

# **Human Rights under pressure**

The Removal of the United Nations Convention on the Rights of the Child from the European Union's Acquis Communautaire

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*Patrick Noordoven, June 2014, Utrecht, Amsterdam and Zurich*

## Table of Contents

<b>ACKNOWLEDGEMENTS</b>	<b>2</b>
<b>PREFACE</b>	<b>4</b>
<b>INTRODUCTION</b>	<b>6</b>
<b>CONTEXT OF DISCOVERY</b>	<b>7</b>
<b>ACADEMIC RELEVANCE</b>	<b>9</b>
 <b>1. THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (UNCRC)</b>	 <b>12</b>
1.1 RATIFICATION AND IMPLEMENTATION OF THE UNCRC	13
1.2 THE NON-RATIFICATION OF THE UNCRC BY THE US	14
1.3 THE UNCRC AND INTER COUNTRY ADOPTION (ICA)	15
1.4 ARTICLE 21.B UNCRC (SUBSIDIARITY PRINCIPLE)	18
1.5 THE HAGUE CONVENTION ON INTER COUNTRY ADOPTION	18
1.6 CONCLUSION	21
 <b>2. THE ACQUIS COMMUNAUTAIRE (AC) AND THE UNCRC</b>	 <b>23</b>
2.1 THE COPENHAGEN CRITERIA AND THE UNCRC	23
2.2 THE ENLARGEMENT PROCESS; THE ROLE OF THE AC AND THE UNCRC	25
2.3 ROMANIA'S ACCESSION TO THE EU	26
2.4 ROMANIA'S ACCESSION TO THE NATO	27
2.5 CONCLUSION	28
 <b>3. ICA AND THE REMOVAL OF THE UNCRC FROM THE AC</b>	 <b>30</b>
<b>CONCLUSION</b>	<b>32</b>
<b>PLAUSIBLE EXPLANATIONS FOR THE REMOVAL OF THE UNCRC FROM THE AC</b>	<b>33</b>
<b>LIST OF ACRONYMS</b>	<b>35</b>
<b>GLOSSARY</b>	<b>36</b>
<b>BIBLIOGRAPHY</b>	<b>39</b>
<b>ANNEXES</b>	<b>43</b>

## Preface

I first started my studies Political History and International Relations in 2003. In 2007 I had to suspend my studies. The reason for this is due to the fact I am trafficked for illegal adoption from Brazil in 1980. As a consequence, being deprived of the right to identity, I was taken to the Netherlands based upon the false identity I carry until today. This made it virtually impossible to conduct and complete the search for my identity, which I started in 2001 in Brazil.

Nevertheless, after migrating to Brazil in 2010, I was able to establish the core aspects of my identity in 2011. The moment of this unexpected success meant great changes in my life. One of these involved migrating to Switzerland where I am confronted with the consequences of my unfinished studies. Finishing my studies in the Netherlands, while living in Switzerland, is a complex solution, to a challenging problem, which I hardly could incorporate in my life. In 2013, not overseeing the full extent of the implications of my choice, I initiated yet another a life changing decision.

Whilst dealing with the aftermath of the initial success of establishing the core aspects of my identity, I started to unveil the reasons behind the deprivation of my identity: I am one of numerous Brazilian new-bourns who were trafficked as part of a worldwide illegal adoption scheme.

The United Nations Convention on the Rights of the Child (UNCRC) is the most important human rights instrument that aims to avoid the deprivation of identity, by holding state parties legally responsible for the right to identity. This is how the UNCRC became the most important document in my life, which makes me highly motivated to write my thesis about this human rights treaty.

At the same time I became aware of the possible extent of the illegal adoptions, I took the final decision to finish my studies in the Netherlands. This meant returning to the country that is responsible for the deprivation of my identity. Additional proof, which I gathered during the course of events, in this respect, required me to acquire legal assistance, both in Brazil and in the Netherlands. At the time of starting to write my thesis, my rights were once more violated as it turned out the Dutch secret service taps all communication with my human rights lawyers.

For these reasons, and many others, staying in the Netherlands is very harsh for me, but also gives me the possibility of conducting further investigations to the scope of cover-up of the illegal adoptions. The results of which I will make public later this year, at the same time when I will launch the NGO I am currently founding to help the victims of the illegal adoptions from Brazil. I am already working on my first case in Germany as I am writing my thesis.

Overall, as a result, the process of writing my thesis has been a paradox as I am driven to write a thesis about the UNCRC, but at the same time, I am almost incapable of focusing on my thesis; as described, I am highly engaged and absorbed in several compelling challenges simultaneously. The tough writing process, deriving from these circumstances, and the startling outcome of my thesis reflect my involvement with the UNCRC.

Likewise, the motivational context of my thesis is a personal one. As is any thesis in essence, stemming from the personal commitment which surges when writing. Although my findings are surprising, the product of my thesis is merely an academic observation (complemented with plausible explanations), which aspires to enhance common awareness about the status of the UNCRC in the EU and its importance for Inter Country Adoption.

## Introduction

The European Union (EU) legally guarantees the right to ask for information from EU bodies. This right is applicable to every citizen or resident of the EU. For this purpose the website [www.AsktheEU.org](http://www.AsktheEU.org) was created by civil society organizations to help members of the public get the information they want about the EU; by asking for it. Once a question has been answered everyone will be able to find the information published on this website.<sup>1</sup>

A request by the NGO Against Child Trafficking (ACT) to Ask the EU learned that the UNCRC was removed from the *Acquis Communautaire* (AC).<sup>2</sup> The AC encompasses ‘the body of common rights and obligations which bind all the member states together within the EU. It is constantly evolving and comprises; [...]; the legislation adopted in application of the treaties and the case law of the court of justice; the declarations and resolutions adopted by the EU; [...]; [...]; international agreements concluded by the community and those concluded by the member states between themselves in the field of the EU's activities.’<sup>3</sup>

The European Commission (EC) has made it its priority to uphold the high standards in children's rights protection set by the UNCRC, which has been ratified by all 28 EU member states.<sup>4</sup> In other words, the UNCRC forms a fundamental, integral and inseparable part of the AC. This means the UNCRC can in theory not be removed from the AC.

Nevertheless, in June 2001 a meeting took place between Director General (DG) Enlargement (ELARG) Eneko Landaburu and DG Legal Service (LS) Michel Petite in which the status of the UNCRC was discussed. As the UNCRC was a fundamental part of the AC, a meeting discussing the status of the UNCRC indicates possible irregularities. As it turned out in 2004, the UNCRC had been removed from the AC, after which it was reinstated to the AC again upon request. The reasons behind this irregularity form the source of inquisitiveness for this thesis. This will lead to the central question, which will be presented in the closing of the context of discovery.

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<sup>1</sup> Access Info Europe, ‘About’, <http://www.asktheeu.org/en/help/about> (9 June 2014).

<sup>2</sup> Access Info Europe, ‘Meeting between DG Landaburu (ELARG) and DG Petite (LS) – 2001’ (20 June 2013), [http://www.asktheeu.org/en/request/meeting\\_between\\_dg\\_landaburu\\_ela#incoming-1988](http://www.asktheeu.org/en/request/meeting_between_dg_landaburu_ela#incoming-1988) (9 June 2014).

<sup>3</sup> Europa portal, ‘Summaries of EU legislation - Glossary’, [http://europa.eu/legislation\\_summaries/glossary/community\\_acquis\\_en.htm](http://europa.eu/legislation_summaries/glossary/community_acquis_en.htm) (9 June 2014).

<sup>4</sup> R. Petrov, *The External Dimension of the Acquis Communautaire* (European University Institute 2007) Abstract.

## Context of discovery

The context of discovery of this thesis is the illicit removal of the UNCRC from the AC as presented in the introduction. The exact reconstruction of this event is not possible as no such official communication is available. Nonetheless, in answer to the request ACT made in June 2013, Ask the EU made the following correspondence public in July 2013.

On 5 October 2004, Fabrizio Barbaso, DG ELARG, wrote to Jonathan Faull, DG Justice (JAI), the following.

*The UN Convention on the Rights of the Child was placed on the JAI-Acquis list in 1998, as part of the Human Rights related instruments to which candidate countries must accede. This Convention, like other UN Conventions, was considered "inseparable from the attainment of the objectives of the Union".*

*We have noted that the October 2003 and September 2004 JAI-Acquis-Updates no longer list the UNCRC among the conventions to which the candidate countries must accede. Since the UNCRC is one of the main human rights conventions, we would request to restore it on the JAI Acquis-list.<sup>5</sup>*

The explanation Barbaso received on 29 October 2004 is stated below.

*To prepare for the accession of the new Member States, DG ELARG compiled in 2003, in close cooperation with concerned line DGs and the Legal Service, a list of international conventions that new Member States should accept upon accession. After discussions with the Legal Service, it was agreed not to include on the list the UN Convention on the Rights of the Child as no direct obligations for Member States could be clearly derived from EU legislation in this area.*

*However, at the time Commission services were not aware of a Council document from 1998 on the JHA acquis (JAI 7 ELARG 51) which listed the Convention as being*

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<sup>5</sup> Access Info Europe, 'Meeting between DG Landaburu (ELARG) and DG Petite (LS) – 2001', European Commission, 'Note for the attention of Mr. Jonathan Faull, Director General DG JAI' (5 October 2004) and 'Note for the attention of Mr. Fabrizio Barbaso, Director-General F.F., DG ELARG' (29 October 2004), <http://www.asktheeu.org/en/request/580/response/1988/attach/2/exchange%20of%20notes%20Barbaso%20Faull%20October%202004.pdf> (9 June 2014).

*inseparable from the attainment of the objectives of the Treaty on European Union and the Treaty of Amsterdam. As we have now ascertained, this document was approved by Coreper on 3 June 1998 and then went as an "A" item to the Council. In these circumstances, we will, as you requested in your note, restore the UN Convention on the Rights of the Child to the list of JHA acquis and inform TAIEX accordingly.<sup>6</sup>*

This communication raises several questions. The main topic of interest I would like to address in this case is the removal of the UNCRC from the EU's AC. As becomes clear from the communication, the removal of the UNCRC from the AC was irregular.

Considering plausible explanations for these irregular courses of events, the most logical thing to do would be to first analyze Faull's answer. The key of his answer appears not to be the official excuse, which is given by his statement, that the EC services was not aware (of a document) listing the UNCRC as being inseparable from the attainment of the objectives of the EU. Instead, after a closer look, the crux of the matter could be the significance of the following phrase of Faull's answer.

*'After discussions with the Legal Service, it was agreed not to include on the list the UN Convention on the Rights of the Child as no direct obligations for Member States could be clearly derived from EU legislation in this area.'*

What exactly is stated here? One could argue that it appears as if Faull wants to make us believe that the EU had no competence to include the UNCRC on the AC because no obligations for member states could be derived from relevant EU legislation.

Is that correct? First of all, one could argue that as the UNCRC was part of the AC, the situation was crystal clear. In case of any doubts, the origins of the UNCRC being part of the AC should have been investigated. No such actions were taken, neither were such investigations made after Barbato's letter, nor were such investigations made following ACT's request to explain the UNCRC's removal from the AC. Besides these rudimentary facts, it is remarkable that DG JAI himself did not take a stand in his answer, whereas his function makes him accountable for the matter. Instead, he seeks cover behind the term *Legal Service* which refers to the Directorate General Justice he is heading.

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<sup>6</sup> Access Info Europe, 'Meeting between DG Landaburu (ELARG) and DG Petite (LS) – 2001', European Commission, 'Note for the attention of Mr. Fabrizio Barbato, Director-General F.F., DG ELARG', (9 June 2014).



Secondly, the reason given for the removal of UNCRC from the AC was referring to the European enlargement process. Except, removing the UNCRC from the AC for reasons of admittance of the new member states in order to comply with the AC was never applicable. Since the process of becoming a new member state of the EU, the prospect member states previously committed to the AC, as in 1998, when the UNCRC was part of the fixed AC. The admittance process takes many years and includes many signatures, including the ones committing to the UNCRC.

Thirdly, all of the new European member states had already signed and ratified the UNCRC. Cyprus ratified the UNCRC in 1990, the Czech Republic in 1993, Estonia in 1991, Hungary in 1990, Latvia in 1992, Lithuania in 1992, Malta in 1990, Poland in 1991, Slovakia in 1993 and Slovenia in 1992. These empirical facts are in direct contradiction with the explanation given by Faull as there were clear and direct obligations for member states; both by international humanitarian law (UNCRC) and EU legislation (AC). So, why was the UNCRC removed from the AC? As mentioned, no further official communication regarding this matters is available. Therefore, This thesis will present responses to the following research question.

***To what extend can plausible explanations be given for the removal of the United Nations Convention on the Rights of the Child from the European Union's Acquis Communautaire?***<sup>7</sup>

## **Academic relevance**

Before making this question operational, first of all it is necessary to further look into the scope of the context of discovery. To realize this, first and foremost it is imperative to establish what the UNCRC exactly represents and encompasses. To this end, I will dedicate the first chapter of this thesis to the UNCRC. By analyzing the ratification (and implementation) as well as the non-ratification I will establish which elements could possibly form an obstacle not to ratify the treaty. This will bring me to the UNCRC and Inter Country Adoption (ICA).

In the second chapter I will take a closer look to the AC and the meaning of the Copenhagen criteria. These criteria define whether a country is qualified to join the EU.

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<sup>7</sup> This research question is not only applicable to the 2003 and 2004 AC list, but also to the 2013 AC list: [http://ec.europa.eu/justice/fundamental-rights/files/eu\\_acquis\\_2013\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/eu_acquis_2013_en.pdf)

After a general exploration of the role of the AC in the enlargement process, I will elaborate on Romania's accession to the NATO and the EU.

Finally, in the third chapter I will present plausible explanations for the removal of the UNCRC from the AC. To the best of my knowledge, no such research has been conducted before. The closest I could get - during the preparatory search for relevant academic articles for my thesis - in finding applicable research, is a study from Ingi Iusmen who analyzed 'the effectiveness of the EU as a global children's rights actor'.<sup>8</sup>

Why was my research question never asked before? After all, children's rights have been the subject of much debate for several centuries and they continue to be so. To answer that question, the removal of the UNCRC from the AC has to be seen in the light of the controversies around the UNCRC. The academic as well as the political discourse about the UNCRC is namely all but free from controversy. Furthermore, the removal of the UNCRC from the AC has only been public since July 2013.

Human rights NGO's like Defense for Children International (DCI) or ACT continuously put (controversial) violations of the UNCRC on both the political as well as the academic agenda. In 2013 for instance, DCI has set up the first children's rights thesis award in the Netherlands to stimulate academic debate on and around the UNCRC. Another Dutch example from 2013, that indicates the controversy about the UNCRC, is the violation of article 10 UNCRC by the Dutch state.<sup>9</sup>

The academic relevance of this thesis is twofold. To start with, it exposes and clarifies seemingly unaccountable events, as the UNCRC was removed from the AC, at least twice. To continue with, this thesis takes a controversial - but justifiable - stand by clarifying the significance of ICA as part of the UNCRC, in such a way and at such a level, which could only be achieved by including political decisions and the weight of a fierce, political driven, ICA lobby. To realize this, I made use of a book written by Roelie Post.<sup>10</sup> She works as a civil servant for the EC since 1983 and gives detailed insights in her book about the way the EU deals with the UNCRC and ICA.

In order to position the insights Post provides us with, I will include a significant example of the academic discourse about the UNCRC and ICA in this thesis; the

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<sup>8</sup> I. Iusmen, 'The EU and the Global Promotion of Children's Rights Norms', in A. Boening et al. (eds.), *Global Power Europe – Vol. 2. Policies, Actions and Influence of the EU's External Relations* (Berlin Heidelberg 2013) 322.

<sup>9</sup> Kinderombudsman, 'Kinderrechtenmonitor', <http://www.dekinderombudsman.nl/ul/cms/fckuploaded/2013%20Kinderrechtenmonitor.pdf> (10 June 2014) 146.

<sup>10</sup> R. Post, *Romania: for export only. The untold story of the Romanian 'orphans'* (St. Annaparochie 2007) no page number.

Bartholet-Smolin debate. They are considered to be the most outspoken and eloquent scholars on ICA. Bartholet's main concern is to ensure the rights of millions of unparented children through the practice of ICA, which she sees as an appropriate and just form of intervention. Smolin, on the other hand, blames ICA for creating the framework of systematic corruption, large-scale trafficking, and what he labels "child laundering."<sup>11</sup>

In the wake of the 65<sup>th</sup> anniversary of the Universal Declaration on Human Rights (UDHR) and the 25<sup>th</sup> anniversary of the UNCRC, this thesis attempts to contribute to the controversial human rights debate about the importance of the UNCRC for ICA.

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<sup>11</sup> E. Bartholet, 'Ratification by the United States of the Convention on the Rights of the Child: Pros and Cons from a Child's Rights Perspective', *The ANNALS of the American Academy of Political and Social Science* 633 (2011) 94-99.

## 1. The United Nations Convention on the Rights of the Child (UNCRC)

This year marks the 25<sup>th</sup> anniversary of the UNCRC (hereafter the Convention, except when UNCRC is required for the purpose of clearness), which is the most rapidly and widely ratified international human rights treaty in history.<sup>12</sup> The Convention aims to protect the most vulnerable in our societies, the children. By Child is meant 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'.<sup>13</sup>

Children's rights - at an international level - date back to the Geneva Declaration of 1924. A five-point text was taken up by the League of Nations after which it was adopted as a seven-point declaration at the 1959 UN General Assembly.<sup>14</sup> 'The Convention is part of the body of UN human rights instruments, based in the UN Charter and elaborated in instruments such as the Universal Declaration on Human Rights (1948) and the International Covenants (1966).<sup>15</sup> The origins of the Convention go back as far as 1979, which was marked the international year of the child. The draft convention, submitted by the government of Poland, formed the occasion after which a ten-year drafting exercise followed.<sup>16</sup> On 20 November 1988, the Convention was adopted and entered into force in 1990, on 2 September.

The Convention is 'the first instrument to incorporate the complete range of international human rights; including civil, cultural, economic, political and social rights as well as aspects of humanitarian law.'<sup>17</sup> These laws establish furthermore that state parties must ensure the rights of the child. Once they signed and ratified the Convention, they are obliged to implementation of all articles from the Convention. Children's rights are positive rights; state parties are required to take positive action, which empowers children to enjoy their rights.

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<sup>12</sup> UNICEF, 'Convention on the Rights of the Child', <http://www.unicef.org/crc/> (9 June 2014).

<sup>13</sup> United Nations Convention on the Rights of the Child, Article 1.

<sup>14</sup> S. C. Bischoff van Heemskerck, *The UN convention on the rights of the child: a comparative study* (Amsterdam 1999) 11.

<sup>15</sup> Ibidem, 7.

<sup>16</sup> Office of the High Commissioner for Human Rights, 'Publications – Fact Sheets – Fact Sheet No. 10 (Rev.1), The Rights of the Child', <http://www.ohchr.org/Documents/Publications/FactSheet10rev.1en.pdf> (22 June 2014).

<sup>17</sup> UNICEF, 'Convention on the Rights of the Child – Rights under the Convention on the Rights of the Child' (19 May 2014), [http://www.unicef.org/crc/index\\_30177.html](http://www.unicef.org/crc/index_30177.html) (9 June 2014).

The Convention consists of four categories of rights and its guiding principles.<sup>18</sup> The guiding principles are normative and ought to be realized and guaranteed. The responsibility for the realization of the rights is primarily a state concern. Nevertheless, in the end, adults anywhere are responsible for realization of the well-being and taking action in the best interest of the child as they are put forward in the Convention. 'Under article 4 of the Convention, state parties are required to undertake all appropriate legislative, administrative and other measures to implement the Convention.'<sup>19</sup>

Children's Rights furthermore need observance, for which the Committee on the Rights of the Child (hereafter the Committee) gathers in Geneva. The Committee normally holds three sessions per year consisting of a three-week plenary and a one-week pre-sessional working group.<sup>20</sup> In this way, a periodic reporting by state parties to the Committee takes place; protecting the rights of the child. In addition, individual complaints can be brought forward to the Committee after national remedies (legal procedures) have been exhausted.

## 1.1 Ratification and Implementation of the UNCRC

More countries than ever have ratified the Convention. Except for South-Soudan, Somalia, and the United States of America (US), every country, recognized by the UN, has ratified the Convention.<sup>21</sup> This is unprecedented in the history of international human rights. To current date, 194 state parties have signed the Convention. The country status of the Convention exists of ratification, acceptance, accession and succession. The most important information this gives us, is enclosed in the declarations and reservations paragraph of the country status. Some provisions of the Convention could be incompatible with national law. If this is the case, countries can make reservations on the conflicting provisions; for instance in case of incompatibility with the laws of Islamic Shari'a and local legislation in effect.

Studying the country status of the Convention, there seems to be a discrepancy between the moment of signing and accepting the Convention by a member state. Take

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<sup>18</sup> Office of the High Commissioner for Human Rights, 'Publications – Fact Sheets – Fact Sheet No. 10 (Rev.1), The Rights of the Child', (22 June 2014).

<sup>19</sup> Ibidem.

<sup>20</sup> Office of the High Commissioner for Human Rights, 'Human Rights Bodies – Committee on the Rights of the Child', <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIntro.aspx> (9 June 2014).

<sup>21</sup> United Nations Treaty Collection 'Databases – Chapter IV HUMAN RIGHTS – 11. Convention on the Rights of the Child' [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en) (18 June 2014).

the Netherlands for example; there is a gap of more than five years between these moments. Albeit signing the Convention obliges a country to take measures to implement the Convention, Jan Pronk, former Dutch minister involved in the creation of the Convention, stated that the Netherlands did not ratify until national law was adapted in such a way the Convention would be of no infringement to Dutch law anymore.<sup>22</sup>

Thus, the implementation of the Convention involves different steps and could take several years. Moreover, compliance with the Convention is not a direct and guaranteed consequence of its implementation. These aspects of the Convention will be disregarded in this thesis, as they do not proceed with ratification of the Convention.

## 1.2 The non-ratification of the UNCRC by the US

The US is possibly the most outspoken country in the world when it comes to the rule of law and democracy, which are very important (export) ideals for the US. The US is also the most powerful country in the world that has taken upon itself the role of international peacekeeper, whether or not based upon humanitarian intervention. Notwithstanding the fact that their interventions as such additionally (in)directly benefit significant self-interest.

When we take a closer look at the human rights track record of the US, we see a country that was; 'active in the creation of the United Nations, with its fundamental statements on human rights in the U.N. Charter; [...] also very active in the creation of the [...] Universal Declaration of Human Rights, which is a foundational statement of the modern human rights.<sup>23</sup> At the same time we see that a number of significant human rights conventions have not been ratified by the US; even when they ratify, it generally takes place being subjected to significant reservations, including a declaration that the Convention is not self-executing and hence is not justiciable in US courts.<sup>24</sup>

A general ambivalence and careful consideration of human rights treaties in the US is one way of explaining the non-ratification of the UNCRC by the US.<sup>25</sup> This can be seen from the perspective of the principle of negative rights, which means the US legal system is built on what governments may not do. Contraire to the positive rights principle, which articulates what governments must do. Another way of explaining the

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<sup>22</sup> J.P. Pronk, Personal interview by Patrick Noordoven, 19 November 2013.

<sup>23</sup> David M. Smolin, 'The Corrupting Influence of the United States on a Vulnerable Intercountry Adoption System: A Guide for Stakeholders, Hague and Non-Hague Nations, NGOs, and Concerned Parties' in: *Selected Works by David A. Smolin* (2013) 22-23.

<sup>24</sup> Ibidem, 24.

<sup>25</sup> Ibidem, 33.

non-ratification of the UNCRC by the US derives directly from one of the consequences the Convention has for ICA; 'UNCRC ratification poses grave risks to children because of its restrictions on ICA', according to Elizabeth Bartholet.<sup>26</sup> In the next sub-chapter the subsidiarity principle will be explained through which this view on the best interest of the child becomes clear.

### 1.3 The UNCRC and Inter Country Adoption (ICA)

The refusal of the US to ratify the UNCRC is directly relevant to ICA, given the multiple provisions pertaining to either adoption or related topics.<sup>27</sup> Following articles from the Convention will illustrate this. By examining the adoption related articles of the Convention, the importance of the Convention with regard to ICA becomes clear. Articles 7-11, as well as articles 20 and 35 are of significance to ICA whereas article 21 is entirely dedicated to ICA. For the purpose of distinctive clarification, article 21 will be regarded in the following sub-chapter.

#### Article 7

A crucial aspect of children's right is the right 'to know and be cared for by his or her parents'.<sup>28</sup> The right to be cared for by his or her parents is qualified by the words "as far as possible". It may not be possible to identify parents, and even when they are known, it may not be in the child's best interests to be cared for by them.<sup>29</sup> This right is part of the so-called survival and development rights. If this right is not realized, in many cases children might be subject to (illegal) ICA.

Birth registration is a fundamental aspect of this right. The birth certificate, which can be obtained through the certificate of birth registration, aims to guarantee the right to identity (article 8), which is particularly important in case of ICA. A birth certificate, in theory, provides access to the right to identity (article 8).

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<sup>26</sup> Bartholet, 'Ratification by the United States of the Convention on the Rights of the Child', 94.

<sup>27</sup> Smolin, 'The Corrupting Influence of the United States on a Vulnerable Inter-country Adoption System', 35.

<sup>28</sup> United Nations Convention on the Rights of the Child, Article 7.1.

<sup>29</sup> UNICEF, *Implementation Handbook for the Convention on the Rights of the Child – Fully revised third edition* (Geneva 2007) 97.

### Article 8

This article aims to preserve the identity of the child by making state parties responsible for the lawful establishment of the name, nationality and family relations of the child.<sup>30</sup>

The provisions of this article were introduced in 1986 by the Argentinean delegation drafting the Convention, on the grounds that it was necessary to secure a state intervention if 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. A number of these children had been adopted by childless couples; active steps were needed to trace these children and establish their true identity.<sup>31</sup>

On the whole, articles 7 and 8 emphasize biological relationships. As such they form the roots of the identity of the child in case of ICA.<sup>32</sup> Nationality loss can occur as a consequence of ICA.

### Article 9

Children should not be separated from their parents against their will.<sup>33</sup> This article furthermore safeguards that all procedures to separate children from their parents must be on fair grounds. It also affirms children's rights to maintain relations and contact with both parents.<sup>34</sup>

Juridical parental relations are altered in case of ICA; biological parental relations remain the same though.

### Article 10

This article is concerned with rights to "family reunification", in accordance with the obligations of states parties under article 9, paragraph 1.<sup>35</sup> The "family reunification" concerns children who are, or whose parents are, involved in entering or leaving a country.

Political initiatives to restrict the possibilities of family reunification can be conflicting with this right. If the child and its parents can stay together, normally ICA would not be considered as a measure to act in the best interest of the child. If this right does not meet compliance, ICA could eventually be considered as a childcare measure.

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<sup>30</sup> United Nations Convention on the Rights of the Child, Article 8.1.

<sup>31</sup> UNICEF, *Implementation Handbook for the Convention on the Rights of the Child*, 113.

<sup>32</sup> Bischoff van Heemskerck, *The UN convention on the rights of the child*, 150.

<sup>33</sup> United Nations Convention on the Rights of the Child, Article 9.

<sup>34</sup> UNICEF, *Implementation Handbook for the Convention on the Rights of the Child*, 121.

<sup>35</sup> United Nations Convention on the Rights of the Child, Article 11.



### Article 11

‘States Parties shall take measures to combat the illicit transfer and non-return of children abroad.’<sup>36</sup> Although the difference with article 35 is not completely clear, article 11 applies to ‘children taken for personal rather than financial gain, [...], whereas “sale” and “trafficking” has a commercial or sexual motive. Furthermore, article 11 is exclusively focused on children who are taken out of their country, whereas article 35 is not.’<sup>37</sup>

As children can eventually become subject to ICA (after an illicit transfer and/or the non-return of the child), either via personal as well as financial gain, this article is relevant to ICA.

### Article 20

Article 20 concerns children who are temporarily or permanently unable to live with their families.<sup>38</sup> This article emphasizes the importance of continuity in a child’s upbringing; including the child’s ethnic, religious, cultural and linguistic background.<sup>39</sup>

The consequence of ICA is a discontinuity of all aspects article 20 includes. Therefore, it forms an indirect measure to keep children from becoming subject to ICA.

### Article 35

‘States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of, or traffic in, children for any purpose or in any form.’<sup>40</sup> This article acts as a ‘fail-safe protection for children at risk of abduction, sale or trafficking.’<sup>41</sup> “The Optional Protocol to the UNCRC defines the sale of children as follows: ‘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.’<sup>42</sup> ICA is subject to this definition.

ICA many times involves grey zones (illegal aspects of legal ICA), which this article aims to prevent. In addition, all forms of illegal ICA in essence fall under this article; by making state parties responsible for the main sources of illegal ICA, which involves abduction of, the sale of, or traffic in, children.

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<sup>36</sup> United Nations Convention on the Rights of the Child, Article 10.

<sup>37</sup> UNICEF, *Implementation Handbook for the Convention on the Rights of the Child*, 143.

<sup>38</sup> United Nations Convention on the Rights of the Child, Article 20.

<sup>39</sup> UNICEF, *Implementation Handbook for the Convention on the Rights of the Child*, 277.

<sup>40</sup> United Nations Convention on the Rights of the Child, Article 35.

<sup>41</sup> UNICEF, *Implementation Handbook for the Convention on the Rights of the Child*, 531.

<sup>42</sup> *Ibidem*, 533.

## 1.4 Article 21.b UNCRC (Subsidiarity Principle)

Article 21 UNCRC is the only explicit and integral article on adoption of the combined articles that form the Convention. Article 20 mentions adoption as one of the possible options for the care of children without families. Article 21.b requires that ICA must only be undertaken as a last resort.<sup>43</sup> The implementation handbook of the Convention explains why.

*Children are a highly desirable commodity in countries where low birth rates and relaxed attitudes towards illegitimacy have restricted the supply of babies for adoption. This has led to an apparently increasing number of adoptions being arranged on a commercial basis or by illicit means. Without very stringent regulation and supervision children can be trafficked for adoption or can be adopted without regard for their best interests; some children are even adopted for nefarious purposes, such as child prostitution or forms of slavery.<sup>44</sup>*

From the discussions in the preparatory meetings on the UNCRC it became apparent that all parties wished to limit adoptions, both nationally and internationally. The debate about the subsidiarity principle, leaving ICA as a last resort, remained unsolved.<sup>45</sup> Venezuela even felt that article 21 opened the door to trafficking, but had no effect on the outcome of the article, as the requested adjournment on the debate was not granted; Canada and Brazil expressed the opinion that ICA should be a last resort, when all other possibilities were exhausted.<sup>46</sup>

## 1.5 The Hague Convention on Inter Country Adoption

The Hague Convention (HC) is not as self-explanatory as the UNCRC for at least two reasons. In the first place, the HC on ICA came into place in 1993, four years after the creation of the UNCRC. Instead of further elaboration (i.e. in the form of additional and optional protocols) on the UNCRC adoption article (21), a new treaty was created. Secondly, 'the HC envisages cooperation between state parties with a view to banning any trade in children and merely allowing ICA when this proves to be in the best interest

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<sup>43</sup> UNICEF, *Implementation Handbook for the Convention on the Rights of the Child*, 297.

<sup>44</sup> Ibidem, 297.

<sup>45</sup> Bischoff van Heemskerck, *The UN convention on the rights of the child*, 183.

<sup>46</sup> Ibidem, 183.

of the child.’<sup>47</sup> In other words: The preconditions for ICA, as put forward in the subsidiarity article of the UNCRC, are put aside. The HC gives preference to ICA above other childcare measures, such as foster placement or institutional care in the home country of the child.

Comparing the UNCRC and the HC, two basic distinctions, leading to one overall analysis, can be made. First, the UNCRC is a universal international human rights treaty in which the adoption article is 1 article out of 54 articles. (Note that the US did not ratify the UNCRC.) Second, the HC is a private law treaty, which holds 48 articles; all of the articles are on ICA. (Note that the US did ratify the HC.)

The HC is not part of the AC and could only become part of the AC if all EU member states have ratified the HC. In this view, it is remarkable that Croatia, who joined the EU in 2013, ratified the HC simultaneously with its EU membership.

### **Requirement and responsibility for Inter County Adoption**

An adoption within the scope of the HC shall take place only if the competent authorities of the state of origin have established that the child is adoptable.<sup>48</sup> Establishing if a child is adoptable involves a theoretical concept, which in practice requires extensive investigation, in countries, under conditions, which often hardly meet the set criteria for such investigations. To put it simple, it is extremely complex to effectively and objectively establish if a child is adoptable.

Receiving ICA countries might be capable of meeting the criteria for extensive investigation, but they could perceive any obligation for such family preservation efforts to be the duty of the country of origin. The HC does not impose such responsibilities on receiving ICA countries which charges the state of origin with determining the adoptability of the child and giving “due consideration” to domestic placements.<sup>49</sup>

### **Last resort**

ICA comes as a last resort, according to the UNCRC, but also (naturally speaking<sup>50</sup>) for the parents of the concerning child. Furthermore, the conditionality expressed in article 4 of the HC has to be seen from the perspective of enabling ICA; the

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<sup>47</sup> Bischoff van Heemskerck, *The UN convention on the rights of the child*, 182.

<sup>48</sup> Hague Conference on Private International Law, ‘Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption’ (29 May 1993) <http://www.hcch.net/upload/conventions/txt33en.pdf> (17 June 2014), Article 4a.

<sup>49</sup> Smolin, ‘The Corrupting Influence of the United States on a Vulnerable Intercountry Adoption System’, 37.

<sup>50</sup> It is against (human) nature for parents to relinquish their child.

HC is about enabling ICA, whereas the UNCRC is not. In this perspective the UNCRC forms a more objective and stringent monitored universal human rights framework.<sup>51</sup>

One could argue the HC reinforces article 21 UNCRC and seeks to ensure that ICA takes place in the best interests of the child and with respect for his or her fundamental rights; seeking to prevent the abduction, the sale of, or traffic in children.<sup>52</sup> The HC aims to give effect to article 21 UNCRC by adding substantive safeguards and procedures to the broad principles and norms laid down in the UNCRC. The HC establishes minimum standards, but does not intend to serve as a uniform law of adoption.<sup>53</sup> Nevertheless, one could argue the HC brings together demand and supply to facilitate ICA. This can be seen from the perspective of the participatory countries; they show a clear distinction between sending and receiving countries. The HC basically sets a private law framework standard in order to realize ICA within the provisions of the HC. The safeguarding principles of the HC are fit to deal with ICA procedures, contrasting with the UNCRC, which does not form an ICA framework.

### **Subsidiarity Principle**

'Subsidiarity in the Convention means that Contracting States recognize that a child should be raised by his or her birth family or extended family whenever possible. If that is not possible or practicable, other forms of permanent care in the State of origin should be considered. Only after due consideration has been given to national solutions should intercountry adoption be considered, and then only if it is in the child's best interests. As a general rule, institutional care should be considered as a last resort for a child in need of a family.'<sup>54</sup>

The reservations being made by 'not possible or practicable', as well as 'due consideration', in combination with considering institutional care as a last resort, thus favors ICA to local and national forms of care; contraire to the subsidiarity principle of the UNCRC.

### **Paradox**

One could argue - from the perspective of an international treaties level - that by forming the HC a paradox was generated, which created a breach to the initial consensus

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<sup>51</sup>The HC is ratified by 64 countries as opposed to 194 countries who ratified the UNCRC: [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=69](http://www.hcch.net/index_en.php?act=conventions.status&cid=69)

<sup>52</sup> Hague Conference on Private International Law, 'Welcome to the Intercountry Adoption Section', [http://www.hcch.net/index\\_en.php?act=text.display&tid=45](http://www.hcch.net/index_en.php?act=text.display&tid=45) (22 June 2014).

<sup>53</sup> Hague Conference on Private International Law, 'Outline Hague Intercountry Adoption Convention' (January 2013), <http://www.hcch.net/upload/outline33e.pdf> (17 June 2014), 1.

<sup>54</sup> Ibidem, 2.

on ICA that derived from the UNCRC. The paradox essentially takes shape in the academic ICA discourse, which is not subjected to ratification and implementation at a political interstate level. Unlike the UNCRC, the HC does not encompass a children's right to be raised by their parents. This is not in line with the HC's preamble that it is "taking into account the principles" of the UNCRC.

Hence, apparent alignment of the HC with the UNCRC is not supported with appropriate articles for achievement.

### **Conflicting treaties**

It becomes apparent that the subsidiarity principles of the UNCRC and the HC are about the explanation of what is in the best interest of the child. They are in essence fundamentally different on this aspect; ICA under the HC is considered to be in the best interest of the child whereas the UNCRC 'allows countries to forbid ICA altogether.'<sup>55</sup> When comparing and analyzing both treaties, one has to take into consider the disparity of both treaties; the HC is a private law treaty and not a human rights treaty. The different outcome on ICA both treaties have is extensively described by Roelie Post who worked for the EC as an expert, reporting on the status children's rights in Romania in the interest of the EU enlargement process. The outcome Post describes can be summarized as the HC enabling ICA to become in the best interest of the child.<sup>56</sup> The non-existing right to a child might be the best conceivable explanation in this perspective.

## **1.6 Conclusion**

The UNCRC is regarded to be the most important human rights treaty in history. Unprecedented consensus on the Convention empowers the most vulnerable of our societies; the children. The US plays a historical role in the history of human rights treaties, yet has not ratified the Convention. Clear provisions are made in the rights that the Convention embodies; ICA forms a crucial aspect of the Convention. The subsidiarity principle of the Convention leaves ICA as a last resort by pronouncing that without very stringent regulation and supervision children can be trafficked for adoption or can be adopted without regard for their best interests.

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<sup>55</sup> Bartholet, 'Ratification by the United States of the Convention on the Rights of the Child', 94.

<sup>56</sup> Post, *Romania: for export only*, 17.

Not all countries in the world see it that way, despite the nearly unanimous ratification of the UNCRC, dozens of countries have ratified the HC; giving way to ICA limited by the UNCRC. The US regards the UNCRC therefore as a risk to unparented children; in this view ICA represents important options for unparented children.<sup>57</sup> 'The failure of the UNCRC to be seriously considered for ratification in the US persists throughout various political administrations, and there is little likelihood that it will be ratified in the near future'.<sup>58</sup>

Upon examination, the concept of ICA is riddled with tensions, paradoxes, and practical difficulties that threaten the various rights of the child, which are not in line with ICA.<sup>59</sup> 'The HC fails to provide any concrete rules or procedures that would require affirmative family preservation efforts as a condition precedent to a valid intercountry adoption. [...] Unfortunately, the structure of the HC can be used to obscure this broader responsibility and create a false justification for a total abdication of responsibility for functions which the Hague Adoption Convention gives, in the first instance, to the other nation'.<sup>60</sup>

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<sup>57</sup> Bartholet, 'Ratification by the United States of the Convention on the Rights of the Child', 81.

<sup>58</sup> Ibidem, 34-35.

<sup>59</sup> Smolin, 'The Corrupting Influence of the United States on a Vulnerable Intercountry Adoption System', 6.

<sup>60</sup> Ibidem, 36-37

## 2. The Acquis Communautaire (AC) and the UNCRC

The Acquis Communautaire is the body of common rights and obligations, which binds all the member states together within the EU. It is constantly evolving and comprises: the content, principles and political objectives of the treaties; the legislation adopted in application of the treaties and the case law of the EU Court of Justice (CJEU); the declarations and resolutions adopted by the EU; measures relating to the common foreign and security policy; measures relating to justice and home affairs; international agreements concluded by the EU community and those concluded by the member states between themselves in the field of the EU's activities.<sup>61</sup>

Candidate states to join the EU have to accept the AC before they can join the EU. The states that apply to become a new EU member have to make sure the AC will be converted into their national legislation and will be implemented from the moment of their accession to the EU. These conditions look deceptively straightforward, however, on closer inspection, readiness to join lies in the eye of the beholder.<sup>62</sup> Nonetheless, for this thesis, these observations do not apply to the UNCRC. The EU conditionality in regard to the AC is not self-evident about what kind of economic and political systems would meet the Copenhagen criteria.<sup>63</sup> Since the Convention is a human rights instrument, and as such part of the AC, it is not subject to any such conditionality interpretations.<sup>64</sup>

### 2.1 The Copenhagen criteria and the UNCRC

Any country seeking membership of the EU must conform to the conditions set out, and the principles laid down in, the treaty on the EU. Relevant criteria were established in 1993 by the European Council in Copenhagen and strengthened in 1995 by the Council in Madrid. This means that, to join the EU, a candidate state must meet the accession criteria, also known as the Copenhagen criteria. The pre-accession strategy and accession negotiations provide the necessary framework and

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<sup>61</sup> Europa portal, 'Summaries of EU legislation – Glossary', [http://europa.eu/legislation\\_summaries/glossary/community\\_acquis\\_en.htm](http://europa.eu/legislation_summaries/glossary/community_acquis_en.htm) (21 June 2014).

<sup>62</sup> H. Grabbe, 'European Union Conditionality and the Acquis Communautaire', *International Political Science Review* 23 (2002) 249-250.

<sup>63</sup> Ibidem, 250.

<sup>64</sup> European Commission – DG Justice, 'EU acquis and policy documents on the rights of the child' (24 February 2014), [http://ec.europa.eu/justice/fundamental-rights/files/eu\\_acquis\\_2013\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/eu_acquis_2013_en.pdf) (21 June 2014) 19-20.

instruments.<sup>65</sup> The criteria require that a new member state has achieved three conditions.<sup>66</sup>

1. Political: Stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.
2. Economic: Existence of a functioning market economy and the capacity to cope with competitive pressure and market forces within the EU.
3. Acceptance of the AC: Ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.

It is for the European Council to decide on opening negotiations with a candidate state; the political criterion must be satisfied. The political criteria involve guaranteeing human rights. The UNCRC forms the most important human rights treaty in history, making it self-evident that the Convention, being part of the AC, requires candidate countries to convert and implement the Convention into their national legislation.

Since the Convention is part of the threshold criteria to open negotiations with a candidate state and since all possible future EU member states have ratified the Convention, one could argue that the compliance with the Convention could never be the matter of discussion for the EU as it is part of its existing and in place legislation. In addition, as the competent authority, the Committee of the Rights of the Child monitors the compliance with the Convention, leaving no other relevant accountability to the EU than ensuring future member states will comply with the Convention for following three reasons.

- A. The political threshold criteria of guaranteeing human rights; including the UNCRC.
- B. The acceptance of the AC; listing the UNCRC.
- C. The implementation of the AC; including the UNCRC as part of the common rights and obligations, which bind all the member states together.<sup>67</sup>

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<sup>65</sup> Europa, 'Summaries of EU legislation – Glossary', [http://europa.eu/legislation\\_summaries/glossary/accession\\_criteria\\_copenhagen\\_en.htm](http://europa.eu/legislation_summaries/glossary/accession_criteria_copenhagen_en.htm) (21 June 2014).

<sup>66</sup> European Commission – Enlargement, 'Enlargement Policy – Glossary', [http://ec.europa.eu/enlargement/policy/glossary/terms/accession-criteria\\_en.htm](http://ec.europa.eu/enlargement/policy/glossary/terms/accession-criteria_en.htm) (21 June 2014).

<sup>67</sup> This common right derives from the universal ratification of the UNCRC of all possible future member states of the EU.



The European Commission has made it its priority to uphold the high standards in children's rights protection set by the Convention. The enlargement process remains a powerful tool for promoting children's rights.<sup>68</sup>

## 2.2 The enlargement process; the role of the AC and the UNCRC

In terms of enlargement policy, countries acceding to the EU must have ratified the UNCRC as part of the Copenhagen criteria and the compilation has been amended to better reflect that.<sup>69</sup> The acceding countries are subject to the export of the AC into their legal system, as part of the preparatory route to join the EU. The export of the fixed or so-called 'pre-signature' AC into the legal system of a candidate state, means that 'parties to external agreements agree to fix the scope of the AC at the point of the formal signature of an agreement.'<sup>70</sup> The fixed AC is embedded in the EU external agreements; meaning, in the preparatory route of becoming a EU member state, the candidate country constitutes 'an integral part of the third country legal orders'.<sup>71</sup> In its internal dimension, the main objective of the AC is to enable consistent development of the EU. For that matter, the export of the AC is considered to be an intrinsic part of the foreign policy of the EU.<sup>72</sup> Its constitutional treaty commits the EU to strict observance and development of international law.<sup>73</sup>

In the process of accession to the EU, a new member state is obliged to commit - through appropriate administrative and judicial structures - to the so-called "acquis criterion" or "accession acquis", encompassing the situation of existence at the moment of accession of the new member state.<sup>74</sup> In its external dimension, the AC comes also into play as the "accession acquis", before the formal accession of the new member state to the EU; its objective is to fulfill the Copenhagen criteria and subsequently to qualify for EU membership. The "accession acquis" is a dynamic concept that changes with every

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<sup>68</sup> EU marks 20 years of Child Rights Protection and Looks ahead

<sup>69</sup> European Commission – DG Justice, 'EU acquis on the rights of the child' (11 December 2013), <http://www.againstchildtrafficking.org/wp-content/uploads/DG-JUST-to-ACT-11-12-2013.pdf> (9 June 2014) and European Commission – DG Justice, 'EU acquis and policy documents on the rights of the child' (24 February 2014), [http://ec.europa.eu/justice/fundamental-rights/files/eu\\_acquis\\_2013\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/eu_acquis_2013_en.pdf) (9 June 2014).

<sup>70</sup> R. Petrov, 'Exporting the Acquis Communautaire into the Legal Systems of Third Countries', *European Foreign Affairs Review* 13 (2008) 35.

<sup>71</sup> Petrov, 'Exporting the Acquis Communautaire into the Legal Systems of Third Countries', 36.

<sup>72</sup> Ibidem, 52.

<sup>73</sup> Petrov, *The External Dimension of the Acquis Communautaire*, 5.

<sup>74</sup> Ibidem, 8.

wave of EU enlargement.<sup>75</sup> One could argue that the “accession acquis” can be regarded as ‘a result of a political compromise which is reached in the course of accession negotiations’<sup>76</sup>. Notwithstanding the fact that, eventually, the “accession acquis” means that a candidate state is expected to implement the whole scope of AC.<sup>77</sup>

In order to determine whether the Convention could be subject to the dynamic “accession acquis” or not, the following EU statement is applicable. The EU Commission established in 2005 that the UNCRC is considered to be an inseparable human rights instrument for the realization of the objectives of the EU; therefore, the Convention is a crucial reference and benchmark for the European Commission to assess the progress made by candidate countries in order to join the EU.<sup>78</sup> This leaves us without any doubt about the true status of the Convention or the EU.

Moreover, in the same declaration on the UNCRC and the enlargement process, the Commission states that concerning ICA, the Commission’s policy is univocally in the interest of the child; whereby explicitly referring to the abuse of the international adoption system. This leaves us without any doubt about the importance of article 21 UNCRC.

## 2.3 Romania’s accession to the EU

Shortly after the creation of the Convention it became a point of interest for the EU; beginning in the early 1990s, in connection with the enlargement process - especially pertaining Romania - and shortly after followed with regard to development policy.<sup>79</sup> The European Parliament (EP) and the EC criticized the Romanian adoption system, ‘which had become close to a market for children’, which lead to the moratorium on ICA.<sup>80</sup> The EU played a key role in encouraging reform and funding the childcare sector in Romania and acknowledged the importance of the articles of the Convention discussed in the first chapter of this thesis.<sup>81</sup> The moratorium on ICA, imposed by the EU in 2001 as a mechanism of preventing children becoming victim to

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<sup>75</sup> Petrov, *The External Dimension of the Acquis Communautaire*, 10.

<sup>76</sup> Ibidem, 18.

<sup>77</sup> Ibidem, 11.

<sup>78</sup> Group of Commissioners on Fundamental Rights, Anti-Discrimination and Equal Opportunities, ‘Children’s Rights and the Enlargement Process - Contribution of DG Enlargement’ (Brussels 2005).

<sup>79</sup> Iusmen, ‘The EU and the Global Promotion of Children’s Rights Norms’, 324.

<sup>80</sup> Group of Commissioners on Fundamental Rights, Anti-Discrimination and Equal Opportunities, ‘Children’s Rights and the Enlargement Process’, 3.

<sup>81</sup> Ibidem, 7.

trafficking (for ICA), was the first time the EU had taken an official stance on the practice of ICA.<sup>82</sup>

The Convention being part of the AC was an important topic of internal EU discussion for Romania's accession to the EU.<sup>83</sup> In this case, the Convention being part of the AC defined the competences of the EU. In 1999, the EP appointed MEP Baroness Nicholson as rapporteur for Romania's EU accession. On 6 March 2001 she had a meeting with Commissioner Verheugen (ELARG), discussing the selling of children for ICA.<sup>84</sup> This shows not only the importance of the Convention (being part of the AC) in case of Romania's accession, but also the importance of (illegal) ICA. The matters are evidently linked as becomes clear from, inter alia, a meeting between the Baroness and UNICEF Romania being held on 3 November 2000; essentially entangling both the UNCRC and the HC subsidiarity principles.<sup>85</sup> Romania's admission to the EU involved article 21.b UNCRC, which has the effect of protecting children from falling victim to illicit ICA.<sup>86</sup>

## 2.4 Romania's accession to the NATO

Romania's accession to NATO should be seen in the context of cooperation, sharing strategic interests, between the EU and the NATO. 'An active and effective EU contributes to the overall security of the Euro-Atlantic area. Therefore the EU is a unique and essential partner for NATO.'<sup>87</sup> This strategic partnership, at first sight, might have little to do with the Convention being part of the AC. At a closer look however, there appears to be a 'political link between the clearance of children for adoption and Romania's accession to NATO'; EU Commissioner Günter Verheugen, responsible for enlargement, declared: "I didn't think that could be possible".<sup>88</sup> When Romania's Prime Minister Adrian Nastase visited US Defense Secretary Colin Powell in Washington in 2001 to discuss Romania's admittance to NATO, Powell called to lift the moratorium on ICA. Since the US' demand for ICA is the highest in the world, Powell was acting in the interest of the US ICA lobby. One could argue that Powell effectively made ICA a

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<sup>82</sup> Iusmen, 'The EU and the Global Promotion of Children's Rights Norms', 326.

<sup>83</sup> Post, *Romania: for export only*, 89, 92-93, 95, 97, 207, 211.

<sup>84</sup> Ibidem, 47

<sup>85</sup> Ibidem, 73.

<sup>86</sup> Ibidem, 101.

<sup>87</sup> NATO, 'NATO-EU: a strategic partnership' (29 October 2012)

[http://www.nato.int/cps/en/natolive/topics\\_49217.htm](http://www.nato.int/cps/en/natolive/topics_49217.htm) (21 June 2014).

<sup>88</sup> G. Atai, 'Documentary: Suche Kind, zahle bar - Die Adoptionslobby' (WDR 2009).

condition for NATO admittance as the ICA issue had to be resolved, before accession to NATO could be further discussed.<sup>89</sup>

This high-level political ICA lobby was neither incidental, nor a relevant and justifiable bilateral matter. In the first place the ICA lobby was not related to Romania's admission to NATO, instead it became topic of interest as it formed an effective way of power politics. This was in line with US Ambassador Guest who, prior to the ICA moratorium, 'had made the Romanian Government understand that if they were to suspend adoptions, this would mean the end of this government.'<sup>90</sup> In 2001, Ronald Federici declined his recommendation for appointment as US Ambassador to Romania. Mr. Federici is a specialist in the neuropsychiatric evaluation and treatment of post-institutionalized children.<sup>91</sup> Through his nomination for Ambassador, the importance of ICA for the US in Romania becomes apparent. In the second place, the US mission in Brussels effectively addressed the EU to seek clarification of the EC's position and simultaneously demanding the Romanian ICA moratorium to be lifted; 'as a continued moratorium would create potential problems in the US Congressional debates on Romania's candidacy for NATO accession.'<sup>92</sup>

## 2.5 Conclusion

The Copenhagen criteria form the key for the principle insight in answering the central question of this thesis. Having examined the nature and scope of the AC, it is to say that the Convention is part of the AC; both in the internal as well as external dimension of the AC. Furthermore, the EU has set clear criteria to safeguard children's rights through means of securing the implementation and compliance with the Convention by means of, inter alia, their external policy (enlargement). 'The EU's embracement of children's rights norms and principles is part of the EU's broader commitment to promote human rights, norms and values.'<sup>93</sup> The EC and the European Council have developed policy measures and instruments based on the Convention, aiming at addressing the violation of children's rights, emphasizing their commitment with the UNCRC.<sup>94</sup>

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<sup>89</sup> Post, *Romania: for export only*, 107.

<sup>90</sup> Ibidem, 119.

<sup>91</sup> Ibidem, 79-80.

<sup>92</sup> Ibidem, 118.

<sup>93</sup> Iusmen, 'The EU and the Global Promotion of Children's Rights Norms', 323.

<sup>94</sup> Ibidem, 334.

Romania proves the extensive and in-depth commitment to the Convention. According to the EC, children's rights are now monitored in all current and potential candidate states as part of the AC criteria.<sup>95</sup>

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<sup>95</sup> Iusmen, 'The EU and the Global Promotion of Children's Rights Norms', 327.

### 3. ICA and the removal of the UNCRC from the AC

On 4 June 2004, ELARG Commissioner Verheugen wrote to Secretary of State Powell about the issue of ICA from Romania.<sup>96</sup> In this letter, the EU takes a clear stand on ICA and the UNCRC. It emphasizes the importance of article 21.b UNCRC (subsidiarity principle) and continues to convey that ICA is an exception within the EU. In spite of the fact Verheugen does not specifically refer to the AC in his letter, he stresses that all EU member states have ratified the Convention and he takes a formal and normative stance in following the Convention's subsidiarity provision. As long as Romania has no legislation in force that fully complies with the Convention, he states, the EC considers a moratorium on ICA necessary.

Meanwhile, the UNCRC was taken from the AC, as we have seen in the introduction of this thesis. The formal, internal EU, explanation given regarding this irregular matter does not correspond with Verheugen's letter, which is very clear about the direct obligations for the EU member states regarding the Convention, in particular concerning ICA.

In April 2005, DG ELARG issues a report on children's rights and the enlargement process. As we have seen, the AC is of crucial importance for the enlargement process. In the financial and children's rights annex of the report, the Commission expresses to have played 'a key role in encouraging reform and funding the childcare sector in Romania'. As mentioned before, the childcare sector in Romania had fallen little short to a market for children. Hence, some € 100 million were spent initially on improving children's rights conditions and funding reform policies and projects.

On 3 April 2006 the EC answered to an inquiry about the moratorium on ICA from Romania that the EU 'attaches utmost importance' to the UNCRC; followed by the statement that Romania from 1 January 2005 adopted new legislation 'aligned with the EU AC in this area and it transposes the UNCRC'.<sup>97</sup> This EC letter once more emphasizes the Convention's subsidiarity principle and goes on explaining that the adopted legislation by Romania, which is aligned with the Convention, 'represents a firm reaction to past irregularities and a measure conducive to developing intra-country alternatives in the best interest of the child'.<sup>98</sup> This firm letter from the EC echoes the UNCRC as part of the AC, one could argue.

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<sup>96</sup> WikiLeaks – Cable '04BRUSSELS2496' (10 June 2004), <http://wikileaks.org/cable/2004/06/04BRUSSELS2496.html> (21 June 2014).

<sup>97</sup> European Commission – Cabinet of Vice President Franco Frattini, 'Mrs Linda Robak, Executive Director "For the Children SOS" (3 April 2006) – see Annex.

<sup>98</sup> Ibidem.

On 5 May 2009, the US Congress wrote a letter to Cristian Diaconescu, Foreign Minister of Romania (Romania became an EU member in 2007). In this letter signed by a combined total of 21 Senators and Congress man and woman - of whom senator Mary Landrieu signed first and senator John Kerry second - the US Congress, on behalf of 215 members of the Congressional Coalition on Adoption underlined the following: 'we urge you to reform current law in Romania to more fully promote and support parental care for children. This reform process must include a reevaluation of your decision to remove ICA as an important permanency option for children who cannot find permanent homes in Romania.'<sup>99</sup> In other words, US Congress pressures Romania to apply the HC subsidiarity principle, in opposition to article 21.b UNCRC. Current law in Romania is part of EU law; hence the AC and the UNCRC are in place.

In 2013, the UNCRC was once more removed from the AC. This time it was even replaced by the HC.<sup>100</sup> In the cause of undocumented and unexplained events, it occurred that, after ACT's inquiry to DG JUST, the UNCRC reappeared on the AC and the HC disappeared from the AC. In addition, ACT pointed out that the EU informed the US, that the EU has no competence on matters related to ICA, referring to the HC.

On 11 December 2013, DG JUST answered to ACT's inquiry about the UNCRC and the HC. This is, by my knowledge, the last known publicly available communication about the removal of the UNCRC from the AC; including the HC.

Different forms of explanation concerning the UNCRC being part of the AC have been analyzed in this thesis. The EC's statement of November 2013 leaves us puzzled with yet another clarification about the UNCRC and the AC: 'we do not consider the UNCRC as EU AC in legal terms because the EU has not ratified it'.<sup>101</sup>

In September 2013, Senator Landrieu introduced an ICA reform bill to the US Congress. She believes the bill will increase the protection of children and help ensure that parents raise children.<sup>102</sup> Contrary to article 21.b UNCRC, the bill strengthens ICA.<sup>103</sup> The bill, called Children in Families First (CHIFF) meets strong opposition; 'opponents

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<sup>99</sup> Congress of the United States – Washington, DC 20515, 'The Honorable Cristian Diaconescu, Foreign Minister Romania', (5 May 2009) – see Annex.

<sup>100</sup> AgainstChildTrafficking (ACT), 'Acquis Communautaire', (8 November 2013), <http://www.againstchildtrafficking.org/wp-content/uploads/FINAL-VERSION-Letter-Le-Bail-incl-Annex.pdf> (21 June 2014).

<sup>101</sup> European Commission – DG Justice, 'EU *acquis* on the rights of the child' (11 December 2013), <http://www.againstchildtrafficking.org/wp-content/uploads/DG-JUST-to-ACT-11-12-2013.pdf> (21 June 2014).

<sup>102</sup> C. Wetzstein, 'International adoption bill orphaned', *The Washington Times*, 20 May 2014, <http://m.washingtontimes.com/news/2014/may/20/international-adoption-bill-orphaned/> (22 June 2014).

<sup>103</sup> Children in Families First – Legislation, 'Children in Families First Act – Chiff', <http://childreninfamiliesfirst.org/legislation-chiff/#what> (22 June 2014).

counter that the proposed bill is an effort by adoption agencies to save the lucrative but dwindling practice of international adoption.’<sup>104</sup> Elizabeth Bartholet, who is against the subsidiarity principle of the UNCRC as we have seen in the first chapter, calls CHIFF ‘a light at the end of a long tunnel of despair’.<sup>105</sup>

## Conclusion

This thesis provides considerable insights on the question to what extent plausible explanations can be given for the removal of the UNCRC from the AC. The understandings this thesis postulate can be categorized into three different levels. First of all, as we have seen, the US plays a significant role in ICA. This thesis reveals various efforts of the US to influence ICA, some of them in a very direct manner, some of them in a more indirect manner.

Secondly, since the EU has made the Convention part of its policies in different ways, the scope of the Convention is clear. Therefore the EU promotes the Convention via its external policies in the light of a broad commitment to human rights. For this purpose, EU bodies issued several reports. These reports emphasize the urgency to comply with the Convention, both in the EU’s internal as well as external dimension. The notion that the EU ‘called for children’s rights to be taken into consideration across EU trade negotiations, development, cooperation and humanitarian aid policies and political dialogues’, proves the EU’s endorsement of the Convention. This can only be aligned with its internal policies and internal commitment to the Convention; Ioannis Vrailas, Deputy Head of the Delegation of the European Union to the United Nations, spoke on behalf of the EU in 2012 at the at the United Nations 67<sup>th</sup> General Assembly Third Committee Item 65: Rights of the Child.

*“The promotion, protection and respect for the rights of the child remain high on the EU’s agenda. The Treaty of the European Union today explicitly requires the EU to promote the protection and the respect for the rights of the child. This is embodied by the “EU Agenda for the Rights of the Child” which was adopted last year.”*<sup>106</sup>

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<sup>104</sup> Wetzstein, ‘International adoption bill orphaned’, *The Washington Times*, 20 May 2014, (22 June 2014).

<sup>105</sup> Ibidem.

<sup>106</sup> European Union Delegation to the United Nations – New York, ‘EU Statement – United Nations 3<sup>rd</sup> Committee: Rights of the Child’ (18 October 2012) [http://www.eu-un.europa.eu/articles/en/article\\_12736\\_en.htm](http://www.eu-un.europa.eu/articles/en/article_12736_en.htm) (22 June 2014).



Third, from the case perspective of Romania we learned that the EU - until a certain extent - practiced what it preached. The UNCRC, its subsidiarity principle and measures against child trafficking, they were all high on the agenda of the EU's commitment to the UNCRC in Romania. From this perspective the EU - until a certain extent - was not receptive for internal and external pressure from the ICA lobby. The internal EU pressure is not further examined for this thesis because it forms the basis for a different thesis.

Nonetheless, the EU experienced both external as well as internal pressure from ICA lobby. Many times, the appearance of the single facts - of which the lobby consists of - provide a counter argument to the laymen's eye. In 2005 for instance, a commission to assist implementing the new law in Romania sought expert assistance. Italy and France provide the requested assistance; by analyzing the non-favorable ICA aspects of the new Romanian law.<sup>107</sup>

## **Plausible explanations for the removal of the UNCRC from the AC**

1. The formal EU explanations given for the removal of the UNCRC from the AC consist of narrow legal argumentation. The formal explanations generate more questions than they provide answers. Also, the explanations given do not apply to the exact course of events, instead they are normative and as such not applicable to the situations in which the UNCRC was removed from the AC; i.e. on behalf of the European enlargement process.

In the end, a whole new explanation for the removal was given by posing that the EU has not ratified the UNCRC. Since the EU is not a country, this explanation is not applicable, as only countries have ratified the UNCRC.

This thesis reveals instead the plausible explanation behind the formalistic arguments; ICA lobby has led to the unaccountable removals of the UNCRC from the AC.

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<sup>107</sup> Post, *Romania: for export only*, 217.

2. The unaccountable removals of the UNCRC from the AC are subject to transatlantic pressure. Meaning, the US has exercised serious pressure upon the EU to facilitate ICA as this thesis shows.

This thesis argues that the actions - the realized EU policies - repeatedly were too fragile not to be influenced by the transatlantic ICA pressure. This thesis shows moreover that the official explanations given for the removal of the UNCRC from the AC are not satisfactory and even contradicting official EU policy, action and communication.

This thesis reveals instead the plausible explanation behind the US interference with EU policy; consequent and persistent transatlantic ICA lobby, resulting in the removal of the UNCRC from the AC, being replaced by the HC.

The conclusions drawn in this thesis form a direct threat to the UNCRC and in particular to the subsidiarity principle of the UNCRC. The removal of the Convention from the AC therefore puts human rights under pressure. This can only be countered by awareness, which this thesis aspires to generate.

## List of acronyms

AC	Acquis Communautaire
ACT	Against Child Trafficking
CJEU	Court of Justice of the European Union
DCI	Defense for Children International
DG	Directorate General / Director General
EC	European Commission
ELARG	European Commission for Enlargement
EP	European Parliament
EU	European Union
HC	The Hague Convention on Inter Country Adoption
ICA	Inter-Country Adoption
JAI	Justice et Affaires Intérieures (DG Justice)
LS	Legal Service
MEP	Member of European Parliament
NATO	North Atlantic Treaty Organization
UNCRC	United Nations Convention on the Rights of the Child 1989
UNICEF	United Nations International Children's Emergency Fund 1946

## **Glossary**

### **Adoption**

Adoption creates legally new family ties between the child and his (adoptive) parents; they become the child's juridical parents.

### **Ask the EU**

Provides information about the EU on request.

### **Committee of the Rights of the Child**

Experts monitor the implementation of the UNCRC.

### **Commissioner**

Heads a EU Commission and is part of the EC.

### **Convention**

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

### **Court of Justice of the European Union (CJEU)**

Comprising the general court and specialized courts; ensures compliance with the EU law in interpreting and applying EU treaties.

### **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 agreements.

### **European Commission**

Exists of commissioners who act in the general interest of the EU with complete independence from national governments. As guardian of the EU treaties, the Commission oversees the application of EU law under the control of the CJEU.

**European Council**

Heads of State or the government of the member states meet at least four times a year to ensure the best interest of the development and the general political guidelines of the EU.

**European Parliament (EP)**

The EP is the assembly of the representatives of the EU citizens.

**European Union Treaty**

The EU originates from the creation of the European Coal and Steel Community (1951), after which 16 treaties were signed until the treaty of Nice (2001). The EU Treaty refers to this series of treaties.

**International Covenants**

Civil, Political, Economical, Social and Cultural rights.

**Inter Country Adoption (ICA)**

ICA makes the child subject to a permanent transfer from the child's birth country to another country where the child becomes new legal ties; both in regard to the adoptive parents as well as country of the child's adoptive parents. This involves a discontinuity of ethnic, religious, cultural and linguistic background of the child; including possible loss of nationality.

**Illegal Inter Country Adoption**

Illegal ICA either refers to ICA with illegal aspects (such as financial gain); which does not necessarily makes the adoption of the child illegal. Or it essentially refers to the illicit deprivation of the right to identity, being the sole basis - and the direct consequence - for this form of illegal ICA.

**League of Nations (1919-1946)**

Organization to maintain world peace.

**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.

**Secretary of State**

US equivalent to Minister of Foreign Affairs.

**Subsidiarity Principle**

ICA is only to be considered if the child cannot be suitably placed to be taken care for in his or her own country; effectively leaving ICA as a last resort solution to act in the best interest of the child.

**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**

Main deliberative body of the UN; equal voting.

**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.

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## Annexes

<http://wikileaks.org/cable/2004/06/04BRUSSELS2496.html>

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

101256Z Jun 04

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

SIPDIS

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

TAGS: [PREL CASC CVIS RO EUN USEU BRUSSELS](#)

SUBJECT: VERHEUGEN RESPONSE TO DEPUTY SECRETARY ON ROMANIAN ADOPTIONS

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

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

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

¶3. (U) Beginning of Text:

Dear Mr. Secretary of State,

Thank you for your letter of 4 May 2004 on the issue of intercountry adoptions from Romania.

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

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

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

line with the UN Convention on the Rights of the Child.

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

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

Yours sincerely,

/S/

Gunter Verheugen

M. P.J. KUIJPER



EUROPEAN COMMISSION  
Directorate-General Enlargement

The Acting Director-General

Brussels, 05 OCT. 2004  
ELARG/BAR D(2004) 104459

NOTE FOR THE ATTENTION OF MR. JONATHAN FAUL  
DIRECTOR GENERAL DG JAI



*Mr. Jonathan Faul*

Subject: JAI-Acquis – status of the UN Convention on the Rights of the Child (UNCRC)

The UN Convention on the Rights of the Child was placed on the JAI-Acquis list in 1998, as part of the Human Rights related instruments to which candidate countries must accede. This Convention, like other UN Conventions, was considered “inseparable from the attainment of the objectives of the Union”.

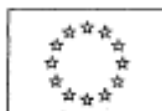
We have noted that the October 2003 and September 2004 JAI-Acquis-Updates no longer list the UNCRC among the conventions to which the candidate countries must accede. Since the UNCRC is one of the main human rights conventions, we would request to restore it on the JAI Acquis-list.

*The importance of this has been stressed by Commissioner Dehaene in his parliamentary hearing.*

*Fabrizio Barbato*  
Fabrizio Barbato

cc. Mr. Michel PETITE (Legal Service)

P. KUIJPER



EUROPEAN COMMISSION  
DIRECTORATE-GENERAL JUSTICE AND HOME AFFAIRS

The Director-General

29 OCT. 2004

Brussels,  
JAI/A/2/WH-mc D (2004) 9972

2851

**NOTE FOR THE ATTENTION OF MR FABRIZIO BARBASO  
DIRECTOR-GENERAL F.F., DG ELARG**

**Subject:** JHA acquis – status of the UN Convention on the Rights of the Child

**Ref.:** Your note of 5 October ELARG/BAR D(2004) 104459

Thank you for your note concerning the inclusion of the above-mentioned Convention in the list of JHA acquis.

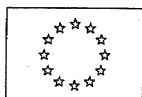
To prepare for the accession of the new Member States, DG ELARG compiled in 2003, in close cooperation with concerned line DGs and the Legal Service, a list of international conventions that new Member States should accept upon accession. After discussions with the Legal Service, it was agreed not to include on the list the UN Convention on the Rights of the Child as no direct obligations for Member States could be clearly derived from EU legislation in this area.

However, at the time Commission services were not aware of a Council document from 1998 on the JHA acquis (JAI 7 ELARG 51) which listed the Convention as being inseparable from the attainment of the objectives of the Treaty on European Union and the Treaty of Amsterdam. As we have now ascertained, this document was approved by Coreper on 3 June 1998 and then went as an "A" item to the Council.

In these circumstances, we will, as you requested in your note, restore the UN-Convention on the Rights of the Child to the list of JHA acquis and inform TAIEX accordingly.

Jonathan Faull

Cc: ~~Mr. P. Kuijper~~ (Legal Service)  
Mr Jung Olsen (TAIEX)



EUROPEAN COMMISSION  
Cabinet of Vice President Franco Frattini

Carlo Presenti  
Head of Cabinet

- 3 AVR. 2006

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

0510

*Monsieur,*

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

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

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

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

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

Commission européenne, B-1049 Bruxelles / Europese Commissie, B-1049 Brussel - Belgium. Telephone: (32-2) 299 11 11.  
Office: BERL 12/361. Telephone: direct line (32-2) 292.12.29. Fax: (32-2) 298.85.95.



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

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

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

Yours sincerely  
Al Pint.

**Congress of the United States**  
**Washington, DC 20515**

May 5, 2009

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

Dear Mr. Foreign Minister:

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

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

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

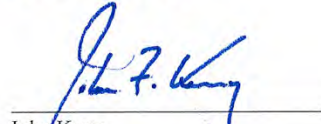
Please know that Romania is not the only nation faced with the challenge of securing a brighter future for its orphaned children. In the United States, approximately 60,000 foster children are still in need of a permanent family to call their own. Because U.S. law remains focused on the best interests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

Sincerely,

PRINTED ON RECYCLED PAPER

  
 Mary Landrieu  
 United States Senator

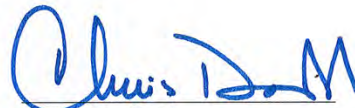
  
 James Inhofe  
 United States Senator

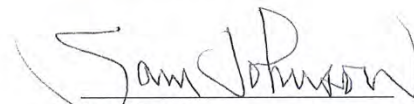
  
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 United States Senator

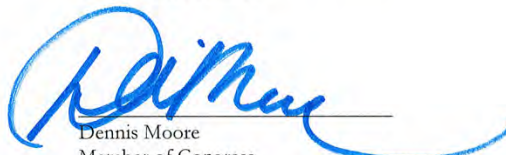
  
 Richard Burr  
 United States Senator

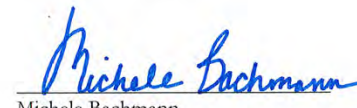
  
 Carl Levin  
 United States Senator

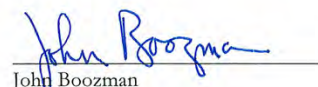
  
 Joseph Lieberman  
 United States Senator


  
 Christopher Dodd  
 United States Senator

  
 Sam Johnson  
 Member of Congress

  
 Dennis Moore  
 Member of Congress

  
 Michele Bachmann  
 Member of Congress

  
 John Boozman  
 Member of Congress

  
 Jim Himes  
 Member of Congress

  
 Barney Frank  
 Member of Congress

  
 Jim Oberstar  
 Member of Congress



Chris Smith  
Member of Congress




Daniel B. Maffei  
Member of Congress



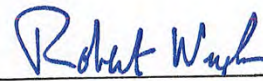
Dan Burton  
Member of Congress



Frank Wolf  
Member of Congress



Rosa L. DeLauro  
Member of Congress



Robert Wexler  
Member of Congress



Blanche Lincoln  
United States Senator



European Commission  
 DG JUST  
 Ms. Francoïse LE BAIL  
 Director General  
 Rue de la Loi 200  
 B – 1049 BRUSSEL

Brussels, 8 November 2013

**Re :** *Acquis Communautaire*

Dear Ms. Le Bail,

I hereby would like to express my concern about the unclear position of DG JUST about the status of the UN Convention on the Rights of the Child (UNCRC) and the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.

UN Convention on the Rights of the Child (UNCRC)

In 2004 DG JLS removed the UNCRC from the *acquis* list (Annex I), and after a request from DG Enlargement put it back on the list as it was considered “inseparable of the attainment of the objectives of the Union”. (Annex II)

Earlier this year I found online the “EU *acquis* and policy documents on the rights of the child”, which did not list the UNCRC<sup>i</sup>.

In order to verify whether this was a simple administrative omission, our organisation wrote to the Commission’s coordinator for the rights of the child requesting clarification. Her reply, of 3 July 2013, was the EU has not ratified the UNCRC so it could not be considered as EU *acquis*. (Annex III)

Puzzled by this reply, I requested under the right of access to documents in the EU treaties, as developed in Regulation 1049/2001, documents which contain a listing of the EU *acquis* for Justice (timeframe 2003 0 2013). As reply I received a new *acquis* list.<sup>ii</sup>

That *acquis* list does list the UNCRC under the chapter Fundamental Rights.

./..



Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption

The document "EU *acquis* and policy documents on the rights of the child", drafted by the Commission's child rights coordinator, also lists the Hague Convention as part of conventions and instruments to which new Member States must accede.

The latest *acquis* list, which I received under regulation 1040/2001, does not mention the Hague Convention.

As far as I understand, the 1993 Hague Convention on Adoption is not part of the *acquis*, as the Council's Working Party on Civil Law, on 10 November 2010, informed the US that the EU has no competence on matters related to intercountry adoption.

I would like to know when and how the decision was taken to put the Hague Convention on the *acquis* list.

Furthermore, I kindly request you to provide clarity on these issues and to ensure that the *acquis* list as published on DG JUST's website contains the correct information.

Looking forward to your reply,

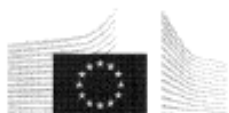
Yours sincerely,

Arun DOHLE

Encl.: 3

<sup>i</sup> [http://ec.europa.eu/justice/fundamental-rights/files/eu\\_acquis\\_2013\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/eu_acquis_2013_en.pdf)

<sup>ii</sup> [http://www.asktheeu.org/en/request/eu\\_acquis\\_justice\\_and\\_home\\_affair#outgoing-1928](http://www.asktheeu.org/en/request/eu_acquis_justice_and_home_affair#outgoing-1928)



**EUROPEAN COMMISSION**  
DIRECTORATE-GENERAL JUSTICE

Directorate C: Fundamental rights and Union citizenship  
Unit C.1 : Fundamental rights and rights of the child  
Head of Unit

Brussels,  
JUST.C1/MT/ts/3891709s

Mr Arun Dohle  
Against child trafficking  
[arun.dohle@gmx.de](mailto:arun.dohle@gmx.de)

**Subject: EU *acquis* on the rights of the child**

Dear Mr Dohle

Thank you for your letter of 8 November 2013 addressed to Director General Françoise Le Bail, in which you point out inconsistencies between the *acquis* listed in the compilation on rights of the child and elsewhere.

**UN Convention on the rights of the child**

We do not consider the UN Convention on the rights of the child as EU *acquis* in legal terms because the EU has not ratified it. As you will have seen from Section 2 of the compilation, EU work is guided by the UNCRC and recent legislation explicitly refers to it. In terms of enlargement policy, countries acceding to the EU must have ratified the UNCRC as part of the Copenhagen criteria and the compilation has been amended to better reflect that. I attach the revised version of the compilation that is posted here: [http://ec.europa.eu/justice/fundamental-rights/files/eu\\_acquis\\_2013\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/eu_acquis_2013_en.pdf)

**Hague Convention of 29 May 1993 on protection of children and cooperation in respect of intercountry adoption**

This Convention is not part of the EU *acquis* and it has now been deleted from Section 16.57 of the compilation - indicative list of conventions and instruments to which candidate countries must accede.

Yours sincerely

Salla Saastamoinen

Enc Version 1.3 of EU *acquis* on rights of the child

