite university is about, and I find it to be complicated and unquestionable diverse.

Meanwhile, one of Brazil's prominent black human rights activists, Marielle Franco, was brutally murdered together with her driver in Rio de Janeiro. In my opinion, things only got worse after this. Firstly because, in a well-orchestrated national attempt to lower diesel prices, truckers across the country managed to effectively shut down the whole country in a matter of days. It soon became even impossible to enter or leave the country as flights had been suspended as a consequence of the generated mayhem.

Having seen supermarket shelves empty of basic commodities, my anxiety issues and panic attacks were prompted again by several apparently unrelated events: two murders and one suicide at the university's departments. Nationwide tensions continued to rise as the presidential elections got closer. Not least because of the arrest and imprisonment of Brazil's socialist former president, Da Silva, could be followed live on a weekend-long national TV-broadcast. Violent clashes between student protestors and the military police weren't an exception, just as expressions of anti-socialist protests at the historically progressive university. In the meantime, classes were suspended at the university due to budget cuts. However, not all professors were hindered by this. Some gave priority to continuity of education, which is how I got to have class in the gardens of the Law Faculty – which sounds more romantic than it actually is.

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<sup>11</sup> WHAT HAPPENED TO BRAZIL? BBC Documentary, January 2019. Available in: <https://www.bbc.com/reel/playlist/what-happened-to-brazil>. Accessed on 28 Apr. 2019.

What I learned during my experience at the UnB is that there are many wonderful people who actively try to accomplish positive change for those most in need of it. They are mostly part of human rights studies and movements such as Law Found on the Street. Most are not in a position of power or otherwise capable of effectively influencing the executive sphere<sup>12</sup>. Unfortunately, they are a minority and are often under threat; the institute where Law Found on the Street holds its seat, for instance, has been terrorized and vandalized. I could only attend meetings with my working group on the Rights of the Child upon registering with my identification. Ultimately, I witnessed the limited influence of those people being repressed even more in the context of the 2018 presidential elections. It is also in this context that one of the UnB's more progressive professors, Debora Diniz, had to go into hiding because of the threats made to her life for expressing views which are not in line with the ideology of Brazil's new presidential regime. Some law professors, teaching human rights in Brazil, even have been fired<sup>13</sup>.

It is in this context that, by the end of the year, I could no longer leave my apartment without being confronted with passive expressions of intimidation, intended to cause fear to those opposed to the President-elect's ideology. What ultimately devastated me was the number of Brazilians who were apparently numb to growing levels of injustice and violence. My heart goes out to those who aren't.

The purpose of this foreword is to give the reader an impression of several factors that formed and shaped my academic experiences in Brazil. The information included in this foreword aims to be enlightening both for Brazilian and foreign readers, and I hope that in discussing some of the significant facts and the way they affected my mindset, the reader's understanding of my research and the context that produced it will be enhanced.

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<sup>12</sup> It is worth mentioning that, according to the UnB's Law statistics, postgraduate students (at the law faculty) are typically in their late twenties / early thirties and have several years of extremely well-paid professional experience (often working as law clerks, lawyers, even as judges, prosecutors, state attorneys and public defense lawyers, or even as politicians, as was the case during my study-period in at the UnB).

<sup>13</sup> See, for instance: <https://www.brasil247.com/pt/247/sudeste/378379/PUC-Campinas-demite-professor-que-defendia-Direitos-Humanos.htm>. Accessed on 21 Apr. 2019.

## INTRODUCTION

As a newborn, I was trafficked for intercountry adoption (ICA) and, as a result, deprived of the human right to identity. As an adult, I have worked to restore my right to identity by obtaining access to my origins<sup>14</sup>. Given my personal experience of the difficulties associated with accessing my right to identity, I consider it a moral responsibility to make my knowledge available to other victims of illegal ICA practices who are in search of their identity. I therefore founded the NGO, Brazil Baby Affair<sup>15</sup>, through which I started researching and informing myself and others about the right to identity.

I was able to embed the expertise I gained from the work of my NGO into my academic background in political history and international relations, not least because of the interdisciplinary approach of my undergraduate education. In the many years that I have studied at universities in the Netherlands, Switzerland and Brazil, and by following several courses at different faculties, I have familiarized myself with philosophy, cultural anthropology, conflict studies, history, political science and law. This experience has taught me the importance of interdisciplinary, multilingual and multicultural approaches to academic problem solving. I believe it is my eye for detail and ability to recognize problems, as well as my eagerness to solve those problems, that brought me to the UnB. The PPGD's selection committee valued highly the academic problem I presented in my thesis proposal<sup>16</sup>, and it is that proposal on which I am now elaborating and presenting during the defense of my thesis.

My personal experience of accessing the right to identity is my personal motivation to research ICA from Brazil. However, it doesn't automatically result in identifying an academic ICA problem, let alone a Masters in Law (LLM) thesis proposal. At a minimum, it caused me to strive to investigate problems emerging in the context of ICA legislation and the rights of the child. The problems I identify extend from private international law to human rights and, for me, they submerge into complex social and academic issues. This is why I decided to obtain

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<sup>14</sup> For a public account of what this entailed, see: <http://www.brazilbabyaffair.org/publications-and-resources/lectures-and-presentations/hague-talks/>. Accessed on 21 Apr. 2019.

<sup>15</sup> NGO Brazil Baby Affair. Available in: [www.brazilbabyaffair.org](http://www.brazilbabyaffair.org). Accessed on 27 Apr. 2019.

<sup>16</sup> My research proposal graded with 9/10 and my academic profile graded with 9/10 as well. Available in: <http://www.fd.unb.br/images/Pos-Graduacao/Processo%20Seletivo/Processo%20Seletivo%202018/Estrangeiro/Tabela%20de%20avaliacao%20Mestrado%20Doutorado%20estrangeiros.pdf> Accessed on 10 Feb. 2019.

academic understanding of ICA judgments in Brazil, focused on the right to identity, for my Master's thesis.

For a number of reasons, I have chosen to study *legal* ICA from Brazil rather than my own experience of *illegal* ICA. First, because my experience does not generally qualify for any legal definition of ICA with which I am familiar; it is not even legally recognized as a wrongful act<sup>17</sup>. This means there is no legal starting point for ICA in my case. Second, if I were to *legally* qualify my case as an example of *illegal* ICA, there is no internationally recognized definition or consensus about what constitutes illegal ICA<sup>18</sup>. Third, doing academic research on my own life while a student in my country of origin is too personal to manage successfully. I have therefore deliberately chosen to write my LLM thesis about the consequences of *legal* ICA from Brazil to the right to identity.

To be clear, this academic research is *not* about trafficking children for illegal ICA; it is *not* about any form of illegal adoption or illegal ICA, and thus it is *not* about my personal legal battles regarding illegal ICA and the deprivation of my identity. It is, instead, about the right to identity, although it does not exclude any legal battles I have already fought or the ones I am still fighting concerning the right to identity and access to that right. More specifically it is about the relationship between the application of the subsidiarity principle and the right to identity. If one thing becomes clear after reading my thesis, it should be the relationship between the application of the subsidiarity principle and the importance of the right to identity for intercountry adoptees and the legal impediments to translating that right into practical access to information about their origins.

The right to identity is a relatively abstract term for most people. I am different in this regard. I could be classed as a human rights activist since I have successfully fought, and continue to fight, several legal battles concerning the right to identity. I have also advocated and continue to advocate for the right to birth registration including the right to a birth certificate. These battles are the result of what I would describe as having an intrinsic perception of the value of the right to identity acquired by suffering the consequences of having that right denied me. In this context I also participated in Special Commission meetings of the Hague

<sup>17</sup> In 2017 I managed to change this situation in the Netherlands, through a favorable court decision about my case, where the court created jurisprudence by recognizing deprivation of identity as a wrongful act towards the victim, see: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2017:6711>. Accessed on 29 Apr. 2019.

<sup>18</sup> The special rapporteur on the sale of children in 2017 defined illegal ICA under paragraph 25 of her report, for the purpose of the report only. See: "Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, 22 December 2016".

Conference on Private International Law (HCCH) about ICA and in meetings of the United Nations Committee on the Rights of the Child (CRC) concerning ICA.

Over the years, I have noticed that the right to identity is not a well-known concept among legal scholars or even human rights experts<sup>19</sup> who are dealing with ICA in their professional capacities, for example at the Special Commission or the CRC. Furthermore, they typically represent the interests of prospective adoptive parents (PAPs) and are not associated with representing the interests of the other stakeholders of the so-called adoption triad (the original family and the adoptee him or herself).

In this regard, I note that UNICEF (United Nations Children's Fund), which is responsible for the text of the Guidelines for the Alternative Care of Children (UNITED NATIONS GENERAL ASSEMBLY, 2010), as well as for the publication of The Best Interests of the Child in Intercountry Adoption (UNICEF, 2014a), which are both of pivotal importance in daily ICA practice, relies mainly on the expertise of a single author, without legal qualification, who does not represent the interests of adoptees and their original families with their legitimate support, for documents which affect every adoptee and his or her original family. Although UNICEF (2014) states that ‘the views expressed in this report are those of the author and do not necessarily reflect UNICEF policies or approaches’, I find this to be a contradictory statement. The Guidelines were welcomed by the United Nations General Assembly (UNGA) on 24 February 2010 as a set of orientations to help to inform policy and practice with the intention of enhancing the implementation of the UN’s Convention on the Rights of the Child and of relevant provisions of other international instruments regarding the protection and well-being of children deprived of or at risk of being deprived of parental care. Since UNICEF has been a principal organ of the UN (United Nations) since its inception in 1946, and as the United Nations General Assembly (UNGA) welcomed the Guidelines, they must reflect UNICEF policies or approaches. UNICEF, likewise, commissioned implementation handbooks by the same author.

This is a common feature of reports and guidelines on ICA legislation, practice and related matters, which are produced without full and legitimate representation of all stakeholders of the adoption triad. They often show a lack of familiarity of the ample

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<sup>19</sup> To the best of my knowledge, with the exception of former vice-chairperson of the CRC (2013-2017), Sara de Jesús Oviedo Fierro who, *inter alia*, held Brazil accountable for the right to identity during its 2015 CRC sessions held at the OHCHR’s office in Geneva.

jurisprudence surrounding the right to identity, as rooted in Article 8 of the European Convention on Human Rights (ECHR) and articles 11, 17, 18 and 20 of the American Convention on Human Rights (ACHR) or discard it completely. I believe that it is illustrative of ICA practices into Europe in general.

In my view, this is a consequence of the enormous influence a few advocates for ICA continue to exercise, even after the Intercountry Adoption Convention was introduced<sup>20</sup>. The same child rights experts who were involved in the creation of the UN's Convention on the Rights of the Child are now also responsible for the proliferation of the Intercountry Adoption Convention. To me this is an indication of their belief that ICA is not a human rights problem but is, instead, a subject for and will be solved by private multilateral international law practice. This is despite the obvious significance of the right to identity for intercountry adoptees, which by definition cannot be safeguarded in ICA cases, as this thesis will explain.

If the right to identity is an abstract idea for most, then ICA is better understood at least in general terms. However, as I have learned during the course of my Masters studies, most child rights experts, law students and law professors are relatively, if not entirely, unfamiliar with crucial legal aspects and the background of ICA in respect of human rights in general and the right to identity in particular. As I have observed, very few are very well-informed on human rights issues and jurisprudence concerning ICA, and those that are so informed are almost exclusively focused on ICA as a solution rather than a problem, or they fail to recognize that their belief in ICA as a solution is problematic. Because, in my experience, they show little to no understanding of the relevance of human rights to ICA.

This is where the essence of my research – the subsidiarity principle – comes in. It is my understanding that few people in Brazil are familiar with the subsidiarity principle. Even fewer know that there is not one but two subsidiarity principles. For reasons given below, I refer to these two subsidiarity principles simply as the double subsidiarity principle.

This lack of knowledge of the double subsidiarity principle also applies to members of the Brazilian judiciary and prosecutors I have interviewed (see Appendix II), despite their dealing with the subsidiarity principle in their professional capacity, which creates a serious problem as I explain throughout this thesis. By writing about the application of the subsidiarity

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<sup>20</sup> In my view, a more recent and more worrying development is the fact that a known critic of HC-1993 chose to discontinue his independent relationship with the HCCH. This critic now acts as a consultant for ISS at the HCCH and is thereby, in my opinion, losing credibility as an independent expert known for voicing concerns that resonated with (intercountry) adoptee rights' movements.

principle in Brazil, I am giving visibility to the increasing significance of the right to identity for intercountry adoptees. I believe that this thesis therefore presents the fundamentals of a new vision for ICA in which access to origins will become a paramount concern.<sup>21</sup>

This thesis provides a legal basis for this vision. In it, I will analyze which legal considerations could and should be used when justifying the balance of interests of the subsidiarity principle and the right to identity in Brazil. I will therefore present academic, legal and social justification.

However, this vision is *not* the conclusion of my research: these are rooted in the already-established and interconnected legal frameworks of Brazil and the wider international context. They are in line with national and international developments concerning the understanding of the consequences of ICA practices and the emergence of adoptee-rights movements.

In the meantime, judges in Brazil will continue to issue ICA rulings based on considerations and interpretations with which I disagree. If they take notice of the conclusions and recommendations I present in this thesis, some might be less prone to adversely weighing the right to identity of a to-be-adopted Brazilian child and thereby refrain from issuing ICA verdicts. This possible development may take place after a judge has read this thesis and has considered its findings. Such development could also be initiated by the Brazilian National Justice Council's (CNJ), depending on their future stance concerning ICA and their conceivable interaction with the judiciary through a potential directive they could issue. The CNJ already expressed a view that is in line with my research and invited me to present my research to them.<sup>22</sup>

In order to provide much-needed and highly relevant human rights guidance to Brazilian judges and other professionals dealing with ICA, my research will present a focus on the latent infringement of the wide range of fundamental human rights in respect of ICA caused by narrow private international law interpretations.

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<sup>21</sup> Internationally, the last years have been an interlude to this new vision because the right to identity of adoptees has become increasingly important in countries such as Ireland, Spain, Canada and Australia according to pending trials, reinforcing court verdicts and even national apologies issued by the governments of some of those countries.

<sup>22</sup> The importance of an invitation by the CNJ to be informed about the findings of this research was stressed in clear wordings by the seconded judge Sandra Torres, responsible for the CNJ's stance on ICA, in Brasília on the 7<sup>th</sup> December 2018 at the offices of the CNJ. Also see Appendix III – Auxiliary Judge Torres

Moreover, this research will raise awareness about ICA cases that can be identified as a contravention of the 1989 United Nations Convention on the Rights of the Child (hereafter the Convention, except when the abbreviation UNCRC is required for the purpose of clarity) by the Hague Conference on Private International Law via its 1993 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (hereafter HC-1993). This thesis can therefore be seen as controversial because it goes against the prevailing doctrines that view ICA as a permanent and protective childcare solution that is in the best interests of the child. It also questions the common stance that ICA from the global south to more developed countries with established welfare states is beneficial for the child and offers life-long opportunities that outweigh long-term negative effects of ICA.

Finally, this thesis will present suggestions for further research that could reinforce its conclusions and which should be *beneficial in terms of protecting the right to identity as well as forming concrete grounds for a constructive dialogue with adoptee-rights movements*. It should be noted that this approach is the result of the author's academic education in the Netherlands and Switzerland and, as such, differs from Brazilian education in general and Brazilian academia more specifically. In addition, due consideration should also be given to the fact that the author does not hold an Bachelors in Law (LLB) degree. Furthermore, the language used throughout this thesis is of an Anglo-Saxon, non-specific juridical nature and not aligned with literal translations of juridical Brazilian Portuguese.

Finally, the author acknowledges that this LLM thesis *cannot deal with every aspect of ICA and the right to identity* and does not aspire to such a tremendous task. The author contends that this would better be done in the form of various contradicting and/or complementary PhD dissertations, which this thesis does not do in any form.

## I – TWO EXAMPLES: Domestic and Intercountry Adoption

Let us take two examples, and call them Adam and Eve<sup>23</sup>. Adam is born and adopted in Brazil: this is a domestic adoption. It came about because neither Adam's original parents nor his extended family could take care of him. In Adam's case, his mother made inquiries about his future during her pregnancy. She asked at the hospital she attended for ante-natal check-ups if, once born, her baby could be adopted because she didn't see any possibility of taking care of him.

This, of course, is an exceptional situation and Adam's mother had to have several conversations with social workers and a psychologist to ensure this was the only option available to her and to Adam himself. When she finally gave her *informed consent*, she understood that Adam would be adopted and would not be returned to her. She would also not be able to stay in touch with Adam and she understood that Adam's name might change after the adoption, and that his surname would become that of his adoptive parents<sup>24</sup>.

Eventually, the judge in Adam's case ruled that Adam be adopted by a Brazilian couple. Adam was given a new identity, but his original language and culture were preserved. Although his adoptive parents took Adam to another State in Brazil, Adam stayed in touch with many aspects of his origins because he grew up in his birth country.

When Adam reached the age of 27 and got engaged, he and his fiancée discussed having children. As a result, Adam became curious about his origins and decided to request his adoption file at the court where he had been adopted. It was relatively easy for Adam since he just had to make a phone call to the relevant authorities. After a few months and upon paying an administrative fee, Adam received a copy of the documents relating to his adoption process. With the information about his adoption in hand, including the crucial access to his original birth certificate, he was able to search for his mother. His birth certificate gave him the name of his mother, and thus his original surname, as well as the names of his maternal grandparents and the date and place of his birth.

<sup>23</sup> The examples are fictitious yet based on truthful and representative events that (intercountry) adoptees from Brazil typically face when calling upon their right to identity in order to get access to their origins; both examples are in accordance with contemporary and current (inter)national adoption legislation.

<sup>24</sup> In some cases, mothers who give their informed consent for (intercountry) adoption name their child, as might be reflected in their child's birth registration in the hospital and/or their declaration of birth with the civil registry. Others do not formally name their (unborn) child(ren); the former might result in a combination of an original name and an adoptive surname, the latter is characterized by the absence of an original name.

Eventually, Adam was reunited with his mother and her family. His mother could tell him what happened, why she had given her informed consent to Adam being adopted. She even told him about his father, something Adam is still thinking about. The nature of Adam's domestic adoption meant he was able to stay in touch with his original identity in its most essential facets and get access to his origins.

The rights concerning identity and origins are fundamental human rights, and form a positive rights obligation for the Brazilian state:

All children have the right to a legally registered name, officially recognized by the government. Children have the right to a nationality (to belong to a country). Children also have the right to know and, as far as possible, to be cared for by their parents, and children have the right to an identity – an official record of who they are. Governments should respect children's right to a name, a nationality and family ties (UNCRC, 1989, articles 7-8).

Now consider Eve. She was also born in Brazil, but was adopted by a French couple who subsequently raised her in France; this is an ICA. As in Adam's case, Eve's adoption came about because neither her original parents nor her extended family could take care of her. Her mother also made inquiries about her future during the pregnancy. After a process similar to that experienced by Adam's mother, she finally gave her informed consent, understanding that Eve would be adopted by unknown persons and that she would not be able to get Eve back. She understood that she would not be able to stay in touch with Eve, that her daughter's name might change after adoption, and that Eve would potentially be adopted by foreigners.

In this case, the judge<sup>25</sup> ruled that Eve be adopted by a French couple. Eve was given not just a new identity, but also a new language and culture. Because she grew up on the other side of the world, Eve did not stay in touch with any of the aspects of her origins.

When Eve reached the age of 23, she started to think of becoming a mother one day. She became profoundly curious about her origins and decided to ask about her adoption papers. Her adoptive parents gave her the information they had. But Eve didn't understand most of the documents as they were in Brazilian Portuguese. Although some of them had been translated into French, most of the French documents were related to her adoption into France and not to her original identity. Eve didn't find her original birth certificate in her papers. She only found

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<sup>25</sup> In contrast to other ICA-sending countries, in Brazil judges typically are the ones who not only issue an ICA verdict but also rule on its merits. In other ICA-sending countries judges merely issue the necessary verdict(s) based on the input of local authorities responsible for ICA practices.

the birth certificate that was created and issued upon the judge's ruling that led to Eve becoming a French citizen with French adoptive parents. This birth certificate is no use to Eve because it names only her adoptive parents and does not refer to or mention her original parents.

Eve wanted to request her adoption file at the court where she had been adopted but she was unable to do so because she did not know where to start. She didn't speak the language and she had no contacts in Brazil. She contacted the international NGO that was involved in her ICA, International Social Service (ISS) in Geneva. The ISS staff could communicate with her in French, but as they didn't have a correspondent in Brazil they were unable to provide her with assistance. Several months after her initial contact and the payment of a fee of more than a €1,000 she learned that no one would be able to assist her.

Eve was understandably disappointed and decided to resort to Facebook where she found several groups for intercountry adoptees from Brazil now living in France. With the help of another NGO, The Voice of Adoptees, she managed to get copies of the documentation regarding her adoption process. This took more than a year because she had to go through several complicated and time-consuming processes, such as giving power of attorney to a Brazilian volunteer from the French NGO.

Unfortunately, there was no original birth certificate in her case file. Eve had apparently been adopted through the intermediary services of a children's home run by Protestant French and Brazilian women: a situation that is typical among intercountry – but not domestic – adoptees from Brazil. According to the testimonies of the women at the children's home, Eve was a foundling. This means that Eve will never be able to effectively call upon her right to identity and get access to her origins.

Eve remains hopeful that she will one day find her mother and possibly other relatives via social media announcements or even through autosomal DNA test results and international DNA-matching databases. However, the unalterable truth is that because of her ICA, Eve was unable to discover her original identity and consequently get access to her origins.

The differences between the cases of Adam and Eve are representative of the way domestic and intercountry adoptions from Brazil are handled and the differing outcomes. ICA legally deprives adoptees of their right to identity<sup>26</sup>. The effects and the magnitude of being

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<sup>26</sup> It is worth noting that domestic adoption can also have a significant impact on the right to identity, and that this thesis in no way wishes to argue that domestic adoption is better than ICA in general terms, or that domestic adoption should take precedence over any of the provisions in the Convention's subsidiarity principle.

adopted into another country last for life and are all-encompassing. Intercountry adoptees are legally severed not just from their family but, more broadly, from their origins in the most complex and impactful way possible. Try to imagine how life must be for Adam and for Eve and how in particular Eve's live could have been less problematic – try to keep this in mind while going through this thesis.

## II – THEME AND IMPORTANCE

Although ICA may not be an important issue in the daily lives of most people, identity is an important theme for everyone, everywhere and always. As *The Economist* put it in its essay “Making you you” (2018), there are two fundamental principles of personal identity: “The first is that any individual’s identity is contingent on the recognition of others. The second is that anything like a modern life is rendered all but impossible when that recognition is not forthcoming, or is suborned.”

As the author of the article explains, people suffer if the state’s power to issue legal identity is not properly applied. He correctly continues that the Convention lists the right to birth registration and to a name as second only to the right to life, which is why the goal of legal identity for all is included in the Sustainable Development Goals the UN set for 2030. The importance of the right to identity, as expounded above, should be clear from these basic facts. In my view, it should also inform a wider audience about the relevance of the right to identity for intercountry adoptees, as per the concept of Law Found on the Street which will be explained further on in this thesis.

This thesis aims to put the theme of the right to identity on the agenda of every state that is party to the HC-1993. The right to identity is the single most important aspect in the lives of both domestic and intercountry adoptees because they are confronted with it on a daily basis throughout their lives. The first cohort of children this concerns were adopted from Brazil following the 1999 ratification of the HC-1993 and so reached legal adulthood in 2017. They have been legally entitled to autonomously pursue access to their right to identity since then. In my view, 20 years since the ratification of HC-1993 is more than enough time for the Brazilian judiciary to become aware of the human rights consequences of their ICA verdicts, which the now-adult intercountry adoptees of Brazilian origin are starting to deal with in order to access their origins and facilitate their claims to the right to identity.

It must be noted, however, that adult adoptees pursuing their right to identity do not typically do so within the very first years of their legal adulthood. Because of this, and the timing of Brazil’s ratification of the HC-1993, there have not yet been a significant number of intercountry adoptees coming forward. As a result, little has been written on this issue from their perspective. Indeed, this thesis is the first academic research written in anticipation of a substantial number of individuals taking their first steps in the active search for their identity,

and whose claims to the right to identity have not yet been actioned under the terms of the HC-1993.<sup>27</sup>

This thesis could therefore also provide a reference for those intercountry adoptees who start searching for their identity and for whom there is currently no clear information available that is focused on their rights. Moreover, intercountry adoptees born since the ratification of HC-1993 have recently become *subjects* of the law instead of being *subjected* to the law. With this new status, the focus on their rights has shifted in such a way that it is now inevitable that the human rights framework of ICA will be closely and carefully assessed, analyzed and even amended to take into account the fundamental rights of intercountry adoptees.

Therefore, the research theme delineation of this thesis is ICA and the right to identity, encompassing the shift of intercountry adoptees from being *subjects* of the law to being *subjected* to the law, from the perspective of taking ownership of the right to identity by adult adoptees who are claiming access to their origins. These claims are problematic because currently there are no provisions in law concerning the accountability of access to origins.<sup>28</sup>

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<sup>27</sup> A search in Brazil's academic catalogue on Master Theses and PhD Dissertations registered with CAPES (<https://catalogodeteses.capes.gov.br/catalogo-teses/#/>) on the keywords of this Thesis (in Brazilian Portuguese) did not invalidate concerning statement.

<sup>28</sup> The first time access to origins for intercountry adoptees was put on the agenda of the HCCH was during the Special Commission on the practical operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, REPORT OF MEETING No 4 (9 June 2015).

### **III – ACADEMIC JUSTIFICATION, SOCIAL RELEVANCE AND SOCIAL JUSTIFICATION**

**Question:** *To what extent does the application of the subsidiarity principle conflict with the right to identity as put forward in Article 8 UNCRC, and as protected by the 1988 Brazilian constitution?*

In order to answer this question, my research will address the following sub-questions:

- (i) How is the subsidiarity principle situated in the national and international legal framework?
- (ii) How is the right to identity situated in the legal hierarchy of the Brazilian state? (iii) Which legal considerations are used to justify the balance of interests of the subsidiarity principle and the right to identity?

**Hypothesis:** *The application of the HC-1993 in Brazil is a violation of the subsidiarity principle of the UNCRC in respect of the right to identity.*

This research aims to identify possible wrongful application of the subsidiarity principle and thus violation of the right to identity. The notion that the HC-1993 could form a violation of the subsidiarity principle leads to the following sub-hypothesis: The right to search for origins, as seen through the perspective of the right to truth and memory, could be violated in case of an absent and/or wrongful justification of the balance of interest between the HC-1993 and the Convention.

The introduction to this thesis demonstrates the academic and social relevance and justification for research about ICA from Brazil. As stated above, foreign adults of Brazilian origin are starting to contact the relevant Central Authorities of the HC-1993 who are responsible for their claims concerning their right to identity. However, the Central Authorities do not hold any expertise about the right to identity and have no mandate regarding restorative action for violations of the right to identity or providing outcomes to acquire access to origins. Research that points out these lacunae in the sphere of fundamental rights is therefore justified, particularly when considered from the perspective of adoptee-rights movements as acknowledged by Law Found on the Street.

The total number of intercountry adoptees worldwide is estimated to be close to one million (SELMAN, 2012), which could be classified as socially relevant. Social relevance could

furthermore be demonstrated by the fact that, out of 193 countries in the world, 59 are involved<sup>29</sup> with ICA practices through their ratification of the HC-1993<sup>30</sup>. These countries could, therefore, be legally held accountable for the right to identity of intercountry adoptees and the justification, or lack thereof, of the application of the UNCRC's subsidiarity principle.

As to social relevance in Brazil itself, the country remains accountable for safeguarding the right to identity in cases of ICA for approximately 500 children per year (SELMAN, 2015). That this is only a rough estimate is accounted for by the Brazilian state in its 2015 report to the Committee on the Rights of the Child (CRC), in which it said that there is no national statistical data about ICA from Brazil available. Nonetheless, these indications of the scope and impact of ICA from Brazil justify this research.

The social relevance of this study can furthermore be illustrated by a Brazilian report from the investigative TV program *Conexão Repórter* from 2016<sup>31</sup>.

Academic justification can also be found in the fact that the HC-1993 is currently ratified by countries that represent 29 per cent of the world's nations; the UNCRC is ratified by countries representing 99.5 per cent of the world's nations.<sup>32</sup> From this perspective, it seems clear that the legitimacy of the subsidiarity principle of the HC-1993, which makes a crucial reservation to the UNCRC's subsidiarity principle (as will be explained in chapter 2), should be questioned.

The importance, relevance and social justification of this study into ICA and the right to identity can also be illustrated by the fact that the right to identity in cases of ICA can only be safeguarded if all branches of the *trias politica* are able to make well-informed decisions concerning the application of the subsidiarity principle. The findings of this research therefore have the potential to propose concrete legislative, executive and judicial recommendations.

The above facts and figures demonstrate the relevance and perspectives of this research on ICA and the right to identity in both the Brazilian and international context. Because all are bound by the same international legislation, the human rights issues concern not just Brazil but

<sup>29</sup> Please note that several other countries are also responsible for ICA practices, taking place outside the scope of the HC-1993 and without due consideration of the subsidiarity principle.

<sup>30</sup> HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW. Available in: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=69>. Accessed on 6 Dec. 2018.

<sup>31</sup> SISTEMA BRASILEIRO DE TELEVISÃO. Vendem-se Brasileiros, o Retorno. **Conexão Repórter**. August 7, 2016. Available in: <https://www.youtube.com/watch?v=7TOInIuvZlQg&feature=youtu.be>. Accessed on 5 Dec. 2018.

<sup>32</sup> The HC-1993 has *de facto* been ratified by 56 countries, and the UNCRC has been ratified by 192 countries, out of 193 countries in the world.

all other countries that have, at some point, sent and/or received intercountry adoptees, and which are confronted with the social and legal consequences of ICA and the right to identity.

In short, there is ample contemporary academic and social justification and relevance behind this research, and it has the potential effect of providing clear directives for the emerging human rights debate about ICA and the right to identity. In order to successfully present such outcomes, I have formulated the problem, research question and hypothesis as presented above.

## IV – OBJECTIVES AND THEORETICAL GROUNDS

I contend that the answer to my research question can be found by the following normative objective: examining how the UNCRC and the HC-1993 relate to the ACHR, the Constitution of the Federative Republic of Brazil (CF) and the ECA (Child and Adolescent Statute of Brazil). Taking this approach leads to several clear objectives, as follows: (i) Identify and define the legal implications of the application of the subsidiarity principle in Brazil; (ii) Examine the scope of the right to identity from the perspective of the ACHR and the ECHR; (iii) Identify possible relevant institutional processes of conflict management and access to justice in Brazil.

The theoretical grounds of this research therefore comprise national and international human rights legislation and jurisprudence with due regard to the socio-political context of human rights in Brazil. I will examine the research question from the perspective of “The understanding of rights and forms of dissemination, such as legal education; access to justice, including advocacy and the development by collective actors of socially constructed rights; and human rights”.<sup>33</sup>

Therefore, this study focuses on an interdisciplinary human rights approach, taking into consideration (i) the relevant legal framework and legal doctrine(s), (ii) the concerning structure(s) of institutions and their implementation of the legal framework and (iii) reference analysis via interviews with Brazilian judges, prosecutors and experts about the application of the subsidiarity principle, with special attention to (iv) relevant jurisprudence concerning the subsidiarity principle and the right to identity.

Because it can be argued, in principle, that academic theses say more about the authors than their observations, I have chosen ICA and the right to identity for transparent reasons of personal interest. After all, this could be considered highly motivational and productive as it is the author who decides what to do with his/her observations, albeit influenced to a greater or lesser extent by his/her professors.

That is why Law Found on the Street, Legal Pluralism and Human Rights can be identified in my research perspectives as theoretical grounds, not just because they are part of

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<sup>33</sup> Call for Applications N° 1/2017. University of Brasilia, School of Law, Graduate Program in Law. Available in: [http://www.fd.unb.br/images/Pos-Graduacao/Processo\\_Seletivo/Processo\\_Seletivo\\_2018/Estrangeiro/Edital\\_2018\\_Ingles2.pdf](http://www.fd.unb.br/images/Pos-Graduacao/Processo_Seletivo/Processo_Seletivo_2018/Estrangeiro/Edital_2018_Ingles2.pdf). Access in 9 Feb. 2019.

the line of research to which my research proposal was conformed, but because they are also related to social movements fighting for the right to identity through which law and eventually liberty can be created. Law Found on the Street is an important and motivational aspect of this research because it embeds the research approach about ICA, which is focused on the subjects of ICA, the intercountry adoptees and their social movements advocating for access to the right to identity.

The theoretical ground of Law Found on the Street assumes trust in social movements and their intercultural dialogues, which results in the creation of “a new society, more just and free than actually” (SOUZA JUNIOR, 2015, p. 9). Theoretical and political paradigms of social transformation and the implicit principles of Law Found on the Street should also strengthen the quality of my research. Not least because Law Found on the Street embraces the idea that research questions are more important than confirmations, in the sense of avoiding patterns while seeking clarifying responses to research confirmations. One could also think of the opposition between universalism and relativism in this regard (SOUZA JUNIOR, 2015, p. 16).

I consider this opposition thinking, and the way Law Found on the Street in general makes me think about my research, to be an essential tool while working on my research objectives in Brazil. Primarily because, in my opinion, a foreign academic should be gifted with a certain predisposition to secure the necessary amount of resilience to be effective in Brazil, but also because, seen through the eyes of a foreigner, Brazilian culture is notorious for its unpredictability: in my experience, getting a firm answer to a question or statement, either positive or negative, is a relatively rare occurrence in Brazil. In practice, this means that in addition to the standard bureaucratic hurdles that have to be overcome in order to get access to information and obtain reliable research data, once granted, requests can be easily revoked<sup>34</sup>. As with rights, nothing is given but everything has to be conquered.

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<sup>34</sup> Conversely, this cultural context might also lead to unexpected access; hence progress and success.

## V – QUALITATIVE RESEARCH

The normative approach strategy of this study allows for a qualitative law study. The main sources therefore are the UNCRC and the HC-1993; the main reference sources are the ACHR and the ECHR. I will furthermore make use of suitable jurisprudence whenever possible and applicable, in particular from the Inter-American Court of Human Rights (IACtHR) and the European Court of Human Rights (ECtHR) considering national and international law and pay due regard to possible relevant jurisprudence from the Superior Court of Justice and the Supreme Federal Court.

Given that this is a LLM thesis and not a PhD dissertation, relevant research elements will be dealt with in a selective and concise way, meaning that part of this research and interrelated learning experience is to continuously adapt to the limits of the research, which may include a lack of results as possible research outcomes.

The main thesis issues I have been dealing with during my studies in Brazil concern in-depth, qualitative analysis of information about the application of the subsidiarity principle obtained through interviews with Brazilian judges and prosecutors.

However, my initial research approach concerning the application of the subsidiarity principle, which was a response to the FD's Call for Applications, was to obtain access to ICA court records and analyze the case-files with a focus on the judge's qualitative, juridical foundation and/or argumentation.

That qualitative research approach was based on the assumption that a judge would necessarily follow the international order of law before coming to an ICA ruling, and on the supposition that a judge would have to justify the application of law in ICA rulings.

Since ICA is considered a last resort under the UNCRC's provisions, and since these provisions are firmly rooted both in the Brazilian constitution and the ECA, I thought that my initial research approach was feasible and would allow me to determine why a judge ruled for ICA, rather than for domestic adoption or alternative forms of care. When I learned that the information I was looking for is not recorded (and that if it were recorded, obtaining access to that information, even if redacted, would be near to impossible) I decided to conduct interviews with members of the Brazilian judiciary.

## **Research Methodology**

In accordance with the research methodology put forward by Uwe Flick (2015), I show throughout this thesis which decisions were taken and why, as well as reflecting on necessary research adaptations. Criteria for empirical social research, including reliability, validity and objectivity, also apply to qualitative research. Communication, interaction and subjective interpretations can be seen not as biases but as strengths or even preconditions of research (FLICK, 2015 p. 236-237).

The assumptions described above regarding the means by which ICA verdicts are reached in Brazil should be verifiable and justifiable (i.e. documented in court records), and the urgency of facilitating access to those files for adult intercountry adoptees, has a juridical foundation based on the above logic. My interpretation of the need for justification of an ICA verdict is a clear example of knowledge priority from an adoptee's perspective. The (intercountry) adoptee's right to have information about his or her identity, origins and adoption, is effectively recognized by human rights courts (see chapter 2.2 Right to Identity) in Europe and the Americas.

The essence of the ECtHR's understanding of the right to identity for (intercountry) adoptees can be summarised as follows: Article 8 ECHR includes and protects "a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. [...] The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life." (ODIEVRE V. FRANCE, 2003) The scope of Article 8 ECHR forms a crucial reference for my research methodology.

Therefore, I included interviews with members of the Brazilian judiciary, a prosecutor and ICA experts in my methodology to ascertain their knowledge about the right to identity and its relevance for intercountry adoptees. The kind of interview I set up can be referred to as a theory-generating expert interview which aims at "developing a typology or a theory about an issue from reconstructing the knowledge of various experts – for example, about contents and gaps in the knowledge of people working in certain institutions concerning the needs of a specific target group" (FLICK, 2015, p. 141).

The method for selecting experts for interview was twofold: one is via the CNJ, which is responsible for adoption and ICA from Brazil. The seconded judge responsible for adoption (see Appendix – II) referred me to a few judges and appeal judges. The other way was through

consultation with a law professor at the Federal University of Rio Grande do Sul, considered to be a child rights expert in Brazil and, as such, familiar with the ECA. Based on her knowledge of adoption and her connections, she put me in contact with several experts who worked with ICA and who contributed to Brazil's accession to the HC-1993. Finally, I included the responsible judge for ICA verdicts in Brasília, who unfortunately was unable to follow through on his expressed commitment to this research. The responsible prosecutor in his district was very accommodating, however. The selection of the interviewed experts was therefore both upon indication from the extra-judicial CNJ as well as random selections, albeit from the experts in the country's capital where I was also studying.

### **The Role of Interviews**

In conclusion, I can state that the function of the qualitative interviews I conducted is merely illustrative and in addition to the normative approach I have chosen for this research. The interviews contribute to the justification of my informed opinion about the application of the subsidiarity principle in Brazil. Because, I consulted members of the judiciary to whom part of the recommendations of this research is directed. As mentioned, through this research, I will acknowledge the international and Brazilian legal order relevant to ICA and the right to identity as well as paying attention to international jurisprudence and due regard to possible relevant Brazilian jurisprudence from the Superior Court of Justice and the Supreme Federal Court. The interviews reflect thereupon in general and provided clarity about consensus on the legal order concerning the right to identity in specific.

From the three techniques of qualitative content analysis as described by Flick (2015, p. 167) I have chosen to apply the procedure of summarizing content analysis. This entails that the interview material is paraphrased so that less relevant passages and paraphrases with the same meanings are skipped. And similar paraphrases are bundled and summarized. Consequently, the summary of the interviews can be read in Appendix III.

The interviews gave an impression of how the experts think about the application of the subsidiarity principle in Brazil and the right to identity. They gave a relatively balanced impression because the interviewed judges have vastly different opinions (i.e. Saraiva vs. Daltoé). The interviews and the interview summaries are by no means meant as a generalization of the representation of the Brazilian judiciary in ICA verdicts they only represent a small sample. That suffices for the illustrative purpose of the interviews as the way Brazilian judges

work does not allow for alignment of ICA verdicts; there are no constraints for judges to create rulings in general, or to rule on the application of the subsidiarity principle specifically.

## 1 RIGHTS OF THE CHILD AND INTERCOUNTRY ADOPTION

### **1.1 International History of the UNCRC**

This year, 2019, it will be 30 years since the Convention was adopted by resolution 44/252 of 20 November 1989 at the 44<sup>th</sup> session of the UNGA. The acceptance of the Convention shows an unprecedented global commitment to advancing children's rights.

All children have the same rights. All rights are interconnected and of equal importance. The Convention stresses these principles and refers to the responsibility of children to respect the rights of others, especially their parents (UNICEF, 2014b).

International children's rights date as far back as the Geneva Declaration of 1924. Initially a five-point text that was taken up by the League of Nations, the predecessor of the UN in Geneva, it was adopted as a seven-point declaration at the 1959 UNGA. The Convention is part of the body of UN human rights instruments and is rooted in the UN Charter. Its provisions are also elaborated through instruments such as the Universal Declaration on Human Rights of 1948 and the International Covenants (1966). The origins of the Convention can be traced back to 1979, the international year of the child, when Poland submitted the draft convention. This started a ten-year drafting exercise (UNITED NATIONS HUMAN RIGHTS, 1993). On 20 November 1988, the Convention was eventually adopted and entered into force on 2 September 1990.

The Convention establishes that state parties to the Convention must ensure the rights of the child, because children's rights are positive rights; states are required to take positive action that empowers children to enjoy their rights. Therefore, once a state has signed and ratified the Convention, it is obliged to have implemented all articles from the Convention, while observing the fact that reservations can be made by states. These reservations include permitting ICA.

The Convention consists of four categories of rights plus guiding principles. The guiding principles are normative and ought to be realized and guaranteed. This is unprecedented because it establishes a binding international human rights law principle about adoption and ICA that is viewed from the child's perspective. The Convention's four categories of children's rights are characterized by the following factors: (i) participation by children in decisions affecting them; (ii) protection of children against discrimination and all forms of neglect and

exploitation; (iii) prevention of harm; and (iv) provision of assistance to children for their basic needs. The responsibility realizing these rights is primarily a state concern. Yet adults continue to be responsible for the realization of the well-being of children, and are obliged to take action in the best interest of the child as put forward by article 3 of the Convention. Under article 4 of the Convention, state parties are required to undertake all appropriate legislative, administrative, and other measures to effectively implement the Convention.

Children's rights need observance, for which the CRC gathers in Geneva. The CRC normally holds three sessions per year, consisting of a three-week plenary and a one-week pre-sessional working group. In this way, a periodic reporting by states takes place, representing checks and balances for the protection of the rights of the child. However, these obligatory occasions of state accountability are infrequent; for each country it can take many years before the reporting sessions re-occur, which potentially undermines the effectiveness of state reporting. In addition to state reporting, individual complaints can be brought forward to the CRC after national remedies such as legal procedures have been exhausted.

The importance of the authority of the CRC concerning the implementation of the Convention in regard of adoption and ICA and the right to identity can be illustrated by closer consideration of the following articles.

Article 7.1 of the Convention, "Birth registration, name, nationality and right to know and be cared for by parents", stipulates the child's right to know and be cared for by his or her parents. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. A birth certificate, which can be obtained through a certificate of birth registration, should guarantee the right to identity, as put forward in article 8 of the Convention. This is particularly important in the case of ICA, because a birth certificate, which is issued by a civil registry and not by a birth hospital, does not safeguard the right to identity. While the human right to obligatory birth registration, which usually takes place at a birth hospital, is a crucial mean to safeguard the right to identity.

As explained in the Introduction above (I – Two Examples), intercountry adoptees do not necessarily have access to their original birth certificate because ICA rulings mandate a new birth certificate that does not include the child's original identity. This is problematic because access to the right to identity can only be obtained via access to the original birth certificate.

With regards to a child's right to be cared for by his or her parents, the Convention makes the reservation "as far as possible" because it may be impossible to identify the parents of the child or, in cases they are known, it may not be in the best interest of the child to be cared for by them (UNICEF, 2007, p. 97). The right to be cared for by his or her parents, as far as possible, is part of survival and development rights. If this right is not realized it may make children subject to ICA.

Article 8 of the Convention, "Preservation of identity", preserves the identity of the child by making state parties responsible for the lawful establishment of the child's name, nationality and family relations as recognized by law, without lawful interference.

The article was introduced in the Working Group drafting the Convention by an Argentinean delegate on the grounds that it was necessary to secure the speedy intervention of the State when the child's right to preserve his or her identity had been violated. Argentina was at the time tackling the disappearance of children and babies, which had occurred under the regime of the Argentinean junta during the 1970s and 1980s. While many such children were killed, a number had been adopted by childless couples; active steps were needed to trace these children and establish their true identity (UNICEF, 2007, p. 113)

Articles 7 and 8 of the Convention emphasize the child's biological identity and represent the origins of the child in case of ICA.

Article 9 of the Convention, "Separation from parents", puts forward that states ensure that the child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. This article furthermore safeguards that all procedures to separate children from their parents must be on fair grounds. So, "it also affirms children's rights to maintain relations and contact with both parents" (UNICEF, 2007, p. 121).

Article 20 of the Convention, "Children deprived of their family environment", states that a child who is deprived of his or her family environment shall be entitled to special protection and assistance from the state in accordance with the national laws. The state should also ensure alternative care for such a child, which includes *inter alia* foster placement, institutional care and adoption. Therefore, article 20 "emphasizes the importance of continuity in a child's upbringing including the child's ethnic, religious, cultural and linguistic backgrounds." (UNICEF, 2007, p. 277).

The Convention does not stand alone, it also is upheld by its optional protocols, including the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OPSC). The Optional Protocol, which was ratified by Brazil on 27 January 2004 aims to safeguard right to identity, in particular concerning ICA: “Every child is entitled to protection and has the right to respect for privacy, integrity and identity. Every child has the right to be considered a person in his or her own right.” (UNICEF, 2009, p. ix-x).

## **1.2 Brazilian History and Ratification of the Rights of the Child**

Considering the recent history of the rights of the child in Brazil, a concise history of two decades of child rights in Brazil has been made up by Wanderlino Nogueira Neto, a Brazilian children’s rights defender and advocate and former member of the CRC. He places the first two decades of the ECA (the implementation of the UNCRC in Brazil) within the international context of human rights and the national context of fighting for human rights for children in Brazil.

According to Nogueira Neto (2011), the ECA needs to be seen as a battle for democracy and human rights in Brazil, which itself is a result of two decades of military dictatorship. That period was characterized by a battle for recognition and a guarantee of normative national and international fundamental rights. In other words: a positive rights approach to human rights in the context of the re-democratization of Brazil.

This period in Brazilian history is considered to be the time of a movement in favor of the most vulnerable in our societies, such as women and children. Such movements that defended the rights of the child accomplished notable social, political, and juridical progress through the ECA most remarkably. Eventually, battles for human rights in Brazil successfully accomplished the establishment of the ECA through Law n° 8.069 on 13 July 1990. These movements also achieved inclusion in the CF of 1988 that established the principles and scope for the development of the protection of the rights of the child via Article 227 (Ratification of the Convention).

Most essential for the protection of the rights of the child in this context is the key hermeneutic doctrine of integral protection. It is important to note that the doctrine is not a given but is in continuous development. The “academic recognition” of the accomplishments of the human rights movements concerning the rights of the child were embedded in several

universities at the time including, *inter alia*, the Pontifícia Universidade Católica de São Paulo (PUC-SP), the Universidade Estadual do Rio de Janeiro (UERJ) and the Pontifícia Universidade Católica do Rio Grande do Sul (PUC-RS) (NOGUEIRA, 2011, p. 3). For a further understanding of these movements, see chapter 3.1.

These events in Brazil can be placed in a normative international approach of strategic advocacy and mobilization for social developments, most recognizably under the flag of UNICEF.

This process of elaboration of this new formal source of public international law has also greatly influenced the struggles for children's rights in Brazil. At a time when a process of reconstruction and democratization of its normative and political-institutional processes took place in Brazil, through a Constituent Congress, Brazil had the privilege of appropriating this information on the new international legal norm, [...] despite the little recognition that is made of this fact, in Brazil, where the Convention is little disseminated, known, studied and applied. (NOGUEIRA, 2011, p. 5).

Finally, in 2006, safeguarding the rights of the child in Brazil was enforced by the National Council of the Rights of the Child (Conselho Nacional dos Direitos da Criança - CONANDA) via resolution 113 of 19 April 2006 on strengthening the System of Guaranteeing of Rights. CONANDA, which is aligned with the UN, maintains a strategic and holistic approach to the protection of the rights of the child in Brazil. However, during the first years following the ECA entering into force in Brazil, CONANDA did not have the same significance as it has today. Social legitimacy and recognition of the ECA could be regarded as a progressive process in Brazil, considering the normative reordering of institutional changes it represents in comparison to the former CF and notwithstanding the present threat to human rights under Brazil's current presidential regime.

The situation of the rights of the child was characterized by profound poverty and inequality which considerably changed for the better under the ECA but which is nevertheless still under threat. There remain several precarious aspects, as expressed by the CRC in the "Consideration of reports submitted by States parties under article 44 of the Convention" on Brazil (CRC, 2015, p. 33 – 36).

These concerns regarding the protection of the rights of the child are recognized and foreseen by the CF and, as such, have led to a strategy of the enforcement of fundamental rights that aims to reduce inequality and avoid the violation of the rights of the child by setting out better conditions and opportunities and thus contributing to more equality. (MOTTA COSTA, 2012, p. 134).

In 2009, the ECA was amended concerning adoption and ICA via law 12.010/09. The law established clear preference for adoption by nationals, even requiring prior consultation with prospective adoptive parents (PAPs) with permanent residency in Brazil when those PAPs are not Brazilian. All attempts to place the child with a Brazilian family should be exhausted. State and national registers should be consulted for this purpose, and the requirement to prepare a multidisciplinary report on the process of ICA observed. The law furthermore determines the preference for Brazilian PAPs residing abroad over foreign PAPs, and establishes a meticulous procedure for international adoption (PAULINO-LOPES, 2010, p. 8). In conclusion, law 12.010/09 stipulates that adoption is a last resort (MOTTA COSTA, 2012, p. 157).

Nevertheless, despite the fact that adoption is to be considered a last resort as established by law 12.010/09, there are several groups of Brazilian PAPs who disregard the law. The stance expressed by the Movement of Action and Social Innovation (*Movimento de Ação e Inovação Social*), published on the CNJ's website in *Três vivas para a adoção* (Three Hurrahs for Adoption) is one example. About adoption, it says this “handbook was designed as a welcoming and training tool for future fathers and mothers to feel secure, embraced and prepared for the arrival of the puppy and, why not, the puppies” (MOVIMENTO DE AÇÃO E INOVAÇÃO SOCIAL, 2018, p. 6). The approach of the movement is focused on the PAPs and therefore is in direct contradiction with the Convention’s principles concerning adoption.

This draws attention to the importance of the enforcement of the rights of the child, from the perspective of the child. The Brazilian state should provide adequate and universal public means to guarantee the rights of the child, including the provisions under Article 7 of the Convention, while observing *inter alia* the necessary supportive role of the state to realize these rights (MOTTA COSTA, 2012, p. 135).

From a historic perspective, the positive rights obligations of the Brazilian state were traditionally characterized by state interventions concerning children in trouble. Such interventions had the effect of violating the right to family life by forcing institutional care upon children in trouble. This cut them off from their social and family context. During the 19<sup>th</sup> and 20<sup>th</sup> Centuries, children of families in poverty were destined to be institutionalized as orphans or abandoned upon seeking assistance from the state (MOTTA COSTA, 2012, p. 137-138). From this perspective, the mentioned PAPs might feel that their stance is justified.

### 1.3 Subsidiarity Principles

As mentioned in the introduction, there are two subsidiarity principles. The first is created by the UN in 1989; the second by the HCCH in 1993. The UN established the human rights principle regarding ICA through the UNCRC. The HCCH subsequently created a private international law principle regarding ICA through the HC-1993. It is possible therefore to identify a double subsidiary principle for ICA. As we will see, the two principles are slightly, yet crucially, different.

The first things to note about the double subsidiary principle are the chronology, and the national and international legal order. The UNCRC already existed before the creation of the HC-1993 and human rights typically prevail over private international law.

In Brazil, the legal order is put forward by Kelsen (CUNHA, 2018), from which follows that the ECA is considered to be an ordinary law. Whereas the UNCRC could be considered as a supralegal norm, because it sets forth human rights rules. While the HC-1993 could arguably not be labeled as a supralegal norm.

According to Kelsen's legal system the CF is placed at the top, being the top norm (and the STF the top court) (LEITE, 2018). Under the CF comes the UNCRC, followed by the ECA and the HC-1993 on the same level. Although the UNCRC, the HC-1993 and the ECA first were incorporated into the Brazilian legal order at the same level<sup>35</sup>, currently the UNCRC takes precedence over the HC-1993 and the ECA according to precedents of the STF. The ECA is nevertheless also relevant for the right to identity as one could argue that the right to identity falls under article 3 ECA, which refers to human dignity and fundamental rights that are set out as a priority in article 1.3 of the CF.

The second thing to note is the full name of the HC-1993: the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption 1993. An obvious interpretation of the name is that the HCCH regards ICA as a form of child protection. In contrast, the earlier UNCRC does not necessarily qualify or identify ICA as a childcare measure. In fact, the UNCRC considers ICA to be a last resort. From this human rights

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<sup>35</sup> UNCRC (entry into force in Brazil: 21 November 1990). Available in: [http://www.planalto.gov.br/ccivil\\_03/decreto/1990-1994/d99710.htm](http://www.planalto.gov.br/ccivil_03/decreto/1990-1994/d99710.htm); HC (Entry into force in Brazil: 21 June 1999). Available in: [http://www.planalto.gov.br/ccivil\\_03/decreto/d3087.htm](http://www.planalto.gov.br/ccivil_03/decreto/d3087.htm); ECA (Entry into force in Brazil: 13 July 1990). Available in: [http://www.planalto.gov.br/ccivil\\_03/leis/l8069.htm](http://www.planalto.gov.br/ccivil_03/leis/l8069.htm)

perspective, that ICA is a last resort, the HC-1993 only regards last-resort human-rights situations and has no other purpose.

In itself, it should not be a problem that the HC-1993 only concerns last resort human rights situations. Because, the UN has the CRC to oversee the implementation of the UNCRC, including the application of the subsidiarity principle. Therefore, the CRC also oversees the implementation of the HC-1993, which is also overseen by national Central Authorities. In Brazil the Central Authority was established via Decree nº 3.174 of 1999 (Ministério da Justiça e Segurança Pública – Conselho das Autoridades Centrais Brasileiras). This is substantially different from the CRC, which is an independent body that holds all countries – with exception of the US – accountable for the rights of the child including ICA.

Because the Central Authorities of the HCCH are not independent bodies they cannot independently hold each other accountable. In fact, they are members of the same multilateral international convention on private law. In that capacity, they mainly communicate with each other about bilateral relations, with state officials representing their own country's interests, which are usually driven by political priorities of elected officials. Multilateral communications mainly happen at the five-yearly Special Commission meetings. This means that although ICA is bound by human rights norms and concerns a human-rights principle, as per the UNCRC, the responsible ministers are typically from the justice department and not from human rights departments.

Although the Central Authority in Brazil was initially within the scope of the ministry of human rights, since 7 May 2018 it sits within the ministry of justice<sup>36</sup>. In fact, the Central Authority did not exist until 2003, four years after Brazil's ratification of the HC-1993. A National Adoption Registry, Cadastro Nacional de Adoção (CNA), has only been in existence since 2008 (CNJ 2015, p.15) – a fact that has been criticized by the CRC (CRC, 2014, p. 33). Although the shift of responsible ministry may represent a throwback, this may change again for the better under future, more progressive, governments.

Now that the context and scope of the subsidiarity principle is clear, we can take a closer look at their exact meanings: as mentioned they are crucially different. The subsidiarity principle of the UNCRC (Article 21 (b)) requires that ICA be undertaken only as a last resort. That is the conclusion after considering the implementation handbook of the Convention (CRC,

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<sup>36</sup> See: <https://www.justica.gov.br/sua-protectao/cooperacao-internacional/acaf>

Article 21 (b); UNICEF, 2007, p. 297-298). The fact that ICA must only be undertaken as a last resort according to the UNCRC, is not the case according to the subsidiarity principle of the HC-1993 (HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, 1993, Article 4; HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, 2008, p. 29-30). Reading the HC-1993 in consideration with its implementation handbook, as is customary for private international law conventions as well, the HC-1993 gives preference to ICA above other childcare measures, such as foster placement or institutional care in the home country of the child: “As a general rule, institutional care should be considered as a last resort for a child in need of a family” (HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, 2013).

This is problematic from a human rights perspective because the crucial disparity between the two subsidiarity principles has the effect of creating different interventions in the life of a child with different life long-lasting effects<sup>37</sup>. If the subsidiary principle of the HC-1993 would have strictly followed the subsidiarity principle of the UNCRC, ICA would most likely rarely take place. That would make the HC-1993 by effect almost obsolete. Avoiding the creation of a convention with little purpose could indicate a motive for the divergence from the UN’s first subsidiarity principle and explain the creation of a second, divergent, subsidiarity principle by the HCCH. Hence, the double subsidiarity principle.

The understanding that there was a need for a subsidiarity principle that would be more beneficial to PAPs could be further explained and illustrated by the fact that the HC-1993 envisages cooperation between states with a view to banning any trade in children, and allowing ICA when this proves to be in the best interest of the child.

Such cooperation could be regarded as controversial because, as per article 2(a) OPSC, the 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. Given the fact that ICA inherently involves financial transactions and/or considerations, one could identify an infringement of rights (i.e. human rights law principle vs. private international law principle). The infringement takes place in the scope of the irreconcilability of ICA without a transfer by any person or group of persons to another for remuneration or any other consideration.

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<sup>37</sup> This despite domestic adoption having a very significant impact on identity, including change of identity, and complete severance of relationship. Such consequences of domestic adoption are bound by national (state) legislation and are outside the scope of this thesis, which concerns itself solely with ICA and the right to identity. The effects of domestic adoption are increasingly being scrutinized by the legislative branches of countries in which domestic adoptee movements are gaining ground and making an impact.

From this perspective one could argue that the HC-1993 allows demand and supply to be effectively brought together, because it gives preference to ICA above other childcare measures. The UNCRC on the other hand leaves ICA as a last resort, and minimizes the opportunities to bring together demand and supply for ICA. It even allows a state to forbid ICA altogether through its pronouncement that, without very stringent regulation and supervision, children can be trafficked for adoption or can be adopted without regard for their best interests (UNICEF, 2007, p. 297). Hence, the subsidiarity principle of the UNCRC has the effect of minimizing crucial aspects of the deprivation of the right to identity, by making states responsible and accountable for considering solutions for the care of children who are temporarily or permanently deprived of their family environment (as put forward, *inter alia*, in article 20(3) UNCRC.)

Given that many ICA-receiving countries are European, when safeguarding the right to identity in the case of ICA into the European Union the UNCRC subsidiarity principle should be the first consideration as it is part of the *Acquis Communautaire*. In cases of conflicting law such as the double subsidiarity principle, European Union law (the UNCRC) precedes national law, as per the primacy principle of European Union law. Therefore, European Union states are primarily held by the UNCRC, which is part of the body of common rights and obligations that is binding on all European Union member states.

European Union States are therefore held accountable for safeguarding the right to identity of adoptees and should guarantee the right of individuals to know their origins that is stipulated in the UNCRC and safeguarded by the ECtHR as we will see in chapter 2.2. Beyond the scope of the ECtHR, the UNCRC also prevails over HC-1993 as put forward in article 103 of the UN Charter: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”.

The academic and social justification of this thesis is partly grounded in the supposition that the HCCH is not compliant with human rights norms and principles when it comes to ICA, especially when relevant jurisprudence of the ECtHR and the IACtHR are taken into account. This is particularly relevant for the focus of this research that lies with the application of the subsidiarity principle.

There is arguably, therefore, a further justification of this research in the extreme paucity of compliance or safeguarding assets in ICA legislation. ICA lawmaking practices exclude the

main stakeholders of the adoption triad: the adoptees and their original parents and/or family. The five-yearly Special Commission meetings on the practical operation of the HC-1993 do not include or consult NGOs that represent adoptees and/or original family in their decision-making processes.

In short, considering that the UNCRC only has one article regarding adoption *and* ICA (article 21), the Convention merely sets out the human rights norm and principle concerning adoption and ICA. Whereas, the HCCH has 48 articles concerning ICA and, as the only convention setting out the UNCRC's norm and principle concerning ICA, could be regarded as the effective lawmaking body for ICA. Receiving countries might see any obligation thereunder, such as family preservation efforts, to be the duty of the sending country as the HC-1993 does not impose such responsibilities on receiving countries.

The HC-1993 is not expressively preoccupied with the right to identity and access to origins of adoptees. Instead its focus is on preventing the abduction, the sale, or the trafficking of children. The HC-1993 aims to give effect to article 21 UNCRC by establishing minimum standards and adding substantive safeguards and procedures to the broad principles and norms laid down in the UNCRC. But it does not intend to serve as a uniform law of adoption (HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, 2013).

The double subsidiarity principle has recently been recognized by the European Network of Ombudspersons for Children (ENOC, 2018, p. 2):

ENOC recognizes the importance of subsidiarity as a founding principle of the 1993 Hague Convention (art. 4 b) and the UNCRC (art. 21). Although the formulation and interpretation are somewhat different in both international instruments, the importance of this principle lies in the integration of intercountry adoption into the national child protection system. States must ensure that no appropriate domestic or internal measures are available before considering intercountry adoption.

Although the ENOC did not go as far as identifying a double subsidiarity principle, it did identify two dissimilar subsidiarity principles. According to the HCCH, there should exist a “principle of subsidiarity” (HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, 2018). They are, thereby, neither referring to the HC-1993's subsidiarity principle, nor to the UNCRC's subsidiarity principle. ISS first identified “a double principle of subsidiarity”, interpreting the double subsidiarity principle as a matter regarding the best interest of the child – and thereby effectively ending any discussion about the legitimacy of crucial reservation made in HC-1993 to the UNCRC regarding ICA (INTERNATIONAL SOCIAL SERVICE,

2016). Later they use the term “principle of subsidiarity”, in which they are effectively advocating for the implementation of the HC-1993’s subsidiary principle, again seeking justification for disregarding the legitimacy of HC-1993’s reservation to the UNCRC concerning ICA on the grounds of ‘best interest of the child.’

Finally, in the light of the importance of the right to identity and access to origins for intercountry adoptees, the Guidelines for the Alternative Care of Children could be considered controversial from the perspective of safeguarding the UNCRC’s subsidiarity principle. By stating that “To support efforts to keep children in, or return them to, the care of their family or, failing this, to find another appropriate and permanent solution, including adoption” (UNITED NATIONS GENERAL ASSEMBLY, 2010, p.2), the Guidelines have the effect of equaling the HC-1993’s subsidiarity principle.

## 2 INTERCOUNTRY ADOPTION AND THE RIGHT TO IDENTITY

### 2.1 International History of the HC-1993

Understanding the recent history of ICA from Brazil helps to explain the present importance of the right to identity in ICA. It was not until the period between the late 1970s and early 1990s that national adoption legislation concerning domestic adoptions was widely established in Brazil via the Civil Code of 1916 (SENADO FEDERAL, 2017).

As we have seen above, this became possible after the Convention was finally completed in 1989 and entered into force in 1990. Brazil signed and ratified the Convention the same year. In accordance with its 1988 federal constitution, Brazil established the ECA based on the Convention's principles, including those for ICA (CÂMARA DOS DEPUTADOS, 2014). In the 1990s, further ICA legislation was established in the form of the HC-1993, to which Brazil made a signatory commitment in 1993, and eventually ratified in 1999 (HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, 1993).

As stated in the preamble to the HC-1993, it was not designed to stand alone. It was instead to be considered in the light of the foundation of the UNCRC: the two were meant to be read together. The broad scope of rights relevant to ICA that are covered in the Convention (see chapter 1.1) are not mentioned in the HC-1993. Instead the HC-1993 preamble envisions that the HC-1993 should be supplemented by the UNCRC and that it is in fact desirable to attempt to reconcile conceivable conflicts, such as the double subsidiarity principle discussed in chapter 1.3 - to the point of apparent contradiction.

As described in chapter 1.3 above, the role of the CNJ concerning ICA is one of the areas of controversy surrounding ICA. In 2018, the CNJ celebrated 10 years of Brazil's national ICA registry (CNA). However, this could hardly be conceived as a celebratory achievement outside the global south. Arguably, the adoption registry should have been in place since Brazil's ratification of the HC-1993 in 1999. What's more, the CNJ has had to acknowledge that it has not been able to meet several of the Convention's provisions designed to protect the rights of the child. Given these shortcomings, it seems more than justified to continue questioning the CNJ's standpoint on safeguarding children's rights and ICA, as will be considered throughout this chapter and in the conclusions and recommendations.

First, consider the failure to meet standards of fundamental rights relating to the scope of state obligations concerning the realization of the Convention's provisions regarding ICA. From this perspective, I believe it is reasonable that all stakeholders should be consulted, including original families and intercountry adoptees who are affected by the Convention and HC-1993.

To reiterate the main justifications of this research: the application of the subsidiarity principle in Brazil is undertaken in Brazilian courts by judges who base their views on the HC-1993's subsidiarity principle, yet intercountry adoptees and their original families are not represented in either the national or international legislative bodies that are responsible for the legislation on which the Brazilian judiciary bases its ICA rulings. Moreover, the rights of intercountry adoptees are not necessarily safeguarded.

One explanation for this phenomenon is that ICA is commonly not regarded as a problem but rather as a solution, and this is a view shared by members of the judiciary. Although the UNCRC's norms and the ECA's principles clearly state that family preservation is of paramount importance, as are primary child-care and child-protection considerations, the right to continuity in upbringing, and the right to identity, ICA does not preserve those rights. Therefore, the Council of Europe – Parliamentary Assembly, asserted the following via Recommendation 1443 (2000) on International adoption:

It wishes to alert European public opinion to the fact that, sadly, international adoption can lead to the disregard of children's rights and that it does not necessarily serve their best interests. In many cases, receiving countries perpetuate misleading notions about children's circumstances in their countries of origin and a stubbornly prejudiced belief in the advantages for a foreign child of being adopted and living in a rich country. The present tendencies of international adoption go against the UN Convention on the Rights of the Child, which stipulates that if a child is deprived of his or her family the alternative solutions considered must pay due regard to the desirability of continuity in the child's upbringing and to his or her ethnic, religious, cultural and linguistic background.

The CNJ has not taken note of this legal perspective from receiving countries of ICA. The CNJ instead is preoccupied with the children who grow up without a permanent family, which in Brazil is widely considered to be the most important situation for which a permanent solution childcare solution must be found. The preservation of the child's right to identity, particularly in cases of ICA, is a secondary concern.

## 2.2 Right to Identity

The right to identity and ICA are intertwined. As the cases of Adam and Eve above illustrate, they are the cause of severe challenges in any intercountry adoptee's life. ICA is a life-changing, legal intervention in a person's life and has an irreversible impact. No matter how hard an intercountry adoptee tries to learn his or her original language, become acquainted with their related culture, or search for crucial aspects of his or her original identity, making a compelling case for procuring access to his or her origins in the process, their right to identity will never be protected in the way a domestic adoptee's right to identity and access to origins are protected<sup>38</sup>.

Recognition of the implications of *legal* deprivation of the right to identity following ICA can only take place within the context of human rights because there are no other legal frameworks available. The right to identity is exactly that: a human right. As is the case with several other human rights, the enforcement of that right to identity was not part of the initial conception of human rights. Consequently, although states like Brazil are obliged to prevent and criminalize human rights violations, and allow for restoration for victims, they do not necessarily have the mechanisms in place to do so.

It is within the context of safeguarding fundamental rights that the concept of the right to identity takes shape. The first consideration concerning the right to identity is the obligation of states to legally register newborns by their original name and original nationality, as set out by the Convention (see chapter 1.1 above). This obligation enables adoptees to obtain ownership of their right to identity in the form of an official record stating who they are by law. It respects the child's right to his or her original name and nationality while preserving their family ties<sup>39</sup>. The second consideration is the need to balance fundamental human rights and private international law concerning ICA.

The human right to identity is stipulated in Article 8 of the Convention and involves various provisions of the Convention, as well as the International Covenant on Civil and Political Rights, the American Convention on Human Rights (ACHR) and the European Convention on Human Rights (ECHR). As we have learned from the examples of Adam and Eve, the search for origins is an inseparable part of the right to identity and inherently part of

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<sup>38</sup> Notwithstanding the fact that domestic adoptees, in particular in the US, are trying to pursue their lawmakers to provide adoptees in all states with access to their original birth certificate. For more information on this, see chapter 3.2

<sup>39</sup> Note that closed-adoption records still prevent adoptees from gaining access to their right to identity, in particular in the US.

the lives of adoptees. Indeed, many of them will consequently engage in the search for identity (BRODZINSKY; SCHECHTER; HENIG, 1993, p. 113-118, 128-132).

The ECHR is of critical importance to ICA. Because the US has not ratified the Convention, it is difficult for a judge in Brazil to rule in favor of an ICA into the US when taking the Convention's and the ECA's provisions into account. The EU is therefore a more easily justified destination for potential intercountry adoptees. The same is true for receiving countries that do not allow for dual citizenship as Brazil is a *jus soli* country, which means intercountry adoptees can legally be identified as Brazilian.

For intercountry adoptees to have ownership of the right to identity that goes beyond being able to obtain a passport from the country of birth, there is a need for, concrete legislative, executive and judicial recommendations that facilitate access to origins. Such recommendations should be seen in the light of, and will add to a number of existing provisions, including: the 2014 publication of the Superior Court of Justice concerning the deprivation of the right to identity for the purpose of ICA (SUPERIOR TRIBUNAL DE JUSTIÇA, 2014); the 2014 Parliamentary Inquiry on the Trafficking of Persons concerning ICA (CÂMARA DOS DEPUTADOS, 2014)<sup>40</sup>; and the 2015 publication of the Federal Public Ministry of the State of São Paulo concerning the deprivation of the right to identity for the purpose of ICA (MINISTÉRIO PÚBLICO FEDERAL, 2015).

Moreover, the 2015 Special Commission meetings on the practical operation of HC-1993 underline the importance of the search for origins (HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, 2015). Since the subsidiarity principle forms the legal basis of the search for origins of intercountry adoptees, the outcome of this study will also raise awareness about the lack of ICA statistics in Brazil. The 2017 United Nations Report of the Special Rapporteur on the sale of children, child prostitution and child pornography underlines the importance of the right to identity in ICA (UNITED NATIONS HUMAN RIGHTS COUNCIL, 2016).

The discourse about the right to identity and ICA is still emerging because it is only since 2017 that intercountry adoptees from Brazil, adopted under the implementation of the HC-1993 have only been able to bring to court cases about access to the right to identity based on the application of the subsidiarity principle. It is of utmost importance that the readers of

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<sup>40</sup> As stated in the introduction, *legal* ICA practice often forms an impediment for intercountry adoptees to enforce their right to identity. This situation is, in practice, similar to intercountry adoptees who were illegally adopted.

this thesis, particularly judges who are concerned with ICA from Brazil, realize that the Brazilian statutes of limitations severely complicate possible claims to ownership to the right to identity in ICA cases.

In principle, the statues of limitations means that an adult intercountry adoptee from Brazil is unlikely to see a prosecutor bring criminal charges regarding deprivation of identity to responsible parties in their ICA. The same is true for claims regarding the civil responsibilities of state actors involved in and/or responsible for their ICA. Given that the interpretation of the prosecutor(s) and understanding of judge(s) are based on the specifics of each case, no concrete examples can be given here. Not the least consideration for this omission is the need to avoid creating false hope for intercountry adoptees who might consider taking legal steps in their country of origin concerning their right to identity.

Nonetheless, the IACtHR has more recently empowered relevant human rights norms and principles concerning the right to identity and recognition of legal personality, as well as the rights to personal integrity and to family protection (ORGANIZATION OF AMERICAN STATES, 2007).

The right to identity and the right to a name is also linked in particular to the right to a family and is recognized in article 18 of the ACHR (UNICEF, 2013, p. 21 - 23). The right to identity is therefore broader than the sum of the rights to the family, a name, a nationality, and to the rights of the child referred to by the American Convention on Human Rights (INTER-AMERICAN COURT OF HUMAN RIGHTS, Gelman V. Uruguay, 2011). The court recently reiterated its rulings by providing even more clarity about family separation, alternative care and the adoptability of a child for ICA.

In the case of the Ramírez brothers, the IACtHR held Guatemala responsible for the violation of provisions pertaining to the scope of the right to identity as protected by the ACHR. The court also found that the way the ICA took place was not in the best interest of the plaintiffs, with regard to the Convention's subsidiarity principle. (INTER-AMERICAN COURT OF HUMAN RIGHTS, Ramírez Escobar and Others V. Guatemala, 2018).

It should be clear that ICA as currently practiced does not protect the right to identity. Within this context it is important to note the Organization of American States publication cited above: "The Committee emphasizes the importance of especially assuring the child's right to identity, reducing therefore its vulnerability in possible abuses and also acting under the

principles of “special protection” and “supreme interest” of the child.” (ORGANIZATION OF AMERICAN STATES, 2007).

In conclusion, family, name, nationality, and the family ties are constituent elements of the right of identity as safeguarded by the ACHR and reiterated by the IACtHR. Accordingly, ICA could have the effect of depriving an individual of the right of identity and to the right to know the history of their origins. The court notes in this regard that the names and surnames have reportedly been changed as a result of the adoption (INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. Report on Merits, Ramírez Brothers and Family V. Guatemala. 2015). That the change of name represents a violation of the right to identity needs no further explanation here.

We will now take a closer look at the European rights situation regarding ICA and the right to identity, and consider the margin of appreciation. The margin of appreciation is a doctrine with a wide scope in international human rights law (COUNCIL OF EUROPE, 2019). It was developed by the European Court of Human Rights to judge whether a state party to the ECHR should be sanctioned for limiting the enjoyment of rights. The doctrine allows the court to reconcile practical differences in implementing the articles of the Convention. This is exactly what this thesis does with articles 8 and 21b UNCRC.

The purpose of the margin of appreciation is to balance individual rights with national interests, and to resolve any potential conflicts. As we will see, the ECtHR has in fact set a human rights standard concerning the right to identity and ICA concerning all parties to the ECHR through the ECtHR’s jurisprudence.

Before analyzing the jurisprudence, it is worth reflecting once more on the right to identity, which can effectively be explained as having ownership of one’s past and future in such a way that creates perspective and continuity. For many, this is essential for the construction of a feeling of personal identity. These aspects of individual identity are at risk by depriving someone of the knowledge of such crucial facts such as the date and place of birth, and the name at birth, which is often unclear in ICA cases. These provisions are part of the scope of the fundamental rights as safeguarded by the CF and reflected by the Convention. The right to identity is an indisputable human right and in Europe is safeguarded in Article 8 ECHR and Article 7 and 8 UNCRC.

As early as 1989, the ECtHR ruled in the case Gaskin V. United Kingdom that the right to identity comprises the right to knowledge of paternal and maternal ascendancy as well as

information that can provide an understanding and insights about one's identity and its development. In this case, the plaintiff, who grew up in a foster family, needed and therefore requested a case file about his care history in the hope that the information would provide information about when he stayed where. The plaintiff argued that this information would help him to solve problems from his troubled adolescence. The court ruled that the United Kingdom should have allowed access to the case files, under the following grounds:

In the opinion of the Commission, the file provided a substitute record for the memories and experience of the parents of the child” who is not in care. The file no doubt contained information concerning highly personal aspects of the applicant’s childhood, development and history and thus could constitute his principal source of information about his past and formative years. Consequently, lack of access thereto did raise issues under Article 8. (COUNCIL OF EUROPE, Gaskin V. United Kingdom, 1989, p. 11).

37. The Court agrees with the Commission. The records contained in the file undoubtedly do relate to Mr Gaskin’s “private and family life” in such a way that the question of his access thereto falls within the ambit of Article 8. (COUNCIL OF EUROPE, Gaskin V. United Kingdom, 2002, p. 11).

49. In the Court’s opinion, persons in the situation of the applicant have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development [...]. (COUNCIL OF EUROPE, Gaskin V. United Kingdom, 2002, p.15).

This means that the court recognizes the importance of the requested information, beneficial to a process of processing and coping with the plaintiff’s access to identity. The scope of the right to identity under Article 8 ECHR therefore contains information about the circumstances in which one’s identity was shaped.

This is also the case in Odièvre V. France in which the court ruled the following:

28. In the instant case, the Court notes that the applicant's purpose is not to call into question her relationship with her adoptive parents but to discover the circumstances in which she was born and abandoned, including the identity of her natural parents and brothers. For that reason, it considers it necessary to examine the case from the perspective of private life, not family life, since the applicant's claim to be entitled, in the name of biological truth, to know her personal history is based on her inability to gain access to information about her origins and related identifying data. (COUNCIL OF EUROPE, Odièvre V. France, 2003, p.18).

29. The Court reiterates in that connection that Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. ... The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life” (see

Bensaid v. the United Kingdom, no. 44599/98, § 47, ECHR 2001-I). Matters of relevance to personal development include details of a person's identity as a human being and the vital interest protected by the Convention in obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents (see Mikulić v. Croatia, no. 53176/99, §§ 54 and 64, ECHR 2002-I). Birth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life guaranteed by Article 8 of the Convention. That provision is therefore applicable in the instant case" (COUNCIL OF EUROPE, Odièvre V. France, 2003, p. 18).

Of crucial importance for the right to identity for intercountry adoptees is the court's qualification that birth, and in particular the circumstances in which the child is born, forms part of the child's, and subsequently the adult's, private life guaranteed by Article 8 of the Convention. This means that the identity of the original parents of the adoptee therefore is merely one of the elements of importance in the process of creating an personal identity. Contextual information therefore is also important for the development of a child and consequently for an adult, as the court reiterated.

45. The Court reiterates that birth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life guaranteed by Article 8 of the Convention (see Odièvre v. France [GC], no. 42326/98, § 29, ECHR 2003-III). Respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality (see, for example, Mikulić v. Croatia, no. 53176/99, §§ 53-54, ECHR 2002-I, and Gaskin v. the United Kingdom, judgment of 7 July 1989, Series A no. 160, p. 16, §§ 36-37, 39). This includes obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents (see Jäggi v. Switzerland, no. 58757/00, § 25, ECHR 2006-...; Odièvre, § 29; and Mikulić, §§ 54 and 64; both cited above). (COUNCIL OF EUROPE, Phinikaridou V. Cyprus, 2008, p. 15).

As we now have learned, the right to identity undisputedly empowers adoptees to claim entitlement to information about their origins, because of the importance of the formative implications it has for their personality. This is also reiterated in the court's judgement in the case Mikulić V. Croatia (COUNCIL OF EUROPE, CASE OF MIKULIĆ v. CROATIA, 2015).

## **2.3 Application of the Subsidiarity Principles in Brazil**

The SUPREMO TRIBUNAL FEDERAL (2009) established the precedent that human rights conventions have a *supralegal* status, meaning that they are under the Constitution, but above ordinary laws. The ECA deals with domestic adoption and is an ordinary law. As

mentioned before, the HC-1993, which deals with ICA, is also an ordinary law. And as stated before, the Convention is a *supralegal* norm, because it set forth human rights norms and principles about ICA among other issues.

Brazil is therefore subject to positive rights obligations deriving from the Convention. In this regard, the CRC stated in 2014 in its report “Consideration of reports submitted by states parties under article 44 of the Convention – Brazil” (2014, p. 34) the following, and thereby de facto holding Brazil accountable for: “Strengthen monitoring and supervising of the system of adoption of children in the light of article 21 and other relevant provisions of the Convention and ensure that intercountry adoption is a measure of last resort”.

In practice, it is the Brazilian judiciary that is responsible for the application of the legal order by their members (judges, appeal judges, high court judges and STF ministers) in accordance with the explanatory report of the HC-1993 on the subsidiary principle under para 105 (PARRA-ARANGUREN, 1994). In accordance thereof, judges should not allow ICA to the US because the US has not ratified the Convention. Judges should respect the child’s right to be heard (also applying to ICA cases) in accordance with:

The child’s opinion, his or her preferences, and how it was evaluated and taken into consideration by the authority for adoption of the respective decision must be duly documented to justify the relationship between the content of the decision and the child’s wishes expressed (UNICEF, 2013, p. 112).

In order to establish key court rulings in Brazil concerning the right to identity and ICA, and as stated in the introduction, I searched for relevant jurisprudence concerning ICA and the right to identity at the STF<sup>41</sup> and Superior Court of Justice (STJ)<sup>42</sup> with the following results:

STF, Recurso extraordinario N° 89.457 – 8 / Goiás, 17 November 1981: Judgement by the second chamber in Goiás about the simple adoption of a grandchild by his grandparents. The STF ruled about the recognition of the right to identity to be reflected in the plaintiff’s birth certificate.

STF, Recurso extraordinário com agravo ARE 886680 / SP, 29 August 2016: Concerns the adoption of a foreign adult by a Brazilian to modify the parental relationships in the adoptee’s state of origin.

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<sup>41</sup> On 6 Oct. 2018 this online portal of the STF was consulted for relevant jurisprudence: <http://www.stf.jus.br/portal/jurisprudencia/listarConsolidada.asp>

<sup>42</sup> On 6 Oct. 2018 this online portal of the STJ was consulted for relevant jurisprudence: <http://www.stj.jus.br/SCON/>

STF, Recurso ordinário em habeas corpus RHC 148232 / PE, 19 March 2018: STF verdict concerning an illegal ICA case dealing with habeas corpus.

STJ, Recurso em mandado de segurança N° 9.336 – SP, 14 September 1998: Concerns an ICA case in which according to law 8.069/90, ICA should be subject to study and analysis by a commission with the purpose of issuing a qualification report. Such a report is for the judge in the youth and family court to take into account when deciding on how to understand the law in light of the ICA.

STJ, Recurso especial N° 202.295 / SP, 28 June 1999: Case concerning the central adoption registries. Before ruling it necessary to consult the adoption registry, the court ruled that, while referring to the Convention, a judge in Jabaquara district of São Paulo should consider ICA a last resort instead of giving preference to it, according to the doctrine and jurisprudence concerning the continuity of the child in his country of origin.

STJ, Recurso especial N° 196.406 / SP, 11 October 1999: ICA case in which ICA is considered as the last resort while emphasizing the best interest of the child principle. ICA should only be allowed as a last resort after exhausting adoption by Brazilians and consulting a central registry of adoptees, which the judge must do before ruling for ICA. The case was ruled in favor of the defendants, based on the fact that the adoptee had stayed with the adoptive family for a period of over two years and that this was considered to be in the best interest of the child. Nonetheless, the court reiterated relevant provisions from the ECA by emphasizing the subsidiarity principle, defining it as exhausting possibilities for family care in the original or extended family in the country of origin.

STJ, Recurso especial N° 180.341 /SP, 17 December 1999: ICA case concerning adoption registries. Before ruling for ICA, national PAPs should be consulted, implying the organization of such a registry at state level that a judge should consult, it being inefficient to consult solely a registry in one district. The case was unanimously declined by the fourth chamber.

In my view, these cases reflect the divergent opinions of judges regarding the application of the subsidiarity principles in Brazil (see Appendix III for the Research Interviews) and should be seen in the light of the current situation in which there are waiting lists of Brazilian PAPs wishing to adopt a child. In theory, ICA from Brazil should not be possible since the demand registered with the CNJ's CNA is higher than the number of children affected by adoption (SENADO FEDERAL, 2019).

In the above-mentioned case N° 202.295 concerning the central adoption registries, one of the high-court judges expressed his admiration for the efforts made by PAPs and judged in favor of providing poor children with a better future in a prosperous country abroad. The same verdict also referred to the expert opinion of Maria Becker, who underlines the importance of ICA as a last resort in accordance with the Convention's subsidiarity principle, saying that "only in last instance in the exceptionality over the exceptionality should adoption to foreigners be permitted."

This correct interpretation of the Convention's subsidiarity principles is explicitly identified and acknowledged by Judge Saraiva. It was explicitly dismissed by Judge Daltoé, whose opinion is that all children placed for adoption should be adopted by foreigners living outside Brazil. Appeal Judge Deboni appears to have the most nuanced view in her relative vast adoption experience, admittedly with the exceptional experience of having her ICA verdict being overturned by the court of appeals upon the instigation of the local prosecutor.

Judge Arnoni seemed to be most sensitive to the impact of adoption on all members of the adoption triad, regardless of whether it is a domestic or ICA case. She explained her insights by sharing personal details about having grown up with an adopted father and having witnessed first-hand the impact the right of identity has on an adoptee. Appeal Judge Cintra is possibly the most experienced judge, and was the most familiar with the HC-1993, although much less so with the Convention. Having dealt extensively with ICA cases under the HC-1993, his focus was the subsidiarity principle of the HC-1993; in my view, this is in line with the verdicts and doctrines therein considered above.

Judge Deboni pointed out that the prosecutor has a special role in safeguarding the application of the subsidiarity principle in Brazil thanks to the powers invested in him or her to bring an ICA court ruling that in his or her opinion violates the application of the subsidiarity principle in Brazil to the court of appeals. It is safe to say that this is an exceptional situation, yet from a legal standpoint it is the only way an adoptee can effectively be prevented from unnecessary loss of identity from ICA.

What all interviewed judges had in common is that they did not see the need to justify their rulings in a way that could be made available to the intercountry adoptees about whose lives they are ruling once they reach adulthood. This is both counter to the IACHR (INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, 2015, p. 34 – 35) and compliance with the CRC, (UNITED NATIONS COMMITTEE ON THE RIGHTS OF THE CHILD, 2013, p. 8 - 9):

The child may be affected by the trial, for example in procedures concerning adoption or divorce, decisions regarding custody, residence, contact or other issues which have an important impact on the life and development of the child, as well as child abuse or neglect proceedings. The courts must provide for the best interests of the child to be considered in all such situations and decisions, whether of a procedural or substantive nature, and must demonstrate that they have effectively done so.

Considering the prevention of the loss of identity through ICA, one of Brazil's promising projects safeguarding the right to identity is ACER (Associação de Apoio à Criança em Risco). ACER's mission is "Rescuing the dignity of Children and Young People, by Promoting the Transformation of Society". It works with programs and activities focused on human development and community intervention. From an institutional perspective, the family guardian program is a social assistance program, with a mission "to strengthen extended families in order for them to be guardians of children who have either lost or been removed from their parents, being flexible towards change and promoting mutual support", and a vision to "develop a sustainable and replicable program that guarantees each child's right to a family, and which breaks the intergenerational cycles of institutional care." (ACER BRASIL).

The program's mission and vision are based on the Convention's principles and the Guidelines for the Alternative Care of Children and envision: "mutual support and bonds of affection as a strategy for breaking intergenerational cycles." Since its inception, the program has worked with a total of 174 children, 54 of whom have already successfully moved on to graduation, independent living, return to birth parents, institutional care, or in some cases, have been removed due to the need for more specialist support. Currently, 120 children are being cared for in the program (HANNAY, 2018).

### **3 LAW FOUND ON THE STREET, LEGAL PLURALISM AND HUMAN RIGHTS**

#### **3.1 Law Found on the Street**

Law Found on the Street has the unique characteristic of focusing on the invisible by providing recognition of social pluralism to justify the public sphere (SOUSA JUNIOR, 2015, p. 133) in which the deprivation of the right to identity and its justification takes place.

In order to understand this statement, one should first consider the origins of Law Found on the Street. It is an expression first coined by Roberto Lyra Filho (SOUSA JÚNIOR, 2008, p. 7), to characterize a concept of law that is based on the sociability generated in the public arena, i.e. the street. Law, in this perspective, is an advanced model of the legitimate organization of freedom, according to Lyra Filho (SOUSA JÚNIOR, 2008, p. 116).

Law Found on the Street is also a movement developed at the UnB. It draws its inspiration from Roberto Lyra Filho's ideas on law and law education within the *Nova Escola Jurídica Brasileira* (New Brazilian Legal School). After the premature death of Lyra Filho in 1986, and under the leadership of José Geraldo de Sousa Júnior it began as a remote-learning course. The first volume in a series of books was published that year. Since then, it has expanded to become a research line, certified in Brazil by the so-called Lattes Platform of the CNPq (National Council for Scientific and Technological Development) and in the post-graduate programs of the FD and the CEAM, both departments of the UnB (SOUSA JÚNIOR, 2017, p. 146).

Lyra Filho's explanation that law that inspires Law Found on the Street is an advanced model of the legitimate organization of freedom, deserves some further explanation. Lyra Filho was mainly influenced by Marxist ideas about law. In his view, law is built through historical processes as it unveils the limits of liberty that is not harmful to others. It is born out of the streets' clamor, voiced by the oppressed. The sifting of such clamor produced customary and written law, which could be authentic or iniquitous (LYRA FILHO, 1982, p. 54-56).

Lyra Filho was a prominent figure in the New Brazilian Legal School that was active during the 1980s, the decade of re-democratization in Brazil. It may be labeled as the Brazilian chapter of the critical legal-theory movement that flourished in the 1970s and 1980s (LLEDÓ, 1996, p. 95). Within the New Brazilian Legal School (also known as NAIR), a new paradigm of law was formulated that intended to overcome the limits of the polarization between jus-

naturalism and jus-positivism (SOUSA JÚNIOR, 2015, p. 75). These paradigms of law dominated the philosophical debate about law in Brazil at the time, which could be described as the contradiction between the defense of law as the established order (jus-positivism or normativism) and the understanding of law as the just and fair order (jus-naturalism) (LYRA FILHO, 1982, p. 15).

Jus-positivism was characterized as the perspective in which law was confined to the rules and customs enacted by the dominant class. Such norms could be acts of the state or other kinds of norms, but they conform to a coherent system of behavioral patterns that are above any other system of norms. The sole legitimate system of rules is the one imposed by the dominant class, to ensure the maintenance of a social order that conforms the legal phenomenon as a whole (LYRA FILHO, 1982, p. 18).

Norberto Bobbio (1995, p. 131-33) further developed the characteristics of jus-positivism in a broad sense, and goes beyond Lyra Filho's Marxist perspective. This broader understanding of jus-positivism helps to clarify what Lyra Filho was attempting to criticize with his paradigm of law. According to Bobbio, an Italian jurist, jus-positivism theories see law as a fact, not a value. Furthermore, jus-positivist thinkers define enforcement as a central aspect of law. Without it, law would not exist. They also consider legislation to be the primary source of law and that the legal norm is a "command". The legal system is coherent and complete, regardless of the flaws it may actually present, and the jurist must address those flaws through interpretation techniques. The interpretation of law is therefore a central role of the jurist and must be done as a mechanical process.

On the other hand, jus-naturalism is the understanding that law is broader than the established rules as seen by positivist jurists. Law, in this perspective, is derived from nature itself, from God or from reason (LYRA FILHO, 1982, p. 24). Jus-naturalism usually has unchangeable maxims and principles and is more committed to the legitimacy of power, rather than the legalism. It is useful to contest an established order, as when the bourgeoisie challenged the *ancien régime* in the time of Revolutionary France, even though it is also used to deny changes in the rules if those rules are considered the fruits of an unchangeable cosmic, theistic or rationalistic order (LYRA FILHO, 1982, p. 27). Hence, its ambivalent meaning, which allows for either the critique of law or its defense.

According to Bobbio (1995, p. 22-3), universality and immutability characterize natural law. This type of law is derived from nature and discovered via human reason. Its rules regulate

conducts that are good and correct in themselves, not being subject to a human will to ascertain such quality. Conversely, positive law is localized, mutable and formulated by a human design to rule conducts that may be fit or unfit.

Both views about law (jus-positivism and jus-naturalism) have generated disputes on the most adequate and correct strategy to enforce it. Such disputes amount to a debate about what law really is. The tension between these paradigms usually arises in hard cases, in which a literal construction of the applicable law is in conflict with a broader more liberal construction. In such debates, the meaning of law as a whole was at stake because the debated point was normally about the limits of law, whether it was only the literal application of norms or whether it also had a political meaning. These debates ended in aporias, without a reasonable answer to the questions arising.

To defuse the tension between the contradictory paradigms of jus-positivism and jus-naturalism, Lyra Filho proposed a new paradigm that would be a synthesis of the two divergent poles. He stood for an approach of law that was not entirely revolutionary, as he did not plainly deny the legitimacy of positive, officially enacted law, but he saw the possibility to dispute its legitimacy, grounded in a broader understanding of law, which comprised natural rights of individuals using the instruments of positive law. The established law has loopholes that could be explored by sage lawyers to contend its legitimacy, based on new demands of society, and which were not channeled through the standard political way to change the law (LYRA FILHO, 1982, p. 54).

Hence, law should be understood as the result of a dialectical evolution, in which society raises demands to new rights, these demands suffer some resistance, but are eventually converted into law. New demands are then raised in a constant generation of hypothesis and synthesis. The rules, customs, and acts that give substance to law must not be seen as shackles that freeze the legal system. The social evolution pushes law forward, reconfiguring what was previously established. Lyra Filho calls such motion the social dialectic of law (SOUSA JÚNIOR, 2015, p. 77).

Law is a product of the tension between liberty and legitimacy in a dialectic historical process. For Lyra Filho, liberty is not a gift. It needs to be achieved within history, as man and women do not achieve liberty acting alone, but together with others. Law is the means of conscious freedom acquired through class conflict. However, it is not a contradictory series of rules produced through social dialectics. Such rules can hide the oppression of the dominant

class, turning law into a despotic tool. Nevertheless, this deviation of law does not delegitimize it as an instrument of freedom. Law is not restriction and prohibition, but it is the coordination of liberties in coexistence (SOUSA JÚNIOR, 2008, p. 118-119).

The dialectic historical process that generates law addresses the demands of justice derived from history and society. It follows that the law never solidifies as the rules of the dominant class, in which liberty and justice are hollow concepts. The tension between diverse individuals or groups will generate new rules and the liberties so created need to be accommodated within society. Liberty is the possibility of action, being, then, a constant construction that never ends. Law is at the center of this constant evolving motion of liberty (SOUSA JÚNIOR, 2008, p. 125).

As the coordinator of liberties, law extracts its legitimacy from the freedom it ensures. Hence, freedom is a core and fundamental value for law. According to Lyra Filho, history is a constant process of liberation. For Sousa Júnior, law is the “articulation of basic principles of social justice, following patterns of reorganization of freedom that are developed in the social struggles of men” (SOUSA JÚNIOR, 2008, p. 128). In this sense, Sousa Júnior affirms that Lyra Filho identified human rights as the main conveyor of the dialectic process of consciousness along history, enabling the enlargement of freedom, since it rescues the oppressed from their alienated condition.

Law Found on the Street is, in essence, a philosophical paradigm of law, based on a sociologic approach to the legal phenomenon and on the ideas of Roberto Lyra Filho in his seminal manifestos about law and the teaching of law (SOUSA JÚNIOR, 2015, p. 35). According to Canotilho, Law Found on the Street is a theoretical-practical movement that proposes alternative ways to understand legal norms and the law (SOUSA JÚNIOR, 2015, p. 44). As the main author and a historical leader of the movement, Sousa Júnior himself builds on the theoretical formulations of Lyra Filho and states that law needs to face the disputes around its appropriation and realization in order to be actually emancipatory (SOUSA JÚNIOR, 2015, p. 37).

Sousa Júnior (2015, p. 44) affirms that:

The alternatives opened to deal with the aporia derived from such multiple crises [of law] have pointed to the necessity to recognize one thing. From the opposition between the officially instituted and formally enforceable law and the emergent normativity of social relations, by one side; and the distinction of the abstract and cold norms that rule behaviors and the concrete normativity applied by judges, by the other, it is pertinent to understand new social

conditions. Such social conditions are, for example, the emergence of social movements, new conflicts, new subjects of laws and the legal pluralism they institute and claim recognition.

Recent social movements, which appeared around the turn of the century, confirmed a new sociability, distinguished by the autonomy of the subjects created due to the new collective actions they undertake. These movements elaborated a frame of cultural meanings about their own experience on the affirmation of new rights. The subjectivity is developed along the mobilization of new demands. The subject is not, *a priori*, an individual being from which the rights are derived. The subject is collective, formed during the process of affirmation of rights (SOUSA JÚNIOR, 2008, p. 270).

In the context of the new sociability built within the contemporaneous social movements, Law Found on the Street is a conceptual approach that can provide an adequate theoretical grounding to introduce into the legal thinking newly formulated questions. Although Law Found on the Street started as a distance-learning course oriented towards social movements, it evolved to become a project aimed at understanding of and reflecting on the legal action of new social movements (CORREIA; ESCRIVÃO FILHO; SOUSA JÚNIOR, 2016, p. 82).

Considering the popular experiences of the creation of law, the Law Found on the Street project works to find the public arenas in which these experiences occur. Such research even includes the extra-legal emergence of new rights, since law is not only what is stated in books, but may also be what is created by the oppressed. From this perspective, Law Found on the Street searches for theoretical representation and the legal nature of the collective subject of rights that is capable of elaborating a political project of social transformation.

Another undertaking of the movement is to order and classify the data gathered in the observation of social practices that create rights. With such data background, it can establish new legal categories to frame an alternative society in which the spoliation and oppression of people can be overcome, and law can be a truly legitimate social organization of liberty. This objective links the theoretical ideas of Lyra Filho with the real practice of law in societies with large inequalities, such as those in Brazil.

The relationship that the Law Found on the Street paradigm can establish with the new social movements, demands legal and political participation to fill the gap between legal theory

and real practice of the law within society. Thus, it can be a link between theory and practice, opening possibilities for innovative legal teaching.

These possibilities, along with the introduction of the actual practice of the law profession to students has been explored within the Law Found on the Street movement since its inception. Following the guidance of the Law Found on the Street paradigm, there are successful experiences of integration between academic legal teaching and counseling of social movements, as well as courses for laymen about their rights under the leadership of students and professors at law schools.

This is possibly the first promising practice I identify through which Law Found on the Street could form a catalyst for Brazilian intercountry adoptee movements: by connecting adoptees with the teaching of law. Considering the practice of law, one of the basic tasks of the legal profession could be the opening of legal institutions to new demands from society. After all, Law Found on the Street means that the practice of law involves the translation of social demands into legal claims, and teaching law must be the training of legal professionals who are willing and capable of realizing such translation. This training can be given through the involvement of students with social movements, exposing them to the realities of conflicts “on the street”, rather than to the abstract classroom examples and simulations. The defense of this thesis might be regarded as having such intent.

The association between practice and theory is a basic premise of Law Found on the Street and therefore of great relevance to the struggle for the right to identity for intercountry adoptees. The movement challenges the distinction between these two aspects of knowledge, which within Brazilian legal academia is presented as natural or obvious. However, there is no theory without practice, nor practice without theory. Since law is an applied social science, the study of the real contexts that inspire the formulation of law makes the comprehension of the theory more accessible. On the other hand, legal practice has a theoretic ground. Hence, both sides are inexorably interconnected. Accordingly, a dogmatic approach to law, which tends more to the theoretic side, attaches itself to the ideas and perspectives of a restricted group of scholars or prominent thinkers, and is deaf to the real necessities of the subjects of law. A mere theoretic approach of law could therefore be construed as undemocratic (SOUSA; COSTA; FONSECA; BICALHO, 2010, p. 45).

A practical understanding of law demands other sources than those offered by the typical legal disciplines. Consequently, legal sociology and history has a central role in the Law Found

on the Street methods, as the complexity of social phenomena can be apprehended in its entirety (SOUSA; COSTA; FONSECA; BICALHO, 2010, p. 46). Legal norms can only be correctly taught within its context. The ambiguity or the complexity of the double subsidiarity principle could potentially be better understood from this perspective. The lack of legitimacy of the HCCH concerning ICA, from an adoptee and original family perspective, could be placed in this assessment. It is within this context and in my experience, that scholars of Law Found on the Street share the common experience of a bi-polar viewpoint: Do theories stem from practice or vice versa? It is my personal conviction that the “viewpoint-debate” is a reflection on the ongoing dilemma of how to effectively influence policy and decision-making processes and ensuring benefitting access to justice: bottom-up or top-down.

Before further linking Law Found on the Street and adoptee rights issues, we can take a short look at some examples of the integration between theory and practice in order to provoke and invite the key stakeholders of the adoption triad to strive for more democratic representation, justification and adaptations of laws affecting them.

Sousa et al. (2010, p. 46-51) present a summary report of the activities developed by Law Found on the Street. These activities exemplify the broad openness of the movement to act in diverse contexts, but with the common feature that it seeks to expand the enforcement of human rights and to make effective social justice. Exactly what is needed for intercountry adoptees who are fighting for their right to identity and access to their origins.

The following inspirational examples are generally labeled as university-extension activities. Probably the oldest activity developed by Law Found on the Street was the legal assistance given to dwellers of the Telebrasília Encampment through the legal clinic of the UnB's Law School. They looked for help to master their right to housing. Eventually, their irregular occupation of the area was legalized. Furthermore, with the assistance of students and professors engaged in Law Found on the Street, they achieved development of the urban infrastructure by the government. The progress made by the movement regarded the right to housing, and not only included the granting of titles deeds, but also the provision of necessary conditions to an adequate urban living. This achievement also preserved the right to memory, as the place was a historical site of the construction of Brasília and its dwellers were pioneers or their descendants.

Another Law Found on the Street activity, carried out in association with a legal clinic, was the mapping of citizenship in Ceilandia. This project consisted of an assessment of the

social movements in the city of Ceilandia, on the outskirts of Brasilia, where the legal clinic is located. This work resulted in the articulation of the social movements operating there and helped the Court of Justice of the Federal District in the implementation of its program of Community Justice.

The Promotoras Legais Populares or Popular Prosecutors is another under Law Found on the Street initiative, albeit one that is still in progress. An extension course to teach basic rights to lay women, it was developed through workshops and similar types of popular legal teaching, to empower those women. In addition to popular teaching, there are also academic activities, such as a study group and the establishment of conferences about women's rights.

The members of Law Found on the Street also undertook the task of collaborating on writing a newspaper column to answer legal questions sent by readers and the most common questions raised at the front desk of the legal clinic. Law students wrote the articles, supervised by post-graduates in law. This had a significant impact on society: it was used as reference in the Chamber of Deputies of the Federal District and it occasioned the granting of a medal by the Superior Labor Court to the UnB Law School.

Most strikingly perhaps, in the light of this thesis, is the accomplishment of Law Found on the Street in 2008. Supported by the United Nations Development Programme, it promoted research about access to justice as part of a large project requested by the Secretary of Legislative Affairs of the Ministry of Justice. As a result, questions that demanded further reflection about the topic of access to justice were raised by the group through a series of interviews with leaders of social movements.

Finally, it is worth mentioning the popular teaching of human rights to social actors of the Federal District and its surroundings. This program aims at constituting community centers for human rights and developing the emancipation of the subjects involved in this project.

In essence, Law Found on the Street challenges what the construction and representation of the Brazilian constitution (on the street) is. It focuses on the sources of research, such as social mobilization of law and expansion of politics of justice. The concept of Law Found on the Street takes the following as its starting point: "What does reality say about law?" Answers to this question can be found in various ways of producing knowledge, representing interaction between research into "what happened", and "what will happen". Scholars of Law Found on the Street are committed to establishing theories by focusing on their topic and *sujet* and, in this

way, to generating profound knowledge. Relating this back to the current thesis, the *sujets* of this research are the intercountry adoptees.

### **3.2 Adoptee Rights Movements: the Right to Identity and Access to Origins**

Human rights violations in Brazil, and in particular against human rights defenders, are worrisome<sup>43</sup>. That is the first relevant observation concerning possible adoptee rights movements who advocate for the right to identity in Brazil. That intercountry adoptees from Brazil typically do not live in Brazil is likely to be a main explanation as to why there are yet no such movements known in Brazil. Despite the dangerous human rights situation, in 1996 mothers in the city of São Paulo in search of their children started what could be regarded as a movement through the foundation of Mães da Sé<sup>44</sup>: the mothers of Sé square.

This initiative was followed by the frequent mobilization of mothers in the city of Jundiaí<sup>45</sup> and was eventually institutionalized by the University of São Paulo's project, Caminho de Volta<sup>46</sup>. Although not all the cases of searching for missing children could be qualified as ICA cases, the eventually institutionalized grassroots initiatives are inherently linked to a child's loss of his or her right to identity.

The emerging discourse about ICA and the right to identity, can be characterized as a world-wide social movement and can be seen from the perspective of 'creating rights from the idea of strengthening democratic experiences and a constitutional dialogue'. As explained in chapter 1.2, the concept of the right to identity should be considered against the background of Brazil's most recent transition from dictatorship to democracy, and the consequent doctrine of "truth and memory" that is inherent to the Brazilian constitution.

These transitions and their legal responses are affecting Brazil's social dimensions, albeit slowly.<sup>47</sup> Newly acquired insights into the right to identity could be summarized as a sense of urgency to "access to origins".<sup>48</sup> The right to identity is strongly connected to the

<sup>43</sup> Available at: <https://www1.folha.uol.com.br/colunas/monicabergamo/2018/07/brasil-e-o-pais-com-mais-mortes-de-defensores-de-direitos-humanos-e-ambientais.shtml>. Accessed on 29 Apr. 2019.

<sup>44</sup> Available at: <http://www.maesdase.org.br>. Accessed on 29 Apr. 2019.

<sup>45</sup> Available at: [http://www.salon.com/1999/01/30/feature\\_379/](http://www.salon.com/1999/01/30/feature_379/). Accessed on 29 Apr. 2019.

<sup>46</sup> Available at: <http://www.caminhodevolta.fm.usp.br>. Accessed on 29 Apr. 2019.

<sup>47</sup> A truth finding committee on Brazil's military dictatorship has only been installed in 2012 and mandated to be active until 2014. See: <http://cnv.memoriasreveladas.gov.br/institucional-acesso-informacao/a-cnv.html>. Accessed on 29 Apr. 2019.

<sup>48</sup> For a first legislative recognition of the – importance of – "search for origins" see the Report of Meeting (No 4) of the Special Commission on the practical operation of The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (9 June 2015).

search for origins; they could be seen as a form of recognition – inspired by Law Found on the Street – of new understandings and possibly even new pedagogical practices focused on the original families of adoptees as well.

In an international context, the following selection of examples are representative and indicative of the potential of Law Found on the Street approaches for intercountry adoptees fighting for their right to identity and access to origins.

Adoptee Rights Law<sup>49</sup> is led by a lawyer who is an adoptee and successfully mobilizes nationwide support for legal and political battles to make all states issue Original Birth Certificate to provide un-redacted access to the identities of adoptees; to help adult adoptees navigate the legal challenges in obtaining their Original Birth Certificate, citizenship, and other identifying information to which they are entitled; and to develop broader legal strategies to challenge and upend a legal framework that denies adoptees their basic and fundamental truths.

Bastard Nation<sup>50</sup> is dedicated to the recognition of the full human and civil rights of adult adoptees, and advocates for access to documents which pertain to the adoptee's historical, genetic, and legal identity, including the Original Birth Certificate and adoption decree.

Love in Action, fp365<sup>51</sup>, is a global family preservation movement. Its mission is to empower vulnerable, expectant mothers and prevent family separation. They are dedicated to building a strong foundation of advocates willing to provide local support, networking and community involvement.

Chilean Adoptees Worldwide<sup>52</sup> is an organization established for those adopted from Chile and are now living either in their birth country or elsewhere in the world in order to provide them with, in their own words, “a platform they can relate to”. They take to the streets and accomplish broad international mobilization with significant visibility and support of the legislative branch in Chile.

ICAV<sup>53</sup> has a special role for intercountry adoptees, and educates, supports, connects, collaborates, galvanizes and gives voice to intercountry adoptees from around the world. ICAV recently confirmed one of the underlying assumptions of this thesis – that addressing ICA

<sup>49</sup> ADOPTEE RIGHTS LAW. Available at: <http://www.adopteerightslaw.com>. Accessed on 25 Mar. 2019.

<sup>50</sup> BASTARD NATION. Available at: <http://bastards.org>. Accessed on 23 Apr. 2019.

<sup>51</sup> LOVE IN ACTION. Available at: <https://familypreservation365.com/2018/12/11/a-global-family-preservation-movement/>. Accessed on 25 Apr. 2019.

<sup>52</sup> CHILEAN ADOPTEES WORLDWIDE. Available at: <http://chileanadoptees.org>. Accessed on 17 Jun. 2019.

<sup>53</sup> ICAV – INTERCOUNTRY ADOPTEE VOICES. Available in: <https://intercountryadopteevoices.com>. Accessed on 13 Apr. 2019.

practices can no longer take place without involving the main stakeholders of the Adoption Triad – by participating in the HCCH’s Meeting of the Working Group on Preventing and Addressing Illicit Practices in Intercountry Adoption<sup>54</sup>. Their participation marks a milestone being the first of its kind<sup>55</sup>.

The fight for equality by adopted citizens is considered to be a civil rights movement (RIBEN, 2015). The examples above can be seen in the broader US and global context concerning adoption rights as illustrated by the opinion article “Don’t Keep Adopted People in the Dark” (GLASER, 2018).

What could these intercountry adoptees from Brazil effectively do in order to claim ownership of their right to identity? They could individually consult the Federal Public Defender (DPU) in Brazil. In São Paulo, for instance, they could initiate an administrative procedure by explaining their case in English if they have no, or a very limited, monthly income. The DPU guarantees access to justice by potentially initiating a legal procedure for those intercountry adoptees from Brazil who are calling upon their right to identity in order to get access to their origins<sup>56</sup>.

They could also provoke a judicial review via a so-called Ação Direta de Inconstitucionalidade (ADI) through a claim of rights infringements with the state’s attorney (PGR – Office of the Prosecutor General) for the STF to decide. For example: hospitals are currently required to keep birth registration records for a period of 18 years (ESTATUTO DA CRIANÇA E DO ADOLESCENTE, 1990, art. 10). This is unconstitutional because it means that (intercountry) adoptees who have reached the age of 18 years are legally not entitled to access their birth registration records.

The ADI approach is direct, but complicated, especially for an intercountry adoptee who will typically have grown up in Europe and does not speak Brazilian Portuguese. Navigating the complicated legal and bureaucratic institutions requires ample preparation and can hardly

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<sup>54</sup> HCCH. Available at: <https://www.hcch.net/en/news-archive/details/?varevent=680>. Accessed on 17 Jun. 2019.

<sup>55</sup> Another milestone for the recognition of the main stakeholders of intercountry adoption is ISS’ comparative working paper “Access to origins: Panorama on legal and practical considerations”, which has been published after this Thesis was completed. Despite the fact ISS did not once made reference to the ‘right to identity’, their focus on ‘access to origins’ could be regarded as another confirmation of one of the underlying assumptions of this thesis – that addressing ICA practices can no longer take place without paying due regard to the legal position of adult intercountry adoptees. Available at: [https://issuu.com/issirc/docs/tfb00031\\_access\\_to\\_origins\\_eng\\_web](https://issuu.com/issirc/docs/tfb00031_access_to_origins_eng_web). Accessed on 30 Jul. 2019.

<sup>56</sup> PRESIDENCY OF THE REPUBLIC OF BRAZIL. Available at: <http://www.brazil.gov.br/government/how-the-government-works/federal-public-defender>. Accessed on 30 Apr. 2019.

be done without professional assistance. One slightly easier way therefore may be directly to a lower court judge through a common lawsuit.

Intercountry adoptees could also action the CNJ's *ouvidora*, as the competent authority for the tension between the articles 7, 8 and 21 (b) of the Convention. Adoptees can do this through the CF provisions under article 103-B under the fourth and fifth paragraph.

Intercountry adoptees from Brazil could also petition the Inter-American Commission on Human Rights. This can be done without exhausting their legal remedies, as is the case in Europe when reaching the ECtHR. The UN is equally difficult to action for a human rights complaint as the ECtHR. Aside from some non-adoption-related issues, this process is a last resort and can only be undertaken when all local and national remedies have been exhausted.

The STF and ACHR both recognize an intimate connection between the right to know one's biological origins and human dignity (SUPREMO TRIBUNAL FEDERAL, 2018, p. 69). This promising assertion lays a path to the creation of jurisprudence with possible far-reaching effects. Collectivity, intercountry adoptees would definitely enhance such chances and would fit into a Law Found on the Street paradigm, which simply stands for 'political clarity that law, in order to be truly emancipatory, should undergo disputes about its appropriation and realization' (SOUZA JUNIOR, 2015, p. 37 and 49). It is my contention that human rights legislation on the right to identity has yet to undergo such a dispute in Brazil.

Contemplating the work and the public positioning of the CNJ concerning ICA also prompts a similar observation. As noted in chapter 1.2, the CNJ's adoption stakeholders are, in practice, defending a non-existing right to a child. By prioritizing adoption as a solution that is in the best interests of the child over alternatives such as: assisting the child's extended family to take on care responsibilities, improving the humanitarian situation in Brazil, or enforcing alternative forms of care such as the ACER project, they are effectively advocating for this non-existing right to a family. They effectively disregard the human right to identity and the holistic approach of the rights of the child that should safeguard the right to know be cared for by one's family<sup>57</sup>.

The ICA stakeholders should in fact be: the adoptees, the original families and the adoptive families. In practice, the CNJ lacks any legitimacy in terms of stakeholder

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<sup>57</sup> Examples of the Brazil's National Justice Council's (CNJ) controversial standpoints can be found e.g. via posts on social media, see for example a Facebook post from the CNJ in May 2018 celebrating Mother's Day. Available at: <https://www.facebook.com/cnj.oficial/posts/2056366424436107>. Accessed on 25 Mar. 2019.

representation. Only the PAPs' interests are represented by the CNJ; there are no known accounts of original family or adoptee representation or advocacy at the CNJ. By arguing that the best interest of a child is the primary consideration when allowing ICA without taking into account the main stakeholders of adoption, the PAPs and their supporters are promoting the violation of the right to identity.

The CNJ's adoption standpoints are therefore under pressure from PAPs, supported by Congress and the Senate (COELHO, 2017), who advocate in favor of ICA and even for swifter, less bureaucratic adoption procedures. In my view, this inevitably means less compliance with the time-consuming, legal ICA process. I observe that the PAPs and Congress do not see the "invisible problem"<sup>58</sup>: that is, the struggle of adult adoptees in search for their identity. Access to justice for intercountry adoptees currently seems to be a distant reality from the perspective of the CNJ.

A recent example from the United Kingdom shows that it is possible that politicians see the "invisible problem" once it has presented itself (HOUSE OF COMMONS, 2018). One could argue therefore that establishing new theories on the right to identity is feasible, if one focuses on the topic (*sujet*) and in this way generates profound knowledge. This could lead to a paradigm shift in the way we think about the best interest of the child and the importance of the right to identity and access to origins. It is commonly observed that the struggle for rights is a moment of class struggle, and that its dynamics lead from political emancipation to human emancipation. If law no longer represents fear for the "invisible" but create hope, it is arguable that access to justice is at hand in this case.

Intercountry adoptees from Brazil who are deprived of their right to identity could try endorsing the prosecutors to bring criminal charges concerning the application of the subsidiarity principle of the HC-1993 in Brazil. This could also be an option for the victims to secure access to justice, in which case legal clinics could play a role (SOUSA JUNIOR, 2015, p. 180-183), in particular when linked with the social justification that current ICA practices could possibly cease to exist.

More likely and more feasible would be to reach out to the CNJ, which in 2016 instigated a working group concerning the rights of the child (CNJ, 2016). Intercountry

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<sup>58</sup> Paulo Freire called the situation of the powerful dominating the public sphere, a culture of silence. The culture of silence describes how, when marginalized voices are not heard at all, it becomes harder for the problems of the marginalized to be understood and discussed.

adoptees from Brazil could demand justified and balanced representation from stakeholders in the adoption triad on this working group. Law Found on the Street has the potential to empower such initiatives and inspires confidence that mastering access to justice is effectively within reach of intercountry adoptees from Brazil, at least in the long run.

In short: Law Found on the Street confronts real-life challenges caused by societal contradictions, such as those who have been deprived of the right to identity but who are forced to justify their desire for access to right to that identity because their problems are invisible to the world. Law Found on the Street has the potential to rebalance this in favor of the victims and their original families.

In addition, there is still plenty to be done to deconstruct ICA paradigms. The psychological impact of ICA and the right to identity, as reported in numerous studies, are an additional justification for intercountry adoptees to seek justice through court cases, in which human rights courts could eventually function as norm-breakers:

Addressing these different questions should not turn the norm-developing role into one of academic inquiry. However, even if external norms are not critically decisive for the case at hand, explaining why this is so can help strengthen the normative basis of a judgment, thereby contributing to ‘public reason’ and increasing a court’s legitimacy in the eyes of both States and applicants (HAMILTON, 2018, p. 232).

### **3.3 State Reparation: National Inquiries and Apologies**

As we have seen, adoptee-rights movements are gathering momentum, particularly from a Law Found on the Street perspective. Other adoptee-led organizations are also exercising their influence on PAPs and their advocates, as well as a more general audience. Once such example is the Adoption Museum Project<sup>59</sup>, which shows the history of adoption and ICA, including class-action suits brought by adoptees and national apologies which adoptees have secured.<sup>60</sup> One of the more obvious examples is the apology issued by Canada, but it is by no means an exception. Over the past years, the world has witnessed numerous national inquiries and apologies issued by states responsible for the right to identity in ICA cases.

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<sup>59</sup> ADOPTION MUSEUM PROJECT. Available in: <http://adoptionmuseumproject.org/about/vision-mission/>. Accessed on 21 Apr. 2019.

<sup>60</sup> SENATE OF CANADA. *Survivors of Postwar Adoption Mandate Share Their Stories*, 9 Apr. 2018. Available in: <https://sencanada.ca/en/sencaplus/news/survivors-of-postwar-adoption-mandate-share-their-stories/>.

Such cases can also be classified by the more rare occurrence of state reparation. Reparations, which can be symbolic as well as material, adhere to Law Found on the Street principles. They can be identified as a transitional form of justice, as they concern systematic violations of the right to identity, for which states are legally accountable. Reparations have taken place on national state levels as well as federal or regional state levels, as was seen in Australia (AUSTRALIAN GOVERNMENT, 2013).

Another example is Ireland, where adoption cases (O'LOUGHLIN; SHERWOOD, 2018), that led to deprivation of the right to identity have featured regularly in the news over the past few years. In each of these cases, adoptees are raising the same issue, namely, the violation of the broad scope of the right to identity. Possibly the most thought-provoking aspect of state reparations is the notion that the essence of all cases concerns access to origins and the violation of fundamental rights. Domestic adoption cases and ICA cases share the fact that adoptees claim ownership of their right to identity by demanding access to their origins.

Given the international development of law suits and state reparations concerning the right to identity, the application of the subsidiarity principle has set the agenda of sending countries such as Brazil. It seems to be merely a matter of time before Brazil has to address ICA cases such as in Spain or Serbia (BADCOK, 2015; CROSBY; MARTINOVIC, 2018). As this thesis explains, ICA represents an inherent loss of identity. That the subsidiarity principle can effectively be considered as a legal defense instrument to avoid intercountry loss of identity and access to origins implies that wrongful application of the subsidiarity principle in Brazil could not only end up at the STF, but also at the IACtHR.

## CONCLUSIONS AND RECOMMENDATIONS

I started this thesis by drawing attention to ICA and the right to identity. In fact, I may even have presented what is considered to be an invisible problem: after all, what exactly is the problem for intercountry adoptees from Brazil? Their problem starts with the tension between the right to identity and the subsidiarity principle. On paper, the subsidiarity principle of the Convention causes no problems. In practice, ICA rulings in Brazil are based on the HC-1993 and have the effect of unnecessarily depriving Brazilians of their right to identity and access to origins. Therefore, in this thesis I have raised awareness about ICA cases that can be identified as a contravention of the Convention.

In this thesis, I continued presenting examples and explanations to this extent and provided a deeper understanding of the double subsidiarity principle and the infringement caused by applying the HC-1993 to fundamental rights. This has been clarified by analyzing various forms of jurisprudence. Finally, this research has focused on the perspective and application of Law Found on the Street as a form of obtaining recognition and access to justice for intercountry adoptees from Brazil.

I explained how the subsidiarity principle can be considered as a legal defense mechanism to avoid intercountry loss of identity and access to origins, and that wrongful application of the subsidiarity principle could be challenged in court. In Brazil this could be done based on the current jurisprudence from the STJ, STF and the IACtHR. In Europe this could be done based on the on the current jurisprudence from the ECtHR.

First and foremost this thesis acknowledges the necessity of judicial theory and practice to balance the interests of the subsidiarity principle and the right to identity. In order to obtain maximum clarity about the need to safeguard the right to identity for adoptees, this thesis has also demonstrated the importance of restorative justice concerning the right to identity for intercountry adoptees, in particular from the perspective of Adoptee Rights Movements. In my opinion, it is within the context of the relativism of applying the law from a judicial standpoint that the Brazilian judiciary in ICA cases should more carefully consider the absolute, legal hierarchy in which the right to identity is embedded.

This thesis furthermore explains that the Brazilian judiciary tends strongly towards the unfavorable balancing of the right to identity with double subsidiarity, and, most importantly, in this respect does not pay due regard to the CRC recommendations, which importance is

underlined by the IACHR, that judges must demonstrate that they have followed the subsidiarity principle. This thesis also has shown that judges do not justify their decision in an adoption court case-file except when calling on best interest of the child principle. This happens in particular because of the doctrine that children should be in a permanent family-care situation, secured by permanent and legal family ties.

The application of the subsidiarity principle therefore comes into conflict with the right to identity as put forward in article 8 of the Convention, and as protected by the CF. This, to the extent that Adoptee Rights Movements, and an increasing volume of human rights jurisprudence regarding the right to identity for intercountry adoptees, put the application of the subsidiarity principle of the HC-1993 under pressure.

In summary, I believe that the right to identity of intercountry adoptees is constrained when the subsidiarity principle of the HC-1993 is applied. As the personal note in the foreword indicates, life in Brazil can be challenging. Given this, ICA supporters can and do point out that life challenges in the countries receiving intercountry adoptees might be fundamentally less demanding and offer more chances of ‘success’ in life than remaining in Brazil. As explained in the introduction, more factors in the right to identity in Brazil are, by definition, better protected in domestic adoption cases than in ICA cases. The chances of successfully obtaining access to those remaining aspects of the right to identity, i.e. origins, are much better in case of domestic adoption in Brazil. However, based on my interviews and research, it seems to me that most members of the Brazilian judiciary believe that the loss of the right to identity that comes from ICA is outweighed by the gains to be had from life in the receiving country. To those members of the judiciary, and any experts they might consult before coming to an ICA verdict, I would like to share following:

I called upon my right to identity, and I was unsuccessful in my request for assistance from both the sending and receiving states responsible for my right to identity. In the Netherlands, this forced the Minister of Justice to explain the situation because he was held accountable by the legislative branch. Upon being held accountable, the minister invited me for a conversation at the ministry, in which he asked following question: “*Would you have preferred growing up in Brazil instead of the Netherlands?*” Before I share the answer I gave the minister, I have to point out that this question is widely regarded by intercountry adoptees as insensitive, inappropriate, and even offensive. There are in fact several awareness-raising campaigns formed around that and similar questions, including those mentioned in the Law

Found on the Street, Legal Pluralism and Human Rights chapter of this thesis. The minister was clearly unaware of this when preparing for his conversation with me, and because he seemed to genuinely need to know my answer to gain a better understanding of the consequences of ICA, I responded as follows: *“Every case of adoption starts with the burden of loss; with the loss of a mother and a father and with loss of identity. The loss of identity through adoption forms life-long challenges. That loss of identity can form insurmountable challenges, as shown by the fact that adoptees are four times more likely to commit suicide than any other person. Given that intercountry adoption significantly increases the loss of identity and severely complicates obtaining access to origins, remaining in the country of origins, and thereby preserving important aspects of the right to identity, is unquestionably preferable to intercountry adoption.”*

## I – CONFLICT MANAGEMENT

The CF should safeguard fundamental rights, therefore the main problem of preserving the right to identity is unrelated to adoption procedures: it is a fundamental rights matter, currently without adequate law provision to obtain access to origins.

Judges, as guardians of the CF, have the task not only of warranting what already is in place, but also of ensuring what is not yet in place. They have this power and social responsibility to compel the executive and legislative branches to implement laws and public policies in favor of the original and extended, families of the most vulnerable of children, who have absolute priority.

The precarious situations of childhood care before the implementation of the Convention were based on different social constructions than today. Those constructions and the Guidelines for the Alternative Care of Children still affect ICA rulings in Brazil, and are based on misunderstanding about the best way to support children deprived from parental care. Judges should consult the most recent reference documents referred to throughout this thesis while observing the Adoptee Rights Movements.

In order to minimize conflicting law situations, the grounds of article 227 CF should be enforced: when issuing ICA rulings judges should make explicit reference to the fact that the Convention is safeguarded by the CF, and that they are therefore bound to give preference to the Convention’s subsidiarity principle. Through such rulings, judges could play an important

role in setting the agenda for the legislative branch which has not been made aware of the double subsidiarity principle and its implication for intercountry adoptees.

Judges in Brazil should furthermore exhaust their consultation of the CNA for domestic adoptions before issuing ICA rulings. The domestic waiting list for adoption is considerably larger than the demand for PAPs by children. This leads inexorably to the notion that ICA is unnecessary, particularly given the domestic alternatives to ICA, such as the ACER project.

Intercountry adoptees could advocate for the implementation of institutionalized expertise, in the form of an international competent body, to assess the double subsidiarity principle from the perspective of intercountry adoptees and their original families, and ensure enforcement and recovery of the right to identity and access to origins. Intercountry adoptees should be able therefore to seek adequate institutionalized assistance to protect and allow them ownership of their rights to identity and origins.

Intercountry adoptees are important stakeholders in the Convention and the HC-1993. Therefore, it should become universally recognised that intercountry adoptees have a crucial voice in decisions on how to invest in the measures needed to enable them to enjoy their rights, in particular concerning the right to identity.

Intercountry adoptees deprived of their identity and in search of their origins are entitled to appropriate state assistance. States should therefore provide all measures necessary to ensure the realisation of the right to identity and access to origins; the Brazilian state provides access to justice for some intercountry adoptees from Brazil via the DPU. Due consideration should be given to the importance of the Convention in all ICA cases: first and foremost, the right to know and be cared for by one's parents and the right to preserve one's identity, including nationality, name and family relations.

Intercountry adoptees could make requests for consular assistance in their country of origin with the consular representations of their country of adoption. This has the potential to generate political pressure on the responsible minister for the CA where intercountry adoptees could also file claims concerning the deprivation of their identity.

Intercountry adoptees could in this way stress the importance of recognition and respect for their human dignity by universally applying the Convention's subsidiarity principle and thereby minimizing the difficult access to origins.

Conflict management in Brazil could also be seen through the perspective of Law Found on the Street and the essential functions of legal clinics within that context. The clinics could attend human rights cases, which could be presented to them by NGOs that represent original

families (as mentioned in chapter 3.2) and intercountry adoptees. Intercountry adoptees could also bring class action suits and concentrated control cases that are, for example, directed at the STF concerning the constitutionality of laws and policies (abstract control of constitutionality), as well as cases brought by the General Prosecutor (*amicus curie*) upon actioning the PGR. Furthermore, the CNJ could be questioned via its *Ovidoria*, and should also be able to provide feedback on the assertions and claims made by this research, if an intercountry adoptee from Brazil so wishes.

## **II – FURTHER RESEARCH**

In anticipation of the academic and socio-relevance of my research results, I intended to develop a toolbox framework of recommendations to be used by members of the judiciary in adoption cases. Such a task was simply impossible to achieve in the capacity of an LLM student.

I have nevertheless suggestions for follow-up research, including the following approaches:

First, a comparative study of the application of the subsidiarity principle before and after the ratification of the HC-1993 could be conducted for both international and Brazilian legal scholars.

Second, ICA and the right to identity could be researched by Brazilian and international legal scholars from the perspective of the original families of the intercountry adoptees. Taking into consideration the positive rights obligation of the Brazilian state regarding ICA under the HC-1993, as well as the intercountry adoptees who are becoming legally entitled to demand access to their right to identity.

Third, international scholars could question the justification of not involving all stakeholders of the adoption triad in the Guidelines for the Alternative Care of Children and Best Interests of the Child Principle.

Furthermore, an adoptee and original family representation survey could be created: The purpose of this survey would be to establish adoptee and original family representation in the legislative and executive branches of which ICA practices are comprised.

The main legislative participants of this survey should be (i) the Office of the United Nations High Commissioner for Human Rights, to which the UNCRC and the CRC pertains,

and (ii) the Multinational Secretariat of the HCCH to which the HC-1993 pertains, in combination with its Central Authorities in the sending and receiving countries of intercountry adoption.

The main executive participants of this survey should be represented by (iii) the General Secretariat of ISS and its Global Network (representing ISS in the sending and receiving countries of intercountry adoption). The main reference NGOs to which this survey applies are considered to have mission and vision statements that are not in conflict with the Convention.

Finally, Brazilian scholars could question why their judges do not create a record of their considerations as to whether a child should be put up for ICA. Because, they are obliged to do so according to the CRC recommendations, and according to the IACHR.

Therefore, Brazilian scholars could conduct research to understand why Brazilian judges are not considering the ECtHR's jurisprudence concerning the right to identity for intercountry adoptees from Brazil. The research could focus on the jurisprudence mentioned in chapter 2.2 and covers intercountry adoptees' rights to have access to information about their identity and origins and, in the wider context of the right to identity, the circumstances in which they were adopted. Those circumstances arguably include the legal considerations I initially proposed to analyze: the judiciary's considerations justifying the ruling for ICA and thereby the reasons that the human rights principle that ICA be a last resort became a final verdict for intercountry adoptees.

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## GLOSSARY

**Adoption**

Adoption creates new legal family ties between the child and his (prospective adoptive) parents; they become the child's caretakers and de facto parents.

**Adoption Triad**

Adoption involves three stakeholders: the adoptee, the adoptee's original family and the adoptee's adoptive parents.

**Committee of the Rights of the Child (CRC)**

Experts monitor the implementation of the UNCRC.

**Conselhos Tutelares**

Appointed citizens representing child protection services.

**Convention**

International agreement between sovereign states and an international organization (e.g. the UNCRC); the commitment to a convention depends on the level of acceptance; ratification, implementation, monitoring, enforcement etc.

**Declaration**

A treaty, an instrument that is annexed to a treaty, an informal agreement with respect to a matter of minor importance, or a series of unilateral declarations constituting binding

**International Covenants**

Civil, Political, Economical, Social and Cultural rights.

**Intercountry Adoption (ICA)**

ICA makes a child subject to a permanent transfer from the child's birth country to another country, based on the ruling of a judge in the child's country of origins (and possibly as well in the home country of the child's (prospective) adoptive parents), according to his or her new

legal family ties. ICA involves discontinuity of ethnic, religious, cultural and linguistic background of the child; including possible loss of nationality.

### **Preamble**

A preliminary statement to a formal document, explaining its purpose.

### **Ratification**

International act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act.

### **Receiving Country**

The country where to an adopted child goes for indefinite permanency after being adopted in his or her home country. The receiving country and the adoptive parents form new ethnic, religious, cultural and linguistic background of the child; including a new nationality.

### **Sending Country**

The country where an adopted child and his or her parents and their family originate. The sending country holds the ethnic, religious, cultural and linguistic background of the child; including the child's original nationality.

### **Subsidiarity Principle**

ICA is only to be considered if a child cannot be suitably placed to be taken care for in his or her own country.

### **Treaty**

All instruments binding at international law concluded between international entities, regardless of their formal designation.

### **Universal Declaration of Human Rights (1948)**

The provisions of this declaration reflected customary international law (codification) and gained binding character as customary law at a later stage.

### **United Nations Charter (1945)**

The UN Charter is the foundational treaty of the United Nations.

### **United Nations General Assembly**

The General Assembly is one of the six main organs of the United Nations, the only one in which all Member States have equal representation: one nation, one vote. All 193 Member States of the United Nations are represented in this unique forum to discuss and work together on a wide array of international issues covered by the UN Charter.

### **UNICEF (1946)**

Mandated by the UN General Assembly and Guided by the UNCRC to advocate for the protection of children's rights, to help meet their basic needs and to expand their opportunities to reach their full potential.

## APPENDIX

### I – Interview questions

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1. Until what extent, are you familiar with the UNCRC and its provisions about intercountry adoption?

*Ate que medida, você está familiarizado(a) com a Convenção dos Direitos das Crianças das Nações Unidas e suas normas sobre adoção internacional?*

2. Until what extent, are you familiar with the Hague Convention on Intercountry adoption?

*Ate que medida, você está familiarizado(a) com a Convenção da Haia sobre adoção internacional?*

3. Can you describe the difference between the eligibility of a child to be domestically or internationally adopted?

*Você pode descrever a diferença entre os requisitos para que uma criança seja adotada interna ou internacionalmente?*

4. Are you familiar with the subsidiarity principle and, if so, do you know that there are two subsidiarity principles?

*Você está familiarizado(a) com o princípio de subsidiariedade e, se sim, você sabe que existem dois princípios de subsidiariedade?*

5. Do you know the difference between them?

*Você sabe a diferença entre eles?*

6. What would be solutions to the conflict between the two subsidiarity principles?

*Quais seriam as soluções ao conflito entre os dois tipos de princípio de subsidiariedade?*

7. Would your solution be the same if you consider the fact that the right to identity is a fundamental right?

*Sua solução seria igual se você considerar que o direito à identidade é um direito fundamental?*

8. How is the right to identity situated in the legal hierarchy of the Brazilian state?

*Onde está situado, na hierarquia do direito brasileiro, o direito à identidade?*

9. Which legal considerations are used to justify the balance of interests of the subsidiarity principle and the right to identity?

*Quais considerações jurídicas são usadas para justificar a ponderação de interesses entre o princípio da subsidiariedade e o direito à identidade?*

10. Why would intercountry adoption be preferably over other options?

*Porque a adoção internacional seria preferível a outras opções?*

11. Are you aware of the case GELMAN v. URUGUAY JUDGMENT OF 24 FEBRUARY 2011?

*Você está ciente do caso GELMAN v. URUGUAY JULGADO EM 24 DE FEVEREIRO DE 2011?*

12. Are you aware of the case RAMÍREZ ESCOBAR AND OTHERS VS. GUATEMALA JUDGEMENT OF 9 MARCH 2018?

*Você está ciente do caso RAMÍREZ ESCOBAR E OTROS VS. GUATEMALA JULGAMENTO DE 9 MARCH DE 2018?*

## II – Interview Overview

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<b>Name</b>	<b>Jurisdiction</b>	<b>Interview date</b>	<b>Interview location</b>
Desembargador José Antônio Daltoé Cesar	Porto Alegre	15 October 2018	Porto Alegre
Mariazinha Becker	Social worker	16 October 2018	Porto Alegre
Juiz João Batista Costa Saraiva	Porto Alegre	17 October 2018	Porto Alegre
Desembargadora Vera Lúcia Deboni	Porto Alegre	17 October 2018	Porto Alegre
Sylvia Baldino Nabinger	Civil servant	18 October 2018	Porto Alegre
Desembargador Reinaldo Cintra Torres de Carvalho	São Paulo	1 November 2018	via FaceTime
Procuradora Leslie Marques Decarvalho	Brasília	6 November 2018	Brasília
Juíza Mônica Gonzaga Arnoni	São Paulo	8 November 2018	São Paulo
Juíza Sandra Aparecida Silvestre de Frias Torres	CNJ	7 December 2018	Brasília
Juiz Titular Renato Rodovalho Scussel	Brasília	No response	By email

### III – Research Interviews

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#### **Appeal Judge José Antônio Daltoé Cezar**

Judge Daltoé is judge since 1988, giving him thirty years of experience, but he has no experience with intercountry adoption. He is an appeal judge for 5,5 years.

Judge Daltoé advocates for intercountry adoption from Brazil. As a judge from the southern state of Porto Alegre he states that there have been no cases of intercountry adoption in the last nine years. In addition to advocating for intercountry adoption from Brazil he refers to the CNJ's CNA as a problematic bureaucratic issue.

1. *Concerning his familiarity with the UNCRC and its provisions about intercountry adoption;* he has knowledge about intercountry adoption, referring to the Central Authority of the Hague Convention. His answer on this question implies that he has no knowledge of the UNCRC, as the Central Authority of the Hague Convention is obviously not the same as the UNCRC.
2. *With regard to his familiarity with the Hague Convention on ICA;* Judge Daltoé observes that the international authorities did not ask judges from Rio Grande do Sul to be involved in intercountry adoption because that state did not facilitate intercountry adoption. According to the appeal judge, ICA from Brazil is currently largely dependent on judge Labuto from Rio de Janeiro.
3. *Concerning the eligibility if a child to be domestically or internationally adopted;* Judge Daltoé states that for the Hague Convention a foreign country has to be part of the Hague Convention and respect Brazil its national legislation.
4. *Concerning the familiarity with the subsidiarity principles;* he is familiar with one subsidiarity principle only, which is that only if there is no Brazilian solution possible, ICA is a second option. He calls this subsidiary.
5. *Regarding the difference between the two subsidiarity principles;* as a result of the Judge's unfamiliarity with the subsidiarity principle of the UNCRC, he cannot say anything about the difference between the two subsidiaries.
6. *Concerning solutions to the two conflicting subsidiarity principles;* Judge Daltoé states that there is no conflict. Therefore, there is no need to protect the family; the child needs

a personal caretaker. While observing that guardianship is not ideal and should be temporary.

7. *Regarding the solution the Judge proposes;* the right to identity is a fundamental right and Judge Daltoé did not go into any details about any further or alternative solutions.
8. *Concerning how the right to identity is situated in the legal hierarchy of the Brazilian state;* according to Judge Daltoé in the Brazilian Constitution the right to identity is included, the right to human dignity.
9. *Concerning justification of the balance of interests of the subsidiary principle and the right to identity;* Judge Daltoé gives an example of classes he had while becoming a judge in which it was notable to the French judges who were teaching that class that Brazilian judges have the freedom to decide. It all depends on the judge. He considers the judiciary to be part of state power.
10. *Concerning why ICA would be preferable over other options;* Judge Daltoé says that answers can be found in psychological research, a minimum norm to judge on ICA. According to the judge both domestic or intercountry adoption are good.
11. *Regarding awareness of the case GELMAN v. URUGUAY JUDGMENT OF 24 FEBRUARY 2011;* Unknown
12. *Regarding awareness of the case RAMÍREZ ESCOBAR AND OTHERS VS. GUATEMALA JUDGEMENT OF 9 MARCH 2018;* Unknown

*Observation:* The reference mentioned judge Labuto from the Rio de Janeiro magistrate school, is known to be one of the fiercest advocates for intercountry adoption in Brazil. The judge recommends talking with her.

Appeal judge Daltoé was clearly in favor of intercountry adoption which in many cases is the best solution in his opinion.

## **Retired Judge João Batista Costa Saraiva**

Judge Saraiva has 32 years of experience and has ruled on perhaps 10 to 20 intercountry adoption cases. Judge Saraiva was coordinator of the area of childhood and youth of the school of the judiciary of Rio Grande de Sul since 1992. He was professor of the Curso de Pós Graduação em Direito da Criança da Fundação Escola do Ministério Público do RS.

1. *Concerning his familiarity with the UNCRC and its provisions about intercountry adoption;* Judge Saraiva says that he gained knowledge and experience about the UNCRC through his work as a consultant for UNICEF in several countries in his professional dealing with the UNCRC.
2. *With regard to his familiarity with the Hague Convention on ICA;* Judge Saraiva is very familiar with the Hague Convention as well and recognizes the important role of the regulation of ICA.
3. *Concerning the eligibility if a child to be domestically or internationally adopted;* Judge Saraiva is concerned that since the ECA, the normative approach of the ECA, or the norms established by the ECA, that adoption is exceptional and not a regular solution according to the ECA. Family preservation comes first and maintaining the original family ties of the child. The difference comes from this perspective, intercountry adoption is a last resort.
4. *Concerning the familiarity with the subsidiarity principles;* Judge Saraiva is indeed familiar with the two subsidiarity principles.
5. *Regarding the difference between the two subsidiarity principles;* Judge Saraiva is aware of the difference and states that the Hague Convention's principle is also restrictive. Judge Saraiva says that he pays special attention to the nationality clause in the Hague Convention.
6. *Concerning solutions to the two conflicting subsidiarity principles;* Judge Saraiva does not identify the conflict but makes clear that the guiding principles comes for the UNCRC which is embedded in art. 2 – 7 of the Brazilian constitution which he considers to be a doctrine.
7. *Regarding the solution the Judge proposes;* the same solution as the right to identity is rooted in the Brazilian legal system, it is not prescribed but should be given preference to.

8. *Concerning how the right to identity is situated in the legal hierarchy of the Brazilian state;* according to Judge Saraiva the right to identity is embedded in the topic of human dignity covered in art. 2 – 7 in the Brazilian constitution which incorporates the child as a subject, instead of the child being subjected.
9. *Concerning justification of the balance of interests of the subsidiary principle and the right to identity;* Judge Saraiva says there are nuances and one has to be careful here with making statements, but he radically defenses the right to identity, while observing the issue of art. 3 of the UNCRC that the best interest of the child can be abused in order to push for intercountry adoption.
10. *Concerning why ICA would be preferable over other options;* Judge Saraiva is of the opinion that intercountry adoption is the last resort, it is not preferable over other options. Rules and procedures prescribe the correct order to decide on adoption.
11. *Regarding awareness of the case GELMAN v. URUGUAY JUDGMENT OF 24 FEBRUARY 2011;* Unknown
12. *Regarding awareness of the case RAMÍREZ ESCOBAR AND OTHERS VS. GUATEMALA JUDGEMENT OF 9 MARCH 2018;* Unknown

*Observation:* Judge Saraiva is the only judge interviewed that is familiar with the two subsidiarity principles and states that intercountry adoption is exceptional according to the UNCRC.

## **Appeal Judge Deboni**

Judge Deboni is judge since 1990, giving her 18 years of experience. Since 1995 she is the first judge for children's rights in Rio Grande do Sul. Judge Deboni has ruled on several adoption cases. She was also auxiliary judge of the Presidency of the National Justice Council (CNJ), having acted in the Justice for Youth program. Currently, she is the President of the Associação dos Juízes do Rio Grande do Sul (Ajuris) for 2018/2019.

1. *Concerning her familiarity with the UNCRC and its provisions about intercountry adoption;* Judge Deboni states that Brazil internalized the UNCRC in the ECA and that Brazilian judges are not used to deal with international conventions. There is no need to use the international conventions, only as a reference.
2. *With regard to her familiarity with the Hague Convention on ICA;* Judge Deboni is familiar with the Hague Convention in general terms. In 1996 there was a council in Rio Grande do Sul which lead to specialized court practices. One of the three specific core competences was intercountry adoption, besides incarceration and constitutional care.
3. *Concerning the eligibility if a child to be domestically or internationally adopted;* Registries for (intercountry) adoption as a basis since 1996. Judge Deboni outlines that the first step is to search for the parents in the registries, after which another registry is consulted, and eventually intercountry adoption would be allowed.
4. *Concerning the familiarity with the subsidiarity principles;* Judge Deboni is not familiar with the subsidiarity principle, neither with the fact that there are two subsidiary principles.
5. *Regarding the difference between the two subsidiarity principles;* Judge Deboni is not aware there are two subsidiarity principles.
6. *Concerning solutions to the two conflicting subsidiarity principles;* Judge Deboni gives as a solution that domestic adoption should be considered in the first place to its full extent. This, whilst observing, based on the following example, that after several months of searching for a domestic solution, that this is undesirable for the child and that a solution for the child has to be found fast. Solutions can include foster care and *famílias acolhedores*.
7. *Regarding the solution the Judge proposes;* she gives as an example from SOS children's villages that a child was unable to adapt to the new reality.

8. *Concerning how the right to identity is situated in the legal hierarchy of the Brazilian state;* according to Judge Deboni the right to identity is embedded in the doctrine and the practice which are focused on the well-being of the child and development of the child.
9. *Concerning justification of the balance of interests of the subsidiary principle and the right to identity;* Judge Deboni uses the best interest of the child, art. 3 of the UNCRC. She gives as an example that for a sick child that could receive the best treatment in for example Germany, the best solution could be intercountry adoption. And at the same time Judge Deboni recognized that art. 3 of the UNCRC is arbitrary and therefore care should be taken applying that article to decide on ICA.
10. *Concerning why intercountry adoption would be preferable over other options;* Judge Deboni states that in the context of the above-mentioned experience to find an alternative for the original family, her consideration is that even if institutions for alternative care are good, they do not fulfill the needs of a child.
11. *Regarding awareness of the case GELMAN v. URUGUAY JUDGMENT OF 24 FEBRUARY 2011;* Unknown
12. *Regarding awareness of the case RAMÍREZ ESCOBAR AND OTHERS VS. GUATEMALA JUDGEMENT OF 9 MARCH 2018;* Unknown

*Observations:* One of the remarkable examples in Judge Deboni's experience is one of her intercountry adoptions ruling which was overturned because the prosecutor in the judge's district did not agree with her ruling and took the case to the court. Hence, other judges overruled her intercountry adoption verdict.

Furthermore, a general observation is that the ECA does not necessarily protect children. According to Judge Deboni the prevailing legal culture in this perspective is to continue in the spirit of the *Código de Menores* in which it was not necessary to search for the original family.

Another observation is that the adoption legislation in Brazil now is simple and clear; there are new norms for the time searching for the extended family (law 12.010 states that it has to be recorded what has been done to localize the extended family). Based on her own professional experience Judge Deboni also points out the importance of prosecutors because they can be key in safeguarding the judge's ICA decisions.

## **Appeal Judge Cintra**

Judge Cintra is judge since 1988, giving him 30 years of experience. Judge Cintra was judge at the Court of Minors in São Paulo. He worked as judge at the *corregedoria* at the court of justice in São Paulo as well as at the CNJ. Additionally, he was secretary at the international adoption commission. Since 2015 he is an appeal judge in São Paulo.

1. *Concerning his familiarity with the UNCRC and its provisions about intercountry adoption;* Judge Cintra has many years of experience working with the Hague Convention. He finds the UNCRC very general for intercountry adoption.
2. *With regard to his familiarity with the Hague Convention on ICA;* Judge Cintra is an expert on the Hague Convention and therefore familiar with the Hague Convention on intercountry adoption.
3. *Concerning the eligibility if a child to be domestically or internationally adopted;* Judge Cintra states that the ECA comes first as it is concerned with the lack of a biological family and the legal dispensability to be adopted. Adoption and intercountry adoption is an ethical juridical decision and intercountry adoption takes place through the Hague Convention's rules between two countries.
4. *Concerning the familiarity with the subsidiarity principles;* according to Judge Cintra the subsidiarity principle applies when there is no prospective adoptive parent available in the country of origin for adoption.
5. *Regarding the difference between the two subsidiarity principles;* according to Judge Cintra the Hague Convention does not mention alternatives to intercountry adoption as a priority, alternatively, for the UNCRC intercountry adoption is a last resort, i.e. extended family comes first. He does not mention non-adoption alternatives as a priority.
6. *Concerning solutions to the two conflicting subsidiarity principles;* Judge Cintra states that the right of the child is to have a family life, this is set in the ECA. In there, a family relationship with affection is of primary importance. Therefore, permanent family ties are always better than non-permanent care-taker alternatives.
7. *Regarding the solution the Judge proposes;* Judge Cintra's solution to the conflict between the two subsidiary principles remains the same when taking into account that the right to identity is a fundamental right.

8. *Concerning how the right to identity is situated in the legal hierarchy of the Brazilian state;* Judge Cintra says that his response to this question is based on natural law and constitutional law. Within a social political context a person has the inherent right to his/her family name and the rights that are derived from his/her identity should be preserved.
9. *Concerning justification of the balance of interests of the subsidiary principle and the right to identity;* Judge Cintra considers it to be a very complex discussion. The right to be raised by a family is more valuable than somebody's right to identity, within the country of origin in non-adoption circumstances. Family life provides better chances in life and if the child is heard in case of an intercountry adoption ruling and the child wants to stay in the country of origin, observing this applies to children as of 12 years. Under the age of 12 a judge has more interpretation flexibility concerning the child's stance and/or position.
10. *Concerning why ICA would be preferable over other options;* Judge Cintra shares a case in which the child was unadoptable in Brazil. Subsequently, a couple in Italy was considered as the child's adoptive parents. However, the child refused the couple as its adoptive parents as the father was not of colored skin and therefore the child could not identify itself with him.
11. *Regarding awareness of the case GELMAN v. URUGUAY JUDGMENT OF 24 FEBRUARY 2011;* Judge Cintra is not familiar with this case.
12. *Regarding awareness of the case RAMÍREZ ESCOBAR AND OTHERS VS. GUATEMALA JUDGEMENT OF 9 MARCH 2018;* Judge Cintra is not familiar with this case.

*Observation:* The number of intercountry adoption cases dropped significantly because Brazilians now also accept to adopt older children. As a result these children are adopted domestically.

## Auxiliary Judge Arnoni

Judge Arnoni is judge since 2014, giving her 4 years of experience. She has a personal connection with adoption because of her father. She is Secretary and Member of the Comissão Estadual Judiciária de Adoção Internacional (CEJAI) do Estado de São Paulo (2018-2019).

1. *Concerning her familiarity with the UNCRC and its provisions about intercountry adoption;* Judge Arnoni mentions that because of her work at the CEJAI the Hague Convention is followed.
2. *With regard to her familiarity with the Hague Convention on ICA;* Judge Arnoni is most familiar with the Hague Convention on intercountry adoption.
3. *Concerning the eligibility if a child to be domestically or internationally adopted;* Judge Arnoni says that intercountry adoption is safer than previously. Domestic adoption requires the prospective parents to attend a preparatory course as well as undergo psychological consultations, to finally be admitted for domestic adoption by judge. Intercountry adoption requires that the prospective parents obtain a court decree for intercountry adoption in the home country. Additionally, the prospective parents should be available to adopt special needs children. Furthermore, an assessment by the child protection service at the home of the prospective parents is required. The public ministry, because of *direitos difusos* allows for the acceptance in Brazil of these documents, through a committee and six Appeal Judges (one of these is the *Corregedor Geral*, three judges are retired, one judge is active, and one judge of law). This will lead to the registration at the CNJ's adoption waiting list, after that a search to match the prospective parents with the prospective adopted child will be executed.
4. *Concerning the familiarity with the subsidiarity principles;* Judge Arnoni is familiar with the subsidiarity principles. She even states that there is a third subsidiary principles which is in the ECA.
5. *Regarding the difference between the two subsidiarity principles;* Judge Arnoni does not remember the difference between the three subsidiarity principles she identifies.
6. *Concerning solutions to the two conflicting subsidiarity principles;* Judge Arnoni states that intercountry adoption is not a conflict, the Hague Convention also states that it is exceptional. Art. 3 of the UNCRC is also important, e.g. family care is always better than institutional care. She observes the differences between a permanent and a temporary family.

7. *Regarding the solution the Judge proposes*; the view of Judge Arnoni remains the same, taking into account that the right to identity is a fundamental human right.
8. *Concerning how the right to identity is situated in the legal hierarchy of the Brazilian state*; according to Judge Arnoni the right to identity is situated in the federal constitution (Art. 5), as well as in the infra-constitutional treaties, the international conventions, and in ordinary law. There is always a hermeneutic interpretation of the right to identity.
9. *Concerning justification of the balance of interests of the subsidiary principle and the right to identity*; Judge Arnoni states that not one right is absolute. Therefore, we have to weight rights; the right to live in a family vs. the rights of a child. She thinks this is interesting as the UNCRC refers to original family and a judge does not.
10. *Concerning why ICA would be preferable over other options*; Judge Arnoni states that adoption and intercountry adoption are exceptional. Because of the UNCRC intercountry adoption is a last resort.
11. *Regarding awareness of the case GELMAN v. URUGUAY JUDGMENT OF 24 FEBRUARY 2011*; Judge Aroni is not familiar with this case.
12. *Regarding awareness of the case RAMÍREZ ESCOBAR AND OTHERS VS. GUATEMALA JUDGEMENT OF 9 MARCH 2018*; Judge Aroni is not familiar with this case.

## Auxiliary Judge Torres

Judge Torres is auxiliary judge of the Corregedoria do Conselho Nacional de Justiça (CNJ).

1. *Concerning her familiarity with the UNCRC and its provisions about intercountry adoption;* Judge Torres states that familiarity with the UNCRC is not applicable to become a judge but it is becoming more and more important and at the schools of the magistrates this is put to the attention of the future judges. Analysis of the constitutionality of the conventions is also a point of attention.
2. *With regard to her familiarity with the Hague Convention on ICA;* Judge Torres says that this is not applicable. Instead, she is more focused on the American conventions. Same as above is applicable; i.e. it is not required in her position but it is important.
3. *Concerning the eligibility if a child to be domestically or internationally adopted;* Judge Torres states that national legislation is about national adoption preference, aiming for a place close to the child's place of origin and the child's local culture, i.e. within the same state, according to the ECA. Remembering that adoption is already exceptional. And that the requirements for domestic and intercountry adoption are almost the same. Local, regional, national and exceptionally intercountry adoption.
4. *Concerning the familiarity with the subsidiarity principles;* Judge Torres is not familiar with the subsidiarity principles.
5. *Regarding the difference between the two subsidiarity principles;* Judge Torres is not familiar with the differences between the two subsidiarity principles.
6. *Concerning solutions to the two conflicting subsidiarity principles;* Judge Torres states that the CNJ refers to the ECA and remains close to its origins.
7. *Regarding the solution the Judge proposes;* Judge Torres would propose the same solution considering the fact that the right to identity is a fundamental right.
8. *Concerning how the right to identity is situated in the legal hierarchy of the Brazilian state;* according to Judge Torres in the Brazilian constitution the right to identity is a fundamental right; it gives preference above all other rights. Note that this is the official answer from the administrative body. In order to get a judiciary answer the Judge recommends that the supreme federal court could respond on a consultation on a concrete case which poses this question.

9. *Concerning justification of the balance of interests of the subsidiary principle and the right to identity;* Judge Torres states that the right to identity is constitutional and explicit in the ECA. This principle is directly related to the right to identity.
10. *Concerning why ICA would be preferable over other options;* Judge Torres states that ICA is only an option in case other alternatives are not available. Adoption is just one mean, not *the* (only) mean to offer a solution. Adolescences should be heard because they want autonomy and not necessarily new juridical ties. A substitute family can be another option.
11. *Regarding awareness of the case GELMAN v. URUGUAY JUDGMENT OF 24 FEBRUARY 2011;* Judge Torres is not familiar with this case but is interested to take note of this case.
12. *Regarding awareness of the case RAMÍREZ ESCOBAR AND OTHERS VS. GUATEMALA JUDGEMENT OF 9 MARCH 2018;* Judge Torres is not familiar with this case but is interested to take note of this case.

*Observation:* Education is key for magistrates. Judge Torres is aware of an intercountry adoption case in which the Judge went against the psychological advice. Which she identifies as a controversy in intercountry adoption. Judge Torres is aware of several of such controversial adoption ‘scandals’ such as in Portugal where the bishop of the *igreja universal* was involved in the stealing of children.

She conceded to the interview request in her formal capacity working for the administrative organ (which the CNJ is) that is dealing with adoption registries, reform, and construction of adoption policies. In this capacity she identifies the consensus between the CNJ and the Inter-American Court for Human Rights and the importance of the sentences of the Inter-American Court for Human Rights for the Brazilian judiciary and the Brazilian education in human rights. All verdicts of the Inter-American Court for Human Rights should be available via the website of the CNJ.

## **Maria Josefina (Mariazinha) Becker**

Mariazinha Becker is a social worker and has a professional background in education and social services. She has professional experience with adoption since the 1970s and with intercountry adoption since the 1980s.

1. *Concerning her familiarity with the UNCRC and its provisions about intercountry adoption;* Mrs. Becker went to Brasília in 1985 at the end of the dictatorship to reformulate the concepts of the rights of the child to implement them into the new Brazilian constitution and in this way she got involved in working with the committee on the rights of the child. Article 226 of the Brazilian constitution has content of the UNCRC.
2. *With regard to her familiarity with the Hague Convention on ICA;* Mrs. Becker was also involved with the development of the Hague Convention. The United States wanted to give power to the adoption agencies while Mrs. Becker preferred giving power to the Central Authorities to set guidelines for the adoption agencies.
3. *Concerning the eligibility if a child to be domestically or internationally adopted;* Mrs. Becker says that adoption is a solution to a disaster and nothing good by itself. A child should be cared for by his or her parents. Poverty is not a reason for adoption. First comes the extended family and close care-takers. In order not to lose the roots of the child. After that, a search for prospective adoptive parents can take place. Intercountry adoption can take place if there are no prospective adoptive parents available domestically. The child has the right to know the truth about its origin and a foreign couple should comply with this.
4. *Concerning the familiarity with the subsidiarity principles;* Mrs. Becker is not familiar with the subsidiarity principles.
5. *Regarding the difference between the two subsidiarity principles;* Mrs. Becker cannot respond to this question as she is not familiar with the two subsidiarity principles.
6. *Concerning solutions to the two conflicting subsidiarity principles;* Mrs. Becker says that the solution would be article 3 of the UNCRC, i.e. the best interest of the child. Institutional care should not be considered in Brazil. Furthermore, Mrs. Becker states that siblings should not be separated.
7. *Regarding the solution the proposed;* Mrs. Becker states that the right to identity is a fundamental right and should be guaranteed by the adoptive parents.

8. *Concerning how the right to identity is situated in the legal hierarchy of the Brazilian state;* according to Mrs. Becker the right to identity is not part of the legal hierarchy of the Brazilian state.
9. *Concerning justification of the balance of interests of the subsidiary principle and the right to identity;* Mrs. Becker cannot answer this question from a juridical point of view, instead she responses from a practical point of view. She says that it depends on the situation which of the interests prevails. Mrs. Becker does not recognize that there may be an issue in case of intercountry adoption because according to her a person can have several identities. The adoptee should have the nationality of his or her adoptive parents in order to avoid problems.
10. *Concerning why ICA would be preferable over other options;* Mrs. Becker states that intercountry adoption is not preferable.
11. *Regarding awareness of the case GELMAN v. URUGUAY JUDGMENT OF 24 FEBRUARY 2011;* Unknown
12. *Regarding awareness of the case RAMÍREZ ESCOBAR AND OTHERS VS. GUATEMALA JUDGEMENT OF 9 MARCH 2018;* Unknown

*Observation:* Mariazinha Becker started working in the field of intercountry adoption thinking that the adoption realm was not politicized.

## **Sylvia Baldino Nabinger**

Sylvia Nabinger is educated as social worker at the PUC in Porto Alegre. She also studied at the Law School in Buenos Aires, Argentina and has an LLM and PhD (1980-1985) from the University in Lyon, France. She works as an expert at the court of justice in Porto Alegre. Sylvia Nabinger is an expert in mother-child separation and has experience as a family therapist.

1. *Concerning her familiarity with the UNCRC and its provisions about intercountry adoption;* Mrs. Nabinger says that she solely has theoretical general knowledge about the UNCRC.
2. *With regard to her familiarity with the Hague Convention on ICA;* Mrs. Nabinger actively contributed to the development of the Hague Convention. Her experience with intercountry adoption from the state of Rio Grande do Sul was a point of reference for the Hague Convention. The Brazilian ambassador in the Netherlands at the time was an adoptive mother and she helped putting intercountry adoption on the agenda.
3. *Concerning the eligibility if a child to be domestically or internationally adopted;* Mrs. Nabinger says that many Brazilian children were available for adoption but the only domestic option was institutional care. In her personal experience she says that foreign couples were preferable to that domestic alternative of institutional care. The children were unwanted by Brazilians.
4. *Concerning the familiarity with the subsidiarity principles;* Mrs. Nabinger's understanding is that the legal ties between the original parents and the child had to be cut through a court verdict. The foreign prospective adoptive parents had to be recognized as qualified adoptive parents and adoption documents and the adoption verdict had to be recognized in the country of origin of the adoptee as well as in the country of origin of the adoptive parents.
5. *Regarding the difference between the two subsidiarity principles;* Mrs. Nabinger says that she is indeed familiar with the two subsidiarity principles. However, she does not necessarily see it as a conflict. The problem is that alternative solutions to intercountry adoption are not put into practice in Brazil.
6. *Concerning solutions to the two conflicting subsidiarity principles;* Mrs. Nabinger says that currently intercountry adoption is too complicated to take place.
7. *Regarding the solution proposed;* She responded to this question with an example of a period in which no more intercountry adoptions took place to Germany from the state of

Rio Grande do Sul. In a so-called trial period which was established in Rio Grande do Sul for prospective adoptive parents, couples were found unsuited for adoption from the perspective of the responsibility of the prospective adoptive parents to safeguard the identity of the adoptees.

8. *Concerning how the right to identity is situated in the legal hierarchy of the Brazilian state*; according to Mrs. Nabinger there was no reference to the right to identity in the Brazilian legislation previous to the ECA. She started working after the implementation of the ECA, to preserve juridical, psychological, cultural and social aspects of the right to identity based on the provisions in the ECA concerning the right to identity.
9. *Concerning justification of the balance of interests of the subsidiary principle and the right to identity*; Mrs. Nabinger says that when deciding for intercountry adoption prospective adoptive parents that where searched for should have similar norms and values as the origins of the adoptees and not conflicting.
10. *Concerning why ICA would be preferable over other options*; Mrs. Nabinger states that intercountry adoption was never preferable.
11. *Regarding awareness of the case GELMAN v. URUGUAY JUDGMENT OF 24 FEBRUARY 2011*; Unknown
12. *Regarding awareness of the case RAMÍREZ ESCOBAR AND OTHERS VS. GUATEMALA JUDGEMENT OF 9 MARCH 2018*; Unknown

*Observation:* Overall, the answers of Mrs. Nabinger mostly had a historical focus.

## **Leslie Marques de Carvalho**

Leslie de Carvalho worked as a lawyer and a prosecutor for the public ministry of the Federal District. Her specialization is *direitos individuais difusos e coletivos*.

1. *Concerning her familiarity with the UNCRC and its provisions about intercountry adoption;* Mrs. de Carvalho is not unfamiliar with the UNCRC and its provisions about intercountry adoption. She observes that the UNCRC must be seen in the light of the constitution.
2. *With regard to her familiarity with the Hague Convention on ICA;* Mrs. de Carvalho responds as for question 1 but adds that some cases have to be verified for certain provisions when it is unsure about how it is integrated. She is aware of conflicting norms.
3. *Concerning the eligibility if a child to be domestically or internationally adopted;* Mrs. de Carvalho says that intercountry adoption should only be considered if domestic adoption has first been considered. In case of intercountry adoption the prospective adoptive parents have to be approved via a selection process. Affection and material conditions are important. Intercountry adoption should guarantee the same rights for the child as it would have in Brazil. In this light she refers to the US not having ratified the UNCRC.
4. *Concerning the familiarity with the subsidiarity principles;* Mrs. de Carvalho is not familiar with the subsidiarity principles.
5. *Regarding the difference between the two subsidiarity principles;* Not applicable.
6. *Concerning solutions to the two conflicting subsidiarity principles;* Mrs. de Carvalho says that each case should be considered individually. The guideline should be family care. Guardianship according to the law is provisional.
7. *Regarding the solution proposed;* Mrs. de Carvalho responds that her solution would indeed be the same.
8. *Concerning how the right to identity is situated in the legal hierarchy of the Brazilian state;* according to Mrs. de Carvalho the Brazilian constitution comes first and after that the ECA. Next, in certain codified norms from the civil code. And finally the law on civil registry, article 115 and also in the reproductive rights.
9. *Concerning justification of the balance of interests of the subsidiary principle and the right to identity;* Mrs. de Carvalho states that there is no conflict. First of all, one should

make sure that the child cannot stay in the extended family. Also focus on the wish of the adoptee regarding his or her identity upon adulthood. She points out the importance and the focus of the law on affectionate relationships. For example, children who want to remain in contact with biological siblings should not be separated. The final consideration should be giving consideration to relevant jurisprudence and doctrines.

10. *Concerning why ICA would be preferable over other options*; Mrs. de Carvalho says that intercountry adoption is preferable because children with special care needs are not wished for by Brazilian parents but are wanted by foreign prospective adoptive parents. Proof of this can be found in the fact that there are 5 times more families registered to adopt than there are children registered for adoption and still the children are not adopted in Brazil.
11. *Regarding awareness of the case GELMAN v. URUGUAY JUDGMENT OF 24 FEBRUARY 2011*; Unknown
12. *Regarding awareness of the case RAMÍREZ ESCOBAR AND OTHERS VS. GUATEMALA JUDGEMENT OF 9 MARCH 2018*; Unknown

