

**The Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention – October 2017**

<b>Document</b>	Preliminary Document <input checked="" type="checkbox"/> Procedural Document <input type="checkbox"/> Information Document <input type="checkbox"/>	No 7 of July 2017
<b>Title</b>	The application of the 1996 Hague Child Protection Convention to unaccompanied and separated children	
<b>Author</b>	Permanent Bureau	
<b>Agenda item</b>	No 15	
<b>Mandate(s)</b>		
<b>Objective</b>	To discuss the application of the 1996 Hague Child Protection Convention to unaccompanied and separated children, with a view to inviting the authorities responsible for international co-operation in child protection matters to closely collaborate – at both the domestic and international levels – with those responsible for immigration and asylum matters, in this area.	
<b>Action to be taken</b>	For Approval <input type="checkbox"/> For Decision <input checked="" type="checkbox"/> For Information <input checked="" type="checkbox"/>	
<b>Annexes</b>	Attached	
<b>Related documents</b>		

## Table of contents

<b>A.</b>	<b>INTRODUCTION .....</b>	<b>3</b>
1.	<b>Purpose .....</b>	<b>4</b>
2.	<b>Definitions .....</b>	<b>5</b>
<b>B.</b>	<b>THE RELEVANT LAW AND AVAILABLE MEASURES OF PROTECTION.....</b>	<b>5</b>
1.	<b>The Convention of 28 July 1951 Relating to the Status of Refugees .....</b>	<b>5</b>
2.	<b>The 1989 Convention on the Rights of the Child .....</b>	<b>6</b>
3.	<b>Specific measures of protection for unaccompanied and separated children .....</b>	<b>8</b>
a.	Urgent measures of protection upon arrival in the territory of a new State .....	8
b.	Durable solutions – general points.....	8
c.	Family reunification (in the (fled) State of origin or the host State) .....	9
d.	Return to the State of origin (especially in cases of orphaned children) ..	9
e.	Local integration.....	10
f.	Intercountry adoption.....	10
g.	Resettlement in a third country.....	10
<b>C.</b>	<b>THE 1996 HAGUE CONVENTION .....</b>	<b>10</b>
1.	<b>Introduction .....</b>	<b>11</b>
a.	Unaccompanied children .....	11
b.	Cross-border placement of children .....	12
c.	An integrated system .....	12
d.	An inclusive system.....	12
2.	<b>Scope.....</b>	<b>12</b>
a.	Ratione personae scope .....	12
b.	Ratione materiae scope .....	12
c.	Geographic scope .....	13
3.	<b>Rules on jurisdiction .....</b>	<b>14</b>
a.	Introduction .....	14
b.	Refugee or displaced children, or children whose habitual residence cannot be established.....	14
c.	Transfer of jurisdiction to an appropriate forum.....	15
d.	Concurrent jurisdiction of the authorities of the State of the child's presence – jurisdiction in cases of urgency (Art. 11) and provisional measures of territorial effect (Art. 12) .....	17
4.	<b>Rules on applicable law.....</b>	<b>17</b>
5.	<b>Rules on recognition and enforcement .....</b>	<b>18</b>
6.	<b>Co-operation mechanisms .....</b>	<b>18</b>
<b>D.</b>	<b>CONCLUSION .....</b>	<b>20</b>
	<b>ANNEXES.....</b>	<b>21</b>
	<b>Hague Conference post-Convention Services .....</b>	<b>i</b>
	<b>Measures of protection to be taken upon arrival, at reception and for interim care .....</b>	<b>i</b>
	<b>Family reunification in the (fled) State of origin or in a third State .....</b>	<b>i</b>
	<b>Family reunification in the host State or local integration.....</b>	<b>i</b>
	<b>Return to the (fled) State of origin or resettlement in a third State .....</b>	<b>i</b>

## A. Introduction

1. Over the years, a number of United Nations bodies have recommended the ratification of or accession to the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*<sup>1</sup> ("1996 Hague Convention" or "1996 Convention") to facilitate the protection of unaccompanied and separated children.<sup>2</sup> Furthermore, in recent years, some States have informally inquired about the application of the 1996 Convention to such children. Recently, the Committee on Legal Affairs of the European Parliament held a workshop on "Potential and challenges of private international law in the current migratory context", which also touched upon the 1996 Convention.<sup>3</sup> In the light of these significant developments and the importance of this subject matter, the Permanent Bureau has prepared this Preliminary Document to raise awareness as to the usefulness of the 1996 Convention in this area. It is hoped that the potential benefits offered by the 1996 Convention for the protection of unaccompanied and separated children may further encourage States to become parties to this instrument.

2. It is important to note that the 1996 Convention, which provides for a child rights-based approach, does not prescribe any specific action in relation to unaccompanied and separated children. Rather, it provides competent authorities with the tools and flexibility to implement just about any cross-border or domestic solution that will respond to the best interest of such children, on a case-by-case basis.<sup>4</sup> It is also important to highlight that competent authorities under the 1996 Convention could either be judicial or administrative authorities (including migration authorities) or both, depending how States wish to implement the Convention. Furthermore, it is important to note that the 1996 Convention will not affect bilateral, regional and international instruments in place that contain provisions regarding unaccompanied or separated children (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 (Arts 39 and 52(2)). Also, and most importantly, the Permanent Bureau is fully aware that the large-scale and delicate problems posed by unaccompanied and separated children can only be solved effectively on the basis of mutually agreed, co-ordinated actions amongst all States concerned, and that these actions require, first and foremost, political consensus. However, the 1996 Convention should be part of the overall solution as it will ensure a conducive legal environment with regard to unaccompanied and separated children in the context of the operation of existing and future bilateral, regional and international instruments. 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.<sup>5</sup> Finally, as for many Hague Conventions, a number of Hague Conference post-Convention services could be developed to support the operation of the 1996 Convention.<sup>6</sup>

---

<sup>1</sup> The text of the Convention is available at < <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70> >.

<sup>2</sup> In 2005, the Committee on the Rights of the Child ("CRC Committee") invited States to ratify or accede to the 1996 Hague 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 28 July 2017) ("*General Comment No 6 (2005)*"). Furthermore, in 2010, the United Nations General Assembly ("UNGA") in its Guidelines for the Alternative Care of Children encouraged States to ratify or accede to the 1996 Hague Convention "to ensure appropriate international co-operation and child protection" in care provision situations for children outside their country of habitual residence. See UNGA, *Guidelines for the Alternative Care of Children*, A/RES/64/142, 24 February 2010, para 1, available at < [www.unicef.org/protection/alternative\\_care\\_Guidelines-English.pdf](http://www.unicef.org/protection/alternative_care_Guidelines-English.pdf) > (last consulted on 28 July 2017) ("*Alternative Care Guidelines*").

<sup>3</sup> The Workshop was held on 20 June 2017. Information about the Workshop, including studies written for the Workshop, are available at: < <http://www.europarl.europa.eu/committees/en/juri/events-workshops.html?id=20170607WKS00621> >. 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 28 July 2017).

<sup>4</sup> See the solutions described, *infra*, paras 16-23.

<sup>5</sup> See, *infra*, para 37.

<sup>6</sup> See Annex 1 to this document for a description of such possible services.

## 1. Purpose

3. The purpose of this Preliminary Document is to explain the possible application of the 1996 Hague Convention to unaccompanied or separated children and to invite the authorities responsible for international co-operation in child protection matters to closely collaborate—at both the domestic and international levels – with those responsible for immigration and asylum matters, with regard to the operation of the 1996 Convention.<sup>7</sup> Before doing so, the terms “child”, “unaccompanied children” and “separated children” will be defined, and specific cases relating to them will be outlined. This will make it possible to subsequently identify the rights which apply to these children, as well as the measures of protection from which they may benefit in accordance with the United Nations Convention of 28 July 1951 Relating to the Status of Refugees (“1951 Refugee Convention” or “1951 Convention”),<sup>8</sup> the United Nations Convention of 20 November 1989 on the Rights of the Child (“1989 Convention on the Rights of the Child” or “1989 Convention”)<sup>9</sup> and the Guidelines for the Alternative Care of Children adopted by the United Nations General Assembly to “enhance the implementation of the [1989 Convention]” (“Alternative Care Guidelines”).<sup>10</sup> This Preliminary Document will also set out the short-, medium- and long-term classical protective solutions in this area which are available to public authorities, such as urgent measures of protection upon arrival in the territory of a new State, family reunification in the (fled) State of origin or the host State, return to the State of origin (especially in cases of orphaned children), local integration, intercountry adoption, and resettlement in a third country.<sup>11</sup>

4. Following a brief introduction of the 1996 Hague Convention, it will be shown that cases of unaccompanied or separated children are included in the *ratione personae* scope of the Convention. The analysis of the *ratione materiae* scope of the 1996 Convention will first identify the rights enshrined in the 1951 Refugee Convention and the 1989 Convention on the Rights of the Child that fall under the scope of the 1996 Convention. Secondly, this analysis will describe the short-, medium- and long-term measures that are available to protect unaccompanied or separated children, which are supported by the 1996 Convention. Examples<sup>12</sup> will finally be given to illustrate the application of the relevant provisions of the 1996 Convention.<sup>13</sup> This document does not deal with private international law matters relating to non-protective measures concerning unaccompanied or separated children, such as the recognition of personal status acquired abroad or the application of foreign law.<sup>14</sup>

<sup>7</sup> It is hoped that before the October 2017 Meeting of the Special Commission, UNICEF and UNHCR officials will meet with government officials from some Central Authorities designated under the 1996 Convention to discuss and examine the practical operation of the 1996 Convention to unaccompanied and separated children.

<sup>8</sup> The text of the Convention is available at: < <http://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html> > (last consulted on 28 July 2017).

<sup>9</sup> The text of the Convention is available at: < <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> > (last consulted on 28 July 2017). The Preamble to the 1996 Hague Convention states that the signatory States “[desire] to establish common provisions [that, *inter alia*, improve the protection of children in international situations, avoid conflicts in legal systems in respect of measures for the protection of children, and comply with the best interests of the child as a primary consideration], taking into account the *United Nations Convention on the Rights of the Child of 20 November 1989*”.

<sup>10</sup> UNGA, *Alternative Care Guidelines*, *op. cit.* note 2, para 1. It has been noted that the 1951 Convention and the 1989 Convention “respond independently to the particular difficulties occasioned by involuntary alienage and to the special care and assistance required by [refugee] children”. See J. Pobjoy, *The Child in International Refugee Law*, Cambridge University Press, 2017, p. 14.

<sup>11</sup> These short-, medium- and long-term protection measures, which are summarised at paras 16-23 below, are fully described in CRC Committee, *General Comment No 6* (2005), *op. cit.* note 2, para. 81-94.

<sup>12</sup> See Annexes 2-A to 2-D to this document for examples of the application of provisions of the 1996 Convention with regard to short-, medium- and long-term measures that are available to protect unaccompanied or separated children such as urgent measures of protection upon arrival in the territory of a new State, family reunification in the (fled) State of origin or the host State, return to the State of origin (especially in cases of orphaned children), local integration and resettlement in a third country.

<sup>13</sup> In addition, information will be provided on the application of the 1996 Hague Convention with *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 II *bis* 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 28 July 2017).

<sup>14</sup> See Directorate General for Internal Policies of the Union, “Private International Law in a Context of Increasing International Mobility: Challenges and Potential”, Legal Affairs, European Parliament, June 2017, 47 p., available at: < [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583157/IPOL\\_STU\(2017\)583157\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583157/IPOL_STU(2017)583157_EN.pdf) > (last consulted on 28 July 2017).

## 2. Definitions

5. Within the meaning of Article 1 of the 1989 Convention on the Rights of Child, "child" refers to "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".<sup>15</sup> Article 2 of the 1996 Convention provides that "the Convention applies to children from the moment of their birth until they reach the age of 18 years". The definition of "child" set out in the 1989 Convention forms the basis for further definitions provided in this section.

6. Unaccompanied children<sup>16</sup> are children who "are not cared for by another relative or an adult who by law or custom is responsible for doing so."<sup>17</sup>

7. Separated children "are separated from a previous legal or customary primary caregiver, but who may nevertheless be accompanied by another relative."<sup>18</sup>

8. Individual cases of unaccompanied children are abundant and diverse, depending on the child's state of health, origin and status. Unaccompanied children are often undocumented, creating difficulties where there is a need to establish their State of habitual residence. Generally, they can be divided into two categories: (1) children who have involuntarily been separated from their parents;<sup>19</sup> and, (2) children who have separated voluntarily from their parents.<sup>20</sup>

### B. The relevant law and available measures of protection

#### 1. The Convention of 28 July 1951 Relating to the Status of Refugees

9. The Refugee Convention, drafted in 1951 and applicable to any person (*i.e.*, adult or child) who meets the definition of refugee set out in Article 1, guarantees very few rights which are uniquely specific to children.<sup>21</sup> Indeed, among the rights included in the Convention, most apply to children and adults alike. The Convention states that Contracting States shall apply its provisions to refugees "without discrimination as to race, religion or country of origin" (Art. 3). The Convention equally provides that "Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children" (Art. 4). It is equally stipulated in the 1951 Convention that "a refugee shall have free access to the courts of law on the territory of all Contracting States" (Art. 16(1)). In addition to these fundamental rights, the Convention also incorporates the *non-refoulement* principle, which currently forms an integral part of customary international law,<sup>22</sup> stating that "No

<sup>15</sup> This implies that any instrument relating to children in the territory of a given State cannot employ a definition of the child which "deviates from the norms determining the age of majority in that State". See CRC Committee, *General Comment No 6* (2005), *op. cit.* note 2, para. 9.

<sup>16</sup> Also called "unaccompanied minors".

<sup>17</sup> UNGA, *Alternative Care Guidelines*, *op. cit.* note 2, para 29(a)(i).

<sup>18</sup> *Ibid.*, para. 29(a)(ii).

<sup>19</sup> The following definitions are from E.M. Ressler, N. Boothby and D.J. Steinbock, *Unaccompanied Children: Care and Protection in Wars, Natural Disasters, and Refugee Movements* (Oxford University Press, 1988) pp 218-219:

"Orphan: a child whose parents are both dead."

"Lost: a child unintentionally separated from the parents."

"Abducted: a child involuntarily and illegally taken from its parents."

"Removed: a child removed from the parents as a result of legal suspension or loss of parental rights."

"Runaway: a child who intentionally left his parents without their consent. From the parents' point of view this is an involuntary separation, but it is a voluntary one on the child's part."

<sup>20</sup> *Ibid.*, pp 219-220:

"Entrusted: a child voluntarily placed in the care of another adult or institution by the parents who intend to reclaim the child.... Evacuation of children in wartime or other emergencies is an example of this parental right to control the child's residence."

"Abandoned: a child whose parents have deserted him with no intention of reunion."

"Surrendered: a child whose parents have permanently given up their parental rights."

"Independent: a child voluntarily living apart from his parents with their consent."

<sup>21</sup> J. Pobjoy, *The Child in International Refugee Law*, *op. cit.* note 10, p. 3.

<sup>22</sup> Ministerial Meeting of States Parties, Geneva, Switzerland, 12-13 December 2001, *Declaration of States Parties to the 1951 Convention and / or its 1967 Protocol Relating to the Status of Refugees*, UN Doc HCR/MMSP/2001/09, 16 January 2002. The Declaration was welcomed by the UN General Assembly in resolution A/RES/57/187, paras 3-4, adopted 18 December 2001.

Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers or 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" (Art. 33). The Convention states that "the personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence" (Art. 12). As concerns housing, "the Contracting States, in so far as the matter is regulated by the laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances" (Art. 21). As for public education, "the Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education" (Art. 22).

10. Experts in the area of family law or the protection of children will note that many rights relating specifically to children, compared with those provided in the 1989 Convention on the Rights of the Child, are not covered by the Refugee Convention. The drafters of the Refugee Convention recognised that the 1951 Convention was perhaps incomplete by prescribing in Article 5 that "nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention."

## 2. The 1989 Convention on the Rights of the Child<sup>23</sup>

11. In the light of Article 5 of the 1951 Refugee Convention, it was appropriate to include Article 22 in the 1989 Convention on the Rights of the Child. The latter provides that a child who is seeking refugee status or who is considered a refugee, whether alone or accompanied, is entitled to the protection afforded by the rights enshrined in the 1989 Convention. Where another family member cannot be traced, the child is to be accorded the same protection set out in the Convention "as any other child permanently or temporarily deprived of his or her family environment for any reason".

12. Founded on this Article is the clear principle that children seeking refugee status or considered refugees should first and foremost be treated as children.<sup>24</sup> More specifically, unaccompanied and separated children who are outside of their country of origin and temporarily or permanently deprived of their family environment have a right to receive alternative care complying with the national laws of the State in which they are located, by virtue of Article 20 of the 1989 Convention on the Rights of the Child.<sup>25</sup> The same Article provides that due regard shall be had, when considering solutions, "to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background" (Art. 20). These provisions indicate the extensive nature of the rights that separated or unaccompanied children enjoy under the 1989 Convention on the Rights of the Child.

13. Some of these rights can be described as fundamental rights, such as, for example, the right to non-discrimination.<sup>26</sup> The rights articulated in the 1989 Convention must be ensured to

<sup>23</sup> Similar rights are also enshrined in the *United Nations International Convention of 18 December 1990 on the Protection of the rights of All Migrant Workers and Members of their Families*, available at <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx>> (last consulted on 28 July 2017), which is applicable to all migrants workers without distinction as to age (Art. 1), including unaccompanied and separated children.

<sup>24</sup> See the comments of François Crépeau, Special Rapporteur on the Human Rights of Migrants, in Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion: The rights of all children in the context of international migration*, 28 September 2012, para. 5, available at <[http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/2012CRC\\_DGD-Childrens\\_Rights\\_InternationalMigration.pdf](http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/2012CRC_DGD-Childrens_Rights_InternationalMigration.pdf)> (last consulted on 28 July 2017). See also UNICEF, *Refugee and Migrant Crisis in Europe Advocacy Brief*, above, p 1: "UNICEF urges States to recall that a child is first and foremost a child..."

<sup>25</sup> See UNGA, *Alternative Care Guidelines*, "Unaccompanied or separated children already abroad should, in principle, enjoy the same level of protection and care as national children in the country concerned", *op. cit.* note 2, para. 141.

<sup>26</sup> The majority of rights that the Permanent Bureau includes in this category have been termed "general principles" by the CRC Committee. These general principles provide guidance as to the overall interpretation of the 1989 Convention, and consist of the right to non-discrimination (Art. 2), the best interests of the child (Art. 3), the right to life, survival and development (Art. 6) and respect for the child's views (Art. 12). See CRC Committee, "General Guidelines Regarding the Form and Content of Initial Reports to Be Submitted by States Parties under article 44, paragraph 1 (a), of the Convention", adopted by the Committee at its 22<sup>nd</sup> meeting (first session) on 15 October 1991, CRC/C/5, para. 13; and Office of the UN High Commissioner for Human Rights, "Fact Sheet No. 10: The Rights of the Child", p. 2,

each child “without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status” (Art. 2). In the cases with which this Preliminary Document is concerned, this obligation applies to every child that finds him or herself on the territory of a given State and every child falling within a given State’s jurisdiction. The principle of non-discrimination prohibits in particular “any discrimination on the basis of the status of a child as being unaccompanied or separated, or as being a refugee, asylum-seeker or migrant”.<sup>27</sup> Moreover, the taking into account of the best interests of the child (Art. 3), another fundamental right, must serve as a primary consideration in all decisions taken in respect of children.<sup>28</sup> This applies to any such decision taken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies – including institutions responsible for migration-related issues.<sup>29</sup> Other fundamental rights of the child that come to mind are: the inherent right to life (Art. 6(1)); the right to survival and development (Art. 6(2));<sup>30</sup> the child’s right to preserve his or her identity, including nationality, name and family relations (Art. 8);<sup>31</sup> the right to maintain, except in exceptional circumstances, personal relations and direct contact with both parents on a regular basis (Arts 9(3) and 10(2));<sup>32</sup> and the right to freedom of thought, conscience and religion (Art. 14).<sup>33</sup>

14. The child is equally entitled to certain legal safeguards. Any child who is capable of forming his or her own views has the right to express these views freely in all matters affecting him or her, and such views should be given due weight in accordance with the age and maturity of the child (Art. 12(1)).<sup>34</sup> The child also has the right to be heard in the course of judicial and administrative proceedings which concern him or her, either directly or through a (legal) representative or an appropriate body, in a manner consistent with the procedural rules of national law (Art. 12(2)).<sup>35</sup> It is important to note that States are required to protect the confidentiality of information relating to unaccompanied or separated children, in accordance with the right to privacy (Art. 16).<sup>36</sup> States notably commit to protecting children against: all forms of sexual exploitation and sexual abuse (Art. 34);<sup>37</sup> illicit transfer, abduction, sale or traffic (Arts 11 and 35); torture or other cruel, inhuman or degrading treatment or punishment (Art. 37(a)); and unlawful or arbitrary deprivation of liberty (Art. 37(b)).

15. The child has the right to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. The child additionally has a right to a standard of living adequate for his or her physical, mental, spiritual, moral and social development (Art. 27). Equally, the child has a right to education (Art. 28), as is also provided in Article 22 of the 1951 Refugee Convention, and a right to rest and leisure (Art. 31).

---

available at <<http://www.ohchr.org/Documents/Publications/FactSheet10rev.1en.pdf>> (last consulted on 28 July 2017).

<sup>27</sup> CRC Committee, *General Comment No 6* (2005), *op. cit.* note 2, para. 18.

<sup>28</sup> See UNGA, *Alternative Care Guidelines*, *op. cit.* note 2, para. 6; United Nations High Commissioner for Refugees, *Guidelines on Determining the Best Interests of the Child*, May 2008, available at <[www.unhcr.org/4566b16b2.pdf](http://www.unhcr.org/4566b16b2.pdf)>; and 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.unicef.org/protection/files/5423da264.pdf>> (last consulted on 28 July 2017) (“UNHCR and UNICEF, *Safe and Sound*”).

<sup>29</sup> CRC Committee, *General Comment No 6* (2005), *op. cit.* note 2, paras 19-22. See para. 20: “A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child’s identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs. Consequently, allowing the child access to the territory is a prerequisite to this initial assessment process.” See also Nigel Cantwell, “Challenges to Developing Appropriate Care for Children on the Move”, in *International Reference Center for the Rights of Children Deprived of their Family - ISS*, Monthly Review No 211, April 2017, p. 11.

<sup>30</sup> *Ibid.*, paras 23-24, and UNGA, *Alternative Care Guidelines*, *op. cit.* note 2, para. 2(b).

<sup>31</sup> UNGA, *Alternative Care Guidelines*, *op. cit.* note 2, para. 16.

<sup>32</sup> *Ibid.*, para. 151.

<sup>33</sup> *Ibid.*, para. 16.

<sup>34</sup> CRC Committee, *General Comment No 6* (2005), para. 25, and UNGA, *Alternative Care Guidelines*, para. 7, *op. cit.* note 2.

<sup>35</sup> UNGA, *Alternative Care Guidelines*, *op. cit.* note 2, para. 57.

<sup>36</sup> CRC Committee, *General Comment No 6* (2005), paras 29-30, and UNGA, *Alternative Care Guidelines*, para. 110, *op. cit.* note 2.

<sup>37</sup> UNGA, *Alternative Care Guidelines*, *op. cit.* note 2, para. 13.

### 3. Specific measures of protection for unaccompanied and separated children<sup>38</sup>

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

16. As soon as the child has arrived in the territory of the State he or she has migrated to, the responsible authorities – judicial or administrative – will have to take responsibility for his or her care, and will need to register the child.<sup>39</sup> The following information will require inclusion in the registration process, in order to enable the authorities to develop an accurate and comprehensive understanding of the identity of the child: nationality; education; cultural, linguistic and ethnic background; specific vulnerabilities and special needs in terms of protection (Art. 8).<sup>40</sup> From the outset of any procedure, an *ad hoc* administrator, guardian or counsellor/advisor should be designated for the child, as well as a legal representative (Art. 12(2)).<sup>41</sup> It may be necessary to grant him or her access to translation and interpretation services, where applicable. The authorities will have to take the child into their care, provide accommodation and full access to the education system, and ensure that the child enjoys an adequate standard of living and receives the care that he or she needs.<sup>42</sup> These measures are vital for the effective prevention of trafficking and sexual or other forms of exploitation of the child, abuse and violence. There is equally a need to prevent the enlistment of the child in the armed forces and deprivation of his or her liberty, as well as to ensure the lawful treatment of the child in cases of detention.

#### b. Durable solutions – general points<sup>43</sup>

17. The path towards durable solutions will enable the authorities to respond to all the protection needs of the child. These should take into account the views of the child and should, if possible, put an end to the unaccompanied or separated circumstances. It is important to note that (temporary) alternative care should be provided while permanent solutions are being sought for the child, or where such solutions are not possible or are not in the best interests of the child.<sup>44</sup> Efforts to reunify the child with his or her family in accordance with Article 9(3) of the 1989 Convention – the child's right to maintain contact with both parents – should be a priority; especially in cases of involuntary separation, unless this would be contrary to the best interests of the child or compromise the fundamental rights of the individuals to be reunified. While authorities try to reunify the child with his or her family, temporary alternative care arrangements might be made for that child.<sup>45</sup> This could include kinship care, foster care, other forms of family-based or family-like care placements, residential care, supervised independent living arrangements for children and pre-adoption placement with prospective adoptive parents.<sup>46</sup> After every reasonable effort has been made to bring about family reunification, but it is determined that this is not possible or not in the best interests of the child, the authorities

<sup>38</sup> The measures of protection identified in this section are drawn from: (1) UNHCR and UNICEF, "Statement of Good Practice—Separated Children in Europe Programme", *Save the Children*, 4<sup>th</sup> Revised Ed., HCR, Unicef, 2009, available at < <http://www.separated-children-europe-programme.org/p/1/69> > (last consulted on 28 July 2017); (2) UNHCR and UNICEF, *Safe and Sound*, *op. cit.* note 28; and (3) CRC Committee, *General Comment No 6* (2005), *op. cit.* note 2.

<sup>39</sup> UNGA, *Alternative Care Guidelines*, *op. cit.* note 2, para. 162.

<sup>40</sup> *Ibid.*, "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.", para. 147.

<sup>41</sup> *Ibid.*, "As soon as an unaccompanied child is identified, States are strongly encouraged to appoint a guardian or, where necessary, representation by an organisation responsible for his / her care and well-being to accompany the child throughout the status determination and decision-making process." Furthermore, "no child should be without the support and protection of a legal guardian or other recognised responsible adult or competent public body at any time", paras 145 and 19 respectively.

<sup>42</sup> *Ibid.*, "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.", para. 67.

<sup>43</sup> CRC Committee, *General Comment No 6* (2005), *op. cit.* note 2, paras 79-80.

<sup>44</sup> UNGA, *Alternative Care Guidelines*, *op. cit.* note 2, para. 2.

<sup>45</sup> *Ibid.*, para. 2(a).

<sup>46</sup> *Ibid.*, paras. 29(c)(i)-(v) and 30(b).



may also consider finding other “appropriate and permanent solutions”, including *kafala* and adoption.<sup>47</sup>

c. *Family reunification (in the (fled) State of origin or the host State)*<sup>48</sup>

18. It would not be in the best interests of the child to reunite him or her with family in the State of origin if there is a “reasonable risk” that such a return would lead to violation of the fundamental rights of the child.<sup>49</sup> This risk is indisputably established by the granting of refugee status or by a decision of non-return based on the *non-refoulement* principle. In cases where there appears to be a mitigation of this risk, it would be appropriate to examine family reunification in light of other considerations affecting the rights of the child, including the consequences of prolonged separation from one’s family.

19. Where family reunification is impossible in the State of origin, the obligations set out in Articles 9(3) and 10(2) of the 1989 Convention on the Rights of the Child should prompt the host State to examine the possibility of family reunification in its own territory. In any case – even where the child is (temporarily) separated from his or her parents and thus does not have direct contact with them – both provisions impose an obligation to fulfil the child’s right to maintain personal relations with both parents on a regular basis, where this is possible. For example, the child’s enjoyment of this right is effectively facilitated where a public authority enables a child to see and speak with his or her parents via videoconference. This illustrates that innovative tools which have only become available after the adoption of the Convention in 1989 can be employed to fulfil the rights contained therein, in particular where children have been physically separated from their parents.<sup>50</sup>

d. *Return to the State of origin (especially in cases of orphaned children)*<sup>51</sup>

20. In order to determine whether it is the child’s best interests to return to the State of origin, unless there is a “reasonable risk” that such a return would lead to violation of the fundamental rights of the child,<sup>52</sup> it is important to take the following criteria into account: (1) the socioeconomic<sup>53</sup> and security conditions awaiting the child upon his or her return (to be determined by means of a social survey); (2) the availability of care arrangements for the child; (3) the views of the child; (4) the extent to which the child has integrated in the host State; (5) the child’s right to preserve his or her identity; (6) the desirability of ensuring continuity in the child’s education, and to account for his or her ethnic, religious, cultural and linguistic background. Where it is impossible for members of the immediate or extended family to assume

<sup>47</sup> *Ibid.*, para 2(a).

<sup>48</sup> CRC Committee, *General Comment No 6* (2005), *op. cit.* note 2, paras 81-83. Family reintegration should be done in accordance with the UNGA, *Alternative Care Guidelines*, *op. cit.* note 2, paras 49-52.

<sup>49</sup> UNGA, *Alternative Care Guidelines* provide that “[u]naccompanied 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.”, *op. cit.* note 2, para. 148.

<sup>50</sup> *Ibid.*, para 151.

<sup>51</sup> CRC Committee, *General Comment No 6* (2005), *op. cit.* note 2, paras 84-87. The UNGA, *Alternative Care Guidelines* provide that “[a]ll 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”, *op. cit.* note 2, para. 11. Note that Article 12(4) of the *United Nations International Covenant of 16 December 1966 on Civil and Political Rights*, available at <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>> (last consulted on 28 July 2017), provides that “No one shall be arbitrarily deprived of the right to enter his own country.” The UN Human Rights Committee interprets “his own country” broadly: “It is not limited to nationality in a formal sense [...] it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien.” Crucially, the Committee remarks that “The right to return is of utmost importance for refugees seeking voluntary repatriation”, see Human Rights Committee, “General Comment No 27 (67) – Freedom of movement (article 12)”, 2 November 1999, CCPR/C/21/Rev.1/Add.9\*\*, paras 19-20, available at <[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.9&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.9&Lang=en)> (last consulted on 28 July 2017).

<sup>52</sup> UNGA, *Alternative Care Guidelines*, *op. cit.* note 2, para. 148.

<sup>53</sup> As concerns the inclusion of socioeconomic conditions in the determination of the best interests of the child, see CRC Committee, *General Comment No 6* (2005), *op. cit.* note 2, paras 84-88.

care of the child, the return of the child to his or her State of origin must not be carried out unless a clear and certain arrangement, including defined custody rights, is in place.

*e. Local integration*<sup>54</sup>

21. In cases where the child cannot be reunited with his or her family in the (fled) State of origin or in the host State or it is not in the best interests of the child, and where he or she cannot be returned to the State of origin on legal or factual grounds, local integration in the host State should be considered. It is to be noted that the Alternative Care Guidelines encourage States "to consider [adoption or *kafala* of Islamic law] only after efforts to determine the location of [the unaccompanied or separated child's] parents, extended family or habitual carers have been exhausted."<sup>55</sup> In any case, priority should be given to family type care solutions. Recourse to placement in institutional care should only be a last resort, after national adoption or foster family placement.<sup>56</sup> The unaccompanied or separated child should enjoy the same rights as other children in the host State, such as the right to education and development, including acquiring the language of the host State, as well as the right to health.

*f. Intercountry adoption*<sup>57</sup>

22. Regarding adoption, States are required to respect the rights and obligations provided in Article 21 of the 1989 Convention on the Rights of the Child (including the principle of subsidiarity), as well as other applicable national and international instruments, including the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* ("the 1993 Hague Convention").<sup>58</sup>

*g. Resettlement in a third country*<sup>59</sup>

23. Where the child cannot be returned to the State of origin or durable solutions cannot be put in place in the host State for factual or legal reasons, resettlement in a third State may offer a durable solution insofar as this serves the child's best interests. This resettlement in a third State is in the best interests of the child if it enables family reunification in the State of resettlement. It is equally in the child's best interests if it ensures continuity in the child's education, taking into consideration the child's ethnic, religious, cultural and linguistic background.

### **C. The 1996 Hague Convention**

24. It is a well-established legal principle that every State may exercise its jurisdiction in accordance with domestic law in respect of any child present on its territory, in order to take measures of protection in relation to that child. It is also a well-established principle that the law applicable to the child, including measures taken to protect him or her, is the law of the forum, namely the law of the State in which the child is present.<sup>60</sup> However, national law cannot in and of itself facilitate the degree of international judicial and administrative co-operation that is necessary for the implementation of protective solutions with cross-border elements, such as the reunification of a family in a State of origin, a host State or even a third State; the return of a child to a State of origin; or reintegration in a third State. It is only through the application of an international instrument such as the 1996 Hague Convention that these tools for co-operation become available.

<sup>54</sup> CRC Committee, *General Comment No 6* (2005), *op. cit.* note 2, paras 89-90.

<sup>55</sup> UNGA, *Alternative Care Guidelines*, *op. cit.* note 2, para. 152.

<sup>56</sup> *Ibid.*

<sup>57</sup> CRC Committee, *General Comment No 6* (2005), *op. cit.* note 2, para. 91.

<sup>58</sup> Again, "[n]o 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." See UNGA, *Alternative Care Guidelines*, *op. cit.* note 2, para. 166. See also Permanent Bureau of the Hague Conference on Private International Law, "Hague Recommendation on Refugee Children (adopted on 21 October 1994)", available on the Hague Conference website at: < [www.hcch.net](http://www.hcch.net) >, under "Adoption", then "HCCH Publications". The principle of subsidiarity is provided for in Art. 21(1)(b) of the 1989 Convention, which states that "inter-country adoption may be considered as an alternative means of the child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin". The 1993 Hague Convention implements the subsidiarity principle.

<sup>59</sup> CRC Committee, *General Comment No 6* (2005), *op. cit.* note 2, paras 92-94.

<sup>60</sup> Case concerning the application of the Convention of 1902 Governing the Guardianship of Infants (*Netherlands v Sweden*) ICJ Reports, 1958, p 55 ("the *Boll* case").

## 1. Introduction

25. The civil aspects of the protection of endangered children in cross-border settings has always been at the heart of the endeavours of the Hague Conference on Private International Law, now for over a century.<sup>61</sup> The Hague Convention of 12 June 1902 Governing the Guardianship of Infants (“1902 Hague Convention”) was the first of a series of Conventions in this area.<sup>62</sup> This Convention was replaced by the *Hague Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants* (“1961 Hague Convention”).

26. During the second half of the 20<sup>th</sup> Century, the opening of national borders, ease of mobility, breaking-down of cultural barriers and, more recently, the free flow of information via the Internet, notwithstanding their benefits, have considerably increased the risks associated with the cross-border movement of children. Cross-border trafficking of children, their exploitation, as well as migration triggered by (civil) war, socioeconomic<sup>63</sup> hardships and natural disasters have become serious problems. There has been an increase in reliance on temporary arrangements to address these problems. The risks associated with the struggle to provide all children with protective measures, that certain States appear to have faced, are grave indeed.

27. The 1996 Hague Convention has a very wide scope dealing with large variety of measures of protection, ranging from decisions pertaining to parental responsibility and contact rights to public measures of protection or care, as well as matters of representation. The Convention establishes uniform rules determining which competent authorities have jurisdiction to take the necessary measures of protection. These rules prevent the occurrence of conflicting decisions. They confer primary responsibility on the authorities of the country of habitual residence of the child, and allow every State in whose territory the child is present to take the necessary urgent or preventive measures of protection regardless of whether, in the case of jurisdiction based on the presence of the child, the child habitually resides in a Contracting State or a non-Contracting State.<sup>64</sup> The Convention designates the applicable law and provides for the recognition and enforcement of measures taken in one Contracting State in every other Contracting State bound by the Convention. Above all, the co-operative measures laid down by the Convention provide a conducive framework for the exchange of information and collaboration between the authorities of the various Contracting States that is necessary to achieve, for example, family reunification, the return of the child to the State of origin or the child’s resettlement in a third country. The Convention proves particularly useful in ensuring the protection of unaccompanied children and the cross-border placement of children.

### a. Unaccompanied children

28. The co-operation procedures provided by the 1996 Hague Convention may prove to be valuable in tackling the growing number of cases in which unaccompanied children cross borders and find themselves in vulnerable situations, subject to exploitation and other risks.<sup>65</sup> Whether the unaccompanied child is a refugee, an asylum seeker, a displaced person or a runaway adolescent, the Convention will assist by facilitating co-operation to locate the child and determining which country’s authorities have jurisdiction to take the appropriate measures of protection. It also ensures that there is co-operation between the authorities of the country of origin and host State, exchange of all necessary information and the implementation of every necessary measure of protection.

<sup>61</sup> 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. 3 (“Explanatory Report on the 1996 Convention”).

<sup>62</sup> The text of the Convention is available at < <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70> > (last consulted on 28 July 2017).

<sup>63</sup> CRC Committee, *General Comment No 6* (2005), *op. cit.* note 2, paras 84-88.

<sup>64</sup> See, *infra*, para 37.

<sup>65</sup> See A. Fiorini, ‘The Protection of the Best Interests of Migrant Children – Private International Law Perspectives’, in G. Biagioni & F. Ippolito (eds), “Migrant Children in the XXI Century: Selected Issues of Public and Private International Law”, *La ricerca del diretto*, Editoriale Scientifica, 2016.

*b. Cross-border placement of children*

29. The 1996 Hague Convention additionally enables co-operation between States faced with the growing number of cases of children placed in another country as an alternative to long-term placement solutions other than adoption, such as institutional placement.

*c. An integrated system*

30. The 1996 Hague Convention is based on the notion that provisions dealing with measures for the protection of children should constitute an indivisible whole. This explains its wide scope, which covers measures of protection or care of both a public and private nature. The Convention overcomes the uncertainty that is likely to arise where distinct laws apply to different types of measures of protection taken in relation to the same case.

*d. An inclusive system*

31. The Convention takes account of the wide variety of legal institutions and systems of protection that exist around the world. It does not attempt to create a uniform international law of child protection; the basic elements of such a law are already to be found in the 1989 Convention on the Rights of the Child. The function of the 1996 Hague Convention is to avoid legal and administrative conflicts and to build the structure for effective international co-operation in child protection matters between the different systems. In this respect, the Convention provides a remarkable opportunity for the building of bridges between legal systems with diverse cultural or religious backgrounds.

## **2. Scope**

*a. Ratione personae scope*

32. Article 2 of the 1996 Hague Convention provides that the instrument “applies to children from the moment of their birth until they reach the age of 18 years”. There is no mention of the legal status of the child. Thus, the 1996 Convention complies with the principle of non-discrimination prescribed by the 1989 Convention on the Rights of the Child. The 1996 Convention applies to unaccompanied children and children who have been voluntarily or involuntarily separated from their parents.<sup>66</sup> The inclusion of this group in the scope of the 1996 Convention is unequivocal; some of these children, such as those who are refugees, who are internationally displaced due to disturbances occurring in their home country and those whose habitual residence cannot be established, are specifically mentioned in Article 6 of the 1996 Convention.

*b. Ratione materiae scope*

33. The *ratione materiae* scope of the 1996 Convention is very broad. It includes both measures of protection of a private and public nature (*i.e.* measures taken by competent authorities as well as parents in relation to children). The scope is regulated by the inclusion of an illustrative list of measures of protection covered by the Convention, provided in Article 3, as well as an exhaustive list of measures of protection not covered by the Convention, set out in Article 4. It follows that if a measure is not listed in Article 4, Article 3 must inevitably cover it.

34. The measures of protection to be taken upon the arrival of the child in the territory of the host State (explained above) that are not specifically provided in the 1951 Refugee Convention, are all covered by Article 3. As such, it will be possible to designate a guardian (Art. 3(c)); a person or body having charge of the child’s person or property, representing or assisting the child (Art. 3(d)); and a legal representative (Art. 3(d)). It will equally be possible to set out the functions and responsibilities of such persons (Art. 3(d)), including the care of the child, the provision of accommodation, access to education, to health care and to an adequate standard of living (Art. 3(b)). The placement of the child in foster care or in an institution outside of the refugee camps, as is good practice, is equally possible in accordance with the 1996 Convention (Art. 3(e)).

---

<sup>66</sup> See the definitions in E.M. Ressler, N. Boothby and D.J. Steinbock, *op. cit.* note 19.

35. Durable solutions are equally all covered by Article 3. These include family reunification in the State of origin or the host State, return to the State of origin, local integration and resettlement in a third State, as well as measures which are incidental to the implementation of these measures of protection. However, adoption and measures preparatory to adoption are excluded from the scope of the 1996 Convention, as they are covered by the 1993 Hague Convention.

36. It is important to take note of the final paragraph of Article 4, which deals with the areas excluded from the scope of the 1996 Convention; this provision may well cause confusion. "Decisions on the right of asylum and on immigration" are excluded from the scope (Art. 4(j)). According to the Explanatory Report of the 1996 Convention, this exclusion is founded on the principle that these decisions derive from the sovereign power of States.<sup>67</sup> It must be understood that only decisions on these matters are excluded – that is, the granting of asylum or of a residence permit.<sup>68</sup> Otherwise, all measures of protection and representation of children seeking asylum or residence permits, as explained below, do fall under the scope of the 1996 Convention.

### c. *Geographic scope*

37. Unlike other Hague Conventions, certain mechanisms of the 1996 Convention may be applied to children who are not habitually resident in Contracting States. For example, certain rules about jurisdiction apply regardless of whether a child is habitually resident in a Contracting State or has no habitual residence at all. Indeed, the authorities of the Contracting State on the territory of which internationally displaced children are present will have jurisdiction over these children (Art. 6(1)).<sup>69</sup> They will also have jurisdiction with regard to children whose habitual residence cannot be established (Art. 6(2)).<sup>70</sup> This feature demonstrates the humanitarian nature of the Convention. The rules on applicable law are of a universal character, as is the case for the majority of Hague Conventions. Under these rules, it is possible to apply the law of non-Contracting States. For example, when ordering the return of a child to his or her State of origin as an urgent measure of protection (Art. 11), the competent authority could order measures of protection in accordance with the law of the State of origin – regardless of whether that State is a Contracting State to Convention or not. On the other hand, the rules on recognition and enforcement of measures of protection are limited to measures that have been taken in Contracting States, due to the Convention's rules on jurisdiction. The implementation of the co-operation mechanisms provided by the 1996 Convention is equally limited to Contracting States based on reciprocity. However, while Article 30 provides that Central Authorities shall co-operate with each other, it also requires them to promote co-operation amongst competent authorities in their States to achieve the purposes of the Convention. This would certainly include the diplomatic and consular offices representing the State of origin of a given unaccompanied child in the Contracting State where that child is present. It would also include intergovernmental organisations that are mandated to look after these children, such as UNICEF and UNHCR. As a result, some cross-border co-operation would still be possible even where the State of origin of a child is not a Contracting State to the 1996 Convention.

---

<sup>67</sup> Explanatory Report on the 1996 Convention, *op. cit.* note 61, para. 36.

<sup>68</sup> *Ibid.*

<sup>69</sup> Article 6 provides that:

- (1) 'For refugee children and children who, due to disturbances occurring in their country, are internationally displaced, the authorities of the Contracting State on the territory of which these children are present as a result of their displacement have the jurisdiction provided for in paragraph 1 of Article 5.
- (2) The provisions of the preceding paragraph also apply to children whose habitual residence cannot be established.'

<sup>70</sup> Furthermore, when urgent (Art. 11) or provisional (Art. 12) measures of protection are ordered with regard to a child habitually resident in a non-Contracting State, such measures "shall lapse in each Contracting State as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question" (Arts 11(3) and 12(3)).

### 3. Rules on jurisdiction

#### a. Introduction<sup>71</sup>

38. The general basis of jurisdiction under the 1996 Convention is the habitual residence of the child (Art. 5). This solution responds to the difficulties created by the concurrent bases of jurisdiction in the 1961 Hague Convention, which could result in conflicting decisions (*i.e.* jurisdiction of habitual residence and nationality jurisdiction).

39. The Convention provides exceptions to jurisdiction based on habitual residence, for example in cases where the child is displaced due to disturbances in his or her State of habitual residence (Art. 6(1)) or in cases where there is an absence of habitual residence (Art. 6(2)). In both cases, the 1996 Convention reverts to the universal principle that every State has exclusive jurisdiction over persons located in their territory, especially for humanitarian purposes. The Convention thus provides for jurisdiction based on necessity.

40. It is also possible to fully or partially transfer jurisdiction based on the habitual residence of the child to the authorities of a Contracting State who are better placed to appreciate, on the facts of the particular case, the best interests of the child. This transfer must be requested or authorised by the authorities of the State of habitual residence of the child (Arts 8 and 9) or requested by the authorities of the State on whose territory the child is present (Art. 8).

41. In certain cases of urgency with extraterritorial effects (*i.e.* effects that occur beyond the territory of the State which has jurisdiction; see Art. 11) or where there is a need for provisional measures with limited territorial effect (Art. 12), territorial jurisdiction may be independently exercised. Its exercise is limited by measures taken or to be taken by the authorities that normally have jurisdiction.

42. 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).

#### b. Refugee or displaced children, or children whose habitual residence cannot be established<sup>72</sup>

43. The jurisdiction that competent authorities have in relation to refugee or displaced children, or those whose habitual residence cannot be established, is governed by Article 6.<sup>73</sup> The category of children covered by this provision is limited to those who have left their country due to disturbances raging there. The Convention does not define the term "disturbances". Civil war, famine, environmental or socioeconomic disturbances are all examples that come to mind.<sup>74</sup> Such children are often unaccompanied or separated and, in all cases, are deprived of their parents temporarily or permanently. Article 6 does not deal with abandoned or runaway children; other provisions of the Convention will offer a solution for such children (Arts 11, 12 and 31(c)).

44. Refugee or displaced children, or children whose habitual residence cannot be established, often require arrangements for their protection that are of a durable nature, except in cases of urgency (Art. 11). This is why these children have been provided with a forum of general jurisdiction (Art. 6), as opposed to one which is limited to urgent measures of protection. The jurisdiction normally attributed to the authorities of the State of habitual residence by the Convention is inoperative in such cases. Indeed, such children have severed every connection with their State of habitual residence, and the uncertain circumstances of their continued presence in the State in which they have found refuge precludes the conclusion that they have acquired a new habitual residence.

45. As soon as the child obtains a new habitual residence, the forum of necessity under Article 6 will cease to have effect. If this new place of habitual residence is in a Contracting

<sup>71</sup> *Ibid.*, para. 37.

<sup>72</sup> *Ibid.*, para. 44.

<sup>73</sup> See *supra* note 69.

<sup>74</sup> CRC Committee, *General Comment No 6* (2005), *op. cit.* note 2, paras 84-88.

State, the competent authorities will exercise their jurisdiction under Article 5, or alternatively the State in whose territory the child is present will have but a limited basis of jurisdiction, as set out in Articles 11 and 12.

46. It is interesting to note that Article 6 of the 1996 Convention finds its counterpart in Article 13 of the Brussels II *bis* Regulation.<sup>75</sup> A rule which co-ordinates the Brussels II *bis* 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).<sup>76</sup> 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.<sup>77</sup>

*c. Transfer of jurisdiction to an appropriate forum*<sup>78</sup>

47. As an exception to the general rules on jurisdiction, Articles 8 and 9 of the 1996 Convention offer a procedure that allows, in the framework of measures for the protection of the person of the child, the transfer of jurisdiction from the authorities of the Contracting State normally having jurisdiction (*e.g.* the State of habitual residence of the child) to the authorities of another Contracting State. This transfer of jurisdiction is only possible once certain conditions have been met, and only in favour of the authorities of another Contracting State that would be better placed in the particular case to assess the best interests of the child. It should be noted that jurisdiction can only be transferred between the authorities of Contracting States. A request for transfer of jurisdiction can be executed in two different ways.

48. Firstly, according to Article 8 of the 1996 Convention, an authority having jurisdiction under Articles 5 (habitual residence) or 6 (refugee or displaced children, or children whose habitual residence cannot be established), if it considers that another authority which lacks jurisdiction would be better placed in the particular case to assess the best interests of the child, may request that the other authority assumes jurisdiction. The Contracting States to whose authorities a transfer of jurisdiction may be made, listed in paragraph 2 of Article 8, are: *a)* a State of which the child is a national, *b)* a State in which property of the child is located, *c)* a State whose authorities are seized of an application for divorce or legal separation of the child's parents, or for annulment of their marriage, *d)* a State with which the child has a substantial connection.

49. 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."<sup>79</sup> Thus, the possibility of this transfer may be particularly appropriate in cases of family reunification in the child's State of origin, return of the child to the State of origin or resettlement in a third country. However, according to the wording of paragraph 2 of Article 8, the addressed State would need to be a State of which the child is a national or with which the child has a substantial connection – such as one where (extended) family members are located or whose language, culture or religion the child shares. Where refugee children are returned to their State of origin, there must be no breach of the *non-refoulement* principle enshrined in the 1951 Refugee Convention.

50. Secondly, under Article 9 of the 1996 Convention, the authorities of a Contracting State listed in paragraph 2 of Article 8 that lacks jurisdiction but which consider that they are better placed in the particular case to assess the child's best interests, may request the competent authority of the Contracting State of the habitual residence of the child (Art. 5) that they be authorized to exercise jurisdiction.

<sup>75</sup> See Brussels II *bis* Regulation, *op. cit.* note 13.

<sup>76</sup> *Ibid.*, Art. 61.

<sup>77</sup> See 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](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583158/IPOL_STU(2017)583158_EN.pdf) > (last consulted on 28 July 2017). At p. 29, the co-operation provisions of Chapter IV of Brussels II *bis* 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 of Brussels II *bis*).

<sup>78</sup> Explanatory Report on the 1996 Convention, *op. cit.* note 61, paras 53-60.

<sup>79</sup> *Ibid.*, para. 56.

51. It is worth noting a very important difference between Articles 8 and 9, especially as it relates to children who are refugees, displaced or whose habitual residence cannot be established. While the transfer of jurisdiction to take measures in relation to them (Art. 6) is expressly provided in Article 8, it is not in Article 9. The Explanatory Report indicates that this is the results of an “oversight”, and that Article 9 should be aligned with Article 8.<sup>80</sup> 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.” There may be another possibility, namely that a State with which the child has a substantial connection – for example, as stated above, one where (extended) family members are located or whose language, culture or religion the child shares<sup>81</sup> – requests a transfer of jurisdiction from the authorities of the State in which the child is present as a result of disturbances occurring in his or her State of habitual residence.

52. The Practical Handbook on the Operation of the 1996 Child Protection Convention stipulates that “at the current time the language of the Convention is clear and it seems that a request under Art. 9 may only be made to the Contracting State of the child’s habitual residence.”<sup>82</sup> On the other hand, the doctrinal position is that “the purposive approach to interpreting the Convention would permit the wider application of Art. 9”, in light of further clarifications contained in the Explanatory Report.<sup>83</sup> In fact, there is nothing to prevent the authorities of Contracting States to act on an agreement to this effect once it has been reached.<sup>84</sup> An interpretative declaration of the States Parties to the Convention or even an amendment to the Convention would enable the resolution of this apparent oversight.<sup>85</sup>

53. The transfer of jurisdiction may occur in respect of a case in its entirety, or a part of it.<sup>86</sup> Once the transfer has been accepted by the authorities of both States, the authority which waives its 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 enforceable.<sup>87</sup> 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.”<sup>88</sup> Yet, in the specific cases outlined above of return to the State of origin or resettlement in a third State, these movements may result in the establishment of a new habitual residence, which can bring about a change in the forum having jurisdiction.

54. There are two possible processes for transferring jurisdiction. Firstly, the authorities themselves may submit the request to the authorities of the other State having jurisdiction, whether directly or with the assistance of the relevant Central Authority (Arts 8(1), first paragraph, 9(1), first paragraph 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 paragraph, 9(1), second paragraph and 31(a)).

---

<sup>80</sup> *Ibid.*, para. 58.

<sup>81</sup> In the case of the migration crisis which is currently raging in Europe one might imagine that the French or Belgian authorities would want to take in, from Greece, French-speaking African children of Franco-African culture and Catholic faith. Such authorities would be able to do so under Article 9, if it provided for the forum of jurisdiction set out in Art. 6.

<sup>82</sup> Permanent Bureau of the Hague Conference on Private International Law, *Practical Handbook on the Operation of the 1996 Hague Child Protection Convention*, The Hague, 2014, note 156, at p. 57, (“Practical Handbook on the Operation of the 1996 Convention”).

<sup>83</sup> N. Lowe and M. Nicholls, *The 1996 Convention on the Protection of Children*, (Family Law, Jordan Publishing, Bristol, 2012), para. 3.44.

<sup>84</sup> In practice, nothing would prevent the Central Authority of the State where the child is present from inviting the competent authority of its State (that has jurisdiction under Art. 6) to exchange views with an authority from another Contracting State as to a possible transfer of jurisdiction under Art. 8. This invitation to exchange views could be initiated if that Central Authority were to know, for example through the network of Central Authorities, that this authority from another Contracting State would be better placed to assess the best interest of the child.

<sup>85</sup> It is noteworthy that this problem does not presents itself in Art. 8 of the *Hague Convention of 13 January 2000 on the International Protection of Adults*, which refers to both Arts 5 (habitual residence) and 6 (refugees). The structure of the 2000 Convention is modelled on that of the 1996 Convention.

<sup>86</sup> *Practical Handbook on the Operation of the 1996 Convention*, *op. cit.* note 82, para. 5.5.

<sup>87</sup> *Ibid.*, para. 5.6.

<sup>88</sup> Explanatory Report on the 1996 Convention, *op. cit.* note 61, para. 56.



- d. *Concurrent jurisdiction of the authorities of the State of the child's presence – jurisdiction in cases of urgency (Art. 11) and provisional measures of territorial effect (Art. 12)*<sup>89</sup>

55. Article 11 grants jurisdiction to the authorities of every State on whose territory the child is located to take any necessary measures of protection in cases of urgency. The 1996 Convention does not define urgency. "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."<sup>90</sup> The jurisdiction covered in Article 11 is concurrent with jurisdiction based on the habitual residence of the child, thus constituting an exception to the principle of primary jurisdiction that underpins the Convention. "As 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<sup>91</sup>" enabling them to take all available measures, whether urgent or not. Thus, in the case of unaccompanied or separated children, Article 11 would be appropriate in the case of runaway or displaced children for whom it is impossible to establish a place of habitual residence and who may otherwise be subject to, for example, trafficking.

56. Alternatively, in cases which are not urgent, Article 12 grants the authorities of every Contracting State on whose territory 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".

#### 4. Rules on applicable law<sup>92</sup>

57. The 1996 Convention incorporates the principle handed down by the International Court of Justice in the *Boll* case, according to which the authorities of Contracting States, in exercising their jurisdiction under the Convention to take measures for the protection of children, apply their own law (Art. 15(1)).<sup>93</sup> In so doing, they will apply the law they are most familiar with, which in most cases coincides with the law of the State on whose territory the child is present under the rules on jurisdiction. Furthermore, measures are generally executed on the territory of the State that has taken them. In this way, implementing these measures is more straightforward where they conform to the law of that State.

58. However, insofar as it is necessary for the protection of the person 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). For example, in the specific cases of family reunification in the State of origin or the return of the child to the State of origin, "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.<sup>94</sup> Similarly, it may be appropriate to apply the law of a third State if the child is to be resettled there in the short term. In any case, as provided in paragraph 2 of Article 15, 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.

59. Additional provisions complement the Chapter on Applicable Law, dealing with: attribution or extinction of parental responsibility (Art. 16); exercise of parental responsibility (Art. 17);

<sup>89</sup> *Ibid.*, paras 67-77.

<sup>90</sup> *Ibid.*, para. 68.

<sup>91</sup> *Ibid.*, para. 69.

<sup>92</sup> *Ibid.*, paras 85-117.

<sup>93</sup> The *Boll* case, *op. cit.* note 60.

<sup>94</sup> Explanatory Report on the 1996 Convention, *op. cit.* note 61, para. 89.

termination or modification of parental responsibility (Art. 18); protection of third parties (Art. 19); exclusion of *renvoi* and 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).

## 5. Rules on recognition and enforcement<sup>95</sup>

60. 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].”<sup>96</sup> The grounds for non-recognition set out in the Convention are the classic grounds found in the various Hague Conventions on private international law.

61. The 1996 Convention provides for preventive action for recognition or non-recognition of a measure of protection (Art. 24). This provision may be of interest in the specific cases of returning the child to his or her State of origin, family reunification in that State, or of resettlement in a third State. Certainty may be required in these cases as to the recognition or enforcement of a measure of protection before the movement of the child. Thus, “[w]ithout prejudice to Article 23, [...] 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.

62. As is customary in Hague 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). “If the measure [of 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)).<sup>97</sup> This procedure will be triggered in the requested State by the request of an interested party for a declaration of enforceability or registration for enforcement, according to the procedure provided in the law of that State (Art. 26(1)). 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).

## 6. Co-operation mechanisms

63. 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. “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)).<sup>98</sup> Each Central Authority is, as it were, a fixed point of contact for the Central Authorities of other Contracting States for obtaining responses to requests. Central Authorities can co-operate in relation to unaccompanied or separated children in different ways.

64. Under Article 31(c), the Central Authority of another Contracting State may be asked to locate a child that appears to be present on the territory of the requested State and in need of

<sup>95</sup> *Ibid.*, paras 118-135.

<sup>96</sup> *Ibid.*, para. 119.

<sup>97</sup> *Ibid.*, para. 132.

<sup>98</sup> *See, supra*, para 37.

protection. It is to be hoped that with time it will become possible, pursuant to the development of good practice in this area, to rely on an opposite direction of co-operation between Central Authorities, in order to trace the parents or family of an unaccompanied or separated child.<sup>99</sup> It is to be noted that tracing the family of a child could be possible in accordance with Article 34.

65. Article 33 of the 1996 Convention imposes a mandatory procedure of consultation and approval between Central Authorities for the placement of the child in a foster family or institutional care, or the provision of care by *kafala*. Such placement can only occur in another Contracting State. This consultation is initiated when an authority having jurisdiction under Articles 5 to 10 contemplates the placement of the child abroad. For the types of cases with which this Preliminary Document is concerned, such placement may be contemplated for an unaccompanied or separated child who may be returned to his or her State of origin or resettled in a third State, without the occurrence of family reunification in either case. "This consultation gives a power to review the decision to the authority of the receiving State, and allows the authorities to determine in advance the conditions under which the child will stay in the receiving State, in particular in respect of immigration laws in force in that State, or even in the sharing of the costs involved in carrying out the placement measure. The text sets it out that the 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."<sup>100</sup>

66. Central Authorities can co-operate under Articles 30 and 32 with a view to ensuring the return of an unaccompanied or separated child to the State of origin or the resettlement of the child in a third State, accompanied by appropriate measures of protection which are to be in place upon the child's arrival. Indeed, Article 32 "envisages the case in which an authority, whether or not the Central Authority, of a State with which the child has a substantial connection is concerned about the fate of this child, who has his or her habitual residence or who is present in another Contracting State, and addresses to the Central Authority of that other State a request with supporting reasons that it be furnished a report on the child's situation or that measures be taken for the protection of the person or property of the child."<sup>101</sup> 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."<sup>102</sup>

67. As part of these rules on co-operation, the first paragraph of Article 34 enables the competent authority of a Contracting State to request any authority of another Contracting State which has information relevant to the protection of the child to communicate that information. It is also important to note that, 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 victim of an act of exploitation discovered in another State.

68. 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 in cases of refugee children, especially for those who have been victims of trafficking and exploitation.

---

<sup>99</sup> The development of a cross-border electronic case management system such as [iSupport](#) (developed for the purpose the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*) could assist in that respect.

<sup>100</sup> Explanatory Report on the 1996 Convention, *op. cit.* note 61, para. 143.

<sup>101</sup> *Ibid.*, para. 142.

<sup>102</sup> *Ibid.*, para. 146.

## D. Conclusion

69. During its twenty-fifth meeting of 18-20 September 2015 in Luxembourg, the European Group for Private International Law adopted the *Declaration on the Legal Status of Applicants for International Protection from Third Countries to the European Union*.<sup>103</sup> In its Declaration, the European Group for Private International Law recalls in particular the 1996 Convention, identifying it as a solution in this area, and calls on the institutions of the European Union and its Member States to take initiatives with a view to “promoting the universal ratification of instruments of private international law aimed at ensuring legal certainty and mutual recognition of personal status, including the Hague Convention on the Protection of Children (1996)”. Moreover, in General Comment No 6 (2005), the Committee on the Rights of the Child also identifies the 1996 Convention as an instrument that addresses the protection of unaccompanied and separated children, and encourages States to ratify or accede to it.<sup>104</sup> The Alternative Care Guidelines equally invite States to ratify or accede to the instrument.<sup>105</sup> Despite these invitations to ratify the 1996 Convention, its rate of ratification is rather slow.

70. As part of the promotion of the 1996 Convention among States, the authorities responsible for immigration and asylum matters should be made aware of the practical application of the 1996 Convention in these areas, as set out in this Preliminary Document. Constructive dialogue and close collaboration should be facilitated between authorities responsible for international co-operation in child protection matters – at both the domestic and international levels – with those responsible for immigration and asylum matters, with regard to the operation of the 1996 Convention in order to better assist unaccompanied and separated children across borders.

71. Thorough and precise knowledge of the applicable legal frameworks and services available in the respective jurisdictions is required to secure sustainable solutions in the fields of asylum, immigration and the protection of children. Positive results in the area of the protection of unaccompanied or separated children can only be obtained as a result of close collaboration between persons and institutions with expertise in these fields in the relevant States concerned.<sup>106</sup> It is to be hoped that the tools for competent authorities set out in this Preliminary Document will inspire the intensification of a collaborative approach among the various authorities of Contracting States to the 1996 Convention,<sup>107</sup> and that with time the promotion of the instrument – and its application to provide protection and certainty for unaccompanied children – will proliferate. It is hoped that before the October 2017 Meeting of the Special Commission, UNICEF and UNHCR officials will meet with government officials from some Central Authorities designated under the 1996 Convention to discuss and examine the application of the 1996 Convention to unaccompanied and separated children. It is also hoped that this Preliminary Document will encourage other States to ratify or accede to the 1996 Hague Convention. Finally, it is hoped that the global implementation of the 1996 Convention will assist with the on-going elaboration and future realisation of the United Nations Global Compact on Refugees and Global Compact for Migration.<sup>108</sup> The migration of unaccompanied and separated children presents global problems that require global solutions. Each child who is part of this group will require protective measures that respond to his or her individual circumstance, and that have force of law across borders. The 1996 Convention can cater to the need for such measures to address this global challenge.

---

<sup>103</sup> The text of the Declaration is available at < <http://www.gedip-egpil.eu/documents/gedip-documents-25bis.htm> > (last consulted on 28 July 2017).

<sup>104</sup> Committee on the Rights of the Child, *General Comment No 6* (2005), *op. cit.* note 2, para. 15.

<sup>105</sup> UNGA, *Alternative Care Guidelines*, *op. cit.* note 2, para. 139.

<sup>106</sup> Nigel Cantwell, *Challenges to Developing Appropriate Care for Children on the Move*, *op. cit.* note 29, p. 11.

<sup>107</sup> States are invited to build on networks created in accordance with the 1996 Convention, as stated in the Conclusions and Recommendations of the Rome Conference of 10 and 11 November 2014 on Fundamental Rights and Migration to the EU, organised by the European Union Agency for Fundamental Rights with the Italian Presidency of the Council of the EU, available at < [http://fra.europa.eu/sites/default/files/frc-2014-conclusions\\_en\\_0.pdf](http://fra.europa.eu/sites/default/files/frc-2014-conclusions_en_0.pdf) > (last consulted on 28 July 2017).

<sup>108</sup> The UNGA invited the Office of the United Nations High Commissioner for Refugees to “include [a global compact on refugees based on comprehensive stakeholder consultations] in his annual report to the General Assembly in 2018”, which the UNGA “will work towards [adopting]” in 2018”. It also resolved to “launch a process of intergovernmental negotiations leading to the adoption of a global compact for safe, orderly and regular migration.” See UNGA, *New York Declaration for Refugees and Migrants*, A/71/L.1\*, 13 September 2016, available at <[https://www.iom.int/sites/default/files/our\\_work/ODG/GCM/NY\\_Declaration.pdf](https://www.iom.int/sites/default/files/our_work/ODG/GCM/NY_Declaration.pdf)> (last consulted on 28 July 2017) Annex I, paras 17-19; and Annex II, para. 1.

## **A N N E X E S**

## Hague Conference post-Convention Services

Over the years, the Hague Conference on Private International Law has gained a unique reputation for the post-Convention services it provides to Contracting States to Hague Conventions. These are services and activities offered by the Secretariat of the Organisation (the Permanent Bureau) to support the implementation of Hague Conventions. What follows is a list of possible post-Convention services and activities that could be offered in relation to the application of the 1996 Convention to unaccompanied and separated children.

### Special Commission to review the practical operation of the 1996 Convention (Art. 56)

A Special Commission is a meeting of Contracting States to a specific Hague Convention. Contracting States' delegations are usually made up of different actors involved in the day-to-day operation of the Convention. In the case of the 1996 Convention and its application to unaccompanied and separated children, States' delegations would include members of the Central Authority designated under the Convention as well as representatives of competent authorities under the Convention, including judges and migration officers, social workers, representatives of guardian associations, alternative care representatives, etc. International organisations, including both intergovernmental and non-governmental organisations (e.g., UNHCR, UNICEF, UNCRC, IOM, Terre des Hommes and Save the Children), would be invited to attend the Special Commission.

Advance preparations for a Special Commission are informed by Contracting States' and organisations' responses to questionnaires prepared by the Permanent Bureau, and an analysis of the topics that form the subject of discussion based on a close monitoring of Contracting States' practice, case law and statistics. The objective of a Special Commission is to identify areas where the Convention is working properly as well as areas where there are implementation or operation challenges, with a view to adopting conclusions and recommendations by consensus to address these issues. The conclusions and recommendations can *i.e.* identify good practices, invite Contracting States to implement the Convention in a certain way or identify future work for the Hague Conference (subject to available resources), such as the development of an implementation checklist, model forms, guides to good practice, practical handbooks, databases (e.g., statistical database, case law database, a cross-border electronic case management and secure communication system or an electronic country profile), a network of migration authorities or a newsletter. Traditionally, most of this work is developed by the Permanent Bureau with the assistance of working groups comprising experts representing Contracting States to the Convention.

### Implementation checklist

A tailored checklist could be developed to assist with the implementation of the 1996 Convention in the area of unaccompanied and separated children (see the [Implementation Checklist under the 2007 Child Support Convention](#)).

### Model forms

Model forms that collect and present information in a standardised way could be developed to facilitate the sharing of information between authorities designated under the 1996 Convention. By using tick boxes and standardised information, language-neutral model forms can overcome potential language barriers and translation issues. Model forms could also serve as the backbone of a future cross-border electronic case management and secure communication system (see the [Recommended Forms under the Child Support Convention](#)). Model forms for the implementation of the 1996 Convention in the area of unaccompanied and separated children could include:

- Model form to locate a missing child
- Model form to locate relatives of an unaccompanied and separated child
- Model form for family reunification
- Model form for placement of the child in a foster family or institution
- Model report on the situation of a child
- Model form for the transfer of jurisdiction under Articles 8 and 9 of the 1996 Convention

### Guides to good practice and practical handbooks

As has been done for other Hague Conventions, guides to good practices could be developed to provide guidance on the establishment of Central Authorities with a special focus on unaccompanied and separated children (see [Guide to Good Practice Child Abduction Convention Part I – Central Authority Practice](#)). Guidance could also be provided on how to implement the 1996 Convention in this area (see [Guide to Good Practice Child Abduction Convention Part II – Implementing measures](#)), or on how to make a best interests assessment.

Practical handbooks could also be developed, for example, to assist caseworkers and officials working in the field (see the [Practical Handbook for Caseworkers under the 2007 Child Support Convention](#)).

### Databases

#### *Statistical database*

A global statistical database could be developed to monitor the types of short-, medium- and long-term protection measures that have been put in place, and the average amount of time that elapses at each stage of execution of a given measure (see [INCASTAT](#), the [database under the 1980 Hague Child Abduction Convention](#)).

#### *Case law database*

Similar to what has been introduced for the 1980 Hague Child Abduction Convention, a case law database specialised in the area of unaccompanied and separated children could be developed (see the [INCADAT](#) database under the 1980 Hague Child Abduction Convention).

#### *Cross-border electronic case management and secure communication system*

A cross-border electronic case management and secure communication system could be developed to assist Central Authorities and competent authorities with their daily co-operation and co-ordination of cases involving unaccompanied and separated children – of which there are over 100,000 worldwide (see [iSupport](#) electronic case management and secure communication system developed under the 2007 Child Support Convention).

#### *Electronic country profile*

A standardised electronic country profile could be developed to describe the implementation of the 1996 Convention in the different Contracting States in relation to unaccompanied and separated children. This service would aim to facilitate information-sharing and to expedite the handling of such cases (see the [electronic Country Profile developed under the 2007 Child Support Convention](#)).

### Network of migration authorities

An international network of migration authorities could be developed under the auspices of the relevant international organisation(s) working in the area of unaccompanied and separated children, similar to the International Hague Network of Judges (IHNJ) specialised in international child protection matters (see the [IHNJ](#)).

### Newsletter

Finally, a Newsletter could be developed to share, among others, the latest news and good practices in this area (see [The Judges' Newsletter on International Child Protection](#)).

## Measures of protection to be taken upon arrival, at reception and for interim care<sup>1</sup>

Relevant provisions of the 1996 Convention that are applicable to measures of protection to be taken upon arrival, at reception and for interim care.

### **Scope (*ratione materiae*)**<sup>2</sup>

**Article 3** – The following urgent and provisional protection measures are covered by Article 3:

- Registration of the child, including the collection of the following information to know his or her identity: nationality; education; cultural, linguistic and ethnic background; specific vulnerabilities and special needs in terms of protection
- Designation of an *ad hoc* administrator, guardian or counsellor/advisor, as well as a legal representative
- Translation and interpretation services
- Family tracing and establishing contact
- Accommodation
- Full access to education, language courses and training
- Provision of health care and an adequate standard of living
- Social assistance and employment (if the child is of an appropriate age)
- Effective prevention of trafficking and sexual or other forms of exploitation of the child
- Effective prevention of enlistment of the child in the armed forces and deprivation of his or her liberty, as well as ensuring the lawful treatment of the child in cases of detention

### **Jurisdiction (*ratione personae* and geographic scope)**<sup>3</sup>

**Article 6(1)**<sup>4</sup> – 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.

**Article 6(2)**<sup>5</sup> – 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**<sup>6</sup> – 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 *i.e.* to runaway, lost, abandoned or abducted children who are not the subject of by Article 6.

**Article 12**<sup>7</sup> – 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 person of the child which have a territorial effect limited to the State in question. This provision applies *i.e.* to runaway, lost, abandoned or abducted children who are not the subject of Article 6.

### **Applicable Law**<sup>8</sup>

**Article 15(1)** - In exercising their jurisdiction in the case of urgent and provisional measures of protection, the authorities of the Contracting States shall apply their own law.

<sup>1</sup> See, "Statement of Good Practice – Separated Children in Europe Programme", *op. cit.* note 38, at pp 20-32.

<sup>2</sup> See, *supra*, paras 33-36.

<sup>3</sup> The provisions listed below, with the exception of Arts 8-9, will apply whether only the State where the child is present is a Contracting State to the 1996 Convention or other States concerned are also Contracting States. See, *supra*, para 37 and note 70.

<sup>4</sup> See, *supra*, paras 38-46.

<sup>5</sup> *Ibid.*

<sup>6</sup> See, *supra*, paras 38-42 and 55 and note 70 with regard to the application of this provision when the child is habitually resident in a non-Contracting State.

<sup>7</sup> See, *supra*, paras 38-42 and 56 and note 70.

<sup>8</sup> The law applicable can either be the law of a Contracting State or the law of a non-Contracting State. See, *supra*, paras 57-59.



**Recognition and Enforcement**<sup>9</sup>

The measures of protection listed above generally should not require cross-border recognition and enforcement.

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

**Co-operation**<sup>10</sup> (when all States concerned are Contracting States to the Convention)

**Article 31(c)** – A Central Authority may be asked to locate a child on the territory of its State. A future good practice could be for Central Authorities to trace the parents or family of unaccompanied or separated children.

**Article 32** – A State that has a substantial connection with a child (*e.g.* if the child's relatives live in its territory) may address certain requests to the Central Authority of the State where the child is 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 consider taking 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 relevant to the protection of the child, including the location of the family of the child.

**Co-operation**<sup>11</sup> (when only the State of presence of the child is a Contracting State to the Convention)

**Article 30** - Central Authorities shall promote co-operation amongst competent authorities in their States to achieve the purposes of the Convention. This would certainly include the diplomatic and consular offices representing the State of origin of a given unaccompanied child in the Contracting State where that child is present. It would also include intergovernmental organisations that are mandated to look after these children, such as UNICEF and UNHCR.

---

<sup>9</sup> The recognition and enforcement provisions of the 1996 Convention will apply only if both the requesting State (*i.e.*, 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 60-62.

<sup>10</sup> See, *supra*, paras 63-68.

<sup>11</sup> See, *supra*, para 37 *in fine*.

### Family reunification in the (fled) State of origin or in a third State<sup>1</sup>

Relevant provisions of the 1996 Convention that are applicable to family reunification in the (fled) State of origin or in a third State.

#### Scope (*ratione materiae*)<sup>2</sup>

**Article 3** – The following protection measures are covered by Article 3:

- Measures of protection to be taken upon arrival, at reception and for interim care (see, *supra*, Annex 2-A)
- Family reunification in the (fled) State of origin or in a third State

#### Jurisdiction (*ratione personae and geographic scope*)<sup>3</sup>

**Article 5** – If the State of origin of the child is a Contracting State to the Convention, its authorities have jurisdiction, based on the habitual residence of the child, to take measures of protection for family reunification in the State of origin of the child.

**Article 6(1)<sup>4</sup>** – 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 for family reunification in the (fled) State of origin or in a third State.

**Article 6(2)<sup>5</sup>** – 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 for family reunification in the (fled) State of origin or in a third State.

**Articles 8-9<sup>6</sup>** – It is 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 in cases of family reunification in the child's State of origin or in a third State, as this transfer of jurisdiction would assist in paving the way for a transfer of the person of the child. The addressed State would need to be a State of which the child is a national or with which the child has a substantial connection, such as one where (extended) family members are located or whose language, culture or religion the child shares.

**Article 11<sup>7</sup>** – 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 *i.a.* to runaway, lost, abandoned or abducted children who are not the subject of Article 6.

**Article 12<sup>8</sup>** – 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 person of the child which have a territorial effect limited to the State in question. This provision applies *i.a.* to runaway, lost, abandoned or abducted children who are not the subject of Article 6.

<sup>1</sup> See, "Statement of Good Practice – Separated Children in Europe Programme", *op. cit.* note 38, at p 37.

<sup>2</sup> See, *supra*, paras 33-36.

<sup>3</sup> The provisions listed below, with the exception of Arts 8-9, will apply whether only the State where the child is present is a Contracting State to the 1996 Convention or other States concerned are also Contracting States. See, *supra*, para 37 and note 70.

<sup>4</sup> See, *supra*, paras 38-46.

<sup>5</sup> *Ibid.*

<sup>6</sup> See, *supra*, paras 38-42 and 47-54 and more specifically note 84.

<sup>7</sup> See, *supra*, paras 38-42 and 55 and note 70 with regard to the application of this provision when the child is habitually resident in a non-Contracting State.

<sup>8</sup> See, *supra*, paras 38-42 and 56 and note 70 *ibid.*

**Applicable Law**<sup>9</sup>

**Article 15(1)** - In exercising their jurisdiction, the authorities of the Contracting States shall apply their own law.

**Article 15(2)** – 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.<sup>10</sup>

**Article 15(3)** - If the child's location 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 location.

**Recognition and Enforcement**<sup>11</sup>

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

**Article 24** – In the specific cases of family reunification in the State of origin of the child or in a third State, it may be necessary to secure the recognition and enforcement of a measure of protection before the movement of the child.

**Article 26(1)** – The enforcement of the handing over of a child will be subject to a declaration of enforceability or registration for the purpose of enforcement in the requested State.

**Co-operation**<sup>12</sup> (when all States concerned are Contracting States to the Convention)

**Article 31(c)** – A Central Authority may be asked to locate a child on the territory of its State. A future good practice could be for Central Authorities to trace the parents or family of unaccompanied or separated children.

**Article 32** – A State that has a substantial connection with a child (*e.g.* if the child's relatives live in its territory) may address certain requests to the Central Authority of the State where the child is 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 consider taking 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 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, such as family reunification in the State of origin of the child or in a third State.

**Article 36** – Competent authorities of different States can co-ordinate measures of protection when the location of a child changes. This may be the case, for example, where a runaway child has been the victim of an act of exploitation discovered in another State.

---

<sup>9</sup> The law applicable can either be the law of a Contracting State or the law of a non-Contracting State. See, *supra*, paras 57-59.

<sup>10</sup> See, *supra*, paras 37 and 58. For example, in the specific case of family reunification in the State of origin or a third State it may be more appropriate to apply the law of the State of origin of the child to measures for his or her protection, even where that State is not a Contracting State to the Convention.

<sup>11</sup> The recognition and enforcement provisions of the 1996 Convention will apply only if both the requesting State (*i.e.*, 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 60-62.

<sup>12</sup> See, *supra*, paras 63-68.

**Co-operation**<sup>13</sup> (when only the State of presence of the child is a Contracting State to the Convention)

**Article 30** – Central Authorities shall promote co-operation amongst competent authorities in their States to achieve the purposes of the Convention. This would certainly include the diplomatic and consular offices representing the State of origin of a given unaccompanied child in the Contracting State where that child is present. It would also include intergovernmental organisations that are mandated to look after these children, such as UNICEF and UNHCR.

---

<sup>13</sup> See, *supra*, para 37 *in fine*.

## Family reunification in the host State or local integration<sup>1</sup>

Relevant provisions of the 1996 Convention that are applicable to family reunification in the host State or to local integration.

### Scope (*ratione materiae*)<sup>2</sup>

**Article 3** – The following protection measures are covered by Article 3:

- Measures of protection to be taken upon arrival, at reception and for interim care (see, *supra*, Annex 2-A)
- Family reunification in the host State, or local integration
- Kinship care, foster care, *kafala*, other forms of family-based or family-like care placements, residential care and supervised independent living arrangements for children

### Jurisdiction (*ratione personae* and geographic scope)<sup>3</sup>

**Article 6(1)**<sup>4</sup> – 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.

**Article 6(2)**<sup>5</sup> – 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**<sup>6</sup> – It is 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 in cases of family reunification in the host State or local integration in the host 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. The addressed State would be the State of habitual residence (and origin) of the child, and the requesting State would be the State where the child is present.

**Article 11**<sup>7</sup> – 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 *i.a.* to runaway, lost, abandoned or abducted children who are not the subject of Article 6.

**Article 12**<sup>8</sup> – 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 person of the child which have a territorial effect limited to the State in question. This provision applies *i.a.* to runaway, lost, abandoned or abducted children who are not the subject of Article 6.

### Applicable Law<sup>9</sup>

**Article 15(1)** - In exercising their jurisdiction, the authorities of the Contracting States shall apply their own law, especially in the case of family reunification in the host State or local integration.

<sup>1</sup> See, "Statement of Good Practice – Separated Children in Europe Programme", *op. cit.* note 38, at pp 37-38.

<sup>2</sup> See, *supra*, paras 33-36.

<sup>3</sup> The provisions listed below, with the exception of Arts 8-9, will apply whether only the State where the child is present is a Contracting State to the 1996 Convention or other States concerned are also Contracting States. See, *supra*, para 37 and note 70.

<sup>4</sup> See, *supra*, paras 38-46.

<sup>5</sup> *Ibid.*

<sup>6</sup> See, *supra*, paras 38-42 and 47-54 and more specifically note 84.

<sup>7</sup> See, *supra*, paras 38-42 and 55 and note 70 with regard to the application of this provision when the child is habitually resident in a non-Contracting State.

<sup>8</sup> See, *supra*, paras 38-42 and 56 and note 70 *ibid.*

<sup>9</sup> The law applicable can either be the law of a Contracting State or the law of a non-Contracting State. See, *supra*, paras 57-59.

**Recognition and Enforcement**

Family reunification in the host State or local integration should not require cross-border recognition and enforcement of measures of protection.

**Co-operation**<sup>10</sup> (when all States concerned are Contracting States to the Convention)

**Article 31(c)** – A Central Authority may be asked to locate a child on the territory of its State. A future good practice could be for Central Authorities to trace the parents or family of unaccompanied or separated children.

**Article 32** – A State with a substantial connection with a child (*e.g.*, if relatives live in that State) may address the Central Authority of the State where the child is present a request – 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 person 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 relevant to the protection of the child, including the location of the family of the child.

**Co-operation**<sup>11</sup> (when only the State of presence of the child is a Contracting State to the Convention)

**Article 30** - Central Authorities shall promote co-operation amongst competent authorities in their States to achieve the purposes of the Convention. This would certainly include the diplomatic and consular offices representing the State of origin of a given unaccompanied child in the Contracting State where that child is present. It would also include intergovernmental organisations that are mandated to look after these children, such as UNICEF and UNHCR.

---

<sup>10</sup> See, *supra*, paras 63-68.

<sup>11</sup> See, *supra*, para 37 *in fine*.

### Return to the (fled) State of origin or resettlement in a third State<sup>1</sup>

Relevant provisions of the 1996 Convention that are applicable to return to the (fled) State of origin or resettlement in a third State.

#### Scope (ratione materiae)<sup>2</sup>

**Article 3** – The following protection measures are covered by Article 3:

- Measures of protection to be taken upon arrival, at reception and for interim care (see, *supra*, Annex 2-A)
- Return to the (fled) State of origin or resettlement in a third State
- Kinship care, foster care, *kafala*, other forms of family-based or family-like care placements, residential care and supervised independent living arrangements for children

#### Jurisdiction (ratione personae and geographic scope)<sup>3</sup>

**Article 5** – If the State of origin of the child is a Contracting State to the Convention, its authorities may have jurisdiction, based on the habitual residence of the child, to take protective measures for the return of the child to his or her State of origin.

**Article 6(1)<sup>4</sup>** – 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 protective measures for the return of the child to his or her State of origin or the child’s resettlement in a third State.

**Article 6(2)<sup>5</sup>** – 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 for the return of the child to his or her State of origin, or for the resettlement of the child in a third State.

**Articles 8-9<sup>6</sup>** – It is 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 in cases of returning the child to his or her State of origin or resettlement in a third country, as this transfer of jurisdiction would assist in paving the way for a transfer of the person of the child. The addressed State would need to be a State of which the child is a national or with which the child has a substantial connection, such as one where (extended) family members are located or whose language, culture or religion the child shares.

**Article 11<sup>7</sup>** – 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 *i.a.* to runaway, lost, abandoned or abducted children who are not the subject of Article 6.

**Article 12<sup>8</sup>** – 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 person of the child which have a territorial effect limited to the State in question. This provision applies *i.a.* to runaway, lost, abandoned or abducted children who are not the subject of Article 6.

<sup>1</sup> See, “Statement of Good Practice – Separated Children in Europe Programme”, *op. cit.* note 38, at pp 40-43.

<sup>2</sup> See, *supra*, paras 33-36.

<sup>3</sup> The provisions listed below, with the exception of Arts 8-9, will apply whether only the State where the child is present is a Contracting State to the 1996 Convention or other States concerned are also Contracting States. See, *supra*, para 37 and note 70.

<sup>4</sup> See, *supra*, paras 38-46.

<sup>5</sup> *Ibid.*

<sup>6</sup> See, *supra*, paras 38-42 and 47-54 and more specifically note 84.

<sup>7</sup> See, *supra*, paras 38-42 and 55 and note 70 with regard to the application of this provision when the child is habitually resident in a non-Contracting State.

<sup>8</sup> See, *supra*, paras 38-42 and 56 and note 70 *ibid.*

**Applicable Law**<sup>9</sup>

**Article 15(1)** - In exercising their jurisdiction, the authorities of the Contracting States shall apply their own law.

**Article 15(2)** – 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.<sup>10</sup>

**Article 15(3)** - If the child's location 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 location.

**Recognition and Enforcement**<sup>11</sup>

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

**Article 24** – In the specific case of returning a child to his or her State of origin or of resettlement in a third State, it may be necessary to secure the recognition and enforcement of a measure of protection before the movement of the child.

**Article 26(1)** – The enforcement of the handing over of a child will be subject to a declaration of enforceability or registration for the purpose of enforcement in the requested State.

**Co-operation**<sup>12</sup> (when all States concerned are Contracting States to the Convention)

**Article 31(c)** – A Central Authority may be asked to locate a child on the territory of its State.

**Article 32** – A State that has a substantial connection with a child (*e.g.* if the child's relatives live in its territory) may address certain requests to the Central Authority of the State where the child is 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 consider taking measures to protect that child.

**Article 33** – There is a mandatory procedure of consultation and approval between Central 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 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, such as the placement of the child in a Contracting State other than the one which has taken the measure of placement.

---

<sup>9</sup> The law applicable can either be the law of a Contracting State or the law of a non-Contracting State. See, *supra*, paras 57-59.

<sup>10</sup> See, *supra*, paras 37 and 58. For example, in the specific case of the return of the child to his or her State of origin or resettlement in a third State it may be more appropriate to apply the law of the State of origin of the child to measures for his or her protection, even where that State is not a Contracting State to the Convention.

<sup>11</sup> The recognition and enforcement provisions of the 1996 Convention will apply only if both the requesting State (*i.e.*, 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 60-62.

<sup>12</sup> See, *supra*, paras 63-68.



**Article 36** – Competent authorities of different States can co-ordinate measures of protection when the location of a child changes. This may be the case, for example, where a runaway child has been the victim of an act of exploitation discovered in another State.

**Co-operation**<sup>13</sup> (when only the State of presence of the child is a Contracting State to the Convention)

**Article 30** – Central Authorities shall promote co-operation amongst competent authorities in their States to achieve the purposes of the Convention. This would certainly include the diplomatic and consular offices representing the State of origin of a given unaccompanied child in the Contracting State where that child is present. It would also include intergovernmental organisations that are mandated to look after these children, such as UNICEF and UNHCR.

---

<sup>13</sup> See, *supra*, para 37 *in fine*.