

Double Subsidiarity Principle and the Right to Identity

Intercountry Adoption (ICA) is regulated by the [Hague Convention on Protection of Children And Co-Operation in Respect of Intercountry Adoption 1993 \(HC-1993\)](#), overseen by its national central [authorities](#). The subsidiarity principle of the [United Nations Convention on the Rights of the Child 1989 \(UNCRC\)](#)¹ requires that ICA must only be undertaken as a last resort.² Contrary to the subsidiarity principle of the HC-1993³, which gives preference to ICA above other childcare measures, such as foster placement or institutional care in the home country of the child: “As a general rule, institutional care should be considered as a last resort for a child in need of a family”⁴.

Deriving from this crucial disparity, between the ICA subsidiarity principles of the UNCRC and the HC-1993, the fact occurs that on the one hand the HC-1993 ‘envisages cooperation between State parties with a view to banning any trade in children and merely allowing ICA when this proves to be in the best interest of the child.’⁵ In practice, the HC-1993 de facto allows for effectively bringing together demand and supply to facilitate ICA. The UNCRC on the other hand leaves ICA as a last resort – even allowing State parties to forbid ICA altogether – by pronouncing that, without very stringent regulation and supervision, children can be trafficked for adoption or can be adopted without regard for their best interests.⁶ Hence, the subsidiarity principle of the UNCRC has the effect of minimizing – crucial aspects⁷ of – the deprivation of the right to identity.

Safeguarding the right to identity⁸ and preventing adoption trafficking such as the Brazil Baby Affair (BBA)⁹ is of primary concern to the UNCRC within the European Union¹⁰. The UNCRC forms the worldwide sole and unanimous framework for ICA, inherently defining the scope of the HC-1993.¹¹ Because every country recognized by the United Nations has signed the UNCRC, which is unprecedented in the history of international human rights. To current date, 194 State parties have signed *and* ratified the UNCRC, with exception of the United States.¹² Contrary to the HC-1993, which does not represent the unanimous framework for – safeguarding the right to identity in – ICA as the UNCRC does. To current date, 48 State parties have ratified the HC-1993¹³.

¹ Convention on the Rights of the Child 1989, Article 21(b).

² Ibidem; [UNICEF, Implementation Handbook for the Convention on the Rights of the Child, 297-298.](#)

³ Hague Convention on Protection of Children And Co-Operation in Respect of Intercountry Adoption 1993, Article 4; [The Implementation And Operation Of The 1993 Hague Intercountry Adoption Convention: Guide To Good Practice Guide No 1, 29-30.](#)

⁴ Hague Conference on Private International Law, ‘Outline Hague Intercountry Adoption Convention’ (January 2013), <http://www.hcch.net/upload/outline33e.pdf> (14 September 2015).

⁵ Bischoff van Heemskerck, The UN Convention on the Rights of the Child, 182.

⁶ UNICEF, Implementation Handbook for the Convention on the Rights of the Child, 297.

⁷ Convention on the Rights of the Child 1989, Article 20.

⁸ Convention on the Rights of the Child 1989, Article 8.

⁹ For further information on safeguarding the right to identity and preventing adoption trafficking such as the Brazil Baby Affair, see: [‘Raising Awareness about False Birth Registration Practices, Known as the Brazil Baby Affair’.](#)

¹⁰ Noordoven, Human Rights under pressure – The Removal of the United Nations Convention on the Rights of the Child from the European Union’s Acquis Communautaire (2014), 23-28.

¹¹ Within the European Union (EU), the UNCRC is part of the Acquis Communautaire, which means, in case of conflicting law, i.e. UNCRC and HC-1993, EU law precedes (national law).

¹² United Nations Treaty Collection ‘Databases – Chapter IV HUMAN RIGHTS – 11. Convention on the Rights of the Child’ https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (11 December 2015).

¹³ HCCH Status Table – ‘33: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption’ http://www.hcch.net/index_en.php?act=conventions.status&cid=69 (11 December 2015).



Adoption trafficking such as the BBA does not comprise of any legal ICA procedure pertaining to the scope of the HC-1993. Therefore, the deprivation of the right to identity, for the purpose of illegal ICA, can only be addressed by the UNCRC.

To this end should the right to identity be safeguarded through converting the right to birth registration¹⁴ into (inter)national human rights law. Hereby it should become universally recognized that the right to birth registration includes a right to a birth certificate and will be accompanied by proper implementation and checks and balances.

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¹⁴Convention on the Rights of the Child 1989, Article 7.