

THE PERVERSE EFFECTS OF THE HAGUE ADOPTION CONVENTION *

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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 Convention¹ 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.² 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

2 Romanian Office for Adoption (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 attention³ 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

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.⁴

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

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 closure⁵. 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

⁵ 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).

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.⁶

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 Frattini⁷, 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

⁶ See letter US State Department, 20 oktober 2005
www.jcics.org/Maura%20Harty%20Reply.Oct20.pdf

⁷ 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 9th 2006. The theme was the issuing of a European Adoption Policy⁸ 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 undertaken⁹ 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.¹⁰

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.

8 See:
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
EC see: 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)

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.¹¹

¹¹ 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.¹² 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.¹³ 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.

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).

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.¹⁴ 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.¹⁵ 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)?

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

15 Gérard Depardieu au service de l'adoption
www.liberation.fr/culture/tentations/next/341674.FR.php

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