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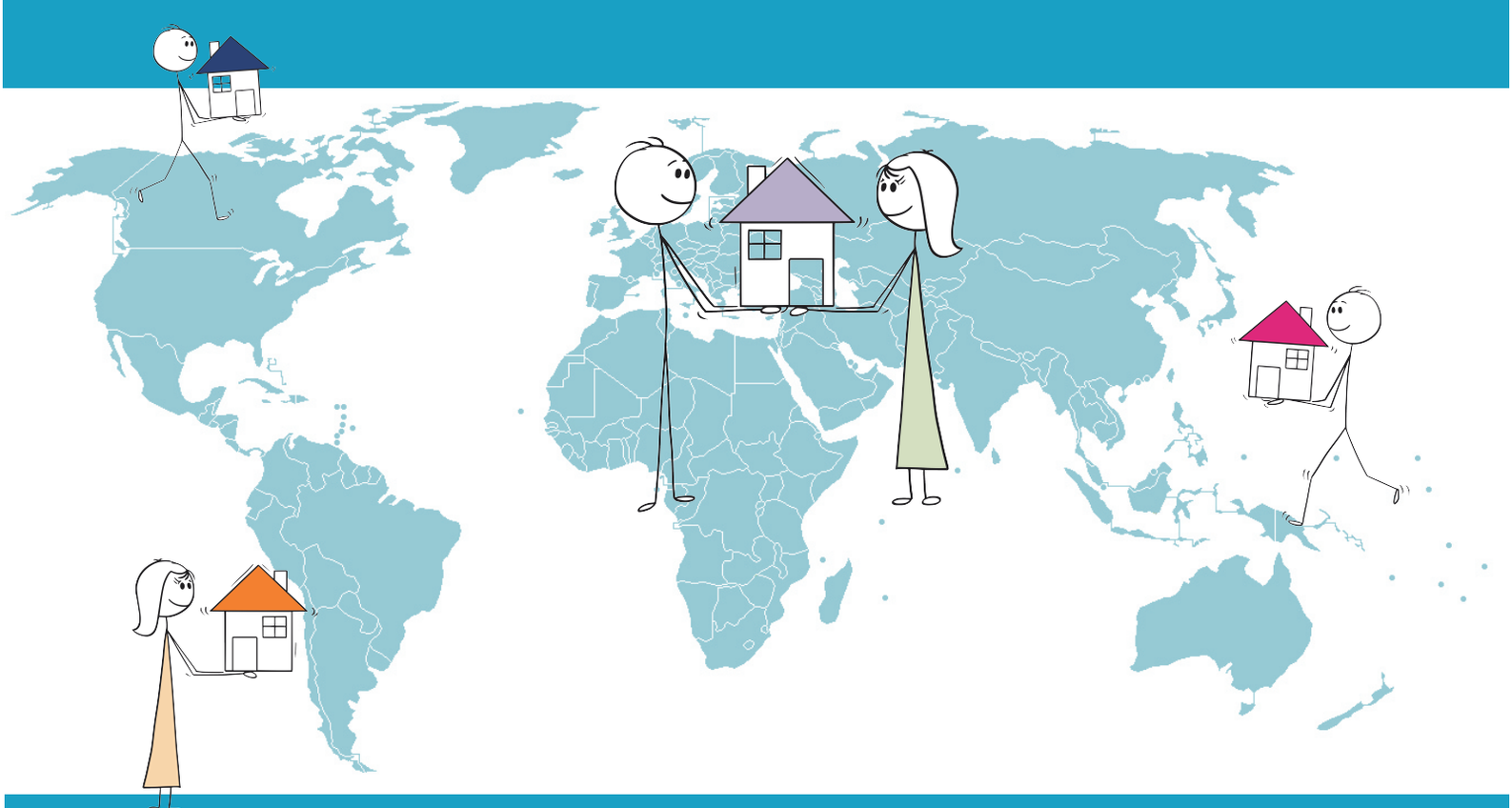
Habitual Residence and Scope of the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption



NOTE ON HABITUAL RESIDENCE AND THE SCOPE OF THE 1993 HAGUE CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION

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INTRODUCTION[1]

1. The concept of habitual residence is key to the effective operation of the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* ("1993 Hague Convention" or "Convention"). Contracting States to the 1993 Hague Convention have, however, noted that in practice they have encountered challenges in some instances in determining the habitual residence of prospective adoptive parents and adoptable children.[2] Uncertainty regarding the habitual residence of a person – for example, as a result of their move from one State to another (which is becoming increasingly common)[3] – can complicate the determination of whether the 1993 Hague Convention applies to a particular adoption. As a result, this topic was discussed at the 2010 and 2015 Special Commission meetings on the practical operation of the 1993 Hague Convention.[4]

2. This Note is a revised version of Preliminary Document No 4 on "Globalisation and international mobility: habitual residence and the scope of the 1993 Convention" prepared for the 2015 Special Commission meeting. It has been revised on the basis of the discussions at that meeting and the comments received thereafter.

3. This Note aims to promote the proper interpretation and application of Article 2 of the 1993 Hague Convention. It does so by seeking to clarify a) the scope[5] of the Convention, and b) the concept of habitual residence, and ultimately promote greater consistency in determinations of habitual residence in Contracting States in the context of this Convention, including by "developing a common understanding of the factors which might be considered when determining habitual residence" for the purposes of this

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All Hague Conference documents on adoption mentioned in this document are available on the Hague Conference website at < www.hcch.net > under "Adoption Section".

1 Special thanks are due to Mr Hans van Loon (former Secretary General) and Mr William Duncan (former Deputy Secretary General) for reading previous drafts of this document and providing valuable comments.

2 See answers to "Questionnaire on the impact of the 1993 Hague Convention on Laws and Practices relating to the Intercountry Adoption and the Protection of Children", drawn up by the Permanent Bureau, Prel. Doc. No 1 of July 2014 for the attention of the Special Commission of June 2015 on the practical operation of the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (hereinafter, "2014 Questionnaire No 1"); and "Questionnaire on the practical operation of the 1993 Hague Intercountry Adoption Convention", drawn up by the Permanent Bureau, Prel. Doc. No 2 of October 2014 for the attention of the Special Commission of June 2015 on the practical operation of the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (hereinafter, "2014 Questionnaire No 2").

In fact, some States consider questions of habitual residence to be among the most significant challenges relating to the implementation and operation of the 1993 Convention (2014 Questionnaire No 1, Question 17(c): Bulgaria; Question 18(c): Belgium).

3 According to the *Global Expatriates: Size, Segmentation and Forecast for the Worldwide Market* Report the number of expatriates worldwide amounted to a total of around 50.53 million in 2013 – this figure grew at a compound annual rate of 2.4% between 2009 and 2013 and is forecast to reach an estimated 56.84 million by 2017 (see: < http://finaccord.com/uk/report_global-expatriates_size-segmentation-and-forecast-for-the-worldwide-market.htm >). The Report states that "[e]xpats are growing as a proportion of both the total worldwide population and the worldwide immigrant population".

4 "Conclusions and Recommendations and Report of the Special Commission on the practical operation of the 1993 Hague Intercountry Adoption Convention (17-25 June 2010)", drawn up by the Permanent Bureau, Prel. Doc. No 4 of March 2011 for the attention of the Council of April 2011 on General Affairs and Policy of the Conference (hereinafter, "Report of the 2010 Special Commission"), paras 44-46 and "Conclusions and Recommendations adopted by the Special Commission on the practical operation of the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (17-25 June 2010)", C&R No 13 (hereinafter, "C&R of the 2010 SC").

5 Regarding scope, see also Art. 2(2) of the Convention which provides an additional element "[t]he Convention covers only adoptions which create a permanent parent-child relationship". See also Permanent Bureau of the Hague Conference on Private International Law, *Guide to Good Practice No 1: The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention*, Bristol, Family Law (Jordan Publishing Limited), 2008, available on the Hague Conference website at < www.hcch.net > under "Adoption Section" (hereinafter, "Guide to Good Practice No 1"), section 8.8.8.

Convention.[6] As recommended by the 2015 Special Commission meeting, it is hoped that this Note will be a key tool in educating the relevant judicial and administrative authorities or bodies in Contracting States in relation to determinations of habitual residence and the scope of the Convention, as well as in raising public awareness as to what qualifies as an intercountry adoption under the Convention.[7]

4. This Note is structured as follows:

- Part A introduces the concept of habitual residence;
- Part B provides a series of case examples in which difficulties have arisen in some States in determining whether the 1993 Hague Convention applies to a particular adoption. Section 1 of this Part presents cases where it should be clear, according to Article 2, whether the Convention applies to that particular adoption or not. Section 2 of this Part presents cases in which it may be more challenging to determine whether the Convention applies to a particular adoption because the determination of the habitual residence of the prospective adoptive parents or the child is more complex;[8] and finally,
- Part C provides guidance on how to *prevent* problems in this area and, where they do occur, how to *address* them.

6 "Conclusions and Recommendations adopted by the Fourth Meeting of the Special Commission on the practical operation of the 1993 Hague Intercountry Adoption Convention (8-12 June 2015)", C&R No 22(a) (hereinafter, "C&R of the 2015 SC"). This has been done on the basis of information submitted by States regarding their practices in this area.

7 C&R No 22(b) and (c) of the 2015 SC.

8 In some cases, this guidance is derived from the Conclusions and Recommendations of previous Special Commission meetings or other already established good practice guidance.

A

THE CONCEPT OF HABITUAL RESIDENCE

5. Habitual residence is the main connecting factor used in all the modern Hague Children's Conventions.[9] None of these Conventions contains a definition of habitual residence or lists specific factors that must be considered. It is understood, however, that habitual residence is an autonomous concept that is determined based upon the facts of each particular case, and in light of the objectives of the particular Hague Convention rather than each State's domestic law constraints.[10] It should be noted that there may be different considerations to take into account when determining habitual residence for the purposes of the different Hague Conventions.

6. For the 1993 Hague Convention, the concept of habitual residence is the only connecting factor in determining whether the Convention applies to a particular adoption.[11] The Convention applies where the child and the prospective adoptive parents are habitually resident in *different* Contracting States:

> "The Convention shall apply where a child habitually resident in one Contracting State ("the State of origin") has been, is being, or is to be moved to another Contracting State ("the receiving State") either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin."[12]

7. How is habitual residence determined? As stated above, the Convention does not include rules for determining when the conditions for habitual residence exist.[13] Rather, habitual residence is a "question of fact" for the judicial or administrative authorities of a State to decide in each individual case.[14] However, as Guide to Good Practice No 1 states, "habitual residence is generally treated as a factual concept denoting the country which has become the focus of the individual's domestic and professional life".[15]

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9 *I.e.*, it is also used in the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter, "1980 Hague Abduction Convention"), the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (hereinafter, "1996 Hague Child Protection Convention"), the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* and the *Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations*. For the full text of these Conventions, see the Hague Conference website at < www.hcch.net > under "Conventions".

10 *I.e.*, the interpretation of the term for the purposes of the 1993 Hague Convention – which should be as consistent as possible across Contracting States – might be different from the interpretation of the term when it is found in a State's domestic law. See as well, < www.era-comm.eu/e-learning/Module%201/grounds_residence.html >.

11 See also Guide to Good Practice No 1 (*op. cit.* note 5), section 8.4.1.

12 Art. 2(1) of the Convention.

13 G. Parra-Aranguren, "Explanatory Report on the 1993 Hague Intercountry Adoption Convention", in Hague Conference on Private International Law, *Proceedings of the Seventeenth Session (1993)*, Tome II, *Adoption – co-operation*, p. 559, para. 78 (hereinafter, "Explanatory Report"). Also available on the Hague Conference website at < www.hcch.net > under "Adoption Section" then "Explanatory documents".

14 Guide to Good Practice No 1 (*op. cit.* note 5), p. 108 (Section 8.4.4.). In line with this, some States emphasised that this is a fact-based, case-by-case analysis (see 2014 Questionnaire No 2, Question 36: Finland, New Zealand and Sweden).

15 *Ibid*.

8. States consider a variety of factors when determining the habitual residence of prospective adoptive parents and / or children. A non-exhaustive list of some of these factors and guidance on their application are provided in Part D of this Note.[16] The weight to be given to each factor may depend on the particular circumstances of each case.

9. When is the habitual residence of the child and the prospective adoptive parents ascertained? In the case of the child, "the condition of the child's [habitual] residence in the State of origin shall be fulfilled when the duties imposed by Article 16 are to be discharged by the Central Authorities".[17] In the case of the prospective adoptive parents, they "must be habitually resident in the receiving State at the time when they present their application for adoption".[18]

10. Is the nationality of the child and / or the prospective adoptive parents relevant in determining whether the Convention applies to a particular adoption? Habitual residence (of the child and of the adopter(s)) is the only connecting factor in determining the scope of the Convention.[19] The nationality of the child and the prospective adoptive parents is generally not relevant in determining whether the Convention applies in a given case.[20] According to the Explanatory Report on the 1993 Hague Convention, "Article 2 does not take into consideration the nationality of the parties to determine the scope of the Convention, among other reasons, because the State of the nationality [when it is different from the State of habitual residence] would not be able to comply with many of the obligations imposed by the Convention's rules, such as the preparation of the reports required by Articles 15 and 16".[21]

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16 See, *infra*, para. 70.

17 Explanatory Report (*op. cit.* note 13), para. 76. Under Art. 16, the Central Authority of the State of origin must prepare a report on the child and the child's family, and must transmit that report to the Central Authority of the receiving State.

18 *Ibid.* In relation to prospective adoptive parents who move cross-border during the intercountry adoption process, see case example 2.c *infra*. If there is a change of habitual residence – depending on the timing of the change and the status of the file – the Central Authority of the receiving country may not be in a position to continue the evaluation process. In some cases, the application or file may be transferred to another Central Authority but in other cases (*e.g.*, where the change happens before the start of the evaluation), the prospective adoptive parents may be asked to present a new application in their new country of habitual residence.

19 See also Guide to Good Practice No 1 (*op. cit.* note 5), section 8.4.1.

20 *Ibid.*, para. 478 and the Explanatory Report (*op cit.* note 13), para. 71.

However, it should be noted that there may be instances where an individual's nationality may be a factor, along with other factors, which assists the relevant authorities in determining the habitual residence of that individual for Convention purposes (*e.g.*, if a couple has recently moved to a State and shortly thereafter applies to adopt intercountry, the fact of their nationality of that State might assist, along with other factors, in finding that they are habitually resident in the State).

In addition, while nationality or citizenship is not relevant to the Convention's applicability, it may be considered in the context of eligibility (or adoptability) under the Convention as these matters are left to the national law. The Explanatory Report (*op. cit.* note 13, para. 71) says that "Even though the nationality of the parties shall not be a barrier to intercountry adoptions, it should not be forgotten that it may be one of the elements to be considered by the State of origin and the receiving State, as well as other personal characteristics, before agreeing that the adoption may proceed, as established by Art. 17 c)". See as well Guide to Good Practice No 1 (*op. cit.* note 5), Sections 8.4.2 and 8.4.3, regarding the relationship between nationality and the determination as to whether a child is adoptable and whether the prospective adoptive parents are eligible to adopt.

21 Explanatory Report (*op. cit.* note 13), para. 71.

B

CASE EXAMPLES

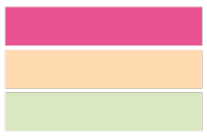
11. The following case examples describe various scenarios in which difficulties have been encountered in some States in relation to the determination as to whether the 1993 Hague Convention applies to a particular adoption.[22]

12. In the examples that follow:

- all States are *Contracting* States to the 1993 Hague Convention unless stated otherwise;
- where determinations of habitual residence are suggested, these are based on the facts as stated in the examples alone; and
- where it is said in an example that persons would likely be considered habitually resident in a particular State, it is assumed that these persons are legally authorised to reside in that State for a defined period or permanently.[23]

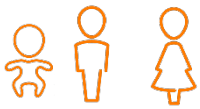
Key

What prevails is the text, not the drawing.



Represents a State that is party to the 1993 Hague Convention and that is involved in the case example.

This persons' habitual residence is clear. The area where the person is located on the map corresponds to the place where he or she is physically.



This persons' habitual residence is unclear. The area where the person is located on the map corresponds to the place where he or she is physically.

Represents the nationality of one of the colored States.

Represents a move that will happen due to the adoption.

Represents a future move.

Represents a previous move.

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22 See, *supra* para. 4.

23 In relation to expat workers or other persons who might be legally resident in a State but only legally able to remain for a defined period of time (rather than permanently or indefinitely), see case example 2.a.

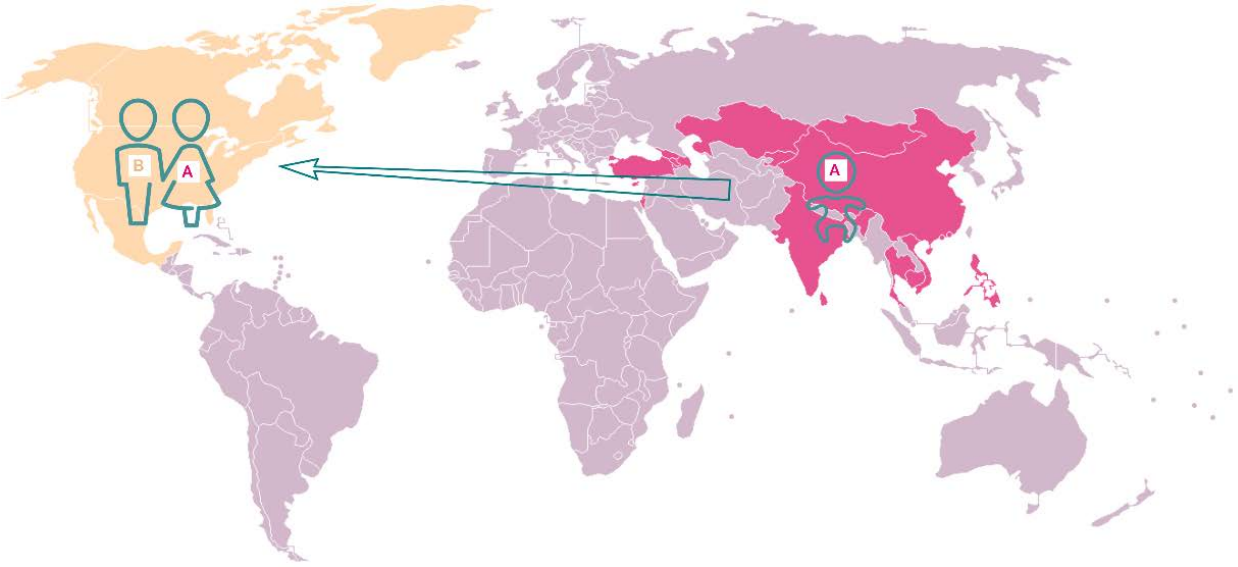
1

Cases in which the habitual residence of the prospective adoptive parents or the child should be clear

Prospective adoptive parents

a. Adoption by persons who are nationals of the State of origin but who are living in the receiving State[24]

1.a. Kim is a national of an Asian State but has lived in a North American State for 10 years. She is working in the North American State and is married to a North American man. She and her husband intend to remain there. She has close contact with family members in the Asian State and goes on vacation there annually. Kim and her husband would like to adopt a child in the Asian State.



[24] The 2014 Country Profile for States of origin (hereinafter, "2014 CP SO") asks whether States of origin treat this situation as a *domestic* or an *intercountry* adoption (see Question 39(c)). Most States of origin responded that they do treat this situation as an *intercountry* adoption to which the Convention applies: Albania, Bulgaria, Cape Verde, Colombia, Czech Republic, Dominican Republic, Ecuador, Haiti, Latvia, Lesotho, Lithuania, Madagascar, Mexico, Moldova (although certain procedures may allow for such an adoption to be considered a domestic adoption), Panama, Philippines, Romania and Togo.

13. Where are the prospective adoptive parents habitually resident? Several factors indicate that Kim (and her husband) would likely be considered habitually resident in the North American State. These factors are: the length of time that Kim and her husband have been living in that State; the fact that they intend to remain living there; the fact that Kim works in the North American State; and the fact that she has strong personal and social ties to the State (she is married to a man who is a national of, and resident in, that State).

14. What does this mean in terms of whether the Convention applies to this proposed adoption? If Kim and her husband's place of habitual residence is determined to be the North American State, as their habitual residence would be different from that of the adoptable child, this would be an **intercountry adoption within the scope of the Convention** (Art. 2: *i.e.*, an adoption to which the Convention applies). Therefore, Kim and her husband should apply to the Central Authority of the North American State in which they are habitually resident. The adoption should not proceed as a domestic adoption in the Asian State. The 2010 Special Commission meeting made specific reference to this type of situation (adoptions by nationals of the State of origin who are habitually resident in another State), and emphasised that these adoptions are subject to the Convention procedures and safeguards.[25]

15. In this case, the nationality of Kim (and her husband) is not relevant in determining whether the Convention applies to this adoption.[26]

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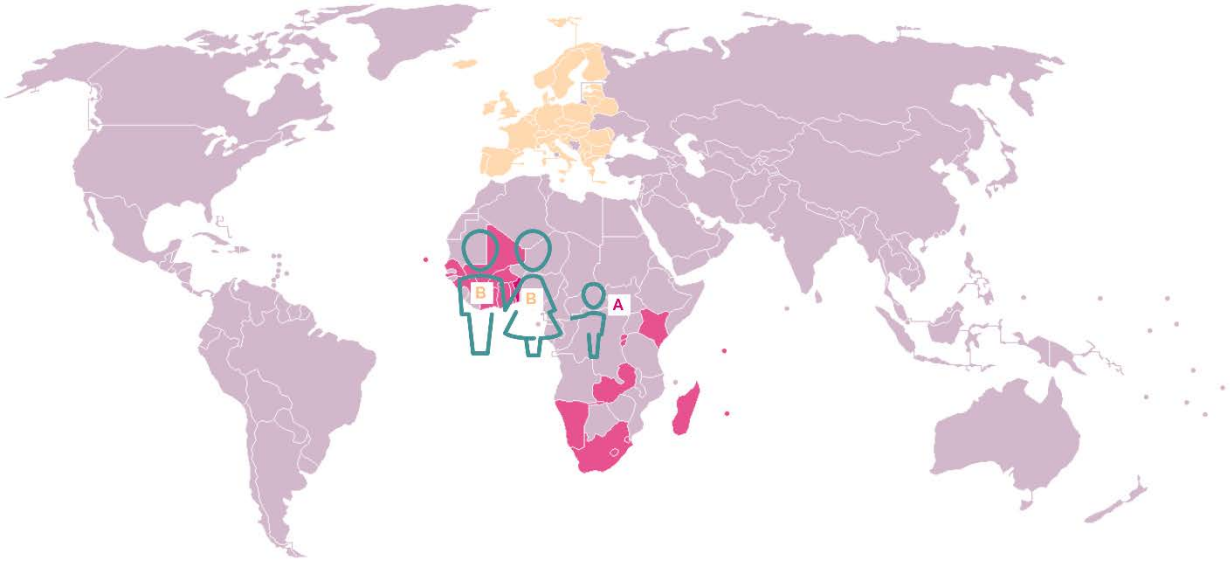
25 C&R No 11 of the 2010 SC: the 2010 Special Commission meeting "emphasised that all intercountry adoptions falling within the scope of the Convention under Art. 2(1), including […] adoptions by nationals of the State of origin, are subject to Convention procedures and safeguards."

26 See *supra*, note 20 for the circumstances in which nationality may be relevant in an intercountry adoption case.

b. Adoption by persons who live in, but are not nationals of, the State of origin

1.b. Peter and Mary are married European nationals who work for an international firm in an African State and have employment contracts of indefinite duration. They have been living in the African State for eight years and expect to remain there for the foreseeable future. They would like to adopt a child living in the African State where they reside.



16. Where are the prospective adoptive parents habitually resident? Peter and Mary would likely be considered habitually resident in the African State based on: the amount of time they have lived in the African State; the fact that they have indefinite employment contracts in the African State; and their intention to remain living there for the foreseeable future.

17. What does this mean in terms of whether the Convention applies to this proposed adoption? If Peter and Mary's place of habitual residence is determined to be the African State, as their habitual residence would be the same as the habitual residence of the adoptable child, this would be a **domestic adoption outside the scope of the Convention** (Art. 2: *i.e.*, an adoption to which the Convention does not apply). Therefore, Peter and Mary would need to apply to the adoption authorities in the African State and they would be seeking to undertake a domestic adoption, in accordance with the African State's domestic adoption laws.[27]

18. In this case, Peter and Mary's nationality is not relevant in determining whether the Convention applies to this adoption.[28]

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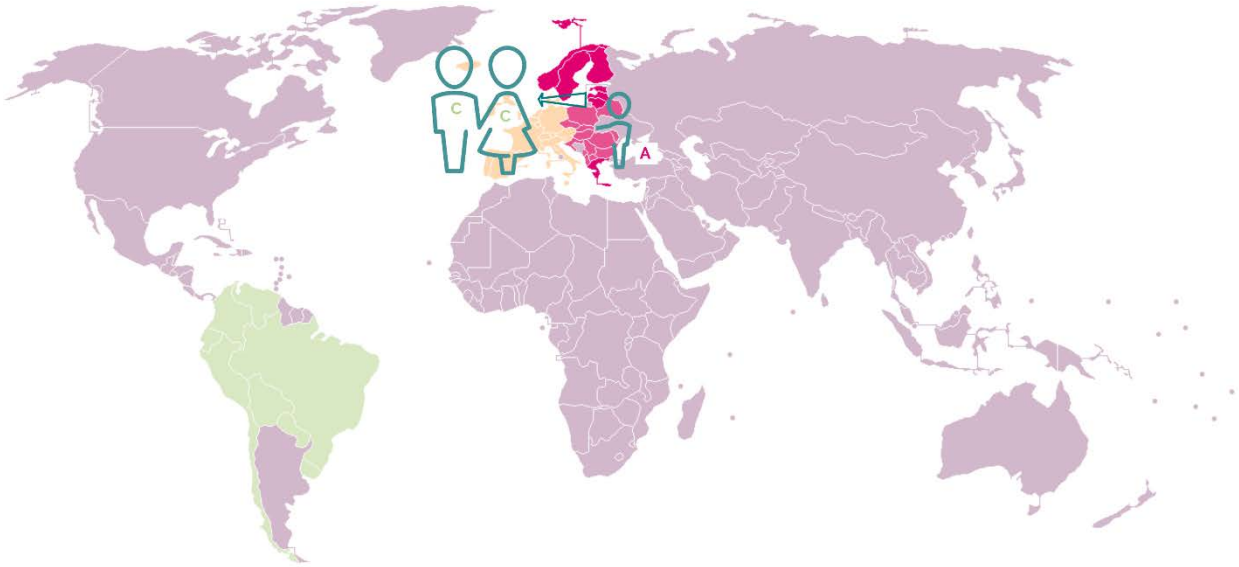
27 If such a State has a provision in its domestic law which prevents *foreign national* prospective adoptive parents from adopting children in these circumstances, this would preclude the adoption. However, States' responses to the 2014 Country Profile indicate that, to the contrary, the domestic laws of many Contracting States *permit* foreign national prospective adoptive parents, habitually resident in that State, to adopt a child who is habitually resident in that same State (subject, in some cases, to certain requirements being met): see 2014 CP SO, Question 39(a): Albania, Bulgaria, Burkina Faso, Cape Verde, Chile, China, China (Hong Kong SAR), China (Macao SAR), Colombia, Czech Republic, Dominican Republic, Ecuador, Guatemala, Haiti, Hungary, Latvia, Lithuania, Madagascar, Mexico, Moldova, Panama, Philippines, Romania, Slovakia, Togo and United States of America; and the 2014 Country Profile for receiving States (hereinafter, "2014 CP RS"), Question 35(b): Australia, Belgium, Canada (selected provinces), China (Hong Kong SAR), China (Macao SAR), Czech Republic, Denmark, Dominican Republic, Finland, France, Germany, Greece, Ireland, Luxembourg, Mexico, Monaco, Netherlands, New Zealand, Norway, Panama, Slovenia, Sweden, Switzerland and United States of America.

In addition, in such cases, the prospective adoptive parents may wish to consult the Central Authority(ies) of the State(s) of their nationality or legal permanent residence to ensure that it agrees that they are habitually resident in the State of origin and that the adoption should proceed as a domestic adoption.

28 See *supra*, note 20 for the circumstances in which nationality may be relevant in an intercountry adoption case.

c. Adoption by persons who are nationals of a third State (neither the State of origin nor the receiving State)

1.c. Pablo and Ana are nationals of a South American State. They have resided and worked for 15 years in a Western European State. They have significant personal and social ties to this State and have no intention to move to another State. They wish to adopt a child living in an Eastern European State.



19. Where are the prospective adoptive parents habitually resident? Several factors indicate that Pablo and Ana would likely be considered habitually resident in the Western European State. These are: the amount of time they have lived and worked in this State; their strong ties to this State; and their intention to remain living there.

20. What does this mean in terms of whether the Convention applies to this proposed adoption? If Pablo and Ana's place of habitual residence is determined to be the Western European State, as their habitual residence would be different from that of the adoptable child, this would be an **intercountry adoption within the scope of the Convention** (Art. 2). Therefore, Pablo and Ana should apply to the Central Authority of the Western European State in which they are habitually resident.

21. In this case, the nationality of Pablo and Ana is not relevant to the determination of whether the Convention applies to their proposed adoption.[29]

22. It should be noted that in this type of case – where prospective adoptive parents who are nationals of one State, are habitually resident in another State, and adopt a child from a third State – it is of paramount importance that it be ascertained by the relevant authorities, in advance of the proposed adoption, that the child will be able to enter and reside permanently in the receiving State.[30] Previous Special Commission meetings have emphasised that the child should be able to retain or acquire a nationality and not be rendered stateless by any intercountry adoption.[31] To this end, certain procedures may need to be followed in the prospective adoptive parents' State of nationality in order for the child to acquire this nationality.[32] As the State of nationality of the parents is a Contracting State to the Convention in this example, it should also be noted that it would be required to recognise the adoption, once certified, under Article 23 of the Convention.

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29 *Ibid.*

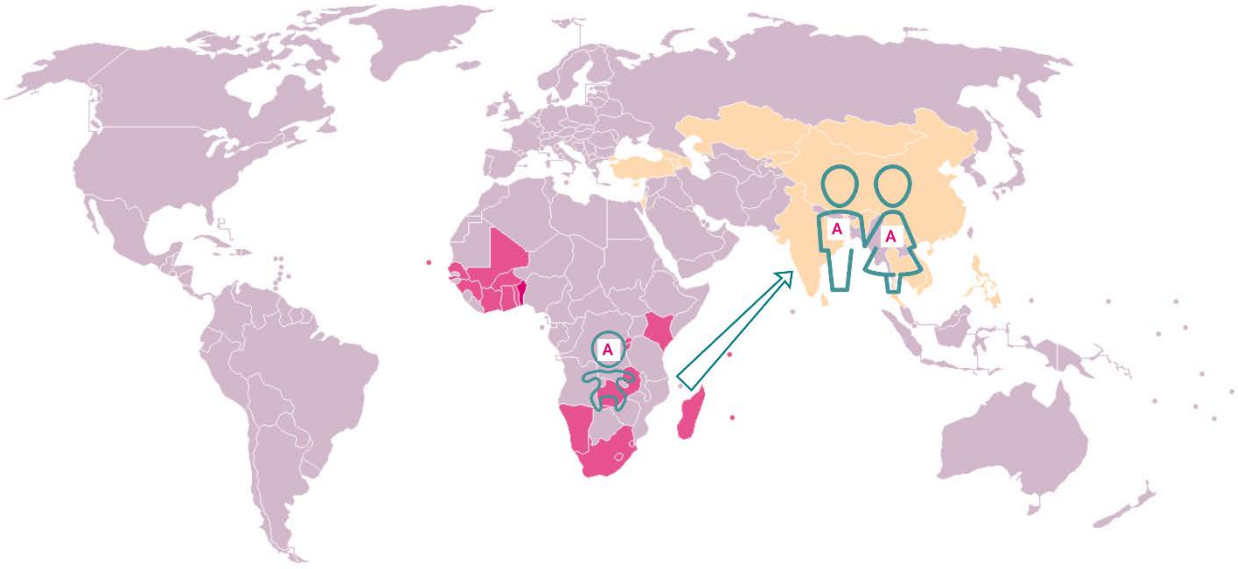
30 Art. 5(c). See the discussion in case example 2.a below concerning the interpretation of Art. 5(c) and, in particular, the requirement for the child to be able to reside "permanently" in the receiving State.

31 "Report and Conclusions of the Special Commission on the practical operation of the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (28 November – 1 December 2000)", drawn up by the Permanent Bureau (hereinafter, "C&R of the 2000 SC"), C&R No 20; "Report and Conclusions of the Second Special Commission on the practical operation of the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (17-23 September 2005)", drawn up by the Permanent Bureau (hereinafter, "C&R of the 2005 SC"), C&R No 17, and C&R Nos 19 to 21 of the 2010 SC.

32 *E.g.*, the birth certificate may need to be entered into the civil registry of the State of the parents' nationality (Monaco, 2014 Questionnaire No 2, Question 41) or the adoption decision may need an *exequatur* procedure (Haiti, 2014 Questionnaire No 2, Question 41). See also 2014 Questionnaire No 2, Question 41: Belgium, Colombia, Denmark, Dominican Republic, New Zealand, Norway and Peru.

d. “In-family” or “relative” adoptions

1.d. Gilbert and Yvette, nationals of an African State, have resided in an Asian State for 12 years. They are working in the Asian State and have strong social and personal ties to this State. They do not intend to relocate to another State in the foreseeable future. They wish to adopt their orphaned two-year old niece who is habitually resident in the African State and who has no other close relative able to care for her.



23. Where are the prospective adoptive parents habitually resident? In light of the following factors, Gilbert and Yvette would likely be considered habitually resident in the Asian State: the amount of time they have lived in that State, their work in that State, their strong ties to this State and their intention to remain living there for the foreseeable future.

24. What does this mean in terms of whether the Convention applies to Gilbert and Yvette's proposed adoption of their niece? The first point to note is that the Convention applies to adoption by relatives in the same manner as adoption by non-relatives.[33] Therefore, if Gilbert and Yvette's place of habitual residence is determined to be the Asian State and their niece's habitual residence is in the African State, **the Convention would apply** as Gilbert and Yvette would have a different habitual residence from that of their niece (Art. 2). As a result, Gilbert and Yvette would need to apply to the Central Authority of the Asian State in which they are habitually resident. The adoption should not proceed as a domestic adoption in the African State (see also case example 1.a).[34]

25. In this case, the nationality of Gilbert and Yvette is not relevant to the determination of whether the Convention applies to their proposed adoption.[35]

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33 Guide to Good Practice No 1 (*op. cit.* note 5), Section 8.6.4. See also C&R No 11 of the 2010 SC, in which it is noted that "all intercountry adoptions falling within the scope of the Convention under Art. 2(1), including in-family adoptions […] are subject to Convention procedures and safeguards." However, it is for each State to determine what constitutes an "in-family" or "relative" adoption for the purposes of its law and procedures.

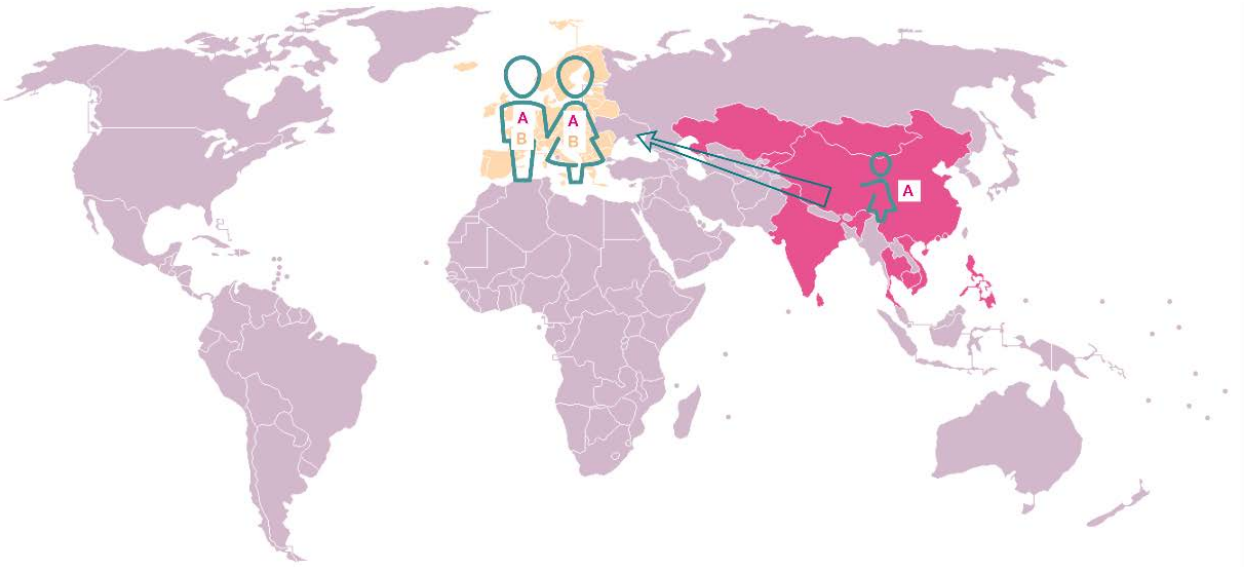
See also C&R No 32 of the 2015 SC which provides some useful guidance on how to approach in-family intercountry adoptions under the Convention: "In relation to in-family adoption, the SC: a. recalled that in-family adoptions fall within the scope of the Convention; b. recalled the need to respect the safeguards of the Convention, in particular to counsel and prepare the prospective adoptive parents; c. recognised that the matching process might be adapted to the specific features of in-family adoptions; d. recommended that the motivations of all parties should be examined to determine whether the child is genuinely in need of adoption; e. recognised that it is necessary to undertake an individualised assessment of each child's situation and it should not be automatically assumed that either an incountry or in-family placement is in a child's best interests."

34 See *supra*, para. 14.

35 See *supra*, note 20 for the circumstances in which nationality may be relevant in an intercountry adoption case.

e. Adoption by persons who are dual nationals of the State of origin and the receiving State[36]

1.e. Julia and her husband are nationals of both an Asian State and a European State. They have lived and worked in the European State for seven years. They do not intend to move to another State. However, they have close family ties in the Asian State and travel there annually to visit relatives. They intend to visit the Asian State to adopt a child living there and plan to return with the child to their European State of residence.



[36] See also Report and C&R of the 2005 SC, *supra*, note 31, para. 135.

26. Where are the prospective adoptive parents habitually resident? Notwithstanding their dual nationality and their continuing ties with the Asian State, several factors indicate that Julia and her husband would likely be considered habitually resident in the European State. These are: the amount of time they have lived in that State, the fact that their work is in that State and their intention to remain living in that State.

27. What does this mean in terms of whether the Convention applies? If Julia and her husband's place of habitual residence is determined to be the European State, as their habitual residence would be different from the habitual residence of the adoptable child, this would be an **intercountry adoption within the scope of the Convention** (Art. 2). Therefore, Julia and her husband would need to apply to the Central Authority of the European State in which they are habitually resident. The adoption should not proceed as a domestic adoption in the Asian State.

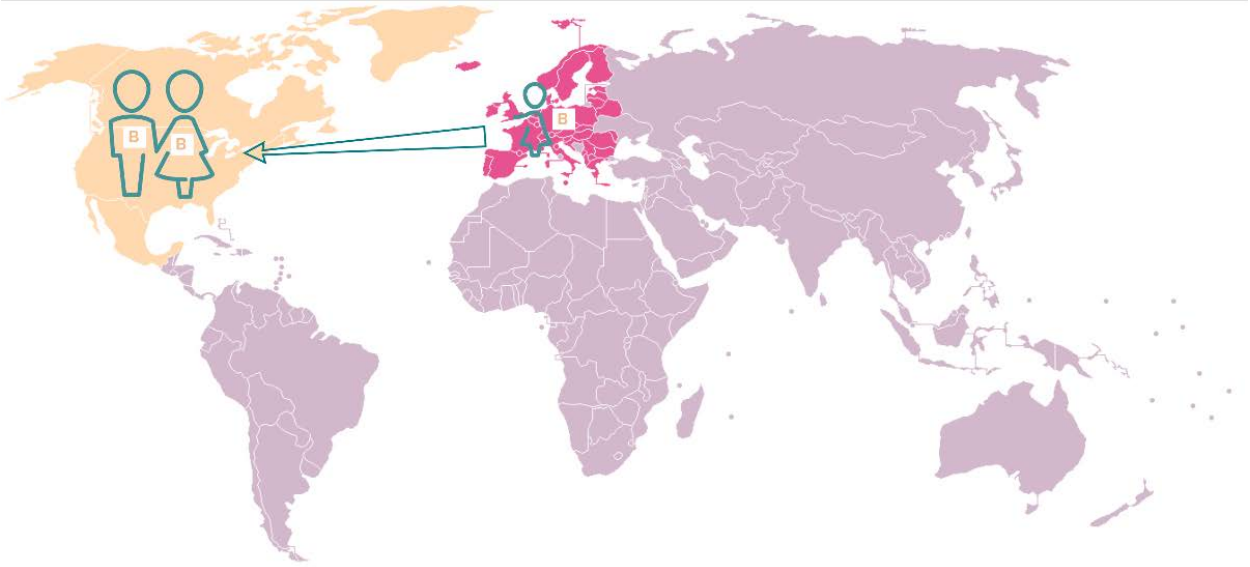
28. In this case, the dual nationality of Julia and her husband is not relevant in determining whether the Convention applies to this adoption.[37]

37 See *supra*, note 20 for the circumstances in which nationality may be relevant in an intercountry adoption case.

Children

f. Adoption of a child who is a national of one State but lives in a different State

1.f. A child, Fleur, is a national of an American State, the State in which she was born and the State of nationality of her parents. However, when she was 6 months old, her parents moved with her to a European State to live indefinitely. Her mother died when she was 2 years old. Fleur is now 9 years old and recently her father passed away. Fleur's paternal aunt and her husband, who are habitually resident in the American State, now wish to adopt her.



29. Where is Fleur habitually resident? In view of the fact that Fleur has spent the vast majority of her life (8.5 years) living in the European State and it is the centre of her social and family life, it is likely that she would be determined to be habitually resident in that State. This is irrespective of the fact that she is not a national of that State.

30. If Fleur was determined to be habitually resident in the European State then, under the 1993 Hague Convention, it is the European State that would be the State of origin and thus responsible for receiving any application for her intercountry adoption. The American State, as the State in which the paternal aunt and her husband are habitually resident, would be the receiving State, responsible for transmitting the application for her intercountry adoption to the European State. As noted above, despite the fact that the application is from Fleur's extended family members, the Convention procedures and safeguards would still apply.[38]

31. In this case, the nationality of Fleur is not relevant in determining the scope of application of the Convention. It is her habitual residence which is the important connecting factor.[39]

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38 See *supra* para. 24 and note 33 regarding in-family intercountry adoptions.

39 See *supra*, note 20 for the circumstances in which nationality may be relevant in an intercountry adoption case.

2

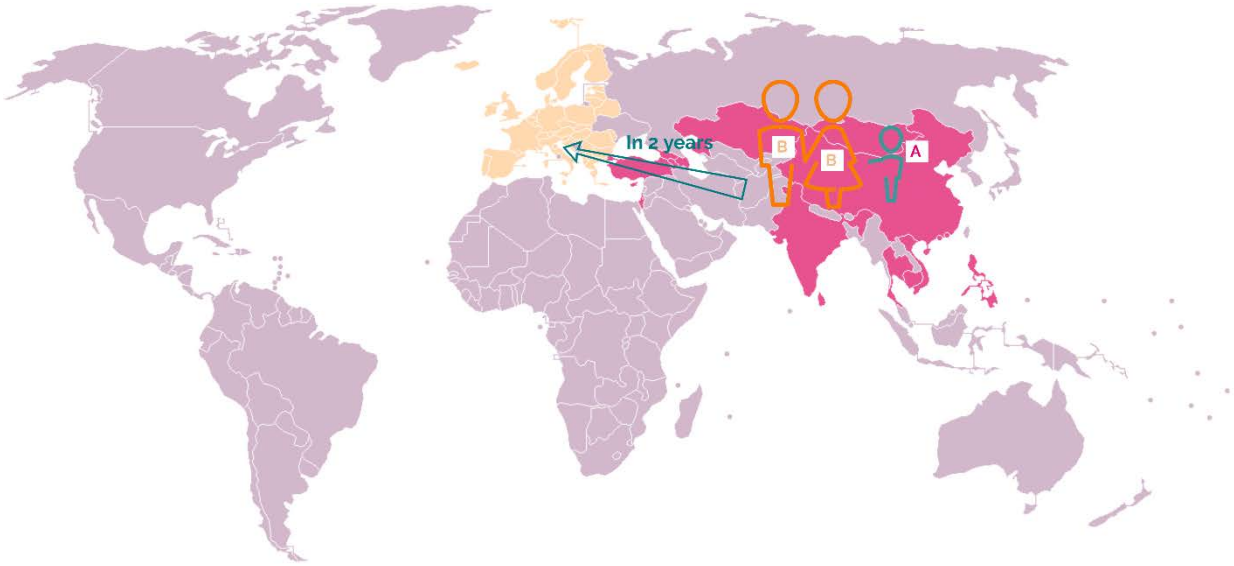
Cases in which determinations of the habitual residence of the prospective adoptive parents or the child are more complex

Prospective adoptive parents[40]

a. Adoption by persons who are temporarily living in the State of origin or in the receiving State (e.g., this scenario might include some expat workers, diplomats and military personnel, amongst others)[41]

Temporarily living in the State of origin:

2.a. Marc and Brigitte are nationals of a European State. They work in an Asian State. They have fixed term contracts for two years and as a condition of their employment they must return home to jobs in the European State when those contracts expire. They wish to adopt a child living in the Asian State.

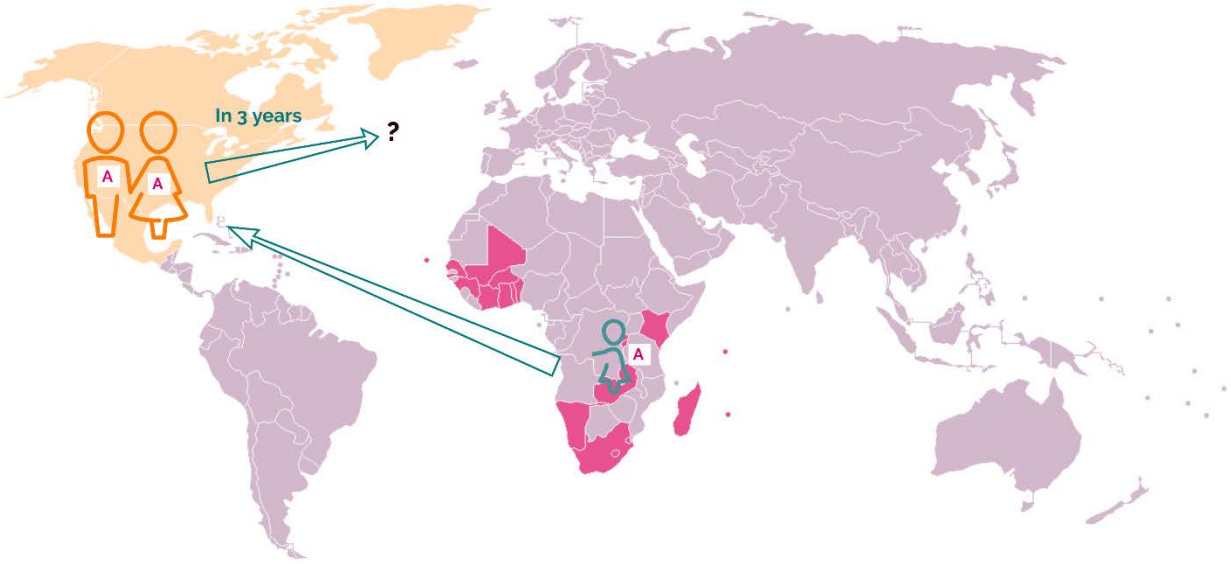


40 Particular difficulties may arise where neither the State of origin nor the receiving State considers the prospective adoptive parents to be habitual residents (2014 Questionnaire No 2, Question 40(a): Andorra, Belgium, Canada (Ontario, Quebec), Chile, Finland, France, Germany, Haiti, Ireland, Lesotho, Monaco, Norway, Philippines, Slovenia, Sweden and Turkey) or where both the State of origin and the receiving State consider the prospective adoptive parents to be habitual residents (2014 Questionnaire No 2, Question 40(b): Andorra, Armenia, Belgium, Burkina Faso, Canada (Ontario, Quebec), Chile, Denmark, Dominican Republic, Finland, France, Germany, Haiti, New Zealand, Norway, Slovenia, Sweden and United States of America).

41 Guide to Good Practice No 1 (*op. cit.* note 5), Section 8.4.1.1 and C&R No 135 of the 2005 SC. Problematic situations involving temporary residence include, *e.g.*, foreigners entering a State for non-permanent jobs (2014 Questionnaire No 2, Question 37: Germany and Peru); frequent change of residence by diplomats (2014 Questionnaire No 2, Question 37: Burkina Faso, Germany and Peru) or military personnel (2014 Questionnaire No 2, Question 37: Germany); individuals who are in a place for a limited time but that time period might be extended, *e.g.*, through a work contract (2014 Questionnaire No 2, Question 37: Germany). Regarding the inherent risks linked with this type of adoption, see the ISS Monthly Review No 210 of March 2017 on "Responding to inherent risks linked to 'expatriate adoptions'".

Temporarily living in the receiving State:[42]

2.a. Koffi and Safia are nationals of an African State. They are temporarily working in an American State, where they have lived for one year. Koffi has an indefinite contract with an international company. The company expects them to move to another State in three years' time. In the future, they expect that, from time to time, they will live for a period of a couple of years in their State of nationality. They regularly visit the African State of their nationality and they own property there. They wish to adopt a child who lives in the African State.



42 This State is named as the receiving State here because it is the State to which Koffi and Safia would wish to bring an adopted child, being the country where they currently live. However, whether it is finally determined to be the receiving State for any intercountry adoption under the 1993 Hague Convention will of course depend upon where Koffi and Safia are determined to be habitually resident.

32. Where are the prospective adoptive parents habitually resident? The determination as to the place of habitual residence of both couples is a more complicated issue. Some of the factors that States may consider include:

- the amount of time that each couple has been living in the State;[43]
- their intentions concerning their residence in this State (*i.e.*, how long do they expect to remain in this State? Do they have a confirmed work contract? How do they view their residence there? Do they intend to return to their "home" country when their work contracts expire?);
- the purpose of, and reasons for, their residence in the State, including any conditions which may attach to this residence;
- their ties to this State, including personal, social, cultural and economic ties; and
- their remaining ties with their "home" State (*e.g.*, whether they still own real property in the "home" State).

33. How might the States concerned proceed in such cases? In such situations, the Central Authority of the State to which the prospective adoptive parents apply should provide advice to the prospective adoptive parents on their particular situation before allowing the adoption application to proceed.[44] In addition, the 2015 Special Commission meeting recommended that "the concerned Central Authority expeditiously consult with the Central Authorities of any other relevant Contracting States before providing advice or communicating its decision to the prospective adoptive parents".[45]

34. If the Convention were determined to apply in these cases – *i.e.*, if the decision concerning habitual residence meant that the adoption would be an *intercountry* adoption, according to Article 2 of the Convention – then, before the application may proceed, the relevant Central Authorities would need to pay special attention to verifying that all the Convention requirements could be complied with in light of the more unusual circumstances of the case. For example, it would need to be ensured that the home study or equivalent report (Art. 15) could be appropriately completed taking into account the nature and length of the couple's residence in the receiving State.

35. Also, it would need to be verified that the couple would be able to meet both States' intercountry adoption requirements, which may or may not require that they remain in the same State until the intercountry adoption process is completed. Indeed, if it were likely that there would be a move during the intercountry adoption process or shortly thereafter, and if this were permitted by both States, this issue should be discussed by the relevant Central Authorities so that it could be ensured that arrangements are put in place to transfer the file where necessary and to ensure that the new State of habitual residence undertakes any necessary follow-up (see further case example 2.c below concerning moves during the intercountry adoption process).

36. Moreover, in the example of Koffi and Safia above, if it were determined that the couple were habitually resident in the American State such that the adoption sought would be an intercountry adoption within the scope of the 1993 Hague Convention, then, again before the application may proceed, the American (receiving) State would need to pay particular attention to ensuring that the requirement of Article 5(c) of the Convention

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43 For shorter stays, one difficulty is determining at what point the place of habitual residence changes (2014 Questionnaire No 2, Question 37: Sweden).

44 C&R No 13 of the 2010 SC. As an example of a good practice in this regard, see the article by Quebec in the ISS Monthly Review No 210 of March 2017 (*op. cit.* note 41), entitled "Québec: the management of adoptions by expatriates" (p. 6).

45 C&R No 23 of the 2015 SC. In relation to the situation in which the relevant Contracting States do not agree on the habitual residence of the prospective adoptive parents, see further para. 74 below.

could be met in the case – *i.e.*, their competent authorities would need to be able to determine that the child "is or will be authorised to enter and reside permanently" in the receiving State.[46] This may indeed raise a problem since the immigration law of some receiving States will only allow the adoptable child to be given permission to remain in the receiving State for so long as the prospective adoptive parents who are *neither nationals of, nor permanent residents of,* their State have such permission.

37. There is no explicit discussion of this issue in the Explanatory Report to the Convention. However, some States have developed the practice of ensuring that the competent authorities of the receiving State have determined that the child is or will be authorised to enter and reside in this State for as long as the prospective adoptive parents are so authorised,[47] whilst also confirming that the prospective adoptive parents have undertaken the necessary steps to ensure that the child will be able to acquire the nationality of at least one of them.[48] Although this practice does not address the requirement of Article 5(c), it is intended to ensure that the child will be able to reside permanently with at least one adoptive parent after they leave the receiving State. In practice, the interested States co-operate with each other, insofar as possible, to assist the prospective adoptive parents. Such co-operation is, of course, long-established best practice under the Convention in any event.

38. Two final points should be borne in mind by the authorities in relation to cases such as these, *i.e.*, cases involving the past, current or potential future cross-border movement of prospective adoptive parents where there may be unintentional or intentional circumvention of the Convention. These are:

- In such cases, it is very important that professionals who might be in direct contact with prospective adoptive parents in these situations (*e.g.*, embassies, immigration authorities, adoption accredited bodies), are trained and educated on the 1993 Hague Convention generally, as well as on the particular issue of what constitutes an intercountry adoption according to Article 2 and the meaning of habitual residence for the purposes of the 1993 Hague Convention.
- Central Authorities need to be aware of the possibility that persons might deliberately seek to avoid the application of the 1993 Hague Convention to their adoption by moving to a Contracting State in order to undertake a *domestic* adoption in that State. This risk and concern was highlighted by the UN Special Rapporteur on the sale of children, child prostitution and child pornography.[49] To prevent this occurring, the Special Commission has invited Contracting States, when considering prospective adoptive parents' applications to adopt *domestically*, to consider carefully the circumstances of the prospective adoptive parents' (and / or the child's) presence in that State.[50]

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46 Guide to Good Practice No 1 (*op. cit.* note 5), para. 483.

In many intercountry adoption cases, the prospective adoptive parents will either live in their State of nationality or will have permanent residency in another State. In these scenarios, Art. 5(c) should not present any problems. The challenge in this particular case results from the fact that the prospective adoptive parents are neither nationals of, nor permanent residents of, the receiving State.

47 *E.g.*, Belgium.

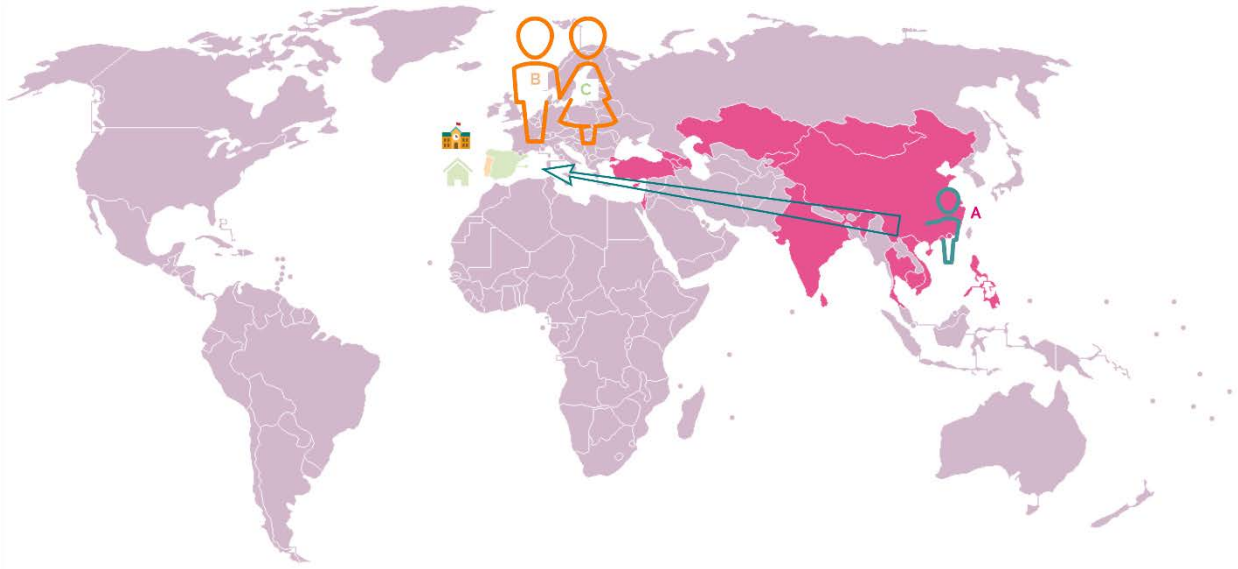
48 See C&R Nos 19 to 21 of the 2010 SC, which recommend that the child be accorded automatically the nationality of one of the adoptive parents or of the receiving State and that receiving State co-operate in the completion of any formalities necessary for the acquisition by the child of this nationality. C&R No 21 makes it plain that whether the child can acquire such a nationality is a matter which must be considered when determining whether an intercountry adoption can proceed under the Convention. See also C&R No 20 of the 2000 SC; C&R No 17 of the 2005 SC.

49 See para. 49 of the Annual Report of the Special Rapporteur (A/HRC/34/55, dated 22 December 2016), available at < http://www.ohchr.org/EN/Issues/Children/Pages/AnnualReports.aspx >.

50 C&R No 24 of the 2015 SC.

b. Adoption by persons who have the centre of their lives in one State but live in an adjacent State

2.b. Lucy is a national of European State C and her husband, Thomas, is a national of European State B, which is adjacent to State C. Their home is in State C, quite close to the border with State B. They each commute to work daily in State B and their children attend school in State B. All the relatives of Lucy and Thomas live in State B. They wish to adopt a child from an Asian State.



39. In this example, the key question is which State, B or C, should be considered the receiving State. In other words, where are the prospective adoptive parents habitually resident? Several factors might be taken into consideration when assessing the habitual residence of Lucy and Thomas. These factors are:

- the length of time that the family has been living in State C (*i.e.*, where their home is and how long they have been living there);
- whether they intend to remain living there;
- whether Lucy and Thomas' jobs in State B are long-term;
- how long the children have been at school in State B and whether the children will remain at school there;
- where the centre of the family's social life is located; and
- the family's other ties with State B or State C.

40. However, in this case, it may be complicated for the authorities of States B and C to determine where the couple is habitually resident due to the fact that their home is in State C but the centre of their activities (*e.g.,* work, school, family) seems to be in State B.

41. In light of this, how should the States concerned proceed in such cases? Before providing advice or communicating a decision on habitual residence to the prospective adoptive parents, the Central Authorities of States B and C should consult expeditiously on this issue.[51] In particular, before the application is allowed to proceed, they may wish to discuss how an intercountry adoption under the Convention might best be undertaken in these circumstances from a practical perspective, including:

- how best to complete the home study or equivalent report on the family in view of the family's home in State C and activities in State B. It is important to note that an adoption accredited body located in one State may not have the authority to undertake the necessary work in another State. This therefore needs to be checked and the Central Authorities need to ensure that the home study can be appropriately completed;
- whichever State is determined to be the receiving State, this State will need to determine that the child will be able to "enter and reside permanently" in that State (Art. 5(c));
- whether the child will be able to acquire the nationality of either State B or C or both.[52]

42. The prospective adoptive parents should receive advice from the Central Authorities on their particular situation before they proceed with such an application.[53]

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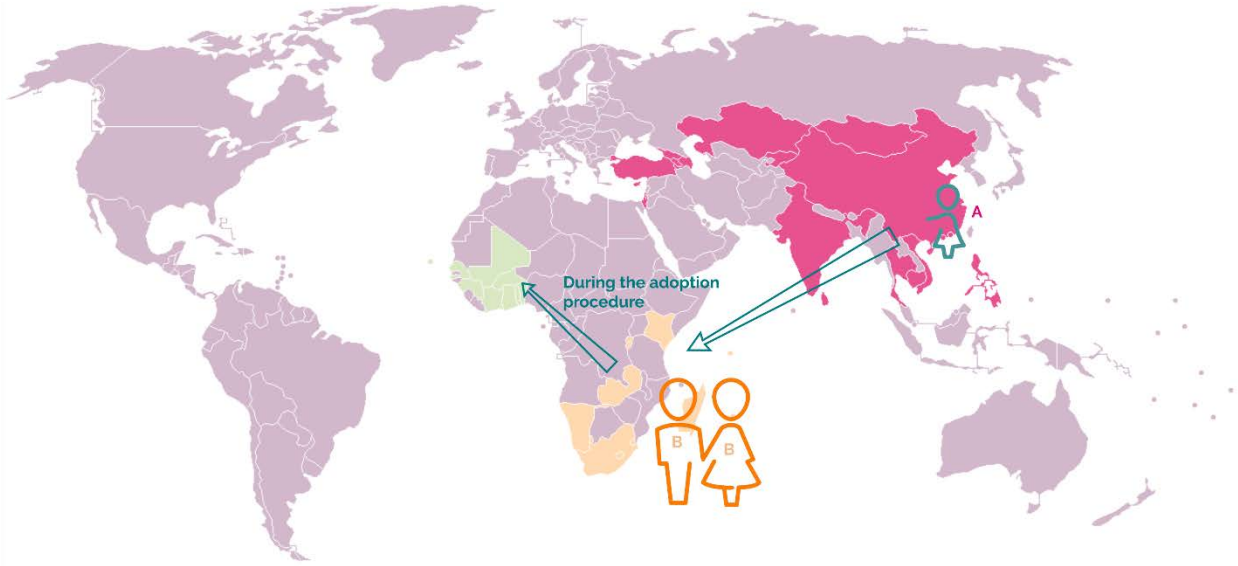
51 C&R No 23 of the 2015 SC. This type of problem was noted in the responses of Germany and Monaco to 2014 Questionnaire No 2, Question 37.

52 See C&R No 20 of the 2000 SC; C&R No 17 of the 2005 SC and C&R Nos 19 to 21 of the 2010 SC.

53 C&R No 13 of the 2010 SC.

c. Adoption by persons who change their place of residence during the adoption procedure

2.c. Jean and Marie live and work in an African State B, of which they are nationals and lifelong residents. They wish to adopt in Asia. After applying to the Central Authority in African State B, but while the adoption procedure is ongoing, they move to African State C.



43. Where are the prospective adoptive parents habitually resident? At the time Jean and Marie presented their application for intercountry adoption, the authorities in State B must have determined that they were habitually resident in State B.[54] Following their move to African State C, however, two questions arise: (1) where is the couple now habitually resident (*i.e.*, are they no longer habitually resident in African State B and have they established a new habitual residence in African State C?); and (2) on a practical level, can the intercountry adoption procedure be completed in light of their move and, if so, how?[55]

44. In determining the first question, due to the fact that the determination of habitual residence has implications for both States B and C, it would be advisable for the Central Authorities of both States to consult expeditiously on this question before providing advice or communicating any decision to the prospective adoptive parents.[56] The possible factors which might be considered when determining whether the habitual residence of the couple has changed are:

- the purpose of their move (*i.e.*, why are they relocating?);
- their intentions regarding their residence in State C and any conditions which attach to their stay there (*i.e.*, how long do they intend to remain there? Is it an open-ended move or a move of time-limited duration and do any residence / work permits dictate this?);
- their remaining ties with State B (*e.g.*, work, social, family and economic ties); and
- any other ties with State B or State C.

45. In relation to the second question, the procedure which should be followed in such cases will likely vary depending on the circumstances of each individual case. A key factor to be considered will be the **stage of the adoption procedure at the time of the move** of the (prospective) adoptive parents.[57] Mutual co-operation (Art. 7) and co-ordination between the relevant Central Authorities will be important in finding the best solution in such a case.[58] It will be particularly important to ensure that the child is permitted to enter and reside permanently in the receiving State.[59]

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54 As the application was allowed to proceed – see Art. 14 of the Convention and, *supra*, para. 9. It should be noted, however, that if, *at the time when they made their intercountry adoption application,* Jean and Marie had already formed a clear intention to move to State B and the move to State B was to take place imminently, State A might have reached a different decision regarding their place of habitual residence.

55 See, *e.g.*, the Explanatory Report, *supra* note 13, para. 187, which states that, if a move takes place during an intercountry adoption procedure, it seems unavoidable that the Contracting State to which the prospective adoptive parents have moved "has to be considered as the receiving State" for the purpose of Art. 5(c) (*i.e.*, for the purpose of determining that "the child is or will be authorised to enter and reside permanently in that State").

56 C&R No 23 of the 2015 SC.

57 This factor was noted by the Netherlands in 2014 Questionnaire No 2, Question 39. The Netherlands indicated that depending on the stage which the adoption process had reached, different conditions for continuation would apply.

58 See Guide to Good Practice No 1 (*op. cit.* note 5), Section 8.4.1.1 and J.H.A. van Loon, "International Co-operation and Protection of Children with regard to Intercountry Adoption", *Recueil des cours de l'Académie de droit international privé*, The Hague, 1993-VII(244), at para. 204(2). Regarding consultations between Central Authorities in such situations, see, *e.g.*, 2014 Questionnaire No 2, Question 39: Andorra, Belgium, Bulgaria, Dominican Republic, France, Monaco, Norway and Viet Nam. For some States, if the prospective adoptive parents move from that State, the intercountry adoption process either cannot continue (2014 Questionnaire No 2, Question 39: Finland, Luxembourg and Netherlands) or cannot continue if the prospective adoptive parents move to a non-Contracting State (2014 Questionnaire No 2, Question 39: Guinea and Peru). One State seeks to inform prospective adoptive parents in advance that moving during the adoption process can cause difficulties (2014 Questionnaire No 2, Question 39: Sweden).

59 Art. 5(c) of the Convention.

46. In this example, it is presumed that Jean and Marie did not have any knowledge of, or information about, their move at the time of making their initial intercountry adoption application.[60] However, it would be good practice for receiving State Central Authorities to ask prospective adoptive parents routinely whether they have any possible plans to relocate, as well as to warn them of the potential challenges it may bring about, before allowing an intercountry adoption application to proceed.[61] In this way, any issues surrounding a potential move can be discussed before the intercountry adoption procedure commences, including with the relevant State of origin. If it is not possible to resolve some issues, the prospective adoptive parents can be advised of this at an early stage rather than part way through the process.

60 See note 54 *supra* concerning the possible impact on the determination of habitual residence had they already known about this move at the time of making their initial application. See also para. 73.

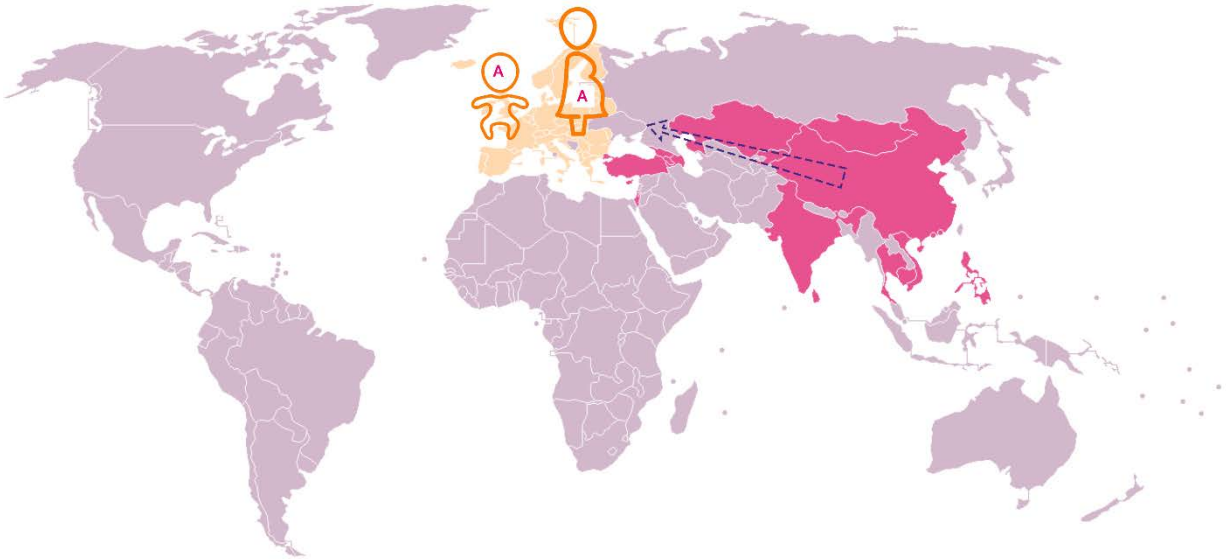
61 This is of course particularly the case if either their State or the relevant State of origin does not allow an intercountry adoption application to continue if there is a move during the process. See further note 58 *supra*.

Children

47. Questions concerning the determination of the habitual residence of children have generally arisen less frequently under the 1993 Hague Convention than those concerning the habitual residence of prospective adoptive parents.[62] The following two case scenarios have, however, arisen in practice. Some very general guidance is therefore suggested in this section on how these situations might be approached.

d. The habitual residence of a child who is born[63] in a State shortly after her mother arrives in that State

2.d. Lisa is 20 years old[64] and a national of an Asian State. She lived in the Asian State all her life until a couple of months ago when, at seven months pregnant, she moved to a European State. Her little girl was born in the European State a few days ago. Lisa has recently started the procedure to relinquish her daughter for adoption in the European State.



62 For the obvious reason that it is far more likely for prospective adoptive parents to be mobile and to be moving across borders than it is for adoptable children. This contrasts with some of the other modern Hague Children's Conventions, such as the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, where it is the habitual residence of the child that is usually the primary question. As stated in para. 5 above, since habitual residence is a factual concept, there may be different considerations to be taken into account when determining the habitual residence of the child for the purposes of the 1993 Convention.

63 It should be recalled that Art. 4(c)(4) of the Convention provides that a birth mother can only consent to her child's adoption after his / her birth. See also Explanatory Report (*op. cit.* note 13), paras 153-154.

64 It should be noted that sometimes, in a case such as this, the mother may be under 18 years old and thus herself a child for the purposes of the 1996 Hague Child Protection Convention (see its Art. 2). In such a case, it should be considered whether any measures of protection need to be taken in relation to the mother, as well as in relation to her baby.

48. The decision of the mother (Lisa) to relinquish her parental rights almost immediately upon her arrival in a foreign country raises concerns that the travel could have been intended to circumvent the Convention process. This type of case could also involve the trafficking of persons and might result in the sale of a child contrary to international and / or national law.[65] Traffickers have been known to recruit pregnant mothers and to persuade them to travel abroad as "tourists" and, when in the foreign State, to relinquish their babies for money. The traffickers often make pre-arranged placements for the unborn child.[66] As a result, when the competent authority of the State of the child's birth is informed of situations where a parent intends to relinquish parental rights upon arriving in that country, it should always carefully verify and thoroughly assess the circumstances leading to the parent's travel.

49. If the case is found to be one of trafficking, the competent authority of the State in which the child is present should take all necessary measures to protect the child (and mother) as a matter of urgency and in accordance with its domestic laws.[67] Whether or not the case is determined to be one of trafficking, no adoption procedure should be commenced until the case has been properly and thoroughly investigated so that a determination can be made as to an appropriate and suitable long-term care plan for the child.[68]

50. In keeping with the subsidiarity principle, the State with jurisdiction should consider all possible longer-term options for the child – *i.e.*, including: the child remaining with his / her birth mother (and the birth mother should receive counselling in this regard), the child being cared for by a relative, or the child being placed in alternative care such as foster care or adoption. In undertaking such an investigation and determination, cross-border co-operation and communication with any other State with which the child and birth mother have a connection may be required (*e.g.*, a State in which they have a relative). It is important that the authorities in all involved States co-operate as necessary and remain in close contact in order to ensure that the best interests and rights of the child are respected and that the best option for the long-term care of the child is found.

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65 See the definition of "trafficking in persons" contained in Art. 3 of the *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, supplementing the *UN Convention against Transnational Organised Crime*. This UN Protocol mandates that "each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in Art. 3 … when committed intentionally" (Art. 5). In relation to the sale of children, see Art. 35 of the *United Nations Convention on the Rights of the Child* of 20 November 1989 (hereinafter, "UNCRC") which states that "States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form", as well as the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, supplementing the UNCRC, which mandates that States Parties "shall prohibit the sale of children" (Art. 1) and that each State Party shall ensure that "improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption" shall be covered under the State's criminal or penal law, whether such offences are committed domestically or transnationally (Art. 3). Moreover, Art. 3(4) mandates that "each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences" and Art. 3(5) states that "States Parties shall take all appropriate legal and administrative measures to ensure that all persons involved in the adoption of a child act in conformity with applicable international legal instruments". This *Optional Protocol*, in its Preamble, refers both to the 1993 Hague Convention and the 1996 Hague Child Protection Convention (as well as to the 1980 Hague Child Abduction Convention).

66 The mothers are illegally given work in the State to which they travel (*i.e.*, without the necessary work visas / permits), placing them in further danger.

67 If the State in which the child is present is Party to the 1996 Hague Child Protection Convention, it will have jurisdiction to take any such necessary urgent measures pursuant to Art. 11 of that Convention (as well as provisional measures under Art. 12).

68 If one or more States involved in the case are Parties to the 1996 Hague Child Protection Convention, with respect to these States the provisions of this Convention will apply to the case and should be applied (*i.e.*, in terms of which State has jurisdiction to take such measures of protection (other than adoption), the recognition and enforcement of these measures in the other State and co-operation provisions, etc.). See further Permanent Bureau, *Practical Handbook on the operation of the 1996 Hague Child Protection Convention*, The Hague, 2014, at para. 13.61 *et seq*.

If adoption is finally determined to be the long-term outcome in the best interests of this child,[69] would the adoption be a domestic or an intercountry adoption?

51. Assuming that the relevant authorities determine that this case should proceed as an adoption, the question of whether the adoption of the child would be a domestic adoption, or an intercountry adoption to which the 1993 Hague Convention would apply, would depend on where (1) the child and (2) the prospective adoptive parents being considered for the child is / are habitually resident.

52. The question of the habitual residence of the child is challenging in this example as the child was born in the European State when the mother had only been living there a very short time and the circumstances of her residence in the European State are unknown (*e.g.*, her immigration status is unknown, as are her intentions regarding her residence). In some cases, factors that might be considered when determining the child's habitual residence in these circumstances include:

- in which State the child was born,
- in which State(s) the child has resided since birth,
- in which State the child is currently living and how long the child has been living in that State,
- whether the child is living in that State legally (*i.e.*, the regularity of the child's residence) and whether any conditions attach to the child's residence there,[70]
- the reasons for the child's residence in that State and, where applicable, the reasons for the family's move to that State,
- the family and social relationships of the child in the State in which he / she is currently living and in any other State(s),
- the ties of the child to the social and family environment in any State,
- where the child's birth parent(s) are currently living and where they are habitually resident (which may be different States),
- the intentions of the child's birth parent(s) concerning their residence,
- any other ties which the child and / or birth parent(s) have to any States.

53. The nationality(ies) of the child and the child's birth parent(s) might also be factors, along with other factors, which are relevant to consider when determining the child's habitual residence in this case.[71]

54. If the prospective adoptive parents selected for the child were habitually resident in the *same* State as the child, this would be a domestic adoption falling outside the scope of the 1993 Hague Convention (Art. 2). If, however, the prospective adoptive parents and the child were habitually resident in *different* States, it would be an intercountry adoption to which the 1993 Hague Convention's procedures and safeguards would need to be applied.[72] This remains the case even if the prospective adoptive parents were relatives or family members of the child.

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69 Whether it was determined that the case is a case of child trafficking or not.

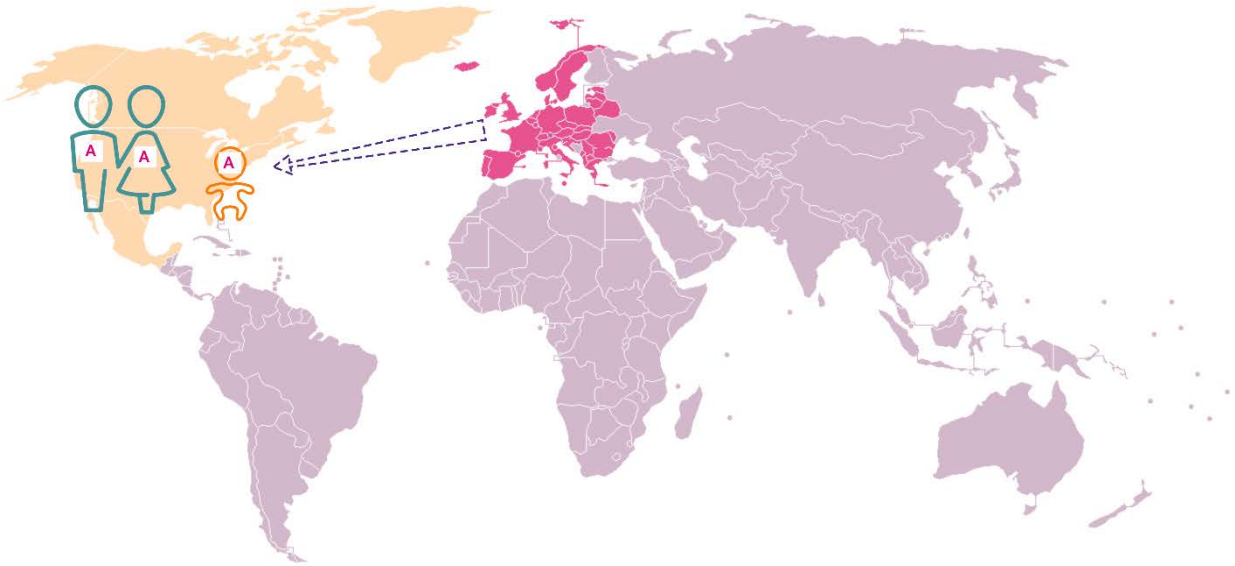
70 In some States, the child would acquire the nationality of the State by virtue of being born therein.

71 See *supra* note 20.

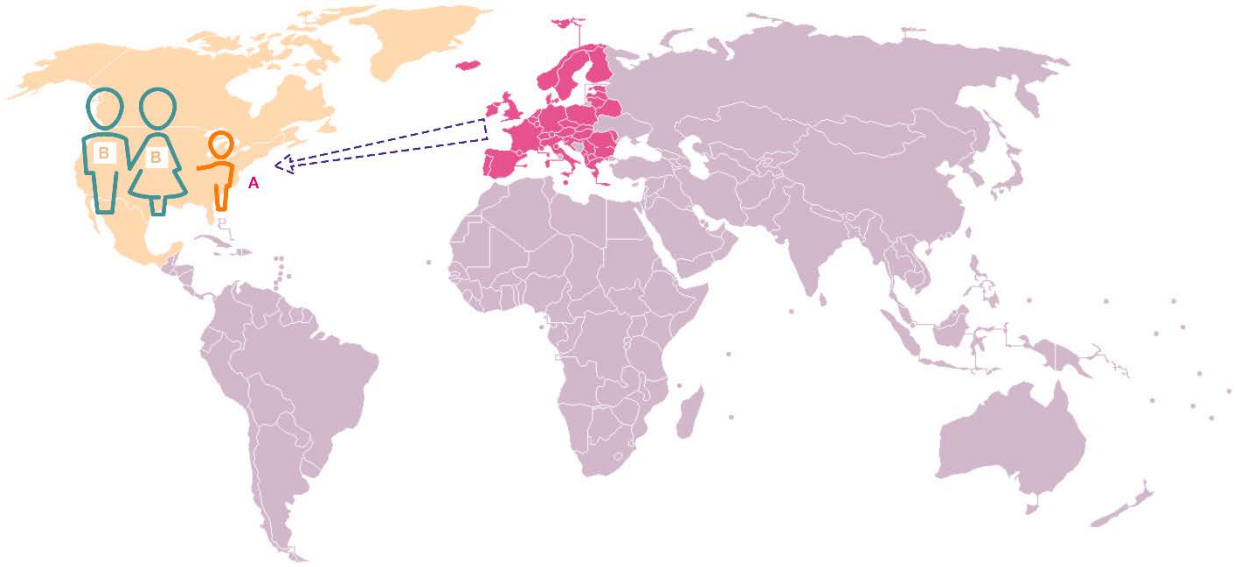
72 Assuming, as we have in these examples (see *supra*, para. 12), that both States are Party to the 1993 Convention.

e. Adoption of a child who has been living temporarily in the State of habitual residence of the prospective adoptive parents

2.e. Ana, a three-year old child who is a national of a European State and has been cared for by her parents, has been living in an American State on a temporary visa for the past 11 months undergoing medical treatment that is unavailable in the European State. She has been living with her aunt and uncle, also nationals of the European State, who have lived and worked in the American State for 12 years and intend to remain there. When Ana originally travelled to the American State, her length of stay was uncertain and there was no intent with respect to adoption. Suddenly, Ana's parents die and Ana's uncle and aunt would like to adopt her, as she has no other family in the European State.



2.e. George, an 11 year old who is a national of a European State, has been in an American State on a student visa for 2 years. His visa will expire in 3 years. He has been living with a couple who are friends of his parents and nationals of the American State. George's parents decide that they would like to relinquish him for adoption by this couple. The couple would like to adopt George and George would like that too.



55. The first point to note in both of these cases is that the original intention was for these children to be "hosted" in the American State and not for these children to be adopted. These children are therefore in a somewhat similar situation, albeit with some important differences, to children who are sent abroad for "respite care" and subsequently their host families wish to adopt them. As the Guide to Good Practice No 1 has explained, such cases can raise "important legal and ethical questions" as they create a potential "loophole for by-passing the Convention" and can place children "at risk of significant harm".[73]

56. Therefore, a major concern is to ensure if these children are really in need of adoption or not, and if an adoption would be in their best interests. In Ana's case, because her parents have died and she has become an orphan, one could argue that she might be in need of adoption and that the adoption would be in her best interests. However, the need for adoption of George is not clear at all (*e.g.*, his parents are still alive; the original intention of his move to the American State was for him to study; and there was no indication when he moved to the American State that his parents would wish for him to be adopted or to remain in the American State indefinitely). The discussion that follows regarding habitual residence and the adoption process would apply only if it has been determined at the outset that the children are in need of adoption and that adoption is in their best interests.

57. If finally it is determined that the child should be adopted, and in order for the adoption to proceed, it must be ensured that all Convention procedures and principles can be, and are, respected.[74] The following issues must therefore be considered particularly carefully:[75]

- the adoptability of the child must be properly established by the State of origin[76] (Art. 4(a)) and the subsidiarity principle must be applied (Art. 4(b));[77]
- the eligibility and suitability of the prospective adoptive parents must be properly determined (Art. 5(a)). They were chosen in the first place by the parents to host the child and thus, until this point, there has not been any professional involvement in their selection, including any professional matching;[78]
- the "home study" and report on the child must be properly prepared (Arts 15 and 16); and
- the counselling and preparation of the child and the prospective adoptive parents must be properly undertaken (which may be difficult to achieve as in these cases the child is already with the family).

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73 Guide to Good Practice No 1 (*op. cit.* note 5), Section 8.8.9, at para. 561.

74 This also applies where the host families are relatives of the children. In relation to adoption by relatives (or "in-family" adoptions), see further Guide to Good Practice No 1 (*op. cit.* note 5), Section 8.6.4. See also C&R No 32 of the 2015 Special Commission meeting.

75 The standards set out here are taken from the 1993 Hague Convention; however, it would be beneficial for domestic adoptions to also respect these principles.

76 Which State is the "State of origin" will depend upon where the children are determined to be habitually resident – as to which see para. 59 below.

77 In relation to in-family adoptions (for the case of Ana), see C&R No 32 of the 2015 SC.

78 In relation to in-family adoptions, see C&R No 32(c) of the 2015 SC which "recognised that the matching process might be adapted to the specific features of in-family adoptions".

58. To determine whether these scenarios do involve *intercountry* adoptions to which the Convention applies, it is necessary to determine where the children are habitually resident for the purposes of Article 2 of the Convention. In light of the circumstances of these cases – with the children having resided in the American State for some months or years – a determination of habitual residence may be challenging and it would be useful for the concerned Central Authorities to consult expeditiously to discuss the matter. Among the factors that might be considered in each case are:

- the period that the child has been living in the American State;
- the purpose of his / her presence there (*i.e.*, the original reason for travelling to the State) and whether any conditions attach to the child's residence;
- the family and social relationships of the child in that State and any other State(s), including the State of his / her nationality.

59. In each case, if the child were determined to be habitually resident in the European State of his / her nationality, then the proposed adoption would be an *intercountry* adoption under the Convention (as the prospective adoptive parents are habitually resident in a different State, being the American State). If, on the other hand, the child were determined to be habitually resident in the American State, then the adoption would be a *domestic* adoption to which the Convention would not apply. In both cases, when determining this question, it may be useful for the authorities to bear in mind the 2015 Special Commission Conclusion and Recommendation which invited Contracting States, when considering prospective adoptive parents' applications to adopt domestically, to consider carefully the circumstances of the child's presence in the State: *i.e.*, to ensure that the child has not been moved in an effort to deliberately circumvent the Convention.[79]

60. It should also be noted that, wherever the children are determined to be habitually resident in these cases and thus whether each case is determined to be an intercountry or a domestic adoption, there will be immigration issues for the relevant competent authorities to consider which may influence whether the adoption is allowed to proceed. In light of this, before allowing the adoption to proceed, the competent authorities in the American State may also need to verify that the proposed adoption is not simply a way of evading the necessary immigration processes which might apply if the children were seeking to immigrate to the American State without any adoption taking place.

79 C&R No 24 of the 2015 SC.

3

Other issues closely related to habitual residence

Cases that do not turn on questions of habitual residence, but rather on national laws which have nationality as a criterion either for applying for the immigration of a child or to adopt

a. Adoption by persons who live in, but are not nationals of, the receiving State, and either the immigration law of the receiving State permits only its nationals to apply for an adopted child to immigrate to the State and / or possessing the nationality of the receiving State is a legal requirement for adopting.

> Nationals of an Asian State, Chen and his wife have resided for over ten years in an American State. The authorities of the American State consider them habitually resident there. The couple wishes to adopt a child living in the Asian State. However, the immigration law of the American State only permits its nationals to apply for an adopted child[80] to be allowed to enter and reside in the American State (i.e., to immigrate to the State).
>
> Nationals of a European State, Rachel and her husband have resided for over fifteen years in an American State. The authorities of the American State consider them habitually resident there. The couple wishes to adopt a child living in an African State. However, the law of the American State only permits its nationals to apply to adopt a child intercountry.

61. Does the Convention apply to these proposed adoptions? As both couples are habitually resident in the American State and they wish to adopt a child who is habitually resident in a different State, these would be **intercountry adoptions to which the Convention would apply** (Art. 2). However, whilst the Convention mandates that an adoption within the scope of the Convention shall only take place if the receiving State has determined that the child will be authorised to enter and reside permanently in that State (Art. 5(c)), it is up to the receiving State's immigration law to determine who is permitted to enter and reside and under what conditions. In addition, the Convention does not prescribe rules of eligibility for those seeking to adopt intercountry: this is an issue left to domestic law.[81]

62. As a result, the fact that the American State's *domestic* law requires prospective adoptive parents to be nationals of that State either to apply for the immigration of an adopted child or to adopt intercountry, would be an obstacle to both intercountry adoption applications.

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80 Or a child to be adopted.

81 See Art. 5 and Guide to Good Practice No 1 (*op. cit.* note 5), Section 8.4.3.

63. The responses to the 2014 Country Profile, however, indicate that many States do not have either an immigration restriction or an eligibility criterion for adoption based on nationality. Many States thus permit *foreign national* prospective adoptive parents, habitually resident[82] in their State, to apply for the immigration of an adopted child from another Contracting State or to adopt a child from another Contracting State.[83]

82 It is understood that (and as shown by some of the answers to the Country Profiles) prospective adoptive parents need to be "legally" habitually resident in the receiving State to be able to adopt intercountry (*i.e.*, persons without a legal immigration status are generally not able to adopt intercountry). See also para. 12.

83 *E.g.,* see 2014 CP RS, Question 35(a): Australia, Belgium, China (Hong Kong SAR), Czech Republic, Finland, France, Germany, Greece, Ireland, Luxembourg, Mexico, Monaco, Netherlands, Norway, Panama, Sweden and Switzerland.

See also 2014 CP SO, Question 39(b) for States of origin (this question refers to foreign national prospective adoptive parents, habitually resident in a State of origin, wishing to adopt a child from another Contracting State to the 1993 Hague Convention): Albania, Bulgaria, Cape Verde, China, China (Hong Kong SAR), China (Macao SAR), Chile, Czech Republic, Dominican Republic, Ecuador, Hungary, Lithuania, Moldova, Panama, Philippines, Romania and Slovakia.

C

RECOMMENDED PRACTICES REGARDING THE APPLICATION OF ARTICLE 2 OF THE CONVENTION, INCLUDING THE INTERPRETATION OF THE HABITUAL RESIDENCE CRITERION

1

Prevention:
Ensuring that the scope of the Convention (Art. 2) is properly understood and applied, including by promoting consistent determinations of habitual residence

64. This section provides some guidance which attempts to *prevent* the misapplication of the Convention by ensuring that the scope of the Convention (Art. 2) is properly understood and applied, including by promoting consistent determinations of habitual residence.

65. A primary issue of utmost concern when seeking to make sure that the scope of the Convention is correctly applied is for Contracting States to ensure that their implementing legislation and procedures are consistent with Article 2 of the Convention. The concept of intercountry adoption (and thereby also the concept of domestic adoption) must be correctly defined in that legislation in accordance with Article 2 and *habitual residence* must therefore be identified as the only relevant connecting factor.

66. Once implementing legislation and procedures are in place in the correct terms, another important issue is ensuring the education and training of the competent authorities and / or bodies that will have to apply that legislation and to ensure that these authorities and / or bodies understand the requirements of Article 2, including the meaning of habitual residence for the purposes of the 1993 Hague Convention.[84] In this regard, they need to understand the difference between habitual residence and nationality, as well as the difference between habitual residence and mere residence. Contracting States should also raise awareness with the public as to what qualifies as an intercountry adoption under the Convention.[85] Prospective adoptive parents should be encouraged to seek advice from the relevant Central Authority(ies) when they are unsure.[86]

67. To ensure that Article 2 of the Convention is not *deliberately* circumvented, Contracting States should give special attention to persons moving to, or moving children from, Contracting States in order to undertake a *domestic* adoption in another Contracting State. To this end, the Special Commission has invited Contracting States, when considering prospective adoptive parents' applications to adopt domestically, to consider carefully the circumstances of the prospective adoptive parents' and / or the child's presence in that State.[87]

Promoting consistent determinations of habitual residence

68. A key element of ensuring that Article 2 is properly applied is making sure that the concept of habitual residence is understood and interpreted as consistently as possible across Contracting States. It is for the relevant national authority to determine the habitual residence of any party, taking into account the circumstances of each case, but in light of the context of the 1993 Hague Convention and its object and purpose, rather than under domestic law constraints.[88]

69. In assessing the relevant factors, it should be kept in mind that:

- no single factor is determinative;
- the various factors must be weighed and, depending on the specific circumstances, each factor will not always be given the same relative weight in the determination of habitual residence; and

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84 C&R No 22 of the 2015 SC.

85 *Ibid*.

86 See also the ISS Monthly Review No 210 of March 2017 (*op. cit.* note 41).

87 C&R No 24 of the 2015 SC.

88 See note 10 *supra*.

- greater caution is necessary where the amount of time spent in the country is relatively short.

70. When determining whether prospective adoptive parents or, in some cases a child, are / is habitually resident in a particular State for the purposes of the Convention, the following non-exhaustive list of factors may be considered (to the extent that they are relevant in the particular case):[89]

- the **length of time** that the person(s) has / have been living in the State; [90]
- the **conditions of their stay** in the State (*e.g.*, in some cases, whether the person(s) has / have an appropriate immigration status or residence or work permit);
- their **reason(s) for moving to and living** in the State;
- their **intention**(s)[91] concerning their residence (*e.g.*, how long they expect to remain living there);
- their place of **work**[92] or the place in which they have the main centre of their professional activities; [93]
- their **ties** to the State,[94] including personal, social, cultural, and economic ties (*e.g.*, family and social relationships, the place of any children's schooling, linguistic knowledge);
- any **other ties** with the State in which they are living (*e.g.*, business interests, ownership of real or personal property,[95] tax connections,[96] social insurance, bank accounts)[97];
- any ties with any other relevant States.

71. Regarding children, it should be noted that, the younger the child, the more the determination of his or her habitual residence will depend on that of the parents. Also, caution should be exercised in determining a habitual residence for the child different from that of the biological parents.

72. In challenging cases where factors point to two receiving States which equally might be considered the habitual residence of the prospective adoptive parents, the report of the 2000 Special Commission meeting might be recalled which noted that, "in

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89 See also *supra*, para. 8.

90 Some States have introduced a minimum residency requirement which must be satisfied in order for a person to be able to adopt intercountry. See, for example, the answers to the 2014 Questionnaire No 2, Question 36: *e.g.*, Mexico (6 months), India (1 year), Cyprus and Peru (2 years), Moldova (3 years), Burkina Faso and Haiti (5 years), and Monaco and Turkey (at least 6 months per year). Whilst States may set out own minimum residency requirements as eligibility criteria for Convention intercountry adoptions (as this is left to States' domestic laws under the Convention), habitual residence is a factual and autonomous concept and should be interpreted in light of the objectives of the Convention and not under domestic law constraints (as set out in paras 5 to 10 *supra*).

91 2014 Questionnaire No 2, Question 36: *e.g.*, Bulgaria, Canada (Quebec), Lithuania, Norway, and Turkey.

92 2014 Questionnaire No 2, Question 36: *e.g.*, Burkina Faso, Canada (Ontario), Colombia, Finland, Germany, Guinea, and Peru.

93 For the purposes of this Note, the term "main centre of professional activities" refers to the person's main work location and is used in the event of a person working in multiple locations. Questionnaire No 2, Question 36: *e.g.*, Lithuania, Monaco, Philippines, Slovenia and Turkey.

94 2014 Questionnaire No 2, Question 36: *e.g.*, Finland, Germany, Ireland, Lithuania, Portugal, Slovenia and Spain.

95 2014 Questionnaire No 2, Question 36: *e.g.*, Canada (Ontario, Quebec), Denmark, Norway and Turkey.

96 2014 Questionnaire No 2, Question 36: *e.g.*, Denmark and France. In this regard, see Guide to Good Practice No 1 (*op. cit.* note 5), Section 8.4.4, concerning determinations of habitual residence and the relevance of acquiring a particular residential status for tax purposes.

97 One State mentioned that, in order to avoid abuses, a person's habitual residence, or "actual centre of life", is determined independently and factors such as, for example, a registered place of residence that is not actually used in daily life, will not affect this determination, see 2014 Questionnaire No 2, Question 36: Germany. See also Guide to Good Practice No 1 (*op. cit.* note 5), Section 8.4.4 in relation to the establishment of habitual residence and possible abuses in this regard.

determining whether prospective adopters are habitually resident in a particular Contracting State, the authorities of that State should consider the underlying objectives of the Convention, whether they would be in a position practically to fulfil their obligations under Article 5, and in particular to determine the suitability of the prospective adopters."[98]

73. Where the habitual residence of the prospective adoptive parents is uncertain, the Central Authority approached by them should provide advice on their situation before the prospective adoptive parents proceed with an adoption application.[99] The Central Authority concerned should also expeditiously consult with the Central Authority(ies) of any other relevant Contracting State(s) before providing advice or communicating its decision to the prospective adoptive parents.[100] As the case examples above demonstrate, in many cases consultations between the Central Authorities of different States will be valuable.[101] It is important that such matters are addressed so that the parties and, in particular, the child, may benefit from the protection of the Convention where it applies.

74. In some cases, the concerned States may reach different conclusions concerning the habitual residence of the prospective adoptive parents or the child. The replies of States to the 2014 Questionnaire No 2 revealed that some States have encountered challenges in certain cases because either (1) *neither* concerned State (*i.e.*, neither the State of origin nor the receiving State) considered the prospective adoptive parents to be habitual residents, or because (2) *both* concerned States considered them to be habitual residents.[102]

75. These cases illustrate that it is vitally important that the Special Commission Conclusions and Recommendations[103] are followed and that the Central Authorities expeditiously consult with each other before providing advice or communicating any decision to the prospective adoptive parents and certainly before allowing any adoption application to proceed. In particular, a State should not continue to process an adoption ignoring this conflict in the decision on habitual residence. That said, States should also not decline all responsibility and leave the prospective adoptive parents in limbo since this carries the risk that they may proceed through irregular channels.[104] Wherever possible, expeditious consultation between the concerned Central Authorities should result in an agreement concerning the habitual residence of the prospective adoptive parents (or the child) which then may be communicated to the prospective adoptive parents and the case can proceed (or not) accordingly.

98 Report of the 2000 SC, para. 95.

99 This would encompass any travel by the prospective adoptive parents to the State of origin to pursue an intercountry adoption. For guidance on such travel, see Guide to Good Practice No 1 (*op. cit.* note 5), Section 7.4.10.

100 C&R No 13 of the 2010 SC and C&R No 23 of the 2015 SC. It has also to be noted that the obligation of co-operation between Central Authorities established in Art. 7 of the Convention is non delegable (Art. 22).

101 This was noted by Belgium in 2014 Questionnaire No 1, Question 10(b).

102 See note **Error! Bookmark not defined.** *supra*.

103 C&R No 23 of the 2015 SC, as well as C&R No 13 of the 2010 SC.

104 See further the ISS Monthly Review No 210 of March 2017 (*op. cit.* note 41).

2

Response: Addressing cases of non-compliance with the Convention's rules with respect to habitual residence

76. This section suggests some good practices which might assist in *addressing* cases where non-compliance with the Convention has occurred.

In certain scenarios, Contracting States may need to address cases in which the Convention has not been applied to a particular adoption when it should have been because of a misinterpretation of habitual residence: *i.e.*, the adoption has been erroneously treated as a *domestic* adoption when, in fact, it was an *intercountry* adoption to which the Convention should have been applied. In such cases, Article 33 of the Convention should be followed:

> "A competent authority which finds that any provision of the Convention has not been respected or that there is a serious risk that it may not be respected, shall immediately inform the Central Authority of its State. This Central Authority shall be responsible for ensuring that appropriate measures are taken."

77. The Special Commission recommended in 2010 that "where an adoption falling within the scope of the Convention has been processed in a Contracting State as a non-Convention adoption, the Central Authorities concerned are strongly recommended to co-operate in efforts to address the situation in a manner which respects Convention procedures and safeguards, and to prevent these situations from recurring".[105]

78. In addition, Guide to Good Practice No 1 provides helpful guidance to address cases involving failure to comply with the Convention.[106] It notes that, in such circumstances, the authorities in the State issuing the adoption decision will not be in a position to certify, pursuant to Article 23, that the adoption has been made in accordance with the Convention. As a result, the adoption will not be entitled to automatic recognition in other Contracting States under the Convention (Art. 23(1)).[107] In effect, the safeguards set out in the Convention will have been circumvented.

79. Is it possible to rectify such cases of non-compliance with the Convention's rules with respect to habitual residence? First, it should be emphasised that such action should be taken in exceptional cases only, after due consideration of the particular circumstances of each case, and that in doing so States should take steps to prevent the recurrence of such problems. However, it will generally be in the spirit of the 1993 Hague Convention as well as in the best interests of the child concerned (see also the *UN Convention on the Rights of the Child*), for the two States involved in such a case to try to co-operate to discuss the matter[108] and find a pragmatic solution. They might wish to consider "healing" the defects which have occurred by trying to do what should have been done had the provisions of the Convention been respected.[109] In this way, after due weight is given to the principles and general safeguards[110] of the Convention, the States concerned might be able to agree that the requirement of Article 17(c) has been satisfied retrospectively, so that the appropriate authorities would be in a position

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105 C&R No 12 of the 2010 SC (emphasis added).

106 See Guide to Good Practice No 1 (*op. cit.* note 5), Section 8.7.2 (but note that in Section 8.7.2, the factual situation addressed is slightly different from those set out in Part C above, sections 1 and 2, with the receiving State erroneously undertaking a domestic adoption following a probationary period by the child in that State).

See as well, ISS publication on "Responding to illegal adoption: a professional handbook" available at < http://www.iss-ssi.org/images/News/Illegal_Adoption_ISS_Professional_Handbook.pdf >.

107 For the responses of States in such circumstances, see 2014 CP RS, Question 35(c): Belgium, Denmark, Finland and New Zealand. In some States a new adoption procedure may be necessary (2014 CP RS, Question 35(c): Luxembourg, New Zealand, Sweden and Switzerland).

108 See, for example, 2014 CP RS, Question 35(c): France and Norway.

109 For examples of this approach, see 2014 CP RS, Question 35(c): Australia, Canada (British Columbia, Manitoba and Ontario) and Luxembourg.

110 It should be emphasised that the approach suggested here is meant to pertain only to address cases of non-compliance with the Convention's rules with respect to habitual residence situations. It is not meant to pertain more generally to any case of non-compliance with the Convention – particularly where the core principles of the Convention are involved (*e.g.*, lack of consent, improper financial gain, trafficking).

to issue the certificate referred to in Article 23(1) of the Convention. The conditions which would need to be satisfied include, but are not limited to, that:

- the State of origin is able to make the determinations required by Article 4 of the Convention;
- the receiving State is able to verify that the provisions of Article 5 have been respected; and,
- the two States are able to agree to an exchange of the required reports under Articles 15 and 16.

80. Rectifying such cases should not be seen as an expedient alternative to compliance with the Convention. Contracting States have a legal obligation to adhere to the Convention and to apply its safeguards. Such rectification measures should be seen as exceptional efforts made, where practicable, to protect the best interests of the child.

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