**Council on General Affairs and Policy of the Conference – March 2019**

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| **Document** | Preliminary Document ☒<br>Information Document ☐ | No 12 of December 2018 |
| **Title** | Report on the cross-border recognition of **domestic adoptions** | |
| **Author** | Permanent Bureau | |
| **Agenda item** | Item III.3 | |
| **Mandate(s)** | C&R No 30 of the March 2016 Council on General Affairs and Policy of the HCCH | |
| **Objective** | Present and analyse the responses of Members to the HCCH Questionnaire on the cross-border recognition of domestic adoptions, and the links of this topic with the Parentage / Surrogacy Project. | |
| **Action to be taken** | For Approval ☐<br>For Decision ☒<br>For Information ☐ | |
| **Annexes** | n.a. | |
| **Related documents** | Prel. Doc. No 4A of February 2016, "Work in the adoption area following the Special Commission meeting of June 2015", para. 17.<br>"Questionnaire on the recognition of domestic adoptions in other States", drawn up by the Permanent Bureau of the HCCH, 2016<br>Prel. Doc. No 2A of October 2018, "Report of the Experts' Group on the Parentage / Surrogacy Project" (meeting from 25 to 28 September 2018) | |

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## I. INTRODUCTION

1. In March 2016, the Council on General Affairs and Policy (Council) of the Hague Conference on Private International Law (HCCH) agreed that, resources permitting, the Permanent Bureau should undertake some preliminary investigative work on the issue of the cross-border recognition of domestic adoptions.[1] In particular, the Permanent Bureau was requested to identify, insofar as possible, the depth and extent, at the global level, of the problems arising in relation to this issue.

2. The key problem which might arise from the refusal to recognise a domestic adoption cross-border is limping legal parentage for the subject child - *i.e.*, the child having different legal parents according to different States - with all the many and varied *consequent* difficulties which can result from this situation, including:

- States having different views on who has parental responsibility for the child;[2]
- problems concerning the acquisition of nationality for the child or his / her immigration status (*i.e.*, the ability to enter and reside in a particular State); and / or
- difficulties concerning issues such as maintenance and inheritance for the child, or even social security / welfare and tax issues.[3]

3. Moreover, even if cross-border recognition of a domestic adoption is ultimately possible, if such recognition is not *automatic*, it may require a family to undertake lengthy and complex recognition proceedings, with financial implications and uncertainty whilst such proceedings are ongoing.

4. For example:

- If a domestic adoption undertaken in one State (State A) is not automatically recognised in another State (State B), to obtain recognition in State B the adopted child and adoptive parents may need to go to court in State B and, in some cases, undertake an exequatur procedure. This may entail long, costly and complicated procedures for the family. During this time, the child's legal status in State B is uncertain.

  If the family is seeking to relocate to State B, this uncertainty could lead to problems in obtaining authorisation for the child to enter and reside in State B. If the family already resides in State B, this could lead to practical problems for the family in terms of school registration, medical care, receipt of social security payments, etc. (because adoptive parents' legal parentage is not yet recognised).

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1 See Conclusions & Recommendations of the Council on General Affairs and Policy of the Conference (15-17 March 2016), C&R No 30 and Prel. Doc. No 4A of February 2016, "Work in the adoption area following the Special Commission meeting of June 2015", para. 17. Both available on the HCCH website < www.hcch.net > under "Governance" then "Council on General Affairs and Policy".

2 Whilst the private international law (PIL) aspects of parental responsibility are governed, as between Contracting States, by the 1996 Hague Child Protection Convention, the attribution of parental responsibility under the applicable law according to the Convention will often depend on who is / are the legal parents of the child – and the question of which law governs this issue is still a matter for States' own PIL rules (see, *e.g.*, para. 102 of the Explanatory Report to the 1996 Convention), which may therefore vary and lead to conflicting results. It is this matter which the Experts' Group on the Parentage / Surrogacy Project of HCCH is looking into and thus their work may be highly relevant for this project. For more information see HCCH website < www.hcch.net > under "Parentage / Surrogacy".

3 For more information as to the difficulties which can result for children and families from uncertain and limping legal parentage, see "The desirability and feasibility of further work on the Parentage / Surrogacy Project" (Prel. Doc. No 3 B of March 2014) ("2014 Report") and its accompanying "Study of Legal Parentage and the issues arising from International Surrogacy Arrangements" (Prel. Doc. No 3 C of March 2014) ("2014 Study"), written for the purposes of the Parentage / Surrogacy Project. See also para. 17 below.

- Moreover, if the outcome of the recognition procedure is ultimately that the adoption is not recognised, then the child will be left with limping legal parentage: *i.e.*, the child will have different legal parents in State A and State B.

  This could also lead to the child having potentially long-lasting immigration and / or nationality difficulties: *i.e.*, if the child wishes to enter and reside in State B with his / her adoptive parents (whom State B does not recognise as the legal parents of the child) or wishes to acquire the nationality of State B by descent from the adoptive parents. If the family are residing in State B already, the practical, day-to-day problems outlined above will likely continue and many other consequent difficulties may also flow from this situation in terms of issues such as maintenance and inheritance for the child, or even tax and social security issues.

5. Whilst it is thus possible to identify the problems which can arise from a refusal to recognise a domestic adoption cross-border *in theory*, the question remains as to whether such problems are actually arising *in practice* and, if so, with what degree of frequency and in what volume. With a view to answering these issues, a questionnaire[4] on this topic was circulated in November 2016 to the National and Contact Organs of the Members of the HCCH, as well as to the Central Authorities designated under the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption* (hereinafter the 1993 Hague Intercountry Adoption Convention). In 2017, the Permanent Bureau received 35 responses to the Questionnaire.[5] This report presents an analysis of these responses and provides further information to Members to assist them in deciding whether there is a need for further work in this area and, in particular, whether the desirability and feasibility of an international instrument on this issue should be considered further.

6. At this juncture, it is important to recall that it is precisely the issue of cross-border limping legal parentage (or worse, children being left parentless due to conflicting State laws, including private international law (PIL) rules, concerning who is / are the child's legal parents) which the Experts' Group convened under the Parentage / Surrogacy Project of HCCH has been examining since 2016 (with Permanent Bureau research on this topic dating back to 2011).[6] Whilst the primary focus of the Parentage / Surrogacy Project has been on legal parentage established *outside the adoption context*,[7] the Experts' Group has already noted the relevance of their work for the issue of the cross-border recognition of domestic adoptions.[8] This overlap is discussed in more detail in **Part E** below. The next steps suggested in **Part F** are intended to take into account this connection between HCCH projects in order to avoid a duplication of work and ensure the streamlined and effective use of HCCH's resources.

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4 "Questionnaire on the recognition of domestic adoptions in other States", drawn up by the Permanent Bureau of the HCCH, 2016 (hereinafter "Questionnaire").

5 States that have submitted responses: Andorra, Armenia, Australia, Belarus, Belgium, Burkina Faso, Canada, Cape Verde, Chile, Colombia, Denmark, Finland, Germany, Guatemala, Haiti, Japan, Lithuania, Luxembourg, Malta, Mexico, Monaco, New Zealand, Norway, Panama, Paraguay, Peru, Romania, Serbia, Slovenia, South Africa, Sweden, Switzerland, Ukraine, United States of America and Venezuela.

6 See the Parentage / Surrogacy Project, *supra* note 2.

7 Except where adoption may be a remedy used in cases of international surrogacy arrangements: see further the 2012 Preliminary Report on International Surrogacy Arrangements (Prel. Doc. No 10 of March 2012) and the 2014 Report and Study, supra note 3.

8 See, for example, Report of the Experts' Group on the Parentage / Surrogacy Project (meeting of 6-9 February 2018) (hereinafter 3rd Experts' Group Report), para. 16, and the Report of the Experts' Group on the Parentage / Surrogacy Project (meeting of 25-28 September 2018) (hereinafter "4th EG Report"), para. 41.

7. The report is structured as follows:

- it first clarifies which situations are covered by this report and, in particular, what is meant by the terms "domestic adoption" and "intercountry adoption" for the purposes of this report (**Part B**);
- it continues with an analysis of the Questionnaire responses of States, in particular concerning their laws and procedures on: (1) the recognition of domestic adoptions issued by other States ("incoming cases"), and (2) determining domestic adoptions when there is the possibility, or the reality, that recognition of the adoption will later be sought (or is being sought) in another State ("outgoing cases") (**Part C**);
- it then presents an overview of the work in this area being done by other international organisations (**Part D**);
- it lastly turns to a consideration of the desirability of future work in this area in light of the views expressed by Members and the work being carried out by the HCCH Experts' Group on Parentage / Surrogacy (**Part E**), before providing some recommended next steps for Members to consider (**Part F**).

## II. THE DIFFERENCE BETWEEN THE CROSS-BORDER RECOGNITION OF DOMESTIC ADOPTIONS AND INTERCOUNTRY ADOPTIONS

8. In this report, a **domestic** adoption refers to the adoption of a child habitually resident[9] in one State by parents habitually resident in that same State.[10] The cross-border recognition of such domestic adoptions may be needed, for example, because:

- the domestic adoption has an international element:

  *Family Diallo: the prospective adoptive parents are habitually resident in a South American State and they wish to adopt a child who is habitually resident in the same South American State. The prospective adoptive parents are, however, nationals of an African State and they would like the child, once adopted, to acquire their African nationality. The adoption may therefore need to be recognised by the African State for the child to be able to acquire nationality "by descent" from his / her adoptive parents.*

AND / OR

- the family decides to move to another State some years after the domestic adoption:

  *Family Kumar: the adoptive parents are habitually resident in an Asian State and, eight years ago, they adopted a child also habitually resident in that Asian State. They are all nationals of that Asian State. Now, due to the work of one of the adoptive parents, they need to move to live in a European State. In order for the*

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9 Under the 1993 Hague Intercountry Adoption Convention (Art. 2), the determining factor in deciding if an adoption is domestic or intercountry is whether the habitual residence of the adoptable child and the prospective adoptive parents is common or different. See also HCCH, "Habitual Residence and the Scope of the 1993 Hague Intercountry Adoption Convention", 2018 (hereinafter "Habitual Residence Note"). Available at the HCCH website at < www.hcch.net > under "Adoption".

10 N.B., this report does not address the issue of domestic adoptions which are undertaken in a State which is not the State of the habitual residence of the child and adoptive parents. This is possible in some States due to their jurisdiction rules for adoption: *e.g.*, in some States it is possible to apply to the court for an adoption based on the fact that one of the adoptive parents remains domiciled in that State (or a national of that State), even if the adoptive parent(s) and child are all habitually resident (and intend to remain) in a different State. This issue may need to be studied and considered in the further work identified in Parts E and F below.

*child to be able to relocate with the adoptive parents and reside in the European State, it may be necessary for the European State to recognise the adoption granted some 8 years ago in the Asian State.*

9. There is no global instrument dealing with the cross-border recognition of **domestic** adoptions. Therefore, this report will look at some of the problems that may arise in the absence of such an international instrument.

10. In contrast, an **intercountry** adoption is an adoption of a child habitually resident in one State by parents habitually resident in a different State (as defined by Art. 2 of the 1993 Hague Intercountry Adoption Convention). Among its Contracting States, the cross-border recognition of intercountry adoptions is ensured by the 1993 Hague Intercountry Adoption Convention (Art. 23).[11] Therefore, this report does not address the cross-border recognition of intercountry adoptions.

11. Another difference between the recognition of domestic adoptions and the recognition of intercountry adoptions (within the 1993 Hague Intercountry Adoption Convention framework) concerns the application of specific standards and safeguards to the adoption procedure:

- The 1993 Hague Intercountry Adoption Convention establishes a co-operation framework between Contracting States which, in respect of a particular intercountry adoption, applies to the adoption procedure *from the beginning.* This instrument is thus able to establish certain minimum standards and safeguards with which the adoption procedure must comply in order for the intercountry adoption to proceed and be finalised. If the adoption is correctly processed in accordance with the Convention, including with respect for these standards / safeguards, it will receive automatic recognition in all Contracting States (Art. 23). If the standards and safeguards have not been respected, the adoption procedure is supposed to be stopped and the issue of recognition should thus never arise.[12] In this way, this instrument establishes standards which, if not complied with, should prevent the adoption being processed or finalised in the first place (rather than only becoming apparent at the stage of recognition when it is too late to prevent the adoption taking place). In this sense, the instrument tries to be preventive, rather than reactive, in its mechanisms.
- Currently, the standards and safeguards that apply to a domestic adoption procedure are determined by States' internal adoption laws. An international instrument limited to the (automatic) cross-border recognition of domestic adoptions would be dealing with adoptions *already issued by States* and thus would not cover the adoption procedure itself.

  Such an international instrument could provide for some minimum standards and safeguards that should be satisfied in order for a domestic adoption to be recognised in another Contracting State (*e.g.*, expressed as conditions for recognition or grounds for non-recognition).

  Of course, the hope might be that in becoming party to an instrument with, for example, minimum standards expressed as conditions for recognition, Contracting States would ensure that their internal adoption laws satisfy these standards so that *their* domestic

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11 The cross-border recognition of intercountry adoptions which do not fall within the scope of the 1993 Convention because one or both States is / are not parties to the Convention, is also outside the scope of this report. This report only deals with the cross-border recognition of domestic adoptions.

12 Of course, this may not always be the case. See, further, on this issue, the Guide to Good Practice No. 1 at Chapter 8.7, as well as the more recent HCCH publication, Habitual Residence Note, *supra* note 9, paras 76 to 80.

adoptions could be recognised automatically under the instrument in other Contracting States without difficulty.

However, an important distinction with the 1993 Hague Intercountry Adoption Convention would remain in that non-compliance with these standards could not prevent the adoption from occurring, but only from being recognised automatically in other Contracting States.

## III. THE LAWS AND PROCEDURES OF STATES CONCERNING THE CROSS-BORDER RECOGNITION OF DOMESTIC ADOPTIONS

### A. "Incoming Cases": cross-border recognition of domestic adoptions issued in *other* States

#### 1. Number of cases reported by States

12. Only a few States could report the number of cases of recognition in their State of domestic adoptions granted previously in other States. Many States answered that they do not have this information accessible (*e.g.*, due in some cases to the fact that the recognition of domestic adoptions is handled directly by a court, and there is no centralisation of data), or that they do not maintain precise statistics on this issue.[13] In addition, the authorities responding to the Questionnaire were often not the authorities responsible for the recognition of domestic adoptions and thus cautioned that they might not be aware of all cases.[14]

13. For those States that could provide some information, the number of cases involving requests to recognise a domestic adoption granted previously in another State varied significantly from State to State. For example, some States reported handling hundreds of cases in the past few years,[15] other States reported a smaller but still significant number,[16] whilst other States reported few or no cases.[17]

14. It is difficult to draw any firm conclusions regarding the volume of incoming cases taking place globally from this limited and incomplete information. However, what is clear is that cases are occurring in practice and, in some States, in significant numbers.

#### 2. The reasons reported for seeking the cross-border recognition of domestic adoptions

15. States reported various reasons why families seek cross-border recognition of domestic adoptions, including families wishing to:

- establish the adopted child's legal parentage in the recognising State;[18]
- ensure that the adoption is valid in the State to which the family intends to relocate;[19]

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13 Question 4(a): Armenia, Belgium, Burkina Faso, Canada, Chile, Guatemala, Japan, Lithuania, Paraguay, Peru, Serbia, Slovenia, Switzerland, Ukraine, United States of America, Venezuela.

14 Answers were mostly provided by Central Authorities of Contracting States to the 1993 Hague Intercountry Adoption Convention and National Organs of Member States of HCCH, which usually do not handle cases of recognition of domestic adoptions and are thus not aware of them. Although they may have consulted internally with the authorities handling domestic adoptions, the amount of information to which these authorities had access might, in some cases, have been limited.

15 Question 4(a): Germany, New Zealand.

16 Question 4(a): Belarus, Colombia, Denmark, Finland, Norway, Romania, South Africa.

17 Question 4(a): Andorra, Australia, Cape Verde, Chile, Haiti, Luxembourg, Malta, Mexico, Monaco, Panama, Sweden.

18 Question 4(b): Belarus, Chile, Switzerland.

19 Question 4(b): Chile, Romania, Venezuela.

- obtain a birth certificate in the recognising State for the adopted child;[20]
- obtain (or retain) the nationality of the recognising State for the adopted child;[21]
- obtain a visa to enter the recognising State for the adopted child;[22]
- obtain rights of residence in the recognising State for the adopted child;[23]
- obtain identity documents in the recognising State for the adopted child;[24] and
- record the adoption in the registry of the recognising State (where the registry has not permitted the recording in the first instance, recognition may be sought).[25]

16. Whilst these reasons for seeking recognition might seem diverse, ultimately, the general objective is the same: ensuring the certainty and continuity of the adopted child's legal status in the recognising State. In some cases, this is needed due to the relocation of the family to that State (see the example of the Kumar family above), while, in other cases, it may instead be due to an international element within the adoption (see the example of the Diallo family above).

17. A number of State responses did acknowledge, however, that families with adopted children move to their State without having the children's adoption formally recognised. Some States reported that some of these families did not know at first that they needed the adoption to be recognised, but learned this later and started proceedings a few months after having moved.[26] Other States conceded that it was impossible to know the number of cases in which families did not seek recognition,[27] which might imply that many families never had their child's adoption formally recognised and are able to live normally in their State of relocation without any difficulties. Indeed, in this vein, some States said that they had generally not encountered problems with families failing to have domestic adoptions issued in other States formally recognised in their State.[28] However, other States indicated that this could create real problems in their State,[29] including:

- the uncertainty of the child's legal status;[30]
- the illegality of the child's residency;[31]
- the difficulty for the child in being granted nationality;[32]
- the difficulty for the child in being issued a birth certificate;[33]
- the impossibility of the child benefitting from social rights.[34]

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20 Question 4(b): Romania. Question 8(c): Germany, New Zealand.

21 Question 4(b): Belarus, Denmark, Germany, New Zealand, Romania, South Africa, Switzerland. Question 8(c): New Zealand, South Africa.

22 Question 4(b): Denmark, Germany.

23 Question 4(b): Haiti.

24 Question 4(b): Germany.

25 Question 4(b): Malta.

26 Question 5: Belgium, Chile, Monaco.

27 Question 5: Andorra, Australia, Burkina Faso, Canada, Cape Verde, Denmark, Japan, Lithuania, Mexico, Switzerland, Ukraine.

28 Question 5: Andorra, Belarus, Burkina Faso, Colombia, Mexico, Monaco, Panama, Sweden, Switzerland.

29 Question 5: Belgium, Chile, Denmark, Finland, Germany, New Zealand, Norway, Peru, South Africa.

30 Question 5: Chile, Norway.

31 Question 5: Denmark, Finland, Germany, New Zealand.

32 Question 5: New Zealand, South Africa.

33 Question 5: Germany.

34 Question 5: Belgium, Guatemala, New Zealand.

### 3. The laws of States governing the cross-border recognition of domestic adoptions

18. An interesting divide was apparent in the responses to the Questionnaire between those States that have specific laws on adoptions (which include some rules on the recognition of domestic adoptions granted in other States)[35] and other States which instead rely for this matter on more general laws, for example laws that address the recognition of foreign judgments (with no specific provisions on *adoption* decisions).[36] For States that only have general laws, the legislation is often found in codes of civil procedure[37] or codes on PIL.[38]

19. For States with adoption legislation specifically addressing this issue, several States responded that the following conditions are applied to determine if the foreign domestic adoption could be recognised in their State:

- First, several States expressed that they have a condition for recognition which is, in effect, a 'check' on the jurisdiction of the issuing State (akin to an indirect rule of jurisdiction): *i.e.*, they explained that the foreign adoption would be recognised in their State if the State which issued it was, for example, the State of the residence,[39] nationality[40] or domicile[41] of the adopting parent(s) (or, in one case, of the adopted person[42]).

  In one State, the situation was more nuanced since the adoption could be recognised *automatically* if it had been issued by the State of the common habitual residence of the adoptive parent(s), provided that their habitual residence had been continuous in that State for at least one year at the time of the adoption. If this was not the case, the court would need to confirm recognition and, would need to be shown that the authorities which issued the adoption had, at the time of the adoption, "sufficient cause" to exercise jurisdiction over the matter by reason of the habitual residence, domicile or nationality of the adoptee or adopting parent(s).[43]

  In some States, this jurisdiction 'check' was expressed not as a condition for recognition, but rather as a basis upon which a person who has a legal interest may seek *non*-recognition of a foreign domestic adoption (in this case, if jurisdiction had been assumed when the issuing State would not have had jurisdiction according to the recognising State's law).[44]
- Several States also mentioned a condition that the foreign domestic adoption must have the same (or substantially the same) legal effects as an adoption order in the recognising State for recognition to take place (with one State specifying that it must create a permanent parent-child relationship).[45]

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35 Question 1: *e.g.*, Australia (state and territorial level), Canada (provincial and territorial level), Denmark, Finland, Germany, New Zealand, Norway, Panama, South Africa, Sweden, Switzerland.

36 Question 1: *e.g.*, Burkina Faso, Chile, Colombia, Luxembourg, Paraguay, Slovenia, Venezuela.

37 Question 1: Chile, Colombia, Luxembourg, Paraguay.

38 Question 1: Slovenia, Venezuela.

39 Question 1: Norway.

40 Question 1: Sweden, Switzerland.

41 Question 1: Denmark, Sweden, Switzerland.

42 Question 1: Canada (Nova Scotia) – this was in addition to the possibility that the adopting person(s) may have been domiciled or resident in the State.

43 Question 1: Finland.

44 Question 1: Germany.

45 Question 1: Canada (Alberta, BC, Manitoba, New Brunswick, Newfoundland and Labrador, Saskatchewan), Denmark, Norway.

In this vein, several States mentioned cases in which they were asked to recognise a simple adoption when only full adoption is possible in their legal system,[46] as well as cases in which adoptive parents sought not only recognition of the foreign domestic adoption but also *conversion* of the foreign simple adoption into a full adoption.[47]

In one State, it was reported that where the legal effects in terms of the legal parentage established or terminated were *different* in the issuing State, this would not prevent recognition but instead the recognising State would only grant the foreign adoption the same legal effects as were granted by the issuing State.[48]

- Other frequently cited conditions were that the foreign domestic adoption should be valid in the issuing State (*i.e.*, in accordance with the law of that State), no longer subject to challenge or appeal (*i.e.*, final) and binding in the issuing State.[49]

  In one State, the adoption also had to be valid under (*i.e.*, issued in full compliance with) the law of the recognising State.[50]

20. A minority of States, however, reported that they take a different approach and subject the foreign domestic adoption to an 'applicable law test': *i.e.*, they will only give the adoption effect in their State if it satisfies the requirements for adoption set down in the law designated by their own choice of law rules. For example, one State reported that it examines whether the requirements for an adoption are satisfied under the law applicable to the formation of juridical acts concerning family relationships.[51] Another State responded that, according to its Civil Code, the law of the State of the child's domicile will be applied to determine the validity of the adoption.[52] In one State, it was also mentioned that if the statutory conditions for recognition are not met (contained within the adoption legislation in the State), in accordance with common law principles the law of the State of the child's domicile would be applied to determine his / her legal status.[53]

21. Most States apply the same rules to recognise an adoption irrespective of where the adoption was made.[54] However, a few States have different rules for States when they are from a particular region (*e.g.*, the Nordic States), or States that are parties to certain agreements, or other specific States.[55] Interestingly, some States also differentiate depending on whether the State which issued the domestic adoption is party to the 1993 Hague Intercountry Adoption Convention or not.[56] For the latter, this could be because these States assume that because Parties to the 1993 Hague Intercountry Adoption Convention respect certain standards and principles for *intercountry* adoption at the international level, they also respect them at the national level for *domestic* adoption, guaranteeing that the adoption has been properly safeguarded and processed. This may mean that,

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46 A full adoption has the effect of terminating a pre-existing legal parent-child relationship and creating a new one. A simple adoption does not terminate such pre-existing relationship, but it establishes another one, in addition to the pre-existing one.

47 Question 8: Haiti. Question 8(e): Germany (about a German simple adoption which could not be recognised in the recognising State). Question 9: Chile. Of course, before converting a simple adoption from another State into a full adoption, it is imperative that the State converting the adoption should ensure that the biological parents of the adopted child consented to a full adoption.

48 Question 1: Switzerland.

49 Question 1: Denmark, Finland, New Zealand, Norway, USA.

50 Question 1: USA.

51 Question 1: Japan.

52 Question 1: Lithuania.

53 Question 1: Canada.

54 Question 1: *e.g.*, Burkina Faso, Colombia, Germany, Japan, Malta, Serbia, Ukraine.

55 Question 1: Andorra, Australia, Chile, Finland, Monaco, New Zealand, Sweden, United States of America (certain states).

56 Question 1: Andorra, Australia, Haiti, Serbia, United States of America (California).

for those States, the presence of agreed standards and safeguards is important to facilitate the automatic recognition of foreign domestic adoptions.

### 4. The procedure and the documentation needed for recognition

22. In all cases involving the cross-border recognition of a domestic adoption, documents need to be presented to the competent authority in charge of recognition in the recognising State. In addition to the adoption order or decision (properly authenticated), the types of documents required for a recognition procedure can include the child's birth certificate before and / or after adoption,[57] a certificate of residence,[58] proof of the right to leave the State,[59] proof of identity of the adoptive parents,[60] proof of the eligibility and suitability of the adoptive parents,[61] and / or proof of consent(s) to the adoption.[62]

23. For the vast majority of States, the procedure for recognition of domestic adoptions is distinct from the procedure for recognition of intercountry adoptions (as should be expected for those States which are party to the 1993 Hague Intercountry Adoption Convention since intercountry adoptions properly processed under this Convention should be subject to automatic recognition upon presentation of the Article 23 Certificate in all Contracting States).[63] The procedure followed for the recognition of domestic adoptions varies considerably from State to State. Commonly, a request for recognition must be made to a court or an administrative body.[64] In certain States this involves an exequatur procedure,[65] which can be quite lengthy and expensive. In a few States recognition may occur automatically, by operation of law, although in some of these States parents have the possibility to apply for a court order or declaration recognising the adoption.[66] Some States also maintain a registry recording foreign adoptions that they have recognised.[67]

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57 Question 1: Belarus. Question 2: Belgium, South Africa. Question 4(c): Chile, Denmark, Finland, Germany, Haiti, Panama, Switzerland.

58 Question 2: Belgium, Panama (of the adoptive parents).

59 Question 2: Belgium. Question 4(c): Chile.

60 Question 2: Belgium, Panama, Peru, South Africa. Question 4(c): Haiti, Panama.

61 Question 1: Belarus. Question 2: Belgium, Norway. Question 4(c): Germany.

62 Question 1: Belarus. Question 2: Belgium. Question 4(c): Germany, Haiti.

63 However, it was reported by two States (Question 1: Denmark. Question 8(e): South Africa - reporting about other States' procedures), that some States follow the same procedure for the recognition of both intercountry adoptions and domestic adoptions. Following the same procedure may either suggest among others:

- that some States are asking for a certificate which cannot be delivered for domestic adoptions;
- that they do not recognise by operation of law intercountry adoptions made in accordance with the 1993 Hague Intercountry Adoption Convention on the presentation of the Art. 23 certificate (which would be a misapplication of the Convention); or
- that they recognise domestic adoptions by operation of law even though they have no guarantee of the procedure followed and / or of the respect of certain safeguards.

64 Question 1: Slovenia. Question 2: Belarus, Belgium, Cape Verde, Chile, Colombia, Denmark, Finland, Guatemala, Haiti, Japan, Lithuania, Malta, Mexico, Norway, Panama, Paraguay, Romania, Serbia, South Africa, Sweden, Switzerland, Ukraine, Venezuela.

65 Question 1 : Haïti Question 2: Belarus, Chile, Colombia, Peru, Romania.

66 Question 1: Andorra. Question 2: Australia, Canada, Germany, Monaco, New Zealand. In some of these States, the automatic recognition is subject to the conditions discussed in the previous section having been satisfied.

67 Question 2: Belarus, Belgium, Chile, Japan, Lithuania, Panama, South Africa, Switzerland.

### 5. The competent authorities and co-operation mechanisms

24. The competent authorities for the purposes of recognising a domestic adoption are generally courts of different levels of jurisdiction[68] or administrative bodies such as a ministry or a registry.[69]

25. Several States reported using cross-border co-operation or communication in recognition cases when the recognising State is considering the recognition request.[70] In such cases, government ministries seem to generally be the entities contacted (in some cases, it seems existing Central Authorities designated under other Hague Conventions, such as the 1993 Hague Intercountry Adoption Convention, might be contacted for help).

26. Recognising States explained that they contact the competent authority of the State in which the adoption decision was issued to: (1) report any problem to the foreign competent authority, (2) get information on the domestic adoption, including the law applied to grant the adoption, or on the birth parents and their consent(s); or (3) ask for other information.

27. States which issued the adoption decisions reported that if they were contacted by the competent authority of the recognising State, it would be for: (1) confirming the issuance of an adoption order,[71] (2) confirming that an adoption complied with the national law of the issuing State,[72] or (3) providing other information at the request of the recognising State.[73] One State processing adoptions also reported that it may reach out unilaterally to another State (via embassies) if the circumstances of the case indicated that the cross-border recognition of its adoption decision might be sought in future.[74] Other States processing adoptions also reported that if the domestic adoption involved a foreign national child or adoptive parents, their authorities may reach out to the authorities in the State of nationality of the person in order to consult with them before proceeding with any adoption (see further, Section 2(b) below).[75]

28. In cases where recognition had been refused, no States reported having recourse to co-operation to find a solution for the adopted child. However, it is not clear whether co-operation was not sought or whether States did not report it because they were not aware of it.

### 6. The outcome of the procedure

#### *a. Decisions of recognition or refusal*

29. Responding States reported that applications for recognition were approved in many cases, although it was not stated whether recognition was obtained easily and quickly or not.[76]

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68 Question 3: Canada, Cape Verde, Chile, Colombia, Germany, Guatemala, Malta, Mexico, Monaco, Paraguay, Peru, Romania, Serbia, Ukraine, United States of America, Venezuela.

69 Question 3: Australia, Belarus, Belgium, Denmark, Finland, Haiti, Japan, Lithuania, New Zealand, Norway, Panama, South Africa, Sweden, Switzerland.

70 Question 4(g): Belgium, Finland, Germany, Haiti, New Zealand, Norway, Panama, South Africa. Question 8(g): Canada, Germany, Guatemala, Haiti, Panama, Romania.

71 Question 7: New Zealand.

72 Question 7: South Africa.

73 Question 7: Paraguay, Romania.

74 Question 6(a): Norway.

75 Question 6(a): New Zealand, Norway, Romania, South Africa, Switzerland (in some cases).

76 Question 8(d): Chile reported one case where the recognising State recognised the Chilean adoption but with difficulty.

30. This said, a significant number of refusals were also reported. The reasons given for refusing recognition of a domestic adoption made in another State unsurprisingly corresponded with the conditions for recognition, or grounds for non-recognition, which States had reported and included:

- the decision did not have the legal effect of an adoption as understood by the recognising State: *e.g.*, the foreign decision, although seemingly called an adoption, granted the applicants parental responsibility rather than legal parentage; or, the foreign decision amounted to a guardianship order;[77]
- the decision was not final and legally binding in the issuing State;[78]
- jurisdiction concerns: this involved either the issuing State not having complied with the requirements of the recognising State in terms of its assumption of jurisdiction,[79] or the recognising State considering that it had exclusive jurisdiction over the adoption (*e.g.*, according to the recognising State's law, children who are nationals of that State must be adopted through a court decree in that State);[80]
- the adoption failed to comply with certain essential procedural or substantive requirements of the recognising State in relation to adoption, such as:[81]
    - the adoption was concluded by private contract and without the involvement of any State body, whether judicial or administrative;[82]
    - proof of consent of the biological parent(s) and / or the child was lacking, or there was evidence of insufficient participation of such parties in the process;[83]
    - there was insufficient examination of the suitability and eligibility of the adoptive parent(s);[84]
    - the age difference between the adoptive parent(s) and the adopted child was not as prescribed by the law of the recognising State;[85]
    - the adoption process was otherwise deficient or not in the best interests of the child.[86]

    In some cases, it seems that the grounds set out above led to a refusal to recognise the foreign adoption order on the basis of "public policy / order", but in other cases these seem to have been separate grounds for a refusal.
- *fraude à la loi*[87] or *abuse of the law*[88] (*e.g.*, where the motive for the adoption was financial or related to immigration, and not based on the best interests of the child);
- public policy / order.[89]

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77 Question 4(e): Australia, Denmark, Norway, South Africa (reporting about other States' procedure).

78 Question 4(e): Denmark, Romania

79 See para. 19 above. Question 4(e): New Zealand, Norway (but there is still a discretion to recognise the adoption where this occurs), Switzerland, Ukraine (with the last two States reporting that this had not occurred but could be a ground for refusing recognition in view of the legislation). Question 8(e): Germany (reporting about other States' procedures).

80 Question 4(e): Romania (unless the consent of the Romanian authorities is sought). Question 8(e): Germany (reporting about other States' procedures).

81 Question 4(e): Colombia, Finland, Germany, New Zealand, Romania, Switzerland, Venezuela.

82 Question 4(e): Germany, Norway.

83 Question 4(e): Germany, Romania, Switzerland.

84 Question 4(e): Finland, Germany, Switzerland.

85 Question 4(e): Romania, Switzerland,

86 Question 4(e): Denmark, Germany, Norway, Switzerland. Question 8(e): Germany (reporting about other States' procedure).

87 Question 4(e): Belgium.

88 Question 4(e): Switzerland.

89 Question 4(e): Belgium, Colombia, Romania, Switzerland.

31. Several States also reported that the recognition of an alleged *domestic* adoption had been refused in circumstances in which the adoption was, in reality, an *intercountry* adoption which should have been processed under the 1993 Hague Intercountry Adoption Convention (and the requirements of the 1993 Convention were not satisfied in the case).[90] This is a known challenge concerning the practical operation of the 1993 Convention and is taken into account in the work of the HCCH.[91]

*b. Remedies for the refusal of recognition*

32. Where recognition was refused, the most common remedy mentioned was a new adoption procedure in the recognising State.[92] Other States reported not taking any action,[93] and one State expressed that although no particular actions were taken, it still granted a visa to the child.[94] However, the vast majority of States did not report any actions that they either had taken or would be able to take in cases of refusal of recognition.

## B. "Outgoing Cases"- issuance of domestic adoptions in circumstances in which recognition abroad may or will be sought in future

### 1. Number of cases

33. In relation to outgoing cases, States that had granted domestic adoptions were rarely aware when recognition of such adoptions was later sought in another State. Only a few States reported that such cases came to their attention during the past three years, and the number of those cases was small.[95] Unless contacted by the adoptive family or recognising State at the time when recognition abroad is sought, it seems unlikely that the issuing authority would know of such requests for recognition abroad.

### 2. Special rules and procedures used by competent authorities when they process a domestic adoption which has an international element[96]

34. Domestic adoption cases which contain an "international element" - *e.g.*, one or several of the parties being foreign nationals, or the family intending to relocate to another State in the future[97] -

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90 Question 4(e): Denmark, Germany, New Zealand. Question 8(e): United States of America (reporting about other States' procedure).

91 See the Conclusions & Recommendations of the 2015 Special Commission at para. 24, and Habitual Residence Note, *supra* note 9, paras 76 to 80 for guidance on what to do in such situations. Two States cited retrospective application of the 1993 Hague Intercountry Adoption Convention as a remedy in cases where the adoption was mistakenly handled as a domestic adoption instead of an intercountry adoption. Question 4(f): New Zealand. Question 8(e): United States of America (reporting about other States' procedures).

92 Question 4(f): Australia, Denmark, Germany, South Africa, Switzerland.

93 Question 4(f): Belgium, Colombia, Norway, Switzerland. Question 8(f): Canada, Romania (reporting about other States' procedure).

94 Question 4(f): Venezuela.

95 Question 8(a): Canada (two cases), Chile (one), Germany (five), Haiti (many), New Zealand (one), Romania (three). It should be acknowledged that they may not have been made aware of all cases.

96 It should be noted that Question 6(a) which asked States about their approach to domestic adoption cases with an international element assumed that all parties (*i.e.*, the adoptive parent(s) and child) were habitually resident *in the State issuing the adoption decision* despite the fact that one or all of them might be foreign nationals. It is important to bear this in mind when considering the responses below.

97 If this is the case, careful screening of the situation by the adoption authorities is required to verify the true habitual residence of the prospective adoptive parents in order to ensure that the adoption should not actually be processed as an intercountry adoption under the 1993 Hague Intercountry Adoption Convention. Sometimes prospective adoptive parents move to another State in order to undertake a *domestic* adoption in the State specifically with a

are not necessarily "outgoing cases" for the purposes of cross-border recognition in that, when processed by the issuing State, the parties may not have disclosed a desire to seek recognition of the adoption abroad (whether immediately after the adoption or in future). However, these cases may well be the most likely to become such outgoing cases in future in view of the international element in the case. Because of this potential, they are addressed under this heading.

35. The first point to note is that an international element in a domestic adoption case, such as foreign national adoptive parents or a child, will cause some States to look to their PIL rules in terms of: (i) whether they have jurisdiction to process the adoption, and, if so, (ii) which law should be applied to it:[98]

(i) In relation to jurisdiction rules, some States specified that adoptive parent(s) need to prove their residency in their State in order for the domestic adoption to be processed there,[99] with some States specifying a specific minimum residency requirement in this regard,[100] and others specifying that the residency must be deemed "permanent".

Other States reported that it is not possible in their State to domestically adopt a resident child who is a foreign national (unless, in some cases, authorisation has been given by the State of nationality of the child),[101] whilst others specified that a foreign national child can be domestically adopted provided they are a permanent resident of the State.[102]

(ii) In relation to applicable law rules, some States reported that if one or both parties were a foreign national, either the entire adoption process or parts of it would be subject to foreign law (usually the law of the State of nationality of the person).[103]

For example, one State reported that for an adoptive parent, the requirements to adopt are subject to the law of the State of his / her nationality, and for the child, the requirements concerning being adopted are subject to the law of the State of his / her nationality.[104]

Another State reported that if the child is a foreign national, the issue of whether the child has to consent to the adoption is subject to the law of the State of his / her nationality.[105]

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view to then immediately relocating back to their State of habitual residence. This is an attempt to circumvent the 1993 Convention safeguards. There are also situations where the prospective adoptive parents are indeed habitually resident in the State of origin but move to another State during the adoption procedure. Further information can be found in the Habitual Residence Note, *supra* note 9, paras 76 to 80.

98 Question 6(a): Finland, Germany, Luxembourg, Monaco, Slovenia, Ukraine. These States specifically reported PIL rules whilst the other States mentioned in the footnotes to this paragraph below reported substantive requirements which have been interpreted as, in effect, jurisdiction or applicable law rules.

99 Question 6(a): Armenia (permanent residency), Australia, Chile, Canada (Alberta), Colombia, Mexico (permanent residency), Paraguay.

100 Question 6(a): Burkina Faso, Haiti. Such requirements may be framed as substantive requirements rather than jurisdiction rules, although the effect will be the same (*i.e.*, you can only adopt domestically if you satisfy such requirements). These requirements are often in place in order to avoid adoptive parent(s) moving to a State in order to undertake a domestic adoption in an effort to circumvent the requirements of the 1993 Hague Intercountry Adoption Convention (see further, Habitual Residence Note, *supra* note 9).

101 Question 6(a): Armenia, Belarus.

102 Question 6(a): Australia, Canada (Alberta). Similar to requirements of residency for prospective adoptive parents, requirements of permanent residency or authorisation by the State of nationality of the child might be in place to ensure the child was not trafficked for the purpose of adoption (see further, Habitual Residence Note, *supra* note 9).

103 Question 6(a): Belarus, Germany, Luxembourg, Monaco, Slovenia, Ukraine.

104 Question 6(a): Luxembourg (with additional specifications, such as, in the case of an adoption by two spouses of different nationality or stateless persons, the applicable law is that of their common habitual residence at the time of the application to adopt.)

105 Question 6(a): Belarus.

36. Beyond PIL rules, some States advised that they apply the following additional or different rules or procedures when the adoption has an international element:

- consulting with the authorities of the State of nationality of the prospective adoptive parent(s) or child[106] and, in some cases, seeking authorisation from this State that the adoption may proceed;[107]
- verifying the residence status or citizenship of the prospective adoptive parents and/or the child (in some cases to ensure compliance with the rules outlined in para. 35 above);[108]
- clarifying whether the intention of the adoptive parent(s) is to move abroad with the child in the near future;[109]
- verifying that the prospective adoptive parent(s) have no criminal record in their State of nationality[110] or previous habitual residence(s);
- considering the continuity of the child's education, the child's ethnic origin, religious and cultural adherence and mother tongue;[111]
- satisfying any formal requirements, such as translation.[112]

37. However, it should be noted that other States reported that they apply the same rules and procedure to any domestic adoption they process, whether or not it has an international element.[113]

38. The data collected from the Questionnaire therefore shows that the presence of an international element in a domestic adoption procedure can lead to additional processes and / or requirements in some – but not all - States.

## IV. WORK UNDERTAKEN IN THIS FIELD BY OTHER ORGANISATIONS

### *a. The European Union*

39. The cross-border recognition of domestic adoptions has been an issue of concern within the European Parliament of the European Union.[114] In February 2017, the European Parliament issued a resolution with recommendations to the European Commission on cross-border aspects of

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106 Question 6(a): Denmark, New Zealand, Norway, Romania, South Africa, Switzerland (in some cases).

107 Question 6(a): Armenia, Belarus, Ukraine (if required by the state's of the child nationality).

108 Question 6(a): Armenia, Australia, Burkina Faso, Canada (Alberta), Chile, Colombia, Haiti, Mexico, Paraguay.

109 Question 6(a): Cape Verde, Haiti. See also note 97 and 100 above on this issue.

110 Question 6(a): Paraguay.

111 Question 6(a): Lithuania.

112 Question 6(a): Guatemala.

113 Question 6(a): Australia, Canada (all provinces except Alberta), Denmark, Japan, Malta, Sweden, USA, Venezuela.

114 It should be noted that the proposed draft Regulation (see note 115 below), at Arts 1 and 2, includes within its scope *any* adoption order, provided it is not an adoption order made pursuant to the 1993 Hague Intercountry Adoption Convention. This would include adoptions which may be intercountry but are not Convention adoptions (*e.g.*, because one or both States are not party to the 1993 Convention), and adoptions undertaken by States in circumstances in which both parties are habitually resident in the same State, but not the State issuing the adoption order (*i.e.*, jurisdiction to undertake the adoption has been based on the domicile of one of the parties).

For an extensive list of the publications of the European Parliament (EP) on the matter of recognition of domestic adoptions, see Legislative Train Schedule. In particular, see EP, EPRS, European Added Value Unit, Cross-border recognition of adoptions, European Added Value Assessment (EAVA), 2016; EP, Policy Department C, *Adoption: Cross-border Legal Issues and Gaps in the European Union*, 2015; EP, Policy Department C, *Adoption: Cross-Border Legal Issues* (Workshop 1 December 2015), 2015.

adoptions, focusing in particular on the recognition of domestic adoption orders.[115] The resolution, noting that there is currently no European or international instrument addressing the recognition of domestic adoptions, found that the absence of such a mechanism "causes significant problems for European families who move to another Member State after adopting a child, as the adoption may not be recognised".[116]

40. The potential problems identified include: difficulty in legally exercising parental authority; financial difficulties because of different fees that apply; jeopardising the rights of children to a stable and permanent family; the necessity of going through recognition procedures or, in some cases, having to re-adopt the child, creating significant legal uncertainty; and preventing families from fully exercising free movement.[117]

41. The resolution included a draft Regulation which provides that the cross-border recognition of domestic adoption orders would be automatic except in cases where the Member State that granted the adoption did not have jurisdiction (based on a direct ground of jurisdiction contained within the Regulation[118]) or where recognition would be manifestly contrary to the public policy of the recognising Member State.[119] The draft Regulation is not designed to affect the substantive family laws of Member States.

42. In April 2017, the European Commission decided not to follow the recommendations put forward by the European Parliament.[120] It recalled its 2009 study which did not provide sufficient useful data to conclude whether or not there was a need to continue work in this area,[121] and came again to the same conclusion. It also acknowledged the work currently undertaken by the Permanent Bureau of the HCCH in this area, which should "help to clarify the depth and extent of the problem and the willingness of Member States to deal with [the issue] at international level as well as any need for corresponding action at EU level".

43. As a result of the fact that the cross-border recognition of domestic adoptions takes place globally, it seems indeed highly desirable to determine first whether further work in this area is needed at the international level (*i.e.*, whether there are problems occurring internationally which require resolution at this level).[122]

44. The work undertaken thus far by the European Parliament is interesting since many of the problems identified in their work as occurring in this area have also been reported by HCCH Members in response to the HCCH Questionnaire. It thus seems to reinforce that issues are occurring but that the volume and frequency of cases is difficult to determine with any accuracy. In addition, the draft Regulation could provide some ideas for any possible future work of HCCH (*e.g.*, the grounds of non-recognition identified).

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115 EP resolution of 2 February 2017 with recommendations to the Commission on cross border aspects of adoptions (2015/2086(INL)).

116 *Ibid.*, paragraph V.

117 *Ibid.*, paragraphs V-Y.

118 *Ibid.*, Art. 4(1): "The authorities of a Member State may only make an adoption order if the adopting parent or parents or the adopted child are habitually resident in that Member State".

119 *Ibid*., Annex to the resolution

120 European Commission, Follow up to the EP resolution of 2 February 2017 on cross border aspects of adoptions, 2015/2086 (INL).

121 European Commission, Comparative study relating to procedures for adoption among the member states of the European Union, practical difficulties encountered in this field by European citizens within the context of the European pillar of justice and civil matters and means of solving these problems and of protecting children's rights, jls/2007/c4/017-30-ce-0157325/00-64.

122 This concern was also addressed in L. Martínez-Mora (2015), *Recognition of intercountry adoptions – practical operation of the 1993 Hague Intercountry Adoption Convention* and in *Adoption: Cross-Border Legal Issues*, *supra* note 114.

*b. International Commission on Civil Status (ICCS)*

45. On 17 September 2015, ICCS adopted a Recommendation relating to "the recognition of certain adoption decisions taken or recognised in a member State of the ICCS".[123] It recommended that States issue, on request, to the adoptive parents or adoptee, an attestation providing the information specified by ICCS in the Annex, such as:

- the adopted child's date of birth,
- the adopted child's nationality,
- the date of the adoption decision,
- the consents to the adoption obtained,
- information concerning the adoptive parents, and
- information on the authority delivering the certificate.

46. The attestation takes the form of a multilingual standard form where each piece of information is entered under a specific number. This facilitates its comprehension in another State and obviates the need for translation.

47. The aim is to facilitate the verification of this information, and ultimately to simplify the cross-border recognition of adoptions as between member States of ICCS. The Recommendation does not, however, provide for any solution or co-operation if the adoption is not recognised.[124] Further, because it is a Recommendation, and not a Convention, it is not binding on member States of ICCS.

48. This Recommendation could provide some inspiration for the work of the HCCH in the area of cross-border recognition of domestic adoptions because it already identifies some of the information which appears important to some recognising States to ascertain from the State which issued the adoption. This could therefore perhaps be a useful starting point for looking at what might be the necessary information which could facilitate automatic cross-border recognition.

*c. A general comment on the scope of work of these Organisations*

49. It is important to note that the work undertaken by the European Parliament and ICCS has a broader scope than this report.[125] One consequence of this is that the proposed draft Regulation and Recommendation apply both to domestic adoptions (as understood in this report) and intercountry adoptions which do not fall under the scope of the 1993 Hague Intercountry Adoption Convention because one or both States is / are not party to the 1993 Hague Intercountry Adoption Convention.

50. Including such non-1993 Convention intercountry adoptions within the scope of any instrument could be seen to run the risk of undermining the operation of the 1993 Hague Intercountry Adoption Convention in a number of ways. Indeed, it might establish a streamlined procedure for the recognition of non-1993 Convention intercountry adoptions, in circumstances where safeguards equivalent to those of the 1993 Hague Intercountry Adoption Convention have not been confirmed as met (thus potentially providing an "easy route" to not respect safeguards). This, in turn, might act as a disincentive for States not already party to the 1993 Hague Intercountry

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123 ICCS, Recommendation (No. 11) relating to the recognition of certain adoption decisions taken or recognised in a member State of the International Commission on Civil Status adopted in Strasbourg on 17 September 2015, available at < http://www.ciec1.org/SITECIEC/PAGE_Recommandations/rA8AAND5swJ3anFGanhhb0JkHwA?WD_ACTION_=MENU&ID=A37>.

124 A general co-operation mechanism does exist, however, in the form of the General Assembly of ICCS, where representatives of the Member States (called the National Sections) meet once a year and discuss challenges, among other things, and seek to find solutions and / or ways to avoid the problems occurring in future.

125 See note 114 above concerning the European Parliament's work.

Adoption Convention to join, since another route for securing the recognition of their adoptions abroad would exist which does not require such stringent safeguards.

## V. FURTHER WORK IN THE AREA OF CROSS-BORDER RECOGNITION OF DOMESTIC ADOPTIONS

### A. Outcome of the Questionnaire

51. Out of 35 States that answered the Questionnaire, 9 States believed that there is a need to address this question at the international level,[126] and 13 did not express an opinion. 13 other States did not see such a need,[127] although some acknowledged that work should be undertaken if some States have issues with the cross-border recognition of domestic adoptions.[128] It should be recalled that most of the authorities which answered this Questionnaire are not working directly in the field of domestic adoptions.[129]

52. From the responses to the Questionnaire, States seem to have identified a number of reasons why this matter could benefit from a global solution:

- First, and perhaps most importantly, it could help guarantee certainty and continuity in the legal status of the child and parent(s) (*i.e.*, legal parentage) cross-border.[130] This means it would avoid the need (as is currently occurring in some States) for the child to be re-adopted abroad - re-adoption causing the family and child great uncertainty in their legal statuses, as well as potentially also causing serious emotional distress, and which may be expensive and lengthy. This was something felt to be very important to address when Members of the HCCH were considering whether to commence work on what later became the 1993 Hague Intercountry Adoption Convention.[131]
- Secondly, even if recognition procedures are available, they can themselves be quite lengthy, cumbersome and expensive. An international instrument could establish a uniform and simplified procedure to facilitate recognition, thus reducing delays and uncertainty.[132]
- Thirdly, it could promote mutual trust, and facilitate communication and co-operation between Contracting States.[133]

### B. The work of the HCCH Experts' Group on Parentage / Surrogacy

53. In 2015, the Council on General Affairs and Policy of the HCCH approved the establishment of an Experts' Group to explore the feasibility of advancing work on the PIL issues surrounding the status of children, including issues arising from international surrogacy arrangements. At the heart of the work of this Group is a desire to "provide predictability, certainty and continuity of legal parentage in international situations for all persons involved, taking into account their fundamental

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126 Question 9: Armenia, Belgium, Cape Verde, Chile, Finland, Malta, Romania, United States of America, Venezuela.

127 Question 9: Andorra, Australia, Belarus, Burkina Faso, Canada, Germany, Japan, Lithuania, Mexico, Monaco, New Zealand, Panama, Peru, Slovenia, Switzerland.

128 Question 9: Andorra, Burkina Faso.

129 See *supra* para. 12.

130 Question 9: *e.g.*, Armenia, Belgium, Chile. See also paras 14, 16 and 30 of this Report.

131 See further, G. Parra-Aranguren, "Explanatory Report on the 1993 Hague Intercountry Adoption Convention", in HCCH, Proceedings of the Seventeenth Session (1993), Tome II, Adoption – cooperation, para. 402. Available on the HCCH website at < www.hcch.net > under "Adoption".

132 Question 9: *e.g.*, Malta, Romania, Venezuela.

133 Question 9: *e.g.*, Finland, Guatemala, South Africa, United States of America.

rights, the *UN Convention on the Rights of the Child* and in particular the best interests of children".[134] To this end, the Group has already concluded that, "the absence of uniform PIL rules on legal parentage can lead to limping parentage across borders in a number of cases and can create significant problems for children and families",[135] and has also identified that "uniform PIL rules can assist States in resolving these conflicts … [w]hile ensuring that the diverse substantive rules and legal parentage of States are respected."[136] The Group's current work is thus focused on exploring the feasibility of unifying PIL rules concerning legal parentage in an international instrument with the aim of achieving the predictability, certainty and continuity of legal parentage mentioned above.

54. As mentioned in paragraph 6, whilst the Group's primary focus has not been on adoption cases,[137] the Group has been aware that adoption includes a transfer of legal parentage and such cases could therefore be implicated by any future international instrument on legal parentage. With this in mind, the last two meetings of the Group have begun to consider the issue of whether the scope of a possible future international instrument on legal parentage should include certain adoption cases and, if so, which particular cases (*e.g.*, only step-parent adoptions, and / or only domestic adoptions, as defined in this report, or a more broad category of cases) and with which safeguards.[138] At its fourth meeting in September 2018, the Group concluded as follows on this issue:

> "There was an initial discussion on the possible inclusion of domestic adoptions (where both the child and the (prospective) adoptive parents are habitually resident in the same State), including second parent adoptions. Most Experts agreed that it would be appropriate to recognise such cases under a possible future instrument on legal parentage. Furthermore, some Experts recommended that if the recognition of domestic adoptions were included, it should be based on grounds for non-recognition / conditions for recognition corresponding to basic safeguards in the adoption procedure."[139] (Emphasis added)

55. It should be noted that the Group has emphasised, however, that the inclusion of intercountry adoption cases within a possible future instrument is a complex issue in view of the need to ensure that the 1993 Hague Intercountry Adoption Convention is not undermined in any way by a new instrument (*e.g.*, it must be ensured that the new instrument is not used as a tool to avoid the safeguards contained within the 1993 Hague Intercountry Adoption Convention, and that States are not discouraged from joining the 1993 Hague Intercountry Adoption Convention).[140] The Group has agreed that this issue requires "further discussion and careful consideration".[141]

56. The Group is at the very early stages of discussing this issue and how it might be addressed in any future instrument. As a result, many questions remain yet to be discussed, including:

- Whether adoption decisions (which are often, though not always, judicial decisions) would be bound by the same rules as other judicial decisions on legal parentage in terms of their cross-border recognition under the instrument. In particular, if indirect grounds of jurisdiction must be satisfied for the cross-border recognition of judicial decisions on legal parentage which are *not* adoption cases, could these same indirect grounds be

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134 See para. 6 of the 4th EG Report, *supra* note 8, regarding the aims of a future instrument on legal parentage.

135 *Ibid*.

136 *Ibid.*

137 Save for where adoption is used as a remedy in international surrogacy cases – see *supra* note 7.

138 3rd Experts' Group Report, *supra* note 8, para. 16 and 4th Experts' Group Report, *supra* note 8, paras 41 and 42.

139 4th Experts' Group Report, *supra* note 8, para. 41.

140 3rd Experts' Group Report, *supra* note 8, para. 16 and 4th Experts' Group Report, *supra* note 8, para. 42.

141 *Ibid.*

used for the cross-border recognition of domestic adoption cases?[142] Or would different indirect grounds, or even *direct* grounds of jurisdiction, be required (particularly in view of the varying definitions and understandings of what is a domestic adoption)?[143]

- Would adoption-specific safeguards be required for cross-border recognition of such cases? How should such safeguards be identified and expressed (*e.g.,* as conditions for recognition or grounds for non-recognition), and how might any such safeguards operate in practice in view of the fact that the domestic adoption will have taken place already at the time recognition is sought (*cf.* intercountry adoptions under the 1993 Hague Intercountry Adoption Convention – see para. 11 above)?
- Would there be any need to unify the applicable law rules of States relating to domestic adoptions or to address in any way the law to be applied to such adoptions (particularly where the case has an international element)?
- Should it apply to existing adoptions (retroactive effect) or only to future adoptions?

## VI. RECOMMENDED NEXT STEPS

57. In view of the current recommendation of the Experts' Group on the Parentage / Surrogacy Project that it may be appropriate to recognise the legal parentage flowing from a domestic adoption under any possible future international instrument on legal parentage, and with a view to avoiding the duplication of work and ensuring the efficient use of HCCH resources, it is recommended that Council confirm that the Experts' Group on the Parentage / Surrogacy Project should continue with its study and consideration of this issue. If needed, this Experts' Group may request further information regarding the degree and frequency of the problems in practice in this specific area.

58. It is suggested that Council may wish to invite the Experts' Group to report back to it on this matter as part of its general reporting on the progress being made in terms of assessing the feasibility of a future international instrument on legal parentage.

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142 See para. 19 above regarding the fact that some States currently employ a kind of 'check' on jurisdiction when looking at the cross-border recognition of domestic adoptions.

143 See para. 41 above regarding the work undertaken by the European Parliament and the direct ground of jurisdiction proposed in the suggested draft Regulation.