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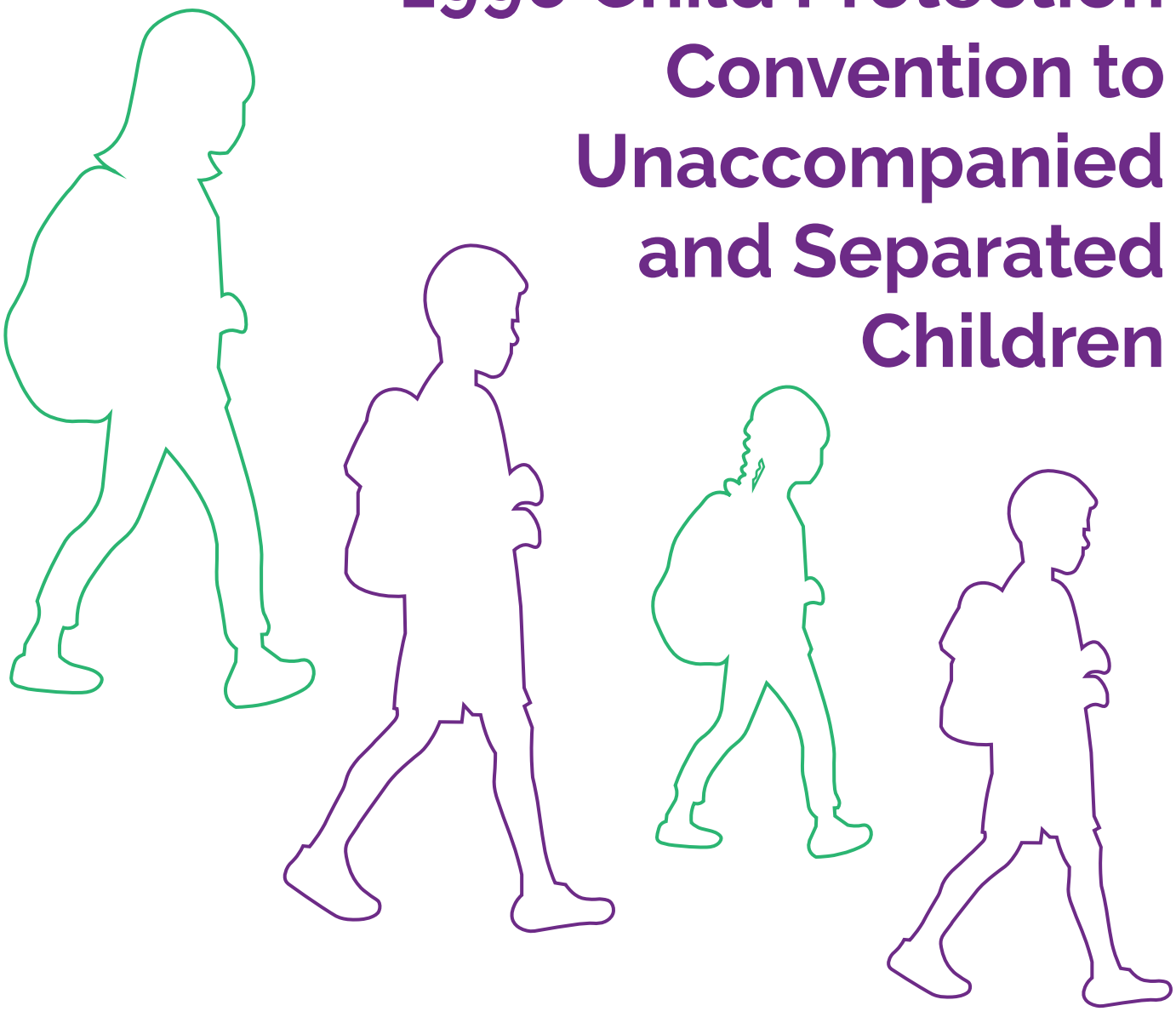
The Application of the 1996 Child Protection Convention to Unaccompanied and Separated Children



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The Application of the 1996 Child Protection Convention to Unaccompanied and Separated Children

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1. Introduction

1.1. Background

1. This document deals with the application of 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*[1] (1996 Convention) in cross-border situations involving children who are unaccompanied, that is, children without parental care who "are not cared for by another relative or an adult who by law or custom is responsible for doing so".[2] It also deals with the application of the 1996 Convention to separated children, that is, children without parental care who "are separated from a previous legal or customary primary caregiver but who may nevertheless be accompanied by another relative"[3] (hereinafter "unaccompanied and separated children"). This document will help legal practitioners, judges and professionals (*e.g.*, child welfare / protection officials and enforcement officers) with responsibilities in the protection of these children to better understand the Convention, where it applies.

2. In recent years, there has been increased awareness globally of the need to ensure the better protection of unaccompanied and separated children and of their rights and interests.[4] In this document, unaccompanied and separated children may include refugee children and children who are internationally displaced due to disturbances occurring in their country. In some regions in particular, the cross-border trafficking of children, their exploitation, as well as migration triggered by (civil) war, socioeconomic hardships and natural disasters have become serious problems. Unaccompanied and separated children may also include orphans, runaways, and children who are lost, abducted, abandoned or surrendered to an adult or a competent authority. Regardless of their individual circumstances, all unaccompanied and separated children shall be entitled to special protection and assistance provided by the State.[5] One common thread is that they face a higher risk of exploitation or trafficking from which they need to be protected.

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1 The text of the 1996 Convention is available on the HCCH website www.hcch.net under "Protection of Children".

2 United Nations General Assembly (UNGA), *Guidelines for the Alternative Care of Children*, A/RES/64/142, 24 February 2010, para. 29(a)(i), available at https://undocs.org/pdf?symbol=en/A/RES/65/230 (last consulted on 3 November 2019) (UNGA Alternative Care Guidelines). Please note that the UNGA Alternative Care Guidelines are non-binding. Please note that some domestic laws may define the term alternative care differently.

3 *Ibid.*, para. 29(a)(ii). Please note that some domestic laws may define this term differently.

4 The *United Nations Convention of 20 November 1989 on the Rights of the Child* (UNCRC) recognises particular rights to children and in particular to unaccompanied and separated children. The UNCRC is available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx (last consulted on 1 April 2022).

5 *Ibid.*, Art. 20.

3. The 1996 Convention is a private international law instrument. Its objects, as described in its Article 1, are to:

   a) determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child;[6]

   b) determine which law is to be applied by such authorities in exercising their jurisdiction;

   c) determine the law applicable to parental responsibility;[7]

   d) provide for the recognition and enforcement of such measures of protection in all Contracting States;

   e) establish such cooperation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.

4. The 1996 Convention Practical Handbook notes that the general cooperation framework of the Convention in particular may assist in cross-border situations involving unaccompanied or separated children in respect of children habitually resident in any of the States Parties. It states that:

> "[t]he extensive cross-border movement of children in many regions of the world raises problems ranging from the sale and trafficking of children, the exploitation of unaccompanied children, to the plight of refugee children and the sometimes unregulated placement of children abroad. This cross-border movement of children could be assisted by the general framework for co-operation which the 1996 Convention puts in place. This applies, for example, to Southern and Eastern Africa, the Balkans, some of the States of Eastern Europe and the Caucasus, parts of South and Central America, as well as many parts of Asia."[8]

5. The practical importance of the 1996 Convention for the protection of children at risk in cross-border situations around the globe has also been recognised at the global level by various bodies and documents of the United Nations (UN).[9]

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6 See P. Lagarde, Explanatory Report on the 1996 Hague Child Protection Convention, *Proceedings of the Eighteenth Session (1996),* Tome II, *Protection of Children,* The Hague, SDU, 1998, para. 10 (Explanatory Report on the 1996 Convention), available on the HCCH website www.hcch.net under "Protection of Children" then "HCCH Publications": "The Convention determines the State whose authorities have jurisdiction, but not the competent authorities themselves, who may be judicial or administrative and may sit at one place or another in the territory of the said State. In terms of conflicts of jurisdiction, it could be said that the Convention sets international jurisdiction, but not internal jurisdiction",

7 See, *infra*, note 17, for a definition of "parental responsibility".

8 HCCH, *Practical Handbook on the Operation of the 1996 Hague Child Protection Convention*, The Hague, 2014, para. 1.3, at p. 12, available on the HCCH website www.hcch.net under "Protection of Children" then "HCCH Publications" (1996 Convention Practical Handbook).

9 The *Optional Protocol to the UN Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* of 25 May 2000 in its Preamble explicitly refers to the 1996 Convention. Furthermore, in 2010, the UNGA in its *Guidelines for the Alternative Care of Children* encouraged States to ratify or accede to the 1996 Convention "to ensure appropriate international co-operation and child protection" in care provision situations for children outside their country of habitual residence. See UNGA Alternative Care Guidelines, *op. cit*. note 2, para.1.

The importance of the Convention more specifically for unaccompanied and separated children has also been recognised by the UN, in particular by the UN Committee on the Rights of the Child.[10]

6. These organisations have also been interested in the nature and substance of protective measures afforded to unaccompanied and separated children. In addition to the UNCRC, which is a legally binding instrument entailing obligations for State parties, a number of UN bodies have developed non-binding principles, guidelines and standards to help States in the application of various UN instruments in regard to unaccompanied or separated children.[11] For example, the UNGA Alternative Care Guidelines recommend a number of measures upon the arrival of an unaccompanied or separated child in a State as well as a path to ensuring a durable solution that should, if possible, put an end to the unaccompanied or separated situation either in the child's State of origin, the new State or another State.[12] States should consider implementing these

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[10] In 2005, the Committee on the Rights of the Child (CRC Committee) invited States to ratify or accede to the 1996 Convention in order "to ensure a conducive legal environment" in this area. See CRC Committee, Thirty-Ninth Session, 17 May – 3 June 2005, *General Comment No 6* (2005) *Treatment of unaccompanied and separated children outside their country of origin*, UN Doc CRC/GC/2005/6, 1 September 2005, para. 15, available at: http://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf (last consulted on 1 April 2022) (General Comment No 6 (2005)). See also, *Joint General Comment No 3* (2017) *of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 22 (2017) of the Committee on the Rights of the Child in the context of International Migration: General Principles* available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/GC/22&Lang=en (last consulted on 1 April 2022) (Joint General Comment No 3/22 (2017)) and *Joint General Comment No 4* (2017) *of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return,* available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/GC/23&Lang=en (last consulted on 1 April 2022) (Joint General Comment No 4/23 (2017)). In Joint General Comment No 4/23 (2017) it is indicated at para. 39 that "[t]he Committees draw the attention of States to article 6 of the 1996 Hague Convention […] under which the judicial or administrative authorities of the Contracting State have jurisdiction to take measures directed to the protection of the child's person or property with regard to refugee children and children who, due to disturbances occurring in their country, are internationally displaced and are present on the territory as a result of their displacement" and at para. 64 that "[t]he Committees reaffirm the need to address international migration through international, regional or bilateral cooperation and dialogue and […] in particular, cross-border case management procedures should be established in an expeditious manner in conformity with […] and the 1996 Hague Convention […]". Please note that General Comments are non-binding. See also, UNHCR, UNICEF and IRC, "Discussion Paper on a Possible Way Forward to Strengthened Policies and Practices for Unaccompanied and Separated Children", available at https://data2.unhcr.org/en/documents/details/53109 (last consulted on 1 April 2022).

[11] In addition to the UNGA Alternative Care Guidelines, *op. cit.* note 2, para. 1, see: (1) UNHCR and UNICEF, Statement of Good Practice—Separated Children in Europe Programme, *Save the Children*, 4th Revised Ed., HCR, UNICEF, 2009, available at http://www.scepnetwork.org/images/18/219.pdf (last consulted on 1 April 2022); (2) UNHCR and UNICEF, *Safe and Sound: What States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, 2014, available at https://www.refworld.org/docid/5423da264.html (last consulted on 1 April 2022).

[12] More specifically, the UNGA Alternative Care Guidelines (*ibid.*), recommend that as soon as an unaccompanied child is identified, States take steps to appoint, in accordance with the applicable law, an *ad hoc* administrator, guardian or counsellor / advisor for the child as well as a legal representative where appropriate (see paras 19 and 145 of the UNGA Alternative Care Guidelines). Durable solutions that should, if possible, put an end to the unaccompanied or separated situation

non-binding principles, guidelines and standards into their domestic policies, procedures, rules and legislation to better ensure the protection of the person, rights and interests of unaccompanied and separated children.

7. The 1996 Convention does not affect bilateral, regional and international instruments in place that contain provisions on matters governed by the Convention (Art. 52(1)). Similarly, the 1996 Convention does not prevent one or more Contracting States from concluding agreements that contain provisions on matters governed by the Convention in respect of children habitually resident in States Parties to such agreements (Arts 39 and 52(2)) which could provide for additional safeguards and clarity.[13] Furthermore, it is important to note that a number of provisions of the 1996 Convention apply regardless of whether the children in need of protection are from a Contracting State to the Convention or a non-Contracting State.

either in the child's State of origin, the new State or another State will include, depending on the applicable law, returning the child to the care of his or her parent(s) or entrusting the child to extended family, or alternative care arrangements such as kinship care, foster care, *kafala*, other forms of family-based or family-like care placements, residential care and supervised independent living arrangements for children (see paras 29(c)(i)-(v) and 30(b) of the UNGA Alternative Care Guidelines). In general terms, it is recommended that measures of protection concerning unaccompanied and separated children should be taken by judicial or administrative authorities (see, UNGA Alternative Care Guidelines, para. 57). Competent authorities for the purpose of the 1996 Convention can be judicial or administrative authorities (see Art. 23(2)(b)). It is also recommended that decisions concerning unaccompanied and separated children should be made on a case-by-case basis and must be grounded in the best interests and rights of the child concerned, in conformity with the principle of non-discrimination and taking due account of the gender perspective (see, UNGA Alternative Care Guidelines, para. 6). Article 3 of the UNCRC recognises that in every action concerning children, the best interests of the child need to be taken into account. The 1996 Convention also refers in its preamble to the principle that the best interests of the child are to be a primary consideration. The best interests determination process should take account of, *inter alia*, the right of the child to be heard and to have his or her views taken into account in accordance with his or her age and maturity (see, UNGA Alternative Care Guidelines, para. 7)). See, UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child*, 2018 provisional release, available at https://www.refworld.org/pdfid/5c18d7254.pdf (last consulted on 1 April 2022). It is important to note that recognition of measures of protection may be refused under Art. 23(b) of the 1996 Convention "if the measure was taken, except in a case of urgency, […] without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State". See Annex 4 to this document for a selection of principles and good practices from the UNGA Alternative Care Guidelines and UNCRC General Comment No 6 with regard to the protection of unaccompanied and separated children, including alternative care arrangements that States should consider implementing in their domestic policies, procedures, rules and legislation.

[13] International cooperation agreements concerning unaccompanied and separated children in place between member States of the Economic Community of West African States (ECOWAS) have been brought to the attention of the Permanent Bureau. If these States were Contracting Parties to the 1996 Convention, these agreements could fall under Arts 39 and 52(2) of the Convention.

2.2. Purpose

8. The purpose of this document is to:

- clarify what the 1996 Convention does and does not do as a private international law instrument in regard to unaccompanied and separated children;
- explain the scope of application of the 1996 Convention and in particular clarify which matters are covered by the scope and which are not;
- present a brief overview of the private international law rules of the 1996 Convention;
- explain how the framework for cooperation among Contracting States may facilitate the taking and implementation of measures of protection directed to unaccompanied and separated children made in accordance with the 1996 Convention; and
- invite Members of the HCCH to promote the wider ratification of the 1996 Convention.

9. Following a general discussion of what the 1996 Convention does and does not do, a description of the *ratione personae, ratione materiae* and geographic scope of the Convention, as well as an explanation of how the rules of the Convention should be applied, readers will better understand how the Convention applies to unaccompanied and separated children who cross international borders. In addition, Annex 1 will demonstrate the functionalities of the Convention where short-term or long-term measures of protection are contemplated, whether the child remains in the new State, returns to the State of origin or relocates to a third State, and Annexes 2 and 3 will provide factual examples to illustrate the application of the relevant provisions of the 1996 Convention. Annex 4 includes a selection of principles and good practices from the UNGA Alternative Care Guidelines and UNCRC General Comment No 6 with regard to the protection of unaccompanied and separated children including alternative care arrangements that States should consider implementing in their domestic policies, procedures, rules and legislation.

2. The 1996 Convention

2.1. Introduction – what the 1996 Convention does and does not do

10. The 1996 Convention harmonises private international law rules dealing with parental responsibility and child protection measures. More specifically, it establishes uniform rules for determining which Contracting State's courts and competent authorities have jurisdiction to take the necessary measures of protection for a child, and which State's law these authorities will apply when taking such measures. The reason for these rules is to prevent the occurrence of conflicting decisions regarding the same child amongst Contracting States. In addition, the Convention provides for the same rules of private international law whether the measures of protection covered by the Convention are of a public or private nature. In this way, the Convention avoids any uncertainty that

could arise if different rules of private international law were to apply to different types of measures of protection taken in relation to the same child.

11. The Convention also provides uniform rules clarifying the law governing parental responsibility arising without the intervention of a judicial or administrative authority. These rules are designed to secure continuity in parent / carer-child relationships while allowing the adaptation to new circumstances. Moreover, the Convention sets out uniform rules for the recognition and enforcement of measures of protection taken in one Contracting State in the other Contracting States. By providing that, measures of protection taken in one Contracting State are recognised by operation of law in other Contracting States, it favours the continuity of the protection for children crossing borders. Finally, the Convention establishes a framework for cooperation among Contracting States to achieve the purposes of the Convention. For example, it enables cooperation between States when a court or competent authority of a Contracting State is contemplating the placement of a child in another Contracting State.

12. As a private international law instrument, the 1996 Convention does not attempt to harmonise domestic procedural rules and substantive law amongst Contracting States or to create a uniform international law of child protection. Consequently, the Convention does not prescribe or direct any specific action in relation to the protection of children, and does not require Contracting States to provide for specific measures of protection for children. Any action to be taken regarding the child, the availability of measures of protection and the conditions under which these measures can be taken all exclusively depend on the domestic policies, procedural rules and substantive law of each Contracting State.

13. In addition, the 1996 Convention does not apply to determinations of asylum and immigration. All such issues, which unaccompanied and separated children may face in a cross-border setting, are governed by the immigration law or refugee law of the State(s) concerned.[14] Moreover, nothing in the 1996 Convention affects the *non-refoulement* principle.[15]

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[14] Decisions ordering measures of protection will be subject to the application, where relevant, of the immigration laws of the States concerned.

[15] The *non-refoulement* principle can be found in Art. 33(1) of the *United Nations Convention of 28 July 1951 on the Status of Refugees* which provides that "[n]o Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion", available at https://www.unhcr.org/3b66c2aa10 (last consulted on 1 April 2022) (1951 Convention on the Status of Refugees).

2.2. Scope

2.2.1. Scope ratione personae

14. Article 2 of the 1996 Convention provides that the instrument "applies to children from the moment of their birth until they reach the age of 18 years".[16] All children are covered regardless of their circumstances or status, including therefore unaccompanied and separated children. For some of these children, such as those who are refugees, who are internationally displaced due to disturbances occurring in their country of origin and those whose habitual residence cannot be established, the Convention even provides a specific base of jurisdiction in Article 6, as explained below.

2.2.2. Scope ratione materiae

15. The 1996 Convention governs matters of private family law, child welfare (child protection) and the protection of the child's property. Within this scope, the rules of the Convention apply to parental responsibility[17] by operation of law[18] and to a broad range of measures of protection[19] of a private or public nature. An illustrative list of these measures of protection is provided in Article 3, which refers notably to:

- the attribution and exercise of parental responsibility;
- rights of custody and access;
- the appointment of a guardian or of a legal representative in relation to the person or the property of the child;
- foster and institutional care placements;
- the provision of care by *kafala* or any other analogous institution; and

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16 The 1996 Convention is consistent with the UNCRC.

17 Art. 1(2) of the 1996 Convention provides that "[f]or the purposes of this Convention, the term 'parental responsibility' includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child". See Explanatory Report on the 1996 Convention, "The definition given [in Art. 1(2)] is broad. It covers at the same time responsibility concerning the person of the child, responsibility concerning his or her property and, generally, the legal representation of the child, whatever be the name which is given to the legal institution in question: parental responsibility, parental authority, paternal authority, as well as guardianship, curatorship, legal administration, *tutelle*, *curatelle*. The rights and responsibilities to which reference is made are those which belong to the father and mother under the law with a view to raising their children and ensuring their development, whether the question involved is custody, education, determination of the residence or the supervision of the child's person and in particular his or her relationships. The term 'powers' has to do more specifically with representation of the child. This responsibility is exercised normally by the parents but it may be exercised in whole or in part by third persons under conditions set by the domestic legislation in case of death, incapacity, unsuitability or unfitness of the parents or in case of the abandonment of the child by his or her parents.", *op. cit.* note 6, para. 14.

18 Arts 16 and 17 of the 1996 Convention.

19 Measures of protection are taken by the competent judicial or administrative authorities of a Contracting State (Arts 5(1) and 6) generally in accordance with their own law (Art. 15).

- the supervision by a public authority of the care of a child by any person having charge of the child.

Where one or more of these measures are contemplated to protect an unaccompanied or separated child, whether in the short or long term, the rules of the Convention – as explained below – will determine which Contracting State's authorities have jurisdiction to take the measures and in application of which State's law. The actual nature of the measures and the conditions under which they can be taken, however, will depend on the applicable domestic substantive law, and not on the rules of the Convention. This includes what measures a competent authority may be able to take to protect a child in the absence of a parent, a guardian or a legal representative, such as, depending on the circumstances, receiving medical treatment,[20] foster placement or the appointment of a guardian.[21]

16. Article 4 lists the matters excluded from the scope of the Convention. This is an exhaustive list. For the purposes of this document, two exceptions are of particular interest. First, according to Article 4(j), "[t]he Convention does not apply to – […] (j) decisions on the right of asylum and on immigration", as these are matters of public law deriving from the sovereign power of States.[22] However, "only decisions on these matters are excluded: in other words, the granting of asylum or of a residence permit. The protection and representation of children who are applying for asylum or for a residence permit fall, to the contrary, within the scope of the Convention" (emphasis added).[23] As such, children who are seeking asylum or a residence permit also fully benefit from the Convention in accordance with its scope *ratione materiae*, as described in the previous paragraph, including in regard to the designation of a legal representative (*e.g.*, for the purposes of a civil law suit) and the taking of child welfare / protection measures (*e.g.*, a foster care placement).[24] A person designated by a competent authority, in accordance with the jurisdictional rules of the Convention, to represent or assist a child could do so in the context of a refugee claim or an application for an immigration matter, if domestic procedural rules and substantive law so allow.[25]

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20 On the issue of a child's access to public health care and public schooling in the Contracting State, see below para. 17.

21 A competent authority would take such decision either on an urgent basis (Art. 11), a provisional basis (Art. 12) or on a regular long-term basis (Arts 5 and 6).

22 Explanatory Report on the 1996 Convention, *op. cit.* note 6, para. 36.

23 *Ibid.* See also 1996 Convention Practical Handbook, *op. cit.* note 8, para. 3.52. It is understood that both decisions that would grant and would not grant asylum or a residence permit are excluded from the scope of application of the Convention.

24 The same logic transpires also from para. 32 of the Explanatory Report on the 1996 Convention, *op. cit.* note 6 (relating to the exclusion of successions from the scope of the 1996 Convention). The last sentence reads: "At the very most, it might be admitted, following the example which has been indicated above in connection with the parent-child relationship, that if the law governing the succession provides for the intervention of the legal representative of the child heir, this representative would be determined through application of the Convention's rules."

25 In some Contracting States, the designation of a legal representative for an applicant under the age of 18 years for an immigration matter or a determination of refugee status is characterised as a matter of due process and procedural law, which is not governed by the Convention. In these States, the competent authority may therefore designate a legal representative for the child in accordance with the procedural rules of its domestic refugee or immigration law, regardless of the jurisdictional and applicable law rules of the Convention and of whether or not the child is present in the

17. Secondly, according to Article 4(h), "[t]he Convention does not apply to – […] (h) public measures of a general nature in matters of education or health". Consequently, eligibility criteria for public education and / or public health care in a Contracting State, which are determined by rules of a general nature, are excluded from the scope *ratione materiae* of the Convention. This exclusion does not mean that unaccompanied and separated children will not have access to public education or public health care in the Contracting State where they are present. Such access will depend on the rules of that State. It is important to note that granting access to state services such as public education or the public health care to a child in that State will not require recognition and enforcement in any other Contracting State.[26] However, "[t]he placement of a specific child in a specific school or the decision to have him or her undergo a surgical operation, for example, are decisions falling within the scope of the Convention".[27]

2.2.3. Geographic scope

18. As will be explained in section 3, unlike other HCCH Conventions, the application of certain rules of the 1996 Convention does not depend on the children being habitually resident in a Contracting State.[28] This is the case, to some extent, for the jurisdictional rules and the applicable law rules. These rules provide Contracting States the ability to take measures of protection for all children, including unaccompanied and separated children who are present on their territory, possibly as a result of a humanitarian crisis, but who are not habitually resident in a Contracting State to the Convention or whose State of habitual residence cannot be determined. The rules on recognition and enforcement of measures of protection, however, apply only where both the State where the measures of protection were taken, and the State where recognition and enforcement is sought, are Parties to the Convention. The cooperation mechanisms provided by the 1996 Convention are also limited to Contracting States based on reciprocity.

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jurisdiction. Depending on the circumstances, the competent authority may designate a person who has already been designated as the legal representative of the child for other purposes or designate another person. Regardless whether the designation of a legal representative for a child for the purposes of a determination of refugee status or an immigration matter is characterised as a matter of due process and procedural law or is deemed to fall within Art. 3(d) of the Convention, such designation should not create any difficulties because, from a legal and practical perspective, the competent authority would be the only one that could designate a legal representative for this specific purpose. In addition, in any event, there would be no need for the decision designating the legal representative to be recognised in the other Contracting States since it would be for the sole purpose of a matter excluded from the scope of the Convention (Art. 4(j)) and that is to be decided by the State making the designation. Finally, it is worth recalling that asylum and immigration decisions resulting from proceedings for which a legal representative was appointed, whether or not there was jurisdiction under the 1996 Convention, are not subject to the recognition and enforcement rules of the 1996 Convention, as they are excluded from the scope of application of the Convention under Art. 4(j).

26 The issue of recognition and enforcement in another Contracting State concerns the decision granting access to public services, not the access itself, which may refer to a public measure of a general nature.

27 See Explanatory Report on the 1996 Convention, *op. cit.* note 6, para. 34. See also 1996 Convention Practical Handbook, *op. cit.* note 8, at paras 3.46-3.47.

28 Explanatory Report on the 1996 Convention (*ibid.*), para. 17.

2.3. Rules on jurisdiction

2.3.1. Introduction[29]

19. The following rules on jurisdiction apply only to Contracting States. The 1996 Convention grants general jurisdiction to take measures of protection to:

- the State of the habitual residence of the child (Art. 5) as the primary basis for jurisdiction;
- the State where the child is present, for refugee children and for children who have been internationally displaced due to disturbances occurring in their country or for those whose habitual residence cannot be established (Art. 6);
- the State to which general jurisdiction is transferred (Arts 8 and 9); and
- the State deciding upon an application for divorce, legal separation or annulment of the marriage of the parents of a child habitually resident in another Contracting State (Art. 10).[30]

20. General jurisdiction means that the authorities of the Contracting State have jurisdiction to take all necessary measures of protection concerning a child whether or not the situation is urgent.

21. Exceptionally, under the 1996 Convention, any other Contracting State on whose territory the child or property belonging to the child is present may exercise jurisdiction autonomously, but only in cases of urgency (Art. 11) or where there is a need for provisional measures with limited territorial effect (Art. 12).

22. It is important to note that measures taken under Articles 5 to 10 remain in force subject to their limitations, even if a change of circumstances has eliminated the basis upon which jurisdiction was founded. This is only insofar as the authorities which have jurisdiction under the Convention have not modified, replaced or terminated such measures (Art. 14).[31]

2.3.2. General jurisdiction of the authorities of the Contracting State of the child's habitual residence – runaway, abandoned or trafficked child (Art. 5)[32]

23. The competent authorities of the Contracting State of the habitual residence of an unaccompanied or separated child who is not a refugee and who has not been internationally displaced due to disturbances in their country have

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29 *Ibid.*, para. 37.

30 Conditions for the application of Art. 10 are explained and set-out, *infra*, para. 31 and note 48.

31 For example, in the case of a relocation, the appointment of a guardian under Art. 5 will remain in force in the State of the new habitual residence of the child as long as the authorities of that State have not modified, replaced or terminated such measure. See also Example 3 of Annex 3.

32 Explanatory Report on the 1996 Convention, *op. cit.* note 6, paras 38-43. See also 1996 Convention Practical Handbook, *op. cit.* note 8, paras 4.4-4.11.

general jurisdiction to take measures of protection. This may be the case, for example, for a runaway, abandoned or trafficked child. The habitual residence of the child is the primary basis of jurisdiction under the 1996 Convention.

2.3.3. General jurisdiction of the authorities of the Contracting State of the child's presence – refugee and internationally displaced children, and children whose habitual residence cannot be established (Art. 6)[33]

24. The competent authorities of the Contracting State where the child is present have general jurisdiction in relation to refugee children, children internationally displaced due to "disturbances"[34] occurring in their country, and those whose habitual residence cannot be established.[35]

25. Refugee or internationally displaced children, or children whose habitual residence cannot be established may be unaccompanied or separated and they often require arrangements for their protection that are of a durable nature, even in the absence of a situation of urgency. This is why the Convention provides general jurisdiction to the Contracting State where such children are present (Art 6), as opposed to limited jurisdiction that applies only in situations of urgency (Art. 11) or where provisional measures with limited territorial effect are required (Art. 12), as explained below.[36] Given the particular circumstances

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33 Explanatory Report on the 1996 Convention (*ibid.*), paras 44-45. See also 1996 Convention Practical Handbook (*ibid.*), paras 4.13-4.19 and 13.58-13.60.

34 The Convention does not define the term "disturbances". It is interesting to note that the CRC Committee indicates that "disturbances" may include: civil war, famine, environmental or socioeconomic disturbances, General Comment No 6 (2005), *op. cit.* note 10, paras 84-88.

35 See 1996 Convention Practical Handbook, *op. cit.* note 8, para. 13.59: "The United Nations High Commissioner for Refugees (UNHCR) and other international bodies have noted that some countries, particularly when faced with large flows of internationally displaced persons, have tended to restrict the definition of "refugee" or used other methods to deny refugees the standards of treatment associated with recognition of refugee status. The application of Article 6 to children who, due to disturbances occurring in their country, are "internationally displaced" is intended to ensure a broad application of this Article."

36 It is interesting to note that Art. 6 of the 1996 Convention finds its counterpart in Art. 13 of *Council Regulation (EC) No 2001/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000* (Brussels IIa Regulation). The text of the Regulation is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R2201:EN:HTML (last consulted on 1 April 2022). A rule which coordinates the Brussels IIa Regulation and the 1996 Convention provides that the Regulation only applies to children who have their habitual residence on the territory of a Member State of the European Union to which the Regulation applies (*i.e.*, every Member State except Denmark), see Art. 61 of the Brussels IIa Regulation. By implication, if it cannot be established that a child has his or her habitual residence in such a Member State, it logically follows that the 1996 Convention is applicable. See on this latter point, Directorate General for Internal Policies of the Union, *Children On the Move: A Private International Law Perspective*, Legal Affairs, European Parliament, June 2017, available at http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583158/IPOL_STU(2017)583158_EN.pdf (last consulted on 1 April 2022). At p. 29, the cooperation provisions of Chapter IV of the Brussels IIa Regulation are described as being cast in very general terms. It is mentioned that "[t]hey are considerably less detailed than the cooperation provisions of the 1996 Hague Convention, which (while remaining applicable to children whose habitual residence is in a third Contracting State) are set aside and replaced by those of the Regulation for children having their habitual residence in a [Member State]" (Art. 61 Brussels IIa Regulation). See also *Council Regulation (EC) No 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)* (Brussels IIa Regulation recast). Art. 11(2) of the Brussels IIa Regulation recast provides that the jurisdiction based

of the children whose situation is captured under Article 6, relying on the general jurisdiction attributed to the authorities of the Contracting State of habitual residence (Art. 5) would be impossible or ineffective because such children may have severed every connection with that State, or it would be unrealistic to seek a measure of protection from the State of habitual residence, regardless of whether a parent or family member is still residing there.

26. Depending on their circumstances, refugee and internationally displaced children, or children whose habitual residence cannot be established, may eventually establish a new habitual residence in the Contracting State of refuge or in another Contracting State. As habitual residence is a question of fact, this will depend on the particular circumstances of each case including on whether the conditions of the child in the country, notably his or her legal status there in accordance with the applicable law (*e.g.*, being a refugee or not), provide for sufficient stability to allow for the establishment of a habitual residence. For example, under German law, in the case of refugee children, if the new State of habitual residence coincides with the State where they are present, the jurisdiction under Article 6(1) will continue.[37] As for children whose habitual residence cannot be established, the jurisdiction under Article 6(2) will cease to have effect as soon as they establish a new habitual residence. If this new place of habitual residence is in a Contracting State, the competent authorities of that State will exercise their jurisdiction under Article 5. Alternatively, the Contracting State in whose territory the child is present if in transit (not the new State of habitual residence) will have a limited basis of jurisdiction, as set out in Articles 11 and 12.

2.3.4. Transfer of general jurisdiction to a Contracting State better placed to assess the child's best interests[38]

27. As an exception to the rules on general jurisdiction, Articles 8 and 9 of the 1996 Convention allow for the transfer of jurisdiction from the authorities of the Contracting State normally having jurisdiction under Article 5 or 6[39] to, notably,

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on the presence of the child "shall also apply to refugee children or children internationally displaced because of disturbances occurring in their Member State of habitual residence". See also recital 25 of Brussels IIa Regulation recast for additional information. The Brussels IIa Regulation recast will apply from 1 August 2022.

37 J. Pirrung, Einführungsgesetz zum Bürgerlichen Gesetzbuche/IPR EU-Verordnung und Übereinkommen zum Schutz von Kindern (Brüssel IIa-VO, KSÜ, HKÜ, ESÜ, IntFamRVG, UmgangsÜ), *in J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, 2018, Art. 6 of the 1996 Convention, paras 50 and 51. If the child subsequently acquires a new habitual residence in another Contracting State, that State will have general jurisdiction under Art. 5.

38 Explanatory Report on the 1996 Convention, *op. cit.* note 6, paras 53-60.

39 While the transfer of jurisdiction to take measures in relation to refugee and internationally displaced children, or children whose habitual residence cannot be established (Art. 6) is expressly provided in Art. 8, it is not in Art. 9. The Explanatory Report indicates that this is the results of an "oversight", and that Art. 9 should be aligned with Art. 8. The Explanatory Report states: "If the authorities of the State of the child's nationality are entitled to ask those of the State of the habitual residence to authorise them to exercise protective jurisdiction, for even stronger reasons they ought to be able to ask the same of the authorities of the State to which, due to disturbances occurring in the country of the child's habitual residence, the child has been provisionally removed", Explanatory Report on the 1996 Convention (*ibid.*), para. 58. See also: 1996 Convention Practical Handbook, *op.*

the authorities of a Contracting State of which the child is a national or with which the child has a substantial connection, or of a Contracting State whose authorities are seised of an application for divorce or legal separation of the child's parents or for the annulment of their marriage.[40] This transfer of jurisdiction is only possible once certain conditions have been met, and only where there is mutual acceptance of the competent authorities of both Contracting States concerned that the authorities of the other Contracting State would be better placed in the particular case to assess the best interests of the child.

28. It is important to note that the best interests of the child must be assessed "in the particular case", that is to say, "at the moment when a certain need for protection is being felt".[41] For example, the possibility of this transfer could be envisaged, where appropriate, in cases where consideration is given to returning the child to the care of his or her parent(s) in the child's State of origin,[42] or to entrusting the child to an extended family member in the State of origin or in another State. However, the State to which jurisdiction would be transferred would need to be a Contracting State and, according to the wording of Article 8(2), it would need to be a State of which the child is a national or with which the child has a substantial connection.

29. The Convention does not define what constitutes a "substantial connection" between a child and a Contracting State for the purposes of a transfer of jurisdiction. The Explanatory Report notes, however, that this formulation will provide flexibility and that "[i]t will permit, according to the case and always as a function of the child's best interests, the possible jurisdiction, for example of the authorities of the State of the former habitual residence of the child, or of the State in which members of the child's family live who are willing to look after him or her".[43]

30. A request for a transfer of jurisdiction may be initiated in the Contracting State normally having jurisdiction (under Art. 8) or in the Contracting State seeking jurisdiction (under Art.9). There are two possible processes for transferring jurisdiction. First, the authorities themselves may submit the request to the authorities of the other Contracting State, whether directly or with the assistance of the relevant Central Authority (Arts 8(1), first option, 9(1), first option and 31(a)). Secondly, the parties to the proceedings may be invited to introduce the request before the authorities of the other Contracting State (Arts 8(1), second option, 9(1), second option). The transfer of jurisdiction may occur in respect of a case in its entirety, or a part of it.[44] Where a transfer has been accepted by the authorities of both States, the authority which waives its

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cit., note 8, footnote 156, at p. 57 and N. Lowe and M. Nicholls, The 1996 Convention on the Protection of Children, Family Law, Jordan Publishing, Bristol, 2012, para. 3.44.

40 Arts 8 and 9 also allow for a transfer of jurisdiction to the Contracting State in which property of the child is located.

41 Explanatory Report on the 1996 Convention, *op. cit.* note 6, para. 56.

42 Consideration of the possible return of the child to the State of origin must take into account the principle of *non-refoulement*, where appropriate. See, *supra*, note 15.

43 Explanatory Report on the 1996 Convention, *op. cit.* note 6, para. 55.

44 1996 Convention Practical Handbook, *op. cit.* note 8, para. 5.5.

jurisdiction may no longer exercise it in the particular matter, and must wait until the decision rendered by the authority of the other State becomes final and, where appropriate, enforceable.[45] Nevertheless, the transfer is not of a permanent nature. "Nothing, indeed, allows it to be affirmed in advance that under future circumstances the authority which has jurisdiction under Article 5 or 6 might not be better placed to decide in the best interests of the child."[46] In practice, this means that the competent authorities of the Contracting State having jurisdiction in accordance with Article 5 or 6 at the time a request is made to modify, replace or terminate the measures of protection ordered by the competent authority of the Contracting State to which jurisdiction was transferred will have general jurisdiction to hear such request. A new transfer of jurisdiction may, however, be accepted in accordance with Article 8 or 9.[47]

2.3.5. Concurrent general jurisdiction of the competent authorities of the Contracting State hearing an application for divorce, legal separation or annulment of the marriage of the child's parents (Art. 10)

31. The competent authorities of a Contracting State exercising jurisdiction to decide upon an application for divorce or legal separation of the parents of a child who is habitually resident in another Contracting State, or for the annulment of their marriage, have jurisdiction to take measures directed to the protection of the child if the law of their State so provides and if certain conditions are met.[48] Such jurisdiction may be exercised, for example, in regard to a runaway child or an internationally displaced child whose parents are divorcing or separating in a Contracting State other than that of the habitual residence of the child.[49]

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45 *Ibid.*, para. 5.6.

46 Explanatory Report on the 1996 Convention, *op. cit.* note 6, para. 56.

47 In some cases where jurisdiction is transferred in accordance with Art. 8 or 9, the consequence will be that the child will relocate to the Contracting State to which jurisdiction is transferred, and that the child will stay there resulting in his or her habitual residence being established in that State. In such instances, there will be no need for a later transfer of jurisdiction.

48 The conditions set out in Art. 10(1) are as follows:

"(1) […]

a) at the time of commencement of the proceedings, one of his or her parents habitually resides in that State and one of them has parental responsibility in relation to the child, and

b) the jurisdiction of these authorities to take such measures has been accepted by the parents, as well as by any other person who has parental responsibility in relation to the child, and is in the best interests of the child.

(2) The jurisdiction provided for [under Article 10(1)] to take measures for the protection of the child ceases as soon as the decision allowing or refusing the application for divorce, legal separation or annulment of the marriage has become final, or the proceedings have come to an end for another reason."

49 The real relevance of this jurisdiction would only arise at the recognition and enforcement stage, if indeed that court has taken a measure with regard to the child, and recognition of that measure is now invoked, or enforcement is sought, in the Contracting State where the child is present.

2.3.6. Concurrent jurisdiction of the authorities of the Contracting State of the child's presence – exceptional jurisdiction in cases of urgency (Art. 11) and provisional measures of territorial effect (Art. 12) – runaway, abandoned and trafficked children[50]

32. Article 11 grants jurisdiction to the authorities of every Contracting State on whose territory the child or property belonging to the child is present to take any necessary measures of protection in cases of urgency. The 1996 Convention does not define urgency. The Explanatory Report, however, states the following:

> "It might be said that a situation of urgency within the meaning of Article 11 is present where the situation, if remedial action were only sought through the normal channels of Articles 5 to 10, might bring about irreparable harm for the child. The situation of urgency therefore justifies a derogation from the normal rule and ought for this reason to be construed rather strictly."[51]

33. The jurisdiction covered in Article 11 is concurrent with general jurisdiction based either on the habitual residence of the child (Art. 5) or, in the situations covered by Article 6, the presence of the child on the territory, thus constituting an exception to the general jurisdiction rules that underpin the Convention.

34. Alternatively, in cases which are not urgent, Article 12 grants the authorities of every Contracting State on whose territory the child or property belonging to the child is present jurisdiction "to take measures of a provisional character for the protection of the person […] of the child which have a territorial effect limited to the State in question, in so far as such measures are not incompatible with measures already taken by authorities which have jurisdiction under Articles 5 to 10".

35. For refugee or internationally displaced children or children whose habitual residence cannot be established, Articles 11 and 12 are essentially inoperative, given that, under Article 6, the Contracting State in which the child is present is granted general jurisdiction. In regard to Article 11 specifically, the Explanatory Report notes that "[a]s concerns the authority of the State where the child is present, this extends by hypothesis to children other than refugee or displaced children within the meaning of Article 6, paragraph 1, or children without a habitual residence within the meaning of Article 6, paragraph 2. For these children, indeed, in the absence of a State of habitual residence which is established or accessible, the authorities where the child is present have general jurisdiction"[52] enabling them to take all available measures, whether urgent or not. However, Articles 11 and 12 would be appropriate, for example, in the case of trafficked, exploited or runaway refugee or displaced children for whom measures of protection may be needed. For example, another Contracting State where the child may be present would have jurisdiction, in

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50 Explanatory Report on the 1996 Convention, *op. cit.* note 6, paras 67-77.

51 *Ibid.*, para. 68.

52 Explanatory Report on the 1996 Convention, *op. cit.* note 6, para. 69.

some circumstances, to take measures under Article 11 or 12 to protect a refugee or a displaced child who has been trafficked from, or who has ran away from, the Contracting State having jurisdiction under Article 6.[53]

36. Jurisdiction based on Article 11 or 12 rests on the assumption that the measures will be in force for a limited time given that the authorities having general jurisdiction under Articles 5 to 10 are ultimately responsible for ensuring the care of the child.[54] The authorities of the Contracting State where the child is present should work with the authorities of the State having general jurisdiction under Articles 5 to 10 to determine the most appropriate long-term arrangements for the child.[55] It should be noted that if the authorities having general jurisdiction under Articles 5 to 10 are not in a position to take measures of protection relating to the child, a longer-term solution will have to be designed by the Contracting State on whose territory the child is present. Until measures of protection are taken by the State of the authorities having general jurisdiction under Articles 5 to 10, jurisdiction to protect these children rests, on an urgent or provisional basis, with the authorities of the Contracting State where the child is present. In addition, and depending on the situation, the authorities of the Contracting State where the child is present may consider the possibility of requesting a transfer of general jurisdiction in accordance with Article 9 of the Convention.[56]

2.4. Rules on applicable law[57]

37. The 1996 Convention provides that the authorities of the Contracting States in exercising their jurisdiction under the Convention to take measures for the protection of children apply their own law (Art. 15(1)). In so doing, they will apply the law with which they are most familiar, which in most cases coincides with the law of the State on whose territory the child is present. Furthermore, measures are generally executed on the territory of the State that has taken

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53 Arts 11 and 12 would be appropriate, for example, if a refugee or a displaced child was illegally removed from the Contracting State having jurisdiction under Art. 6 to another Contracting State because of child trafficking. They would also be appropriate if a refugee or a displaced child was to run away to another Contracting State for reasons other than to seek refugee status there or because of disturbances occurring in the Contracting State having jurisdiction under Art. 6. In such circumstances, the Contracting State in which the child is present would have jurisdiction under Arts 11 or 12, including to take measures to protect the child against the risk of further exploitation or measures directed to safely returning the child to the Contracting State having jurisdiction under Art. 6.

54 Where the child is habitually resident in a Contracting State, the measures taken under Art. 11 or 12 lapse as soon as the authorities having general jurisdiction under Arts 5 to 10 have taken measures required by the situation (Arts 11(2) and 12(2)). Where the child is habitually resident in a non-Contracting State, the measures taken under Art. 11 lapse in all Contracting States as soon as the measures required by the situation and taken by the authorities of another State are recognised in the Contracting State that took the urgent measures (Art. 11(3)). In regard to measures taken under Art. 12, they lapse in the Contracting State that took the provisional measures as soon as measures required by the situation and taken by the authorities of another State are recognised in that Contracting State (Art. 12(3)).

55 1996 Convention Practical Handbook, *op. cit.* note 8, para. 13.62.

56 This, of course, will only be possible where the State of the child's habitual residence is another Contracting State and the other conditions for a transfer of jurisdiction are fulfilled. See 1996 Convention Practical Handbook (*ibid.*), para. 13.63.

57 Explanatory Report on the 1996 Convention, *op. cit.* note 6, paras 85-117.

them. In this way, implementing these measures is more straightforward as they conform to the law of that State.

38. However, insofar as it is necessary for the protection of the child, the authorities of the Contracting States may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection (Art. 15(2)). It is important to note the universal character of the rules on applicable law, meaning that they apply even if the law designated by them is the law of a non-Contracting State (Art. 20). As noted in the Explanatory Report, "it might […] be indicated to apply to the protection of foreign children their national law, if it appeared that these children would be returning in a short time to their country of origin", even where that State is not a Contracting State.[58] This could be the case, for example, if the contemplated measure of protection consisted of appointing an uncle who resides in the State of origin of the child as the child's guardian. Similarly, it may be appropriate to apply the law of a third State if the child would be expected to relocate there in the short term. In any case, as provided in Article 15(2), the authorities in one State may take into consideration the law of another State in order to avoid taking a measure of protection that would not be capable of being enforced in the latter State.

39. Additional provisions complement the Chapter on applicable law, dealing with: attribution or extinction of parental responsibility (Art. 16); exercise of parental responsibility (Art. 17); termination or modification of parental responsibility (Art. 18); protection of third parties (Art. 19); exclusion of *renvoi*, which avoids the risk of conflicts between choice of law systems (Art. 21); and public policy, by which "the law designated by the provisions [of the 1996 Convention] can be refused only if this application would be manifestly contrary to public policy, taking into account the best interests of the child" (Art. 22).

2.5. Rules on recognition and enforcement[59]

40. The 1996 Convention sets forth the principle that measures taken in one Contracting State shall be recognised by operation of law in all other Contracting States (Art. 23).

> "Recognition by operation of law means that it will not be necessary to resort to any proceeding in order to obtain such recognition, so long as the person who is relying on the measure does not take any step towards enforcement. It is the party against whom the measure is invoked, for example in the course of a legal proceeding, who must allege a ground for non-recognition set out in paragraph 2 [of Article 23]."[60]

41. The non-mandatory grounds for non-recognition set out in the Convention are, for the most part, the classic grounds found in the various HCCH Conventions

[58] *Ibid.*, para. 89.

[59] *Ibid.*, paras 118-135.

[60] *Ibid.*, para. 119.

on private international law.[61] One ground, however, is specific to the 1996 Convention. It allows Contracting States not to recognise or enforce a measure of protection involving the cross-border placement of the child in foster or institutional care or the cross-border provision of care of a child by *kafala* or analogous institution, where the competent authorities failed to consult and obtain the consent of the competent authority in the Contracting State where the placement or the provision of care is to take place prior to taking such a measure. The duty to consult, transmit a report on the child and obtain consent is provided for in Article 33 of the Convention.

42. While measures of protection are recognised by operation of law, "[…] any interested person may request from the competent authorities of a Contracting State that they decide on the recognition or non-recognition of a measure taken in another Contracting State" (Art. 24). Such a procedure is governed by the law of the requested State. This provision may be of interest in cases where the measure of protection involves the return or relocation of the child to another Contracting State as the result of, for example, a custody determination, the appointment of a guardian or a cross-border placement into foster care. Such return or relocation could be to the Contracting State of the child's current or former habitual residence, that of the child's nationality or a third State, subject to relevant immigration rules allowing the child to enter and reside in the State concerned. Certainty may be required in these cases as to the recognition or enforcement of a measure of protection that has been taken before the relocation of the child but in no circumstances will a determination of recognition under Article 24 trump the application, where relevant, of the immigration rules of the requested state.

43. As is customary in HCCH Conventions, "[t]he authority of the requested State is bound by the findings of fact on which the authority of the State where the measure was taken based its jurisdiction" (Art. 25). In addition, "there shall be no review of the merits of the measure taken" (Art. 27).[62] "If the measure [of

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61 "Article 23

[…]

(2) Recognition may however be refused –

a) if the measure was taken by an authority whose jurisdiction was not based on one of the grounds provided for in Chapter II;

b) if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State;

c) on the request of any person claiming that the measure infringes his or her parental responsibility, if such measure was taken, except in a case of urgency, without such person having been given an opportunity to be heard;

d) if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child;

e) if the measure is incompatible with a later measure taken in the non-Contracting State of the habitual residence of the child, where this later measure fulfils the requirements for recognition in the requested State;

f) if the procedure provided in Article 33 has not been complied with."

62 If, in light of the circumstances, the measure of protection should be reviewed, modified or terminated, the competent authorities of the Contracting State having jurisdiction under the

protection] requires enforcement, for example a measure of constraint to obtain the handing over of the child, [...] the measure will have to be the subject in the second State of a declaration of enforceability or, according to the procedure applicable in certain States, of registration for the purpose of enforcement" (Art. 26(1)).[63] Such procedure will be triggered in the requested State at the request of an interested party. Contracting States are required to apply a simple and rapid procedure to the declaration of enforceability or registration for enforcement (Art. 26(2)). Finally, the 1996 Convention provides that:

> "[m]easures taken in one Contracting State and declared enforceable, or registered for the purpose of enforcement, in another Contracting State shall be enforced in the latter State as if they had been taken by the authorities of that State. Enforcement takes place in accordance with the law of the requested State to the extent provided by such law, taking into consideration the best interests of the child" (Art. 28).

2.6. Cooperation mechanisms[64]

44. The 1996 Convention puts in place a system of Central Authorities tasked with discharging the duties which are imposed by the Convention (Art. 29). Every Contracting State will designate a Central Authority for this purpose.[65] "Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their States to achieve the purposes of the Convention" (Art. 30(1)). Each Central Authority is, as it were, a fixed point of contact for the Central Authorities of other Contracting States for requesting information or assistance. Central Authorities can cooperate in relation to unaccompanied or separated children in different ways.

45. In accordance with Article 30(2), in connection with the application of the 1996 Convention, Central Authorities shall take appropriate steps to provide information as to the laws in force of, and services available in, their States relating to the protection of children. The Central Authority of the State of origin of the child or the Central Authority of a third State could be requested to provide such information in a case where the child could be returned to his or her State of origin or relocated to a third State.

46. Under Article 31(c), the competent authority of a Contracting State may request the Central Authority of another Contracting State to provide assistance in locating a child that appears to be present on the territory of the requested State and in need of protection. Furthermore, Article 34 provides that "[w]here a measure of protection is contemplated, the competent authorities under the Convention, if the situation of the child so requires, may request any authority

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1996 Convention at the time the new measures are contemplated would have jurisdiction to decide on the matter.

63 Explanatory Report on the 1996 Convention, *op. cit.* note 6, para. 132.

64 *Ibid.*, paras 136-153.

65 In federal States, more than one Central Authority may be designated, sometimes with a federal Central Authority designated as a "Central mailbox" which can be contacted if one does not know which Central Authority to contact.

of another Contracting State which has information relevant to the protection of the child to communicate such information", which may include, where available, information about the location of the family members of an unaccompanied or separated child. Article 34 does not impose a duty to furnish the requested information. Doing so will therefore depend on the good will of the authorities of the requested State and the mutual trust between both States and on the substantive and procedural law applicable. The decision to share available information may also depend on the rules governing the confidentiality of the information in the requested State.

47. As noted above, Article 33 of the 1996 Convention imposes a mandatory procedure of consultation and approval for the cross-border placement of the child in a foster family or institutional care, or the provision of care by *kafala* in another Contracting State.[66] This consultation is initiated when an authority having jurisdiction under the Convention contemplates the placement of the child abroad in another Contracting State. For the types of cases with which this document is concerned, such placement may be contemplated for an unaccompanied or separated child in his or her State of origin or in another State, subject to immigration rules allowing for the child to enter and reside in the State concerned.

> "This consultation gives a power to review[67] 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 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."[68]

48. Under Article 32, a Contracting State with which the child has a substantial connection may, with supporting reasons, request a report on the situation of a child from the Central Authority of the Contracting State in which the child is habitually resident and present.[69] It may also request that the competent authority of the latter State consider the need to take a measure of protection of the child. Here, too, Article 32 does not impose a duty on the requested Contracting State to provide such a report or to consider taking measures of

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66 Domestic placements will take place in accordance with domestic law.

67 It is to be noted that the French version of the Explanatory Report reads "*donne un pouvoir de contrôle sur la decision*" which is different from "review". It is to be understood that the requested State can only say "yes" or "no" but cannot "review" the decision.

68 Explanatory Report on the 1996 Convention, *op. cit.* note 6, para. 143.

69 This provision may apply in the case when a child is unaccompanied within his or her State of habitual residence and relatives located in another Contracting State would like to obtain a report assuming that, given the particular circumstances, the child's relationship with the relatives is such as to create a substantial connection between the child and them and between the child and the requesting State. This provision may also apply in the case where a State to which jurisdiction has been transferred would like to obtain a report.

protection. The same considerations of good will, mutual trust and rules governing confidentiality will apply in such instances.

49. The first paragraph of Article 35 also provides for "mutual assistance between the competent authorities of the Contracting States for the implementation of measures of protection. Such assistance will often be necessary, in particular in case of removal of the child or of his or her placement in an appropriate establishment, situated in a State other than that which has taken the measure of placement."[70]

50. According to Article 36, "in any case where the child is exposed to serious danger, the competent authorities of the Contracting State where measures for the protection of the child have been taken or are under consideration, if they are informed that the child's residence has changed to, or that the child is present in another State, shall inform the authorities of that other State about the danger involved and the measures taken or under consideration." This may be the case, for example, where a runaway child has been the subject of trafficking or the victim of an act of exploitation discovered in another State. Disclosing information about the measure taken or contemplated will be subject to the rules governing confidentiality of the State concerned. It is important to note that the duty to notify in such instances applies regardless of whether the child is present or residing in a Contracting State or a non-Contracting State.

51. Within this framework of information sharing, Article 37 of the Convention merits particular attention and emphasis. It provides that "an authority shall not request or transmit any information under this Chapter if to do so would, in its opinion, be likely to place the child's person […] in danger, or constitute a serious threat to the liberty or life of a member of the child's family." This obligation takes on particular importance, for example, in cases of refugee children and other unaccompanied or separated children who have been victims of trafficking and exploitation.

3. Conclusion

52. The 1996 Convention plays a key role in facilitating the cross-border protection of children, notably in the areas of private family law and child protection. It also provides for more effective cooperation among Contracting States. The Convention applies to all children up to the age of 18 years, regardless of their status or circumstances. With regard to unaccompanied and separated children, the Convention constitutes an important complement to other global and regional instruments relating to the protection of children, including those dealing with unaccompanied and separated migrant and asylum-seeking children. States are therefore strongly encouraged to consider becoming Contracting States to the 1996 Convention.[71]

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[70] Explanatory Report on the 1996 Convention, *op. cit.* note 6, para. 146.

[71] This message was also brought forward at the Workshops co-organised by the HCCH and UNICEF in May and September 2018 for States of the regions of South Asia (Afghanistan, Bangladesh, India,

53. Both Contracting and non-Contracting States are also invited to promote cooperation among competent authorities responsible for child protection measures and authorities responsible for immigration within their State, where such cooperation is possible and relevant or where coordination is necessary. For Contracting States, although the 1996 Convention does not govern domestic substantive law on the protection of children or matters related to immigration law and refugee law, it does provide for cooperation amongst all competent authorities to achieve the purposes of the Convention, in accordance with its particular scope.

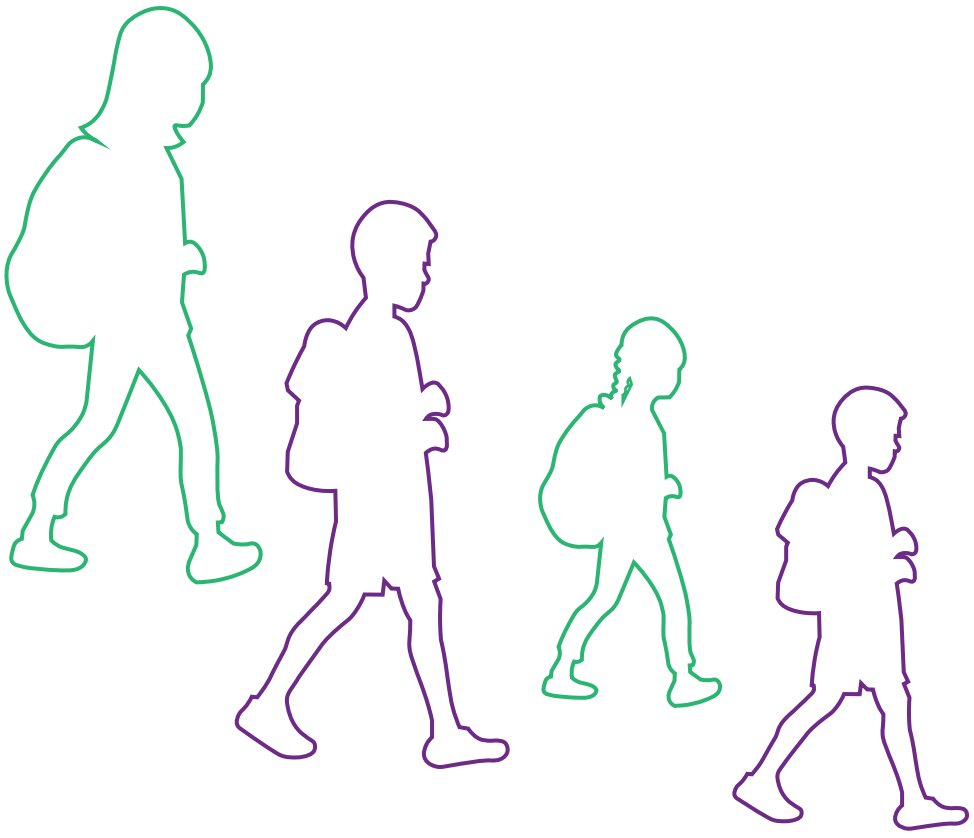
54. Collaboration between authorities should also be encouraged at the regional and international levels. In the European context significant steps have already been taken in this area. For example, at the November 2015, April 2016 and June 2017 annual meetings of Central Authorities under the Brussels IIa Regulation in the framework of the European Judicial Network in civil and commercial matters (EJN), possible cooperation between Central Authorities, national child protection authorities and authorities dealing with asylum and immigration was discussed and promoted with regard to refugee children and unaccompanied and separated children. Moreover, the theme of the 10th European Forum on the rights of the child, organised by the European Commission in November 2016, was "The protection of children in migration". The Forum was preceded by a side-event on guardianship. Guardians, child protection and immigration officials were given an overview of the relevant legal instruments available in these areas and encouraged to enter into a structured dialogue. As a result, a European Guardianship Network has now been established.[72] Hopefully, there will be other such positive initiatives to establish and support the important dialogue and collaboration that needs to

Maldives, Nepal and Sri Lanka), in Kathmandu, Nepal, and for East Asia and the Pacific (Fiji, Indonesia, Malaysia, Marshall Islands, Mongolia, Myanmar, Philippines and Thailand), in Bangkok, Thailand. Both Workshops included the participation of authorities responsible for international cooperation in child protection matters and authorities responsible for immigration and asylum matters at both the domestic and international levels. Additional information concerning these Workshops, including Conclusions and Recommendations adopted at the Workshops, are available respectively at https://www.hcch.net/en/news-archive/details/?varevent=610 and https://www.hcch.net/en/news-archive/details/?varevent=635 (both last consulted on 1 April 2022). This message was also brought forward at the April 2019 African Regional Conference on the HCCH Children's Conventions which took place in Cape Town, South Africa. Additional information concerning the African Regional Conference co-organised by the Faculty of Law of the University of the Western Cape, the International Academy of Family Lawyers, Miller du Toit Cloete Inc. and the HCCH, including Conclusions and Recommendations adopted by the Conference, are available at https://www.hcch.net/en/news-archive/details/?varevent=668 (last consulted on 1 April 2022). Finally, this message was also brought forward at the 14-15 November 2019 International Seminar on the Protection of Children Across Borders: The 1996 HCCH Convention on the Protection of Children which took place in Rabat, Morocco, and was attended by governmental experts and judges from Belgium, Burkina Faso, Cameroon, Egypt, France, Germany, Italy, Côte d'Ivoire, Mali, Mauritania, Morocco, Nigeria, Senegal, Spain, Switzerland, Togo, Tunisia and the United Kingdom, and representatives from the European Union, UNICEF, the CRC Committee, the Permanent Bureau of HCCH and the International Social Service (ISS). Conclusions and Recommendations adopted at the seminar are available at https://assets.hcch.net/docs/34629925-5823-4f8b-bb2b-da07873504fa.pdf (last consulted on 1 April 2022). These four events took place to promote, among other things, the application of the 1996 Convention to unaccompanied and separated children where the States concerned are party to the Convention.

[72] Information on the European Network of Guardianship Institutions is available at https://www.egnetwork.eu/about/ (last consulted on 1 April 2022).

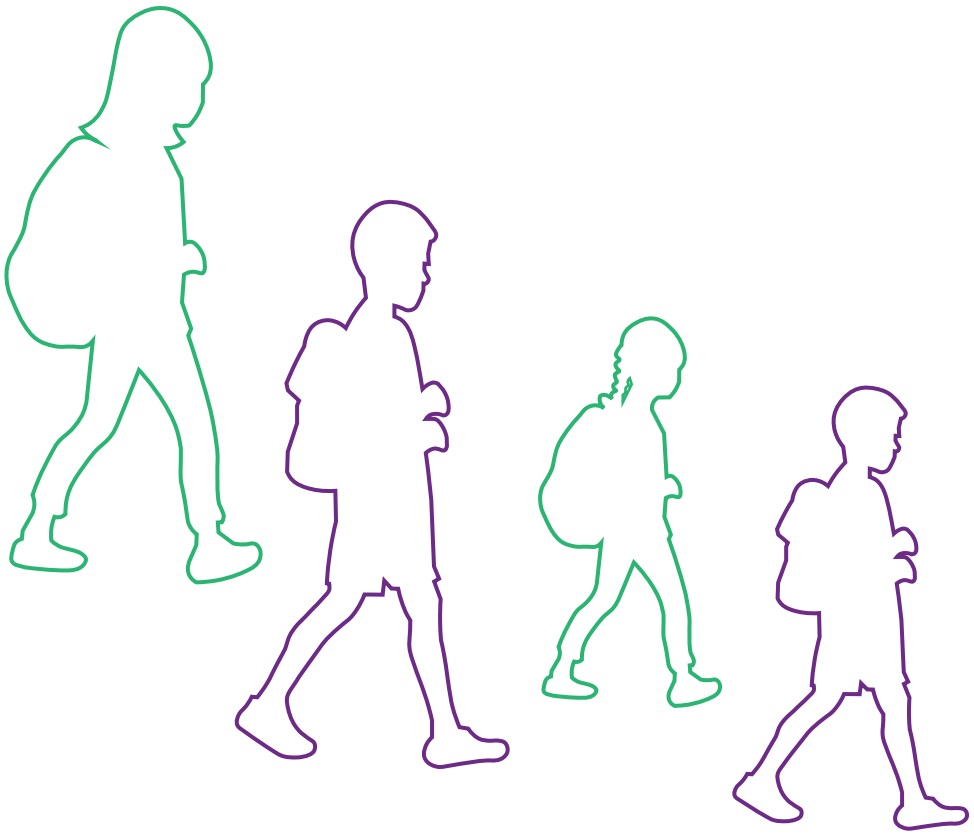
exist between all authorities involved in the protection of unaccompanied and separated children.

Annexes



Annex 1 A

Short-term urgent or provisional measures directed to the protection of the person of an unaccompanied or separated child



Comments on the relevant provisions of the 1996 Convention that are applicable to short-term urgent or provisional measures directed to the protection of the person of an unaccompanied or separated child.[1]

Scope (*ratione materiae*)[2]

Article 3 – The following measures of protection listed in Article 3 are covered by the Convention:[3]

- the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation;[4]
- rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence;
- guardianship, curatorship and analogous institutions;
- the designation and functions of any person or body having charge of the child's person, representing or assisting the child such as a legal representative, counsellor, advisor or an *ad hoc* administrator;
- the placement of the child in a foster family or in institutional care, or the provision of care by *kafala* or an analogous institution;[5]
- the supervision by a public authority of the care of a child by any person having charge of the child.

Jurisdiction (*ratione personae* and geographic scope)[6]

Article 6(1)[7] – The authorities of the Contracting State on the territory of which certain children are present – namely, refugee children or children who, due to disturbances occurring in their country, are internationally displaced – have jurisdiction to take measures of protection.

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1 The full text of the 1996 Convention and of the following provisions is available on the HCCH website www.hcch.net under "Protection of Children".

2 See, *supra*, paras 15-17.

3 The availability of the measures of protection listed here and decisions concerning such measures will be subject to the applicable law under Article 15. Furthermore, they will be subject to the application, where relevant, of the immigration laws of the States concerned.

4 Including returning the child to the care of his or her parent(s).

5 Including kinship care, foster care, other forms of family-based or family-like care placements, residential care and supervised independent living arrangements for children.

6 Arts 6, 11 and 12 apply only where the State where the child is present is a Contracting State to the 1996 Convention, regardless of whether the other States concerned are also Contracting States. See, *supra*, para. 18 and note 54.

7 See, *supra*, paras 24-26.

Article 6(2)[8] – The authorities of the Contracting State on the territory of which children whose habitual residence cannot be established are present also have jurisdiction to take measures of protection.

Article 11[9] – In all cases of urgency, the authorities of a Contracting State in whose territory the child is present have jurisdiction to take any necessary measures of protection. This provision applies, *e.g*, to runaway, lost, abandoned or abducted children whose circumstances are not captured by Article 6.

Article 12[10] – The authorities of a Contracting State in whose territory the child is present have jurisdiction to take measures of a provisional character for the protection of the child which have a territorial effect limited to the State in question. This provision applies, *e.g.*, to runaway, lost, abandoned or abducted children whose circumstances are not captured by Article 6.

Applicable law

Article 15(1) – In exercising their jurisdiction to take any measure of protection, including in the case of urgent and provisional measures of protection, the authorities of the Contracting States shall apply their own law.

Article 15(2)[11] – In exercising their jurisdiction, the authorities of the Contracting States may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection, such as the State of origin of the child.

Article 15(3)[12] – If the child's habitual residence changes to another Contracting State, the law of that other State governs, from the time of the change, the conditions of application of the measures taken in the State of the child's former habitual residence.

Recognition and enforcement[13]

Article 23(1) – Measures of protection taken in one Contracting State shall be recognised by operation of law in all other Contracting States.

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8 *Ibid*.

9 See, *supra*, paras 32-36 and note 54 with regard to the application of this provision when the child is habitually resident in a non-Contracting State. See, more specifically, *supra*, para. 35 and note 53, where this provision could apply to a child whose circumstances are covered by Art. 6 but who would has either been removed (*e.g.*, trafficked) or ran away to another Contracting State.

10 *Ibid*.

11 The law applicable can either be the law of a Contracting State or the law of a non-Contracting State. See, *supra*, paras 37-39.

12 It is important to note that Art. 15(3) can only apply if the measure continues to produce effect.

13 The recognition and enforcement provisions of the 1996 Convention will apply only if both the State where the measures of protection were ordered and the requested State (*i.e.*, the State where the measures of protection are to be recognised and enforced) are Contracting States. If only one of them is a Contracting State, the measures of protection will be recognised and enforced in the requested State in accordance with the domestic rules on the recognition and enforcement of foreign measures / decisions of that State. See, *supra*, paras 40-43.

Article 23(2) – Recognition of a measure of protection may however be refused for one of the reasons listed in Article 23(2).[14]

Article 26(1) – The enforcement of measures of protection will be subject to a declaration of enforceability or registration for the purpose of enforcement in the requested State, according to the procedure provided in the law of that State.

Cooperation[15]

Article 31(c) – A Central Authority may be asked to provide assistance to locate a child on the territory of its State when the child is in need of protection.

Article 32 – A Contracting State that has a substantial connection with a child (*e.g.*, depending on the circumstances, if the child's relatives live in its territory or if jurisdiction has been transferred to a State with which the child has a substantial connection) may address certain requests to the Central Authority of the Contracting State where the child is habitually resident and present, in respect of that child. Such requests must be accompanied by supporting reasons and may ask for a report on the child's situation or for the addressed Central Authority to possibly request that the competent authority of its State consider the need to take measures to protect that child.

Article 34 – Competent authorities of a Contracting State may request any authority of another Contracting State (*e.g.*, a State where relatives of a child are located) to communicate any information it possesses which is relevant to the protection of the child.

Article 36 – In any case where a child is exposed to a serious danger, the competent authorities of a Contracting State where measures of protection have been taken or are under consideration, if they are informed that the residence of the child has changed to, or the child is present in, another State, shall inform the authorities of that other State about the danger involved and the measures taken or under consideration. This may be the case, for example, where a runaway child has been the victim of an act of exploitation discovered in another State.

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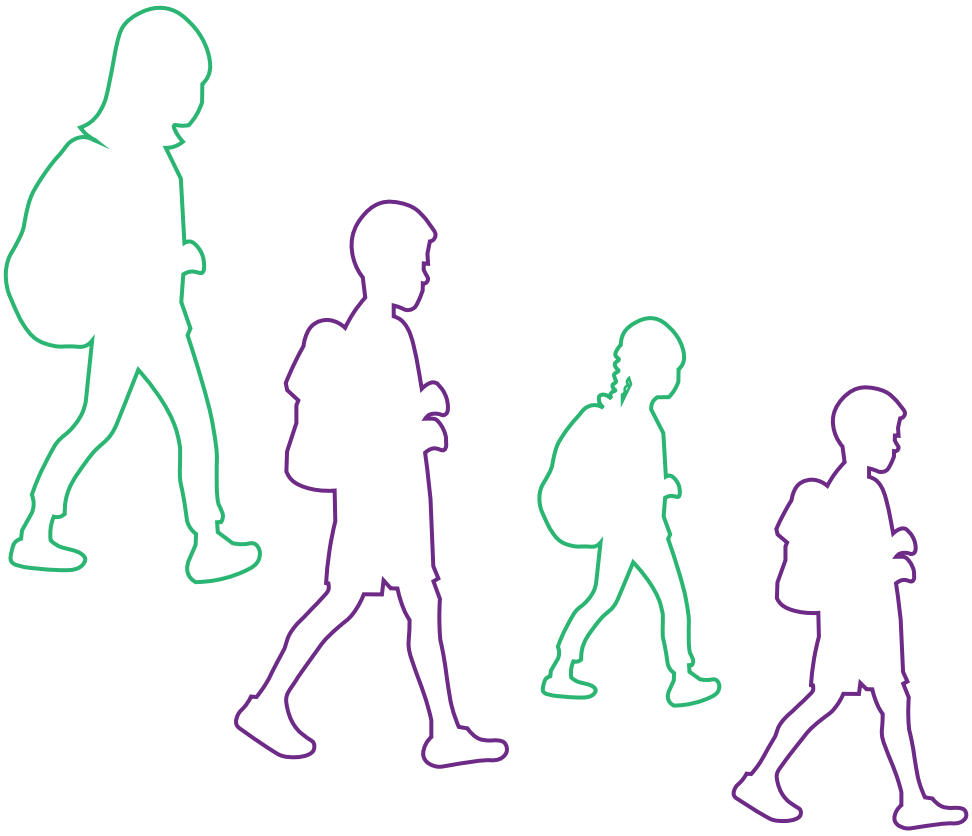
[14] See, *supra*, para. 41 and note 61.

[15] Arts 32 and 34 do not require the requested State to respond favourably. Doing so will depend on the laws of the requested State including the laws concerning access to information and the protection of privacy. See, *supra*, paras 44-51.

Annex 1 B

Long-term measures directed to the protection of the person of an unaccompanied or separated child that would result in the child staying in the new State



Comments on the relevant provisions of the 1996 Convention that are applicable to long-term measures directed to the protection of the person of an unaccompanied or separated child that would result in the child staying in the new State.[1]

Scope (*ratione materiae*)[2]

Article 3 – The following measures of protection listed in Article 3 are covered by the Convention:[3]

- the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation;[4]
- rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence;
- guardianship, curatorship and analogous institutions;
- the designation and functions of any person or body having charge of the child's person, representing or assisting the child such as a legal representative, counsellor, advisor or an *ad hoc* administrator;
- the placement of the child in a foster family or in institutional care, or the provision of care by *kafala* or an analogous institution;[5]
- the supervision by a public authority of the care of a child by any person having charge of the child.

Jurisdiction (*ratione personae* and geographic scope)[6]

Article 5 – If the State of origin of the child is a Contracting State to the Convention and the child is still habitually resident in that State, its authorities have jurisdiction to take measures that would result in the relocation of the child to the new State.

Article 6(1)[7] – The authorities of the Contracting State on the territory of which certain children are present – namely, refugee children or children who, due to disturbances occurring in their country, are internationally displaced – have jurisdiction to take measures of protection.

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1 The full text of the 1996 Convention and of the following provision is available on the HCCH website www.hcch.net under "Protection of Children".

2 See, *supra*, paras 15-17.

3 The availability of the measures of protection listed here and decisions concerning such measures will be subject to the applicable law under Article 15. Furthermore, they will be subject to the application, where relevant, of the immigration laws of the States concerned.

4 Including returning the child to the care of his or her parent(s).

5 Including kinship care, foster care, other forms of family-based or family-like care placements, residential care and supervised independent living arrangements for children.

6 Arts 5-6, 8-9 and 11 apply only to Contracting States to the 1996 Convention regardless of whether the other States concerned are also Contracting States. See, *supra*, para. 18 and note 54.

7 See, *supra*, paras 24-26.

Article 6(2)[8] – The authorities of the Contracting State on the territory of which children whose habitual residence cannot be established are present also have jurisdiction to take measures of protection.

Articles 8-9[9] – It may be possible to transfer jurisdiction to the authority of another Contracting State if it is considered that this other authority would be better placed in the particular case to assess the best interests of the child. The possibility of a transfer may be particularly appropriate when considering returning the child to the care of his or her parent(s) in the new State or relocating the child in the new State, if the State of origin of the child is a Contracting State to the Convention and has retained jurisdiction over the child on the basis that the habitual residence of the child is still in the State of origin (Art. 5).[10] The State that would transfer its jurisdiction would be the State of habitual residence (and origin) of the child, and the State agreeing to take jurisdiction would be the State where the child is present.

Article 14 – The measures taken in application of Articles 5 to 10 remain in force according to their terms, even if a change of circumstances has eliminated the basis upon which jurisdiction was founded, so long as the authorities which have jurisdiction under the Convention have not modified, replaced or terminated such measures.

Applicable law

Article 15(1) – In exercising their jurisdiction, the authorities of the Contracting States shall apply their own law, including when returning the child into the care of his or her parent(s) in the new State or providing for alternative care arrangements for the child in the new State.

Article 15(2)[11] – In exercising its jurisdiction, the authorities of the Contracting States may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection, such as the new State of the child.

Article 15(3) – If the child's habitual residence changes to another Contracting State, the law of that other State governs, from the time of the change, the conditions of application of the measures taken in the State of the child's former habitual residence.

Recognition and enforcement[12]

Article 23(1) – Measures of protection taken in one Contracting State shall be recognised by operation of law in all other Contracting States.

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8 *Ibid*.

9 See, *supra*, paras 27-30 and more specifically note 39.

10 This will only be practical if there has been a previous measure where the custody has been taken from the parents, and a new measure is necessary to alter the previous measure.

11 The law applicable can either be the law of a Contracting State or the law of a non-Contracting State. See, *supra*, paras 37-39.

12 The recognition and enforcement provisions of the 1996 Convention will apply only if both the State where the measures of protection were ordered and the requested State (*i.e.*, the State where the measures of protection are to be recognised and enforced) are Contracting States. If only one of them is a Contracting State, the measures of protection will be recognised and enforced in the requested State in accordance with the domestic rules on the recognition and enforcement of foreign measures / decisions of that State. See, *supra*, paras 40-43.

Article 23(2) – Recognition of a measure of protection may however be refused for one of the reasons listed in Article 23(2).[13]

Article 26(1) – The enforcement of measures of protection will be subject to a declaration of enforceability or registration for the purpose of enforcement in the requested State, according to the procedure provide in the law of that State.

Cooperation[14]

Article 31(c) – A Central Authority may be asked to provide assistance to locate a child on the territory of its State when the child is in need of protection.

Article 32 – A State with a substantial connection with a child (*e.g.*, the State of the nationality or, depending on the circumstances, a State where relatives of the child live) may address a request to the Central Authority of the State where the child is present and habitually resident – with supporting reasons – that it be furnished with a report on the child's situation or that measures be taken for the protection of the child.

Article 34 – Competent authorities of a Contracting State may request any authority of another Contracting State (*e.g.*, a State where relatives of a child are located) to communicate any information it possesses which is relevant to the protection of the child.

Article 36 – In any case where a child is exposed to a serious danger, the competent authorities of a Contracting State where measures of protection have been taken or are under consideration, if they are informed that the residence of the child has changed to, or the child is present in, another State, shall inform the authorities of that other State about the danger involved and the measures taken or under consideration. This may be the case, for example, where a runaway child has been the victim of an act of exploitation discovered in another State.

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[13] See, *supra*, para. 41 and note 61.

[14] See, *supra*, paras 44-51. Art. 34 does not require the requested State to respond favourably. Doing so will depend on the laws of the requested State including the laws concerning access to information and the protection of privacy.

Annex 1 C

Long-term measures directed to the protection of the person of an unaccompanied or separated child that would result in the child returning to the State of origin or in the child relocating to a third State

Comments on the relevant provisions of the 1996 Convention that are applicable to long-term measures directed to the protection of the person of an unaccompanied or separated child that would result in the child returning to the State of origin or in the child relocating to a third State.[1]

Scope (*ratione materiae*)[2]

Article 3 – The following measures of protection listed in Article 3 are covered by the Convention:[3]

- the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation;[4]
- rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence;
- guardianship, curatorship and analogous institutions;
- the designation and functions of any person or body having charge of the child's person, representing or assisting the child such as a legal representative, counsellor, advisor or an *ad hoc* administrator;
- the placement of the child in a foster family or in institutional care, or the provision of care by *kafala* or an analogous institution;[5]
- the supervision by a public authority of the care of a child by any person having charge of the child.

Jurisdiction (*ratione personae* and geographic scope)[6]

Article 5 – If the State of origin of the child is a Contracting State to the Convention and the child is still habitually resident in that State, its authorities may have jurisdiction to take measures of protection allowing for the return of the child to the care of his or her parent(s) in the State of origin of the child or in a third State. Similarly, measures of protection could be taken for the child to be entrusted to the care of an extended family member (possibly as a guardian) or being placed, for example, in foster care in the State of origin of the child or in a third State.

Article 6(1)[7] – The authorities of the Contracting State on the territory of which certain children are present – namely, refugee children or children who, due to disturbances

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1 The full text of the 1996 Convention and of the following provision is available on the HCCH website www.hcch.net under "Protection of Children".

2 See, *supra*, paras 15-17.

3 The availability of the measures of protection listed here and decisions concerning such measures will be subject to the applicable law under Article 15. Furthermore, they will be subject to the application, where relevant, of the immigration laws of the States concerned.

4 Including returning the child to the care of his or her parent(s).

5 Including kinship care, foster care, other forms of family-based or family-like care placements, residential care and supervised independent living arrangements for children.

6 Arts 5-6, 8-9 and 11 apply only to Contracting State to the 1996 Convention regardless of whether the other States concerned are also Contracting States. See, *supra*, para. 18 and note 54.

7 See, *supra*, paras 24-26.

occurring in their country, are internationally displaced – have jurisdiction to take measures of protection allowing for the return of the child to the care of his or her parent(s) in the State of origin of the child or in a third State. Similarly, measures of protection could be taken for the child to be entrusted to the care of an extended family member (possibly as a guardian) or being placed, for example, in foster care in the State of origin of the child or in a third State.

Article 6(2)[8] – The authorities of the Contracting State on the territory of which children whose habitual residence cannot be established are present also have jurisdiction to take measures of protection allowing for the return of the child to the care of his or her parent(s) in the State of origin or in a third State. Similarly, measures of protection could be taken for the child to be entrusted to the care of an extended family member (possibly as a guardian) or being placed, for example, in foster care in the State of origin of the child or in a third State.

Articles 8-9[9] – It may be possible to transfer jurisdiction to the authority of another Contracting State if it is considered that this other authority would be better placed in the particular case to assess the best interests of the child. The possibility of a transfer may be particularly appropriate when considering measures allowing for the return of the child to the care of his or her parent(s) in the State of origin of the child (if the habitual residence of the child in that State, and consequently also the jurisdiction of that State, has been lost in the meantime) or a relocation of the child in a third country, as this transfer of jurisdiction would assist in paving the way for such return or relocation.[10] Similarly, the possibility of a transfer may be appropriate when considering measures of protection that could be taken for the child to be entrusted to the care of an extended family member (possibly as a guardian) or being placed, for example, in foster care in the State of origin of the child or in a third State. The State to which the jurisdiction would be transferred would need to be a State of which the child is a national or with which the child has a substantial connection, which, depending on the circumstances, may include one where (extended) family members are located.

Article 14 – The measures taken in application of Articles 5 to 10 remain in force according to their terms, even if a change of circumstances has eliminated the basis upon which jurisdiction was founded, so long as the authorities which have jurisdiction under the Convention have not modified, replaced or terminated such measures.

Applicable law

Article 15(1) – In exercising their jurisdiction, the authorities of the Contracting States shall apply their own law, including when returning the child into the care of his or her parent(s) or providing for alternative care arrangements for the child in the State of origin or in a third State.

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8 *Ibid*.

9 See, *supra*, paras 27-30 and more specifically note 39.

10 This will only be practical if there has been a previous measure where the custody has been taken from the parents, and a new measure is necessary to alter the previous measure.

Article 15(2)[11] – In exercising their jurisdiction, the authorities of the Contracting States may exceptionally apply or take into consideration the law of another State with which the situation has a substantial connection, such as the law of the State of origin of the child or the law of a third State.[12]

Article 15(3) – If the child's habitual residence changes to another Contracting State, the law of that other State governs, from the time of the change, the conditions of application of the measures taken in the State of the child's former habitual residence.

Recognition and enforcement[13]

Article 23(1) – Measures of protection taken in one Contracting State shall be recognised by operation of law in all other Contracting States.

Article 23(2) – Recognition of a measure of protection may however be refused for one of the reasons listed in Article 23(2).[14]

Article 24 – It may be appropriate to seek a determination on the recognition or non-recognition of a measure of protection before returning the child to his or her State of origin or relocating the child to a third State.

Article 26(1) – The enforcement of the return or relocation of a child will be subject to a declaration of enforceability or registration for the purpose of enforcement in the requested State, according to the procedure provided in the law of that State.

Cooperation[15]

Article 30(2) – The Central Authority of the State of origin of the child or the Central Authority of a third State could be requested to provide information as to the laws in force of, and services available in, their States relating to the protection of children in the case where the child could be returned to his or her State of origin or relocated to a third State.[16]

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11 The law applicable can either be the law of a Contracting State or the law of a non-Contracting State. See, *supra*, paras 37-39.

12 See, *supra*, paras 18 and 38. For example, in the specific case of the return of the child to his or her State of origin or the relocation in a third State it may be more appropriate to apply the law of the State of origin of the child or the law of the third State to measures for his or her protection, even where that State is not a Contracting State to the Convention.

13 The recognition and enforcement provisions of the 1996 Convention will apply only if both the State where the measures of protection were ordered and the requested State (*i.e.*, the State where the measures of protection are to be recognised and enforced) are Contracting States. If only the requesting State is a Contracting State, the measures of protection will be recognised and enforced in the requested State in accordance with the domestic rules of private international law of that State. See, *supra*, paras 40-43.

14 See, *supra*, para. 41 and note 61.

15 See, *supra*, paras 44-51. Art. 34 does not require the requested State to respond favourably. Doing so will depend on the laws of the requested State including the laws concerning access to information and the protection of privacy.

16 See, *supra*, para. 45.

Article 31(c) – A Central Authority may be asked to provide assistance to locate a child on the territory of its State when the child is in need of protection.

Article 32 – A State that has a substantial connection with a child (*e.g.*, the State of the nationality or, depending on the circumstances, a State where relatives of the child live) may address certain requests to the Central Authority of the State where the child is present and habitually resident, in respect of that child. Such requests must be accompanied by supporting reasons and may ask for a report on the child's situation or for the addressed Central Authority to consider taking measures to protect that child.

Article 33[17] – There is a mandatory procedure of consultation and approval between Central Authorities or other competent authorities for the placement of the child in another Contracting State in a foster family or institutional care, or the provision of care by *kafala*.

Article 34 – Competent authorities of a Contracting State may request any authority of another Contracting State (*e.g.*, a State where relatives of a child are located) to communicate any information it possesses which is relevant to the protection of the child, including the location of the family of the child.

Article 35 – Competent authorities of a Contracting State may request the authorities of another Contracting State to assist with the implementation of measures of protection taken under the Convention, to allow for the return of the child to the care of his or her parent(s) in the State of origin of the child or in a third State or the placement of the child in a Contracting State other than the one which has taken the measure of placement.

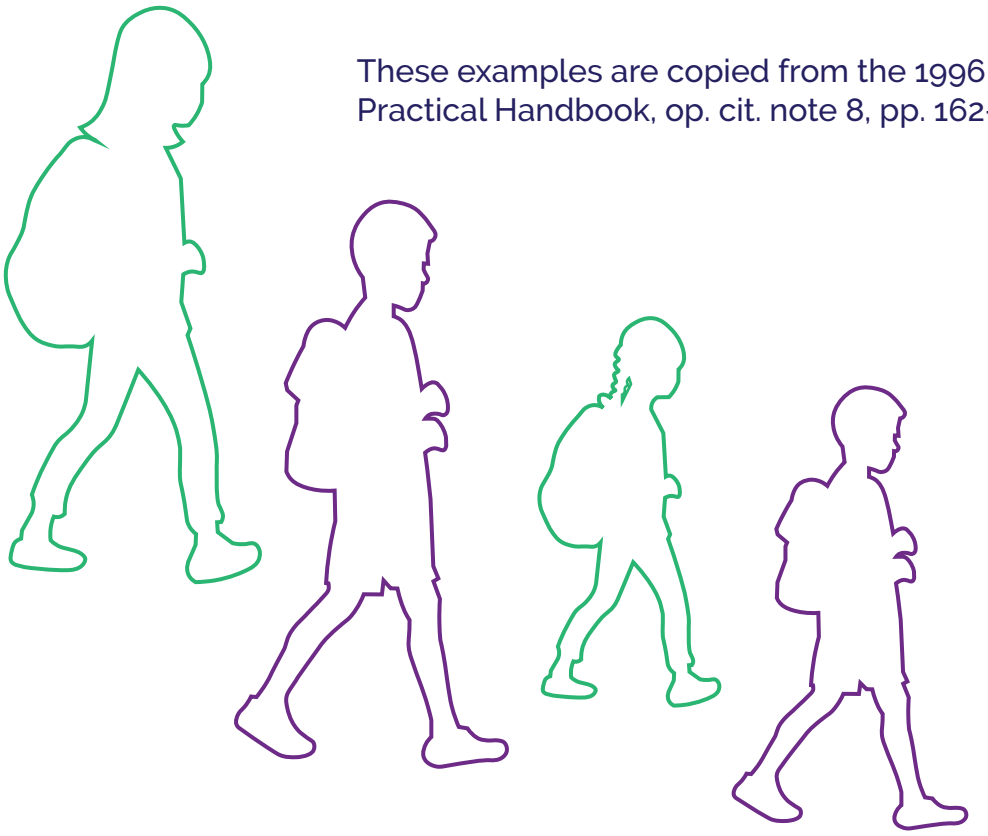
Article 36 – In any case where a child is exposed to a serious danger, the competent authorities of a Contracting State where measures of protection have been taken or are under consideration, if they are informed that the residence of the child has changed to, or the child is present in, another State, shall inform the authorities of that other State about the danger involved and the measures taken or under consideration. This may be the case, for example, where a runaway child has been the victim of an act of exploitation discovered in another State.

[17] Art. 33 would not apply to the return of a child to his or her parent(s).

Annex 2

Examples of applications of the 1996 Convention to children who are refugees, internationally displaced or without a habitual residence

These examples are copied from the 1996 Convention Practical Handbook, op. cit. note 8, pp. 162-163



Example 1

Thousands of people are displaced following a natural disaster in Contracting State A. Among those who arrive in Contracting State B are a 10-year-old boy and his 8-year-old sister who have been orphaned. Article 6 allows Contracting State B to exercise jurisdiction to take long-term measures directed to the protection of these children. However, before long-term measures of protection are taken, the authorities in both Contracting States A and B cooperate in an attempt to find out as much information as possible regarding the background of the children and to see if other family members can be located.[1] Whilst such enquiries are ongoing, Contracting State B takes measures of protection it considers appropriate to ensure the protection of the children. When the enquiries have been concluded, depending upon their outcome, Contracting State B may, for example, consider giving parental responsibility to a relative residing in a third State or place the children in long-term foster care.[2] Under the Convention, the measures taken will have to be recognised and enforced in all other Contracting States.

Example 2

An 11-year-old boy arrives unaccompanied in Contracting State A. He states that he had to leave Contracting State B because of the civil war there in which his parents and siblings were killed. According to the laws of Contracting State A, in order to apply for refugee status, the child requires a guardian. Under Article 6(1), the authorities of the Contracting State where the child is present, in this case Contracting State A, have general jurisdiction in relation to the child. This includes jurisdiction to appoint a guardian for the child. The authorities in Contracting State A can also take other measures to provide for the care and protection of the child.

Example 3

A child arrives, unaccompanied, in Contracting State A and the State of the child's habitual residence cannot be determined. Under Article 6(2), the authorities in Contracting State A take measures of protection providing for the child's care. A month later, it is established that the child's habitual residence is in non-Contracting State B and the child's departure from that State did not result from an international displacement or refugee scenario. Despite this discovery, the measures of protection previously taken in respect of the child under Article 6 continue in force even though a change of circumstances has eliminated the basis upon which jurisdiction was founded (Art. 14). If the authorities of non-Contracting State B take a decision in respect of the child, the non-Convention rules of Contracting State A concerning the recognition and enforcement of foreign decisions will apply to determine the effect of the foreign decision.

In the future, since the State of the child's habitual residence has now been determined, the authorities of Contracting State A do not have jurisdiction to take further measures of protection in respect of the child on the basis of Article 6(2). Instead, under the Convention, they will only be able to take measures of protection

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1 Art. 30 of the 1996 Convention.

2 This is true only if the placement is to take place in State B itself. If it is in another Contracting State, Art. 33 and the corresponding ground for refusal in Art. 23 would apply.

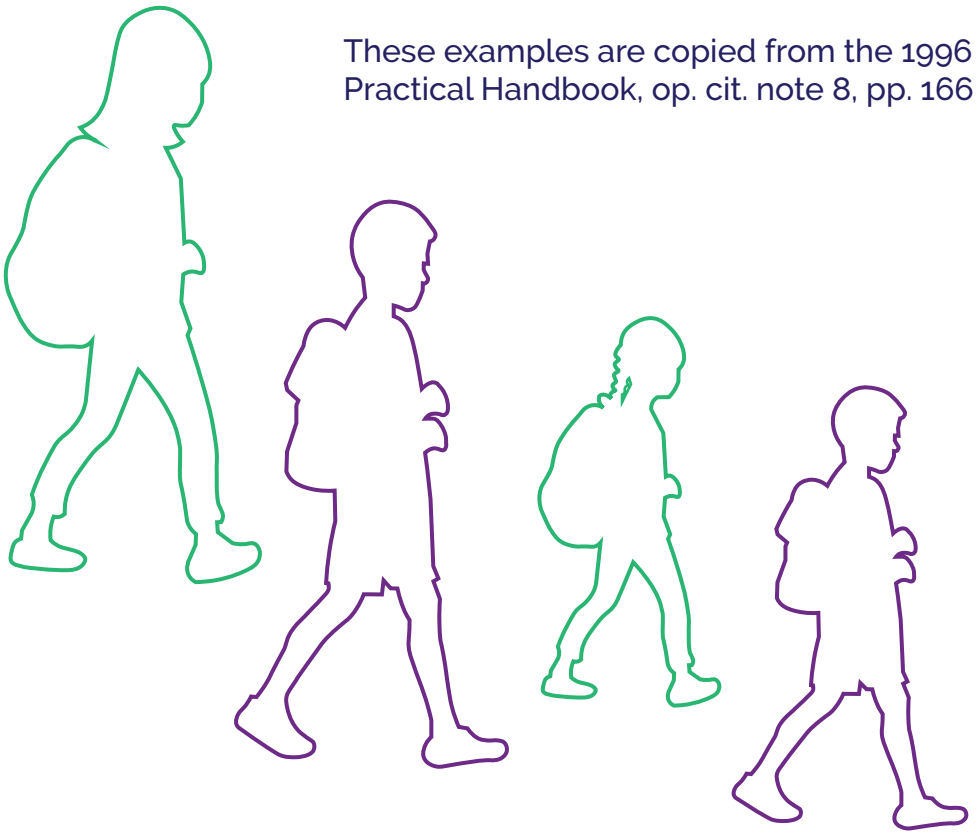
based upon Articles 11 and 12 of the Convention.[3]However (*sic.*) [Moreover], as regards the fact that, since the child has been established as being habitually resident in a non-Contracting State, Contracting State A may take measures of protection based upon its non-Convention rules of jurisdiction.[4] However, if it does so, such measures will not be recognised and enforceable under the Convention."

3 If measures of protection are taken by Contracting State A in future under Art. 11 or 12, they will be recognised by operation of law and enforceable in all other Contracting States. Whether they are recognised / enforceable in non-Contracting State B will, of course, depend on non-Contracting State B's own private international law rules.

4 1996 Convention Practical Handbook, *op. cit.* note 8, paras 3.11-3.13.

Annex 3

Examples of applications of the 1996 Convention to runaway, abandoned or trafficked children



These examples are copied from the 1996 Convention Practical Handbook, op. cit. note 8, pp. 166 169

Example 1

A 14-year-old girl from Contracting State B is found in Contracting State A having been trafficked into the country and forced to work. The authorities in Contracting State A have jurisdiction to take measures under Articles 11 and 12 in respect of the child, such as appointing a temporary guardian and arranging for her immediate care, but should make contact with, and cooperate with, the authorities in Contracting State B to determine what arrangements will be made for the long-term care of the child (Art. 30).

Example 2

A 13-year-old boy runs away from his family home in Contracting State A and arrives in Contracting State B. His father suspects that the child may be in Contracting State B as some family members in Contracting State B have reported seeing him. The parents approach the Central Authority of Contracting State B for assistance.[1] The Central Authority provides information on the laws and services in Contracting State B that may help the parents (Art. 30(2)). The Central Authority also provides assistance in discovering the whereabouts of the child (Art. 31(c)).

Once the child is located, Contracting State B takes a necessary measure of protection in relation to the child, placing the child in temporary State care (Art. 11). The parents wish to travel to Contracting State B to collect the child. Before this occurs, the authorities of Contracting States A and B should engage in close cooperation on this issue to ensure that this is a safe and appropriate option for the child. Indeed, depending on the circumstances of the case, it may be that the return of the child should only take place once the authorities of Contracting State A (the authorities with general jurisdiction in the case) have taken measures of protection to ensure that the child will be safe upon his / her return.[2]

Example 3

A 13-year-old girl runs away from her home in Contracting State A accompanied by her 20-year-old boyfriend. The girl and her boyfriend initially travel to Contracting State B to start a life together. However, in Contracting State B the boyfriend gets into trouble with the police and the couple flee to Contracting State C.

In the meantime, the girl's parents in Contracting State A have reported her missing. They are concerned for her well-being since they know that her boyfriend has a

[1] In this example, the parents go directly to the Central Authority of Contracting State B where they think the child is. It would also be perfectly possible for the parents to approach the Central Authority in Contracting State A where they reside for assistance. This Central Authority would then transmit the requests to the Central Authority of Contracting State B.

[2] In the case of a runaway child, hearing the child and, in particular, ascertaining the reasons why he / she ran away, will often be particularly important when considering what measures of protection should be taken in relation to the child, whether on an urgent or long-term basis (see, in this regard, the requirements of Art. 12 of the 1989 Convention on the Rights of the Child). Close cooperation between the authorities of both Contracting States will also be extremely important to discover, for example, whether previous child protection concerns have been raised in relation to the child or whether the public authorities in the Contracting State of the child's habitual residence have been previously involved with the family.

criminal record. The parents contact the Central Authority in Contracting State A for assistance in locating the girl (Art. 31(c)). Due to the fact that the parents have very limited information as to where the girl may be, the enquiries initiated by the Central Authority in Contracting State A to locate the girl progress slowly.

After a month in Contracting State C, the boyfriend gets into trouble with the police there and the girl comes to the attention of the authorities. The authorities make enquiries and, considering the girl to be in a dangerous situation, they take necessary measures of protection on the basis of Article 11[3] and place her in temporary foster care. The authorities contact the Central Authority in Contracting State A and inform them of the girl's presence in their jurisdiction and of the measures of protection taken.

However, the girl manages to escape from her foster care and, with her boyfriend, quickly moves on to Contracting State D. In accordance with Article 36, the authorities of Contracting State C (having ascertained that the girl has travelled to Contracting State D), inform the authorities in Contracting State D of the danger the girl is in and of the measures they took in respect of her. These measures will be recognised by operation of law in Contracting State D and all other Contracting States. The authorities of Contracting State C also, as a matter of good practice, inform Contracting State A of the girl's departure from their State and of her presence in Contracting State D.

In this case, each Contracting State in which the girl becomes present has jurisdiction to take measures of protection in respect of her on an urgent or provisional basis (under Arts 11 and 12 of the Convention). However, whilst the girl's "habitual residence" remains in Contracting State A, that is the only Contracting State which may take long-term measures of protection in respect of the girl (Art. 5). In this example, the authorities in Contracting State D may therefore either recognise and enforce[4] the measure of protection taken by Contracting State C[5] or, if they consider it necessary, may take another measure of protection for the girl under Article 11.

In the case of a child "on the run" for a considerable length of time, if, on the facts of the case, the situation develops so that the child is in a position where she can no longer be said to have a "habitual residence", the Contracting State where the child is present may decide that it has general jurisdiction to take long-term measures of protection for the child in accordance with Article 6(2) of the Convention. However, it should not be determined lightly that a child no longer has a habitual residence.[6]

Example 4

A child, aged 11, is habitually resident with her parents in Contracting State E. Unbeknown to the public authorities in this Contracting State, the child is sent by her parents to Contracting State F to live, on a long-term basis, with her paternal aunt in order to help the aunt and to get an education. The child travels on a 6-month visitor

3 For the relationship between the 1996 Convention and the Brussels IIa Regulation see, *supra*, note 36.

4 For sake of clarity the following words should be added here "under the Convention".

5 For sake of clarity the following words should be added here "under Article 11".

6 1996 Convention Practical Handbook, *op. cit.* note 8, paras 4.16-4.19 and 13.83-13.87.

visa. The aunt does not attempt to regularise the child's immigration status and does not send her to school – the child is in effect in a situation of domestic servitude.

Four years after the child's arrival in Contracting State F, the authorities learn of this situation from a new neighbour of the aunt. The competent authorities, after an assessment of the situation, take immediate measures to put the child into State care. Pending further investigations, the child is placed with a foster family. Under Article 5 of the 1996 Convention the authority considers that the child is now habitually resident in Contracting State F.

In accordance with Article 32,[7] the competent authority in Contracting State F, with the assistance of its Central Authority, contacts the Central Authority in Contracting State E in order to obtain any information available about the child and her family. The competent authority in Contracting State F wishes to assess whether returning the child to her parents in Contracting State E might be a possible long-term care option for the child (*e.g.*, if the parents were entirely unaware of her circumstances and were lied to by the paternal aunt). The competent authority in Contracting State E communicates that the parents do not want the child to return to their care. The authority further reports that there are no other extended family members in State E who could be considered as potential carers for the child. As a result of this information, the competent authority in Contracting State F is able to start considering long-term measures of protection for the child."

[7] The reference here should be to Art. 34.

Annex 4

Selection of principles and good practices from the UNGA Alternative Care Guidelines and UNCRC General Comment No 6 with regard to the protection of unaccompanied and separated children, including alternative care arrangements that States should consider implementing in their domestic policies, procedures, rules and legislation

Please note that the UNGA Alternative Care Guidelines and the UNCRC General Comment No 6 are non-binding.

Procedure-related principles and good practices

UNGA Alt. Care Guidelines, para. 57 – Decision-making on alternative care in the best interests of the child should take place through a judicial, administrative or other adequate and recognized procedure, with legal safeguards, including, where appropriate, legal representation on behalf of children in any legal proceedings. It should be based on rigorous assessment, planning and review, through established structures and mechanisms, and should be carried out on a case-by-case basis, by suitably qualified professionals in a multidisciplinary team, wherever possible. It should involve full consultation at all stages with the child, according to his/her evolving capacities, and with his/her parents or legal guardians. To this end, all concerned should be provided with the necessary information on which to base their opinion. States should make every effort to provide adequate resources and channels for the training and recognition of the professionals responsible for determining the best form of care so as to facilitate compliance with these provisions.

UNGA Alt. Care Guidelines, para. 6 – All decisions, initiatives and approaches falling within the scope of the present Guidelines should be made on a case-by-case basis, with a view, notably, to ensuring the child's safety and security, and must be grounded in the best interests and rights of the child concerned, in conformity with the principle of non-discrimination and taking due account of the gender perspective. They should respect fully the child's right to be consulted and to have his/her views duly taken into account in accordance with his/her evolving capacities, and on the basis of his/her access to all necessary information. Every effort should be made to enable such consultation and information provision to be carried out in the child's preferred language.

UNGA Alt. Care Guidelines, para. 7 – In applying the present Guidelines, determination of the best interests of the child shall be designed to identify courses of action for children deprived of parental care, or at risk of being so, that are best suited to satisfying their needs and rights, taking into account the full and personal development of their rights in their family, social and cultural environment and their status as subjects of rights, both at the time of the determination and in the longer term. The determination process should take account of, inter alia, the right of the child to be heard and to have his/her views taken into account in accordance with his/her age and maturity.

UNCRC Gen. Com. No 6, para. 25 – Pursuant to article 12 of the [UNCRC], in determining the measures to be adopted with regard to unaccompanied or separated children, the child's views and wishes should be elicited and taken into account (art. 12(1)). To allow for a well-informed expression of such views and wishes, it is imperative that such children are provided with all relevant information concerning, for example, their entitlements, services available including means of communication, the asylum process, family tracing and the situation in their country of origin (arts 13, 17 and 22(2)). In guardianship, care and accommodation arrangements, and legal representation, children's views should also be taken into account. Such information must be provided in a manner that is appropriate to the maturity and level of understanding of each child. As participation is dependent on reliable communication, where necessary, interpreters should be made available at all stages of the procedure.

UNCRC Gen. Com. No 6, para. 21 – Subsequent steps such as the appointment of a competent guardian as expeditiously as possible serves as a key procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child and, therefore, such a child should only be referred to asylum or other

procedures after the appointment of a guardian. In cases where separated or unaccompanied children are referred to asylum procedures or other administrative or judicial proceedings, they should also be provided with a legal representative in addition to a guardian.

UNCRC Gen. Com. No 6, para. 34 – In the case of a separated child, guardianship should regularly be assigned to the accompanying adult family member or non-primary family caretaker unless there is an indication that it would not be in the best interests of the child to do so, for example, where the accompanying adult has abused the child. In cases where a child is accompanied by a non-family adult or caretaker, suitability for guardianship must be scrutinized more closely. If such a guardian is able and willing to provide day-to-day care, but unable to adequately represent the child's best interests in all spheres and at all levels of the child's life, supplementary measures (such as the appointment of an adviser or legal representative) must be secured.

UNCRC Gen. Com. No 6, para. 35 – Review mechanisms shall be introduced and implemented to monitor the quality of the exercise of guardianship in order to ensure the best interests of the child are being represented throughout the decision-making process and, in particular, to prevent abuse.

UNCRC Gen. Com. No 6, para. 36 – In cases where children are involved in asylum procedures or administrative or judicial proceedings, they should, in addition to the appointment of a guardian, be provided with legal representation.

UNCRC Gen. Com. No 6, para. 37 – At all times children should be informed of arrangements with respect to guardianship and legal representation and their opinions should be taken into consideration.

Urgent measures of protection upon arrival in the territory of a new State

UNGA Alt. Care Guidelines, para. 162 – Identifying, registering and documenting unaccompanied or separated children are priorities in any emergency and should be carried out as quickly as possible.

UNGA Alt. Care Guidelines, para. 147 – In order to assist in planning the future of an unaccompanied or separated child in a manner that best protects his/her rights, relevant State and social service authorities should make all reasonable efforts to procure documentation and information in order to conduct an assessment of the child's risk and social and family conditions in his/her country of habitual residence.

UNGA Alt. Care Guidelines, para. 145 – As soon as an unaccompanied child is identified, States are strongly encouraged to appoint a guardian or, where necessary, representation by an organization responsible for his/her care and well-being to accompany the child throughout the status determination and decision-making process.

UNGA Alt. Care Guidelines, para. 19 – No child should be without the support and protection of a legal guardian or other recognized responsible adult or competent public body at any time.

UNCRC Gen. Com. No 6, para. 21 – Subsequent steps such as the appointment of a competent guardian as expeditiously as possible serves as a key procedural safeguard to ensure respect for the best interests of an unaccompanied or separated

child and, therefore, such a child should only be referred to asylum or other procedures after the appointment of a guardian. In cases where separated or unaccompanied children are referred to asylum procedures or other administrative or judicial proceedings, they should also be provided with a legal representative in addition to a guardian.

UNCRC Gen. Com. No 6, para. 24 – The Committee is of the view that practical measures should be taken at all levels to protect children from the risks mentioned above. Such measures could include: priority procedures for child victims of trafficking, the prompt appointment of guardians, the provision of information to children about the risks they may encounter, and establishment of measures to provide follow-up to children particularly at risk. These measures should be regularly evaluated to ensure their effectiveness.

UNCRC Gen. Com. No 6, para. 33 – States are required to create the underlying legal framework and take necessary measures to secure proper representation of an unaccompanied or separated child's best interests. Therefore, States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory and/or jurisdiction of the State in compliance with the Convention and other international obligations. The guardian should be consulted and informed regarding all actions taken in relation to the child. The guardian should have the authority to be present in all planning and decision-making processes, including immigration and appeal hearings, care arrangements and all efforts to search for a durable solution. The guardian or adviser should have the necessary expertise in the field of child care, so as to ensure that the interests of the child are safeguarded and that the child's legal, social, health, psychological, material and educational needs are appropriately covered by, inter alia, the guardian acting as a link between the child and existing specialist agencies / individuals who provide the continuum of care required by the child. Agencies or individuals whose interests could potentially be in conflict with those of the child's should not be eligible for guardianship. For example, non-related adults whose primary relationship to the child is that of an employer should be excluded from a guardianship role.

UNGA Alt. Care Guidelines, para. 104 – The role and specific responsibilities of the designated person or entity should include:

(a) Ensuring that the rights of the child are protected and, in particular, that the child has appropriate care, accommodation, health-care provision, developmental opportunities, psychosocial support, education and language support;

(b) Ensuring that the child has access to legal and other representation where necessary, consulting with the child so that the child's views are taken into account by decision-making authorities, and advising and keeping the child informed of his/her rights;

(c) Contributing to the identification of a stable solution in the best interests of the child;

(d) Providing a link between the child and various organizations that may provide services to the child;

(e) Assisting the child in family tracing;

(f) Ensuring that, if repatriation or family reunification is carried out, it is done in the best interests of the child;

(g) Helping the child to keep in touch with his/her family, when appropriate.

UNGA Alt. Care Guidelines, para. 67 – States should ensure the right of any child who has been placed in temporary care to regular and thorough review – preferably at least every three months – of the appropriateness of his/her care and treatment, taking into account, notably, his/her personal development and any changing needs, developments in his/her family environment, and the adequacy and necessity of the current placement in these circumstances. The review should be carried out by duly qualified and authorized persons, and should fully involve the child and all relevant persons in the child's life.

Durable solutions – general points

UNCRC Gen. Com. No 6, para. 79 – The ultimate aim in addressing the fate of unaccompanied or separated children is to identify a durable solution that addresses all their protection needs, takes into account the child's view and, wherever possible, leads to overcoming the situation of a child being unaccompanied or separated. Efforts to find durable solutions for unaccompanied or separated children should be initiated and implemented without undue delay and, wherever possible, immediately upon the assessment of a child being unaccompanied or separated. Following a rights-based approach, the search for a durable solution commences with analyzing the possibility of family reunification.

UNCRC Gen. Com. No 6, para. 80 – Tracing is an essential component of any search for a durable solution and should be prioritised except where the act of tracing, or the way in which tracing is conducted, would be contrary to the best interests of the child or jeopardise fundamental rights of those being traced. In any case, in conducting tracing activities, no reference should be made to the status of the child as an asylum-seeker or refugee. Subject to all of these conditions, such tracing efforts should also be continued during the asylum procedure. For all children who remain in the territory of the host State, whether on the basis of asylum, complementary forms of protection or due to other legal or factual obstacles to removal, a durable solution must be sought.

UNGA Alt. Care Guidelines, para. 1 – The present Guidelines are intended to enhance the implementation of the Convention on the Rights of the Child and of relevant provisions of other international instruments regarding the protection and well-being of children who are deprived of parental care or who are at risk of being so.

UNGA Alt. Care Guidelines, para. 2 – Against the background of these international instruments and taking account of the developing body of knowledge and experience in this sphere, the Guidelines set out desirable orientations for policy and practice. They are designed for wide dissemination among all sectors directly or indirectly concerned with issues relating to alternative care, and seek in particular:

(a) To support efforts to keep children in, or return them to, the care of their family or, failing this, to find another appropriate and permanent solution, including adoption and kafala of Islamic law;

(b) To ensure that, while such permanent solutions are being sought, or in cases where they are not possible or are not in the best interests of the child, the most suitable forms of alternative care are identified and provided, under conditions that promote the child's full and harmonious development;

(c) To assist and encourage Governments to better implement their responsibilities and obligations in these respects, bearing in mind the economic, social and cultural conditions prevailing in each State; and

(d) To guide policies, decisions and activities of all concerned with social protection and child welfare in both the public and the private sectors, including civil society.

UNCRC Gen. Com. No 6, para. 81 – In order to pay full respect to the obligation of States under article 9 of the [UNCRC] to ensure that a child shall not be separated from his or her parents against their will, all efforts should be made to return an unaccompanied or separated child to his or her parents except where further separation is necessary for the best interests of the child, taking full account of the right of the child to express his or her views (art. 12) (see also Section IV(e), Right of the child to express his or her views freely). While the considerations explicitly listed in article 9, paragraph 1, sentence 2; namely, cases involving abuse or neglect of the child by the parents, may prohibit reunification at any location, other best interests considerations can provide an obstacle to reunification at specific locations only.

UNGA Alt. Care Guidelines, para. 29(c) – For the purposes of the present Guidelines, and subject, notably, to the exceptions listed in paragraph 30 below, the following definitions shall apply:

[…]

(c) With respect to the environment where it is provided, alternative care may be:

(i) Kinship care: family-based care within the child's extended family or with close friends of the family known to the child, whether formal or informal in nature;

(ii) Foster care: situations where children are placed by a competent authority for the purpose of alternative care in the domestic environment of a family other than the children's own family that has been selected, qualified, approved and supervised for providing such care;

(iii) Other forms of family-based or family-like care placements;

(iv) Residential care: care provided in any non-family-based group setting, such as places of safety for emergency care, transit centres in emergency situations, and all other short- and long-term residential care facilities, including group homes;

(v) Supervised independent living arrangements for children;

[…].

UNGA Alt. Care Guidelines, para. 30(b) – The scope of alternative care as foreseen in the present Guidelines does not extend, however, to:

(a) […];

(b) Care by adoptive parents from the moment the child concerned is effectively placed in their custody pursuant to a final adoption order, as of which moment, for the purposes of the present Guidelines, the child is considered to be in parental care. The Guidelines are, however, applicable to pre-adoption or

> probationary placement of a child with the prospective adoptive parents, as far as they are compatible with requirements governing such placements as stipulated in other relevant international instruments;
>
> (c) […].

UNGA Alt. Care Guidelines, para. 161 – Should family reintegration prove impossible within an appropriate period or be deemed contrary to the best interests of the child, stable and definitive solutions, such as adoption or kafala of Islamic law, should be envisaged; failing this, other long-term options should be considered, such as foster care or appropriate residential care, including group homes and other supervised living arrangements.

Family reintegration (in the (fled) State of origin or the new State)

UNCRC Gen. Com. No 6, para. 81 – In order to pay full respect to the obligation of States under article 9 of the [UNCRC] to ensure that a child shall not be separated from his or her parents against their will, all efforts should be made to return an unaccompanied or separated child to his or her parents except where further separation is necessary for the best interests of the child, taking full account of the right of the child to express his or her views (art. 12) (see also Section IV(e), Right of the child to express his or her views freely). While the considerations explicitly listed in article 9, paragraph 1, sentence 2; namely, cases involving abuse or neglect of the child by the parents, may prohibit reunification at any location, other best interests considerations can provide an obstacle to reunification at specific locations only.

UNCRC Gen. Com. No 6, para. 82 – Family reunification in the country of origin is not in the best interests of the child and should therefore not be pursued where there is a "reasonable risk" that such a return would lead to the violation of fundamental human rights of the child. Such risk is indisputably documented in the granting of refugee status or in a decision of the competent authorities on the applicability of non-refoulement obligations (including those deriving from article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and articles 6 and 7 of the International Covenant on Civil and Political Rights). Accordingly, the granting of refugee status constitutes a legally binding obstacle to return to the country of origin and, consequently, to family reunification therein. Where the circumstances in the country of origin contain lower level risks and there is concern, for example, of the child being affected by the indiscriminate effects of generalized violence, such risks must be given full attention and balanced against other rights-based considerations, including the consequences of further separation. In this context, it must be recalled that the survival of the child is of paramount importance and a precondition for the enjoyment of any other rights.

UNCRC Gen. Com. No 6, para. 83 – Whenever family reunification in the country of origin is not possible, irrespective of whether this is due to legal obstacles to return or whether the best interests-based balancing test has decided against return, the obligations under article 9 and 10 of the Convention come into effect and should govern the host country's decisions on family reunification therein. In this context, States parties are particularly reminded that "applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner" and "shall entail no adverse consequences for the applicants and for the members of their family" (art. 10(1)). Countries of origin must respect "the right of the child and his or her

parents to leave any country, including their own, and to enter their own country" (art. 10(2)).

UNGA Alt. Care Guidelines, para. 49 – In order to prepare and support the child and the family for his/her possible return to the family, his/her situation should be assessed by a duly designated individual or team with access to multidisciplinary advice, in consultation with the different actors involved (the child, the family, the alternative caregiver), so as to decide whether the reintegration of the child in the family is possible and in the best interests of the child, which steps this would involve and under whose supervision.

UNGA Alt. Care Guidelines, para. 50 – The aims of the reintegration and the family's and alternative caregiver's principal tasks in this respect should be set out in writing and agreed on by all concerned.

UNGA Alt. Care Guidelines, para. 51 – Regular and appropriate contact between the child and his/her family specifically for the purpose of reintegration should be developed, supported and monitored by the competent body.

UNGA Alt. Care Guidelines, para. 52 – Once decided, the reintegration of the child in his/her family should be designed as a gradual and supervised process, accompanied by follow-up and support measures that take account of the child's age, needs and evolving capacities, as well as the cause of the separation.

UNGA Alt. Care Guidelines, para. 148 – Unaccompanied or separated children must not be returned to their country of habitual residence:

(a) If, following the risk and security assessment, there are reasons to believe that the child's safety and security are in danger;

(b) Unless, prior to the return, a suitable caregiver, such as a parent, other relative, other adult caretaker, a Government agency or an authorized agency or facility in the country of origin, has agreed and is able to take responsibility for the child and provide him or her with appropriate care and protection;

(c) If, for other reasons, it is not in the best interests of the child, according to the assessment of the competent authorities.

UNGA Alt. Care Guidelines, para. 151 – Those responsible for the welfare of an unaccompanied or separated child should facilitate regular communication between the child and his/her family, except where this is against the child's wishes or is demonstrably not in his/her best interests.

<u>Return to the State of origin (especially in cases of orphaned children)</u>

UNCRC Gen. Com. No 6, para. 84 – Return to the country of origin is not an option if it would lead to a "reasonable risk" that such return would result in the violation of fundamental human rights of the child, and in particular, if the principle of non-refoulement applies. Return to the country of origin shall in principle only be arranged if such return is in the best interests of the child. Such a determination shall inter alia take into account the:

- Safety, security and conditions, including socio-economic conditions awaiting the child upon return including through home

study, where appropriate, conducted by social network organizations.

- Availability of care arrangements for that particular child.
- Views of the child expressed in exercise of his or her right to do so under article 12 and those of the caretakers.
- The child's level of integration in the host country and the duration of absence from the home country.
- The child's right "to preserve his or her identity, including nationality, name and family relations" (art. 8).
- The "desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background" (art. 20).

In the absence of the availability of care provided by parents or members of the extended family, return to the country of origin should, in principle, not take place without advance secure and concrete arrangements of care and custodial responsibilities upon return to the country of origin.

UNCRC Gen. Com. No 6, para. 85 – Exceptionally, a return to the home country may be arranged, after careful balancing of the child's best interests and other considerations, if the latter are rights-based and override best interests of the child. Such may be the case in situations in which the child constitutes a serious risk to the security of the State or to the society. Non rights-based arguments such as, those relating to general migration control, cannot override best interests considerations.

UNCRC Gen. Com. No 6, para. 86 – In all cases return measures must be conducted in a safe, child-appropriate and gender sensitive manner.

UNCRC Gen. Com. No 6, para. 87 – Countries of origin are also reminded in this context of their obligations pursuant to article 10 of the Convention and, in particular, to respect "the right of the child and his or her parents to leave any country, including their own, and to enter their own country".

UNGA Alt. Care Guidelines, para. 11 – All decisions concerning alternative care should take full account of the desirability, in principle, of maintaining the child as close as possible to his/her habitual place of residence, in order to facilitate contact and potential reintegration with his/her family and to minimize disruption of his/her educational, cultural and social life.

UNGA Alt. Care Guidelines, para. 148 – Unaccompanied or separated children must not be returned to their country of habitual residence:

(a) If, following the risk and security assessment, there are reasons to believe that the child's safety and security are in danger;

(b) Unless, prior to the return, a suitable caregiver, such as a parent, other relative, other adult caretaker, a Government agency or an authorized agency or facility in the country of origin, has agreed and is able to take responsibility for the child and provide him or her with appropriate care and protection;

(c) If, for other reasons, it is not in the best interests of the child, according to the assessment of the competent authorities.

Local integration

UNCRC Gen. Com. No 6, para. 88 – Local integration is the primary option if return to the country of origin is impossible on either legal or factual grounds. Local integration must be based on a secure legal status (including residence status) and be governed by the Convention rights which are fully applicable to all children who remain in the country, irrespective of whether this is due to their recognition as a refugee, other legal obstacles to return, or, whether the best interests-based balancing test has decided against return.

UNCRC Gen. Com. No 6, para. 89 – Once it has been determined that a separated or unaccompanied child will remain in the community, the relevant authorities should conduct an assessment of the child's situation and then, in consultation with the child and his or her guardian, determine the appropriate long-term arrangements within the local community and other necessary measures to facilitate such integration. The long-term placement should be decided in the best interests of the child and at this stage, institutional care should, wherever possible, serve only as a last resort. The separated or unaccompanied child should have the same access to rights (including to education, training, employment and health care) as enjoyed by national children. In ensuring that these rights are fully enjoyed by the unaccompanied or separated child, the host country may need to pay special attention to the extra measures required to address the child's vulnerable status, including, for example, through extra language training.

UNGA Alt. Care Guidelines, para. 152 – Placement with a view to adoption or kafala of Islamic law should not be considered a suitable initial option for an unaccompanied or separated child. States are encouraged to consider this option only after efforts to determine the location of his/her parents, extended family or habitual carers have been exhausted.

UNGA Alt. Care Guidelines, para. 161 – Should family reintegration prove impossible within an appropriate period or be deemed contrary to the best interests of the child, stable and definitive solutions, such as adoption or kafala of Islamic law, should be envisaged; failing this, other long-term options should be considered, such as foster care or appropriate residential care, including group homes and other supervised living arrangements.

Intercountry adoption

UNCRC Gen. Com. No 6, para. 91 – Adoption of unaccompanied or separated children should only be considered once it has been established that the child is in a position to be adopted. In practice, this means inter alia that efforts with regard to tracing and family reunification have failed, or that the parents have consented to the adoption. The consent of parents and the consent of other persons, institutions and authorities that are necessary for adoption must be free and informed. This supposes notably that such consent has not been induced by payment or compensation of any kind and has not been withdrawn.

- Unaccompanied or separated children must not be adopted in haste at the height of an emergency.
- Any adoption must be determined as being in the child's best interests and carried out in keeping with applicable national, international and customary law.

- The views of the child, depending upon his/her age and degree of maturity, should be sought and taken into account in all adoption procedures. This requirement implies that he/she has been counselled and duly informed of the consequences of adoption and of his/her consent to adoption, where such consent is required. Such consent must have been given freely and not induced by payment or compensation of any kind.
- Priority must be given to adoption by relatives in their country of residence. Where this is not an option, preference will be given to adoption within the community from which the child came or at least within his or her own culture.
- Adoption should not be considered:
  - Where there is reasonable hope of successful tracing and family reunification is in the child's best interests;
  - If it is contrary to the expressed wishes of the child or the parents;
  - Unless a reasonable time has passed during which all feasible steps to trace the parents or other surviving family members has been carried out. This period of time may vary with circumstances, in particular, those relating to the ability to conduct proper tracing; however, the process of tracing must be completed within a reasonable period of time.
- Adoption in a country of asylum should not be taken up when there is the possibility of voluntary repatriation under conditions of safety and dignity in the near future.

UNGA Alt. Care Guidelines, para. 166 – The validity of relationships and the confirmation of the willingness of the child and family members to be reunited must be verified for every child. No action should be taken that may hinder eventual family reintegration, such as adoption, change of name or movement to places far from the family's likely location, until all tracing efforts have been exhausted.

<u>Resettlement / relocation in a third country</u>

UNCRC Gen. Com. No 6, para. 92 – Resettlement to a third country may offer a durable solution for an unaccompanied or separated child who cannot return to the country of origin and for whom no durable solution can be envisaged in the host country. The decision to resettle an unaccompanied or separated child must be based on an updated, comprehensive and thorough best interests assessment, taking into account, in particular, ongoing international and other protection needs. Resettlement is particularly called for if such is the only means to protect effectively and sustainably a child against refoulement or against persecution or other serious human rights violations in the country of stay. Resettlement is also in the best interests of the unaccompanied or separated child if it serves family reunification in the resettlement country.

UNCRC Gen. Com. No 6, para. 93 – The best interests assessment determination prior to a decision to resettle, needs also to take into account other factors such as: the envisaged duration of legal or other obstacles to a child's return to his or her home country; the child's right to preserve his or her identity, including nationality and name (art. 8), the child's age, sex, emotional state, educational and family background; continuity/discontinuity of care in the host country; the desirability of continuity in a

child's upbringing and to the child's ethnic, religious, cultural and linguistic background (art. 20), the right of the child to preserve his or her family relations (art. 8) and related short-, mid- and long-term possibilities of family reunion either in the home, host, or resettlement country. Unaccompanied or separated children should never be resettled to a third country if this would undermine or seriously hamper future reunion with their family.

UNCRC Gen. Com. No 6, para. 94 – States are encouraged to provide resettlement opportunities in order to meet all the resettlement needs related to unaccompanied and separated children.

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