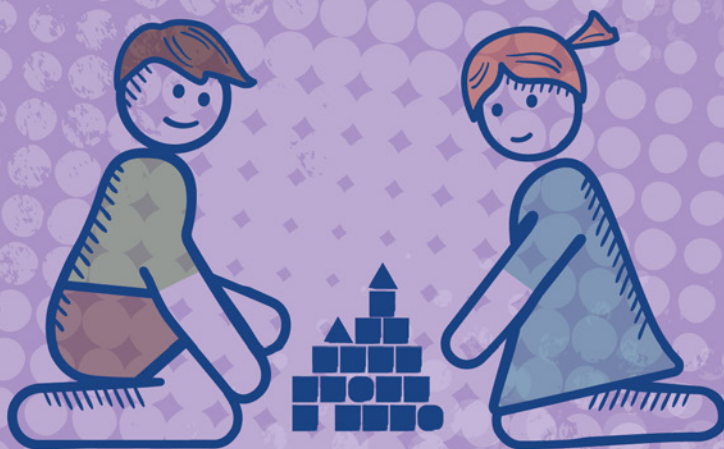


# INTRAFAMILY INTERCOUNTRY ADOPTIONS: UPHOLDING THE RIGHTS OF THE CHILD

ISS/IRC comparative working paper 3:  
Spotlight on solutions



International Social Service  
Service Social International  
Servicio Social Internacional

General Secretariat • Secrétariat Général • Secretaría General

Published by:

International Social Service

32 Quai du Seujet

1201 Geneva, Switzerland

Tel: + 41 22 906 77 00; Fax: + 41 22 906 77 01

[www.iss-ssi.org](http://www.iss-ssi.org)

© International Social Service 2020. All rights reserved.

All reproductions, copies or diffusions of this publication are prohibited without the publisher/ editor's approval.

Design and illustration: [www.transformbrands.co.uk](http://www.transformbrands.co.uk)

ISBN: 978-2-940629-13-8


Dambach, Mia & Messineo, Jimmy (2020). *Intrafamily Intercountry Adoptions: Upholding the rights of the child*. ISS/IRC comparative working paper 3: Spotlight on solutions. Geneva, Switzerland. International Social Service.

In close collaboration with Christina Baglietto, Cécile Jeannin, Juliette Roulez and Jeannette Wöllenstein-Tripathi.

### **Acknowledgements**

A warm thanks for the generous financial support of the Mission de l'Adoption Internationale (MAI), Autorité Centrale, Ministère des Affaires Etrangères et Européennes (French Central Adoption Authority) allowing for the translation and design of this publication.

Thanks also go to the translators: French to English by Belinda Allen, English/French to Spanish by Christina Baglietto, and English to French by Barbara Weber.



# Contents

<b>Abbreviations and acronyms .....</b>	<b>05</b>
<b>Introduction .....</b>	<b>06</b>
<b>I. General considerations .....</b>	<b>09</b>
1. <b>Basic concepts and scope of study .....</b>	<b>09</b>
1.1 Definition of intrafamily ICA .....	09
1.2 Intrafamily adoption and the specific case of adoption by a step-parent .....	10
1.3 Intrafamily adoption and care by extended family .....	10
2. <b>Statistics .....</b>	<b>11</b>
3. <b>Cultural aspects .....</b>	<b>17</b>
<b>II. Legal considerations .....</b>	<b>20</b>
1. <b>International framework .....</b>	<b>20</b>
1.1 Application of the UN CRC to intrafamily adoption .....	20
1.2 Application of the 1993 Hague Convention to intrafamily ICAs .....	20
1.2.1 Current debate No 1: Does the principle of subsidiarity mean always considering national adoption before intrafamily ICA? .....	24
1.2.2 Current debate No 2: Should the placement of a child with extended family abroad always take the form of intercountry adoption? .....	25
1.3 Use of the 1996 Hague Convention: a sometimes more appropriate solution .....	25
1.4 Guidelines for the Alternative Care of Children .....	26
2. <b>National frameworks .....</b>	<b>28</b>
2.1 Specific legal provisions .....	28
2.1.1 Certain intrafamily adoptions are not permitted .....	28
2.1.2 Adapted legal provisions/procedures .....	29
2.2 Degree of blood relations/ties .....	30
2.3 Legal nature of the adoption .....	31
3. <b>Cross section between adoption and immigration laws .....</b>	<b>32</b>
3.1 Use of adoption authorities and/or procedures to process family reunification cases .....	32
3.2 Use of adoption authorities to approve/process existing family arrangements .....	33
3.3 Use of immigration authorities to process intrafamily adoptions .....	34

<b>III. Practical considerations</b>	<b>35</b>
<b>1. Specific challenges and problems</b>	<b>35</b>
1.1 Non-application or misapplication of the 1993 Hague Convention	35
1.1.1 Intrafamily adoptions involving a country not party to the 1993 Hague Convention	35
1.1.2 Intrafamily adoptions involving a country party to the 1993 Hague Convention but excluding intrafamily adoptions from its scope	36
1.1.3 Circumvention of the 1993 Hague Convention by some actors	36
1.1.4 Risks of private and independent adoptions	36
1.2 Understanding the adoption plan	36
1.3 Lack of preparation, support and follow-up for the adoption triangle	37
1.3.1 Lack of preparation and support for the child	37
1.3.2 Lack of preparation and support for prospective adoptive parents and biological parents	38
1.3.3 Difficulty in ensuring post-adoption follow-up	38
<b>2. Recommendations of the ISS/IRC: addressing the challenges by introducing adapted procedures</b>	<b>39</b>
2.1 Providing for preliminary analysis of the plan before starting the process, and encouraging cooperation	41
2.1.1 Confirming that an adoption is intrafamily	43
2.1.2 Assessing the specific motivations for this plan, and the other options available	43
2.2 Practical assessment of the needs and interests of the child, and the capacity of the prospective adoptive parents to meet these	45
2.2.1 Practical assessment of the needs and best interests of the child	45
2.2.2 Ensuring proper assessment of the prospective adoptive parents	49
2.3 Providing preparation and support for the adoption triangle	50
2.3.1 Providing adapted preparation for all members of the adoption triangle	50
2.3.2 Providing adapted support for all members of the adoption triangle	50
2.3.3 Recognising intrafamily adoptions that comply with the 1993 Hague Convention and rejecting those that circumvent it	51
2.4 Providing post-adoption follow-up and ensuring cooperation in the event of breakdown	53
<b>Conclusion</b>	<b>54</b>

# Abbreviations and acronyms

<b>1993 Hague Convention</b>	Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption
<b>1996 Hague Convention</b>	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
<b>AAB</b>	Adoption Accredited Body
<b>CA</b>	Central Authority
<b>CRC</b>	Convention on the Rights of the Child of 20 November 1989
<b>Guidelines</b>	Guidelines for the Alternative Care of Children
<b>HCCH</b>	Hague Conference on Private International Law
<b>HCCH Guide to Good Practice No 1</b>	The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice No 1
<b>Intrafamily ICAs</b>	Intrafamily Intercountry Adoptions
<b>ISS</b>	International Social Service
<b>ISS/IRC</b>	International Social Service/International Reference Centre for the rights of children deprived of their family
<b>PAP</b>	Prospective Adoptive Parent
<b>Special Commission</b>	Special Commission on the Practical Operation of the 1993 Hague Convention on Intercountry Adoption





## Introduction

The *International Reference Centre for the rights of children deprived of their family (ISS/IRC)* has chosen to dedicate the third issue in its series 'Comparative working papers: Spotlight on solutions' to the subject of intrafamily intercountry adoptions (intrafamily ICAs), closely linked to the wider issue of cross-border family placements, which will also be part of this new study.

This publication is designed for all professionals involved in intrafamily adoptions and/or cross-border family placements. It is naturally, but not only, drafted for child protection and adoption professionals. It should also prove a valuable tool for migration authorities, embassy staff, or Central Authorities (CAs) party to the *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*

(1996 Hague Convention). It will also be useful for professionals who are in frequent contact with the child, such as school staff or health professionals.

In a globalised world where families are spread across continents, it is no longer unusual for a child to have a member of their (nuclear or extended) family abroad. Certain situations, for example where the child cannot be cared for in his or her country of habitual residence, may justify recourse to living in a family in another country. Although this may represent formal or informal care, it will often become necessary to formalise it to meet migration requirements for the child to cross borders. There are many legal and administrative mechanisms for this, including intrafamily adoption, which currently seems to be a preferred route.

Intrafamily adoption naturally promotes some continuity in the child's life, and is in

accordance with the principles of care within the extended family and of cultural continuity. However, it is not necessarily the most appropriate approach to meet the child's needs, and if misunderstood or misapplied it ultimately risks undermining this continuity, partly through its impact on filiation (particularly in the case of full adoption).

In addition, specific questions arise as to how the States involved should implement the *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (1993 Hague Convention) and ensure that these adoptions respect the fundamental rights of the child as set out in the *Convention on the Rights of the Child of 20 November 1989* (CRC). Challenges may arise in declaring the adoptability of the child, assessing the capacity of prospective adoptive parents (PAPs), or observing the principle of subsidiarity.<sup>1</sup>

For example, some States are concerned that there is not always a clearly established need for the use of adoption in the context of intrafamily ICAs. Where it is established, the question then arises as to the most appropriate solution – a national adoption by people with whom the child has no family ties, or adoption by a family member living abroad.

The answer to this question, which must be subject to a case-by-case assessment of the best interests of the child, is often affected by differing cultural perceptions between States (see *section 1.3*).

The removal of the child, who is then cut off from his or her community and benchmarks, can lead to problems, especially if there is no preparatory work with the child and the PAPs. Questions inevitably arise where the child had loose or non-existent ties with their family members abroad, especially where the child previously lived with his or her biological family. Similarly, aspects such as assessment of the PAPs' motivation and capacity, and the preparation, support and post-adoption follow-up they receive, are often underestimated, although they merit equal if not greater attention than in the case of a traditional ICA. This is because intrafamily ICA is sometimes seen more as a migratory and/or educational opportunity than as a child protection measure. It is also not unusual for nationals of a State of origin, with habitual residence in a receiving State, to undertake national adoption of a member of their family in the State of origin, then to seek enforcement of the judgment in the receiving State, thereby circumventing the safeguards in the *1993 Hague Convention*.

1 Dambach, M. (2019). *Principle of subsidiarity. ISS/IRC comparative working paper 1: Spotlight on solutions*. Geneva, Switzerland. International Social Service. Available at: [https://www.iss-ssl.org/Images/Publications\\_ISS/ENG/PRINCIPLE\\_SUBSIDIARITY\\_ANG.pdf](https://www.iss-ssl.org/Images/Publications_ISS/ENG/PRINCIPLE_SUBSIDIARITY_ANG.pdf).

## 8 Intrafamily Intercountry Adoptions

In light of these questions and challenges, many countries would like to see additional guidelines introduced. Also, over recent years, the ISS/IRC has observed a growing interest from Central Adoption Authorities (CAs) in the publication of tools to frame, manage and support intrafamily ICA processes. This interest is particularly evident during the *Special Commissions* on the practical operation of the 1993 Hague Convention, run by the Hague Conference on Private International Law (HCCH). The issue was the subject of a topical discussion during the *Special Commission of June 2015*, which resulted in specific recommendations.<sup>2</sup> The same is expected at the Special Commission of 2021. In their responses to the *questionnaire* on possible topics for the Special Commission of 2021, 98% of States indicated that this topic should be discussed, and 42% considered it a high priority topic.<sup>3</sup>

This study is based on a survey by the ISS/IRC among its network of CAs during 2019, to which 27 countries responded – 15 considered receiving States<sup>4</sup> and 12 considered States of origin<sup>5</sup> for ICA. To make it as comprehensive as possible, and to refine or complement the data received, the ISS/IRC also used secondary information sources such as the country profiles available on the HCCH site, and recent publications by the ISS/IRC.

In addition to a comparative study of the legal systems, this new publication aims to promote some promising practices, prompt reflections on intercountry family placement, and share recommendations from the ISS/IRC to ensure that intrafamily ICAs and cross-border family placements are conducted with respect for the rights of the child, and to guarantee that they have the same rights as all other children.

2 *Conclusions and recommendations of the Special Commission 2015*. Available at: <https://assets.hcch.net/docs/858dd0aa-125b-4063-95f9-4e9b4afd3719.pdf>.

3 See Prel. Doc. 2 of December 2019 – *Analysis of the responses to the 2019 Questionnaire on possible topics and format for the Fifth Meeting of the Special Commission to review the practical operation of the 1993 Adoption Convention*, especially paragraph 25, p. 7.

4 Andorra, Belgium, Canada, Cyprus, Denmark, France, Germany, Italy, Luxembourg, Malta, Netherlands, New Zealand, Spain, Sweden and Switzerland.

5 Armenia, Colombia, Latvia, Lebanon, Lithuania, Peru, Philippines, Poland, Slovakia, Slovenia, Togo and Vietnam.





# I. General considerations

## 1. Basic concepts and scope of study

This first chapter sets out to clarify the situations that will be considered in the context of this study, and those that will be excluded. It also provides an update on reported statistics in this field, and discusses the cultural aspects of this particular form of adoption.

### 1.1 Definition of intrafamily ICA

Intrafamily ICA is the main subject of this study. *In the questionnaire for the Fifth Meeting of the Special Commission*,<sup>6</sup> the Permanent Bureau of the HCCH indicated that intrafamily adoption covers two scenarios. Thus, an “intrafamily adoption is one in which the adoptive parent(s) are either relatives of the child (e.g. an aunt, a grandparent, a cousin) or a step-parent of

the child. These adoptions are respectively referred to as ‘relative adoptions’ and ‘step-parent’ adoptions”.

The degree of relationship required for an adoption to be considered as intrafamily varies from one country to another, and depends on national legislation (*see section II.2*). In practice, intrafamily adoption mainly covers adoption by uncles and aunts or cousins, or sometimes by grandparents or siblings.

As with any adoption, intrafamily adoption is considered intercountry if it involves the removal of a child from his or her country of habitual residence, to the PAPA’s country of habitual residence.<sup>7</sup>

<sup>6</sup> Prel. Doc. 3 of February 2020 – *Questionnaire on the practical operation of the 1993 Adoption Convention* Available at: <https://assets.hcch.net/docs/839bda26-b747-487b-a9c9-6c2a05e0d0e8.docx>.

<sup>7</sup> This definition is based on the scope of the 1993 Hague Convention, specifically Article 2.

## 1.2 Intrafamily adoption and the specific case of adoption by a step-parent

Although adoption by a step-parent is in some ways similar to adoption by other family members, it also raises some specific issues. Therefore, it seems important to distinguish clearly between these two forms of adoption. Given that only 25% of countries consider adoption by a step-parent a high priority for the next Special Commission, compared to 42% for adoption by other family members,<sup>8</sup> this study will focus primarily on the second category. Where there is a reference to adoption by a step-parent, this will therefore be made explicit.

## 1.3 Intrafamily adoption and care by extended family

Because of its legal, social and psychological implications (in terms of filiation), adoption is not always the best option for a child in the care of a member of the extended family, especially if this placement is intended to be temporary. Thus, adoption should in principle only be considered as a last resort, where there is no potential for the child to be reintegrated into his or her biological family, and where other local options have been explored.

As recommended by the *CRC* (Articles 3, 8 and 20) and the *Guidelines for the Alternative Care of Children* (Guidelines), in situations where a child can no longer be cared for by his or her parents, priority should be given to alternative care within the child's

extended family, given the benefits of a family environment and right to retain his or her identity and family ties.

Kinship care is defined in paragraph 29 (c) (i) of the *Guidelines*, as "care within the child's extended family or with close friends of the family known to the child, whether formal or informal in nature".

According to a 2019 report by *Family For Every Child*<sup>9</sup>, around one in ten children around the world are in kinship care, in most cases with grandparents.<sup>10</sup> This care, which is usually organised informally, is a widespread practice in many national contexts.<sup>11</sup> In some countries, such as Indonesia, Rwanda and the United Kingdom children are 20 times more likely to be placed with extended family or close friends than in any other alternative care setting.<sup>12</sup> It should be noted that, in some countries, carers must have prior registration as foster carers in order to care for a child from their family.

In many cultures, informal placement with extended family amounts to "adoption" even in the absence of any legal formalisation (*see section 1.3*). However, placement with extended family abroad, like national placement with extended family, may be considered outside the adoption framework. (*see section II*).

In countries with an Islamic tradition, where adoption is generally prohibited, placement with extended family may take the form of *kafala*.<sup>13</sup>

<sup>8</sup> *Supra* 3.

<sup>9</sup> Family For Every Child (2019). *The Paradox of Kinship Care: the most valuable but least resourced care option – a global study*. Available at: <https://familyforeverychild.org/wp-content/uploads/2020/03/The-Paradox-of-Kinship-Care-text-full-English-report-04-03.pdf>. The full report is also available in Spanish. An executive summary is available in Arabic, French, Greek and Portuguese.

<sup>10</sup> *Ibid*, p. 5.

<sup>11</sup> *Ibid*.

<sup>12</sup> *Ibid*.

<sup>13</sup> For more information on *kafala*, see also forthcoming ISS/IRC comparative research publication on this topic.



## 2. Statistics

In terms of collecting statistics on intrafamily adoptions (both relative and step-parent adoptions), it is clear that there is room for improvement. As the practice continues to present a number of challenges ([see section III.1](#)), it is important that all countries undertaking ICAs examine more closely any trends in order to be able to appropriately respond. Therefore, the ISS/IRC encourages all countries that currently do not collect any statistics to have regard to this question and follow France and Germany, who have more robust systems in place. Given broadly the dearth of detailed statistics on the topic, it is difficult to draw any precise conclusions regarding trends and proportions on intrafamily adoptions. Based on the information collected, a few observations however, can be made.

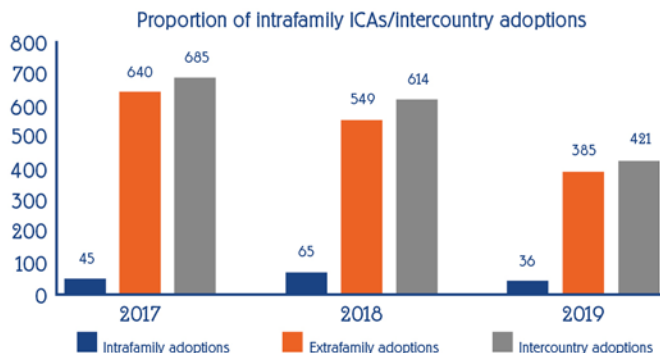
### ***Observation 1: The numbers and proportion of intrafamily adoptions in relation to overall ICAs vary between countries***

It seems that whilst intercountry adoption numbers are generally declining in most countries, intrafamily ICAs appear to be proportionately increasing in a few receiving States.

For example, in France, the proportion of intrafamily ICAs, including step-parent adoptions rose from 6.6% of ICAs in 2017 to 10.59% in 2018, with slightly less at 8.6% in 2019 as shown in the table on the left.

Likewise, Germany carried out 685 intercountry adoptions between 2015 and 2018, including 90 intrafamily adoptions. Specifically, intrafamily adoptions represented 11.79% of ICAs in 2015 and reached almost

## 12 Intrafamily Intercountry Adoptions



15% in 2018.<sup>14</sup> Whilst the Swiss Canton of Bern could not provide any statistics, the Central Adoption Authority was of the view that intrafamily adoptions were on the increase.

**In contrast, despite intrafamily ICAs representing a significant number in France and Germany, a number of receiving States appear to process far less numbers for various reasons.**

- Receiving States that only receive a few requests

Armenia confirmed that the numbers were insignificant and only concerned step-parent adoptions.<sup>15</sup> Likewise, Cyprus confirmed that they rarely process such cases. Similarly, in Malta, the Adoption Accredited Body (AAB) Foundation for Social Welfare Services notes that they receive few requests. For example, in 2019, they received four requests to adopt nieces and nephews, with only two requests still in the pipeline for Thailand and Russia. Regarding Spain, three of their autonomous communities detected similar trends as above. Castilla y Leon declares that it has never been

faced with such a case and Andalusia identified only two cases concerning the adoption of nephews under the age of five in Colombia. The autonomous community of Madrid specifically noted that this type of adoption represents an insignificant part of adoptions, as while more than 10,000 intercountry adoptions have been carried out since the early 1990s, only five cases concerned intrafamily adoptions. In all cases, it was either the adoption of nieces/nephews or the adoption of small children by a person living in Madrid with origins in Latin America.

In Switzerland, it seems that there are less intrafamily cases being processed in some Cantons. For example, the Canton of Vaud notes that they receive two or three cases per year. The Cantonal CA explained this low number being due to the fact that they no longer intervene in cases where the child still has his or her father or mother, unless the parent is unable to take care of the child, the child no longer lives with the biological parents, and the latter have signed a consent to adoption.

<sup>14</sup> According to statistics supplied by the German Federal Central Authority: 2015: 212 intercountry adoptions, 25 (11.79%) of which were intrafamily adoptions; 2016: 207 intercountry adoptions, 26 (12.56%) of which were intrafamily adoptions; 2017: 158 intercountry adoptions, 23 (14.56%) of which were intrafamily adoptions; 2018: 108 intercountry adoptions, 16 (14.81%) of which were intrafamily adoptions. It should be noted that this number excludes independent and private adoptions for which the federal central authority has no statistical data.

<sup>15</sup> In 2018, 27 children were adopted and none of these adoptions were of an intrafamily nature. In 2019, as of September 2019, there were 8 adoptions finalised, again none of which were intrafamily. However, the Central Adoption Authority notes that at the same time, 3 stepparent adoptions dossiers were being explored.

In the Jura Canton, they processed three intrafamily adoptions out of 20 intercountry adoptions.

- Receiving States that receive a number of requests but proceed with only a few

In Belgium, both the French-speaking and the Flemish community receive a significant number of intrafamily adoption requests but according to the specific procedure in place (*see section III.2*), they only proceed with a few cases. Thus, in the Flemish community, from the period 2008 to 2018, there were 369 demands for an intrafamily adoption, of which only 21 files for children were approved (6%). Similarly, in the French-speaking community, over the same period, 306 intrafamily adoptions were registered for the preparation classes, but only 84 PAPs proceeded with the actual preparation stage and 69 PAPs sent a file to the CA. In the end, only 21 relative adoptions were finalised, in contrast with 1,300 ICAs overall (1.61%). The German-speaking community noted only two cases in the pipeline in 2019.<sup>16</sup>

Interestingly, Luxembourg noted that despite receiving numerous requests for intrafamily adoptions, the CA did not finalise any cases in recent years. This is explained by the fact that it is mainly a project concerning the adoption of a child from a distant family (fourth degree or more) or a child who is not in need of ICA. The CA observes that it is generally a child who is part of a sibling group and who lives with his or her immediate family and for whom an ICA would not be in his or her best interest. However, this procedure is sometimes circumvented and the CA is aware of two cases where the adopters have obtained an adoption order locally and then obtained exequatur in Luxembourg (*see section III.1.1.3*).

- A receiving State that does not allow intrafamily ICA

In the Netherlands, it is not possible to adopt a child through intrafamily ICA so there are no cases (*see section III.2.2.1*). There is, however, the possibility to regard the child as a related foster child and to apply for a residence permit to enable the child to live in the country.

**As with receiving States, intrafamily ICAs do not appear to present any consistent ICA trends for States of origin. There are some countries where the numbers are limited and for others intrafamily ICAs are more significant.** In Colombia, intrafamily adoption is more significant at the national level than at the international level, which is one indication that the principle of subsidiarity is being respected. Thus, excluding the spouse's child, between 2015 and 2019, Colombia carried out 258 domestic and 22 intrafamily ICAs, including 4 in 2015, 8 in 2016, 5 in 2017 and 2018 and none in 2019. Latvia also noted that intrafamily ICAs are very rare.

**On the other hand, in some States of origin, a much higher proportion of ICAs are intrafamily adoptions.** For example, in the Philippines, it seems that the proportion of intrafamily adoptions remains steady and is on a slight increase. Between January and June 2019, it had reached 16.50% of ICAs, against 6.1% in 2016. Likewise, in Togo between 2014 and 2018, 200 adoptions were carried out: 99 national adoptions and 101 ICAs. Among national adoptions, 87 were extra-family (87.9%) and 12 were intrafamily (12.1%). On the other hand, for ICAs, of the 101 adoptions 61 were non-relative (60.39%) and 40 intrafamily (39.61%). Moreover, in Vietnam, from 2011

<sup>16</sup> The German-speaking community noted only two cases in the pipeline in 2019 but it should be observed that it has a small territorial competence.



to June 2019, there were 905 cases of intrafamily ICA out of the 3,293 ICA cases, representing more than 27.4%.

### **Observation 2: Intrafamily ICAs are higher from some States of origin where adoption is permitted, especially in Africa and certain countries in Asia**

For European CAs, it seems that a significant number of children adopted in the intrafamily context come from Africa. For the French speaking countries, the language and historical ties arguably facilitate the immigration of families.

In Belgium's Flemish Community, intrafamily adoptions occurred from Colombia, Ghana, Guinea Bissau, Haiti, Liberia, Moldova, Nigeria, Philippines, Russia, Sierra Leone, and Thailand. In Belgium's Francophone Community, the great majority of intrafamily adoptions originate from Africa (83%), followed by Eastern Europe (11.5%). Requests for other regions such as South East Asia (4%) and Latin America (1%) are much rarer. One to three children were adopted from Benin, Cameroon, Republic of the Congo (Congo-Brazzaville), Gabon, Guinea, Ivory Coast, Togo and Senegal. In addition, more children were adopted from Burkina Faso (4), Burundi (6), Madagascar (5), the Democratic Republic of the Congo (DRC) (10) and Rwanda (7).

Similarly, in France, most requests come from Africa. The French CA notes that the top five States of origin for intrafamily adoptions are Ivory Coast (93 children adopted intrafamily in four years), Cameroon (50 children), Madagascar (17 children), Republic of the Congo (Congo-Brazzaville) and DRC (15 children) and Togo (13 children). This trend

is confirmed by the AAB Agence Française de l'Adoption (AFA), which indicates that since 2013, it has finalised 58 intrafamily adoptions, including 47 in Africa (i.e. 81%), mainly in Madagascar (50%) and Togo (25%). It should also be noted that according to the Central Authority's 2019 statistics, most of these procedures took place in countries that are not party to the 1993 Hague Convention (58.3%).

In Germany, the majority of the requests for intrafamily ICAs were also from Africa (Ghana, Nigeria, Togo) as well as Asia (India, Philippines, Thailand, Vietnam). One explanation may be the relatively significant number of immigrants, from India for example.<sup>17</sup> In Spain, it seems that the few intrafamily ICAs that occur are from Latin America (*see above*). In Sweden, children come mainly from Africa, Eastern Europe and Thailand.

### ***Observation 3: Requests for intrafamily ICA occur for States of origin where adoptions are generally not permitted***

Germany noted that they receive a number of inquiries about intrafamily ICA from relatives from Morocco, Pakistan, Tunisia, etc. With the exception of Tunisia, the legislative framework for such countries is based on Sharia law, which does not allow for adoption. It is therefore encouraging that Germany does not allow for intrafamily adoptions in these cases. Germany acknowledged that it may be more compatible to consider a cross-border kafala placement as covered by Article 3.e) of the 1996 Hague Convention (*see section II.1.3*).<sup>18</sup>

17 See: <https://www.statista.com/statistics/894238/immigrant-numbers-by-country-of-origin-germany/>.

18 See: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70>.

***Observation 4: The profile of children varies greatly for intrafamily ICA, although generally older, and especially for step-parent adoptions***

The profile of children adopted by relatives varies greatly between countries. France, Germany and Vietnam record that children adopted intrafamily are mostly older. In 2019, for example in France, 44.4% of children adopted through intrafamily adoption were between 6 and 10 years old, 30.6% were over 15 years old and 13.9% were between 11 and 14 years old. Specifically, for step-parent adoption in 2018, 39.5% of intrafamily adoptions were children from 6 to 10 years old, 25.6% children from 11 to 14 years old and 23.3% children over 15 years old.

In particular, Vietnam notes that intrafamily adoptions are often arranged for children who are living with their biological and/or extended families with limited resources. It seems in such cases that child protection issues are not the primary reason for separation, but rather material needs. Such separation due to solely “poverty” is contrary to international standards (see section challenges III.2.2.I).

***Observation 5: Intrafamily adoptions may include risky procedures***

France’s 2018 statistics show that the great majority of intrafamily adoptions are independent adoptions (78%), which is significantly higher than the proportion of independent adoptions in general (22.1%). The nature of such adoptions is of concern given that the Conclusions and Recommendations of the 2015 Special

Commission at paragraph 46 noted that “recalling 2010 SC C&R Nos 22 and 23 and the fact that private and independent adoptions are not compatible with the Convention, the SC encouraged Contracting States to move towards the elimination of private and independent adoptions.”<sup>19</sup> (see section III.1.1.4).

***Observation 6: Breakdowns***

Responses to the ISS/IRC questionnaire show that both States of origin and receiving States have recorded many cases of breakdown of intrafamily adoption. This is not surprising, given that these intrafamily adoptions may be carried out under conditions that increase risk factors (see observations 3-5 above). However, it would seem that few countries keep statistical data on these breakdowns. The ISS/IRC encourages countries to establish mechanisms for gathering data on breakdowns.<sup>20</sup> It also suggests that they disaggregate the data, firstly by distinguishing intrafamily adoptions from “traditional” adoptions, then among intrafamily adoptions using other relevant indicators such as age, degree of relationship with the PAPs, whether or not the child was previously living with the biological family, etc.

Many countries have reported instances where, following an adoption breakdown, the child returned to live in his or her State of origin. In particular, **one receiving State has observed that, among the adoption breakdowns of which it is aware, 64% of the children returned to their State of origin in the case of intrafamily adoption, whereas this figure was only 4% among breakdowns of non-intrafamily adoptions.** This country indicates that, in most cases,

<sup>19</sup> *Supra* 2.

<sup>20</sup> Jeannin, C. (Ed.) (2018). *Towards a greater capacity, Learning from intercountry adoption breakdowns*. ISS, Geneva, Switzerland, pp. 32-39. Available at: [https://www.iss-ssl.org/images/Publications\\_ISS/ENG/ICA\\_Breakdowns\\_ENG.pdf](https://www.iss-ssl.org/images/Publications_ISS/ENG/ICA_Breakdowns_ENG.pdf).

the children were returned – at the request of the adoptive parents – to their biological parents or the organisation previously taking care of them, without any consultation with local or central authorities in the State of origin or the receiving State.

Another receiving State reports that, where an intrafamily ICA breaks down, they seek wherever possible and safe to return the child to his or her biological family or State of origin, rather than placing him or her with strangers or in an institution in the receiving State. Where

the child had acquired nationality of this country or permission to stay, he or she retains this status in accordance with the principle of non-discrimination. **One State of origin indicates that in these situations, children usually return to the country either voluntarily or in collaboration with the CA.** This return has sometimes been temporary and sometimes permanent. Another State of origin has only recorded one case of breakdown of intrafamily ICA, and in this case the child returned to the State of origin with their family.





### 3. Cultural aspects

The practice of intrafamily adoption is heavily influenced by different perceptions of parentage and family. As demonstrated by a study in Quebec, the cultural perception of parentage in the West is that a child originates from a single parental couple and that the parents hold exclusive rights, so to speak. By contrast, in many other societies, parental duties can be shared among several people and not just the biological parents, without this prejudicing their status as parents.<sup>21</sup> Although intrafamily adoption enables the child to circulate within the family, it interferes with filiation and is thus sometimes difficult to reconcile with these cultural practices.

Moreover, in many cultures a child is not seen just as that of the couple, but of the line of descent and sometimes the wider community. This is particularly true in Africa, as demonstrated by the African proverb, “it takes a village to raise a child”.

As explained by Alphonsine Sawadogo, former director of the Burkina Faso Central Authority (*see box on p.18*),<sup>22</sup> in many African countries intrafamily adoption amounts to a socio-cultural obligation, based on the child belonging to the extended family and on family solidarity.

As emphasised by Valérie Delaunay, this system where the child belongs to the line of descent rather than the couple results in children circulating within the wider family.

21 Ouellette, F.-R., Collard, C., Lavallée, C., Cardarelli, A., Garnon, G., Méthot, C., Mossière, G., St-Pierre, J. (2005). *Les ajustements du droit aux nouvelles réalités de l'adoption internationale*. INRS Centre - Urbanisation Culture Société, Montréal, especially p. 62. Available at: <http://espace.inrs.ca/id/eprint/5010>.

22 Sawadogo, A. (2011). *Relative Adoption in the general African context, and in the Burkina Faso one in particular*. ISS/IRC Monthly Review No 3-4/2011, March-April 2011. At the time of writing this article, Mme Alphonsine Sawadogo was Director of Placements and Adoptions at the Burkina Faso Central Authority, a post she occupied from 2007 to 2013.



This traditional system of child circulation ranges from temporary foster care to a child being donated to a specific person, which amounts to “adoption”. However, even if the child is exclusively donated and there is full transfer of responsibilities, ties are not broken with the

biological parents. These practices occur in a context where social and family structure is designed to distribute responsibilities throughout the family network, with a view to creating or strengthening mutual support and kinship bonds.<sup>23</sup>

### Extracts from the article:

#### ***Relative adoption in the general African context, and in the Burkinabe one in particular***

In Africa in general, and in Burkina Faso in particular, the child is community inheritance. He or she first belongs to the wider family (extended family) before being his biological parent's child. This belonging covers a social reality, with causes and implies a duty of protection and education of the child, in terms of satisfaction of his basic needs (socialisation need, maintenance need, etc), which is incumbent on the members of the community. This rule is immutable and is perpetuated from one generation to the next one. Given the establishment of this rule, every member of the community, at his own level, plays the role of an educator (uncle, aunt, nephew, grandfather, grandmother, etc). Thus, it is not unusual to see relatives within the country (living in the cities or in other villages in the countryside) or living abroad (in Europe, for example), who take children from the wider family with them to secure their needs. This is even more noticeable when the relative has better living conditions. Everyone has the duty to help others. Everyone is brought up to know this culture, and nobody must ignore it, at the risk of being excluded or self-excluding oneself from the group, from the line of descent. (...) All these practices predispose people to practice relative adoption, given that in their subconscious, the legal notion of adoption as it is understood by receiving (European, North Americans, etc.) countries is merely secondary. The child's filiation is established in relation to his or her biological parents by law, but from a socio-cultural perspective, in practice, the child belongs to a third person (uncle, aunt, co-spouse, grandmother, etc.) (...) Intrafamily adoption is an obligation in our socio-cultural context, whether within or beyond society. Resorting to adoption, in its modern meaning, is merely making the approach (procedure) comply with the instruments that govern adoption in the receiving States.

This practice of donating a child is also found in Oceania, particularly in the Melanesian culture of the Pacific or in Polynesia. As explained by Dr Marie-Odile Pérouse de Montclos, “in Melanesian society, the individual is integrated within a social bond, and he or she exists only in relation to others,

*their clan, and their territory. This conception of the individual applies to the child from an early age (...) The aim of traditional adoption is to maintain a social, cultural and land tenure balance. It is also indicative of rich and complex relationship mechanisms. Traditional adoption is an integral part*

23 Delaunay, V. (2009). *Abandoning Children versus Child Care in Africa: A Central Issue for Child Protection*. Mondes en développement, 2009/2 (No 146), p. 33-46. Available at: [https://www.cairn-int.info/article-F\\_MED\\_146\\_0033--abandoning-children-versus-child-care.htm](https://www.cairn-int.info/article-F_MED_146_0033--abandoning-children-versus-child-care.htm).



*of the exchange between clans or within a clan, between close or distant neighbours. The reciprocity of these donations is important, not so much for the quality of the exchanges as for the relationships they generate. When the transfer occurs within a family, it is a double integration within the group and the family, and represents much more than fulfilling the desire for a child.”*<sup>24</sup> Child circulation is also a widespread traditional practice in Polynesia, where it is known by the term *faamu’ra*. This is derived from the word *fa’a* meaning “to do” and *amu* meaning “to feed”. This circulation of children, originally designed to ensure they were fed, usually and traditionally operates within the family or with close friends. This may be a temporary or permanent situation, but it never involves the child’s contacts with his or her biological family being broken.

Moreover, the study undertaken by researches from Quebec (Canada) cited above reveals that in many cultures, in the name of family solidarity, “it is part of the responsibility of parents to secure a child for a family member who is unable to have one”.<sup>25</sup> It emphasises that, in countries where blood ties are strong and adoption is often stigmatised or secretive, such as Haiti, India or the Philippines,<sup>26</sup> there are more cases of intrafamily adoption due to infertility.

For example, the researchers reference a study carried out in India in 2005 among 332 infertile women. This found that 10% of the women had adopted a child. In every case, this was an informal adoption within the family. These women felt that “otherwise adoption would be pointless and an unknown child could not elicit the same love or the same security in old age as a related child”.<sup>27</sup> Similarly, the researchers quote a statement by a Congolese adoptive parent that she would never have adopted an unknown child.<sup>28</sup> In these cases, the practice of intrafamily adoption is thus based on the donation, not the abandonment, of a child and therefore calls into question its status as a child protection measure.

In light of these major cultural differences, there is a need for dialogue, particularly during the next Special Commission, to enable countries to agree approaches which both respect the traditional values described above and conform with children’s rights embedded in international standards that most of them have ratified ([see experience in Togo, section III.2.2.1](#)).

<sup>24</sup> Pérouse de Montclos, O. (2019). *Child adoption in accordance with Kanak traditions*. ISS/IRC Monthly Review No 228, January 2019.

<sup>25</sup> *Supra* 21, in particular p. 58.

<sup>26</sup> *Ibid*, p. 63.

<sup>27</sup> *Ibid*, p. 58.

<sup>28</sup> *Ibid*, p. 63.



## II. Legal considerations

### 1. International framework

#### 1.1 Application of the UN CRC to intrafamily adoption

In light of all adoption principles in the UN CRC, Article 20(3) provides arguments in favour of intrafamily adoptions. When a child is deprived of his or her family, ***“such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or, if necessary, placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.”*** Intrafamily adoptions allow for continuity, with priority given to families with the same habitual residence as the child. However, given that adoptions may result in the unnecessary

severance of family ties, other care options such as kinship care or foster care, may more accurately preserve genealogical ties. Identifying the most suitable response will depend on the national laws of each country (see section II.2) as well as the individual needs of each child.

#### 1.2 Application of the 1993 Hague Convention to intrafamily ICAs

According to Article 2 of the 1993 Hague Convention, it applies to all adoptions which create a permanent parent-child relationship, where this involves the child being moved from his or her country of habitual residence to that of the PAPs. This scope does not exclude intrafamily adoptions.

The issue of applying the 1993 Hague Convention to intrafamily adoptions has been debated ever since it was drafted. For example, during the preliminary work, Germany suggested excluding from the scope of the Convention cases where the PAPs and the child are directly or collaterally related up to the fourth degree.<sup>29</sup> During the Diplomatic Session, the German representative stated that it was of major importance for their country that intrafamily adoptions be excluded, in order to apply easier rules for adoptions between relatives or within the same family. This proposal, which was also supported by Austria, was however opposed by Israel, Finland and the Philippines. These countries pointed out that adoptees needed protection in every case regardless of whether or not it was a family adoption, and there would be no guarantee that children in intrafamily adoptions would not be subject to the abuses that the Convention seeks to avoid.<sup>30</sup> During voting, the German proposal was rejected, meaning that **intrafamily adoption does fall within the scope of the 1993 Hague Convention.**

However, as emphasised in the *Explanatory Report*,<sup>31</sup> the Convention allows for special treatment of intrafamily adoptions in some respects:

- Article 26 (1) c) allows termination of the pre-existing legal relationship

between the child and his or her mother and father, but not with the other members of the family.

- Article 29 provides for exception from the prohibition of contact between the PAPs and the child's parents or any other person who has care of the child.

### Extracts from HCCH Guide to Good Practice No. 1

**Paragraph 148.** If the Central Authority is to exercise control of the adoption process (Articles 14-22), eliminate obstacles (Article 7(2) b)) and deter all practices contrary to the objects of the Convention (Article 8), it should have sufficient powers to achieve these aims. In some States the Central Authority may also need additional powers to deal with in-family adoptions (adoption of a child by a family member) under the Convention.

**Paragraph 312.** The procedural requirements for each intercountry adoption under the Convention are prescribed in Articles 14 to 22 of the Convention (Chapter IV). These rules are mandatory and must be followed for every adoption, including in-family adoptions.

29 See working document No 13 presented by Germany. Available in *Proceedings of the Seventeenth Session (1993), tome II, Adoption – co-operation*, p. 298. See: <https://assets.hcch.net/docs/d9254027-0a77-402a-a053-4dc765ccddb8.pdf>.

30 See Minutes No 2, Meeting of Tuesday 11 May 1993. Available in *Proceedings of the Seventeenth Session (1993), tome II, Adoption – co-operation*, p. 362. See: <https://assets.hcch.net/docs/d9254027-0a77-402a-a053-4dc765ccddb8.pdf>.

31 Parra-Aranguren, G. (1993). *Explanatory Report on the 1993 Hague Intercountry Adoption Convention*, paragraph 92.

## 22 Intrafamily Intercountry Adoptions

Moreover, the *HCCH Guide to Good Practice No 1: The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention* also provides several useful clarifications on application of the 1993 Hague Convention to intrafamily ICAs. Chapter 8.6.4 (paragraphs 511 to 518) specifically addresses the applicability of the 1993 Hague Convention to intrafamily ICAs,<sup>32</sup> and chapter 8.6.5 (paragraph 519) its applicability to adoption by a step-parent.<sup>33</sup> These chapters provide a useful reminder of the pivotal role of CAs, and the fact that all the Convention procedures apply, including the report on PAPs required by Article 15. Other references relevant to the topic of intrafamily adoptions can be found in paragraphs 52, 148, 312, 359, 487 and 489.

In addition to the HCCH Guide to Good Practice No. 1, the conclusions and recommendations from the Special Commissions have repeatedly emphasised the application of the 1993 Hague Convention (*see table on right*).

### Conclusions and recommendations of the Special Commission 2015

**Paragraph 32.** “In relation to in-family adoption, the SC:

- a. recalled that in-family adoptions **fall within the scope of the Convention**;
- b. recalled the **need to respect the safeguards** of the Convention, in particular to counsel and prepare the prospective adoptive parents;
- c. recognised that **the matching process might be adapted to the specific features** of in-family adoptions;
- d. recommended that the motivations of all parties should be examined to determine whether **the child is genuinely in need of adoption**;
- e. recognised that it is necessary to undertake an **individualised assessment of each child's situation** and it should not be automatically assumed that either an in-country or in-family placement is in a child's best interests.”

32 HCCH (2008). *The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention*. See in particular section 8.6.4: *Do intercountry adoptions, which are in-family (sometimes called relative adoptions) fall within the scope of the Convention?* pp. 113-115. Available at: <https://assets.hcch.net/docs/bb168262-1696-4e71-acf3-fbbd85504af6.pdf>.

33 *Ibid*, section 8.6.5: *Step-child adoptions*, p. 115.

In practice, the great majority of countries apply the 1993 Hague Convention to intrafamily ICAs, for example Australia,<sup>34</sup> French Community of Belgium,<sup>35</sup> Benin,<sup>36</sup> Cambodia,<sup>37</sup> Cap Vert,<sup>38</sup> China,<sup>39</sup> Colombia,<sup>40</sup> Republic of the Congo (Congo-Brazzaville),<sup>41</sup> Croatia,<sup>42</sup> Estonia,<sup>43</sup> Finland,<sup>44</sup> France,<sup>45</sup> Germany,<sup>46</sup> Greece,<sup>47</sup> Honduras,<sup>48</sup> Ireland,<sup>49</sup> Lithuania,<sup>50</sup> Luxembourg,<sup>51</sup> Malta,<sup>52</sup> Mexico,<sup>53</sup> New Zealand,<sup>54</sup> Norway,<sup>55</sup> Slovenia,<sup>56</sup> Spain,<sup>57</sup> Switzerland,<sup>58</sup> Togo,<sup>59</sup> USA<sup>60</sup> and Vietnam<sup>61</sup>. Yet it is of concern that some countries noted the 1993 Hague Convention does not apply, as counselling and preparation of the PAPs is not required, nor preparation of the child, in intrafamily ICAs.<sup>62</sup>

Although there is no doubt about the applicability of the *1993 Hague Convention* to this type of adoption, there is debate about the applicability of the **principle of subsidiarity**,<sup>63</sup> a key principle for ICA. This principle which is clearly recorded in international law – in particular in the *CRC* and the *1993 Hague Convention* – has a two-tier approach that can be summarised as follows:

- national adoption is subsidiary to keeping or reintegrating the child in his or her family of origin (first degree of subsidiarity);
- ICA is subsidiary to national adoption (second degree of subsidiarity).

34 Australia HCCH country profile 2019 at question 24: <https://assets.hcch.net/docs/49f2d977-03fd-47bf-8bb7-cd35e534ba4b.pdf>.

35 See Belgian Civil Code and Legal Code.

36 Benin HCCH country profile 2018 at question 29: <https://assets.hcch.net/docs/3d854a5b-b5e9-4a0f-9cad-bb35f2e9518a.pdf>.

37 Cambodia HCCH country profile 2018 at question 29: <https://assets.hcch.net/docs/e6baabc2-64af-4bc5-84b7-7d04ad93895.pdf>.

38 Cape Verde HCCH country profile 2019 at question 29: <https://assets.hcch.net/docs/93a9fcd2-dba1-447b-af81-a99449e5349c.pdf>.

39 China HCCH country profile 2019 at question 29: <https://assets.hcch.net/docs/7c03cfbb-288f-4260-a58f-397585e12728.pdf>.

40 Colombia HCCH country profile 2020 at question 29: <https://assets.hcch.net/docs/a6d63493-6ac0-421c-b371-93d5d6eada6a.pdf>.

41 Republic of the Congo HCCH country profile 2019 at question 29: <https://assets.hcch.net/docs/9f4db4b1-a4d1-47f9-a042-98cd60b776d8.pdf>.

42 Croatia HCCH country profile 2018 at question 29: <https://assets.hcch.net/docs/5f9e6104-4a72-4147-bf79-bb0f0f0ce60.pdf>.

43 Estonia HCCH country profile 2019 at question 29: <https://assets.hcch.net/docs/83a0210d-7f6f-4730-8a72-8aca761fa47.pdf>.

44 Finland HCCH country profile 2019 at question 24: <https://assets.hcch.net/docs/09d88396-4459-4379-a65f-4d1f86124585.pdf>.

45 France HCCH country profile 2018 at question 24: <https://assets.hcch.net/docs/d12896ff-2831-4ff0-8a35-0217e6299c82.pdf>.

46 Germany HCCH country profile 2018 at question 24: <https://assets.hcch.net/docs/c11f07f-bd60-4a7f-9be2-0880226f5f53.pdf>.

47 Greece HCCH country profile 2019 at question 24: <https://assets.hcch.net/docs/bc05860d-8964-416c-b31d-47363c884123.pdf>.

48 Honduras HCCH country profile 2019 at question 29: <https://assets.hcch.net/docs/abadd79d-52ee-42af-8ee8-2dc689a12f3e.pdf>.

49 Ireland HCCH country profile 2019 at question 24: <https://assets.hcch.net/docs/f8cf0d71-4cef-4958-8593-5c7f1249b8e9.pdf>.

50 Lithuania HCCH country profile 2019 at question 29: <https://assets.hcch.net/docs/2363fe55-f1ed-4462-b382-57d17638a539.pdf>.

51 Luxembourg HCCH country profile 2019: <https://assets.hcch.net/docs/fcc7776f-bf2a-49e0-81f3-c9116aac3257.pdf>.

52 Malta HCCH country profile 2018 at question 24: <https://assets.hcch.net/docs/79adc9a0-f297-4450-8764-cb00f0cf0c13.pdf>.

53 Mexico HCCH country profile 2018 at question 29: <https://assets.hcch.net/docs/1aaee827-1b7c-4d72-922d-e82fe2b7372a.pdf>.

54 New Zealand HCCH country profile 2019 at question 24: <https://assets.hcch.net/docs/27ebd10b-53d2-4a97-f8a5-d5d4ca5f820.pdf>.

55 Norway HCCH country profile 2019 at question 24: <https://assets.hcch.net/docs/05230c10-c2b4-44a0-960f-0ee58fd0a9d.pdf>.

56 Slovenia HCCH country profile 2019 at question 24: <https://assets.hcch.net/docs/932a854c-5be5-4652-87b1-fe8f0140db7f.pdf>.

57 See Ley 54/2007 de adopción internacional and Decreto 282/2002 de 12 de noviembre de Acogimiento y Adopción.

58 Switzerland HCCH country profile 2018 at question 24: <https://assets.hcch.net/docs/eba55fac-e01d-4d25-850d-34f29cf6f7d.pdf>.

59 Togo HCCH country profile 2019: <https://assets.hcch.net/docs/8a700f64-b730-43de-9d07-532781f13ff.pdf>.

60 USA HCCH Country profile 2018 at question 29: <https://assets.hcch.net/docs/9083739a-34c2-499c-923c-be4099c313e8.pdf>.

61 Vietnam HCCH Country profile 2018 at question 29: <https://assets.hcch.net/docs/d063c818-e048-4d33-95e4-109fe9339868.pdf>.

62 Mauritius HCCH country profile 2019: <https://assets.hcch.net/docs/b45b60a5-f112-491c-a3f3-929b082a38af.pdf>.

63 *Supra* 1.



### 1.2.1 Current debate No 1: *Does the principle of subsidiarity always mean considering national adoption before intrafamily ICA?*

This question was addressed by the HCCH in the *HCCH Guide to Good Practice No 1*, in particular in paragraphs 516 to 518<sup>64</sup> (see box on p.21). This guide clearly indicates that the overarching principle of the *1993 Hague Convention* is the principle of the best interests of the child, not the principle of subsidiarity (paragraph 516). Therefore, adoption by a family member abroad is preferable to national adoption if and only if it is in the best interests of the child, which must be determined on a case-by-case basis (paragraph 517).

The *discussions at one of the concurrent sessions of the Special Commission of 2015* also addressed the following questions:

- How should the principle of subsidiarity be applied in cases of intrafamily adoption?
- Is a national adoption, allowing the child to remain in the State of origin, generally preferable to placing the child abroad with relatives?

#### Extracts from HCCH Guide to Good Practice No. 1

**Paragraph 518.** Other factors may be relevant. For example, the child may not know the relatives; the child may be the subject of guardianship orders and adoption or intercountry adoption is not necessary; some cases could be dealt with under the 1996 Child Protection Convention and transferred abroad. The formal adoption of an older child may not be necessary and permanent care arrangements would be satisfactory; a change of country may be more difficult for an older child to adjust to; sometimes there is pressure on families in the State of origin by the family in the receiving State to allow the intercountry adoption.

On this occasion, the countries concluded that no general response could be given, and that the situation would have to be assessed on a case-by-case basis, as underlined by the Conclusions and Recommendations of the *Special Commission of 2015*<sup>65</sup> (see box on p.22).

This question is likely to be debated again at the Special Commission of 2021, as it appears in *point 40 of the Questionnaire on the practical operation of the 1993 Hague Convention (Preliminary Document No 3 of February 2020)*.

<sup>64</sup> *Supra* 32. p.114.

<sup>65</sup> *Supra* 2.

### 1.2.2 Current debate No 2: *Should the placement of a child with extended family abroad always take the form of intercountry adoption?*

Another frequent question is whether intrafamily ICA is the most appropriate solution for a child being cared for by extended family abroad, or whether other types of placement could also be considered. In the spirit of the CRC and the Guidelines, if there is the possibility of safely keeping or (re)integrating the child in his or her biological family, no adoption of any form should be considered. In addition, adoption, especially in its full form, has a sometimes dramatic impact on the filiation of the child (*see section II.2.3*), which calls into question whether it is in his or her interests.

For this reason, **there are many situations in which cross-border placement of the child with extended family, through a protection measure that does not break bonds, would be preferable to intrafamily ICA.** In particular, this could apply to children whose biological parents are still living, older children, or situations in which only full (not simple) adoption could be considered, or that involve a country that does not recognise any adoption system. In addition, the HCCH reiterates, in paragraph 518 of the HCCH Guide to Good Practice No 1 (*see box on p.24*), that some cases should be dealt with under the 1996 Hague Convention rather than through an intrafamily ICA procedure.

### 1.3 Use of the 1996 Hague Convention: a sometimes more appropriate solution

The 1996 Hague Convention provides rules on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children. It covers a wide range of civil child protection measures, takes account of the wide variety of existing legal institutions and protection systems, and addresses cross-border child protection. In particular, it covers:<sup>66</sup>

- delegation of parental responsibility,
- guardianship, curatorship and analogous institutions,
- the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child,
- the placement of the child in a foster family or in institutional care, or the provision of care by *kafala* or an analogous institution.

### 1996 Hague Convention

**Art. 33. 1.** If an authority having jurisdiction under Articles 5 to 10 contemplates the placement of the child in a foster family or institutional care, or the provision of care by kafala or an analogous institution, and if such placement or such provision of care is to take place in another Contracting State, it shall first consult with the Central Authority or other competent authority of the latter State. To that effect it shall transmit a report on the child together with the reasons for the proposed placement or provision of care.

2. The decision on the placement or provision of care may be made in the requesting State only if the Central Authority or other competent authority of the requested State has consented to the placement or provision of care, taking into account the child's best interests.

Notably, Article 33 (see box above), the operation of which is explained in the *Practical Handbook on the Operation of the 1996 Hague Child Protection Convention*,<sup>67</sup> addresses the situation where a child is to be placed in another country. In these circumstances, there must be consultation between the Central Authorities, taking the child's best interests into account in assessing the placement.<sup>68</sup> If this procedure is not followed, the measure may be refused recognition.<sup>69</sup>

This mechanism, based on close cooperation between the Authorities and on a report enabling assessment of the child's needs, draws on the provisions of the 1993 Hague Convention.<sup>70</sup>

Although there is a debate about whether Article 33 applies to placement within the extended family, the ISS/IRC considers it should apply to enable the Authorities to cooperate in ensuring the placement is in the child's best interests.<sup>71</sup>

**The ISS/IRC encourages countries that have not already done so to ratify or accede to the 1996 Hague Convention, the implementation of which will offer alternatives to the use of intrafamily adoption in situations where adoption would not be appropriate, while maintaining close international cooperation.**

## 1.4 Guidelines for the Alternative Care of Children (Guidelines)

The Guidelines provide a guiding framework for the placement of a child with extended family. Whilst the Guidelines do not specifically apply to an adoption itself (see paragraph 30 (b)), they do apply to the pre-adoption process (e.g. prevention supporting parents in their caregiving role, national options) and specifically paragraphs 137 to 139 apply to international placements.

In this context, the *cross-border services of the International Social Service (ISS)*, which is represented in 120 countries, can play an important role through activities such as the following:

<sup>67</sup> HCCH (2014). *Practical Handbook on the Operation of the 1996 Hague Child Protection Convention*, paragraph 11.16, p. 121. Available at: <https://assets.hcch.net/docs/eca03d40-29c6-4cc4-ae52-edad337b6b86.pdf>. See in particular paragraphs 11.13 to 11.17 (pp. 120-121) and 13.31 to 13.42 (pp. 150-153).

<sup>68</sup> *Ibid*, paragraph 11.16, p. 121.

<sup>69</sup> *Ibid*, paragraph 11.17, p. 121.

<sup>70</sup> *Ibid*, paragraph 13.40, p. 153.

<sup>71</sup> *Ibid*, paragraph 13.37-38, p. 152.

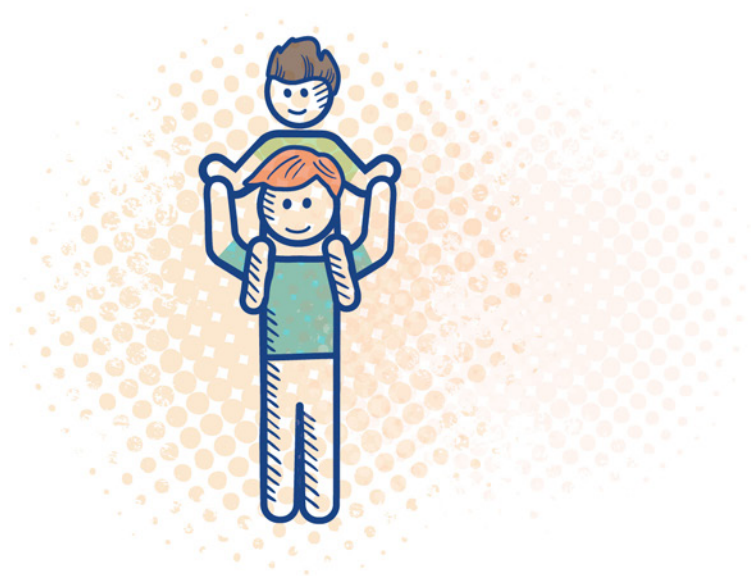
- Helping with or carrying out an assessment of the family members abroad and/or the child's situation, in conjunction with the Authorities in countries party to the 1996 Hague Convention, or with competent authorities in non-Convention countries.
- Supporting and participating in the development of a placement and transition plan.
- Organising visits, support and reports after placement.

### UN Guidelines

**Paragraph 137.** The present Guidelines should apply to all public and private entities and all persons involved in arrangements for a child to be sent for care to a country other than his/her country of habitual residence, whether for medical treatment, temporary hosting, respite care or any other reason.

**Paragraph 138.** States concerned should ensure that a designated body has responsibility for determining specific standards to be met regarding, in particular, the criteria for selecting carers in the host country and the quality of care and follow-up, as well as for supervising and monitoring the operation of such schemes.

**Paragraph 139.** To ensure appropriate international cooperation and child protection in such situations, States are encouraged to ratify or accede to the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, of 19 October 1996.



## 2. National frameworks

In some countries, a number of special provisions apply to intrafamily ICA. A few are highlighted below such as countries that only permit certain cases (*see section II.2.1.1*), where there are adapted legal provisions/procedures (*see section II.2.1.2*), requirements as to degree of blood relations (*see section II.2.2*) and legal nature of the adoption (*see section II.2.3*).

### 2.1 Specific legal provisions

#### 2.1.1 Certain intrafamily adoptions are not permitted

In Croatia,<sup>72</sup> the Croatian Family Act notes that a blood relative in the direct line, brother or sister, cannot be an adoptive parent. Other relatives can adopt the

child. In Estonia,<sup>73</sup> relative adoption is only possible by married partner. In France, a precedent has been established in case law that adoption by grandparents is contrary to public policy, in that it “*would constitute an unacceptable disturbance to the family order for the parties involved, and would thus have more of a negative than a positive impact*” (*1st Civil Chamber, 6 March 2013, Appeal No 12-17183*). In Lithuania, brothers and sisters cannot adopt their brother or sister.<sup>74</sup> In Serbia, ancestor and descendant relatives may not be adopted which includes lateral kinship relations such as a brother and a sister, as well as a half-brother and a half-sister.<sup>75</sup> In Slovenia, adoption of a relative in a direct line shall not be permitted,

<sup>72</sup> *Supra* 42.

<sup>73</sup> *Supra* 43.

<sup>74</sup> *Supra* 50.

<sup>75</sup> Family Act, article 92.



nor may a brother or a sister be adopted.<sup>76</sup> Similarly, in Vietnam, PAPs are not allowed to adopt siblings and nor are grandparents allowed to adopt grandchildren.

### 2.1.2 Adapted legal provisions/procedures

In Armenia, the legislation welcomes intrafamily adoptions with separate regulations. Except in cases where the pregnancy was a secret, social workers are required to initially search for the child's relatives and see whether one of them wishes to care for or adopt the child. If the search is unsuccessful, the child will be registered as eligible for adoption. However, firstly to ensure that intrafamily adoption remains a child protection measure, and secondly to prevent private pre-arrangements, intrafamily ICA is not possible if both biological parents are still alive. The Armenia CA specifically notes that this provision "is aimed at keeping the child in the family so that the child is not adopted by relatives for other charitable reasons. Experience has shown that with the presence of both parents, the adoption in the case of a relative is of a fictitious nature." If the child has only one living parent, however, this parent may consent to his or her adoption by a pre-identified relative.<sup>77</sup>

In Belgium, specific procedure exists for intrafamily ICAs (*see section III.2*) and the prohibition of contact prior to matching is lifted.<sup>78</sup> Following Article 29 of the 1993

Hague Convention, Belgium has adapted its Civil Code. Prior contact is thus allowed and given the nature of intrafamily adoptions, Belgium accepts that such adoptions are by nature open adoptions, compliant with the principle of continuity (*see section II.1.1*).

In Haiti, the age limit of 50 for PAPs does not apply to intrafamily adoptions or adoptions by a step-parent.<sup>79</sup> Similarly, the age gap between the child and the PAPs, generally a minimum of 14 years, is reduced to 9 years for intrafamily adoptions.<sup>80</sup> In addition, PAPs can request exemption from the mandatory 15-day familiarisation period by proving frequent contact with the child.<sup>81</sup>

In Latvia, intrafamily ICAs are permitted from residential care institutions, foster care or guardianship. Whereas for non-relative adoptions, these can only occur from residential care institutions. In domestic adoption processes, a relative adopter should first become the child's guardian and then start the adoption process from guardianship.

In Madagascar, a reform in 2017 established a specific framework for intrafamily adoptions. This means that adoption, which is generally only permitted for children aged under 15 years,<sup>82</sup> is permitted up to 18 years in national or intrafamily ICA (by relatives or a partner).<sup>83</sup> Moreover, national intrafamily adoption is open to single people,<sup>84</sup> where it is usually reserved for heterosexual married couples.<sup>85</sup>

<sup>76</sup> *Supra* 56.

<sup>77</sup> Information provided by the Armenian Central Authority in response to the ISS/IRC questionnaire. See also Article 112 of the Family Code and Article 39 of the adoption law.

<sup>78</sup> Belgium HCCH country profile 2020 at question 24: <https://assets.hcch.net/docs/677011d2-d758-45ee-8b82-0c14575ec210.pdf>.

<sup>79</sup> Adoption reform law of 15 November 2013, Articles 10 and 11.

<sup>80</sup> *Ibid*, Article 12.

<sup>81</sup> Bulletin IBESR/DG/08-14/#885, Article 8.

<sup>82</sup> Law No 2017-014 on adoption, Article 59.

<sup>83</sup> *Ibid*, Articles 81, 87 and 93.

<sup>84</sup> *Ibid*, Article 80.

<sup>85</sup> *Ibid*, Article 56.

The one-month familiarisation period does not apply to these adoptions either.<sup>86</sup> Finally, in the case of adoption by a step-parent, the process is not subject to the administrative stage by the CA: the partner submits a request directly to the competent legal authority. The step-parent is also exempt from obtaining authorisation, meeting the length of residence requirement, and any post-adoption follow-up.<sup>87</sup>

In Poland, intrafamily adoption, even when intercountry, is generally prioritised over other forms of adoption. According to this legislation, ICA is subsidiary to national adoption except in cases where there are family or affinity bonds between the child and the PAPs, or where the latter have already adopted a sibling of the child.<sup>88</sup>

In Vietnam, procedures are slightly adapted so that *“PAPs shall either personally submit dossiers to the Department of Adoption or authorise their relatives to do so. However, the CA of Vietnam recommends and encourages PAPs to submit dossiers through foreign licensed adoption organizations”*.<sup>89</sup>

## 2.2 Degree of blood relations/ties

Whilst some countries, such as Germany,<sup>90</sup> Honduras,<sup>91</sup> Ireland,<sup>92</sup> Malta<sup>93</sup> and Norway,<sup>94</sup> do not specify the degree of blood relations necessary for an adoption to be considered intrafamily, a number of countries do.

In Andorra, according to Article 19 of the

national law on adoption,<sup>95</sup> intrafamily ICAs are permitted if the child or adolescent is an orphan and a relative of one of the adopters from the third degree of consanguinity and affinity, and in the case of the child of the adopter's spouse.

The Belgian Civil Code and the decree relating to adoption specify the conditions which make it possible to consider the adoption as intrafamily. Intrafamily ICAs may be considered when it involves the adoption of a child related up to the fourth degree of relations to the adopter, or for a child who shares or has shared the adopter's daily life for a significant period of time. This period of time should not have been part of an adoption project.

In China, “relative adoption includes step-child adoption by step-parents and the adoption of a child belonging to a collateral relative by blood of the same generation and up to the third degree of kinship.”<sup>96</sup>

In Colombia,<sup>97</sup> Law 1098 of 2006, in its Article 66, creates the possibility of starting the adoption process by relatives up to the third degree of consanguinity and second degree of affinity, or for the child of a spouse. Two administrative processes are carried out by the CA, the first of which seeks to determine if the child can remain with his nuclear family or if the adoption is authorised or if consent is applied. Once this procedure is exhausted, the adoption process by the family begins, in the receiving State according to the requirements of the 1993

86 *Ibid*, Article 96.

87 *Ibid*, Articles 97 and 98.

88 Information provided by the Polish Central Authority in response to the ISS/IRC questionnaire. See also Articles 116 to 120 of the Family Code and Article 167 of the 2011 law.

89 *Supra* 61.

90 *Supra* 46.

91 *Supra* 48.

92 *Supra* 49.

93 *Supra* 52.

94 *Supra* 55.

95 Ley calificada de la adopción y de las otras formas de protección del menor desamparado de 21 de marzo de 1996 (BOPA, n°29 – año 12 – 24.04.1996).

96 *Supra* 39.

97 *Supra* 40.

Hague Convention and the regulations of the country of residence of the PAPs.

France authorises the adoption of a child in another country by a family member up to the sixth degree or in the event of the adoption of the spouse's child.<sup>98</sup> In Luxembourg, intrafamily adoptions are considered up to the third degree, and in Peru up to the fourth degree.

In the USA, the states define the term "relative" differently and may include relatives by blood, marriage, or adoption ranging from the first to the fifth degree.<sup>99</sup>

### 2.3 Legal nature of the adoption

The ISS/IRC's Factsheet 49 on relative adoptions notes that *"in order to respond best to the interests of the child, it is also appropriate to inquire into the simple or full nature of these relative adoptions. Whereas relative adoption encourages a certain degree of continuity in the child's life, this continuity is at risk of being weakened if these adoptions are carried out as full adoptions. Indeed, a considerable number of biological family bonds find themselves undone and rebuilt at the legal level: the grandmother, the aunt, the mother's cousin or the child's step-sister may become his mother. If such is the case, how can other members of the family be included in this scrambled genealogy?"*

*Thus, relative adoption raises several issues, which are of a psychological and legal nature, and which remain unsolved. Simple adoption, or even open adoption, may constitute initial responses, even though, to date, they are only applied by a very limited number of countries."*<sup>100</sup>

In terms of States of origin, some States allow for simple and full adoption. For example, the AFA notes that Burkina Faso and Togo allow both types of ICAs, which includes intrafamily adoption. The simple or full nature of the adoption depends on the consent given by the biological parents or by the family council. Conversely, Madagascar (articles 57 and 89 of the Law on Adoption of 26 July 2017) and Haiti (Article 22 of the Law reforming Adoption of 15 November 2013) whilst allowing for both simple and full, only allow full adoption for ICA even in the case of intrafamily adoptions.

In terms of receiving States, Belgium's Francophone Community notes that it is the CA that will make a decision about whether the adoption is simple or full, depending on each case and the laws of the State of origin. It will be observed, however, as shown in the comparison table produced by the ISS/IRC, that most receiving States only recognise full adoption, which restricts the opportunities for the use of simple adoption.<sup>101</sup>

The Canton of Bern (Switzerland) notes that for intrafamily ICA, there is an obligation that the adoption is open, given the importance of the child knowing his or her origins, including biological family. As intrafamily adoptions are particularly susceptible to family secrets, the Cantonal CA places extra efforts on understanding the motivations of the PAPs and their willingness to be transparent about the child's origins.

98 Supra 45. See also article 348-5 of the Civil Code.

99 Supra 60.

100 See ISS/IRC training fact sheet No 49, *Relative adoption*. Available at: [https://www.iss-ssi.org/Images/thematic-facts-sheet/eng/49\\_Adoption%20intrafamiliale%20eng.pdf](https://www.iss-ssi.org/Images/thematic-facts-sheet/eng/49_Adoption%20intrafamiliale%20eng.pdf).

101 ISS/IRC (2020). *Comparison table on simple and full adoption*. Available on request from the ISS/IRC: [irc-clr@iss-ssi.org](mailto:irc-clr@iss-ssi.org).



### 3. Cross section between adoption and immigration laws

#### 3.1 Use of adoption authorities and/or procedures to process family reunification cases

A number of CAs of receiving States noted their concerns that intrafamily ICAs could be used to bypass immigration rules and facilitate family reunification.

Regarding step-parent adoption: In France, there is a possibility of family reunification for one's spouse or one's child. Three cumulative conditions must be met in order to benefit from family reunification:<sup>102</sup> 1) have resided in French territory for at least 18 months with a valid residence permit; 2) proof of stable and sufficient resources to ensure the care of his or her child in good conditions; and 3) have accommodation considered normal

for a comparable family living in the same geographic region. The first condition is often the longest to obtain. Some spouses start an adoption procedure for their partner's child, thinking that it will be faster.

Regarding other intrafamily adoptions: a number of States identified situations where the biological parents are still living, where the aunts or uncles, would like to "adopt" their niece or nephew or grandparents would like to "adopt" a grandchild, to give them the opportunity to live in the receiving State, which is materially more prosperous. Specifically, Peru observes that adoption for such reasons "denaturalises" the institution of adoption. Interestingly, Belgium's Flemish Community observed that families had often experienced several failed attempts for family reunion and

102 Article L. 411 of the Code for Entry and Residence of Foreigners in France and the Right of Asylum (CESEDA).



other visas, prior to submitting an adoption application. France's CA cited examples where the purpose of the child's stay is to benefit from educational opportunities that are not available in the State of origin. Moreover, New Zealand's CA has mentioned that some ICA cases are proposed as an alternative to immigration options that are available to families, e.g. student visas. Due to the costs involved for such visas, relatives frequently opt for adoption rather than pay fees. Both Belgium's Flemish CA and the Swiss Canton of Bern note that such situations are easy to detect during interviews with PAPs about their motivations for adoptions. The Swiss Canton of Geneva notes that motivations for intrafamily adoptions have included "the parents' precarious conditions, material impossibility of taking care of the child, parent's failing state of health, child's state of health, insecurity, lack of opportunity for the future, education, professional." The Swiss Canton of Vaud stresses that this problem is less problematic now that adoption is limited to cases of true orphans or when a child is abandoned.

A number of countries noted that if the conditions for family reunification were less stringent in certain situations, this would avoid unnecessary severance of family ties and unjustifiable recourse to adoption. Moreover, as solutions, Belgium's Francophone Community noted that increased resort to guardianship might be helpful. Both France and Germany suggested that, perhaps, a delegation of parental authority might be more appropriate than an ICA. ISS/IRC recalls the possibility of processing such cases under the 1996 Hague Convention, especially through Article 33. Nonetheless, it will require a specific visa or permit for the child to enter the receiving State (*see sections II.1.3 and III.2.2.1*).

### 3.2 Use of adoption authorities to approve/process existing family arrangements

In some cases, CAs are asked to issue adoption decisions in cases where the child was already living with the family for an extended period of time. It is important in such cases that the CAs are able to confirm that all international standards have been complied with and that the child can access his or her origins. Such cases should not be used to confirm a *fait accompli* without the necessary safeguards in place. For example, the Cantonal CAs of Geneva and Vaud (Switzerland) mention there have been cases where couples benefit from a full adoption pronounced in favour of family members such as nephews/nieces in their States of origin, and that they return to Switzerland with the child within the framework of a family reunification, without the Cantonal CA being involved. They are notified by the Population Service of the child's entry and ask to be appointed curator, provided that the couple has not already lived for a year with the child. They have had very few situations of this kind and it has generally been countries that are not party to the 1993 Hague Convention.

This authority noted that they often see cases where the child has lived in Switzerland for several years (clandestinely or through foster care) with his or her aunt or uncle, the latter generally being guardians. In view of the length of the child's stay in Switzerland, provided that all the conditions for adoption are met and that the assessment has led to positive conclusions, the CA will issue an adoption authorisation.

Whilst the Cantonal CA generally informs the authorities of the child's State of origin that the adoption is underway in Switzerland, it is important that the two countries cooperate to confirm adoptability and other conditions.



### 3.3 Use of immigration authorities to process intrafamily adoptions

In contrast to the countries that allow for intrafamily adoptions through their designated CAs, immigration authorities may take on this role in other contexts. It is arguable that the safeguards of the 1993 Hague Convention may not necessarily be complied with by the immigration authorities, which may not be familiar with its application. For example, in the Netherlands, requests for permission to bring a child of a relative to the country with a view to adoption are dealt with by the Netherlands' Immigration and Naturalisation Service (the Service) on the basis of its Immigration Law. Whilst the Service is arguably competent to deal with administrative issues such as visas, all questions relating to ICAs should be dealt with by the CA. Whilst it is promising that a specific entry visa exists for cross-border child protection ([see section III.2.2.1](#)), it would be of concern if this visa were used for processing ICAs and the 1993 Hague Adoption safeguards were not checked and complied with.

It seems that the immigration authorities may likewise be asked to process certain intrafamily adoptions in New Zealand. New Zealand citizens and residents are able to adopt from other countries that have adoption legislation compatible with the criteria in Section 17 of the Adoption Act 1955 (which is linked to New Zealand citizenship legislation). These adoptions are usually of relatives. The CA is not involved in any way in these adoptions and data about applications for citizenship or residence immigration status for children adopted overseas are kept by the New Zealand Department of Internal Affairs and Department of Immigration, respectively.





### III. Practical considerations

In practice, whilst this type of adoption provides benefits to some children, it also exposes States to specific challenges and problems. Having studied these issues,

the ISS/IRC would like to offer some thoughts on how to address them, while highlighting promising practices developed by certain States.

## 1. Specific challenges and problems

The problems mentioned by the CAs of receiving States and States of origin demonstrate the need to adopt both international and national measures to ensure that intrafamily adoptions are conducted in accordance with ethical rules,<sup>103</sup> and international standards.

### 1.1 Non-application or misapplication of the 1993 Hague Convention

#### 1.1.1 Intrafamily adoptions involving a country not party to the 1993 Hague Convention

The first challenge occurs solely in the case of adoptions involving a country not party to the *1993 Hague Convention*. As specified at the *Special Commission of 2000*, Convention countries should always apply the standards and safeguards of the 1993 Hague Convention, including when dealing

<sup>103</sup> See *ISS/IRC Manifesto for Ethical Intercountry Adoption*. Available at: [https://www.iss-ssi.org/images/Publications\\_ISS/ENG/ISS\\_Manifesto\\_ANG.pdf](https://www.iss-ssi.org/images/Publications_ISS/ENG/ISS_Manifesto_ANG.pdf).

with non-Convention countries. Thus, the State of origin should transmit a report on the child to the receiving State, and the receiving State

should transmit a report on the PAPs to the State of origin, before the adoption takes place. However, as highlighted by one CA, some non-Convention States of origin do not apply this procedure, and ask PAPs to submit their request direct to the court. Moreover, as reported by Germany, Belgium, Sweden and Vietnam, where the other country is not party to the Convention, it is often difficult for the CA of the State of origin or the receiving State to establish communication and to find a suitable person to carry out the assessment, especially if the child lives outside the capital city.

### **1.1.2 Intrafamily adoptions involving a country party to the 1993 Hague Convention but excluding intrafamily adoptions from its scope**

Although the *1993 Hague Convention* applies to intrafamily ICAs,<sup>104</sup> some States continue to treat these as national adoptions. For example, one of the State surveyed indicates that the CA is not involved at all in intrafamily adoption, which falls solely within the jurisdiction of the legal authority. As a result, there is no requirement either for the child to be under the authority of the State, or for a legal declaration on lack of protection and on adoptability.

### **1.1.3 Circumvention of the 1993 Hague Convention by some actors**

Meanwhile, many States report cases where, even though the CA expects the *1993 Hague Convention* to apply to an adoption, the

courts either in the State of origin or the receiving State conduct the adoption outside the framework of the Convention, and that those in the other country grant enforcement of these decisions under their private international law (*see section 1.2*).

The CAs then find themselves faced with a *fait accompli* that obstructs proper application of the Convention.

### **1.1.4 Risks of private and independent adoptions**

Because it is conducted within the family, intrafamily adoption may become private adoption if there is no oversight by the child protection or adoption authorities. There are cases where arrangements have been made before the birth of a child, between the biological parents and a sibling who cannot have children, and also cases where people pretend to be family members to circumvent a ban on identifying the child. Such schemes are obviously incompatible with Article 4 of the *1993 Hague Convention*.

## **1.2 Understanding the adoption plan**

Intrafamily adoptions are difficult to fathom, as they fall at the intersection between various practices: between immigration and adoption (*see section 11.3*), between informal circulation of children within the extended family and adoption (*see section 1.3*), between humanitarian gesture and desire for parenthood.<sup>105</sup>

In addition, many of the motivations of PAPs, as reported in the responses to the ISS/IRC questionnaire, are not considered legitimate motivations for adoption, and thus present challenges for the countries surveyed.

104 *Supra* 2 and *Supra* 32, p. 115.

105 *Supra* 21.

### Snapshot 1

One State of origin reports a case of intrafamily ICA where the adoptive parents already had biological children. An adolescent crisis by the adoptee led to serious disagreements between the different children. The adoptive parents sent the adoptee back to his State of origin, where he now lives with his biological mother. The CA of the State of origin admits that it did not sufficiently apply the principle of subsidiarity at the time. Since then, it closely examines such cases. It has already refused some intrafamily adoption plans which were not in the interests of the child, and which carried a high risk of failure.

**Educational opportunity:** This often applies to children aged 15 to 17 years, who are the subject of an intrafamily adoption plan so they can continue their studies in the receiving State.

**Economic opportunity:** It is often a case of seeking a better future for children experiencing poor standards of living with their biological family.

**Response to infertility of PAPs:** some PAPs experience fertility problems and thus turn to intrafamily adoption, either straight away or after having initially considered traditional adoption. As mentioned above, child donation is a widespread practice in many cultures (*see section 1.3*). The Swiss canton of Bern is seeing an increase in requests of this type, although this is not permitted under its legislation.

These schemes, with a variety of motivations, usually reflect a wish – or even a moral obligation – to help one's family, and are not in response to a need for protection by a vulnerable child. They are thus based more on the wishes of adults than on the needs of children. These are worrying cases, which do not comply with international standards and are responsible for many adoption breakdowns. They may also be illicit and sometimes result in the sale of children, in the sense of Articles 3.5 and 2(a) of the Optional

Protocol to the CRC on the sale of children, child prostitution and child pornography, if there is payment or any other benefit (such as gifts) in exchange for transfer of the child.

### 1.3 Lack of preparation, support and follow-up for the adoption triangle

The importance of preparation, support and post-adoption follow-up, for both the child and the adoptive parents – and where appropriate the biological parents – is now generally recognised.<sup>106</sup> Nevertheless, there is still insufficient investment in these stages in the case of intrafamily adoption.

#### 1.3.1 Lack of preparation and support for the child

Many countries have observed that children who are subject to intrafamily ICA are often older children. Despite this, they generally receive little or no psychological, legal or cultural preparation for this adoption, which makes their social and educational integration into the receiving State difficult. According to one receiving State, the main reasons for this reported by adoptive parents are behavioural problems, which may have a variety of causes, including experiencing disappointment compared with their preconceived idea of life in the receiving State, or missing their biological

106 ISS/IRC (2019). *Comparative analysis on the assessment of prospective adoptive parents*. Available on request from the ISS/IRC: [irc-clr@iss-ssi.org](mailto:irc-clr@iss-ssi.org).

parents if they are still living and were raising the child before the adoption. Meanwhile, if the adoptive parents already have biological children, the adopted child sometimes has problems finding their place among the

siblings. Like the adoptee, the adoptive parents' biological children have generally not been involved in the plans or prepared for their cousin to become their brother.

### Snapshot 2

Sarah, aged 8, born to an unknown father and a mother who was declared unfit to look after her, came to the receiving State with a view to adoption by her uncle and aunt. From her arrival, Sarah was clearly missing her mother. She thought her mother was going to join her. When she understood that this would not be the case, she expressed a wish to go home. The authorities allowed the aunt to take Sarah back to her mother and the adoption never went ahead.

### 1.3.2 Lack of preparation and support for prospective adoptive parents and biological parents

One receiving State highlights that adoptive parents are generally not aware of the legal and symbolic significance of adoption. They insist on retaining their original degree of relationship, including being referred to as uncle and aunt, to preserve the place of the

biological parents. Although this approach may seem to avoid breaking filiation, it also leaves the child in a halfway situation which prevents him or her from psychologically accepting the new filiation that has been legally established. In the same way, the biological parents may wish to retain their role and thus prevent the adoptive parents from taking their new place.

### Snapshot 3

Vincent was living with his parents, who were considered unfit to look after him. A court in the State of origin approved his adoption by his uncle and aunt, who lived abroad and already had two adolescent children. The family members knew each other very well and assumed adjustment would be easy. However, the strict daily routine imposed by the adoptive parents was new and strange for Vincent, who had previously only been there for the holidays. The situation deteriorated and the adoptive parents became abusive. In the end, they sent Vincent back to his parents in the State of origin, without consulting the CAs.

### 1.3.3 Difficulty in ensuring post-adoption follow-up

It would appear sometimes more difficult to implement post-adoption follow-up in the case of intrafamily adoption. While one State of origin has reported more problems with the adjustment of children in intrafamily contexts, receiving States often find it

difficult to obtain follow-up reports on these children. This is because, as the child is a member of their family, the adoptive parents are even more reluctant to accept external support from professionals, and may see this follow-up as a violation of the right to privacy and family life.





## 2. Recommendations of the ISS/IRC: addressing the challenges by introducing adapted procedures

To address the challenges posed by intrafamily adoption, the ISS/IRC encourages countries to adopt public policies, guidelines or practices designed to comply with children's rights in this field.

In particular, these procedures should start with a preliminary stage of assessing the adoption plan (*see section III.2.1*), which would enable it to be redirected, if necessary, towards more appropriate protection. If the plan does appear beneficial for the child, there should then be a concrete analysis of the needs and best interests of the child, followed by a proper assessment of the capacity of the PAPs to meet these (*see section III.2.2.2*). During this process, high quality preparation and support, tailored to this specific type of adoption, should be offered to all parties in the adoption triangle (*see section III.2.3*). Recognition of these

adoptions should also be within a framework that promotes proper implementation of the 1993 Hague Convention (*see section III.2.3.3*). As the adoption process does not end with this recognition, it is also vital to give due prominence to post-adoption follow-up, and to promote cooperation in the event of breakdown (*see section III.2.4*).

While conducting its survey, the ISS/IRC was able to identify many promising practices that could provide inspiration for countries. These will be shared within the different sections to which they apply. However, as Belgium and Quebec (Canada) have adopted modified procedures covering many of the aspects discussed below, these promising practices are presented in this section.

### Introduction of an adapted procedure BELGIUM

Belgium has developed a particularly commendable adapted procedure, in various stages.

**Informational interview:** Before any intrafamily ICA plan, there is a preliminary interview between the PAPs and the Community CA (ACC), to assess the child's situation and the benefits of adoption. This also enables the PAPs to be better informed on the plan's chances of success.

**Tailored training:** As for any adoption, the PAPs then need to undertake mandatory training which takes the form of two information sessions focusing on aspects specific to intrafamily ICA.

**Assessment of suitability by family court:** This includes two interviews by social workers from the ACC, and three interviews with psychologists from the Adoption Accredited Body (AAB), appointed by the ACC. The welfare report partially focuses on the suitability to adopt that specific child.

**Oversight of the adoption by the ACC:** Once suitability has been declared, the procedures for intrafamily adoption cannot be supervised by an AAB; they **must be directly managed by the ACC in accordance with a support protocol**.

The applicants have a new interview with the ACC; they are given a questionnaire on adoption in the country and on the child's specific circumstances. Four to six months after receiving the questionnaire, the ACC returns a decision on continuation of the process. This includes verifying the **legal, psychological and social adoptability of the child, observance of his or her best interests and basic rights, and compliance with the principle of subsidiarity**. The ACC contacts the Federal Central Authority, the Central Authorities of the other receiving States, and the office for Foreign Affairs to assess the general adoption situation in the State of origin. It also contacts the competent authority in the other country, to obtain details on the adoptability of the child and the benefit to him or her of adoption; this is done through a standard questionnaire.

The purpose of these various contacts is to verify the child's true situation, without just going by what the PAPs say, and hence to confirm his or her need for adoption – or whether a different, local, form of care would be better for the child. Following this process, if the ACC decides to handle the request, an agreement is signed and the case is processed in the normal way. Post-adoption follow-up will be provided by the ACC social worker who carried out the welfare report.

### Introduction of an adapted procedure QUEBEC (CANADA)

In Quebec, intrafamily adoptions are always managed directly by the CA.<sup>107</sup> To ensure that the planned adoption is a child protection measure with his or her interests at heart, the CA has developed a multi-stage protocol.

**Preliminary review of the adoption plan:** The chief advisor in the country where the child is domiciled collects from the PAPs, with the help of a form, information on the child and the PAPs. This interaction is to establish the family context, understand the motivations behind the plan, and assess whether the legal requirements are met, both for Quebec and for the country where the child is domiciled. If this is not the case, the PAPs are informed at this stage.

**Analysis by the review committee:** The plan is presented to the **review committee**, which is comprised of all the advisors and the legal researcher or director of the CA. Using a **checklist** for situations that justify an adoption plan, and based on analysis of protection and risk factors, there is a collective decision on the eligibility of the plan. If it is considered ineligible, the PAPs are informed by letter.

**In 2019, only 8% of requests presented were judged eligible.** If the PAPs attempt to override this rejection by securing an approval in the State of origin, a record of this rejection and the reasons for it will show up during referral by the immigration authorities to the CA.

**Verification of documents:** If the plan is eligible, the PAPs must submit documents proving their identity, place of domicile and relationship to the child, and if applicable confirming the death or illness of a parent. If these documents confirm what the PAPs have stated, the plan will be accepted, a file will be opened, and the PAPs will receive a letter authorising them to apply to their local social services to instigate the psychosocial assessment.

**Adapted assessment:** The assessment will include the background to the plan, the specific characteristics of the child and the details of the adoption, especially regarding restructuring of filiation and thus of the family. If the PAPs are assessed to be unfit, the plan will be suspended. If the assessment is favourable, the advisor will help the PAPs to compile their file and submit it to the State of origin. The case is then processed in the normal way.

## 2.1 Providing for preliminary analysis of the plan before starting the process, and encouraging cooperation

This preliminary stage in an intrafamily adoption is needed to ensure that the

process is done in a way that respects and promotes the rights of the child. It confirms that it is an intrafamily adoption (*see section III.2.1.1*) and enables deeper analysis of the motivations behind the plan (*see section III.2.1.2*).

In addition to the adapted procedures in

<sup>107</sup> Regulation on adoption without a certified body of a child domiciled outside Quebec, by a person domiciled in Quebec, Article 7: "A person may be authorized to make adoption arrangements without a certified body if: (1) the proposed adoption is of a brother, sister, nephew, niece, grandson, grand-daughter, cousin, half-brother or half-sister of the person or of the person's spouse, or is of the child of the person's spouse, including a de facto spouse with whom the person has been living for at least 3 years, provided that neither the person nor the person's spouse is bound to another person by marriage, civil union or another form of conjugal union that is still valid (...)". Available at: <http://legisquebec.gouv.qc.ca/en/ShowDoc/cr/P-34.1.%20r.%202>.

Belgium and Quebec which include this preliminary review (see above), the prior procedures developed by the Philippines

(State of origin) and by the Swiss canton of Bern (receiving State) represent promising practices.

### Procedure prior to submission of file in a State of origin PHILIPPINES<sup>108</sup>

**Preliminary questionnaire and recommendation by receiving State:** Before submission of a file, the applicants must, via their CA or AAB, provide the CA in the Philippines (ICAB) with a completed *Questionnaire for Relative Adoptive Applicants* with the required supporting documents and the full name, current address and any other contact details for the child and the guardian(s). The CA or AAB will also provide a recommendation on the adoption plan.

**Eligibility assessment:** The Department of Social Welfare and Development (DSWD) is responsible for assessing the adoptability of the child within 3-6 months. If the DSWD judges that the proposed adoption supports the welfare of the child, it will officially approve the report and submit the child's file to the CA, which will request the file on the PAPs from the receiving State.

**Review of the file:** A social worker from the CA then reviews the child's file and that of the prospective parents. He or she can request additional information if necessary, and will make recommendations on the plan to the matching committee, which may approve or reject the application. In the case of rejection, the PAPs will be able to appeal against this decision. The case is then processed in the normal way for adoption.

### Preliminary coordination with the CA in the State of origin CANTON OF BERN (SWITZERLAND)

The Cantonal CA of Bern (Switzerland) has introduced an adapted procedure for **intrafamily ICAs from a country party to the 1993 Hague Convention**.

Prior to assessment of the PAPs' capacity, the CA in the State of origin is contacted to report on the child's adoptability. The PAPs are asked to supply the child's case history, birth certificate, medical certificate and documentary evidence of the child's adoptability, which are submitted to, or requested from, the CA in the State of origin. It is only after the CA has confirmed the child's adoptability that the assessment of the applicants can commence. The documents mentioned will then be referred to the professional responsible for the welfare report, so he or she can assess whether the PAPs have the capacity to meet the specific needs of the child and whether placement in the adoptive family will be in his or her interests.

<sup>108</sup> See <https://www.icab.gov.ph/relative-adoption/>.

### 2.1.1 Confirming that an adoption is intrafamily

Some States only consider the information on family bonds contained within the various documents in the file, such as the social reports. However, to prevent irregular practices and ensure that an intrafamily adoption plan is not disguising the identity of a child and/or a private or independent adoption, there is a need to verify in advance that it is truly an intrafamily adoption.

For this purpose, many countries require the presentation of civil registration documents<sup>109</sup> for all individuals concerned, that can be used to trace the relationship between the PAPs and the child. Some countries even go further with these checks, such as Colombia and France who go on to verify the authenticity of these civil registration documents. New Zealand and the Swiss canton of Vaud even use DNA tests in certain circumstances.

#### Verification of the authenticity of civil registration documents by competent authorities COLOMBIA and FRANCE

To ensure that the adoption is intrafamily, and to clear any suspicion about false identity of a child:

**Colombia** reports that the Defensoria de familias del Instituto Colombiano de Bienestar Familiar – ICBF conducts verification of the birth certificates of the child and the PAPs, as well as the degree of relationship, from the civil registers.

**France** requires presentation, before approval and submission of the file, of all civil registration documents needed to prove the relationship between the child and the PAPs. In conjunction with its diplomatic and consular offices in the case of ICAs, civil registration documents are routinely checked to ensure their authenticity.

#### Use of DNA tests to ensure an adoption is intrafamily NEW ZEALAND and CANTON OF VAUD (Switzerland)

When confronted with contradictory or limited information, **New Zealand** uses DNA tests to ensure that an adoption is intrafamily.

Similarly, the **Cantonal CA of Vaud (Switzerland)** reports having used a DNA test in a case where the documents describing the child's case history and relationship to the PAPs were so contradictory that doubt had arisen as to the family ties, and whether consent had really been signed by the mother of the prospective adoptee.

### 2.1.2 Assessing the specific motivations for this plan, and the other options available

From the perspective of receiving States, it seems highly advisable to schedule this step prior to assessment of the PAPs, as it enables them to rapidly ascertain the

<sup>109</sup> Birth or death certificates.



#### 44 Intrafamily Intercountry Adoptions

motivations for the plan, and if necessary to explore potential alternatives, in conjunction with the State of origin. This preliminary work also enables better understanding of the profile and needs of the child, and can later help to guide the assessors if adoption does prove to be the best option. From the perspective of States of origin, not having already received an adoption application gives them a chance to establish, without any pressure, the options available for the child (*see section III.2.2.1*).

As highlighted by France, the adoption breakdowns encountered should flag the importance of checking that the principle of subsidiarity has been applied before

approving an intrafamily adoption, including through **analysis of the motivations behind the adoption plan**, and active involvement of all relevant individuals in the process. In this respect, **the Special Commission of 2015** *“recommended that the motivations of all parties should be examined to determine whether the child is genuinely in need of adoption”*.<sup>110</sup> As emphasised by Andorra, the plan should be assessed with regard to the interests of the child, without assuming that intrafamily ICA represents the most appropriate solution.

In this context, the promising practices developed by New Zealand, Sweden and the Swiss canton of Vaud are worth noting.

##### **In-depth analysis of motivations and of other options NEW ZEALAND**

When PAPs approach the CA of New Zealand about adopting a child from their family **who is resident in a country party to the 1993 Hague Convention**, the following procedure is followed.

There is a preliminary analysis of the plan, with the help of a questionnaire. This is used to review the child's situation and the local solutions available, and to explore the family relationship between the child and the PAPs. It asks several questions about the child's attachment to his or her parents, siblings and the PAPs, the motivations for the plan, and the potential for the child and family to receive support locally, or from the PAPs remotely.

The aim of the questionnaire is to clarify for the CA the advisability of an intrafamily ICA with regard to the interests of the child. For the process to go ahead, it must be concluded, based on evidence about the child's circumstances and welfare and safety issues, that intrafamily ICA represents the most appropriate solution in his or her interests.

##### **Review of the motivations for the plan, with the PAPs and biological parents SWEDEN**

During the assessment of the motivations and capacity of the PAPs for intrafamily ICA, the authority responsible for the assessment also contacts the child's biological parents, if living, to establish the real motivations for the adoption plan. If it proves necessary, the services of an interpreter are used.

**Prohibition of intrafamily ICAs when poverty in State of origin or material prosperity in the receiving State is the main reason for separation**  
**CANTON OF VAUD – SWITZERLAND**

It is encouraging that the Cantonal CA of Vaud in Switzerland notes that the motivations around financial precariousness, better educational opportunities, attachment between the child and his/her uncle and aunt are no longer sufficient to accept an intrafamily ICA. Further, the argument that the couple has no children and that they could help their family members living abroad by relieving them of the responsibility of raising a child, is a ground for refusing to proceed.

**Recommendations of the ISS/IRC: The preliminary assessment of the motivations involves examining the underlying reasons for this adoption plan, ensuring the participation of all parties affected. It assumes close cooperation between the CAs in responding to the following questions:**

- Who is initiating this adoption plan?
- Are the main reasons for the separation poverty and/or economic/educational opportunity in another country?
- Does this child need alternative care?
- Is there potential to support the biological family so they can keep their child?
- If this is not possible, does the child need adoption or a different solution?

**This should be an opportunity to redirect the plan towards a more appropriate solution, looking through the lens of the principles in the Guidelines and real needs of the child, and if necessary first considering a cross-border placement under the 1996 Hague Convention.**

**2.2 Practical assessment of the needs and interests of the child, and the capacity of the prospective adoptive parents to meet these**

To ensure that the adoption is in the best interests of the child, there should be a

practical assessment of his or her needs (*see section 2.2.1*). There should then be a full assessment of the capacity of the PAPs to adopt and to meet the needs thus identified, without the intrafamily nature of the adoption reducing the rigour with which the analysis is carried out (*see section III. 2.2.2*).

**2.2.1 Practical assessment of the needs and best interests of the child**

The **Federal CA of Germany** stipulates that *“intrafamily adoption should only take place where it serves the child’s welfare, and where a parent/child relationship can develop between the PAPs and the child. It must not transform a pre-existing family relationship into a parent/child relationship unless no other more appropriate solution has been found in the interest of the child.”* It underlines its preference for *“children to enter the receiving State under a cross-border family-based placement, especially if they are older children. They need to be cared for by adults, but not necessarily new parents”*. In a similar vein, the **French CA** indicates that *“intrafamily adoptions must be restricted to considered and honed plans that are in the true interests of the child, and are not designed just to obtain delegation of parental authority for economic or humanitarian motives.”*

In this regard, the promising practice by the Netherlands is worth reporting.

### Enabling cross-border alternative care through a specific law and permit NETHERLANDS

In the Netherlands, the law of 16 February 2006 on guardianship establishes a procedure for applying Article 33 of the 1996 Hague Convention to prioritise cross-border placement (*see section II.1.3*). There is also a special residence permit for children cared for by their extended family to enter and remain in the Netherlands.<sup>111</sup> The conditions are as follows.

1. The child cannot be cared for in the State of origin by the biological family or close relatives, and is not likely to have a satisfactory future in the State of origin.
2. The child's parents or legal representatives must consent to the placement, as well as the authorities in the State of origin in some cases (e.g. where the parents are deceased or cannot be traced).
3. The plan should not be exclusively based on the opportunity for the child to grow up under better economic conditions.
4. This type of placement can only be considered where the child is taken into the care of a grandparent, sibling, half-sibling, brother- or sister-in-law, uncle or aunt.
5. The foster carers must be Dutch or EU citizens, or have a residence permit. They must have custody of the child and be able to provide him or her with quality care and education.

As observed by the **CA of Slovenia**, *“the primary consideration must be the best interests of the child, and there must be an assessment on a case-by-case basis of all relevant aspects to determine whether the child really needs to be adopted and whether intrafamily adoption is in his or her best interests (individual assessment of the child, the family relationships and motivations). If the court considers that the conditions for adoption are met and that it is in the child's best interests, it must approve the (national or intercountry) adoption; if not, it must reject it.”*

**Making the child's best interests the primary consideration is not a guideline specific to intrafamily ICA. It applies to all adoptions, as it is a requirement under Article 21 of the CRC.** However, it is not unusual to see cases where, because it is an intrafamily adoption,

it is assumed to be in the best interests of the child, despite the absence of any solid evidence. In addition, as emphasised by the Cantonal AC of Bern (Switzerland), assessments of the interests of the child are more strongly influenced by cultural aspects, for example in the case of donation of a child, in intrafamily adoption than in traditional adoption (*see section I.3*). The authorities in many receiving States report that it is not unusual in some States of origin for the opportunity for the child to live in better economic conditions, or to have better educational options, to be considered sufficient to satisfy the “best interests” requirement, including where the child had until then been living with his or her biological parents. This situation does not comply with paragraph 15 of the Guidelines (*see box on p.47*).

<sup>111</sup> See <https://ind.nl/en/family/pages/adopted-or-related-foster-child.aspx>.

### UN Guidelines

**Paragraph 15.** Financial and material poverty, or conditions directly and uniquely imputable to such poverty, should never be the only justification for the removal of a child from parental care, for receiving a child into alternative care, or for preventing his/her reintegration, but should be seen as a signal for the need to provide appropriate support to the family.

In this context, the ISS/IRC commends Togo for thoroughly assessing intrafamily adoption plans in light of the interests of the child, and for rejecting plans that do not reflect these interests and would endanger the child (see box below). Given that this is a country where family is understood in the wider sense, this practice is even more commendable.

### In-depth assessment of adoption plan with regard to interests of the child TOGO

The CA for Togo (*Comité national d'adoption d'enfants au Togo – CNAET*) is meticulous in ensuring that an adoption is not approved solely because it is intrafamily, and that it is guided by the interests of the child.

**In-depth review of the child's file:** The child's file is the primary tool for assessing whether the adoption is in the interests of the child. The various reports included in this file should trace the child's identity and history, but also provide a full review of his or her social context (living conditions, schooling, relationship with parents and siblings, search for solutions in accordance with the principle of subsidiarity), an assessment of the motivations, an appraisal of the psychological impacts of the change in filiation, and a medical assessment of the child. The file must also include all the necessary consents.

**Interviews with the parents and child:** The CNAET interviews the biological parents and the child, together and separately, to check whether consent has been freely given, informed and not induced by compensation, and whether the adoption is truly considered to be in the best interests of the child.

**Under this procedure, the CNAET has rejected several cases over the past two years, including the following.**

- Simple adoption plan for a child aged 14 years who was living with both biological parents and two brothers. The PAPs had two biological children themselves. The CNAET considered that the plan was not motivated by protection for the child, and that the PAPs, who did not wish to enlarge their family, could financially support the biological parents to look after the child.
- Simple adoption plan for a child aged 15 years, whose biological parents were living.

The PAPs, aged around 60 years, had two children together and the father had two other children born outside this marriage. These two children were not accepted by the wife. The CNAET rejected this case, considering that the real motivations were not those of a true adoption, and that there was a high risk of failure. It encouraged the PAPs to support the child within the biological family.

In their responses to the ISS/IRC questionnaire, many receiving States highlighted that the assessment of the child's situation and adoptability is under the jurisdiction of the State of origin, and it is thus difficult for them to refuse to process the application when the State of origin considers that the adoption is in the best interests of the child.

### 1993 Hague Convention

**Article 17 c).** Any decision in the State of origin that a child should be entrusted to prospective adoptive parents may only be made if:

(...)

**c) the Central Authorities of both States have agreed that the adoption may proceed.**

While the ISS/IRC understands these problems, it notes that adoptability often needs to be justified by the motivations of the PAPs. It is therefore up to receiving States to draw conclusions, particularly at the point of approving the request or sending the file. In addition, the ISS/IRC draws attention to the principle of co-responsibility established by the *1993 Hague Convention* and the fundamental role that Article 17 c), on agreement that the adoption may proceed,<sup>112</sup> can play in such circumstances (see box above).

### Recommendations of the ISS/IRC:

The ISS/IRC reiterates that the international standards governing adoption must not be disregarded just because the planned adoption will be intrafamily. In all cases, an adoption of this nature must only take place if the child is identified to truly need it, and if it is in his or her best interests. Consequently, while recognising the importance of the child being able to continue living within the extended family, the ISS/IRC reiterates, as it has expressed many times, including in its *Manifesto for Ethical Inter-country Adoption*, that “the best interests of the child, which falls within the framework of respecting all the child's rights, is the primary consideration that must guide the entire adoption process, excluding all other forms of influence.”

### UN Guidelines

**Paragraph 62.** Planning for care provision and permanency should be based on, notably, the nature and quality of the child's attachment to his/her family, the family's capacity to safeguard the child's well-being and harmonious development, the child's need or desire to feel part of a family, the desirability of the child remaining within his/her community and country, the child's cultural, linguistic and religious background, and the child's relationships with siblings, with a view to avoiding their separation.

<sup>112</sup> ISS/IRC (2018). *Agreement on adoption proceeding, Article 17 c) of the 1993 Hague Convention – Survey summary*. Available upon request at [irc-clr@iss-ssi.org](mailto:irc-clr@iss-ssi.org).



However, in order to assess whether intrafamily adoption meets the needs of the child and reflects his or her best interests, several aspects must be examined by both the State of origin and the receiving State. The Special Commission of 2021 should be an opportunity for countries to reflect jointly on these aspects and to take inspiration from paragraph 62 of the Guidelines. Thus, the assessment could cover notably, but not exclusively, the following aspects the:

- child's relationship with his or her biological parents and any siblings;
- child's views on the planned intrafamily adoption;
- child's views on the possibility of extra-family ICA or other types of cross-border placement;
- child's specific needs (in relation to age, mode of attachment, any physical or psychological vulnerabilities, etc.);
- views of any children of the PAPs, and the siblings of the adoptee;
- degree of relationship between the child to be adopted and the PAPs;
- quality of the relationship between the child and the PAPs (degree of familiarity; frequency of contact; social, cultural and linguistic factors, etc.);
- motivations (*see section III.2.1.2*) underlying this intrafamily adoption.

### 2.2.2 Ensuring proper assessment of the prospective adoptive parents

As Germany has rightly highlighted, *"the fact that the child and the PAPs are from the same*

*family does not automatically mean that the PAPs are fit to adopt this child. As the child is known, it is vital to pay attention to his or her history and individual characteristics, and to look at how the PAPs could accommodate these."* In addition, as clarified by Slovenia, "in the case of intrafamily adoptions, as well as assessing their capacity to make good adoptive parents as for all PAPs, there is also a need to assess their motivations and the nature of the relationship between the child and the PAPs, to ensure that the adoption is successful and in the best interests of the child."

#### Recommendations of the ISS/IRC:

The preliminary review of the motivations of the PAPs carried out by CAs (*see section III.2.1.2*), with the sole aim of redirecting the plan if it does not appear to be in the interests of the child, in no way detracts from the importance of an in-depth review of these motivations by the professionals responsible for the psychosocial assessment.

Their assessment must be just as rigorous as for traditional adoption, but must also address the specific aspects of intrafamily adoption. Thus, in addition to the usual aspects,<sup>113</sup> there must be careful assessment of issues such as breaking family bonds or maintaining a relationship with the biological family.

Moreover, it is important that the assessment reflects the capacity of the PAPs to meet the specific needs of the child. It would be particularly helpful for the professionals in the receiving State to have access to the report on the child from the State of origin as soon as the assessment has been done, so they can adapt their assessment and preparation of the PAPs to the specific needs of the child.

113 Fronek, P., "Assessment of prospective adoptive parents", in Jeannin, C. (Ed.) (2018). *Towards a greater capacity, Learning from intercountry adoption breakdowns*. ISS, Geneva, Switzerland, pp. 110-113. Available at: [https://www.iss-ssi.org/images/Publications/ISSENG/ICA\\_Breakdowns\\_ENG.pdf](https://www.iss-ssi.org/images/Publications/ISSENG/ICA_Breakdowns_ENG.pdf).

## 2.3 Providing preparation and support for the adoption triangle

### 2.3.1 Providing adapted preparation for all members of the adoption triangle

Intrafamily adoption raises many unique issues. Therefore, it is important to plan

information sessions specific to this type of adoption, for all parties involved.

In terms of preparation for PAPs, specific training has been introduced in Belgium, France and Luxembourg. The practice developed by the accredited adoption body in France is presented below.

#### **Training PAPs in the specific aspects of intrafamily adoption French Agency for Adoption – AFA (FRANCE)**

Launched in 2017 and run jointly by the AFA country correspondent, doctor and psychologist, specific training courses were held for PAPs planning intrafamily adoptions in Haiti and Togo. These provide an opportunity to recap on the specifics of the process and the timeframes involved (generally the same as for a traditional ICA process, sometimes longer), to create links between the families, to introduce the health advisors available on their return, and to informally address – in the form of a discussion group – topics central to ICA in general, and to intrafamily adoption in particular, such as disruption to filiation. An opportunity to refocus the plan on the child, and reflect on the feasibility and particularly on the benefits and risks for the child, to help reduce failures as far as possible.

Meanwhile, the children themselves must receive proper support. It is essential that States of origin develop preparation programmes for them, and that they are fully informed about the changes that adoption, even by relatives, will mean for their lives.

These countries also have a responsibility to develop adapted preparation programmes for biological families, explaining the implications of this form of adoption and informing them about alternatives available.

The ISS/IRC reiterates the benefits of open adoption,<sup>114</sup> and the importance of addressing the issue of maintaining ties, in the preparation of both biological parents and PAPs.

#### **Recommendations of the ISS/IRC:**

**The ISS/IRC encourages all receiving States to develop training modules adapted to intrafamily adoption, covering aspects specific to this type of plan. This training should provide an opportunity for PAPs to reflect on alternative options and on the challenges they will face. Similarly, the ISS/IRC calls on States of origin to prepare biological parents and children for these adoption plans and for all their implications, as well as receiving States with respect to their responsibilities to prepare, assess and support PAPs.**

### 2.3.2 Providing adapted support for all members of the adoption triangle

Throughout the intrafamily adoption process, the PAPs, the child and if appropriate the

114 ISS/IRC (2015). *Comparative study on open adoption: Current situation and outlook*. Available upon request at [ISS/IRC:irc-cir@iss-ssi.org](mailto:ISS/IRC:irc-cir@iss-ssi.org).

biological family have a right to the same quality support as in any other adoption plan.

One receiving State considers that PAPs who are familiar with the language and public institutions of the State of origin do not need the same support as foreign PAPs, and that it would be enough to simply use a lawyer for the legal steps. A number of caveats should be made in this regard:

- Knowledge of how local institutions function, although this can be an advantage, could also be a risk factor, opening the door to irregular practices or at least poor practices.
- As the PAPs have often lived in the receiving State for a long time, in some cases even been born there, they may be distanced from local reality and have a distorted view of it.
- Even if the PAPs and the child know each other, it is vital for a specialist professional to check locally that conditions for a successful adoption are met, to reduce the risks of failure.

#### **Recommendations of the ISS/IRC:**

**The ISS/IRC considers that intrafamily adoptions should receive preparation and support of equal quality to other adoptions. The specific features of this type of plan, which should not be underestimated, must also be addressed in the long-term work with each member of the adoption triangle, throughout the process.**

#### ***2.3.3 Recognising intrafamily adoptions that comply with the 1993 Hague Convention and rejecting those that circumvent it***

- Intrafamily ICAs in accordance with the 1993 Hague Convention

When an intrafamily adoption is made in accordance with the 1993 Hague Convention and the safeguards in this Convention are observed, it should receive automatic recognition as stipulated in Articles 23(1) and 24 of the Convention.

#### **1993 Hague Convention**

**Article 23 (1).** An adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognised by operation of law in the other Contracting States (...).

**Article 24.** The recognition of an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child.

A different situation applies if the adoption is made outside the framework of this Convention or in violation of it.

- Intrafamily ICAs in a country not party to the 1993 Hague Convention

Before recognising the adoption, it is important that the courts are able to check that the ethical safeguards have been observed, and that the adoption is in the interests of the child.

However, the ISS/IRC is well aware that countries may find their actions here limited by their private international law on recognition and enforcement of judgments made abroad. It is therefore clearly important to adopt national frameworks that reproduce the safeguards in the *1993 Hague Convention*, and to establish specific rules on the recognition of judgments that violate the legal provisions.

- Intrafamily ICAs that circumvent the provisions in the 1993 Hague Convention

To avoid national adoptions being conducted in place of ICAs covered by the safeguards in the 1993 Hague Convention, there is a need to adopt strict legal frameworks, defining penalties for circumvention – even unintentional – of the Convention, while identifying ways of launching a new process that is in accordance with the Convention.

### 1993 Hague Convention

**Article 33.** 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.

### **Application of Article 33 of the 1993 Hague Convention FRANCE 1st Civil Chamber, 18 March 2020 (No 19-50.031)**

A French court had declared the simple intrafamily adoption of a child habitually resident in Haiti, without applying the 1993 Hague Convention. The biological mother, with whom the child was living, applied to the French Embassy in Haiti for an adoption visa. The Embassy identified a violation of the Convention and applied Article 33 in alerting the French Central Authority, which informed the prosecution service. As an appeal in the interests of the law had been raised against the judgment,<sup>115</sup> the Court of Cassation quashed it and issued a solemn reminder of the obligation of judges handling an ICA to systematically check compliance with the 1993 Hague Convention.

### **Legalising cases through a new procedure compliant with the 1993 Hague Convention BELGIUM and NEW ZEALAND**

A national adoption conducted in a State party to the 1993 Hague Convention will not be recognised as allowing the child to enter the country or obtain citizenship. The process will have to be legalised through a new procedure compliant with the provisions of the Convention.

French case law recently demonstrated the benefits of the mechanism for close cooperation between Authorities, required under Article 33 of the 1993 Hague Convention, in the event of violation of the Convention.

The legalisation procedures established in Belgium and New Zealand also provide inspiration in addressing these irregular practices.

### **Recommendations of the ISS/IRC:**

**To prevent circumvention of the 1993 Hague Convention, the ISS/IRC encourages all States of origin and receiving States to do the following if they have not already.**

**1) Strengthen their legal frameworks, particularly in terms of the following aspects:**

- clearly establishing the criteria for an adoption to be considered national;
- providing clear rules on the recognition

<sup>115</sup> An appeal in the interests of the law is a provision under French civil procedure allowing the Public Prosecutor of the Court of Cassation to appeal against a definitive judgment. Quashing on this basis is without effect between the parties (the judgment remains in effect) but it ensures the supreme interest of the law is defended.



of national adoptions conducted abroad;

- adopting legislation on ICA that embodies all the principles in the 1993 Hague Convention, particularly the requirement for agreement to proceed in all ICAs, including with non-Convention countries;
- prohibiting private and independent adoptions (*see section III.1.1.4*).

## 2) Provide regular training on the 1993 Hague Convention, specifically on intrafamily adoptions for:

- CA and AAB staff,
- judges responsible for adoption matters,
- officials from consular services and migration authorities.

## 2.4 Providing post-adoption follow-up and ensuring cooperation in the event of breakdown

It is the responsibility of receiving States to provide post-adoption follow-up to identify potential problems. PAPs should be informed about the need for this follow-up right from the assessment/preparation stage. Signature of a commitment to post-adoption follow-up may be recommended; this should guarantee access to all post-adoption support services and programmes available in the receiving State. In case of adoption breakdown, plans should be made for cooperation between the CA of the receiving State and that of the State of origin. The *1996 Hague Convention* may provide an instrument for this cooperation.<sup>116</sup>

### Close cooperation with the State of origin in the event of breakdown

#### FRANCE

In these situations, which are addressed on a case-by-case basis, the French CA – la Mission de l'adoption internationale (MAI) – has informed the CA in the State of origin of the child's return, so that – if permitted by its domestic law – measures can be taken to best serve the child's interests, particularly in securing his or her legal status (withdrawal of parental authority from the adoptive parents, revocation in the case of simple adoption, etc.). Where there was no bilateral agreement on child protection between the two countries, the CAs have been able to act as intermediaries in deciding amicably, with the adoptive parents, the level of an allowance to cover the child's costs.

### Recommendations of the ISS/IRC:

- Advise PAPs, from the preparation stage, of the importance of post-adoption follow-up, which should be seen as support available rather than compulsory monitoring.
- Require PAPs to sign a commitment to post-adoption follow-up.
- Promote cooperation between CAs in the event of adoption breakdown.
- Encourage ratification of the 1996 Hague Convention, provide training on this Convention for all professionals involved, and promote its application in the event of breakdown.

<sup>116</sup> Martinez-Mora, L. "International conventions and intercountry adoption breakdowns", in Jeannin, C. (Ed.) (2018). *Towards a greater capacity, Learning from intercountry adoption breakdowns*. ISS, Geneva, Switzerland, pp. 57-59. Available at: [https://www.iss-ssi.org/Images/Publications\\_ISS/ENG/ICA\\_Breakdowns\\_ENG.pdf](https://www.iss-ssi.org/Images/Publications_ISS/ENG/ICA_Breakdowns_ENG.pdf).



## Conclusion

Intrafamily ICAs are an important child protection measure that in principle allows for continuity in the child's family and culture when he or she is deprived of parental care. However, intrafamily ICAs are not an exception to the basic principle that the child should be at the heart of the process and that his or her interests must be prioritised above all others, above cultural practices, desire for a child, or projected material benefits to the child. Once again, there is a need for shared responsibility between receiving States and States of origin, to jointly ensure that intrafamily adoptions are not conducted outside the international legal framework they share.

In particular, care must be taken to ensure these are not subject to "simplified" procedures when in fact their specific features call for refined procedures, and that this option is only considered where it is best for the child. In this respect, the ISS/IRC emphasises the key role that the Guidelines and the 1996 Hague Convention can play in determining the most appropriate child protection measure, including in the context of cross-border placements. The ISS/IRC is glad to share promising practices developed in various countries, and to spark discussions between countries that it hopes will be productive. Close cooperation between countries is ultimately the answer to the major challenge identified in this publication: how to conduct intrafamily ICAs that fully respect the rights of the child.

# Notes



Published by:

International Social Service

32 Quai du Seujet

1201 Geneva, Switzerland

Tel: + 41 22 906 77 00; Fax: + 41 22 906 77 01

[www.iss-ssi.org](http://www.iss-ssi.org)

© International Social Service 2020. All rights reserved.

All reproductions, copies or diffusions of this publication  
are prohibited without the publisher/editor's approval.

ISBN: 978-2-940629-13-8

