

APOSTILLE

novembre / November 2016



**CONCLUSIONS AND RECOMMENDATIONS OF THE SPECIAL COMMISSION ON THE PRACTICAL
OPERATION OF THE APOSTILLE CONVENTION**

(2-4 November 2016)

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**CONCLUSIONS ET RECOMMANDATIONS DE LA COMMISSION SPÉCIALE SUR LE FONCTIONNEMENT
PRATIQUE DE LA CONVENTION APOSTILLE**

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**Conclusions and Recommendations
of the 2016 Special Commission on the Practical Operation
of the Apostille Convention**

The Special Commission (SC) met in The Hague from 2 to 4 November 2016 to review the practical operation of the *Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents* (Apostille Convention or the Convention). The practical operation of the Convention was previously reviewed by the SC in 2003, 2009 and 2012. The SC was attended by over 190 participants from over 65 States and international organisations.

The SC unanimously approved the following Conclusions and Recommendations:

1. The SC welcomes the high number of additional accessions and resulting expanded global coverage since its last meeting in 2012. The SC also notes with satisfaction the announcements by Guatemala, Iran and the Philippines of their intention to accede to the Convention at the earliest possible time. The SC also notes with pleasure expressions of interest in joining the Convention from Guyana and Indonesia, as well as China's openness to considering applying the Convention to the mainland of China.
2. As regards new accessions, the SC duly takes note of C&R No 4 adopted by the Council on General Affairs and Policy of the Conference (the Council) at its March 2016 meeting.¹ It further expresses its view that the entry into force of the Convention between two Contracting Parties cannot prejudice the position of States that have objected, including based on the issue of statehood, to the accession of one of them.²
3. On the occasion of the SC's first meeting since the 2013 publication of the *Handbook on the Practical Operation of the Apostille Convention* (Apostille Handbook),³ the SC welcomes this publication and notes with great satisfaction its utility as an essential and user-friendly tool enhancing the practical application of the Convention and acknowledges with pleasure the publication of Greek, Spanish and Vietnamese translations. The SC is most appreciative of the voluntary contributions by Members of the Conference that made these translations possible. The SC welcomes the announcement made by Germany that a German translation of the Apostille Handbook is currently being produced, in consultation with the relevant authorities of Austria and Switzerland. The SC also welcomes the announcement of the Russian Federation that a Russian translation of the Apostille Handbook has been completed, pending final approval. The SC notes that the Permanent Bureau will develop an updated edition of the Apostille Handbook, taking into account the discussions of the SC meeting. This updated version will be submitted to the Council for approval.
4. The SC congratulates the Permanent Bureau on the updated Hague Conference website, in particular its ease of navigation and multi-platform capability. The SC encourages the Permanent Bureau to study and implement, to the extent possible, additional modifications which it may find expedient, including improvements to the layout of the status table of the Convention.

¹ C&R No 4 reads as follows:

"New ratifications / accessions: role of the Depositary and the Permanent Bureau

4. The Council took note of the different views expressed on the subject matter. It recalled the relevance of the Vienna Convention of 1969 on the Law of Treaties, in particular its Articles 76(2) and 77 on the functions of depositaries, and the provisions and requirements of the relevant Hague Convention. When, following the deposit of an instrument of ratification, approval, or accession, the Depositary subsequently receives an objection from a Contracting State, including based on the issue of statehood, the Depositary brings the matter to the attention of all Contracting States to the Convention concerned."

² The SC takes note that more than 20 States, mindful of UNSC 1244, have objected to Kosovo's accession to the Convention based on statehood.

³ All subsequent references in these Conclusions & Recommendations to the Apostille Handbook refer to the paragraph numbers as set out in the first edition (2013).

5. The SC notes that the European Union has adopted *Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012*, which entered into force on 15 August 2016 and is scheduled to be applied as of February 2019. This regulation will have the effect of eliminating the need for Apostilles for certain public documents among European Union Member States. The SC notes that this regulation has no impact on the application of the Convention in relation to third States.
6. The SC recognises the outstanding contribution by the Permanent Bureau and its Regional Offices in providing post-Convention services and assistance, including furthering the broader implementation of the electronic Apostille Program (e-APP). Additionally, the SC acknowledges the continuing support and positive input of the Trade and Competitiveness Global Practice of the World Bank and the International Finance Corporation (IFC) as well as other organisations, to facilitate additional accessions to, and the practical implementation of, the Convention.
7. The SC reiterates C&R No 12 of the 2012 meeting, as it is set out in paragraph 112 of the Apostille Handbook, that it is for the law of the State of origin of a document to determine its public nature.
8. The SC recognises that there is nothing in the Convention that precludes its application to documents relating to extradition and notes that the responses to the 2016 Questionnaire revealed a diversity of practices in relation to the use of Apostilles for these documents.
9. In relation to the classification of medical certificates and translations as public documents, the SC refers to C&R No 7, above.
10. Considering C&R No 15 from the 2012 meeting, the SC determines that the categories of exclusion in Article 1(3)(a) and (b) are to be construed extremely narrowly. In particular, the SC confirms that documents that are not *executed* by a diplomatic or consular agent but merely *issued* by them may be apostilised when necessary. The SC considers that this concept of mere *issuance* applies to documents both generated at their post and those transmitted from a sending State's database.
11. The SC notes the questions raised by many parties in relation to the process of authenticating documents generated by supranational and intergovernmental organisations. The SC recommends that the Council on General Affairs and Policy of the Hague Conference direct the Permanent Bureau to convene a group to study these issues and make recommendations regarding the possible application of the Convention to those documents.
12. The SC notes that certain organisations, such as Chambers of Commerce, may be considered private organisations in some jurisdictions and public organisations in others. The SC reaffirms that the Convention only applies to public documents and the SC again refers to C&R No 7, above.
13. The SC encourages Contracting Parties that become aware of instances of non-Contracting Parties to issue certificates purporting to be Apostilles, or giving effect to Apostilles issued in Contracting Parties, to share this information with the Permanent Bureau.
14. The SC notes with satisfaction that a number of jurisdictions employ additional text outside the area containing the 10 standard informational items, clarifying the nature and effect of an Apostille. The SC strongly encourages those jurisdictions that have not done so to consider the usefulness of such text in explaining the function of an Apostille and in combatting fraud.

15. The SC notes the practice in some Contracting Parties of issuing a single certificate for both Apostille and non-Convention authentications.
16. The SC is aware of requests from some Contracting Parties for others to confirm their procedures for issuing Apostilles in the context of a possible rejection. The SC recalls paragraph 318 of the Apostille Handbook, which addresses the propriety of these requests and encourages Contracting Parties who receive such requests to resolve these issues bilaterally.
17. The SC appreciates the efforts of Competent Authorities and National Organs in educational outreach regarding the Convention and its operation. In particular, programmes directed towards institutions concerning the acceptance of Apostilles have greatly assisted in the efficacy of the Convention.
18. The SC notes the reports of several Contracting Parties highlighting the benefit of decentralising Competent Authorities which provides adequate and proper service to the public and notes the importance of providing appropriate resources and staff training to ensure the quality of service. In the experience of one Contracting Party, the use of online resources was a key factor in achieving this aim.
19. The SC notes the experience of two Contracting Parties in arranging for their diplomatic and consular missions to issue Apostilles for certain public documents. Other Contracting Parties commented that practical and legal considerations would prevent them from implementing such a process.
20. The SC welcomes the addition of an Expert Panel to this meeting and looks forward to similar panels as part of its future meetings.
21. The SC endorses the C&R of the 10th International Forum on the e-APP, which can be found in Annex I to this document.
22. The SC recommends to the Council that the SC meet again in approximately four years, subject to the overall work programme of the Conference.

ANNEX I

10th International Forum on the electronic apostille program (e-APP)

CONCLUSIONS & RECOMMENDATIONS

On 1 November 2016, over 190 experts from over 65 States (both Contracting and non-Contracting Parties), as well as other invited observers, convened in The Hague, Netherlands to attend the *10th International Forum on the electronic Apostille Program (e-APP)*, this being the highest ever number of participants in the history of the e-APP.

The Forum was organised by the Permanent Bureau to coincide with the meeting of the Special Commission on the practical operation of the *Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents* (Apostille Convention).

Participants emphasised that the interest in the Apostille Convention and the e-APP continues to increase, with many Parties currently considering accession to the Convention and / or implementation of the e-APP.

This being the 10th such Forum, and while recognising the value of past Fora, participants decided to mark the occasion by compiling the numerous Conclusions and Recommendations (C&R) from previous Fora in addition to adopting new Conclusions, in order to produce the following authoritative omnibus of e-APP Forum C&R, which was unanimously agreed upon:

The electronic Apostille Program (e-APP) in general

1. The participants noted with great satisfaction that over 200 Competent Authorities from 29 Contracting Parties have, to date, implemented one or both components of the e-APP. They particularly welcomed the jurisdictions that have joined the e-APP since the 2014 Hong Kong Forum, namely Australia, Austria, Brazil, Chile, Romania, Tajikistan and one state of Mexico (Baja California Sur). In addition, participants congratulated those Parties that are progressing with the implementation of one or both components of the e-APP. Participants noted with satisfaction that a high percentage of newly acceding Parties join as e-APP Parties.
2. Participants reiterated that the e-APP enables the Apostille Convention to continue to grow from strength to strength. They recalled the value of the e-APP as a tool to further the secure and effective operation of the Convention more broadly. In addition, participants noted the continuing increase in the issuance of e-Apostilles, with demand growing steadily, and in the number of verifications of Apostilles using e-Registers.
3. Participants reiterated that the spirit and letter of the Apostille Convention do not constitute an obstacle to the usage of modern technology and their application and operation can be further improved by relying on such technology.
4. All Contracting Parties to the Apostille Convention, and those considering joining the Convention, are once again strongly encouraged to consider implementing both components of the e-APP. In this respect, participants noted the increasing ease of implementing these components, largely due to the fact that there is an increasing number of Parties that have the requisite implementation experience. These Parties are thus available for consultation and to provide assistance to new Contracting Parties, particularly with respect to addressing privacy, security, technological or other concerns. Participants thus confirmed that effective communication between Competent Authorities with regard to the implementation of the e-APP will facilitate the development of good practices and enhance awareness among authorities of the different e-APP systems in operation.
5. Participants reaffirmed the good practice of informing the Permanent Bureau of the Hague Conference when Contracting Parties begin issuing e-Apostilles or operating an e-Register. In the past, some Contracting Parties have informed also the depositary (*i.e.*, the Ministry of Foreign Affairs of the Kingdom of the Netherlands).
6. Participants noted with interest the developments reported and updates provided by the experts in attendance, from both Contracting Parties and the invited observers. In particular,

the Forum noted with great interest the initiatives of the DONA Foundation and the InterPARES International Research Project, acknowledging the utility of harnessing the power of technologies such as the Handle System, Cloud-facilitated document preservation and Blockchain. Participants are invited to continue to study the relevance of these and other related technologies for the e-APP.

e-Apostilles

7. Participants noted that two different systems relating to the issuance of e-Apostilles are currently in use among the Contracting Parties to the Convention: the *dynamic* system and the *static* system, the former being used in the majority of Contracting Parties that have implemented the e-Apostille component and the latter in one Contracting Party. Under the *dynamic* system, the electronic file containing the e-Apostille and the electronic public document is transmitted electronically from the State of origin to the State of destination. The e-Apostille can be subsequently verified in the e-Register of the Competent Authority. Under the *static* system, the electronic file containing the e-Apostille and the electronic public document is stored in a repository of the Competent Authority (usually, its e-Register) and is not transmitted. The file can then be viewed by the applicant and / or recipient by accessing the Competent Authority's repository.

8. Participants noted that despite the differences between the systems relating to the issuance of e-Apostilles, both systems work well in practice. Several Parties reported receiving positive feedback with respect to the issuance of their e-Apostilles.

9. The participants noted the increase in the number of electronic public documents issued around the globe and that e-Apostilles offer the only solution for apostillising electronic public documents in their original format. Participants noted that some Contracting Parties that have not implemented the e-Apostille component are currently issuing paper Apostilles for electronic public documents. This is done by attaching a paper Apostille to a printout of an electronic public document, which would seem to undermine the purpose and utility of electronic public documents. In practice, e-Apostilles offer the only solution for apostillising electronic public documents, thereby maintaining the advantages of these documents in terms of security, efficiency and ease of transmission.

10. Participants also noted that jurisdictions are increasingly issuing e-Apostilles for paper public documents which are subsequently scanned or digitalised. The law of the issuing Party determines how and by whom paper public documents are to be scanned or digitalised. The participants noted the different practices and reaffirmed the fundamental function of Competent Authorities to verify the authenticity of public documents and the need to adopt practices which allow assessing the genuine character of all documents presented as public documents for the issuance of an Apostille.

11. Participants noted that some jurisdictions have started issuing only e-Apostilles for both electronic documents and paper public documents that are subsequently scanned or digitalised. In these jurisdictions, paper Apostilles will no longer be issued and only e-Apostilles will be issued for public documents.

12. Participants recognised the benefits of using modern technologies in providing Apostille services (incl. reducing the turnaround time in the issuance of Apostilles) and noted that at least one jurisdiction (Colombia) has implemented an online e-Apostille service, which is available 24 hours a day, seven days a week. In addition, the use of modern technologies facilitates the implementation of a one-step process (*i.e.*, there is no need for prior authentication within the State of origin before the public document may be presented to the Competent Authority for apostillisation).

13. Participants noted that some e-APP jurisdictions have passed laws or regulations specifically to enable their Competent Authorities to issue e-Apostilles, whereas others have not seen the need for such measures. It is for the law of the issuing Party to determine whether such measures are necessary (see also C&R No 18).

14. Participants also recalled that Apostilles, whether in paper or electronic form, must be attached to the underlying public document (Art. 4 of the Apostille Convention).

Acceptance of e-Apostilles

15. Participants again emphasised the fundamental principle of the Convention according to which an Apostille validly issued by one Party must be accepted in other Parties; the Forum participants stressed that this principle equally applies to e-Apostilles issued in accordance with domestic law of the issuing Party. Not extending this basic principle to e-Apostilles would provide receiving Parties with more power in the electronic environment than they have in the paper environment. Such a double standard would be both undesirable and unsatisfactory as the use of e-Apostilles offers a far higher security standard than paper Apostilles, because paper Apostilles may be more easily falsified or tampered with than e-Apostilles. This acceptance of foreign e-Apostilles is further supported by the fact that the majority of Parties have adopted legislation to the effect that electronic signatures are the functional equivalent of manuscript (wet) signatures. Finally, Forum participants stressed the great advantage of the parallel use of an e-Register if and when a Competent Authority issues e-Apostilles; the possibility to also verify the origin of an e-Apostille in the relevant e-Register should provide recipients of e-Apostilles with all the necessary assurance.

16. Participants noted that a State of destination may not reject e-Apostilles on the sole ground that the State of origin or the State of destination does not have legislation concerning e-Apostilles. Participants further recalled that Apostilles, whether in paper or in electronic format, do not affect the acceptance, admissibility or probative value of the underlying public document.

17. Reference was made to the model laws promulgated by UNCITRAL in relation to e-commerce and e-signatures. Participants were invited to work with their relevant authorities to ensure, where suitable, that domestic law is compatible with the receipt of underlying public documents in the electronic form, so as to reduce, as far as possible, the risk of rejection of underlying public documents in the State of destination.

18. The participants noted that e-Apostilles are being widely accepted and have been of great benefit to users. Where there have been instances of rejection because the underlying public document must be presented in paper form under the domestic law of the State of destination, Competent Authorities have attempted a variety of actions, such as contacting the diplomatic missions of the State of destination and engaging in a dialogue to explain the process of issuance in further detail to alleviate security and other concerns. As a result of this dialogue, some Competent Authorities then issue a paper Apostille to accommodate the (often urgent) needs of the applicants.

Design and layout

19. Participants also noted that the design and layout of Apostilles (both paper and electronic) must conform with the model annexed to the Convention. In order to facilitate the circulation of public documents, participants recalled the utility of conforming as closely as possible to this model, as well as the importance of bilingual or trilingual Apostille Certificates and the inclusion of additional text outside the area of the 10 standard informational items.

Electronic signatures and digital certificates

20. The participants noted that the majority of Parties have adopted legislation recognising that electronic signatures are functionally equivalent to handwritten signatures.

21. Forum participants reaffirmed the good practice of applying high standards to the issuance and management of digital credentials for use in applying digital signatures to e-Apostilles. This includes choosing a Certificate Authority that is well recognised in providing digital certificates which run on all major browsers and suit the document format chosen by the Competent Authority.

22. Participants acknowledged the good practice of providing information about how to validate signatures on e-Apostilles and, where applicable, of ensuring that all e-Apostilles issued are included in the e-Register

Non-expiry of e-Apostilles

23. The participants further recalled that as Apostilles do not have an expiration date, e-Apostilles continue to be valid even after the digital certificate of the person signing the e-Apostille expires, provided that the digital certificate was valid when the e-Apostille was

issued. Participants invited Competent Authorities to take this situation into account when selecting and using digital certificates to issue e-Apostilles, noting the availability of Long Term Signatures that remain valid beyond the expiry of the digital credential, such as “Advanced Electronic Signatures” for PDF (PAdES) and HML (XAAdES-T).

e-Registers

24. Participants reaffirmed that an e-Register is an invaluable tool to facilitate and enhance the use of Apostille registers to verify the origin of Apostilles, providing an efficient means of verification and thus additional assurance for users.

25. Participants further noted the proven benefits of e-Registers in facilitating the verification of Apostilles in *both* paper and electronic form, but also that non-repudiation of e-Apostilles in particular is greatly enhanced by the parallel use of an e-Register.

26. Participants emphasised that frequent and more systematic verification of Apostilles is essential in combatting fraud. To facilitate this, participants recommended that Parties consider implementing e-Registers that allow searches in English and French, with simple, user-friendly interfaces.

27. Participants noted that like registers in paper form, e-Registers must comply with the requirements set out in Article 7 of the Apostille Convention. Accordingly, an e-Register must at least record the following particulars: (i) the number and date of the Apostille; and (ii) the name of the person signing the public document and the capacity in which he has acted, or in the case of unsigned documents, the name of the authority which has affixed the seal or stamp. The e-Register must also allow the recipient of the Apostille (whether a paper Apostille or e-Apostille) to verify each of the above particulars.

28. Participants noted that basic e-Registers (Category 1 e-Registers that simply confirm whether or not an Apostille matching the number and date entered by the user has been issued) do not allow the relevant Competent Authority to discharge its obligations under Article 7 of the Apostille Convention, as it does not allow the recipient to verify the name of the person who has signed the public document and the capacity in which that person has acted, or in the case of unsigned documents, the name of the authority which has affixed the seal or stamp. Furthermore, Category 1 e-Registers do not provide the assurance that the relevant Apostille is indeed being used with the underlying public document for which it was originally issued. Competent Authorities are therefore encouraged to operate e-Registers that provide at least a basic description and / or image of the Apostille and / or of the underlying public document (Category 2 e-Registers) or which also provide for a digital verification of the Apostille and / or of the underlying public document (Category 3 e-Registers). Participants further recalled that the full display of the Apostille and / or the underlying public document is subject to data protection laws of the jurisdiction operating the e-Register.

29. Participants stressed the importance of preventing fishing expeditions (*i.e.*, attempts by users of an e-Register to collect information about Apostilles that they have not received) in the use of e-Registers and suggested the entry of unique information associated with an Apostille received; the most efficient means to accomplish this goal is for Competent Authorities to number Apostilles non-sequentially (or otherwise randomly) and for the e-Register to request the recipient to enter this unique identifier in the e-Register, together with the date of issuance of the Apostille. If Apostilles are numbered sequentially, it is recommended to include a code on the Apostille (ideally alphanumeric and generated electronically) outside the area containing the 10 standard informational items of the Apostille and to request the recipient to enter this code together with the number and date of the Apostille to access the e-Register.

30. In order to ensure a comprehensive system of verification for all Apostilles issued, participants encouraged Parties to, where possible, implement a centralised e-Register connecting the Competent Authorities of that Contracting Party.

31. Participants once again acknowledged the value and importance of clearly displaying instructions for accessing the e-Register on the Apostille certificate, together with an accompanying message that the origin of the Apostille may be verified online via an e-Register. To this end, participants noted with satisfaction the various practices of Contracting Parties, ranging from providing a simple URL with a unique identifier, to the use of a Quick Response (QR) code. In particular, participants noted that e-Registers are regularly requiring users to

enter a randomly generated word and / or number to ensure that the user is a person and not a computer. This practice is to be encouraged as it helps avoiding spam. The participants noted that relevant technology is evolving and that other means can produce the same results.

32. In the interests of securing the relevant website, participants encouraged Parties to use an SSL Certificate of similar technology (often indicated by a green colour in the URL bar of the web browser), which provides proof of an independent third party verification that the website itself belongs to the authority, person or company to which it purports to belong. Thus providing visitors to the website (*i.e.*, in this case, those seeking to verify an Apostille) with proof of the identity and confidence in the integrity and security of the online communications.

33. Subject to any domestic legal and practical requirements, issuing Competent Authorities are encouraged to keep e-Register entries accessible online for as long as possible, so as to allow for continued online verification of Apostilles.