

Title	Placement or provision of care of the child in another Contracting State under the 1996 Child Protection Convention (Art. 33)
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Placement or provision of care of the child in another Contracting State under the 1996 Child Protection Convention (Art. 33)

I. Introduction

- 1 This Preliminary Document (Prel. Doc.) focuses on the placement of the child in a foster family or institutional care, or the provision of care by *kafala* or an analogous institution in another Contracting State under 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 Child Protection Convention or 1996 Convention). It deals in particular with Articles 3(e) and 33 of that Convention.
- 2 The Prel. Doc. aims to (a) raise issues concerning the scope of application of Article 33, (b) provide information about how this Article is being implemented by States, and (c) identify possible areas that may need further work for the consideration of the Eighth Meeting of the Special Commission (SC) to review the practical operation of the 1980 Child Abduction and 1996 Child Protection Conventions.
- 3 In preparation for the SC, the Permanent Bureau (PB) circulated a Questionnaire on the practical operation of the 1996 Convention (2022 Questionnaire),¹ which included questions (Nos 23-27) concerning Article 33. The information included in the current Prel. Doc. is mainly based on the practices and challenges reported by States² in relation to Article 33 in their responses to these questions³ and conveyed to the PB during informal consultation meetings.⁴ It also includes references to the text of the 1996 Convention, Conclusions and Recommendations (C&R) adopted in previous meetings of the SC, and extracts from other relevant HCCH documents (see **green boxes**).
- 4 This Prel. Doc. includes the following sections:
 - Background and preliminary considerations (Section II);
 - Scope and application of Article 33 (section III);
 - Procedure under Article 33 (section IV);
 - Other elements to be taken into consideration in the application of Article 33 (section V);
 - Practices following the decision on the placement or provision of care of the child (section VI);
 - Possible issues for the consideration of the 2023 SC (section VII).

* All HCCH documents on child protection mentioned in this document are available on the HCCH website at www.hcch.net under "Child Protection" Section.

¹ [Prel. Doc. No 2 of October 2022](#) – Questionnaire on the Practical Operation of the 1996 Child Protection Convention.

² States which responded to questions 23-27 of the 2022 Questionnaire: Australia, Austria, Belgium, Czech Republic, Denmark, Dominican Republic, Ecuador, Estonia, France, Finland, Georgia, Germany, Honduras, Italy, Latvia, Lithuania, Nicaragua, Norway, Paraguay, Poland, Portugal, Slovakia, Spain, Sweden, Switzerland, United Kingdom (England & Wales, Northern Ireland and Scotland), Ukraine, and Uruguay.

³ [Prel. Doc. No 6 A of June 2023](#) – Compilation of responses received to the October 2022 Questionnaire on the Practical Operation of the 1996 Child Protection Convention (responses from Contracting Parties (HCCH Members and non-Members)).

⁴ During the month of September 2023, the PB held informal meetings with the following States: Canada, France, Germany, Norway, Switzerland, and the United Kingdom, during which issues related to Art. 33 were discussed, among other things.

II. Background and preliminary considerations

A. Negotiation history of Articles 3(e) and 33 of the 1996 Convention

- 5 Article 3(e) of the 1996 Convention,⁵ including the reference to *kafala*, was part of the Convention text from the beginning of the drafting process. Morocco had requested to include *kafala* in the 1996 Convention because it could not be included in the *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (1993 Adoption Convention or 1993 Convention), as *kafala* does not create a permanent parent-child relationship (filiation) and the child does not become a member of the family of the *kafil* (host family).⁶
- 6 On the other hand, Article 33 was only introduced during the final stages of the 1996 Diplomatic Session. The idea behind Article 33 was originally submitted by the delegation of the Netherlands, suggesting by explanation that: “Whenever the child’s placement outside its family of origin involves its removal to another Contracting State, a procedure similar to that provided for by the Convention of 29 May 1993, **should** be followed.”⁷ (emphasis added). The fact that this Article was introduced at a final stage explains the lack of minimal information available on Article 33 in the Explanatory Report and the *Travaux préparatoires*. The lack of information on the scope of application of the provision and its operation has, as a consequence, created some challenges. The implementation of Article 33 is not always consistent from one State to another. More importantly, there is also a lack of awareness about Article 33 and the mandatory nature of this provision.⁸

B. The mandatory nature of Article 33 – Awareness raising

- 7 Some States⁹ reported that in practice the procedure set forth by Article 33 is not always applied in States of origin,¹⁰ leaving receiving States confronted with a *fait accompli*, *i.e.*, with a situation in which the placement is already implemented, or the placement procedure is too advanced, making it difficult or even impossible for the authority to follow the steps required by Article 33. It also appears that some requested States (*i.e.*, the “receiving State”) may refuse to apply Article 33 in certain circumstances, or ignore fully or partially, the obligations set forth by Article 33.¹¹
- 8 This shows that one of the main challenges in the application of Article 33 is that some States (and / or authorities) are not aware of the existence of the mandatory procedure required by Article 33, and when and how it should be applied. One of the ways in which the implementation of Article 33 can be improved is to raise awareness, not only to its scope and object but particularly to the mandatory procedure prescribed therein.
- 9 With this intention, some States have disseminated information about Article 33 through, for example, circulars or their websites, and have published guidelines and manuals about Article 33

⁵ In the preliminary draft Convention adopted by the SC on 22 September 1995, existing Art. 3(e) was then Art. 4(e). See Prel. Doc. No 7 of March 1996 in *Proceedings of the Eighteenth Session (1996)*, Tome II, *Protection of children*, The Hague, SDU, 1998, at p. 141.

⁶ P. Lagarde, Explanatory Report on the 1996 Child Protection Convention, *Proceedings of the Eighteenth Session (1996)*, *ibid.*, pp. 535-605, at p. 547, para. 23. (Explanatory Report). See also Work. Doc. No 10 of 30 September 1996, in Annex I to this Prel. Doc., which describes the procedure of *kafala* established by the Moroccan law of 10 September 1993.

⁷ See Work. Doc. No 59 in *Proceedings of the Eighteenth Session*, *op. cit.* note 5, at p. 249.

⁸ See HCCH, [Practical Handbook on the Operation of the 1996 Child Protection Convention](#), para. 13.35 (1996 Practical Handbook).

⁹ 2022 Questionnaire, Question 23(a): Dominican Republic, Sweden, Switzerland; Question 23(b): Australia, Question 23(e): Germany, Slovakia; Question 23(f): France, Norway, United Kingdom (England and Wales – Judiciary).

¹⁰ Please note that the State which is contemplating the measure (*i.e.*, the State where the child is) is referred as the “requesting State” or the “State of origin”; and the State where it is envisaged that the measure will be exercised (*i.e.*, the State where the child will be) is referred to as the “requested State” or the “receiving State”. Please note that the Convention refers to “requesting State and “requested State”.

¹¹ 2022 Questionnaire on the 1996 Convention, Question 23(a): Dominican Republic (referring to other States); Question 23(b): Australia (referring to other States); Question 23(e): Germany (referring to other States). See also, *infra*, para. 55.

(see para. 34 below). Through this material, some States explain the benefits of the procedure under Article 33 when a child is placed abroad. Awareness-raising is an essential aspect to be covered in the discussion on Article 33, including awareness of the advantages of cooperation between States in order to ensure the suitability of the child's living environment abroad.

10 Article 33 institutes the only procedure for obligatory consultation provided by the 1996 Convention. Among others this consultation aims at ensuring that the child is placed in a suitable environment. It "gives a power to review the decision to the authority of the receiving State, and allows the authorities to determine in advance the conditions under which the child will stay in the receiving State, in particular in respect of immigration laws in force in that State, or even in the sharing of the costs involved in carrying out the placement measure".¹²

11 If this consultation does not take place, the requested State (*i.e.*, the receiving State) has the discretion under Article 23(2)(f) of the Convention to refuse the recognition of the placement.¹³ The non-respect of the mandatory consultation and the non-recognition of placement that would have been the object of the consultation could result in a lack of legal certainty, predictability, security, and perhaps even liability issues.

C. Preliminary conclusion

12 Due to the lack of information concerning the scope and implementation of Article 33 and a lack of awareness as to the existence and mandatory nature of the Article, the SC may want to consider the need for the development of a document to assist in meeting those needs.

III. Scope and application of Articles 3(e) and 33

A. Measures of protection covered by Articles 3(e) and 33

HCCH 1996 Child Protection Convention

Article 3(e)

The measures referred to in Article 1 may deal in particular with -

[...]

e) the placement of the child in a foster family or in institutional care, or the provision of care by *kafala* or an analogous institution;

[...]

Article 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.

¹² Explanatory Report, *op. cit.*, note 6, para. 143.

¹³ *Ibid.*, para. 143.

United Nations Convention on the Rights of the Child (UNCRC)

Article 20

- (1) A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
- (2) States Parties shall in accordance with their national laws ensure alternative care for such a child.
- (3) 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.

HCCH documents

“This paragraph [Article 3(e)] refers to **forms of alternative care** that can be provided for children. These usually apply where the child has been orphaned or the parents are unable to care for the child.” (1996 Practical Handbook, para. 3.25 (emphasis added))

“**Decisions regarding the placement of a child in a foster family or in institutional care, or the provision of care by means of *kafala* or an analogous institution come within the definition of measures directed to the protection of children** and fall within the scope of the Convention” (1996 Practical Handbook, para. 13.31 (emphasis added))

“The Special Commission notes that only decisions on placements or provision of care made or approved by a competent authority fall under the scope of Article 33. The Special Commission recalls that the consultation mechanism provided by Article 33 is mandatory **for any placement or provision of care by *kafala* or an analogous institution that is to take place in another Contracting State, including the case where the care is provided by relatives of the child.**” (2017 SC, C&R No 42 (emphasis added))

“This consultation should occur well before taking a decision about the placement or provision of care, and it should be as comprehensive as possible (including among other things, a clear description of the measure of protection, status of the child, health (where appropriate) and family history, migration conditions of the child in the receiving country) **in order to allow the respective authorities to take an informed decision in the best interests of the child.** The decision on consent to the placement by the requested State should be provided as quickly as possible.” (2017 SC, C&R No 43 (emphasis added)).

- 13 The 1996 Child Protection Convention covers a wide range of measures of protection. Even if the Convention, the Explanatory Report on the Convention¹⁴ or the 1996 Practical Handbook¹⁵ do not provide a definition of what a measure of protection is, the Convention provides in Article 3(a) to (g) an open list of examples of possible measures.
- 14 Regarding measures ordering the placement or the provision of care for the child (Art. 3(e) in particular), the 1996 Practical Handbook indicates that they “usually apply where the child has been orphaned or the parents are unable to care for the child”.¹⁶ It is important to note that

¹⁴ *Ibid.*, para. 18.

¹⁵ See 1996 Practical Handbook, *op. cit.*, note 8, at para 3.14.

¹⁶ *Ibid.*, para 3.25 at p. 30.

placements with a view to the adoption of a child (Art. 4(b)) or placements following a criminal offence committed by the child (Art. 4(i)) are excluded from Articles 3(e) and 33.¹⁷

15 All forms of measures of alternative care referred to in Articles 3(e) and 33 are covered by Article 20 of the UNCRC (namely, foster placement, *kafalah*, placement in suitable institutions for the care of children) and the UN *Guidelines for the Alternative Care of Children* (UN GACC).¹⁸

16 According to the UN Guidelines, defining a measure as an alternative care arrangement depends, among others, on the reason justifying the placement of the child. For example, informal arrangements where a child stays with relatives for recreational purposes is not considered an alternative care placement falling within the scope of the UN Guidelines, because they are not connected with the parents' general inability or unwillingness to provide adequate care.¹⁹

17 Under Article 33 of the 1996 Convention, an alternative care measure is a measure of protection decided by an authority and generally put in place or at least overseen by the State in connection with its responsibility towards children usually deprived of parental care, orphans, children whose parents lack the ability or are unwilling to provide adequate care for them.²⁰ In a cross-border context, both States involved would have a responsibility over such children which is among one of the other reasons²¹ for the mandatory consultation set out under Article 33 of the 1996 Convention. These measures of protection are sometimes accompanied by regular monitoring of the situation by the State, or a body to which this task is delegated, as part of their responsibility towards children subject to such placements.²²

18 Other measures of protection falling within the scope of the 1996 Convention (mentioned in Art. 3(a)-(d), (f)-(g)) do not refer to measures of alternative care. However, measures of alternative care may sometimes overlap with other measures (e.g., curatorship, guardianship).²³ For example, in the case of a placement abroad, the State of origin may place the child with a foster care family in the receiving State and, on the same occasion, attribute guardianship rights concerning the child to a third person in the same State where the child is located. In that situation, the transfer of guardianship rights could be considered part of the placement and be covered by Article 33.

B. Challenges and practices reported by States as to measures of protection falling within the scope of the application of Article 33

19 Some States have indicated issues that often arise concerning whether the following measures of protection fall under the scope of application of Article 33:

¹⁷ "The measures of placement of a child in a foster family or in institutional care are somewhat the prototypes of measures of protection and are obviously covered by the Convention, unless expressly excluded, as is placement with a view to adoption or placement following a criminal offence committed by the child (Art. 4(b) and (i))", Explanatory Report, *op. cit.*, note 6, at para. 23.

¹⁸ United Nations [Guidelines for the Alternative Care of Children](#) (UN GACC), formally welcomed by the United Nations General Assembly Resolution A/RES/64/142 of 24 February 2010.

¹⁹ *Ibid.*, para. 30. For example, one can think of a child with special health and / or educational needs whose parents would lack ability to provide adequate care.

²⁰ See Art. 20 of the UNCRC. See also para. 5 of the UN GACC, *op. cit.*, note 18: "Where the child's own family is unable, even with appropriate support, to provide adequate care for the child, or abandons or relinquishes the child, the State is responsible for protecting the rights of the child and ensuring appropriate alternative care, with or through competent local authorities and duly authorized civil society organizations. It is the role of the State, through its competent authorities, to ensure the supervision of the safety, well-being and development of any child placed in alternative care and the regular review of the appropriateness of the care arrangement provided."

²¹ See para. 10 above. ER para. 143: "[...] This consultation gives a power to review the decision to the authority of the receiving State, and allows the authorities to determine in advance the conditions under which the child will stay in the receiving State, in particular in respect of immigration laws in force in that State, or even in the sharing of the costs involved in carrying out the placement measure [...]"

²² See UN GACC, *op. cit.*, note 18, paras 5, 101-104.

²³ *Ibid.*, paras 103-104.

- Measures where the child is to be placed with relatives abroad:²⁴ Notwithstanding C&R No 42 adopted by the 2017 SC, it has been reported that some receiving States refuse to apply Article 33 when there is a decision of an authority to place a child with relatives abroad.²⁵ In addition, the domestic law of some States does not consider these measures as an alternative care measure that would fall under the scope of Article 33.²⁶ It is important to note that in many States foster parents that are relatives of the child have to be certified and / or registered as foster parents in accordance with the law of the State to be able to welcome a fostered child in their family environment. It is also important to note that *kafalas* can also provide for the placement with relatives.²⁷
- Measures which delegate the exercise of parental responsibility to someone located abroad other than the child's parent:²⁸ For some States, measures delegating parental responsibility, in accordance with Article 3(a) of the 1996 Convention, to someone other than a parent is not a placement within the meaning of Article 33.²⁹ However, for one State, such measures would fall under the scope of Article 33 because the procedure established therein would be the only way to evaluate the environment in which the child will be placed.³⁰
- Measures for short-term stay of the child abroad,³¹ including, for example, for vacation purposes.³² It is to be noted that a person who has authority for the child in particular circumstances, such as when the child is abroad to attend a summer camp, would be covered under Article 3(d).³³ Furthermore, it is accepted that a child travelling abroad for vacation purposes with their foster parent from their State of habitual residence is not a placement abroad under Article 33.³⁴
- Measures for educational placements abroad.³⁵ It is to be noted that a person who has authority for the child in particular circumstances such as when the child is placed in a school abroad would be covered under Article 3(d).³⁶

20 In some cases, the measure of protection which is taken in the requesting State has no equivalent in the receiving State.³⁷ States may, thus, have difficulties determining or agreeing whether the measure does indeed fall under the scope of Article 33. In that case, it would be important in the first place to assess whether the measure is to protect and assist a child that is usually temporarily or permanently deprived of their family environment, or cannot remain in their family environment as it would be against their best interests. Furthermore, through consultations it may be possible to adapt the measure to the legal requirements of the receiving State.³⁸

²⁴ 2022 Questionnaire, Question 23(a): Dominican Republic, Germany, United Kingdom (Wales).

²⁵ *Ibid.*, Question 23(a): Dominican Republic (referring to other States).

²⁶ *Ibid.*, Question 23(a): Germany.

²⁷ See UNICEF, An Introduction to Kafala, published by UNICEF ESARO 2023, available at <https://www.unicef.org/esa/media/12451/file/An-Introduction-to-Kafalah-2023.pdf>, p. 7: "*Kafalah* is often a form of kinship care as it commonly involves close relatives absorbing the child on an informal, largely spontaneous, and unregulated basis. Like other forms of kinship care, *kafalah* promotes continuity in upbringing in relation to children's kin connections and cultural and religious backgrounds. Not all *kafalah* involves care by a family member or friends of the family; children may be supported whilst in residential care or placed with a *kafil* who is unknown to the child. *Kafalah* is also different from other forms of kinship care in that it is endorsed and regulated by Islamic sharia law and not necessarily national law."

²⁸ *Ibid.*, Question 23(a): Switzerland; Question 23(c): Norway, United Kingdom (England and Wales – Judiciary).

²⁹ *Ibid.*, Question 23(a): Switzerland (referring to other States).

³⁰ *Ibid.*, Question 23(a): Switzerland.

³¹ *Ibid.*, Question 23(f): Norway.

³² *Ibid.*, Question 23(a): Germany; Question 23(f): Norway.

³³ See 1996 Practical Handbook, *op. cit.*, note 8, para. 3.24.

³⁴ This was confirmed during informal meetings held between Canada, France, Germany, Norway, Switzerland, and the United Kingdom, *supra*, note 4.

³⁵ 2022 Questionnaire, Question 23(a): Latvia.

³⁶ See 1996 Practical Handbook, *op. cit.*, note 8, para. 3.24.

³⁷ 2022 Questionnaire, Question 23(c): Norway, United Kingdom (England and Wales – Judiciary).

³⁸ See C&R No 30 of the 2017 SC.

21 Challenges have also arisen when a measure was not considered a measure of alternative care in the requesting State from the beginning, while, for the receiving State, the measure should have been considered an alternative care measure subject to Article 33.³⁹ The assessment of the measures, as explained in the previous paragraph, could play an important role.

22 States have taken different approaches in cases of doubt about whether a measure falls under the scope of Article 33. For example:

- making the assumption that all placements, apart from placements with a parent (*i.e.*, the mother and / or father), potentially fall under the scope of Article 33, except if the authority of the requested State informs otherwise;⁴⁰
- when contemplating the placement of a child abroad (*i.e.*, requesting States), contacting the competent authority in the receiving State to enquire about whether that other State considers the envisaged placement or provision of care to fall under the scope of Article 33;⁴¹
- in relation to measures for which it is not clear that they fall under Article 3(e), cooperation could take place in accordance with Article 34 with a view to verify whether a consultation would need to take place prior to initiating a consultation under Article 33.

C. Challenges and practices reported by States as to the requirement that the decision on placement or provision of care be decided by a competent authority

23 With regard to the prerequisite that the measure of placement or provision of care in another Contracting State be decided by a competent authority, two States⁴² raised the following challenges:

- In practice, the distinction between a placement as a measure of protection decided by competent authorities and a private placement agreed upon by the persons with parental responsibility⁴³ and the caregiver is not always clear.⁴⁴
- States have different views as to when they consider an authority to be competent for Article 33 purposes. For some States, the authorities are considered competent if they are “actively” making a decision concerning the measure of placement of the child. This means that for these States, if a competent authority is only “rubber stamping”⁴⁵ a private arrangement, such authority would not be actively making a decision and thus, Article 33 would not apply.⁴⁶

24 To illustrate the challenges mentioned above, it may be relevant to explore the following nuances:

- Placements that follow a given procedure decided by a judicial or administrative authority:⁴⁷ Because an authority is involved from the beginning of the care situation and therefore the

³⁹ 2022 Questionnaire, Question 23(a): Sweden.

⁴⁰ *Ibid.*, Question 23(a): United Kingdom (England and Wales – Judiciary).

⁴¹ *Ibid.*, Question 23(a): United Kingdom (England and Wales – Central Authority).

⁴² France and Norway.

⁴³ See C&R No 32 of the 2017 SC, “The Special Commission recalls that private arrangements between parents on parental responsibility (*i.e.*, parental agreements) do fall under the scope of the Convention through the application of the rules on applicable law, if consistent with Article 3 and not excluded by Article 4. Such parental agreements cannot be subject to the rules on recognition and enforcement, unless they have been confirmed or approved by a competent authority, or have been subject to an act of a similar nature by a competent authority with a view to giving such agreements force of law (see Art. 23, which provides for recognition by operation of law of measures taken by the authorities of a Contracting State).”

⁴⁴ 2022 Questionnaire, Question 23(a): Norway.

⁴⁵ In French, “homologuer”.

⁴⁶ 2022 Questionnaire, Question 23(a): France.

⁴⁷ See para. 23 of the Explanatory Report, *op. cit.*, note 6, “[...] The Moroccan delegation had furnished to the Special Commission a detailed note on the institution of Islamic law known as the *kafala* and a new document (Work Doc. No 10) was produced during the Diplomatic Session describing the procedure for *kafala* established by the Moroccan law of 10

authority has an “active” role in deciding the placement of the child or the provision of care, it seems clear for States that such measures fall under the scope of Article 33.

- Placements that are arranged privately and which are approved by a judicial or administrative authority: In such situations, an authority is involved but, in principle, not from the beginning of the care situation as described in the previous bullet point. There might therefore be questions about the “active” role of the authority in deciding about the need to order the placement and, for example, to what extent such an authority could disapprove the alternative care arrangement.

According to C&R No 42 of the 2017 SC which refers to placements “made or approved”, such measures may fall under the scope of Article 33. However, in practice, questions have arisen about such cases. Some States have considered this situation to fall under the scope of Article 33.⁴⁸ For one State, it is not sufficient that an authority approves the measure for it to fall under the scope of Article 33 because the authority must also have an “active” role with regard to the placement or provision of care of the child as described in the previous scenario.⁴⁹ The SC may wish to discuss further the use of the term “approved” in C&R No 42 of the 2017 SC and the fact that Article 33(2) only refers to “decisions”.

- Private arrangements in the form of an agreement or unilateral act, including a notarial kafala, validated by a notary:⁵⁰ Considering that, in general, notaries reflect the wishes of the party(ies) in private agreements or unilateral acts and only give legal validity to such arrangements, they would not be considered a “competent authority” deciding a measure of alternative care. However, it is not clear from the responses to the 2022 Questionnaire whether all States agree with this statement.
- Purely private arrangements resulting in an informal care placement: In such private arrangements, no authority is involved.⁵¹ The arrangement may simply be oral and not written. Considering that this type of informal care placement is not decided by an authority, it does not fall under the scope of Article 33.

25 With regard to the rules on jurisdiction set out in Articles 5 to 14 of the 1996 Convention, it is important to note that the Convention determines the Contracting State whose authorities have jurisdiction, but not the authority which is competent within that Contracting State. This question is left to domestic procedural law.⁵² It is understood that a competent authority could be a government department, agency or office such as a youth and welfare authority, vested by law to take measures to protect children in need of protection and assistance.⁵³

September 1993. From this it appeared that a child in need of protection may be entrusted either by a decision of the guardianship judge or by an administrative commission to a public or social institution or to a Muslim family which will care for the child’s person (shelter, maintenance, education) and, if needed, for the property of the child and who, if necessary, would receive delegation of guardianship over the child. [...]”

⁴⁸ 2022 Questionnaire, Question 23(a): France (referring to other States).

⁴⁹ *Ibid.*, Question 23(a): France.

⁵⁰ See UNICEF, *op. cit.*, note 27: “A notarial Kafalah takes place when a private contract or arrangement is established between the biological parent(s) and the *kafil* parent(s), and then validated through a notarial deed drawn up by a notary.” See in the 2022 Questionnaire on the 1996 Convention, Question 23(a): France, the example of requests involving a notarial kafala (“*kafala adoulaire*”).

⁵¹ The UN GACC, *op. cit.*, note 18, define an informal care placement as “any private arrangement provided in a family environment, whereby the child is looked after on an ongoing or indefinite basis by relatives or friends (informal kinship care) or by others in their individual capacity, at the initiative of the child, his or her parents or other person without this arrangement having been ordered by an administrative or judicial authority or a duly accredited body.”

⁵² See 1996 Practical Handbook, *op. cit.*, note 8.

⁵³ *Ibid.*, para. 3.14, footnote 69.

D. Preliminary considerations with regard to the scope and application of Articles 3(e) and 33

- 26 It appears from the above analysis and challenges reported by States that the placement of the child in a foster family or in institutional care, or the provision of care by *kafala* or an analogous institution (*i.e.*, alternative care arrangements) that fall under the scope of Articles 3(e) and 33 of the 1996 Convention are measures of protection decided by a competent authority (*i.e.*, judicial or administrative authority (*e.g.*, a government youth and welfare agency, a social worker)) to protect and assist children who are usually temporarily or permanently deprived of their family environment, or cannot remain in their family environment as it would not be in their best interests. In a cross-border context, it is understood that the two States involved in the placement (*i.e.*, the requesting State (State of origin) and the requested State (receiving State)) share the responsibility to protect and assist the child, *i.e.*, the mandatory consultation provided for under Article 33.
- 27 The SC may want to discuss further the use of the term “approved”, in C&R No 42 of the 2017 SC and the fact that Article 33(2) only refers to “decisions”.
- 28 The SC may want to consider whether additional information should be provided in the draft Country Profile for the 1996 Child Protection Convention in addition to what appears under Sections 16 to 19 and 36 of the Country Profile to assist with the implementation of Article 33.⁵⁴
- 29 Taking into consideration the challenges reported by States, the SC may want to consider developing a Guide, illustrated by examples, to better understand which situations fall within the scope of Article 33 and which arrangements fall outside its scope of application.

IV. Procedure under Article 33

A. General aspects

HCCH documents

“It should be noted that the Convention itself does not provide the exact details of how the procedure under Article 33 is to operate in practice, but rather gives only basic rules. It is for the Contracting States themselves to establish a procedure to implement these basic rules. They may want to consider establishing clear and efficient rules and procedures [...]” (1996 Practical Handbook, para. 13.39).

“While the 1996 Convention expressly excludes adoption from its material scope, the 1993 [...] Adoption Convention provides a similar procedure in intercountry adoption cases that may assist with the understanding (and / or implementation) of Article 33 of the 1996 Convention. Further, although the legal effects and requirements differ as between adoption and other forms of care, the co-operation mechanisms and some of the general principles of the 1993 Convention may still prove useful in relation to the cross-border provision of care. The Guide to Good Practice on the 1993 [...] Adoption Convention gives a clear explanation of these mechanisms and principles.” (1996 Practical Handbook, para. 13.40).

“This consultation gives a power to review the decision to the authority of the receiving State, and allows the authorities to determine in advance the conditions under which the child will stay in the receiving State, in particular in respect of immigration laws in force in that State, or even in the sharing of the costs involved in carrying out the placement measure. The text sets it out that the

⁵⁴ Prel. Doc. No 9 of July 2023 - Draft Country Profile for the 1996 Child Protection Convention, available on the HCCH website at www.hcch.net under the “Child Abduction” Section then “Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention”.

consultation will be with the Central Authority or other competent authority of the receiving State, and that it will be demonstrated by the furnishing to that authority of a report on the child's situation and by the reasons for the proposed placement or provision of care." (**Explanatory Report**, para. 143).

- 30 The procedure under Article 33 includes the following minimum steps:
1. The competent authority of the State which is contemplating the measure of alternative care consults with the competent authority in the State where it is envisaged that the measure will be exercised by:
 - a. transmitting a report on the child;
 - b. explaining the reasons for the envisaged placement or provision of care.
 2. The competent authority of the State where it is envisaged that the measure will be exercised gives its consent to the envisaged placement or provision of care.
 3. If the receiving State has consented to the placement or provision of care, the competent authority of the requesting State then issues its decision, taking into account the child's best interests.⁵⁵

1. Challenges and practices reported by States

- 31 Article 33 provides minimum steps concerning the procedure to be followed by States. Given that the steps provided in Article 33 provide a general framework, it is not clear for at least one institution involved in these processes how to interpret the rules set forth by the Convention.⁵⁶
- 32 Some States provide more clarity in the procedure set forth in Article 33 and request additional criteria to be met for the placement or provision of care abroad to take place, including for example, that:
- an agreement be signed between the competent authority of both involved States;⁵⁷
 - a report be made about those who will take care of the child;⁵⁸
 - the subsidiarity of the placement abroad has been respected;⁵⁹
 - there is information about the voluntary or involuntary character of the placement;⁶⁰ and
 - the child has been granted a residence permit.⁶¹
- 33 However, especially since these additional criteria are not provided for under the 1996 Convention, at least one State has noted that they may be challenging for other States to follow.⁶²

⁵⁵ Art. 33(1): "it shall first..."; Art. 33(2): "the decision [...] may be made [...] only if [...]".

⁵⁶ 2022 Questionnaire, Question 23(e): Ecuador.

⁵⁷ *Ibid.*, Question 23(b): Norway; Question 25: Norway, Sweden.

⁵⁸ *Ibid.*, Question 23(e): France.

⁵⁹ *Ibid.*, Question 24: Switzerland; Question 25: Sweden.

⁶⁰ *Ibid.*, Question 23(f): Norway; Question 25: Sweden.

⁶¹ *Ibid.*, Question 23(f): Norway.

⁶² *Ibid.*, Question 23(b): Norway.

- 34 Several States have developed their own procedure under Article 33 within their legislation;⁶³ others have published different types of guidelines and / or manuals to assist authorities in its application;⁶⁴ one State published a recommended model form for requests under Article 33.⁶⁵
- 35 One State also notes that since there may be differences in legislation and procedures between the requesting State and the receiving State, it may be challenging and thus require good cooperation between the States involved to ensure that these differences are well taken into account.⁶⁶
- 36 Some States also point out that in some instances, requests under Article 33 were made *a posteriori*, after the child had already been placed in their State, sometimes already for many years.⁶⁷ At least one of these States notes particular challenges to retroactively consent to the measure, which may render the requirements of Article 33 impossible to respect.⁶⁸ Such practices could be seen as distorting the aim and purpose of Article 33 and they may be seen as a possible circumvention of the procedure set forth in Article 33.

2. Aspects that may require further clarification

37 States may wish to clarify:

- whether it would be relevant for this SC and / or future HCCH documents to provide more detailed guidance and clarity as to the steps in the procedure under Article 33: for example, clarifying which aspects of the procedure need to be agreed upon in a more detailed way, in order to ensure that there is a common understanding of the procedure to be followed. Ultimately, this would ensure greater cooperation and coordination between States in their Article 33 consultations;
- The draft Country Profile for the 1996 Convention, under its Section 36, invites States to provide information on procedures or protocols in place for the implementation of Article 33.⁶⁹

⁶³ *Ibid.*, Question 24: Australia, Belgium, Norway, Paraguay, Spain, Sweden, United Kingdom (England and Wales; Wales).

⁶⁴ *Ibid.*, Question 24:

- Finland (https://stm.fi/documents/1271139/6195033/Kuntainfo_5-2018_verkkoon.pdf/418ff4ce-aa36-4ed5-8740-7f151251ccb3/Kuntainfo_5-2018_verkkoon.pdf),

- Germany (http://www.bagl.jae.de/assets/downloads/143_verfahren-bei-grenzueberschreitenden-unterbringungen.pdf and https://www.deutscher-verein.de/de/uploads/empfehlungen-stellungnahmen/2022/dv-19-21_auslandsmassnahmen.pdf),

- Sweden (<https://www.socialstyrelsen.se/globalassets/sharepoint-dokument/artikelkatalog/handbocker/2020-3-6640.pdf>) and (<https://www.mfof.se/download/18.7a15f94516e8e25421b15fd0/1574867419181/Vardnad-boende-umgange.pdf>),

- Switzerland (<https://www.bj.admin.ch/bj/fr/home/gesellschaft/kinderschutz/platzierungen.html>),

- United Kingdom (England and Wales – Judiciary) (https://www.justice.gov.uk/courts/procedure-rules/family/parts/part_12),

- United Kingdom (England and Wales – Central Authority)

(https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/280834/The_1996_Hague_Convention.pdf),

- United Kingdom (Wales) (<https://www.gov.wales/sites/default/files/publications/2022-01/handling-cross-border-child-protection-cases.pdf>)

⁶⁵ *Ibid.*, Question 24: Switzerland (<https://www.bj.admin.ch/bj/fr/home/gesellschaft/kinderschutz/platzierungen.html>).

⁶⁶ *Ibid.*, Question 23(f): Finland.

⁶⁷ *Ibid.*, Question 23(b): Australia (referring to other States); Question 23(e): Germany; Question 23(f): France (referring to both France and other States), Norway.

⁶⁸ *Ibid.*, Question 23(f): Norway.

⁶⁹ See Prel. Doc. No 9 of July 2023, *op. cit.*, note 69.

B. Specific steps in the procedure

1. Authority to be contacted for an Article 33 request

HCCH documents

"Each Contracting State may designate the authorities to which requests under Articles [...] 33 are to be addressed." (Art. 44 of the 1996 Convention).

"The designations referred to in Articles [...] 44 shall be communicated to the Permanent Bureau of the Hague Conference on Private International Law." (Art. 45 of the 1996 Convention).

"Each Contracting State **may designate the authority to which requests under Article 33 should be addressed**. If any such designation is made, it must be communicated to the Permanent Bureau of the Hague Conference on Private International Law. The Permanent Bureau will make this information available in the relevant section of its website (www.hcch.net, under "Convention 34" then "Authorities"). **If no such designation is made, communications may be sent to the Central Authority of the relevant Contracting State.**" (1996 Practical Handbook, para. 11.15 (emphasis added)).

"In two specific situations set out in the Convention [Arts 33 and 36], an obligation to cooperate / communicate is placed on the authorities of Contracting States. **It should be noted that these obligations are not placed specifically on Central Authorities, but on the particular authorities which wish to take [Art. 33], or which have taken (in the case of Art. 36), a certain measure of protection under the Convention.** However, it is anticipated that the communication and cooperation required by these provisions may take place through, or with the assistance of, the relevant Central Authority / Authorities." (1996 Practical Handbook, para. 11.12 (emphasis added))

"[Contracting States] may want to consider establishing clear and efficient rules and procedures, which may, in particular, enable the authority contemplating the placement to identify easily the competent authority in the other Contracting State to whom the request for consent must be addressed." (1996 Practical Handbook, para. 13.39).

38 It is important that States know to which authority requests under Article 33 should be addressed. The 1996 Convention currently has 54 Contracting States. However, only 11 of these States have notified to the PB the authorities which are competent for receiving requests under Article 33.⁷⁰ Even if it is the Central Authority which receives the requests, it would be very useful if this information were available on the HCCH website . If authorities do not know to whom they should address their requests under Article 33, it may cause delays in the procedure and / or it may simply mean that some States will not apply Article 33.

2. Information to be provided under Article 33(1)

HCCH documents

"This consultation [...] should be as comprehensive as possible (including among other things, a **clear description of the measure of protection, status of the child, health (where appropriate) and family history, migration conditions of the child in the receiving country**) in order to allow the

⁷⁰ See on the website of the HCCH (<https://www.hcch.net/en/instruments/conventions/authorities1/?cid=70>), those States that have designated competent authorities under Art. 44: Australia, Croatia, Denmark, Germany, Ireland, Lithuania, Monaco, Montenegro, Romania, Slovakia.

respective authorities to take an informed decision in the best interests of the child.” (2017 SC, C&R No 43 (emphasis added)).

- 39 At least one State reported that requests made under Article 33 are often unclear,⁷¹ and that the report on the child and the explanations on the reasons for the envisaged placement or provision of care abroad do not contain sufficient information.⁷² The provision of such information is crucial to ensure that the envisaged measure of alternative care is in the best interests of the child. For example, in one instance, the ultimate purpose of the measure was actually an adoption (which would circumvent the 1993 Adoption Convention as its safeguards and procedures would not be respected) and migration.⁷³

3. Obtaining the consent of the receiving State

HCCH documents

“This consultation **should occur well before taking a decision** about the placement or provision of care [...].” (2017 SC, C&R No 43 (emphasis added)).

“The decision to place the child in the other Contracting State **must not be made unless the Central Authority or other competent authority from the other Contracting State has consented** to the placement or provision of care, taking into account the child’s best interests.” (1996 Practical Handbook, para. 11.16 (emphasis added)).

“The decision to place the child abroad by the authority having jurisdiction under Articles 5 to 10 **may not be made unless the authority from the other Contracting State has consented** to the placement or provision of care, taking into account the child’s best interests.” (1996 Practical Handbook, para. 13.35 (emphasis added)).

- 40 Article 33 does not specify how the consent of the receiving State should be given and States have different practices in this regard. While it seems that most States provide a written consent (sometimes, this may take the form of a decision), this is not the case in at least one State.⁷⁴
- 41 Before giving their consent, at least one State has implemented additional criteria to the provision of a report on the child and of an explanation on the reasons for the envisaged placement or provision of care required under Article 33. For instance, some States have also requested a report on the person(s) who will take care of the child, or a report on whether the envisaged measure is in the best interests of the child.⁷⁵
- 42 The receiving State may undertake its own assessment concerning the placement. However, it is not always possible to know in advance if such an assessment will be made. Therefore, it is challenging for States to plan in advance, and prospective carers may end up being required to undertake multiple assessments by different authorities. This can cause delays in the procedure.⁷⁶
- 43 Two States have, furthermore, indicated the following challenges relating to consent:
- If the requests for placement or provision of care come without sufficient notice before the decision on the measure is to be taken (see also paras. 52 to 54 below on that point), they may not be able to give their consent on time.⁷⁷

⁷¹ 2022 Questionnaire, Question 23(a): Switzerland (referring to other States).

⁷² *Ibid.*, Question 23(a): Switzerland (referring to other States)

⁷³ *Ibid.*, Question 23(f): Sweden.

⁷⁴ *Ibid.*, Question 23(f): Italy.

⁷⁵ *Ibid.*, Question 23(e): France; Question 23(f): United Kingdom (Wales) (referring to other States).

⁷⁶ *Ibid.*, Question 23(f): United Kingdom (Wales).

⁷⁷ *Ibid.*, Question 23(e): France.

- In some situations, the decision was taken by the requesting State prior to the completion of the consultation period⁷⁸ (i.e., prior to the full procedure provided for under Art. 33 being followed).

4. Immigration requirements

HCCH documents

“[...] This consultation gives a power to review the decision to the authority of the receiving State, and **allows the authorities to determine in advance the conditions under which the child will stay in the receiving State, in particular in respect of immigration laws in force in that State [...]**” (Explanatory Report, para. 143 (emphasis added)).

- 44 While Article 33 does not make any specific references to immigration requirements, it is a substantial part of the procedure which States should always consider because the measure of alternative care will not be able to proceed without the child having received permission to leave the requesting State, and the right to enter and reside in the receiving State. At least one State noted that in some cases, the placement had to be postponed because the residence permit had not been issued on time.⁷⁹
- 45 It should also be noted that the competent authorities for immigration issues are likely to be different from the competent authorities which deal with the procedure under Article 33.⁸⁰ If immigration issues are raised, both competent authorities will need to be involved and cooperate.
- 46 Considering that the procedure to obtain a residence permit or a visa can be lengthy, it is important that authorities anticipate this step of the procedure well in advance and confirm at the earliest possible stage that the child has the documentation to travel to and stay in the receiving State.⁸¹ Such practice would avoid the situation in which the child is left waiting in the requesting State while the consent has already been given and a decision has already been made.⁸²

5. Adjustment of the child in the new environment

- 47 A placement or the provision of care of a child in another Contracting State may involve many changes and have a significant impact on the child's life. For example, if a child is entrusted to the care of a relative living abroad, or if the child is placed with a foster family, it may take some time for the child to adapt to their new carers and / or new environment. It is thus crucial that authorities ensure a smooth relocation and that sufficient time is provided for the child to adapt.⁸³

V. Other elements to be taken into consideration in the application of Article 33

A. Coordination between States

- 48 States may need to coordinate the procedure between the requesting State and the receiving State to ensure the success of the placement or the provision of care.⁸⁴ Some practices developed in this area include systematically asking the receiving State what the procedure is in their State for the

⁷⁸ *Ibid.*, Question 23(e): Germany.

⁷⁹ *Ibid.*, Question 23(e): Belgium

⁸⁰ *Ibid.*, Question 23(e): United Kingdom (England and Wales – Central Authority).

⁸¹ *Ibid.*, Question 23(e): United Kingdom (England and Wales – Judiciary).

⁸² *Ibid.*, Question 23(e): Australia.

⁸³ *Ibid.*, Question 23(e) and (f): Czech Republic.

⁸⁴ *Ibid.*, Question 23(b): Australia.

application of Article 33⁸⁵ and envisaging alternative measures of protection in case the placement is unsuccessful.⁸⁶

B. Equivalent measures

- 49 At least one State noted important challenges when the measure of alternative care available in the requesting State has absolutely no equivalent in the requested State, where it will be exercised.⁸⁷ This may also possibly lengthen the procedure as well as the time it takes for the State to understand what the measure entails and how they will be able to implement it. One possible solution to overcome this challenge might be to ensure that the measure is well understood before the competent authority gives its consent.⁸⁸

C. Financial costs

- 50 Two States indicated challenges in knowing, determining, agreeing and arranging which States or persons (*i.e.*, either the requesting State or the receiving State) should bear the costs for the measure of alternative care abroad.⁸⁹ Other challenges may arise if the child's habitual residence changes, as there may be a transfer of jurisdiction and thus the authority competent to bear the costs may also change.⁹⁰ It is interesting to note that in 1996 the Diplomatic Session rejected a proposal which would have charged the costs of the placement measures referred to in Article 3(e) [and Article 33] to the State which ordered the measure and not to the State which implemented it.⁹¹
- 51 To address these challenges, at least one State noted the importance of clarifying in advance which State will bear which costs inherent to the measure.⁹²

D. Time frames of the procedure under Article 33

HCCH documents

“This consultation should occur well before taking a decision about the placement or provision of care [...]. The decision on consent to the placement by the requested State should be provided as quickly as possible.” (2017 SC, C&R No 43 (emphasis added)).

- 52 Regarding the length of the procedures, States indicated two main types of challenges:
- Some requesting States send their requests too late:⁹³
 - ⇒ In such situations, receiving States do not have sufficient time to assess the situation and are left with two options:
 - > to give their consent under Article 33 without having properly assessed the situation, or
 - > to withhold or refuse to give their consent (or not be in a position to give their consent on time),⁹⁴ which may leave children without a solution concerning their placement or provision of care.

⁸⁵ *Ibid.*, Question 23(a): United Kingdom (England and Wales – Central Authority).

⁸⁶ *Ibid.*, Question 23(b): Australia.

⁸⁷ *Ibid.*, Question 23(c): Belgium.

⁸⁸ See *supra* para. 20.

⁸⁹ *Ibid.*, Question 23(d): Belgium, Sweden.

⁹⁰ *Ibid.*, Question 23(d): Sweden.

⁹¹ See Explanatory Report, *op. cit.*, note 6, para. 152, footnote 68.

⁹² 2022 Questionnaire, Question 23(d): Switzerland.

⁹³ *Ibid.*, Question 23(b): Australia (referring to other States), Denmark (referring to other States); Question 23(e): France (referring to other States).

⁹⁴ *Ibid.*, Question 23(b): Denmark; Question 23(e): France.

⇒ Such situations raise the same challenges as if Article 33 had not been applied altogether. This puts significant pressure on the receiving State to implement a measure over which they had no control.⁹⁵

At least one State also noted that all these situations and options they are left with may negatively impact the welfare of the child.⁹⁶

- Some receiving States take too long to respond to requests under Article 33,⁹⁷ and at least one State noted that this makes the procedure under Article 33 useless.⁹⁸

53 One State noted that these challenges may sometimes be due to the fact that the Convention does not provide clear time frames, so States have implemented their own time frames, which may differ from one State to another.⁹⁹ Because time frames can vary greatly from one situation to another, at least one State noted also being unable to inform the other State about their own time frames under Article 33,¹⁰⁰ which made it difficult to coordinate. Since the Convention does not provide for a detailed procedure with many rules, at least one State has implemented its own additional rules, which may be challenging for other States to follow, thus causing delays.¹⁰¹

54 To address these challenges, one State has implemented the following practices:

- It sets specific time frames for the steps of the procedure. For example, it arranged to respond to the consultation within a month of receiving the request.¹⁰²
- When a long period of time elapsed between sending the request to the receiving State and the decision being made in the requesting State, one receiving State provided updated information to the requesting State.¹⁰³

E. Possible non-recognition of the measure

HCCH documents

“Paragraph 2 of Article 33 provides that the decision on the placement or provision of care may be made in the requesting State only after it has been approved by the Central Authority or other competent authority of the requested State. Failure to follow this procedure for consultation in advance is sanctioned by refusal of recognition of the placement measure (Art. 23, para. 2 f, see above).” (**Explanatory Report**, para. 143).

“Article 23, paragraph 2, sub-paragraph f, avoids placing the State, in which the measure of placement is to be carried out, before a *fait accompli*, and authorizes it to refuse recognition if the procedure for consultation has not been followed.” (**Explanatory Report**, para. 127).

55 The responses to the 2022 Questionnaire rarely referred to the practice of not recognising the measure under Article 23(f) when the procedure of Article 33 had not been followed and States had been left with a *fait accompli*.¹⁰⁴ Even though these States could choose not to recognise the measure, they also considered that refusing recognition of a measure may put the child in an at-risk situation and / or would allow for the possibility of conflicting decisions in the State of origin and the receiving State, further resulting in uncertainty in relation to the care of the child. In such cases where Article 33 is not complied with, it may be that the child is placed abroad without any

⁹⁵ *Ibid.*, Question 23(b): Australia.

⁹⁶ *Ibid.*, Question 23(b): Australia.

⁹⁷ *Ibid.*, Question 23(b): Belgium (referring to other States), Italy (referring to other States), Latvia (referring to other States).

⁹⁸ *Ibid.*, Question 23(b): Switzerland.

⁹⁹ *Ibid.*, Question 23(b): Lithuania.

¹⁰⁰ *Ibid.*, Question 23(b): United Kingdom (Wales).

¹⁰¹ *Ibid.*, Question 23(b): Norway.

¹⁰² *Ibid.*, Question 23(b): Latvia.

¹⁰³ *Ibid.*, Question 23(b): Latvia.

¹⁰⁴ *Ibid.*, Question 23(a): Switzerland; Question 23(f): Norway.

authority having had the possibility to evaluate the safety and appropriateness of the placement arrangement, and without the necessary safeguards in the receiving State concerning the implementation of the placement. This situation brings concerns for some States regarding the protection of these children and their best interests,¹⁰⁵ as well as concerns of a practical nature such as the compliance of the arrangements with immigration law¹⁰⁶ and the obtention of visas and residence permits.¹⁰⁷

VI. Practices following the decision on the placement or provision of care of the child

56 Once a measure of alternative care has been taken (*i.e.*, after the procedure under Art. 33 has been followed, the decision made and the child moved to the requested State), different challenges may still occur and these are discussed below.

A. Competence of the authority

57 While the measure has been taken by the requesting State, the implementation of the measure is to be made by the State of habitual residence of the child. One State noted that for short(er) term placement, the child's habitual residence usually does not change, thus the requesting State remains competent.¹⁰⁸ For long(er) term placement, some States noted that the child may acquire a new habitual residence, in the requested State.

58 In the case of a change of habitual residence, one State noted that it is not always clear nor predictable when this change happens, which may create uncertainty as to which State's authority is competent.¹⁰⁹ Some other States also noted that in some instances, the requesting State continues to take actions for the implementation of the measures, even though it is the requested State which would have been competent.¹¹⁰ Such practices may raise important concerns as they may be against the law of the requested State.

C. Information sharing

59 As mentioned above, depending on the duration and type of placement or provision of care abroad put into place, the State where the measure was taken may or may not still have competence for the child. When States still have competence, some States require information about the child following the placement or provision of care in another Contracting State, to ensure that it is still in their best interests.¹¹¹ Two States noted that they request follow-up information every six months¹¹² (which may correspond with their practices for domestic placements).¹¹³ Some States notes that they do not require such follow-up information for every placement, but only sometimes, depending, for example, on the necessity, the difficulty of the placement or the particular circumstances of the case.¹¹⁴

¹⁰⁵ *Ibid.*, Question 23(a): Switzerland.

¹⁰⁶ *Ibid.*, Question 23(b): Australia.

¹⁰⁷ *Ibid.*, Question 23(e): Germany.

¹⁰⁸ *Ibid.*, Question 25: Belgium.

¹⁰⁹ *Ibid.*, Question 23(f): Norway.

¹¹⁰ *Ibid.*, Question 23(a): Sweden (referring to other States).

¹¹¹ *Ibid.*, Question 25: Belgium, Ecuador, Georgia, Latvia, Norway, Portugal, Slovakia, Sweden.

¹¹² *Ibid.*, Question 25: Georgia, Slovakia.

¹¹³ *Ibid.*, Question 25: Slovakia.

¹¹⁴ *Ibid.*, Question 25: Australia, Czech Republic, Dominican Republic, Switzerland, United Kingdom (Northern Ireland), United Kingdom (Wales).

- 60 To avoid the risk that a receiving State does not provide such follow-up information, some requesting States noted that they agree on this aspect with the receiving State before the placement takes place, in order to ensure that they receive this follow-up information.¹¹⁵
- 61 States seem to be basing their request for follow-up information on different Articles of the Convention: Article 30,¹¹⁶ Article 32,¹¹⁷ Article 33 or 34.¹¹⁸ Other States note that it is not clear whether requests from such States for follow-up information fall under the scope of Article 33 or Article 34 of the Convention.¹¹⁹
- 62 Some other States, however, do not require follow-up information.¹²⁰

D. Subsequent measure(s)

- 63 In some situations, because of the measure put into place, the child may acquire a new habitual residence. If there is a request to adapt the measure (or simply take a new measure), the new State of habitual residence of the child will likely be competent. One State noted that some persons entrusted with the care of the child wait for this change of habitual residence before requesting a new measure to be put into place, for example, after a *kafala* has been ordered, those taking care of the child apply to adopt the child.¹²¹ Such examples raise a particular challenge, in particular with regard to the consent of the birth family of the child, as it is not clear whether their consent is valid only for a measure of *kafala* or also for an adoption.¹²²

VII. Possible issues for the consideration of the 2023 SC

- 64 The SC may want to discuss what clearly falls within the scope of application of Article 33 of the 1996 Convention and what clearly falls out of the scope of application of Article 33.
- 65 The SC may want to consider discussing the use of the term “approved” in C&R No 42 of the 2017 SC as it does not appear in Article 33 of the 1996 Convention.
- 66 The SC may want to consider whether additional information should be provided in the Country Profile for the 1996 Convention in addition to what appears under Sections 16 to 19 and 36 of the draft Country Profile to assist with the implementation of Article 33.¹²³
- 67 The SC may want to consider developing a Guide, illustrated by examples, to assist Contracting States with the implementation and operation of Article 33. In addition to covering issues relating to the scope of application of Article 33, the Guide could cover the different issues of procedure relating to Article 33 as presented in this Prel. Doc. Such a Guide would raise awareness as to the mandatory nature of Article 33. The SC may wish to recommend that such a Guide be developed by a Working Group.
- 68 The SC may want to consider the need to develop a model recommended form for the purpose of requests under Article 33.

¹¹⁵ *Ibid.*, Question 25: Italy, Norway, Sweden.

¹¹⁶ *Ibid.*, Question 25: Latvia.

¹¹⁷ *Ibid.*, Question 25: Portugal.

¹¹⁸ *Ibid.*, Question 23(a): France.

¹¹⁹ *Ibid.*, Question 23(a): France.

¹²⁰ *Ibid.*, Question 25: Austria, Denmark, Estonia, Finland, Lithuania, Nicaragua, Poland, Ukraine.

¹²¹ *Ibid.*, Question 23(e): Germany.

¹²² *Ibid.*, Question 23(e): Germany. See also “Toolkit for Preventing and Addressing Illicit Practices in Inter-country Adoption”, Fact Sheet 2, “Circumventing the Application of the Convention”, note 7.

¹²³ Prel. Doc. No 9 of July 2023 - Draft Country Profile for the 1996 Child Protection Convention, *op. cit.* note 54.

ANNEXE

Annex I

WORK. DOC. No 10

COMMISSION II
CHILD PROTECTION

EIGHTEENTH SESSION
(30 September - 19 October 1996)

Distribution: 30 September 1996

Proposal from the delegation of Morocco¹²⁴

about

**"The *Kafala* procedure as established by the law of 10 September 1993
on abandoned children".**

The procedure laid down for *Kafala* as defined in the 1993 law constitutes a set of guarantees adopted in the best interests of the child.

Under this law, a child declared abandoned is taken into *Kafala* (legal fosterage) by court order. The child may only be entrusted to those seeking legal fosterage if they meet the necessary conditions and, in certain cases, only after obtaining the consent of the birth parents.

The same law provides for an administrative commission with the task of entrusting the *Kafala* to public bodies and institutions responsible for child protection, and for placing the child in the hands of couples who have been married for three years and are of the same faith as the child.

A decree implementing this law is currently being drafted, with the aim of regulating two institutions:

- the administrative commission at the level of each prefecture or province, which includes all the government departments concerned with children's issues, will be responsible for awarding *Kafala* to the married couples who apply for it, on presentation of a file containing all the documents required to prove that the applicants meet the conditions necessary to assume the obligations and costs of *Kafala*;

- the institution of a social worker whose role will be to monitor and control the well-being of the child who is the subject of the *Kafala* and to draw up a report on their state of health, education and living conditions in general.

The *Convention on the Rights of the Child*, which Morocco joined in 1993, requires States Parties to this Convention to take all necessary measures to combat the illicit transfer of children abroad and to protect children who are the subject of *Kafala* in order not to lose their identity and assimilate them into cultures different from their own or subject them to any kind of exploitation. In keeping with this spirit, the draft decree provides for a certain number of administrative and judicial measures to be taken with regard to travelling with a "*makfoul*" child outside Moroccan territory, in order to avoid any possible abuse that could harm the child's interests.

¹²⁴ This is a courtesy translation by the Permanent Bureau of the HCCH.

Thus, the government authority responsible for social affairs is required to inform the government authorities responsible for foreign affairs and Moroccan community affairs abroad of any decision authorising the "*makfoul*" child to leave Moroccan territory. And this with the aim of taking any measure (by the Moroccan consular services abroad), allowing the monitoring of the situation and the control of the execution of the commitments of the *Kafil* towards the child and to advise the governmental authorities in charge of justice and those of social affairs as well as those in charge of the Moroccan community abroad of the living conditions of the child outside Morocco.