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**GLOBALISATION AND INTERNATIONAL MOBILITY:
HABITUAL RESIDENCE AND THE SCOPE OF THE 1993 CONVENTION**

drawn up by the Permanent Bureau

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**MONDIALISATION ET MOBILITE INTERNATIONALE : LA RESIDENCE HABITUELLE ET LE
CHAMP D'APPLICATION DE LA CONVENTION DE 1993**

établi par le Bureau Permanent

*Preliminary Document No 4 of April 2015 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*

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Commission spéciale de juin 2015 sur le fonctionnement pratique de la
Convention de La Haye du 29 mai 1993 sur la protection des enfants et
la coopération en matière d'adoption internationale*

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INTRODUCTION¹

1. As a consequence of globalisation, more people move across international borders and they move more frequently. This trend can complicate determinations as to what is an intercountry adoption for the purposes 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"): *i.e.*, when the 1993 Hague Convention applies to an adoption.

2. At the 2010 Special Commission meeting on the practical operation of the 1993 Hague Convention, experts discussed various circumstances in which questions relating to globalisation and international mobility can arise in the context of the 1993 Hague Convention and some guidance was provided.² However, the responses of States to the 2014 Country Profiles,³ as well as their responses to the 2014 Questionnaires,⁴ indicate that challenges remain in this area⁵ and that further guidance on this topic would be welcome.

3. This paper examines these issues with a view to supporting the discussions at the June 2015 Special Commission meeting on this topic. Among other things, participants may wish to consider whether this document, amended in light of discussions at the meeting, might be published subsequently in the form of a Note in order to provide further guidance on this topic. Once published, the Note would be made available on the Hague Conference website.

4. This paper is structured as follows:

- Section 1 presents the concept of habitual residence;
- Section 2 provides a series of case examples in which difficulties have arisen in determining whether the 1993 Hague Convention applies to a particular adoption. Where possible, it seeks to provide guidance on the correct approach under the Convention in these situations. Where there is not a clear answer, some suggested guidance is presented for discussion during the Special Commission meeting;⁶ and finally,
- Section 3 provides some guidance on how to *prevent* problems in this area in the future and, where they do occur, how to *address* them.

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

² "Report of the Special Commission on the practical operation of the Convention (17-25 June 2010)", drawn up by the Permanent Bureau (hereinafter, "Report of the 2010 Special Commission"), paras 44-46 and "Conclusions and Recommendations of the Special Commission on the practical operation of the Convention (17-25 June 2010)", (hereinafter, "Conclusions and Recommendations of the 2010 Special Commission"), Recommendation No 13. Both available on the Hague Conference website at < www.hcch.net > under "Intercountry Adoption Section" then "Special Commissions".

³ "Country Profile on the 1993 Hague Intercountry Adoption Convention for States of origin" (hereinafter "2014 CP SO"); and "Country Profile on the 1993 Hague Intercountry Adoption Convention for receiving States" (hereinafter "2014 CP RS"). Both available on the Hague Conference website at < www.hcch.net > under "Intercountry Adoption Section" then "Country Profiles".

⁴ "Questionnaire on the impact of the 1993 Hague Convention on Laws and Practices relating to the Intercountry Adoption and the Protection of Children", Prel. Doc. No 1 of July 2014 for the attention of the Special Commission of June 2015 on the practical operation of the 1993 Hague Convention (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 1993 Hague Convention (hereinafter, "2014 Questionnaire No 2"). Both available on the Hague Conference website at < www.hcch.net > under "Intercountry Adoption Section" then "Special Commissions".

⁵ 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).

⁶ In some cases, based upon the Conclusions and Recommendations of previous Special Commission meetings or other already established good practice guidance.

1. THE CONCEPT OF HABITUAL RESIDENCE⁷

5. The concept of habitual residence is one of the critical factors in determining whether the Convention applies to a particular adoption. 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."⁸

6. How is habitual residence determined? The Convention does not include rules for determining when the conditions for habitual residence exist.⁹ Rather, habitual residence is a "question of fact" for the judicial or administrative authorities of a State to decide.¹⁰ However, as Guide to Good Practice No 1 states, habitual residence denotes "the country which has become the focus of the individual's domestic and professional life".¹¹ For Convention purposes, habitual residence is an autonomous concept and should be interpreted in light of the objectives of the Convention.

7. Responses to 2014 Questionnaire No 2 and the 2014 Country Profiles reveal that, in the context of the 1993 Hague Convention, States consider a variety of factors when determining the habitual residence of prospective adoptive parents and / or children. These factors include: the length of time that the relevant individual(s) has / have been living in the State;¹² the personal and social ties to the State;¹³ the main centre of professional activities of the person(s);¹⁴ and their intention(s) concerning their residence in the State (*e.g.*, demonstrated by the reasons for their stay, their work or tax connections¹⁵ with that State (or another) or their ownership of real property).¹⁶ One State mentioned that, in order to avoid abuses, a

⁷ Habitual residence is the main connecting factor used in all the modern Hague Children's Conventions (*i.e.*, also in the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 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*, 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*). None of these Conventions contains a definition of habitual residence, which has to be determined by the relevant authorities in each case on the basis of factual elements. As habitual residence is a factual concept, there may be different considerations to take into account when determining habitual residence for the purposes of the different Hague Conventions. For the full text of these Conventions, see the Hague Conference website at < www.hcch.net > under "Conventions".

⁸ Art. 2(1) of the Convention.

⁹ G. Parra-Aranguren, Explanatory Report on the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, Hague Conference on Private International Law, *Proceedings of the Seventeenth Session*, Tome II, "Adoption – co-operation", pp. 537-651. Also available on the Hague Conference website at < www.hcch.net > under "Intercountry Adoption Section" then "Explanatory documents" (hereinafter, "Explanatory Report"), para. 78. See also note 7 above.

¹⁰ Hague Conference on Private International Law, *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice*, Guide No 1, Family Law (Jordan Publishing Ltd), 2008, available on the Hague Conference website at < www.hcch.net > under "Intercountry Adoption Section" (hereinafter, "Guide to Good Practice No 1"), 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).

¹¹ Guide to Good Practice No 1, *supra* note 10, Section 8.4.4.

¹² Several States also noted that they have minimum residency requirements which must be satisfied before a person can be considered habitually resident in their State. See 2014 Questionnaire No 2, Question 36: *e.g.*, Cyprus (2 years), Madagascar (5 years), Monaco (more than 6 months per year), Peru (2 years) and Turkey (more than 6 months per year).

¹³ 2014 Questionnaire No 2, Question 36: Belgium, Bulgaria, Burkina Faso, Canada (Ontario), Chile, Colombia, Finland, France, Germany, Ireland, Lithuania, Norway, Philippines, Slovenia and Spain.

¹⁴ 2014 Questionnaire No 2, Question 36: Bulgaria, Burkina Faso, Canada (Ontario), Colombia, Finland, Germany, Monaco, Peru, Philippines, Slovenia and Turkey.

¹⁵ In this regard, see Guide to Good Practice No 1, *supra*, note 10, Section 8.4.4, concerning determinations of habitual residence and the relevance of acquiring a particular residential status for tax purposes.

¹⁶ 2014 Questionnaire No 2, Question 36: Bulgaria, Canada (Ontario, Quebec), Colombia, Denmark, Lithuania, Norway and Turkey.

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.¹⁷

8. 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.¹⁸ 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.¹⁹

9. Is the nationality of the child and / or the prospective adoptive parents relevant in determining whether the Convention applies to a particular adoption? No, 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

2. CASE EXAMPLES

10. The following case examples describe various scenarios in which difficulties have been encountered in relation to the determination as to whether the 1993 Hague Convention applies to a particular adoption. In some examples (section 2.1), whether the Convention applies to the case should be clear but misunderstandings appear to remain. In other examples (section 2.2), determinations of habitual residence may be more complex.

11. In the examples that follow, all States are *Contracting* States to the Convention unless stated otherwise.

2.1 Cases in which the habitual residence of prospective adoptive parents should be clear but challenges remain in applying Article 2 of the Convention

a) *Adoption by persons who are nationals of the State of origin but who are living in the receiving State*²¹

Kim is a national of an Asian State but has lived in North America for 10 years and intends to remain there. She is working in North America and is married to a North American man. 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.

12. 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 has been living in that State; the fact that the centre of her professional life is in the State; and the fact that she has strong personal and social ties to the State (she married a North American man habitually resident in that State).

¹⁷ 2014 Questionnaire No 2, Question 36: Germany. See also Guide to Good Practice No 1, *supra*, note 10, Section 8.4.4 in relation to the establishment of habitual residence and possible abuses in this regard.

¹⁸ Explanatory Report, *supra* note 9, 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.

¹⁹ *Id.*

²⁰ Guide to Good Practice No 1, *supra* note 10, Section 8.4.1 and the Explanatory Report, *supra* note 9, para. 71. However, it should be noted that, in exceptional cases, an individual's nationality may be a factor 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 intercountry adopt, 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, see 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 The 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. What does this mean in terms of whether the Convention applies to this adoption?²² 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.

14. The nationality of Kim (and her husband) is irrelevant in determining whether the Convention applies to this adoption.

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

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 several 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.

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

16. What does this mean in terms of whether the Convention applies to this 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 law.²³

17. Peter and Mary's nationality is not relevant in determining whether the Convention applies to this adoption.

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

Pablo and Ana are nationals of a South American State that is not a Contracting State to the Convention. They have resided for many years in a Western European State, are fully integrated there and have no intention to move to another State. They wish to adopt a child living in an Eastern European State.

18. 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 in this State; their integration in this State; and their intention to remain living there.

²² In this regard, it should be noted that the 2010 Special Commission "emphasised that all intercountry adoptions falling within the scope of the Convention under Article 2(1), including [...] adoptions by nationals of the State of origin, are subject to Convention procedures and safeguards" (see the Conclusions and Recommendations of the 2010 Special Commission, *supra* note 2, Recommendation No 11).

²³ 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 CP 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 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.

19. What does this mean in terms of whether the Convention applies to this 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.

20. The nationality of Pablo and Ana is not relevant to the determination of whether the Convention applies to their proposed adoption.

21. It should be noted that, in this type of case where prospective adoptive parents, nationals of one State, are habitually resident in another State and adopt a child from a third State, certain procedures may need to be followed in the first State in order to secure, for the adopted child, the nationality of the prospective adoptive parents.²⁴

d) "Intra-family" or "relative" adoptions

Gilbert and Yvette, nationals of an African State, have resided in Asia for many years. They are working in the Asian State, are well integrated and do not intend to relocate to another State in the foreseeable future. They wish to adopt their niece who was recently born in the African State.

22. 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 degree of integration in this State and their intention to remain living there for the foreseeable future.

23. What does this mean in terms of whether the Convention applies to Gilbert and Yvette's adoption of their niece? The first point to note is that the Convention applies to adoption by relatives.²⁵ 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.

24. The nationality of Gilbert and Yvette is not relevant to the determination of whether the Convention applies to their proposed adoption.

e) Adoption by persons who are dual nationals of the State of origin and the receiving State

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 many years. They do not intend to move to another State. However, they still feel connected to 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.

25. Where are the prospective adoptive parents habitually resident? 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 that their intention is to remain in that State.

²⁴ 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.

²⁵ Guide to Good Practice No 1, *supra* note 10, Section 8.6.4. See also the Conclusions and Recommendations of the 2010 Special Commission, *supra* note 2, Recommendation No 11, in which it is noted that "all intercountry adoptions falling within the scope of the Convention under Article 2(1), including in-family adoptions [...] are subject to Convention procedures and safeguards."

26. 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).²⁶ 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.

27. The dual nationality of Julia and her husband is not relevant in determining whether the Convention applies to this adoption.

2.2 Cases in which determinations of habitual residence are more complex²⁷

a) Adoption by persons who are temporarily living in the State of origin or in the receiving State²⁸

Temporarily residing in the State of origin: Marc and Brigitte are nationals of a European State. They work in an Asian State. They have fixed term contracts for two years and must return home when those contracts expire. They wish to adopt a child living in the Asian State.

Temporarily residing in the receiving State: Daniel and his wife are nationals of an African State. They are temporarily working in a North American State for a limited period, after which they intend to return to the African State. They wish to adopt a child who lives in the African State.

28. 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 in these cases due to, among other things, the following factors: the limited amount of time that each couple has been living in the State in which they work;²⁹ the fact that they intend to, or have to, return to their "home" country when their work contracts expire; and the fact that it may not be clear if the couples have integrated into society in the States in which they currently live.

29. Nonetheless, whatever determinations are made regarding the habitual residence of these couples, and thus whether the Convention is determined to apply in each case or not (*i.e.*, whether it is a domestic or an intercountry adoption), there are several practical considerations which must be borne in mind by the relevant adoption authorities:

- (1) If each couple applies to adopt in the State in which they currently live, before accepting the application, the adoption authority of this State would need to consider whether the couple will remain in the State long enough to complete the adoption process.
- (2) In addition, in determining whether to accept an application and, if so, how to proceed, the authorities in both States would need to consider whether the home study or equivalent report on the couple could be appropriately completed.

²⁶ See also the "Report and Conclusions of the Special Commission on the practical operation of the Convention (17-23 September 2005)", available on the Hague Conference website at < www.hcch.net > under "Intercountry Adoption Section" (hereinafter, "Report and Conclusions of the 2005 Special Commission"), para. 135.

²⁷ 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, United States of America and Viet Nam).

²⁸ Guide to Good Practice No 1, *supra* note 10, Section 8.4.1.1 and "Report and Conclusions of the 2005 Special Commission", *supra* note 26, para. 135. 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).

²⁹ For shorter stays, one difficulty is determining at what point the place of habitual residence changes (2014 Questionnaire No 2, Question 37: Sweden).

- (3) It must be clear which State would be responsible for undertaking the post-adoption follow-up if there is a move during the adoption process or shortly thereafter.
- (4) It must be clear that the adopted child will be able to enter and reside permanently in any States in which the family might live in the foreseeable future (see Art. 5(c)).³⁰

30. In light of these practical considerations, how might the States concerned proceed in such cases? As was established in the Conclusions and Recommendations of the 2010 Special Commission meeting, 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.³¹ In addition, it may be useful for the Central Authorities of the concerned States to consult to try reach a practical solution.

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

Lucy is a national of European State A and her husband, Thomas, is a national of European State B, which is adjacent to State A. Their home is in State A, 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.

31. 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: where their home is located, the place of their work, where the children go to school and where the centre of their social life is located. However, in this case, it may be complicated for the authorities of States A and B to determine where the couple is habitually resident due to the fact that their home is in State A but the centre of their activities seems to be in State B. In addition, there may be practical complications because, for example, an adoption accredited body located in one State may not have the authority to undertake the necessary work in another State.

32. In light of this, how should the States concerned proceed in such cases? The Central Authorities of States A and B should consult to consider how an intercountry adoption under the Convention might be undertaken in these circumstances.³² Prospective adoptive parents should receive advice from the Central Authorities on their particular situation before they proceed with such an application.³³

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

Jean and Marie live and work in State A. They wish to adopt a child living in Asia. After applying to the Central Authority in State A, but while the adoption procedure is ongoing, they move to State B.

33. Where are the prospective adoptive parents habitually resident? At the time Jean and Marie presented their application for intercountry adoption, the authorities in State A must have determined that they were habitually resident in State A.³⁴ Following their move to State B, however, a question arises as to which authorities have responsibility to complete the intercountry adoption procedure.³⁵

³⁰ Guide to Good Practice No 1, *supra* note 10, para. 483.

³¹ Conclusions and Recommendations of the 2010 Special Commission, *supra* note 1, Recommendation No 13.

³² This type of problem was noted in the responses of Germany and Monaco to 2014 Questionnaire No 2, Question 37. Monaco described a situation in which individuals worked in Monaco but resided across the border in a neighboring State. When those individuals sought to pursue an intercountry adoption, it was determined that the authorities of the neighboring State were competent to handle the adoption process.

³³ Conclusions and Recommendations of the 2010 Special Commission, *supra* note 2, Recommendation No 13.

³⁴ See Art. 14 of the Convention and, *supra* para. 8 of this document. 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.

³⁵ See, e.g., the Explanatory Report, *supra* note 9, 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

34. How should the States concerned proceed in such cases? 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.³⁶ Mutual co-operation (Art. 7) and co-ordination between the relevant Central Authorities will be important to finding the best solution in such a case.³⁷

2.3 Cases that do not turn on questions of habitual residence, but rather on national laws concerning eligibility to adopt based on nationality

a) Adoption by persons who live in, but are not nationals of, the receiving State, and possessing the nationality of the receiving State is a legal requirement for intercountry adoption³⁸

Nationals of an Asian State, Chen and his wife, have resided for many years in a South American State. The authorities of the South American State consider them habitually resident there. The couple wishes to adopt a child living in the Asian State. However, the South American State in which they reside only permits intercountry adoption by its nationals.

35. Does the Convention apply to this adoption? As Chen and his wife are habitually resident in the South American State and they wish to adopt a child who is habitually resident in the Asian State, this is an **intercountry adoption to which the Convention applies** (Art. 2). However, the Convention does not prescribe rules of eligibility for those seeking to intercountry adopt: this is an issue left to domestic law.³⁹

36. As a result, the fact that the South American State's *domestic* law requires prospective adoptive parents to be nationals of their State in order to apply for an intercountry adoption would be an obstacle to Chen and his wife's intercountry adoption application.

37. It should be noted, however, that the responses to the recent 2014 Country Profile indicate that many States do not have this eligibility criterion and thus permit *foreign national* prospective adoptive parents, habitually resident in their State, to adopt a child from another Contracting State.⁴⁰

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").

³⁶ 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.

³⁷ See Guide to Good Practice No 1, *supra* note 10, 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*, Vol. 244 (1993-VII) 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).

³⁸ It should be noted that some States which have such an eligibility criterion are traditionally States of origin but, in this situation, are acting as receiving States (see further the responses of States to the 2014 CP SO, Question 39(b) and 2014 CP RS, Question 35(a)).

³⁹ See Art. 5 and Guide to Good Practice No 1, *supra* note 10, Section 8.4.3.

⁴⁰ *E.g.*, see 2014 CP RS, Question 35(a): Australia, Belgium, Canada (regulated by individual 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, Sweden and Switzerland; and 2014 CP SO, Question 39(b): 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. Some of these States noted, however, that the individuals would need to have legal or permanent resident status in order to adopt intercountry in these circumstances.

3. GUIDANCE REGARDING THE APPLICATION OF THE HABITUAL RESIDENCE CRITERION

38. As a final section, this paper provides some guidance which attempts to: (1) promote consistent determinations of habitual residence and thereby *prevent* the misapplication of the Convention; and (2) provide some good practices which might assist in *addressing* cases where non-compliance with the Convention has occurred.

3.1 *Prevention: consistent determinations of habitual residence*

39. When determining whether prospective adoptive parents (or, in some cases, a child) are habitually resident in a particular State for the purposes of the Convention, some relevant factors to take into consideration might be:⁴¹

- the length of time that the person(s) has / have been living in the State (including, in some cases, whether the person(s) has / have an appropriate immigration status or residence permit);
- their reason(s) for moving to and living in the State;
- their intention(s) concerning their residence (*e.g.*, how long they expect to remain living there);
- in which State they have the centre of their professional activities;
- their personal and social ties to the State, including their degree of integration into the State (*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, real or personal property);
- any ties with any other relevant States.

40. In complex cases, the underlying objectives of the Convention, as well as whether the authorities of a State would be in a position *practically* to fulfil their obligations under the Convention in the specific case, might also be borne in mind.⁴²

41. Contracting States should ensure adequate education and training of the authorities and bodies assessing the habitual residence of the prospective adoptive parents and the child. In particular, it should be ensured that these authorities and bodies understand the requirements of Article 2 of the Convention, as well as the meaning of habitual residence and the difference between habitual residence and nationality.

42. Where the habitual residence of the prospective adoptive parents is uncertain, the concerned Central Authority should provide advice on the particular situation before the prospective adoptive parents proceed with an adoption application.⁴³ As the case examples above demonstrate, in many cases consultations between the Central Authorities of different States will be valuable.⁴⁴ 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.

3.2 *Addressing cases of non-compliance with the Convention*

43. In certain scenarios, including those set out in sections 2.1 and 2.2 above, Contracting States may need to address cases in which the Convention has not been applied to a particular adoption when it should have been: *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:

⁴¹ See also *supra*, para. 7.

⁴² "Report of the Special Commission on the practical operation of the Convention (28 November – 1 December 2000)", drawn up by the Permanent Bureau, at para. 95, available on the Hague Conference website at < www.hcch.net > under "Intercountry Adoption Section" then "Special Commissions".

⁴³ Conclusions and Recommendations of the 2010 Special Commission, *supra* note 1, Recommendation No 13.

⁴⁴ This was noted by Belgium in 2014 Questionnaire No 1, Question 10(b).

“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.”

44. In addition, Guide to Good Practice No 1 already provides helpful guidance to address non-compliance with the Convention in such cases.⁴⁵ 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)).⁴⁶ In effect, the safeguards set out in the Convention will have been circumvented.

45. Is it possible to rectify such cases of non-compliance with the Convention? It would be in the spirit of the 1993 Hague Convention and the *UN Convention on the Rights of the Child*, as well as in the best interests of the child concerned, for the two States involved in such a case to try to co-operate to discuss the matter⁴⁷ 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.⁴⁸ In this way, 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 to issue the certificate referred to in Article 23(1) of the Convention. The conditions which would need to be satisfied include 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

46. The 2010 Special Commission meeting concluded on this point as follows:

“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.”⁴⁹

⁴⁵ See Guide to Good Practice No 1, *supra* note 10, Section 8.7.2 (but note that in Section 8.7.2, the factual situation addressed is slightly different from those set out in sections 2.1 and 2.2 above, with the receiving State erroneously undertaking a domestic adoption following a probationary period by the child in that State).

⁴⁶ 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).

⁴⁷ See, for example, 2014 CP RS, Question 35 (c): France and Norway.

⁴⁸ For examples of this approach, see 2014 CP RS, Question 35 (c): Australia, Canada (British Columbia, Manitoba and Ontario) and Luxembourg.

⁴⁹ Conclusions and Recommendations of the 2010 Special Commission, *supra* note 2, Recommendation No 12.

Questions for discussion at the Special Commission

1. Please consider the **examples** in Section 2 of this document:
 - a. Would you amend any of these examples? Would you add any other examples?
 - b. Do you agree with the good practice guidance suggested in relation to these examples? Could *further* guidance be provided?
2. Do you have any *general* comments or suggestions to improve this document?
3. In order to provide more detailed guidance to States and other actors on this topic, do you think it would be useful to revise this document in light of discussions at the Special Commission meeting and publish it subsequently as a Note (including on the Hague Conference website)?

Further Reading

All documents mentioned below are available on < www.hcch.net > in the specialised "Intercountry Adoption Section".

- Responses of States to Questionnaire No 2, questions 36 to 41.
- Responses of States to the latest version of the Country Profile (2014) at Part XII (on "International Mobility").
- The Report of the 2010 Special Commission meeting (at paras 44 to 46) and Conclusion and Recommendations Nos 11 to 13.
- Guide to Good Practice No 1 (*e.g.*, Chapter 8.4).