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**Hand-Delivered to the Cabinet**

Brussels, 12 February 2016

Dear President Schulz,

Hereby I address myself to you as whistleblower, with the request for support and protection.

As a permanent official of the European Commission, I have been the subject of harassment and intimidations since the adoption of Romanian children was halted in the framework of Romania's accession to the European Union. I was at the time DG Enlargement's Task Manager for the Romanian Children File. This work was done under the guidance of Commissioner Günther Verheugen, who considered this a key issue under the Copenhagen criteria for Romania's accession.

It was a tough job, which could only be done thanks to my dedication, determination, problem analysing and problem solving skills, and by withstanding the pressure which came from multiple sides and often under fake flags. I was considered to be decisive in allowing the Commission to finally after many years of failed efforts to correctly shape a coherent and well based policy as to how to deal with the sensitive topic of children's rights in Romania.<sup>1</sup>

In short, the problem was that the Romanian children issue had been politicised by the "Adoption lobby", whereas it really was a technical issue. During my work on the Romanian children file, the issue was de-politicised with the help an Independent Panel of Family Law Experts of the Member States.

This "Adoption-Lobby" also has its tentacles inside the European institutions. With the changing of the guards, in 2004, Commissioner Verheugen was replaced and I was rapidly ostracised. Additional to this I was, and still am, the target of intimidations and clear threats at personal level.

With full support of the Secretary General of the European Commission and, by then, Vice President Verheugen, in 2007 I blew the whistle by authoring the book "Romania for Export Only, the untold story of the Romanian "orphans".

The Secretary General of the European Commission, in 2008, decided to temporarily second me to an NGO<sup>2</sup> that was set up especially for that secondment. Objective: to counter this in-house lobby from outside, awaiting the lie of the land in the next European Commission.

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<sup>1</sup> Staff Appraisal Report 2005

<sup>2</sup> Against Child Trafficking (ACT) [www.againstchildtrafficking.org](http://www.againstchildtrafficking.org)

This strategy, however bizarre it was, has partly worked out well. Most lobby attempts were not successful due to our actions. This has attracted wide media attention. For example, the WDR produced a documentary about this in 2009 (Suche Kind, Zahle Bar – die Adoptionslobby), which received the 2009 Media prize of the German child rights NGO Kindernothilfe. Last year a book was published by a Danish journalist that also describes the adoption battlefield at the European Commission (Adoptionens slagmarker).

The secondment contract came to an end in August 2014. The Secretary General advised me to come back. I was hoping that the new Commission would welcome me back and set the record straight. With this I mean, putting the record straight concerning the issue of children's rights, as well as about my personal situation because the two have become inseparably linked.

Unfortunately the opposite was the case. There was no "welcome back". Instead I was isolated, mobbed - ostracized.

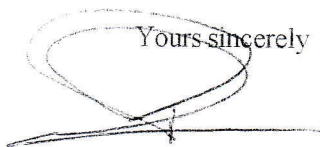
For my personal safety and well-being I had to take protective measures. Therefore, I have retracted myself from Brussels, and live in hiding.

I attach my most recent appraisal report<sup>3</sup>, including the attachments. To which there was no follow-up.

Over the last 18 months I have tried to find a personal solution with the European Commission, but have found no willingness at all to do so. Having turned everywhere, I see no other way then to turn to you. Considering the fact that the issue was re-politicised over the last 10 years, it is likely that only at that level that a solution may be found.

Against Child Trafficking and myself have fully documented the events that took place over the last 10 years. On request we can make this available.

Yours sincerely



Roelie Post

Encl:

- Self Assessment, Staff Report, including annexes
- Romania for Export Only, the untold story of the Romanian "orphans"

Copies:

Dutch Presidency: Prime Minister Mr. Mark Rutte  
 European Ombudsman: Mrs. Emily O'Reilly  
 Kinderombudsman: Mr. Marc Dullaert

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<sup>3</sup> The Appraisal Report contains the name of a second permanent official, at her explicit request

# **Appraisal Report**

## **Reporting Year 2015**

### **Self Assessment contribution of:**

**Roelie Post**  
**Staff nr. 57432**

I have been on part-time medical leave from January/April 2015, at the advice of the Medical Service, awaiting a new job that would comply with my qualifications and experience.

During this time I had hardly any work and, in agreement with the Head of Unit, mainly participated in a number of internal trainings to catch-up on changes that took place during my 10 years “absence” - in order to prepare for another job.

In February 2015 I was informed by the Head of the Human Resource Unit that my transfer would be part of the larger reorganisation. This reorganisation, after some postponements, took place on 1 May 2015. However, a new job for me was not included.

As mentioned in last year’s appraisal report, I consider the way I am treated as a continuation of the mobbing that started 10 years ago. I have written several complaints to the Secretary General (Mrs. Catherine Day) and Director General for Human Resources (Mrs. Souka), because they were both involved in my secondment. I explained how I was ostracised, isolated, mobbed and suggested to find a solution.

As reaction, DG NEAR and DG Human Resources have, again, medicalised the situation and forced me into sick leave after having cut my salary retroactively in August. I was instructed to provide a retroactive sick leave certificate (four months).

Both my doctor and I have informed the Medical Service that I am not sick, but had to stop going to work in order to prevent that I become sick. This was accepted as justified absence/leave.

I write “again”, because in 2007 there was an attempt to start an invalidity procedure for reasons of paranoia. This was stopped after my complaint about harassment to Vice-President Kallas. Due to interference of Secretary General Mrs. Catherine Day, I accepted, under duress, to establish an NGO so that the Commission could “park” me for the duration of the Barroso Commission.

I have to mention that my reinstatement took place at a time when another colleague in DG NEAR, Mrs. Katja de Sadeleer, got caught up in a similar situation, because she internally blew the whistle on the child protection reform in Montenegro, where intercountry adoption was made into an integrated part of the child protection system. Ms. De Sadeleer and I both worked on the Romanian Children File in 2004/2005. The

pressures, intimidations, mobbing she endured since she blew the whistle on this, are quite similar to my experience.

I could not escape the impression that the presence of both of us was no longer desired by DG NEAR.

Whereas Mrs. De Sadeleer, at her request - after a long delay - was finally moved to another post, I am being pushed out, while the underlying issue remains unaddressed. I attach a note that summarises this underlying issue.

I regret that my internal whistle blowing remained without constructive response.

Please note that the contribution report of the Director of the NGO Against Child Trafficking for the 2014 appraisal exercise was not discussed during the dialogue with the Reporting Officer, as it was added to Sysper after the dialogue.

I have been informed that a complaint about the handling of this contribution is currently pending with the European Ombudsman. Therefore, I will send a copy of my contribution to this appraisal report as well as the attached note to the European Ombudsman.

Encl.: Note about children's rights in the EU

# THE RIGHTS OF THE CHILD and the EUROPEAN UNION

During the last 10 years children's rights in the EU are being manipulated by adoption proponents and others with vested (financial) interests in the business with children. These actors succeeded in getting their grievances onto the agenda of the EU institutions. This led to a biased interpretation of key international instruments on (intercountry) adoption and child rights. The results are devastating for families.

## 1. The Issue

The European Commission does not hold the competence to legislate on family law and child protection. These policy fields are the exclusive competence of the EU Member States.

During the accession negotiations with Romania, the issue of the poor state of Romania's child protection (so-called "orphanages") became a key issue due to pressure from civil society, and those with a vested interest in intercountry adoption.

In 1997 the European Council decided that the UN Convention on the Rights of the Child (UNCRC) was to be considered inseparable of the EU Treaty and thus was placed on the *acquis* list as legal basis for the accession monitoring and negotiations under the Copenhagen Criteria. Article 24 - The rights of the child - of the EU Charter on Fundamental Rights is also based on the UNCRC.

There is also another international convention, the Hague Adoption Convention (1993). This private law convention, however, is not part of the *acquis*. Although it was meant to prevent child trafficking, in practice, in Romania, it created a demand-driven market in children. Behind this legal market, all kind of abuses are hidden, such as corruption, abuse of power and the infiltration of pedophiles.

The European Commission and the European Parliament, at the time (2000), spoke with one voice in condemning this market, and requested from Romania the full respect of the UN Convention on the Rights of the Child. Especially as concerns article 21b of the UNCRC, which limits intercountry adoption as a last resort – after all local care options such as foster care, adoption, residential care and any other suitable manner of care (the so-called subsidiarity principle).

It then appeared that those with vested interests in intercountry adoption (United States, Israel, France, Italy, Spain and the Scandinavian countries) interpreted children's rights in a different manner. While these countries respect the UNCRC, article 21b, for their own children (except the US which did not ratify the UNCRC), they apply the Hague adoption Convention's version of subsidiarity for countries from where they adopt children.

The Hague Adoption Convention's interpretation of subsidiarity conflicts with article 21b of the UNCRC, as it does not consider foster care and residential care as suitable care, but only as short term temporary options. Instead the adoption proponents see three options: return of the child to the children's family, national adoption, intercountry adoption. Strict time limits for the first two options then automatically lead to the availability of children for intercountry adoption. If families cannot take back their children from residential care or foster care timely, their parental rights are terminated and children become "adoptable".

## 2. What Happened

Romania found itself between conflicting requests from the US/Israel (and some EU Member States) and the EU, and also inside and outside the European Commission and the European Parliament private opinions differed.

The EU legal position was that Romania should respect the UNCRC, where intercountry adoption is not a child protection measure, but an extreme and exceptional measure that may (but does not have to) be invoked if no care is available in-country.

The “other side” pressured for the Hague Adoption Convention’s interpretation, which makes intercountry adoption part of the national child protection system.

UNICEF, which serves as reference for other child rights NGO’s, was at the time at best unclear in their position. Formally UNICEF is promoting the UNCRC, but in practice they preach the Hague Adoption Convention.

In 2003 Romania requested assistance from the European Commission on solving this juxtaposition. The Commission then set up an Independent Panel of Family law Experts from EU Member States with as task to provide a technical, non political opinion.

This Independent Panel, in 2004, said that (intercountry) adoption is not, and should not, be seen as a measure of child protection. EU Member States in any case are obliged to have family support and child protection measures in place, so that they do not need to export children. Moreover, foster care and residential care (in conformity with the UNCRC) come before intercountry adoption. Intercountry adoption can, if all, only be an exceptional measure of last resort, as it is an extreme measure.

As a consequence, Romania’s new laws on children’s rights and on adoption that entered into force on 1 January 2005 did no longer foresee the option of intercountry adoption by non-related foreigners.

The adoption community (adoption agencies, prospective adoptive parents and others with vested interests) were greatly alarmed, and feared that other countries, worldwide, might take the same position and the business of intercountry adoption would no longer be possible.

**Countering the Opinion of the Independent Panel:** since 2004 there are efforts to get the European position on intercountry adoption reversed by forces inside and outside the European Commission. This resulted in:

- no longer considering the UNCRC as *acquis* (= legal basis);
- pretending that the Hague Adoption Convention is *acquis*,
- thus including intercountry adoption as integral part of national child protection systems, and not as an extreme exception, a measure of last resort.

## 3. Result

Over the last 10 years, some individuals and groups having a vested interest in intercountry adoption are working towards reversing the position taken in the Romanian case.

These inside and outside forces have been successful in:

- removing the UNCRC as legal basis, it now only “guides” the European Commission;



- promoting the Hague Adoption Convention;
- creating a smokescreen by promoting a de-institutionalisation campaign in Eastern European Countries, whereby the word intercountry adoption is rarely used. But which will have as result an important increase in such adoptions, the first effects are being seen in Bulgaria;
- UNICEF and the European Commission now speak with one voice. The EU is now one of the main funders of Unicef and a formal political partnership is being prepared;
- EU Member States and accession countries are becoming more and more sending countries (Portugal, Bulgaria, Latvia, Poland, Serbia, Montenegro - to name a few).

They were not successful in:

- creating a European Adoption Policy (2006/2009). Now, this initiative is being taken up again under the name “cross-border adoptions”.

The above has dire consequences for families. It departs from the European values, which obliges Member States to provide assistance to families in raising their children, and to provide suitable care for children temporarily deprived of their families.

Roelie Post

14 January 2016

*The undersigned is a civil servant of the European Commission since 1983.*

*I was from 1999 until 2005 the Task Manager for the Romanian Children File in the European Commission (DG Enlargement). I was forcibly removed from my tasks and not allowed to work in- or outside the European Commission and forced into sick leave.*

*The Secretary General of the European Commission, eventually, “rescued” me by seconding me to the NGO “Against Child Trafficking (ACT)”, which was set up for this reason.*

*In August 2014 the Commission’s secondment contract with ACT ended, and I was reinstated into the European Commission. However, I was still not welcome and all efforts were taken to discourage me to reintegrate, to humiliate and destabilise me, which made a successful reintegration a mission impossible. I am now on forced sick leave, likely facing invalidity procedures.*

*In 2007, I authored the book “Romania for Export Only, the untold story of the Romanian “orphans”. This book inspired the German TV Documentary “Search a Child, Pay Cash”, which was awarded the 2010 Media Prize of the German Child Rights Organisation “Kindernothilfe”*

<http://www.roeliepost.com/2009/09/suche-kind-zahle-bar/>

## **ANNEXES:**

- **THE PERVERSE EFFECTS OF THE HAGUE CONVENTION**, Roelie Post, this article was first published in Dutch in November 2008, in *Justitiële Verkenningen* (Judicial explorations) 2008/07, title: *Adoption under Fire* (page 25-37) by the Research and Documentation Centre of the Dutch Ministry of Justice.  
Published in English in 2013, “Human Trafficking The Stakeholders' Perspective” Veerendra Mishra - Secretary, Central Adoption Resource Authority (CARA), Ministry of Women and Child Development, Government of India.
- **THE EU AND INTERNATIONAL ADOPTION FROM ROMANIA**, Ingi Iusmen, 2013, *International Journal of Law, Policy and the Family* Page 1 of 27, Department of Politics, University of Sheffield, Sheffield, UK

## **FOR FURTHER REFERENCE:**

- **INSIDE STORY OF AN ADOPTION SCANDAL**, Arun Dohle, 2008, *Cumberland Law Review* 131  
[https://www.brandeis.edu/investigate/adoption/docs/adoption\\_Dohle\\_cumb\\_final.pdf](https://www.brandeis.edu/investigate/adoption/docs/adoption_Dohle_cumb_final.pdf)
- **REPORT ON PLAYERS INVOLVED IN THE ILLEGAL ADOPTION IN GUATEMALA**, International Commission Against Impunity Guatemala, 2010  
[http://www.cicig.org/uploads/documents/informes/INFOR-TEMA\\_DOC05\\_20101201\\_EN.pdf](http://www.cicig.org/uploads/documents/informes/INFOR-TEMA_DOC05_20101201_EN.pdf)



# THE PERVERSE EFFECTS OF THE HAGUE ADOPTION CONVENTION \*

*R. Post* \*\*

Last year I published the book titled *Romania For Export Only, The Untold Story Of The Romanian 'Orphans'*. The book focused on my work for the European Commission in relation to the reform of Romania's child protection. In this book I describe the facts that led to the moratorium on intercountry adoptions and the pressure to re-open adoptions in Romania. In the media I was quoted as saying that intercountry adoption in fact was legalised child trafficking. This is not a popular statement and many placed me in the anti-adoption camp. I would like to distance myself from pro and anti-adoption labels and direct this discussion back to the heart of the matter: is intercountry adoption a child protection measure, or do children have rights in their own country and is intercountry adoption the ultimate breach of such rights?

This article describes the effects that the Hague Adoption Convention<sup>1</sup> had on adoptions from Romania. The aim of the Hague Convention was to guarantee that intercountry adoption would take place in the interest of the child, with respect for his/her fundamental rights, and to prevent the abduction, sale of or trafficking in children. Romania was one of the first countries that ratified this Convention (1994), and adopted in 1997 a Hague compliant adoption law. However, from 1997 to 2001 this convention did not so much protect the rights of the children, but foremost those of the parties in the receiving countries: central authorities,

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\* This article was first published in Dutch in November 2008, in *Justitiële verkenningen* 2008/07, title: *Adoption under Fire* (page 25-37).

*Justitiële Verkenningen* (Judicial explorations) is published eight times a year by the Research and Documentation Centre of the Dutch Ministry of Justice in cooperation with Boom Juridische uitgevers. Each issue focuses on a central theme related to judicial policy.

\*\* Roelie Post (MSc) is employed by the European Commission in Brussels since 1983 and was involved in the reform of Romanian child protection from 1993 until 2005. She is the author of the book -- *Romania For Export Only, The Untold Story Of The Romanian 'Orphans'*.

1 Full Title: Convention on Protection of Children and Co-operation in Respect of intercountry Adoption. The Convention was initiated by Italy and entered into force in 1995.

adoption agencies and adoptive parents. It further shows how intercountry adoption developed into a full-grown market, which functions according to the economical laws of Supply and Demand.

The result of the Romanian ban on intercountry adoptions will be discussed, including the consequences with regards to other countries. The article ends with the crucial question: can intercountry adoption be legislated without it leading to a demand-driven child market? This article argues why such is not possible under the current provisions of the 1993 Hague Convention.

### **The Romanian case**

The Romanian adoption law from 1997 made intercountry adoptions conform to The Hague Convention, subsidiary to national adoption. Adoption became a child protection measure for abandoned children. A child who was placed in a children's home and who was not visited by their parents for six months would then be deemed abandoned. In this case the directors of children's homes were obliged to start a legal procedure to terminate parental rights. That way the children became 'adoptable' and would be placed on the national adoption list for three months, after which the child would become available for intercountry adoption. After the yearlong reporting about child trade and corruption, this law was enthusiastically welcomed by the international community. But, the devil appeared in the details about international cooperation. Intercountry adoption would be done by Romanian adoption agencies in cooperation with foreign agencies. Foreign agencies were required to support the Romanian child protection with money, projects or other forms of aid. The amount of aid would be translated into points, on the basis of which adoptable children would be allocated.

From 1998 until 2000 the number of intercountry adoptions increased from 1000 to 3000 children per year.<sup>2</sup> Also the costs increased (Ambrose and Coburn, 2001). In no time more than a hundred Romanian agencies were active. Lawyers, doctors, business people... almost anyone could start an adoption agency and cooperate with the many interested foreign agencies. More and more children were declared legally abandoned. And more and more of these foreign agencies would run their own children's homes for adoptable children. Proof came out about so-called stillborn babies, who were actually reserved in a backroom for intercountry adoptions. Parents, who attempted to reclaim their children, were not allowed to do so.

Although thousands of children were now leaving the country, the number of children in residential care continued to increase. And despite

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2 Romanian Office for Adoption ([www.adoptiromania.ro/statistici.aspx](http://www.adoptiromania.ro/statistici.aspx)).

the perhaps good intentions of this system, not all aid went to the benefit of the children. The Romanian government had allocated insufficient budget for child protection, counting on the aid and funding in exchange for children. As a result, in 1999, a financial crisis broke out. The Romanian secretary of State then asked for foreign aid and reinforced the notion and general impression that Romania was unable to provide for its children.

In the meantime the negotiations for Romania's accession to the European Union had started. Under pressure of a French NGO the European Commission had included child protection under the human rights criterion. Confronted with numerous scandals and complaints about intercountry adoption, the European Commission and the European Parliament required that Romania would need to respect the rights of the child in order to prevent that other interests would prevail in decisions regarding intercountry adoptions.

In October 2001 Romania placed a moratorium on intercountry adoptions. But just a month later, under external pressure, so-called pipeline cases would be allowed and exceptions to the moratorium would also be permitted.

This would be the beginning of an endless battle to obtain children. One would expect that, after the finalizing of most pipeline cases, there would only be incidental exceptions. The opposite was true. Once clear how the system of exceptions functioned, these would happen more and more - under political pressure and private requests of certain politicians (Post, 2007, p. 117-173). At the end of 2003 Romanian Prime Minister Adrian Nastase agreed, during political talks with the Italian Prime Minister Silvio Berlusconi (then EU President) to the adoption of 105 children for Italy. Explosive media attention<sup>3</sup> was the result as well as a negative reaction of the European Union. Consequently Romania disallowed all exceptions to the moratorium; all pipeline cases had already been dealt with by a working group of the Romanian government.

### **Legislating children's rights**

In the meantime Romania had started reviewing its child rights legislation.

Already in 2001 an international working group was established to advise the Romanian government (Hague Conference, UNICEF, USAID, World Bank, EU). During a daylong meeting, with an American tape recorder at the table, it became clear that opinions were divided. The most

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3 EC issues ultimatum to Romania: stop child exports, *Daily Telegraph* 2 februari 2004.

important point of discussion: in which case children should be made available for intercountry adoption? Most of the participants considered foster care or residential care not suitable. The EU negotiators, however, felt these care options if implemented correctly, based on experience in the then 15 EU member states, were appropriate (Post, 2007, p. 112).

This important stumble block stems from the difference in approach between The Hague Adoption Convention and the UN Convention on the Rights of the Child (UNCRC), article 21b. This article indicates that intercountry adoption may be an option, in countries that know/use adoption, if there is no suitable care available in the country itself, such as foster care, local adoption or residential care. The preamble of the Hague Convention deals differently with this by making intercountry adoption subsidiary to national adoption, hereby excluding foster and residential care.<sup>4</sup>

At the end of 2003 the Romanian government, caught between conflicting demand of the EU and the US, asked the European Commission for help with the drafting of a new child rights law. As common practice in such cases when there is no expertise available within the European Commission, a Panel of Experts was established – made up of experts from five EU member States. This panel would remain in function for two years, when the laws were finalized. The mandate of the panel was to verify that the new laws would give the Romanian children similar legal protection as the laws in the then 15 EU Member States. The panel based its position on the UNCRC that is part of the *acquis communautaire* of the European Community. All Member States ratified this Convention and it is considered as inseparable of the Treaty of Rome. The panel therefore considered intercountry adoption as a last option, which only should be allowed if there is no suitable foster care, adoption or residential care in country available. As concerns EU Member States the panel:

*'Intercountry adoption cannot be considered as a measure of child protection. Romania's situation in this is exceptional, as no EU Member State expatriates its children. Other Member States protect their children and deal with the issue in-country.'*

In the meantime the reform of the Romanian child protection had continued rapidly. Large children's homes were closed and replaced by modern alternatives, such as foster care, family type homes and assistance to families. Consecutively a large public awareness campaign took place to inform the population about children's rights. Without the pressure to deliver children for intercountry adoption, a functioning local child protection could finally come to fruition. As a result there was no reason

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4 Explanatory Report on the Adoption Convention, written by G. Parra-Aranguren, 1994, art. 40 en 41.

to further expatriate children, and the Romanian government decided in June 2004 a law that no longer offered intercountry adoption by non-relatives as an option.

### **The effects of intercountry adoptions on local child protection**

It is crucial to understand the detrimental effect of intercountry adoption on the local child protection. Already in 2002 Jonathan Dickens described the effect of the Hague compliant Romanian adoption law and the point system. He signalled a paradox: while intercountry adoption indeed can lead to more money for the development of local child protection, it undermines the care and protection of the children who stay behind.

At first glance the Romanian adoption law improved the rules for intercountry adoption and limited the circumstances under which it could occur (subsidiarity). But in practice it effectively cemented the place of intercountry adoption by making it a child protection measure. In the local child protection powers that drew children into the adoption circuit were faring well. On the one hand for monetary profit and project aid and on the other hand because local protection, despite all the funding, remained unavailable. From the 30 million euro income from intercountry adoption, in 1999, the adoption agencies only invested 4 million euro into the local child protection (project aid). Furthermore the best paying adoption agencies had an attractive pull on the staff of the local child protection, which as a result caused the effectiveness of the latter to be undermined. In addition, the demand for children resulted in parents being 'advised' to relinquish their children, who with a minimum of help could have cared for the children themselves. In short, intercountry adoption had a negative effect on the integrity and independency of the local child protection.

Dickens' therefore concludes that intercountry adoption is not simply about meeting the needs and wishes of the prospective adopters. It is also about meeting the organisational survival needs of the international agencies; about meeting the resource needs of the different workers involved; about satisfying international political obligations and interests.

### **What happened next?**

The adoption agencies and other advocacy groups for intercountry adoptions were quite alarmed by Romania's closure<sup>5</sup>. Romania chose for the original interpretation of article 21b of the UNCRC and opted for in-country care. There was no longer a direct subsidiarity between national

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<sup>5</sup> The American lobby organisation Focus on Adoption organised in Washington a 'rally for adoption' out of fear that the Romanian example would be followed by Guatemala (see [www.guatadopt.com/archives/000183.html](http://www.guatadopt.com/archives/000183.html)).

and intercountry adoption. Adoption agencies feared that other countries would follow that example. The Romanian decision came under heavy fire. It is beyond this article to fully describe the well-organised adoption lobby, but this has been detailed in my book. In short it means that this lobby can successfully influence politicians. The intercountry adoption issue became in this way part of diplomatic pressure, often done in the framework of international trade agreements and other international relations.

An example; The American Secretary of State Colin Powell raised this issue during his negotiations with the Romanian Prime Minister Adrian Nastase about Romania's accession to NATO. Also the US State Department, encouraged by the Joint Council on International Children's Services (an interest group of US adoption agencies) and by the Congressional Coalition on Intercountry Adoption (an interest group consisting of members of the US Congress and US Senators), entered into contact with several EU Member States with a view to coordinate actions.<sup>6</sup>

Even now, five years later, attempts are ongoing to finalise certain pipeline cases despite the fact that the Romanian authorities have declared repeatedly that these children are not adoptable. It is noteworthy that politicians and prospective adoptive parents generate this pressure, with the majority stemming from France, Italy and the US. The adoption agencies are hiding, while adoptive parents from different countries, organized in interest groups, coordinate and often act jointly. The central authorities of the receiving countries remain silent.

### **Towards a European Adoption Policy?**

After the change in power at the end of 2004 in both the European Parliament and the European Commission, within these European institutions, serious efforts were made to reverse the Romanian adoption ban.

In the European Commission Franco Frattini<sup>7</sup>, before Foreign Affairs Minister in the first Berlusconi government, became the Italian Vice President responsible for children's rights. The European Parliament elections, in 2004, brought two new French members. They did not hide their mission to re-open Romanian adoptions. They had expected Romania to re-allow adoptions after their accession to the European Union, but when that did not happen these politicians took actions (written declarations, press conferences, visits to Romania). Failing

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<sup>6</sup> See letter US State Department, 20 oktober 2005  
[www.jcics.org/Maura%20Harty%20Reply.Oct20.pdf](http://www.jcics.org/Maura%20Harty%20Reply.Oct20.pdf)

<sup>7</sup> In April 2008 Frattini returned to Italy as Foreign Affairs Minister for the Berlusconi II-government. EC-vice-president Jacques Barrot (France) took over his Brussel's responsibilities.

success, the French Members of the European Parliament organised a conference on November 9<sup>th</sup> 2006. The theme was the issuing of a European Adoption Policy<sup>8</sup> in order to re-open Romanian adoptions through the back door.

During this conference several calls were made to create a European space for children. Reference was made to the freedom of movement of agricultural products, of financial services and the need to extend this to free movement of (adoptable) children. Vice President Frattini supported this call for a European Adoption Policy and committed to having this policy option investigated, while openly questioning the rightfulness of foster care as a suitable care option. He also announced the need to involve children from outside the EU into the decision making process. Since then a number of preparatory initiatives were undertaken<sup>9</sup> in perfect tango between the European Parliament, initiated by European Parliament Members Jean-Marie Cavada and Claire Gibault, and the European Commission, by VP Frattini. While recent documents concerning a European Adoption Policy are no longer referring to Romania specifically, it is undoubtedly clear that Romania's closure motivated these actions.

What would such a European Adoption Policy entail? The idea is as follows: limit foster care to a maximum of two years, after which children who cannot be placed back with their families, would become adoptable. These children would then become available for national adoption for a limited amount of time, and then be placed on a central European adoption register, after which they would become available for intercountry adoption.<sup>10</sup>

With this approach the European adoption agencies would kill two birds with one stone:

1. It would not only re-allow adoptions from Romania, but also impose the Hague interpretation of article 21b to EU Member States who until then were receiving countries.
2. It would give European citizens priority in adopting from other European countries at the expense of other countries like the US, Canada and Australia.

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8 See:  
[www.europarl.europa.eu/eplive/expert/shotlist\\_page/20061109SHL12462/default\\_en.htm](http://www.europarl.europa.eu/eplive/expert/shotlist_page/20061109SHL12462/default_en.htm)

9 Two contracts were awarded, both explicitly aiming towards the development of a European Adoption Policy  
EP see: [www.euroalert.net/en/contracts.aspx?idl=66682](http://www.euroalert.net/en/contracts.aspx?idl=66682)  
EC see: [www.ec.europa.eu/justice\\_home/funding/tenders/funding\\_calls\\_en.htm](http://www.ec.europa.eu/justice_home/funding/tenders/funding_calls_en.htm)

10 Le nuove frontiere dell'accoglienza: kafala, adozione europea e affidamento internazionale, 30 augustus 2007 (see: [www.amicideibambini.it/movimento/cervia-notizie2007.htm](http://www.amicideibambini.it/movimento/cervia-notizie2007.htm))



## The broader context

Since 2005 intercountry adoptions have been steadily declining worldwide. Not only has Romania stopped intercountry adoption, other countries also show a continuous process of delays, temporary closure and re-opening (Cambodia, Guatemala, Vietnam and Russia) just to name a few. Always with comparable stories about corruption and about children who are labelled as abandoned or orphaned, while the majority are not. Basically it often comes down to the exploitation of vulnerable families left with no choice. Parents are often tricked into relinquishing their children without understanding the full concept of adoption (thinking the children will come back). And while old markets close, the travelling circus of adoption agencies moves on and a new market is evolving in Africa. Particularly Ethiopia has seen an exponential growth over the last years.

Most countries that were in the news the last years because of adoption related child trafficking – in adoption jargon often called ‘irregularities’ – receive from the international community the advice to ratify the Hague Convention. The Hague Convention, which was established to prevent irregularities, fails to do this because it is mainly based on the trust between central authorities from both sending and receiving countries. Relying on this trust is not justifiable, as just the few examples of Romania, India and China have shown. It is almost impossible for receiving countries to judge how and why children end up in residential care, because the formal adoption process masks the underlying child trafficking (Leifsen, 2008). This means that also stolen children, or children with a falsified identity, can be legally adopted under the Hague Adoption Convention.

The fact that ratification of the Hague Convention is no guarantee to prevent wrongdoings is not only proven by the example of Romania. India, where the Hague Convention entered into force in 1996, is regularly in the news because of the adoption of kidnapped children or falsified relinquishment declarations. Such children could under Hague compliant adoption legislation be whitewashed for legal intercountry adoption (Smolin, 2006). Recent research shows that the regulation of the adoption process in India in fact works contra productive (Bos, 2007). It leads to a mystification of the reality. The more adoptions are regulated and monitored, the further politically correct objectives get distanced from daily practices. Where in general it is said that unwed mothers relinquish their child voluntarily, this research shows that that is not always the case. Bos states that children are clearly ‘commodities’ although all interested parties deny or hide the financial component of adoptions. Therefore children’s homes have a priming effect. The homes must be emptied, but they also must be full. Adoption after all is a multi-million industry.<sup>11</sup>

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<sup>11</sup> NRC, De kindertehuizen moeten leeg, maar ze moeten ook vol, 25 mei 2007.

Ratification of the Hague Convention, and the regulation of intercountry adoption whereby intercountry adoption becomes subsidiary to national adoption – while foster care and residential care are limited in time – will not lead to less wrongdoings, but will be masked by this legislation.

The effects this is having on the local child protection, considering the large influence of foreign adoption agencies in the financing and/of creation of children's homes and foster care, should be reason for concern. Because under the Hague Convention such care is not considered as suitable care. If parents cannot take back the child within a certain legally defined timeframe, adoption follows and more often intercountry adoption.

Also in countries that before did not allow intercountry adoptions, intercountry adoption has become a child protection measure after the ratification of the Hague Treaty, for example in the Czech Republic.<sup>12</sup> While at the start of the Hague Convention the participating countries were divided in countries of origin and receiving countries, it seems that the system is heading in the direction where countries can be both at the same time. This is also what the initiators of a European Adoption Policy are striving for.

The UNCRC does not consider adoption as an average child protection measure, as it is a concept unknown in most countries and because children without parental care can be ensured suitable care in other ways.<sup>13</sup> Furthermore, intercountry adoption may only be a last option if there is no other way to raise the child in-country. The Hague Convention, however, transforms intercountry adoption into a regular form of child protection in countries of origin. And thus dismisses these countries of their commitments taken under the UNCRC, to ensure children, temporarily or permanently deprived of parental care, the right to alternative care in country.

In the receiving countries the Hague Convention has created an image of ethical adoptions. It is understandable that more and more people are interested in such adoptions. It is a simple, though lengthily, administrative process, implemented under the auspice of central authorities (in the Netherlands, the Ministry of Justice). A fully socially accepted, well regulated, legal market of children, where payments are defined as costs and country fees.

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12 Recently a conference took place in Prague where intercountry adoptions were promoted by mainly Italian and Danish adoption agencies/authorities, *Prague Post* 1 October, 2008, Panel promotes intercountry adoption ([www.praguepost.com/articles/2008/10/01/panel-promotes-foreign-adoption.php](http://www.praguepost.com/articles/2008/10/01/panel-promotes-foreign-adoption.php)).

13 Implementation Handbook UNCRC, p. 270.

### **A last remark**

There is an upcoming trend: to combine project aid or development aid with adoptions. Experience has shown that countries that do this will receive more children for adoption. This brings us in fact back to a (comparable) point system, which was in Romania's case heavily criticized.

France even takes it a step further. In 2004 the French government, confronted with more than 25,000 adoption requests, decided to double the number of adoptions from 4,000 to 8,000. The opposite happened, the following years adoptions dropped with 20%. In an attempt to regain part of the market share from Italy, Spain and the US, the French government recently created a Peace Corps.<sup>14</sup> It consists of students who will do voluntary work, financed by the Ministry of Foreign Affairs. Their mission? To find abroad adoptable children for French families – the first target is Cambodia. Actor Gérard Depardieu spearheads the initiative.<sup>15</sup> He has engaged himself to use his network to find wealthy private donors who could provide the needed capital to complement the adoption related funding of the French Foreign Affairs Ministry.

Monetary gain is the driving force behind many of the wrongdoings in intercountry adoptions. To replace direct payment (country fee) by project aid will not solve this.

What remains still is the key question regarding whose best interest this is really all about: the interest of the child or the interest of the receiving countries (adoption agencies and adoptive parents)?

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14 Gap-year mission to find baby orphans for France, 29 juli 2008  
[www.timesonline.co.uk/tol/news/world/europe/article4419249.ece](http://www.timesonline.co.uk/tol/news/world/europe/article4419249.ece)

15 Gérard Depardieu au service de l'adoption  
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# THE EU AND INTERNATIONAL ADOPTION FROM ROMANIA

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## ABSTRACT

The European Union (EU) has applied an anti-inter-country adoption (ICA) policy in Romania as part of EU accession conditionality, while after 2007 the EU promoted a pro-ICA approach. Romania had to overhaul its child protection system and ban ICA before it could become an EU member, while its current legislation maintains the ban on ICA. However, since 2007 the EU has been demanding that Romanian authorities resume ICA from Romania. This article examines the factors and processes which shaped the EU's 'chameleonic' policy on ICA in relation to Romania. The child protection system in Romania still faces significant shortcomings. However, it is shown that the EU's embrace of a pro-ICA policy after 2007 does not constitute a response to the problems faced by child protection in Romania. On the contrary, the EU's plea for the liberalization of ICA from Romania is the outcome of a combination of *endogenous* factors, such as the EU's own embrace of a children's rights policy and its biased interpretation of key international instruments on ICA and child rights, and *exogenous* factors, such as adoption lobbies, which succeeded in getting their grievances onto the agenda of EU institutions.

## INTRODUCTION

This article examines how and why the European Union (EU)'s position on the provision of international adoption from Romania radically shifted after 2007. It will be shown that the EU's policy position regarding inter-country adoption (ICA) in Romania changed from a staunch ICA critic during the enlargement process to a supporter of ICA from Romania after 2007. However, what factors explain the EU's 'chameleonic' policy on international adoption from Romania? By drawing on the empirical case of EU intervention in the issue of international adoption in Romania before and after 2007, it will be demonstrated that both *exogenous* and *endogenous* factors shaped the EU's radical shift from an anti-ICA stance to an ICA advocate after 2007. As part of EU accession conditionality, the EU demanded that

Romania ban ICA in order to reform the child protection system; yet the ban on ICA generated a backlash in the market of international adoption and the lucrative business run by international adoption agencies via the ICA of Romanian children. Romania had to overhaul its child protection system to be in line with international instruments before it joined the EU. After 2007, however, EU institutions promoted a pro-ICA policy by urging the Romanian government to lift the ban on ICA. It will be shown that the EU's embrace of a pro-ICA policy regarding Romania has, ironically, not been triggered by the situation of child protection in Romania after 2007. On the contrary, it will be argued that the EU's 'chameleonic' position on ICA is the outcome of a combination of *endogenous* factors, such as the EU's own embrace of a children's rights policy and its biased interpretation of international instruments, and *exogenous* factors, such as adoption lobbies, which succeeded in getting their grievances onto the agenda of EU institutions.

The empirical findings of this article provide insights into the role and scope of regional organizations, such as the EU, in the regulation of international adoption and in the broader protection of children's human rights across Europe. The findings of this article draw on triangulated data collection methodology that includes semi-structured interviews<sup>1</sup> with EU and child rights actors, detailed documentary analysis and an examination of key international instruments on international adoption and children's rights. Qualitative interviews were conducted with key EU actors (Commission officials in Directorate-General (DG) Enlargement, European Commission Delegation in Bucharest, European Parliament (EP)'s rapporteur for Romania) and child rights experts involved in the accession negotiations with Romania (from 1999–2007) along with the main Romanian governmental actors (secretaries of state, civil servants) and non-governmental organizations and institutions (such as UNICEF) involved in different aspects of child rights and international adoption in Romania (before and after 2007). Semi-structured interviews were also conducted with key EU officials in the European Commission (DG Justice) in charge of EU internal policy on children's rights after 2007 and an expert on child rights (member of) in the UN Committee on the Rights of the Child (CRC Committee). The snowballing sampling method was employed to identify suitable interviewees for this research. Due to confidentiality reasons, the names of interviewees are not provided in the 'Appendix', and therefore, interviewees' names have been replaced by numbers, which are used in the notes supporting the empirical claims of this article. The findings of the article draw on the analysis of all interview data, although not all interviewees are cited in the text. This article is organized as follows: the section 'International Instruments on Children's Rights and ICA' examines the main international instruments regulating ICA and how scholars and practitioners have

interpreted them, while the section 'International Adoptions in Romania and EU Accession Conditionality' scrutinizes the anti-ICA policy applied by the EU in Romania as part of the EU accession conditionality. The post-2007 pro-ICA shift is explored in the section 'The Situation after 2007'. The key factors that shaped the change of EU policy line from a staunch anti-ICA position to a defender of ICA are examined in the last section. It is shown that the EU's embrace of a pro-ICA policy was not a response to the situation of child protection in Romania: rather, EU internal developments and pro-adoption lobbies influenced the EU's pro-ICA policy in relation to Romania after 2007.

#### INTERNATIONAL INSTRUMENTS ON CHILDREN'S RIGHTS AND ICA

The principles underpinning ICA and the mechanisms providing for its global regulation are enshrined in the main international instruments on children's rights and international adoption, namely the UN Convention on Rights of the Child (CRC) (1989) and the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption (Hague Convention, 1993). However, the legal confusion surrounding the relationship between the two instruments (Dillon, 2003: 186) and their enforcement at the national level has engendered in practice conflicting interpretations by scholars and child rights practitioners. The CRC is regarded as the 'touchstone for children's rights throughout the world' (Fortin, 2009: 49) by providing a paradigm shift in thinking about children as both 'beings' and 'becomings' (Freeman, 2011: 27). Indeed, the CRC merits include its breadth and the extent of its detailed provision for the autonomous rights of children (Kilkelly, 2001: 308–26). As the main international instrument upholding children's rights and the basic standard-setting on adoption at the global level, the CRC provides in Article 21b that ICA 'may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin', while any childcare solution has to secure the preservation of the child's cultural and ethnic identity (Article 20 CRC). According to the CRC provisions, therefore, ICA is a last resort measure.<sup>2</sup> The provisions regarding ICA have to be interpreted in conjunction with other CRC articles, such as Article 3 on the 'best interests of the child', Article 12 on the child's right to express his/her views freely or Article 9 on child's separation from parents. The widely accepted interpretation of CRC provisions is that in-country childcare solutions constitute a priority, along with the preservation of the child's



biological family, whereby the state is responsible for the development and implementation of policies designed to support family preservation (Vite, 2008: 25).

The Hague Convention, while drawing on the CRC principles, is a private international law instrument that has a different legal status and scope to the CRC: it aims to provide the minimum safeguards to protect the rights of children affected by ICA by achieving cooperation between states and recognition of adoptions that take place in line with the Convention's provisions. While the CRC is a broader convention on the general principles constitutive of the human rights of children, the Hague Convention has a narrower focus, namely it specifies the procedures and standards that should guide legal ICA by preventing the corruption and profiteering generated by it (Dillon, 2003: 203). Therefore, the Hague Convention legitimizes ICA by establishing the procedures and mechanisms to regulate and control the ICA practice (Bartner, 2000; Bainham, 2003). To this end, Article 4 of the Hague Convention states that ICA shall take place 'only if the competent authorities of the state of origin... have determined after possibilities for placement of the child within the State of origin have been given due consideration, that an inter-country adoption is in the child's best interests'. Both the CRC and Hague Convention provide that the choice for a childcare solution is to be guided by the principle of the 'best interests of the child' (Article 21 CRC and Article 4 Hague Convention). Unlike the CRC, the Hague Convention emphasizes in its Preamble that ICA offers the advantage to 'a permanent family to a child for whom a suitable family cannot be found in his or her State of origin'. The interpretation of this particular provision has led to the view that ICA is preferred to institutional care or even foster care (Bartholet, 2007, 2010). However, the Hague Conference on Private International Law adopted guidelines on how to interpret the Hague Convention provisions regarding the hierarchy of childcare solutions, according to which 'in-country permanent family or foster care should be preferred to international adoption (Hague Conference on International Law, 2008: 29–30). Indeed, the Hague Convention has been interpreted as giving effect to Article 21 CRC (Selman, 2009; Smolin, 2010) by adding substantive safeguards and procedures to the broad CRC principles and norms.<sup>3</sup> For instance, UNICEF endorses this interpretation of the Hague Convention and CRC, namely that 'stable family-based solutions' take precedence over international ones (UNICEF, 2010a). The CRC Committee, which is the main body in charge of monitoring the transposition of the CRC at the national level, recommends in its Concluding Observations that State parties should implement Article 21 CRC, according to which ICA is a last resort measure, and particularly that they sign and ratify the Hague Convention (Committee on the Rights of the Child, 2009a, b).

In other words, the Committee interprets CRC provisions on ICA as being consistent with the Hague Convention's, namely that the subsidiarity principle is to be applied in relation to ICA.<sup>4</sup> The key international child rights institutions and organizations, such as UNICEF, the CRC Committee, the Hague Conference on Private International Law, along with international NGOs such as Save the Children, share the view that stable in-country solutions are to be preferred to ICA, which is regarded as a last resort (McLoughney, 2009; Hague Conference on Private Law, 2008; Save the Children, 2010; UNICEF, 2010a; Committee on the Rights of the Child, 2009a, b).

However, some scholars have attributed conflicting interpretations to the provisions in the CRC and Hague Convention regarding the hierarchy of childcare solutions. While CRC explicitly prioritizes in-country solutions, and therefore ICA is a last resort measure, ICA advocates deem that the Hague Convention prioritizes permanent family solutions, and therefore, advances a preference for ICA over institutional care, and even over foster care (Bartholet, 2010; Barozzo, 2010). Some argue that international adoption provides the only means for finding a permanent family to unparented children, and although they acknowledge the abuses and corruption generated by ICA, they argue that the restriction of ICA cannot be justified by either adoption abuses or corruption (Bartholet, 2010: 91; 2012: 379). This perspective on ICA is particularly predominant in the USA, where foster care has proven to be problematic due to a 'lack of permanency and feelings of contingency' (Dillon, 2003: 201) which have damaging effects on children. Those who regard ICA as a last resort measure, on the other hand, invoke the corruption and child trafficking generated and fuelled by ICA (Bhabha, 2004; Smolin, 2010; Selman, 2009). Therefore, the interpretation of the two main conventions leads to antagonistic positions regarding the regulation and provision of ICA as a childcare solution.

At the heart of the heated debate between those who view ICA as a last resort measure and others who do not lies the dichotomy between the abuses and fraud underlying ICA and the damaging psychological effects of institutionalization on child development and well-being (Zeanah et al., 2003; Dillon, 2003: 235). Therefore, the quality and availability of in-country childcare alternatives along with an evaluation of domestic placements (Smolin, 2012: 385) are crucial factors influencing the choice for in-country solutions. Both conventions concede that it is the responsibility of competent national authorities to assess how the available childcare solutions, including ICA, meet the best interest of children without a family. Only if a child cannot be cared for in a 'suitable manner' domestically (Article 21 CRC) or after 'due consideration' (Article 4 Hague Convention) has been given to all in-country alternatives, can ICA be considered an option. Even then,

ICA is a viable solution only if it is allowed by the sending country's legislation (Article 21 CRC). While it is not clear what kind of standards care institutions should meet in practice (Cantwell and Holzscheiter, 2008: 53), the stigma of 'institutions' as referring only to orphanages is misleading. Although orphanages with appalling conditions still exist, international institutions and child rights experts have been promoting the development of 'institutional care' providing family-like environment.<sup>5</sup> For instance, 'family-type' homes or 'group homes', which represent small, residential facilities located within a community and designed to serve children (Mezmur, 2009: 93) have been advanced as suitable childcare institutions that are widely used across Europe. To this end, the UN bodies and the main international NGOs promote de-institutionalization via the establishment of family-type care solutions or small-group care, which meet certain quality standards that would be conducive to child's development (Human Rights Council, 2009).

At the European level, the enforcement mechanisms of the European Convention on Human Rights (ECHR) have been invoked in conjunction with the rights-based content of the CRC (Kilkelly, 1999) and thus children's human rights under the ECHR have in some cases been interpreted in the light of the CRC standards and principles (Kilkelly, 2002). Under the ECHR framework, ICA has been interpreted as an extreme measure because of two factors. First, it is the state's duty to promote and facilitate contact between children and parents and work for the reunification of parent and child and, second, the state has the obligation to establish adequate child protection measures regarding child abandonment and family support (Bainham, 2003). Indeed, the implementation of the CRC provisions entails in practice the state's responsibility for protecting the rights of the child, while ensuring appropriate alternative care solutions and supervising the well-being and development of any child placed in alternative care (SOS Children's Villages International, 2009). The Hague Convention, on the other hand, does not include measures which states are obliged to take to support the birth family or to seek the reunification of the child with the family (Bainham, 2003: 7; Bhabha, 2004) given that its main objective is the safeguarding of ICA after all alternative care solutions have been exhausted. In the context of the ECHR, therefore, the practice of ICA would amount to an admission of failure on the part of the state (Bainham, 2003: 13), which is the reason why the international adoption of children from the Member States is not a common practice. In brief, it is contended that the interpretation of the Hague Convention in conjunction with the CRC should render ICA as the measure of last resort, which is further reinforced by the rights and principles included in the ECHR.

INTERNATIONAL ADOPTIONS IN ROMANIA AND EU  
ACCESSION CONDITIONALITY

The fall of communism exposed the appalling conditions of Romanian orphanages and the huge number of children cared for in these institutions. In the early 1990s, therefore, international adoption became the main rescue solution for the 100,000 institutionalized children (Morrison, 2004) and Romania was the main provider of children for ICA worldwide (Selman, 2010). Yet, the ICA from Romania violated the international instruments on children's rights<sup>6</sup> due to poor regulation and lack of observance of international instruments regulating the ICA practice (European Commission, 2001:24). Although Romania had signed and ratified the CRC in 1990 and the Hague Convention in 1995, the principles and provisions in the two conventions were not reflected in the Romanian legislation or institutional framework. The legal irregularities underpinning ICA in Romania were unearthed by the findings published in a report in 2002 by the Independent Group for the Analysis of Inter-country Adoption (IGAIA), a group set up by the Romanian authorities and consisting of child rights experts (Jacoby et al., 2009: 123). For instance, according to this report, the institutionalization law (11/1990) and the abandonment (47/1993) law, according to which children protected within residential care could be legally declared abandoned if their parents had shown lack of interest in the child for a period of 6 months (IGAIA, 2002: 16–17), in practice facilitated the proliferation of ICA as a solution by finding families for children in institutional care.

According to some, the post-1990 legislative framework led to the emergence of a Romanian international adoption market which was offer-driven,<sup>7</sup> according to which Romania was a supplier in the activities of agencies specializing in international adoptions (IGAIA, 2002: 23). For instance, adoption agencies set up a database of children fit for international adoption whereby children would have 'price tags' with sums ranging from \$6,000–\$30,000 (Jacoby et al., 2009: 124) based on their age, health and physical features (Post, 2007). Furthermore, corrupt staff in orphanages and the lack of post-adoption monitoring provided opportunities for illicit adoptions (Dickens, 2002) and the emergence of baby trade (Jacoby et al., 2009: 117). Adoption facilitators had resorted to procuring children directly from biological families, usually in exchange for money (Roby and Ilfe, 2009: 663), and hence 'paper orphans' were manufactured (Graff, 2008: 63) as these children were neither orphans nor abandoned by their parents.<sup>8</sup> They were in institutions as a result of their families' poverty (European Parliament, 2001: 17). What emerged in Romania was a system of private adoptions, whereby a form of ICA emerged in which individuals or mediating bodies outside the formal structure of

the Hague Convention Central Authority proposed a match, which is not approved by the Hague Convention system (Hayes, 2011: 289). Therefore, private ICA was promoted as a means of getting children out of the large residential institutions and placing them into families abroad. This system prioritized the best interests of adopters and not of the adopted children for three reasons (Post, 2007: 85). It generated money without putting the interests of the child first; it discouraged domestic adoptions and, above all, children who did not qualify as adoptable were adopted. According to the European Parliament's rapporteur for Romania, ICA from Romania was 'child selling... children being smuggled out of the country [...] it was no surprise to me when Romania was named by the UN as one of the top eleven countries as a source of human trafficking'.<sup>9</sup> For instance, the level of ICA peaked in 2000 when 3,035 children were adopted internationally while only 1,219 children were adopted nationally (Table 3).

Given the international media coverage of the situation of children in institutions and the illegal adoption of children from Romania (Selman, 2009), child protection became a formal EU accession condition in 2000 as part of the application of the Copenhagen political accession criteria.<sup>10</sup> Yet, the EU had no legal competence in child rights and ICA in relation to EU Member States, although within the enlargement context, the Commission could employ the accession conditionality to seek changes in a wide range of human rights areas, including child protection and international adoption. The Commission was the main EU institution which devised and managed the pre-accession process (Grabbe, 2006: 26), and therefore its role as a 'screening actor' (Hillion, 2004: 11) entailed overseeing the candidates' progress in meeting the accession criteria, even in relation to those policy sectors where the Commission lacked expertise and experience, such as in child rights matters in general.<sup>11</sup> However, it is contended that the EU has significant leverage to forge substantial changes in candidate states' human rights provision by employing the accession conditionality even if those policy sectors are not deemed to be traditional EU areas, such as ICA and child protection.

## 1. THE MORATORIUM ON ICA

Romania violated the international instruments on ICA (European Commission, 2001) and therefore, within the EU enlargement context, at the Commission's behest, a moratorium was placed on international adoptions in 2001 by the Romanian government.<sup>12</sup> The EU position was that Romania had to reform its legislation on international adoptions in order to be in line with the European practices on ICA, according to which Member States do not render children available for ICA.<sup>13</sup> A key reason for the moratorium was that reform of the child protection

system and a ban on international adoptions were mutually exclusive: ie the system could not be reformed if children did not become part of the system because they had been sent abroad. The reform of the system had to be underpinned by the adoption of new legislation on ICA and protection of children's rights. At the same time, although EU receiving countries accounted for 40 per cent of all ICA from Romania, it was deemed inappropriate for EU states or prospective states to *send* children for international adoption (Selman, 2010). The reform of the system was supported by EU financial assistance under the PHARE (Poland and Hungary: Assistance for Restructuring their Economies) programme<sup>14</sup> and was targeted at developing childcare alternatives, such as 'group home alternatives', which accompanied the de-institutionalization of children via the closure of old-style institutions. Indeed, the reform of the child protection system in Romania provides the 'most dramatic example of a country engaged in large scale movement of children from institutions to foster care and group homes' (Dillon, 2003: 202). For instance, one of the European experts on family law and children's rights deemed that the ban on ICA was the *sine qua non* condition for reforming child protection and particularly for preventing the profiteering and irregularities underlying how the ICA procedure functioned in Romania.<sup>15</sup>

The Independent Panel of Experts on Family Law – set up by the Commission to advise Romanian government on the new law – aimed to ensure that the new Romanian legislation was in line with the practices of the EU Member States regarding international adoption. The new Romanian legislation on children's rights (272/2004) and adoption (273/2004) – which was based on the CRC provisions – entered into force in 2005 and maintained the moratorium on ICA by limiting it to extreme exceptions. Romanian children could be adopted abroad only by their relatives up to the second degree of kinship.<sup>16</sup> Foreign couples could adopt Romanian children only if they were permanent residents in Romania (law 273/2004). The new legislation on children's rights and child adoption, which was welcomed by the European Commission (European Commission, 2005b), was highly innovative and revolutionary and was recommended as a model even for some West European states. According to a member of the Independent Panel of experts 'the legislation is pushing very far the application of the UN Convention of the Rights of the Child and it contains a number of provisions by which the other EU Member States could be inspired'.<sup>17</sup> The USA based pro-ICA lobby was critical of the new legislation that maintained the ban on ICA.<sup>18</sup> Yet, the Independent Panel of Experts' stance on the new Romanian legislation was that it mirrored the practices of the Member States as no EU Member State expatriates its children.<sup>19</sup> Presenting a legal rather than a political argument, the European child rights experts in the Independent Panel followed the provisions in the



international instruments on children's rights and the positions of key international child rights bodies, such as UNICEF (2010a) and the CRC Committee, according to which international adoption is a measure of last resort (Mezmur, 2009; Herczog, 2009). At the same time, the ICA policy template promoted by the EU in Romania followed the child protection model of the Member States, where a wide range of child-care services are targeted at helping biological families keep their children, while family-based alternatives are rendered available on a large scale and ICA is a last resort.<sup>20</sup> By relying on the technical knowledge provided by the child rights experts who advised the Romanian government on the new legislation, the Commission and legislation in Romania embraced a strict anti-ICA policy as part of the EU accession conditionality. Indeed, the EU contended that Romania's legislation on ICA and child rights complied with international instruments and, therefore, the EU wholeheartedly supported the new legislation on children's rights within the enlargement context (European Commission, 2005b).

#### THE SITUATION AFTER 2007

After Romania's accession to the EU in 2007, the EU embraced a pro-ICA position by urging Romania to lift the ban on ICA. This radical U-turn on ICA emerged incrementally at the Parliament level as members of the European Parliament (MEPs) in the Committee on Civil Liberties, Justice and Home Affairs (LIBE) took a public pro-ICA stance at the EU level after 2007. For instance, some MEPs in LIBE signed a *Joint Declaration* (2008)<sup>21</sup> which requested the support of the Commission in addressing the situation of international adoption in Europe. By highlighting the detrimental effects on child development of foster and institutional care, the Declaration requested that European states prohibiting ICA, such as Romania, should review their anti-ICA legislation by relaxing the intra-EU adoption procedure. The issue of ICA was also debated within a broader European context, for instance via the conference 'Challenges in Adoption Procedures in Europe' (2009) where the European Commission (DG Justice, Freedom and Security (JLS)) presented the findings of a study<sup>22</sup> on the state of play of international adoptions in the 27 EU Member States. The conference provided a means for the Commission (DG JLS) to persuade Member States of the need to facilitate international adoption inside the Union and hence to force Romania to lift the ban on ICA maintained by its current legislation, as the Commission official responsible for the organization of the conference, Patrizia de Luca, put it (De Luca, 2009). The Commission's study recognized the diversity in the adoption legislation of Member States by singling out the



uniqueness of the Romanian legislation on ICA and the need to change it (Brulard and Dumont, 2009). The Commission endorsed an explicit pro-ICA position by providing its own interpretation of international instruments on children's rights and international adoption. For instance, by discarding Article 21 CRC and its principle of subsidiarity in relation to ICA due to 'uncertain interpretations', the Commission embraced a preference for ICA by interpreting the Hague Convention as prioritizing ICA over foster care and other forms of in-country care alternatives (Brulard and Dumont, 2009; De Luca, 2009: 2).<sup>23</sup> Yet this constituted a radical shift from the Commission's anti-ICA policy within the enlargement context, where ICA was deemed a measure of last resort. The Commission justified its pro-ICA position by drawing on the inclusion of children's rights among the Union's objectives in the Lisbon Treaty (Article 3 TEU) and its commitment to protect children's rights, as enshrined in the EU Charter of Fundamental Rights, where Article 24 covers the rights of the child (De Luca, 2009: 3). Yet neither the EU Charter of Fundamental Rights nor the Lisbon Treaty provide the Commission with the legal competence to adopt hard law measures on children's rights or to regulate international adoptions inside the Union (Piris, 2010). By highlighting the references to children's rights at the Treaty level, the Commission strategically adopted a pro-ICA position as part of its broader commitment to protect children's rights inside the Union, which is radically at odds with the anti-ICA policy line applied to Romania as part of the pre-accession process.

The only democratically elected institution of the EU, the European Parliament, took the lead in promoting a pro-ICA policy line in relation to Romania after 2007. For instance, the vice-president of the Parliament and its child rights rapporteur, MEP Roberta Angelilli, requested that the Romanian government lift the ban on ICA because of the high rate of child abandonment in orphanages and the overall huge number of children in residential institutions (Angelilli, 2010, 2011). The Parliament can employ various instruments, such as requesting the Commission's intervention or naming and shaming, to persuade Member States to take action in certain policy areas. Given the EU's lack of legal mandate to intervene in the ICA provision of the Member States, the Parliament alerted the Commission with respect to Romania's need to resume ICA. Yet, child rights organizations and NGOs monitoring the protection of children's rights in Romania contend that the situation of children in residential care has radically improved since mid 2000s, while the high demand for domestic adoption removes the need for Romania to resume ICA.<sup>24</sup> Indeed, child rights organizations view the decision to reopen ICA as a matter for competent national authorities to judge on the basis of whether the conditions for children in care are 'suitable' rather than being imposed

from outside (McLoughney, 2009). The Parliament set out its pro-ICA policy by adopting the Resolution *International Adoption in the European Union* in 2011. The Resolution expresses the Parliament's position on ICA in Europe. However, it has been claimed that the pro-ICA policy embraced by the Parliament is driven by some MEPs and adoption lobbies, especially the Italian ones, who push for the re-opening of ICA from Romania and therefore, the Resolution is the concrete outcome of this alliance between the lobbies and MEPs.<sup>25</sup> The Resolution endorses the Parliament's explicit pro-ICA stance, along with the hierarchy of childcare measures and particularly the role that EU institutions should play in this policy area. The Parliament advances its own interpretation of the CRC and Hague Convention by supporting ICA over other forms of in-country care because of its provision of a permanent family environment<sup>26</sup> (European Parliament, 2011) and indirectly urging states like Romania to reconsider international adoption as a valid childcare solution without making any reference to the availability of family-based alternatives. Notwithstanding the Resolution, the Parliament further sought to persuade Romania to reopen ICA by explicitly requesting the Commission to intervene in relation to Romania's 'violation' of adoption standards by depriving children 'of the possibility of having a family' via ICA (Angelilli, 2011). According to the Parliament, 70,000 children in institutional care in Romania are in a 'state of total abandonment' and hence deprived of the possibility of finding a family via ICA (Angelilli, 2011). Although the Parliament does not have legal competence to require Member States to change their ICA legislation, the Parliament has political clout to raise public awareness and also to name and shame those Member States that fail to uphold the EU values and norms. Its plea for the resumption of ICA from Romania echoes the ICA supporters' rhetoric: namely, that ICA is the best solution for finding a family for children in the child protection system. By advancing a pro-ICA policy in Romania, the Parliament contradicts the EU's pre-2007 anti-ICA policy as part of the accession conditionality and hence indirectly acknowledges a failure of the EU conditionality instrument that required the overhaul the child protection in Romania before 2007. In other words, the EU contradicts its pre-accession intervention regarding the reform of the child protection system and ICA policy in Romania, which had been heralded as a success by the EU itself (European Commission, 2005b).

#### REFLECTING ON THE EU'S 'CHAMELEONIC' ROLE IN ICA

The EU applied an anti-ICA policy in Romania before 2007 as part of the accession conditionality. However, after 2007, the main EU institutions adopted an explicit pro-ICA policy line, which is anchored in an

opportunistic interpretation of the CRC and Hague Convention. What factors brought about the EU's radical shift in relation to ICA from Romania and how do they shape the EU's role in ICA and in the broader protection of children's rights? It is argued below that the pro-ICA position embraced by the EU after 2007 was not a response to the situation of child protection in Romania. Instead, other *exogenous* factors, such as the pro-adoption lobby actions at the EU level, along with EU *endogenous* conditions, such as the emergence of an EU children's rights policy, caused the EU's 'chameleonic' embrace of a pro-ICA position in relation to Romania.

### 1. CHILD PROTECTION IN ROMANIA AFTER 2007

The Romanian child protection system underwent a root-and-branch reform before 2007, while the moratorium on ICA was maintained by the post-2007 legislation. The EU requested that Romanian authorities resume ICA after 2007 for two main reasons: the rate of child abandonment in maternity wards and the high number of children in institutional care (Brulard and Dumont, 2009; Angelilli, 2011). The quick fix to this situation was, according to the Parliament, the resumption of ICA as the only viable solution for providing children with a family (Angelilli, 2011). The depiction of institutional care in Romania by the EU, however, does not reflect the situation on the ground. The child protection system in Romania, despite its radical overhaul in the early 2000s, still suffers from significant shortcomings, such as the slowness of the domestic adoption procedure.<sup>27</sup> However, these are not related to the reasons given by the European Parliament in its promotion of a pro-ICA policy for Romania. The difficulties faced by the Romanian child protection system are qualitatively distinctive from those signalled by the EU after 2007. The domestic adoption process is slow and highly bureaucratic, while there are some categories of children, such as children with disabilities and older children, who are hard to adopt nationally (UNICEF, 2011) but also globally (Smolin, 2012). These factors are explored below.

The reformed child protection system and children's rights legislation in Romania prioritize the family-type childcare services, such as the placement of children in his/her extended family, with a guardian or with foster families. Because of EU pre-accession financial assistance, the old residential institutions have been restructured into family-type apartments providing care and accommodation for children with disabilities or for those not yet placed in a family-type service (Transtec, 2006). After the ban on ICA, the number of children in residential care dropped sharply from 57,181 in 2000 to 22,742 in 2011 due to de-institutionalization, while the number of children placed in family care solutions doubled, peaking to 43,518 in 2011 (Table 1).

Table 1. Romania: number of children in child protection system from 1998 to 2011

Date	Number of children in public and private residential care	Number of children in family care (extended family, foster care, foster families)
31/12/1998	38,597	17,044
31/12/1999	33,356	23,731
31/12/2000	57,181	30,572
31/12/2001	49,965	37,553
31/12/2002	43,234	43,092
31/12/2003	37,660	46,568
31/12/2004	32,679	50,239
31/12/2005	28,786	47,723
31/12/2006	26,105	47,871
31/12/2007	25,114	48,172
31/12/2008	24,437	47,159
31/12/2009	23,696	45,550
31/12/2010	23,183	43,817
30/06/2011	22,742	43,518

Source: Romanian Office for Adoption ([www.adoptiromania.ro](http://www.adoptiromania.ro)).

The number of children in residential institutions in Romania is not high compared with other former communist states and even the old EU Member States. For instance, if the figures are related to the size of population, according to data for 2010,<sup>28</sup> the number of children in residential care per 10,000 inhabitants is: 11 (Romania), 10 (Bulgaria), 10 (Estonia), 10 (Hungary), 28 (Lithuania), 12 (Latvia), and 20 (Czech Republic). In the 'old' Member States the figures indicate: 11 (Denmark), 15 (Finland), 6 (Netherlands), 9 (Portugal), 3 (Spain), and 16 (Belgium). Therefore, Romania is not an outlier regarding the number of children in residential care. On the contrary, both the West European countries and the former communist states have higher numbers of children in residential care than Romania. Similarly, the rate of child abandonment in Romanian hospital wards averages around 700 children per year, with the great majority of these children being either reintegrated into their families or placed in family-based alternative care ([General Office for Child Protection, 2011](#)). Indeed, since 2005 more than 50 per cent of children abandoned in hospitals have been returned to their biological families ([Jacoby et al., 2009](#)) while substantially fewer children are now abandoned each year ([Murray, 2006: 3](#)). At the same time, the development of family-based alternative care, such as fostering or guardianship, was the key target of the reform of child protection in Romania before 2007. According to aggregated data on family-based care for countries in Eastern Europe, Romania has the highest number of children placed in family-based alternative care (see [Table 2](#)).

Since 2001 the demand for domestic adoptions has been flat, averaging around 1,300 adoptions per year (see [Table 3](#)). Before the ban on

Table 2. South-Eastern Europe: Children in family-based care (with foster parents or guardians: absolute numbers and rates per 100,000 children 0–17 years old.) in 2000, 2005 and 2007, at the end of the year

South Eastern Europe	Number of children in Family-based care			Rate (per 1000,000 children 0–17 years)		
	2000	2005	2007	2000	2005	2007
Romania	26,917	47,723	46,160	537	1100	1132
Albania		4,074	5,964	–	302	462
Bosnia & Herzegovina	3,783	3,311	3,296	402	368	378
Croatia	4,376	3,774	3,574	470	437	425
Montenegro Serbia <sup>a</sup>		2,700	3,350		187	241
TFYR Macedonia	1,126	1,157	1,126	206	235	238

<sup>a</sup>Foster care only

Source: TransMONEE database 2009 as cited in UNICEF study *At home or in a home? Formal care and adoption of children in Eastern Europe and Central Asia* (UNICEF, 2010b).

Table 3. Romania: number of international and national adoptions 1998–2008

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Domestic adoptions	840	1,710	1,291	1,274	1,346	1,383	1,422	1,136	1,421	1,294	1,300
Inter-country adoptions	2,017	2,575	3,035	1,521	407	279	251	2	0	0	0
Total	2,857	4,285	4,326	2,795	1,753	1,662	1,673	1,138	1,421	1,294	1,300

Source: ANPDC statistics (www.copii.ro).

ICA, the number of international adoptions exceeded by far the number of domestic adoptions, while after 2001 the number of domestic adoptions approved yearly varied between 1,300 and 1,400 (Table 3). At the same time, according to the Romanian Office for Adoption, the number of families requesting to adopt nationally exceeds by far the number of adoptable children in the system<sup>29</sup> (UNICEF, 2011). Therefore, the EU's demand that Romania lift the ban on ICA due to the significant number of children in institutions and who are denied a family in their home-country is not supported by the figures. However, the shortcomings of the child protection system in Romania are of a different kind. The procedure of domestic adoption is extremely slow and bureaucratic, while several categories of children, such as older and disabled children, are hard to adopt (UNICEF, 2011). The Romanian legislation forbids the institutionalization of children under three, and therefore such children are placed in residential care only for medical reasons (National Authority for the Protection of Child's Rights, 2006). Indeed, the vast majority of children in residential care have mental and

physical disabilities and their age is above three (National Authority for the Protection of Child's Rights, 2006). According to post-2007 statistical data, disabled and older children are difficult to adopt, particularly those children who are over ten and have special needs, both factors that make them less likely candidates for adoption (Jacoby et al., 2009; Smolin, 2012). The adoption of older children and particularly of children with disabilities is a recurrent problem encountered also in other European countries, such as the UK (Baker 2007; Cousins 2009).

The CRC Committee signalled the shortcomings underlying the national adoption process in its latest Concluding Observations (2009c). Apart from requesting Romanian authorities to speed up the process of national adoption, the Committee also recommended that Romania 'withdraw the existing moratorium as a barrier to the full implementation of Article 21 of the Convention' (Committee on the Rights of the Child, 2009c: 13). Therefore, the Committee recommends the full implementation of Article 21 CRC, whereby international adoption would be governed by the principle of subsidiarity and thus would be a last resort measure, which would put the Romanian adoption legislation in line with the Member States'. However, the resumption of ICA in order to meet the provisions in Article 21 CRC – according to which ICA is a measure of last resort – would still fall short of addressing the EU's pro-ICA pleas, according to which institutional care rather than ICA is a measure of last resort. The Romanian legislation was amended in November 2011 to speed up the process of domestic adoption and also to allow Romanian citizens living abroad to adopt children from Romania, provided that within two years' after the child has been declared adoptable no eligible family, including the child's extended family, is found for the child. This amendment of the legislation reflects the situation after 2007 when many Romanian citizens chose to live in other European countries and wanted to adopt Romanian children (Panait, 2011). Therefore, the Romanian government has slightly relaxed the ICA provision, although this does not amount to the full resumption of ICA. In short, the current situation of child protection in Romania does not indicate the need to resume ICA, as adoption advocates, including the EU, claim. On the contrary, as child rights organizations and Romanian governmental officials contend, the system of domestic adoption has to become more effective and efficient in processing the adoption applications received rather than that ICA be resumed.<sup>30</sup>

## 2. EXOGENOUS FACTORS: ADOPTION LOBBIES

Adoption agencies played a key role in influencing the EU institutions' shift to a pro-ICA policy after 2007. There is evidence of intensive pro-adoption lobby activity at the EU level aimed at persuading



Romanian authorities to resume international adoption.<sup>31</sup> The pro-adoption lobbying strategies targeted the EU's opportunity structures to persuade Romanian authorities to lift the ban on ICA. After Romania's accession to the EU in 2007, adoption lobbies accessed those EU venues, such as the Parliament's LIBE, which have leverage over EU internal policy, in order to re-open ICA.<sup>32</sup> The employment of the Parliament as a lobbying venue attaches political salience to the issue of ICA in Europe. The adoption agencies' commonly employed tactic was to send petitions to the Parliament or contact various MEPs in order to raise awareness regarding the situation of children in institutions. By employing an 'emotionally loaded' tactic regarding the situation of children in institutional care in Romania after 2007, the lobbies framed ICA as a matter of EU internal policy by pleading that the EU should play a leading role in establishing an open market for ICA (European Parliament, 2010). Adoption agencies, such as Solidarite Enfants Roumains Abandonnee (SERA), Amici dei Bambini (Friends of Adoption) or Angels Children, found supportive EU politicians in the Parliament to launch an EU campaign on the need to facilitate ICA in Europe, especially from Romania.<sup>33</sup>

The Italian NGO, Amici dei Bambini, lobbied the Parliament by sending petitions and letters regarding the situation of Romanian children in institutions and the need to lift the ban on ICA (European Parliament, 2010). For instance, Marco Griffini, the leader of the adoption NGO Amici dei Bambini, petitioned the Parliament in 2010 requesting its explicit intervention in the situation of ICA from Romania. By employing the common pro-ICA strategy, ie the emphasis on the huge number of Romanian children in institutions, Griffini requested that Romanian authorities reopen ICA as a legitimate and necessary way of finding a family for Romanian children (European Parliament, 2010). However, adoption lobbies employ an opportunistic interpretation of international instruments. By completely disregarding Article 21 CRC, they overemphasize the Hague Convention's reference to 'permanent family' and hence endorse a preference for ICA over in-country solutions, such as foster care (European Parliament, 2010).

The lobbies were most successful in setting the EU's policy agenda when their framing of the situation of institutionalized children in Romania converged with the EU's own endeavour to expand its remit in new policy sectors. EU institutions can use the lobbies' agenda as a 'window of opportunity' (Kingdon, 1984) to rationalize the EU's role in ICA inside the Union. It has been argued that the EU usually engages a wide range of non-state actors at the EU level in order to generate grounds to push for the extension of EU competence 'by stealth' (Majone, 2005). The European Parliament was quick to embrace the lobbies' pleas for ICA when this could be justified as a legitimate area

for EU internal policy by drawing on EU responsibility to protect children's rights after the entry into force of the Lisbon Treaty (European Parliament, 2011). Indeed, the involvement of interest groups, such as adoption agencies, at EU level can enhance the EU's legitimacy (Scharpf, 1998) regarding its engagement with the issue of international adoption and children's rights. Therefore, it is contended that the adoption lobby brought the issue of ICA to the forefront of the Parliament's child rights agenda, and subsequently, the Parliament has embraced the EU's role in improving the operation of the Hague Convention by 'eliminating unnecessary bureaucracy and enabling adoption procedures to be completed more expeditiously while protecting the paramount rights of the child' (European Parliament, 2011). The lobbies' self-interested actions to liberalize ICA in Europe and in Romania were arguably most successful when they chimed with the self-interest of EU institutions to acquire a scope and role in ICA inside the Union. As shown above, the external influence exerted by adoption lobbies on EU institutions relied on an interpretation of the Hague Convention prioritizing ICA at the expense of in-country solutions, such as foster care.

### 3. ENDOGENOUS FACTORS: EU CHILD RIGHTS AGENDA

The EU's pro-ICA policy line adopted after 2007 can be justified by the emergence of an EU child rights agenda. Since 2006 in particular, the European Commission has extended its embrace of human rights norms to children and young people, inside and outside the European Union, as set out in the Communication *Towards an EU Strategy on the Rights of the Child* (2006). The 2000 EU Charter of Fundamental Rights specifically mentioned children's rights to protection and participation, while the Commission's 'strategic objectives' for 2005–2009 included the protection of the rights of children as 'a particular priority' and promised that 'the Union [would] act as a beacon to the rest of the world' in respect of children's rights (European Commission, 2005a). The 2006 Communication attempted to bring together all European Commission policies affecting children into an integrated, rights-based framework (European Commission, 2006a, b). The Parliament had been a long-standing advocate of the EU's children's rights agenda (Stalford and Schuurman, 2011), for instance, showing its support by adopting policy documents such as the Resolution *Towards an EU Strategy on the Rights of the Child* (2008), and particularly after the entry into force of the Lisbon Treaty. Indeed, since 2006 there has been an emergent child's rights rhetoric and agenda (Stalford and Drywood, 2009) in relation to EU internal policy. Various actions and measures on matters related to children were framed as being part of the EU's endeavour to uphold children's rights. Therefore,



EU institutions justified their support for a pro-ICA policy as being part the EU's commitment to protect children's rights as enshrined in Article 3 TEU (Lisbon Treaty), according to which the protection of children's rights is one of the EU's objectives. To this end, the Parliament embraced the self-ascribed commitment to addressing 'the problem of precarious childhood, and in particular that of abandoned and institutionalised children' (European Parliament, 2011: 3).

The emergence of an EU children's rights agenda provided the EU with the normative framework to embrace a pro-ICA policy after 2007 in relation to Romania. Yet, the EU's support of a pro-ICA stance fell short of pursuing the spirit and letter of the CRC and Hague Convention. The European Parliament in particular attached its own interpretation to these conventions by promoting its own hierarchy of childcare solutions, which prioritizes ICA at the expense of foster care or any other in-country solution, except domestic adoption. In the same vein, the Commission's relationship with the CRC, as part of the EU's child rights policy, is underpinned by lack of genuine allegiance to the principles and rights enshrined in the CRC (Stalford and Drywood, 2011: 214). Key EU policy documents, such as the *Communications Towards an EU Strategy on the Rights of the Child* (2006) and *An EU Agenda for the Rights of the Child* (2011) mention the CRC as the main source of rights. However, in relation to ICA, the Parliament does not refer to the provisions in Article 21 CRC. The reason why the Parliament disregards the CRC provisions on ICA is related to the CRC's stance on ICA as a last resort measure, which is at odds with the Parliament's pro-ICA attitude.

As stated earlier, the Parliament's request that the Romanian government lift the ban on ICA, despite the EU's lack of competence in this area, relies on inaccurate factual data regarding the situation of child protection in Romania after 2007. Furthermore, the Parliament's pro-ICA policy makes no reference to family-based alternatives available at the national level. The Parliament deems that the situation of children in institutions would be solved by having a liberalized ICA provision across Europe, without targeting the root of the problem, namely how and why children become separated from their biological parents in the first place (Smolin, 2012: 382). Some politicians in the Parliament promote ICA as a 'panacea' for the plight of children without parents in the child protection system, by ignoring the impact of this radical solution on the wide range of rights enjoyed by children as provided in the CRC. Indeed, it has been argued that MEPs 'endorse easy child care solutions by overlooking the broader child rights framework as provided by international instruments and conventions'.<sup>34</sup> Decisions regarding ICA have to be taken in the context of all the rights enshrined in the CRC, while the choice for the childcare solution is to

be determined according to the 'best interest of the child', which is contingent on the child's concrete circumstances. However, the EU's pro-ICA stance does not reflect the complexity of thinking that children have rights (Eekelaar, 1992) which have to be applied consistently in all policy measures, including ICA, affecting them. The Parliament's pro-adoption rhetoric echoes that of the ICA supporters, namely a focus on the consequences of child relinquishment (Bartholet, 2010) – the only solution to it being ICA – rather than its prevention, namely by addressing the economic or social circumstances which can lead to child abandonment. Even the ratification of the CRC and Hague Convention does not oblige state parties to prioritize ICA or make children available for ICA (Bainham, 2003; Dillon, 2003). Yet, the Parliament's pro-ICA stance after 2007 is fuelled by its partial interpretation of the international instruments, such as the Hague Conventions, regulating ICA and its lack of accurate factual evidence regarding the situation on the ground. By endorsing a reflective approach to the interpretation of international instruments on children's rights and the situation of child protection on the ground across Europe, the Parliament could adopt a more nuanced position regarding its role in ICA, which could make a difference to children's lives. Yet, the Parliament's pro-ICA position as part of its commitment to promote children's rights demonstrates that the EU has *de facto* joined the ICA advocates by espousing an opportunistic interpretation of the main international provisions on ICA to favour international adoptions at the expense of in-country solutions, such as family-based care. In short, the current pro-ICA position adopted by the EU constitutes a radical U-turn from the position adopted during Eastern enlargement.

## CONCLUSION

This article scrutinized how and why the EU's position on ICA from Romania shifted after 2007. The situation of child protection and the corruption underpinning ICA in Romania after 1989 led to the ban on ICA as part of the EU pre-accession requirements. EU financial assistance and intervention radically overhauled the child protection system before Romania joined the EU in 2007. However, after 2007 the EU pursued a pro-ICA policy line in relation to Romania, which was radically at odds with its anti-ICA pre-accession policy. The key empirical evidence presented in this article demonstrates that the pro-ICA turn at the EU level was not determined by the situation on the ground in Romania. On the contrary, statistical data from Romania highlight that there is no need for Romania to resume ICA. Therefore, it appears that *exogenous* factors, such as adoption lobbies,

and *endogenous* processes, such as the EU's embrace of a child's rights agenda, provided the EU with the rationale to endorse a pro-ICA role and scope inside the Union. The EU's advancement of a pro-ICA agenda was underpinned by its skewed interpretation of the main international instruments on children's rights and international adoption.

This article provides insights into the role and scope of regional organizations in affecting the practice of international adoption and the broader protection of children's rights. Child abandonment and unparented children constitute serious violations of children's rights. The key international instruments providing the legal framework for ICA and children's rights have been widely invoked by EU institutions to tackle these violations of children's human rights on the ground. However, the legal ambiguity (Vite, 2008) underpinning the relationship between the CRC and Hague Convention has generated in practice conflicting interpretations between those who regard ICA as a child rescue solution and those who do not. To this end, scholars and child rights practitioners have highlighted both the damaging effects of institutionalization (Zeanah et al., 2003; Dillon, 2003) and the exceptional character of employing ICA as a childcare solution (Smolin, 2010). The polarized views on the issue of ICA, as embraced by ICA advocates and ICA critics, fail to provide a more nuanced and reflective account of the diversity of child protection provisions on the ground across EU Member States.

The EU does not have legal mandate to intervene in the ICA practice of the Member States, yet it does have the political force to address at the EU level those social and economic circumstances conducive to child abandonment and unparented children. However, the promotion of ICA as the most viable and effective solution to tackle child abandonment and the plight of children in care, as the EU has been advocating since 2007, does not address the key factors which generate child relinquishment in the first place (Selman, 2009). Rather than addressing the consequences of child abandonment, the EU could develop policies and measures targeting those national factors conducive to circumstances whereby children are separated from their biological families. At the same time, ICA is an extreme measure of childcare and a wide range of complex factors have to be assessed in line with the 'best interests of the child' (Article 3 CRC) before national authorities regard it as the best solution for children without a family. The EU's advancement of ICA as a solution meant to provide a quick fix to child abandonment and institutionalization overlooks the complexity and distinctiveness of the child rights provision across the Member States. By considering these factors, the EU's role in ICA would be consistent with the provisions of the main international instruments, and furthermore, would have a long-term impact on the overall protection of the rights of the child at the national level.

## NOTES

<sup>1</sup> This article draws on a set of 22 qualitative interviews (conducted from 2008 until 2011) with Commission officials, Members of the European Parliament, Romanian authorities and child rights experts and organisations. All interviewees, with some exceptions, approved to be cited anonymously and are not, therefore, named.

<sup>2</sup> This position is endorsed by the UN Committee on the Rights of the Child and is evident in the Committee's Concluding Observations (Interviewee 20).

<sup>3</sup> See Explanatory Report to the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Inter-country Adoption*, by G. Parra-Aranguren, at paragraph 6. Available on the Hague Conference website, [www.hcc.net](http://www.hcc.net). under Inter-country Adoption Section/Explanatory Documents.

<sup>4</sup> For instance, in its Concluding Observations on Malawi the Committee recommends that 'the State party review and ensure that its legislation on adoption is in conformity with article 21 of the Convention. The Committee reiterates its previous recommendation. . .and in particular encourages the State party to ratify the 1993 Hague Convention on the Protection and Cooperation in Respect of Inter-country Adoption' (Committee on the Rights of the Child 2009a). The same recommendation is done in relation to Niger (Committee on the Rights of the Child, 2009b).

<sup>5</sup> Interviewee 21.

<sup>6</sup> According to Commission Regular Reports the 'Commission expressed concern with regard to legislation and practices on inter-country adoption that allowed considerations other than the best interest of the child to influence adoption decisions' (European Commission, 2001: 24).

<sup>7</sup> Interviewee 9.

<sup>8</sup> It has been shown that the Romanian children adopted by foreigners were neither orphans nor abandoned by their families, they were in fact being sold by their parents due to poverty-related reasons (Dillon, 2003:249).

<sup>9</sup> Interviewee 9.

<sup>10</sup> According to the Copenhagen political criteria, the applicant country has to have 'achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities' (Conclusions of the Presidency, Copenhagen Council 1993).

<sup>11</sup> According to a Commission official in DG Enlargement: 'We are not a human rights organisation: our bread and butter business is the *acquis communautaire*', ie the complete body of EU legislation covering all policy areas where the EU has competence to act (Interviewee 12).

<sup>12</sup> Interviewee 4 and interviewee 11.

<sup>13</sup> Interviewee 3.

<sup>14</sup> For instance, between 1990 and 2000 the EU provided more than 100 million Euros as humanitarian aid to the childcare system (Jacoby et al., 2009: 120). After the adoption of the moratorium on ICA, the EU financial aid was channelled towards the reform of the system rather than humanitarian aid (Post, 2007).

<sup>15</sup> Interviewee 3.

<sup>16</sup> The 2005 legislation (law 274/2004) provided that children could be adopted internationally only by their grandparents living abroad. The legislation was amended in 2009 to include the provision that children can be adopted internationally by their relatives up to the third degree of kinship.

<sup>17</sup> For instance, the child rights experts who advised the Romanian government on the new legislation took into account the provisions in the latest conventions covering aspects on child rights, such as the Convention on Contact Concerning Children (Council of Europe).

<sup>18</sup> Interviewee 2 and interviewee 6.

<sup>19</sup> Interviewee 3.

<sup>20</sup> Interviewee 5.

<sup>21</sup> *Joint Declaration* by Claire Gibault and Jean Marie Cavada See Factsheet, Towards a European adoption procedure available at [http://www.coe.int/t/DC/Files/Source/FS\\_children\\_adoption\\_en.doc](http://www.coe.int/t/DC/Files/Source/FS_children_adoption_en.doc).

<sup>22</sup> 'Comparative study relating to procedures for adoption among the Member States of the European Union, practical difficulties encountered in this field by European citizens within the context of the European pillar of justice and civil matters and means of solving these problems and of protecting children's rights' (2009).

<sup>23</sup> According to the Commission 'If national adoption is not possible, inter-country adoption has to be considered as a possible alternative for the care of the child [. . .] By making the child's right

to a family an absolute principle it would always be possible to act in the child's best interest, giving clear preference to the possibility of European adoption over institutionalisation or long-term foster care in the child's country of origin' (De Luca, 2009: 2–10).

<sup>24</sup> Interviewee 21.

<sup>25</sup> Interviewee 13.

<sup>26</sup> According to Parliament Resolution 'if primary care of children by the family is unavailable, adoption should be one of the natural secondary choices, whilst placing a child in institutional care should be the very last option' (European Parliament, 2011: 2).

<sup>27</sup> Interviewee 17.

<sup>28</sup> According to data available in the Eurochild study 'Children in alternative care. National surveys January 2010-2<sup>nd</sup> edition' (2010), available at [http://www.eurochild.org/fileadmin/user\\_upload/Publications/Eurochild\\_Reports/Eurochild%20Publication%20Children%20in%20Alternative%20Care%20-%202nd%20Edition%20January2010.pdf](http://www.eurochild.org/fileadmin/user_upload/Publications/Eurochild_Reports/Eurochild%20Publication%20Children%20in%20Alternative%20Care%20-%202nd%20Edition%20January2010.pdf).

<sup>29</sup> For instance, each year 1,100 children are declared adoptable while there are 2,500 families requesting to adopt nationally (Interviewee 17).

<sup>30</sup> Interviewee 18 and interviewee 21.

<sup>31</sup> Interviewee 14 and interviewee 15.

<sup>32</sup> Interviewee 13.

<sup>33</sup> Interviewee 13.

<sup>34</sup> Interviewee 21.

## APPENDIX

### INTERVIEWS WITH EU OFFICIALS

Interviewee 1 (member of the 'Coordination' unit, DG Enlargement) Interview. Brussels, 26 May 2009.

Interviewee 2 (member of the 'Coordination' unit, DG Enlargement) Interview. Brussels, 30 May 2009.

Interviewee 3 (member of the Independent Panel of Experts on Family Law) Interview. Brussels, 10 December 2008.

Interviewee 4 (head of the Romania team 2005–2006, DG Enlargement) Interview. Brussels, 27 May 2009.

Interviewee 5 (member of the Romania team, DG Enlargement) Interview. Brussels, 29 May 2009.

Interviewee 6 (member of the Commissioner Olli Rehn cabinet, DG Enlargement) Interview. Brussels, 27 May 2009.

Interviewee 7 (head of the Romania team 2004–2005, DG Enlargement) Interview. Brussels, 29 May 2009.

Interviewee 8 (member of the country desk in the Romania team, DG Enlargement) Interview. Brussels, 29 May 2009.

Interviewee 9 (European Parliament rapporteur for Romania, 1999–2004) Interview. Brussels, 28 May 2008.

Interviewee 10 (head of the Romania team 1999–2004, DG Enlargement,) Interview. Brussels, 28 May 2009.

Interviewee 11 (task manager for children's rights in the Romania team 2000–2005, DG Enlargement,) Interview. Brussels, 26 May 2009.

Interviewee 12 (member of the country desk in the Romania team, DG Enlargement) Interview. Brussels, 27 May 2009.

Interviewee 13 ('Civil justice' unit, DG Justice). Interview. Brussels, 5 July 2011.

Interviewee 14 (head of the EC Delegation in Romania, 2000–2006) Interview. Brussels, 26 May 2009.

Interviewee 15 (member of the Romania team, DG Enlargement, 2005–2006) Interview. Brussels, 28 May 2009.

Interviewee 16 ('Fundamental Rights and Rights of the Child' unit, DG Justice) Interview. Brussels, 19 September 2009.

#### INTERVIEWS WITH ROMANIAN GOVERNMENTAL ACTORS

Interviewee 17 (secretary of state in the Romanian Office for Adoption) Interview. Bucharest, 8 July 2009.

Interviewee 18 (secretary of state in the National Authority in the Protection of Child's Rights and former task manager for child protection in the EC Delegation in Romania) Interview. Bucharest, 7 July 2009.

Interviewee 19 (member of Romania's EU chief negotiator's team) Interview. Brussels, 30 May 2009.

#### INTERVIEWS WITH CHILD RIGHTS ORGANIZATIONS

Interviewee 20 (UN Committee on the Rights of the Child), phone interview, 10 November 2011.

Interviewee 21 (UNICEF Romania). Interview. Bucharest, 5 September 2011.

Interviewee 22 (project manager for 'Children's Rights High Level Group-Romania') Interview. Bucharest, 10 July 2009.

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# THE RIGHTS OF THE CHILD and the EUROPEAN UNION

During the last 10 years children's rights in the EU are being manipulated by adoption proponents and others with vested (financial) interests in the business with children. These actors succeeded in getting their grievances onto the agenda of the EU institutions. This led to a biased interpretation of key international instruments on (intercountry) adoption and child rights. The results are devastating for families.

## 1. The Issue

The European Commission does not hold the competence to legislate on family law and child protection. These policy fields are the exclusive competence of the EU Member States.

During the accession negotiations with Romania, the issue of the poor state of Romania's child protection (so-called "orphanages") became a key issue due to pressure from civil society, and those with a vested interest in intercountry adoption.

In 1997 the European Council decided that the UN Convention on the Rights of the Child (UNCRC) was to be considered inseparable of the EU Treaty and thus was placed on the *acquis* list as legal basis for the accession monitoring and negotiations under the Copenhagen Criteria. Article 24 - The rights of the child - of the EU Charter on Fundamental Rights is also based on the UNCRC.

There is also another international convention, the Hague Adoption Convention (1993). This private law convention, however, is not part of the *acquis*. Although it was meant to prevent child trafficking, in practice, in Romania, it created a demand-driven market in children. Behind this legal market, all kind of abuses are hidden, such as corruption, abuse of power and the infiltration of pedophiles.

The European Commission and the European Parliament, at the time (2000), spoke with one voice in condemning this market, and requested from Romania the full respect of the UN Convention on the Rights of the Child. Especially as concerns article 21b of the UNCRC, which limits intercountry adoption as a last resort – after all local care options such as foster care, adoption, residential care and any other suitable manner of care (the so-called subsidiarity principle).

It then appeared that those with vested interests in intercountry adoption (United States, Israel, France, Italy, Spain and the Scandinavian countries) interpreted children's rights in a different manner. While these countries respect the UNCRC, article 21b, for their own children (except the US which did not ratify the UNCRC), they apply the Hague adoption Convention's version of subsidiarity for countries from where they adopt children.

The Hague Adoption Convention's interpretation of subsidiarity conflicts with article 21b of the UNCRC, as it does not consider foster care and residential care as suitable care, but only as short term temporary options. Instead the adoption proponents see three options: return of the child to the children's family, national adoption, intercountry adoption. Strict time limits for the first two options then automatically lead to the availability of children for intercountry adoption. If families cannot take back their children from residential care or foster care timely, their parental rights are terminated and children become "adoptable".

## 2. What Happened

Romania found itself between conflicting requests from the US/Israel (and some EU Member States) and the EU, and also inside and outside the European Commission and the European Parliament private opinions differed.

The EU legal position was that Romania should respect the UNCRC, where intercountry adoption is not a child protection measure, but an extreme and exceptional measure that may (but does not have to) be invoked if no care is available in-country.

The “other side” pressured for the Hague Adoption Convention’s interpretation, which makes intercountry adoption part of the national child protection system.

UNICEF, which serves as reference for other child rights NGO’s, was at the time at best unclear in their position. Formally UNICEF is promoting the UNCRC, but in practice they preach the Hague Adoption Convention.

In 2003 Romania requested assistance from the European Commission on solving this juxtaposition. The Commission then set up an Independent Panel of Family law Experts from EU Member States with as task to provide a technical, non political opinion.

This Independent Panel, in 2004, said that (intercountry) adoption is not, and should not, be seen as a measure of child protection. EU Member States in any case are obliged to have family support and child protection measures in place, so that they do not need to export children. Moreover, foster care and residential care (in conformity with the UNCRC) come before intercountry adoption. Intercountry adoption can, if all, only be an exceptional measure of last resort, as it is an extreme measure.

As a consequence, Romania’s new laws on children’s rights and on adoption that entered into force on 1 January 2005 did no longer foresee the option of intercountry adoption by non-related foreigners.

The adoption community (adoption agencies, prospective adoptive parents and others with vested interests) were greatly alarmed, and feared that other countries, worldwide, might take the same position and the business of intercountry adoption would no longer be possible.

**Countering the Opinion of the Independent Panel:** since 2004 there are efforts to get the European position on intercountry adoption reversed by forces inside and outside the European Commission. This resulted in:

- no longer considering the UNCRC as *acquis* (= legal basis);
- pretending that the Hague Adoption Convention is *acquis*,
- thus including intercountry adoption as integral part of national child protection systems, and not as an extreme exception, a measure of last resort.

## 3. Result

Over the last 10 years, some individuals and groups having a vested interest in intercountry adoption are working towards reversing the position taken in the Romanian case.

These inside and outside forces have been successful in:

- removing the UNCRC as legal basis, it now only “guides” the European Commission;

- promoting the Hague Adoption Convention;
- creating a smokescreen by promoting a de-institutionalisation campaign in Eastern European Countries, whereby the word intercountry adoption is rarely used. But which will have as result an important increase in such adoptions, the first effects are being seen in Bulgaria;
- UNICEF and the European Commission now speak with one voice. The EU is now one of the main funders of Unicef and a formal political partnership is being prepared;
- EU Member States and accession countries are becoming more and more sending countries (Portugal, Bulgaria, Latvia, Poland, Serbia, Montenegro - to name a few).

They were not successful in:

- creating a European Adoption Policy (2006/2009). Now, this initiative is being taken up again under the name “cross-border adoptions”.

The above has dire consequences for families. It departs from the European values, which obliges Member States to provide assistance to families in raising their children, and to provide suitable care for children temporarily deprived of their families.

Roelie Post

14 January 2016

*The undersigned is a civil servant of the European Commission since 1983.*

*I was from 1999 until 2005 the Task Manager for the Romanian Children File in the European Commission (DG Enlargement). I was forcibly removed from my tasks and not allowed to work in- or outside the European Commission and forced into sick leave.*

*The Secretary General of the European Commission, eventually, “rescued” me by seconding me to the NGO “Against Child Trafficking (ACT)”, which was set up for this reason.*

*In August 2014 the Commission’s secondment contract with ACT ended, and I was reinstated into the European Commission. However, I was still not welcome and all efforts were taken to discourage me to reintegrate, to humiliate and destabilise me, which made a successful reintegration a mission impossible. I am now on forced sick leave, likely facing invalidity procedures.*

*In 2007, I authored the book “Romania for Export Only, the untold story of the Romanian “orphans”. This book inspired the German TV Documentary “Search a Child, Pay Cash”, which was awarded the 2010 Media Prize of the German Child Rights Organisation “Kindernothilfe”*

<http://www.roeliepost.com/2009/09/suche-kind-zahle-bar/>

## **ANNEXES:**

- **THE PERVERSE EFFECTS OF THE HAGUE CONVENTION**, Roelie Post, this article was first published in Dutch in November 2008, in *Justitiële Verkenningen* (Judicial explorations) 2008/07, title: *Adoption under Fire* (page 25-37) by the Research and Documentation Centre of the Dutch Ministry of Justice.  
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# THE PERVERSE EFFECTS OF THE HAGUE ADOPTION CONVENTION \*

*R. Post* \*\*

Last year I published the book titled *Romania For Export Only, The Untold Story Of The Romanian 'Orphans'*. The book focused on my work for the European Commission in relation to the reform of Romania's child protection. In this book I describe the facts that led to the moratorium on intercountry adoptions and the pressure to re-open adoptions in Romania. In the media I was quoted as saying that intercountry adoption in fact was legalised child trafficking. This is not a popular statement and many placed me in the anti-adoption camp. I would like to distance myself from pro and anti-adoption labels and direct this discussion back to the heart of the matter: is intercountry adoption a child protection measure, or do children have rights in their own country and is intercountry adoption the ultimate breach of such rights?

This article describes the effects that the Hague Adoption Convention<sup>1</sup> had on adoptions from Romania. The aim of the Hague Convention was to guarantee that intercountry adoption would take place in the interest of the child, with respect for his/her fundamental rights, and to prevent the abduction, sale of or trafficking in children. Romania was one of the first countries that ratified this Convention (1994), and adopted in 1997 a Hague compliant adoption law. However, from 1997 to 2001 this convention did not so much protect the rights of the children, but foremost those of the parties in the receiving countries: central authorities,

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1 Full Title: Convention on Protection of Children and Co-operation in Respect of intercountry Adoption. The Convention was initiated by Italy and entered into force in 1995.

adoption agencies and adoptive parents. It further shows how intercountry adoption developed into a full-grown market, which functions according to the economical laws of Supply and Demand.

The result of the Romanian ban on intercountry adoptions will be discussed, including the consequences with regards to other countries. The article ends with the crucial question: can intercountry adoption be legislated without it leading to a demand-driven child market? This article argues why such is not possible under the current provisions of the 1993 Hague Convention.

### **The Romanian case**

The Romanian adoption law from 1997 made intercountry adoptions conform to The Hague Convention, subsidiary to national adoption. Adoption became a child protection measure for abandoned children. A child who was placed in a children's home and who was not visited by their parents for six months would then be deemed abandoned. In this case the directors of children's homes were obliged to start a legal procedure to terminate parental rights. That way the children became 'adoptable' and would be placed on the national adoption list for three months, after which the child would become available for intercountry adoption. After the yearlong reporting about child trade and corruption, this law was enthusiastically welcomed by the international community. But, the devil appeared in the details about international cooperation. Intercountry adoption would be done by Romanian adoption agencies in cooperation with foreign agencies. Foreign agencies were required to support the Romanian child protection with money, projects or other forms of aid. The amount of aid would be translated into points, on the basis of which adoptable children would be allocated.

From 1998 until 2000 the number of intercountry adoptions increased from 1000 to 3000 children per year.<sup>2</sup> Also the costs increased (Ambrose and Coburn, 2001). In no time more than a hundred Romanian agencies were active. Lawyers, doctors, business people... almost anyone could start an adoption agency and cooperate with the many interested foreign agencies. More and more children were declared legally abandoned. And more and more of these foreign agencies would run their own children's homes for adoptable children. Proof came out about so-called stillborn babies, who were actually reserved in a backroom for intercountry adoptions. Parents, who attempted to reclaim their children, were not allowed to do so.

Although thousands of children were now leaving the country, the number of children in residential care continued to increase. And despite

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2 Romanian Office for Adoption ([www.adoptiromania.ro/statistici.aspx](http://www.adoptiromania.ro/statistici.aspx)).

the perhaps good intentions of this system, not all aid went to the benefit of the children. The Romanian government had allocated insufficient budget for child protection, counting on the aid and funding in exchange for children. As a result, in 1999, a financial crisis broke out. The Romanian secretary of State then asked for foreign aid and reinforced the notion and general impression that Romania was unable to provide for its children.

In the meantime the negotiations for Romania's accession to the European Union had started. Under pressure of a French NGO the European Commission had included child protection under the human rights criterion. Confronted with numerous scandals and complaints about intercountry adoption, the European Commission and the European Parliament required that Romania would need to respect the rights of the child in order to prevent that other interests would prevail in decisions regarding intercountry adoptions.

In October 2001 Romania placed a moratorium on intercountry adoptions. But just a month later, under external pressure, so-called pipeline cases would be allowed and exceptions to the moratorium would also be permitted.

This would be the beginning of an endless battle to obtain children. One would expect that, after the finalizing of most pipeline cases, there would only be incidental exceptions. The opposite was true. Once clear how the system of exceptions functioned, these would happen more and more - under political pressure and private requests of certain politicians (Post, 2007, p. 117-173). At the end of 2003 Romanian Prime Minister Adrian Nastase agreed, during political talks with the Italian Prime Minister Silvio Berlusconi (then EU President) to the adoption of 105 children for Italy. Explosive media attention<sup>3</sup> was the result as well as a negative reaction of the European Union. Consequently Romania disallowed all exceptions to the moratorium; all pipeline cases had already been dealt with by a working group of the Romanian government.

### **Legislating children's rights**

In the meantime Romania had started reviewing its child rights legislation.

Already in 2001 an international working group was established to advise the Romanian government (Hague Conference, UNICEF, USAID, World Bank, EU). During a daylong meeting, with an American tape recorder at the table, it became clear that opinions were divided. The most

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3 EC issues ultimatum to Romania: stop child exports, *Daily Telegraph* 2 februari 2004.



important point of discussion: in which case children should be made available for intercountry adoption? Most of the participants considered foster care or residential care not suitable. The EU negotiators, however, felt these care options if implemented correctly, based on experience in the then 15 EU member states, were appropriate (Post, 2007, p. 112).

This important stumble block stems from the difference in approach between The Hague Adoption Convention and the UN Convention on the Rights of the Child (UNCRC), article 21b. This article indicates that intercountry adoption may be an option, in countries that know/use adoption, if there is no suitable care available in the country itself, such as foster care, local adoption or residential care. The preamble of the Hague Convention deals differently with this by making intercountry adoption subsidiary to national adoption, hereby excluding foster and residential care.<sup>4</sup>

At the end of 2003 the Romanian government, caught between conflicting demand of the EU and the US, asked the European Commission for help with the drafting of a new child rights law. As common practice in such cases when there is no expertise available within the European Commission, a Panel of Experts was established – made up of experts from five EU member States. This panel would remain in function for two years, when the laws were finalized. The mandate of the panel was to verify that the new laws would give the Romanian children similar legal protection as the laws in the then 15 EU Member States. The panel based its position on the UNCRC that is part of the *acquis communautaire* of the European Community. All Member States ratified this Convention and it is considered as inseparable of the Treaty of Rome. The panel therefore considered intercountry adoption as a last option, which only should be allowed if there is no suitable foster care, adoption or residential care in country available. As concerns EU Member States the panel:

*'Intercountry adoption cannot be considered as a measure of child protection. Romania's situation in this is exceptional, as no EU Member State expatriates its children. Other Member States protect their children and deal with the issue in-country.'*

In the meantime the reform of the Romanian child protection had continued rapidly. Large children's homes were closed and replaced by modern alternatives, such as foster care, family type homes and assistance to families. Consecutively a large public awareness campaign took place to inform the population about children's rights. Without the pressure to deliver children for intercountry adoption, a functioning local child protection could finally come to fruition. As a result there was no reason

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4 Explanatory Report on the Adoption Convention, written by G. Parra-Aranguren, 1994, art. 40 en 41.

to further expatriate children, and the Romanian government decided in June 2004 a law that no longer offered intercountry adoption by non-relatives as an option.

### **The effects of intercountry adoptions on local child protection**

It is crucial to understand the detrimental effect of intercountry adoption on the local child protection. Already in 2002 Jonathan Dickens described the effect of the Hague compliant Romanian adoption law and the point system. He signalled a paradox: while intercountry adoption indeed can lead to more money for the development of local child protection, it undermines the care and protection of the children who stay behind.

At first glance the Romanian adoption law improved the rules for intercountry adoption and limited the circumstances under which it could occur (subsidiarity). But in practice it effectively cemented the place of intercountry adoption by making it a child protection measure. In the local child protection powers that drew children into the adoption circuit were faring well. On the one hand for monetary profit and project aid and on the other hand because local protection, despite all the funding, remained unavailable. From the 30 million euro income from intercountry adoption, in 1999, the adoption agencies only invested 4 million euro into the local child protection (project aid). Furthermore the best paying adoption agencies had an attractive pull on the staff of the local child protection, which as a result caused the effectiveness of the latter to be undermined. In addition, the demand for children resulted in parents being 'advised' to relinquish their children, who with a minimum of help could have cared for the children themselves. In short, intercountry adoption had a negative effect on the integrity and independency of the local child protection.

Dickens' therefore concludes that intercountry adoption is not simply about meeting the needs and wishes of the prospective adopters. It is also about meeting the organisational survival needs of the international agencies; about meeting the resource needs of the different workers involved; about satisfying international political obligations and interests.

### **What happened next?**

The adoption agencies and other advocacy groups for intercountry adoptions were quite alarmed by Romania's closure<sup>5</sup>. Romania chose for the original interpretation of article 21b of the UNCRC and opted for in-country care. There was no longer a direct subsidiarity between national

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<sup>5</sup> The American lobby organisation Focus on Adoption organised in Washington a 'rally for adoption' out of fear that the Romanian example would be followed by Guatemala (see [www.guatadopt.com/archives/000183.html](http://www.guatadopt.com/archives/000183.html)).

and intercountry adoption. Adoption agencies feared that other countries would follow that example. The Romanian decision came under heavy fire. It is beyond this article to fully describe the well-organised adoption lobby, but this has been detailed in my book. In short it means that this lobby can successfully influence politicians. The intercountry adoption issue became in this way part of diplomatic pressure, often done in the framework of international trade agreements and other international relations.

An example; The American Secretary of State Colin Powell raised this issue during his negotiations with the Romanian Prime Minister Adrian Nastase about Romania's accession to NATO. Also the US State Department, encouraged by the Joint Council on International Children's Services (an interest group of US adoption agencies) and by the Congressional Coalition on Intercountry Adoption (an interest group consisting of members of the US Congress and US Senators), entered into contact with several EU Member States with a view to coordinate actions.<sup>6</sup>

Even now, five years later, attempts are ongoing to finalise certain pipeline cases despite the fact that the Romanian authorities have declared repeatedly that these children are not adoptable. It is noteworthy that politicians and prospective adoptive parents generate this pressure, with the majority stemming from France, Italy and the US. The adoption agencies are hiding, while adoptive parents from different countries, organized in interest groups, coordinate and often act jointly. The central authorities of the receiving countries remain silent.

### **Towards a European Adoption Policy?**

After the change in power at the end of 2004 in both the European Parliament and the European Commission, within these European institutions, serious efforts were made to reverse the Romanian adoption ban.

In the European Commission Franco Frattini<sup>7</sup>, before Foreign Affairs Minister in the first Berlusconi government, became the Italian Vice President responsible for children's rights. The European Parliament elections, in 2004, brought two new French members. They did not hide their mission to re-open Romanian adoptions. They had expected Romania to re-allow adoptions after their accession to the European Union, but when that did not happen these politicians took actions (written declarations, press conferences, visits to Romania). Failing

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<sup>6</sup> See letter US State Department, 20 oktober 2005  
[www.jcics.org/Maura%20Harty%20Reply.Oct20.pdf](http://www.jcics.org/Maura%20Harty%20Reply.Oct20.pdf)

<sup>7</sup> In April 2008 Frattini returned to Italy as Foreign Affairs Minister for the Berlusconi II-government. EC-vice-president Jacques Barrot (France) took over his Brussel's responsibilities.

success, the French Members of the European Parliament organised a conference on November 9<sup>th</sup> 2006. The theme was the issuing of a European Adoption Policy<sup>8</sup> in order to re-open Romanian adoptions through the back door.

During this conference several calls were made to create a European space for children. Reference was made to the freedom of movement of agricultural products, of financial services and the need to extend this to free movement of (adoptable) children. Vice President Frattini supported this call for a European Adoption Policy and committed to having this policy option investigated, while openly questioning the rightfulness of foster care as a suitable care option. He also announced the need to involve children from outside the EU into the decision making process. Since then a number of preparatory initiatives were undertaken<sup>9</sup> in perfect tango between the European Parliament, initiated by European Parliament Members Jean-Marie Cavada and Claire Gibault, and the European Commission, by VP Frattini. While recent documents concerning a European Adoption Policy are no longer referring to Romania specifically, it is undoubtedly clear that Romania's closure motivated these actions.

What would such a European Adoption Policy entail? The idea is as follows: limit foster care to a maximum of two years, after which children who cannot be placed back with their families, would become adoptable. These children would then become available for national adoption for a limited amount of time, and then be placed on a central European adoption register, after which they would become available for intercountry adoption.<sup>10</sup>

With this approach the European adoption agencies would kill two birds with one stone:

1. It would not only re-allow adoptions from Romania, but also impose the Hague interpretation of article 21b to EU Member States who until then were receiving countries.
2. It would give European citizens priority in adopting from other European countries at the expense of other countries like the US, Canada and Australia.

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8 See:  
[www.europarl.europa.eu/eplive/expert/shotlist\\_page/20061109SHL12462/default\\_en.htm](http://www.europarl.europa.eu/eplive/expert/shotlist_page/20061109SHL12462/default_en.htm)

9 Two contracts were awarded, both explicitly aiming towards the development of a European Adoption Policy  
EP see: [www.euroalert.net/en/contracts.aspx?idl=66682](http://www.euroalert.net/en/contracts.aspx?idl=66682)  
EC see: [www.ec.europa.eu/justice\\_home/funding/tenders/funding\\_calls\\_en.htm](http://www.ec.europa.eu/justice_home/funding/tenders/funding_calls_en.htm)

10 Le nuove frontiere dell'accoglienza: kafala, adozione europea e affidamento internazionale, 30 augustus 2007 (see: [www.amicideibambini.it/movimento/cervia-notizie2007.htm](http://www.amicideibambini.it/movimento/cervia-notizie2007.htm))

## The broader context

Since 2005 intercountry adoptions have been steadily declining worldwide. Not only has Romania stopped intercountry adoption, other countries also show a continuous process of delays, temporary closure and re-opening (Cambodia, Guatemala, Vietnam and Russia) just to name a few. Always with comparable stories about corruption and about children who are labelled as abandoned or orphaned, while the majority are not. Basically it often comes down to the exploitation of vulnerable families left with no choice. Parents are often tricked into relinquishing their children without understanding the full concept of adoption (thinking the children will come back). And while old markets close, the travelling circus of adoption agencies moves on and a new market is evolving in Africa. Particularly Ethiopia has seen an exponential growth over the last years.

Most countries that were in the news the last years because of adoption related child trafficking – in adoption jargon often called ‘irregularities’ – receive from the international community the advice to ratify the Hague Convention. The Hague Convention, which was established to prevent irregularities, fails to do this because it is mainly based on the trust between central authorities from both sending and receiving countries. Relying on this trust is not justifiable, as just the few examples of Romania, India and China have shown. It is almost impossible for receiving countries to judge how and why children end up in residential care, because the formal adoption process masks the underlying child trafficking (Leifsen, 2008). This means that also stolen children, or children with a falsified identity, can be legally adopted under the Hague Adoption Convention.

The fact that ratification of the Hague Convention is no guarantee to prevent wrongdoings is not only proven by the example of Romania. India, where the Hague Convention entered into force in 1996, is regularly in the news because of the adoption of kidnapped children or falsified relinquishment declarations. Such children could under Hague compliant adoption legislation be whitewashed for legal intercountry adoption (Smolin, 2006). Recent research shows that the regulation of the adoption process in India in fact works contra productive (Bos, 2007). It leads to a mystification of the reality. The more adoptions are regulated and monitored, the further politically correct objectives get distanced from daily practices. Where in general it is said that unwed mothers relinquish their child voluntarily, this research shows that that is not always the case. Bos states that children are clearly ‘commodities’ although all interested parties deny or hide the financial component of adoptions. Therefore children’s homes have a priming effect. The homes must be emptied, but they also must be full. Adoption after all is a multi-million industry.<sup>11</sup>

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<sup>11</sup> NRC, De kindertehuizen moeten leeg, maar ze moeten ook vol, 25 mei 2007.

Ratification of the Hague Convention, and the regulation of intercountry adoption whereby intercountry adoption becomes subsidiary to national adoption – while foster care and residential care are limited in time – will not lead to less wrongdoings, but will be masked by this legislation.

The effects this is having on the local child protection, considering the large influence of foreign adoption agencies in the financing and/of creation of children's homes and foster care, should be reason for concern. Because under the Hague Convention such care is not considered as suitable care. If parents cannot take back the child within a certain legally defined timeframe, adoption follows and more often intercountry adoption.

Also in countries that before did not allow intercountry adoptions, intercountry adoption has become a child protection measure after the ratification of the Hague Treaty, for example in the Czech Republic.<sup>12</sup> While at the start of the Hague Convention the participating countries were divided in countries of origin and receiving countries, it seems that the system is heading in the direction where countries can be both at the same time. This is also what the initiators of a European Adoption Policy are striving for.

The UNCRC does not consider adoption as an average child protection measure, as it is a concept unknown in most countries and because children without parental care can be ensured suitable care in other ways.<sup>13</sup> Furthermore, intercountry adoption may only be a last option if there is no other way to raise the child in-country. The Hague Convention, however, transforms intercountry adoption into a regular form of child protection in countries of origin. And thus dismisses these countries of their commitments taken under the UNCRC, to ensure children, temporarily or permanently deprived of parental care, the right to alternative care in country.

In the receiving countries the Hague Convention has created an image of ethical adoptions. It is understandable that more and more people are interested in such adoptions. It is a simple, though lengthily, administrative process, implemented under the auspice of central authorities (in the Netherlands, the Ministry of Justice). A fully socially accepted, well regulated, legal market of children, where payments are defined as costs and country fees.

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12 Recently a conference took place in Prague where intercountry adoptions were promoted by mainly Italian and Danish adoption agencies/authorities, *Prague Post* 1 October, 2008, Panel promotes intercountry adoption ([www.praguepost.com/articles/2008/10/01/panel-promotes-foreign-adoption.php](http://www.praguepost.com/articles/2008/10/01/panel-promotes-foreign-adoption.php)).

13 Implementation Handbook UNCRC, p. 270.

### **A last remark**

There is an upcoming trend: to combine project aid or development aid with adoptions. Experience has shown that countries that do this will receive more children for adoption. This brings us in fact back to a (comparable) point system, which was in Romania's case heavily criticized.

France even takes it a step further. In 2004 the French government, confronted with more than 25,000 adoption requests, decided to double the number of adoptions from 4,000 to 8,000. The opposite happened, the following years adoptions dropped with 20%. In an attempt to regain part of the market share from Italy, Spain and the US, the French government recently created a Peace Corps.<sup>14</sup> It consists of students who will do voluntary work, financed by the Ministry of Foreign Affairs. Their mission? To find abroad adoptable children for French families – the first target is Cambodia. Actor Gérard Depardieu spearheads the initiative.<sup>15</sup> He has engaged himself to use his network to find wealthy private donors who could provide the needed capital to complement the adoption related funding of the French Foreign Affairs Ministry.

Monetary gain is the driving force behind many of the wrongdoings in intercountry adoptions. To replace direct payment (country fee) by project aid will not solve this.

What remains still is the key question regarding whose best interest this is really all about: the interest of the child or the interest of the receiving countries (adoption agencies and adoptive parents)?

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14 Gap-year mission to find baby orphans for France, 29 juli 2008  
[www.timesonline.co.uk/tol/news/world/europe/article4419249.ece](http://www.timesonline.co.uk/tol/news/world/europe/article4419249.ece)

15 Gérard Depardieu au service de l'adoption  
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# THE EU AND INTERNATIONAL ADOPTION FROM ROMANIA

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## ABSTRACT

The European Union (EU) has applied an anti-inter-country adoption (ICA) policy in Romania as part of EU accession conditionality, while after 2007 the EU promoted a pro-ICA approach. Romania had to overhaul its child protection system and ban ICA before it could become an EU member, while its current legislation maintains the ban on ICA. However, since 2007 the EU has been demanding that Romanian authorities resume ICA from Romania. This article examines the factors and processes which shaped the EU's 'chameleonic' policy on ICA in relation to Romania. The child protection system in Romania still faces significant shortcomings. However, it is shown that the EU's embrace of a pro-ICA policy after 2007 does not constitute a response to the problems faced by child protection in Romania. On the contrary, the EU's plea for the liberalization of ICA from Romania is the outcome of a combination of *endogenous* factors, such as the EU's own embrace of a children's rights policy and its biased interpretation of key international instruments on ICA and child rights, and *exogenous* factors, such as adoption lobbies, which succeeded in getting their grievances onto the agenda of EU institutions.

## INTRODUCTION

This article examines how and why the European Union (EU)'s position on the provision of international adoption from Romania radically shifted after 2007. It will be shown that the EU's policy position regarding inter-country adoption (ICA) in Romania changed from a staunch ICA critic during the enlargement process to a supporter of ICA from Romania after 2007. However, what factors explain the EU's 'chameleonic' policy on international adoption from Romania? By drawing on the empirical case of EU intervention in the issue of international adoption in Romania before and after 2007, it will be demonstrated that both *exogenous* and *endogenous* factors shaped the EU's radical shift from an anti-ICA stance to an ICA advocate after 2007. As part of EU accession conditionality, the EU demanded that

Romania ban ICA in order to reform the child protection system; yet the ban on ICA generated a backlash in the market of international adoption and the lucrative business run by international adoption agencies via the ICA of Romanian children. Romania had to overhaul its child protection system to be in line with international instruments before it joined the EU. After 2007, however, EU institutions promoted a pro-ICA policy by urging the Romanian government to lift the ban on ICA. It will be shown that the EU's embrace of a pro-ICA policy regarding Romania has, ironically, not been triggered by the situation of child protection in Romania after 2007. On the contrary, it will be argued that the EU's 'chameleonic' position on ICA is the outcome of a combination of *endogenous* factors, such as the EU's own embrace of a children's rights policy and its biased interpretation of international instruments, and *exogenous* factors, such as adoption lobbies, which succeeded in getting their grievances onto the agenda of EU institutions.

The empirical findings of this article provide insights into the role and scope of regional organizations, such as the EU, in the regulation of international adoption and in the broader protection of children's human rights across Europe. The findings of this article draw on triangulated data collection methodology that includes semi-structured interviews<sup>1</sup> with EU and child rights actors, detailed documentary analysis and an examination of key international instruments on international adoption and children's rights. Qualitative interviews were conducted with key EU actors (Commission officials in Directorate-General (DG) Enlargement, European Commission Delegation in Bucharest, European Parliament (EP)'s rapporteur for Romania) and child rights experts involved in the accession negotiations with Romania (from 1999–2007) along with the main Romanian governmental actors (secretaries of state, civil servants) and non-governmental organizations and institutions (such as UNICEF) involved in different aspects of child rights and international adoption in Romania (before and after 2007). Semi-structured interviews were also conducted with key EU officials in the European Commission (DG Justice) in charge of EU internal policy on children's rights after 2007 and an expert on child rights (member of) in the UN Committee on the Rights of the Child (CRC Committee). The snowballing sampling method was employed to identify suitable interviewees for this research. Due to confidentiality reasons, the names of interviewees are not provided in the 'Appendix', and therefore, interviewees' names have been replaced by numbers, which are used in the notes supporting the empirical claims of this article. The findings of the article draw on the analysis of all interview data, although not all interviewees are cited in the text. This article is organized as follows: the section 'International Instruments on Children's Rights and ICA' examines the main international instruments regulating ICA and how scholars and practitioners have

interpreted them, while the section 'International Adoptions in Romania and EU Accession Conditionality' scrutinizes the anti-ICA policy applied by the EU in Romania as part of the EU accession conditionality. The post-2007 pro-ICA shift is explored in the section 'The Situation after 2007'. The key factors that shaped the change of EU policy line from a staunch anti-ICA position to a defender of ICA are examined in the last section. It is shown that the EU's embrace of a pro-ICA policy was not a response to the situation of child protection in Romania: rather, EU internal developments and pro-adoption lobbies influenced the EU's pro-ICA policy in relation to Romania after 2007.

#### INTERNATIONAL INSTRUMENTS ON CHILDREN'S RIGHTS AND ICA

The principles underpinning ICA and the mechanisms providing for its global regulation are enshrined in the main international instruments on children's rights and international adoption, namely the UN Convention on Rights of the Child (CRC) (1989) and the Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption (Hague Convention, 1993). However, the legal confusion surrounding the relationship between the two instruments (Dillon, 2003: 186) and their enforcement at the national level has engendered in practice conflicting interpretations by scholars and child rights practitioners. The CRC is regarded as the 'touchstone for children's rights throughout the world' (Fortin, 2009: 49) by providing a paradigm shift in thinking about children as both 'beings' and 'becomings' (Freeman, 2011: 27). Indeed, the CRC merits include its breadth and the extent of its detailed provision for the autonomous rights of children (Kilkelly, 2001: 308–26). As the main international instrument upholding children's rights and the basic standard-setting on adoption at the global level, the CRC provides in Article 21b that ICA 'may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin', while any childcare solution has to secure the preservation of the child's cultural and ethnic identity (Article 20 CRC). According to the CRC provisions, therefore, ICA is a last resort measure.<sup>2</sup> The provisions regarding ICA have to be interpreted in conjunction with other CRC articles, such as Article 3 on the 'best interests of the child', Article 12 on the child's right to express his/her views freely or Article 9 on child's separation from parents. The widely accepted interpretation of CRC provisions is that in-country childcare solutions constitute a priority, along with the preservation of the child's

biological family, whereby the state is responsible for the development and implementation of policies designed to support family preservation (Vite, 2008: 25).

The Hague Convention, while drawing on the CRC principles, is a private international law instrument that has a different legal status and scope to the CRC: it aims to provide the minimum safeguards to protect the rights of children affected by ICA by achieving cooperation between states and recognition of adoptions that take place in line with the Convention's provisions. While the CRC is a broader convention on the general principles constitutive of the human rights of children, the Hague Convention has a narrower focus, namely it specifies the procedures and standards that should guide legal ICA by preventing the corruption and profiteering generated by it (Dillon, 2003: 203). Therefore, the Hague Convention legitimizes ICA by establishing the procedures and mechanisms to regulate and control the ICA practice (Bartner, 2000; Bainham, 2003). To this end, Article 4 of the Hague Convention states that ICA shall take place 'only if the competent authorities of the state of origin... have determined after possibilities for placement of the child within the State of origin have been given due consideration, that an inter-country adoption is in the child's best interests'. Both the CRC and Hague Convention provide that the choice for a childcare solution is to be guided by the principle of the 'best interests of the child' (Article 21 CRC and Article 4 Hague Convention). Unlike the CRC, the Hague Convention emphasizes in its Preamble that ICA offers the advantage to 'a permanent family to a child for whom a suitable family cannot be found in his or her State of origin'. The interpretation of this particular provision has led to the view that ICA is preferred to institutional care or even foster care (Bartholet, 2007, 2010). However, the Hague Conference on Private International Law adopted guidelines on how to interpret the Hague Convention provisions regarding the hierarchy of childcare solutions, according to which 'in-country permanent family or foster care should be preferred to international adoption (Hague Conference on International Law, 2008: 29–30). Indeed, the Hague Convention has been interpreted as giving effect to Article 21 CRC (Selman, 2009; Smolin, 2010) by adding substantive safeguards and procedures to the broad CRC principles and norms.<sup>3</sup> For instance, UNICEF endorses this interpretation of the Hague Convention and CRC, namely that 'stable family-based solutions' take precedence over international ones (UNICEF, 2010a). The CRC Committee, which is the main body in charge of monitoring the transposition of the CRC at the national level, recommends in its Concluding Observations that State parties should implement Article 21 CRC, according to which ICA is a last resort measure, and particularly that they sign and ratify the Hague Convention (Committee on the Rights of the Child, 2009a, b).

In other words, the Committee interprets CRC provisions on ICA as being consistent with the Hague Convention's, namely that the subsidiarity principle is to be applied in relation to ICA.<sup>4</sup> The key international child rights institutions and organizations, such as UNICEF, the CRC Committee, the Hague Conference on Private International Law, along with international NGOs such as Save the Children, share the view that stable in-country solutions are to be preferred to ICA, which is regarded as a last resort (McLoughney, 2009; Hague Conference on Private Law, 2008; Save the Children, 2010; UNICEF, 2010a; Committee on the Rights of the Child, 2009a, b).

However, some scholars have attributed conflicting interpretations to the provisions in the CRC and Hague Convention regarding the hierarchy of childcare solutions. While CRC explicitly prioritizes in-country solutions, and therefore ICA is a last resort measure, ICA advocates deem that the Hague Convention prioritizes permanent family solutions, and therefore, advances a preference for ICA over institutional care, and even over foster care (Bartholet, 2010; Barozzo, 2010). Some argue that international adoption provides the only means for finding a permanent family to unparented children, and although they acknowledge the abuses and corruption generated by ICA, they argue that the restriction of ICA cannot be justified by either adoption abuses or corruption (Bartholet, 2010: 91; 2012: 379). This perspective on ICA is particularly predominant in the USA, where foster care has proven to be problematic due to a 'lack of permanency and feelings of contingency' (Dillon, 2003: 201) which have damaging effects on children. Those who regard ICA as a last resort measure, on the other hand, invoke the corruption and child trafficking generated and fuelled by ICA (Bhabha, 2004; Smolin, 2010; Selman, 2009). Therefore, the interpretation of the two main conventions leads to antagonistic positions regarding the regulation and provision of ICA as a childcare solution.

At the heart of the heated debate between those who view ICA as a last resort measure and others who do not lies the dichotomy between the abuses and fraud underlying ICA and the damaging psychological effects of institutionalization on child development and well-being (Zeanah et al., 2003; Dillon, 2003: 235). Therefore, the quality and availability of in-country childcare alternatives along with an evaluation of domestic placements (Smolin, 2012: 385) are crucial factors influencing the choice for in-country solutions. Both conventions concede that it is the responsibility of competent national authorities to assess how the available childcare solutions, including ICA, meet the best interest of children without a family. Only if a child cannot be cared for in a 'suitable manner' domestically (Article 21 CRC) or after 'due consideration' (Article 4 Hague Convention) has been given to all in-country alternatives, can ICA be considered an option. Even then,

ICA is a viable solution only if it is allowed by the sending country's legislation (Article 21 CRC). While it is not clear what kind of standards care institutions should meet in practice (Cantwell and Holzscheiter, 2008: 53), the stigma of 'institutions' as referring only to orphanages is misleading. Although orphanages with appalling conditions still exist, international institutions and child rights experts have been promoting the development of 'institutional care' providing family-like environment.<sup>5</sup> For instance, 'family-type' homes or 'group homes', which represent small, residential facilities located within a community and designed to serve children (Mezmur, 2009: 93) have been advanced as suitable childcare institutions that are widely used across Europe. To this end, the UN bodies and the main international NGOs promote de-institutionalization via the establishment of family-type care solutions or small-group care, which meet certain quality standards that would be conducive to child's development (Human Rights Council, 2009).

At the European level, the enforcement mechanisms of the European Convention on Human Rights (ECHR) have been invoked in conjunction with the rights-based content of the CRC (Kilkelly, 1999) and thus children's human rights under the ECHR have in some cases been interpreted in the light of the CRC standards and principles (Kilkelly, 2002). Under the ECHR framework, ICA has been interpreted as an extreme measure because of two factors. First, it is the state's duty to promote and facilitate contact between children and parents and work for the reunification of parent and child and, second, the state has the obligation to establish adequate child protection measures regarding child abandonment and family support (Bainham, 2003). Indeed, the implementation of the CRC provisions entails in practice the state's responsibility for protecting the rights of the child, while ensuring appropriate alternative care solutions and supervising the well-being and development of any child placed in alternative care (SOS Children's Villages International, 2009). The Hague Convention, on the other hand, does not include measures which states are obliged to take to support the birth family or to seek the reunification of the child with the family (Bainham, 2003: 7; Bhabha, 2004) given that its main objective is the safeguarding of ICA after all alternative care solutions have been exhausted. In the context of the ECHR, therefore, the practice of ICA would amount to an admission of failure on the part of the state (Bainham, 2003: 13), which is the reason why the international adoption of children from the Member States is not a common practice. In brief, it is contended that the interpretation of the Hague Convention in conjunction with the CRC should render ICA as the measure of last resort, which is further reinforced by the rights and principles included in the ECHR.



INTERNATIONAL ADOPTIONS IN ROMANIA AND EU  
ACCESSION CONDITIONALITY

The fall of communism exposed the appalling conditions of Romanian orphanages and the huge number of children cared for in these institutions. In the early 1990s, therefore, international adoption became the main rescue solution for the 100,000 institutionalized children (Morrison, 2004) and Romania was the main provider of children for ICA worldwide (Selman, 2010). Yet, the ICA from Romania violated the international instruments on children's rights<sup>6</sup> due to poor regulation and lack of observance of international instruments regulating the ICA practice (European Commission, 2001:24). Although Romania had signed and ratified the CRC in 1990 and the Hague Convention in 1995, the principles and provisions in the two conventions were not reflected in the Romanian legislation or institutional framework. The legal irregularities underpinning ICA in Romania were unearthed by the findings published in a report in 2002 by the Independent Group for the Analysis of Inter-country Adoption (IGAIA), a group set up by the Romanian authorities and consisting of child rights experts (Jacoby et al., 2009: 123). For instance, according to this report, the institutionalization law (11/1990) and the abandonment (47/1993) law, according to which children protected within residential care could be legally declared abandoned if their parents had shown lack of interest in the child for a period of 6 months (IGAIA, 2002: 16–17), in practice facilitated the proliferation of ICA as a solution by finding families for children in institutional care.

According to some, the post-1990 legislative framework led to the emergence of a Romanian international adoption market which was offer-driven,<sup>7</sup> according to which Romania was a supplier in the activities of agencies specializing in international adoptions (IGAIA, 2002: 23). For instance, adoption agencies set up a database of children fit for international adoption whereby children would have 'price tags' with sums ranging from \$6,000–\$30,000 (Jacoby et al., 2009: 124) based on their age, health and physical features (Post, 2007). Furthermore, corrupt staff in orphanages and the lack of post-adoption monitoring provided opportunities for illicit adoptions (Dickens, 2002) and the emergence of baby trade (Jacoby et al., 2009: 117). Adoption facilitators had resorted to procuring children directly from biological families, usually in exchange for money (Roby and Ilfe, 2009: 663), and hence 'paper orphans' were manufactured (Graff, 2008: 63) as these children were neither orphans nor abandoned by their parents.<sup>8</sup> They were in institutions as a result of their families' poverty (European Parliament, 2001: 17). What emerged in Romania was a system of private adoptions, whereby a form of ICA emerged in which individuals or mediating bodies outside the formal structure of

the Hague Convention Central Authority proposed a match, which is not approved by the Hague Convention system (Hayes, 2011: 289). Therefore, private ICA was promoted as a means of getting children out of the large residential institutions and placing them into families abroad. This system prioritized the best interests of adopters and not of the adopted children for three reasons (Post, 2007: 85). It generated money without putting the interests of the child first; it discouraged domestic adoptions and, above all, children who did not qualify as adoptable were adopted. According to the European Parliament's rapporteur for Romania, ICA from Romania was 'child selling... children being smuggled out of the country [...] it was no surprise to me when Romania was named by the UN as one of the top eleven countries as a source of human trafficking'.<sup>9</sup> For instance, the level of ICA peaked in 2000 when 3,035 children were adopted internationally while only 1,219 children were adopted nationally (Table 3).

Given the international media coverage of the situation of children in institutions and the illegal adoption of children from Romania (Selman, 2009), child protection became a formal EU accession condition in 2000 as part of the application of the Copenhagen political accession criteria.<sup>10</sup> Yet, the EU had no legal competence in child rights and ICA in relation to EU Member States, although within the enlargement context, the Commission could employ the accession conditionality to seek changes in a wide range of human rights areas, including child protection and international adoption. The Commission was the main EU institution which devised and managed the pre-accession process (Grabbe, 2006: 26), and therefore its role as a 'screening actor' (Hillion, 2004: 11) entailed overseeing the candidates' progress in meeting the accession criteria, even in relation to those policy sectors where the Commission lacked expertise and experience, such as in child rights matters in general.<sup>11</sup> However, it is contended that the EU has significant leverage to forge substantial changes in candidate states' human rights provision by employing the accession conditionality even if those policy sectors are not deemed to be traditional EU areas, such as ICA and child protection.

## 1. THE MORATORIUM ON ICA

Romania violated the international instruments on ICA (European Commission, 2001) and therefore, within the EU enlargement context, at the Commission's behest, a moratorium was placed on international adoptions in 2001 by the Romanian government.<sup>12</sup> The EU position was that Romania had to reform its legislation on international adoptions in order to be in line with the European practices on ICA, according to which Member States do not render children available for ICA.<sup>13</sup> A key reason for the moratorium was that reform of the child protection



system and a ban on international adoptions were mutually exclusive: ie the system could not be reformed if children did not become part of the system because they had been sent abroad. The reform of the system had to be underpinned by the adoption of new legislation on ICA and protection of children's rights. At the same time, although EU receiving countries accounted for 40 per cent of all ICA from Romania, it was deemed inappropriate for EU states or prospective states to *send* children for international adoption (Selman, 2010). The reform of the system was supported by EU financial assistance under the PHARE (Poland and Hungary: Assistance for Restructuring their Economies) programme<sup>14</sup> and was targeted at developing childcare alternatives, such as 'group home alternatives', which accompanied the de-institutionalization of children via the closure of old-style institutions. Indeed, the reform of the child protection system in Romania provides the 'most dramatic example of a country engaged in large scale movement of children from institutions to foster care and group homes' (Dillon, 2003: 202). For instance, one of the European experts on family law and children's rights deemed that the ban on ICA was the *sine qua non* condition for reforming child protection and particularly for preventing the profiteering and irregularities underlying how the ICA procedure functioned in Romania.<sup>15</sup>

The Independent Panel of Experts on Family Law – set up by the Commission to advise Romanian government on the new law – aimed to ensure that the new Romanian legislation was in line with the practices of the EU Member States regarding international adoption. The new Romanian legislation on children's rights (272/2004) and adoption (273/2004) – which was based on the CRC provisions – entered into force in 2005 and maintained the moratorium on ICA by limiting it to extreme exceptions. Romanian children could be adopted abroad only by their relatives up to the second degree of kinship.<sup>16</sup> Foreign couples could adopt Romanian children only if they were permanent residents in Romania (law 273/2004). The new legislation on children's rights and child adoption, which was welcomed by the European Commission (European Commission, 2005b), was highly innovative and revolutionary and was recommended as a model even for some West European states. According to a member of the Independent Panel of experts 'the legislation is pushing very far the application of the UN Convention of the Rights of the Child and it contains a number of provisions by which the other EU Member States could be inspired'.<sup>17</sup> The USA based pro-ICA lobby was critical of the new legislation that maintained the ban on ICA.<sup>18</sup> Yet, the Independent Panel of Experts' stance on the new Romanian legislation was that it mirrored the practices of the Member States as no EU Member State expatriates its children.<sup>19</sup> Presenting a legal rather than a political argument, the European child rights experts in the Independent Panel followed the provisions in the

international instruments on children's rights and the positions of key international child rights bodies, such as UNICEF (2010a) and the CRC Committee, according to which international adoption is a measure of last resort (Mezmur, 2009; Herczog, 2009). At the same time, the ICA policy template promoted by the EU in Romania followed the child protection model of the Member States, where a wide range of child-care services are targeted at helping biological families keep their children, while family-based alternatives are rendered available on a large scale and ICA is a last resort.<sup>20</sup> By relying on the technical knowledge provided by the child rights experts who advised the Romanian government on the new legislation, the Commission and legislation in Romania embraced a strict anti-ICA policy as part of the EU accession conditionality. Indeed, the EU contended that Romania's legislation on ICA and child rights complied with international instruments and, therefore, the EU wholeheartedly supported the new legislation on children's rights within the enlargement context (European Commission, 2005b).

#### THE SITUATION AFTER 2007

After Romania's accession to the EU in 2007, the EU embraced a pro-ICA position by urging Romania to lift the ban on ICA. This radical U-turn on ICA emerged incrementally at the Parliament level as members of the European Parliament (MEPs) in the Committee on Civil Liberties, Justice and Home Affairs (LIBE) took a public pro-ICA stance at the EU level after 2007. For instance, some MEPs in LIBE signed a *Joint Declaration* (2008)<sup>21</sup> which requested the support of the Commission in addressing the situation of international adoption in Europe. By highlighting the detrimental effects on child development of foster and institutional care, the Declaration requested that European states prohibiting ICA, such as Romania, should review their anti-ICA legislation by relaxing the intra-EU adoption procedure. The issue of ICA was also debated within a broader European context, for instance via the conference 'Challenges in Adoption Procedures in Europe' (2009) where the European Commission (DG Justice, Freedom and Security (JLS)) presented the findings of a study<sup>22</sup> on the state of play of international adoptions in the 27 EU Member States. The conference provided a means for the Commission (DG JLS) to persuade Member States of the need to facilitate international adoption inside the Union and hence to force Romania to lift the ban on ICA maintained by its current legislation, as the Commission official responsible for the organization of the conference, Patrizia de Luca, put it (De Luca, 2009). The Commission's study recognized the diversity in the adoption legislation of Member States by singling out the

uniqueness of the Romanian legislation on ICA and the need to change it (Brulard and Dumont, 2009). The Commission endorsed an explicit pro-ICA position by providing its own interpretation of international instruments on children's rights and international adoption. For instance, by discarding Article 21 CRC and its principle of subsidiarity in relation to ICA due to 'uncertain interpretations', the Commission embraced a preference for ICA by interpreting the Hague Convention as prioritizing ICA over foster care and other forms of in-country care alternatives (Brulard and Dumont, 2009; De Luca, 2009: 2).<sup>23</sup> Yet this constituted a radical shift from the Commission's anti-ICA policy within the enlargement context, where ICA was deemed a measure of last resort. The Commission justified its pro-ICA position by drawing on the inclusion of children's rights among the Union's objectives in the Lisbon Treaty (Article 3 TEU) and its commitment to protect children's rights, as enshrined in the EU Charter of Fundamental Rights, where Article 24 covers the rights of the child (De Luca, 2009: 3). Yet neither the EU Charter of Fundamental Rights nor the Lisbon Treaty provide the Commission with the legal competence to adopt hard law measures on children's rights or to regulate international adoptions inside the Union (Piris, 2010). By highlighting the references to children's rights at the Treaty level, the Commission strategically adopted a pro-ICA position as part of its broader commitment to protect children's rights inside the Union, which is radically at odds with the anti-ICA policy line applied to Romania as part of the pre-accession process.

The only democratically elected institution of the EU, the European Parliament, took the lead in promoting a pro-ICA policy line in relation to Romania after 2007. For instance, the vice-president of the Parliament and its child rights rapporteur, MEP Roberta Angelilli, requested that the Romanian government lift the ban on ICA because of the high rate of child abandonment in orphanages and the overall huge number of children in residential institutions (Angelilli, 2010, 2011). The Parliament can employ various instruments, such as requesting the Commission's intervention or naming and shaming, to persuade Member States to take action in certain policy areas. Given the EU's lack of legal mandate to intervene in the ICA provision of the Member States, the Parliament alerted the Commission with respect to Romania's need to resume ICA. Yet, child rights organizations and NGOs monitoring the protection of children's rights in Romania contend that the situation of children in residential care has radically improved since mid 2000s, while the high demand for domestic adoption removes the need for Romania to resume ICA.<sup>24</sup> Indeed, child rights organizations view the decision to reopen ICA as a matter for competent national authorities to judge on the basis of whether the conditions for children in care are 'suitable' rather than being imposed

from outside (McLoughney, 2009). The Parliament set out its pro-ICA policy by adopting the Resolution *International Adoption in the European Union* in 2011. The Resolution expresses the Parliament's position on ICA in Europe. However, it has been claimed that the pro-ICA policy embraced by the Parliament is driven by some MEPs and adoption lobbies, especially the Italian ones, who push for the re-opening of ICA from Romania and therefore, the Resolution is the concrete outcome of this alliance between the lobbies and MEPs.<sup>25</sup> The Resolution endorses the Parliament's explicit pro-ICA stance, along with the hierarchy of childcare measures and particularly the role that EU institutions should play in this policy area. The Parliament advances its own interpretation of the CRC and Hague Convention by supporting ICA over other forms of in-country care because of its provision of a permanent family environment<sup>26</sup> (European Parliament, 2011) and indirectly urging states like Romania to reconsider international adoption as a valid childcare solution without making any reference to the availability of family-based alternatives. Notwithstanding the Resolution, the Parliament further sought to persuade Romania to reopen ICA by explicitly requesting the Commission to intervene in relation to Romania's 'violation' of adoption standards by depriving children 'of the possibility of having a family' via ICA (Angelilli, 2011). According to the Parliament, 70,000 children in institutional care in Romania are in a 'state of total abandonment' and hence deprived of the possibility of finding a family via ICA (Angelilli, 2011). Although the Parliament does not have legal competence to require Member States to change their ICA legislation, the Parliament has political clout to raise public awareness and also to name and shame those Member States that fail to uphold the EU values and norms. Its plea for the resumption of ICA from Romania echoes the ICA supporters' rhetoric: namely, that ICA is the best solution for finding a family for children in the child protection system. By advancing a pro-ICA policy in Romania, the Parliament contradicts the EU's pre-2007 anti-ICA policy as part of the accession conditionality and hence indirectly acknowledges a failure of the EU conditionality instrument that required the overhaul the child protection in Romania before 2007. In other words, the EU contradicts its pre-accession intervention regarding the reform of the child protection system and ICA policy in Romania, which had been heralded as a success by the EU itself (European Commission, 2005b).

#### REFLECTING ON THE EU'S 'CHAMELEONIC' ROLE IN ICA

The EU applied an anti-ICA policy in Romania before 2007 as part of the accession conditionality. However, after 2007, the main EU institutions adopted an explicit pro-ICA policy line, which is anchored in an

opportunistic interpretation of the CRC and Hague Convention. What factors brought about the EU's radical shift in relation to ICA from Romania and how do they shape the EU's role in ICA and in the broader protection of children's rights? It is argued below that the pro-ICA position embraced by the EU after 2007 was not a response to the situation of child protection in Romania. Instead, other *exogenous* factors, such as the pro-adoption lobby actions at the EU level, along with EU *endogenous* conditions, such as the emergence of an EU children's rights policy, caused the EU's 'chameleonic' embrace of a pro-ICA position in relation to Romania.

### 1. CHILD PROTECTION IN ROMANIA AFTER 2007

The Romanian child protection system underwent a root-and-branch reform before 2007, while the moratorium on ICA was maintained by the post-2007 legislation. The EU requested that Romanian authorities resume ICA after 2007 for two main reasons: the rate of child abandonment in maternity wards and the high number of children in institutional care (Brulard and Dumont, 2009; Angelilli, 2011). The quick fix to this situation was, according to the Parliament, the resumption of ICA as the only viable solution for providing children with a family (Angelilli, 2011). The depiction of institutional care in Romania by the EU, however, does not reflect the situation on the ground. The child protection system in Romania, despite its radical overhaul in the early 2000s, still suffers from significant shortcomings, such as the slowness of the domestic adoption procedure.<sup>27</sup> However, these are not related to the reasons given by the European Parliament in its promotion of a pro-ICA policy for Romania. The difficulties faced by the Romanian child protection system are qualitatively distinctive from those signalled by the EU after 2007. The domestic adoption process is slow and highly bureaucratic, while there are some categories of children, such as children with disabilities and older children, who are hard to adopt nationally (UNICEF, 2011) but also globally (Smolin, 2012). These factors are explored below.

The reformed child protection system and children's rights legislation in Romania prioritize the family-type childcare services, such as the placement of children in his/her extended family, with a guardian or with foster families. Because of EU pre-accession financial assistance, the old residential institutions have been restructured into family-type apartments providing care and accommodation for children with disabilities or for those not yet placed in a family-type service (Transtec, 2006). After the ban on ICA, the number of children in residential care dropped sharply from 57,181 in 2000 to 22,742 in 2011 due to de-institutionalization, while the number of children placed in family care solutions doubled, peaking to 43,518 in 2011 (Table 1).

Table 1. Romania: number of children in child protection system from 1998 to 2011

Date	Number of children in public and private residential care	Number of children in family care (extended family, foster care, foster families)
31/12/1998	38,597	17,044
31/12/1999	33,356	23,731
31/12/2000	57,181	30,572
31/12/2001	49,965	37,553
31/12/2002	43,234	43,092
31/12/2003	37,660	46,568
31/12/2004	32,679	50,239
31/12/2005	28,786	47,723
31/12/2006	26,105	47,871
31/12/2007	25,114	48,172
31/12/2008	24,437	47,159
31/12/2009	23,696	45,550
31/12/2010	23,183	43,817
30/06/2011	22,742	43,518

Source: Romanian Office for Adoption ([www.adoptiromania.ro](http://www.adoptiromania.ro)).

The number of children in residential institutions in Romania is not high compared with other former communist states and even the old EU Member States. For instance, if the figures are related to the size of population, according to data for 2010,<sup>28</sup> the number of children in residential care per 10,000 inhabitants is: 11 (Romania), 10 (Bulgaria), 10 (Estonia), 10 (Hungary), 28 (Lithuania), 12 (Latvia), and 20 (Czech Republic). In the 'old' Member States the figures indicate: 11 (Denmark), 15 (Finland), 6 (Netherlands), 9 (Portugal), 3 (Spain), and 16 (Belgium). Therefore, Romania is not an outlier regarding the number of children in residential care. On the contrary, both the West European countries and the former communist states have higher numbers of children in residential care than Romania. Similarly, the rate of child abandonment in Romanian hospital wards averages around 700 children per year, with the great majority of these children being either reintegrated into their families or placed in family-based alternative care ([General Office for Child Protection, 2011](#)). Indeed, since 2005 more than 50 per cent of children abandoned in hospitals have been returned to their biological families ([Jacoby et al., 2009](#)) while substantially fewer children are now abandoned each year ([Murray, 2006: 3](#)). At the same time, the development of family-based alternative care, such as fostering or guardianship, was the key target of the reform of child protection in Romania before 2007. According to aggregated data on family-based care for countries in Eastern Europe, Romania has the highest number of children placed in family-based alternative care (see [Table 2](#)).

Since 2001 the demand for domestic adoptions has been flat, averaging around 1,300 adoptions per year (see [Table 3](#)). Before the ban on



Table 2. South-Eastern Europe: Children in family-based care (with foster parents or guardians: absolute numbers and rates per 100,000 children 0–17 years old.) in 2000, 2005 and 2007, at the end of the year

South Eastern Europe	Number of children in Family-based care			Rate (per 1000,000 children 0–17 years)		
	2000	2005	2007	2000	2005	2007
Romania	26,917	47,723	46,160	537	1100	1132
Albania		4,074	5,964	–	302	462
Bosnia & Herzegovina	3,783	3,311	3,296	402	368	378
Croatia	4,376	3,774	3,574	470	437	425
Montenegro Serbia <sup>a</sup>		2,700	3,350		187	241
TFYR Macedonia	1,126	1,157	1,126	206	235	238

<sup>a</sup>Foster care only

Source: TransMONEE database 2009 as cited in UNICEF study *At home or in a home? Formal care and adoption of children in Eastern Europe and Central Asia* (UNICEF, 2010b).

Table 3. Romania: number of international and national adoptions 1998–2008

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Domestic adoptions	840	1,710	1,291	1,274	1,346	1,383	1,422	1,136	1,421	1,294	1,300
Inter-country adoptions	2,017	2,575	3,035	1,521	407	279	251	2	0	0	0
Total	2,857	4,285	4,326	2,795	1,753	1,662	1,673	1,138	1,421	1,294	1,300

Source: ANPDC statistics (www.copii.ro).

ICA, the number of international adoptions exceeded by far the number of domestic adoptions, while after 2001 the number of domestic adoptions approved yearly varied between 1,300 and 1,400 (Table 3). At the same time, according to the Romanian Office for Adoption, the number of families requesting to adopt nationally exceeds by far the number of adoptable children in the system<sup>29</sup> (UNICEF, 2011). Therefore, the EU's demand that Romania lift the ban on ICA due to the significant number of children in institutions and who are denied a family in their home-country is not supported by the figures. However, the shortcomings of the child protection system in Romania are of a different kind. The procedure of domestic adoption is extremely slow and bureaucratic, while several categories of children, such as older and disabled children, are hard to adopt (UNICEF, 2011). The Romanian legislation forbids the institutionalization of children under three, and therefore such children are placed in residential care only for medical reasons (National Authority for the Protection of Child's Rights, 2006). Indeed, the vast majority of children in residential care have mental and

physical disabilities and their age is above three (National Authority for the Protection of Child's Rights, 2006). According to post-2007 statistical data, disabled and older children are difficult to adopt, particularly those children who are over ten and have special needs, both factors that make them less likely candidates for adoption (Jacoby et al., 2009; Smolin, 2012). The adoption of older children and particularly of children with disabilities is a recurrent problem encountered also in other European countries, such as the UK (Baker 2007; Cousins 2009).

The CRC Committee signalled the shortcomings underlying the national adoption process in its latest Concluding Observations (2009c). Apart from requesting Romanian authorities to speed up the process of national adoption, the Committee also recommended that Romania 'withdraw the existing moratorium as a barrier to the full implementation of Article 21 of the Convention' (Committee on the Rights of the Child, 2009c: 13). Therefore, the Committee recommends the full implementation of Article 21 CRC, whereby international adoption would be governed by the principle of subsidiarity and thus would be a last resort measure, which would put the Romanian adoption legislation in line with the Member States'. However, the resumption of ICA in order to meet the provisions in Article 21 CRC – according to which ICA is a measure of last resort – would still fall short of addressing the EU's pro-ICA pleas, according to which institutional care rather than ICA is a measure of last resort. The Romanian legislation was amended in November 2011 to speed up the process of domestic adoption and also to allow Romanian citizens living abroad to adopt children from Romania, provided that within two years' after the child has been declared adoptable no eligible family, including the child's extended family, is found for the child. This amendment of the legislation reflects the situation after 2007 when many Romanian citizens chose to live in other European countries and wanted to adopt Romanian children (Panait, 2011). Therefore, the Romanian government has slightly relaxed the ICA provision, although this does not amount to the full resumption of ICA. In short, the current situation of child protection in Romania does not indicate the need to resume ICA, as adoption advocates, including the EU, claim. On the contrary, as child rights organizations and Romanian governmental officials contend, the system of domestic adoption has to become more effective and efficient in processing the adoption applications received rather than that ICA be resumed.<sup>30</sup>

## 2. EXOGENOUS FACTORS: ADOPTION LOBBIES

Adoption agencies played a key role in influencing the EU institutions' shift to a pro-ICA policy after 2007. There is evidence of intensive pro-adoption lobby activity at the EU level aimed at persuading



Romanian authorities to resume international adoption.<sup>31</sup> The pro-adoption lobbying strategies targeted the EU's opportunity structures to persuade Romanian authorities to lift the ban on ICA. After Romania's accession to the EU in 2007, adoption lobbies accessed those EU venues, such as the Parliament's LIBE, which have leverage over EU internal policy, in order to re-open ICA.<sup>32</sup> The employment of the Parliament as a lobbying venue attaches political salience to the issue of ICA in Europe. The adoption agencies' commonly employed tactic was to send petitions to the Parliament or contact various MEPs in order to raise awareness regarding the situation of children in institutions. By employing an 'emotionally loaded' tactic regarding the situation of children in institutional care in Romania after 2007, the lobbies framed ICA as a matter of EU internal policy by pleading that the EU should play a leading role in establishing an open market for ICA (European Parliament, 2010). Adoption agencies, such as Solidarite Enfants Roumains Abandonnee (SERA), Amici dei Bambini (Friends of Adoption) or Angels Children, found supportive EU politicians in the Parliament to launch an EU campaign on the need to facilitate ICA in Europe, especially from Romania.<sup>33</sup>

The Italian NGO, Amici dei Bambini, lobbied the Parliament by sending petitions and letters regarding the situation of Romanian children in institutions and the need to lift the ban on ICA (European Parliament, 2010). For instance, Marco Griffini, the leader of the adoption NGO Amici dei Bambini, petitioned the Parliament in 2010 requesting its explicit intervention in the situation of ICA from Romania. By employing the common pro-ICA strategy, ie the emphasis on the huge number of Romanian children in institutions, Griffini requested that Romanian authorities reopen ICA as a legitimate and necessary way of finding a family for Romanian children (European Parliament, 2010). However, adoption lobbies employ an opportunistic interpretation of international instruments. By completely disregarding Article 21 CRC, they overemphasize the Hague Convention's reference to 'permanent family' and hence endorse a preference for ICA over in-country solutions, such as foster care (European Parliament, 2010).

The lobbies were most successful in setting the EU's policy agenda when their framing of the situation of institutionalized children in Romania converged with the EU's own endeavour to expand its remit in new policy sectors. EU institutions can use the lobbies' agenda as a 'window of opportunity' (Kingdon, 1984) to rationalize the EU's role in ICA inside the Union. It has been argued that the EU usually engages a wide range of non-state actors at the EU level in order to generate grounds to push for the extension of EU competence 'by stealth' (Majone, 2005). The European Parliament was quick to embrace the lobbies' pleas for ICA when this could be justified as a legitimate area

for EU internal policy by drawing on EU responsibility to protect children's rights after the entry into force of the Lisbon Treaty (European Parliament, 2011). Indeed, the involvement of interest groups, such as adoption agencies, at EU level can enhance the EU's legitimacy (Scharpf, 1998) regarding its engagement with the issue of international adoption and children's rights. Therefore, it is contended that the adoption lobby brought the issue of ICA to the forefront of the Parliament's child rights agenda, and subsequently, the Parliament has embraced the EU's role in improving the operation of the Hague Convention by 'eliminating unnecessary bureaucracy and enabling adoption procedures to be completed more expeditiously while protecting the paramount rights of the child' (European Parliament, 2011). The lobbies' self-interested actions to liberalize ICA in Europe and in Romania were arguably most successful when they chimed with the self-interest of EU institutions to acquire a scope and role in ICA inside the Union. As shown above, the external influence exerted by adoption lobbies on EU institutions relied on an interpretation of the Hague Convention prioritizing ICA at the expense of in-country solutions, such as foster care.

### 3. ENDOGENOUS FACTORS: EU CHILD RIGHTS AGENDA

The EU's pro-ICA policy line adopted after 2007 can be justified by the emergence of an EU child rights agenda. Since 2006 in particular, the European Commission has extended its embrace of human rights norms to children and young people, inside and outside the European Union, as set out in the Communication *Towards an EU Strategy on the Rights of the Child* (2006). The 2000 EU Charter of Fundamental Rights specifically mentioned children's rights to protection and participation, while the Commission's 'strategic objectives' for 2005–2009 included the protection of the rights of children as 'a particular priority' and promised that 'the Union [would] act as a beacon to the rest of the world' in respect of children's rights (European Commission, 2005a). The 2006 Communication attempted to bring together all European Commission policies affecting children into an integrated, rights-based framework (European Commission, 2006a, b). The Parliament had been a long-standing advocate of the EU's children's rights agenda (Stalford and Schuurman, 2011), for instance, showing its support by adopting policy documents such as the Resolution *Towards an EU Strategy on the Rights of the Child* (2008), and particularly after the entry into force of the Lisbon Treaty. Indeed, since 2006 there has been an emergent child's rights rhetoric and agenda (Stalford and Drywood, 2009) in relation to EU internal policy. Various actions and measures on matters related to children were framed as being part of the EU's endeavour to uphold children's rights. Therefore,

EU institutions justified their support for a pro-ICA policy as being part the EU's commitment to protect children's rights as enshrined in Article 3 TEU (Lisbon Treaty), according to which the protection of children's rights is one of the EU's objectives. To this end, the Parliament embraced the self-ascribed commitment to addressing 'the problem of precarious childhood, and in particular that of abandoned and institutionalised children' (European Parliament, 2011: 3).

The emergence of an EU children's rights agenda provided the EU with the normative framework to embrace a pro-ICA policy after 2007 in relation to Romania. Yet, the EU's support of a pro-ICA stance fell short of pursuing the spirit and letter of the CRC and Hague Convention. The European Parliament in particular attached its own interpretation to these conventions by promoting its own hierarchy of childcare solutions, which prioritizes ICA at the expense of foster care or any other in-country solution, except domestic adoption. In the same vein, the Commission's relationship with the CRC, as part of the EU's child rights policy, is underpinned by lack of genuine allegiance to the principles and rights enshrined in the CRC (Stalford and Drywood, 2011: 214). Key EU policy documents, such as the *Communications Towards an EU Strategy on the Rights of the Child* (2006) and *An EU Agenda for the Rights of the Child* (2011) mention the CRC as the main source of rights. However, in relation to ICA, the Parliament does not refer to the provisions in Article 21 CRC. The reason why the Parliament disregards the CRC provisions on ICA is related to the CRC's stance on ICA as a last resort measure, which is at odds with the Parliament's pro-ICA attitude.

As stated earlier, the Parliament's request that the Romanian government lift the ban on ICA, despite the EU's lack of competence in this area, relies on inaccurate factual data regarding the situation of child protection in Romania after 2007. Furthermore, the Parliament's pro-ICA policy makes no reference to family-based alternatives available at the national level. The Parliament deems that the situation of children in institutions would be solved by having a liberalized ICA provision across Europe, without targeting the root of the problem, namely how and why children become separated from their biological parents in the first place (Smolin, 2012: 382). Some politicians in the Parliament promote ICA as a 'panacea' for the plight of children without parents in the child protection system, by ignoring the impact of this radical solution on the wide range of rights enjoyed by children as provided in the CRC. Indeed, it has been argued that MEPs 'endorse easy child care solutions by overlooking the broader child rights framework as provided by international instruments and conventions'.<sup>34</sup> Decisions regarding ICA have to be taken in the context of all the rights enshrined in the CRC, while the choice for the childcare solution is to

be determined according to the ‘best interest of the child’, which is contingent on the child’s concrete circumstances. However, the EU’s pro-ICA stance does not reflect the complexity of thinking that children have rights (Eekelaar, 1992) which have to be applied consistently in all policy measures, including ICA, affecting them. The Parliament’s pro-adoption rhetoric echoes that of the ICA supporters, namely a focus on the consequences of child relinquishment (Bartholet, 2010) – the only solution to it being ICA – rather than its prevention, namely by addressing the economic or social circumstances which can lead to child abandonment. Even the ratification of the CRC and Hague Convention does not oblige state parties to prioritize ICA or make children available for ICA (Bainham, 2003; Dillon, 2003). Yet, the Parliament’s pro-ICA stance after 2007 is fuelled by its partial interpretation of the international instruments, such as the Hague Conventions, regulating ICA and its lack of accurate factual evidence regarding the situation on the ground. By endorsing a reflective approach to the interpretation of international instruments on children’s rights and the situation of child protection on the ground across Europe, the Parliament could adopt a more nuanced position regarding its role in ICA, which could make a difference to children’s lives. Yet, the Parliament’s pro-ICA position as part of its commitment to promote children’s rights demonstrates that the EU has *de facto* joined the ICA advocates by espousing an opportunistic interpretation of the main international provisions on ICA to favour international adoptions at the expense of in-country solutions, such as family-based care. In short, the current pro-ICA position adopted by the EU constitutes a radical U-turn from the position adopted during Eastern enlargement.

## CONCLUSION

This article scrutinized how and why the EU’s position on ICA from Romania shifted after 2007. The situation of child protection and the corruption underpinning ICA in Romania after 1989 led to the ban on ICA as part of the EU pre-accession requirements. EU financial assistance and intervention radically overhauled the child protection system before Romania joined the EU in 2007. However, after 2007 the EU pursued a pro-ICA policy line in relation to Romania, which was radically at odds with its anti-ICA pre-accession policy. The key empirical evidence presented in this article demonstrates that the pro-ICA turn at the EU level was not determined by the situation on the ground in Romania. On the contrary, statistical data from Romania highlight that there is no need for Romania to resume ICA. Therefore, it appears that *exogenous* factors, such as adoption lobbies,

and *endogenous* processes, such as the EU's embrace of a child's rights agenda, provided the EU with the rationale to endorse a pro-ICA role and scope inside the Union. The EU's advancement of a pro-ICA agenda was underpinned by its skewed interpretation of the main international instruments on children's rights and international adoption.

This article provides insights into the role and scope of regional organizations in affecting the practice of international adoption and the broader protection of children's rights. Child abandonment and unparented children constitute serious violations of children's rights. The key international instruments providing the legal framework for ICA and children's rights have been widely invoked by EU institutions to tackle these violations of children's human rights on the ground. However, the legal ambiguity (Vite, 2008) underpinning the relationship between the CRC and Hague Convention has generated in practice conflicting interpretations between those who regard ICA as a child rescue solution and those who do not. To this end, scholars and child rights practitioners have highlighted both the damaging effects of institutionalization (Zeanah et al., 2003; Dillon, 2003) and the exceptional character of employing ICA as a childcare solution (Smolin, 2010). The polarized views on the issue of ICA, as embraced by ICA advocates and ICA critics, fail to provide a more nuanced and reflective account of the diversity of child protection provisions on the ground across EU Member States.

The EU does not have legal mandate to intervene in the ICA practice of the Member States, yet it does have the political force to address at the EU level those social and economic circumstances conducive to child abandonment and unparented children. However, the promotion of ICA as the most viable and effective solution to tackle child abandonment and the plight of children in care, as the EU has been advocating since 2007, does not address the key factors which generate child relinquishment in the first place (Selman, 2009). Rather than addressing the consequences of child abandonment, the EU could develop policies and measures targeting those national factors conducive to circumstances whereby children are separated from their biological families. At the same time, ICA is an extreme measure of childcare and a wide range of complex factors have to be assessed in line with the 'best interests of the child' (Article 3 CRC) before national authorities regard it as the best solution for children without a family. The EU's advancement of ICA as a solution meant to provide a quick fix to child abandonment and institutionalization overlooks the complexity and distinctiveness of the child rights provision across the Member States. By considering these factors, the EU's role in ICA would be consistent with the provisions of the main international instruments, and furthermore, would have a long-term impact on the overall protection of the rights of the child at the national level.

## NOTES

<sup>1</sup> This article draws on a set of 22 qualitative interviews (conducted from 2008 until 2011) with Commission officials, Members of the European Parliament, Romanian authorities and child rights experts and organisations. All interviewees, with some exceptions, approved to be cited anonymously and are not, therefore, named.

<sup>2</sup> This position is endorsed by the UN Committee on the Rights of the Child and is evident in the Committee's Concluding Observations (Interviewee 20).

<sup>3</sup> See Explanatory Report to the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Inter-country Adoption*, by G. Parra-Aranguren, at paragraph 6. Available on the Hague Conference website, [www.hcc.net](http://www.hcc.net). under Inter-country Adoption Section/Explanatory Documents.

<sup>4</sup> For instance, in its Concluding Observations on Malawi the Committee recommends that 'the State party review and ensure that its legislation on adoption is in conformity with article 21 of the Convention. The Committee reiterates its previous recommendation. . .and in particular encourages the State party to ratify the 1993 Hague Convention on the Protection and Cooperation in Respect of Inter-country Adoption' (Committee on the Rights of the Child 2009a). The same recommendation is done in relation to Niger (Committee on the Rights of the Child, 2009b).

<sup>5</sup> Interviewee 21.

<sup>6</sup> According to Commission Regular Reports the 'Commission expressed concern with regard to legislation and practices on inter-country adoption that allowed considerations other than the best interest of the child to influence adoption decisions' (European Commission, 2001: 24).

<sup>7</sup> Interviewee 9.

<sup>8</sup> It has been shown that the Romanian children adopted by foreigners were neither orphans nor abandoned by their families, they were in fact being sold by their parents due to poverty-related reasons (Dillon, 2003:249).

<sup>9</sup> Interviewee 9.

<sup>10</sup> According to the Copenhagen political criteria, the applicant country has to have 'achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities' (Conclusions of the Presidency, Copenhagen Council 1993).

<sup>11</sup> According to a Commission official in DG Enlargement: 'We are not a human rights organisation: our bread and butter business is the *acquis communautaire*', ie the complete body of EU legislation covering all policy areas where the EU has competence to act (Interviewee 12).

<sup>12</sup> Interviewee 4 and interviewee 11.

<sup>13</sup> Interviewee 3.

<sup>14</sup> For instance, between 1990 and 2000 the EU provided more than 100 million Euros as humanitarian aid to the childcare system (Jacoby et al., 2009: 120). After the adoption of the moratorium on ICA, the EU financial aid was channelled towards the reform of the system rather than humanitarian aid (Post, 2007).

<sup>15</sup> Interviewee 3.

<sup>16</sup> The 2005 legislation (law 274/2004) provided that children could be adopted internationally only by their grandparents living abroad. The legislation was amended in 2009 to include the provision that children can be adopted internationally by their relatives up to the third degree of kinship.

<sup>17</sup> For instance, the child rights experts who advised the Romanian government on the new legislation took into account the provisions in the latest conventions covering aspects on child rights, such as the Convention on Contact Concerning Children (Council of Europe).

<sup>18</sup> Interviewee 2 and interviewee 6.

<sup>19</sup> Interviewee 3.

<sup>20</sup> Interviewee 5.

<sup>21</sup> *Joint Declaration* by Claire Gibault and Jean Marie Cavada See Factsheet, Towards a European adoption procedure available at [http://www.coe.int/t/DC/Files/Source/FS\\_children\\_adoption\\_en.doc](http://www.coe.int/t/DC/Files/Source/FS_children_adoption_en.doc).

<sup>22</sup> 'Comparative study relating to procedures for adoption among the Member States of the European Union, practical difficulties encountered in this field by European citizens within the context of the European pillar of justice and civil matters and means of solving these problems and of protecting children's rights' (2009).

<sup>23</sup> According to the Commission 'If national adoption is not possible, inter-country adoption has to be considered as a possible alternative for the care of the child [. . .] By making the child's right



to a family an absolute principle it would always be possible to act in the child's best interest, giving clear preference to the possibility of European adoption over institutionalisation or long-term foster care in the child's country of origin' (De Luca, 2009: 2–10).

<sup>24</sup> Interviewee 21.

<sup>25</sup> Interviewee 13.

<sup>26</sup> According to Parliament Resolution 'if primary care of children by the family is unavailable, adoption should be one of the natural secondary choices, whilst placing a child in institutional care should be the very last option' (European Parliament, 2011: 2).

<sup>27</sup> Interviewee 17.

<sup>28</sup> According to data available in the Eurochild study 'Children in alternative care. National surveys January 2010-2<sup>nd</sup> edition' (2010), available at [http://www.eurochild.org/fileadmin/user\\_upload/Publications/Eurochild\\_Reports/Eurochild%20Publication%20Children%20in%20Alternative%20Care%20-%202nd%20Edition%20January2010.pdf](http://www.eurochild.org/fileadmin/user_upload/Publications/Eurochild_Reports/Eurochild%20Publication%20Children%20in%20Alternative%20Care%20-%202nd%20Edition%20January2010.pdf).

<sup>29</sup> For instance, each year 1,100 children are declared adoptable while there are 2,500 families requesting to adopt nationally (Interviewee 17).

<sup>30</sup> Interviewee 18 and interviewee 21.

<sup>31</sup> Interviewee 14 and interviewee 15.

<sup>32</sup> Interviewee 13.

<sup>33</sup> Interviewee 13.

<sup>34</sup> Interviewee 21.

## APPENDIX

### INTERVIEWS WITH EU OFFICIALS

Interviewee 1 (member of the 'Coordination' unit, DG Enlargement) Interview. Brussels, 26 May 2009.

Interviewee 2 (member of the 'Coordination' unit, DG Enlargement) Interview. Brussels, 30 May 2009.

Interviewee 3 (member of the Independent Panel of Experts on Family Law) Interview. Brussels, 10 December 2008.

Interviewee 4 (head of the Romania team 2005–2006, DG Enlargement) Interview. Brussels, 27 May 2009.

Interviewee 5 (member of the Romania team, DG Enlargement) Interview. Brussels, 29 May 2009.

Interviewee 6 (member of the Commissioner Olli Rehn cabinet, DG Enlargement) Interview. Brussels, 27 May 2009.

Interviewee 7 (head of the Romania team 2004–2005, DG Enlargement) Interview. Brussels, 29 May 2009.

Interviewee 8 (member of the country desk in the Romania team, DG Enlargement) Interview. Brussels, 29 May 2009.

Interviewee 9 (European Parliament rapporteur for Romania, 1999–2004) Interview. Brussels, 28 May 2008.

Interviewee 10 (head of the Romania team 1999–2004, DG Enlargement,) Interview. Brussels, 28 May 2009.

Interviewee 11 (task manager for children's rights in the Romania team 2000–2005, DG Enlargement,) Interview. Brussels, 26 May 2009.

Interviewee 12 (member of the country desk in the Romania team, DG Enlargement) Interview. Brussels, 27 May 2009.

Interviewee 13 ('Civil justice' unit, DG Justice). Interview. Brussels, 5 July 2011.

Interviewee 14 (head of the EC Delegation in Romania, 2000–2006) Interview. Brussels, 26 May 2009.

Interviewee 15 (member of the Romania team, DG Enlargement, 2005–2006) Interview. Brussels, 28 May 2009.

Interviewee 16 ('Fundamental Rights and Rights of the Child' unit, DG Justice) Interview. Brussels, 19 September 2009.

#### INTERVIEWS WITH ROMANIAN GOVERNMENTAL ACTORS

Interviewee 17 (secretary of state in the Romanian Office for Adoption) Interview. Bucharest, 8 July 2009.

Interviewee 18 (secretary of state in the National Authority in the Protection of Child's Rights and former task manager for child protection in the EC Delegation in Romania) Interview. Bucharest, 7 July 2009.

Interviewee 19 (member of Romania's EU chief negotiator's team) Interview. Brussels, 30 May 2009.

#### INTERVIEWS WITH CHILD RIGHTS ORGANIZATIONS

Interviewee 20 (UN Committee on the Rights of the Child), phone interview, 10 November 2011.

Interviewee 21 (UNICEF Romania). Interview. Bucharest, 5 September 2011.

Interviewee 22 (project manager for 'Children's Rights High Level Group-Romania') Interview. Bucharest, 10 July 2009.

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