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## THE LEGALITY AND ETHICS OF INDEPENDENT INTERCOUNTRY ADOPTION UNDER THE HAGUE CONVENTION

### I. INTRODUCTION

The 1993 Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption was preceded by a lively debate over the type of framework that should be put in place to regulate the practice. Proposals ranged from the broadly social democratic and pro-organizational contention that this framework should rely on the state and on authoritative organizations to the more liberal view that intercountry adoption (ICA) should be framed around groups in society and individuals. The Convention provided a compromise that admitted to both approaches, but the debate has continued to rumble on, and since the USA brought the Convention into force in 2008, it has acquired a new impetus from the guidance issued by the Permanent Bureau at the Hague Conference.

The Permanent Bureau is one of a number of bodies that supports a social democratic approach and wishes to exclude as far as possible more liberal approaches. In accordance with this objective, it has set about interpreting the adoption process set out in the 1993 Convention in a way that emphasizes its reliance on a central authority and authorized organizations at every stage, with little or no scope for allowing individuals and societal organizations to have decision making roles. The Convention requires all states to designate a central authority to act as a gatekeeper, with all adoptions in and out of the country being channelled through its system of checks. From the outset, the Permanent Bureau has argued that the role of the Central Authority is not just one of *checking* matches, but also of *making* them. This interpretation was proposed in the *Explanatory report* of Gonzalo Parra-Aranguren (1994) and has been strongly reiterated in the Permanent Bureau's 2008 *Guide to Good Practice*.

The *Guide* calls for the prohibition of a form of intercountry adoption in which individuals or mediating bodies outside the formal structure of the central authority propose a match. This is referred to as an ‘independent adoption’. The Permanent Bureau argues that such adoptions are inconsistent with the Convention and that states should take measures to ‘eliminate’ them (Permanent Bureau 2008, 626-7). Similarly, the draft guidance on accreditation of adoption agencies drawn up by the Permanent Bureau warns of ‘the dangers of private and independent adoptions’ (Permanent Bureau 2010a, 32). A 2010 Special Commission has placed independent adoptions under further pressure. In preparation for the meeting of this Commission the Permanent Bureau distributed a questionnaire to Convention countries. Under the pejorative heading ‘Questions on Abduction Sale and Traffic in Children in the Context of Adoption’, it asked ‘are private or independent adoptions permitted by your state?’ Not surprisingly, numerous states answered ‘No’.<sup>1</sup> The Special Commission met at The Hague on June 17-25 2010. Invited speakers presented papers that criticized independent adoptions (Mezmur 2010; Smolin 2010) and International Social Service (ISS) presented a paper that, in passing, classified them as illegal under the Convention (ISS 2010a, 8). Towards the end of the conference a small committee got together and two hours before the meeting came to an end, draft conclusions and recommendations were circulated to those in attendance and accepted (ISS 2010b). Amongst them was the claim that if an adoption system is to be well regulated it is essential to prohibit independent adoptions (Special Commission 2010, rec. 1). Independent adoptions, it was said, are ‘not compatible with the Convention’ (Special Commission 2010, rec. 23).

It will be shown that independent intercountry adoptions *are* compatible with the 1993 Convention. The checks that are imposed by both the receiving state and the state of origin mean that they fully comply with its terms. The claim that independent ICA is inconsistent with the Convention can only be sustained by ignoring things that are in the Convention and inserting things that are not. However, what is legal under the articles of the Convention is not necessarily ethical and if the ethical case against independent ICA was relatively strong, then

one might concede that such adoptions violate the spirit of the Convention, even if they abide by the letter. However, the empirical basis for the argument that independent adoption is more open to abuse than organised forms of adoption is weak. Because the claim is a comparative one, the evidence must also be comparative, but such evidence is very limited. An indirect comparative analysis of independent adoptions against state organized adoptions was made in a report by Defence for Children International, ISS and Terre des Hommes that circulated at the discussions preceding the Convention (Defence for Children International 1991; Parra-Aranguren 1994, 13). The report considered comments solicited from member organizations in 12 receiving states and 11 sending states with somewhat inconclusive results: ‘According to the receiving country reports, illicit and questionable practices are most often linked to independent adoptions; in contrast, there is no agreement (consensus) among country of origin reports, some of which associate them with agencies, independent adoptions or both’ (Defence for Children International 1991, 14). Terre des Hommes and ISS have gone on to harden their position against independent ICA without either of them appearing to have undertaken systematic comparison of independent and agency adoptions. Sometimes it is simply assumed that independent ICA is more risky (ISS 2004). Sometimes the heightened risk is presented as a logical deduction that does not require empirical support, as in the Terre des Hommes report *Adoption at What Cost* (Lammerant and Hofstetter 2008). The argument against independent adoption by UNICEF also lacks a comparative evidence base. In calling for all adoptions to be centralised, UNICEF makes the universal claim that ‘by far the worst and most frequent problems arise in the context of ‘private’ adoptions’, and selects sources to fit this claim, beginning with a newspaper report from Russia (UNICEF 1998). UNICEF is in a delicate position as criticism of a state for, say, widespread corruption, is a much more serious matter than making a general assumption about corruption in civil society. It may, for example, jeopardize reform initiatives undertaken in conjunction with that state. It is perfectly understandable, therefore, that criticism of states by UNICEF is muted. However, the resulting

one sided presentation of problems as emanating from society should not be mistaken for objective analysis, as such an analysis would at least consider the contrary possibility that in a venal state the sphere of civil society may give scope for people to act with relative honesty and dignity.

It is argued here that the case against independent ICA is built upon ideology rather than upon evidence. The arguments against independent ICA are based on assumptions that flow from a particular worldview, one that has been imposed upon the evidence and the ethical questions in a biased way. In fact independent ICA is not only legal under the Hague Convention but it is also no more ethically problematic than the more organized form of ICA promoted in the *Guide*. It is concluded that systematic efforts to eliminate independent ICA are misconceived, and that permitting both independent ICA and organised forms of ICA to operate alongside one another is in the best interests of needy children.

## II. DEFINITIONS

An independent intercountry adoption can have a range of meanings. In terms of the aspirations of the birth and adoptive parents and any mediators, it might be said that an independent ICA is one in which there is an effort to minimize official involvement, but this leaves open how far, if at all, this effort is successful. If an independent ICA is at least partially free from being determined by official bodies there are a number of permutations that might be called an independent adoption, ranging from adoptions with no oversight at all to ones where most of the key decisions have been taken by authorized officials (UNICEF 1998, 8).

The definition of independent adoption offered in the Glossary at the start of the 2008 *Guide* identifies adoptions as independent where the adoptive parents have fulfilled at least some official procedures prior to being matched with a child.

The term ‘independent adoption’ is used to refer to those cases where the prospective adoptive parents are approved as eligible and suited to adopt by their Central Authority or accredited body. They then travel independently to a country of origin to find a child to adopt, without the assistance of a Central Authority or accredited body in the State of origin.

The definition makes the implicit assumption that these adoptions are being certified and hence being officially authorized in both the state of origin and receiving state, as the *Guide* continues immediately to state that this ought not be done:

Independent adoptions, as defined, do not constitute good practice. They do not satisfy the Convention’s requirements and should not be certified ... as a Convention adoption.

This definition succeeds in giving a general sense that the kind of adoptions that are objected to by the Permanent Bureaus are ones without official matching, but there are three areas that require clarification.

(1) The definition is overly precise in specifying that a successfully concluded home study comes first, travel to another state second and finding a child to adopt third. In adoptions that one might well call ‘independent’ other sequences are also possible including traveling to a foreign state first, finding a child second, and assessment of suitability third. The Romanian adoptions of the early 1990s often followed this pattern (Hayes 2000). The sequence set out in the definition would also exclude forms of adoption that are evidently independent. These are the so-called holiday adoptions that occur where either (a) parents go on a short trip (not necessarily a holiday) to another state without intending to adopt, and form the wish to adopt a particular child while away (ISS 2007a), or (b) the parents and child first meet in the parents’ home state through an international program of respite care (ISS 2007b ).

(2) How far ‘assistance’ from the central authority extends to other intermediaries is left a little vague. The professional categories defined in the Hague Convention include (a) the Central Authority itself, (b) accredited bodies, and (c) other individuals or bodies that are deemed suitable to arrange an ICA under Article 22. These latter individuals or bodies are referred to by the Permanent Bureau as ‘approved (non-accredited) persons’, and their potential role is admitted only with reluctance. They are not mentioned in the definition, but later it is said that in an independent adoption as one where the match is made without the assistance of the central authority or accredited body, *or* approved (non-accredited) person (Permanent Bureau, 2008, 191). This is slightly confusing, as in the 1994 *Explanatory Report* the mediators described in Article 22 are said to conduct independent adoptions.

(3) The relationship between private adoptions and independent adoption is also left a little vague. The *Guide* provides a separate definition of private adoptions which occur:

where arrangements for adoption have been made directly between a biological parent in one Contracting State and prospective adopters in another Contracting State. Private adoptions ... come within the scope of the Convention if ... the child has been, is or will be moved from the State of origin to the receiving State, but such adoptions are not compatible with the Convention (Permanent Bureau 2008, Glossary).

The separate definition of private adoptions seems to imply that preliminary matching in independent adoptions always involve mediators. However, as the extent, if any, of official endorsement of a private adoption is not specified the definition might also imply a lack of authorization by the home state of the adoptive parents, and possibly the state in which the adoption occurs.

Some of these ambiguities over the meaning of independent ICA may be deliberate. A definition that allows a degree of flexibility is potentially advantageous in the campaign to

persuade states to prohibit independent ICA. Insofar as the Permanent Bureau can get member states to agree that independent adoptions are to be banned, it wants this ban to be as *wide* as possible. Insofar as it has to concede that independent adoptions are permitted under the Convention, it wants this concession to be as *narrow* as possible. However, as aiding this campaign is not the purpose here the definition for the purposes of this paper is modified to remove ambiguity. An independent ICA that occurs between states party to the Convention is one where *the preliminary match between the adoptive parents and the child is made by persons or bodies that hold no professional status under the Convention. That is, they are neither the central authority, nor an authorized body, nor approved under Article 22. However, an assessment of the suitability of the parents to undertake an adoption is carried out by those with such professional status in the receiving state, and the decision on whether or not to allow the adoption is taken by state authorities in the country of origin.* The revised definition makes clear that the ‘independent’ element of the adoption concerns only the preliminary matching and so avoids confusion with private adoptions if these are defined as occurring without state authorization. However, if a private adoption refers only to a preliminary match made directly between parents, after which official authorization is given by the host state, and if the adoptive parents also gain approval from their home state, these cases can be seen as a further form of independent adoption. No particular sequence in the process is specified, this means that it includes both forms of ‘holiday’ adoption.

### III. THE LEGALITY OF INDEPENDENT ADOPTION

An intercountry adoption can be divided into three steps (though steps 1 and 2 can occur in either order):

- (1) A home study and assessment of suitability is carried out in the country of residence of the potential parents.
- (2) Preliminary matching between parent and child occurs.
- (3) The state authorities in the country of origin decide whether or not to approve the match.

The Permanent Bureau argues that at both steps 1 and 2, decision making must be in the hands of the central authority or an accredited agency (and possibly approved non-accredited individuals). Independent adopters fulfil this demand for central authority control when they complete a home study in step 1, but not when matching themselves with a child in step 2. Therefore, they should be turned down when they seek approval in step 3.

The *Guide* contends that the best interests of children are served when all matching is done professionally, and tends to elide professionals with state-authorized bodies. What skills these professionals are supposed to possess are somewhat vague, although there are references to psycho-social expertise and a claim that adoption outcomes are better when there is professional matching at the outset (Permanent Bureau 2008, 357, 562, 602). This claim is not supported by research as the limited comparative evidence available suggests that independent adoptions, including independent ICAs from Romania, have outcomes that are as good as any other (Wittenborn and Myers 1957, 141-55; Beckett 1999). Nonetheless, according to the *Guide*, good practice requires prospective parents to rely on the offices of the central authorities and their authorized bodies to make matching decisions on their behalf. If prospective parents are to stay within the terms of the Convention they apply from their home state to adopt any suitable needy child from a state of origin. A number of home study reports on such prospective parents are compiled by the receiving state and transmitted to the state of origin. In a parallel development the state of origin identifies children in need of adoption. Experts in the state of origin compare reports and identify which parents are to be matched with which child (Permanent Bureau 2008, 354, 357). This decision is transmitted to the receiving state and

passed on to the selected parents. On the basis of the child's file the parents then decide whether to accept or reject the match (Permanent Bureau 2008, 356). The parents are only now able to travel to the state of the child and meet the child (Permanent Bureau 2008, 381; see also UNICEF 1998, 11, 14-15).

The insistence on this mode of adoption in the *Guide* is not reflected by the text of the Convention, which certainly allows for prospective parents to play a much more active role in matching, and perhaps even assumes that they will do so. This is evident in articles 14-16.1 that describe the adoption process in terms that suggest that it only begins once the prospective parents have already identified a child they wish to adopt. How the preliminary match is made is not spelled out, but the possibility is left open that it is done independently.

The Hague Convention sets out the procedural requirements for intercountry adoption as follows:

*Article 14*

Persons habitually resident in a Contracting State, who wish to adopt a child habitually resident in another Contracting State, shall apply to the Central Authority in the State of their habitual residence.

*Article 15*

(1) If the Central Authority of the receiving State is satisfied that the applicants are eligible and suited to adopt, it shall prepare a report including information about their identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, as well as the characteristics of the children for whom they would be qualified to care.

(2) It shall transmit the report to the Central Authority of the State of origin.

*Article 16*

(1) If the Central Authority of the State of origin is satisfied that the child is adoptable, it shall

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*a)* prepare a report including information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child's family, and any special needs of the child;

*b)* give due consideration to the child's upbringing and to his or her ethnic, religious and cultural background;

*c)* ensure that consents have been obtained in accordance with Article 4; and

*d)* determine, on the basis in particular of the reports relating to the child and the prospective adoptive parents, whether the envisaged placement is in the best interests of the child.

In Article 14 prospective adoptive parents of one state wish to adopt a child of another. Taken in isolation, this wish could be interpreted either as referring to a specific child, or to any needy child of a foreign state. There is an intentional ambiguity in this as the Convention is designed to provide a broad framework that permits different placement methods. The Permanent Bureau chooses not to recognise this ambiguity and interprets Article 14 exclusively as a starting point for parents who wanted to adopt in general; the possibility that prospective parents applied for a home study after identifying a specific child is not admitted. This helps to explain why the definition of independent adoption in the Glossary to the *Guide* specifies that the home study comes first. It also explains why the *Guide* suggests that the report prepared on the parents, as referred to in Article 15, is used for matching purposes (Permanent Bureau 2008, 318). Article 16.1 is the most difficult to interpret as referring only to a process in which professionals both make and check a match, rather than just checking a match. This Article is described in the *Guide* as follows:

If it is satisfied that the child is adoptable, the Central Authority in the State of origin prepares a report on the child, ensures that proper consents have been obtained, *matches the child with appropriate adoptive parents*, and determines whether the envisaged placement is in the child's best interests (Permanent Bureau 2008, 319 italics added).

The problem with this rendition of Article 16.1 is that it slips in an extra clause between clause c (ensuring consents have been contained) and clause d (determining whether or not the envisaged placement is in the interests of the child). There is no mention of the central authority matching the child with appropriate adoptive parents in Article 16.1 of the Convention, or indeed anywhere else. One of the difficulties facing the Permanent Bureau in its effort to demonstrate that only professional matching satisfies the requirements of the Convention is that the text of the Convention never mentions matching at all. Here in the *Guide* the Permanent Bureau simply adds it in without comment. Similarly, in listing some of the things that must be done to ensure that the best interests of the child are upheld, and that are supposedly 'referred to in the Convention', the Glossary to the *Guide* includes 'matching the child with a suitable family' (Permanent Bureau 2008, Glossary). Later in the Glossary, and again in the main text, the Permanent Bureau turns to the explanation of the omission of matching put forward by Parra-Aranguren in his *Explanatory report*. Parra-Aranguren claimed that the term was not mentioned because of insuperable translation difficulties for the French version of the Convention: matching 'does not appear in the text of the Convention because no French equivalent exists' (1994, 318). The *Guide* repeats this claim (Permanent Bureau 2008, Glossary, 354).

The assertion that 'matching' could not be mentioned in the Convention because the drafters were flummoxed by how to translate the word strains credulity. In the French text of the *Explanatory report* (a few paragraphs before Parra-Arangurien claims that 'matching' is impossible to translate), the word *appariement* is used (1994, 311). Current standard practice is

to use *apparentement* for matching, as is done in the French version of the 2008 *Guide*. Even if one accepts, for the sake of argument, that the term matching is untranslatable, the concept could surely be rendered in French. It seems extremely unlikely that a process supposedly vital to the Convention would be left to be inferred rather than being spelt out. Indeed, when in December 1990 a seven member ad hoc advisory committee that included Parra-Aranguren created ‘illustrative draft articles’ of the Convention, the procedures for adoption explicitly incorporated matching by the central authority, and this was described, with perfect clarity, in French as well as in English.<sup>2</sup>

In comments appended to these draft articles it was explained that that there had been a difference of opinion between ad hoc committee members who wished to make the process that had been outlined essential ‘thus excluding “independent” adoptions’, and others who argued that the same process ‘should be available to the parties but should not be imposed upon them’ (Permanent Bureau 1994, 147). This was one of the disagreements that confronted the ten member drafting Committee of 1991, including Peter Pfund the chief negotiator of the USA, the largest receiving state of adopted children. Pfund favoured a flexible document and stated that if the USA was to ratify the Convention, the possibility of independent adoptions must be left open (Pfund, 1996, 117; Kennard 1993, 640). This was also the majority view amongst the Special Commission, which voted by 33 votes to seven to include independent adoptions within the Convention. The Convention, therefore, was drafted to ensure that independent adoptions were permissible, provided the state of origin and receiving state allowed for them (Pfund 1996, 118-9). The *Explanatory Report* explained that the Convention had ended in a compromise, one that allowed for the ‘limited possibility of “independent” or “private” adoptions’ (Parra-Aranguren 1994, 373, 378).

Pfund’s view that the Convention should be flexible prevailed in two respects.

(1) Mediators with the power to arrange and authorise adoptions went beyond the central authority and authorised bodies. This was set out in Article 22.2:

Any Contracting State may declare to the depositary of the Convention that the functions of the Central Authority under Articles 15 to 21 may be performed in that State, to the extent permitted by the law and subject to the supervision of the competent authorities of that State, also by bodies or persons who -

- a) meet the requirements of integrity, professional competence, experience and accountability of that State; and
- b) are qualified by their ethical standards and by training or experience to work in the field of intercountry adoption.

Article 22.2 opens up the possibility of selecting parents and approving matches to individual mediators, and to organisation that are not ‘accredited’ bodies and whose affairs are not extensively managed by the central authority (Articles 9-13).

(2) Considerable revisions were made to the illustrative 1990 draft articles on the adoption process in what became articles 14-16.1. These articles allow potential parents to take an active role in moving the adoption forwards, so that far from prohibiting an independent adoption they implicitly describe one. The articles are not narrowly prescriptive, they allow for either professional matching or for independent adoption and this, rather than supposed translation problems, is why matching goes unmentioned. However, if one were put in the false position of having to choose between whether the Convention describes a professional match or an independent adoption, then one could only conclude that in Article 14 the parents have already identified the particular child later referred to in Article 16.1. It is the initial wish of the prospective parents to adopt a specific child that sets the process in articles 15 and 16 in motion. These latter articles both begin with the same formulation: In article 15, a report is prepared if the receiving state is satisfied that the parents are eligible to adopt, and in article 16.1 a report is prepared if the state of origin is satisfied that the child is adoptable. The prospective parents

evidently initiate the application to be deemed suitable, and the receiving state responds. The child, however, cannot take the initiative, so who does? The similarity in wording suggests that the initiative comes from the same prospective parents: they propose to adopt a particular child and the state of origin responds. There is no reference to the state seeking out a child in need of adoption, rather it merely satisfies itself that the child is adoptable. This interpretation is confirmed when the reports on the parents and the child are compared to assess a placement that – note the past tense – has already been ‘envisaged’ (Article 16.1d). The task is not one of identifying a match, but rather of determining whether the match already wished for by the parents is in the interests of the child. Similarly, the intermediate assessment by the home state described in Article 15, serves as a check upon the match wished for by the parents by considering whether or not the specific child they propose to adopt falls within the range of children that they are qualified to care for. Thus, the process outlined in articles 14-16.1 of the Convention more closely corresponds to an independent adoption arising from the initiative of potential parents in identifying a particular child than it does to a professional match following a general application to adopt. It is, more or less, an independent adoption as defined in the *Guide*; it is true that the prospective parents identify a child that they wish to adopt prior to being assessed in their home state, but this just serves to emphasise their independence.

Further evidence that an independent adoption can satisfy the requirements of the Convention is seen by comparison with the process of relative adoption. Relative adoptions were very much a subsidiary issue when the Hague Convention was drawn up; there is no reference to relatives in the problems described in the preamble and the text only once mentions them (in Article 29). The procedures for adoption outlined in articles 14 to 16.1 were, therefore, designed principally for non-relatives. However, in addition to preventing independent adoptions, the *Guide* aims to extend and consolidate the authority of the Convention to cover relative adoptions, to which end it suggests that where a child in need of adoption has relatives living abroad, these relatives should be specifically excluded from adopting through national adoption legislation (Permanent

Bureau 2008, 489). The *Guide* goes on to emphasise that relatives who live outside the home state of the child must be subject to Convention procedures and safeguards (Permanent Bureau 2008, 511). Prospective parents who are also relatives obviously wish to adopt a specific child and have identified this child without the assistance of the central authority of the state of origin. In these circumstances the adoption procedure set out by the *Guide* follows the process outlined in articles 14-16.1 of the Convention as interpreted here. In other words, the match is initiated by prospective parents and the reports provide a basis for checking its suitability (Permanent Bureau 2008, 513, 514, 516-8). If relatives can satisfy the Convention through these procedures, it is hard to see why non-relatives cannot. A similar point can be made about private adoptions. As has been seen, the Glossary to the *Guide* defines a private adoption as incompatible with the Convention. However, this issue is later qualified by saying that a private arrangement must be authorised by the procedures outlined in the Convention (Permanent Bureau 2008, 522-3). As with relative adoptions, the authorities in these procedures judge a preliminary match that has already been made privately.

The *Guide* argues that independent ICAs fail to guarantee the safeguards in the Convention and particularly those contained in Article 29 (Permanent Bureau 2008, 191). This article states that prospective adoptive parents should not meet ‘the child’s parents or any other person who has care of the child’ until domestic placement has been considered, the consent of the birth mother freely obtained, and the parents identified assessed as suitable to adopt by their home state. The prohibition on meeting anyone who ‘has care’ of the child, read literally to extend beyond family members, also makes it appear effectually impossible to have contact with the child before gaining approval in a home study (although this would still allow an independent adoption as defined in the *Guide* where the home study comes first). However, Article 29 concludes that contact *is* allowed provided either that it occurs within the family or if ‘it is in compliance with the conditions established by the competent authority of the State of origin’. The effect of this proviso is to render the article discretionary (Parra-Aranguren 1994, 499).

Opponents of independent adoption have contended that this qualification to Article 29 should only ever apply on a case by case basis (ISS 2005). The *Guide*, however, simply ignores the final clause and presents Article 29 as an unconditional requirement.

The *Guide* also points to articles 4, 16 and 17 and suggests that they cannot be guaranteed (Permanent Bureau 2008, 525). Article 4 concerns giving ‘due consideration’ to placing the child in the state of origin, ensuring the free consent of the birth mothers and others from whom consent is required, and ensuring that the child has also been consulted insofar as age and maturity allows. As has been seen, Article 16, concerns the appropriateness of the placement in the light of reports on the child and prospective parents. Article 17 concerns the agreement to the adoption of the states involved. It is not at all obvious why these safeguards should be comparatively ineffective for an independent adoption. It has been argued here that the Hague Convention is designed to check the probity of adoptions, without specifying any particular mechanism for initiating a match. It has also been argued that insofar as a particular mode of adoption is implied in the account of an authorized adoption process, it is an independent adoption. If this interpretation is correct, then it follows that the Convention was written precisely to provide safeguards with independent adoptions in mind. For example, Article 16.1.c, ensuring that consents have been obtained, is a check that can be made of any match; similar points could be made of the other safeguards.

In the convention negotiations articles 14-16.1 had reached more or less their final form in the Preliminary Draft Convention of September 1992 (Permanent Bureau 1994, 167-173). The gloss upon these revised articles by Parra-Aranguren in a draft of what became his explanatory report was already attached to this document (although at this point he did not claim that ‘matching’ was untranslatable) (Permanent Bureau 1994, 174-241). Parra-Aranguren’s commentary can be seen as the first step in the campaign against independent ICA under the Hague Convention. For having lost on the text of the Convention, the Permanent Bureau quickly realized that they could yet win on its interpretation. The US delegation may have had

this in mind when in its comments on the Preliminary Draft it attempted, unsuccessfully, to ensure that the flexibility implicit in these articles, was recognized in the explicit right of potential adoptive parents to be actively involved in moving the adoption process forward by petitioning the state of origin to be able to adopt a child. It explained that:

such specific authorization for prospective adoptive parent-initiated activity in the State of origin would be appropriate (1) to ensure that there is no misunderstanding or belief that the Convention prohibits such activity, and (2) to provide for the regulation of such activity by the Convention. (Permanent Bureau 1994, 261).

The concern expressed in this comment was justified; fostering the misunderstanding or belief that parent initiated activity is prohibited under the Convention exactly describes the agenda of the Permanent Bureau.

#### IV. ACCOMMODATING THE USA

The Convention entered into force in the USA on April 1, 2008 and this helps to explain the resurgence of the argument to eliminate independent ICA. While the USA was moving towards implementing the Convention it was necessary for the Permanent Bureau to acquiesce to an interpretation of the text of the Convention that allowed for the possibility of independent adoption. Once the USA had committed itself, the time was ripe to shift decisively to another interpretation that did not allow for it. From the perspective of the Permanent Bureau the strategic reasoning and that explains and justifies this shift would appear to be as follows:

(1) The decision to allow independent adoptions under the Convention has been a matter of expediency to secure the involvement of the USA rather than a matter of principle.

(2) When the implications latent in the principled elements of the Convention are drawn out, they come into conflict with this expediency.

(3) As the objective of including the USA has now been achieved, independent adoption should now be eliminated so that the principled elements of the Convention can be developed unhindered.

It will be argued below that this reasoning is mistake as independent ICA is not unprincipled, but we must first establish the grounds for thinking that such a strategy does indeed underpin the Permanent Bureau's campaign. As has been seen, the 2008 *Guide to Good Practice* is explicit in saying that independent ICA may deviate from Convention safeguards that uphold ethical principles, and should be banned. The timing of this demand as part of a long-term strategy to get the USA to implement the Convention and then to change its meaning goes unmentioned. However, the Permanent Bureau is very much aware of the position of the USA when it negotiated the Convention, as is evident in a 2008 letter from Jennifer Degeling, Principal Legal Officer at the Permanent Bureau and the main author of the *Guide*, to the Dutch adoption authorities. Degeling addresses a question on the rules for Dutch parents wishing to adopt a US child, and in the course of her reply each of the three steps are worked through. (1) Degeling quotes the admission in the *Explanatory Report* that independent adoptions *are* possible under the Convention, and explains that that this was a compromise which 'arose from the need of certain States, in particular the US, to make some provision for adoption services by private persons' (Degeling 2008b, 2). (2) Degeling specifies principles that she suggests conflict with this possibility, including that public authorities should identify a child as adoptable and that a domestic placement for the child must be sought first. According to the letter, upholding these principles requires decision making within the hierarchy of the central authority and removes autonomy away from (a) organizations in civil society--tainted by profit seeking; and (b) the family--including US birth mothers who might use an independent adoption to have their wish

for an international rather than a domestic placement honoured. (3) Degeling then contradicts her earlier admission that the Convention allows independent adoption. She concludes that now that the Convention has entered into force in the USA, independent adoptions between the two states are *not* possible: ‘As the US and the Netherlands are both Convention Countries, any intercountry adoptions between the 2 countries must be done in accordance with the Convention’, and ‘must not be an independent adoption’ (Degeling 2008b, 3). The reasoning in this letter sets out, in a condensed form, the connection between the campaign of opposition to independent ICA and the strategy towards the USA.

## V. RIVAL APPROACHES TO PROBLEM SOLVING

The idea that allowing independent ICA under the Convention has been a somewhat distasteful compromise required to get the USA on board, and that it has now served its purpose, is too one-sided. Independent adoption is not unprincipled; rather it is associated with a different set of principles than those supported by the Permanent Bureau. These different sets of principles broadly conform to the distinction between a social democratic perspective and a classical liberal perspective toward adoption policy. In the discussions that preceded the Convention, the social democratic perspective came out in a preference for state oriented reform. The *Guide*, maintains a distinctly social democratic perspective in its interpretation of good practice, as indicated by its prescriptions for welfare reform through state intervention and family support (Permanent Bureau 2008, annex 4.3). The US delegation at the discussions took a more liberal approach, but found that ‘it proved impossible to convince experts from most countries in which adoption services are provided primarily or exclusively by public authorities that for-profit services can be as ethical and competent as ... services provided by public authorities or non-profit agencies’ (Pfund 116 n.79). From a social democratic perspective, allowing independent ICA gives rise to the same type of problems that are associated with

liberal policies more generally; policies that are said to give too much latitude to market forces while not doing enough to protect the poor from exploitation. From a liberal perspective one might equally argue the reverse: independent adoption is good practice as it empowers individuals, while the contrary view that matching should be restricted to authorized professional bodies is problematic as it creates a closed shop in adoption mediation that can lead to the abuse of power and to inefficiencies likely to be harmful to children, such as the slow processing of adoption applications.

The different principles that inform support for one adoption procedure over another are also based on a preference for decision making to occur at (a) an individual or (b) an organizational level. These distinctions have some correspondence with the liberal–social democrat division as liberal philosophy aims to elevate the autonomy of the individual and social democrats look to state organizations and non profit organizations to advance social justice. However, a preference for individual or organizational decision making also indicates two different psychological orientations, one that places a high value on autonomy, the other on acting in accordance with a bureaucratic role (Edelman 1977, 86-7). Those who prefer an independent adoption aspire to act as individuals. Rather than playing a largely passive role in a centralized system they aim to pursue their own initiative. For potential adoptive parents this attitude typically includes having a sense of adventure and a willingness to accept what chance brings: These aspirations are foreign to the problem solving orientations of those who act in the context of organizations: here different virtues are emphasized, such as planning, order and caution.

On the basis of these and other preferences it is possible to list the features of two integrated and coherent ways of thinking about adoption. They are two sets of ‘pattern variables’, each made up of a series of preferences that are closely interlinked (Parsons 1960). When the two sets of preferences are set against each other, as they are in Figure 1, the differences between them and the possibility for tension quickly become apparent.

*Figure 1 Two approaches to problem solving for children in need of adoption*

<b>Organizational problem solving orientation</b>	<b>Individual problem solving orientation</b>
Top down	Bottom up
General/Abstract	Specific/Concrete
Centralized	Localized
Seeks uniform process	Seeks unique story
Requires Planning	Allows for Chance
Requires Order	Accepts Chaos
Detached	Involved

### *Top Down and Bottom Up*

The central authority required by the Hague Convention suggests a hierarchical top down structure by its very name. The organizational view of how to move forward in helping children in need focuses on working down through this hierarchy from the central authority to authorized organizations, and aims for birth and adoptive parents to act only within these top down structures. The *Guide* seeks to reinforce this hierarchical organization. Parallel structures within a state, for example, are ruled out, a federal state with more than one central authority must have ‘a “central” Central Authority’ (Permanent Bureau 2008, 156). By contrast, the independent adopter maintains a degree of individual initiative in problem solving. They seek autonomy to make decisions outside larger hierarchical structures in a bottom up approach. Birth mothers may also wish to act outside institutional hierarchies to enable them to exercise greater choice over placement (Grove 1967). They may also prefer, perhaps with good reason, not to entrust their children to the care of the state.

*General and Specific*

An organization concerned with child welfare is necessarily somewhat impersonal and general in its approach; it is dealing with quantities of children not individuals. By contrast the individual pursuing an independent adoption is concerned with a specific child. When potential parents make contact with an individual child, their adoption efforts accelerate. Their abstract wish to find a child to adopt has been made concrete, and this can spur them to make zealous attempts to move the process forward. Putting a face on a unique individual gives a potential parent a quite different sense of purpose than working through organizations to support children in general. Potential parents, therefore, are apt to pressurize authorities to work faster. As one parent wrote, while formal checks stalled, ‘Sophia was lying in a hot nursery in Delhi. The annoying thing was that they were always reassuring me that they had the child’s best interests at heart. Such nonsense. The system was more important than the person’ (Mostyn 1993, 94). Opponents of independent ICA suggest that the pressure that potential parents can put on the adoption authorities once they have identified a child is one more reason to prohibit it (Committee on Lesbian Parenthood 2008, 41–2; Permanent Bureau 2008, 431).

*Centralized and Localized*

In states that allow for independent adoption there may be various small scale efforts to find adoptive homes for children that are responsive to local needs. Sometimes there may be an ad hoc attempt to secure an adoptive home for a single child, arising out of personal knowledge of the circumstances of the birth mother, by relatives or intermediaries in the professions of medicine and law (Zelizer 1994, 203). The independent adopter participates in such local initiatives. The organizational approach to intercountry adoption opposes outright the authority of individuals to mediate in adoption and is also opposed to the accreditation of a large numbers of small organizations, preferring a few large organizations. Widespread granting of accreditation by small organizations engaged in local initiatives is associated with a loss of

centralized control, the inability to enforce common professional standards, and the increased risk of corruption (Permanent Bureau 2008, Annex 4.7; Permanent Bureau 2010, 4.4). If many small organizations succeed in increasing the number of children adopted, this is viewed with suspicion as a probable measure of the extent of that corruption (UNICEF 2003; Degeleing 2008a; Lammerant and Hofstetter 2008, 12-13).

### *Process and Story*

The organizational approach to adoption envisages a rationalistic process. Prospective parents are expected to follow each step in its proper sequence with little scope for decision making as they are moved through the system. From the perspective of parents, this process can be seen as inefficient, and needlessly bureaucratic. The extended timescales of official procedures in some states helps to explain why some parents choose independent adoption.<sup>3</sup> Adoptive parents who undertake an independent adoption step outside of the process and use the terminology of the story to describe what they have done; adoption is not a mechanical process, it requires action; it is an adventure (Humphrey and Humphrey 1993). In this story the parents may be beset by obstacles and challenges, including bureaucracy, that they have needed to overcome. The child they adopt is assigned not by the rational determination of psycho-social experts, but by fate (Astachnowicz and Astachnowicz 1993). In considering the relative merits of process and story it is worth noting that many adoption agencies now encourage parents to create or update life story books with their adopted children, as such a narrative of a child's life may help the child to understand and accept how they have become part of a new adoptive family. This suggests the possibility that if the manner of a child's adoption lends itself to a story, this too may help to tie the new adoptive family together.

### *Planning and Chance*

Closely related to the distinction between a process and a story is the organizational emphasis on planning for an adoption against the acceptance of chance in adoption by the independent adopter. The rise of adoption professions in western states has been associated with parental assessments in which family circumstances are mapped out in advance and projected into the future. This is characteristic of the home study with its predictive focus on finance, health and relationships. Parents involved in an independent adoption tend to place more emphasis on spontaneity and less on planning for what the future may bring. The idea of an adopted child as one's fate signals an acceptance of chance, luck and serendipity. For the independent adopter chance is viewed positively, it is seized as an *opportunity*. From an organizational perspective chance is a *threat* to a planned process.

### *Order and Chaos*

Proponents of organizational problem solving promote a rationalistic, orderly adoption processes involving expert matching, long term planning, the financial disinterest of decision makers, and shared professional values. There may be a sharp disjuncture between this order and the lives of children in need of adoption, and perhaps a sharp disjuncture between it and the de facto organization of the state in which the children live. Children in need of adoption are sometimes in circumstances that can be described as chaotic. Their rights go unrecognized, they live in hand to mouth uncertainty, they are outside the protection of state authorities, and their mothers are in a marginalized position. Children in institutions may subsist in very poor conditions. If an adoption policy is to be effective, it has to reach out to these children. The Hague Convention takes as its starting point a child already within the system and does not consider how to reach out to more children in need. It does, however, leave open a window for independent matches to be proposed to the authorities. The *Guide* seeks to close this window. From an organizational perspective, once potential parents enter into the world of a needy child,

they and their money exacerbate the chaos. Those involved in independent adoption see things differently. They act as they must to get a child out of chaotic conditions. They do not wait until a child is in the system, they work with the situation of the child as they find it. If this involves paying bribes, it is seen as adapting pragmatically to corruption that is already in place.

### *Detached and Involved*

The organizational process set out in the *Guide* keeps parents and children at a distance until the decisions have been made. The parents are not to travel to the state of origin until a child has already been assigned to them on the basis of a comparison of reports. The decision makers may also be physically removed from the sight, sounds and smells of the child and their environment, particularly if they only get to see files or use a computerized matching system—though the *Guide* warns that ‘matching should not be done by computer alone’ (Permanent Bureau 2008, 357). By contrast, prospective adoptive parents who travel abroad before everything has been arranged become immersed in the milieu of the child. Their senses and their feelings are all heightened by the unfamiliar circumstances and their decisions are informed by the intensity of their experiences. From an organizational perspective, they become subjective, compromised by their feelings. From an individual perspective, the more detached organizational decision making can seem cold and excessively formalistic, and lose any sense of the urgency of a child’s needs. This perception of bureaucrats is not limited to parents. According to Hoelgaard, adoption agency workers in Columbia express similar criticisms of children’s advocates, officials who have the power to authorize or deny a child the chance of adoption. ‘Being in daily contact with children, casa workers felt concerned about them as individuals, but come up against rigid, sometimes absurdly rigid, officials whose concern was with ‘paperwork and formalities at the expense of children’. (Hoelgaard 1998, 214).

Those opposed to independent adoption, contend that there is another distinction between treating the child (a) as a human being in the organized form of ICA, and (b) as a ‘commodity’ in independent ICA. The centralized bureaucratic processing of children, however, is not obviously related to their humanity, and under some circumstances the children involved in an independent ICA are less likely to be treated as ‘commodities’ than they are in the agency process recommended by the *Guide*. Part of what is offensive about the commodification of children is that it violates the principle of human equality; the cash value of a child varies with their characteristics such as age, and degree of health. These characteristics define a child not as an individual, but as a category. However, in some forms of independent adoption, adoptive parents are able to think of the child as an individual and not a category because they meet and get to know the child; this is exemplified by ‘holiday’ adoptions. By contrast, if children are matched by agencies and everything is arranged before the parents ever get to meet the child, then in their dealings with the agency, the parents can only think of children in terms of general categories such as ones defined by age or health, categories which they rank as more or less desirable. The ranking may be softened by putting it in terms of the types children that the parents are able to care for, but the children are still placed on a scale rather than being treated as individuals of equal worth.

## VI. THE REACTION TO ROMANIA

In the early 1990s after the terrible conditions in Romanian orphanages became known, thousands of parents across Western Europe responded by traveling to the state and arranging an independent adoption. This event above all others has stimulated and shaped opposition to independent ICA. The adoptions were taking place as the delegates debated the Convention, and were alluded to in the *Explanatory Report* as ‘the bitter and recent experiences in some countries, arising out of the direct contact of the prospective adoptive parents with the countries of origin’ (Parra-Aranguren 1994, 292). A British study has found that children adopted out of

institutional care in Romania have made substantial developmental gains and that there has been a low disruption rate (Rutter, 1998). One might think, therefore, that Parra-Aranguren's strongly worded comment should have at least been more equivocal. However, the term 'bitter' becomes understandable if the worldview of opponents of independent ICA is taken into account. The parents who traveled to Romania formed a grass roots movement without leadership or organization, founded on the simple idea of *getting the children out*. They exemplified the mindset of those undertaking an independent ICA: they acted spontaneously from the bottom up, they worked with locals, they were driven by their feelings from the outset and especially once a child had been identified, they embraced chance and accepted chaos, they were adventurous, and often cavalier about official procedures. In short they were everything that was offensive towards those who advocated an organizational approach to ICA. It is not surprising, therefore, that there was little or no acknowledgement that the adoptions had quickly and effectively helped to ameliorate the tragedy in Romania. Rather, the core reaction of those with an organizational worldview was that *this must never happen again*. This is seen every time a disaster raises the prospect that individuals may resort to independent ICA, at which point a coalition of international organizations, charities and NGOs step in to mount a vigorous campaign to prevent it. The Permanent Bureau is part of this coalition, as seen most recently in its response to the 2010 earthquake in Haiti (Permanent Bureau, 2010b).

A concern that preceded the Romanian adoptions was that far from helping children, any large scale efforts to engage in ICA made things worse for them overall by dampening domestic efforts to promote adoption and other child care reforms. As Damian Ngabonziza of ISS put it, 'if intercountry adoption is developed as a programme of some priority, it may impede the development of more effective wider solutions' (Ngabonziza 1988). This criticism has been widely applied by critics of ICA. It has been argued, for example, with respect to South Korea (Sarri 1998).<sup>4</sup> The same argument has been made in the case of Romania, where the government progressively imposed a moratorium on ICA from 2001. Writing just before the moratorium,

Dickens contended that even if ICA was tightly regulated and organized it would ‘still have detrimental effects on domestic services’ (Dickens 2002, 82). After the moratorium was imposed, Bainham warned that it must not be lifted, as this risked a return to the later 1990s when the promotion of ICA was combined with steps to ‘suppress domestic adoption’ (Bainham 2003, 226). The moratorium was supported by Emma Nicholson, the European Parliament’s Special Rapporteur for Romania’s EU accession. Nicholson explained that ‘in a country of 23 million people, there will be plenty of couples who are unable to have a child and who have a home to give a child and want a child. These Romanian couples were turned aside. ... They weren't [allowed] to know the children were there. In fact in some cases, I've heard of children being whisked away when a Romanian couple asked if there were any children available for adoption’ (McElhinney 2002). Nicholson later described the ending of ICA from Romania as a success story (Nicholson 2006). However, official figures, given in Table 1, show that the domestic adoption numbers have stayed flat since 2000. Troubling findings of poor standards of care in studies into childcare and family welfare in Romania suggest that other reforms have thus far had only limited success (National Authority 2004; Bartholet 2007; Report 2008).

The idea that extensive ICA inhibits domestic adoption and care services is a version of dependency theory, which challenges liberal (or ‘neo-liberal’) relations between rich and poor states. As such it has an intuitive appeal to those who hold a social democratic worldview, both for those who are critical of all ICA and for those who are opposed to independent ICA, as it is simple to adapt the idea to blame independent ICA for depressing domestic adoptions. The experience of Romania since the moratorium illustrates the importance of testing ideas, however attractive they are in theory, against the evidence.

Table 1. Romanian Adoptions 2000-2008

Year	No. adopted domestically	No, adopted internationally	Total
2000	1291	3035	4326
2001	1274	1521	2795
2002	1346	407	1753
2003	1383	279	1662
2004	1422	251	1673
2005	1136	2	1138
2006	1421	0	1421
2007	1294	0	1294
2008	1300	0	1300

Sources: adapted from Government of Romania 2007; Muntean 2010.

## VII. EXTENDING AND RESTRICTING ADOPTION

The Hague Convention is meant to help to ensure that a child has been correctly classified as in need of adoption, has had the opportunity to be adopted nationally, and then gains the opportunity to be placed internationally. These objectives relate to four groups of children:

- (a) Children in need of adoption who are placed in an adoptive home.
- (b) Children in need of adoption who are *not* placed.
- (c) Children who are placed internationally but who *could* have been placed nationally.
- (d) Children *not* in need of adoption who *are* placed for adoption.

To get an overall picture of the success or otherwise of adoptions arranged under the Convention, it is necessary to consider its combined impact on all four of these sets of children, including ensuring that as many children in need of adoption are indeed adopted, that is maximizing the number of children who fall within (a) and minimizing the number who fall within (b). The *Guide* however, concerns itself only with how to minimize negative outcomes in groups (c) and (d), that is, the unnecessary placement of children abroad, either because they could have been placed within their home state or because they need not have been adopted at all. An emphasis on the risks of inappropriate adoptions while downplaying the problem of children in need who are not adopted characterises critics of ICA, and has also been expressed by UNICEF and some NGOs and state officials (Bartholet 2007; Pfund 1996, 80; Hayes 2000). There is virtually no consideration of children in need considered as a whole, but only those children for whom an adoption is already proposed. If a needy child not adopted is seen as someone else's problem, it is easy to see why either ICA in general or independent ICA is criticized: ICA presents risks--as does any form of adoption--while the benefits that it may bring to increasing the number of children in need who are adopted (and the risks they face if they are not) are not factored in. The propensity to argue in a way that excludes consideration of the fate children in need of adoption who are not placed, however, is due not to an inadvertent lack of joined up thinking, but rather to a deliberately selective manner of presenting evidence.

An example of an analysis of this type is seen in the Permanent Bureau's criticism that 'holiday' adoptions of children who travel abroad for respite care 'creates a loophole for bypassing the Convention and potentially places children at risk of significant harm' in the *Guide to Good Practice* (Permanent Bureau, 2008, 561). According to the Permanent Bureau, the risks come from the state of origin not being able to determine if the child is adoptable and the lack of formal adoption preparation. The risks also include the absence of professional selection and matching from the outset—in common with many adoption professionals the Permanent Bureau assumes that this impairs outcomes despite the lack of supporting evidence—and that

the subsidiarity principle 'is not respected', although it is not asked whether the somewhat older children that typically participate in respite care programs have a realistic prospect of adoption in their home state (Permanent Bureau, 2008, 561). The *Guide* cites an ISS editorial as a source of its information on adoption from respite care, but passes no comment on the tragic dilemma that gave rise to it. (ISS 2007b; Dall'accoglienza 2006) This concerned an Italian couple who found that the child they were looking after in respite care appeared to have been the victim of appalling abuse in the institution where she lived in her home state of Belarus. In this belief they refused to return her and attempted to hide her, to the anger of the Belarus government, which suspended its respite care program with Italy. Had the Permanent Bureau expanded their problem focus to admit that children in need of adoption who are not adopted may suffer significant harm in its most brutal form, their concerns about adoptions out of respite care might at least have been presented more equivocally.

Some critics of independent ICA make the fallacious assumption that (a) the number of children in need of adoption is the same as (b) the number of children who are officially recognised as such. Thus ISS identifies as adoptable only those children who are 'officially recognised as having a legal status enabling adoption to be considered'. On this basis, and without considering how many needy children may fall outside the official purview, ISS seeks to debunk claims that the number of adoptable children are in the millions (ISS 2008b). A similar assumption underlies the hope of ISS and Terre des Hommes that the recent decline in recorded ICA numbers means that less children are in need of adoption (ISS 2008a; Lammerant and Hofstetter 2008, 5). Casting doubt on this complacent view are the incalculable numbers of children living and dying in extremely adverse circumstances. There are around 100 million missing girls, some have been aborted others are the victims of neglect and infanticide (Sen 2003, Sahni 2008). About 115 million children are engaged in hazardous forms of child labour (International Labour Office 2010). There are millions of children living in institutions, including more than a million in Eastern Europe and The Commonwealth of Independent States

(UNICEF 2010). There are untold numbers of street children. Under these circumstances providing the opportunity for more potential parents to adopt will help more needy children. Independent adoption allows additional routes to matching a child with parents that do not rely on officials taking the initiative. It appeals to a wider range of potential parents, including those who want a degree of autonomy in their endeavour to adopt. Allowing for a preliminary match outside central authority structures makes it easier for potential parents to take the first step towards adoption from different starting points. In particular, potential parents do not need to initiate the process with an abstract wish to adopt a certain category of child but may begin with a specific child. This means that children who are in less popular categories (such as older children) may still be adopted.

Overly optimistic assumptions about the state also inform the view that banning independent ICA will help to protect birth mothers in a difficult position and unaware of their rights and of the official support on offer. Critics of ICA and of independent ICA have raised serious concerns about vulnerable birth mothers, and this underscores the need for scrutiny as provided for in the safeguards of the Convention. However, an outright ban on independent ICA will not by itself do anything to protect birth mothers and their children. If the ability of birth mothers themselves to take the initiative through an independent adoption is curtailed as part of a comprehensive package of state support for such mothers that is one thing. It is quite another to impose an international prohibition on independent ICA while the support on offer to mothers in some states is insubstantial or non-existent, for this means that birth mothers have been put in a yet more difficult position. It is not at all obvious that as a general rule state authorities are more likely to act ethically with respect to such mothers and their children than are individuals and bodies in civil society. Where there is corruption it often takes the form of exploiting positions of authority conferred by the state. And on far too many occasions it has been found that the ethical standards of care for children in state run institutions are very poor. The commitment of some states to support the most vulnerable members of society may not be particularly strong,

and even with the best of intentions, the reach of the state organizations may not extend to adequate protection of children and birth mothers who are then left to their own devices in society, but who no longer have the option of seeking an independent ICA by societal means.

There is an asymmetry between efforts to ban or restrict independent ICA--or all ICA--in a state on the one hand, and successful reform in that state on the other. Banning or restricting adoption is relatively simple wherever it requires public authorisation. There are bottlenecks through which the adoption must pass if it is to gain this official authorisation and these can quite easily be narrowed or closed off. By changing the rules, legal and administrative authorities can restrict the number of children adopted at a stroke. To make significant reforms, however, is liable to be incomparably more difficult than enforcing restrictions. For example, bottlenecks have been used to restrict ICA out of Haiti after the earthquake, but how does one ensure that a child who might otherwise have been adopted abroad is not placed domestically in a family as a *restavek*? To give adequate support to birth mothers and provide needy children with the opportunity to grow up in a loving home in the land of their birth may require significant changes to the culture of a whole society, or the transformation of its economy, or the fundamental redirection of the spending priorities of a state. Amongst critics of independent ICA, and of ICA more generally, there is little recognition of this asymmetry. Policy documents can sometimes appear to suggest that simply by putting proposals to limit or ban ICA alongside proposals for reform they become two sides of the same coin. They do not. To restrict or ban independent ICA is an eminently attainable, practical proposition and the campaign against it has achieved considerable success. The campaigners have prevented any repeat of the grass roots movement to rescue children in need from Romania through independent ICA, and their bitter view of these adoptions has become accepted to the extent that the very word 'rescue' has been largely expunged from accounts of what happened there. They have encouraged the limiting or banning of independent ICA in several states, as is made evident in the replies to the 2010 questionnaire distributed by the Permanent Bureau. They have contributed to the success

of critics of ICA in general in reducing adoption numbers (Bartholet, 2010). In all these respects, a relatively small number of activists in international organisations and NGOs that aspire to be opinion formers, including those in the strategically placed Permanent Bureau, have had a disproportionate impact in their advice to states to eliminate independent ICA. By contrast, when it comes to full scale reform of provision for needy children, it is unrealistic to imagine that this alliance can have more than a trivial influence. Their positive reform proposals are merely pious hopes of no practical benefit to children in need and not adopted.

## VIII. CONCLUSION

Independent adoptions under the Hague Convention should be facilitated not prohibited. Opposition to them is based on an over-reliance on social democratic and organizational problem solving for children in need. Social democratic and organizational perspectives undoubtedly have something to offer in formulating a policy on how best to help children in need of adoption but so do perspectives that are more liberal in their policy preferences and individualistic in their mindset. The campaign against independent adoption does not recognise this, it has developed into a totalising agenda that aims to exclude almost all decision making by the individual and entails a blanket rejection of liberal approaches to problem solving.

Independent adoptions embody an individualistic approach to decision making and advocates of the more organizational approach have mistakenly concluded that this makes independent ICA unethical. Individual and organizational modes of decision making in adoption are not necessarily incompatible, they can complement each other provided that there are agreed boundaries on the legitimate scope to be allowed for each. The boundaries that are set out in the Hague Convention do exactly this; they allow for independent adoption providing it is scrutinized by the states involved. This balance between the individual and organizational decision making has the potential to benefit needy children as it can preserve the best of what

both individuals and organizations can offer, while at the same time allowing for them to act as a check upon each other. However, the leading advocates of the organizational approach, including the Permanent Bureau, have refused to accept these boundaries, and are wholly one sided in promoting their system to the virtual exclusion of independent decision making. From the perspective of the needy child, this takes the Hague Convention in a most unfortunate direction.

Notwithstanding the arguments of the Permanent Bureau, independent ICA is legal under the 1993 Hague Convention. The Convention was designed to scrutinise independent adoptions, not to get rid of them. It does not require the central authority or authorised bodies to identify matches between a child and prospective parents, but only to check them. The Convention was formed out of a compromise between proponents of an adoption system that stressed the role of the state and of authoritative organizations on the one hand and proponents of an adoption system that gave more scope to civil society and to individuals on the other. As a result, the articles of the Convention are not narrowly prescriptive; they allow for either professional matching under auspices of the central authority or for independent matching. Considered in terms of outcomes for children in need, this compromise should not be thought of as second best. It gives scope for striking a reasonable balance between allowing for initiative by potential parents, birth mothers and adoption agencies in civil society on the one hand, and allowing for scrutiny by the state and authorised bodies on the other. It is unfortunate that this balance has never been accepted by the Permanent Bureau, and that the *Guide to Good Practice* calls for the elimination of independent adoption. This call should be resisted. The ability of birth mothers, independent mediators and potential adoptive parents to make a preliminary match should be maintained. It should not be whittled away by those who view permitting independent adoption as no more than a bait that can be dispensed with now that the USA has been enticed into implementing the Convention. The interests of children in need of adoption are not served by

tendentious and one-sided interpretations of the Convention, but by a return to the compromise that the Convention sets out.

## NOTES

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<sup>1</sup> By September 2010 the Permanent Bureau had published 50 replies to the questionnaire on its website: [http://www.hcch.net/index\\_en.php?act=conventions.publications&dtid=33&cid=69](http://www.hcch.net/index_en.php?act=conventions.publications&dtid=33&cid=69). Four states either did not respond to the question on independent adoption or did not clearly address it. Twenty three states replied with a clear negative, either with an explanation of their policy or with the single word ‘No.’ Twenty three other states replied with various qualifications that independent and/or private adoptions were possible. (Only one of these states, Burundi, simply answered ‘Yes’.) These included states which responded that independent adoptions were allowed under some limited circumstances or that efforts to ban them had were not yet as thoroughgoing as they could be, or that they were allowed but not under the Convention. It is unclear how many states understood independent adoption to refer specifically to preliminary matching.

<sup>2</sup> ‘The Central Authority [of the state of origin] shall address itself to the competent authorities of its State in order to have the child selected for the prospective adoptive parents’. In French: ‘elle s’adresse aux autorités compétentes de l’Etat dont elle relève pour que soit désigné l’enfant à proposer aux candidates’ (Permanent Bureau 1994, 140, 141).

<sup>3</sup> Finland reported to the Permanent Bureau that in response to lengthy delays, potential adoptive parents frequently take matters in their own hands, with about 40 out of 200 international adoptions being arranged independently in 2009. The authorities in Finland have created a working group to consider how better to prohibit this (Finland 2010).

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<sup>4</sup> In 2007 the Korean government significantly reduced ICA as part of a package of childcare reforms, including measures to encourage domestic adoption. Domestic adoption numbers have, so far, stayed flat (Hayes and Kim 2008; So 2009).

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