

**RIGHTS OF UNPARENTED CHILDREN UNDER SIEGE: THE NEED
FOR A HUMAN RIGHT TO BE ADOPTED**

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MA LONG THESIS: Human Rights

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Abstract

There are millions of parentless children in the world who currently fade out in institutions or on the street all over the world. Regardless of the fact that domestic and intercountry adoption (ICA) is often the only way for such children to be raised in a family environment and thus to have the opportunity to develop to the highest of their potential and enjoy a life full of dignity, international law, as it stands at the moment, is very hostile towards adoption and, especially towards ICA and leaves the discretion on whether to allow or ban ICA to the discretion of the corresponding states.

The thesis examines how international law, namely the Convention on the Rights of the Child and the Hague Intercountry Adoption Convention deal with ICA. Secondly, a systematic preview of the arguments used against ICA is being offered. What is found is that international law allows for using ICA and the rights of unparented children as instruments for states to achieve other political goals, which clearly falls against the interests of the children. This thesis aims at challenging this state of play by arguing that the international community, national states and advocates for children's rights should recognize that children have a fundamental right to be adopted, which includes the right to be considered for ICA. This right will act as a way of protecting children against state interests.

Next, the impact of international law and the discourse surrounding ICA on a domestic level are analyzed through the experience of one sending country – Bulgaria. Finally, what obligations would recognizing the right of children to be adopted will impose on states is discussed.

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List of abbreviations

BEIP – Bucharest Early Intervention Project

CRC – UN Convention on the Rights of the Child

CRComm – UN Committee on the Rights of the Child

ECtHR – European Court of Human Rights

EU – European Union

ICA – Intercountry Adoption

UN – United Nations

UNICEF – United Nations Children’s Fund

Notes:

All translations from Bulgarian are mine.

All web links have been last visited on 30 June 2015.

Introduction

There are millions of unparented children¹ in the world, many of whom can potentially benefit from adoption in order to be able to live in a “supportive, protective and caring environment that promotes his/ her full potential”.² And while the exact number of unparented children is unknown,³ it is for sure that a great number of children currently live in detrimental conditions in institutions or on the street. Data shows, that institutionalization of “orphaned, maltreated, and abandoned young children” is still common all over the world – in “Central and South America, Asia, the Middle East, and Africa, and even parts of Europe”.⁴ Actually, this situation is not unique for poor and underdeveloped countries, but also for many developed countries, such as Western European countries⁵ and Japan.⁶ Furthermore, in 2013 there were more than 400,000 children in foster care in the USA only.⁷

¹ For the purpose of this thesis, I will use unparented children as used by James G. Dwyer to mean “children who should be available for adoption because both of their parents have died, abandoned them, or permanently relinquished custody and no kin or community members have taken over the role of raising them”. Dwyer explains further that “[f]or the most part, such children are either in state institutional or foster care or are living on the streets“. JG Dwyer, *Inter-Country Adoption and the Special Rights Fallacy*, UNIV. PENNSYLVANIA J. INT. LAW, 103 (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2316383 (last visited Apr 17, 2015).

² Guidelines for the Alternative Care of Children, G.A. Res. 64/142, U.N. Doc. A/RES/64/142 (Feb. 24, 2010). (hereinafter: UN Guidelines for Alternative Care), § 4.

³ A brief discussion on the estimated number of unparented children will be presented below.

⁴ CHARLES A NELSON, NATHAN A FOX & CHARLES H ZEANAH, ROMANIA’S ABANDONED CHILDREN: DEPRIVATION, BRAIN DEVELOPMENT, AND THE STRUGGLE FOR RECOVERY 318 (2014).

⁵ Catherine Hamilton-Giachritsis & Kevin Browne, *Forgotten children? An update on young children in institutions across Europe*, 88 EARLY HUM. DEV. 911–914, 912 (2012), <http://dx.doi.org/10.1016/j.earlhumdev.2012.09.018> (noting that in 2003 countries like Belgium, Finland, Spain, the Netherlands, Portugal and France had “very high rates of very young children in institutional care”).

⁶ HUMAN RIGHTS WATCH, WITHOUT DREAMS: CHILDREN IN ALTERNATIVE CARE IN JAPAN, 2 (2014), http://www.hrw.org/sites/default/files/reports/japan0514_ForUpload_1.pdf (According to the official governmental statistics in 2013 there were “just under 34,000 children” placed in government-run institutions).

⁷ Child Welfare Information Gateway. (2015). Foster care statistics 2013. Washington, DC: U.S. Department of Health and Human Services, Children’s Bureau.

Although, it is now widely accepted that institutionalization of children is a “very extreme” form of neglect⁸ and as such “may have tragic, long-term consequences for psychological, neurological, and biological development”,⁹ children are still being raised in such facilities. There is a global movement towards deinstitutionalization and states are making steps to deal with the problem – they provide assistance to mothers and families in order not to abandon their children, alternative care options are being developed for children, which may include kinship care,¹⁰ foster care,¹¹ residential care,¹² adoption and intercountry adoption (hereinafter: ICA). While both domestic and intercountry adoptions are formally not recognized as forms of alternative care, because once an adoption order becomes final, the respective child is considered to be with parental care,¹³ they are nevertheless listed as forms of alternative care by the UN Convention on the Rights of the Child (hereinafter: CRC)¹⁴ and, when reintegration or kinship care is not available, adoption is often the only option for children to be able to grow up in a family. Ironically, while international human rights law, and especially the CRC emphasizes on numerous occasions the importance of family care,¹⁵ it does not require states to consider adoption as a form of alternative care and a means to provide an actual family care, when the original is not available for any reason. In the context of ICA, the CRC at best does not prohibit it. While the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (hereinafter: the Hague Adoption

⁸ NELSON, FOX, AND ZEANAH, *supra* note at 306.

⁹ *Id.* at 304.

¹⁰ Kinship care is defined as “family-based care within the child’s extended family or with close friends of the family known to the child, whether formal or informal in nature”. UN Guidelines for Alternative Care, § 29(c)(i).

¹¹ Foster care is defines as “situations where children are placed by a competent authority for the purpose of alternative care in the domestic environment of a family other than the children’s own family that has been selected, qualified, approved and supervised for providing such care”. UN Guidelines for Alternative Care, § 29(c)(ii).

¹² Residential care is defined as “care provided in any non-family-based group setting, such as places of safety for emergency care, transit centers in emergency situations, and all other short-and long-term residential care facilities, including group homes”. UN Guidelines for Alternative Care, § 29(c)(iv).

¹³ UN Guidelines for Alternative Care, § 30(b).

¹⁴ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

¹⁵ See below.

Convention) is considered by many as a step towards recognizing ICA, it is also far from actually endorsing it. So, international documents that specifically address the issue of adoption of children fail to recognize the right to be adopted, nor even to be considered for such an option, regardless of the fact that it can be in their best interests to be adopted domestically or internationally.

The aim of this thesis is to examine the rights of unparented children in general from the perspective of intercountry adoption. I argue that current state of children's rights law does not adequately protect the rights of unparented children because it allows for the instrumentalization of children in the name of political, economic and other interests, which is especially evident in the discourses surrounding ICA, as well as in the fact that many countries which have historically been involved in ICA have closed their adoption programs because of national and international pressure, which resulted in denying the opportunity of many unparented children in institutions or on the street to access to family care through ICA, which in many cases can be life-saving. This thesis argues, that a truly child-centered approach in providing alternative care for parentless children is to assess each and every child's individual situation on a case by case basis and consider what realistic options exist for them without employing nationalistic and paternalistic claims over unparented children.

In order this to be possible, I argue that a fundamental right of every child to be adopted, meaning to be considered for adoption, including for ICA when this is deemed to be in their best interest should be recognized by the advocates of children's rights. Acknowledging the existence of this right will raise the status of unparented children as true right holders and will act as a protective shield against states, which tend to use ICA policies in order to pursue their own interests. In order for such right to be addressed, one should depart from focusing on special children's rights instruments, and rather employ general human rights norms.

The thesis also aims at situating the legal issues of ICA, as well as the arguments employed in the discussions surrounding it in the national context. Thus, the involvement of Bulgaria in the intercountry adoption process on an international level, as well the different developments and discourses on a national level are being analyzed.

The first chapter of this thesis aims at situating ICA within international human rights law – namely the Convention on the Rights of the Child and the Hague Intercountry Adoption Convention. Offering a brief overview of the current trends in global ICA, the chapter continues with analyzing the main legal issues raised by the two conventions – a preference for domestic placement in alternative care, the best interests of the children involved in ICA, and the preservation of the child’s ethnic, religious, cultural and linguistic background.

Chapter 2 focuses on the discourse surrounding ICA by looking at the debates surrounding intercountry adoption with a particular focus on the employment of different negative arguments concerning the members of what I call the intercountry adoption *tetrad* – the child (the adoptee), their biological parents, the prospective adopters and the state, as a supreme regulator of policies affecting children. I argue that the current debates surrounding ICA are profoundly driven by political interests of states. The discourses most often picked up by media, politicians and scholars are based on a number of highly unfortunate dramatic situations and fail to employ genuine arguments concerning the rights of children ICA is meant to serve. The power relations within the debates are very much dominated by the interests of the states and leaves the other members of the adoption tetrad in a highly vulnerable position.

Chapter 3 aims at refocusing the discourse on ICA back to the rights of unparented children. It addresses the main arguments used by opponents of ICA and whether ICA actually results in causing adverse impacts on children. After that the argument for the need for recognition of a fundamental right to be adopted is presented. In order to be able to adequately address the need for a right to be adopted, I argue that a departure from the way child rights advocate should re-structure on how they look at children and start see them as subjects of not only children's rights but also of general human rights norms.

Following this, Chapter 4 looks at Bulgaria as a case study to understand how the different power relations in the ICA discourse shape the actual policies governments implement. The review of the developments in the ICA system of the country, confirms the notion that states are mainly driven by their own interests in the pursuit of populism and public image, which leaves unparented children vulnerable and their actual needs are left unaddressed. This also confirms the need of recognition of a right to be adopted as an important human right of a child.

Finally, Chapter 5 deals with the practical implications of the recognition of the right of unparented children to be adopted. The chapter argues that once a right to be adopted is acknowledged by a state, it has corresponding obligation to reassess its policies and positions towards ICA, which include among others the endorsement of ICA as an integral part of its national alternative care system, reassessing the Domestic Placement Preference Principle as well as positive obligations to put more efforts on fighting against abuses against children, so that unparented children are not denied of their right to be considered for ICA.

Chapter 1: The State of International Human Rights Law

There are millions of unparented children in the world – children that live in institutions or on the street and do not have biological parents or any meaningful relationship with their extended families. Yet, there are only around 30,000 children adopted internationally each year.¹⁶ Among the reasons for this discrepancy is the fact that ICA is perceived as a highly controversial issue and as such has been a subject of a number of compromises on behalf of the international human rights community. International law as it now stands regarding ICA mirrors this political compromises and gives a very high level of discretion to states in terms of whether ICA should be perceived as a viable option for the millions of unparented children across the world.

Aiming at situating ICA within international human rights law, this chapter starts with a brief overview of the number of the unparented children and children in institutions in the world and the available statistics of the numbers of ICA per year. Acknowledging the detrimental effects of institutionalization to the lives of unparented children, the Chapter continues to discuss the legal aspect of intercountry adoption by firstly providing a short general discussion of the UN Convention on the Rights of the Child as the most prominent source of international human rights law specifically focusing on children with the aim of critically analyzing the spirit of the Convention regarding the weight it provides to the interests of children, on one hand, and other parties concerned—parents and the state.

¹⁶ Peter Selman, *Global trends in intercountry adoption: 2001-2010*, 44 ADOPT. ADVOCATE (2012).

Having analyzed the general framework of the CRC, the chapter aims at situating ICA within the most influential international documents regulating adoption of children – the CRC and the Hague Adoption Convention and discussing several specific human rights dimensions of ICA – subsidiarity of ICA, the best interests of the children involved in ICA, preservation of the child’s “ethnic, religious, cultural and linguistic background”¹⁷. As CRC and the Hague Convention are “overwhelmingly negative in the sense that [they] focus[e] almost entirely on the bad things that can happen” in ICA and “sometimes prohibit international adoption altogether”,¹⁸ general human rights norms that can be relevant in the case of ICA are considered. The overall aim of this review of the legal framework surrounding ICA is to map the human rights dimensions of adoption as a manifestation of a most fundamental right of children to develop to the best of their potential and thus to be able to enjoy a meaningful life.

1. Unparented children, institutions and ICA – statistics and current trends

The family is recognized as the “fundamental group of society and the natural environment for the growth and wellbeing of [...] children”.¹⁹ Regardless of this fact, we live in a world where millions of children are deprived of parental care. Although, it is impossible to know the exact number of this population, a number of recorded estimates give an overview of the situation. The United Nations Children's Fund (hereinafter: UNICEF) estimates that there are around 145 million children who have lost at least one of their biological parents.²⁰ More than 16 million of them are

¹⁷ CRC, Article 20 (3).

¹⁸ Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 BUFFALO HUM. RIGHTS LAW REV. 152–203, 164 (2007).

¹⁹ CRC, Preamble.

²⁰ Johanna Oreskovic & Trish Maskew, *Red Thread or Slender Reed: Deconstructing Prof. Bartholet’s Mythology of International Adoption*, 147 BUFFALO HUM. RIGHTS LAW REV. 71–128 (2009).

believed to be double orphans – children who lost both of their biological parents.²¹ According to UNICEF, in 2009 in Eastern Europe and Central Asia alone, there were 1.3 million children separated from their families.²² Furthermore, there are an estimated 100 million street children²³ of whom around 25 million are believed to “truly live on the streets and without meaningful family ties”.²⁴

As far as the number of children in institutions is concerned, it is estimated that between 2,000,000 and 8,000,000 children are being raised in institutions around the world, although this number is believed to underestimate the real number of institutionalized children.²⁵ In Eastern Europe and Central Asia, where the rates of institutionalized children are the highest in the world,²⁶ in 2012 there were almost 600,000 children living in residential care, with more than 49,700 cases of new placements of children in institutional care during the same year.²⁷ The use of institutionalization as a form of care for children is not unique for underdeveloped countries but is also quite abundant

²¹ Laura Matney Shapiro, *Inferring a Right to Permanent Family Care from the United Nations Convention on the Rights of the Child, the Hague Convention on Intercountry Adoption, and Selected Scientific Literature Inferring a Right to Permanent Family Care*, 15 WASH. LEE J. CIV. RTS. SOC. JUST. 191 –225, 193 (2008).

²² UNICEF, CHILDREN UNDER THE AGE OF THREE IN FORMAL CARE IN EASTERN EUROPE AND CENTRAL ASIA: A RIGHTS-BASED REGIONAL SITUATION ANALYSIS (2013), http://www.unicef.org/ceecis/UNICEF_Report_Children_Under_3_FINAL.pdf.

²³ Sara A. Dillon, *Making Legal Regimes for Inter-country Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Inter-country Adoption*, 21 BOSTON UNIV. INT. LAW J. 179–257, 184 (2003).

²⁴ *Id.* at 184, citing: Childhope, *Who are the world's street children?*, at: <http://www.childhopeusa.com/kids/index.html> (n.d.).

²⁵ CHARLES A NELSON, NATHAN A FOX & CHARLES H ZEANAH, ROMANIA'S ABANDONED CHILDREN: DEPRIVATION, BRAIN DEVELOPMENT, AND THE STRUGGLE FOR RECOVERY (2014) at 318. (Explaining that the reasons for the difference between the official numbers and the real numbers of institutionalized children is complex, including the lack of official statistics, political will of states to under-report the children living in institutions and others).

²⁶ UNICEF, *supra* note.

²⁷ UNICEF Regional Office for CEE/CIS, TransMonEE 2014 Database (www.transmonee.org).

in countries like Japan,²⁸ the Netherlands,²⁹ Germany,³⁰ and France³¹. A substantial part of the children in institutions all over the world are with some kind of disability. In most cases, the conditions in which children with disabilities are being raised up are even more appalling and can have deadly consequences for the children raised in them.³² Children with disabilities in institutions are also “vulnerable to mental, physical, sexual and other forms of abuse as well as neglect and negligent treatment”.³³

While the material conditions in many institutions can be adequate and some specialized care may be available, the reality is that there is now more than enough evidence to demonstrate how damaging institutionalization for children is, especially for very young children, but not

²⁸ HUMAN RIGHTS WATCH, *WITHOUT DREAMS: CHILDREN IN ALTERNATIVE CARE IN JAPAN*, 2 (2014), http://www.hrw.org/sites/default/files/reports/japan0514_ForUpload_1.pdf (According to the official governmental statistics in 2013 there were “just under 34,000 children” placed in government-run institutions).

²⁹ Annemiek T. Hardera et al., *Different sizes, similar challenges: Out of home care for youth in Germany and the Netherlands*, 22 *PSYCHOSOC. INTERV.* 203–213 (2013), <http://psychosocial-intervention.elsevier.es/en/different-sizes-similar-challenges-out/articulo/90260046/> (last visited Apr 26, 2015) (providing information that in 2010 there were more than 15,000 children in residential youth care in the Netherlands).

³⁰ *Id.* (providing information that in 2010 there were 93,785 children in residential care in Germany).

³¹ Thomas Gabriel et al., *Out of home care in France and Switzerland*, 22 *PSYCHOSOC. INTERV.* 215–225 (2013), <http://psychosocial-intervention.elsevier.es/en/out-of-home-care-in/articulo/90260047/> (citing information that as of 2008 there were 48,800 children living in institutions and services).

³² Bulgaria is one notorious example. For more information, see: ECtHR, *Nencheva and others v. Bulgaria*, Application No. 48609/06, Judgment from 18 June 2013, in which the ECtHR ruled on a case where fifteen children and young adults died during the winter of 1996/97 only in one care home due to lack of food, heating and basic care. Furthermore, in 2010 the Bulgarian Helsinki Committee together with the Prosecutor’s Office made investigations in all functioning care homes for children with mental disabilities in the country. The results were appalling – 238 children died during the last ten years with at least two thirds of which were unnecessary and avoidable, including 31 deaths resulting from starvation, 84 – from general physical deterioration, 13 – from infections due to bad hygiene and 6 caused by accidents, such as freezing to death, drowning, suffocation and others. Bulgarian Helsinki Committee, *BHC ANNOUNCES THE RESULTS OF THE INSPECTIONS CARRIED OUT IN THE COUNTRY’S INSTITUTIONS FOR MENTALLY DISABLED CHILDREN* (2010), <http://www.bghelsinki.org/en/news/world/single/bhc-announces-the-results-of-the-inspections-carried-out-in-the-countrys-institutions-for-mentally-disabled-children/>.

Another such example is Russia, where children with disabilities in institutions suffer serious abuse and neglect. For more information, see: HUMAN RIGHTS WATCH, *ABANDONED BY THE STATE: VIOLENCE, NEGLECT, AND ISOLATION FOR CHILDREN WITH DISABILITIES IN RUSSIAN ORPHANAGES* (2014).

³³ Committee on the Rights of the Child, General Comment No. 9 – The rights of children with disabilities, *CRC/C/GC/9* (2006), para. 47.

exclusively so.³⁴ Despite that reality, most international bodies, such as the UN, describe ICA as a measure of “last resort”.³⁵

The current rates and global decline of the numbers of the children adopted internationally also mirror the “last resort” language. Even in 2004, when there was a peak in the number of ICAs with an estimated total of 45,288 children involved in ICA, which was a result of a steady growth,³⁶ the number of children who benefited from ICA was still immensely disproportional to the large number of children in institutions, even if we consider the most conservative estimates. But the situation actually got worse with a dramatic fall of the number of children involved in ICA – 37,526 children in 2007 (17.1 % fall)³⁷ and approximately 30,000 children in 2010³⁸ (a total of about 35 % fall since 2004).

The reasons for this dramatic fall are mainly political.³⁹ Romania and Bulgaria were pressured by the EU in their pre-accession negotiations to limit the number of children adopted internationally.⁴⁰

³⁴ OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, THE RIGHTS OF VULNERABLE CHILDREN UNDER THE AGE OF THREE: ENDING THEIR PLACEMENT IN INSTITUTIONAL CARE, http://www.europe.ohchr.org/Documents/Publications/Children_under_3__webversion.pdf.

³⁵ See, for example, *Id at 24* (stating that “If reunification [in the biological family] is not possible, in-country adoption may be recommended, while international adoptions should be seen as a last resort”). For a detailed analysis of the “last resort” language see also, for example: Benyam Dawit Mezmur, *Intercountry Adoption as a Measure of Last Resort in Africa: Advancing the Rights of a Child Rather than a Right to a Child*, 10 SUR - INT. J. HUM. RIGHTS 83–104 (2009).

³⁶ Peter Selman, *The rise and fall of intercountry adoption in the 21st century*, 52 INT. SOC. WORK 575–594, 575 (2009).

³⁷ Peter Selman, *The rise and fall of intercountry adoption in the 21st century*, 52 INT. SOC. WORK 575–594, 579 (2009).

³⁸ Peter Selman, *Global trends in intercountry adoption: 2001-2010*, 44 ADOPT. ADVOCATE, 2 (2012).

³⁹ Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 BUFFALO HUM. RIGHTS LAW REV. 152–203 (2007).

⁴⁰ Romania is a classic example where after a tremendous amount of pressure of the EU during the pre-accession negotiations implemented a ban on all ICA in the country. For more information, see for example: Carrie A. Rankin, *Romania’s new child protection legislation: Change in intercountry adoption law results in a human rights violation*, 24 SYRACUSE J. INT’L L. COM. 259–286 (2006); Carrie A. Rankin, *Romania’s new child protection legislation: Change in intercountry adoption law results in a human rights violation*, 24 SYRACUSE J. INT’L L. COM. 259–286 (2006); Richard Carlson, *Seeking the Better Interests of Children with a New International Law of Adoption*, 55 NEW YORK LAW SCH. LAW REV. 733–779, 741–746 (2011).

A detailed analysis of the situation in Bulgaria is provided in Chapter 4.

China which traditionally had a great number of children adopted internationally, especially girls, because of the one-child policy implemented in the country⁴¹ because of concerns that many Chinese children were adopted by same-sex couples and single lesbian women and the fact that the country became “aware of the negative image that continuing international adoption can create”.⁴² According to Selman, similar were the driving forces behind Korea’s fall of children involved in ICA.⁴³ Russia is yet another example of a country which closed down ICA of children to the USA due to political reasons.⁴⁴

Other countries have severely limited ICA or even banned it over instances of abuses and trafficking of children.⁴⁵ But yet instead of implementing measures to fight procedural abuses, a number of countries, as explained above, enacted moratoria against all ICA, thus effectively condemning the lives of many adoptable children, who could have benefitted from ICA, but instead will remain in institutions or on the street.⁴⁶ The current state of play of international law, however, not only allows this, but according to many, it even encourages it.⁴⁷

The rest of this chapter will focus on the relationship between ICA and international human rights law. The two documents that have been the most influential and have “shaped the global debate on the legitimacy of international adoption”⁴⁸ are the 1989 UN Convention on the Rights of the Child and the Hague Convention on Protection of Children and Co-operation in Respect of

⁴¹ Bartholet, *supra* note at 160–161.

⁴² Peter Selman, *The rise and fall of intercountry adoption in the 21st century*, 52 INT. SOC. WORK 575–594, 590 (2009).

⁴³ Selman, *supra* note at 591.

⁴⁴ Human Rights Watch, RUSSIA: REJECT ADOPTION BAN BILL (2012), <http://www.hrw.org/news/2012/12/21/russia-reject-adoption-ban-bill> (explaining that a law banning adoption of Russian children by citizens of the United States was introduced in order to “retaliate for the so-called Magnitsky Act, which [...] calls for visa bans and asset freezes on Russian officials allegedly involved in the torture and killing of whistle blowers in Russia”).

⁴⁵ Carlson, *supra* note.

⁴⁶ A thorough analysis of the discourse both in favour and against ICA is presented in Chapter 2.

⁴⁷ Dillon, *supra* note.; Bartholet, *supra* note at 160–161.

⁴⁸ Laura McKinney, *International adoption and the Hague Convention: Does implementation of the convention protect the best interests of children?*, 6 WHITTIER J. CHILD FAM. ADVOCACY 368–412 (2007).

Intercountry Adoption. I argue that the current state of play of international human rights law, and especially children's rights law, and the way ICA is governed by it not only do not defend the rights of unparented children, but actually make possible severe violations of their rights to happen. It does so by allowing, in the words of Paulo Barrozo, the "instrumentalization of the young in the name of the state, politics, ethnicity, race, religion, economic interests".⁴⁹ That is why a new right of unparented children to be adopted must be codified in order to better ensure the respect for the fundamental rights and needs of unparented children. In order to achieve this, it is useful to consider the rights of unparented children within the broader scale of general human rights law and not to constrain the debates only within the much more narrow, and as we will be discussing in the following section, unproductive framework of children's rights.

2. The State of International Human Rights Law

2.1. CRC – Convention on the Rights of whom?

CRC is the world's most widely ratified international human rights convention.⁵⁰ Largely seen as a groundbreaking document that recognizes children as "moral and legal subjects possessed of fundamental entitlements, as having agency [and] a voice that must be listened to"⁵¹ it was adopted in 1989. According to Professor Bartholet the CRC represents "one of the strongest legal statements to date that children have full human rights entitlements, comparable with adults, and that their interests should be valued at least equally with adults' interests"⁵². There are four core principles that are the most important in the CRC – the principle of non-discrimination, the best

⁴⁹ Paulo Barrozo, *Finding Home in the World: A Deontological Theory of the Right to be Adopted*, 55 NEW YORK LAW SCH. LAW REV. 701–731, 710 (2011).

⁵⁰ As of March 2015 there are only two countries in the world that have not ratified the Convention – the United States of America and Somalia, which have both signed it.

⁵¹ DAVID ARCHARD, *CHILDREN RIGHTS AND CHILDHOOD* 58 (Second ed. 2004).

⁵² Elizabeth Bartholet, *Ratification by the United States of the Convention on the Rights of the Child: Pros and Cons from a Child's Rights Perspective*, 633 ANN. AM. ACAD. POL. SOC. SCI. 80–101, 80 (2011).

interest of the child principle, the right to life, survival and development and the respect for the views of the child.⁵³ These principles provide “provide the foundation for the recognition and protection of a number of civil, social, economic, cultural, and political rights enjoyed by children everywhere”.⁵⁴

At the same time, being “the most quickly ratified UN human rights treaty ever”⁵⁵ the CRC was a product of decades of negotiations. Such a worldwide consensus, however, requires compromises.⁵⁶ In reality, the Convention on the Rights of the Child “on the whole has as much to say explicitly about rights of parents, and implicitly about rights of cultures and nations, to possess and control children as it has to say about the rights of children themselves”.⁵⁷ Firstly, and perhaps most importantly, such a paternalistic approach is used in one of the cornerstones of the Convention – Article 3⁵⁸ – the best interest of the child principle.⁵⁹ The reference of the “rights and duties of parents” in the text of Article 3 creates a strong conflict of interests, which is especially

⁵³ UNICEF, THE CONVENTION ON THE RIGHTS OF THE CHILD - GUIDING PRINCIPLES: GENERAL REQUIREMENTS FOR ALL RIGHTS, http://www.unicef.org/crc/files/Guiding_Principles.pdf.

⁵⁴ McKinney, *supra* note at 377.

⁵⁵ Nicola Taylor, *Articles: What do we know about Involving Children and Young People in Family Law Decision Making? A Research Update*, (2006) AUS. J. FAM. L. 5, 15 (2006), cited in: Rebecca M. Stahl, *Don't Forget about Me: Implementing Article 12 of the United Nations Convention on the Rights of the Child*, 24 ARIZ. J. INT. COMP. LAW 803–842, 803 (2007).

⁵⁶ Zöe Clark & Holger Ziegler, *The UN Children's Rights Convention and the Capabilities Approach – Family Duties and Children's Rights in Tension*, in CHILDREN'S RIGHTS AND THE CAPABILITY APPROACH: CHALLENGES AND PROSPECTS 213–232, 224 (Jean-Michel Bonvin & Daniel Stoecklin eds., 2014).

⁵⁷ Dwyer, *supra* note at 113.

⁵⁸ CRC, *supra* note Article 3 (1) and (2):

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

⁵⁹ Among all rights and principles that are covered by the Convention, the Committee on the Rights of the Child has determined four guiding principles in order the Convention to be effectively implemented by Member states: (1) the non-discrimination principle (Article 2), the best interests of the child principle (Article 3 (1)), the right to life, survival and development principle (Article 6), and the respect for the view of the child principle (Article 12). Committee on the Rights of the Child, *General Comment No 5*, 2003 CRC/GC/2003/5.

obvious in cases when children need protection from their parents, particularly because the specific rights and duties of parents are not defined in the Convention.⁶⁰

The principle is further weakened by the use of the phrase “a primary consideration”, which according to Professor Dwyer, opens the gates for the “interests of other people or of a nation collectively to properly factor into any and all decisions about children’s lives”, including on matters such as what kind of alternative care should be secured for unparented children.⁶¹ Other articles that have explicit connection with the rights of the parents include: Article 5 (Parents, family, community rights and responsibilities),⁶² Article 14 (Freedom of thought, conscience and religion),⁶³ Article 18 (Responsibility of the parents for upbringing their children)⁶⁴ and others.⁶⁵ On the one hand, these provisions are yet another confirmation on how reluctant member states have been during negotiations of the provisions of the CRC and the amount of compromises that had to be done by the drafters, in order for the document to become acceptable for virtually all states in the world.⁶⁶

⁶⁰ Michael Freeman, *Article 3: The Best Interests of the Child*, in A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, 69–71 (A. Alen et al. eds., 2007).

⁶¹ Dwyer, *supra* note at 113. For a more complex analysis of the meaning of “a primary consideration” within the framework of Article 3, see: Freeman, *supra* note at 60–64. Professor Freeman also explains why in some cases it is impossible, or extremely difficult to determine whose best interests should prevail, which is one of the reasons that “a primary consideration” standard is actually a working option.

⁶² CRC, *supra* note, Article 5: “States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom [...]”.

⁶³ CRC, *supra* note, Art. 14(2) (“States Parties shall respect the rights and duties of the parents [...] to provide direction to the child in the exercise of his or her right [...]”).

⁶⁴ CRC, *supra* not, Art. 18 (1) (“Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child”).

⁶⁵ Dwyer, *supra* note at 113. Dwyer points out that there are other articles in the CRC which although expressed in terms of rights of children, appear to be “designed at least as much to protect interests of parents, cultural groups, or nations”. According to him, those articles include: Art. 7(1) (“The child shall [...] have the right [...] as far as possible [...] to know and be cared for by his or her parents”); *id.* at Art. 8(1) (“States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference”); *id.* at Art. 9(1) (“States Parties shall ensure that a child shall not be separated from his or her parents against their will [...]”); *id.* at Art. 10(2) (“States Parties shall respect the right of the child and his or her parents to leave any country [...]”).

⁶⁶ *Id.* at 113–114.

On the other hand, these provisions exemplify the inherent conflict between children's rights and parents' rights on one side and the interests of the wider community and the state on the other. What appears from these provisions and especially from Article 18, is that the CRC positions the development of children as a "primarily private rather than public concern".⁶⁷ It follows from this, that the wellbeing of children within the family depends on "their parents; cultural and social position as well as on their capability to earn money".⁶⁸ It is this complex situation of potential conflicts between the interests of children, parents and the state that lies in the heart of two other provisions of the CRC concerning what happens to a child who is deprived of parental care, which are of a primary importance – Article 20 (Right to alternative care) and Article 21 (Adoption and ICA). The next part of this chapter will focus on the human rights issues that those two articles, as well as the Hague Convention on Intercountry Adoption, considered by some scholars to be an "agent of implementation of UN norms"⁶⁹, raise.

2.2. ICA and the international law – between politics and serving the needs of the child

Despite the benefits that ICA can give to unparented children who would otherwise be doomed to grow up in the extremely depriving atmosphere of an institution or be transferred from one foster family to another, international law – both international human rights law and international private law are hostile towards adoption, especially towards ICA. The CRC and, although to a lesser extend but with the same overall result, the Hague Convention treat ICA as the least favorable

⁶⁷ Clark and Ziegler, *supra* note at 227.

⁶⁸ *Id.* at 228–229.

⁶⁹ Alexandra Maravel, *U.N. Convention on the Rights of the Child and the Hague Conference on Private International Law: The Dynamics of Children's Rights Through Legal Strata*, 6 TRANSNATL. LAW CONTEMP. PROBL., 315 (1996).

option for providing of alternative care for unparented children. Moreover, states can ban ICA altogether, if they wish so.

This prejudiced view against ICA is based on three arguments– 1) the fact that there is no requirement for any state to allow adoption whatsoever – domestic or intercountry; 2) the so called principle of “subsidiarity” or the domestic placement preference principle (DPP),⁷⁰ which places ICA as a measure of last resort among the other available alternative care measures demeaning it to be less desirable than institutionalization for children and foster care. Thirdly, ICA is further discredited by the requirement for the preservation of the child’s ethnic, religious, cultural and linguistic background, which is often used by opponents of ICA in order to justify a complete ban on ICA.⁷¹

Another function of the negative approach of ICA is the focus of both the CRC and the Hague Convention on introducing safeguards against violations and policing, rather than focus on the positive outcomes that ICA can have for unparented children and how to maximize this effect.

A. *UN Convention on the Rights of the Child*

According to Article 20 of the CRC a child who is deprived of parental care or is in their best interest to not be in their family environment are entitled to special protection by the state. This protection should be in accordance with the national laws and can include “*inter alia* foster placement, kafalah of Islamic law, adoption, or if necessary placement in suitable institutions for

⁷⁰ The term “subsidiarity” is also used in the context of the European Convention of Human Rights and EU law with a different meaning (see, for example: Federico Fabbrini, *The Margin of Appreciation and the Principle of Subsidiarity: A Comparison*, in *A FUTURE FOR THE MARGIN OF APPRECIATION?* (Mads Andrenas, Eirik Bjorge, & Giuseppe Bianco eds., Forthcoming ed. 2015), <http://papers.ssrn.com/abstract=2552542>.). In order to avoid a possible confusion, I will use the term “Domestic placement preference”, as used by James Dwyer. For more information on the latter term, see: Dwyer, *supra* note at 114.

⁷¹ CRC, Article 20 (3). For more information on the use of this requirement in the discourse against ICA, see Chapter 2.

the care of children”.⁷² Under Article 21, those countries which recognize and/ or permit adoption shall ensure that the best interests of the child “shall be the paramount consideration” in the adoption process. It is important to note that the language concerning the best interests of the child principle within Article 21 is the strongest among the whole Convention.⁷³ The implication of such a very strong threshold that has to be met means that the interests of the child within the system of adoption “must have precedence over any other interest”,⁷⁴ including those of the biological parent(s) of the child, the prospective adoptive parent(s), the country of origin and the receiving country, as well as all intermediaries.

Ironically, though, starting with this very strong statement, Article 21(b) continues to place intercountry adoption at the very lowest level on the hierarchy of available options for alternative care – lower than foster care, domestic adoption and “even lower than institutional care that might be deemed “suitable””.⁷⁵ This sends a strong message that according to the drafters of the CRC, ICA is inherently wrong and dangerous for children and thus, special provisions should be implemented in order for those wrongdoings to be limited.

According to Professor Bartholet these provisions of the CRC are “profoundly anti-child”⁷⁶ and reproduce much more the demands of the ratifying states, than the interests of the children who may benefit from adoption. Although there are different views on to which extend the exact meaning of the DDP clause in Article 21, Benyam Mezmur when analyzing observations of the Committee on the Rights of the Child (hereinafter: CRCComm) concerning the reports submitted to

⁷² CRC, Article 20.

⁷³ Compare with the wording of Article 3, which states that “the best interests of the child shall be a **primary** consideration” (emphasis mine).

⁷⁴ Sylvain Vité & Hervé Boéchat, *Article 21: Adoption*, in A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD , 24 (André Alen et al. eds., 2008).

⁷⁵ Bartholet, *supra* note at 172.

⁷⁶ Bartholet, *supra* note at 95.

the Committee by different states, shows that, while not exactly consistent in its views on what the exact hierarchy of alternative care measures should be, the Committee on the Rights of the Child on numerous occasions and in different contexts have stated that the ICA should be considered “as a measure of last resort”.⁷⁷ The DPP principle has also been consistently promulgated by UNICEF,⁷⁸ as well as other influential international children’s organizations, such as the International Social Service⁷⁹ and Save the Child.⁸⁰ Finally, an integral part of the DPP principle is the requirement of Article 20 (3) when considering the specific alternative care measure for a child to pay “due regard [...] to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background”.⁸¹

B. Hague International Adoption Convention

Although, more favorable towards ICA,⁸² the Hague Convention does not go much further than introducing clear legally binding rules against improper adoption practices. According to the first article of the document, the main aim of the Convention is to “ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights”.⁸³ So, although the Hague Convention is not a human rights document *per se*, it has adopted a rights-based discourse since the beginning. With its 95 contracting states,⁸⁴ it is considered as a big step towards advancing children’s stand in international law.

⁷⁷ Benyam Dawit Mezmur, “Acting Like a Rich Bully”?: *Madonna, Mercy, Malawi, and international children’s rights law in adoption*, 20 INT. J. CHILD. RIGHTS 24–56, 37–38 (2012).

⁷⁸ See, generally, Bartholet, *supra* note; Dillon, *supra* note; Sara A. Dillon, *The Missing Link: A Social Orphan Protocol to the United Nations Convention on the Rights of the Child*, 35 ADMIN. REG. L. NEWS 7–9 (2010).

⁷⁹ Mezmur, *supra* note at 36–37.

⁸⁰ Oreskovic and Maskew, *supra* note.

⁸¹ CRC, *supra* note, Art. 20(3).

⁸² Bartholet, *supra* note.

⁸³ Hague Convention on Intercountry Adoption, Art. 1, para. A.

⁸⁴ Hague Conference on Private International Law, *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption: Status table*, available at: http://www.hcch.net/index_en.php?act=conventions.status&cid=69.

On a textual level, the Hague Convention appears to be certainly more favorable towards ICA than the CRC. Firstly, the document makes a clear statement that in order for a child to develop fully they “should grow in a family environment”.⁸⁵ This is a strong statement, which together with the fact that in the Preamble the drafters stated that the state parties recognize that ICA “may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin”⁸⁶ speaks strongly against institutionalization. It is even said to be an “explicit rejection” of the CRC preference of foster care and even institutionalization as opposed to ICA.⁸⁷ In the substantial part of the Convention (Article 4(b)), however, there is another component of the DPP principle – *i.e.* that the domestic placement possibilities have to be duly considered.⁸⁸

It seems that many scholars interpret the DPP principle of the Hague Convention as it appears in the Preamble and Article 4 as being much more favorable to ICA than the CRC – Professor Maravel explains that Art. 4 (b) “implicitly rejects the hierarchy of alternative care in the UN Convention that places intercountry adoption after institutional care in the State of origin”.⁸⁹ Furthermore, according to others the Hague Convention “declares [ICA] to be a viable alternative and on to which may look in the absence of an adequate domestic family”.⁹⁰

⁸⁵ Hague Convention on Intercountry Adoption, Preamble.

⁸⁶ *Id.*

⁸⁷ Sara R. Wallace, *International adoption: the most logical solution to the disparity between the numbers of orphaned and abandoned children in some countries and families and individuals wishing to adopt in others?*, 20 ARIZ. J. INT. COMP. LAW 689–724, 701 (2003).

⁸⁸ Hague Convention on Intercountry Adoption, Article 4(b): “An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin [...] – b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child’s best interests”.

⁸⁹ Alexandra Maravel, *Dynamics of Children’s Rights through Legal Strata*, 6 TRANSNAT’L. L. & CONTEMP. PROBS. 318 (1996), cited in: Dillon, *supra* note at 212.

⁹⁰ Intercountry adoption and the Convention on the Rights of the Child: can the free market in children be controlled, page 421.

On the other hand, however, one must interpret the wording of Article 4 (b) to be weightier than the Preamble text, and the wording of Article 4 (b) is “vague and ambiguous”.⁹¹ So, while it may be interpreted that “states should give consideration contemporaneously in every case to both domestic applicants, if there are any at that moment, and foreign applicants”,⁹² in practice it may not be like that. The Hague Convention introduces a number of very important rules and requirements to be considered before an adoption to be ruled legal under the Hague Convention, such as that states have to determine whether the child is in fact adoptable, whether all parties have given a free consent to the adoption, without inducements by payment and after receiving counselling on what the consequences of their actions are, and, finally, that state parties consider the “child’s wishes and opinions”.⁹³ But what it does not give, is a requirement that states should permit ICA if it is in the child’s best interests. As is the case with the CRC, the Hague Convention also leaves this central and most important question to the discretion of the states.⁹⁴

Conclusion

So, in conclusion as discussed above, the two documents that make ICA “a subject of international human rights law”⁹⁵ – the CRC and the Hague Convention are hostile towards ICA. Nothing requires states to permit adoption, even less so ICA. Both documents do nothing more than actually impose restraints on ICA – a practice which through the lenses of the international law is perceived as abusive and harmful.⁹⁶ And while there are certainly cases of trafficking of children, any forms

⁹¹ Dwyer, *supra* note at 118.

⁹² *Id.* at 118.

⁹³ Hague Convention on Intercountry Adoption, Art. 4 (d), para. 2. Joan Catherine Bohl, *The future of children in international law intercountry adoption: Is international law protecting the best interests of the children?*, 19 SOUTHWEST. J. INT. LAW 323–340, 331 (2013).

⁹⁴ Dwyer, *supra* note at 119.

⁹⁵ Mezmur, *supra* note at 84.

⁹⁶ Chapter 2 will examine the existence of abusive practices within ICA in more detail.

of abuse of the procedure, by denying unparented children the opportunity to be considered for ICA in their best interests is a human rights violation.

Due to many different reasons hundreds of thousands of unparented children will never be able to find families within their country. As practically everyone agrees, the family is the best setting for a child to grow up in a safe and loving environment in order to develop “at a minimum the human capacities to learn, create, imagine, judge, connect, communicate, act, and love”⁹⁷ – capacities that are essentially important for a meaningful enjoyment of all other human rights. By not treating adoption and ICA as a valuable and potentially the only life-saving option for a number of unparented children and by focusing, instead, on “safeguards and policing”,⁹⁸ international law does allow the “instrumentalization of [children] in the name of the state, politics, ethnicity, race, religion [and] economic interests”.⁹⁹

Professor Dwyer quite intuitively compares ICA with emigration with the purpose of forming a family and shows how adults leave their home country in order to be able to find a better life. Turning towards general human rights instruments in order to escape from what he calls “the special rights fallacy” he shows how if a country tries to ban its citizens from emigrating, this will be addressed by the international human rights community as a gross violation of human rights.¹⁰⁰ Nevertheless, when states do essentially the same with children by blankly banning or heavily restricting ICA, the international community seems far less concerned.

The answer proposed by this thesis is the notion that children possess a fundamental right to be adopted. A right that imposes “human rights-imposed duty, binding individuals, society, and

⁹⁷ Barozzo, *supra* note at 703.

⁹⁸ *Id.* at 705.

⁹⁹ *Id.* at 710.

¹⁰⁰ Dwyer, *supra* note.

public and private institutions”.¹⁰¹ In order to achieve that objective, I argue that the discourse surrounding ICA has to be restructured in order to refocus on the needs and interests of the unparented children who have to be empowered as real right-holding individuals, so that their interests can be secured against the intrusion of other more powerful forces, i.e. states and parents.

¹⁰¹ Barozzo, *supra* note at 704.

Chapter 2. ICA: In the interests of whom?

In essence, adoption is a legal construct. How the law will regulate it, however, is a highly political decision¹⁰² and as we will see in this chapter, the regulation of adoption on the international arena has proved to be a quite controversial matter. International human rights law regulates adoption in a hostile way – it does not treat it as a potential fundamental benefit for unparented children and instead focuses on policing and prevention of potential abuses. This particular development of international law does not come in an isolated way. From Roman times, when adoption was used “first and foremost [...] for property, financial, or political reasons”,¹⁰³ through Australia, where adoption was used to assist the politics of assimilation of the indigenous people¹⁰⁴ and the use of adoption by the socialist government in Bulgaria as a means of social engineering¹⁰⁵ adoption has been heavily influenced by politics.

When it comes to intercountry adoption, however, it seems that it is even more subjected to political influence. Professor Bartholet summarizes the reasons in one sentence:

[In ICA] typically the adoptive parents are relatively privileged white people from one of the richer countries of the world, and typically they will be adopting a child born to a desperately poor birth mother belonging to one of the less privileged racial and ethnic

¹⁰² KERRY O’HALLORAN, *THE POLITICS OF ADOPTION: INTERNATIONAL PERSPECTIVES ON LAW, POLICY & PRACTICE* 3 (2nd ed. 2009).

¹⁰³ JG Dwyer, *Inter-Country Adoption and the Special Rights Fallacy*, UNIV. PENNSYLVANIA J. INT. LAW, 706 (2013).

¹⁰⁴ O’HALLORAN, *supra* note at 1.

¹⁰⁵ ELYA TSANEVA, ANNI KIRILOVA & VANYA NIKOLOVA, *ADOPTION IN THE BULGARIAN CULTURAL TRADITION (ОСИНОВЯВАНЕТО В БЪЛГАРСКАТА КУЛТУРНА ТРАДИЦИЯ)* 182–194 (2010). For more information, see also Chapter 4.

*groups in one of the poorer countries of the world. International adoption is characterized by controversy.*¹⁰⁶

Although, (intercountry) adoption as a social measure is supposed to serve only children in need of parental care, more often than not, issues and debates surrounding it have less in common with children than with national pride, economy and international image. This chapter looks at the debate surrounding intercountry adoption with a particular focus on the employment of the different negative arguments concerning the agents of the intercountry adoption *tetrad*.¹⁰⁷ While doing so, a horizontal approach will be used and firstly, the arguments concerning the states – both the countries of origin and the receiving countries will be considered. Next, the interest-based arguments regarding the biological and the prospective adoptive families are going to be explored. I argue that the current debates surrounding ICA are profoundly driven by political interests of states. The discourse most often picked up by media, politicians and scholars is based on a number of highly unfortunate dramatic situations and fails to employ real arguments concerning the rights of children ICA is meant to serve. The power relations within the debates are very much dominated by the interests of the states and leaves the other members of the adoption tetrad in a highly vulnerable position.

¹⁰⁶ Elizabeth Bartholet, *International Adoption*, in CHILDREN AND YOUTH IN ADOPTION, ORPHANAGES, AND FOSTER CARE 107–130, 107 (Lori Askeland ed., 2005).

¹⁰⁷ The term “adoption triad” is widely used in the adoption community to represent the three “key players” in the adoption process – the child (the adoptee), their biological parents and the adopters. And while in domestic adoption, the process is regulated by the state, the debates surrounding it do not include the interests of the state as such in the process. As we will see in this chapter, however, when it comes to intercountry adoption, the state emerges as another major force, whose interests have to be into account. This is why, I will use the term “adoption tetrad” in order to better illustrate the driving forces behind the debates surrounding ICA.

1. State interests and the interests of the community v. the interests of the child – children as possession of the state

Before we start looking at the ICA discourse from the point of the different members of the adoption tetrad it is useful to first have a glimpse on the international level – what role do international organizations and human rights bodies have in shaping the debate surrounding ICA. The UN Committee on the Rights of the Child, UNICEF, as well as international NGOs dealing with children's rights such as Save the Children Alliance¹⁰⁸ are at the forefront of the international children's rights arena. Although with little differences, the overall position of those three organizations is negative towards ICA, which is probably not surprising, given how international law treats ICA –namely that ICA should be a “measure of last resort”, and it would be best if it does not exist at all.

The Committee on the Rights of the Child is the body that interprets the Convention on the Rights of the Child, as well as the body that oversees the implementation of the CRC through the reporting process.¹⁰⁹ The current chairperson of the CRCComm – Dr. Benyam Mezmur is an international expert on intercountry adoption and has previously criticized the lack of a consistent position of the Committee on the place of ICA within the alternative care systems of states and whether ICA or institutionalization should be considered a measure of last resort.¹¹⁰

¹⁰⁸ For the position of the Save the Children on ICA see, for example: SAVE THE CHILDREN, INTERCOUNTRY ADOPTION: POLICY BRIEF (2012), <http://resourcecentre.savethechildren.se/sites/default/files/documents/6250.pdf>.

¹⁰⁹ In 2011 the UN General Assembly adopted an Optional Protocol to the Convention on the Rights of the Child on a communication procedure, which entered into force in October 2014. Thus, the Committee on the Rights of the Child “may [also] consider individual communications alleging violations of the Convention on the Rights of the Child or its two first Optional Protocols on the sale of children, child prostitution and child pornography (OPSC), and on the involvement of children in armed conflict (OPAC) by State Parties to the Third Optional Protocol on a communications procedure (OPIC)”. UN Office of the High Commissioner of Human Rights, *Information about Complaints Procedures*, available at:

<http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx>. Currently, however, there are only 17 states that are parties to the Optional Protocol on a communications procedure.

¹¹⁰ Mezmur, *supra* note at 95–96; Mezmur, *supra* note at 37–38.

On the other hand, UNICEF, which have been a very powerful player in the implementation of reforms in the child protection systems of many states has had a much more definite position on ICA – support of ICA when there are no in-country options for placement of a child.¹¹¹ And while the language of this position seems permissive, compared to many other scholar and experts calling for complete ban on ICA, in practice the positions of UNICEF has been accused by the adoption community to take hostile approach towards ICA. Professors Bartholet, Carlson and Dillon have criticized UNICEF for using their power in order to limit ICA.¹¹² And while international organizations cannot engage in an openly anti-ICA argument, they make it clear that they do not endorse ICA as a valid option for unparented children and actively use the “last resort” language. From the one hand, this position of the international children’s rights bodies and organizations is reflecting the stand the CRC and the Hague Convention take towards ICA, especially because of the fact that acting as standard-setters in the sphere of children’s rights, they have to take into consideration numbers of political issues, and potentially to make compromises. On the other hand, by failing to recognize ICA as a viable option for alternative care, potentially in some cases even the best one, the CRCComm and UNICEF give a green light to states the practically sole discretion on matters concerning ICA.

1.1. ICA as a form of neo-colonialism and exploitation of resources

¹¹¹ The official position of the organization is: “*For individual children who cannot be cared for in a family setting in their country of origin, intercountry adoption may be the best permanent solution*”.

¹¹² Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 BUFFALO HUM. RIGHTS LAW REV. 152–203, 154–157 (2007); Elizabeth Bartholet, *International Adoption: The Human Rights Position*, 1 GLOB. POLICY 91–100, 95 (2010); Richard Carlson, *Seeking the Better Interests of Children with a New International Law of Adoption*, 55 NEW YORK LAW SCH. LAW REV. 733–779, 776 (2011) (stating that “UNICEF’s recommendations for child-welfare policies consistently call for vigilance against illicit adoption or “trafficking”, but fail to encourage legitimate adoption as any part of child welfare policy”); Sara A. Dillon, *Making Legal Regimes for Inter-country Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Inter-country Adoption*, 21 BOSTON UNIV. INT. LAW J. 179–257, 198 (2003).

Having briefly looked at the positions of UNICEF and the CRCComm, we will now continue with an attempt to map out some of the main arguments used against ICA from the point of view of the states involved in ICA – both receiving and sending countries. This set of arguments treats ICA as inherently exploitative, a form of “*neocolonialist/ postcolonial act that takes children from vulnerable and poor families, often from non-white racial or ethnic groups and of ten from nations that have been under colonial rule or neocolonial domination, and gives them to wealthy, predominately white families in rich nations who often had been involved in colonial rule or neocolonial domination*”.¹¹³ The main predisposition to this argument is viewing children, including unparented children, as the “country’s greatest resource”.¹¹⁴ So, within this line of arguments, typical receiving countries – the USA, as the world’s leader in the number of intercountry adoptions, as well as Canada and the richer European countries,¹¹⁵ some of which former colonial powers, are seen as imperialists, who are depriving the countries of origin in Africa, Central and South America, Eastern Europe and Asia¹¹⁶ from their resources.

¹¹³ David Smolin, *Can the Center Hold? The Vulnerabilities of the Official Legal Regimen for Intercountry Adoption*, in *THE INTERCOUNTRY ADOPTION DEBATE: DIALOGUES ACROSS DISCIPLINES*, 4 (Robert Ballard et al. eds., 2015).

¹¹⁴ Jeremy Youde, *Shame, ontological insecurity and intercountry adoption*, 27 *CAMBRIDGE REV. INT. AFF.* 424–441, 7 (2014).

¹¹⁵ Selman, *supra* note at 3–5. According to prof. Selman in 2009 46 % of all ICAs have been to the USA or 12,149 adopted children. During the same year 4,130 children were adopted in Italy, 3,504 children in France, 2,891 – in Spain, 1,946 – in Canada and 697 – in the Netherlands.

¹¹⁶ Selman, *supra* note. Peter Selman provides statistics according to which the major sending countries in 2010 were: China, Ethiopia, Russia, Haiti, Columbia, Vietnam and Ukraine.

Thus, it is not surprising that a number of scholars and politicians in the West have referred to ICA as “new imperialism”,¹¹⁷ post-colonialism and “monohumanism”,¹¹⁸ a “lucrative export”.¹¹⁹ This arguments manifest themselves in extreme and very damaging statements, such as that ICA is used to provide organs from adopted children to the already born children of the adoptive parents,¹²⁰ or that adopted children from Romania were “often subjected to pedophilia, child prostitution or domestic servitude”.¹²¹ Although, essentially rumors¹²² and political statements are not based on real evidence,¹²³ such graphic statements have actually been the reason for many countries to limit their ICA programs.

In order to be able to better illustrate the notion that ICA is inherently exploitative, many scholars turn back into history in an attempt to link modern day ICA to past events, where policies on child welfare have been used in order to justify actions of dominant cultures “to undermine or eradicate minority or economically dependent cultures”¹²⁴ – phenomena that world history has seen a lot. In

¹¹⁷ Curtis Kleem, *Airplane trips and organ banks: Random events and the Hague Convention on Intercountry Adoptions*, 28 GA. J. INT’L COMP. L. 319–348, 325 (2000).

¹¹⁸ Shani King, *Challenging MonoHumanism: An Argument for Changing the Way We Think About Intercountry Adoption*, 30 MICHIGAN J. INT. LAW 413–470, 414, 426 (2009). Professor King defines post-colonialism as: “Post-colonialism is a set of theories that critique analytical structures-such as literature, film, law, and political science-that identify previously colonized peoples through binary opposition structures that reflect a hierarchical inferiority of the previously colonized populations.” Monohumanism is defined by King as: “the ethnocentric and myopic failure to include discourses that have their origins in the lives, cultures, and vocabulary of historically oppressed peoples, in an area that is often conceived of as a “win-win” for all parties involved and as the most humanitarian of endeavors.”

¹¹⁹ E.J. Graff, *The lie we love*, FOREIGN POLICY, 2008, at 59–66.

¹²⁰ Jena Martin, *The good, the bad and the ugly? A new way of looking at the intercountry adoption debate*, 13 UC DAVIS J. INT. LAW POLICY 173–216, 185 (2007); Kleem, *supra* note at 326.

¹²¹ Emma Nicholson, *Red light on human traffic*, THE GUARDIAN, 2004, <http://www.theguardian.com/society/2004/jul/01/adoptionandfostering.europeanunion>; Carlson, *supra* note at 742. This statement belongs to Baroness Emma Nicholson, a British politician, who was appointed a European Parliament Rapporteur for Romania during the period of the pre-accession negotiations for EU membership. She is also credited as the major driving force for the pressure the EU put on Romania in order to limit and eventually ban ICA.

¹²² Kleem, *supra* note at 326 (stating that the US government has “thoroughly investigated the rumors [for organ trade] and found them to be baseless”).

¹²³ Carlson, *supra* note at 741–746.

¹²⁴ *Id.* at 748. Carlson cites different sources, describing several cases of using child welfare policies with devastating effects on minorities, such as: the Nazi’s removal of Polish children in order to be raised as Germans; the policies of USA authorities to place Native American children in non-tribal families.

the 1970s Australia employed a policy for a “forcibl[e] remov[al] [of] indigenous children from their families and make them wards of the state or place them under the control of church officials”¹²⁵ is just one example. Thousands of children’s lives have been used by politicians in order to employ deeply controversial political aims. Yet another example is what Karen Dubinsky describes as a scheme, known as the “Operation Peter Pan”. During this operation with the support of the US Central Intelligence Agency more than 14 thousand children were brought from Cuba to Miami. The children were send alone by their parents, because of rumors that “the new revolutionary government was planning on nationalizing children and sending them to the Soviet Union for indoctrination” or even as worse as the believe, that if children stay, they “would be eaten”.¹²⁶

These extremely troubling events have been employed by opponents of ICA in order to describe slavery and indentured servitude in the late 19th and early 20th century as a “precursor to modern-day ICA”, as professor King does.¹²⁷ Although, as professor Carlson explains the actual historical link between slavery and adoption can be traced to attempts of social workers to promote modern adoption “to prevent indentured servitude of homeless children”,¹²⁸ the anti-exploitation arguments appear to be very powerful. The examples of spreading extreme rumors for monstrous perverted practices rooted in national interests and historical criminal activities highlights the extreme vulnerability of unparented children in the face of nowadays international politics. Some scholars even argue that ICA “must be analyzed as a political institution in which issues of rights,

¹²⁵ Youde, *supra* note at 6.

¹²⁶ Karen Dubinsky, *Babies Without Borders: Rescue, Kidnap, and the Symbolic Child*, 19 J. WOMENS. HIST. 142–150, 143 (2007).

¹²⁷ King, *supra* note at 414.

¹²⁸ Carlson, *supra* note at 749.

inequality and the potential for exploitation must be central”.¹²⁹ And as Prof. Perry points out, the focus of the need of individual children for adoptive homes, which will cover their needs, diverts the discussion from the discussion on the “political and economic circumstances that shape the lives of so many more children in this society and the world”.¹³⁰

In reality, the most vocal defenders of the post-colonial objection to ICA as prof. King appear to be almost completely detached from reality, i.e. the reality that millions of children currently live in institutions and other non-family based environments and are subjected to sometimes extreme physical and emotional deprivation, whose actual lives depend on the existence of loving family care, which their original families for or another reason are not able to offer.

1.2. ICA as a source of national shame

On the other side of the anti-exploitation arguments, but relying to the same extent on the notion that children are the nation’s greatest resource, is the idea that ICA is a source of national shame. The re-conceptualizing of ICA through the paradigm of exploitation has “induced shame to states by arguing that ICA is proof that a country is unable to care for its people and is a sign of weakness”.¹³¹ In order for states to correct what Prof. Youde calls “ontological insecurity”, countries, such as Korea and Romania severely limit or even ban ICA altogether in order to remove the source of shame.

At some point of the history of ICA both South Korea and Romania were among the top states to participate in ICA as sending countries and have often been analyzed by both opponents and proponents of ICA in their argumentation for and against the practice. ICA in South Korea started

¹²⁹ Twila Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race and Feminist Legal Theory*, 10 YALE J. LAW FEM. 100–164, 147 (1998).

¹³⁰ *Id.* at 147.

¹³¹ Youde, *supra* note at 15.

in the 1950s, particularly in the aftermath of the Korean War. Among the consequences of the war were millions of orphaned children, as well as a number of children born of American fathers.¹³² At first, the target of ICA were exactly those children that were the descendants of American soldiers, which allowed the government to “to avoid the perceived societal shame of having non-ethnically pure Koreans”¹³³ while gradually other types of children were also included in the adoption process. In the 1980s, however, with the economic growth of the country and the hosting of the 1988 Olympic Games, South Korea found the ICA practice to be a “painful reminder of its inability to care for all of its citizens”.¹³⁴ Aiming at showing the world the progress of modern South Korea, the authorities changed their adoption policy and as a result severely limited the number of children available for adoption. Youde cites a Korean adoption official, who said ICA had become “a very embarrassing issue for many Koreans” and that the rise of the support for the opposition party was a result of how the opposition “shamed the government over ICA”.¹³⁵

After the fall of the communist regime of Ceausescu in 1989 in Romania, the world became aware of the existence of the so-called “Ceausescu orphans”¹³⁶ – tens of thousands children in institutions (estimates varied from 50,000 to 170,000 children).¹³⁷ The Western media quickly began showing images of “neglected, deprived, and frightened children some tied to metal cribs or cots [which images] horrified the world”.¹³⁸ Among the immediate answers to the desperate and life threatening situation was opening adoption to foreign nationals. As a result, an estimated number

¹³² See generally: Dong Soo Kim, *A country divided: contextualizing adoption from a Korean perspective*, in INTERNATIONAL KOREAN ADOPTION: A FIFTY-YEAR HISTORY OF POLICY AND PRACTICE 3–24 (Katheleen Bergquist et al. eds., 2007).

¹³³ Youde, *supra* note at 9.

¹³⁴ Dubinsky, *supra* note at 147.

¹³⁵ Youde, *supra* note at 10.

¹³⁶ *Id.* at 11.

¹³⁷ NELSON, FOX, AND ZEANAH, *supra* note at 55.

¹³⁸ *Id.* at 39.

of 10,000 children were adopted in the USA just in between January 1990 and July 1991, and hundreds of others to other European countries.¹³⁹ While in the beginning ICA was perceived by the Romanian authorities as a way “to reduce pressure from the state’s overburdened social services”¹⁴⁰ the perception changed very soon and the Government started to see in the high rates of ICA as shameful. So, the government introduced a moratorium on ICA in 1991. And while in the next years Romania struggled to improve the condition for its thousands of unparented children, as well as with poor regulation on children’s rights, the rates of ICA dramatically dropped.¹⁴¹

In the next years Romania (together with Bulgaria, which will be extensively reviewed as a case study in Chapter 4) became under scrutiny from the European Commission during the pre-accession period. In 2001 European Commission made achieving significant reforms in the child protections system, including ICA and a severe reduction of the number of children adopted internationally, a prerequisite for opening accession negotiations with Romania.¹⁴² As a result, Romania was “singled out to be different than [...] other EU member countries which do not export their children”.¹⁴³ Eventually, the government introduced a ban of ICA in 2006.

As South Korea, Romania was essentially required to effectively ban ICA in order to be able to be included in the family of modern civilized states which do not export their children.¹⁴⁴ Instead of

¹³⁹ Peter Selman, *Intercountry adoption in Europe 1998–2008: Patterns, trends and issues*, 34 ADOPT. FOSTER. 4–19, 6 (2010).

¹⁴⁰ Youde, *supra* note at 11.

¹⁴¹ Selman, *supra* note at 8. According to Peter Selman “the total number of children sent by Romania, where numbers fell from a peak of 2,478 in 2000 to 24 in 2005 with no adoptions to non-relatives after 2006”.

¹⁴² M. PEREBOOM, THE EUROPEAN UNION AND INTERNATIONAL ADOPTION (2005), www.adoptionpolicy.org/pdf/4-28-05-MPereboomTheEUandInternationalAdoption.pdf; Youde, *supra* note at 12.

¹⁴³ Popa-Mabe, Melania (2010) ‘Ceausescu’s orphans’: narrating the crisis of Romanian international child adoption (PhD dissertation, Bryn Mawr College) 156, cited in: *Id.* at 12.

This situation is actually particularly disturbing, given the fact that EU countries were among the states with a greatest number of received children from Romania, as well as the fact that some of the EU Member States that joined the Union in 2005, such as Latvia, Lithuania and Poland continued to send many children abroad. Selman, *supra* note at 8; Youde, *supra* note at 12.

¹⁴⁴ *Id.* at 12–13.

addressing the needs of children and provide support to the government to properly address the needs of thousands of children subjected to neglect in institutions in the Romania, the EU rapporteur on Romania Baroness Nicholson made the state authorities look like they support trafficking of children and pedophilia.

The employment of the anti-exploitative arguments and the mirroring sense of ontological shame in countries engaging in ICA actually do not differ much from the horrific examples of using child welfare policies for political reasons given above.

The above situations exemplify the instrumentalization of children and their exploitation for political issues that are detached from the one and only issue that should be central in the whole debate on ICA – the best interests of the child, which as the CRC sets should be a primary consideration in all actions concerning children, not factors that drive domestic politics of states.

2. The interests of biological parents and the interests of children

As discussed in Chapter 1, the potential harm that ICA may does to birth families have been one of the major concerns of international law – both of the Convention on the Rights of the Child and especially the Hague Convention.¹⁴⁵ The issue of commodification of children in the form of trafficking of children for different purposes has its own distinctive place in the international human rights system through the Optional Protocol to the CRC on the sale of children, child

¹⁴⁵ Among the principle features included in the outline of the Convention by the Hague Conference is the obligation of the States to “establish safeguards to prevent abduction, sale and trafficking in children for adoption by: protecting birth families from exploitation and undue pressure; ensuring only children in need of a family are adoptable and adopted; preventing improper financial gain and corruption; regulating agencies and individuals involved in adoptions by accrediting them in accordance with Convention standards”. Hague Conference on Private International Law, *Outline Hague Intercountry Adoption Convention*, January 2013, available at: <http://www.hcch.net/upload/outline33e.pdf>.

prostitution and child pornography,¹⁴⁶ which “requires contracting nations to criminalize the improper inducement of consent and to enact laws and institute programs to deter the sale of children”.¹⁴⁷ The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (Palermo Protocol)¹⁴⁸ also provides for combating and preventing trafficking of children. No matter what regulations exist, however, the history of ICA knows numerous examples of using ICA as a form of child trafficking and abduction and stealing of children from their birth parents in order to be given for adoption. The main reason for this illegal devastating practices is the easy money that is associated with ICA. Adoptive parents from receiving countries pay huge amounts of money in order to be able to adopt a child from abroad.¹⁴⁹ Many scholars have made parallels to the system of ICA with a market driven economy, a form of “lucrative business”, dominated by private intermediaries who make considerable profit in the quest for supplying childless couples from the West with children.¹⁵⁰ While there is a separate line of arguments of the effects of this “increasing commercialization”¹⁵¹ of the ICA system on children, which will be the focus in the next Chapter, in this Chapter we will focus on the harmful illegal

¹⁴⁶ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, May, 25, 2000, A/RES/54/263.

¹⁴⁷ Marianne Blair, *Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers*, 34 CAP. UNIV. LAW REV. 249–403, 350 (2005).

¹⁴⁸ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, November, 15, 2000, GA/RES/55/25.

¹⁴⁹ See, for example: Elizabeth Bartholet & David Smolin, *The Debate*, in INTERCOUNTRY ADOPTION: POLICIES, PRACTICES, AND OUTCOMES 233–254, 380 (Judith Gibbons & Karen Rotabi eds., 2012). Prof. Smolin provides information that “between 2002 and 2008, 24,778 Guatemalan children came to the United States for intercountry adoption, with the typical fee paid to Guatemalan attorneys in the range of 15,000 to 20,000 USD per child: a total of 371 to 495 million dollars over seven years”.

¹⁵⁰ See, among many others: J. Triseliotis, *Intercountry Adoption: Global Trade or Global Gift?*, 24 ADOPT. FOSTER. 45–54 (2000); Jacqueline Bhabha, *Moving Babies: Globalization, Markets and Transnational Adoption*, 28 FLETCHER FORUM WORLD AFF. 181–197 (2004); Oreskovic and Maskew, *supra* note; K. McCreery Bunkers, V. Groza & D. P. Lauer, *International adoption and child protection in Guatemala: A case of the tail wagging the dog*, 52 INT. SOC. WORK 649–660 (2009); A Young, *Developments in Intercountry Adoption: From Humanitarian Aid to Market-Driven Policy and beyond*, 36 ADOPT. FOSTER. 67–78 (2012), <http://aaf.sagepub.com/cgi/content/abstract/36/2/67?rss=1> <http://aaf.sagepub.com>.

¹⁵¹ Young, *supra* note at 73.

practices of birth parents of children¹⁵² – namely the loss of birth parents experience when relinquish their children for adoption.

In some cases when the birth parent is not alive or is unavailable for any reason, or when the relationship between the child and their birth parent has been legally terminated because of domestic abuse or neglect, there is no loss for the birth parents, or if there is, as in the latter case it is unavoidable and widely accepted.¹⁵³ Apart from these instances, Prof. Carlson identifies two situations where the relinquishment of children is associated with real loss: 1) when the birth parents consent has been obtained by corruption; and 2) when the parent pressured by economic difficulties does not have any other option but to give away the child for adoption.¹⁵⁴

2.1. ICA as kidnapping, child laundering and stealing

While there is a debate on the prevalence of abusive practices in ICA, and especially concerning how state authorities should deal with them,¹⁵⁵ no one in the adoption community denies the existence of corruption and illegal practices. There are two general types of corruptive practices, most often cited by scholars.¹⁵⁶

Firstly, there are many documented cases of using financial inducement in order to make the birth mother relinquish their child for adoption. Prof. Marianne Blair provides evidence for serious wrongdoings in Cambodia, where “baby recruiters” were literally children for a 50 kg bag of rice

¹⁵² Some authors, such as Prof. David Smolin look also at the potential harm of ICA on the extended family of the adopted children. He argues that “the family into which the child is born extends beyond the parents, and beyond the nuclear family, to include an inter-generational and extensive family group” (Bartholet and Smolin, *supra* note at 381). As the aim of this chapter is to map out the main arguments and interests in the ICA discourse, the arguments for the interests of the extended families will not be discussed.

¹⁵³ Carlson, *supra* note at 756.

¹⁵⁴ *Id.* at 756.

¹⁵⁵ See, generally, Bartholet and Smolin, *supra* note.

¹⁵⁶ Carlson, *supra* note at 764.

and \$20 to \$200 in cash.¹⁵⁷ In a country where in 2012 more than 2.5 million of people were living with less than \$1.20 a day and 37 % of children under the age suffered from malnourishment.¹⁵⁸ As a response to this crisis, the USA and some European countries imposed moratoria on ICA from Cambodia. The same response have been employed in Romania, where allegations for buying of children have been an important part of the decision of the authorities to close down ICA.¹⁵⁹

The other abusive practice that exists in ICA is the so-called “child laundering” – i.e. in the words of Prof. Smolin, who has been one of the most prominent scholars dealing with child laundering, to purposefully falsify evidence which “identifies such illicitly obtained children as legally abandoned or relinquished “orphans”; and offering or placing these so-called “orphans” for adoption”.¹⁶⁰ The schemes that intermediaries use in order to obtain children may be endless.¹⁶¹ However Prof. Smolin also points out that these illegal practices generally do not happen in many of the big sending countries.¹⁶² There are also other examples of countries which successfully reformed their adoption system, which resulted in significantly less irregularities.¹⁶³

So, on the one hand we have ICA as a system that allows cases of financial inducement and laundering of the child adoptable status, which some opponents of ICA perceive as so inherently corrupt that the whole ICA system should be abandoned. On the other hand, countries often respond to evidence and allegations of illegal practices with an overall moratorium over all

¹⁵⁷ Blair, *supra* note at 356–358.

¹⁵⁸ The World Fact Book: Cambodia, U.S. CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/cb.html> (last updated Jun. 25, 2015).

¹⁵⁹ Bartholet, *supra* note at 156–157.

¹⁶⁰ David Smolin, *Child laundering and the Hague Convention on Intercountry Adoption: The future and past of intercountry adoption*, 48 UNIV. LOUISV. LAW REV. 441–498, 443–444 (2010).

¹⁶¹ David Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping and Stealing Children*, 52 WAYNE LAW REV. 113–200 (2006). In his work, prof. Smolin provides eight different scenarios in which cases of laundering the child adoptability status have been used by different actors.

¹⁶² David Smolin, *Intercountry Adoption as Child Trafficking*, 39 VALPARAISO UNIV. LAW REV. 281–325, 282 (2004).

¹⁶³ Blair, *supra* note at 392.

adoptions from the respective countries – a response that sacrifices the lives of many actual unparented children who are in a real need for adoption and for whom ICA may be the only option to receive real parental care.

While all the above illegal practices are actually forbidden in international law, many moderate critics of ICA show that there is room for reforming the system on a national level both in the receiving and sending countries in order for illegal practices to be adequately prosecuted,¹⁶⁴ as well as on an international level.¹⁶⁵ And this should be the only valid answer to illegal practices. While discussing possible reforms, however, politicians and scholars have to carefully weigh not only the evil side of the ICA, but also keep in mind what harm would complete ban on ICA would cause unparented children who are denied the opportunity to find loving families.

2.2. ICA and poverty – is there a truly informed consent?

The arguments presented in this Chapter explore the ethical questions surrounding the situation where birth parents voluntarily (meaning without any illegal coercion) relinquish their child for adoption, but would not have done so, if it was not for their poor economic status. Can one talk for a truly voluntary consent in a situation where a single unemployed mother relinquish her child, because she does not see any genuine way of taking care of her child? Is it not “perverse to spend thousands of dollars taking a child from the birth family [through ICA], when a much smaller sum would have kept the family intact”?¹⁶⁶

¹⁶⁴ See, for example: Katie Rasor et al., *Imperfect Remedies: The Arsenal of Criminal Statutes Available to Prosecute International Adoption Fraud in the United States*, 55 NEW YORK LAW SCH. LAW REV. 801–822 (2011).

¹⁶⁵ Carlson, *supra* note at 772–779; Dillon, *supra* note.

¹⁶⁶ David Smolin, *Intercountry Adoption as Child Trafficking*, 39 VALPARAISO UNIV. LAW REV. 281–325, 310 (2004).

This line of arguments is based on several widely accepted facts – there are millions, if not billions, of families that live in poverty. From a human rights perspective, poverty leads to serious violations of human rights – it actually leaves families extremely powerless and vulnerable to grave illegal practices, such as human trafficking, slave labor.¹⁶⁷ An intervention through ICA according to Prof. Smolin in such cases is exploitative and unethical towards birth parents, and especially mothers. As a solution he offers the establishment of a fund, sponsored by the fees adoptive parents to pay domestic adoption agencies acting as intermediaries, from which financial aid would be offered to families, which according to him, will make 90 % of birth parents choose not to relinquish their child.¹⁶⁸

The idea of Prof. Smolin may be more of symbolic value with little practical implementation.¹⁶⁹ The reality is that there are no real prospects that the situation with poverty in most of the countries will change in the near future. Given the way the world is developing, food and water shortage will soon affect even more people, many of whom live in countries which are currently among the main sending countries.¹⁷⁰ International help is very much needed in many countries in order to provide for security of poor families, but even if such is available, the change would come slowly. Economic inequality, the gap between the rich and the poor continue increase every day. While the fact that some families would relinquish their children out of economic despair, it should not impose an ethical obligation for a ban on ICA.

¹⁶⁷ David Smolin, *Intercountry Adoption and Poverty: A Human Rights Analysis*, 36 CAP. UNIV. LAW REV. 413–453, 417–425 (2007).

¹⁶⁸ Carlson, *supra* note at 758.

¹⁶⁹ *Id.* at 758–760.

¹⁷⁰ The Guardian, *The Guardian view on food security: if the dreamers lose, we face a nightmare*, THE GUARDIAN, March 1, 2015, <http://www.theguardian.com/commentisfree/2015/mar/01/guardian-view-food-security-dreamers-lose-face-nightmare>.

3. The interests of prospective adoptive parents v. the interests of children

Last but not least, this chapter will provide a short preview of the arguments used against ICA when it comes to the relationship between the interests of prospective adoptive parents in receiving countries and unparented children in sending countries. Although relatively privileged given the economic stability of adoptive parents and the fact that they are most probably citizens of some of the most developed nations, the anti-ICA discourse leaves prospective adopters in a very vulnerable position compared to the state as such, which eventually becomes the only member of the adoptive tetrad that has an actual discretion on whether to allow ICA.

The vulnerability of the prospective adopters comes from one hand from the fact that they are to some extent passive actors in the process. They do not and should not have a right to adopt.¹⁷¹ ICA, as domestic adoption, is and should be providing a family to a child, and not the opposite. The Hague Convention bans contact between adoptive parents and the child's biological parents or other caregivers until the requirements for acquiring the adoptive status of the child have been completed.¹⁷² And while this measure has been introduced in order to exclude any possible interference with the consent to adoption of the biological parents, other caregivers of the child and the child herself, it shows how adopters are perceived as potential threats and likely to engage in illegal practices.

This notion is exploited by politicians and scholars in order to limit ICA. One such example is the Russian ban of ICA by US citizens in December 2012. Russia, as other former communist

¹⁷¹ A right to adopt a child has to be clearly differentiated from a right to be able to adopt – a right claimed, for example, by lesbian and gay individuals and same-sex couples around the world. For a discussion on LGB people and ICA, see, for example: Jennifer Mertus, *Barriers, Hurdles, and Discrimination: The Current Status of LGBT Intercountry Adoption and Why Changes Must Be Made to Effectuate the Best Interests of the Child*, (2010).

¹⁷² Hague Intercountry Adoption Convention, Article 29.

countries, has huge numbers of children in institutions – according to Human Rights Watch in 2011 there were nearly 120,000 children eligible for adoption, with approximately 7,400 of which were adopted in the country and 3,400 abroad.¹⁷³ The reason for the ban on ICA to the USA was entirely political and had been an answer to a law, adopted by the USA which “calls for visa bans and asset freezes on Russian officials allegedly involved in the torture and killing of whistle-blowers in Russia”.¹⁷⁴

Following the report for a death of a three year old boy adopted from Russia in January 2013, the Russian authorities engaged in a “massive propaganda campaign”¹⁷⁵ many components of which targeted US adoptive parents and attempted at demonizing them. The Russian authorities claimed that adopted children in the USA were in more danger than those in Russian orphanages;¹⁷⁶ that US adoptive parents who abuse their adopted children will get softer punishments, because judges and juries in the USA are anti-Russian; US adoptive parents are corrupt and hire corrupt adoption agencies, which engage in child trafficking; and, finally, that US adoptive parents were adopting so many children from Russia in order to buy white, blond and blue-eyed children.¹⁷⁷

And while this example maybe extreme it perfectly illustrates how no matter that the motivation for most of the prospective adoptive parents is “first and foremost a personal, individual, and entirely natural decision to build a family”¹⁷⁸ adoptive parents often are accused of other motives, behind which the notion that no matter how bad a country treats its unparented children, they still belong to the states, as its national resources.

¹⁷³ Human Rights Watch, *supra* note.

¹⁷⁴ *Ibid.*

¹⁷⁵ Michael Bohm, *10 Russian Myths About U.S. Adoptions*, THE MOSCOW TIMES, February 8, 2013, <http://www.themoscowtimes.com/opinion/article/10-russian-mythsabout-us-adoptions/475238.html>.

¹⁷⁶ For a human rights inquiry on the conditions in Russian institutions, see: HUMAN RIGHTS WATCH, *supra* note.

¹⁷⁷ Bohm, *supra* note.

¹⁷⁸ Carlson, *supra* note at 745.

One such motive that have been exploited a lot is the notion that adopters seek to adopt children from abroad in order to “rescue them from an inferior society”.¹⁷⁹ It is argued that ICA is being advertised by adoption agencies in such a way, so that it “provide[s] a portal for middle-class whites in the West to imagine the needs of the poor – domestic and international – and to position themselves as their champions”.¹⁸⁰ While some authors provide evidence for wide scale attempts to “rescue” children in the past,¹⁸¹ modern day adopters before being approved to apply for ICA go through a detailed screening process and adoption may only take place after it has been determined that adoptive parents are “eligible and suited to adopt”.¹⁸²

4. Conclusion

The aim of this Chapter was to map the main lines of arguments concerning ICA employed in the relations between the different members of the adoption tetrad – the state, the birth parents and the prospective adoptive parents, on the one hand, and unparented children in need of adoption, on the other. ICA has been, is and will be characterized by a number of controversial issues and as such present some compelling ethical questions. Instead of addressing those challenges from a human rights perspective in order to be able to serve the needs and interests of children, who are the primary subject of ICA, the debates are dominated by and seen to be centered around the interests of states engaged in ICA and manifest themselves in the employment of arguments which rely on a number of very unfortunate, but often inaccurate situations. This shifting of the focus, however,

¹⁷⁹ *Id.* at 745.

¹⁸⁰ Dubinsky, *supra* note at 147.

¹⁸¹ Kathleen Ja Sook Bergquist, *International Asian Adoption: In the Best Interest of the Child*, 10 TEXAS WESLEY. LAW REV. 343–350 (2003); K. J. S. Bergquist, *Operation Babylift or Babyabduction?: Implications of the Hague Convention on the humanitarian evacuation and “rescue” of children*, 52 INT. SOC. WORK 621–633 (2009).

¹⁸² Hague Intercountry Adoption Convention, Art. 17.

leaves all members of the adoption tetrad in a vulnerable and not-winning position. But it is children, the most vulnerable member of the tetrad, who pay the highest price in the end.

Chapter 3. Towards a right to be adopted

As we discussed in the previous chapters, debates about intercountry adoption often involve intense discussions that often have very little to do with the actual interests of unparented children. Because children have “powerful symbolic value”,¹⁸³ children often fall into the pitfalls of causes that do not serve their best interests. Disguised as acting in the child’s best interests, international law as it stands now, with its practically exclusive focus on regulation and prevention of abuses, and the discourse surrounding ICA, actually instrumentalize children “in the name of the state, politics, ethnicity, race, religion, economic interests”.¹⁸⁴ That is why in order to be able to adequately address the needs and rights of unparented children, the discourse on ICA should be restructured and refocused back to where it should really belong – the children in need of alternative care. I argue that this can be achieved through re-conceptualizing the concepts of adoption and ICA as a human rights issue and recognizing a new fundamental right of children to be adopted.

This Chapter starts with a brief discussion of some of the potential harms, on the one hand, and benefits, on the other, that ICA have on children. Here I will address some of the main arguments used against ICA – 1) the notion that the process of matching children and adoptive parents commodifies children and 2) the loss of identity argument, i.e. the fact that ICA involves a certain level of loss of the child’s national, ethnic and cultural heritage. The latter argument is also in the

¹⁸³ Elizabeth Bartholet, *International Adoption: The Child’s Story*, 24 GA. STATE UNIV. LAW REV. 333–379, 367 (2007).

¹⁸⁴ Barozzo, *supra* note at 710.

heart of the Domestic Placement Preference principle envisaged in international law.¹⁸⁵ I argue that while every advocate for children's rights should acknowledge the losses and challenges that ICA inherently involves, a truly child-centered approach is to assess each and every unparented child's individual situation and what realistic options there are for her and choose what will serve her interests best, including among other options their access to ICA.

In order for such an individualized approach to be actually efficient, I argue that child rights advocates should recognize that children possess a fundamental right to be adopted. A right to be adopted will provide children with protection against the state as the supreme regulator of welfare policies, which, as shown, is not driven by an obligation to secure the child's best interests, but by political and economic interests.

1. Children and the possible disadvantages of ICA

When it comes to arguments that directly speak about the harms that ICA do to children involved in it, both proponents and opponents of ICA mainly engage in three lines or arguments: 1) they describe the horrific experiences that children who fell victims of trafficking and other abuses within the ICA system; 2) the matching process between children and foreign adopters is portrayed as to resemble a market for children, which commodifies the children; and 3) the notion that ICA steals the child's identity and is essentially a violation of the right to preserve of their national, ethnic or cultural heritage.

As we saw in the previous chapter, the history of ICA has involved a number of horrific abuses against children. Illegal acts such as kidnapping, baby buying and trafficking in children are truly

¹⁸⁵ For more information on the Domestic Placement Preference principle, see Chapter 1.

appalling practices and represent gross human rights violations. As pointed out in Chapter 3 both opponents and proponents of ICA agree on the need of serious reforms and the development of better legal mechanisms in order to successfully prosecute those crimes. According to many scholars, there is no “persuasive evidence” that adoption abuses are widespread.¹⁸⁶ Too often, however, media, politicians and cynical scholars have picked different very dramatic situations in order to justify bans on ICA without weighing up the negative consequences such moratoria on ICA have on unparented children in the respective countries. As, we have already looked considerably at this kind of arguments, in this Chapter we will focus on the other two arguments.

1.1. ICA as commodification of children

Some of the cynical opponents of ICA engage in a line of argument that the adoptive parents and intermediaries engage in a form of market driven industry which advertises ICA as products in order to secure financial gain for adoptive agencies. A particularly disturbing example in this regard is a study, conducted in 2007 which used a Google search in order to look at the websites of adoption agencies and see whether those intermediaries were working according to the established principles of children’s rights law.¹⁸⁷ While looking at 116 websites of adoption agencies in the USA, the authors of the study found that 37 % of the agencies advertised that potential adoptive parents may “select” the child they want. They also found that almost 10 % of the websites contained pictures of children who have been adopted, 25 % contained pictures of named children waiting for adoption and half of the websites contained pictures of unnamed

¹⁸⁶ See, generally: Bartholet and Smolin, *supra* note at 378.

¹⁸⁷ S. Chou, K. Browne & M. Kirkaldy, *Intercountry Adoption on the Internet*, 31 ADOPT. FOSTER. 22–31 (2007).

children.¹⁸⁸ The researchers also looked at whether the names of the agencies “encourage pedophile fantasy or imply ‘market promotion’¹⁸⁹ and what was the ending of the web addresses, finding that almost 40 % of the websites were ending with .com or .net, which according to researchers was a marker for engaging in commercial activities, a proof of which were the cited financial sums needed for adoption.¹⁹⁰

Thus, without providing any real evidence that the review adoption agencies engaged in real illegal activities, the authors of the study concluded that ICA is extremely controversial and harmful. Even more, by making references to child sexual abuse, they made implicit connotations that children, even before actually being adopted in the USA, will be subjected to such abuse and if actually adopted, they will most probably end up in the hands of pedophiles.

Engaging in such discussions and using profound stereotypes is extremely dangerous. Not only it stigmatizes adoptive parents and demonize intermediaries, but it also victimizes children, both adopted and in need of adoption. While it is probably the case that some adoption agencies engage in activities that are against the best interests of the child, what is needed is a detailed research and prosecution of those intermediaries.

1.2. ICA as a loss of the child’s identity

¹⁸⁸ *Id.* at 26–28. According to the authors the fact that the reviewed websites contained the agencies who had pictures of children on their websites were “expos[ing] those children’s photographs and other personal information to anyone with access to the internet, *including individuals who sexually fantasize about children*” [emphasize mine]. *Id.* at 28.

¹⁸⁹ *Id.* at 26. According to the authors markers for encouraging pedophile fantasies and market promotion are names of agencies that contain words such as: angel, heart, loving, hope and dreams.

¹⁹⁰ *Id.* at 26–28.

One of the most widely used arguments against ICA is the argument that when adopted internationally, children lose a considerable part of their identity. The proponents of this argument cite the Convention on the Rights of the Child, which says that when considering alternative placement options for unparented children “due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background”.¹⁹¹ Furthermore, this argument is manifested to a great extent in the Domestic Preference Principle laid down in both the CRC and the Hague Intercountry Convention. Thus, ICA is presented as a violation of a fundamental right of children and is characterized by prof. Smolin as “the lifelong loss, confusion, trauma, dislocation, and profound identity issues that accompany transracial, transculture, transnational adoptions” some adult adoptees feel.¹⁹²

While one can easily imagine what difficulties children, who already have experienced abandonment which is described as the “most traumatic event in the child’s life”,¹⁹³ have gone through years of growing up in an institution, which is often characterized by severe neglect, physical, psychological and even sexual abuse,¹⁹⁴ and who have been adopted internationally to a place, where they have lost all their friends, no one speaks their language and have to immediately learn to speak another language. Sadly though, the preserving of the child’s heritage argument is “popular among nationalist politicians, who oppose ICA of children from their own communities”.¹⁹⁵ The notoriously famous opponent of ICA from Romania – Baroness Nicholson

¹⁹¹ CRC, Article 20 (3).

¹⁹² Smolin, *supra* note at 6.

¹⁹³ Ana Muntean, Mihaela Tomita & Violeta Stan, *Complex Trauma of Abandoned Children and Adoption as a Healing Process*, 46 *PROCEDIA - SOC. BEHAV. SCI.* 273–276, 273 (2012).

¹⁹⁴ See, for example, reports from Bulgaria’s Homes for Children Deprived of Parental Care in: KRASSIMIR KANEV ET AL., *CHILDREN DEPRIVED OF LIBERTY IN BULGARIA: BETWEEN LEGACY AND REFORM* [ДЕЦА, ЛИШЕНИ ОТ СВОБОДА В БЪЛГАРИЯ: МЕЖДУ НАСЛЕДСТВОТО И РЕФОРМАТА] 238–253 (2014), http://www.bghelsinki.org/media/uploads/documents/reports/special/bhc_%282014%29_children_deprived_from_liberty_bg.pdf.

¹⁹⁵ Carlson, *supra* note at 746.

had even raised claims that children should remain in institutions, if this would be the only way to prevent children from being exported from their country.¹⁹⁶

The extreme arguments for preserving the child's heritage are a form of an argument that children belong to their cultural, ethnic, racial and national groups. Often such claims are used to "promote and justify policies that are clearly very harmful for children".¹⁹⁷ In many cases the opponents of ICA using such nationalist-like arguments do not weigh up the reality of what damages institutionalization does to children and the fact that if they stay there, they may even not be able to enjoy any cultural heritage at all, due to a number of factors.

The Bucharest Early Intervention Project (hereinafter: BEIP),¹⁹⁸ which represents "the most comprehensive, systematic and detailed study ever conducted of the brain and behavioral development of children being raised in institutions",¹⁹⁹ proved that institutionalization affects every aspect of the child's development. And it does not need to be one of those Romanian orphanages that have shocked the world back in the 1990s. Because even if basic needs can be met, the "lack of individualized adult responsiveness [which are inherent characteristic of every institution, no matter what the name of it is] can lead to severe impairments in cognitive, physical and psychological development".²⁰⁰ Furthermore, the BEIP has proved that as early an intervention by providing family care happens the greater the chances are for children to be able to overcome

¹⁹⁶ *Id.* at 747.

¹⁹⁷ Bartholet, *supra* note at 359–361.

¹⁹⁸ The Bucharest Early Intervention Project is a unique project grounded in neuroscience which aims at a randomized trial of foster care as an intervention for early institutionalization. As prof. Bartholet describes it, it was "designed to document scientifically both the effects of institutionalization and the degree of recovery that foster care can provide, and to assist the government of Romania in developing alternative forms of care beyond institutions". Bartholet, *supra* note at 179. See, also: NELSON, FOX, AND ZEANAH, *supra* note at 19–38.

¹⁹⁹ *Id.* at 304.

²⁰⁰ HARVARD UNIVERSITY CENTER FOR THE DEVELOPMENT OF THE CHILD, INBRIEF: THE SCIENCE OF NEGLECT, http://developingchild.harvard.edu/resources/briefs/inbrief_series/inbrief_neglect/.

the difficulties and adapt successfully.²⁰¹ It must also be noted that for the comparison, the BEIP researchers used a form of specifically designed model foster care, which sadly is actually available in most states.²⁰² The reality is that it would take years for most of the states with high numbers of institutionalized children to reform their child protection systems in order to achieve deinstitutionalization and the creation of adequate domestic foster care, adoption and family-like placement options.

Secondly, if we use the example of Bulgaria, where despite recent reforms, a substantial number of children who have entered the child protection system in one way or another, remain in the system until they reach the age of majority, when they are supposed to reintegrate into the society without proper support.²⁰³ And thirdly, research show that institutionalized children are subjected to severe discrimination both because of their status of being in the child protection system, and because, as it is the case in Romania and Bulgaria, the majority of them are of Roma origin, an ethnicity subjected to extremely high level of racism in both countries.²⁰⁴

What is important from all those issues is that unparented children, and especially those in institutions are in imminent danger and they “need to be helped now and it is not acceptable to put children’s lives on hold”²⁰⁵ until reforms are implemented. Of course, ICA would not be considered the best alternative care option for many institutionalized children. It should also be noted that ICA will probably never serve the needs of all unparented children. What is important, however, is to free the debates surround ICA from arguments that serve causes that have nothing

²⁰¹ NELSON, FOX, AND ZEANAH, *supra* note at 308–315.

²⁰² Bartholet, *supra* note at 181.

²⁰³ KANEV ET AL., *supra* note.

²⁰⁴ See, generally: BULGARIAN HELSINKI COMMITTEE ET AL., CHILDREN DEPRIVED OF LIBERTY IN CENTRAL AND EASTERN EUROPE: BETWEEN LEGACY AND REFORM (2014).

²⁰⁵ Marie A. Failing, *Moving Toward Human Rights Principles for Intercountry Adoption*, 39 NORTH CAROLINA J. INT. LAW COMMER. REGUL. 523–590, 541–542 (2014).

to do with children's needs and to recognize that ICA is in the best interests of many unparented children. In the end, a "truly principled child centered approach requires a close and individualized examination of the precise real life situation of the particular child involved".²⁰⁶

2. Towards a right to be adopted

As we have seen in the previous Chapters the international law governing ICA as it stands now does not adequately protect unparented children. It leaves the state to be a supreme regulator on how to design its alternative care system. Regardless of the fact that in terms of providing secure long-term family care for children in need adoption ICA can be the best alternative care option, the Convention on the Rights of the Child does not require states to accept it. As it became evident from the provided discussion of the different arguments used against ICA, children are seen as possessions of their states and their birth parents. If ICA was not a measure for children, but for adults, states would have never been able to sacrifice the lives of millions of children through blanket bans on ICA for the sake of their political interests. The reality is that until now, international children's rights law has to great extent failed in addressing issues related to unparented children.

In the remaining part of this Chapter I argue that in order the approaches towards unparented children to be able to truly reflect onto their actual needs and interests, a human rights based approach should be employed. This approach means recognizing that children have a fundamental right to be adopted, including through ICA if this would be in their best interests.

²⁰⁶ Mezmur, *supra* note at 98.

The CRC when adopted was very much celebrated as giving agency to children.²⁰⁷ To a great extent the same was considered for the Hague Intercountry Adoption Convention.²⁰⁸ As we saw in the course of this thesis, however, when it comes to adoption and, especially intercountry adoption, the law governing ICA leaves children to be passive toys in the hands of much more powerful stakeholders. Focusing exclusively on the negative side of adoption, the CRC and the Hague Convention actually stem from the notion that children are a possession of their states, and thus adoption abuses are seen as a violation of the “state’s monopolistic dominium over their populations”.²⁰⁹

This is certainly not the way states see their adult populations. Prof. James Dwyer, argues that ICA proponents should shift the focus from children’s rights instruments and instead turn towards the more powerful general human rights instruments.²¹⁰ In his article, he provides a compelling analysis of how if ICA was viewed from an adults perspective, namely as a right to emigrate in order to look for better opportunities through family formation, practically all arguments which are used by politicians in order to justify their actions against ICA will certainly not be sufficient in order to deny them this right.²¹¹

So, in order a right to be adopted to be actually accorded to children, we must refocus the way we look at adoption and see it as what it inherently is – a formation of a new family relationship for a child, whose original birth family has for some reason ceased to exist. When the state bans ICA, unparented children will have this right violated. The question then is how should we ensure that children will actually be seen as holders of such a right.

²⁰⁷ Clark and Ziegler, *supra* note at 213.

²⁰⁸ Barozzo, *supra* note at 705.

²⁰⁹ *Id.* at 705.

²¹⁰ Dwyer, *supra* note.

²¹¹ *Id.* at 150–180.

When it comes to relationship rights of adults, one can easily see how much freedom an adult has to enter into some sort of a family relationship with practically any other adult²¹² and at the same time to “refuse a relationship” no matter what any other person’s interests may be or what will effect will this relationship have on the broader social interests, such as cultural, socio-economic or racial.²¹³

On the other hand children’s relationship rights are almost exclusively dominated by the state. And because children generally lack actual agency, they suffer in many situations, because “the legal rules governing particular decision about their relationship lives do not require state decision makers to act with a single-minded focus on the welfare of the affected children [but] instead law encourages state actors to protect interests of other people or to advance broad societal aims”.²¹⁴ Exactly this is the situation with ICA and the way it is regulated in international law, which gives exclusive discretion to states to decide whether to allow ICA or not and the ability at any time to put a moratorium on it.

In order for children to be able to argue for a right to be adopted we should look for a way to redefine how we perceive them as rights-holders. Generally young children cannot claim their own rights by themselves, which means that their rights must be enforced by a special “proxy” which should act on their behalf and according to their best interests.²¹⁵ This, however, should not prevent us from looking at the as humans, who possess rights, because of being humans. And as such, we

²¹² Of course, there are numerous limitations, such as for example entering a same-sex relationship in countries which do not allow such.

²¹³ JG Dwyer, *Equality between adults and children: its meanings, implications, and opposition*, MICHIGAN STATE LAW REV. 1007–1028, 1019 (2013).

²¹⁴ JG DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN 2* (2006).

²¹⁵ JG Dwyer, *Equality between adults and children: its meanings, implications, and opposition*, MICHIGAN STATE LAW REV. 1007–1028, 1009 (2013).

must recognize that children's and adult's interests should matter equally – i.e. “no moral actor should treat children's interests as inherently less important or weighty” than those of adults.²¹⁶

This is so, because children as every other human being possess human dignity, and because of their dignity, children are entitled to a right to “flourish as [...] free person[s], which includes a right to [develop] and the right to opportunity to love and be loved.”²¹⁷ As we saw above, if the society do not provide individualized family care to children in institutions, they are deemed to be subjected to gross violation of their dignity and the potential to develop to the best of their abilities and thus to be able to enjoy all other human rights. A recognition of a fundamental right to be adopted contributes to protect the human dignity of children. As such it also acts as a protection against the state as the supreme regulator of relationship rights of children, which as we already saw is often counterproductive and acts against the interests of children in need of care.

Once, access to adoption is recognized as a fundamental right of children to form new family relations with other people, i.e. the potential adopters, then any violation of this right, such as for example a blanket moratorium on ICA from a given country, which on its hand will prevent children from being adopted internationally will be discriminatory towards unparented children. It is so, because if we imagine a similar situation with adults, the state would not impose restrictions on its adult citizens, who wanting to go abroad in order to start new family life.²¹⁸ While one can easily argue that a flow of a large number of people aiming at forming a new family life go from a given poor country X to a rich country Y can be perceived as Y stealing the most precious resource of country X – its population, if the authorities in country X ban all possibilities of adults to exit the country will result in an international outcry. As we saw on numerous occasions in this

²¹⁶ Dwyer, *Id* at 1008.

²¹⁷ Failinger, *supra* note at 533.

²¹⁸ For general review of this line of arguments, see also: Dwyer, *supra* note.

thesis, however, if it comes to children, states not only impose overall bans on ICA without considering the harms this moratorium would have on unparented children in need of adoption, but also international children's rights law allows that. This is why in order to justify the existence of a right to be adopted, child rights advocates should re-structure on how they look at children and start see them as subjects of not only children's rights but also of general human rights norms.

Conclusion

International law governing ICA fails at securing the rights and interests of unparented children by focusing entirely on regulating possible abuses, i.e. violations of the state's monopolistic claims over their populations. While accepting the possible losses that a child may experience when adopted internationally, true advocates for children's rights should carefully weigh up all consequences and other, potentially life-threatening harms that a ban from ICA may have on unparented children. The only way a truly child-centered approach, free from discourses that instrumentalize the child in the name of interests of others, is to recognize that children have a fundamental right to be adopted, which protects their dignity and their right to develop. In order for such a right to be exercised, the interests of children should be acknowledged to be of morally and legally the same value as those of adults.

If accepted, from the right to be adopted stem a corresponding obligation of states to not violate this rights. This obligation raises a number of practical issues, some of which are discussed in Chapter 5 of this thesis. Before that, however, the thesis continues with

Chapter 4: Intercountry Adoption in Bulgaria

As we saw in the previous chapters, what lies in the heart of the discourses surrounding ICA is politics – both on a national level and an international level. Having attempted to map out the human rights dimensions of ICA from a legal perspective, as well as the main arguments used both for and against ICA on behalf of all members of the adoption tetrad, this chapter aims at examining whether and how the main arguments in the ICA discourse have been employed in the national context of Bulgaria – country that participates in the ICA process as a sending country.

Being a former socialist country, Bulgaria has a long history of institutionalization of children and the use of adoption as a means of “social engineering”. After 1989 the country has reemerged as a democratic country, and began to slowly open itself towards the rest of Europe. Although, it ratified the Convention on the rights of the Child as early as in 1991, the country did not made substantial efforts to reform the child protection system, as well its overall policies towards children’s rights until the early 2000s. As a result, during the 1990s when the country experienced a severe economic crisis, the number of children in institutions became rose very much to reach the highest ration of institutionalized children in Europe.²¹⁹ Parallel to this, the number of children who were adopted through ICA also increased to reach its peak of 1,121 in 2002.

After a painful transitional process, which included the need of a major transformation of the country’s policies towards children, the country became a member of the European Union in 2007.

²¹⁹ Jenna Holtz, *CHILD WELFARE IN CRISIS: A FOCUS ON EASTERN EUROPE*, 14 CHI.-KENT J. INT’L COMP. L. 1–19, 8 (2014).

During the pre-accession period the country made a number of important steps towards reforming its child protection system, including ratifying the Hague Intercountry Adoption Convention in 2002, as well as adopting a Child Protection Act in 2000 and reforming the system of adoption in 2003. During the same time, however, the country was successfully pressured by the EU, as well as international organizations, namely Save the Child and UNICEF to reduce the numbers of children adopted internationally. Regardless of the disastrous situation in the country's institutions, and especially in those for children with disabilities, as well as the lack of almost any domestic alternatives, the external and internal pressure, which successfully employed nationalistic arguments, lead to a dramatic drop of the number of ICA.

In 2007, however, a documentary about the appalling conditions in one institutions for children with mental disabilities, which was aired on BBC made an international outcry and revealed the reality of child protection in the newly-admitted EU member state. The movie and the following international pressure shamed the Bulgarian authorities before their European partners and resulted in a number of reforms that the country initiated, including easing the ICA procedure, as well as starting a large deinstitutionalization process. Eventually, in 2009 a new Family Code was adopted, which considerably eased the adoption procedures and resulted in a steady growth of the number of international adoption, which continues until now. What is specific, however, is that the vast majority of children which are adopted internationally are “unwanted children”, i.e. children with disabilities, as well as of Roma origin²²⁰ – both groups that have virtually no prospect for domestic adoption.

²²⁰ The information was provided by the Head of the “International legal protection of children and intercountry adoptions” Directorate within the Ministry of Justice Ms Milena Parvanova in an interview I conducted with her in October 2014 (hereinafter: Interview with Ms Milena Parvanova).

The Ministry of Justice which is the Central authority for ICA as according to the Hague Intercountry Adoption Convention does not keep statistics on the number of children being adopted internationally on the basis of their health

The chapter starts with a brief overview of the legacy of the Communist rule in Bulgaria from 1945 to 1989 and the use of adoption as a direct instrument for conducting the state reproductive policies. Although, no ICA took place during this period, it is very important to keep in mind the effects the government policies had on the following changes concerning ICA Bulgaria experienced. After that the chapter continues by examining the different developments both from a legal perspective, as well as from a social one, in order to better assess the different arguments and discourses employed in the country in three distinctive period – 1) from 1989 to 2002; 2) from 2002 to 2009; and 3) after 2009.

While aiming at mapping the different arguments surrounding the two major changes in the policy of the Bulgarian government on the position of ICA in the national child protection system, I argue that while in the end the Bulgarian government actively endorsed ICA as a viable option for unparented children, this would not have been the case if the majority of children were not of those two highly stigmatized groups. The analysis confirms the need for recognition of a right to be adopted in order to guarantee that unparented children's interest would be effectively protected against the state not acting in their best interests.

This chapter relies on a number of sources including transcripts of plenary sessions in the Bulgarian Parliament, information obtained under the Access to Public Information Act, as well as information based on previous researches and work done by me during my work as a researcher in the Bulgarian Helsinki Committee.²²¹

status or ethnicity. For more information, see: Decision No 95-00-84 from 22 October 2014 for providing information under the Access to Public Information Act.

²²¹ The website of the organization is: <http://www.bghelsinki.org/en/>.

1. ICA, the legacy of the Communist regime – adoption as a means of “social engineering”

As the other former communist countries, Bulgaria has a painful past that considered children not as right-holders, but rather as objects. In the 1970s the Bulgarian authorities engaged in an ideology of the so called “family cell”, which was perceived as “a structural and social building block playing a fundamental role in society”.²²² Within this ideology in order to ensure the quality of the nation, a “healthy family cell” must procreate biologically.²²³

At the same time the socio-economic conditions in the country made an increasing number of mothers to relinquish their children in state-run orphanages. The adoption of these children was used by the authorities in order to heal the “sick family cells” – those who did not have biological children.²²⁴ Thus, the Bulgarian authorities engaged in a number of very painful practices of laundering the adopted children’s identities in order to hide the fact that they were adopted,²²⁵ as well as of putting enormous pressure of single mothers to relinquish their children for adoption.²²⁶ Regardless of this horrific instrumentalization of children, the Constitution of 1971 set forth a number of social rights to children which were a reality for many of the Bulgarian children.²²⁷ Nevertheless, the number of children raised in institutions during the communist regime rose –

²²² TSANEVA, KIRILOVA, AND NIKOLOVA, *supra* note at 232.

²²³ *Id.* at 232.

²²⁴ *Id.* at 232.

²²⁵ *Id.* at 182–209.

²²⁶ Anelia Kasabova, *Hidden (everyday) problems. Mechanisms for evaluation and exclusion of “defective” children* [Скрити (всекидневни) проблеми. Механизми за оценностяване и изключване на “дефектни” деца], 4 BULG. ETHNOL. 459–476, 465–467 (2013).

²²⁷ Velina Todorova, *Children’s Rights in Bulgaria after the End of Communism*, 17 INT. J. CHILD. RIGHTS 623–646, 625 (2009).

from 2,088 in 1965 to 6,140 in 1985.²²⁸ Regardless of this fact, the number of orphans in institutional care according to UNICEF was much smaller (less than 1,400 in 1989).²²⁹

Parallel to the social policy of the communist state and the actual encouragement of adoption as a way of “healing” of the society, the government engaged in a process of differentiation between children that were “fit” for this aim – namely white, young healthy children from Bulgarian ethnic origin, which were used to implement the social engineering policies; and all the other “unfit” children – i.e. children of Roma origin and, especially children with disabilities who were effectively isolated from the eyes of the public by putting them in a number of extremely isolates institutions across the country.²³⁰

2. The painful transition to democracy – ICA between 1989 and 2002

Following the international political developments in the end of the 1980s, the communist regime in Bulgaria fell in 1989 and the country began its slow process of becoming a democratic state. The 1990s were characterized by deteriorating economic conditions and an “actual collapse of the major systems of social cohesion: the labor market, health care, education, justice”.²³¹ As a result the number of children institutions began to proliferate and reached 1.78 % of all children, which was the highest percentage of institutionalization of children in Europe.²³² One of the main victims of this economic crisis were children in institutions, and especially children with disabilities which, as we saw above, have been victims of what appears to be “eugenic” policy conducted by the previous regime towards them. A particularly tragic example is the case of the Dzhurkovo Home

²²⁸ Kasabova, *supra* note at 463.

²²⁹ UNICEF, “CHILDREN AT RISK IN CENTRAL AND EASTERN EUROPE: PERILS AND PROMISES”, REGIONAL MONITORING REPORT NO 4 84 (1997), <http://www.unicef-irc.org/publications/pdf/monee4.pdf>.

²³⁰ Kasabova, *supra* note at 467–470.

²³¹ Todorova, *supra* note at 626.

²³² Holtz, *supra* note at 8.

for Children with Mental Disabilities, where fifteen children and young adults died during the winter of 1996/97 only in one care home due to lack of food, heating and basic care.²³³

As regarding ICA, following the ratification of the Convention on the Rights of the Child in 1991, the Bulgarian government adopted for the first time specific rules on the regulation of ICA.²³⁴ This first attempt for regulation of ICA was characterized by imposing a number of restrictions on ICA. On the first place, ICA was possible only after all possibilities for domestic adoption have been exhausted, i.e. if a child had not been sought for adoption for a period of one year before the registration of the adoption application of the respective foreign adopter, or at least three Bulgarian families have deposited a refusal to adopt the child.²³⁵ Secondly, potential adopters could only be families that do not have previous biological or adopted children.²³⁶

It is interesting that both rules were later challenged in court in 2012, however while the second requirement was quashed by the court, the judges confirmed the 1-year waiting period as in accordance with the “higher interests of the child to grow up and live in its motherland”.²³⁷

The nationalistic claims over children combined with a paternalistic approach over them, as well as the lack of trust of the Bulgarian authorities towards ICA, can also be found also in a 1994 discussion in the Parliament concerning changes in the adopted in 1985 Family Code. The changes, which were never adopted, concerned easing the procedure for domestic adoption and hardening

²³³ Bulgaria was eventually found in violation of the European Convention on the Rights of the Child by the ECtHR. For more information, see: ECtHR, *Nencheva and others v. Bulgaria*, Application No. 48609/06, Judgment from 18 June 2013. For a discussion of the case, see: Holtz, *supra* note.

²³⁴ Bulgaria, Ordinance No. 17 from 3 August 1992 for the terms and conditions for adoption of a person, who is a Bulgarian citizen, by a foreigner under art. 136, para. 1 of the Family Code issued by the Minister of Justice (*Наредба № 17 от 3 август 1992 г. за условията и реда за осиновяване на лице, което е български гражданин, от чужденец по чл. 136, ал. 1 от семейния кодекс, издадена от министъра на правосъдието*) (hereinafter: Ordinance No. 17).

²³⁵ Ordinance No. 17, Art. 5.

²³⁶ *Ibid*, Art. 9, para. 1.

²³⁷ Bulgaria, Supreme Administrative Court, Decision No. 9904 from 6 November 2002 on administrative case No. 2829/2002.

up the procedure for ICA, especially of children with disabilities. The argument for this proposal was that while the main aim of adoption was “in the family to grow up a healthy child, who in the future is going to look after her old parents or adopters”, than when it comes to children with disabilities, they are being adopted in order to be used for organs.²³⁸

Regardless of all those difficulties, imposed by the Bulgarian authorities on ICA, from 1991 to 1999 the number of international adoptions was characterized by a steady growth from under 200 in 1991 to around 1,000 in 1999.²³⁹ Eventually the number of ICA had a peak of 1,121 children in 2002,²⁴⁰ which provoked outrage from both national media with allegation of corruptive practices, as well as international NGOs and the European Union, to which Bulgaria applied in 1995.

3. ICA from 2002 to 2009 – Accession to the EU and pressure not to “export” children

Although Bulgaria had ratified the CRC in 1991, this remained just a symbolic issue until 2011, when the development of a child protection policy became the focus of the Government.²⁴¹ It was entirely because of pressure from abroad, mainly by UNICEF, which opened an office in the country that the rights of the child became a significant political issue. Regardless of the fact that the period between 1999 – 2001 “mark the emergence of children's issues in the political agenda of Bulgaria” none of the governments actually considered the rights of the child as their priority.²⁴²

²³⁸ Transcript of the 365th plenary session of the Bulgarian Parliament from 11 May 1994.

²³⁹ SAVE THE CHILDREN, POSITION PAPER ON INTERNATIONAL ADOPTION OF CHILDREN FROM BULGARIA (2007), http://www.iss-ssi.org/2007/Resource_Centre/Tronc_DI/documents/Bulgaria-SCUK.pdf.

²⁴⁰ Decision No 95-00-84 from 22 October 2014 for providing information under the Access to Public Information Act.

²⁴¹ Todorova, *supra* note at 627.

²⁴² *Id.* at 627.

In reality, unlike Romania, where a reform in the child protection system was a pre-condition to start negotiations, it was not until the pre-accession monitoring of the Bulgaria's progress that a reform in the child protection system was raised as a central issue by the European Commission.²⁴³ With regard to ICA during that period, 2002 was the peak year with some 1121 adopted children. This peak was accompanied by allegations of corruptive practices in the Bulgarian media,²⁴⁴ as well as increasing pressure by international NGOs, particularly Save the Children,²⁴⁵ and the EU. In the 2003 report Progress Towards Accession included a recommendation on ICA, namely that ICA could be resorted to "only if all options for domestic placement or adoption had been exhausted and three Bulgarian candidates had declined to take the child within a six-month period" and that all ICA should remain an exception.²⁴⁶ Furthermore, in 2004 the European Parliament issued a resolution calling Bulgaria "to take urgent action to ensure that international adoptions be used only as a last resort and that the welfare of children be the primary concern, not the financial revenue accruing to a family, institution or intermediaries".²⁴⁷ Meanwhile, in 2002 the Bulgarian authorities ratified the Hague Convention on Intercountry Adoption and changed its adoption legislation in line with it.²⁴⁸

Eventually, Bulgaria has been effectively pressured to limit ICA and the numbers fell to 595 in 2003, 217 – in 2004, 101 – in 2005; 98 – in 2006 and 81 in 2007.²⁴⁹ Similar to Romania, Bulgaria

²⁴³ *Id.* at 628 (stating that it was not until 2001 that children's rights were mention in the reports of the European Commission).

²⁴⁴ SAVE THE CHILDREN, *supra* note.

²⁴⁵ *Id.* See, also: Todorova, *supra* note at 637–638.

²⁴⁶ M. PEREBOOM, THE EUROPEAN UNION AND INTERNATIONAL ADOPTION 26–27 (2005), www.adoptionpolicy.org/pdf/4-28-05-MPereboomTheEUandInternationAdoption.pdf.

²⁴⁷ *Id.* at 26–27.

²⁴⁸ Bulgaria, Family Code, 28 May 1985, as ammended on 15 July 2003 with State Gazette No. 63.

²⁴⁹ Decision No 95-00-84 from 22 October 2014 for providing information under the Access to Public Information Act.

was successfully shamed by the EU and the international community in order to severely limit its ICA program. Although formally open for ICA, the government engaged in a “tacit policy” of practically reducing to a minimum all ICA.²⁵⁰ As it was the case in Romania, Bulgaria was conditioned by the EU to limit the number of children it “exported” abroad, in order to be able to be included in the family of “democratic states”, a process, which as we saw in Chapter 2 was characterized by the feeling of ontological shame by the country.

ICA after 2009 – towards a right to be adopted

Interestingly, it was another act of public shaming that made Bulgaria open up its ICA process again. While the EU successfully made the country to severely limit ICA in the pre-accession period, very high institutionalization rates (more than 8,000 children) and numbers of institutions continued to be serious.²⁵¹ Just months after the EU accession in 2007, BBC showed the “*Bulgaria’s abandoned children*” documentary movie about the Mogilino Home for Children with Mental Disabilities.²⁵² The movie which showed the appalling conditions in which 65 disabled children, subjected to severe malnourishment and neglect shocked the European public and institutions and resulted in immediate pressure by the EU.²⁵³ It was even screened in the European Parliament despite fierce opposition of the Bulgarian government and MEPs.²⁵⁴

²⁵⁰ Interview with Ms. Milena Parvanova.

²⁵¹ Vyara Ivanova & George Bogdanov, *The Deinstitutionalization of Children in Bulgaria - The Role of the EU*, 47 SOC. POLICY ADM. 199–217, 206 (2013).

²⁵² Blewett, K., „Bulgaria’s Abandoned Children“ (2007), BBC Film.

²⁵³ *Id.* at 204–206.

²⁵⁴ Elitsa Savova, *Bulgarian MEPs oppose screening of BBC Mogilino documentary in European Parliament*, THE SOFIA ECHO, February 13, 2008, http://sofiaecho.com/2008/02/13/658856_bulgarian-meps-oppose-screening-of-bbc-mogilino-documentary-in-european-parliament.

The reaction of the Bulgarian government was typical for a country, which public image was deeply seriously damaged and was publicly shamed that it puts its own children to death. The Bulgarian officials publicly accused the British television, other media and the Members of the European Parliament for engaging in some kind of an “anti-Bulgarian campaign” according to the Bulgarian President,²⁵⁵ which in the words of the Minister of Social Affairs, was based on a “tendentious presentation of the situation in Mogilino”.²⁵⁶

Eventually, the high external pressure, as well as the followed by serious efforts of national NGOs,²⁵⁷ resulted in 2010 in starting a process of large-scale deinstitutionalization of children and initiating a major reform in child protection system through the use of the EU structural funds.²⁵⁸

The increased pressure for reform of the child protection system in Bulgaria, as well as a change in the EU position on ICA, permitted the Bulgarian authorities to reform the ICA system. It became evident that during the time of almost shutting down of all ICA, there were more than 2,000 adoptive parents, which were included in the registry but were never offered a child.²⁵⁹ The new

²⁵⁵ Mediapool.bg, *Parvanov: the BBC film for Mogilino is a part of an anti-Bulgarian campaign* [Първанов: филмът на ББС за Могилино е част от антибългарска кампания], MEDIAPOOL.BG, 2008, <http://www.mediapool.bg/parvanov-filmat-na-bbs-za-mogilino-e-chast-ot-antibalgarska-kampaniya-news136932.html>.

²⁵⁶ Mediapool.bg, *Maslarova also accuses Brussels for Mogilino* [И на Масларова ѝ крив Брюксел за Могилино], MEDIAPOOL.BG, 2008, <http://www.mediapool.bg/i-na-maslarova-y-kriv-bryuksel-za-mogilino-news136748.html>.

²⁵⁷ In 2010 the Bulgarian Helsinki Committee together with the Prosecutor’s Office made investigations in all functioning care homes for children with mental disabilities in the country. The results were appalling – 238 children died during the last ten years with at least two thirds of which were unnecessary and avoidable, including 31 deaths resulting from starvation, 84 – from general physical deterioration, 13 – from infections due to bad hygiene and 6 caused by accidents, such as freezing to death, drowning, suffocation and others. Bulgarian Helsinki Committee, *supra* note.

²⁵⁸ For more information on the process of deinstitutionalization and the role the EU played in it, see: Ivanova and Bogdanov, *supra* note.

²⁵⁹ Interview with Ms. Milena Parvanova.

management of the Ministry of Justice engaged openly in a discourse in favor of ICA. Gaining momentum the system was reformed with the adoption of a new Family Code in 2009.

According to it, a child with a habitual residence in Bulgaria may be adopted by a person with a habitual residence in a foreign country when all domestic possibilities of the child to be adopted in the country have been exhausted and the child is included in the inter-country adoption registry.²⁶⁰ There is a clearly prescribed Domestic Placement Preference principle, according to which a child is registered for inter-country adoption if for a 6-month period since their inclusion in the national adoption registry, at least three adopters had been named, but none of them have filed a request for adoption, or when, regardless of the efforts taken, it is impossible for an adopter to be found.²⁶¹

During the debates on the adoption of the new Family Code, the Bulgarian authorities started to openly speaking of ICA as a very good option for parentless children, and especially those of Roma origin, as well as with disabilities.²⁶² Eventually, following the new legal developments, the number of ICA become to grow again steadily – 220 children were adopted abroad in 2009, 246 – in 2010, 329 – in 2011, 395 – in 2012, 407 children in 2013.²⁶³

Regardless of the current relative openness of the Bulgarian authorities towards ICA, it is evident that the change was possible because the main focus of the reform have been the historically singled out as “unwanted” by the society children – those of Roma origin and children with

²⁶⁰ Bulgaria, Family Code (*Семеен кодекс*), Art. 110, para. 1, 01 October 2009, available in Bulgarian at: www.lex.bg/bg/laws/ldoc/2135637484.

²⁶¹ Bulgaria, Family Code (*Семеен кодекс*), Art. 113, para. 2, 01 October 2009, available in Bulgarian at: www.lex.bg/bg/laws/ldoc/2135637484.

²⁶² Monitor, *Ilonka Raychinova, Deputy Minister of Justice: The requirements towards families are draconian* [Илонка Райчинова, зам.-министър на правосъдието: Изискванията към семействата са а драконовски], MONITOR.BG, 2009, <http://www.monitor.bg/article?id=192246>.

²⁶³ Decision No 95-00-84 from 22 October 2014 for providing information under the Access to Public Information Act.

disabilities. Up until very recently, those children had particularly no chance of getting out of the institutions and receiving family care.²⁶⁴ This is so, because during the almost 25-year of transition into democracy, the Bulgarian state never overcame the extremely poisonous heritage of severe institutional discrimination towards those two groups.

Conclusion

Bulgaria is yet another example of how political pressure and media reports can alter the regulation of the rights of the child without a real discussion with the help of employment of very tragic events. The current policy of the Ministry of Justice is openly in favor of ICA adoption, stating that it can clearly be the best option for many children, especially those with specific medical needs. While this is a very positive development, the Bulgarian system needs to recognize that children should have the right to be adopted in order for the rights of unparented children in Bulgaria to be really secured and to prevent future nationalistic and paternalistic claims to be used in order to sacrifice their interests.

²⁶⁴ Interview with Ms Milena Parvanova.

Chapter 5: Recognizing the right of unparented children to be adopted – the corresponding state obligations

Throughout this thesis, I have attempted to look at the rights of unparented children through the lenses of intercountry adoption. I have argued that the current state of play of the international children's rights law fails at providing the best protection of the interests of unparented children by failing to recognize that all unparented children should have the right to be considered for adoption, including intercountry adoption if this would be in their best interests. I have also argued that if recognized, the human right of children to be adopted will serve as a barrier against the state, which as we saw continuously, have used ICA as a means of serving its national and international political interests.

This chapter attempts to look briefly at some of the implications that a recognition of the right to be adopted will have on international law governing ICA. I argue that the acknowledgement of the right to be adopted would impose an obligation to the international community and national states to focus on how to improve the compliance with the right to be adopted instead of dealing completely with the possible abuses of the adoption procedure.²⁶⁵ Thus, the potential abuses on every level of the adoption procedure, including when assessing the child's adoptability status, when choosing the best adopters for the specific child and after the adoption takes place, should be considered as violations of their right to be adopted and not, like it is the case now, as a violation of the "state's monopolistic dominium over their populations".²⁶⁶

²⁶⁵ Barozzo, *supra* note at 705.

²⁶⁶ *Id.* at 705.

Finally, this chapter will deal with the implications that the right to be adopted has on the current requirements of the CRC and the Hague Intercountry Adoption Convention state parties to comply with the Domestic Placements Preference (DPP) principle. I argue that states will have a responsibility to adopt a new approach which will enable adoption placement options, both domestic and international, to be considered simultaneously in order to prevent a delay in the placement, which, as we saw earlier, can result in considerable damage in the child's development.

1. International law should endorse ICA

As we saw earlier, international law as it stands now does not require national states to accept adoption in their national system for child protection. When it comes to ICA the case is even worse. One of the main reasons for this development is that the documents that currently regulate ICA have been a result of a general consensus between states, which tend to perceive children as possessions of the state and as their most important natural resources.

If taken seriously, a right to be adopted would mean that all national states, as well as international organizations – both political in nature, such as the EU and the UN as such, as well as the Children's rights bodies and organizations, including the CRCComm, UNICEF and Save the Child should “authorize”²⁶⁷ ICA and recognize its potential to truly serve the rights of many unparented children who would otherwise be doomed to live their lives in a state of severe neglect and abuse in institutions and on the street. This will enable states instead of engaging in long and often biased discussions for or against ICA on a national level, to focus instead on how to optimize their child protection system and ensure the compliance with the rights of unparented children.

²⁶⁷ Carlson, *supra* note at 775.

2. The DPP principle should be reassessed

Another consequence of the right to be adopted would mean that countries will have to reassess the inclusion of the Domestic Placement Preference principle in their child protection systems. This does not mean that unparented children should be put directly for ICA. Instead a system should be developed that would consider all real options for every individual child, and considering their own wishes, will examine those options simultaneously.

Currently, pursuing the DPP principle required by CRC and the Hague Intercountry Adoption Convention, countries have included a number of limitations on ICA – i.e. minimum period of time that the child should have stayed in an institution; a minimum number of attempts for matching the child with domestic adopters; putting the child in foster care, which due to its temporary nature may not be in the child’s best interests, etc.²⁶⁸ In many cases, while it is own by the authorities that the specific child does not a realistic option to be actually adopted domestically, the social services are nevertheless required to comply with the terms of the DPP principle.

This is wrong as in many cases it unnecessarily delays the placement of many children in permanent family care, which as we saw earlier in this thesis, can have very bad effects on the child’s development. Instead, all options, which provide “providing appropriate, protective, and permanent family care to children living without families”²⁶⁹ should be examined simultaneously and the best option for each specific child should be considered regardless of what the national politicians would want.

²⁶⁸ For a detailed review of the different legislative requirements of European states, see: CLAIRE FENTON-GLYNN, *CHILDREN’S RIGHTS IN INTERCOUNTRY ADOPTION: A EUROPEAN PERSPECTIVE* 21–50 (2014).

²⁶⁹ Mary Landrieu & Whitney Reitz, *How Misconceptions About International Adoption Lead to a Violation of Human Rights Against Unparented Children*, , 60 (2014).

3. Countries should have positive obligation to better fight against abuses

Last but not least, a recognition of the access of every child to adoption, including intercountry adoption would require national states to implement better strategies which to fight against abuses, such as trafficking, laundering of the adoptability status of children and others and prosecute all those who perpetrate or enable such crimes.

A true human rights approach towards ICA will mean, however, that states would fight against abuses not like it is the case now, i.e. to prevent the stealing of their “resources”, but in order to comply with the right of unparented to children to be adopted. This will prevent national authorities from engaging in some form of a mass punishment of all children in the respective state by putting a blanket moratorium on all ICA, instead of prosecuting specific people for their specific criminal activities.

Conclusion

The aim of this chapter was to propose what some of the possible implications of a new human rights approach towards ICA may be. While it is for sure that such an approach will be very hard, if not impossible to achieve in the near future and especially on a global level, it is nevertheless important to remember that children, and especially unparented children, which are among the most vulnerable and stigmatized groups in every society, are particularly in danger of becoming toys in the hands of politicians who will use their fates in order to achieve causes that can have nothing to do with the children themselves.

Conclusion

The overall aim of this thesis was to look at the phenomenon of intercountry adoption from the perspective of the rights of unparented children. Currently, ICA is governed by two major human rights documents – the Convention on the Rights of the Child and the Hague Intercountry Adoption Convention. These two conventions focus exclusively on the prevention of potential abuses that can happen in the system of ICA and do not address the potentials ICA possess to serve the best interests of millions of children in institutions and on the street. This approach is governed by the notion that states have possession rights on their children, which represents a real threat for millions of children's lives.

As we saw on numerous occasions, because of their symbolic value, children are often instrumentalized by politicians and states in order to argue for all sorts of different causes which do not have any real link to their actual interests – the need for access to permanent solution of their status of children, deprived of parental care. One such option is ICA. What we see on a global and local level, however, is that the discourse surrounding ICA is dominated by and seen to be centered around the interests of states engaged in ICA and manifest themselves in the employment of arguments which rely on a number of highly unfortunate and dramatic events, which, however, often misrepresent the actual situations. This shifting of the focus, however, leaves all members of the adoption tetrad, and especially children, in a vulnerable and not-winning position.

As a solution of the current state of play of the legal and social position on ICA, this thesis suggests the employment of a new, human rights approach towards adoption and intercountry adoption.

This means that international law, international bodies and organizations, as well as national states must recognize that children should be entitled to a fundamental right to be adopted.

This approach will enable the refocusing of the discourse on children's needs and will ensure a true child-centered approach towards alternative care for unparented children. An approach which will empower unparented children as true right-holders and will serve as a protection against the nationalistic, paternalistic, populist and all other kinds of claims over their lives.

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